

A comparison study of liability of the carrier in the International Conventions on the Carriage of Goods by Sea

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ABSTRACT

The introduction of the four conventions, namely the Hague Rules, Hague Visby Rules, Hamburg Rules, and Rotterdam Rules is to establish a uniform and harmonized regime governing the international carriage of goods by sea. The rules on the carrier's liability are the central issues of these conventions which directly connect to the allocation of risks between the carrier and cargo interests. However, the solutions adopted in these Conventions are not likely to satisfy all parties in the international marine community and have faced various criticisms. This research will look at the liability of the carrier regime under these four Conventions. It will examine, by comparative analytical method, the regulation of carrier's liability in the four Conventions and the similarities and differences between them. It concludes among other things that the Rotterdam Rules deal with the liability of carrier rules better than the older conventions.

Keywords: liability of the carrier, Hague Rules, Hague-Visby Rules, Hamburg Rules, Rotterdam Rules.

I. INTRODUCTION

In the international carriage of goods by sea, the potential conflict between the carrier and cargo owner interests might raise the problem of risk allocation concerning damages to or loss of sea-borne cargo and balancing of rights and responsibilities. Therefore, it is beneficial to have uniform legislation and a fair distribution of risk to facilitate international maritime trade. With the domination of ocean freight shipments, the four conventions governing the issue of international carriage of goods by sea, namely the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature (Hague Rules), the Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Visby Rules), International Convention on the Carriage of Goods by Sea (Hamburg Rules), and United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), has been introduced for the purpose of uniformity and harmonization. The rules on the carrier's liability are the central issues regulated in the conventions because they affect the development of the international shipping industry and international trade. Each Convention deals with the liability of the carrier and its limitation which directly connect to the allocation of risks between the carrier and cargo interests. However, the solutions adopted in these Conventions are not likely to satisfy all parties in the international marine community and have faced various criticisms. This paper will look at the liability of the carrier regime under these four conventions to examine the similarities and differences between the four

Conventions governing the rules on liability of carrier.

II. THE HAGUE RULES AND THE HAGUE VISBY RULES

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. The introduction of the Hague Rules aims to provide a unified private international law concerning carriage of goods under bills of lading and to provide a minimum mandatory framework of obligations and liability of carriers and to protect cargo owners from widespread exclusion of liability by sea carriers.

After a long period of application, the Hague Rules were considered outdated. 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. The main advancement of this amendment was to change the basic accounting unit from ‘poincaré gold francs’ to the International Monetary Fund’s ‘Special Drawing Rights.’¹

1. *General principles*

In both the Hague and the Hague Visby Rules, the liability of the carrier is on fault basis. The carrier is liable, due to his breach of duties, for the loss of or damages to the goods when they are under his control. The period of liabilities of the carrier is similar to the period of his obligations, i.e. from the time when the goods are loaded on the ship to the time of the completion of their discharge.²

The carrier’s liabilities only arise when the claimant proves that the loss or damage to the cargo was caused by the carrier’s fault during the voyage. The claimant may provide a clean bill of lading recording the condition of the goods to prove

¹ ‘The Travaux Préparatoires of the Hague Rules and of the Hague Hague-Visby Rules’ (*Comite Maritime International*) <<https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoires-of-the-Hague-Rules-and-of-the-Hague-Visby-Rules.pdf>> accessed 8 April 2024, 32-75.

² Protocol amending the International Convention for the unification of certain rules of law relating to bills of lading, 25 August 1924, as amended by the Protocol of 23 February 1968, 1412 UNTS 380, (Hague/Hague Visby Rules) art. 1. (e).

that the loss or damages were the result of the fault of the carrier.³ The carrier may defend himself against the claim by showing there was no breach of his duties during the voyage or bringing the cause of the damage within one of the exemptions listed in Article 4(2)(a)—(p).

2. *Liability exemptions*

Article 4.2 of the Hague and the Hague Visby Rules lists seventeen immunities that the carrier can rely on to exempt himself from a maritime claim. These exceptions are based on the four common law exceptions: Act of God, Queen's enemies, inherent vice and general average sacrifice. Among these exceptions, three anomalous exemptions cannot be found in any latter maritime Conventions, namely the exemption for navigation or management error, fire, and catch-all exceptions.

Navigational Fault—Article 4.2(a)

This is the carrier's main exemption and has become one of the most controversial topics. The carrier is not liable for the errors caused by his master, mariner, pilot or the servants in the navigation or the management of the ship. 'Navigation' means the art of sailing a ship safely from a known point to the required point along a prearranged route, and the term 'navigation errors' refers to a defect on the bridge of the ship during the navigation of the ship. Management of the ship embraces activities related to the ship's operation, except navigational activities. An error in the management of the ship refers to an error of act or omission of the management of the ship, not an act or omission to care for the cargo.

The root of this exemption is from the American Harter Act of 1893, in which the shipowner is exempted from liability for "damage or loss resulting from faults or errors in navigation or in the management of said vessel".⁴ Because the carrier and the shipowner could not control and supervise all the masters, mariners, pilots or servants during the voyage, there was no reason for them to bear liabilities for the occurrence that was out of their control.⁵ However, with the development of navigational technologies and communication devices today, it is unreasonable to maintain this exemption. The presence of this immunity brings unfairness of interests which is too in favor of carriers,⁶ as the carrier may

³ Hague/Hague Visby Rules, art. 3.

⁴ See the Harter Act (1893), 46 USC § 30701.

⁵ See statement of Dixon J in *Union Steamship Co of New Zealand Ltd v James Patrick & Co Ltd* [1938] 60 CLR 650, 672.

⁶ Douglas A Werth, 'The Hamburg Rules Revisited – A Look at US Options' (1991) 22 Journal

be excused for its awful actions and put cargo interests at a disadvantage, forcing them to bear unnecessary risks.⁷

Fire—Article 4.2(b)

The carrier is not liable for loss or damages that occurred due to fire unless it is proven that the fire was caused by the actual fault or privity of the carrier. Thus, the carrier is excluded from liability for fire which was the consequence of the fault or negligence of his servants or agents. In this case, the claimant is responsible for providing proof.

The catch-all—Article 4.2(q)

This exemption is known as the ‘catch-all’ or ‘q-clause’ exception which the carrier may apply as the last resort when failing to invoke other exceptions to escape from liability. Accordingly, the carrier is excluded from liability for any loss or damages resulting from any other cause arising outside his fault as well as his servants or agents’ fault. The burden of proof in this case belongs to the carrier, not the claimant, to prove that the cause of the damage was not a result of the fault or negligence of himself or his agents or servants. This burden of proof is non-shifting, it does not return to the claimant like other exceptions. It is said that this kind of proof is usually difficult to apply and the possibility to successfully invoke this clause is rare.⁸

Life salvage or property salvage—Article 4.2(l)

In addition to the above exemptions, the immunity in life salvage and property salvage is also noticeable. The carrier is not liable for loss or damages caused by his actions to save life or property.

3. *Deviation*

Article 4.4 sets forth the provision on deviation. The carrier bears no liability for loss or damages resulting from “any deviation in saving or attempting to save life or property at sea or any reasonable deviation.” However, the Hague and the Hague Visby Rules fail to make clear what is ‘reasonable deviation.’ There was a

of Maritime Law and Commerce 59, 72. See also Leslie Tomasello Weitz, ‘The Nautical Fault debate (the Hamburg Rules, the US COGSA 95, the STCW 95 and the ISM Code)’ (1998) 22 *Tulane Maritime Law Journal* 581, 587.

⁷ *ibid.*

⁸ NJ Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (University of Amsterdam 2008) 167.

prominent case in English law—*Stag Line v. Foscolo Mango & Co.*,⁹ where the test was framed by Atkin LJ as “[a] deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test [of reasonable deviation] seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one”.¹⁰ According to Lord Atkin, at the very least, the voyage back was unreasonable. It seems the Hague and the Hague-Visby Rules provide a broader protection than the common law. However, it is argued that *Stag Line* does not clearly state the law and it would be erroneous to affirm that the Hague/Visby Rules offer a wide exception to the carrier’s duty not to deviate.¹¹

4. *Delivery and delay in delivery*

There is no provision in both the Hague and the Hague Visby Rules stipulating the responsibility of the carrier for cargo delivery to the consignee. The Hague Rules and Hague Visby Rules also fail to provide provision for delay in delivery. These shortcomings are also one of the reasons to consider the Hague and the Hague Visby Rules outdated.

III. THE HAMBURG RULES

The Hamburg Rules (‘International Convention on the Carriage of Goods by Sea’) were drafted under the auspices of the United Nations. They 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

⁹ In this case, a vessel carried a cargo of coal from Swansea to Constantinople made a detour into St Ives to land two engineers who had been sent on board to check her fuel-saving apparatus. Upon leaving St Ives, the ship ran aground, resulting in the loss of cargo. The House of Lords held that this deviation was not reasonable and declined to allow the shipowner to rely on the protection provided by the Hague Rules. See generally *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328 (*Stag Line*)

¹⁰ *Stag Line*, 343-344.

¹¹ Paul Todd, *Principles of carriage of goods by sea* (Routledge 2016) 74.

Hague and the Hague Visby Rules, which attracted a good deal of criticism for their uncertainties and ambiguities as well as the unbalanced allocation of risk between the carrier and cargo owner.¹² The Hamburg Rules also consider new technology, new cargos and new issues that can lead to losses being incurred. However, after a long time of being effective, the Hamburg Rules have not obtained great success. The Hamburg Rules have been ratified by 35 states without any ratification by major maritime nations.¹³

1. General principles

The Hamburg Rules regulate liability of the carrier based on the fault presumption. The carrier is liable for any loss of or damages to the goods or delay in delivery caused by him or his servants and agents during the time the goods were in charge of the carrier.

The carrier is liable for the goods during the period while he is in charge of the goods at the port of loading, during the carriage, until the goods are delivered at the port of discharge.¹⁴ This means the responsibility of the carrier is from 'port to port' which is wider than the 'tackle to tackle' rule in the Hague and the Hague Visby Rules.

For the first time in an international maritime Convention, the carrier is bound to be liable for delay in delivery. This is considered one of the advancements of the Hamburg Rules. Delay in delivery is defined in Article 5.2 as occurring when the cargo has not been delivered at the port of discharge during the specific time expressed in the agreement. Because the carrier's obligation continues to the port of discharge, he is liable for his failure to deliver the goods at the time specified in the contract. Through this clause, the liability of the carrier in the Hamburg Rules is expanded compared to the Hague Rules and Hague Visby Rules. However, it is submitted that it is reasonable to add this duty as it is suitable for the development of carriage of goods.

While the allocation of the burden of proof in the Hague Rules and Hague Visby Rules is quite complicated, the Hamburg Rules simplify this issue by placing the burden of proof on the carrier. However, there are two exceptions, when the burden of proof is on the claimant to prove the damages or loss resulted from the fault of the carrier or his agent or servants. The first exception is fire. The carrier is liable for damages or loss caused by fire if the claimant success-

¹² GA Res. 31/100, 15 December 1976.

¹³ 1978 Hamburg Convention on the Carriage of Goods by Sea, 1695 UNTS 3. (Hamburg Convention).

¹⁴ Hamburg Convention, art. 4.

fully proves that the fire arose from fault or neglect of the carrier, his servants or agents.¹⁵ In this case, the carrier may defend himself by proving that he and his colleagues took all reasonable measures to avoid the incident and its consequences. This provision is also vague in specifying what ‘measures’ the carrier could ‘reasonably’ take.¹⁶ The requirement for the carrier to have knowledge of the risk in the Hague Rules and Hague Visby Rules is removed in the Hamburg Rules. It seems to be difficult for the claimant to bring the fire evidence, because the knowledge of the fact is on the party who is closest when the fire happened, and that is the carrier.

The second exception relates to live animals which is regulated in Article 5.5. Because carriage of live animals may raise risks that the carrier may not predict, such as sickness or infection, the carrier is not liable for the loss or damages caused by such risks if he has followed strictly the special instructions of the shipper. The claimant has to prove that the loss or damage resulted from the negligence of the carrier, his servants or agents.

Regarding deviation, the Hamburg Rules do not provide a specific definition. The only provision referring to deviation is Article 5.6. Accordingly, the carrier is excused, except in general average, from liability for loss, damage or delay in delivery resulting from measures to save life or from reasonable measures to save property at sea. The exemption for salvage of property only applies when it is conducted with ‘reasonable measures.’ The carrier cannot abuse this exception for the benefit of salvage to the detriment of the sea-borne goods.¹⁷ Deviation stipulated in the Hamburg Rules is much narrower than in the Hague Rules and Hague Visby Rules. In case of deviation, the carrier is still liable for all loss, damages and delay in delivery that results after deviation. There is no regulation on the effect of negligence of carrier while conducting life-saving measures.¹⁸

In case the goods are carried on deck with no agreement with the shipper, the carrier becomes liable for loss of or damages to the goods or delay in delivery resulting from the carriage on deck.

2. Exceptions to liability

The carrier is exonerated from liability if he proves that he, his servants or agents, “took all measures that could reasonably be required to avoid the occur-

¹⁵ Hamburg Convention, art. 5.4.

¹⁶ David C. Frederick, ‘Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules’ (1991) 22 *Journal of Maritime Law and Commerce* 81, 114.

¹⁷ John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 219.

¹⁸ Robert Force, ‘A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)’ (1996) 70 *Tulane Law Review* 2051, 2068.

rence and its consequences”¹⁹ even if the loss or damage happened due to his servants or agents’ fault. This provision is similar to the burden under Article 4.2 of the Hague Rules.²⁰

The catalog of exceptions of liability of the carrier listed in the Hague Rules and Hague Visby Rules is eliminated in the Hamburg Rules. Also, the Hamburg Rules made a great change when eliminating the nautical and managerial fault exemption of the Hague Rules and Hague Visby Rules, which have been strongly criticized anyway.²¹ This removal, on the one hand, improves the cargo interest; on the other hand, brings a substantial disadvantage for shipowner.²² Furthermore, this deletion of nautical fault creates a unified concept of liability by providing a single chance of carrier exemption which is based on lack of negligence during the carriage.²³ However, this elimination has been under fierce criticism²⁴ resulting in some nations’ decision to refrain from ratifying the Hamburg Rules.²⁵

Although the list of exceptions in the Hague Rules and Hague Visby Rules is not repeated in the Hamburg Rules, it does not mean that the immunities listed from Article 4.2(d) to Article 4.2(p) no longer remain at the carrier’s disposal in the Hamburg Rules. The exemption list (i.e. Article 4.2(d)—4.2(p) of the Hague Rules and Hague Visby Rules) does not involve faults on the part of the carrier and the carrier is only liable for his fault (presumed fault principle), therefore, the carrier may invoke the real cause which is beyond his control, such as an act of war, riots, public enemies or civil emotions, etc. to free himself from liability.

¹⁹ Hamburg Convention, art. 5.1.

²⁰ See Sze Ping-fat, *Carrier’s Liability Under the Hague, Hague-Visby and Hamburg Rules* (Kwel Law International 2002) 64.

²¹ UNCTAD and the developing nations are keen to remove this exemption. They contend that the Hague and the Hague-Visby Rules impose severe disadvantages on states, in which the marine shipping industry is not strong. They consider if the nautical fault exemption remains applicable, the allocation of risks between the carrier and the cargo interest is unfair. See: Proposition to the SMC 1993/94:195, 139.

²² ‘The Economic and Commercial Implications of the Entry Into Force of the Hamburg Rules and the Multimodal Convention’ (UNCTAD, 1991) 22.

²³ Rand R. Pixa, ‘The Hamburg Rules Fault Concept and Common Carrier Liability Under US Law’ (1979) 19 *Virginia Journal of International Law* 444.

²⁴ The majority of the opposition to the exemption came from some EU states and Scandinavian nations, whereas other influential nations like the USA, France, and Canada advocated for an even higher degree of accountability for carriers than was ultimately agreed upon. See: Rolf Herber, ‘The Hamburg Rules: Origin and Need for the New Liability System’ in F Berlingieri and others (eds), *The Hamburg Rules: A Choice for the E.E.C.?* (Maklu 1994) 41.

²⁵ *ibid* 17.

3. Division of loss—Article 10

The contractual carrier bears responsibility for the whole voyage, even if the performance is excised by the actual carrier. The actual carrier takes on liability for his performance of the carriage. In case both the carrier and the actual carrier share responsibility for carriage, their liability is joint and several. When loss, damages or delay in delivery resulting from the fault or negligence of the carrier, his servants or agents combined with other causes, the carrier is liable only to the part that occurred due to his fault or neglect. In this case, the burden of proof to prove that the loss, damages or delay is not attributable to his fault or negligence is on the carrier.

IV. THE ROTTERDAM RULES

Taking into account the critiques of the existing conventions and with the desire to introduce a consistency and uniformity framework, the United Nations sponsored the drafting of a new international maritime convention: The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, commonly known as ‘The Rotterdam Rules’. The Convention was adopted in 2008 and has been open for signature for states from 23 September 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. However, over a decade passed, the Rotterdam Rules have not come into force yet.²⁶

1. General principles

Like the earlier Conventions, the Rotterdam Rules also maintained the presumed fault principle as the basis of the carrier’s liability.

The Rotterdam Rules have a different approach to the period of the carrier’s obligation. The duty of the carrier is extended from when the goods for carriage are received by the carrier to when they are delivered (‘door-to-door principle’).²⁷ This difference is important for multimodal transportation, where the carrier might receive the goods inland and have to transport the goods to the port before loading. This means that the carrier’s period of responsibility begins earlier than under the ‘tackle-to-tackle’ and ‘port-to-port’ principle. However, the carrier might exclude this period in case he is required to hand over the goods to authorities. The carrier cannot be expected to be responsible for what happens to the goods if it is not in his custody. Another exception is the agreement of the

²⁶ GA Res. 63/122, 11 December 2008. (Rotterdam Rules).

²⁷ Rotterdam Rules, art. 12.

parties on the time and location of receipt and delivery of the goods.²⁸ In this case, the agreed period of responsibility is not allowed to be less than it would have been in the ‘tackle-to-tackle’ principle of the Hague and the Hague Visby Rules.²⁹

The carrier is liable for loss, damages or delay, if the claimant proves that the cause of loss, damages or delay occurred during the time of the carrier’s responsibility.³⁰ The carrier may rebut the claim by disproving it or proving that the loss, damage or delay was caused by the excepted peril set out in Article 17(3).³¹ The claimant may defeat the carrier’s defense by indicating that the carrier was at fault that the excepted peril has arisen,³² or there are other causes outside Article 17(3). In this case, the burden of proof is then shifted to the carrier to show that he has no fault involving the event or circumstance.³³ The claimant may also prove that the loss, damage or delay was due to the failure to provide the seaworthiness of the ship,³⁴ and that the burden is ordinary.³⁵ The carrier then may demonstrate that there is no causal link between such failure of seaworthiness and the loss or he complied to exercise due diligence in making and keeping the vessel seaworthy.³⁶

It can be seen that the way liability arises and the burden of proof structured under Article 17 of the Rotterdam Rules appear complicated but logical and comprehensive. By providing a reversal of the burden of proof, the Rotterdam Rules differ from the Hamburg Rules which place the burden of proof only on the carrier, except for the loss, damage or delay caused by fire.

2. The carrier’s exemptions from liability

The general exemption from liability is set out in Article 17.2 which is similar to Article 4(2)(q) of the Hague Rules and Hague Visby Rules. Accordingly, the carrier is not liable for loss, damages or delay if the cause of the damage to, loss or delay of the goods was neither his fault nor the fault of any other ‘performing

²⁸ Rotterdam Rules, art. 12.2(a)-(b) and 12.3.

²⁹ Phillippe Delebecque, ‘Obligations of the Carrier’ in Alexander von Ziegler, Stefano Zunarella and Johan Schlein (eds), *The Rotterdam Rules: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea* (Kluwer Law International 2010) 81.

³⁰ Rotterdam Rules, art. 17.1.

³¹ Rotterdam Rules, art. 17.2 and 17.3.

³² Rotterdam Rules, art. 17.4(a).

³³ Rotterdam Rules, art. 17.4(b).

³⁴ Rotterdam Rules, art. 17.5(a).

³⁵ Michael F Sturley, *The Rotterdam Rules: The U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Sweet & Maxwell 2010) 113.

³⁶ *ibid* 115.

party.’ In the Rotterdam Rules, the carrier only has to pay a proportional part of the damage for the part caused by him, whereas, in the Hague Rules and Hague Visby Rules, the carrier is required not to be involved in the cause of the damages.

The Rotterdam Rules repeat almost the whole list of exceptions of liability for the carrier set out in Article 4.2 of the Hague Rules and Hague Visby Rules, with some noticeable changes. The errors in navigation and the ‘catch-all’ exception clauses stipulated in the Hague Rules and Hague Visby Rules are no longer mentioned in the Rotterdam Rules. This abolition increases the protection of shippers’ interests and sets a unified cross-modal defense for liability of the carrier.³⁷ This elimination further affirms the view of the Hamburg Rules that the nautical fault exception is too favorable towards carriers. It also fits the growth of modern technology, such as satellites and computers.

The provision on immunity from liability of the carrier for fire set out in Article 17.3(f) of the Rotterdam Rules differs from the clause outlined in Article 4(2) (b) of the Hague Rules and Hague Visby Rules. There is no expression of actual fault and privity of the carrier as regulated in the Hague Rules and Hague Visby Rules, and fire is considered as the case of non-fault by the carrier.³⁸ The carrier, in the Hague Rules and Hague Visby Rules, bears no liability for loss or damage caused by fire (including fires caused by crewmen or other employees) unless loss or damage is due to the carrier’s actual fault or privity of the carrier.³⁹ Under the Rotterdam Rules, the carrier is unable to invoke this fire exception if there is evidence of fault or negligence by the carrier or his servants or the performing party. Therefore, liability of the carrier is limited to his fault. This exemption only applies to the events of fires occurring during the carriage of goods.⁴⁰

Like in the previous Conventions, the carrier is excused from liability for damages or loss resulting from its attempts to save life or property. The Rotterdam Rules keep this immunity of the Hamburg Rules, i.e. exoneration for all endeavors to save lives, but the exemption for attempts to save property stands only if it is conducted reasonably.⁴¹ It is because life is so valued, whereas it is unreasonable to jeopardize a shipment of goods to salvage less valuable assets.⁴²

³⁷ Marel Katsivela, ‘Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague Rules and Hague Visby Rules’ (2010) 40 *Revue Generale* 413, 431.

³⁸ Alexander von Ziegler, ‘Liability of the Carrier for Loss, Damage or Delay’ in Alexander von Ziegler, Stefano Zunarella and Johan Schlein (eds), *The Rotterdam Rules: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea* (Kluwer Law International 2010) 81.

³⁹ Hague-Visby Rules, art. 4.2(b).

⁴⁰ Alexander von Ziegler (n 38) 104.

⁴¹ Rotterdam Rules, art. 17.3(l) and (m).

⁴² Sturley (n 35) 106.

Besides, the Rotterdam Rules also add the exception for reasonable efforts to prevent damage to the environment.⁴³ This additional exemption stems from the devastating impact on the marine environment in this modern age.

The carrier is also excluded from liability in case the cargo was damaged during operations actually conducted by the shipper as agreed between parties under Article 13.2.⁴⁴ However, this exemption does not apply to the agreement to allocate the loading cost.

3. Carrier's liability for other persons

In addition to the liability for his own fault, the carrier is also liable for the fault caused by the acts or the omissions of any performing party, the employees of the carrier and of a performing party, the master and crew of the ship, or any other person who exercise the carrier's duties under the carriage contract, provided that that person's performance is under the carrier's agreement and supervision.⁴⁵ The maritime performing party shares similar duties like the carrier's duties for its performance part, therefore, he is also liable for his breach of obligation as well as has the right to apply the carrier's exceptions and limits of liability of the carrier, provided that certain conditions outlined in Article 19.1 are satisfied.

Under Article 19.2, the parties can make agreement on the carrier's obligations other than the scope of the Rotterdam Rules. However, such arrangement cannot bind the maritime performing party, unless it explicitly consents to such obligations.

If there is an overlapping obligation between the carrier and performing party, their liability will be joint and several, but in total it does not surpass the total limits stipulated by the Convention.⁴⁶

4. Carrier's liability for delay

Like the Hamburg Rules, the Rotterdam Rules also regulate the liability of the carrier for delay. The carrier is not only liable for the damage or loss to the goods, but also the damage or loss due to delay in the delivery caused by the fault of the carrier, his servants or agents.⁴⁷ As interpreted in Article 21, a delay in

⁴³ Rotterdam Rules, art. 17.3(n).

⁴⁴ Rotterdam Rules, art. 17.3(i).

⁴⁵ Rotterdam Rules, art. 18.

⁴⁶ Rotterdam Rules, art. 20.

⁴⁷ Rotterdam Rules, art. 17.1.

delivery happens when the cargo is not delivered to the destination on a specific date agreed in the contract by the parties. If the delivery date is not indicated in the contract, no liability for delay arises. The claimant is required to prove that there was a failure to deliver within the agreed time which caused a loss to him.⁴⁸ The burden of proof is then shifted to the carrier to demonstrate that such delay was not attributable to his fault nor the performing party's fault, or that it occurred beyond his period of responsibility. It seems that the regulation for delay in the Rotterdam Rules is quite on the carrier's side.

5. Live animals

The Rotterdam Rules also adjust the live animals carriage as the Hamburg Rules do. Under Article 81a, the carrier is liable for the loss, damage, or delay if the claimant succeeds in demonstrating that such loss, damage, or delay resulted from acts or omissions of the carrier, or the intent or reckless performance of the maritime performing party who have the knowledge that such loss, damage or delay would probably result. However, there is a difference between the two Conventions: the Hamburg Rules regulate the liability of the carrier, whereas the Rotterdam Rules provide for the carrier's freedom of contract.⁴⁹

6. Deviation

The Rotterdam Rules have a different approach regarding deviation from other maritime Conventions. The carrier (including the maritime performing party) still benefits from any of exemption and limitation, even when the deviation, according to the applicable law, constitutes a breach of the carrier's obligations.⁵⁰

7. Deck cargo on ships

Under the Rotterdam Rules, goods on deck are treated as normal goods. The Rotterdam Rules keep the three situations of permitting the carriage of deck cargo in the Hamburg Rules,⁵¹ and add the fourth one in Article 25.1: when the cargo is carried in or on containers or vehicles. This new condition is considered

⁴⁸ *ibid.*

⁴⁹ 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>> accessed 12 May 2024. 44.

⁵⁰ Rotterdam Rules, art. 24.

⁵¹ The three situations are when it is in accordance with usage of the particular trade, when it is required by statutory rules or regulations, and when it is in accordance with an agreement with the shipper.

to be suitable for the growth of modern container and vehicle carriages.⁵² The containers or vehicles in this case are required to fit for deck carriage, and the decks must be adequate to carry them. The carrier is excluded from liability for loss, damage or delay in case of deck carriage caused by the special risk when the carriage is following Article 25(1)(a) and (c).⁵³ In case of the shipment on deck other than those four permitted situations, the carrier will not only be liable for loss, damage or delay, but also lose the protection from the defenses prescribed in Article 17.⁵⁴

In case the deck carriage is contrary to an express agreement, the carrier will lose his benefit to limitation of liability.⁵⁵

V. STATUS OF THE CONVENTIONS AND THE QUESTION OF UNIFORMITY

The Hague Rules are totally supported by the carrier community and ship owning states. Until now, the Hague Rules are the most successful international convention with widespread ratification,⁵⁶ while the amended Hague Visby Rules, unfortunately, are not welcomed by all nations.⁵⁷

After a long time of implementation, the Hamburg Rules only get strong support from the developing states. The Hamburg Rules have a modest number of ratifications, 35 states, without any representative from maritime nations.⁵⁸ The Hamburg Rules have not been accepted by the international community as a marine cargo liability regime, worthy of implementation by mandatory international convention, to regulate the carriage of goods by sea in private maritime commerce.⁵⁹

⁵² Berlingieri (n 49) 43.

⁵³ Rotterdam Rules, art. 25.2.

⁵⁴ Rotterdam Rules, art. 25.3.

⁵⁵ Rotterdam Rules, art. 25.5.

⁵⁶ For reference of the states of ratification, see: 'Status of the ratifications of and accessions to the Brussels international maritime law conventions' <<https://comitemaritime.org/wp-content/uploads/2018/05/Status-of-the-Ratifications-of-and-Accessions-to-the-Brussels-International-Maritime-Law-Conventions.pdf>> accessed 26 March 2024, 375-381

⁵⁷ Many states chose not to adopt the Hague-Visby Rules and stayed with the 1924 Hague Rules. Only a few states remained ratification of the 1979 SDR protocol. Source of states of ratification: <<https://treaties.un.org/pages/showdetails.aspx?objid=08000002800d54ea>> accessed 26 March 2024.

⁵⁸ Source: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-3&chapter=11&clang=_en. accessed 26 March 2024.

⁵⁹ Brian Makins, 'Sea Carriage of Goods Liability: Which Route for Australia? The Case for the Hague-Visby Rules and SDR Protocol' (1987) Fourteenth International Trade Law Conference Report 22-24.

The Rotterdam Rules will come into force one year after ratification by twenty UN Member states. After over ten years, twenty-five states, including the US and eight EU Member States, have signed the convention, however, only five states (Benin, Cameroon, Spain, Togo and Congo) have ratified it.⁶⁰ Neither ASEAN member states nor North Asian states have signed this Convention, and only a few other states are expected to ratify it in the not-too-distant future. Although there is widespread support from various organizations,⁶¹ the possibility of entering into force of the Rotterdam Rules seems rather slim. The first reason for the reluctance of states to ratify the Rotterdam Rules stems from their complication. While states are familiar with the previous regimes, the introduction of new rules with complicated structures and new terminologies may bring difficulties in application to states. If they ratify it, they need more time to adapt to this new regulation. Another reason comes from the possibility of ratification from the big economic states. The ratification from the developed economic states, such as the US or the EU Member states will urge the ratification from the other states. The ratification from China would encourage a large number of Asian states to ratify the Rotterdam Rules. However, China has no prospect of being a party anytime soon.⁶² Most of the ratification of other states will depend on the US's ratification. In fact, the US did express its great interest in setting up a new legal regime that would cover "door to door" transport and took a leading role during the negotiation of the convention until the Convention was introduced in 2008. The reason behind the active participation of the US is that it is one of the largest importers and exporters of commodities in the world, and it is probably in favor of the cargo interests' side rather than the owners' side. Therefore, the US appears as if it has been willing to ratify the Rotterdam Rules. However, after over ten years of the Rotterdam Rules' announcement, there is no signal of the US's ratification. The objection of some US port authorities and terminal operators⁶³ prevents its submission to the Senate for consideration, and

⁶⁰ Source: 'Status: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (the Rotterdam Rules)' <https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status> accessed 26 March 2024.

⁶¹ The Rotterdam Rules are largely supported by the United Nations General Assembly; the Arab Academy for Science, Technology and Maritime Transport; the Comité Maritime International; the American Bar Association; the ICC Committee on Maritime Transport, the International Chamber of Shipping; the World Shipping Council; the European Community Shipowners' Association; and the National Industrial Transportation League (US). Source: 'Rotterdam Rules: On-line resources' <https://uncitral.un.org/en/en/library/online_resources/rotterdam_Rules> accessed 27 March 2024.

⁶² Ingar Fuglevåg, 'The Rotterdam Rules – Another nail in the coffin?' (*Simonsen Vogt Wiig*, 27 March 2020) <<https://svw.no/artikler/2168>> accessed 14 December 2023.

⁶³ The ports and terminals fear that the liability on ports and terminals (Art. 19) of the Rotterdam Rules would impose them on potential risks of cargo damage liability. See: Ustav Mathur, 'Rotterdam rules - Ratification status in the US and effectiveness of choosing to apply them voluntarily' (*Norton Rose Fulbright*, 2016) <<https://www.nortonrosefulbright.com/en/knowl->

the current composition of the US Senate makes it difficult to obtain two-thirds approval.⁶⁴ If there is no prospect for ratification from big economic states like the US or EU Member states, the entry into force of the Rotterdam Rules is still questionable. With the current situation from each country's position, the Rotterdam Rules seem unlikely to come into force.

The status of ratification of these Conventions shows an undetermined scenario. The most successful maritime convention with widespread ratification is the Hague Rules of 1924. The ratification of the Hague Rules does not imply the ratification of the amended Hague Visby Rules. Some states are members of both the Hague Rules and the Hamburg Rules, in this case, the latter convention is applicable. The most recent Convention, the Rotterdam Rules, satisfy the development of modern maritime transport, however, it has not come into force yet. Therefore, the issue of uniformity of these Conventions is still a question. No Convention obtains the total support from all states and this is a challenge for acquiring a uniform private international law in the field of carriage of goods by sea in the future.

VI. CONCLUSION

Generally, the system of liability in all Conventions is based on fault. The period of responsibility of the carrier tends to be widened in the latter conventions, from tackle-to-tackle in the Hague Rules and Hague Visby Rules to port-to-port in the Hamburg Rules, and to door-to-door in the Rotterdam Rules. The Hague and the Hague Visby Rules and Rotterdam Rules list the exception to liability of the carrier, whereas the Hamburg Rules contain no such enumeration list.

The Hamburg Rules and Rotterdam Rules, on the one hand, adopt new rules to fix existing problems that are under criticism in the Hague Rules and Hague Visby Rules, and update, on the other hand, the development of the seaborne carriage. It is submitted that the removal of the nautical error exemption provided in the Hague Rules and Hague Visby Rules of the both Hamburg and Rotterdam Rules is a positive development. Live animals and deck carriage are treated as normal cargo. The carrier's responsibilities are broader by imposing the duty to deliver goods to the receiver and deliver timely as indicated in the contract. The exception to property salvage is restricted to 'reasonable measures.'

The most recent Convention, the Rotterdam Rules, is a combination of the advancement of the previous Conventions and the development of modern maritime trade. On the one hand, it restores some benefits for the carrier as the

edge/publications/aacba04/rotterdam-rules---ratification-status-in-the-us-and-effectiveness-of-choosing-to-apply-them-voluntarily> accessed 7 April 2024.

⁶⁴ *ibid.*

Hague Rules and Hague Visby Rules. It adopts new rules that put the shipper to advantage. Furthermore, it also provides new rules (for example: the e-transport documents, multimodal transport, etc.) to fit with modern maritime transport.

From the above section's analysis, it is apparent that the Hague Rules and Hague Visby Rules favor the carrier and ship-owner interest, while the Hamburg Rules attempt to reach a balance between the interest of both carrier and shipper by abolishing significant benefits conferred on the carrier in the Hague/Visby, however, this turns the Hamburg Rules to be pro-shipper. As a merit, the Rotterdam Rules not only balance the interest between parties, but also update to modern trends and technologies. Therefore, in the author's opinion, although the Rotterdam Rules appear rather complicated, its regime is more outstanding than previous Conventions and suitable for the current growth of international marine trade.