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Nguyen Thi Quynh* : Limitations of carrier liability for marine cargo: A comparative analysis under the international maritime conventions

Abstract

This paper seeks to investigate the regulations of limitation of the carrier's liability in international carriage of goods by sea adopted in the four international maritime Conventions: the Hague Rules 1924, Hague-Visby Rules 1968, Hamburg Rules 1978, and Rotterdam Rules 2008. It will examine, by comparative and analysis methods, how the carrier's liability is limited in the four Conventions and what are the similarities and differences between them. It is concluded that the Rotterdam Rules deal with the limits of the carrier's liability issues better than the older conventions.

Keywords: *limitation of the carrier's liability, international carriage of goods by sea, international maritime Conventions, the Hague Rules, Hague-Visby Rules, Hamburg Rules, and Rotterdam Rules.*

I. Introduction

When involving in international carriage of goods by sea, the participants should be aware of potential dangers that may occur to the goods. There are a number of factors that could lead to delayed, lost, or damaged freight shipments. In the contract of international carriage of goods by sea, the carrier is bound to be responsible for the carriage and is liable if any loss or damage occurs to the cargo during the carriage. However, not all factors fall under the liability of the carrier and he is not always liable for all loss or damage during his performance of the contract. The carrier has a limited liability, in case loss or damage occurred, to the extent of his responsibility. Limits of liability of the carrier is the limited amount of compensation for the damage, or loss, or delays established in the Conventions which the carrier can rely on to limit his liability without considering the actual amount of the loss or damage. The limits of liability clauses can be found in the four main international maritime conventions that regulate international carriage of goods by sea: the Hague Rules of 1924,¹ Hague-Visby Rules of 1968,²

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¹ The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature, generally known as the Hague Rules, became the first unified international maritime convention. The Hague Rules were adopted in 1924 in Brussels and entered into force in 1931. They were drafted in an attempt to unify private international law concerning the carriage of goods under bills of lading and to provide a minimum mandatory framework of duties and liability of carriers and to protect cargo owners from exemption of the carrier's liability.

² The Visby Protocol ("Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading") was first introduced in 1968 to amend some provisions of the Hague Rules and came into force in 1977. This combination of the Hague Rules and the Visby Protocol has formed the Hague Visby Rules. The Hague Visby Rules were further amended by the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1979.

Hamburg Rules of 1978,³ and Rotterdam Rules of 2008.⁴ The liability limits are set differently between these Conventions and seem to reflect different communities of interest. Therefore, the solutions adopted in these Conventions are not likely to satisfy all parties in the international marine community and have attracted a great deal of criticism. This paper seeks to investigate the limitation of liability of the carrier approach adopted in these Conventions. It will examine, by comparative and analysis methods, how the liability of the carrier is limited in the four Conventions and what are the similarities and differences between them. In this paper, only the issue of limitation of liability of the carrier for international marine transportation is discussed.

II. Comparative analysis of limitations of carrier liability

1. General approach

The sphere of application of the limitation of carrier's liability is different between the Conventions and tends to be broader in the Rotterdam Rules. While the liability's limits in the Hague and Hague Visby Rules applies to "*any loss or damage to or in connection with the goods*",⁵ in the Hamburg Rules, it covers "*loss resulting from loss of or damage to goods*",⁶ and in the Rotterdam Rules, it widens to the breaches of the obligations of the carrier.⁷ Obviously, this broader application of the Rotterdam Rules means all damages caused by the breach of the carrier's duties are included. The replacement from "*in connection with*" in the Hague and Hague Visby Rules to the broader expression "*breaches of (the carrier's) obligations*" in the Rotterdam Rules makes the carrier's liability for misdelivery and misinformation more clear than earlier Conventions.⁸ In addition, the Rotterdam Rules also allow the carrier to apply limitation for liability arising from deviation.⁹ However, no limitation is conferred on the carrier in the case of loss, damage, or delay arising from the carriage of the cargo on deck.¹⁰

³ The Hamburg Rules ("International Convention on the Carriage of Goods by Sea") were drafted under the auspices of the United Nations. The Rules were adopted on March 31, 1978, and came into force on November 1, 1992. The purpose of the Hamburg Rules was to provide a uniform maritime framework that was both more modern and less biased in favour of ship-operators, and to improve the Hague/Visby Rules, which attracted a good deal of criticism. However, after a long time of being effective, the Hamburg Rules have not obtained overwhelming success. The Rules have been ratified by 34 countries without any ratification by major maritime nations.

⁴ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea known as "The Rotterdam Rules" is sponsored by the United Nations and was adopted in 2008. The Convention is open for signature for countries from September 23, 2009. The Rotterdam Rules are expected to unify and modernize international maritime law. They propose new international rules to revise the legal framework for maritime carriage, new transport liability regime and carriage of goods by sea. It also brings a new and improved legal regime for both maritime and combined transports.

⁵ Hague Rules and Hague Visby Rules, Art. 4(5),

⁶ Hamburg Rules, Art. 6(1).

⁷ Rotterdam Rules, Art. 59.1.

⁸ Kate Lannan, 2009: 'Behind the numbers: The Limitation on Carriers Liability in the Rotterdam Rules. In: Uniform Law Review, 14(4), pp. 901–929.

⁹ Rotterdam Rules, Art. 24.

¹⁰ Rotterdam Rules, Art. 25.

Each Convention provides for exclusions to the carrier's limited liability. Both the Hague and Hague Visby Rules and the Rotterdam Rules provide two exceptions: when there is a document particulars including a declaration of the value of the goods from the shipper, or when the carrier and the shipper agreed on a higher amount for the limitation of liability of the carrier, provided that such amount does not exceed the levels stated in the Convention.¹¹ However, the Hague, Hague Visby Rules, and the Rotterdam Rules have differences in expressing the first exception. While in the Hague and Hague Visby Rules, "*the nature and value*" of the goods is required to be declared and indicated in the bill of lading, the Rotterdam Rules deleted the word "*nature*" and kept only the phrase "*value of the goods*". This adjustment in the Rotterdam Rules is to remove confusion on the intention of the shipper regarding the declared value of the goods and to keep with the text "*a description of the goods*" set out in the contract.¹² On the other hand, the Hamburg Rules only contain the latter exception.¹³

2. Amount

While the Hague Rules adopt only one method to calculate the limitation of the carrier's liability, the other Conventions offer two methods. The first method is on per package or unit basis. This is the only method indicated in the Hague Rules with the amount limited to 100 pounds sterling per package or unit.¹⁴ This was amended in the Hague-Visby Rules to 666.67 SDRs,¹⁵ and has risen approximately 25% to 835 SDRs in the Hamburg Rules.¹⁶ The Rotterdam Rules have adjusted modestly higher than the Hamburg Rules with per package limitation of 875 SDRs, but noticeably higher than the Hague-Visby Rules, approximately 30%.¹⁷ The second calculation approach is on per kilogram basis which is included in the Hague Visby Rules, the Hamburg Rules, and the Rotterdam Rules as well. The limits which under the Hague Visby Rules are 2 SDR per kilogram, have been increased to 2.5 SDRs under the Hamburg Rules, and have risen significantly to 3 SDRs in the Rotterdam Rules which is higher than 50% than the Hague Visby Rules and 20% to the Hamburg Rules. Among the two calculation methods, the higher amount shall be count to determine the carrier's liability limits.

Generally, the Hague/Visby Rules, the Hamburg Rules, and the Rotterdam Rules have the same methods of calculating approach, the difference is the level of limitations set out in the Conventions. Both the Hague and Hague/Visby Rules only refer to "*per package or unit*" without specifying clearly which kind of "*unit*" will be applied, if it is the "*shipping*" or "*freight*" unit. This conflict is resolved in the Hamburg Rules and Rotterdam Rules by stating clearly that a "*package or other shipping units*" is the unit at issue.¹⁸

¹¹ See Hague Rules and Hague Visby Rules, Art. 4(5), Rotterdam Rules Art. 59.1.

¹² Rotterdam Rules, Art. 36.1(a)

¹³ Hamburg Rules, Art. 6.4.

¹⁴ Hague Rules, Art. 4.5.

¹⁵ Hague-Visby Rules, Art. 4.5(a).

¹⁶ Hamburg Rules, Art. 6.

¹⁷ Rotterdam Rules, Art. 59.1.

¹⁸ Hamburg Rules Art. 6.1(a) and Rotterdam Rules Art 59.1.

3. *Unit of account*

The unit of account is used in all Maritime Conventions to establish limits of liability aiming to avoid or minimize the effects of inflation. While only the Hague Rules apply the pound sterling as the unit of account to measure, the latter Conventions indicated the Special Drawn Rights (SDRs)¹⁹ to be the unit of account. The use of SDRs is based on its features of convenience and stability. The pounds sterling provided in the Hague Rules is referred to as the gold value.²⁰ This form of unit is argued that it is fairly low and not suitable for the modern context. Therefore, the latter Conventions establish a new unit of account with higher limits in order to improve the position of cargo-owners. However, it is said that in fact, the limitations in the Hague Rules are higher than the Hague/Visby Rules due to the application of the gold value.²¹

4. *Bulk cargo*

Bulk cargo is defined as unpackaged cargo. With unpackaged cargo, the question is raised what kind of unit should be applied to measure the limits? While unpackaged goods are not considered clearly in the Hague Rules, this problem is resolved in the latter Convention by adding the “*unit of account per kilogram of the gross weight of the goods lost or damaged*” as the measure to apply if the limit is higher than the limit that results from the volume of packages or units.²² This amendment is considered to address some other conflicting issues of the Hague Rules which treat the limit of a standard bag or a box as the same as that of a car, large machinery, etc., regardless of their weight.²³

5. *Container limitation*

For the question of how to calculate the per package limitation in case goods are consolidated for transport in a container, pallet or similar article of transport which is absent in the Hague Rules, the Hague/Visby, Hamburg Rules, and Rotterdam Rules address it with the familiar feature. Accordingly, the per package or (shipping) units approach is made to the number of package or (shipping) unit stated in the bill of lading or transport documents, in case of failing to indicate in such documents, the cargo packed in such kind of transportation is calculated at one package or (shipping) unit. The Rotterdam Rules show its advancement by adding the phrase “*in or on a vehicle*” which imply that cargo carriages by road and rail have similar status with containers regarding limitation on liability and in terms of deck cargo.²⁴

¹⁹ Special Drawn Rights is an international reserve asset created and maintained by the International Monetary Fund.

²⁰ Rules Hague Rules Art. 9.

²¹ £100 gold sterling as decided in *The Rosa S* case is equivalent £6,630 while SDR 666.67 in the Hague-Visby Rules equates to approx. USD 1,023 at the time of drafting this Article.

²² Hague-Visby Rules Art. 5(a), Hamburg Rules Art. 6(a) and Rotterdam Rules Art. 59.1(a).

²³ Alberto c. Cappagli: Limitation of Liability in The Rotterdam Rule - A Latin American Perspective. <https://comitemaritime.org/wp-content/uploads/2018/05/Limitation-of-Liability-in-the-Rotterdam-Rules-Alberto-Cappagli.pdf>. 30.10. 2023.

²⁴ Rotterdam Rules, Art. 25.

6. *Limits of liability for loss due to delay*

While there is no provision regulating the limits of liability for loss due to delay neither in the Hague nor in the Hague/Visby Rules, it appears in the Hamburg Rules, and the Rotterdam Rules. The carrier's liability for loss due to cargo delayed is limited to an amount equivalent to two and one-half times the freight payable. Such amount should not surpass "*the total freight payable under the contract of carriage of goods by sea*".²⁵ The total amount allowed to claim compensation for combined loss, damage or delay should not be higher than the total recoverable amount of the loss.²⁶ The damage caused by delay is divided into three types: physical cargo damage or loss of goods (for example breakage, falling, rolling, or spoilage), economic loss for fluctuation of the market and price of the goods during the time of delay, and pure economic loss for factory's failure to operate and manufacture due to the delayed goods, components and parts of an essential products.²⁷ For the physical and economic loss, the general limitation on liability in Article 59 is applied, and the calculation of damage is measured according to Article 22, while the pure economic loss measurement will follow the Article 60.²⁸

7. *Loss of Benefit of Limitation of Liability*

Except the Hague Rules entitle the carrier to benefit from a limited amount for liability "*in any event*", the latter Conventions allow a claim for recovery exceeding the limitation on the carrier's liability in some situations. Generally, the conditions of breaking the carrier's limitation on liability are quite similar in these Conventions in which the carrier cannot entitle liability limits for the loss or damage arising from his intent or reckless act or omission with the knowledge of such loss or damage would result.²⁹ While in the Hague Visby Rules, the carrier should have the knowledge that damage would probably result, the Hamburg Rules and Rotterdam Rules indicate the carrier should have knowledge that such loss, delay (and damage in the Hamburg Rules) would probably result. Both the Hague/Visby and Hamburg Rules refer to consequences resulting from "*an act or omission of the carrier*", the Rotterdam Rules show more complicated by providing it is resulted from the "*breach of the carrier's obligation*" which was "*attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with the knowledge that such loss would probably result*".³⁰ Because it refers to the breach of the carrier's obligation rather than to loss of or damage to the cargo, the (financial) loss resulting from the breach is considered, not the physical loss of or damage to the goods.³¹

²⁵ Hamburg Rules Art 6.1 (b).

²⁶ Hamburg Rules Art 6.1 (c).

²⁷ A/CN.9/616 - Report of Working Group III (Transport Law) on the work of its eighteenth session, p. 183.

²⁸ Ibid p.184.

²⁹ Hague and Hague Visby Rules Art. 4(5), Hamburg Rules, Art. 8 & Rotterdam Rules, Art. 61.

³⁰ Rotterdam Rules, Art. 61.

³¹ Francesco Berlingieri, A Comparative Analysis of The Hague-Visby Rules, The Hamburg Rules and The Rotterdam Rules <https://comitemaritime.org/wp-content/uploads/2018/05/Comparative-analysis-of-the-Hague-Visby-Rules-the-Hamburg-Rules-and-the-Rotterdam-Rules-1.pdf>. 7.11. 2023, p.44.

In this regard, the Hague/Visby Rules apply only to the carrier, while the Hamburg Rules apply not only to the carrier but also to the servant or agent of the carrier.³² The Rotterdam Rules make it clear by including the persons referred to in Article 18 beside the carrier which is considered unclearly in the past regimes. Furthermore, both the Hague/Visby Rules and Hamburg Rules only mentioned “*an act or omission of the carrier*”,³³ which is under debate whether it covers the acts or omissions of the servants or agents. The Rotterdam Rules differ from other Conventions by requiring the “*personal*” act or omission of the carrier or the persons claiming the benefit of limitation”.³⁴ The addition of the word “*personal*” seems to make the claimant find impossible or difficult to break the limitation on the carrier’s liability. However, it is said that the high level of limitation as well as the possibility of full recovery for loss or damage dampen the claimant’s will to deprive the carrier of the benefit of limitation.³⁵

III. Conclusion

All Conventions apply a similar rule of limitation where cargo owners are not beneficiaries of the limitation of liability. The level of limitation amount tends to increase in the latter Conventions. The limitation of liability rules in the Hague Rules have significant differences with the other Conventions. It seems the Hague-Visby, Hamburg Rules and Rotterdam Rules go further by covering the existing problems in the Hague Rules (e.g unit, bulk cargo, container, etc). Besides, the Hamburg Rules and the Rotterdam Rules update the rules of the limits for liability for delay. The Rotterdam Rules also set up and update new rules which are absent or unclear in the previous conventions and tighten the carrier’s right to limit the liability. The author believe that the Rotterdam Rules deal with the limits of liability issues better than the older conventions.

³² HamburgRules Art 8.2.

³³ HamburgRules Art 8.

³⁴ Rotterdam Rules Art 61.

³⁵ Supra note 8.