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## Contracts of carriage and bills of lading

# The Hague Visby Rules

### What are they?

The Hague/Hague Visby Rules are a mandatory framework of rights and obligations that apply to the carriage of goods by sea. Outside of this basic framework the parties to a contract of carriage are free to negotiate additional terms as they wish<sup>1</sup>. The Hague rules were brought into English law by the Carriage of Goods by Sea Act 1924 and were subsequently updated by the Carriage of Goods by Sea Act 1971 which brought into force the Hague Visby Rules. Unless stated, this publication will focus on the application of the Hague Visby Rules.

### Why do we have them?

Before the Hague Rules were introduced, parties to a contract of affreightment had freedom to negotiate whatever terms they wanted. This often led to wide-reaching exclusions of liability by sea carriers who could take advantage of their stronger bargaining position. The shipping industry therefore needed a set of codified rules to ensure a fairer system which both defined the rights and obligations of the parties and specified maximum exclusions of liability.

### Which contracts are covered?

Art I (b) states that the Rules are applicable 'only to contracts of carriage covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by sea'.

Therefore, the Rules will not apply to waybills or other non-negotiable documents as they are not documents of title. Nor will they apply to bills of lading issued under charterparties as the terms of the contract will be found in the charter itself<sup>2</sup>. The Rules also do not apply to

charterparties themselves unless specifically incorporated in a clause paramount.

So what contracts of carriage do the Rules apply to?

They will apply to bills of lading operating as a document of title ie an 'order' bill. Goods under an 'order' bill must be delivered to the person directed by the consignee and this will usually be done by way of an indorsement on the bill itself.

The Rules will also apply to straight bills of lading ie bills which are made out to a named consignee even though straight bills of lading are not negotiable documents of title<sup>3</sup>.

### Which voyages are covered?

Art X of the Hague Visby Rules states that they will apply to every bill of lading if:

- the bill of lading is issued in a contracting state
- the carriage is from a port in a contracting state
- the contract contained in or evidenced by the bill of lading provides that these Rules, or legislation of any State giving effect to them, are to govern the contract.

In practice, the Rules are usually expressly incorporated by way of a clause paramount on the reverse side of the bill of lading, although attention must be paid to the exact wording used.

- Subject to Art III Rule 8 which provides that any attempt to dilute the liability set out in the Rules will be null and void.
- The Rules will though apply once the bill has been transferred to a third party and the bill becomes the contract between the carrier and the lawful holder of the same.
- The Rafeala S* [2005] 1 Lloyd's Rep. 347.



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### Carrier's obligations: 1. Obligation to provide a seaworthy ship

Art III (1) states that a carrier must exercise due diligence before and at the beginning of the voyage to make the ship seaworthy, to properly man and supply the ship, and to ensure the holds are fit to receive the goods.

The obligation to carry out due diligence to make the ship seaworthy arises only during loading and before the commencement of the voyage; it is not a continuing obligation and the carrier will not be responsible for defects which develop during the voyage. Due diligence has been interpreted by the courts as equivalent to the common law duty of care and the duty cannot be delegated<sup>4</sup>.

#### Burden of proof

The burden of proving that due diligence has been exercised is on the carrier, but only arises after the claimant has first established that the ship was unseaworthy and that this breach of duty caused the loss<sup>5</sup>. This can often cause difficulty to a claimant because the carrier is usually the party with full access to the facts, but, on the other hand, the courts have shown a willingness to give the claimant the benefit of the doubt. For example the presence of seawater in the holds is often treated as prima facie evidence of unseaworthiness in cargo claims.

### Carrier's obligations: 2. Care of cargo

Art III (2) states that the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods delivered.

The standard imposed is equivalent to that of 'reasonable care' and the goods must be carried in accordance with a sound system<sup>6</sup>. The obligation to care for the cargo is continuous and runs from 'tackle to tackle' ie from the commencement of loading to the completion of discharge, but often the obligation to load and discharge the cargo is transferred to the shipper/consignee if the charterparty terms are properly incorporated.

#### Burden of proof

The carrier's obligation to care for the cargo is made expressly subject to the defences listed in Art IV (2). These are discussed further below, but the general position is that once the cargo owner has shown that the goods were damaged during the voyage, the burden of proof will be on the carrier to bring the cause of the damage within one of the exceptions listed in Art IV (2) (a) – (p)<sup>7</sup> or show that there was no breach of the carrier's duty to care for the cargo.

### Exceptions to liability

Art IV (2) lists seventeen exceptions which a carrier can rely on when faced with a claim. These exceptions build upon the four common law exceptions applicable to every carriage: act of God, Queen's enemies, inherent vice and a general average sacrifice.

The Rules also include three unique exemptions which cannot be found in any other convention:

- 1) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship
- 2) Fire, unless caused by the actual fault or privity of the carrier
- 3) The catch-all exception.

Although this may seem like an extensive list, a carrier will not be able to rely on a listed exception if:

- a) the peril could have been avoided by exercise of reasonable care
- b) the operative cause of the loss was the unseaworthiness of the vessel
- c) there has been a fundamental breach of the contract of carriage.

### Limitation of liability

Carriers can limit their liability for cargo damage under the Rules in order to protect themselves from the risks associated with high-value goods of undisclosed value.

Art IV (5) of the Hague Rules limited the liability of the carrier to £100 gold value per package or unit. The Hague Visby Rules retained the concept of 'package or unit' for limitation of individual items of cargo, but also introduced an alternative formula based on the weight of the cargo.

The monetary unit of limitation (special drawing right) is defined by the International Monetary Fund as 666.67 units of account per package or unit or 2 units of account per kilo of the gross weight of the goods lost or damaged, whichever is higher.

<sup>4</sup> *The Muncaster Castle* [1961] 1 Lloyd's Rep 57.

<sup>5</sup> See Scrutton on Charterparties p 399.

<sup>6</sup> *Albacora v Westcott and Laurance Line* [1966] 2 Lloyd's Rep 53.

<sup>7</sup> Art IV (2) (q) also allows a carrier to avoid liability if the loss occurred 'without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier'.



### Time bar

Art III (6) of the Rules states that any claim in respect of the goods carried will be time barred unless proceedings have been commenced within one year of their delivery, or the date when they should have been delivered. This is one of the first points to check when notified of a claim as it will provide the carrier with an absolute defence to the claim.

### Applicability to charterparties

If incorporated, the common law obligation to provide a seaworthy ship is replaced by the duty to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage. A shipowner will also be able to rely on the wide range of defences listed in Art IV in respect of any of the duties they are expected to perform under the charterparty.

A shipowner will be able to rely on the one year time bar in respect of claims linked to the goods carried. If the claim is not linked to the goods, for example a claim for lost freight, it is unlikely that the time bar will be applicable.

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