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Maritime Plus Approach: Reforming the Applicability of the Rules under Contract of Carriage by Sea

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There should be an active involvement between the seller and the buyer of different country in order to flourish the international trade. As international trade has the very essence of internationality it is therefore reasonable to say that the parties involved in the contract of carriage has to be of different origin that is to say the port of loading and the port of discharge have to be in different nation. In this regard one could clearly foresee the importance of shipping laws as the maritime sector covers a huge part of international trade. It is therefore the laws of shipping that benefits the international trade.

Commerce and technological advancements are rapidly increasing in the world today. Be it international or domestic the commercial world is seeing beneficially effect due to such advancement. This rapidity is considered to be trading transactions' major feature. But as one could see this feature is not maintained by the old regimes or regulation. The old regulation is slowly getting into the phase where it could be considered as obsolete. The carriage by sea is picking up with the phase and is slowly becoming the preferred choice for transportation under the international trade as compared to the choice of air or rail etc. This is one of the main reasons that the carriage by sea is growing rapidly around the world. This increase calls for special regulation to govern the carriage by sea.

On august 25th 1924 The Hague rules originally called 'the international convention for unification of certain rules of law relating to bills of lading was adopted in Brussels as an international convention. This was the first attempt to codify regulation governing the carriage by sea.

This very first step to introduce a new legal regime that was independent on its own way was due to the reason that the liability regime in cases of damage or loss under the common law was not satisfactory to both the cargo owner and shipper community. The common law regime was more stringent and vague with respect to the liability regime as there was no uniformity, taking into the aspect that the carriage by sea was mostly of international nature. This created a ruckus between the national laws and the international laws and called for a independent uniform regime resulting in the formation of the Hague rules. in 1968 after more than five decades amendments were made to the Hague rules through a protocol in 1968 called the Visby protocol. These new set of amended rules were collectively called the Hague-Visby rules. Though not further in 1979 these laws went under another transformation as another amendment was made. This amendment was called the Special Drawing Right protocol.

Even after such transition of laws coming into force and then being amended by two major protocols, little did they justify their lenient approach toward the minimum responsibility approach taken against the carrier. Under both The Hague and The Hague Visby the carrier has a comparatively upper edge over the shippers. Both the laws in some manner favour the carrier and for which the shipper association are not well in favour of such regulation. There could be seen as these laws hardly put a bare minimum liability on the carrier. This could be justified if look into Article 4 of the Hague Visby rules which almost gives a whole lot of big list of exception through which a carrier could exempt his liability in almost every case including the mishandling by his crew in certain circumstances.

The scope of application of the HVR is also very narrow and confined. Moreover apart from these two issues, the convention is getting old and obsolete in many ways. As discussed the technological advancement the provision related to digitisation are completely unfamiliar to the Hague Visby rules as there are no reorganisation of digital forms of bill of lading.

In 1978, conference on carriage of goods by sea was carried out by the united nation because of the issues being dealt by the older regimes specially the issue of liability regime under those rules relating to the carrier. Therefore a new set of rules were formulated by the UN in that convention later known to the Hamburg Rules to fill the void made by the previous regimes.

Countries like the UK and the US being one of the powerful shipping nations were very sceptical for the ratification of these rules which led to the failure of Hamburg rules.

On 23rd September, 2009 the United Nations general assembly in a formal ceremony opened a new convention for signature known as the Rotterdam rule. The name went after Rotterdam as this was the first place where it was open for signature.

Major intention to bring on these laws were to remove or replace the existing regime that was formulated on the basis of the three major old convention that being the HVR, the Hague rules and the Hamburg rules. moreover other reason to bring the change included the so called unification of laws governing the carriage by sea which was long foreseen during the drafting of the very first major regulation that bought a significant change in the shipping industry that is the Hague rules.

Several other issues which were not dealt under the previous rules and regulation such as door to door delivery, multimodal transport or the electronic transport documents as discussed earlier were also taken into account while drafting the new Rotterdam rules.

Regimes creating a mechanism for the liability of the carrier under a contract of carriage are basically the integral part of that contract. It is therefore required that the laws should be equally be balancing the interest of both the parties that is the shipper or the carrier in matters related to liability in cases of loss or damage, issuing of B/L, delivery and taking diligence of goods under his possession also taking into account the rights of the consignor as the all international organisations are concerned related to the rights of the consignor.

With all these positive approaches under the Rotterdam rules, it is still to come into force as it requires twenty ratification to come into force. The reason would not be elaborated as such in this thesis as to why countries are not ready to accept these laws but a critical comparison would be done of Rotterdam rules with respect to its counterpart those being the HVR or The Hague rules or the Hamburg rules.

Defining Carrier

As the ship-owner manages the vessel and being party issues bill of lading is therefore incurs liability same as that of carrier. In wehner v dene[1], the as a demise charter party as seen by the general rules of contract. The charterer's demise clause is one party to the Bill of Lading being entitled for transfer his contractual duties to the ship owner. Under the English law this demise clause was also recognised in the case of berkshire[2]. There are cases in which a jurisdictions clause or a demise clause may have been added to the bill which was different from that of a charter-party but even with it the ship owners were not able to resist it.

In the case of Roberta[3] it was seen that the charterer was acting as a principal while signing the bill and therefore the charterer were held to be primarily liable and not the ship owners due to the fact that the master was under the command of the charterer due to the authority provided by the charter party and therefore for the acts of the master the charterer was made liable as a carrier. HVR the charterer may be termed as carrier incurring all liabilities of that of a carrier.

In cases where there is a liner bill of lading, there may not be any limitation to or disqualification on the head of the sub charterer with regards to the personal liability, where the contract may be issued in the name of sub-charter but is signed by the parties involved that be agents or owner. Any person who on behalf of the owner or master signs B/L would be liable as carrier. The person either be a agent or a ship-owner or be a sub charterer. This is due because of the reason as there being no provision in the B/L to identify the sub-charterer.

Scope of Application

The primary aspect of carriage under all the convention is the essence of internationality in the contract of carriage and should be in connection to the contracting state. While if we look into HVR the rules only apply if the place where B/L is issued or the loading port is in state which is party to rules. Whereas as if we analyse Hamburg rules, they have nothing too with the issuing place of the bill of lading the contracting nation or not as it may not be connected with voyages. But still one may see certain reference related to loading port and discharging port. Therefore if the national law have ratified these rules they may apply to B/L, but under the HVR the rules will not apply if even the discharging port is in the contracting nation due to fact that the port of origin might not be in contracting state.

Based on its requirements, in lieu of the places of receiving and of distribution and loading and discharge ports, the geographical linking factors were applied to the Rotterdam law, as it also refers to contracts between doors and doors in which approval and distribution will take place internally. Instead, as stated in the Hamburg laws, there is no connection, for the aforementioned purposes, to the position of issue of the B/L. Nor was this inclusion of regulations in transport document referred to, effect if incorporation was different in various jurisdiction. In addition, reference to a national legislation that applies to both HVR and the Hamburg Rules may trigger a significant lack of uniformity and confusion because separate national laws can result.

[1] Wehner and others v dene steam shipping company and others,2 KB 92, [1905]
[2] The “Berkshire”, 1 LLOYD’S REP 185. [1974]
[3] The "Roberta", 60 Ll.L.Rep. 84, (1938)

Article 10 of the Hague rules elaborates the scope of its application:

"The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States".[4]

Therefore, Hague rules necessarily on apply to the situation where port of origin must be in the contracting party to the convention, the port of discharge is not taken into consideration while applying the Hague rules. But these are not applicable to the situation wherein the loading port is in the country not party to the convention but the port of discharge is, in these cases the applicable national law is taken into consideration.

The 'clause-paramount' strategy specific to countries implementing the Hague Rules is another fascinating thing. In these cases the party gets the freedom to choose any law other than the Hague rules be it the laws governing the B/L is the laws of the nation. In such cases the Hagues rules will not apply to those contracts and these contracts are governed by different laws as applicable be it the foreign law of the country where the port of loading is situated.

Reforms to Hague Rules

From the text in this article it is evident that, for instance, to a discharging port not in contracting state from a port situated in Singapore, in such case Hague rules would be immediately always applicable in the transportation by sea of goods.

To solve this issue of conflicting laws an important amendment was made in order to extend the applicability of the territorial application of the Hague rules.

Therefore the rules now apply to three types of voyages as prescribed under Article 10:

- *"B/L issued by in contracting State; or"*
- *"Port of origin is in state party to the convention; or"*
- *"The contract in the bill of lading shall specify that these Rules or laws in any State that gives force to these Rules shall regulate the contract."*[5]

In the case of Vita Food Products v Unus[6] Shipping, court found that scope of application of the Hague rules was not applicable in present case, due to which the contract was governed by the agreement rather than the rules. This issue was persistent and therefore amendment was made to overcome the issue arose through the case.

The Regulations appear to give the interpretation of the Rules through their language even greater power. In fact, the Rules of Procedure of the UK, for example, was provided "the power of law" under Articles 1 (2),(3),(6) and (7) of the Sea Act of 1971, which introduced the laws. The Rules specify explicitly that whenever a carriage arrangement comes with one of the given circumstances laid down under Article 10 of Hague rules, the laws of Procedure shall be applicable irrespective that there are correct law of the contract present. That is, law by force and regularly in or out shipments, the convention refer.

Major part of the world is governed under by HVR as they are in terms one of the oldest regime for carriage of goods by sea. While few of the nations that are twenty-six maritime conation adopted Hamburg rules. N number of rules makes it difficult to have a uniform regime because of which different nations have different rules to apply at the port of origin given in a different circumstance. It could be seen in different European countries as they tend to apply amendment Hague-Visby rules to govern the outbound shipment. Whereas they tend to apply Hague rules if the country country of origin of shipment applies those rules instead of the new amended Visby protocol. while regarding the the shipment whose origin port of loading and discharging port are both in within local limits of the state, certain countries tend to apply local laws with certain modification in them keeping in mind the international regime.[7]

Different countries adopting different rues created more complication in different ways. Their different approaches taken by different countries like France accepted the regime rectified it, no further incorporation was required. Countries like Australia and Canada may not have signed the Hague convention or even ratified it, but in certain way such as incorporated or accepted the HVR to their national statutes called maritime liability act

[4] The Hague Rules. art 10
[5] Visby protocol art 10
[6] Vita Food Products Inc v Unus Shipping Co Ltd, 63 Ll L Rep 21, (1939)
[7] Zulkifli Hasan and Nazli Ismai, the weakness of the Hague rules and the extent of reforms made by the hague-viby rules, WORDPRESS

etc. In this case, they can comply very closely without being subject to the relevant international instrument.[8] The countries who have not at least ratified the Hague or the HVR the Hamburg rules do not have similar local laws, but still, by the custom of adopting different foreign treaties, or the rule of a negotiating party in the Bill of Lading, are required through international requirements for all practical purposes.

Before the Visby amendment the applicability of the Hague rules were determined in the context of the ex proprio vigore principal that is by its own force in contracts governing the carriage that were formulated through the B/L or any other document. Under Article 1(b) it could be analysed as:

''Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.''[9]

The possible constraints were imposed on the Hague law. The usage of the most relevant clauses that is the paramount clause has contributed to this. Moreover looking into Article 10:

"The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States', [10]this was often overruled by national implementing laws, where they were used, that required the bill of lading to contain a paramount clause expressly stipulating that the Hague Rules were to govern the contract."[11]

This was seen in Vita Food Products v. unus Shipping Co.Ltd[12] as it was affirmed by the privy council, but later the judgement was revered and the requirement of paramount clause to be present was removed and now Hague rules apply even if there is no clause paramount.

Due to this the wordings were changed that of article 10 of HVR to curb out such possibility as discussed above to make it more stronger.,' "Each Contracting State shall apply the provisions…''[13] nevertheless, now it is apparent that such paramount clauses need no longer be in compliance with the Hague / Visby laws, and national legislation previously not in effect.

The requirements for the laws are laid down by Article X of the HVR regulation are made for rules to be affective. Goods that are being transported from one state to another will attract the HVR, it states:

- "a bill of lading is issued in a contracting state"
- "the carriage begins in the port of a contracting state"
- "the contract of carriage specifically incorporates the rules by reference."[14]

If circumstances are such that can a country may extend its scope of HVR if not covered under article 10 but not otherwise. Like for instance if they explicitly relate to the rules themselves, the United Kingdom extended the Hague Visby to the receipts that are non-negotiable. The Hague and Visby rules for carriages that only reside within this nation can also apply national law. The service under the Nordic Maritime Code undertaken currently by Finland, Norway, Swedan and Denmark.

Hamburg Rules

As there were certain mishap and loops with the application of HVR, Hamburg rules were formulated with the purpose to resolve it.

Article 2(1) had a major change in this respect stating:

"The rules apply to 'all contracts of carriage by sea' and not only to contracts entered by way of bills of lading when:

- the port of discharge is in a contracting state
- the port of loading is in a contracting state
- when any one of an optional group of ports of discharge is in a contracting state
- when the Hamburg Rules are incorporated by reference in the contract
- when the bill of lading or other contractual document is issued in a contracting state"[15]

[8] ibid
[9] The Hague rules. art 1(b)
[10] The Hague rules, art10
[11] Hamburg Rules for International Carriage' (19th, July 2020) <https://www.lawteacher.net/free-law essays/international-law/hamburg-rules-for-international-carriage.php?vref=1>
[12] (1939) 63 Ll L Rep 21
[13] The Hague Visby rules, art10
[14] ibid
[15] The Hamburg rules, art2(1)

Application of HVR was only made to extent of the b/L whereas new Hamburg regime extended that scope to all the other forms of contracts that is of the nature involving carriage by sea. Simultaneously these laws curbs one of the major issue related to the B/L as to the definition and what falls under the definition this definition. Any laws that prevent potential confusion should boost the trading climate and should therefore be accepted as part of the Hamburg Convention under article 2. The HVR governing as to what al arts of the contracts may be covered by the regulation have been significantly uncertain. The laws apply to lading bills and other similar title papers in Articles 1(b) and 2 of Hague / Visby. Article 6 specifies, moreover, use of receipts that are non-negotiable in nature shall just, subject to such restrictions, preclude the provisions of the law.

"Any other exceptions are also listed and the fact is that the ultimate and true scope for the operations of the HVR is unclear under these area of importance. The rules while were truly aimed at excluding non-negotiable payments, it appears that they did try not avoiding the rules while using receipts that were non-negotiable in nature whether natural or unlawful instances."[16]

Hague Visby rules article 10 is same as that of or parallel to the of the rules of Hamburg's namely article 2(1) (a). However, HVR article 2(1) is not extended to formulates wherein the origin port is not State party to regulation and does not enforce the Hamburg Regulations, as in the case where the issuance of contract has taken place in the state that is party to the regulation, Article 10(a) of the Hamburg regulations, provide that the rules apply. Similarly, if the provisions of the contractual document itself are incorporated by reference, this suffices to ensure the application of the provisions. The laws are laid out in Article 10(c) of the Laws of Law / Visby and are identical with the Article 2(1)(e) of the Hamburg rules.[17]

Rotterdam Rules 'Maritime Plus Approach'

Unlike full coverage in multi modal transport the scope of Rotterdam rules are comparatively narrower unlike that of its counterpart like multimodal transport convention where the application of convention covers two or more than two type of carriage such as covering rail and road in addition to the maritime leg etc. however analysing the Rotterdam rules Article 1(1) one could say the rules require a presence of maritime leg in the transportation in subsequent to other modes. This obligatory presence of a necessary maritime leg makes the rules a 'maritime plus convention. The 'marine plus approach' is defined as contract of carriage' under what the company take on to transport against payment of freight the goods form one port to another. Agreement provides for the contract carriage by ship apart from the carriage of sea.' The significance of this concept is that it provides a special provision which allows the combination of a ship leg and other modes of transportation. However, the sea leg is an absolute precondition, but other transport modes are not.

Therefore due to this approach Rotterdam rules will apply to situations even if the maritime leg is less as compared to any other mode of carriage be it rail or road or air etc. and the carrier would attract Rotterdam rules liability regime.

Though scholars were not ready to accept the same opinion. They contest on the point that though Rotterdam rules include any mode of transport other than that of the maritime carriage, still the carrier only attracts liability for the maritime carriage being undertaken.[18] Therefore even if the maritime leg did not actually occurred mere presence of such legs present in the contract is sufficient to attract the Rotterdam rules liability regime.[19]

Therefore Rotterdam rules cover not just the sea leg but also any other mode of transport is what expanded by the inclusion of the maritime approach in the Rotterdam rules.[20]

"The loading port and discharge port position shall be the key connection factor when the time is used for operation of Visby protocol and Hamburg Laws, and port to port is the principal connecting factor. The extent of implementation of the Rotterdam Rules, however, is dependent on the geographical relation between state who is part to the convention and the carrier. Rotterdam rules therefore refers instead to receiving place and place of delivery where the application period is door-to-door."[21]

As the sea leg is always required to be implementing the Rotterdam regulations, however, it was decided that 'alternative connecting factors still must be considered for the ports of load on and discharge from a ship. It

[16] Hamburg Rules for International Carriage' (19th, July 2020) <https://www.lawteacher.net/free-law essays/international-law/hamburg-rules-for-international-carriage.php?vref=1>
[17] ibid
[18] zulkifli hasan and nazli ismail, the weakness of the Hague rules and the extent of reforms made by the Hague-viby rules
[19] ibid
[20] vol 73,hooper chester d, carriage of goods and charter-parties, 169 170 (Tulane law review 1998-1999)
[21] ibid

is therefore sufficient that the receipt site, the cargo port, discharging port or delivery place be in a state party to contract for this convention to apply.

Consequently, Rotterdam's Rules are strictly limited to international shipments in continuation of the current international rule. In addition, both the maritime journey and the complete contractual carrying of a new Agreement must be foreign for a specific contract. 'In separate party to the convention the origin port of a sea carrier and that discharging port of similar transport by sea shall be subject to the Convention.

The different approach incurred by the previous regime are the basis of the Rotterdam rules. the 'documentary approach' is being followed by HVR and Hague Regulations. this approach determines applicability of regulations depending upon their document's nature provided in the contract, like the bill of lading. However incorporation of the 'contract approach' in the Hamburg rules which makes parties attract liability who are in the contract even if there is no documents available. The document are not the need in determining the applicability in Hamburg rules. Rotterdam rules have incorporated both the approaches as mention above namely the 'contract approach' and the 'documentary approach' as it applies to all contract of carriage involving a sea leg.

Rotterdam dam rules scope of application are dealt under article V of the rules. It should distinguish between the location in which the receiving of the cargo occurred and charged by carrier plus location in which it is loaded and transported to the recipient. What is most important is that receiving and delivery places are in the various states and the loading and unloading port in various countries.

Three approaches were taken into account while drafting the rules by the working group III those were:

- Contractual approach
- Trade approach
- Documentary approach

These approaches expanded the scope of Rotterdam rules as the first approach based the scope on the document similar to HVR. Other expanded the application of the regulation taking into account the contract itself same as that to Hamburg rules and third approach based the application on certain type of trading being carried out. Therefore the Rotterdam rules scope of application was a mixture of previous convention.[22]

"The RR findings are more mature and provide more complexity than was thought appropriate at one stage of the study. In addition, previous revisions omitted charter parties, affreightment contracts and quantity contracts; nevertheless, these definitions became more ambiguous than clarifying."[23]

By relation to the Hamburg Regulations, they do not recognise the location where the bill is published, taking into consideration the foreign dimension of the marine transport industry. "the Rules of Procedure do not follow the laws.

One relevance could be seen Rotterdam rules and Hamburg rules have is, unlike Hague-Visby rules these rules doesn't require document to attract applicability of rules.

Geographical application of Rotterdam rules.

Nature of carriage must be international in order to apply Rotterdam rules. it should moreover also involve a maritime leg due to this Rotterdam rules are termed as 'maritime plus convention. This could be simplified by an example that if the carriage is take within a country where both loading port and discharging port is same RR would will not be applicable. Though national laws could extend the Rotterdam rules application in terms of incorporate them to their national legislation. It is also a matter of geography that a significant connecting factor with a contracting state must be created.

[22] vol.47, simon baughen, shipping law 299-300(2nd ed informa law)
[23] Lorena Sales Pallare, the rotterdam rules:between hope and disappointment, 2 mexican law review