# THE HAMBURG RULES: DID IT INCREASE THE LIABILITY OF THE CARRIER?

**BY**

**KWEKU GYAN AINUSON**

**(Under The Direction of Professor Gabriel Wilner)**

## ABSTRACT

The Convention on the Carriage of Goods by Sea (Hamburg rules) was hoped to provide a uniform modern commercial code for the international carriage of goods by sea. However, after 26 years after the diplomatic conference and nearly 13 years after it came into force, the rules have not been ratified by the world's major maritime powers. The main contention of the maritime powers is that, the Hamburg rules have increased the liability of the carrier to unbearable levels. The majority of the world maritime powers have thus, continued to use the previous rules with some adopting a hybrid of the previous and the existing one.

My thesis is therefore to assess the extent to which the Hamburg rules have increased the liability of the carrier. The focus will be on making a comparison between the Hamburg rules and the previous Hague rules, specifically on the provisions of the definition of the carrier, carrier's period of responsibility, carrier's obligation and the carrier's general liability.

INDEX WORDS: Carrier Liability, Definition of carrier, Carriage of Goods by Sea, Period of responsibility, Obligation of Carrier, Nautical fault, Management of Vessel, Fire onboard, Salvage at Sea, International law, Marine Transportation, International Maritime Law, Hamburg rules, Hague rules, Hague-Visby rules,

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## DEDICATION

This work is dedicated to the almighty God who has been my life long helper, to my parents for providing for all my needs and to Mamle for all her support.

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# CHAPTER I

## A. INTRODUCTION

The 'Hamburg rules' is the shortened name of the International Convention on the Carriage of Goods by Sea.[1] The convention got its shortened name from the German city of Hamburg because that was the venue of the diplomatic conference, which approved the final version of the convention.

Unlike other International Transport Laws, the rules on international carriage of goods by sea are presently in a state of disuniformity.[2] At present, there are about nine different regimes competing with each other, thus leaving many legal problems to the uncertainties of private international law.

The purpose of the Hamburg Rules was to provide a uniform modern commercial code in the carriage of goods regime.[3] Specifically, the Hamburg Rules were to serve as a good replacement for the then existing Hague-Visby Rules. However, nearly 26 years after the parties voted the Hamburg Rules into effect, it has not been able to capture the major international maritime powers.[4] In 1992, Zambia was the twentieth country to ratify the Hamburg rules and brought it into effect in accordance with article 30(1) of the

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[1] United Nations Convention on the Carriage of Goods by Sea, March 31st 1978,1695 U.N.T.S., 4 (hereinafter the "Hamburg Rules" or "Hamburg")

[2] William Tetley, The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law, 30 JMARLC 595 (1999); Joseph Sweeney, The Prism of COGSA, 30 JMARLC 543 at 546 (1999); Paul Myburgh, Uniformity or Unilateralism in the Law of Carriage of Goods by Sea, 31 Vic. U. Wel. L R, 355,382 (2000).

[3] UNCTAD, The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention. UNCTAD, New York, (1991), E.91.II.D.8

[4] Jochen Hundt, The Importance of Hamburg Rules in the International Sea Carriage of Goods, available at http://www.globaleconsulting.co.uk/soaiblaw/The%20Importance%20of%20Hamburg%20Rules%20in%20the%20International%20Sea%20Carriage%20of%20Goods.htm)

convention.[5] Since then, the number of countries which have ratified the Hamburg rules has grown to 25. The majority of the countries which have ratified the Hamburg rules are relatively poor West and Central African countries like Gambia, Sierra Leone and Guinea who do not have any great importance in the maritime world. Even though a few highly populated African countries of some economic importance like Nigeria and Kenya have also adopted the Hamburg rules, these countries only represent a very small part of the world's maritime trade.[6] In addition, in the Arab world, none of the rich oil producing countries that have some great importance in maritime trade is a member of the Hamburg rules community.[7]

The world maritime powers are still using The Hague–Visby[8] rules while some countries[9] have adopted a combination of The Hague–Visby rules and the Hamburg rules into their national legislation.[10] In Canada, The Canadian Carriage of Goods by Water Act 1993[11] adopting the Hague-Visby Rules[12] came into effect on the 6th of May 1993.[13] The 1925 Indian Carriage of Goods by Sea Act[14] was amended substantially in 1992 to adopt The Hague-Visby Rules.[15] In Japan, the Hague Rules entered into force in June

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[5] Status of Ratification of Maritime Conventions, Available at http://www.comitemaritime.org/ratific/uninat/uni02.html

[6] See Top 20 World Merchant Fleeting by Country of Ownership at http://www.marad.dot.gov/Marad_Statistics/PMFW-7-03.htm (Non of the Countries was listed as one of the countries belonging to the Top 20 World Merchant Fleet by Country of Owner)

[7] Id. (Saudi Arabia and Turkey the only Arab nations listed as 14th and 17th respectively in the Top 20 World Merchant Fleet by Country of Ownership have not ratified the Hamburg Rules.)

[8] See Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968,1412 U.N.T.S, 23643(hereinafter the Hague-Visby rules)

[9] Hundt, supra note 4

[10] Chandler, After Reaching a Century of the Harter Act: Where Should We Go From Here? 24 JMLC 43 (1993)

[11] See The Carriage of Goods by Water Act, S.C (1993), Can. Y.B. INT'L L. (2001).

[12] Hague-Visby Rules, supra note 8

[13] See The Maritime Transport Committee's Annual Report (1999) available at http://www.oecd.org/document/32/0,2340,en_2649_34367_2087136_119687_1_1_1,00.html

[14] See India Cen. Acts, Carriage of Goods by Sea Act, (1925)

[15] Thye Lam & Co v The Eastern Shipping Corp Ltd [1960] MLJ 235 H.C, Penang per Rigby J.

1993 with full support of Japanese ship owners and shippers.[16] In the Netherlands, The Hague-Visby Rules have been incorporated into the Code of Commerce, which came into effect on 26 July 1992.[17] The Thailand Carriage of Goods by Sea Act 1991 is substantially based on the Hague-Visby Rules.[18] A new Chinese Maritime Code, which came into effect on July 1993, has significantly adopted the Hague-Visby Rules with some principles of the Hamburg rules.[19] In the United States, The United States Carriage of Goods by Sea Act,[20] which is an adoption of The Hague Rules, is still in effect. New Zealand and Australia, which, initially decided on the adoption of the Hamburg Rules, have now postponed its adoption indefinitely.[21] Germany and The United Kingdom have categorically rejected the Hamburg rules.[22]

The failure of the world maritime powers to adopt the Hamburg Rules in their national legislation have further widened the lack of uniformity in the law governing the carriage of goods by sea. Thus, the cherished goal of United Nations Conference on Trade and Development (UNCTAD) to promulgate a uniform code for the carriage of goods by sea has been elusive.[23]

Despite the rejection of the maritime powers of the Hamburg Rules, it is interesting to note that all the interested parties at the Hamburg conference agreed that the

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[16] Christoff Luddeke &Andrew Johnson, The Hamburg Rules from Hague to Hamburg via Visby, London Press, 2nd ed .6 (1995 )
[17] Id at p 5
[18] Id at p 6
[19] Id
[20] Even though an MLA proposed amendment to the U.S Carriage of Goods by Sea Act substantially follows the Hamburg rules, it has not yet come into effect. Commentators actually doubt that the MLA proposals would ever become law in the United States.
[21] Hundt, supra note 4
[22] Id
[23] Paul Myburg, Supra note 2; also available at http://:www.upf.pf/recherche/Myburgh.doc+UNCTAD+uniform+carriage+of+goods&hl=en

once successful Hague rules was outdated and the 1968 Visby amendment[24] left several questions unanswered.[25]

This thesis compares the carrier's role under The Hague rules and the Hamburg Rules. It will first deal with the definition of the carrier, and the liability of the carrier. It will then examine why the Hamburg Rules has not been universally ratified by all the maritime nations.

## B. THE ORIGIN OF THE HAMBURG RULES

### 1. Historical Antecedent

Prior to the 1900s, there was no common international law governing the carriage of goods by sea.[26] Dispute over loss, damage or delay were for many years resolved by resorting to the applicable contract between the contracting parties.[27] Most of the law in this area was based on the legal system of the particular country where the dispute took place. This became a problem as parties increasingly resorted to shopping for the most favorable jurisdiction to the detriment and inconvenience of the other party.

A compromise between the carriers and shippers from the major shipping nations[28] led to the International Convention for the Unification of Certain Rules of Law

[24] Hague-Visby rules, supra note 8
[25] UNCTAD Working Group, Report on Second Session, document TD/B/C.4/86, para.7
[26] Samuel Robert Mandelbaum, International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S Approach to COGSA, Hague-Visby, Hamburg and The Multimodal Rules. 5 JTLP 2 1(1995), see also Gilmore & Black, Admiralty 139-143, 2nd ed. (1975)
[27] Id. at p 3
[28] Robert Force, A Comparison of The Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?) 70 Tul.L.Rev. 2052 (1995-1996)

Relating to Bills of Laden, August 25, 1924.[29] This convention is commonly referred to as the Hague Rules. The Hague Rules entered into force in 1931, and to date there are 91 contracting parties to the convention. The Hague rules have been referred to as one of the most successful maritime codes of all time.[30] For a considerable length of time, The Hague Rules regulated the international maritime trade to the satisfaction of the cargo owners as well as the carriers. However, after four decades in existence, due to commercial changes in cargo carriage, the Hague Rules needed major amendments.[31]

One of the significant commercial changes to affect the effectiveness of the Hague Rules was the introduction of the container in the carriage of goods.[32] Goods were increasingly being transported in up to 40 feet long containers, which when sealed at the port of loading are transported to the final destination. This mode of transport ridiculed the per package limitation contained in The Hague rules. The whole 40 feet long container was regarded as one package, whiles a pallet of 4 feet by 4 feet by 6 feet was also regarded as on shipping unit for basis on calculating liability.

In addition, with the introduction of modern and sophisticated satellite backed navigation, radar and improved technology in building vessels, complains against the nautical fault defense[33] in The Hague rules grew even greater. The nautical fault defense exonerated the carrier from liability if the loss or damage was caused by fault in the navigation or management of the ship.

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[29] International Convention for the Unification of Certain Rules of Law Relating to Bills of Laden, August 25,1924 , 120 U.N.T.S, 2 764 (hereinafter the Hague Rules)
[30] Hundt, supra note 4; See also William Tetley, Package and Kilo Limitations and The Hague-Visby and Hamburg Rules, 26 JMLC 133-155. (1995); See also Egger Palmieri, The Unworkable Per-Package Limitation of the Carrier's Liability under the Hague (Hamburg) Rules, 24 McGill L. J. 459 (1978)
[31] Force, supra note 28 at 2053
[32] Hundt, supra note 4; Palmieri, supra note 30
[33]William Tetley, Selected Problems of Maritime Law under the Hague Rules. 9 McGill L. J. 53 (1963)

In 1959, through the initiative of the Comite Maritime International (CMI), a committee was put in place to draft an amendment to the Hague Rules. After an international discussion with the stakeholders, the amended draft was adopted in 1963 at a plenary conference in Stockholm and signed on the Swedish island of Gotland in a small town called Visby. An international diplomatic conference held in Brussels in May 1967 gave the final shape to the amended protocol and was adopted as the Hague-Visby amendment on 23 June 1968.[34]

The Visby Amendment sought to offer solutions to the problems that have arisen under the Hague Rules. First, the limit of per package liability was increased to a commercial level by over 350% against the original level in the Hague Rules.[35] This was further improved in 1979 by a second protocol that expresses the limitation amount in '**special drawing right'** (SDR).[36] This removed the limitation amount out of the reach of inflation.[37] A special container clause made the relatively low limitation figures unacceptable for modern methods of transportation. In addition, the Visby Amendment denied the carrier the ability to limit his liability whenever he acted with intent to cause damage, or recklessly and with knowledge that damage will probably result.[38] However, the nautical fault defense that has been the subject of much criticism was left untouched. Despite the above improvements contained in the Visby Protocol, the Diplomatic conference in 1967/68 led to considerable disappointment. The Visby rules left many

[34] Hague-Visby rules, supra note 8
[35] Hundt, Supra note 4
[36] A value that is tied to a basket of the world's leading currencies, and which is defined by the international Monetary Fund and regularly quoted in the financial press, available at http:// www.imo.org
[37] Hundt, supra note 4, the author hopes that with limitation amount tied to the special drawing rights, the amount awarded as damages will be free from inflation.
[38] Hague-Visby rules, supra note 8; Hundt, supra note 4

issues pertaining to the liability system unanswered.[39] Many states wanted an extensive discussion on basic questions including the liability system, but were not allowed to do so at the diplomatic conference.[40] This was due to the fact that at the decision of the CMI in Stockholm, the schedule of the Diplomatic Conference was planned in such a way that it excluded the possibility to discuss many problems in a detailed manner as envisaged by the participants.[41]

The main reservations to the liability system of the Hague Rules not improved by the Visby Protocol are as follows:[42]

a. The absence of compulsory liability for damages caused beyond the period while the goods are aboard the ship. Thus, the carrier is able to contract out of liability for the particularly dangerous operations of loading and unloading even if he has already taken charge of the goods.
b. There was no provision for liability to deck cargo. It was argued that in recent times containers are often carried on deck and therefore should be treated similar to cargo carried under deck.
c. There was no provision for liability of the carrier in case of fault committed by the servants in the management or navigation of the ship. This meant in the case of a willful misconduct by the master of the ship, there would be no liability.
d. The provisions did not contain any compulsory scheme of liability at all unless a bill of lading has been issued.

[39] Hundt, supra note 4; sea also Bauer, G. Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules- a Case by Case Analysis. 24 JMLC 53 (1993)
[40] Id
[41] Id
[42] Id

There was therefore intense criticism from the affected countries for a change in the Hague/Visby rules. Representatives of some developing countries and some developed countries realized that their nationals were mainly cargo owners, and did not enjoy an equal bargaining power with carriers on the carriage contract.[43] Most of these countries had not been part of the creation of the existing legal regime and therefore it did not strike a fair balance between the interest of cargo owners and carriers.[44]

Some of The developing countries especially, saw the Hague-Visby rules as the handy work of their former colonial powers, and so wanted changes that will reflect their interest.[45] They looked for another opportunity to have The Hague Rules reviewed by an International Conference with a worldwide participation. This quest for the review of the existing carrier regime led to the coming into effect of the Hamburg rules. One author[46] sums up the events leading to the Hamburg rules as follows.

> "… widespread frustration and deep seated shipper and public resentment over those 'hardy perennials'- the indiscriminate use of invalid clauses in bills of lading, the abuse of the jurisdiction clause, the low monetary limit of liability, and the wide exceptions permitted the carrier…"[47]

**2. The U.N Contribution**

A UNCTAD resolution[48] set in motion the revision of the regime on carrier liability. The United Nations Conference on trade and Development (UNCTAD) and

[43] Force, supra note 28 at 2051
[44]UNCITRAL, Working Group on the Revision of the Hague Rules, 1st Sess. Doc. TD/B/289, 456th plen.mtg; 2nd Sess. Doc. TD/B/C.4/86, 4th plen.mtg. (1970)
[45] ICJ, Conference on Development, Human Rights and the Rule of Law, 26 RICJ, p 1-2. (1981)
[46]Hannu Honka, New Carriage of Goods By Sea, 18, ed; The Nordic Approach Including Comparisons with Other Jurisdiction, Abo (1997) p 33
[47] Id. at p 4-5
[48]See UNCTAD 6th Sess. Res. 46 6th plen.mtg; See also UNCTAD Committee on Shipping 3rd Sess. Res.73rd plen.mtg (1968)

United Nations Commission on International Trade Law (UNCITRAL) were charged[49] with the direct responsibility of the revision of the regime on carrier liability. After some discussions UNCITRAL set up a working group in 1971 to review the law and practices relating to bills of lading and how it conforms to the economic development of developing countries in particular. This working group eventually saw to the drafting of the Draft Convention on Carriage of Goods by Sea.[50] Pursuant to a United Nations General Assembly resolution[51] UNCITRAL had put on it agenda international legislation on shipping and had decided to review this issue with regard to the recommendations and suggestions that would come out of the UNCTAD deliberations.[52] Upon consultation between UNCTAD and UNCITRAL, an agreement was reached as to the scope of the work to be done. UNCITRAL then proceeded with the drafting of the legislation.[53]

**3. The Hamburg Conference**

After UNCTAD had approved the draft convention and received comments from member states, the Secretary General of the United Nations convened a diplomatic conference. On the invitation of the Federal Republic of Germany, the conference took place from the 6th to the 31st of November in Hamburg, Germany.

At the diplomatic conference in Hamburg, when the 78 Delegation from States and 8 intergovernmental observers and 7 nongovernmental organizations began to discus

[49]Id. See also Carbone, M & Pocar, F 'Conflicts of Jurisdiction, Carriage by Sea and Uniform Law' in Francesco Berlingieri, Studies on the Revision of the Brussels Convention on bills of Lading (1974)
[50] Id
[51] G.A. Res.2421,U.N.GAOR ( 1968)
[52] UNCITRAL Rep. 2nd Sess. 133rd plen.mtg (1969)
[53] UNCITRAL Rep. 4th Sess.1014th plen.mtg (1971); UNCITRAL, Rep. 2nd Sess Doc TD/B/C.4/86 Annex 1(1971)

the UNCITRAL Draft convention, it became evident that the removal of the nautical fault defense was one of the main hurdles to be cleared.[54] This defense formed part of the famous compromise reached in 1924 under the Hague Rules discharging the carrier from the nautical fault of his servants' fault.[55] Prior to 1924, the carrier reserved the right to insert in the contract a clause discharging him from every kind of liability for the acts of his servants. With the insertion of the nautical fault defense in the Hague rules, the carrier could only limit his liability to the acts of his servants which were due to nautical faults. The reason for the insertion of the nautical fault defense was mainly due to the particularly dangerous and unpredictable nature of the sea, and the inability of the carrier to supervise his crew while they were on the high seas and far away from home.

Due to technical developments in shipping and also, in view of the fact that many ships are in contact with their owners or charterer on a constant basis nautical risks have reduced considerably.[56] It was therefore not surprising that majority of the states wanted the deletion of this rule which finds no parallel application in any existing international rule pertaining to other means of transport.[57]

At the conference, it became evidently clear that only a handful of delegates wanted the nautical fault exception maintained.[58] In fact, out of the 78 Delegations only four argued for the exception to be maintained. Four others were in favor of an agreement on the exceptions if its approval could lead to a uniform law on maritime transportation.[59] Failing to reach a compromise on the issue, the Chairman of the first

[54]Rolf Herber, The Hamburg Rules: A, Choice for the EEC? Origin and Need for The New Liability System, (1993), also available at http:www.europa.eu.int
[55] Id at p40
[56] Weitz Leslie, The Nautical Fault Debate, 22 Tul. M. L. J 581 (1997-1998)
[57] Id. 582
[58] Herber, supra note 54
[59] Id at 40

Committee of the Conference and President of the conference, Professor Chafik from Egypt agreed on an avoidance of a vote on the issue.[60] A vote would have made it difficult for any compromise on the question of liability after a majority of the delegates had intimated their support for the expulsion of the nautical fault defense. As an alternative, a contact group of ten delegates worked out a package solution which among others includes the following:[61]

The carrier was liable for loss of or damage to the goods at the entire period of the voyage whiles the carrier is in charge of the goods irrespective of a bill of lading. [62] Deck cargo was included in the liability regime.[63] The traditional defense of nautical fault was deleted.[64] The exception for damages caused by fire was retained albeit in a modified form: as liability for fault, the fault to be proved by the carrier. Liability for delay was added, however, on the basis of a very flexible definition of delay.

To compensate for these liabilities of the carrier, a decision was taken to maintain the rest of defenses available to the carrier contained in the Hague/Visby Rules. Without any further discussion at the Hamburg Diplomatic Conference, an increase of 25% over the limitation figures in the Hague/Visby rules was accepted in anticipation of any future monetary changes. At the end of the Conference, though the Hamburg Rules were adopted, many issues were still outstanding between the carrier nations and the shipper nations. The shipper nations were dissatisfied with the Hamburg Rules because they thought the reform did not go far enough to make the carrier assume a higher liability

[60] Id at 40-41
[61] Id. See also Sinha Basnayake, Introduction: Origins of the 1978 Hamburg Rules, 27 Am. J. Comp. L. 353 (1979)
[62] Supra note 50 at 42
[63] Id 50 at 42
[64] Id at 42,43

under the contract for the carriage of goods by sea. The carrier nations were on the other hand dissatisfied that the nautical fault defense has been deleted.

## CHAPTER 2

### A. THE CARRIER

The Liability of the common carrier at Common Law is summarized by Carver as follows:

"The common law, with regard to the liability of public carrier of goods, is strict. Apart from express contract he is, with certain exceptions, absolutely responsible for the safety of the goods while they remain in his hands as carrier."[65]

All common carriers are deemed to incur the liability of a public carrier.[66] In this light, "a common carrier is one who holds himself out as being prepared to carry for reward all and sundry without reserving the right to refuse the goods tendered."[67]

Contrary to the Common Law position of strict liability of the carrier, it is well documented in existing literature that with the advent of the Hague/Hague Visby Rules and The Hamburg rules, this strict liability has been abandoned. There has been the emergence of a new scheme of liability, which is based on "fault".[68]

The ensuing discussion will examine the definition and different kinds of carrier as in the Hamburg Rules and the scope of application of the Hamburg rules and how they affect the carrier as compared to the Hague Rules.

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[65] Colinvaux, Carver's Carriage by Sea 13th ed. (1982)
[66] Id.
[67] Glass & Cashmore, Introduction to the Law of Carriage of Goods, Sweet & Maxwell London (1989) 12
[68] UNCTAD, The Economics and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention (TD/B/C.4/315/Rev.1) U.N. 1991 9th plen.mtg. & 113th plen.mtg

**1. Definition of a Carrier**

Article 1 of the Hamburg rules[69] define the carrier to mean "any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper."[70] Article 1(2) goes on to say that an actual carrier means "any person to whom performance of the carriage of goods, or part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted."[71]

One of the remarkable features of the Hamburg rules as opposed to the Hague Rules[72] is the fact that it draws a distinction between the 'carrier' and the 'actual carrier.' In this regard, the carrier is the person who enters into a contract of carriage with the shipper. The actual carrier however is the person to whom the actual carriage of goods has been entrusted. It must be noted that in many cases, the carrier himself is the actual carrier. An example is a situation where a liner operator accepts cargo for shipment directly from the shipper. Here, there being no delegation of carriage, the liner operator will be the carrier and the actual carrier as defined in articles 1(1) and 1(2) respectively in the Hamburg rules. On the other hand, where a shipping agency sub-contracts the carriage to the liner operator, the shipping agency becomes the carrier and the liner operator becomes the actual carrier. The carrier however carries the responsibility for the entire carriage notwithstanding any delegation. The actual carrier is jointly and severally liable for the part he takes in the carriage.[73]

[69]Hamburg Rules, supra note 1 at art. 1
[70] Id. art.1(3) defines the Shipper to mean "any person by whom or on whose behalf a contract of carriage, has been entrusted by the carrier, and includes any person to whom such performance has been entrusted.
[71] Id. art. 1(2)
[72]Hague Rules, supra note 29
[73] Id. art. 10

It is worth noting that the Convention Relating to the Carriage of Passengers and their Luggage by Sea, commonly known as the Athens Convention, 1974[74] makes a distinction between contracting "carrier" and "performing carrier". However, an author[75] explains that the definition of "actual carrier" in the Hamburg Rules is potentially wider than "performing carrier" under the Athens Convention, though both of them seem to be focusing on the party who does the actual performance.[76]

The Hague rules simply define the carrier to include the owner or the 'charterer' who enters into a contract of carriage with a shipper.[77] There is no reference to the distinction between a carrier and an actual carrier as exist under the Hamburg Rules. Instead, under the Hague Rules, it is common for a bill of lading to contain an "identity of carrier clause." The identity of carrier clause attempts to identify the responsible carrier in the bill of lading. Such an attempt in most cases identifies the charterer or owner of the vessel as responsible.[78] The English courts recognize clauses of this nature. A ruling in an English court found no conflict between The Hague rules definition of the carrier and such clauses identifying the responsible carrier on the reverse of the bill of lading.[79] However, in other jurisdictions, especially the United States, an attempt to use such provisions on the reverse side of the bill of lading will not be recognized.[80]

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[74]See Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, Athens 1974. 1463 U.N.T.S. 24817

[75] Palmieri, supra note 30

[76] Luddeke & Johnson, supra note 16 at 6

[77] The Hague Rules, supra note 29 at Art. 1

[78] An example of a carrier clause will read: "If the ship is not owned by or chartered by demise to the company or Line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said Company or Line who acts as agents only and shall be under no personal liability whatsoever is respect thereof"

[79] Vikfost 1 Lloyd's Rep. 560 (1980)

[80] The Newfoundland Coast (1990) LMLN 271 US CA

Under the Hamburg Rules, where a bill of lading contains an identity of carrier clause, an attempt to identify the owners as responsible will be in direct contravention of Hamburg Rules. As noted above, the Hamburg Rules identifies the actual carrier as the responsible party.[81]

**2. Period of Responsibility**

Article 4 of the Hamburg Rules provides elaborate provisions on the period of responsibility of the carrier. Luddeke and Johnson[82] assert that article 4 of the Hamburg rules indicates a considerable extension of potential period of liability of the carrier over that of the Hague Rules. The Hague Rules provide in article 1 that, the period of carriage is limited to the period from the time when the goods are loaded to the time they are discharged from the ship. This is commonly referred to as from 'tackle to tackle' and it is generally argued that the Hague rules does not apply to the period before loading and after discharge of the goods from the ship.[83] It is arguable to say that a carrier may never be liable under the Hague rules for any damage occurring during the pre-loading time or after the discharge of the goods. A carrier may be liable under the Hague rules for any damages occurring prior to loading or after the discharge of the goods if it is so incorporated in the bill of lading. In Sabah Shipyard v Harbel Tapper[84] in the context of extending the limits of liability under the Carriage of Goods by Sea Act (COGSA)[85] to cover a post discharge damage claim, the U.S court held that "…parties may

[81]Hamburg Rules, supra note 1 at Art. 1(2) & 4; See also W.E Astle, The Hamburg Rules, Fairplay Publication. (1981) 86, 93
[82] Luddeke & Johnson, supra note 16 at 9
[83] Sze Ping-fat, Carriers Liability under the Hague-Visby and Hamburg Rules, Kluwer International, (2000) p 148;
[84] 178 F.3d 400 (5th Circuit 1999)
[85] Carriage of Goods By Sea Act, 46 USCA ss 1300 (1936)

contractually incorporate COGSA…to the period of carriage before loading and after discharge"[86]

The Supreme Court of British Colombia[87] held that the Hague rules (under the Canadian carriage of goods by Water Act) were not applicable to a period of three weeks during which goods were discharged at Singapore awaiting transshipment to it bill of lading destination. The court held that this time did not qualify as a period during which goods were carried by sea. In the situation above, it has been suggested that the question under the Hamburg rules will be whether the time the goods were sitting at Singapore waiting to be shipped to the bill of lading destination will qualify as a period during carriage for which the carrier will be in charge.[88]

It is interesting to note that, contrary to what Luddeke and Johnson says above,[89] Sze Ping-fat is of the view that, the notion that the Hamburg rules substantially extend the period of liability of the carrier by holding him liable for any loss, damage or delay whilst the goods are in his custody is only an academic argument but not practical.[90] In practice, there is no substantial extension of the carrier's period of responsibility under the Hamburg Rules in the light of the following discussion.

By virtue of article I (e) and II of The Hague Rules, it follows that prima facie, any right or liability occurring before loading or after discharge falls outside the scope of their application. Without a doubt, the parties to a sea carriage contract have the freedom to make any provisions over their respective rights and liabilities over the custody, care and handling of the goods prior to the loading on and subsequent to the discharge from the

[86] Id
[87] Captain v. Far Eastern Steamship Co (1979) 1 Lloyd's Report 595
[88] Luddeke & Johnson, supra note 16 at 9
[89] Id.
[90] Sze Ping-Fat, supra note 83 at 16 & 20

ship.[91] The U.S Carriage of Goods Act, which is the United States' statutory version of The Hague rules, also makes a similar provision regarding freedom of the parties to agree on their respective rights prior to loading and subsequent to discharge.[92] This freedom of contract granted to parties to a contract of carriage of goods by sea was justified due to the marine risk and the different cargo handling procedures in various countries.[93] It follows from the above that the parties are at liberty to arrange that the Hague Rules apply to their respective rights prior to loading and subsequent to the discharge of the goods from the vessel. In Australia, in Rockwell Graphic System Ltd v Fremantle Terminals Ltd,[94] it was held that the Rules were applicable after the goods had passed over the rail and to the non-sea segment.[95] In the case of The Captain Gregos,[96] the English court of appeal rendered a decision to the effect that some provisions of The Hague rules could apply to issues following discharge.[97] And an experience lawyer in the absence of a special agreement will most invariably advice his client to make the convention applicable to the pre loading and post discharge period.[98]

Despite the above, it seems rational and Robert Force agrees[99] that, despite the provisions of article 7 of the Hague Rules,[100] the carrier's liability literally commences and ends upon the cargo crossing the ship's rail. Devlin J has criticized this position in the following terms:

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[91] Hague-Visby rules, supra note 8 at Art. 7
[92] 46 USCA ss 1308
[93] Mankababy (ed) The Hamburg Rules on the Carriage of Goods by Sea (Boston 1978) p 48-49
[94] 106 FLR 294 (1991)
[95] Mankababy, supra note 93
[96] See (1990)1 Lloyd's Rep 311
[97] Kamil Export Ltd v NPL Ltd 1(1996) VR 538. It was stated however that the Rules should apply only for a reasonable time after the discharge of the goods.
[98] This author is of the opinion that to protect a client from any undue losses, a lawyer will advice that the Hague rules be applicable prior to loading to discharge of the goods.(is this your opinion?)
[99] Force, supra note 28
[100] Article 7 allows the parties to incorporate the provisions of the Hague rules to their activities prior to loading and subsequent to discharge of the goods.

> "But the division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its nineteenth century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail."[101]

Due to the brevity of the loading period, there is the tendency for difficulties to arise as to the determination of the point where cargo is deemed as loaded or unloaded. According to Devlin J, "the carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those covered by the contract of carriage."[102] It has been explained that the term "loading" covers the entire operation and not just that loading occurs after the goods have crossed the ship's rail.[103] Loading is a single process albeit composed of numerous stages. Thus, it cannot be singled out that loading is effected only when the goods cross the rail of the ship. It therefore stands to reason that the process of loading may nonetheless commence before the goods pass the rail of the ship whereas the unloading process is not deemed complete until all the goods have been discharged into the lighter.[104] Therefore, it is not strange for the Hague rules to be applicable to the period prior to loading and after the discharge of the goods from the ship.[105]

Certainly, whenever a carrier undertakes to load or discharge cargo, his liability may be extended and regulated by the Hague Rules.[106] This provision is in consonance with the Brussels Convention as it seeks to prevent the mandatory liability of the carrier

[101] Pyrene Co. Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402 at 416-419 per Devlin J
[102] Id at 418
[103] Id at 415
[104] Sze Ping-fat supra note 83 at 20
[105] Id. at 25
[106] Hague Visby rules, supra note 29 at Art. VII

as opposed to increasing the liability.[107] Thus, Luddeke and Johnson[108] argue that the Hamburg Rules does not substantially increase the period of responsibility of the carrier in the carriage of goods by sea. The Hamburg Rules encapsulates, codify and clarify the responsibilities of the carrier as evidenced in practice and case law.[109]

The responsibility of the carrier under the Hamburg rules is from 'port to port'.[110]That is to say, it covers the period while the carrier of the goods is in charge of the goods at the port of loading, during the carriage until the goods are delivered at the port of discharge. The carrier is deemed to have taken charge of the goods at the port of loading from the time he has taken them over from;

"the shipper, or a person acting on his behalf or
an authority or other third party to whom, pursuant to local law or regulation at the port of loading, the goods must be handed over for shipment."[111]

This provision of the Hamburg Rules, on its face differs from the provisions of The Hague rules in that the process of loading and discharge no longer determines the carriers' responsibility. Rather the carrier is responsible from the time of taking over till there are discharged.

The reason for this provision according to the UNCTAD is that, it is to clarify and widen the responsibilities under the Hague rules.[112] Even though UNCTAD writes about wider responsibility for the carrier under the Hamburg rules, it must be noted that all the

[107]Id. art. 5 & 6
[108]Luddeke and Johnson, supra note16 at 9,10
[109] UNCTAD comment on article 4 of the Hamburg Rules T.D./B/C.4/315. available at ttp://www.forwarderlaw.com/archive/uncrules.htm
[110] Mandelbaum, S.R. Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Convention, 23 TRANSLJ 471 at 486
[111]Hamburg rules, supra note 1 at Art.4(2)

[112] See Sweeney, report on the UNCTAD and UNCITRAL Preparatory work, Journal of Maritime Law and Commerce 1976

provision did was to encapsulate the interpretation that was already being ascribed to the Hague rules and also reasons as discussed above. [113]

However, the provision standing on its own is not without criticisms. The following will outline some of the main criticisms about this provision and the response that has been offered in defense.

One criticism is that the carrier's responsibility may commence even before the contract of carriage exists, so long as the carrier is deemed to be in charge.[114] Sze Ping-fat[115] responds to this criticism by saying that this will not arise as any charge or liability at the door step of the carrier will have to be preceded by a contract for the carriage of goods.[116]

As noted by some commentators,[117] this increase in the liability of the carrier might turn out to be detrimental to carriers because it invalidates delivery under FIOs clauses.[118] In the pre Hague times when freedom of contract regulated the law on sea carriage, comparable terms allowed the carrier to consider the goods as delivered once the hatches of the vessel were opened.[119] Consequently, the carrier was able to escape from any liability during the discharge of the goods at the port of discharge. The carrier generally has a stronger bargaining power than the shipper and therefore found it easy to

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[113] Luddeke & Johnson supra note16 at 84-87
[114] Schilling "The Effect of International Trade on the Implementation of the Hamburg Rules on the Shipper" CMI Colloquium on the Hamburg Rules .Vienna 1979. 16
[115] Sze Ping-fat supra note 83
[116] See articles 1 (1) & (6) of the Hamburg Rules supra note 1
[117] Mandelbaum, supra note 116 at p 475; Sze Ping-fat, supra note 83 at p26

[118]The expression "FIO Free in and out" is commonly found in shipping documents and is usually understood to mean that the shipper undertakes to arrange and bear the cost of loading and of discharge (at least to the ship's rail)

[119] Hundt, supra note 4.

incorporate FIOs clauses in the carriage contract. The Hamburg rules therefore seek to prevent a situation where the carrier will capitalize on his stronger bargaining power to the detriment of the shipper.

It has been suggested that when the Hague rules apply, goods are often subjected to more that one liability regime within one single shipment.[120] Hundt explains that where the Hague rules are used, goods are subjected to a different liability regime before the goods are loaded and after there are discharged from the ship.[121] Thus to remedy this, the Hamburg rules extended the period of coverage to the period during which the carrier is in charge of the goods, which meets the requirement of modern transport rules.

It has been argued that difficulties in interpretation may arise in a situation where the carrier has taken charge of the goods before they reach the port of loading[122]and that such an interpretation will likely go against the carrier. For instance, the carrier may take charge of the goods at the premises of the shipper from which he has undertaken pre-carriage haulage to the port of loading. The United Nations Conference on Trade and Development makes this controversy succinctly clear. In its comment to article 4 of the Hamburg rules, The United Nations Conference on Trade and Development states "It is intended to avoid interference with multimodal transport and to limit the application of the Hamburg rules to transport by sea. It corresponds to the principle in article 1(6) that only the ocean part of the carriage is covered by the Hamburg rules"[123] Thus, the Hamburg rules is clear as to where the carrier's liability will begin.[124] The carrier may

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[120] Id
[121] Id
[122]Luddeke and Johnson, supra note 16 at 9
[123] UNCTAD comments on The Hamburg Rules, T.D./B/C.4/315. also available at http://www.unctad.org/ttl/ttl-docs-legal.htm
[124]Hague-Visby rules, supra note 29 Art. VII of The Hague rules provide that parties may agree to extend the application of the rules to the period prior to the loading on, and subsequent to the discharge. Likewise,

also protect himself further by inserting an exemption clause that meets the exemption clause requirements of the Hamburg rules.[125]

There may also be some difficulties about the application of the Hamburg rules to a situation where the goods have been taken over by the carrier on arrival at port of discharge but are later damaged whilst in the compulsory custody of port authorities pursuant to the rules of the particular port. In such cases, technically the carrier will still be held to be in charge of the goods and thus responsible for any damages thereof.[126] However, under the Hague rules, the responsibility of the carrier ends as soon as the hatches of the vessel are open.[127] It must be noted that, the carrier, practically, will not be liable if this scenario were to arise under the Hamburg rules. In practice, the national law frequently grants monopolies to state owned or private warehouse or docks for the handling and storage of goods before loading or upon discharge.[128] It has therefore been argued that the Hamburg rules do not present a completely different scenario in this direction from the Hague rule.[129] In any case, pursuant to article 4 (2) (b) (iii), the carrier is not responsible for any damage or loss during such period due to the fact that he has no control over the goods. To further fortify his resolve, the carrier may seek to regulate his liability in the bill of lading, specifying that he is not liable for the period while the goods are in the compulsory care of the port authority.[130] Such a clause in the bill of lading

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under the U.S COGSA, parties are permitted to make COGSA applicable prior to loading and after the discharge of the goods. See also note 15 above. It is suggested therefore that the parties by agreement may extend the application of the Hamburg rules to cover the period prior to the goods reaching the harbor.

[125] Hamburg rules supra note 1 at Art. 11

[126] Luddeke and Johnson, supra note 16 at 7

[127] Hundt supra note 4

[128] Sze Ping-fat supra note 83

[129] Id

[130] Luddeke and Johnson, supra note 16 at 7

must however conform to the non-derogation provisions of article 23 of the Hamburg Rules.

As soon as the carrier's responsibility commences under article 4 of the Hamburg rules, all the subsequent operations like shifting the goods from the warehouse to the quay, loading, storage and discharge of the goods are all integral part of the contract of carriage and therefore the responsibility of the carrier.

Thus according to Robert Force, the Hamburg rules do not materially change the carrier's responsibility vis-à-vis the Hague rules, insofar as the party is deemed in charge of the cargo practically from its loading until its discharge.[131] It is interesting to note that there has been little controversy about this alleged extension of the carrier's responsibility.[132] Many of the most recent legislative measures, such as the 1996 Nordic Maritime Codes countries[133] and the proposal for the amendment of the U.S COGSA,[134] include the same modifications.

## B. THE OBLIGATIONS OF THE CARRIER

### 1. General Rule on Liability of Carriers

Article 5 (1) of the Hamburg rules provides that:

[131]Force, supra 28, see also United Nation's Conference on Trade and Development, T.D./B/C.4/315, Part 1, December 1987
[132]Hundt, supra note 4
[133]Hannu Honka (ed), supra note 46
[134] Revising the Carriage of Goods by Sea Act: Final Report of the Ad Hoc Liability Study Rules Group (Feb. 15, 1995, (MLA) Doc. No. 716, U.S Carriage Of Goods by Act (46 U.S.C)

The carrier is liable for the loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined under article 4, unless the carrier proves that he, his servant or agents took all measures that could reasonable be required to avoid the occurrence and its consequences.

This provision has given rise to controversy " because it changes the structure and terminology of the Hague Rules by substituting a rule of presumed fault for the laundry list of immunities enumerated under article IV (2) (a-q) of the Hague Rules." [135]

The carrier, under the Hamburg rules has a duty to take all reasonable measures to ensure that goods are not lost or damaged from the time that he takes charge of the goods until they are delivered to the shipper or the consignee. The carrier has a further duty to ensure that the goods are delivered to the shipper or consignee at the time stated in the bill of lading and in the absence of a stipulated time, in reasonable time. This duty of the carrier extends throughout the voyage from the time the carrier takes charge until the goods are discharged from the vessel.[136]

Article III[137] of the Hague rules imposes the following obligation on the carrier:

"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 preservation.
2 … the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

[135] Chandler, After Reaching a Century of the Harter Act: Where Do We Go From Here? 24 J.M. L.C. 43 (1993); See also Honnold, Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg? 24 J. M. L.C. 151 (1993)
[136] Force, supra note 28
[137] Hague Rules, supra note 29

The controversy about article 5 of the Hamburg rules seem to be sparked by the phrase in article III of the Hague rules which say that, "[t]he carrier shall be bound, before and at the beginning of the voyage…" It has been argued that under The Hague rules, the carrier is under an obligation to exercise due diligence to meet the obligations under article III only at the beginning of the voyage.[138] While under the Hamburg rules the carrier is to exercise the same obligations throughout the entire journey.[139]

[138] Id
[139] Id

# CHAPTER 3

## A. LIABILITY OF THE CARRIER

### 1. Hague Rules

Unlike the Hamburg rules, there are no express provisions in the Hague rules describing the liability of the carrier.[140] Article III of the Hague Rules however provides for the duties of the carrier and makes provisions for situations where the carrier is not liable in respect of loss, damage or delay. Article IV and V of the Hamburg rules spells out in detail the duties owed the shipper by the carrier and the liabilities thereof.

#### a. Responsibilities of the Carrier

The carrier, under article III has a duty to ensure the seaworthiness of the ship; this duty is however not continuous. The duty must be fulfilled before and at the beginning of the voyage.[141] It must be noted that this duty cannot be delegated to a third party to perform; it is the sole responsibility of the carrier. The duty of the carrier to care for the goods is however continuous and exist through out the journey until delivery.[142]
Concerning the nature of the obligations and thus the basis of liability of the carrier for breach, the duty of seaworthiness is explicitly stated as a duty to exercise due diligence.

[140] Hamburg rules, supra note 1 at Art. 3
[141] Wilson, "Basic Carrier Liability and the Right of Limitation", Mankabady (ed) The Hamburg Rules on the Carriage of Goods by Sea (Boston 1978) pp 137 – 140; See also Maxine Footwear Co Ltd v. Canadian Government Merchant Marine Ltd [1959] AC 589 at 603 per Lord Somervell
[142] Wilson, supra

Therefore, the basis of liability is fault. Even though not expressly stated, it has been suggested that the same conclusion holds for the duty to care for the cargo.[143]

b. Immunities Under The Hague Rules

No liability attaches to the carrier for loss, damage or delay in delivery because of unseaworthiness before and at the beginning of the voyage if he proves that he has discharged his duties as stated under article III (1). Thus, the carrier is also not liable for any loss or damage resulting from any supervening unseaworthiness during the cause of the voyage even if it is proved that the fault was attributable to the ship's crew.[144] Therefore, absent any supervening unseaworthiness, any loss or damage caused by the faulty nature of the vessel is presumed the fault of the carrier as the carrier will be said not to have discharged his obligation at the beginning of the journey to make the ship seaworthy. The carrier is however not liable, say, for any deficiencies in the vessel not reasonably discoverable at the beginning of the journey, as far as he has no reason to doubt the know-how of the shipbuilder.[145]

It has been suggested[146] that article IV (4) standing alone may mean that the shipper bears the burden of proving loss or damage resulting from unseaworthiness, however reading article IV(4) together with IV(2), the duty is not on the shipper to prove the cause of the loss or damage. If the shipper discharges his duties as spelt out in article III (3) (a)

[143] Id
[144] Id
[145] The Muncaster, [1961] AC 807 at 841-842 per Viscount Simonds.
[146] Supra 49at 90

and the bill of lading is not transferred to a third party, then the duty will be on the carrier to prove that he discharged his duties under article III (2).

## 2. The Hamburg Rules

- The General Rules on Liability

Article V(1) of the Hamburg Rules makes provision of an affirmative statement of responsibility of the carrier based on the fact that the carrier is presumed to be at fault for loss or damage to the goods or for delay in delivery while the goods are in his charge as defined in article IV. The reason for this provision was set out in clear terms at the end of the Hamburg Diplomatic Convention, in annex II.[147] Annex II makes provision for the common understanding of the parties to the Convention.[148] It provides that the liability of the carrier under this convention is based on the principle of presumed fault or neglect. This means that as a rule, the burden of proof lies on the carrier. However, with respect to certain cases, the provisions of the convention modify this rule[149]. The carrier will therefore be presumed liable under this rule for any loss or damage suffered by a cargo owner unless he can prove a defense under the convention.

It must be noted that whilst in paragraph 1 of article 5 there is a positive duty imposed on the carrier, in paragraphs 4, 5 and 7 of article 5, the duty imposed on the

[147] See the Final Act of the Hamburg Conference, Document A/CONF.89. Annex II provides the common understanding of the Conference that the liability of carrier under the Convention is based on the principle of presumed fault or neglect.
[148] Id. See also Luddeke & Johnson supra note 16 at 12
[149] Hamburg rules supra note 1

carrier is negative. Under paragraphs 4, 5 and 7, there is the description of a behavior, which the carrier should avoid, and the existence of this behavior will impute liability to the carrier. The words used in the rules that are also common to paragraphs 4, 5 and 7 are "fault and neglect." That is to say, the carrier must make sure that there is no fault or neglect in carrying out his duties under paragraphs 4, 5 and 7 of article 5.

It is clear from the text of article 5 that the basis of liability under paragraph 1 and under paragraph 4, 5 and 7 are the same. The different wording used is due to the fact that the allocation of the burden of proof is different.[150] Unlike under paragraph 1, under paragraph 4, 5 and 7 the burden of proof is on the consignee or the shipper. Thus with respect to loss of, damage to or delay in the delivery of live animals, paragraph 5 provides that

> "…the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from the fault or neglect on the part of the carrier, his servant or agents."[151]

In the case of loss or damage caused by fire on board the ship, to make the carrier liable, the shipper or consignee bears the burden of proof that "the fire arose from the fault or neglect on the part of the carrier, his servant or agents."[152] The burden of proof is not alleviated by the provision that allows the carrier or the claimant to

[150] Berlingieri, supra note 49 at 90
[151] Art. 5(5) Hamburg Rules supra note 1
[152] Art. 5(4) Hamburg Rules supra note 1

demand a survey of the circumstances of the fire nor does it in any manner ensure to the claimant a protection he would not otherwise have.[153]

Where loss, damage or delay in the delivery of the goods are caused not only by the carrier but due to other factors, the carrier will be liable to the part that the shipper or the consignee may be able to prove that the loss, damage or delay in the delivery was as a result of the fault or neglect of the carrier.[154] Thus in a situation where perishable goods are lost while at the care of the carrier, if the goods were damage due to bad handling on the part of the shipper at the time when the goods were lost, the state of the goods will be taken into consideration when assessing the carrier's damages.[155] The assessment of damages and the state of the goods at the time when it was lost will be a question of fact which will be proved on the preponderance of probabilities.[156]

- Exception to the General Rule

The combine effect of article 5(1) & 5(6) is to provide an exception to the general rule established under article 5. The Hamburg rules in article 5(6) makes a distinction between measures taken to save life at sea and measures taken to save property. Pursuant to article 5(6)[157] the carrier is exempted from liability for loss, damage or delay in the delivery if such loss, damage or delay in delivery occurred as a result of measures to save life at sea or reasonable measures taken to save property at sea. The condition of

[153]Id at 93
[154]Supra note 1 at art. 5(7)
[155]Id
[156]Id
[157]Id

reasonability exists for the salvage of property and not for salvage of life. The carrier is therefore allowed to take whatever measures it deems fit to save life at sea. The carrier must however exercise extreme caution, because there can always be a question as to whether or not there was an actual threat to life at sea to warrant any such measures. The carrier bears the burden of prove on the reasonability of measures taken to save property at sea. [158]

Unlike the Hague Rules, there are no specific provisions in the Hamburg rules concerning deviation except as implied under Article 5(6). Thus, in the event of a deviation there will be carrier liability resulting from loss, damage or delay in delivery except the carrier can discharge the burden of proof that he, his agents and servant took "all measures that could reasonably be required to avoid the circumstance and its consequences."[159]

Under English law[160], a carrier deviating from the agreed course was regarded as being contrary to the contract and therefore would not be entitled to the defenses listed on the bill of lading, whether expressed at back of the bill of lading or as a matter of law.[161] A deviating carrier may therefore find himself unable to limit his liability even in a situation where the loss was not connected to the deviation.[162] The Hamburg rules, in a situation where the carrier deviates, will attribute liability where the loss was as a consequence of the deviation. Where the deviation causes delay resulting in the damage to goods, the Hamburg rules places a duty on the carrier to demonstrate that he took all reasonable measure necessary to prevent such loss. The carrier liability may also be

[158] Id
[159] Tetley, supra note 2
[160] The Chanda (1989) 2 Lloyd's Report 494
[161] Luddeke & Johnson supra note 16 at 14
[162] Id

limited under article V even where the deviation was unauthorized.[163] Thus unlike under the Hague rules where the incidental deviation might deprive the carrier of his defenses and limits of liability, the liability of the carrier under the Hamburg rules is different. The carrier will have to prove that the unauthorized deviation was as a consequence of his exercising all reasonable measure to avert a total loss of goods. In addition, article 5(6) expressly eliminates the situation where the carrier acted to safe life or took reasonable measure to save property.

- Life Animals

Article 5(5) includes the carriage of life animals within the structure of the Hamburg rules, although to a limited degree. Article 5(5) exempt the carrier from any liability associated with any loss, damage or delay in the delivery "resulting from any special risk inherent in the carriage of live animals."[164] To escape liability under article 5(5), the carrier must prove that he complied with all the instructions that the shipper gave in caring for the animals. The carrier cannot plead that the specific instructions given him by the shipper were onerous and unreasonable to comply.[165] If it is proved that the loss, damage and delay occurred as a result of the fault or negligence of the carrier, he still will be liable. Thus in the absence of a situation where the carrier refuses to follow the specific instructions of the shipper or any fault or neglect on the part of the carrier, it will be presumed that any loss, damage or delay resulted from the special risk inherent in

[163] Supra note 1
[164] See Report of the Expert Meeting on The Development of Multimodal Transport and Logistics Services available at http://r0.unctad.org/ttl/ttl-doc-titles.htm
[165] supra note 49 at 96

carrying life animals.[166] It has been submitted however that the special risks will be viewed in relation to the type of animal being carried and the dangers normally inherent in sea transportation.[167]

B. Comparison between The Hague Rules and The Hamburg Rules

**1. Basis of Liability**

Under the Hague rules, in the case of a loss, damage or delay in the delivery of goods the shipper has the first burden of proving that the loss, delay or damage occurred as a result of the fault of the carrier. [168]

As noted above, under the Hamburg Rules, article 5(1) provides a positive statement of responsibility based on a presumption of fault on the part of the carrier. Thus in the event of a loss, damage or delay in the delivery of goods the carrier bears the burden of proof to show that he has taken all reasonable measures to avoid the loss, damage or delay in the delivery of the goods.

Commentators agree that this effectively constitutes a shift of liability from the shipper to the carrier and that the carrier may be liable in some situations under The Hamburg rules while he may not be liable in the same situation under The Hague rules.[169] It must be noted however, that in practice, the presumption of fault in the Hamburg rules does not necessarily increase carrier liability.[170] For instance, article III (2) of The Hague

[166] UNCTAD report supra note 131
[167]Luddeke and Johnson, supra note 16 at 14
[168]Id.
[169]Id.
[170]Id. at 42

rules imposes the following duties on the carrier. "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

These duties are in full force throughout the journey, from the moment the goods are loaded on to the ship until they are discharged from the vessel. Even though under the Hague Rules, in the event of a loss, damage or delay, the shipper bears the burden of proof to show that the carrier breached it duty of properly caring for the goods, in practice the shipper may rely on a clean bill of lading to establish a prima facie case against the carrier.[171] The shipper can establish a prima facie case against the carrier by showing that the goods were in good condition when turned over to the carrier. This can further be backed by the issuance of a clean bill of lading. Thus, the delivery of the goods by carrier in a damaged state proves prima facie that the carrier was the cause of the damage to the goods. Therefore, in the situation above, the presumption will be that the carrier failed in his duties to properly care for the goods unless the carrier can rebut the presumption of fault attributed to him.[172]

**2. Exception to liability**

The Hague rules under article IV exonerate the carrier from liability in some distinct areas that have been reduced into a catalogue of immunities. In the event of a loss or damage to goods, the carrier will not be responsible if he can successfully plead any of the seventeen exceptions provided under article IV of the Hague Rules. Of all the

[171] Quaker Oats Co. v. M/V Torvanger, 734 F.2d 238 at 243;Force supra note 21
[172] If the carrier sustains it burden of establishing immunity under the Hague rules, the burden shifts back to the shipper.

defenses, one of the most controversial is the nautical fault exception to liability, which seeks to exonerate the carrier from liability from loss or damage caused by the neglect or default of the carrier in the navigation or management of the ship. [173] It has been said that it is unfair to clear a carrier of any liability based on a showing of negligence and too unfair to hold the shipper responsible for the established nautical or managerial negligence on the part of the carrier and his agents.[174]

a. Navigational Fault

The nautical fault exception to liability contained in the Hague rules turned out to be perhaps the most controversial exception, particularly the period just before and the round up to the Hamburg conference.[175]

It must be noted that at common law, the carrier is permitted to limit his liability where the loss, damage or delay in the delivery of goods were due to navigational faults at sea.[176] Sellers LJ in The Lady Gwendolen summed up the rational for this as follows;

> "Navigation of a ship at sea is so much in the hands of the master, officers and crew and so much out of control of the owners that failure of an owner to establish no actual fault or privity in respect of navigation itself is exceptional and striking."[177]

[173]See Status of the Hamburg Rules, 12, U.N. doc. A/CN 9/401/Add.1 (1994) 2 para. 15
[174] Cargo Liability and the Carriage of Goods by Sea Act (COGSA): Oversight Hearing Before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries, 102d Cong,2d sess. (1992) (see statement of Roger Wigen )
[175]Bauer, supra note 39
[176] Lyons v Mells (1804) 102 ER 1134 at 1138 per Lord Ellenborough; See also Steel v State Line SS Co (1877) at 88 per Lord Blackburn
[177] The Lady Gwendolen, (1965) 1 Lloyd's Rep 335 at 337

This is aptly responded to by Samuel Robert Mandelbaum[178] in the following terms, While this [lack of control of the carrier over the vessel] may have been true in the first third of the century, it certainly is not true today. Telecommunication advances allow a maritime liner carrier to have as much control over its crew as do trucking and railroad companies.[179]

The Hague rules in article IV (2) (a) reiterate the common law position and release the carrier from any liability for loss, damage or delay in the delivery of goods resulting from any " act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." It has been said that in this regard, navigation refers to some movement of the ship whiles the management shows a wide range of activities ranging from maintenance to the caliber of crew employed. This subsection will consider the navigational faults while the next section will examine the management of the ship.

Under the nautical fault exception in the Hague rules, the carrier is not liable for any loss, damage or delay in the delivery of goods if such loss, damage or delay is as a result of the neglect or default of the carrier in the navigation of the vessel. The nautical fault exception is said to be part of a fundamental compromise that culminated in the coming into being of the Hague Rules.[180] As part of the compromise, the carrier agreed to accept a responsibility of exercising due diligence to make the ship seaworthy in exchange for the right to limit his liability and also to repudiate liability in a number of cases, which are contained in a catalogue of exceptions.[181] One of these defenses and

[178] Mandelbaum supra note 110
[179]Mandelbaum, supra note 26 at 38
[180]Id.
[181]Hundt supra note 4, see also art. 4 the Hague Rules

perhaps the most important for the carrier is the exemption from liability of "negligence in the management or navigation of the vessel "- the nautical fault defense. It is therefore not surprising that certain major carrier nations insisted on having the nautical fault defense stipulated in the Hamburg Rules.[182]

This exception was the subject of much discussion at the UNCTAD conference during the discussion of the Hamburg rules.[183] Among others, the carriers maintain that the exemption of the nautical fault is an important device for distributing risk among insurers in major casualties.[184] Wigen argued that the absence of the nautical fault exception will result in more suits against the carriers in the event of major casualties like collision, stranding and fires.[185] Third party liability insurers, in order to remain in business will pass it on as high insurance premiums for the carrier.

Cargo owners however are of the view that this defense gives an undue advantage to the carrier as it allows carriers to evade responsibilities on the high seas even when it is due to their negligence.[186]

At the end of the Hamburg diplomatic conference, the nautical fault immunity in the Hague Rules was replaced in the Hamburg rules. The navigational fault immunity has no counterpart under the Hamburg Rules. In fact, this nautical fault defense runs contrary to the basic tenets of the Hamburg rules, which is liability, based on fault. The critics of the Hamburg Rules have given the impression that the absence of the nautical

[182] UNCITRAL Rep. 4th Sess.; 1971 II Yearbook, 9. United States and Great Britain argued to save the nautical fault defense in the Hamburg Rules. See also Mandelbaum supra note 110
[183] UNCTAD Working Group on International Shipping legislation Rep. 2nd Sess. TD/B/C.4/86 & TD/B/C.4/ISL/8 (1971) paras. 45 &59; Rep.5th Sess. TD/B/C.4/148 & TD/B/C.4/ISL/21(1976) paras 8 & 41; See also Cleton "The Special feature Arising From The Hamburg Diplomatic Conference" The Hamburg Rules – A one day Seminar hosted by Lloyd's of London Press (London 1978)
[184] See Statement of Roger Wigen, supra note 173, at 21-22.
[185] Id, at 21
[186] Id. at 21; See also UNCITRAL Report of the Working Group 1974 A/CN.9/88, p 5

fault defense in the Hamburg rules increased tremendously the liability of the carrier.[187] Some commentators argue that the absence of the nautical fault defense effectively constitute a total shift of liability from the shipper to the carrier.[188] Admittedly, looking at The Hamburg rules from a layman's point of view it may not be strange for one to refer to it as so. This is so because a careful look at the Hamburg rules does not indicate any nautical fault defense. However, a practical look at the law might reveal a different scenario altogether. In practice, the omission of the nautical fault defense in the Hamburg Rules does not spell doom for the carrier. In fact, even if such an omission increases the liability of the carrier, it is not at the scale that some commentators put it.[189] Even though the Hague rules provide under article IV (2) (a) that "Neither the carrier nor the shipper shall be responsible for loss or damage arising or resulting from [an] act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship", this does not give a blanket immunity to the carrier. Under the Hague rules, the carrier is not exempted from all navigational faults.

In Swenson v. Argonaut,[190] the third circuit court held as follows;

> When a collision is caused by a vessel …there is a presumption of fault on her part and she is liable unless she can show affirmatively that drifting was as a result of inevitable accident, which human skill and precaution could not have prevented.' [191]

[187] O'Hare, C.W. 'Cargo Dispute Resolution and the Hamburg Rules. 29 Int.Comp. L.Q 219 (1980) p 230, 237
[188] Bonassies, P,D.M.F. (1993) 4 &7
[189] O'Hare supra note 187 p 237
[190] 204 F.2d. 636. 3rd Cir (NJ) May 7th, 1953
[191] Id. See also Maroceano Compania Naviera S.A of Panama v. City of Los Angeles, 193 F.Supp.529

District Judge Jacob Misler also held in the case of In re Compliant of Garda marine Inc that;

> The failure of a ship's master to exercise diligence in selecting, training or supervising crew members whose navigational faults contribute to an accident is proper ground to deny limitation of liability.[192]

Thus, the navigational fault defense does not offer the carrier a sweeping defense in the case of damage or loss caused out of the negligence of the crew members or the master of the ship.[193] Davies and Dicky suggest that this exception is limited to the negligence of the carrier's master or servants during the voyage.[194] Assuming *arguendo*, that this position was true, then it will be difficult to justify this view in the light of the carrier's paramount duty under article III (2)[195] to carefully and properly care for the cargo for the duration of the carriage.[196] To make it practical therefore, the navigational fault exception aspire to release the carrier from liability for any act or omission of his crew which is seen as lying outside of the carrier's power and control.[197]

Article V(1) provides that "the carrier is liable…unless the carrier proves that he, his servant or agents took all measures that could reasonably be required to avoid the occurrence and its consequences." Thus to escape liability under article V, the carrier must prove that he took all reasonable measures to avoid the occurrence and it consequences. Indeed, if the occurrence lies outside the control and power of the carrier, then it presupposes that the carrier must have exhausted all reasonable measures to let the

[192] 1992 WL 321213. S.D Fla, April 23, 1992
[193] Sze Ping-fat, supra note 83 at 43
[194] Davies & Dickey, Shipping Law 2nd ed 1995 p583
[195] Hague Rules supra note 29
[196] Sze Ping-fat supra note 83 at 94
[197] Id at 95

occurrence lie within his power and control. In fact, The Hamburg rules go further to say that the carrier must also take reasonable measures to avoid the consequences of the occurrence. For instance if a vessel carrying perishable goods at sea is stranded on the high seas, the carrier must take reasonable steps to either preserve the perishable goods or to dispose them of in a reasonable way. In the absence of any reasonable measures to cater for the perishable goods at sea, the carrier will be liable for any resulting loss or damage. Thus, as a matter of practice, one can come to the conclusion that the carrier is not necessarily disadvantaged by the elimination of the nautical fault exception under the Hamburg Rules.

In fact, even with the navigational fault exception in the Hague rules, a court could still find that there was a failure on the part of the carrier to exercise due diligence to make the vessel seaworthy with respect to competence of staff and the absence of navigational equipment.[198] Perhaps, the only difference between the provisions of the Hague rules and the Hamburg rules is that, unlike the Hague rules, the carrier is liable not only for his own negligence, but also for the negligence of his servants and agents.[199] With this difference, Force is of the view that this change was long overdue.[200] It has long been argued that it is unreasonable and inequitable to absolve the carrier for the negligence of its own employees particularly due to the fact that the carrier is in charge of the vessel. [201] These arguments are based on the fact that the nautical fault exception is in

[198] In re Ta Chi Navigation (Panama) Corp. S.A. 513 F. Supp.148, 1981
[199] Force, supra note 28 at 2063
[200]Id. 2069
[201] Ad Hoc Liability Study Group, Maritime Law Association, Revising the Carriage of Goods by Sea Act 1995. Reprinted in MLA Doc. 716, 684, 1995. (Hereinafter MLA Proposal), Section 4(2)(b); see also Hundt supra note 4

conflict with general legal principles, common sense and in particular in stark contradiction to the tort principle of vicarious liability.[202]

In spite of the fact that only a hand full of delegates at the Hamburg conference wanted the nautical fault exception maintained, it is interesting to note that a lot of criticisms have been offered for the elimination of the nautical fault exception and such criticisms have contributed to some nation's decision to refrain from ratifying the convention.[203]

- Management of the Vessel

In addition to the nautical fault defense, the Hague rules also provided for an exemption from liability for the carrier in the situation where loss or damage is caused by the negligence of the carrier and his servant in the management of the ship.

Professor Francesco Berlingieri[204] writes that the condemnation of the exoneration of fault in the management of the vessel is not justifiable. He goes on to stay that the practical effect of this exoneration is not as great as one would be made to think.[205] He argues that the obligation of the carrier to make the ship seaworthy before and at the commencement of the voyage is associated with each individual shipment. [206] Therefore, in the event that goods are loaded from several ports on a single journey, this duty must be complied with at each port at the time of loading.[207] Therefore if after loading at port A, a fault is discovered on the way to port B, the duty of the carrier will

[202]The Theory and Principles of Tort Law: Foundations of Legal Liability, Thomas A Street
[203]Herber, supra note 54
[204]supra note 49
[205] Id
[206] Id
[207] Id

accrue at port B to provide a seaworthy ship before and at the commencement of the voyage to say port C. Thus, even though the carrier is to exercise due diligence to provide a seaworthy ship at the beginning of the journey, and though the journey is a single journey, the carrier will be liable if he fails to provide a seaworthy ship at the beginning of the journey at port B. This is notwithstanding the fact that at the time he left port A for the journey to port D the ship was seaworthy.

Under the Hague rules, the responsibility of the carrier to make the ship seaworthy at the commencement of the voyage is more strict than under the Hamburg rules.[208] This is due to the fact that under The Hague rules, the responsibility is non-delegable and therefore the carrier is liable even if the fault is attributed to the negligence of an independent contractor. The position under the Hamburg rules is different. Under the circumstances above, the carrier will escape liability if he can prove that he exercised all reasonable care in the appointment of the independent contractor. For instance, the carrier may escape liability for damage or delay to goods in the course of the journey if he proves that he assigned the management of the vessel to a first class yard, which has been proven one of the leading yards in the industry.[209]

Furthermore, it is not always easy to distinguish an operation done in the management of the ship where the exception may be granted and other general operations.[210] For instance in the Gosse Millerd case,[211] where the crew omitted to close the hatches of the vessel resulting in the damage to the cargo, it was held that the

[208]George Chandler,Comparison of COGSA, the Hague-Visby Rules and the Hamburg Rules, 15 J.M.LC 233 (1984).
[209]Id
[210] Sze Ping fat supra note 83 at 93
[211] Gosse Millerd Ltd v. Canadian Government Merchant Marine Ltd [1927] 2 KB 432

omission was outside the management of the vessel. In the Iron Gippsland case[212] the inert gas system of the vessel contaminated the diesel oil cargo. It was held that the management of the inert gas system was not a fault in the management of the ship in spite of the fact that inert gas systems are usually installed on tankers purposely for the protection of the vessel.

With the Hamburg rules, all that the carrier will have to do in the case of a loss, damage or delay is to prove that he took all reasonable measures to prevent such loss, damage or delay. Under the Hamburg rules, the liability of the carrier is therefore clearer as there little likelihood of controversies arising as to whether an act constitute management of the vessel or not.

- Fire

In the event of fire on board the vessel, under the Hague rules, the carrier is not responsible for any loss or damage resulting thereof unless it is proven that the fire was as a result of the actual fault of the carrier or the carrier was privy to the fire. Thus, under The Hague rules the carrier is exempted from liability if the fire was as a result of the fault or negligence of his servants or agents. Article 5(4) of the Hamburg rules provide that the carrier is only liable for loss, damage or delay caused by fire if the shipper proves that the fire arose as a result of the negligence or fault on the part of the carrier, servant or agents. The Hamburg rules further provides that the carrier is liable for loss, delay or damage caused by fire if the shipper is able to prove that the carrier, his servants or agents were guilty of fault or neglected in taking all reasonable measures that could be

[212] Caltex Refining Co Ltd v. BHP Transport Ltd [1993] 34 NSWLR 29

required to put out the fire and avoid or mitigate the effect thereof. It must be noted that under both The Hague rules and the Hamburg Rules, the claimant bears the burden of proving that the fire was as a result of the negligence of the carrier. Under the Hague rules, the claimant has to prove not only that the servants of the carrier were negligent, but also the actual negligence of the carrier. Under the Hamburg rules, prove that the servants of the carrier were negligent will suffice to impute liability to the actual carrier.

- Salvage

The provision for salvage of life at sea is the same under both the Hague Rules and the Hamburg Rules. Under both regimes, the carrier is not liable for loss, damage or delay that may occur in an attempt to save life at sea.[213] Article 5(6) of the Hamburg rules however draws a distinction between measures to safe life and measures to save property at sea. This is where The Hamburg Rules and The Hague Rules part company. Under the Hague Rules, the carrier is exempted from liability for any measures taken to save property at sea. However, the carrier, to be exempted from liability must prove that the measures taken to save property at sea were reasonable. Thus, the carrier remains liable for any unreasonable measures taken to save property at sea. However, in practice, it has been said that even under The Hague rules unreasonable measures taken to save property at sea will incur carrier liability.[214] In addition, article 4(4) of the Hague rules create a presumption that while measures to save life and property is always reasonable, nevertheless prove to the contrary is possible.

[213]See art. 4(l) of the Hague rules: art. 5(6) of the Hamburg Rules
[214]Berlingieri supra note 49 at 97

Unlike the Hague rules, there are no specific provisions concerning geographical deviations under the Hamburg Rules save as implied under article 5(6). Thus, the carrier will be liable for loss, damage or delay resulting from deviation unless he can demonstrate that he or his servant took all reasonable measures necessary to avoid the occurrence and it consequences.

All deviations in the course of the vessel's voyage unauthorized by the shipper are not allowed under the Hague rules and the consequences are onerous. As stated by Luddeke and Johnson,[215]

"A deviating carrier will be treated as acting extra-contractually and would not be entitled to rely upon any of the defenses available under the bill of lading whether expressed on the reverse or incorporated as a matter of law, [for instance] those set out in article IV, Rule 2 of the Hague /Hague Visby Rules."

A deviating carrier may therefore find himself liable and unlimited to liability even where the loss complained of is totally unconnected to the said deviation.[216] A carrier who deviates from the contractually agreed route, under the Hamburg rules, will be liable only if the loss was caused by such a deviation. The carrier is also at liberty to exercise his right to limit his liability under article 6 even in the case of an unauthorized deviation. If loss to goods are occasioned by a deviation on the part of the carrier, article 6(1) (a) affords the carrier ability to limit his liability. Article 6 (1) (a) provides that liability for loss resulting from damage to goods is limited to an amount equivalent to 835 units of account per package or 2.5 units of account per kilogram of gross weight of the goods lost. Thus unlike the Hague rules, the carrier's liability under the Hamburg rules can be limited in terms of damages that can be awarded.

[215] Id at 14
[216] The Chanda [1989] 2 Lloyd's Rep. 494

- Multiple Causes

It can be implied from the provisions of article IV of the Hague rules that for the carrier to claim the immunities spelt out under paragraphs (2) (a)-(q), the carrier must have taken measures to make the ship seaworthy and in proper condition for the voyage as spelt out under article IV (1). The courts in the United States have stated, where loss or damage occurs partly by a cause excused by the law and partly due to an unexcused cause, the court imposes a burden on the carrier to show what part of the loss or damage was due to the cause for which it is excused or else it will be liable for all the loss or damage.[217] In similar terms, the Hamburg rules provide under article 5(7) that where the fault or neglect of the carrier combines with other causes to produce loss, damage or delay, the carrier's liability will be limited to the part of the loss or damage attributed to the fault provided it can prove the amount of loss or damage not attributed to it. Thus just like under the Hague rules, under the Hamburg rules, if the carrier is not able to prove the loss not attributed to it fault, it will be liable for the entire loss or damage. It is interesting to note that under the Maritime Law Association's proposed amendment to the United States Carriage of Goods by Sea Act, if the respective proportions can not be ascertained, the damages will be equally divided with the carrier being responsible for only one-half of the loss.[218]

[217] The Vallescura, 293 U.S.296 (1934)
[218] MLA Proposal, Session 4(2) Proviso available at http://tetley.law.mcgill.ca/maritime/cogsacom.htm

## CHAPTER 4

### A. ISSUES AGAINST RATIFICATION

The final version of the Hamburg rules was adopted in 1978 at the Hamburg diplomatic conference.[219] The convention was opened for signature until April 30, 1979. By the deadline 26 countries had already signed.[220] A lot of the signatures were however subject to ratification in the individual countries. Some of the original signatory countries to the convention never ratified the convention and thus make it a part of their domestic laws. Nevertheless, in accordance with article 30(1), the convention entered into force on 1 November 1992 after Zambia the twentieth country had adopted the convention.

Currently, there are only twenty-five nations who have adopted the Hamburg rules.[221] In fact, statistics indicate that the part of world sea trade covered by the Hamburg rules is estimated at less than 20%.[222] A number of reasons have accounted for this lack of enthusiasm in adopting the Hamburg rules.

Generally, looking at the list of countries that have ratified the convention, it can be implied that it is the carrier nations who have failed to ratify the convention. This has,

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[219] O'Hare supra note 186 at p 219; See also the Final Act of the Conference, document A/CONF.89/13
[220] Basnayake, S. Carriage of Goods by Sea, 27 Am. J. Comp. L. 353 (1979) at 355. As at 30th April 1979 the Convention had been signed by Austria, Brazil, Chile, Czechoslovakia, Denmark, Ecuador, Egypt, the Federal Republic of Germany, Finland, France, Ghana, the Holy See, Hungary, Madagascar, Mexico, Norway, Pakistan, Panama, Philippines, Portugal, Senegal, Sierra Leone, Singapore, Sweden, United States of America, Venezuela, and Zaire.
[221] See the Final Act of the Conference, Document A/CONF.89/13.
[222] Available at http://www.marad.dot.gov/Marad_Statistics/PMFW-7-03.htm

essentially been due to a widely held conviction that the Hamburg rules favor the cargo owners to the detriment of the carriers.[223]

The Hague rules are said to be based on a compromise between the carrier and the cargo owner.[224] Under the Hague rules, the carrier accepts responsibility to make the ship seaworthy and in exchange, earns the right to limit his liability and to renounce responsibility in a number of issues. One of such defenses is the one for "negligence in the management or navigation of the vessel" called the nautical fault defense. The carrier nations therefore guarded this nautical fault defense jealously for more than five decades. Thus as soon as the nautical fault defense was left out of the Hamburg rules, the Convention automatically lost favor with the carrier nations who represent a large proportion of the world maritime trade.[225] However, as stated above, the abolition of the nautical fault defense in the Hamburg rules did not overly increase the liability of the carrier.[226] Supporters of the convention, drawing examples from road, rail and air carriers have argued that no carrier in any of these modes of transportation has been given such a right.[227] Neither have other professionals like doctors and lawyers been released from liability of the fault of their members.[228] Thus, it is felt that as a matter of principle and in conformity with the current trends in other comparable trade, it was in the right direction that the nautical fault defense was left out of the Hamburg rules. As Mandelbaum puts it, the nautical fault defense must be revised, because the historical reason for which it was included no longer existed.[229]

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[223] Hundt, J supra note 4 at p 8&9
[224] Id. 2,3
[225] Berlingieri supra note 49 at 41
[226] Id. See also United States v. Atlantic Mut. Ins. Co., 343 U.S 236, 239-240 1952
[227] Mandelbaum, supra note 26 at p8
[228] id
[229] Mandelbaum supra note 110 at 28 & 29

Hundt argues that

> those who are in favor of the nautical fault exception have in principle only one argument of weight on their side: Nautical fault is part of the 'hard nosed' compromise that supports the Hague rules and that led the world out of an international legal jungle, where the only law was the law of the jungle. Changes in that field imply changing the whole system. This is why opponents of the Hamburg Rules often present the nautical fault defense as 'tradition' and 'time tested ' in order to justify its continued existence.

The nautical fault defense may have contributed to the success of the Hague Rules, but with the introduction of sophisticated navigational technology, satellite-backed navigation it no longer makes sense to maintain the nautical fault defense.[230]

Another point of dispute is the introduction of the requirement of 'reasonableness' in the text of the Hamburg rules. Many authors have argued that the requirement of 'reasonableness' is too elastic a term and that it tends to make the Convention too vague. For instance, Frederick criticizes that "at Hamburg reasonableness became the linguistic device to cloak the delegates' inability to agree on how far to shift the balance of risk toward carriers."[231]

In response, it has been pointed out that in a lot of areas of the common law, the concept of reasonableness has been widely used without any damaging consequences.[232] It has been pointed out however that The Hague rules is not without ambiguity of language.[233] In addition, clear language in itself does not necessarily lead to a law which lends itself to easy interpretation. Much depends on the rules of interpretation used coupled with the competence of the lawyers and judges who will use the law. It is an

[230] Mandelbaum, supra note 26 at p8
[231] David C. Fredrick, Political Participation and Legal Reform in the International Maritime Rulemaking Process: From The Hague to the Hamburg Rules, 22 J.ML.C. 81 (1991)
[232] Id
[233] Scott Thompson, The Hamburg Rules: Should they be Implemented in Australia and New Zealand. 4 Bond LR., 168(1992)

accepted norm however that at the international level plain language is very important. Because of the multiple countries and players involved at the international level, plain language facilitates easy interpretation and avoids unnecessary controversies. However, the concept of 'reasonableness' being used widely in different jurisdictions, it is certain that this concept will lend itself to easy interpretation on the international scene.[234]

Another criticism leveled against the Hamburg rules is that the introduction of the Hamburg rules will render the already decided case law under the Hague rules useless. This, is has been said will necessitate expensive and unnecessary litigation as there will be no precedents.[235] The author feels that this argument is untenable, for it will mean that there should be no change to any existing law no matter how absurd the existing law is. In addition, due to the similarities of the convention, the case law under the Hague rules will still be important in the administration of the Hamburg rules. The case law under the Hague rules may also serve as a point of comparison and for historical analysis.

Perhaps the most widely used criticism against the Hamburg rules is that it introduction will trigger an unprecedented increase in carrier insurance premiums.[236] The marine insurance market for the carriage of goods by sea is not covered throughout by the same kind of insurers. Ship owners are mutually self-insured through their Protection and Indemnity (P&I) clubs.[237] The marine cargo insurers are naturally opposed to any action that may shift liability to the detriment of their clients, they have therefore defended the nautical fault defense strongly.[238] The P&I clubs are of the view that the

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[234] Id
[235] Id.
[236] Moore, J. The Hamburg Rules, 10 J.M. LC. 1, (1978); See also Christopher J.S. Hill, 'The Clubs' Reaction to the Coming Effect of the Hamburg Rules' MAKLU ed. (1993) ;See also Berlingieri supra note 49 at 195
[237] Available at http://www.lsso.com/delivery/d/index.asp
[238] Hill, supra note 234

absence of the nautical fault defense increases the liability of the carrier and this will intern mean that they will be made to settle a lot of insurance claims on behalf of their clients.[239] Professor Michael Sturley however points out that this insurance argument is not supported by empirical evidence and should therefore be abandoned.[240] Privately among the members of the P&I club it is acknowledged that the nautical fault defense is "an anomaly and a historical survivor which should have been buried in history years ago."[241] This criticism was perhaps borne out of shock by the members due to the revolutionary nature of the Hamburg rules and not any particular empirical studies.[242]

[239]Id.
[240] Michael Sturley, Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby and Hamburg in a Vacuum of Empirical Evidence,24 J.M.L.C. 119,249 (1993)
[241]Hill, supra note 234
[242] Id.

# CHAPTER 5

## A.THE FUTURE OF THE HAMBURG RULES

In spite the importance of the Hamburg rules and its significant resemblance to the Hague-Visby rules there seem to be no move in the international scene to a total ratification by the international maritime community. Currently, the total number of countries, which have officially ratified the Hamburg rules, stands at 29.[243] In spite of the small number of countries that have ratified the Convention, the Convention on The International Carriage of Goods by Sea is still an important maritime law.

Increasingly, major maritime nations in the world who have still not ratified the Hamburg rules are adopting the provisions of the convention in their domestic laws. The Hamburg rules are therefore affecting how national laws on carrier liability are being revised. Thus, the Hamburg rules still has an important position in maritime laws around the world. For instance, the Korean Carriage of Goods Law for Maritime Commerce has in conformity with the Hamburg rules eliminated the nautical fault defense.[244] Further the Korean law no longer permits a carrier to limit his liability for delay in the carriage of goods.[245]

### 1. Scandinavian Maritime Code

[243]Available http://www.uncitral.org/english/status/status-e.htm#United%20Nations%20Convention%20on%20the%20Carriage%20of%20Goods%20by%20Sea,%201978%20(Hamburg)

[244] See Korean Commercial Code, Ch. IV, s 1, at art. 787; also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=248818

[245] Id. art. 746

The Scandinavian Maritime Code refers to the body of maritime laws that are applicable to the Scandinavian countries.[246] Within the Scandinavian countries,[247] the Hamburg rules are regarded as the way of the future; it is therefore not surprising that the Scandinavian countries are implementing many of the provisions of the Hamburg Rules in their new legislation.[248] The major changes in the Scandinavian laws as summarized by Lowe and Andersen are as follows;

The 'tackle to tackle' as espoused in the Hague Rules has been abandoned. The carrier will not be permitted to disclaim liability for damage or loss of cargo occurring at the port of loading, before the cargo pass the ship's rail or at the port of discharge, after the cargo has passed the ship's rail. The new rules make the carrier liable for any loss or damage while the goods are in his care from the time he takes charge of the goods until the goods are delivered as per the contract of carriage. In effect, the Scandinavian countries have adopted the compulsory period of responsibility of the Hamburg rules, which cannot be contracted out.[249]

In addition, the Scandinavian countries have given up the long list of defenses available to the carrier under the Hague rules. In its place the reasonability test has been used. Thus, the carrier in order to escape from liability for any damage, loss or delay must prove that he, his servants and agent took all reasonable measures required to avoid the damage, loss or delay. The Scandinavian countries also include in their maritime code the provisions in the Hamburg rules relating to carrying life animals and deck

[246]Christopher Lowe, The Scandinavian Compromise: Maritime Codes, LLOYD'S LIST, 1994 at 7; See also Scandinavian Maritime Codes, 1994 II Diritto Maritimo 1222
[247] Honka supra note 96 see particularly Finland, Sweden, Norway and Denmark
[248] Lowe, supra note 246
[249] Id.

cargoes. Under new law, as in the Hamburg rules, the carrier can longer exclude liability for damage to or loss of live animals.[250]

The carrier will no longer be permitted to exclude liability for loss or damage to cargo carried on deck. It makes the carriage of goods on deck limited to only exceptional circumstances. In the event, where the carrier carries cargo on deck against the express agreement of the parties to carry the cargo under deck, the carrier will forfeit his right to limit his liability.[251]

The Scandinavian countries have also adopted the provisions of the Hamburg rules on jurisdiction and arbitration. This ensures that the plaintiff to an action can only commence action at a specified place, Vis, where the defendant has his place of business, the place the transport agreement was concluded, or the place of delivery or where the carrier took the goods.[252]

**2. Chinese Maritime Code**

The Chinese Maritime Code also incorporates quite a significant number of the Hamburg Rules' provisions.[253] The major provisions of the Chinese Maritime code are as follows:

The definition of the carrier under the Hamburg rules has been adopted to include the contracting carrier and the actual carrier.[254]

[250] Id.
[251] Id.
[252] Id.
[253] See Carriage of Goods by Sea, Ch. 4 of the Chinese Maritime Code (1993)
[254] Id.art. 42

Tailored from the Hamburg rules, the carrier bears responsibility over cargo in containers from the time he receives the goods at the port of loading until delivery at the port of discharge.[255]

The liability of the carrier for delay in the delivery of goods is the same under the Hamburg rules. Damages are however limited to the actual freight payable for the goods delayed.[256]

Derived from article 9 of the Hamburg rules, the carrier is liable for the loss or damage to deck cargo, unless the shipper had contractually agreed in advance that the goods be carried on deck.[257]

### 3. The Proposed MLA Amendment to the U.S Carriage of Goods by Sea Act

In the United States, the Maritime Lawyers Association (MLA) in February 1995 proposed a draft bill to amend the existing 1936 COGSA.[258] This MLA proposed draft bill is titled the Carriage of Goods by Sea Act of 1995. The MLA presented the proposed draft bill to the U.S Senate's Sub committee on Surface Transportation and Merchant Marine at a hearing of the Sub-Committee held April 21, 1998. The proposal then became commonly referred to as Senate COGSA.[259] Though designed to be based on the Hague rules, the MLA draft bill draws heavily from the Hamburg rules. An adoption of

[255] Id.art. 46
[256] Id. arts. 50 & 57
[257] Id. art.53
[258] The MLA proposal, supra notes 134. The MLA proposal was approved at the annual general meeting of the MLA in New York on May 3, 1996 by a vote of 278 to 33
[259] If adopted, it will be codified as Carriage of Goods by Sea Act, 46 U.S.C. The original senate COGSA was subsequently changed several times by the MLA working in consultation with the staff of the U.S Senate.

the MLA proposal will be a shift more towards the Hamburg rules.[260] Even though this proposal has not yet been adopted by the United States, it provisions demonstrate how stake holders in the United States favor the Hamburg rules though the United States has not yet ratified the convention. The draft bill presented to the Senate's Sub committee on Surface Transportation and Merchant Marine in 1999[261] includes the following important changes over the U.S COGSA 1936:

It abolishes the 'error in navigation or management' as a defense, as in the Hamburg Rules. Therefore, a carrier will be liable for loss or damage where the claimant presents proof of negligence in the navigation or management of the ship.[262]

The period of carriage covers the period before loading and after discharge by the contracting carrier and the performing carrier.[263] This provision is a partial adoption of the provisions of article 4 of the Hamburg rules.

Contrary to The Hague Rules, the proposals cover deck cargo (as provided in the Hamburg Rules) and do not leave out cargo carried on deck from the definition of 'goods'.[264] Senate COGSA also covers all contract of carriage, including bills of lading or waybills and electronic shipping documents.[265] This provision is modeled after articles 1(6) and 2(1) of the Hamburg Rules. Further, as provided under article 20(1) and (5) of the Hamburg rules, senate COGSA's provisions on limitations cover not only suits, but also arbitration and actions in indemnity.[266] It also provides that a carrier is liable for

[260] Mandelbaum, supra note 110 at 8
[261] This is the sixth re-write by the Senate staff of the draft Carriage of Goods by Sea Bill, dated September 24, 1999, which reflects most of the corrections and amendments by the MLA's Steering Committee
[262] See ss 4(2), supra note 233
[263] Senate COGSA '99 sections 2 (a) (8), 5 (a), (b)
[264] Senate COGSA '99
[265] Tetley, W. The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law. Journal of Maritime Law and Commerce, 1999
[266] Id.

loss or damage for any unreasonable deviation in saving or attempting to save life or property at sea.[267] It must be noted however that if the deviation is reasonable then the carrier is exonerated from any liability.

[267] Id.

## CONCLUSION

The time has come for an overhauling of the old maritime regime. The Hague Rules must have served the shipping and international trade successfully for years. They are largely outdated today.[268] The Hague Rules were designed for marine transportation as existed in the 1920s. The drafters could not envisage the electronic data revolution; advanced satellite telecommunication and the other technological revolution that the world has seen at the later part of the 20-century. They were therefore not able to design the Hague rules to apply to the technological developments that followed the convention.

Nevertheless, the Hamburg Rules have failed to win the support of the world maritime powers. However, it is right to say today that when new legislation on the carriage of goods by sea is proposed on a national level, amendments are generally drawn from provisions contained in the Hamburg Rules. Typical examples are the new Scandinavian Maritime Codes and the proposals of the MLA for a new COGSA. This shows that, if the Hamburg Rules failed to meet the expectations of many, they still, despite their so-called weaknesses, do constitute a very important influence in national carriage of goods by sea law reform.

The Hamburg Rules resembles the Hague rules in a number of ways. Though some changes might have shifted new liability to the carrier, these changes have been done to reflect the modern trend of carriage of goods by sea. It is about time that the world maritime powers put away their political differences and accept the Hamburg rules to achieve world uniformity in the carriage of goods by sea regime.

[268] Carriage of Goods by Sea Act: Oversight Hearing before the Subcommittee on Merchant Marine of the House Committee on Merchant Marine and Fisheries, 102d Cong., 2d Session 21 (1992) at 127

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