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**A COMPARATIVE LEGAL STUDY OF
RESPONSIBILITIES AND LIABILITIES OF A
CARRIER OF GOODS BY SEA.**

BY

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ABSTRACT OF THE THESIS

In a carriage of goods by sea, the carrier's responsibilities and liabilities vary under different regimes. As a result of this in many cases, the cargo owners had no effective remedy against the carriers. When the International Convention for the unification of certain rules of law relating to bills of lading was signed for adopting the Hague Rules, the intention was that the Rules should become mandatory and apply to bills of lading worldwide. This was not achieved and in the past few decades events have taken place leading to amendments of the Rules, namely the Hague-Visby Rules, 1968 and the Hamburg Rules, 1978. The intention of the latter was to replace the Hague Rules, the Visby Rules and the Hague-Visby Rules.

However, no one set of Rules will have universal application because these Rules only become effective between contracting States as and when they ratify the Conventions and introduce internal legislation to give the Rules statutory effect. Thus, in the first chapter, the author will discuss the general concept of carriage of goods by sea. The responsibilities, the exclusion of liabilities and the liabilities of a carrier are discussed in the subsequent chapters. The dissertation will compare the issue of responsibilities and liabilities of a carrier under the International Rules and common law countries, particularly England, Malaysia and other European countries and the author will also highlight the differences under each regime.

In conclusion, the author will hypothesize that due to the differences under each regime, there is an urgent need to have uniformity in the law governing the carriage of goods by sea.

ملخص البحث

في حمل البضاعة عن طريق البحر هناك مسؤوليات قانونية للحامل. هذه المسؤوليات تختلف حسب اختلاف النظام في الدول المختلفة. ونتيجة لذلك في حالات كثيرة فإن مسؤولي الحمولة لا يعطون التعويض المناسب للنقل، وعندما وقعت الاتفاقية الدولية لاتحاد بعض القوانين التابعة (لفوائد الشحن) قوانين هييج. الفكرة وراء ذلك كانت هي أن تكون هذه القوانين إجبارية وتطلق على فواتير الشحن في مختلف أنحاء العالم ولكن لم يحدث ذلك.

وحدثت هناك تغييرات في السنوات الماضية التي أدت إلى تعديل القوانين خاصة هيكيويسي وهمبرج، وكان الهدف من قوانين همبرج هو تغيير قوانين هييج وقوانين وييسي وقوانين هييج وييسي. ولكن هذه القوانين لن تكون له تطبيق لأن هذه القوانين تطبق فقط في الدول التي وقعت على الاتفاقية الدولية. وهذه الدول عدلت في قوانينها المحلية حتى تتوافق مع قوانين الاتفاقية الأولى.

لذلك في الباب الأول فإن الكاتب سوف يتحدث عن القوانين العامة لحمل البضاعة عن طريق البحر، والباب الثاني وما بعده يدور عن المسؤوليات وتحديد المسؤوليات ومسؤوليات الحمال. البحث سوف يقارن مسؤوليات الحكام تحت القوانين الدولية ودول القوانين العامة خاصة بريطانيا - ماليزيا - ودول أوروبا أخرى. والكاتب سيوضح الفرق بين نظام الدول المختلفة. وفي النهاية الكاتب يوضح رأيه عن الاختلاف بين كل نظام في الدول المختلفة وضرورة تنسيق القوانين لنقل البضائع عن طريق البحر.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Law.

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. Other sources are acknowledged by footnotes giving explicit references and a bibliography is appended.

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Signature.......... Date...19.5.98.....

This thesis is dedicated to my parents.

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IN THE NAME OF ALLAH (S.W.T); THE MOST GRACIOUS, THE MOST
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Shereen Khan @ Khin Hnin Oo.

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1924

1924 Limitation Convention

1957 Limitation Convention

United Nations Convention on the Carriage of Goods by Sea 1978

LIST OF ABBREVIATIONS

AC	Appeal Cases
All ER	All England Reports
Art./arts.	article/articles
ch.	Chapter (in legal terms)
e.g.	(<i>exempligratia</i>); for example
ed./eds	edition/editions; editor, edited by
etc.	(<i>et cetera</i>): and so forth
ibid.	(<i>ibidem</i>): in the same place
KB	King's Bench (Law Reports)
Lloyd's Rep.	Lloyd's Report
Mal LR	Malayan Law Review
MLJ	Malayan Law Journal
No./nos.	number/numbers
Par./pars	paragraph/paregraphs
QB	Queen's Bench(Law Reports)
QBD	Queen's Bench Division
Sch.	schedule
S.W.T	Subhanahu Wa Ta'ala (Praise be to Allah and the Most High)
sec/secs	section/sections
UK	United kingdom
USA	United States of America
v./vv	verse/verses
vols./vols	volume/volumes
Vs.	(<i>versus</i>): against (in legal terms)

INTRODUCTION

The contract of carriage of goods by sea is the bill of lading incorporating the terms, conditions and exceptions of a charterparty, where those terms, conditions and exceptions are such that they purport to restrict the shipowner's obligations strictly to the carriage element and to relieve the shipowner of all the ancillary obligations of loading, handling, stowing and discharging.

Carriage of goods by sea has always played an important role in international trade. It is still the cheapest and most convenient mode of carriage between two countries or geographical regions.¹ When a shipowner, either directly or through an agent, undertakes to carry goods by sea or to provide a vessel for that purpose, such contracts may take a variety of forms although the traditional division is between those evidenced by bills of lading and those embodied in charterparties. Where the shipowner employs his vessel in the liner trade, offering a carrying service to anyone who wishes to ship cargo, the resulting contract of carriage will usually be evidenced by a bill of lading. It can be called as carriage in general ship and the owner is the carrier. On the other hand, if he agrees to make available the entire carrying capacity of his vessels for either a particular voyage (voyage charterparty) or a specific period of time (time charterparty), then the arrangement normally takes the form of a charterparty. These can be called carriage in a chartered ship.

¹ Peter Koh Soon Kwang, *Carriage of Goods by Sea*, Butterworths, Singapore, 1986, p.1.

The two categories of bill of lading and charterparty are not, however, mutually exclusive, since frequently the party chartering a vessel for a specific period of time may himself operate it as a general carrier.²

Carriage of goods in a general ship are usually evidenced by bills of lading which are to a large measure regulated by statute law which restrains the shipowner from introducing exemptions from his liability beyond those admitted by the Rules relating to the bills of lading. Carriage in a chartered ship is mainly governed by the rules of common law. The principle of freedom of contract applies to them and the shipowner may, by agreement with the charterer, modify his normal liability as a carrier without any limitations apart from those postulated by the general principles of common law.³ Thus the contract for carriage of goods aboard a chartered ship is usually made between the goods owner and the shipowner.⁴ But the bill of lading will not supersede the charterparty as between shipowner and charterer. If, however, this bill of lading is indorsed to a third party, the relations between the shipowner and the party will be based on the bill of lading, not on the charterparty unless the bill of lading clearly incorporates its terms or the party is aware of them.

Whether it is a carriage of goods in a general ship or in a chartered ship, the carrier has responsibilities towards the goods while in his charge. If anything has happened to the

² Wilson, John, *Carriage of Goods by Sea*, 2nd ed., Pitman Publishing, London, 1993, p.3.

³ Schmitthoff, Clive M., *Export Trade : The Law and Practice of International Trade*, 9th ed., Stevens & sons, London, 1990, p. 545.

⁴ *Venezuela, The* [1980] 1 Lloyd's Rep. 393.

goods while in his charge, the carrier is liable for loss of or damage to the cargo. These responsibilities of the carrier in respect of the safety of the goods entrusted to his care are varied under the different rules. In some of the cases, the carrier is not liable in respect of loss or damage to the cargo. However, if a carrier is liable for damage to or loss of the goods shipped, there are limitations of the liability and these limitations vary under different regimes.

Contracts for the carriage of goods by sea under bills of lading had been governed in the past by divergent laws of maritime nations, and no serious attempt had been made prior to 1924 to adopt uniform rules concerning them. The terms embodied in bills of lading varied in form from one country to another, and the law on the subject was far from clear. The shipowners often exempted themselves from all types of liabilities by specific stipulations in their contracts, as a result of which in many cases the cargo owners had no effective remedy against the ship. There was no internationally accepted standard in regard to the degree of responsibility, which the carrier assumed in respect of the cargo. The principle that the carrier cannot stipulate exemption from certain minimum liabilities and responsibilities was not internationally accepted until after the end of the First World War.⁵

As a result of mercantile pressure, the United States passed the Harter Act 1893, adopting the principle that the carrier was not entitled to disclaim liability for loss or

⁵ International Convention for the Unification of certain Rules of Law Relating to Bills of Lading, Brussels, 25 August 1924.

damage unless he exercised due diligence in making the ship seaworthy. Many other nations soon introduced legislation based on the Harter Act. As a result of various such attempts, the Hague Rules finally came to be adopted in 1924. These Hague Rules created uniform rules of law on the subject for the first time. It specially laid down, among others, the minimum responsibilities and liabilities of a carrier of goods by sea under bills of lading. These rules relate to bills of lading and they are not concerned with charterparties except in so far as the provisions of the latter are specifically incorporated in bills of lading.⁶

After many years of use, it was generally recognised that the Hague Rules were in need of certain changes to suit modern developments in transportation. The Comité Maritime International (CMI) therefore drafted a proposed amendment, which became known as the Visby Amendments. It was not until 1977 that the required number of ratifications was achieved, bringing the Hague/Visby Rules into effect. In 1978, the Hamburg Rules were created. It may be said that the Hamburg Rules came about because of the needs of the commercial and maritime communities, while the Hamburg Rules were requested by a segment of the political community- particularly the developing countries. While the Hamburg Rules offer certain improvements with respect to liability and responsibility, it appears that little effort was made to improve the possibilities of settlement of claims without litigation.⁷ In many aspects the

⁶ T.K. Thommen. 1990. Carriage of Goods by Sea: The Hague Rules and Hamburg Rules. *Journal of the Indian Law Institute*. 32: 285.

⁷ Chandler, George F. A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules. (1984) 15 *JMLC* 233.

Hamburg Rules have clarified international shipping law to the mutual advantage of the carrier and the cargo interest. These rules have accomplished a balanced and equitable allocation of rights and responsibilities between the contracting parties. The Hamburg Rules came into force on 1 November 1992 having collected the required total of 20 ratifications and accessions from different states, irrespective of tonnage.⁸

In the United Kingdom, prior to the agreement of the 1924 Convention, Parliament had already enacted an earlier draft as the Carriage of Goods by Sea Act 1924 (repealed). The Hague/ Visby Rules, as amended by the SDR Protocol, now have the force of law in England by virtue of the Carriage of Goods by Sea Act 1971. However the United Kingdom has not ratified the Hamburg Rules. Under the most common terms of international sale, the buyer is the party who is at risk as from the shipment of the goods, regardless of whether or not he is the owner of the goods from that time. He will not be a party to any contract with the carrier since the contract of carriage will have been entered into by the shipper. A claim in tort is faced with the difficulty and the Bills of Lading Act 1855 was enacted to deal with this problem. Because of the difficulties, the 1855 Act was repealed, and replaced by the Carriage of Goods by Sea Act 1992. The 1855 Act, however, still applies to documents issued before 16 September 1992. It is interesting to note that almost half of the States subscribing to the Hague/Visby Rules were signatories to the Hamburg Rules, but it is believed that

⁸ The signatories represent a total of some 5 per cent of world trade, none of the major maritime states having as yet ratified the convention.

most of these States will not ratify or adhere to the Hamburg Rules. The major commercial and maritime powers have not adopted the Hamburg Rules; however, Australia⁹ and Canada¹⁰ may put the Hamburg Rules into effect.

In the United States, a different approach is being pursued. Presently, the Hague Rules are applied in the United States through the Carriage of Goods by Sea Act (COGSA). It has been in effect and unchanged since its enactment in 1936, a year before the International Convention for the Unification of Certain Rules Relating to Bills of Lading, adopted at Brussels in 1924, was ratified by the United States. Ratification was subject to the understanding that in the event of a conflict between any provision of COGSA and the Convention, COGSA would prevail. The Hague/Visby Rules has not been ratified by the United States. However, it may be applied by the United States courts, to the extent that it is not in conflict with COGSA, when a Hague/Visby contracting State is involved, or when the Protocol is incorporated by reference in the bill of lading or other contract of carriage. However it is not possible to predict when the Hamburg Rules will ever be effective in the United States.¹¹

In Malaysia, the main body of law governing carriage of goods by sea in West Malaysia is found in the Carriage of Goods by Sea Ordinance 1950 which is an

⁹ Carriage of Goods by Sea Act (1991). The Act came into force on October 31, 1991.

¹⁰ An Act Respecting the Transportation of Goods by Water, ch.21, 1993 R.S.C. 369-401 (Can.).

¹¹ Mendelsohn, Allan I. Why the U.S. Did Not Ratify the Visby Amendments. (1992)23 JMLC 29.

adoption of the Hague Rules of 1924.¹² In Sarawak, provisions, which give effect to, the Hague Rules and the exclusion or limitation of the shipowners' liability in certain cases is found in the Merchant Shipping Regulations 1960¹³. These regulations were expressly extended to Sabah by the Merchant Shipping Regulations 1961.¹⁴

Section 5(1) of the Civil Law Act¹⁵ provides that in all questions or issues which arise or have to be decided in West Malaysia excluding Malacca and Penang with respect to the law of carriage by sea, marine insurance, average, etc. and the law with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of coming into force of this Act i.e. April 7, 1956- if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law. Section 5(2)¹⁶ introduces similar English law at the appropriate date into Malacca, Penang, Sabah and Sarawak. By reason of this section 5(1) and (2) of the Civil Law Act, the (English) Bills of Lading Act, 1855, applies in Malaysia in the manner explained earlier.

¹² Section 2 of the Carriage of Goods by Sea Ordinance, 1950.

¹³ Sarawak Carriage of Goods Ordinance (Cap.90, 1948 Ed.) was repealed by s.279 (1)(e) of the Sarawak Merchant Shipping Ordinance (No.2 of 1960).

¹⁴ Abraham, Cecil, *Proposed Changes in Malaysian Shipping Law*, in Peter Koh Kwang, *Carriage of Goods by Sea*, Singapore, 1986, at p. 146.

¹⁵ 1956 (Revised – 1972) Act 67.

¹⁶ *Ibid.*