



**A COMPARATIVE ANALYSIS OF THE HAGUE -VISBY
RULES AND THE ROTTERDAM RULES WITH
REFERENCE TO CARRIER'S LIABILITTIES**

BY

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**A dissertation submitted in fulfilment of the requirement for
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ABSTRACT

Trade transactions depend primarily on trust and prompt service. It is recognized that the carriage of goods by the sea plays a vital role to promote such features by being the most preferred choice compared to air or railroad transportation. However, the existing law-rules that regulate the international trade could not keep up with these features. The carrier under the Hague-Visby Rules has many opportunities to exempt himself from liability for loss or damage to the cargo in several cases. In addition, the Hague-Visby Rules suffers from the lack of uniformity in the interpretation regarding these exclusionary provisions in different jurisdictions. Such problems have resulted in the carrier's dilution of responsibility, and the fortification of his immunity against the cargo-owner's position. In an attempt to create a fairer balance between the carrier and the cargo interest, *UNCITRAL* has enacted an alternative legal instrument known as, Rotterdam Rules, to promote the international trade law in general, and to provide global uniformity in the application of the rules to the carriage of goods by sea, in particular with respect to enhancing the carrier's liability. This study compares the application of both rules to the carrier's liability; it elaborates the major obligations of the carrier against the cargo owner. However, it submits that the higher liability of the carriers and ship-owners, led the majority of the powerful industrial countries to ignore the ratification of the Rotterdam Rules and to maintain the application of the Hague/Hague-Visby Rules. In view of these circumstances, this study has revealed an imminent need for ratification the Rotterdam Rules to establish a suitable and effective set of rules to revive maritime law and to promote international trade, particularly, in terms of solving the shipping conflicts between the carriers and the cargo-interests. Finally, the study proposes that all countries should focus their efforts to make necessary improvements to ensure that they are in a position to ratify the Rotterdam Rules in the nearest future for the purpose of establishing international uniformity for multimodal transport.

خلاصة البحث

تعتمد المعاملات التجارية مبدئياً على الثقة وسرعة الاداء، ومن المسلم به أن النقل البحري للبضائع يلعب دوراً حيوياً في تعزيز هذه السمات مقارنة بالنقل الجوي وكذا النقل عبر السكك الحديدية. غير أن المعاهدة الدولية لاهاي- فيسبي Hague-Visby Rules والمتعلقة بتنظيم التجارة الدولية لا تتماشى وهذه الميزات. وبالتالي يمكن للناقل بموجب هذه القواعد إعفاء نفسه من المسؤولية عند فقدان أو تلف البضاعة، بالإضافة إلى ذلك قد يختلف تفسير هذه القواعد والاحكام اثناء تطبيقها من سلطة قضائية لآخرى، مما قد يؤدي إلى نفي مسؤولية الناقل تماماً أو تحصيله في مواجهة مالك البضاعة. في محاولة للتوصل إلى اضعاء نوع من التوازن في العلاقة القانونية بين الناقل ومالك البضاعة، سنت منظمة الأونسيترال UNCITRAL مجموعة من القواعد والاحكام تعرف بمعاهدة روتردام Rotterdam Rules بديلاً لسابقتها من اجل تعزيز القانون التجاري الدولي بوجه عام، و تحقيق تناسق و انسجام عالميين في تطبيق هذه القواعد على عقود نقل البضائع عن طريق البحر بوجه خاص، لا سيما فيما يتعلق بمسؤولية الناقل. تطرح هذه الدراسة مقارنة بين تطبيق كلا المعاهدتين على مسؤولية الناقل من حيث الالتزامات الرئيسية التي يتحملها في مواجهة مالك الحمولة. كما توضح هذه الدراسة ايضاً أن حجم المسؤولية الملقى على عاتق أصحاب السفن وفقاً للقواعد البديلة دفعت أغلبية البلدان الصناعية إلى عدم التصديق على هذه القواعد والمحافظة على تطبيق قواعد لاهاي / لاهاي فيسبي. وبناء على ضوء هذه الظروف، كشفت الدراسة عن وجود حاجة ملحة للتصديق على قواعد روتردام من أجل إحياء القانون البحري وتعزيز التجارة الدولية، لا سيما حل النزاعات المتعلقة بالنقل البحري بين الناقلين واصحاب البضائع. وأخيراً، تقترح الدراسة على جميع البلدان أن تركز جهودها في إنجاز المشاريع والبنيات التحتية اللازمة لضمان كونها في وضع يسمح لها بالتصديق على هذه المعاهدة في المستقبل القريب بغرض إنشاء قانون تجاري دولي موحد لنقل البضائع.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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*Dedicated to those who have supported me with much love and patience,
my Father Abd Elkader Nedjar*

And

*To the dearest to my heart, my beloved Mother Malika Mokdad
May Allah (SWT) grant them mercy and Aljannah, Aameen.*

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16. The Hague-Visby Rules The Hague Rules of 1924 as amended by the Visby Protocol, 1968
17. The Rotterdam Rules United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008
18. The Hamburg Rules United Nations Convention on the Carriage of Goods by Sea, 1978
19. US Harter Act 1893

LIST OF ABBREVIATIONS

ART	Article
BBL	Bolero Bills of Lading
B/L	Bill of Lading
BLA	English Bill of Lading Act
CIM	International Convention on the Carriage of Goods by Rail.
COGSA	Carriage of Goods by Sea Act.
CLC	International Convention on Civil Liability for Oil Pollution Damage.
CMI	Comité Maritime International
CMR	Convention on the Contract for the International Carriage of Goods by Road
CMNI	Contract for the Carriage of Goods By Inland Waterway.
EB/L	Electronic Bill of Lading
FC	Fund Convention
FIO	Free in and out clause
GPS	Global Positioning System.
IMF	International monetary fund
MOFCOM	Department of Treaty and Law of China's Ministry of Commerce
P&I Clubs	Protection and Indemnity clubs
SDR	Special Drawing Right
UK	Unit Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UN	United Nation
US	United States
WG	Working Group

CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Today's world is experiencing several advancements in the field of technology and commerce. Such an improvement has an essential effect on the commercial world, whether the domestic or the international one. It is recognized that the major feature of all trading transactions is its rapidity. However, the existing law-rules that regulate international trade could not keep up with this feature. At the same vein, the carriage of goods by the sea is playing a vital role in international trade due to the increased demand for international transportation as the carriage of choice compared to air or railroad transportation. Thus, the contract of carriage of goods by sea is considered as the most important international contract of transportation around the world. This importance has raised the need for special rules to regulate such a contract.

Several attempts have been made to produce convenient rules that will successfully regulate the carriage of goods by sea. As a result, the Hague Rules was adopted in Brussels on 25 August 1924 as the first international convention, its original name being '*The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*'.¹ This attempt was the result of widespread dissatisfaction among shippers and the cargo-owners for the restriction of carrier's liability at common law in case of loss of, or damage to cargo. However, after the Conference of Brussels the Hague Rules provides the basis for the adoption of a

¹ See the website: <http://www.admiraltylawguide.com/conven/haguerules1924.html>.

uniform set of rules governing the carriage of goods by sea.² After almost five decades as the fundamental source of law that governs the contract of carriage, the Hague Rules was amended by Brussels protocol in 1968. It became known as the Hague-Visby Rules, which was again amended by *Special Drawing Right (SDR)* protocol in 1979.³ Despite, the creation of the new international legal instruments, the most striking aspect is that both The Hague and The Hague-Visby Rules are prominently in favour of the carrier, whereby both have imposed only a minimum mandatory responsibility on the carrier. For example, the Hague-Visby Rules include a lot of exceptions on the carrier's liability against the cargo interest or the claimant, pursuant to which the carrier can easily avoid his liability.⁴

Apparently, the Hague-Visby Rules has been established by '*Comité Maritime International*' (CMI).⁵ This convention fails to regulate all aspects of carriage of goods by sea within the constantly developing field, compounded by its narrow scope of application and a short period of the carrier's responsibility.⁶

Due to the constant criticisms levelled at the Hague-Visby Rules, especially in term of carrier's liability, the *United Nation (UN)* conference on carriage of goods by sea, which was held in 1978, made another attempt to produce more balanced provisions relating to the responsibility of the carrier toward the cargo-owner in formulating Hamburg Rules. As a result, these rules were released and it was expected to fill the vacuum in the Hague-Visby Rules in to regulate the carriage of goods by

² The 1924 Hague Rules had been ratified by England in the Carriage of Goods by Sea Act 1924(COGSA).

³ *SDR PROTOCOL* amended The Hague-Visby Rules convention in Brussels, 21 December 1979; see The Hague-Visby Rules Protocol (1979).

⁴ Art 4(2) from the Hague-Visby Rules involves 17 exceptions on the carrier's liability versus the claimant in case of loss or damage to the cargo.

⁵ Comité Maritime International.

⁶ Art 10 of the Hague-Visby Rules restricts its applicability in three narrow cases, where the Bill of lading is issued in the contracting state, or the carriage is from a port in a contracting state, or the contract of carriage lead to apply the convention by giving effect to them.

sea.⁷ In addition, the scepticism of the major shipping countries such as the *United States (US)* and *Unit Kingdom (UK)* towards the ratification led to the failure of the application of this convention.⁸

As the Hamburg Rules has failed to provide an acceptable solution to the issue of carrier's liability in the contract of carriage, international organizations have continued to push for a suitable resolution. Therefore, the '*UN General Assembly*' in 2008 adopted the '*United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*' which is known as The Rotterdam Rules.⁹

The *UN General Assembly* has authorized the formal ceremony for the opening of the new convention for signature which had been held in Rotterdam on September 23, 2009. The main purpose of this convention is to replace the three existing regimes namely the Hague Rules of 1924, the Hague-Visby Rules of 1968, and the Hamburg Rules of 1978 and to create a uniform set of rules worldwide in the field of carriage goods by sea, by including several incidental matters, for instance, multimodal transport, door to door deliveries, and electronic transport documents. However, for entry into force, the Rotterdam Rules requires at least twenty ratifications.¹⁰

Throughout the above discussion, it can be recognized that the provisions which regulate the carrier's liability are a fundamental part of the contract of carriage. Thus, creating a set of rules aimed at balancing the competing interest between the carrier's liabilities relating to the issuance of the bill of lading, the delivery of goods,

⁷ United Nations Convention on the Carriage of Goods by Sea, 1978.

⁸ Denning N. Metuge, "*Carriage goods by sea – from Hague to Rotterdam: Safer Waters*", (Thesis Submitted in fulfilment of the requirements for the award of the degree of Magister Legum, faculty of law, Nelson Mandela Metropolitan University, Jan 2012), p3.

⁹ See United Nation Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008.

¹⁰ Rotterdam Rules, Art 94 (1).

the liability for damage and loss of goods on the one hand with the consignor's rights, which has been the major concern of all the international commercial organizations. However, so far, attempts to balance the rights and liabilities of the cargo carrier with those of the cargo owner have proved unsuccessful.

1.2 STATEMENT OF THE PROBLEM

Pursuant to the provisions of the Hague-Visby Rules it is submitted that the carrier has many opportunities to exempt himself from liability for loss or damage to the cargo in several cases under the article 4(2). In addition, the Hague-Visby Rules suffers from the lack of uniformity in the interpretation regarding these exclusionary provisions in different jurisdictions over the world, such as, the carrier should handle the cargo "properly" and "carefully". Moreover, there is inadequacy in terms of any litigation against the carrier. The carrier's comparative advantage under the rules as previously discussed has resulted in the carrier's dilution of responsibility and immunity against the cargo-owner's position as witnessed in several cases.

In an attempt to create a fairer balance between the carrier and the cargo interest, '*United Nations Commission on International Trade Law*' (UNCITRAL) has enacted other legal instrument, known as Rotterdam Rules, with the objective of providing global uniformity in the application of the rules and to promote the international trade law in general, and the carriage of goods by sea in particular, especially, in terms of enhancing the carrier's liability. However, these improved rules for the carriage of goods wholly or partly by sea seem to be ignored by the majority of the industrial powerful countries due to the much higher imposition of liability on the carriers and the ship-owners. Therefore, they maintain the application of the Hague/Hague-Visby Rules. Nevertheless, the anticipation and prediction to promote

the carriage goods by sea, subject to the Rotterdam Rules have not yet been realised due to its express clauses which have increased the limits of the carrier's liability. The Rotterdam Rules may subsequently follow the same course of failure as the Hamburg Rules.

1.3 RESEARCH OBJECTIVES

The main objectives of this study are as follows:

- To identify the major similarities and differences between the two international legal instruments, Hague-Visby Rules and Rotterdam Rules with reference to the clauses that govern the carrier's liability.
- To analyse the narrow scope of the applicability of the Hague-Visby Rules in the field of the carriage goods by sea and the stronger position of the carrier toward the cargo-owner under this regime.
- To justify the need for a new international legal instrument for regulating the field of maritime law in order to establish a logical fair and equal balance between the carriers and the cargo-owners.
- To prove the effectiveness of the Rotterdam Rules in terms of solving the shipping conflicts between the carriers and the cargo interests and suggest the ways forward to ratify it.

1.4 RESEARCH QUESTIONS

Based on the above statement of the problem, the following questions are closely examined.

- How different is the carrier's liability under the Hague-Visby Rules, and the Rotterdam Rules?

- What are the reasons giving by the majority of countries for accepting the application of the Hague-Visby Rules?
- Does the maritime law need legal reform in the field of the carriage goods by sea in general and regarding the carriers liability in particular?
- Can the application of Rotterdam Rules be considered as the alternative option to enhance the regulation of the carriage good by sea and why the rules have not yet been adopted by the majority of the countries?

1.5 RESEARCH HYPOTHESIS

- The liberal adoption and acceptance of the Hague-Visby Rules worldwide was due to the advantages provided to the carrier against the cargo interest.
- The ratification of the Rotterdam Rules by the industrialised countries would result in loss of the economic income that comes from their vessels.
- Rotterdam Rules are the best alternative option for striking a balance between the duties of the carrier and the cargo interest.
- The best way to solve the shipping conflicts is to ratify the Rotterdam Rules which attempts to create a fair legal regime between the parties to the contract of carriage

1.6 SCOPE AND LIMITATION OF THE STUDY

The study encompasses the field of the international carriage of the cargo by sea. It focuses on the international legal regimes in terms of the basis of the carrier's liability and responsibilities applicable to the international contract of carriage goods by sea

only. Therefore, it excludes the examination of the other international transport modes such as air or railroad transport.

In addition, the research examines the basis of the carrier's liability which is included only in the contractual liability under the Hague-Visby Rules and the Rotterdam Rules. Thus, the other liabilities of the carrier emanating from any other sources rather than these two conventions are outside the scope of this study.

The focus is limited to the substantive legal provisions of the international conventions excluding the historical development of these legal instruments.

1.7 LITERATURE REVIEW

It is clear that the Hague-Visby Rules lacks uniformity of interpretation concerning the provisions which govern the international contracts of the carriage goods by sea.¹¹ In addition, multimodal transport and electronic transport documents are not regulated by the regime. Therefore, an essential reform is necessary for the law that governs the carriage of goods by sea is noticeably getting ineffective. Therefore, it is mandatory to start working by suggesting another solution to the current existing problems in this field such as enacting a new set of rules to fill the gap.

The *UNCITRAL* creates modern transportation rules to realise uniformity and avoid the lack of adaptation in the conventions which govern the carriage goods by sea. Thus, it provided the Rotterdam Rules in 2008 as an alternative to the disadvantages inherent in the Hague-Visby Rules and it is considered as a new product for different needs. Its objectives are to establish uniform provisions to modernise and harmonise the rules governing the international carriage of goods by

¹¹ For example the statement '*before and at the beginning*' have some ambiguity in terms of its interpretation before the courts, therefore, in *Maxine Footwear case* the carrier was deprived from his immunities (fire exception) under Art 4(2) as long as the obligation of seaworthiness was not fulfilled