# ANALYSIS OF THE PROVISIONS REGARDING LIABILITY UNDER THE HAGUE AND HAGUE/VISBY RULES*

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*In this article which was presented at the CMI Seminar held 1988 in Lagos, the author analyzes the provisions of so-called Hague Rules and Visby Rules with special attention to the notion of due diligence of the shipowner for the seaworthiness of the ship. In the second part of the article the author concentrates his attention to the various reasons set forth in the Visby Rules concerning limitation and exception of the shipowner's liability for loss, damage and shortage of cargo carried onboard the vessel.*

**1.** In continuation of the introduction of liability between shippers and carriers in the transport of goods by sea, presented by previous speakers, we shall try to analyse the concept and the system of the carrier's liability as elaborated in respective provisions under two widely recognized international instruments i.e.

A. The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed in Brussels on 25th August 1924,[1] commonly known as »The Hague Rules«, (hereinafter the Hague Rules) and

B. The Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924, signed in Brussels, 23rd February 1968,[2] commonly known as »The Visby Rules« (hereinafter the Visby Rules).[3]

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[1] List of states that have ratified or adhered to the Hague Rules annexed as exhibit 1.

[2] List of states that have ratified or adhered to the Visby Rules annexed as exhibit 2.

[3] In 1979 an additional Protocol to the Hague-Visby Rules was signed, reffered to infra as the Protocol 1979. List of ratifications or accession in exhibit 3.

**2.** We shall deal with the standard of liability for the carriage of goods by sea, as framed by the Hague Rules, separately from the amendments implemented by the Visby Rules, always bearing in mind that there is a genuine unavoidable link between the Visby Rules and the Hague Rules. This genuine unbreakable link is clearly evident from the structure of the Visby Rules, because it is conditioned that any contracting state can only adhere to the Protocol of 1968 if it is either already a contracting state to the Hague Rules, or by a ratification of the Visby Rules, which means automatic acceptance of the Hague Rules as well. In order to avoid any doubt, the Visby Rules contain a specific provision (Art. 12. p. 2) which reads: »Accession to this Protocol shall have the effect of accession to the Convention«, and furthermore the Hague Rules and the Visby Rules shall be read and interpreted together as one single instrument. However, it is necessary to underline that any state may be or even may become in the future a contracting state to the Hague Rules without accession to the Visby Rules. Conversely, there is no possibility that any state may ratify the Visby Rules without the acceptance of the Hague Rules.

We take the liberty to elaborate and at the same time to comment certain basic terms and principles which are common for both the Hague and the Visby Rules. Let us start with those of special importance.

**3.** Both sets of Rules represent a mandatory or compulsory system of liability imposing upon carriers the minimum standard of the carrier's acceptable liability. Therefore, contractual freedom has been eliminated insofar as a reduction of liability or an extension of exemptions from liability of carriers is concerned. Consequently, any specific contractual provision aiming to reduce the carrier's liability will remain ineffective or null and void. Nevertheless, all contractual stipulations establishing or implementing increased or extended standards of liability of carriers will be legally recognized.

**4.** One of the essential features for the determination of liability under the Hague/Visby Rules is to identify the carrier. The carrier is a contracting party, who having control over a ship, enters into a contract of carriage to perform the transport of goods by sea with the other party acting on behalf of those interested in the cargo. By provision of Art. 1 a) of the Hague Rules, it is defined that the »Carrier« includes the owner or the charterer who enters into a contract of carriage with a shipper. It has been confirmed in judicial practice world-wide that the term carrier is interpreted in an extended concept and besides the owner and the charterer, it includes the operator, the disponent owner, the mortgagee in possession and the sub-charterer.

**5.** However, the contract of carriage in the Hague Rules, has a restricted meaning. Namely, it applies only to contracts of carriage covered by a bill of lading or any similar document of title insofar as such a document relates to the carriage of goods by sea. Consequently, the Hague Rules have established as a fundamental precondition for its application, as it appears

from the title itself of the corresponding International Convention, that a bill of lading or any similar document of title is involved in respect of the carriage of a particular cargo on board any ship. Thus, unless there is an intention to issue a bill of lading or similar document of title or unless it is actually issued, such carriage will not be applicable to the system of liability as tailored and embodied in the Rules. We find support for the above conclusion in the ruling of Lord Wright, who said in the British Appeal Court, as follows: »There is nothing to prevent a contract of sea carriage in which there is no bill of lading at all, and in that case the British Carriage of Goods by Sea Act, 1924, has no application«.[4]

The term »covered« used in the definition under our review suggests that the bill of lading can be released or even issued after the voyage or carriage has commenced.

Lord Devlin, who was a prominent participant as a very distinguished delegate of the British Maritime Law Association, in the activity of the Comite Maritime International, during the fifties and sixties of this century, in a very often cited case[5] ruled in favour of the implementation of the Hague Rules saying: »In my judgment, whenever a contract of carriage is concluded and it is contemplated that a bill of lading will in due course be issued in respect of it, that contract is from its inception »covered« by a bill of lading and is therefore from its inception a contract of carriage within the meaning of the Rules and to which the Rules apply«.

A contract of towage is very distinct from a contract of carriage and the Rules will not be applicable if the transport of goods by sea is performed by the towage of cargo in a barge towed by a ship or a tug, unless a bill of lading is issued. It is interesting to note that in French jurisprudence it has been decided that although the contracting parties require transport of goods by towage, if a bill of lading is issued, the Hague Rules should be applied.[6]

**6.** We believe it is right to state that the Hague Rules, as adopted in the vast majority of the contracting states, have their application only if the contract of carriage is accompanied by a bill of lading or by any similar document of title. However, in a certain number of countries, by virtue of their internal legislative structure, the application of the pattern of liability as provided by the Hague Rules has been extended to all contracts of carriage, including charter parties, irrespective of whether a bill of lading or any document of similar nature has been issued or irrespective of whether it has or has not been contemplated that such a shipment be covered by a corresponding document.[7]

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[4] Carver, Carriage by sea, I. para 234. A.C. (1947) Canadian Sugar Co. v. Canadian Seamships. The Hague Rules were incorporated into British Law by the COGSA 1924.

[5] Pyrene v. Scindia Navigation Co. (1954) 1 Lloyd's Law Rep. p. 329.

[6] Tribunal de Commerce du Havre (1958).

[7] Japan, Soviet Union, Germany, Yugoslavia, etc.

The above mentioned feature of the extended applicability of the pattern of carrier's liability as provided by the Rules, is an exception to general practice. We therefore must stress that charter parties, either voyage or time and all other contracts of affreightment, where the shipowner takes over the custody of the goods for transport by sea and assumes liability for the loss or damage to the cargo, under General Law or under Common Law, do not come within the mandatory application of the Hague Rules, unless a bill of lading is issued. Assuming that the goods are carried by sea under a charter party or other type of contract of affreightment, it remains traditionally at the liberty of the parties to regulate their relationship in conformity with their own wishes and preferences. Nevertheless, it is worth mentioning, that in view of widely accepted practice, either bill of lading or similar documents of title are customarily issued following any type of contract of carriage of goods by sea; the field of liability outside application of the Hague Rules has remained exceptional indeed.

Furthermore, we wish to add that it is common practice to incorporate the Rules into charter parties, either the Hague Rules only or even more appropriately the Hague and the Visby Rules together with the Protocol of 1979, the latter alternative being more desirable since it is more in line with the demand of modern trade. We recommend such incorporation since it is then possible to apply the same standards of the carrier's liability for loss or damage to the goods in relation to the obligations arising out of the charter party or under the bill of lading.

**7.** UNCTAD — The United Nations Conference for Trade and Development — began more than a decade ago and has since then been investigating the feasibility and the desirability of entering, on an international level, into the sphere of charter parties and other forms of contracts of affreightment, its main aim being to achieve harmonization in maritime trade for the benefit of the maritime community. Special consideration, in the course of study and review of the problems involved, has been devoted to the evaluation of all the relevant elements particularly from the aspect of interests of underdeveloped countries.

**8.** A bill of lading or similar document of title means a negotiable or transferable document capable of being used in trade and banking transactions in conformity with the regime of pamenty under documentary credit practices.

A mate's receipt or a dock receipt is not a negotiable or transferable document and does not involve application of the Rules.

A similar situation appears to apply with a sea waybill, if marked as a non-negotiable document. However, at present, within the CMI a thorough examination of all aspects and legal implications connected with the use of a sea waybill, which accompany goods in transitu, is being carried out and we hesitate to comment on this matter before further progress is achieved within the CMI.

However, a bill of lading marked »received for shipment« is considered a proper and valid link for application of the Rules. and the same effect is reached, of course, in cases where a through bill of lading is used.

**9.** The carriage of goods by sea is a common and joint term covering a number of individual interconnected or separate actions or services, which the carrier, or the persons in his service or on his behalf are expected to provide, as mentioned expressly in the provision of Art. 2 para. 2 of the Hague Rules, such as the loading, handling, stowage, carriage, custody, care and discharge of such goods.

**10.** The Hague Rules define the terms »ship« and »goods« in rather a wide sense. The only exclusion in respect of the term »goods« relates to live animals and cargo which, in the contract of carriage, are stated as being carried on deck and are so carried. We may add that difficulties have not been experienced in the interpretation and practical application of the above mentioned terms.

**11.** The liability of the carrier in the Hague Rules is determined in conformity with the principle of presumed fault, based on an essential duty or obligation of the carrier to exercise due diligence before and at the beginning of the voyage, to make the ship seaworthy; to properly man, equip and supply the ship; and to make the ship's spaces and all the other parts in which the goods are carried, fit and safe for their reception, carriage and preservation.

We offer Professor Tetley's definition of seaworthiness who writes: »Seaworthiness may be defined as that state of vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage«.[8] Seaworthiness extends over many aspects in connection with the ship. It includes, but is not limited to, the sound and safe construction and structure, dry holds and other compartments, right hatch covers, a proper system and the good and reliable operating condition of the main engine and auxiliaries, pumps, valves, rudder, refrigerator and the navigational, safety, fire-fighting etc. equipment. The ship has to be manned by a qualified and competent master and crew, furnished with up to date charts and directories, fresh notices and accurate and adequate instructions, supplied properly with bunkers, spare parts and other provisions, etc. The listed elements have not exhausted all the items which the carrier must take care of. In other words, the carrier is under a commitment to seaworthiness and is legally obliged to take care of everything as a prudent and diligent, professional operator is expected to do.

**12.** The obligation to exercise due diligence in making the ship seaworthy is an abstract concept, never sufficiently precise in its definite and final form and its actual meaning can be determined only when applied to the particular circumstances of any individual case. However, the »due diligence«

[8] W. Tetley, Marine Cargo Claims, 2nd ed. p. 157.

factor should always be considered and evaluated in relation to the nature of the voyage and the kind of goods to be transported. Albeit, while we are dealing with a legal terminology, which is inevitably of an abstract nature, the term »seaworthiness of the ship« is a living and still developing concept. We venture to say that the seaworthiness of the ship demonstrates an impressive vital forcecharacter of a living feature, even though conceived a long time ago, when ships were technically simple units, with poor and modest equipment, it corresponds to the demands of the extremely sophisticated technological products of the modern, often computerized shipbuilding industries of present times. Consequently, it can be said that the concept of »seaworthiness« is developing and advancing along the same path together with the advance of technological and navigational achievements in shipping generally. A great number of cases have been tested in courts in many jurisdictions to ascertain whether a carrier has exercised due diligence or if he has failed in his efforts to discharge his duty in respect of seaworthiness, and it is only right to mention on this very issue that the relevant judgments can be referred to as guidelines or as illustrative examples.[9]

**13.** The duty of the carrier to make the ship seaworthy according to the Hague Rules does not represent a warranty of an absolute nature. Unseaworthiness must be either the cause of the loss or damage to the cargo, or it must be a relevant connecting link with that loss, in order to establish the liability of the carrier. When the seaworthiness of the ship is a contributing factor only as a cause of loss together with a cause for which the carrier is entitled to be exonerated, the duty to exercise due diligence to make the ship seaworthy prevails as a relevant cause of the loss of cargo and will be simply construed against the carrier.[10] Due diligence is a prerequisite of sine qua non importance for the carrier in order to seek protection under the exceptions and exonerations of liability listed in para. 2 Art. 4 of the Hague Rules.

**14.** The carrier's obligation provided in Art. 3 para. 2 of the Hague Rules to handle, stow, keep, care for and discharge goods properly and carefully refers to the proper conduct of those operations. The duty imposed involves, as Carver says, doing each of those tasks in a proper manner and with reasonable care.[11] We are inclined to accept the view that the carrier's obligation to conduct these operations is of a stricter nature,[12] since he cannot avoid liability by proving that he has exercised due diligence by merely arranging the relevant operations. The carrier cannot discharge his obligations by employing a qualified independent contractor who does not carry out the carrier's obligation properly. In respect of loading, handling, stowage, custody and discharge of goods, the liability of the carrier is governed in conformity with the principle of negligence.

[9] British cases: The Muncaster Castle (1961), The Makedonia (1962), The Amstelslot (1963).
[10] The Irish Spruce (1957) A.M.C. p. 2579.
[11] Carver, ibid. para. 269.
[12] Tetley, ibid. p. 261—262.

**15.** The Hague Rules follow the presumption of fault system as a fundamental structure of the carrier's liability and this is evident from the wording in Art. 4 para. 1 which regulates that whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier. Thus, the onus of proof rests with the carrier. However, if the shipper or receiver wishes to be successful in the recovery of his claim for the loss or damage to the cargo, he assumes the burden of proof in certain instances, and in particular in respect of the following:

(a) title over the goods,

(b) loss or damage to the goods including the extent of damage and its monetary value, and here the principle of »Restitutio in integrum«, construed already in Roman Law, still remains applicable.

Furthermore the claimant is bound to advance the prima facie situation of a causation link that the goods were lost or damaged while under custody of the carrier.

On the contrary, to reject liability, the carrier is faced with the burden of proof in a cumulative manner in respect of the following issues:

(a) the cause of the loss or damage,

(b) that due diligence was exercised to make the ship seaworthy before or at the beginning of the voyage related to the loss or damage,

(c) existence of any of the exculpatory events or situations.

**16.** The liability for loss or damage to the goods remains with the carrier unless on a balance of probabilities the evidence predominantly shifts in favour of the carrier. In the course of legal proceedings it is open to the claimant, pursuant to Art. 3 para. 2 of the Hague Rules, to prove also that the loss or damage to the cargo is the result of the negligence of the carrier or his servants in performance of either the loading, stowage, custody or the care for and the discharge of the cargo.[13] Here we have in the Hague Rules a clear influence of the liability of the carrier based on the culpae — fault principle, but nevertheless in the Hague Rules, the principle of liability remains overhelmingly in accordance with presumptive fault.

**17.** Where the loss or damage is a result of two different factors in respect of which the carrier is responsible for one but not for the other, the damages should be apportioned in conformity with the effect caused by each of the relevant contributing factors, e.g. the cargo is damaged partly due to bad stowage and partly due to the insufficiency or inadequacy of marks. In such a situation, the carrier faces a burden of proof to produce persuasive evidence in order to establish the proportion in which the cargo was damaged due to the insufficiency or inadequacy of marks. Failing to do so, the responsibility for loss or damage rests entirely with the carrier, which is again consistent with the basic principle of presumptive fault.

[13] Tetley, ibid. p. 55.

**18.** The Hague Rules in Art. 4 contain a very long list (total 17) of exceptions and immunities which, if proved by the carrier that loss or damage to the cargo was caused by any such event, exempts the carrier from liability, but these exceptions are always subject to the fact that »loss or damage arising or resulting from unseaworthiness is not caused by want of due diligence on the part of the carier to make the ship seaworthy...« as provided by para. 1 of Art. 3. Space does not permit an in depth elaboration of each exemption, in spite of the fact that every itemized event has its own history, meaning and significance. The exemptions apply to the shipowners as well, when sued in action in rem, even if they were not the contracting party under the contract of carriage.

**19.** Error in navigation is among the most frequently challenged exemptions which exonerate the carrier for negligent acts of his servants, including the master and the pilot in the navigation or management of the ship. Error in navigation covers collision cases and strandings of the ship as typical examples of the so-called »Nautical fault« for which the master, the pilot or any other crew member of the »carrying ship« is to blame. The exception under the term error in management relates to the management of the ship, and has a restricted meaning and should not be confused with »error in management« of the cargo, such as failure to ventilate the cargo compartments in order to protect the cargo, when committed by the servants of the carrier, which is not a valid defence for the carrier. The Hague Rules introduce an exception to the general principle of law that the carrier is liable for the acts and omissions of the master, the pilot, other crew members and other persons in his employment, if and when performed within the scope of their duties and obligations under their employment contract, insofar as the relevant errors are performed in the navigation or in the management of the ship.

**20.** Fire has special treatment as an incident of the casualties at sea because it is often extremely difficult or impossible to ascertain what was in fact the actual cause of the ignition. Therefore, the carrier under the Hague Rules will be liable for damages or loss of goods as a result of the fire if caused by the actual fault or privity of the carrier; in other words if it is proved that the fire occurred as a result of the carrier's personal act or omission. Actual fault of the carrier extends to acts and omissions of a senior rank employee of the shipowning corporation, but does not include the master or junior superintendent.

**21.** Perils, dangers and accidents of the sea, (c); Acts of God or vis major or force majeure, (d); acts of war, (e); acts of public enemies, (f); or in more up to date language international crimes at sea and arrest or restraint of princes, rulers or people, or seizure under legal process, (g); quarantine restrictions, (h); strikes or lockouts or stoppage or restraint of labour for whatever cause, whether partial or general, (j); and riots and civil commotions, (k); are listed in para. 2. Art. 4. and are occurrences constituting, in accordance with the Hague Rules, an event not imputable to the carrier. A common characteristic for all the above mentioned events is that such

occurrences are beyond the control of the carrier and therefore the harmful consequences of such events should remain with each individual party or interest, following the principle casus sentit dominus accompanied by the doctrine of fair distribution of risks in the common adventure.

**22.** The act or omission of the shipper or owner of the goods, his agents or representatives (i); and insufficiency or inadequacy of marks (o); are for obvious reasons mentioned in the list of exemptions of carrier's liability. Moreover, para. 5 of Art. 3 imposes upon the shipper an obligation to indemnify the carrier against all loss, damages and expenses arising out of or resulting from inaccuracies of the marks, number, quantity and weight, at the time of shipment. It is important to note that the carrier is not bound to state in the bill of lading any marks, number, quantity or weight, if he has no reasonable means of checking or if he has reason to suspect the accuracy of such particulars.

**23.** Normal loss in weight or volume of the cargo, damage or loss arising from an inherent defect, quality or vice of the goods (m) are walid exceptions for the exoneration of the carrier from liability provided that the carrier shows satisfactory evidence that the cargo was stowed and carried in accordance with a proper and careful standard.[14]

**24.** The exception of the insufficiency of packing (n) although primarily within the duties to be performed by the shipper does not relieve the carrier of his obligations to handle, stow and care for the goods properly. The carrier or other persons employed or engaged by him are supposed to have satisfactory knowledge and experience of standard requirements for the handling of the specific commodities. The carrier's role in the operation of loading and stowage imposes upon him the duty to perform such an operation properly, i.e. without being negligent. The carrier is authorized either not to accept the cargo for transport, unless it is packed properly or to put appropriate remarks in the bill of lading. Failure or omission to do so involves the carrier's liability even for duties which originally should have been carried out by the shipper. Insufficiency of packing as the exoneration element has its merit and effect only if it is not visible externally, such as the packing of the merchandise carried within the container. Otherwise, when the insufficiency of packing can be externally discovered on reasonable examination, and if a clean bill of lading is issued with a notation, as customary, that the goods have been shipped in »apparent good order and condition«, the carrier will be estopped from pleading insufficiency of packing as against the holder of the bill of lading in good faith.[15]

**25.** During the performance of the voyage, the carrier may render assistance in saving or attempting to save life or property at sea; it is at the same time the duty of the master to respond to every call to save lives

[14] Chris Foodstuffs Ltd. v. Nigerian National Shipping Line (1967) 1 Lloyd's Law Rep. p. 299.
[15] Carver, ibid. para 288.

at sea, as long as he does not expose his own ship to exceptional hazard. In some exceptional situations the master is bound to embark upon an operation to save property at sea as well, and in compliance with his duties, the master cannot involve the carrier in responsibility for any loss or damage sustained to the goods carried on board his ship, in the course of the salvage operation. This liberty of the carrier is specifically reiterated in para. 4 Art. 4 of the Hague Rules as a valid exemption of liability extended with an exemption provision in regard to »any reasonable deviation«. There is no breach of the Hague Rules or of the contract of carriage arising out of any deviation in saving property or life at sea or any other reasonable deviation. The most typical and frequent example for a justified deviation is a departure from the contemplated navigation route in order to call into a place or port to disembark a sick crew member.

**26.** The defence under (p) Latent defects not discoverable by due diligence, has been commented by Carver citing the case where it was said that »a defect is latent when it cannot be discovered by a person of competent skill using ordinary care.«[16] Latent defect does not cover fault in the design of the ship or corrosion or deficiency of wear and tear nature. The use of the expression »due diligence« in the context of the exception in question is not a mere repetition of the carrier's obligation pursuant to para. 1 Art. 3 of the Hague Rules. It should be noted that in respect of exception (p), due diligence is not qualified by the phrase »before or at the beginning of the voyage«. This consequently means that the duty to exercise due diligence in relation to the latent defects exception, regarding timing, is not limited only to the period ending with the »beginning of the voyage«.

**27.** The last exception under (q) commencing with the words »any other cause« intimates, on superficial reading, a rather wide application in view of its »omnibus« character. On the contrary, the structure of the exception (q) requires the carrier, if he is to be successful in claiming exemption from liability, to prove not only that he had not been guilty of the actual fault of privity, but also that the fault or neglect of his agents or servants had not contributed to the loss or damage. Indeed a case of probatio diabolica. The carriers cannot with optimism revert to exoneration under the provision (q). As C. Goldie says »there is a world wide trend towards restricting the defences available to the carrier«[17] in the Hague Rules, and in our submission, the applicability of exception under (q) is already in process of factual disappearance.

**28.** The Hague Rules do not mention losses or damages sustained by those interested in the goods by delay. Silence in respect of delay results in a different treatment of this type of damage in various jurisdictions, unless the cargo deteriorated due to the delay in delivery. In this latter situation, it is unanimously accepted that the loss resulted because of dete-

[16] Carver, ibid. para 290.
[17] C. Goldie, Effect of the Hamburg Rules on shipowners liability insurance, Vienna Colloquium, p. 24.

rioration of the cargo, irrespective of whether caused by the delay or otherwise, and falls within the term loss or damage to the goods. Nevertheless, for other types of damages caused by the delay, e.g. loss of profit because commodity prices dropped on the market, etc. substantial differences are recorded in the application of the Hague Rules and not only in judicial practice in different states, but also in the interpretation of the meaning of the Hague Rules manifested in the manner of how the Hague Rules or the Convention of 1924 have been enacted in national internal law.[18]

**29.** The Visby Rules are the result of successful efforts within the CMI to draft amendments to the Hague Rules to bring the system of liability of the carrier, as much as possible, into line with the sophisticated demands developed in maritime trade. The essential structure of liability has not been disturbed and Art. 6 of the Visby Rules contains a restatement that the Convention and the Protocol, i.e. the Hague Rules and the Visby Rules respectively, shall be read and interpreted together as one single instrument. From the aspect of the legal technique, incorporation of the Protocol into the structure of the Hague Rules is carried out with admirable skill and knowledge. Compliments must be addressed to those who contributed and participated in the drafting.

**30.** The fundamental system of liability has not been disturbed and the established balance has been maintained in order to fit in with the preferences of the commercial community. However, quite a few improvements have been introduced, and we shall try to offer some comments mentioning the most interesting changes and innovations in respect of the modifications promulgated by the Visby Rules into a uniform system of liability of the carrier as universally accepted in the world in conformity with the Hague Rules.

**31.** While the Hague Rules have established that a bill of lading shall be prima facie evidence, the Visby Rules have introduced (para. 1 Art. 1.) a special provision in order to strengthen the position of any third party acting in good faith. The prima facie notion has been substituted for the principle that no proof is admissible after the bill of lading has been transferred to the bona fide holder. Consequently, the presumption accepted in the Hague Rules to stand until »proved to the contrary«, has been modified by the Visby Rules into the principle of incontestable evidence, of »de iuris et de iure« rank, which, in English legal terminology, corresponds closely to the concept of »estoppel«.

[18] Simplifying the problem, the border line seems to arise out of the nature of the issue, i. e. how the loss of profit, as e specific head of damage, has been developed, framed and defined in the commom law or civil law of the respective states. Namely, the issue is whether the physical damage to goods includes loss of profit or not, and differences have been manifested as to whether a clause incorporated in the negotiable bill of lading aiming to exempt liability of the carrier for loss caused by delay will be recognised, as it appears to be the case in the Netherlands, Yugoslavia, Italy etc. or if such a clause will have no effect at all, being contrary to the mandatory law as in USA, United Kingdom, Canada, Japan etc.

**32.** The basic prescription period remains at one year. This means that all claims will become time barred unless action is commenced within one year of the delivery of the goods or from the date when the goods should have been delivered. The Visby Rules provide the explicit possibility in para. 2 of Art. 1. that the period of one year can be extended byt he agreement of the parties, after the cause of action has arisen. This provision was necessary because, in certain jurisdictions, the agreement by the parties to extend the time bar period, was not recognized as effective and valid as against the precisely fixed period provided by the law.

**33.** An important innovation has been introduced by para. 3 Art. 1. of the Visby Rules extending the time bar period by law, for an additional minimum three months, for the so-called recourse actions against third parties. Thus, for instance, a cargo insurer, by virtue of subrogation, has an additional period of three months to commence action for recovery against the carrier. Three months shall start to run from the day when the person bringing such action has paid the claim or has been served with the process in the action against himself.

**34.** As a result of the amendments in the Visby Rules, the system of the carrier's liability »per package or unit« related in the Hague Rules to the one hundred pounds sterling, or the equivalent in other currencies under the governing law of the particular state, as a monetary unit linked to gold value, has been radically changed. Namely, besides other innovations in this area, the Visby Rules introduced the reference to the Franc Poincare,[19] and abolished entirely the link to the pound sterling. The Franc Poincare, as the monetary unit was, in the fifties and sixties of this century, a common basis for calculation in maritime international conventions or instruments, aiming to create uniformity and unification in maritime law. The Visby Rules regulate that the system of the carrier's liability/limitation per unit, functions in the alternative way, i.e. the ceiling of liability is fixed to the amount not exceeding 10.000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damged, whichever is the higher. Those who introduced the Franc Poincare formula into the Visby Rules for the purpose of ascertaining the limits of the carrier's liability per package or unit, thought that a link with gold would fortify such a method as a stable pattern for conversion into national currencies. At the same time, the limitation amount was considered a fair and just compensation between the carrier and those interested in the cargo.

**35.** However, unstable tendencies in the world economy, upward and downward fluctuations in the prices of basic commodities including gold and chaotic rates of exchange between various national currencies over a period of time, caused the monetary unit, as introduced by the Visby Rules, to become neither stable, nor consistent, nor fair. It was in these cirsumstances that the International Monetary Fund introduced a formula commonly known

[19] One Franc Poincaré means an imaginary unit consisting of 65.5. milligrammes of gold of 900 millesimal (900/1000) fineness.

as the Special Drawing Rights (SDR) as a monetary unit to be used as a reference point for the conversion of different national currencies. It was subsequently confirmed that this formula was an acceptable solution in the instruments on unification of the Maritime Law and a new Protocol to the Hague and Visby Rules was drafted. On 21st December 1979 in Brussels, the Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, August 25th 1924, was signed, as amended by the Protocol, dated February 23rd 1968. The only issue dealt with by the Protocol of 1979 relates practically to the replacement of the unit of 10.000 Francs Poincare by 666,67 special drawing rights and/or to the replacement of the unit of 30 Francs Poincare into 2 special drawing rights per kilo, again to be governed by whichever is the higher.[20] The special drawing rights formula is made available for calculation in the national currencies of the states affiliated to the International Monetary Fund. The accession of any state to the Protocol of 1979 produces the effect of automatic ratification of the Hague Rules together with the Visby Rules.

**36.** In order to establish what is a unit in each particular case, it will be of assistance to look into the relevant particulars as inserted on the face of a specific bill of lading. We are inclined to accept the view that the term »unit« should be interpreted in the direction of the »freight unit«, which means any unit, used as a basis for the calculation of the freight under the particular contract of carriage.

**37.** In connection with the meaning of the term »package« as used in the Hague Rules, the Visby Rules have introduced a very desirable clarification by which the existing ambiguity, on this issue (under the Hague Rules) has been eliminated. The specific provision in the Visby Rules provides that where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such an article of transport, shall be deemed to be the number of packages or units relevant for limitation. Thus, unless identification of the contents inside the container or other similar article of transport is made in satisfaction of the requirements under sub-para. (c) of Art. 2 of the Visby Rules, the entire container or pallet or similar article of transport shall be considered as one package or unit relevant for package or unit limitation. The absence of a specified itemization of the packages inside the container is detrimental to the claimant's interests, since only one unit of limitation will be applied to all the cargo within the container.

**38.** The rights of the carrier arising out of the benefit of the limitation per package or unit are less if it is proved that the damage resulted from an

[20] The limits fixed by the Protocol 1979 are the minimum applicable limits. However, if the nature and the value of the goods have been declared by the shipper and inserted in the bill of lading the carrier will be liable up to limits so identified, aand of couose, exeeding limits expressed as 666,67 and 2 SDR respectively.

[21] Para 2 of the art. 6 of the Protocol reads: »Ratification of this Protocol by any state which is not a party to the Convention shall have the effect of ratification of the Convention«.

act or omission of the carrier, committed with the intent to cause damage or recklessly and with the knowledge that damage would probably result. It is obvious that no benefit on the limitation of liability will be granted in situations of socalled serious misconduct and the above referred language, inserted in the Visby Rules to this effect, is consistent with the provisions of other international maritime conventions such as the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea 1974 and the Convention on the Limitation of Liability for Maritime Claims »Global Liability) (1976).

**39.** By the provision of Art. 3 of the Visby Rules, the application of the Hague Rules is extended, in addition to actions in contract, to actions in rem. The Visby Rules implement all defences and immunities inclusive of the benefit of package or unit limitation under the Rules to be available if an action for loss or damage of goods is bronght against a servant or agent of the carrier, by setting up the principle that the aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit of liability available under the Rules. However, the Visby Rules provide that neither the servant nor the agent of the carrier shall be entitled to enjoy the benefit of limited liability in respect of package or unit in cases of serious misconduct by the respective servant or agent.

**40.** The legal regime of the carrier's liability for loss or damage to goods as provided in the Hague Rules, has served all participants in transport by sea over decades, establishing a balanced allocation of risks upon the relevant parties involved, together with the accompanying backing of the cargo insurance schemes widely available on the one side and the insurance of the shipowners — carrier's liability on the other. The Visby Rules have contributed to the improvement of the system and now together with the Protocol 1979, the Hague-Visby system is facing challenges of whether or not the system will survive over into the next century. It has to be appreciated that the present system is not immune to certain imperfections and ambiguities and it should be acknowledged that further improvements can be introduced to remove defects already identified, to eliminate superfluous exemptions and in particular to respond to the requirements of modern times, which have brought new practices and modern technologies. The United Nations Convention on the Carriage of Goods by Sea 1978, commonly known as the Hamburg Rules, is now taking over this challenge. The race is not only imminent, it has started already and we shall not venture, at this stage, to predict the outcome.

Exibit 1.

**LIST OF THE CONTRACTING PARTIES TO THE HAGUE RULES**

Algeria 1964
Angola 1952
Antigua & Barbuda 1930
Argentina 1961
Australia 1955
Bahamas 1930
Barbados 1930
Belgium 1930
Belize 1930
Bolivia 1982
Cape Verde 1952
Cote d'Ivoire 1961
Cuba 1930
Cyprus 1930
Denmark 1938
Dominican Republic 1930
Egypt 1943
Ecuador 1977
Fiji 1970
Finland 1930
France 1937
Gambia 1930
German Democratic Republic 1958
German Federal Republic 1953
Ghana 1930
Grenada 1930
Guinea-Bissau 1952
Guyana 1930
Hungary 1930
Ireland 1962
Islamic Republic of Iran 1966
Israel 1959
Italy 1938
Jamaica 1930
Japan 1957
Kenya 1930
Kiribati 1930
Kuwait 1969
Lebanon 1975
Macao 1952
Madagascar 1965
Malaysia 1930
Mauritius 1970
Monaco 1931
Mozambique 1952
Nauru 1955
Netherlands 1956
Nigeria 1930
Norway 1938
Papua New Guinea 1955
Paraguay 1967
Peru 1964
Poland 1937
Portugal 1931
Romania 1937
Sao Tome and Principe 1952
Senegal 1978
Seychelles 1930
Sierra Leone 1930
Singapore 1930
Solomon Islands 1930
Somalia 1930
Spain 1930
Sri Lanka 1930
St. Kitts and Nevis 1930
St. Lucia 1930
St. Vincent and the Grenadines 19
Sweden 1938
Switzerland 1954
Syrian Arab Republic 1974
Tonga 1930
Trinidad & Tobago 1930
Turkey 1955
Tuvalu 1930
United Kingdom 1930
United Republic of Tanzania 1962
United States of America 1937
Yugoslavia 1959
Zaire 1967

Exibit 2.

**LIST OF THE CONTRACTING PARTIES TO THE HAGUE/VISBY RULES**

Belgium 1987
Denmark 1975
Ecuador 1977
Egypt 1983
Finland 1984
France 1977
German Democratic Republic 1979
Italy 1985
Lebanon 1975
Netherlands 1982
Aruba 1986
Norvay 1974
Poland 1980
Singapore 1972
Sri Lanka 1981
Sweden 1974
Switzerland 1975
Syrian Arab Republic 1974
Tonga 1978
United Kingdom 1976
including Bermuda, Hong Kong, and other dependencies

Exibit 3.

**LIST OF THE CONTRACTING PARTIES TO THE PROTOCOL 1979**

Belgium 1983
Denmark 1983
Finland 1984
France 1986
Italy 1985
Netherlands 1986
Norway 1983
Poland 1984
Spain 1982
Sweden 1983
United Kingdom 1983
including Bermuda, Hong Kong and other dependencies.

*S A Ž E T A K:*

*ANALIZA ODREDABA O ODGOVORNOSTI PO HAŠKIM I HAŠKO-VISBYJSKIM PRAVILIMA*

*Autor u prvom dijelu analizira odredbe Haških pravila s posebnim osvrtom na pojam dužne pažnje brodara u odnosu na sigurnost broda za plovidbu. Osim toga autor detaljno analizira pojedine razloge za isključenje odnosno ograničenje odgovornosti brodara za štete uslijed gubitka i manjka tereta prilikom prijevoza morem.*

*U drugom dijelu rada autor obrađuje odredbe Visbyjskih pravila ističući da sustav odgovornosti brodara za gubitak i manjak tereta, kako je ustrojen Haškim pravilima, predstavlja danas u svijetu univerzalno prihvaćen standard pomorskog prava za odgovornost brodara za teret prihvaćen na prijevoz brodom. Ovu postavku autor obrazlaže ne samo oslanjajući se na broj država ugovornica nego i navodeći primjere pojedinih država koje nisu ratificirale Konvenciju iz 1924, ali su pojedina načela i rješenja unijele u svoje zakonodavstvo.*