

THE PROVISIONS REGARDING THE CARRIERS' LIABILITY UNDER THE HAMBURG RULES

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After giving a brief history of the drafting and adoption of the United Nation Convention on the Carriage of Goods by Sea (1978) commonly known as the Hamburg Rules, the author outlines the main differences between the Hamburg Rules and the Hague Rules and elaborates in detail the meaning and importance of some of the provisions of the Hamburg Rules and in particular of art. 4, 5, 6, 7 and 8. The article aims to assist evaluation of the changes that would result to the commercial community worldwide if the Hamburg Rules were substituted for the system of liability as structured by the Hague-Visby Rules. The author concludes with the statement that it would be in general detrimental of the world to move towards the adoption of two different system of liability concurrently. Nevertheless he stresses also that once the Hamburg Rules come into force, a quick departure from the Hague Rules and the Hague-Visby Rules will be imminent.

1. The United Nations Convention on the Carriage of Goods by Sea 1978, commonly known as the Hamburg Rules, is intended to be a code of provisions regulating, on an international scale, the transport of goods by sea. Elaborating all the most important issues in connection with the carriage of cargo by sea, the unifying effect, aiming to be achieved, will be reached only if the Hamburg Rules receive world wide acceptance, through the ratification or accession of states, whose nationals (citizens or entities) participate, in a significant way, in maritime transport.

2. Study and evaluation of the problems involved by the different bodies within the large family of the United Nations' lasted for about ten years. Initial work was performed by the UN office of legal affairs, which is the secretariat of the United Nations Commission on International Trade Law (UNCITRAL), with the participation of twenty-one experienced experts, selected from various parts of the world and coming from different legal systems and schools of law. The work on the subject was taken over by the Com-

mitte on Shipping of the United Nations Conference on Trade and Development (UNCTAD). Examination of all issues and discussions in connection with each of the respective provisions was continued by a specially established working group on International Shipping legislation with significant assistance given by the UNCTAD Secretariat. This time and effort consuming exercise ended with a draft of the Convention on the Carriage of Goods by Sea that was submitted to the Diplomatic Conference, convoked under the auspices of the United Nations, held in Hamburg between 6—31 March 1978.

3. The Diplomatic Conference in Hamburg was attended by seventy eight participating states, including borty six developing countries. On 31 March 1978 the Conference adopted the final act of the United Nations Convention on the Carriage of Goods by Sea, with sixty eight votes in favour, three abstensionis and one vote against. The Hamburg Rules will enter into force one year after ratification or accession by twenty states. It is now exactly ten years since the Hamburg Rules were offered to the world community, the Convention has been ratified by eleven countries¹ and consequently the Hamburg Rules have not yet entered into force.

4. The main changes, from the Hague Rules regime, contained in the Hamburg Rules, in berif, are as follows:

- The long list of exemptions of the carrier's liability, provided for in the Hague Rules, have been abolished.
- The mandatory system of liability of the carrier, applicable to carriage of goods by sea, including the transport of deck cargo and live animals, which is performed by use of transport documents other than bills of lading has been modernized and extended.
- The scope of application and the period of responsibility. Have been extended.
The adaptation of the limits of liability to corresponding levels and calculating methods more consistent with the standards of the modern age have been introduced.
- Some other specific issues connected with the transport of goods by sea such as guarantee letters, jurisdiction, arbitration atc. have been regulated.

5. In the drafting of the Hamburg Rules, a clear terminology, a systemized structure and a comprehensive legal technique were followed and used, all fully consistent with contemporary legislative practices. Furthermore, the Hamburg Rules brought the system of the carrier's liability for carriage of goods more into line with the international regime for other modes of transport.

¹ By 31 December 1987, the instruments of ratification were delivered by the following states: Barbados (1981); Chile (1982); Egypt (1979); Hungary (1984); Lebanon (1983); Morocco (1981); Rumania (1982); Senegal (1986); Tunisia (1980); Uganda (1979); United Republic of Tanzania (1979).

In spite of the fact that the Hamburg Rules have quite a number of very interesting and useful innovations, which time permitting would deserve special attention and acknowledgment, we shall in our presentation concentrate only on some aspects of the problem of the carrier's liability, being the essential and we venture to say, the most important issue of the UN Convention on the Carriage of Goods by Sea. The liability of the carrier is dealt with in the second part (Articles 4—11) of the Hamburg Rules.

6. By the provisions of Art. 4 of the Hamburg Rules, the period of liability is extended from the so called »tackle to tackle« to »port to port« solution. The Hamburg Rules, which in our submission justifiably extend the liability of the carrier to »the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge«.

It should be mentioned that under the existing law of certain countries, including the U.S.A. and France, the period of responsibility of the carrier is already extended to the period prior to loading and after discharge.

7. The provisions of Arts. 5, 6 and 8, which were offered to the Conference as a compromise package deal, emerged as a result of protracted negotiations. Among these provisions, para. 1 of Art. 5 defines the cardinal elements of the carrier's liability, and because of its importance we quote it below:

»1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences«.

Para. 1 of Art. 5 appears to reflect the concept of liability based on presumed fault and neglect, but nevertheless, during the debate in Hamburg, many conflicting views were expressed on the issue as to whether or not the principle of presumed fault is satisfied by the wording of the above quoted paragraph. In addition to the text of the Hamburg Rules, the Conference, as a common understanding, adopted the Annex to the Convention indicating that the nature of the carrier's liability was based on the principle of presumed fault or neglect and restating that the burden of proof rests on the carrier unless the provisions of the Convention do not modify this rule.

Quite a number of the delegations had conditioned their approval of Arts. 5, 6 and 8 upon the inclusion of the »Common Understanding« in the final act of the Conference.²

² Official Records of the United Nations Conference of the Carriage of Goods and by Sea, United Nations, Documents of the Conference and Summary Records of the Plenary Meetings of the Main Committees, A/conf — 89/14, (hereafter Off. Records) p. 174—175.

8. Notwithstanding lengthy discussion about the precise nature of liability during the early sessions of the Conference, no acceptable wording of para. 1 of Art. 5 was suggested and it appears the wording quoted was the only acceptable solution. However, we are afraid that the problem has not been eliminated entirely and we have only to hope that the »common understanding«, as spelled out in the Annex, will assist in the appropriate interpretation of the Hamburg Rules. The real problem arises in respect of the meaning of the phrase that »the carrier proves that he, his servants and his agents took *all* measures that could *reasonably* be required...« As appears from the text under review, the definition contains two main qualifications of the carrier's duty. On the one hand, that all measures were taken to avoid the occurrence and its consequences, and on the other hand, that among all such measures, the only ones that have to be taken are those that could reasonably be required, in order to discharge the carrier from liability.

Although both attributes describe one and the same concept of »measures«, for the proper application of the Hamburg Rules, it is very important that both these elements are read and always interpreted jointly and in conjunction with the relevant circumstances of the case.

9. In order to illustrate the problem, a dilemma remains as to whether the carrier would be successful in discharging his burden if he proved either:

- a) that any prudent or diligent carrier in his position would not have taken any other measures than he did, including his servants and agents, in that particular case; (this would be a typical presumptive fault situation) or
- b) that it would have been impossible to carry out or undertake, under the circumstances, any additional measures in order to avoid the occurrence and its consequences; (this situation would be very close to the concept of the strict liability principle).

10. The absence of the reference to the terms »prudent« or »diligent« in para. 1 of Art. 5 causes some uncertainty in respect of the standard of proof required to be carried out by the carrier to discharge the liability for the loss of or damage to the goods. Even more so, because in the subsequent paragraph of Art. 5 of the Hamburg Rules, the meaning of delay in delivery is defined, using as an essential qualification, the wording »diligent carrier«.

11. In 1979, the Committee Maritime International held a colloquium on the Hamburg Rules in Vienna (The Vienna Colloquium) and, after discussing the problem of the basis of liability under the Hamburg Rules, under Professor Selving, the conclusions of the debate on the provisions of para. 1 of Art. 5 were as follows: »It was recognized that some variations in national law might continue to exist in the fields of negligence and burden of proof. Thus, it was noted that courts of different countries might not look upon cases of unknown cause of damage in exactly the same way, since in some countries affirmative proof of reasonable care would not necessarily be held to be sufficient to avoid liability.«³

³ CMI Colloquium on the Hamburg Rules, January 1979, p. 46.

12. The term »servant and agents« in para. 1 of Art. 5 includes, in addition to all persons under permanent employment by the carrier in performance of the transport contract, any person employed by the carrier for the same purpose, whether or not according to the internal law of the contracting state such a person is an agent or an independent contractor employed by the carrier on an »ad hoc« basis.

13. Under the Hamburg Rules the carrier is made liable also for »delay in delivery« and para. 4 of Art. 5 regulates that the delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage »within the time expressly agreed upon or, in the absence of such agreement within the time which it would be reasonable to require of a diligent carrier«. Therefore, in order to avoid uncertainties, it is recommended that the relevant transport document should state the period within which the cargo will be delivered at the contracted destination.

14. The fire exception has been retained in the Hamburg Rules and the burden of proof remains entirely with the claimant to prove that the loss or damage to the goods or delay in delivery caused by fire arose from fault or neglect on the part of the carrier, his servants or agents. In this instance the Hamburg Rules have laid down that the liability of the carrier is dependent on the principle of »proven fault«. In practice it is rarely easy to establish proof of its origin, i.e. whether it was generated on the ship's side or within the cargo itself, in view of the fact that some cargos are very much exposed to the risk of self-ignition.

15. With respect to live animals, the carrier is not liable for losses resulting from any special risks inherent in the carriage of live animals, and provided the carrier proves that he complied with the special instructions received from the shipper, it will be presumed that the loss, damage or delay in delivery was so caused. Otherwise, the general rules on liability in conformity with the provision of para. 1 Art. 5 remain, governing the loss, damage or delay in delivery of live animals, and the carrier cannot contract out of liability for negligence caused by his servants in the transport of live animals.

16. It should be noted also that cargo will no longer be required to contribute its proportion in general average and salvage in cases where there has been a breach of the contract of carriage in that the shipowner, his servant or agent fails to prove that all measures that could reasonably be required were taken to avoid the occurrence and its consequences. It is true that there has, over the past decade, been an increasing trend by cargo owners to refuse to contribute on the grounds that there was a failure to exercise due diligence to provide a seaworthy ship, but the Hamburg Rules will certainly strengthen the position of cargo owners.

17. It is obvious that the stowage of cargo on deck exposes the cargo to a greater risk of damage than if the cargo is stowed below deck. Under the Hamburg Rules, goods may be carried on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of a particular trade or if required by statutory rules or regulations (e.g. in res-

pect of dangerous and toxic cargos). The basis of the carrier's liability for the cargo loaded on deck is governed by the provision of para. 1 of Art. 5, with the result that the carrier is entitled to exempt himself from liability. However, if the carrier is not entitled to carry goods on deck, he loses the exemption defence, if the loss, damage or delay is caused solely because of the stowage on deck. Consequently, the mandatory regime provided by the Hamburg Rules is extended also to the liability of the carrier in respect of loss or damage to the goods, as well as to the delay in delivery.

18. Under the Hamburg Rules the carrier is entitled to limit his liability to an amount equivalent to 835 units of account or 835 special drawing right units per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher. These figures, converted into US dollars, are equivalent to US dollars 1.158 and US dollars 3.47 respectively.⁴ There are special lower limits in respect of the liability of the carrier for delay in delivery and according to the provisions of Art. 5, the liability for delay is limited to an amount equivalent to two and a half times the freight payable for the goods delayed under the contract of carriage.

19. The carrier loses the benefit of limitation of liability if it is proved that the loss, damage or delay in delivery resulted from an »act or omission of the carrier done with the intent to cause such loss, damage or delay or recklessly and with the knowledge that such loss, damage or delay would probably result.« This provision is the same wording as that found in the Visby Rules and in 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.

20. During the sessions of the Diplomatic Conference in Hamburg in March 1978, a lot of time was spent and many arguments were put forward as to whether the exemption of the so called Nautical fault should be abolished or not. This issue remained controversial in commentaries after the Conference and the following paragraphs set out some thoughts on the matter.

21. If the basis of responsibility of the sea carrier is compared to a standard concept of liability of the carrier in respect of other relevant modes of transport, then we should conclude that the benefit of the Nautical fault exemption should be abolished, particularly because of the advanced standards of automatic control and available navigational aids and permanent communications system which do not leave the master and the crew alone and helpless, after the ship has left the loading port, as was very often the case during the first half of our century.

22. Furthermore, from the legal point of view, the carrier should not enjoy a benefit of exoneration for faults, errors, omissions, in fact for negli-

⁴ Conversion rate as prevailing on 4 April 1988.

gence of any kind of the master and other crew members because they are professionals in the service of the carrier and acting within the scope of their employment, in fulfilment of the duties that should be performed properly, enabling the carrier to meet his contractual obligations. The carrier is free to select qualified, competent and diligent professionals. If they fail to perform their duties properly, even in the navigation and the management of the ship, it should be a risk to be met by the carrier, and consequently not shifted to those interested in the cargo.

23. However, if the problem is approached on the basis that the carriage of goods is the provision of a service for the transport of goods from one port or place to another, for which services the party ordering the same should pay, a conclusion is imposed per se (eo ipso) that the price of the relevant service should reflect the standard of service ordered and contracted for. The standard of service includes the nature of »quality« of the liability of the carrier. For a higher standard, including a stricter »quality« of liability a higher rate should be charged, whereas for a lower standard with less onerous liability on the carrier, a lower rate should be charged. In the context of the above economic reality, we wish to raise one aspect which is sometimes under-estimated. Namely, in the vast majority of cases, and in particular in cases of commercial operations, insurance is always, or almost always present, in the form of cargo insurance, on the cargo side, and in the form of insurance of the shipowner's responsibility on the carrier's side. In other words, the responsibility or risk is shifted from the cargo to the ship, which automatically means a shift from the cargo insurers to the insurers of the shipowner's liability. Because of the more restricted insurance cover,⁵ savings in cargo insurance premiums for more restricted risks, will be paid as increased freight to the carrier, who in turn is bound to buy wider cover for insurance of his liability. In view of the fact that shipping is a very dynamic industry, it may be assumed that a balance will be restored over a period of time and that everybody will continue to live happily,⁶ particularly if such a possibility is confirmed in practice.

24. Nevertheless it should not be disregarded that cargo insurers will lose a fraction of their portfolio in favour of the insurers of the carrier's/ /shipowner's liability, who will no doubt gain. We cannot afford to disregard the fact that the cargo insurance business has been developed in many states world wide including many of the developing countries.⁷ However, the insurance of the shipowner's liability has been virtually concentrated in a

⁵ Since cargo insurance cover will not be diminished even when and if the Hamburg Rules are in force, the advantage of the cargo insurers may be defined as a benefit recoverable by recourse against carriers.

⁶ The great majority share the view that there would be a higher increase in premiums for liability insurance than saving on the cargo insurance premium. Off. Records p. 233—275.

⁷ Prof. Tanikawa said: »The P and I insurance market was limited to a small number of countries, so that any increase in liability insurance costs could have an important influence on the national balance of payments, especially in the case of developing countries.« Off. Records, p. 235.

very few developed countries, and to the best of my knowledge no developing country has an independent insurance scheme of shipowner's liability accepted internationally.

25. The above deliberations are set out only to be of assistance in evaluating, together with many other aspects, in a more comprehensive way what changes will be introduced in the commercial community world wide as a result of substituting the Hamburg Rules for the system of liability as structured by the Hague-Visby Rules. We venture to say that it would be no general detrimental if the world moved towards the adoption of two different systems of liability concurrently, and I am pleased to quote the very impressive prediction voiced by our colleague Mr. Ramberg in the address on behalf of the CMI to the delegates of the Hamburg Diplomatic Conference in 1978.

»With respect to the future development of maritime law there are various possibilities. The Conference might be a complete success, as the CMI sincerely hopes, and a draft Convention might be adopted which would effectively replace the Hague Rules. If the Conference did not succeed, however, it would be better for it to be a total failure rather than a partial success, since partial success would lead to a situation in which some countries would be applying the Hague Rules, some the 1968 Protocol, others the UN Convention and still others none of those instruments. The end result would be a chaotic situation from which only lawyers would profit.«

We do not hesitate to associate ourselves with the statement made in Hamburg by Mr. Ramberg ten years ago, because the voice, in the same tenor, is still fresh and valid. The world has the Hamburg Rules but they are not yet in force. We are not convinced that once the Hamburg Rules come into force, achieving the twenty ratifications, that a quick departure from the Hague Rules and the Hague-Visby Rules will be imminent.

Sažetak:

ODREDBE O BRODAROVOJ ODGOVORNOSTI PREMA HAMBURŠKIM PRAVILIMA

Autor u članku, nakon kratkog povijesnog pregleda nastanka Hamburških pravila, iznosi osnovne razlike između Hamburških pravila i Haških pravila. U nastavku članka analizira pojedine članove Hamburških pravila (npr. čl. 4,5,6,7) kojima se regulira odgovornost broдача, ističući novine koje Konvencija sadrži, ali također argumentirano ukazujući što to može značiti za brođare. Članak završava tvrdnjom da bi, općenito uzevši, bilo porazno ako bi se međunarodnopravno ustalila dva bitno različita pravna režima, a to znači režim Hamburških pravila u nekim državama, a režim Haških pravila u ostalim državama. Autor ističe da dosadašnje iskustvo pokazuje kako Hamburška pravila neće, i ako steknu dovoljan broj ratifikacija za stupanje na snagu, tako brzo u većoj mjeri zamijeniti pravni režim odgovornosti broдача utvrđen Haškim pravilima.

⁸ Professor Ramberg, Off. Records, p. 233/234.