



International Trade, Bills of Lading, Charterparties and Arbitration

Day 5

Obligations of Carrier under Rules

Arun Kasi

Advocate & Solicitor, Malaya

Arbitrator, AIAC and THAC panels

Fellow, Chartered Institute of Arbitrators London (CIArb)

Member, London Maritime Arbitrators Association (LMAA)

Obligations of Carrier under Rules

Statutory Application

- Hague Rules (implemented by the 1950 Act for Peninsular Malaysia)
 - Sec. 1 – Act applies to **Peninsular Malaysia**
 - Sec. 2 - shipment out from a **Malaysian** port under B/L
 - Art. X - Application of Rules to B/Ls issued in any contracting State - omitted in part of Schedule 1 to the Act
 - Art IV(5) - liability limit modified from £100 per package or unit – not modified
- Sarawak and Sabah
 - 1960 Sarawak Regulations (Art. IV(5) liability limit modified from £100 to RM850 per package or unit)
 - 1961 Sabah Regulations (adopts the 1960 Sarawak Regulations)

Obligations of Carrier under Rules

Statutory Application

- Hague-Visby Rules (Art X)
 - Bill of lading issued in a contracting state
 - Shipments out from a port of a contracting state
 - Bill of lading provides that the Rules (or a legislation giving effect to the Rules) are to govern the contract
- Carriage of Goods by Sea (Amendment) Bill 2019 (for Peninsular Malaysia only)
 - Gives discretion to Minister to change the Rules in Schedule
 - Expected that Minister will change the Rules to Hague-Visby Rules (as amended by SDR Protocol)
 - Anticipated that Art X will again be omitted, as no change to s. 2 is proposed.
 - B/Ls changed to sea carriage documents (includes: sea waybills and ship's delivery orders)

Obligations of Carrier under Rules

Statutory Application

- Hague-Visby Rules (Art IVbis)
 - Extends the protection accorded in the Hague-Visby Rules to:
 - tort actions
 - servants and agents of carrier (but not independent contractors)
 - Art IVbis
 - 1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.
 - 2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention. Shipments out from a port of a contracting state
 - Not found in Hague Rules

Obligations of Carrier under Rules

Circumventing Statutory Application

- *Vita Foods Products Inc v Unus Shipping Company Ltd (1939)*
 - B/L issued in Canada for a shipment from a Canadian port to a US port.
 - Bill contained a choice of law clause for English law.
 - Under the English law, application of the Hague Rules was only compulsory for shipments out of the UK.
 - Accordingly, the Privy Council held that the Hague Rules did not apply in this case.

Obligations of Carrier under Rules

Circumventing Statutory Application

- *The Hollandia* (1983)

- Shipment from a UK port.
- B/L had an exclusive jurisdiction clause for Netherlands.
- UK adopted Hague-Visby Rules.
- Netherlands adopted Hague Rules (at that time).
- Cargo damaged and cargo interest brought action before English court.
- Carrier applied for Stay of the action.
- House of Lords refused the stay.

Obligations of Carrier under Rules

Circumventing Statutory Application

- *The Benarty* (1984)

- Shipment from European ports to Indonesia.
- European ports, mostly, adopted Hague-Visby Rules.
- Indonesia did not adopt Hague or Hague-Visby Rules.
- Exclusive jurisdiction clause for Indonesia.
- Cargo claim brought before English court.
- Carrier applied for Stay of the action
- Indonesia had a more favourable tonnage limitation regime than the UK.
- CA allowed stay
 - on carrier's undertaking that it will not take any advantage by non-application of the Rules
 - while they are free to enjoy benefits of the favourable tonnage limitation in Indonesia.
- Art VIII: "The provisions of this Convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels."

Obligations of Carrier under Rules

Voluntary Application

Voluntary Application (i.e. Contractual Application)

- By clause paramount

Statutory Application v. Voluntary Application – Why Difference Significant?

- When statutorily applicable, the Rules may not be ousted unfavourably to the shipper (Art. III(8)).

Art. III(8): The provisions of this Convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

- When voluntarily applicable, the Rules may be modified as parties desire.

Obligations of Carrier under Rules

Period of Coverage

STATUTORY

Same in Hague / Hague-Visby Rules

- Art. I(e):
"Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.
- Art. II
Subject to the provisions of Article VI, 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 hereinafter set forth.
- Art. VII
Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea.

Obligations of Carrier under Rules

Period of Coverage

CONTRACTUAL

- Usually extended by express provisions in B/L
- May be extended by concepts of implied contract
 - Before loading
(even before bill is issued, if no received for shipment bill is issued)
Pyrene v Scindia
 - After discharge
Brandt v Liverpool

Obligations of Carrier under Rules

Obligations

SEAWORTHINESS / CARGOWORTHINESS OBLIGATION

- Art. III(1) – duty to exercise *due diligence, before and at the beginning* of the voyage, 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.
- It is sufficient if unseaworthiness is ‘a’ cause
 - *Smith, Hogg v Black Sea and Baltic General Insurance* (1940) (HL)
- Burden of proving unseaworthiness is on the cargo interest, then the duty to prove due diligence on the carrier
- Art. III(2) - duty to properly and carefully
 - load, handle, stow, carry, keep, care for, and discharge.
 - But this does not affect free-in / free-out terms, imposing liability for loading / discharge on the cargo interest
 - *Pyrene v Scinda* (1954)
- See [Arun Kasi, ‘Operation of Doctrine of Stages under Hague/Hague-Visby Rules Regime’, 2021.](#)

Obligations of Carrier under Rules

Defences

Art. IV(2) defences, available to breach of Art. III(2) obligation but not III(1) obligation:

- (a) 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.
- (b) Fire, unless caused by the actual fault or privity of the carrier.
- (c) Perils, dangers and accidents of the sea or other navigable waters.
- (d) Act of God.
- (e) Act of war.
- (f) Act of public enemies.
- (g) Arrest or restraint of princes, rulers or people, or seizure under legal process.
- (h) Quarantine restrictions.
- (i) Act or omission of the shipper or owner of the goods, his agent or representative.
- (j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
- (k) Riots and civil commotions.
- (l) Saving or attempting to save life or property at sea.
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- (n) Insufficiency of packing.
- (o) Insufficiency or inadequacy of marks.
- (p) Latent defects not discoverable by due diligence.
- (q) 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.

Obligations of Carrier under Rules *Art. III(2) / IV(2) - Burden of Proof*

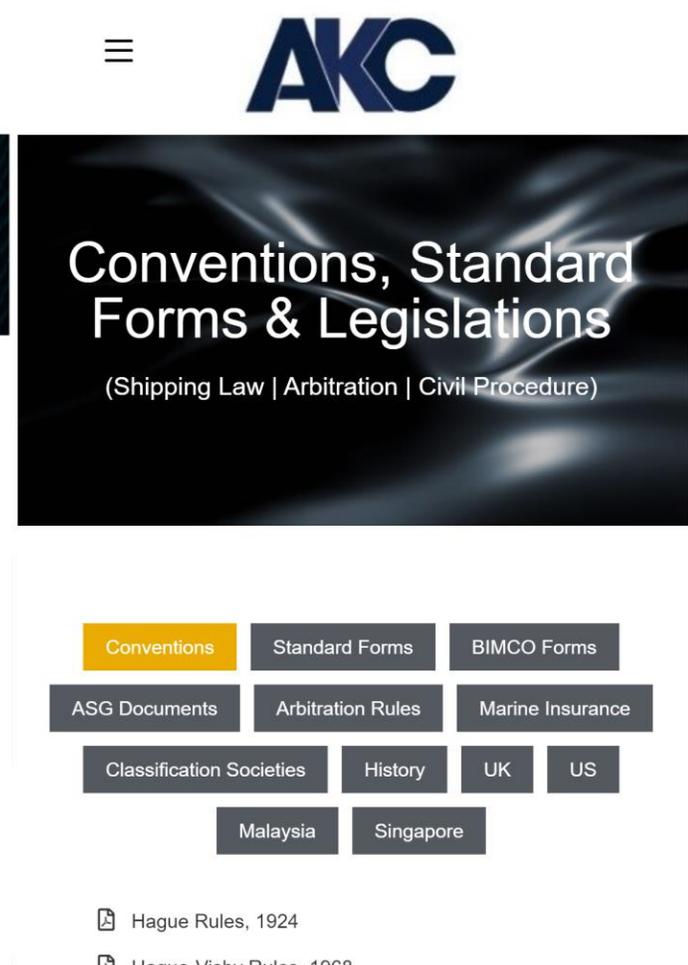
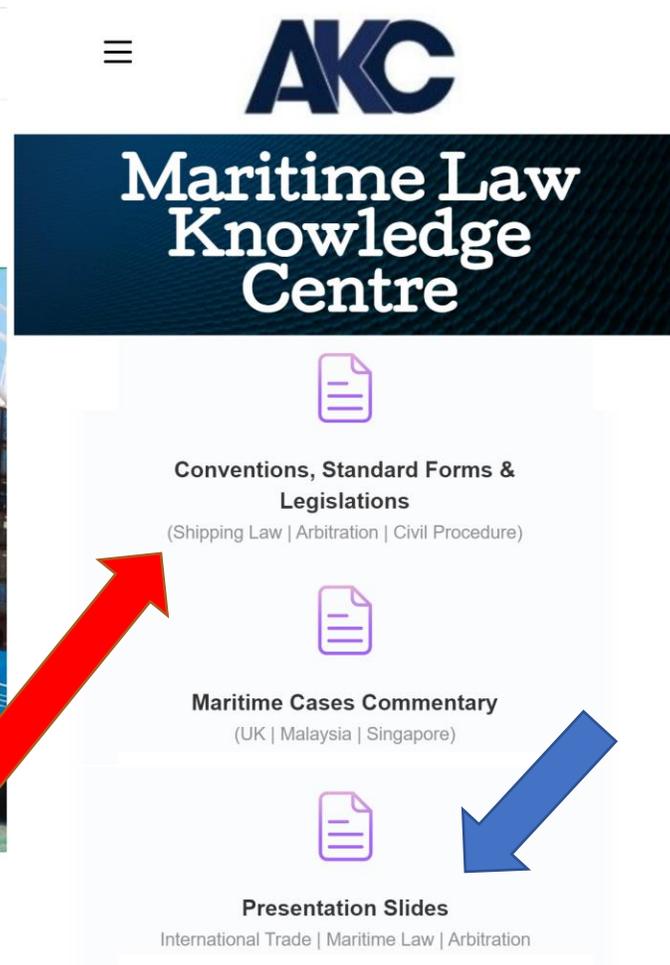
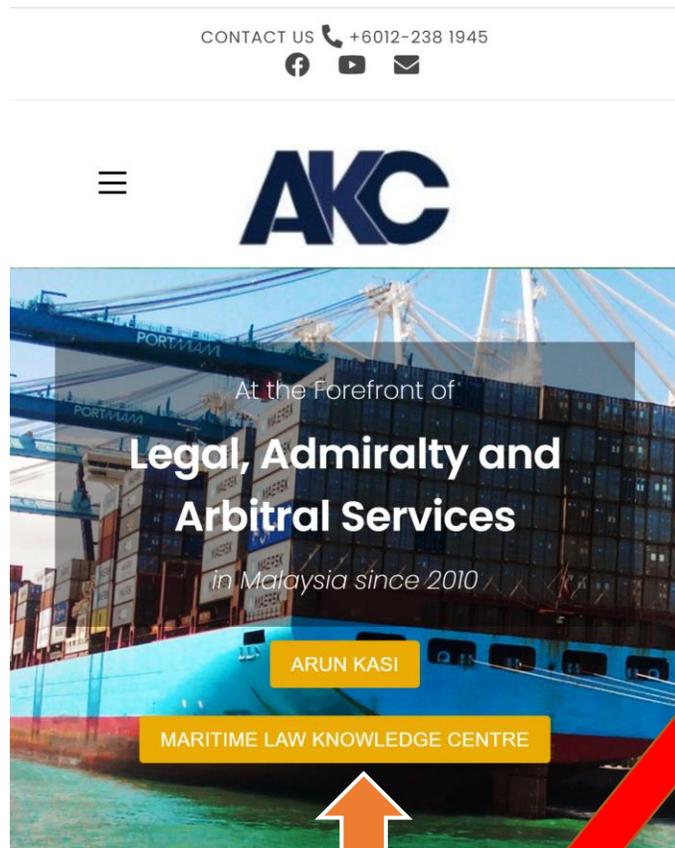
- *Volcafe v CSAV* (2018)(UK SC)
 - *The Glendarroch* (1894) overruled
 - Cargo claimant to prove goods were shipped in good order and condition
 - a fact most of the time evidenced in the bill of lading itself
 - Then, legal burden falls on the shipowner/carrier (**as bailee**) to prove that the loss or damage happened without its fault
 - Only then, shipowner/carrier may rely on Art. IV(2) defences
 - i.e. shipowner/carrier must prove no-negligence before it can rely on Art. IV(2) defences

Obligations of Carrier under Rules *Art. III(2) / IV(2) - Burden of Proof*

- *Volcafe* will apply in Malaysia
 - Evidence Act 1950, s. 106
“When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”
 - Contracts Act 1950, s. 105
“The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in section 104.”
 - *Port Swettenham Authority v Tw Wu and Company (M) Sdn Bhd* (1978) (PC on appeal from Malaysia)
- See **Arun Kasi, ‘Burden of Proof in Cargo Claims: *Volcafe v CSAV* in Commonwealth’, [2020] 1 LNS(A) v**

International Trade, Maritime Law and Arbitration Web Reference

arunkasico.com -> [Maritime Law Knowledge Centre](#) -> [Conventions ...](#)



Carriage of Goods by Sea

Further Reading

[Arun Kasi, *The Law of Carriage of Goods by Sea*, Singapore, Springer, 2021](#)

Arun Kasi

The Law of Carriage of Goods by Sea

 Springer

PART I: INTRODUCTION AND INTERNATIONAL TRADE

1. Introduction and Legal Framework
2. Shipping Documents
3. International Trade

PART II: BILLS OF LADING

4. Obligations of Carrier under Rules: Legal Bases
5. Third Parties: Protection and Action for
6. Proof of Damages: Presumptions and Estoppels
7. Implied Terms and Exclusion Clauses.
8. Hague & Hague-Visby Rules: Application
9. Hague & Hague-Visby Rules: Carriers' Obligations and Defences
10. Hague & Hague-Visby Rules: Carriers' Liability and Time Limitations
11. Shippers' Obligation for Dangerous Cargo

PART III: CHARTERPARTIES

12. Charterparty: Introduction
13. Voyage Charter: Freight and Lien
14. Voyage Charter: Laytime and Demurrage
15. Time Charter: Orders and Indemnity
16. Time Charter: Withdrawal, Off-Hire and Redelivery
17. Time Charter: Apportionment of Cargo-Claims Liability

Carriage of Goods by Sea

Further Reading

Arun Kasi

The Law of Carriage of Goods by Sea

 Springer

Availability

Malaysia

- Kinokuniya

UK

- Wildy
- Foyles
- Waterstone
- Blackwells
- John Smith's
- Browns Books

USA

- Barnes & Noble
- Books A Million
- Walmart
- The Last Bookstore
- Schuler Books
- Bookscouter
- Joseph Beth
- Bluemanatee
- Literatibookstore
- Powells
- Bookshop.org
- Kinokuniya

Canada

- Indigo

Australia

- Dymocks
- Booktopia
- Kinokuniya

Germany

- Hugendubel
- Weltbild
- Thalia
- Langer Blomqvist
- Buchkatalog
- Umbreit
- Stephanus Buchhandlung

France

- Galignani

Brussels

- Standard Boekhandel
- Club

Sweden

- Adlibris
- AkademiBokHandeln
- Bokus

Switzerland

- Buchhaus
- OrellFuessli

Estonia

- Krisostomus

Elovakia

- Martinus

Denmark

- Saxo

Czech

- Martinus

Singapore

- Kinokuniya

Taiwan

- Kinokuniya
- Books.com.tw

Thailand

- Kinokuniya

S. Korea

- Aladin

India

- Books Wagon