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Dissertation for the Degree of Master of Laws

A Comparative Study on
the Liability of the Carrier
between the Korean Maritime Law
and the South African Maritime Law

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February 2016

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국문초록

대한민국과 남아프리카공화국은 지속적으로 좋은 관계를 맺어오고 있다. 지리적으로는 남아프리카공화국은 아시아와 유럽을 잇는 장소에 위치하고 있기 때문에 남아프리카공화국을 통한 많은 해상운송이 이루어지고 있다. 경제적으로 남아프리카공화국은 아프리카에 있는 국가들 중에서 대한민국의 가장 큰 무역 파트너인 국가이며 대한민국에서 남아프리카공화국에서 생산되는 광물들을 수입하고 대한민국에서는 이를 통한 제조품을 생산하여 남아프리카공화국으로 수출하고 있다. 이렇게 남아프리카공화국과 대한민국 간에 교류는 활발히 진행되고 있지만, 해상운송에 관해서는 두 국가 간 다른 법률이 적용되고 있다. 그러므로 본 논문에서는 대한민국과 남아프리카공화국에 적용되고 있는 해상운송에서 중요한 여러 국제규범과 각 국가의 국내법에 대해 논하고 이에 대한 보완책을 제안하고자 한다.

이와 관련하여 본 논문은 다음과 같이 구성되어 있다.

제1장에서는 남아프리카와 한국간의 관계에 대해 간략히 설명하고 해상운송인의 책임을 연구하기 위한 목적과 그 연구범위 및 방법에 대해서 서술하였다.

제2장에서는 해상운송인의 책임에 대해 규정한 국제규범을 살펴보고자 한다. 또한 한국의 해상법과 남아프리카공화국의 해상법에 대해 각각 포괄적으로 살펴보고 규범 간에 차이를 연구하고자 한다.

제3장에서는 해상운송인이 가진 책임의 제한에 대해 논해보고자 한다. 국제규범에서 명시한 사항과 한국의 해상법과 남아프리카 공화국의 해상법 상 기술된 규정에 따라 어떠한 차이가 있는지 비교하여 분석하였다.

제4장에서는 본 논문의 결론으로서 각 장의 내용을 요약하여 정리하였다. 이에 더하여 상기한 내용에 따른 제안을 함께 제시하였다.

이 연구는 국제규범과 각 국가의 국내법의 내용을 비교하여 분석하는 비교법적인 연구방법을 사용하였고 관련 사항에 대해서 각 규범들의 내용에 기초하여 해석하였다.



CHAPTER I INTRODUCTION

HISTORY

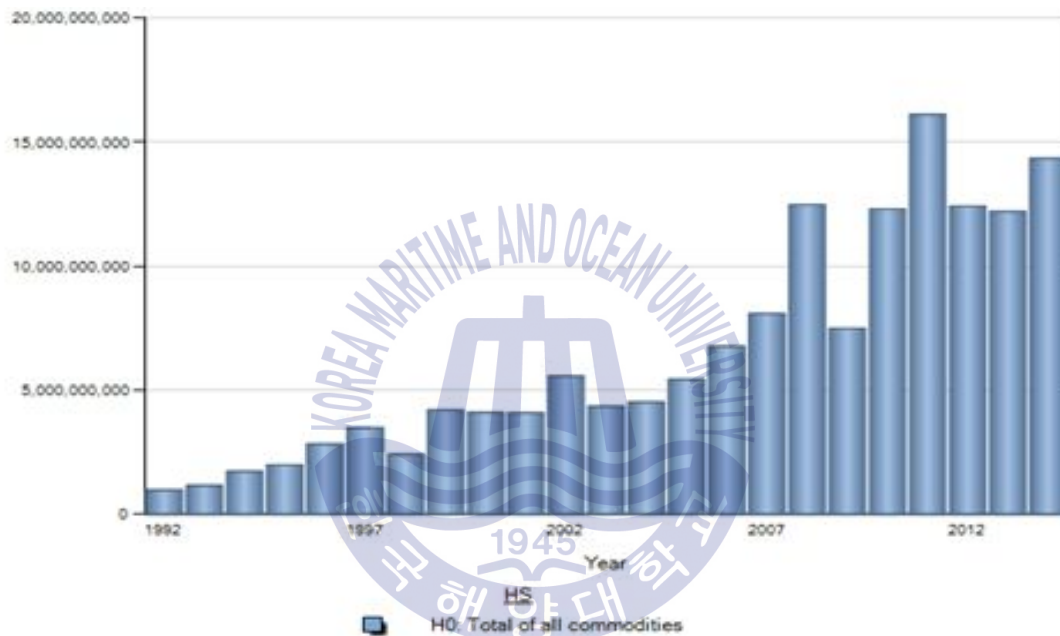


Fig. 1 THE RELATIONSHIP BETWEEN THE RSA TO THE REPUBLIC OF KOREA IN ZAR¹⁾

South Korea and South Africa have a good relationship. Politically, South Korea has always had fairly friendly relations with South Africa as South Africa had dispatched troops to South Korea during the Korean War (one Air Force squadron of 826 soldiers dispatched with 24 of them killed in action), but formal ties were severed after 1978 when South Korea joined the UN sanctions against the African nation for its racial discrimination policies. As the white-ruled South African government abolished its policies of racial segregation in 1990, both nations began to seek ways to improve their

1) <http://tradestats.thedti.gov.za/TableViewer/chartView.aspx>, taken on 25/03/2015

ties, eventually signing an agreement to establish diplomatic relations in December 1992.

Since that time, mutual visits have been made at the head-of-state level. South Africa elected a black majority government in May 1994 through its first all-race democratic election. Its first black president, Nelson Mandela, made an official visit to South Korea in July 1995. South African President Jacob Zuma visited South Korea twice during his tenure, first for the G20 Seoul Summit in November 2010 and then for the Nuclear Security Summit in March 2012. South Korean President Lee Myung-Bak visited the African nation for the IOC General Assembly in Durban in July 2011. From the establishment of formal diplomatic ties through 2014, eight rounds of political consultations were held at the level of deputy foreign minister. At the 8th political consultation held in Seoul in October 2014, the two nations agreed to enhance their relations into a strategic partnership and to hold a foreign-minister level joint committee meeting in 2015.

With regard to Economic and trade relations, the diplomatic ties were established between the two nations in December 1992 has brought about an increase in the volume of trade between them each year. It reached 3 billion dollars in 2006, hit the record high of 5.35 billion dollars in 2011, and has remained significant at the level of 3 billion dollars since then. South Korea had traditionally operated a deficit in its trade with South Africa due to mineral imports from the African nation. However, the situation has improved thanks to the strong performance of Korean manufacturers (including automakers and mobile phone makers), and it saw its deficit turn into a surplus in 2012.

Given that the two nations have economic structures which are supplementary, efforts should be made to strengthen South Korea's economic ties with South Africa through encouraging South Korean companies to invest in the nation. South Africa has rich underground resources and is the largest industrial nation in Africa. From a mid- to long-term perspective, there is great potential for further economic and

trade cooperation.

Table 1 - (a) Trade status

(Unit: USD 100 mn)

Classification	2010	2011	2012	2013	2014
Total trade volume	39.4	53.62	43.17	44.27	31
Export	16.68	22.56	21.88	26.98	14.76
Import	22.72	31.06	21.29	17.29	16.24
Balance	-6.04	-8.5	0.59	9.69	-1.48

* Source: WTO

South Africa is South Korea's largest trading partner in Africa. The key export items are automobiles, mobile phones, synthetic resin, heavy construction equipment, diesel fuel, and lubricant. South Korea imports natural resources including mineral resources from South Africa and the key import items include platinum, alloy iron, iron ore, aluminum ingot, bronze ingot, and bituminous coal.

South Korea has also made investments in South Africa. Herewith follows the annual direct investment by South Korean companies:

Table 1 - (b)

(Unit: USD 1,000)

Year	2009	2010	2011	2012	2013	2014	Total
Investment reported	825	16,673	32,203	75,365	5,753	4,912	304,851
Investment made	94	16,896	31,504	32,806	3,365	1,983	355,496

* Source: The Export-Import Bank of Korea

About 20 South Korean companies are running branch offices in South Africa, including Korea Trade Promotion Corporation (KOTRA), Korea Resources Corporation (KRC), Korea Electric Power Corporation, Daewoo International, Samsung Electronics, LG Electronics, Samsung C&T, M-TEK, Hyundai Motor, CHEIL, POSCHROME, Daewoo E&C, and Hyundai E&C.

Lastly, the two countries have also reached agreements and treaties between themselves as nations:

- Double Taxation Treaty: signed in July 1995 and entered into force on January 7, 1996
- Aviation Treaty: signed in July 1995 and entered into force on July 7, 1995
- Investment Promotion and Protection Agreement: signed in July 1995 and entered into force on June 6, 1997
- Science and Technology Cooperation Agreement: signed in February 2004 and entered into force on August 31, 2004
- Nuclear Cooperation Agreement: signed in October 2010 and entered into force on February 24, 2011
- Extradition Treaty: signed in May 2007 and entered into force on June 20, 2014
- Treaty on Mutual Assistance in Criminal Matters: signed in May 2007 and entered into force on June 20, 2014
- Cultural Cooperation Agreement: formal draft agreed on in June 2013
- Customs Mutual Assistance Agreement: formal draft agreed on in August 2013.²⁾

As it stands in modern society South Korea is known for its maritime traffic, especially compared to the third richest country in Africa, South Africa. It is clearly depicted from the graphs hereunder that there is a lot to learn from South Korea compared to the traffic handled in the waters of the Cape of Good Hope.

2) <http://zaf.mofa.go.kr/english/af/zaf/bilateral/bilateral/index.jsp>, taken on 13/04/2015.

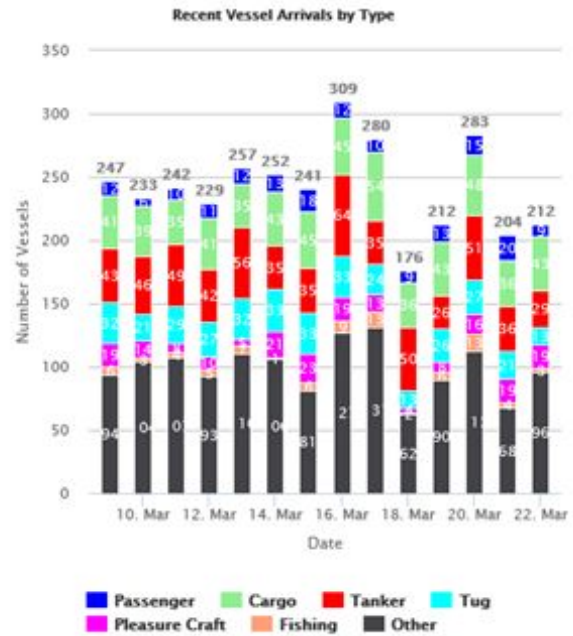
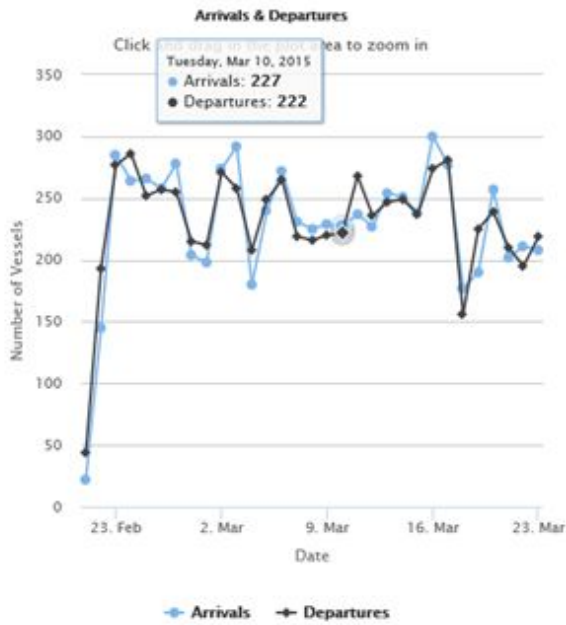


Fig. 2 - (a) Port of Busan, Republic of Korea, March 2015.³⁾

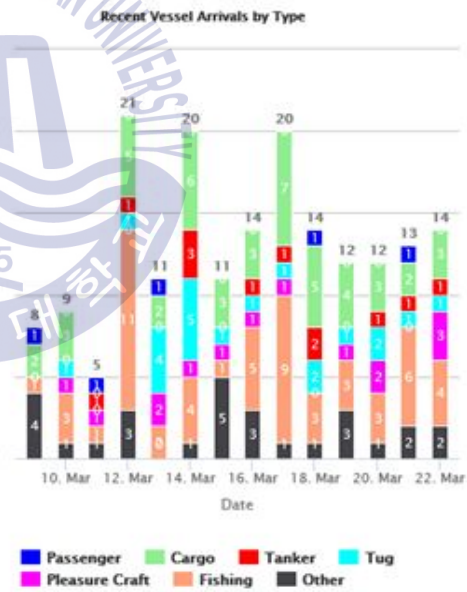
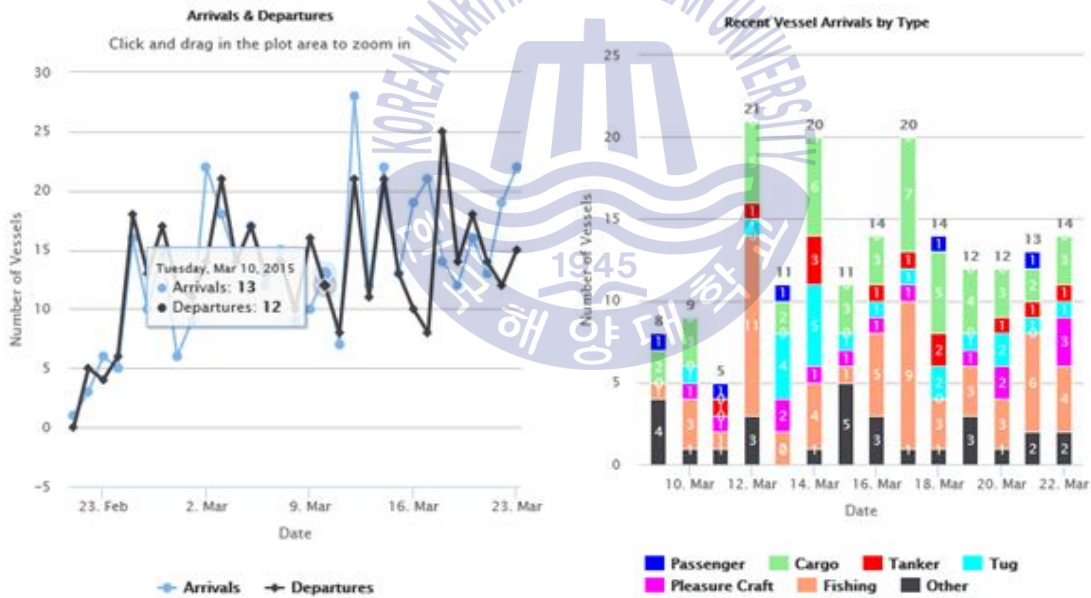


Fig. 2 - (b) Port of Cape Town, The Republic of South Africa, March 2015.⁴⁾

This was not always the case.

- 3) http://www.marinetraffic.com/en/ais/details/ports/793/Korea_port:BUSAN, taken on 23/03/2015.
- 4) http://www.marinetraffic.com/en/ais/details/ports/166/South%20Africa_port:CAPE%20TOWN, taken on 23/03/2015.

South Africa played a big role in the Dutch East India Company of the 17th Century. The Dutch East India Company (VOC; Verenigde Oost-indische Compagnie), founded in 1602, is often considered as the first true multinational corporation. From the 17th to the 18th century trading companies such as VOC (and its British counterpart; the East India Trading Company) acted on behalf of European governments in Asia. As joint stock companies they were private mercantilist tools with a guaranteed trade monopoly in exchange of rights paid to their respective governments. They were almost states by themselves with their own ships (military and merchant) and military forces. Their initial goal was to develop trade links for prized commodities such as pepper and as time progressed they became increasingly involved in the control and development of their respective territories. In 1610, VOC gained a foothold in Batavia (Indonesia / Dutch East Indies) and conquered most of the island of Ceylon (Sri Lanka) by 1640, establishing the stronghold of Galle. The major trading hub of Malacca was taken from the Portuguese in 1641. By the mid seventeenth century VOC has replaced most local trading networks with their own with a series of fortified trading posts. Cape Town (South Africa) was also founded in 1652 as a crucial stage for the long Europe-Asia voyage.⁵⁾

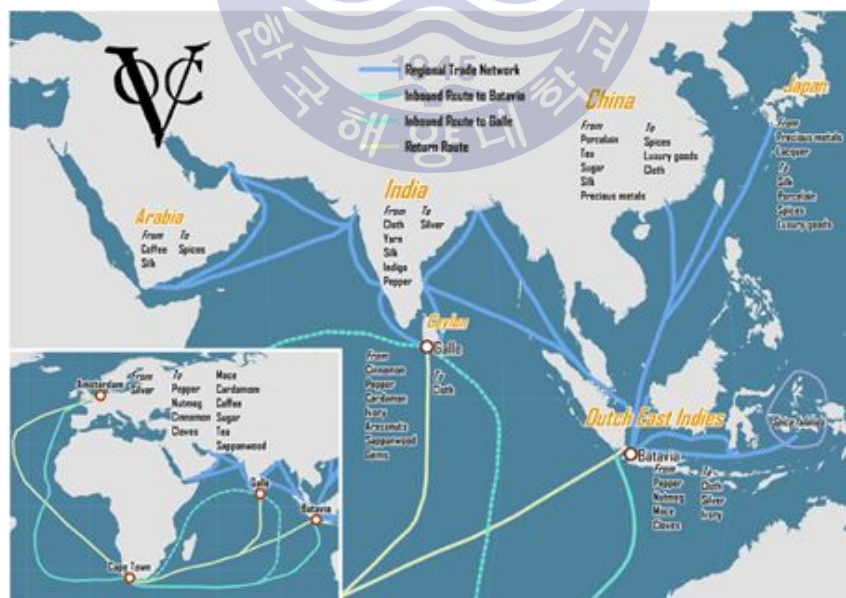


Fig. 3

5) https://people.hofstra.edu/geotrans/eng/ch2en/conc2en/map_VOC_Trade_Network.html, taken on 25/03/2015

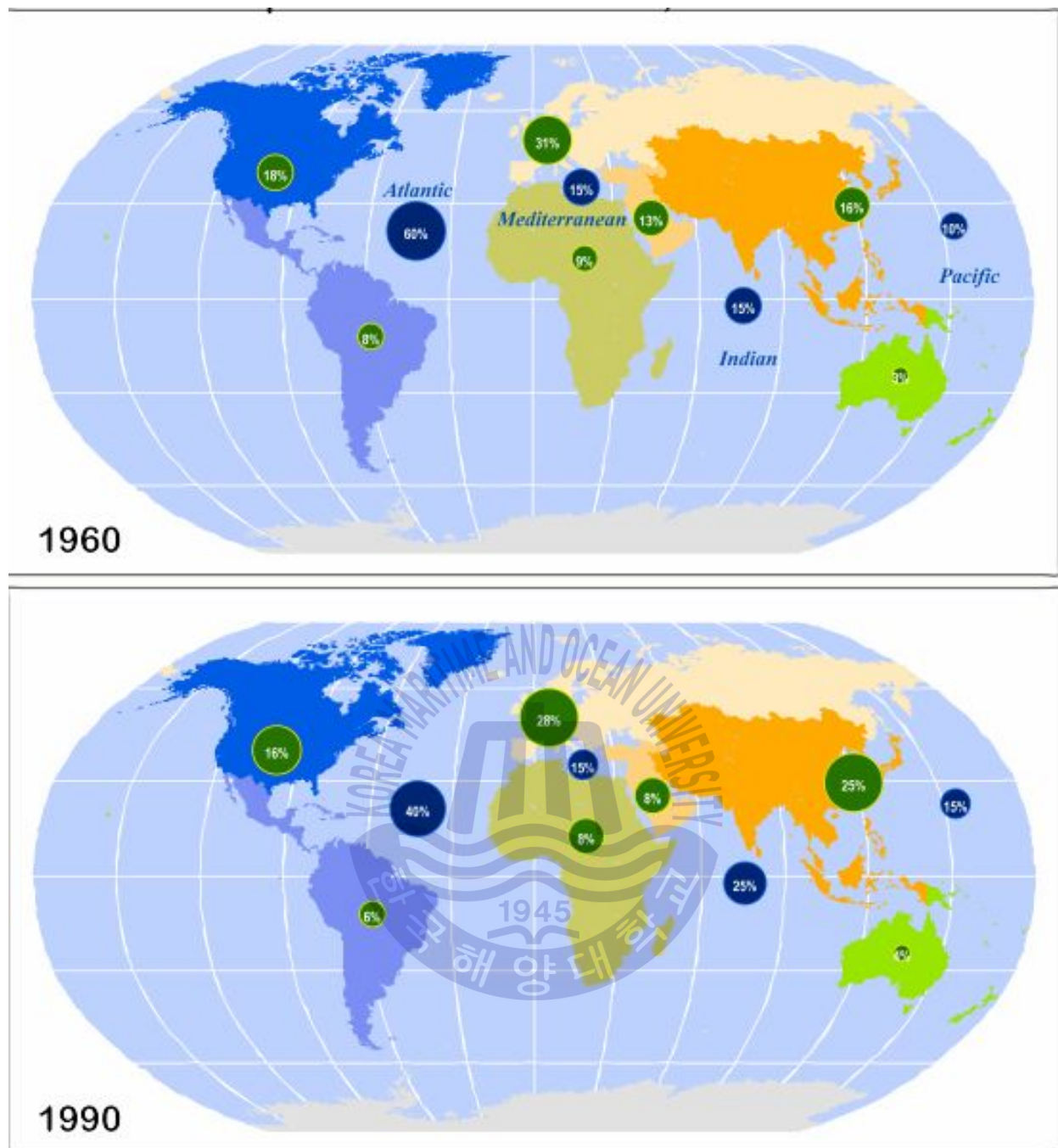


Fig. 4 The traffic in Asia started to bloom much later into the 20th Century.⁶⁾

The two above figures demonstrate the evolution of the maritime traffic tonnage between 1960 and 1990. Several trends can be identified. The share of Europe and North America (via the Atlantic) has shown a relative decline. On one hand, Asian maritime trade was growing strongly and on the other, economic integration (ALENA and EU) increased the intra-continental exchanges that generally occur by

6) https://people.hofstra.edu/geotrans/eng/ch2en/conc2en/map_VOC_Trade_Network.html, taken on 25/03/2015.

land transport. Pacific Asian countries knew an important increase of their relative share of the maritime traffic. The industrial activities of Japan, South Korea, and Taiwan require an increasing quantity of oil products (from the Middle East and Southeast Asia), of iron ore (Australia) and coal (Canada and United States).⁷⁾

REASONS FOR CHOOSING DIFFERENT CONVENTIONS AND COUNTRIES

With the gravity of this sort of trade and traffic by countries each of their own beliefs and customs, the need for universal codification is quite obvious especially now where we have no geographical barriers to international trade, more specifically by sea, and the vessels being used are highly modernized. This constant transacting and the development of new business relationships affect the parties which are subjected to the application of different laws.

Therefore, in order to enable uniformity within the legal regulation of international carriage of goods, several international conventions were developed and adopted by the international community. It is important to compare the carrier's liability between the different conventions and national laws. Thus, in this paper aim will be placed on initially providing a comprehensive explanation of the international instruments currently governing the international carriage of goods by sea, especially regarding the carrier's liability as well as the package limitation. In view of the abovementioned background, I am of the opinion that it is important to compare and study the carrier's liability which has international significance.

In relation to the international conventions, the focus will be placed on Hague/Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. In relation to national laws, I have chosen the South African maritime legal instruments in place as well as those of South Korea, on the carrier's liability and the limitation of liability in society as we know it today. I have chosen these national maritime laws because of the trade relationship and the shared history of these two countries as depicted in my discussion under Chapter I. Secondly, they all have perfect legal systems especially relating to maritime law. Furthermore, another compelling reason is because of the close personal relationship that I have with

7) <https://people.hofstra.edu/geotrans/eng/ch3en/conc3en/maritime6090.html>, taken on 25/03/2015.

both these countries and will incorporate them in my future as an international legal practitioner.



CHAPTER II OVERVIEW OF THE CARRIER' S LIABILITY

2.1 THE CARRIER' S OBLIGATIONS EXPLAINED

Liabilities are resulting from the breach of obligations and basic obligations of the carrier' s liabilities are always linked with obligations. Therefore, in order to study the carrier' s liability, it is essential to understand the prescribed obligation with regard to the carrier in different international conventions. As a rule of thumb, the carrier has an obligation to exercise due diligence as to seaworthiness of his vessel. This obligation is one of the most fundamental obligations for the carrier.

What is meant by the carrier' s obligation to provide a seaworthy ship has been referred to in many cases. Thus, in one of the leading cases it is said that a seaworthy vessel is one which is "fit to meet and undergo the perils of sea and other incidental risks to which of necessity she must be exposed in the course of a voyage."⁸⁾ More specifically the carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to make and keep the ship seaworthy; properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.⁹⁾ The above provision is taken from The Rotterdam Rules and bares similarity to that in The Hague Rules and The Hague-Visby Rules, but the duration varies between them. The Hague Rules only

8) Stephen Girvin, *Carriage of Goods by Sea*, New York: Oxford University Press, 2007, p.296.

9) Article 14 of the Rotterdam Rules

obliges the carrier to exercise due diligence to make the ship seaworthy before and at beginning of the voyage. Under the Rotterdam Rules, however, the duration extends to the entire voyage, also referred to as door-to-door.

Closely following the obligation to make the vessel seaworthy is that of care in respect of carried Goods. In terms of The Hague Rules and The Hague Visby Rules, “the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.”¹⁰⁾ This is nearly identical that of the Rotterdam rules providing that “the carrier shall during the period of its responsibility (…), properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.”¹¹⁾ This is the obligation of care of cargo. This provision of the Rules is of central importance. If there is no issue as to the unseaworthiness of the vessel, but the goods have arrived in a damaged condition or have been short delivered, there will be a prima facie breach of the obligation of care of cargo and the carrier will be liable unless he can establish a defense under exception from liability clauses. It will be noted that the carrier’s obligation of care of cargo must be exercised “properly and carefully“. Furthermore, compared with The Hague Rules and The Hague-Visby Rules, the Rotterdam Rules add to the carrier’s obligations in as far as he has the duty to receive and deliver, which increases and extends the obligations of the carrier.

Another obligation to discuss is the Obligation to issue Bills of Lading. A bill of lading is a very important in that it is not only a formal receipt for the goods shipped and evidence of the contract of carriage of goods by sea, but also a document of title. The Hague-Visby rules provide that “(a)fter receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things……”¹²⁾ In terms of the Rotterdam Rules, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper’s

10) paragraph 2 of Article 3

11) Article 13.1 of the Rotterdam Rules

12) paragraph 3 of Article 3 of The Hague-Visby Rules

option: a non-negotiable transport document or a non-negotiable electronic transport record; or an appropriate negotiable transport document or a negotiable electronic transport record. ¹³⁾

This indicates a variation once again in the obligations as set out by international conventions. The Hague Rules and The Hague-Visby Rules provide that the shipper can ask the carrier to issue a bill of lading, and as such there is no obligation on the part of the carrier to issue such a bill of lading unless requested to do so by the shipper. This provision is different from that of the Rotterdam Rules which provides that once the goods were delivered to the carrier for shipment, the carrier shall issue the bill of lading to the shipper. The demand of the shipper is no longer a condition for the carrier to perform such obligation.

Last but not least is the obligation as to unreasonable deviation. According to paragraph 4 of Article 4 of The Hague-Visby Rules any reasonable deviation, meaning any deviation in saving or attempting to save a life or property at sea, shall not be deemed to be an infringement or breach of the contract of carriage. As a consequence, the carrier shall not be liable for any loss or damage resulting therefrom. These aforesaid provisions do not disturb the existing common law principles on deviation. Indeed, the provision recognizes the well-known liberty of “saving or attempting to save life”. Extended protection is given to shipowners with reference to deviations to save lives and property; and other reasonable deviations. These extensions are potentially of great significance.¹⁴⁾ However, it is very difficult to interpret the phrase “any reasonable deviation”.

2.2 INTRODUCING THE CARRIER’S LIABILITY UNDER INTERNATIONAL CONVENTIONS

As regards the basis of the liability of the carrier, although the basis is fault under all Rules, there are significant differences between them in respect of the exceptions to the general rule that fault entails liability and of the allocation of the burden of proof. But first, in order to fully understand the particularities of the

13) Article 35 of the Rotterdam Rules

14) Supra note 8, at 343.

current regime of liability being applied to the international carriage of goods by sea, it is important to look back on the production of the first documents and see how they evolved according to the transformations that occurred throughout the years in the transport industry, as an attempt to follow such changes and produce updated conventions in modern society to fit the shipping practice.

Initially, it should be considered that at the very beginning, carriage was conducted by wooden ships, propelled by sails or oars, which were extremely vulnerable to maritime risks and perils. This is completely opposed to nowadays reality of giant vessels supplied with navigation equipment of high technology. Thus, following such evolution in the ship building technology, during the nineteenth century the shipowners became more economically powerful to the extent that their fleet of vessels became larger and more efficient. By the early twentieth century, England was indeed a powerful nation and it was then a major shipowner nation, as it possessed the largest merchant fleet in the world. At that time, there was no freedom of contract in the bills of lading whose terms were usually dictated by the shipowners.¹⁵⁾

As a consequence, English shipowners were entailed in such a stronger position that they were able to profit from such a privileged situation which enabled the increase in the introduction of exemption clauses in its bills of lading. In this sense, the economical imbalanced situation between carriers and shippers was so absurd that only the exact words used by this author were able to dictate the situation, as ‘in the course of time, the number of exemption clauses increased so much that he had almost no duty other than the collection of freight.’¹⁶⁾

Besides, the English shipping companies also started to insert English choice-of-law and choice-of-forum clauses in their bills of lading, as to ensure that the English courts would be most competent to decide any dispute arising out of the bill of lading, consequently English law and its provisions in favour of

15) A Diamond, ‘The Hague-Visby Rules’, (1978) LMCLQ 225, 227

16) H Karan, The carrier’s liability under international maritime conventions: The Hague, Hague-Visby and Hamburg Rules (Edwin Mellen Press, Lewiston 2004,) 13

shipowners would be applied.

The American shippers extremely revolted with the unfair situation established due to the abusive control exercised by the English carriers then produced the US Harter Act, a national statute passed in 1893 by the US Senate, after several amendments.

The US initiative influenced several other countries to adopt a national legislation based on the Harter Act. In this sense, Canada passed in 1910 the Canadian Water Carriage of Goods Act which was drafted in accordance with the style of the American Act, followed by other countries such as Australia, Morocco and New Zealand, Denmark, Finland, France, Iceland, the Netherlands, Norway, South Africa, Spain and Sweden which also contemplated Harter-style legislation.

However, as different statutes about carriage of goods by sea were spreading all over the world, there was a need of uniformity in order to avoid different outcomes in claims as local rules had local effects and applied only to domestic and outward shipments, whilst inward shipments were governed by English law in favour of the carrier. With this regard, between May and June 1921, the Maritime Law Committee of the International Law Association, prepared a draft of what later became an international convention on the carriage of goods by sea matter, which was based on the US Harter Act and also on the Canadian Carriage of Goods by Sea Act, despite the express objections from English carriers as to these law being utilised as a model.

Thereafter, this same draft was accepted by the members of the International Law Association in a Conference held at The Hague, in Netherlands, in September 1921, hence the reason why this document was then registered under the name of the 'pre-Hague Rules 1921' .

Afterwards, in October 1922, the London Conference of the Maritime Law Committee of the International Law Association prepared a draft based on the final changes introduced to the pre-Hague Rules, and turned it into the shape of mandatory legislation that could consequently be accepted by a diplomatic conference. To this effect, the 'International Convention for the Unification of

Certain Rules of Law relating to Bills of Lading' was signed in 25th of August 1924, in a diplomatic conference at Brussels and came into effect in June, 1931.

Curiously, although they are normally called The Hague Rules, said instrument is also referred to as the Brussels Convention 1924 as they were adopted by a diplomatic convention held at Brussels. The Hague Rules represented the first attempt by the international community to find a workable and uniform means of dealing with the problem of shipowners regularly excluding themselves from all liability for loss or damage of cargo. The objective of The Hague Rules was to establish a minimum mandatory liability of carriers which could be strayed from.

Additionally, it is considered that The Hague Rules formed the basis of national legislation in almost all of the world's major trading nations, and probably cover more than ninety percent of world trade. The Hague Rules have been updated by two protocols, but neither of them readdressed the basic liability provisions originally settled, which remain unchanged.

Amongst one of the main purposes for the creation of The Hague Rules was to guarantee that, by establishing a minimum amount of limitation of liability per package or unit, the shipowners would be prevented of inserting clauses in their bills of lading purporting to limit liability to absurdly low figures.¹⁷⁾ But it was also developed within the aim to create rules of general application, so that the rights and liabilities of shipowners and the rights of the cargo owners respectively would be subjected to standard rules in different jurisdictions, before a dispute related to the contract of carriage could possibly arise.¹⁸⁾

A fun fact about The Hague Rules are that they are proudly enacted into South African legislation, and mainly based on the previous Harter Act of 1893. Whatever its sources were, the truth is that Hague Rules are a remarkable document for two main reasons, firstly for standardising important terms of bills of lading, secondly because it was able to solve the issue of imbalance which had been claimed between ship and cargo owners relating to the losses or damages to cargo during

17) Supra not 16, at 228

18) W Payne and E R H Ivamy, Payne & Ivamy's Carriage of goods by sea (13th ed, Butterworths, London 1989)

the voyage.

But the painful truth is that times constantly change. Therefore, as a result of modernization causing confusion and controversy, it was recognised that the Rules caused such problems due to its insufficient language. This had the consequence of the evolution of the shipping industry as there was a need to update and improve The Hague Rules provisions.

However, the provisions under The Hague Rules did not have ‘the force of law’¹⁹⁾ and were held in *Vita Food Products Inc. v Unus Shipping Co Ltd*,²⁰⁾ to have effect more by agreement than law in the absence of a paramount clause,²¹⁾ and still permitted exceptions from liability that favoured the carriers when sued under the contract of carriage.²²⁾ Also, litigations,²³⁾ and the provisions with regard to package limitations were considered commercially unrealistic,²⁴⁾ due to inflation and developments in the sea transport industry such as the use of containers in carriage, which rendered the provisions of The Hague Rules inconsistent with the realities of transactions. The provisions of The Hague Rules did not cover acts by servants or agents of the carrier amongst other shortcomings, thus leading to the enactment of The Hague-Visby Rules in 1968, to correct the shortcomings of The Hague Rules. In this sense, approximately thirty years after The Hague Rules were signed, the revisions over the original provisions

19) *The Morviken* [1982] 1 Lloyd's Rep 325 328, where Lord Denning MR explained the meaning of “the force of law”: “In my opinion it means that, in all Courts of the United Kingdom, the provisions of the rules are to be given the coercive force of law. So much so that, in every case properly brought before the Courts of the United Kingdom, the rules are to be given supremacy over every other provision of the bill of lading. If there is anything elsewhere in the bill of lading which is inconsistent with the rules or which derogates from the effect of them, it is to be rejected. There is to be no contracting-out of the rules.” In Tetley “The Hague Visby Rules commentary” McGill University 9 <http://tetley.law.mcgill.ca/>.

20) [1939] AC 277

21) Todd, *Cases and Materials*, 516.

22) Lord Goff “Commercial Contracts and the Commercial Court” 1984 LMCLQ 382 396 in Todd *Cases and Materials* 501.

23) *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co (The Muncaster Castle)* [1962] AC 446 in Todd *Cases and Materials* 521

24) Pravin 2011

<http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html>, taken on 02/04/2015

were ratified at Brussels under the name of the ‘Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to bills of lading signed at Brussels on 25th August 1924’ , which was called the Visby Protocol.

This Protocol and The Hague Rules would be read together as one single instrument, consequently the so called Hague-Visby Rules, which was brought into force on June 1977 after the tenth state acceded to it. However, the international regime of liability in force at that time was still subjected to changes, as the modifications to The Hague Rules effected by the Brussels Protocol in 1968 did not gain universal approval.²⁵⁾

As a result, a new Convention started to be drafted and consequently adopted at an international conference sponsored by the United Nations in Hamburg, in March 1978.²⁶⁾ The new convention was then referred to as ‘Hamburg Rules’ was drafted based on arguments raised by cargo interests and amongst all their claims were one of the most important, which is the request for the carrier’ s liability to be based exclusively on fault as well as he should be liable without exception for losses or damages resulting of his fault or from his servants.

In this sense, the Hamburg Rules introduced several changes in the previous international regime of liability established by Hague and Hague-Visby Rules. A strict liability was then imposed to the carrier and the long list of exceptions contained in Hague and Hague-Visby Rules were excluded from these rules’ provisions. Moreover, it included a new kind of liability, which relates to any loss caused due to the delay in delivery of the cargo, and a considerable increase of twenty-five percent on the carrier’ s liability considering that the new limitation amount is equivalent to 835 units of account per package or 2,5 units of account per kilogram.

Finally, all the aforementioned development of international conventions contain provisions as to the sea carrier’ s liability which constitutes the current

25) J F Wilson, Carriage of Goods by Sea (6th ed, Pearson, London 2008), 214

26) Id., at 214

international regime of liability applied to the international carriage of goods. Said relevant provisions shall be applicable either by statute, when the international convention is duly adopted and enacted into a national law, or by the terms of the contract, which incorporates such rules to be the governing law of the contract of transport.

Thus, in order to better evaluate the legal aspects involved in a contract of carriage of goods by sea, it is essential to understand some of the historical particulars about the shipping industry.

2.2.1 HAGUE RULES

Establishing the identity of ‘the carrier’ under the Rules is vital before we consider his responsibility under contracts covered by the Rules. In defining who the carrier is, Article I (a) includes the owner (of the ship) or charterer who enters into a contract of carriage with the shipper (consignor). But this is not as cut and dry as it may seem, the definition of the term ‘carrier’ has been subject of much litigation in order to determine on whom liability for loss or damage to cargo shall lie as has been seen in much litigation in the past.

The term ‘seaworthy’ under the provisions of the Rules relates to both the physical state of the ship and its fitness to carry the contractual cargo, thus its cargo worthiness. However, the undertaking of seaworthiness under the Rules is not absolute. This is in conformity with the provisions of Article IV(1) which provide that; the carrier shall not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy.

The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship. Furthermore, the carrier must make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.²⁷⁾ Subject to the provisions of

²⁷⁾ Article 3(1) of The Hague Rules.

Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.²⁸⁾

After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things ,the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage. Also, either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper, and lastly, the apparent order and condition of the goods should be furnished. It is important in this regard to be aware that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.²⁹⁾

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.³⁰⁾

Unless notice of loss or damage and the general nature of such loss or damage is given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage is not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or

28) Article 3(2) of The Hague Rules.

29) Article 3(3) of The Hague Rules.

30) Article 3(5) of The Hague Rules.

damage is not apparent, the notice must be given within three days of the delivery of the goods. The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. In the event of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.³¹⁾

After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands, be a “shipped” bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the “shipped” bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article 3,³²⁾ shall for the purpose of this Article be deemed to constitute a “shipped” bill of lading.

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.³³⁾

As I have already provided above, the provisions of The Hague Rules did not cover acts by servants or agents of the carrier amongst other shortcomings, thus leading to the enactment of The Hague-Visby Rules in 1968, to correct the flaws

31) Article 3(6) of The Hague Rules.

32) The Hague Rules, 1924.

33) Article 3(8) of The Hague Rules.

of The Hague Rules.

2.2.2 HAGUE-VISBY RULES

The topic of liability of the carrier is expressed in Article III of The Hague-Visby Rules. As depicted in the history of this maritime instrument, it has solved many an issue in the past but of course also caused many an issue for nations affected. In discussing the liability I always think that it is imperative to be aware of when such obligations ensue. Therefore I refer Article I which makes provision to the extent that “Carriage of goods” covers the period from the time when the goods are loaded on to the time they are discharged from the ship.³⁴⁾

The liability of the carrier in terms of The Hague-Visby Rules is also dependent mostly on the seaworthiness of the vessel. The traditional obligations of the carrier is to exercise due diligence to make the ship seaworthy and to care for the goods. Responsibilities and Liabilities are that the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy; properly man, equip and supply the ship; make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.³⁵⁾

Furthermore, the carrier is obliged to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.³⁶⁾ After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things, the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage. Also shown on said bill of lading should either be the number of packages or pieces, or

34) Article 1 of The Hague-Visby Rules.

35) Article 3(1) of The Hague-Visby Rules.

36) Article 3(2) of The Hague-Visby Rules.

the quantity, or weight, as the case may be, as furnished in writing by the shipper. Lastly, the apparent order and condition of the goods should also be shown clearly on said bill of lading. In the event that the carrier, master or agent of the carrier has reasonable ground for suspecting that any marks, number, quantity, or weight stated or shown in the bill of lading does not accurately to represent the goods actually received or which he has had no reasonable means of checking, the said party shall not be bound.³⁷⁾

At the time of shipment the shipper shall be deemed to have guaranteed to the carrier the accuracy of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. It is important to note that the right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.³⁸⁾

Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage is not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

The carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen. In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.³⁹⁾

37) Article 3(3) of The Hague-Visby Rules.

38) Article 3(5) of The Hague-Visby Rules.

This is of course not a provision set in stone since an action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against him.⁴⁰⁾

After the goods are loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a “shipped” bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the “shipped” bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a “shipped” bill of lading.⁴¹⁾

Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability.⁴²⁾

Although The Hague-Visby Rules were very helpful at resolving maritime issues there was another radical wave of reform that took place in the 1960s and 1970s. Developing countries, increasingly dissatisfied with the existing uniform carriage rules, which they saw as outmoded, inefficient, biased in favour of carrier interests from the industrialised nations and a contributory cause of unnecessarily high

39) Article 3(6) of The Hague-Visby Rules.

40) Article 3(6bis) of The Hague-Visby Rules.

41) Article 3(7) of The Hague-Visby Rules.

42) Article 3(8) of The Hague-Visby Rules.

insurance and transport costs, began agitating for fundamental reforms to the international transport regime. Proposals made through CMI to overhaul The Hague-Visby Rules were blocked. In 1968 the United Nations Conference on Trade and Development (UNCTAD) began work on the issue. Although the industrialised countries managed to have discussions on reforms moved away from UNCTAD to the United Nations Council on International Trade Law (UNCITRAL), which was perceived to be a less politicised forum, they were unable to thwart reform negotiations altogether. These led to the signing of the Hamburg Rules in 1978.⁴³⁾ Rather than simply modernising or tinkering with the template of The Hague-Visby Rules, the Hamburg Rules represent a fundamental break with the past. The Hamburg Rules have never been widely accepted. Although they finally came into force in 1992, no major maritime jurisdictions have implemented them to date.⁴⁴⁾

2.2.3 HAMBURG RULES

As with all the discussions above, when addressing the liability of the carrier it is naturally important to discuss who the carrier is in the eyes of the law in place. It is sometimes tricky with the Hamburg rules since the Hamburg Rules draw a distinction between the carrier and the actual carrier, so as to facilitate litigation and the settlement of claims. An interpretation of Article 10 of the Hamburg Rules provides that the carrier is responsible for the part of the carriage performed by the actual carrier, and they are both liable jointly and severally for any loss or damage to the goods.⁴⁵⁾ However, Article 10(5) states that the aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limitation of liability provided for under the convention.⁴⁶⁾ These are factors that need to be taken into account when looking at the application of the Hamburg Rules.

That being said let's look at the liability of the carrier. In order to comprehend

43) United Nations Convention on the Carriage of Goods by Sea 1978.

44) Paul Myburgh, 2000, Uniformity or Unilateralism in the law of carriage of goods by sea, 361.

45) Murray 1980, Lawyer of the Americas, 72 <http://www.jstor.org/stable/40175868>.

46) Luddeke & Johnson, The Hamburg Rules, 23.

the full extent of the carrier's liability, I am of the opinion that the period at which time the liability commences is also of significance and not only the basis of liability. It is important to know at which point, legally, in terms of the Hamburg rules, the carrier ensues liability for his/her actions. Therefore I refer to Article IV.

The responsibility of the carrier for the goods under this Convention covers 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.⁴⁷⁾ Therefore the time that the carrier is deemed to be in charge of the goods is from the time he has taken over the goods from either the shipper, or a person acting on his behalf; or an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment. The carrier is further deemed in charge of the goods until the time he has delivered the goods, either by handing over the goods to the consignee; or in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or lastly, by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.⁴⁸⁾

The aforementioned refers to both the carrier or to the consignee, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.⁴⁹⁾

Now let's get to the heart of the liability in the Hamburg Rules, and that lies in Article V: Basis of liability. 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 or agents took all measures that could reasonably be required to avoid the occurrence and its

47) Article 4(1) of the Hamburg Rules.

48) Article 4(2) of the Hamburg Rules.

49) Article 4(3) of the Hamburg Rules.

consequences.⁵⁰⁾

In the event that a delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea 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, having regard to the circumstances of the case.⁵¹⁾

The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of Article V of the Hamburg Rules.⁵²⁾

With regards to liability the carrier is liable for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents. Furthermore, the carrier is liable for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences. In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.⁵³⁾

From Article V(5) onward, there is discussion of the cases in which the carrier might be exempt from liability. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be

50) Article 5(1) of the Hamburg Rules.

51) Article 5(2) of the Hamburg Rules.

52) Article 5(3) of the Hamburg Rules.

53) Article 5(4) of the Hamburg Rules

attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.⁵⁴⁾

Additionally, the carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.⁵⁵⁾

In the event that there has been some sort of fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.⁵⁶⁾

Taking a deeper look at the provisions stated from the legislation you can see that the carrier's liability under the Hamburg Rules is based on a presumption of fault.⁵⁷⁾ Article 5(1) of the Hamburg Rules provides that:

“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 in delivery took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”⁵⁸⁾

This is a major development from the liability regime under The Hague-Visby Rules, as it changes the fundamental rules on the allocation of risks between the consignor and the carrier, where at first the burden was on the claimant to prove the fault of the carrier, but under the new regime, the carrier is presumed at fault

54) Article 5(5) of the Hamburg Rules

55) Article 5(6) of the Hamburg Rules

56) Article 5(7) of the Hamburg Rules.

57) Carr, International Trade, 302

58) Supra note 46, at 11.

for any loss, damage or delay in shipment unless he provides evidence to the contrary.⁵⁹⁾

The Hague-Visby Rules provided a long list of exceptions to carrier liability, including unconditional exoneration of carrier liability for loss or damage to the goods resulting from; an 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.⁶⁰⁾ The provisions of Article 5(1) of the Hamburg Rules erase these exceptions by imposing a single standard of liability.⁶¹⁾

The liability scheme awarded under The Hague-Visby Rules has no parallel in the law regulating other transport modes, more so, its contrary not only to the general legal concept that one should be liable to pay compensation for loss or damage caused by his fault, or that of any person under his employment, but also to the economic rationale that the party who is in position to avoid a loss should be liable for its occurrence.⁶²⁾

In another connection, The Hamburg Rules improve on the provisions of The Hague-Visby Rules, as they provide partial liability for delay, loss or damage to the goods in circumstances of joint of causation:⁶³⁾

“where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.⁶⁴⁾

Following the model of the Warsaw convention 1928, regulating air carriage, the CMR regulating carriage by road and the CIM convention 1962 regulating carriage

59) Hellawell R “Allocation of Risk between Cargo Owner and Carrier” 1979 (27), American Journal of Comparative Law, 357-36 357 <http://www.jstor.org/stable/840039>, taken on 09/04/2015.

60) Article 4(2)(a) of The Hague Visby Rules.

61) Supra note 59, at 358.

62) Explanatory note by UNCITRAL Secretariat on the United Nations Convention on the Carriage of Goods by Sea 1978 (A/AN. 9/306), 17.

63) Supra note 57, at 302.

64) Supra note 46, at 11.

by rail, the Hamburg Rules impose liability on the carrier for delayed delivery, unless the carrier can prove that he took all reasonable measures to avoid the delay and its consequences.⁶⁵⁾

The provisions of Article 5(1) of the Hamburg Rules are a significant advancement to maritime law, as under The Hague regime, it is evident that there was uncertainty with regards to the party on whom the burden of proof rested. This burden fluctuated between the consignor and the carrier, and more often than not, leaving the consignor with the burden of proving facts that were particularly within the knowledge of the carrier.⁶⁶⁾ The problem with these rules however is the lack of support from nations since very few nations have ratified it as a marine cargo liability regime deserving of global implementation through a mandatory instrument.

2.2.4 ROTTERDAM RULES

The Rotterdam Rules build upon, and provide a modern alternative to, earlier conventions relating to the international carriage of goods by sea such as the conventions previously discussed in my research. Liability regime is always the core issue for the law of carriage of goods by sea. This is of course not the only reason why I make specific reference to The Hague-Visby Rules in comparison to the Rotterdam Rules. The Hague-Visby rules, especially the carrier's responsibilities are entrenched in South African Legislation regulating the carriage of goods by sea.⁶⁷⁾ It is useful to peruse the alternatives to the instruments in place regulating the maritime legal system of my country.

The full name of the Rotterdam Rules is "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea".⁶⁸⁾ The

65) Pravin 2011

<http://pravinrathinam.blogspot.com/2011/06/hamburg-rules-failure-or-success-review.html>. Taken on 09/04/2015.

66) Supra note 59, at 361-362, <http://www.jstor.org/stable/840039>, taken on 09/04/2015

67) Carriage of Goods by Sea Act 1 of 1986.

68)

http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html, taken on 26/03/2015.

Rotterdam Rules were adopted by the General Assembly on 11 December 2008 and opened for signature in Rotterdam, the Netherlands, on 23 September 2009. This Convention needs 20 ratifications to enter into force.

Even though South Africa is not yet a party to these Rules, The Rules aim to establish a uniform and modern global legal regime governing the rights and obligations of parties in the maritime transport industry under a single contract for door-to-door carriage, namely, to create a modern and uniform law concerning the international carriage of goods which include an international sea leg and what is already called “wet multimodal transport” , that is, multimodal transport as long as it includes a maritime leg, but which is not limited to port-to-port carriage of goods.⁶⁹⁾

It is well accepted that the core of the Convention is the carrier’ s liability. It is for this reason that the fundamental elements of the liability regime include the basis of liability and the allocation of the burden of proof. Article 17 of the Rotterdam Rules is entitled “Basis of Liability” which is under Chapter V dealing with the liability of the carrier for loss, damage, or delay. Furthermore, in this Article 17, the basis of liability is crystallized by way of providing for in detail the allocation of burden of proof respectively to the claimant on one side and to the carrier on the other side.

The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier’ s responsibility as defined in chapter IV of the Rules.⁷⁰⁾

Let’ s discuss and compare the period of responsibility under the major conventions and the Rotterdam Rules. Under The Hague-Visby Rules, the period of liability differs from the period of application: the Rules applied only between loading and discharging, that is to say, from tackle to tackle (it’ s during that period that the goods are subject to the typical risks of maritime transport) but the

69) Id., taken on 26/03/2015.

70) Article IV, United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea, 2008.

period of custody and liability of the carrier might begin before the loading operation and extend after the unloading. That subdivision of the contract of carriage in three periods, the period prior to loading, the transport itself –the only one to which The Hague–Visby rules apply– and the period subsequent to the unloading was criticised by many.

Now, the Rotterdam Rules introduce a major modification when they extend the period of application of the Rules, which will govern from reception to delivery of the goods in a door to door solution. Additionally, under the Rotterdam Rules, the period of application of the rules coincides with the period of liability of the carrier.

The Rotterdam Rules will apply from “door to door” thus extending the period of liability of the traditional Hague–Visby Rules which apply only from tackle to tackle. More precisely, the period of responsibility of the carrier begins when the carrier or a performing party receives goods for carriage and ends when goods are delivered including reception and delivery from or to an authority or other third party. Nevertheless, in a door to door transport, the period of liability of the carrier will include, for example, the time when the goods are under the custody of a port terminal that has received the goods for or after carriage. In my opinion The Rotterdam Rules will solve the problem of multimodal transport all together, if this is the case. There will be no more disputes dealing with the respective legs of the transport of goods if the Rotterdam Rules come into effect and is signed and ratified by the major trading nations.

There are two ways of taking care of the cargo: the direct way of care of the cargo, namely to load, handle care for, etc. the goods, a duty that is imposed to all the period of liability of the carrier. The other way of caring for the cargo is the indirect care of the cargo which is the seaworthiness, imposed only during the voyage by sea.

Firstly, I would like to discuss direct care of cargo. The first obligation of the carrier is to carry the goods to the place of destination. Then, article 11 imposes the obligation of carrying the goods to the place of destination, not to the port of

destination, considering the door-to-door condition of the rules, and to deliver them to the consignee. Article 13 considers the so called ‘specific’ obligations of the carrier. These are duties that affect every mode of transport: sea transport, as well as inland, and air transport, in case there were any. Article 13 includes the same seven obligations of Article III, rule 2 of The Hague Visby rules.

These obligations are: to load, handle, stow, carry, keep, care for, and unload the goods, enforceable during the whole period of responsibility of the carrier, as stated in article 13(1) However, as the Rotterdam Rules are a door-to-door convention, article 13 imposes two new obligations on the carrier, namely: the duties to receive the goods for transport and to deliver them to the consignee at destination. Therefore, the nonfulfillment of such obligations will be regulated by the Rotterdam Rules, entitling the carrier, for example, to oppose the exonerations of liability of article 17 and the time bar of article 62. These two new obligations weren’ t provided for by The Hague-Visby Rules because they applied from the loading to the unloading.

According to article III, rule 2 of The Hague-Visby Rules the obligations to load, handle, etc. the goods must be carried out carefully and properly. The Rotterdam Rules share the same provision in article 12(1) the carrier will fulfill his duty of carefully and properly transporting the cargo if he adopts a sound system taking into account the knowledge he has or should have, of the goods.

The goods must be delivered on time to avoid delay.⁷¹⁾ According to article 21, delay only occurs when the goods are not delivered within the time agreed and in the same condition of receipt, to avoid liability. The carrier is liable for loss, damage or delay occurred during the period of responsibility.⁷²⁾

With the regards to goods that become a danger, the carrier is not obliged to receive or to load goods and he may decline to do so if the goods are or reasonably appear likely to become an actual danger to persons, property or the

71) Article 21, United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea,2008

72) Article 17(1), United Nations Convention for the International Carriage of Goods Wholly or Partly by Sea,2008

environment. He can also take other reasonable measures such as to unload, destroy or render the goods harmless. Even while at sea the carrier may sacrifice goods if this is reasonable for the common safety of the property involved (this would be a general average) or for preserving human life.

Article 13(2) allows the Carrier and shipper to agree that loading, handling, stowing or unloading is to be performed by the shipper, the documentary shipper or by the consignee. The FIO clauses (“free in and out”) have been incorporated into the Rotterdam Rules. The English approach has been adopted, by which those duties and the consequent liability prima facie rested on shipowners but it could be transferred by agreement to cargo interests. This solution is not found in the text of The Hague-Visby Rules.

There are some formal requirements because the FIO clause must be referred to in the contract particulars. It seems that what should be referred to in the contract particulars is just the FIO clause and it is not necessary to state that the carrier is not liable, because this is stated in Article 17(3)(i).

The issue is not for the carrier to be released from his responsibility if he failed to perform an assumed duty, but for him not to have to assume the performance of such an obligation. Speaking of obligations, let's steer our legal minds to the obligations applicable to voyage by sea. The specific obligations applicable to the voyage by sea under Article III, rule 1, of The Hague-Visby Rules is the obligation on the carrier to exercise due diligence stressing that this was only before and at the beginning of the voyage. The Rotterdam Rules have changed things and the carrier is bound at the beginning of and during the voyage by sea to exercise due diligence to make and keep the ship seaworthy. Therefore, the Rotterdam Rules bring a very important modification, and that is the period of the obligation. Now, the obligation is not only to make the vessel in a seaworthy condition at the beginning of the voyage by sea, but also to keep the vessel in that condition at sea. Even though it is a personal obligation the carrier may beforehand, delegate his obligation to make and keep the vessel seaworthy but he cannot delegate his liability afterwards.

It is important to note that the Courts rulings under The Hague Visby Rules will still be in force under the Rotterdam Rules. Finally, in relation to the obligations of the carrier, the balance of the risk has moved slightly in favour of the cargo.

2.3 LIABILITY IN KOREAN MARITIME LAW

2.3.1 INTRODUCTION

Maritime law⁷³⁾ is private law dealing with the legal relationship between the parties involved in a contract for the carriage of goods by sea. Korean maritime business ranks 6th in terms of ship owning capacity, and the volume of Korean trade of commodities ranks 10th; Korean shipbuilding capacity ranks among the top in the world. Almost all commodities from and to Korea are transported by vessel. Maritime law is regarded as an important domain of law in Korea.⁷⁴⁾

Korean law has its roots in continental law such as German law and French law. Unlike other domains of law, a strong demand for English law in maritime law practice exists in Korea. In reality, Korean maritime law has been heavily influenced by English law since the beginning of the 20th century. Many maritime contracts with English governing law clauses are routinely executed in Korea.⁷⁵⁾ Herewith I will be discussing certain aspects of the Korean Maritime legal system in place.

2.3.2 THE OBLIGATIONS AND LIABILITY OF THE CARRIER

The contract for the carriage of individual goods is a typical contract for the carriage of goods by sea under the Korean Commercial Code (KCC). It is very similar to the common carriage in the US. The carrier makes out its schedule of carriage on a regular basis in advance. (Hanjin Shipping and Hyundai Merchant Shipping Co. Ltd are two major liner companies in Korea.) The provisions regulating

73) The scope of Maritime law in the article is limited to private matters relating to maritime activities. The term of Admiralty law is generally interchangeable with maritime law in Korea.

74) In Hyeon Kim "The Asian Business Lawyer", 35th ed. Vol. 10. (Wolters Kluwer Law & Business), 2012. P.36

75) Id., at 36

the contract for the carriage of individual goods as shown in Section 1 of Chapter 2 in Book 5 are equivalent to those in the COGSA in the US, the UK, Singapore and Japan.

Firstly, the carrier's rights and obligations in terms of responsibility starts from the receipt of the cargo and ends at the delivery of the cargo. The carrier's fault is presumed, and thus, unless it proves that it did exercise due diligence to discharge its obligations, it is liable for loss or damages of the cargo.⁷⁶⁾ The carrier also has the obligation of maintaining the vessel as seaworthy at the beginning of the voyage.⁷⁷⁾ On the other hand, the carrier enjoys the benefits granted by the KCC. The carrier is entitled to invoke the package limitation. The carrier also enjoys navigation fault exemption and fire exemption.⁷⁸⁾ In addition, the shipper is no longer entitled to claim for loss or damages to the cargo against the carrier if the suit is lodged one year after the cargo was delivered.⁷⁹⁾ Under the KCC, the carrier is regarded as having superior power as opposed to the shipper. The KCC has a compulsory provision in order to protect the shipper from the carrier's abuse of superior power. In terms of Article 799 of the KCC, any agreement for the carrier to derogate from its obligation and liability stipulated in the KCC is null and void. This is identical to Art. 3(8) of The Hague Visby Rules.⁸⁰⁾

Secondly, The Himalaya clause in the Bill of lading is incorporated into the KCC as a type of law and has legal effects on the person without contractual agreement with the carrier,⁸¹⁾ under which the servant or agent of the carrier is entitled to invoke the package limitation just as the carrier. Although there is no clear wording for exclusion of independent contractors under the KCC, they are not the beneficiary in the Himalaya provision.⁸²⁾ For independent contractors such as stevedores and warehouse keepers to enjoy protection, the wording of the independent contractor as one of the beneficiaries needs to be inserted into the bill

76) Article 795 (1) of the KCC

77) Article 794 of the KCC

78) Article 797(2) of the KCC

79) Article 814(1) of the KCC

80) Supra note 74, at 47

81) Article 798(2) of the KCC

82) Korean Supreme Court case 2004.4.13. Docket No. 2001da75318.

of lading. Unlike the UK or the US, the validity of the Himalaya clause has not been challenged in Korea mainly because the Korean Civil Code has a provision for a third party to enforce the debtor's obligation to the creditor for its own benefit.⁸³⁾

Next up for discussion would be the shipper's Obligations. The shipper's obligation is not stipulated in detail in the KCC. The shipper is strictly liable for statements such as for weight or quantity of the cargo in the bill of lading which it reported to the carrier.⁸⁴⁾ The KCC has a provision for dangerous cargo. However, the shipper is interpreted as not strictly liable for damages to the carrier when it did not notify the carrier about the dangerous nature of the cargo when it delivered the cargo. KCC Art. 801 does not include wording imposing strict liability on the shipper, unlike Hague Visby Rules.⁸⁵⁾

Accordingly, the general rule of fault based liability is applicable to the case and the shipper who loaded dangerous cargo without knowing its dangerous nature, thus not notifying the carrier about its nature, and as a result of which the carrier suffered from hull damage, is not liable for the damage unless the carrier proves that the damage was caused by breach of the shipper or negligence of the shipper in tort. It can be said that the carrier is in a disfavored position as opposed to the carrier under The Hague Visby Rules or UK COGSA in this respect.⁸⁶⁾

Let's not forget the oh so important, bill of lading. The bill of lading is issued in common carriage. The bill of lading has three functions such as the receipt of the goods, evidence of the contract for the carriage and document of title. Under Korean law, possession of the bill of lading does not mean ownership. The expression in the bill of lading such as the weight or number of the cargo is prima facie evidence between the carrier and the shipper, but conclusive evidence between the carrier and bona fide third party holder of the bill of lading.⁸⁷⁾ The

83) Article 539 of the KCC

84) Article 853(3) of the KCC, like Article 3(5) of The Hague Visby Rules

85) Article 4(6) of the KCC

86) Young Suk, Jeoung, International Maritime Transportation Law, (Bum Han, Busan of Korea), 2008, p.109.

87) Article 854 of the KCC

carrier has an obligation not to hand over the cargo to the consignee without the receipt of the bill of lading from the consignee.⁸⁸⁾

Lastly, tort Claims. The Korean Supreme Court allows the claimant to raise claim against the carrier in two different causes of action. One is breach of the duty in the contract, and the other is negligence in tort.⁸⁹⁾ The claimant should prove the presence of negligence by the wrongdoer when it raises claim based on the cause of action in tort, whereas the carrier as the obligor should prove that it did exercise reasonable care for the cargo. In this respect, the cargo claimant is in a favorable position when it raises claims based on breach of contract. However, the time limit of 3 years in a law suit based on tort⁹⁰⁾ is much longer than 1 year in a suit based on breach of the contract, which favors the cargo claimant when it raises a law suit based on tort. Korea does not impose joint and several liability upon the actual carrier and contractual carrier.⁹¹⁾

2.3.3 RELEVANT OTHER PROVISIONS ABOUT MULTIMODAL TRANSPORT OPERATORS AND CHARTER PARTIES

2.3.3.1 MULTIMODAL TRANSPORT OPERATORS

Multimodal transport (also known as combined transport) is the transportation of goods under a single contract, but performed with at least two different means of transport; depending on the circumstances the carrier is liable for the entire carriage, even though it is performed by several different modes of transport e.g. by rail, sea and road. The carrier does not have to possess all the means of transport, and in practice usually does not; the carriage is often performed by sub-carriers, referred to in legal language as “actual carriers“. The carrier responsible for the entire carriage is referred to as a multimodal transport operator, or MTO.

88) Supra note 86, at 49

89) Article 750 of the KCC

90) Article 766 of the KCC

91) Supra note 86, at 49-50.

The contract for combined transport is widely engaged in Korea, even though land transport from South Korea to mainland China is not possible due to the Demilitarized Zone in the middle of the Korean Peninsula. Korea did not have any provision regulating combined transport until 2008. Instead, FIATA⁹²⁾ or KIFFA⁹³⁾ combined bills of lading has been widely engaged in the Korean practice based on the parties' agreement. In the 2007 revision of the KCC, a provision regarding combined transport was inserted. Article 816 serves as the provision to designate an applicable law in case of combined transport. When the place of damage to the goods is ascertained, the law applicable in that place governs the liability issue. The Korean Ministry of Justice formed a special committee in 2010 to develop a more advanced and comprehensive combined transport law, which has wider application than the current Article 816 in the KCC. The draft of the combined transport law was completed in 2010 and sent to the Korean Parliament.⁹⁴⁾

Let's go back even further. In 1991, South Korea incorporated the basic principles of The Hague-Visby Rules into the Korean Commercial Code (KCC), the domestic law applicable to commercial transactions, although it did not formally ratify The Hague or Hague-Visby Rules. Now, South Korea has been involved in many rounds of debates to amend the maritime law chapter in the KCC under the auspices of the Ministry of Justice of Korea. Out of the items under discussion, the regulation of multimodal transport was one of the most controversial issues. Given that roughly 70% of the containerized cargoes in and out of Korea are being handled in the form of multimodal transport, it may well attract the attention of the concerned industries. Although multimodal transport does not necessarily involve carriage by sea, because the draft amendment that was discussed at the time was confined to the multimodal transport that necessarily included carriage by sea, the issue was relevant to the amendment of the maritime law chapter of the KCC. It may have been a trend-setting move in the field of multimodal transport since the amendment of the KCC containing the provisions regulating multimodal transport has materialized.

92) International Federation of Freight Forwarders Associations.

93) Korean International Freight Forwarders Association.

94) Supra note 86, 50

The current Regime is that the UN Convention on International Multimodal Transport of Goods, 1980 has not become effective yet because of the lack of support of the member countries. The convention's support consists of only eleven parties and six signatories.⁹⁵⁾ As a result, globally, most of the business practices concerning multimodal transport are being regulated by the general terms of the bill of lading or air way bill. This inclusion of liability under multimodal transport is of significance since there are pools of individual counterparties the shipper has to deal with in unimodal carriage that may cause difficulties in case the cargo is damaged en route. Especially if it proves impossible to discover at which stage of the transport the damage occurred. In such a case each carrier will be tempted to decline liability if he can, and the claimant or his insurer could well be left to bear the loss under certain legal regimes.⁹⁶⁾ It is therefore useful to contract with a single multimodal carrier, since even if the exact stage where the loss occurred cannot be identified, at least it is clear which party can be held responsible under the contract of carriage.⁹⁷⁾ As previously stated, the Korean Commercial Code addresses this issue in Article 816.

The Ministry of Justice of the Republic of Korea has been undergoing a process of enacting Multimodal Transportation Act as well as the Act on Air Transportation, which is to be incorporated under Chapter VI of the KCC. I reiterate, While the legislative attempt on multimodal transport was initiated in 1990, to date there exists only one relevant article on the liability of multimodal transport operator

95)

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&lang=en, taken on 27/03/2015.

96) Racine 1982, p. 223-224. Depending on his insurance coverage this is either a problem for the shipper himself or for the insurance company that compensates him and is subrogated to his claim against the responsible parties. Subrogation of rights in this case means that the insurance company steps into the footsteps of the shipper and receives the rights the shipper had based on the carriage contract. Thus the insurance company can try to recover as much as it can to offset the insurance monies it has had to pay out. Since the insurance company's claim is limited to the claim the shipper could have brought however, and is subject to all the defenses to which the shipper would have been exposed, this simply shifts the problem to another party. Nevertheless, an insurance company may be better equipped to deal with difficulties like these.

97) Van Beelen 1996, p. 11; Rogert 2005, p. 17.

under the Article 816 of the KCC. This Article provides that if the carriage of goods the carrier undertook includes a stage other than sea carriage, the carrier shall assume liabilities in accordance with the law to be applied in the particular stage where the damage arose.⁹⁸⁾

Further provision has been made to the effect that if it is unclear in which stage of transport the damage occurred, or if the occurrence of the damage by nature cannot be confined to a certain stage, the carrier shall assume liabilities in accordance with the law to be applied in the stage where the transportation is the longest. There is a condition attached to this provision. In cases where the length of transportation is the same or it is not possible to determine the stage where the transportation is the longest, the carrier shall assume liability in accordance with the law of the stage for which the freight is the most expensive.⁹⁹⁾

2.3.3.2 JOINT AND SEVERAL LIABILITY UNDER THE CHARTER PARTIES

A charter party is a contract for use of a vessel for a certain period of time between the shipowner and the charterer. There are three types of charter parties as distinguished in the KCC, including: (i) bareboat charter party, (ii) time charter party and (iii) voyage charter party.¹⁰⁰⁾ The shipowner, bareboat charterer, time charterer and voyage charterer are admitted as maritime merchants, and they own the vessel or possess it as the charterer. They are engaged in maritime business by way of chartering vessels or transporting cargo on board vessels. Because they are regarded as commercial merchants, the maritime law of the KCC applies to their commercial transaction with another party.¹⁰¹⁾

The legal relations between parties in the charter party are left to party autonomy, even though the KCC has several provisions regarding the charter party. The contract for carriage of goods by sea under Korean law can be divided into common carriage and voyage charter party. The shipper and bona fide third party

98) Article 816(1) of the KCC (Liability of Multimodal Transporter)

99) Article 816(2) of the KCC (Liability of Multimodal Transporter)

100) Supra note 86, at 44

101) Id., at 40-41.

are protected by obligatory rules. The shipowner who owns the vessel sometimes lends it to the bareboat charterer or time charterer, and subsequently the charterer becomes a lawful possessor of the vessel.¹⁰²⁾ It is important to note that the provisions in the KCC is not obligatory and thus if parties in the contract make agreements different from the provisions in the KCC, such agreements are valid. And just out of interest, NYPE 81 and NYPE 93 are the most widely circulated form of charter parties in Korea.¹⁰³⁾

The time charter party is an agreement between the shipowner and the charterer, in which the owner promises to lend the vessel with its crew on board to the charterer for a certain fixed time, and the charterer, in return, promises to pay the owner for hire.¹⁰⁴⁾ The legal nature of the time charter party has long been disputed in Korea. The majority view is that it is a kind of lease which is very similar to the bareboat charter party.¹⁰⁵⁾ On the other hand, the minority understands it as a kind of contract for the carriage of goods by sea.¹⁰⁶⁾ The merit of the majority view is that the famous Article 850 of the KCC can be applicable to the time charter party case. Article 850 stipulates that the bareboat charter has the same obligation and rights as the shipowner when it operates the vessel. The most controversial issue regarding the time charter party in Korea is focussed on who the obligor is for claims between the shipowner and the time charterer.

In the Korean Supreme Court Case 1992.2.23. Docket No. 91da4215 (Polsa Dos Case),¹⁰⁷⁾ the cargo was on board the vessel under the time charter party. The holder of the bill of lading claimed against the time charterer. In turn, the time charterer argued that it was not liable but the owner is liable. The Court rendered that the time charter party is very similar, in legal nature, to the bareboat charter party and thus the time charterer is liable for the damages in the same way the

102) Id., at 41

103) In Hyeon Kim, *Transport Law in South Korea*, Wolter Kluwer, 2011, p. 70.

104) Article 842 of the KCC

105) *Supra* note 103, at 70.

106) Lee Sik, Chai, *An Introduction to KOREAN MARITIME LAW*, Korea University Press, 1999, p. 114. The legal nature of the time charter party is mostly regarded as a contract for carriage according to English authors.

107) (1992) Korean Case Reports, 1120.

bareboat charterer is liable under the bareboat charter party pursuant to Article 766 (New Article 850).

However, the judgment was condemned because the obligor, in a case involved in the breach of contract, should be judged by factors in relation to the contract. In the case abovementioned, the claimant was the holder of the bill of lading. The prevailing view is that the obligor should be decided by factors such as the logo of the shipping company that appeared in the bill of lading, and who is the receiver of the freight.¹⁰⁸⁾

Given the take on this case above it is of significance to discuss the Korean stance in bareboat charterers. The KCC does not try to regulate the relationship between the shipowner and the charterer, and thus the minimum provisions are inserted in the charter party section such as the definition of each different charter party and time bars. The bareboat charter party (BBC) is understood as a kind of lease in Korea.¹⁰⁹⁾ The shipowner lends the vessel itself without crew on board to the charterer.¹¹⁰⁾ The period of the charter party is usually 5 or 10 years. The bareboat charterer enters into the subsequent contract for the carriage of goods by sea with the cargo owner. Otherwise, it lends the chartered vessel to another charterer. The bareboat charterer rather than the shipowner is liable for damages caused by negligence of the crew in case of collision in accordance with Article 850.¹¹¹⁾

In Korean practice, the bareboat charter party in hire purchase (BBCHP) is widely engaged for the purpose of obtaining vessel ownership. Unlike the simple BBC, the vessel is not returned to the owner of the vessel under the BBCHP.¹¹²⁾ The In the bareboat charter party, the charterer rather than the shipowner employs the Master. As a result, the bareboat charterer as the employer of the Master is vicariously liable for damages caused by the negligence of the Master in tort.¹¹³⁾ Getting back to the *Polsa Dos* case, the issue was who the obligor between

108) Young Suk, Jeoung, *International Maritime Transportation Law*, 2008, p. 223.

109) It is also regarded as a kind of lease under UK law. C. Hill, *op. cit.*, p. 168.

110) Article 847 of the KCC

111) Korean Supreme Court case 1975.3.31 Docket No. 74da847.

112) *Supra* note 86, at 44 - 45.

the Owner or the bareboat against the third party victim. The KCC has a provision to address this issue, to effect that the bareboat charterer has the same rights and obligations as the owner when the vessel is operated under the bareboat-charterer-party arrangement.¹¹⁴⁾

In the Korean Supreme Court case 1975.3.31 Docket No. 74da847, the Court rendered that only the bareboat charterer was liable for the damages caused by the collision when a vessel was under the bareboat charter party. It is established law in Korea that the bareboat charterer, instead of the owner, is liable for damages which third party victims suffer during the bareboat charter party pursuant to the KCC Article 850.¹¹⁵⁾ There is no dispute that the bareboat charter party falls outside the definition of contract for the carriage. Rather, it is regarded as a kind of lease agreement in Korea. When a bareboat charterer operates a vessel as a carrier, it entitled to invoke both the package limitation and the global limitation.¹¹⁶⁾

Since a bareboat charter party is regarded as a kind of lease agreement in Korea, it is important to address the laws pertaining to that. Under Korean law, the contractual right of the lessee is very weak in that if the lessor sells a movable which is the subject of lease to an assignee, the lessee no longer has the right of possession against the assignee.¹¹⁷⁾ A vessel is a kind movable and thus this rule is applicable to the case of the vessel. If this general rule is applicable to the vessel's lease, the bareboat charterer as the lessee can no longer use the vessel, which will result in the impediment to the stable operation of the shipping business. The KCC solved this problem by inserting a provision to the effect that the

113) Article 850 of the KCC is the result of reflecting this theory. Under Article 850, the bare boat charterer has the same obligation and right as the shipowner during operation of the chartered vessel. In Korean Supreme Court case 1975.3.31. Docket No. 74da847, the Court decided that the bareboat charterer was the obligor for the damages rather than the shipowner when the cargo was damaged by the tort of the master.

114) Article 850 Korea Commercial Code.

115) In Hyeon Kim, "Study on Leading cases of Korean Maritime Law over past 50 years", Study commercial Law Cases 23-1(2010), 224

116) Supra not 103, at 68.

117) Kwak Yun Jik, Contract (II), Parkyoungsa, 328.

bareboat charterer as the lessee is entitled to request the owner to help the bareboat registration. The KCC Article 849 provides the bareboat charterer with a mechanism to maintain the possession of the vessel even though the vessel was sold to the assignee. By registering the fact that the vessel is bareboat chartered, the bareboat charterer is entitled to raise a defence that the vessel is still under the bareboat charter party against the purchaser.

The last type of charter party to discuss under this heading is that of Voyage Charter Party. The shipowner and the charterer are two parties in the voyage charter party. It is regarded as a kind of contract for carriage in Korea. Therefore, the KCC imposes upon the shipowner the obligation of the carrier such as care for the goods during custody,¹¹⁸⁾ and maintaining seaworthiness at the beginning of the voyage.¹¹⁹⁾ The shipowner is entitled to enjoy benefits such as the package limitation just as the carrier. The voyage charterer as a cargo owner borrows the vessel from the shipowner for transporting its cargo. However, when the voyage charterer enters into a subsequent voyage charter party with a cargo owner and it acts as the carrier, the shipowner is jointly and severally liable for cargo damages by the operation of the KCC Article 809.

2.4 LIABILITY IN SOUTH AFRICAN MARITIME LAW

2.4.1 INTRODUCTION

South Africa has a 'hybrid' or 'mixed' legal system, formed by interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch, a common law system inherited from the British, and a customary law system inherited from indigenous Africans (often termed African Customary Law, of which there are many variations depending on the tribal origin). These traditions have had a complex interrelationship, with the English influence most apparent in procedural aspects of the legal system and methods of adjudication, and the Roman-Dutch influence most visible in its substantive private law.¹²⁰⁾ As a general rule, South

118) Article 795 and 841 of the KCC.

119) Article 794 and 841 of the KCC.

Africa follows English law in both criminal and civil procedure, company law, constitutional law and the law of evidence; while Roman-Dutch common law is followed in the South African contract law, law of delict (tort), law of persons, law of things, family law, etc. With the commencement in 1994 of the interim Constitution, and in 1997 its replacement, the final Constitution, another strand has been added to this weave. All of this is relevant because of the international influences molding liability to what it is today.

All of this is good and well; however, we need to focus on what the Maritime legal system of the country offers us as academics. Let's begin with what gives legal force to this institution. The Admiralty Act¹²¹⁾ provides the formula to determine what law applies to the substantive merits of a maritime claim. Clearly any applicable South African statute law will be over-arching, and the High Court will generally recognize and apply a choice of law elected by the parties. For maritime claims which are novel jurisdiction introduced by the Admiralty Act in 1983, the South African common law will apply. For claims in respect of which the South African court in admiralty enjoyed jurisdiction prior to the Admiralty Act, English law is retained - though English law as it was when the Admiralty Act came into effect i.e. on 1 November 1983.

This does not mean to say that a large part of South African maritime law is frozen as at 1 November 1983 because, although English decided cases and statutes of the British parliament passed subsequent to this date dealing with maritime matters are not binding on a South African court, they are still regarded as strong persuasive authority. Furthermore, decisions by the South African courts and statutes passed by the South African legislature ensure that the local maritime law is constantly evolving, more or less in line with English maritime law.

2.4.2 LIABILITY UNDER MARITIME LAW

120) Du Bois, F (ed) "Wille's Principles of South African Law" 9th ed. Cape Town, Juta & Co, 2007

121) Admiralty Jurisdiction Regulation Act 105 of 1983.

2.4.2.1 COMMON LAW

As South Africa's legal system was influenced by Roman law, Praetor's Edict had great influence on the common law structures and formed the basis of many legal decisions taken. The South African common law of carriage is based mainly on the famous Praetor's Edict **de nautis, cauponibus et stabulariis**.¹²²⁾ An edict was an official rule or order in Roman times. The Roman Praetor was an annually elected magistrate of the ancient Roman Republic and who had law making powers. Since we are only dealing with the law of carriage, we will only study the edict as it applies to the maritime affairs or carriers by sea. With this edict, the Praetor wanted to make sure that professional carriers by sea would have greater responsibility than other carriers who did not transport goods as a profession. The Praetor imposed this responsibility because, along with the Roman public at the time, he suspected that the public carriers by sea were untrustworthy and often plotted with thieves to arrange the disappearance of goods in their care.

Therefore, the Praetor's Edict declared that public carriers who provide carriage as a profession or a trade would be strictly liable if they did not restore goods entrusted to them for safekeeping. This meant that if the goods were not restored promptly and in good condition, the public carrier would be responsible for any loss or damage, even if the carrier was not at fault. Of course this was not without exceptions. Certain circumstances beyond the carrier's control excluded.

As we know that the Edict only applies to public carriers who provide carriage as a profession or a trade, what about private carriers then? Roman law still sets a precedent for South African law in that private carriers need to be evaluated to determine whether they are being paid or are they transporting the goods for free. Where a carrier is not being paid, the carrier will only be liable for willful wrongdoing or gross negligence. As for a private carrier that is being paid, the carrier will have to prove that he or she was not at fault in order to escape liability. Effectively this means that the burden of proof is reversed.

122) "for mariners, innkeepers and stable keepers"

All of the above was a discussion of the carriage of goods, now I will touch on the topic of passengers. With regards to passengers, the normal principles of negligence apply. A carrier will be liable if the passenger can prove that the harm was caused due to the carrier's negligence. Keep in mind that the liability of a carrier for passengers is based on the ordinary principles of negligence, regardless of whether the carrier is a public or private carrier.¹²³⁾

2.4.2.2 LEGISLATION

Upon the codification of laws, the legislatures addressed liability in an Act called the Carriage of Goods by Sea Act 1 of 1986 (COGSA). COGSA came into force on 4 July 1986. This Act repealed chapter VIII of the Merchant Shipping Act 57 of 1951; and gave force of law in South Africa to The Hague Rules of 1924 as amended by the Brussels Protocol of 1968 (otherwise known as The Hague-Visby Rules or the amended Hague Rules). The purpose of the amendment of the original rules was to remedy certain shortcomings that had become apparent over the years. COGSA changed the Common Law position provided by the Edict. Wherever the carriage of goods by sea takes place from a South African port, the rules contained in COGSA supersede those of the Edict. Parties may also contractually agree to have the terms of COGSA govern their contract.

What is important to know about COGSA is that it adopts an international set of rules from The Hague-Visby Rules regarding carriage of goods by sea. This is significant by reason of the effect that The Hague-Visby Rules have on liability. The Hague-Visby Rules replaces the strict liability under the Praetor's Edict with liability based on fault. Furthermore, it restricts the carrier's liability in respect of damage or loss to goods and requires the carrier's ship to be seaworthy. In exchange for these benefits, carriers are not allowed to use exemption or exclusion clauses to avoid The Hague-Visby Rules.¹²⁴⁾

Let's take a closer look at the legislation in place. "Liable" means your legal

123) Avinash Govindjee, Dave Holness, "Fresh Perspectives: Commercial Law 2". Cape Town, Pearson Prentice Hall, 2007, 277-278

124) Supra note 123, at 284

responsibility. Therefore, the sections explaining what the carrier is legally responsible for in terms of COGSA will hereafter be discussed. In Section 1 of COGSA, provision is made for the application of The Hague-Visby Rules as amended by the Brussels Protocol, 1986. A “Carrier” is defined by ARTICLE I to include the owner or the charterer who enters into a contract of carriage with a shipper.

ARTICLE II and ARTICLE III provides that under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in the Act.

Firstly, the Carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy; properly man, equip and supply the ship and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Secondly, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing inter alia; the leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage. Furthermore, either the number of packages or pieces, or the quantity, or weight as furnished in writing by the shipper, must be indicated. This is considered the apparent order and condition of the goods provided that there are no reasonable grounds for suspecting inaccurate representation of the goods actually received. Such a bill of lading as aforementioned shall be prima facie evidence of the receipt by the carrier of the goods as described therein. However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

The removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage is prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading; unless notice of loss or damage and the general nature thereof is given in writing to the carrier or his agent at the port of discharge before or at the time of, or, if the loss or damage is not apparent, within three days of such removal. The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

Unless suit is brought within one year of their delivery of the goods or of the date when they should have been delivered, the carrier and the ship shall be discharged from all liability whatsoever in respect thereof. This period may be extended if the parties so agree, after the cause of action has arisen. This indemnification is qualified in terms of S6bis of COGSA. In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

After the goods are loaded the 'shipped' bill of lading is to be issued by the carrier, master, or agent of the carrier, to the shipper, if the shipper so demands. In the event that the shipper had previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading. Provided the document of title contains all the requisite information as provided for by the Act, said document shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading, at the option of the carrier.

Any clause, covenant, or agreement in a contract of carriage relieving or

lessening such liability otherwise than as provided for as aforementioned, shall be null and void and of no effect. However, a benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

A further piece of legislation enacted in South Africa, and fairly new, dealing with the liability this issue is the Consumer Protection Act 68 of 2008. Exemption clauses limiting the liability of a carrier and deposittee are frequent. They are virtually the norm in the industry. The effect of such exemption clauses has been limited by the Consumer Protection Act 68 of 2008 (CPA), which came into effect on 1 April 2011 and which restricts the power of a supplier of goods or services to impose conditions or terms that exempt the supplier from common law obligations. However, given the exclusion of juristic person consumers whose asset value or annual turnover at the time of the transaction exceeds R 2 million from the operation of the CPA, the common law is still relevant when considering the rights and obligations of contracting parties where the supplier of goods or services attempts to enforce provisions exempting or limiting liability. The section of the CPA dealing with said exemption is Section 48(1) of the CPA which provides that a supplier must not –

‘(a) offer to supply, supply, or enter into an agreement to supply, goods or services –

(i) …

(ii) on terms that are unfair, unreasonable, or unjust;

(b) … ; or

(c) require a consumer, or other person to whom goods or services are supplied at the direction of the consumer –

(i) to waive any rights;

(ii) … ; or

(iii) waive any liability of the supplier, on terms that are unfair, unreasonable or unjust or impose any such terms as a condition of entering into a transaction.’

Precisely what constitute 'unfair, unreasonable or unjust' terms is still to be determined by the courts. There is, however, some indication in the CPA that excluding liability for negligence, as opposed to gross negligence, may be permissible. Section 51 of the Act prohibits an exemption of a supplier of goods or services from liability for any loss directly or indirectly attributable to gross negligence of the supplier or any person acting for or controlled by the supplier. By implication, a clause exempting liability for ordinary negligence is not prohibited.¹²⁵⁾

2.4.3 LIABILITY UNDER CHARTER PARTIES

In general a charter party is an agreement between parties in which a charterer hires from a shipowner a whole ship or parts of it, with or without the crew of the ship, for a certain time or a certain voyage.¹²⁶⁾ The nature of a charterparty was discussed fully in recent South African case in which it was held to be a lease.¹²⁷⁾ In effect, a demise charter amounts to a lease of the entire ship.¹²⁸⁾ The charterer obtains from the owner the exclusive right of possession and control of the ship for an agreed period. It may sometimes be difficult to tell from the wording of any particular charterparty whether a full demise was intended. The test which has been formulated over the years is one of control.¹²⁹⁾

The three kinds of charter parties in South Africa are: Demise or bareboat charter, time charter and voyage charter. A charterparty by demise is a contract by which the shipowner places a ship in the hands of the demise charterer who assumes possession and control for an extended period of time - seldom for less

125) Ian Chadwick, Contracting out of liability for gross negligence. 2011

126) John Hare Shipping law & admiralty jurisdiction in South Africa, 1ed (revised) (2006) 574

127) *Montelindo Compania Naviera SA v Bank of Lisbon and SA Ltd* 1969 2 SA 127 (W) 135-138.

128) Scrutton, 45

129) *Baumwall v Gilchrest* [1892] 1 QB 253. Approved by House of Lords [1893] AC 8 and followed in a South African case *Compagnie Des Messageries Maritimes v The Agricultural Co-operative Union LTD and Fred Cohen, Goldman and Co Ltd* 1922 NPD 84.

than one year.¹³⁰⁾ The consideration paid by the charterer is hire, which is payable at specified intervals during the term of the charter. Under a demise charterparty, the shipowner appoints the master and the crew, although they are paid and controlled by the demise charterer.¹³¹⁾ Fuel and bunkers are provided by the demise or bareboat charterer himself. The demise charterer usually flies his house flag, paints the ship in the house colours and – if permitted by the legal and the demise charterers’ flag – even places the vessel in a ‘dual register’. In a simple sentence: Possession and control of the vessel are passed from the shipowner to the demise charterer; master and crew become his servants¹³²⁾ if not appointed by the demise charterer himself. A bareboat charter is a demise charter whereby the bareboat charterer names, pays and controls the master and the crew.¹³³⁾

Who appoints, pays and has the power to dismiss the master and crew of the vessel? The answer to this question will make clear whose servants are to be in charge of her. Where they are the shipowner’s servants, he will normally be acting as a carrier of the goods for the charterer; where they are the charterer’s, a demise charter will exist as the charterer will have possession and control of the navigation of the vessel. The situation does occasionally arise where the charterer appoints the master and crew, but the owner pays their wages and has the power to dismiss them.¹³⁴⁾

As for the liabilities of the shipowner and charterer to each other, this is governed by the law relating to the hiring chattels and not to the liabilities of shippers and carriers. This fact was made quite clear in the English Courts in 1949 where it was held that “A ship on hire is in the same position as any other chattel on hire”, and in South Africa in 1968 when the nature of a charterparty was found to be that of a lease. Thus the law applicable to the agreement

130) Supra note 126, at 580; William Tetley International Maritime and Admiralty Law, (2003) 160-172.

131) William Tetley Glossary of Maritime Law Terms, 2ed (2004) ‘c’.

132) Hare, 583.

133) Supra note 131.

134) Clare AC Dillon, The Comparative and International Law Journal of Southern Africa, Vol. 12, No. 3 (NOVEMBER 1979), pp. 303.

between charterer and owner will be that which governs the hire of movables. The parties are free to select the terms of their contract, but in the absence of express stipulation there are several which will be implied law. What the implied terms are will fall to be determined by the law which governs the contract.

In South Africa the most important of those obligations which will attach to the shipowner concern the condition of the vessel. He must guarantee the charterer against damage from defects in the property of which he is aware or should have been aware by reason of his trade or occupation. Further, the shipowner will have to make such repairs to the property as are necessary to maintain it in a condition reasonably fit for the purposes for which it was let. In effect this means that the shipowner has a duty to let a vessel in a seaworthy condition and to maintain her in that condition throughout the period of hire.

The main obligations of a charterer are to pay rent as agreed and to take proper care of the vessel, using it only for the purpose for which it was let. At the end of the charter period the charterer must return the vessel to the owner in the same condition in which it was delivered to him, fair wear and tear excepted.¹³⁵⁾

With regards to responsibilities of the owner and the charterer to third parties, it is in this area that the real problems and differences of the demise charter are found. The shipowner has relinquished the possession and control of the vessel to the charterer. Title does not pass, but in almost all other respects the charterer will be considered to be in the position of owner. Usually it will be the charterer who has dealings with third parties and the owner will normally be in a position to incur personal liability. He will be affected, though by the in rem liability of the vessel for many contractual or delictual liabilities.¹³⁶⁾

South African authority on many of these particular problems which may arise are slender and it is therefore necessary to have recourse to the decisions of the courts of the United Kingdom in order to assess how variety of difficulties might

135) Id., at 304.

136) Supra note 134, at 305.

be treated were they to come before the courts of South Africa.¹³⁷⁾

The time charterer is usually chartering the vessel either directly from the owner or from a demise or bareboat charterer. In a time charter the owner¹³⁸⁾ of a vessel is placing his vessel for an agreed period of time at the disposal of the charterer who is free to employ it for the exclusive use of the cargo space on board that ship¹³⁹⁾ for his own purposes within the contractual limits.¹⁴⁰⁾ The charterer pays in advance, usually on a monthly or other basis, hire for the use of the vessel.¹⁴¹⁾ The charter period may be from a number of days to a number of years.¹⁴²⁾ The crew is employed by the owner and the crew remains the servant of the shipowner¹⁴³⁾ who is also responsible for the nautical operation and maintenance of the vessel,¹⁴⁴⁾ the charterer operates the commercial function of the vessel,¹⁴⁵⁾ he is normally responsible for the resultant expenses¹⁴⁶⁾ of such activities and also undertakes to indemnify the shipowner against liabilities arising from the master obeying his instructions.¹⁴⁷⁾

The time charter fits nicely into the pyramid of all the charter parties and the rights and obligations of the parties. The higher one is situated in the pyramid the greater is the power of decision: The bareboat charterer is as close to being the owner of the vessel as one can be and therefore he has the greatest power of decision out of all the charterers because he hires the ship 'bare' and therefore

137) Id., at 305.

138) The 'owner' as described above does not necessarily have to be the registered legal owner of the vessel as the registered legal owner might have chartered the vessel to a 'demise charterer' as despondent owner who in turn could have chartered the vessel to the time charterer. Yet, for clarification purposes the despondent owner shall be referred to as 'owner' in the following if not otherwise necessary.

139) Supra note 126, at 588

140) John F. Wilson Carriage of goods by sea, 5ed (2004) 85.

141) Sir Thomas Edward Scrutton (ed) and Stewart C. Boyd Scrutton on Charterparties, 20ed (1996) 351.

142) Lars Gorton, Rolf Ihre and Arne Sandevärn Shipbroking and chartering practice, 5ed (1999) 115.

143) Supra note 131, at 126.

144) Supra note 142, at 114.

145) Id., at 255.

146) such as bunkers

147) Supra note 140, at 85.

considerable decisions are made by him. The demise charterer has less power of decision because the master and the crew are employed by the owner and the owner therefore keeps much power regarding employment of 'his' crew. The next in the line the time charterer who has only the commercial control over the ship, the nautical control stays with the 'owner' as described above. The consideration - hire- in a time charter is independent from the weight or the size of the carried cargo because the time charterer always has (commercial) control over the entire available cargo space on board of the ship whereas the voyage charterer often only, yet not necessarily, books a certain amount of space on board of a ship and pays freight which depends on the amount and/or the weight of the cargo to be shipped. The voyage charterer usually has no influence on nautical considerations except for naming the ports of loading and discharge.¹⁴⁸⁾

A voyage charterparty is a contract whereby the lessor (the shipowner or demise or time charterer) places all or part of the carrying capacity of a ship at the disposal of the lessee (the voyage charterer) for the transport of goods agreed upon, on one or more voyages, for a consideration called 'freight', based on the quantity of cargo carried and is payable as provided for in the charterparty.¹⁴⁹⁾ The voyage charter gives the charterer very little control over the ship, only slightly more than to a holder of a bill of lading, but much less than the time charterer and of course very much less than the bareboat charterer.¹⁵⁰⁾

In the South African context, claims against charterers arise in two main areas. Firstly, where there is a dispute in terms of a charter party which is to be resolved by way of arbitration, usually in London or in New York. In such cases, South African attorneys very often become involved in obtaining security for the arbitration proceedings by way of a security arrest.

The second main area in which claims against charterers arise is where the charterer is the carrier under a bill of lading. In these cases, South African attorneys are instructed by the cargo interests to begin recovery actions against

148) Supra note 140, at 49.

149) Günther Malchow, Dieter Schulze Güterverkehr über, See 1ed (1992) 100.

150) Supra note 140, at 85.

the charterer in the South African courts.

A major problem facing claimants where charterers refuse to put up security and consent to the court's jurisdiction in these two areas is that the charterer may not have any assets within the jurisdiction of the South African court. In the past, attorneys have proceeded against charterers by attaching bunkers on board the chartered vessel owned by the charterers.

There are a number of reported cases in South Africa turning on the wording of NYPE time charter parties and on whether wordings such as "shall take over and pay for bunkers on board" constitute a passing of ownership from owner to charterer.

The problems with attaching bunkers are twofold. The first is that the claimant is often not in possession of a copy of the charter party and it may later transpire that the wording is such that the bunkers remain the property of the owners. The second point is that, where the claim is substantial, the value of the bunkers may not be sufficient to adequately secure the claim.

The Admiralty Jurisdiction Regulation Act as amended in 1992 has addressed the above problems in Section 3 (7)(c). That section reads:

"if at any time a ship was the subject of a charter party, the charterer or sub-charterer, as the case may be, shall for the purposes of (the associated ship arrest provisions) be deemed to be the owner of the ship concerned in respect of any relevant maritime claim for which the charterer or the sub-charterer, and not the owner, is alleged to be liable".

A charterer's interest in a vessel can either be arrested for proceedings to be commenced in South Africa or as security for proceedings, including an arbitration in another country that has commenced or has yet to commence. This provision effectively allows claimants to arrest any other (associated) ship owned or controlled by the charterer. The effect of this provision is best illustrated by way of example.

If the charterer of Ship A accepts responsibility as carrier and thereafter it damages a cargo, the cargo owner will have a claim against the charterer. In circumstances where the charterer does not own the bunkers aboard the chartered vessel, there would ordinarily be no right of recourse against the ship.

Section 3(7) alters this position and, where the charterer owns the majority of the shares in a company which owns Ship B, or controls Ship B, the cargo interest can arrest Ship B as an associated vessel of the chartered ship.

The problem remains where a charterer carries on business solely as a charterer and neither owns nor controls any other vessels. In such circumstances a claimant's remedy is to proceed against the charterer in the jurisdiction where it is incorporated or where it carries on business. This jurisdiction may be inconvenient, or impossible for a claimant to take action in. Furthermore, the charterer may be a brassplate company and not own any assets which can be located for the purposes of execution.

Recently, the South African courts extended a claimant's right to proceed against charterers. In the case of the *Snow Delta* (1998 3 SA 636 (C)) the court allowed a claimant to attach the charterers' interest in the vessel chartered. The court held that "should the vessel find itself within the jurisdiction of this court at the relevant time, it would be ... open to the (claimants) to proceed by way of an action in personam against the owner in this court, provided, of course that the vessel had first been properly attached ad fundandum jurisdictionum in terms of Section 3 (2)(b) of the Act".¹⁵¹⁾

"Under its time charter party, the respondent has no title to the vessel or right to its possession or control: but it does have a right to the use or employment of the vessel to carry cargoes on voyages at its direction, subject, of course to the specific terms of the charter party, which may impose certain limitations in this regard".¹⁵²⁾

151) http://www.maritimeadvocate.com/arbitration/claims_against_charterers.htm, taken on 12/04/2015.

152) http://www.maritimeadvocate.com/arbitration/claims_against_charterers.htm, taken on 12/04/2015.

An important question that naturally flows from this case is how to quantify the value of the charterer's interest in the vessel. There has been no judicial decision on this point. However, one view is that the value of the right is equal to the hire to be paid multiplied by the remaining duration of the charter party. Thus, should the charterer not secure the claim, the claimant would be able to apply to the court for the sale of that charterers' interest in and to the vessel to a third party. The third party would acquire rights against the head charterer/owner and the charterer would be divested of its rights. The charterer would however be obliged to continue to pay the hire of the vessel to the owner/head charterer.¹⁵³⁾

It has not been decided what the value of the interest is in cases where the charter party provides that the charterer is entitled to cancel the charter party in the event of there being an arrest. A charterer's interest in a vessel can either be arrested for proceedings to be commenced in South Africa or as security for proceedings, including an arbitration in another country that has commenced or has yet to commence.

The Snow Delta decision is an important one as it plugs the gap of charterers' liability. That is the situation where shipowners are held to account for their transgressions but where charterers can commit similar transgressions with relative impunity. The decision in the Snow Delta is being taken to the Supreme Court of Appeal. The interest attached is not an ownership interest, nor a possessory interest, but "consists of the right which (the charterer) enjoys against the vessel owner to have the goods carried in that specific vessel ...".¹⁵⁴⁾

Naturally there is not enough paper in the world to address every issue ever arising from charterparties, therefore it should be noted that this is not an exclusive statement of the laws in place, but the focus on the most important aspects regarding the laws on the topic implemented in South Africa.

153) http://www.maritimeadvocate.com/arbitration/claims_against_charterers.htm, taken on 12/04/2015.

154) http://www.maritimeadvocate.com/arbitration/claims_against_charterers.htm, taken on 12/04/2015.

CHAPTER III THE LIMITATION OF THE CARRIER' S LIABILITY

3.1 PACKAGE LIMITATION IN INTERNATIONAL CONVENTIONS

3.1.1 INTRODUCTION

Package limitation is a controversial issue and has been the topic of disputes around the world over the years. I am of the opinion that in order to discuss the package limitation, it is important to determine what the global acceptance of “package” in fact is. Whilst in most disputes relating to general or break bulk cargoes the question as to what constitutes a “package” for limitation purposes is a straight forward question. However, in the modern world of containerization this raises the question of what constitutes a package where a container is involved. Is it the container itself or the number of shipping units therein?

This question of what is a package was discussed under English law in *The River Gurara*¹⁵⁵⁾ by the Court of Appeal. However this dealt with the position under Article IV Rule 5 of The Hague Rules which states that the carrier's liability is restricted to £100 “per package or unit“. The facts of this case are as follows:

Following an engine breakdown, the vessel was lost on a voyage from Africa to Europe. The Hague Rules applied to this carriage. The bill of lading contained a provision stating that where the container was not packed by the carrier, the container was to be the package or unit for limitation purposes. Also, the bill of lading descriptions were qualified with the words “said to contain“.

155) [1998] 1 Lloyds Rep. 225

At the Court of Appeal, Lord Justice Phillips led the judgment and held as follows:

“Notwithstanding the inclusion of the term “said to contain“ it was the individual cartons in the container and not the container that was the package. Clauses in bills of lading stating that the container is the package are ineffective as they are ruled out by Article III Rule 8. (Article III Rule 8 strikes out any provision in the contract which seeks to reduce the liability as set out in The Hague Rules).”

It was held by the Court of Appeal that with a view to package limitation the description in the bill of lading was not decisive; it was felt that were it to be otherwise the carrier would effectively be able to “sneak around“ the limits that The Hague Rules sets out. Under The Hague Rules, what was important was what the shipper could show to have been loaded, and with regard to package limitation, qualifications such as “said to contain“ and “weight and contents unknown“ did not have any affect.

While the end result was the same, i.e. the carrier was only entitled to limit up to the amount of each package in the container, the approach taken by Phillips in the Court of Appeal was unusual in that he held the description in the bill of lading not to be determinative. Whereas Lord Justice Hirst who gave the dissenting judgment in the Court of Appeal, and Mr. Justice Colman who gave the judgment at First Instance, held that whilst the words “said to contain“ and “weight, quantity, quality unknown“ did not affect the description of the cargo in the bill of lading, with regard to package limitation, the number of packages enumerated in the bill of lading would still be important. Hence according to Colman J and the dissenting Hirst LJ, where the contents were described by words which made it unclear whether the contents were separately packed for transportation then the container would be the package. For example, if the bill of lading stated “one container said to contain televisions“, then the container would be the package for limitation purposes. However, if the bill of lading stated “one container said to contain 200 televisions“, it is likely that the limitation figure would be applied to 200 packages.

Under the approach espoused by Phillips and Mummery LLJ, however, it would

be possible where the bill of lading stated one container said to contain televisions, that the shipper would be entitled to adduce evidence to prove the number of separate televisions that were in fact loaded on the container and attempt to peg his package limitation thereto. This is an unsatisfactory situation for two reasons. Firstly, it does not sit well with the provisions in The Hague Visby Rules. The Hague Visby Rules (which increases The Hague Rules package/unit limit considerably) states at Article IV Rule 5 (c) that;

“where a container, pallet or similar article of transport is used to consolidate the goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package of unit“.

It is therefore the number of packages enumerated in the bill of lading that should be determinative. And, secondly because due to the need to adduce evidence in support of the number of individual packages loaded in the container, the resolution of container claims is going to be more prolonged, costly and labour intensive.

The position under The Hague Visby Rules has not been looked at by the English Courts, however this is not a worldwide trend as the Federal Court of Australia took a look at this in the case of *El Greco*.¹⁵⁶⁾

The bill of lading described the cargo as “One 20’ container said to contain 200,945 pieces of posters and prints“. Despite the bill of lading noting the individual number of pots of paint and posters, it was acknowledged by both parties that the items had been in fact shipped in around 2,000 packs in the container, but no mention of these 2,000 packs was made in the bill of lading. The majority of the Court said that the numeration in the bill did not relate to packages, as posters and prints were not packages. Packages by their very nature involve some level of packing and the individual items enumerated in the bill of lading were not in fact

156) *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] FCAFC 202

packed, hence the package for limitation purposes would be the container.

However, the decision of the Court was not unanimous. Mr. Justice Beaumont felt that the actual way that the posters were packed, rather than the enumeration was important. In other words, he felt that there were 2,000 packages for limitation purposes, and his logic was as follows. The Hague Visby Rules state “the number of packages or units enumerated in the bill of lading as packed in such article of transport should be deemed to be the number of packages or units“. He focused on the words “as packed“ in such article of transport, and reasoned that the intention of the Rules was to limit liability on the number of packages in the manner in which they were packed in the container, i.e. the actual way in which they were packed and not the way in which they were enumerated in the bill of lading. Fortunately, Mr. Justice Beaumont was in the minority.

This decision serves to highlight how even the apparently clear Hague Visby Article IV Rule 5 (c) provision can still cause confusion.¹⁵⁷⁾ As can be seen from the discussion above, package limitation has raised many a different interpretation. It is for this reason that we should look at the international rules and influences as well as our national instruments in place dealing with package limitation.

	HAGUE RULES	HAGUE-VISBY RULES	HAMBURG RULES
13. Limits of liability (a) Goods lost or damaged	Art IV Rule 5 £100 per package or unit unless value declared and inserted in the B/L. The £100 limit per package has been held to amount to £100 gold value (see The Rosa S [1988] 2 Lloyd's Rep. 574), often resulting in a higher limit than the Hague-Visby Rules limitation.	Art IV Rule 5 10,000 Poincare Francs per package or unit or 30 Poincare Francs per kilo of gross weight of damaged or lost goods whichever is higher. By virtue of SDR Protocol 1979 2 SDRs per kg or 666.67 SDRs per package.	2.5 SDRs per kg or 835 SDRs per package or shipping unit.

Fig. 5 158)

157) 2005 “What is a package?”

<http://www.steamshipmutual.com/publications/Articles/Articles/ContainerPackage0405.asp>, taken on 01/04/2015

158) “Cargo conventions” <http://www.hilldickinson.com/pdf/Cargo%20conventions.pdf>, taken on 03/04/2015

3.1.2 HAGUE RULES

The question of Limitation of liability is discussed in Article IV of The Hague rules. For your reference, The Hague rules provide the following:

“1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.”

The Hague rules also have an extensive explanation in list form, dealing with specific risks. Neither the carrier nor the shipper shall be responsible for loss or damage arising or resulting from an 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. Neither, in the case of fire, unless caused by the actual fault or privity of the carrier, nor perils, dangers and accidents of the sea or other navigable waters. Further exemptions include an act of God, an act of war and acts of public enemies. Also, arrest or restraint; princes, rulers or people, or seizure under legal process; quarantine restrictions and acts or omissions of the shipper or owner of the goods, his agent or representative.

The list goes on to strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general; riots and civil commotions; saving or attempting to save life or property at sea; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; insufficiency of packing; insufficiency or inadequacy of marks and latent defects not discoverable by due diligence.

Lastly, any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.¹⁵⁹⁾

As seen from the provisions of the convention, stated above, the shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.¹⁶⁰⁾ Furthermore, any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.¹⁶¹⁾

Limitation of liability is also extended to goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.¹⁶²⁾

As for package limitation, this is the moment we have all been waiting for, Article IV(5) The Hague Rules. This section provides that neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or

159) Article IV(2) The Hague Visby Rules.

160) Article IV(3) The Hague Visby Rules.

161) Article IV(4) The Hague Visby Rules.

162) Article IV(6) The Hague Visby Rules.

unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier. By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named. Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

The quest for an internationally recognized, uniform liability regime which allocates the risk of loss or damage to cargo carried by sea has been a dominant theme of maritime law for over a century. The full explanation of 'The Hague Rules' and the impact of its liability regime on the maritime legal system as we know it today has been beautifully expressed in the writings of Paul Myburgh in 'All That Glisters' : The Gold Clause, The Hague Rules and Carriage of Goods by Sea" (2002) 8 New Zealand Business Law Quarterly 260-265.

After a number of false starts, the International Law Association and the Comité Maritime International held a series of diplomatic conferences in The Hague, London and Brussels from 1921 to 1924 which culminated in the signing of an International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in Brussels in 1924. The Hague Rules were generally well-received, particularly in the Anglo-Common Law world,¹⁶³⁾ and have been adopted by an overwhelming majority of maritime nations. The Rules are, however, not free of substantive and drafting problems.

163) English lawyers, we are told, regarded The Hague Rules "with a mixture of pride, affection, and even slight awe as a largely English innovation and one that had achieved a remarkable success": see A Diamond "The Hague-Visby Rules" [1978] LMCLQ 225, 226. However, this view was not universally shared. For example, the Norwegian Ministry of Justice recommended that The Hague Rules be implemented by general reference only, to avoid putting on the Norwegian statute books provisions "that do not meet the most elementary standards of technique, readability and good statutory language": see JO Honnold "Ocean Carriers and Cargo: Clarity and Fairness - Hague or Hamburg?" (1993) JML&C 75, 101 n 98.

The first major difficulty with The Hague Rules is that Article IV rule 5 limits the carrier's liability in the English text to "£100 per package or unit, or the equivalent of that sum in other currency" (unless the shipper has a declaration of value, in which case the carrier's liability is limited to the (higher) declared value). Easy enough right? Well not quite...

The authoritative French text refers to "100 livres sterling¹⁶⁴) par colis ou unité, ou l'équivalent de cette somme en une autre monnaie". The travaux préparatoires of The Hague Rules reveal considerable debate and confusion as to whether "£100" or "100 livres sterling" referred to the nominal or face value of the paper currency, or to its gold value. Reading aforementioned shows us what an issue this might be.

The drafters attempted to resolve this issue in a separate Article IX, which provides that "monetary units mentioned in this Convention are to be taken to be gold value". Article IX allows contracting States which do not use pounds sterling to pass domestic legislation converting the package limit into their own national currencies "in round figures".

Expressing the carrier's package limitation in terms of the gold value of £100 was feasible, after a fashion,¹⁶⁵) whilst the United Kingdom and other major shipping nations adhered to the gold standard. With the departure of the United Kingdom from the gold standard in 1931, however, the formula became increasingly

164) From the travaux préparatoires it seems that "sterling" was included in the English draft at one point, but was later dropped: see F Berlingieri (ed) *The Travaux Préparatoires of The Hague Rules and of The Hague-Visby Rules*(CMI, Antwerp, 1997) 486; C Boyle and MF Sturley (ed) *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of The Hague Rules*(Fred B Rothman & Co, Littleton, 1990) vol 1, 375. On the etymology of "sterling" see D Sinclair *The Pound: A Biography* (Arrow Books, London, 2000) 77-82. See also the Hallmarking Act 1973 (UK), Sch 1, Pt III: "A description of an article, or of the metal in an article, as 'sterling' ... is to be presumed to be an indication that the article, or the metal, is of silver ... of a standard of fineness of 925."

165) Even when The Hague Rules were being drafted in 1923, there was disquiet about the discrepancy between the nominal value of the pound, and its gold value which was 5% higher. One of the delegates perceptively expressed fears about "the problems inherent in the case where the pound underwent a greater depreciation": see F Berlingieri (ed) *The Travaux Préparatoires of The Hague Rules and of The Hague-Visby Rules*(CMI, Antwerp, 1997) 490-492, 678-679.

unworkable. In particular, those countries that had converted the £100 package limit into their own currencies in domestic legislation almost invariably failed to update the amounts to take account of inflation and changing currency relativities.

In 1968, the Visby Protocol to The Hague Rules substituted a new standard package limit of 10,000 Poincaré francs per package or unit. The Poincaré franc, which had been used in other international Conventions,¹⁶⁶⁾ was defined as a unit consisting of 65.5 milligrams of gold of millesimal fineness 900. It also proved problematic. Finally, the 1979 SDR¹⁶⁷⁾ Protocol to The Hague-Visby Rules introduced a package limitation of 666.67 Special Drawing Rights or SDRs.¹⁶⁸⁾

The Hamburg Rules¹⁶⁹⁾ and the recent Comité Maritime International(CMI) Draft Instrument on Transport Law¹⁷⁰⁾ similarly express the carrier's limited liability in SDRs. The second major difficulty with The Hague Rules relates to the scope of the Rules' mandatory application. It is crucial to know when The Hague Rules are mandatorily applicable, because Article III rule 8 of the Rules nullifies any clauses in carriage contracts which purport to lessen the carrier's liability below the package limit discussed above.

Article X of The Hague Rules baldly states that the "provisions of this Convention shall apply to all bills of lading issued in any of the contracting States". As Clarke notes,¹⁷¹⁾ the wording of Article X is as simple as

166) For example, the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929. On the problems generated by Article 22 of the Warsaw Convention, see WK Hastings "Living with an Archaic Treaty: Solving the Problem of the Warsaw Convention's Gold Clause" (1996) 26 VUWLR 143.

167) The SDR was created by the International Monetary Fund (IMF) in 1969. It is a unit of account valued on the basis of a basket of key national currencies (presently the euro, Japanese yen, pound sterling, and US dollar).

168) New Zealand became a party to The Hague Rules, as amended by the 1968 Visby Protocol and 1979 SDR Protocol, in 1995: see the Maritime Transport Act 1994, s 209 and Schedule 5. At the time of writing, 666.67 SDRs amounts to a package limit of NZ\$1,814.08 per or unit.

169) See the United Nations Convention on the Carriage of Goods by sea 1978, Art 6, which provides for a package limit of 835 SDRs, or NZ\$2,272.13.

170) For the full text of the CMI Draft Instrument (10 December 2001), see <http://www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf>. Article 6.7 of the Draft Instrument expresses the carrier's limited liability in terms of SDRs, but the number of units of account has deliberately been left blank at this stage, indicating the sensitivity of this issue.

interpretations of the effect of Article X and the obligations that arise from it are complex. It has been variously interpreted as giving rise to an international obligation to enact domestic legislation giving effect to the Rules, as creating or requiring a general conflict of laws rule in favour of the *lex fori* or perhaps the proper law of the bill of lading, or as having nothing to do with the scope of application of the Rules.

This confusion over the effect of Article X was compounded by the manner in which the United Kingdom chose to give domestic effect to The Hague Rules in the Carriage of Goods by Sea Act 1924 (UK). Rather than reproducing all the Rules in the Schedule and giving them the force of law, the drafters of the Act statutorily incorporated only Articles I-IX of the Rules into outward bills of lading.¹⁷²⁾ The Act required bills of lading issued in the United Kingdom to include an express statement, commonly known as a Clause Paramount, that the bill of lading took effect “subject to the provisions of The Hague Rules as applied by this Act”. The legislation of most Common Law jurisdictions followed the English model.

The problem with this model is that it created a loophole which allowed parties to contract out of The Hague Rules by choosing any law other than the law where the bill of lading was issued as the proper law of their contract.¹⁷³⁾ If they did so, the Clause Paramount probably had no effect – the “Rules as applied by this Act” would not govern their contract, as the contract was governed by foreign law. Even if the parties selected the law of another Hague Rules country as the proper law of their contract, the Rules would still not have mandatory application if

171) MA Clarke *Aspects of The Hague Rules: A Comparative Study in English and French Law* (Martinus Nijhoff, The Hague, 1976) 11-17.

172) The Protocol of Signature of The Hague Rules permits the High Contracting Parties to “give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention”.

173) *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC); *Ocean Steamship Co Ltd v Queensland State Wheat Board* [1941] 1 KB 402 (CA). For criticism of this approach, see *The Torni* [1932] P 78 (CA); *The Hollandia* [1982] QB 872 (CA); JHC Morris “The Choice of Law Clause in Statutes” (1946) 62 LQR 170; JHC Morris “The Scope of the Carriage of Goods by Sea Act 1971” (1979) 95 LQR 59.

that country had also followed the English model and had only statutorily incorporated the Rules into bills of lading issued in its jurisdiction. This gave rise to the ludicrous prospect that carriage of goods between two countries that had adopted The Hague Rules might not be governed by the Rules.

In order to plug this loophole and restore uniformity, Article X of The Hague Rules was amended in 1968. Article X of The Hague-Visby Rules provides that the Rules apply to every bill of lading relating to the carriage of goods between ports of different States if: (a) the bill of lading is issued in a contracting State; (b) the carriage is from a port in a contracting State; or (c) the contract contained in or evidenced by the bill of lading provides that it is governed by the Rules or the legislation of any State giving effect to the Rules.

A new method of giving domestic effect to The Hague-Visby Rules was also adopted. Rather than statutorily incorporating the Rules into bills of lading by means of a Clause Paramount, most jurisdictions giving domestic effect to The Hague-Visby Rules simply provide that the Rules have the force of law in that jurisdiction.¹⁷⁴⁾ This makes it plain that, where a connecting factor in Article X is satisfied, The Hague-Visby Rules are mandatorily applicable and cannot be avoided by including a choice of law or exclusive foreign jurisdiction clause pointing to a non-Hague-Visby Rules country. That being said, it has expressed a perfect Segway into a discussion on The Hague-Visby Rules.

3.1.3 HAGUE-VISBY RULES

The limitations in The Hague Rules and Hague-Visby Rules are majority the same, however of significance is the addition to The Hague-Visby Rules as opposed to The Hague Rules, of Article IV bis(1), which provides that the defenses and limits of liability available to the carrier of goods shall apply in an action for loss or damage to goods covered by the contract of carriage whether the action is brought on contract or in tort. In conformity with Article IV bis(1) and (2), the defenses and limits to liability apply to the carrier and his servants or agents,

174) Carriage of Goods by Sea Act 1971 (UK), s 1(2); Maritime Transport Act 1994, s 209.

provided such servant or agent is not an independent contractor.¹⁷⁵⁾ However, the carrier may extend the cover of Article IV bis(1) and (2) to independent contractors by expressly including them in a clause in the bill of lading. Such a clause is known as the ‘Himalaya’ clause,¹⁷⁶⁾ which owes its name after the vessel in *Adler v Dickson*.¹⁷⁷⁾ In *New Zealand Shipping Co Ltd v AM Satterthwaite and Co Ltd (The Eurymedon)*,¹⁷⁸⁾ Lord Wilberforce said that such a clause will be effective with regards to independent contractors to include; exemptions, limitations, defenses and immunities contained in the bill of lading.¹⁷⁹⁾ However, this research is more concerned with package limitation.

Per Article IV(5)(a) the sum of liability shall be calculated in terms of package, unit or weight of the goods, and it is at the discretion of the consignor to use the measure of calculation that provides a higher amount in damages.¹⁸⁰⁾

Article IV Rule 5(a) of The Hague-Visby Rules limits carriers’ liability for loss or damage to goods carried. It provides that:

Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 SDR [Special Drawing Rights] per package or unit or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher” .

This Article makes specifications relating package limitations but as all legal instruments it has not been without scrutiny and analysis. Courts have had to apply their legal minds to terms and application of this limitation. In a more recent case courts have had to determine the precise meaning of the words “goods lost or damaged” in Article IV Rule 5(a). In *THE LIMNOS*,¹⁸¹⁾ the point was considered

175) Supra note 57, at 259.

176) Id., at 260.

177) [1959] 2 Lloyd’s Rep 267.

178) [1975] AC 169.

179) Supra note 57, at 261.

180) Supra note 57, at 264.

181) *The Limnos* [2008] 1 Lloyd’s Rep.50.

during judgment of a preliminary issue regarding a claim for damage to a shipment of corn from the US to Jordan under bills of lading that incorporated The Hague-Visby Rules. The facts are as follows.

At the discharge port wetting damage was noted to either 7 or 12 MT¹⁸²⁾ of cargo (this point remained to be determined). A further quantity of about 250 MT had to be discharged by bulldozers, and suffered physical damage in the process. Further, as a condition of discharge imposed by the Jordanian authorities, the whole cargo had to be fumigated and transferred to disinfected silos, which resulted in further physical damage. As a result, the whole cargo acquired a reputation in the market as a distressed cargo, substantially reducing its value.

The point before the court was whether some or all of the cargo which was not physically damaged was nevertheless “economically damaged” and fell within the definition of “goods lost or damaged” in Article IV Rule 5(a).

The cargo owner argued that the Article IV Rule 5(a) limitation should be calculated on the basis of the whole cargo (about 44,000 MT), which would result in a limit greater than the value of his total claim. Carriers, on the other hand, claimed limitation should be calculated on the basis of the physically damaged cargo only (that is, 250 MT).

The court decided that the test for when and whether goods are damaged is at the time of discharge/delivery of the goods and that the words “lost or damaged goods” refer to two categories of goods: those that are lost in the sense of gone or destroyed, and those that are damaged in the sense of not being lost but surviving in damaged form. The judge noted that no prior cases had decided the proper meaning to be given the words “gross weight of the goods lost or damaged”.

After a lengthy analysis, he concluded that the reference to “gross weight of the goods” controlled the interpretation of “lost or damaged”. The complete phrase had to be given its literal meaning so the limitation amount would be calculated on the weight of the physically damaged cargo only. The court found that loss or damage

182) Metric Ton

incurred after discharge was “loss or damage in connection with the goods” as described in the first part of Article IV Rule 5(a) provided these were the goods that were damaged while in the carrier’s custody, so the reference to “goods lost or damaged” in the last part of Article IV Rule 5(a) is a reference to those goods. Cargo not damaged while in the carrier’s custody could not be described as “economically damaged” ; a claim for losses consequential upon physical damage could not be a claim for economically damaged goods. Therefore, instead of recovering \$1.5 million, the cargo owner stood to recover only \$38,000.

The carrier was found to be entitled to limit liability in respect of the cargo owner’s claim by reference to the quantity of cargo physically damaged (7 MT or 12 MT, which remained yet to be determined).

The conclusion to this case was that Article IV Rule 5(a) refers to claims for lost or damaged goods and claims for loss or damage in connection with those lost or damaged goods, and the weight of those lost or damaged goods will be the basis for the limitation of liability.¹⁸³⁾

3.1.4 HAMBURG RULES

UNCITRAL¹⁸⁴⁾ has promoted the Hamburg Rules since their ratification in 1978. These Rules finally came into force before the turn of the millenium, but they governed only a small percentage of the world’s sea-borne trade.

Shipowners were opposed to the adoption of these Rules for many reasons. The Rules placed the burden of proof on a shipowner to show that damage was not caused or contributed to by its negligence. Shipowners lost the benefit of the time honoured defense of “error in the navigation and management of the ship“. Shipowners claimed that the Rules would prove in practice to be a strict liability regime. Further, the introduction of the Rules would substantially consign the considerable body of case law on the interpretation of The Hague Rules to

183) Gard News 193, February/April 2009,

<http://www.gard.no/ikbViewer/web/updates/content/52777/english-law-hague-visby-rules-package-limitation-goods-lost-or-damaged>, taken on 03/04/2015

184) United Nations Commission on International Trade Law.

irrelevance.

The Hamburg Rules increased the limits of liability from 2 SDR per kilo or 666.67 SDR per package, as provided by The Hague Visby Rules, to 2.5 SDR per kilo or 835 SDR per package. The principal justification for the increase was that The Hague Rules package limitation amount had been devalued by fifty years of inflation.

Shipowners were opposed to this increase in the limits, which would increase their costs without reducing the need for cargo insurance. So the Rules would compound the problem of double insurance, as both the shipowner through liability insurance and the cargo owner through cargo insurance protected themselves against the risks of damage to cargo during transport.¹⁸⁵⁾

Let's get to the content of the Hamburg rules. Limits of liability are addressed by Article 6 of the Hamburg Rules. The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account 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.¹⁸⁶⁾ For the purpose of calculating which amount is the higher, the following rules apply:

“(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.”¹⁸⁷⁾

185) Peter Jones, http://www.forwarderlaw.com/library/view.php?article_id=483, taken on 13/04/2015.

186) Article 6(1)(a) of the Hamburg Rules.

187) Article 6(2) of the Hamburg Rules.

Article 6.1(a) of the Hamburg Rules of 1978, follows (with higher limits) the criteria of article 4.5 of The Hague-Visby Rules, as amended by the 1979 Protocol, so the limits are established by reference to the number of packages or units lost or damaged, or by reference to their weight.¹⁸⁸⁾ By agreement between the carrier and the shipper, limits of liability exceeding those provided for in Article 6(1) of the Hamburg rules, may be fixed.¹⁸⁹⁾

The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.¹⁹⁰⁾ In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of Article 6(1), exceed the limitation which would be established under subparagraph (a) of for total loss of the goods with respect to which such liability was incurred.¹⁹¹⁾

Let's discuss the unit of account means the unit of account. The unit of account referred to in article 6, is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgement or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be calculated in a manner determined by that State.¹⁹²⁾

Nevertheless, those States which are not members of the International Monetary

188) Alberto C. Cappagli

<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf>, , taken on 13/04/2015.

189) Article 6(4) of the Hamburg Rules.

190) Article 6(1)(b) of the Hamburg Rules.

191) Article 6(1)(c) of the Hamburg Rules.

192) Article 6(1) of the Hamburg Rules.

Fund and whose law does not permit the application of the provisions provided in the Hamburg Rules may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as: 12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogram of gross weight of the goods.¹⁹³⁾

The monetary unit referred to above corresponds to sixty-five and a half milligrams of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.¹⁹⁴⁾

As for the calculation and the conversion, it is to be made in such a manner as to express it in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depositary the manner of calculation as provided by Article 6, or the result of the conversion mentioned in Article 26(3), at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in Article 26(2) and whenever there is a change in the manner of such calculation or in the result of such conversion.¹⁹⁵⁾

3.1.7 ROTTERDAM RULES

Limitation of liability is also known as package limitation. The carrier may limit its liability for loss caused by breaches of the carrier's obligations under the Rotterdam Rules, meaning any of the carrier's obligations –this is a new formula intended to be clearer than those used in the past(Art59). The system bears most similarity to the Hamburg Rules but the number of Special Drawing Rights (SDR) has been increased to 875. The shipper and the carrier may agree between them on a higher compensation than that provided for by the Rotterdam Rules. What constitutes a 'unit' , for the purpose of calculating the package limit, is given

193) Article26(2) of the Hamburg Rules.

194) Article26(3) of the Hamburg Rules.

195) Article26(4) of the Hamburg Rules.

greater clarity in the Rotterdam Rules (see Art 59(2)).

Article 59.1 and 2 of the Rotterdam Rules of 2009 follows the Hamburg Rules with certain differences. For instance, they equate the term “vehicle” with “container, pallet or similar article of transport used to consolidate goods” . Another difference —and this is a significant one— is that in The Hague Rules, The Hague-Visby Rules and the Hamburg Rules, the limitation may be invoked in case of “goods lost and damaged” . Under article 59.1 of the Rotterdam Rules the carrier may invoke the limit in any event of breach of “its obligations under this Convention” ¹⁹⁶⁾

To put the Package limitation into a monetary perspective, under the Rotterdam Rules, a carrier’s liability will be limited to 875 SDRs (“special drawing rights,” which are an artificial value set by the International Monetary Fund that currently is around \$1,500) or 3 SDRs per kilogram of weight (about \$2.20 pound), whichever is higher. The weight option would be significant to break bulk shippers of cargo that might otherwise constitute a single package, as was the case in the Pasternak Baum case.¹⁹⁷⁾ Clearing up some confusing issues also apparent from this case, a “package” for limitation of liability purposes will be the smallest unit definitively listed on a bill of lading, even if it is palletized with other packages. Limited liability will not be available to a carrier if its owner recklessly or knowingly caused the loss.

The Rotterdam Rules have been adopted by the requisite number of countries,

196) Supra note 188.

197) *Vigilant Ins. Co. v. M/T “Clipper Legacy,” et al.*, 656 F.Supp.2d 352 (SDNY 2009). The shipper’s subrogated insurer, Vigilant, sued the carrier’s vessel to recover the peanut oil’s \$231,963.34 value, and the carriers sought to limit their liability to \$500 per COGSA and an incorporating term in the bill of lading. At issue was the definition of “package.” Vigilant, which had paid full value to Pasternak Baum & Co, urged that each one of the designated 303.736 metric tons in the shipper’s order constituted a “package,” and that the carriers calculated the freight rate on that basis. But the parties had a course of dealing whereby the carrier quoted flat rates which weren’t adjusted even when the freight tonnage tendered differed from what was ordered. The bill of lading unambiguously quoted a flat rate, and parol evidence as to how it was calculated wasn’t admissible. On that basis, the court concluded that the entire load consisted of one COGSA package, and the carriers liability was limited to peanuts.

but some of them are awaiting ratification by parliamentary and legislative bodies. They could be passed into law next year. If Pasternak Baum's shipment had moved a couple years later, there might have been a different result in court.¹⁹⁸⁾

There is also a special provision on limitation for loss or damage caused by delay, calculated separately in a slightly different manner (Art60). While compensation for damage to or loss of the goods resulting from delay follows the usual rule, liability for economic loss is separately limited to 2½ times the freight payable on the goods delayed. This is cumulative with the normal compensation, but there is also an outside limit: the sum of the liability for loss of or damage to the goods due to delay and the liability due to other causes may not exceed the limit for total loss of the goods (Art60).

The carrier may, as ever, lose the right to limit liability, both for loss and for loss due to delay, if the loss was attributable to (or in the case of loss due to delay, resulted from) the personal act or omission of the person seeking to limit, done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result (Art61).¹⁹⁹⁾

3.2 PACKAGE LIMITATION IN KOREA AND SOUTH AFRICA

3.2.1 KOREAN MARITIME LAW

Let's begin by discussing the legal regimes for limitation in South Korea. With regard to cargo conventions, South Korea is not a party to any of the cargo conventions. However, Korea has adopted by and large the provisions of The Hague-Visby Rules in its Commercial Code (Chapter V – Maritime). Furthermore, South Korean delegates have been actively participating in the drafting process of

198) Steve Block,

http://www.forwarderlaw.com/library/view.php?article_id=608&highlight=package+limitation, taken on 13/04/2015

199) Britannia News Conventions, 8, July 2010,

http://eprints.soton.ac.uk/170957/1/the_rotterdam_rules_in_a_nutshell.pdf, taken on 04/04/2015; Sang Gyu, Ji, "A Study on the Right of Control of the Goods in Shipper and Consignee under the Rotterdam Rules", Dong-A Law " no.56, Dong-A University Law Institute, 2012, pp.358~362.

the Rotterdam Rules, but it is not yet clear whether Korea will ratify the Rotterdam Rules. Also, with regard to The Hague/Hague-Visby Rules, in contrast to English law, South Korean law does not distinguish straight bills of lading from other bills of lading, and the Commercial Code provisions, which are enacted based on The Hague-Visby Rules, shall equally apply to straight bills of lading as well. Finally, there are naturally a few compulsory rules applicable to shipments. In this regard, determining whether a certain statute or provision is applicable to a shipment to or from our jurisdiction will be determined by the terms of the contract and also according to the provisions of the Conflict of Laws Act.²⁰⁰⁾

South Korea is not a party to any of the limitation conventions (except for the Civil Liability and Fund conventions), but essentially adopts the provisions of the 1976 Limitation Convention in the Commercial Code, including the tonnage limitation regime. However, the compensation limits for the death of or injury to passengers have been increased in line with the 1996 Protocol.

In determining the limitation issues for claims against the vessel, South Korean courts would apply the law of the vessel's port of registry, pursuant to the Conflict of Laws Act. Parties seeking to limit include the owners, charterers (which include voyage charterers and arguably slot charterers), managers (who are appointed by joint owners, when the vessel is owned by more than one owner) and operators of the vessel, the employees or agents of the said parties, such as the crew or pilot, salvors (article 774, paragraph 1 of the Commercial Code), and possibly their respective liability insurers (article 744 of the Commercial Code).

The test for breaking the limitation is by adopting the test stipulated in the 1976 Limitation Convention, under South Korean law. Limitation is broken when the loss in question resulted from the personal act or omission of the party invoking limitation, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result (article 769 of the Commercial Code).

In Korea there are limitation provisions establishing jurisdiction for the substantive

200) Kim & Chang Byung-Suk Chung, 306, Shipping & International Trade Law 2011

claim. In order to invoke tonnage limitation, the party invoking limitation (the ‘applicant’) must commence limitation proceedings with the court and establish the limitation fund (article 766 of the Korea Commercial Code). Under South Korean law, such limitation proceedings can be commenced with the court that has jurisdiction over any of the following places: (a) the port of registry of the vessel; (b) the applicant’ s address; (c) the place where the accident occurred; (d) the first port of call after the accident; and/or (e) the place where the applicant’ s assets are attached based on the claims subject to limitation (article 3 of the Act on the Procedures of the Limitation of the Shipowners’ Liability).

In the limitation proceedings, if there is any objection to the filed claims, the limitation court will review the claims and issue an ‘adjustment judgment’ for the purpose of distributing the limitation fund. If there is then any objection to the adjustment judgment, separate legal proceedings are thereby commenced with the civil court (different from the limitation court), and the court will issue a judgment on the substance of the claim in question. Therefore, the commencement of limitation proceedings will lead to a decision on the merits of the disputed claims, and the court would thereby, in effect, have jurisdiction over the substantive claims against the party invoking limitation, based on the court’ s jurisdiction over the party’ s right to commence limitation proceedings.

In terms of article 797, paragraph 1 of the Commercial Code, the package limitation figure in South Korea is 666.67 SDRs per package or 2 SDRs per kilogram, whichever is greater. The test for breaking this package limitation is the same as that for the shipowners’ global limitation as discussed above.²⁰¹⁾ However, the carrier shall not limit his liability if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause such damage, or recklessly and with knowledge that damage would probably result.

In applying article 797, paragraph 1 of the KCC, the number of the package or shipping unit shall be determined as follows: 1. Where a container or similar article of transport is used to consolidate the goods, if the number of packages or

201) Supra note 200, at 309

shipping units of the goods in such article of transport is enumerated in the bill of lading or other documents evidencing the contract of carriage, each package or unit shall count as a package or a shipping unit. Except as aforesaid, each article of transport that contains the goods shall count as a package or a shipping unit.²⁰²⁾ Furthermore, where the article of transport itself supplied by a person other than the carrier has been lost or damaged, such article of transport shall be deemed a separate package or shipping unit. The aforementioned shall not apply if, at the time of delivery of the goods to the carrier by the shipper, the nature and value of the goods have been declared by the shipper and inserted in the bill of lading or other documents evidencing the contract of carriage. Lastly, where the shipper has knowingly and significantly misstated the nature or value thereof, the carrier shall not be responsible in any event for the loss in respect of the goods unless the carrier or his employees was aware of the misstatement.²⁰³⁾

In brief, it is important to note that not only the shipowners but also the charterers are persons who are entitled to limit their liability (Art. 774).²⁰⁴⁾ However, the right of the shipowner will be denied if it is proved that the loss resulted from his personal act or omission, committed with the intent to cause such loss, or recklessly and with knowledge that such loss would probably result (reckless behavior) (Art. 769).²⁰⁵⁾ The question of what constitutes ‘reckless behavior’ is not relevant to this topic.

3.2.2 SOUTH AFRICAN MARITIME LAW

South Africa is not a party to any of the Limitation Conventions. The South African tonnage limitation regime is embodied in sections 261 to 263 of the Merchant Shipping Act No. 57 of 1951. This legislative instrument puts forward the circumstances under which an owner would escape liability for a part of or the whole damage incurred. The provisions are modelled loosely on the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships

202) Article 797(2) of the KCC.

203) Article 797(3) of the KCC.

204) Chinese Maritime Code Art. 204.

205) 1976 LLMC Art.4; Chinese Maritime Code Art. 209.

1957 as amended by the Protocol amending that Convention of 1979. The persons entitled to limit their liability include the owner of a vessel, any charterer, any person interested in or in possession of such ship, and a manager or operator of such ship. The provisions apply to any kind of vessel used in navigation by water, however propelled or moved.

The owner of a ship, whether registered in the Republic or not, shall not, if any loss of life or personal injury to any person, or any loss of or damage to any property or rights of any kind, whether movable or immovable, is caused without his actual fault or privity, if no claim for damages in respect of loss of or damage to property or rights arises, be liable for damages in respect of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage; or if no claim for damages in respect of loss of life or personal injury arises, be liable for damages in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage.

Furthermore, if claims for damages in respect of loss of life or personal injury and also claims for damages in respect of loss of or damage to property or rights arise, be liable for damages to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage: Provided that in such a case claims for damages in respect of loss of life or personal injury shall, to the extent of an aggregate amount equivalent to 140 special drawing rights for each ton of the ship's tonnage, have priority over claims for damages in respect of loss of or damage to property or rights, and, as regards the balance of the aggregate amount equivalent to 206,67 special drawing rights for each ton of the ship's tonnage, the unsatisfied portion of the first-mentioned claims shall rank *pari passu* with the last-mentioned claims.²⁰⁶⁾

An easier explanation of this section would be that in the event that the only damages incurred are for loss of life or personal injury, claims are limited to the rand(ZAR) equivalent of 206.67 special drawing rights (SDR) for each ton of the

206) S261(1) & (2) of the Merchant Shipping Act 57 OF 1951.

ship's tonnage. In the event that the only damages incurred are for loss of or damage to property, claims are limited to the rand(ZAR) equivalent of 66.67 SDR for each ton of the ship's tonnage. In the event that both types of damages are incurred, claims are limited to the rand(ZAR) equivalent of 206.67 SDR for each ton of the ship's tonnage with claims in respect of loss of life and personal injury ranking ahead of property claims to the extent of 140 SDR for each ton of the ship's tonnage and both types of loss of life and personal injury claims ranking equally with claims relating to property in respect of the balance of the fund. Limitation probably does not apply to liability for the cost of wreck removal.²⁰⁷⁾

The provisions of this section shall extend and apply to the owners, builders or other persons interested in any ship built at any port or place in the Republic, from and including the launching of such ship until the registration thereof under the provisions of the Merchant Shipping Act 57 OF 1951. The provisions of this section shall apply in respect of claims for damages in respect of loss of life, personal injury and loss of or damage to property or rights arising on any single occasion, and in the application of the said provisions claims for damages in respect of loss, injury or damage arising out of two or more distinct occasions shall not be combined. The amounts mentioned in the paragraph above shall be converted into South African currency on the basis of the value of such currency on the date of the judgment or the date agreed upon by the parties. For the purpose of converting from special drawing rights into South African currency the amounts as abovementioned in respect of which a judgment is given, one special drawing right shall be treated as equal to such a sum in South African currency as the International Monetary Fund have fixed as being the equivalent of one special drawing right for either the day on which the judgment is given; or if no sum has been so fixed for that day, the last day before that day for which a sum has been so fixed. Additionally, a certificate given by or on behalf of the Treasury stating that a particular sum in South African currency has been so fixed for a particular

207)

<https://www.ensafrica.com/news/Shipping-2013-South-Africa?Id=821&STitle=shipping%20and%20logistics%20ENSight>, taken on 01/04/2015.

day; or that no sum has been so fixed for that day and that a particular sum in South African currency has been so fixed for a day which is the last day for which a sum has been so fixed before the particular day, shall be prima facie proof of those matters for the purposes of S261 subsection (1) of the Merchant Shipping Act 57 OF 1951. Also, a document purporting to be such a certificate shall, in any proceedings, be admissible in evidence and, in the absence of evidence to the contrary, be deemed to be such a certificate.²⁰⁸⁾

Since the package limitation has direct bearing on the tonnage of the ship it is important to determine how the tonnage is calculated. For the purpose of section 261 of the Merchant Shipping Act 57 OF 1951, the tonnage of a ship shall be her gross register tonnage.²⁰⁹⁾ There shall not be included in such tonnage any space occupied by seamen or apprentice-officers and appropriated to their use which has been certified by a surveyor to comply in all respects with the requirements of the Merchant Shipping Act. As for the measurement of such tonnage, in the case of a South African ship, it shall be done according to the law of the Republic. And in the case of a treaty ship registered elsewhere than in the Republic, tonnage shall be calculated according to the law of the treaty country where the ship is registered. Lastly, in the case of a foreign ship, tonnage shall be calculated according to the law of the Republic, if capable of being so measured.²¹⁰⁾

In the case of any foreign ship, which is incapable of being measured under the law of the Republic, the Authority shall, after consideration of the available evidence concerning the dimensions of the ship, give a certificate stating what would, in its opinion, have been the tonnage of the ship if she had been duly measured according to the law of the Republic; and the tonnage so stated in such certificate shall, for the purpose of section 261, be deemed to be the tonnage of the ship.²¹¹⁾

Any obligation imposed by this Part upon any owner of a ship shall be imposed

208) S261(3) & (4) of the Merchant Shipping Act 57 OF 1951.

209) S262(1) of the Merchant Shipping Act 57 OF 1951.

210) S262(2) & (3) of the Merchant Shipping Act 57 OF 1951.

211) S262(4) of the Merchant Shipping Act 57 OF 1951.

also upon any person (other than the owner) who is responsible for the fault of the ship; and in any case where, by virtue of any charter or lease, or for any other reason, the owner is not responsible for the navigation and management of the ship, this Part shall be construed to impose any such obligation upon the charterer or other person for the time being so responsible, and not upon the owner.²¹²⁾ Additionally, for the purposes of section 261 of the Act, the word “owner“ in relation to a ship shall include any charterer, any person interested in or in possession of such ship, and a manager or operator of such ship.²¹³⁾

The courts have a wide discretion to give such directions as it deems fit with regard to the procedure in any claim for limitation, including the staying of any other proceedings and the conditions for the consideration of any such claim, which may include a condition that such amount as the court may order be paid to abide the result of the consideration of the said claim, or that the claimant be required to admit liability for all or any claims made against him or her, or any other condition that the court deems fit. The appropriate method of dealing with limiting as against a number of claims appears to be by way of limitation action. Limitation may also be pleaded as a defense to a claim but this method of raising limitation will only establish the right to limit liability as against the claimant in that claim and not as against any other claimants. There is no need to establish a limitation fund when pleading limitation as a defense.²¹⁴⁾

There are circumstances in which case limitation can be broken. Limitation can be broken in the event that the person seeking to limit is not able to show that the event that occurred was caused without its actual fault and privity. The South African courts have followed the later English decisions in holding that fault and privity on the part of management is sufficient to break limitation. The onus of proving a lack of fault and privity is on the person wishing to rely upon that exception.

212) S263(1) of the Merchant Shipping Act 57 OF 1951.

213) S263(2) of the Merchant Shipping Act 57 OF 1951.

214) Supra note 207.

CHAPTER IV CONCLUSION AND SUGGESTIONS

4.1 CONCLUSION

South Korea and South Africa has crossed paths in both history and in modern days. Their relationship dates back to the tragic Korean war and the graves of 11 South African Air force members that fought for their country lie in the United Nations cemetery and Peace Park in Busan, South Korea. Their relationship is not confined to history but also to modern day business. Their legal systems have much correlations in fact their similarities are rather awe inducing. Both Korean law and South African law enjoy significant English law influence incorporated in their national legislation.

This is not the only thing that these countries have in common. The Hague-Visby Rules have made an appearance in both the South African Carriage of Goods by Sea Act, the legislation that regulates all matters relating the carriage of goods by sea and also in the Korean Commercial Code. As was already brought to your attention, neither Korea nor South Africa have ratified The Hague-Visby Rules but clearly hold high regard for the content thereof as is evident of the incorporation thereof in national regimes regulating maritime affairs.

A further discussion is made in this research regarding charter parties in both South Africa and South Korea. These two countries share similar view entrenched in their legislation regarding charter parties. As aforementioned, there are three types of charter parties in both countries, namely; bareboat(demise) charter part, time charter party and also voyage charter party. The terms of these charter parties are, as can be predicted, in essence the same. Both countries regard this arrangement as a form of lease, therefore, their agreements may be subject to

the laws in place regulating the lease of movables. In the case of a bareboat(demise) charter party, the charterer is the lawful possessor. In the case of a time charter party, it is only an agreement between the charterer and the shipowner in which the shipowner promises to lend the vessel with the crew on board to the charterer for a certain fixed period of time in exchange for timeous payment of an agreed upon amount.

When it comes to South Africa's take on carrier's liability there has been years of advancement. The Praetor's Edict imposed strict liability on carriers, subject to the laws of the country for a very long time. This was not in order with the views of the people in the trade community and legislature rectified that with the birth of the Carriage of Goods by Sea Act 57 of 1986(COGSA). Under international conventions and national law discussed in my research the carrier has four basic obligations, namely; making the vessel seaworthy, caring for the cargo, issuing the bill of lading and non-deviation.

When addressing the liability of the carrier it is important to focus on who constitutes as a carrier. There is wide range of definitions identifying the carrier and in practice, there are a number of possibilities i.e. the shipowner, the charterer, the freight forwarder, the non-vessel operating common carrier and the vessel manager. Unfortunately, the KCC does not clearly define the carrier. Since COGSA is modelled after The Hague-Visby Rules, the question of what is defined as the carrier is taken from that.

The discussion of liability in this research naturally brought about the discussion relation to specific aspects of the limitation of liability. More specifically, package limitation. Given the age of both countries' national legal systems and international conventions as well as inflation and the size of modern vessels compared to old wooden, ore propelled vessels, it is quite obvious that the principles of package limitation are quite different.

National legislation of South Africa dealing with the question of package limitation is addressed by sections 261 to 263 of the Merchant Shipping Act No. 57 of 1951. This legislative instrument is modelled on the International Convention

Relating to the Limitation of the Liability of Owners Seagoing Ships 1957 as amended by the Protocol amending that Convention of 1979. Liability in terms of this Act, will ensue for damages in respect of loss of life or personal injury to an aggregate amount exceeding 206,67 special drawing rights for each ton of the ship's tonnage; or if no claim for damages in respect of loss of life or personal injury arises, liability for damages will ensue in respect of loss of or damage to property or rights to an aggregate amount exceeding 66,67 special drawing rights for each ton of the ship's tonnage. This is obviously not without exception. In the event that both types of damages are incurred, claims are limited to the rand(ZAR) equivalent of 206.67 SDR for each ton of the ship's tonnage with claims in respect of loss of life and personal injury ranking ahead of property claims to the extent of 140 SDR for each ton of the ship's tonnage and both types of loss of life and personal injury claims ranking equally with claims relating to property in respect of the balance of the fund. As for the position in terms of South Korean laws, the convention which had influence on the KCC provisions relation to package limitation is the Convention on Limitation of Liability Claims of 1976. The package limitation figure in South Korea is 666.67 SDRs per package or 2 SDRs per kilogram, whichever is greater.

The persons seeking to limit liability are generally the same in both national legal regimes. They include the owners, charterers, managers, and operators of the vessel. Also, the KCC makes provision for the employees or agents of said parties, such as crew or pilot, salvors and possibly their liability insurers.

As for package limitation under international conventions discussed in this research, there has been significant growth in the interpretation starting from The Hague Rules, moving on to The Hague-Visby Rules and finally the Rotterdam rules. Let's begin with the grandfather of all the conventions, The Hague Rules. Package limitation is regulated by Article IV(5) of The Hague Rules. This section provides that neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared

by the shipper before shipment and inserted in the bill of lading. However, The Hague Rules revealed considerable debate and confusion as to whether “£100” or “100 livres sterling” referred to the nominal or face value of the paper currency, or to its gold value. It is for this reason that the formula became increasingly unworkable.

Consequently, in 1968, the Visby Protocol to The Hague Rules substituted a new standard package limit. The 1979 SDR Protocol to The Hague-Visby Rules introduced a package limitation of 666.67 Special Drawing Rights or SDRs. Then came a need for modification, so The Hamburg Rules were born and increased the limits of liability from 2 SDR per kilo or 666.67 SDR per package, as provided by The Hague Visby Rules, to 2.5 SDR per kilo or 835 SDR per package. The principal justification for the increase was that The Hague Rules package limitation amount had been devalued by fifty years of inflation, however this is not the newest convention addressing this topic and even so, it won't be the last either. The Rotterdam Rules were created with the intention to be clearer than those used in the past. The Rotterdam Rules bears most similarity to the Hamburg Rules but the number of Special Drawing Rights (SDR) has been increased to 875 or 3 SDRs per kilogram of weight, whichever is higher.

4.2 SUGGESTIONS

The Hague Rules, The Hague-Visby Rules and The Rotterdam Rules seem stipulating similar structures for carrier's obligations, and by extension, the national maritime legal systems of both South Korea and South Africa. They all agree that the carrier's key obligations of seaworthiness of the ship and care for cargo are established, subject to certain exceptions to obligations concerning dangerous goods, measures to save life or property at sea and fault of the shipper. Naturally, the exact requirements of these obligations and exceptions either vary slightly or are different under each legal regime. The Rotterdam Rules, by extending the time of the carrier's obligation of

seaworthiness to cover the whole voyage, impose the heaviest burden on the carrier as for his mandatory obligation. Even though this extension of seaworthiness obligation can be justified by the development of modern shipping technology and more exceptions to the carrier's obligations are provided, nowadays it is an important consideration when potential Contracting States are assessing the evolutions introduced by the Rotterdam Rules. This difference is also worth noting for the Korean law and South African law as they only require the carrier to fulfil an obligation of 'initial seaworthiness of the ship'.²¹⁵⁾

The extension of this obligation to cover the whole carriage means that there will be a demand of higher level shipping technology and management in the industry which may not be reached by every country. The Reason why I am making mention of this is that I think it is something that many countries with high maritime traffic, especially with regard to carriage of goods, should seriously be considering.

I am the cheerleader of all that is Rotterdam. I'm not a professed legal academic but on the face of it, it just makes sense. It saves time and it is technologically up to date. Now don't get me wrong. I'm all about retro. The times of Nirvana and even further back, Jimi Hendrix were peerless. But this is business and there is no time like the present when it comes down to business and here is why.

The Rotterdam Rules is an international convention trying very well to frame new regulations for the carriage of goods including the maritime leg. Even though the roots for the Rotterdam Rules stem from The Hague, Hague-Visby and Hamburg rules, and its main purpose is modernisation with the needs posed by current day. This necessity is prevalent in many parts of carriage such as liability of the carrier, carriage beyond the sea leg or electronic records. Even more amazing than that is that the Rules are aimed at anticipating any

215) Sang Gyu, Ji, "A Study on the Right of Control of the Goods in Shipper and Consignee under the Rotterdam Rules", p.383.

dispute that may arise as also the result of such dispute.

The Rotterdam Rules view carriage as more than just transportation. Several important principles are reflected in the Rotterdam Rules, more specifically, of hybrid point of view. The Rules advocate the desire to achieve broad uniformity in the law governing the international carriage of goods. It wants to cut out the middle man and the never-ending perils and risks that is multimodal transportation. In my opinion, the system of multimodal transportation looks like an amalgamation of different aspects of the conveyance of goods, just because our abilities became more expanded by the development of modern transportation, unlike the laws governing them. Each aspect was governed by a different legal regime and in the end they threw them all together in a pool call “multimodal transportation” . Of course the process was more complicated than that, but it appears messy and leaves room for many an error. Thus, the importance of uniformity is well needed. That’s where The Rotterdam Rules come in. They now offer the only realistic possibility for an internationally uniform regime in the present and future. The Rules directly address the big issue of the previous regimes that are, only applicable on a tackle-to-tackle (Hague-Visby) or port-to-port (Hamburg) basis.

Since transport today often is multimodal in nature because of the use of containers, there is a clear need for regulation. Multimodal transport is currently governed by a quilt of different laws and no multimodal convention is in force. Another important change about The Rules is liability. At common law as described in the above paragraph about Praetor’s Edict, the liability of public carrier of goods, is strict. Apart from a regulating contract, the carrier is responsible for the safety of the goods while they remain in his hands. Accordingly, the issue of liability of the carrier needs proper uniformity. In my opinion, The Rotterdam Rules will do just that. Especially liability for delay is properly maintained. Finally I refer to the saying that goes: “You can please half the people, half of the time, most of the people most of the time, but you can never please all of the people all of the time.” It is for this reason that I say The Rules are obviously not perfect and fit for every incident that ever happened

or will happen, but it is certainly still better than its predecessors and suitable for practice in the event of application to multimodal transportation and electronic documentation. South Africa and South Korea would both benefit from the solutions presented by the Rotterdam Rules.



REFERENCES

Graphics

“BUSAN (KRPUS) - Port Calls, Departures and Expected Arrivals - AIS Marine Traffic.” Marinetraffic.com. N.p., 23 Mar. 2015. Web. 23 Mar. 2015.

“CAPE TOWN (ZACPT) - Port Calls, Departures and Expected Arrivals - AIS Marine Traffic.” Marinetraffic.com. N.p., 23 Mar. 2015. Web. 23 Mar. 2015.

Trade Statistics. Digital image. Department of Trade and Industry, South Africa. N.p., 2012. Web. 25 Mar. 2015.

Books

Avinash Govindjee, Dave Holness, “Fresh Perspectives: Commercial Law 2” . Cape Town: Pearson Prentice Hall, 2007, 277-278

Carr, I. International Trade Law. 3rd ed. N.p.: Cavendish, 2005.

Clare AC Dillon, “The Comparative and International Law Journal of Southern Africa” , Vol. 12, No. 3 1979.

Diamond, Anthony. The Hague-Visby Rules. N.p.: LMCLQ, 1978. 225-27.

Du Bois, F (ed) “Wille’s Principles of South African Law“ 9th ed. Cape Town: Juta & Co, 2007

John Hare. “Shipping law & admiralty jurisdiction in South Africa” , led (revised) (2006) 574

Jeong Young Suk, “International Maritime Transportation Law” (Bum Han, Busan of Korea), 2008.

Karan, Hakan. “The Carrier’s Liability under International Maritime Conventions: The Hague, Hague-Visby and Hamburg Rules” . Lewiston: Edwin Mellen, 2004.

Kim & Chang Byung-Suk Chung. “Shipping & International Trade Law” . 1 ed. European Lawyer reference. 2011.

Kim In-hyeon, “Maritime Law” . Seoul: Bobmun sa, 2007.

Kim, In Hyeon. The Asian Business Lawyer. 35th ed. Vol. 10. : Wolters Kluwer Law & Business, 2012.

Kim, In-Hyeon. Transport Law in South Korea. Alphen Aan Den Rijn: Wolters Kluwer Law & Business, 2011.

Kwak Yun Jik, Contract (II), Parkyoungsa, 328.

Lars Gorton, Rolf Ihre and Arne Sandevärn. “Shipbroking and chartering practice” , 5ed 1999.

Lee Sik, Chai, An Introduction to KOREAN MARITIME LAW, Korea University Press, 1999, p. 114.

Luddeke, C., and A. Johnson. The Hamburg Rules. 2nd ed. N.p.: Lloyd’s of London, 1995.

Payne, W., and E. R H Ivamy. Payne & Ivamy’s Carriage of Goods by Sea. 13th ed. London: Butterworths, 1989. Print.

Stephen Girvin, Carriage of Goods by Sea, New York: Oxford University Press, 2007.

Todd P Cases and Materials on International Trade Law. Sweet & Maxwell, 2003.

William Tetley. “Glossary of Maritime Law Terms” , 2ed 2004.

Wilson, J. F. Carriage of Goods by Sea. 6th ed. London: Pearson, 2008.

Journals, Thesis, Articles and Internet resources

Alberto C. Cappagli. “Limitation of liability in the Rotterdam Rules” , at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Limitation%20of%20Liability%20-%20Alberto%20Cappagli.pdf>.

Berlingieri F “A COMPARATIVE ANALYSIS OF THE HAGUE-VISBY RULES, THE HAMBURG RULES AND THE ROTTERDAM RULES” Google.co.za http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf (Accessed: 10/04/2015).

Britannia News Conventions, 8, July 2010, at http://eprints.soton.ac.uk/170957/1/the_rotterdam_rules_in_a_nutshell.pdf (Accessed: 04/04/2015).

Diego Esteban Chami, “The Obligations of the Carrier“, at <http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Diego%20Chami%20-%20Obligations%20of%20the%20Carrier.pdf>.

Goff, Lord. “Commercial Contracts and the Commercial Court.“ Todd Cases and Materials. N.p.: LMCLQ, 1984.

Hellawell, R. “Allocation of Risk between Cargo Owner and Carrier.“ The American Journal of Comparative Law 27 (1979): n. pag. [Http://www.jstor.org](http://www.jstor.org). Web. 9 Apr. 2015.

Ji, Sang Gyu, “A Study on the Right of Control of the Goods in Shipper and Consignee under the Rotterdam Rules” , Dong-A Law no.56, Dong-A University Law Institute, 2012.

Metuge, D. M “CARRIAGE OF GOODS BY SEA - FROM HAGUE TO ROTTERDAM: SAFER WATERS” LLM South Africa (2012).

Murray, D. E. The Hamburg Rules: A Comparative Analysis. 1st ed. Vol. 12. N.p.: U of Miami Inter-American Law Review, 1980. [Http://www.jstor.org](http://www.jstor.org). Web.

Myburgh, Paul. “Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?“ VUWLZ 31 (2000): [Http://www.victoria.ac.nz/law](http://www.victoria.ac.nz/law). Web. 6 Apr. 2015.

Peter Jones. “And the winner is the Hamburg Rules limits“, February

2008, at http://www.forwarderlaw.com/library/view.php?article_id=483. Web. 13 April 2015.

Pravin, S. V. "The Lawyer's World." : "THE HAMBURG RULES, FAILURE OR SUCCESS?" A REVIEW BY S.V. PRAVIN RATHINAM, June 2011. Web. 2 April 2015.

Riverstone Meat Co Pty Ltd v Lancashire Shipping Co (The Muncaster Castle). Todd Cases and Materials 521. AC. 1962. Print.

Rodrigue, Jean-Paul, Dr. "Dutch East India Company, Trade Network, 18th Century." Dutch East India Company, Trade Network, 18th Century. N.p., 1 Jan. 2015. Web. 25 Mar. 2015.

Steve Block. "Rotterdam Rules: More Problems with Packages?" , April 2010, at http://www.forwarderlaw.com/library/view.php?article_id=608&highlight=package+limitati on

Unknown, "Korea-South Africa Relations." The Embassy of the Republic of Korea to the Republic of South Africa. MOFA, 6 Apr. 2015. Web. 13 Apr. 2015.

Unknown. "What is a package?" , at [http://www.steamshipmutual.com/publications/Articles/Articles/ContainerPackage0405.as](http://www.steamshipmutual.com/publications/Articles/Articles/ContainerPackage0405.asp) p

Conventions

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading -The Hague Rules 1924

The Hague-Visby Rules-The Hague Rules as Amended by the Brussels Protocol 1968.

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea -The Rotterdam Rules.

United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules)
Hamburg, 30 March 1978.

Legislation

Admiralty Jurisdiction Regulation Act 105 of 1992. Published in Government Gazette Vol.1774 No. 1481 1 July 1992.

Carriage of Goods by Sea Act 1 of 1986. Published in Government Gazette Vol.249 No. 10125 19 March 1986.
<http://www.gov.za/sites/www.gov.za/files/Act%201%20of%201986.pdf>

Merchant Shipping Act 3 of 1989. Published in Government Gazette Vol.285 No. 11736 8 March 1989.
<http://www.gov.za/sites/www.gov.za/files/Act%203%20of%201989.pdf>

The Korea Commercial Code (finally revised in 2007)

Case Law

Adler v Dickson [1959] 2 Lloyd's Rep 267.

Baumwall v Gilchrest [1892] 1 QB 253. Approved by House of Lords[1893] AC 8 and followed in a South African case *Compagnie Des Messageries Maritimes v The Agricultural Co-operative Union LTD and Fred Cohen, Goldman and Co Ltd* 1922 NPD 84.

El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA [2004] FCAFC 202.

Montelindo Compania Naviera SA v Bank of Lisbon and SA Ltd 1969 2 SA 127 (W) 135-138.

New Zealand Shipping Co Ltd v AM Satterthwaite and Co Ltd (The Eurymedon) [1975] AC 169.

Polsa Dos Case, Oriental Fire & Marine Ins. Co. v. Dongnama Shipping Co., Ltd, the Supreme Court, 1992.2.25

The Gurara. [1998] 1 Lloyds Rep. 225.

The Limnos [2008] 1 Lloyd's Rep.50.

The Morviken. AC [1983] Lloyd's Rep 325.

Vigilant Insurance Co., a/s/o Pasternak Baum & Co., v M/T "Clipper Lagacy" et al., [2009] S.D.N.Y.

Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 277.



DECLARATION

I, Charlé van Heerden, hereby declare that “A comparative study on the liability of carrier between the Korean Maritime Law and the South African Maritime Law.” is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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