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Burden of Proof, Proof

Both the future of the specialized agencies and of the Court itself are likely to be affected by this Opinion. Specialized agencies have the prerogative to transfer their offices, but they must consult in good faith and give reasonable notice to the host state.⁴⁹ This duty exists regardless of particular host agreement provisions. This should serve to stifle manipulation of regional offices as a means of political retaliation for extrinsic differences. Moreover, other specialized agencies may now be more willing to seek advisory opinions from the Court. By rephrasing the questions asked, the Court was able to give a more complete answer, but it risks deterring requests for opinions by agencies wary of rephrasing. In the long run, this opinion should turn out to be a positive step for both the Court and the specialized agencies, and ultimately for all member states of the United Nations.

Charles A. Wintermeyer, Jr.

Risk of Loss in Shipping Under the Hamburg Rules

INTRODUCTION

In March 1978, the United Nations held a conference on the carriage of goods by sea in Hamburg, West Germany. Twenty-seven conference participants signed the resulting convention.¹ The rules embodied in the convention dramatically changed and simplified the basic legal relationships between cargo shipper and cargo carrier in regard to allocation of risk.

The purpose of this development is to examine the new rules of maritime shipping in light of historical experience and the contemporary environment. Inquiry will be made into the theoretical soundness and anticipated effects of the new rules. The prevailing pragmatic question of whether the rules can expect widespread ratification will also be entertained. First, a brief examination will be made of the rules traditionally

49. See 20 INT'L LEGAL MAT. at 99-100.

1. The United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, U.N. Doc. A/CONF. 89, reprinted in 27 AM. J. COMP. L. 421 (1979). The convention was signed by Austria, Brazil, Chile, Czechoslovakia, Denmark, Ecuador, Egypt, the Federal Republic of Germany, Finland, France, Ghana, the Holy See, Hungary, Madagascar, Mexico, Norway, Pakistan, Panama, the Philippines, Portugal, Senegal, Sierra Leone, Singapore, Sweden, the United States, Venezuela, and Zaire.

used in the international community for allocation of risk between shipper and carrier. Second, the contents of the new legislation will be explained. The third section will introduce and critique criticisms and support for the Hamburg rules. Finally, the prospects for ratification of the new rules will be considered and a conclusion will be offered.

THE HAGUE RULES

The Brussels Convention of 1924² enacted the Hague rules, which have been used for allocation of risk in shipping for the past half century. The provisions of the Hague rules which bear the major burden of allocating the risk of cargo loss and damage between the cargo owner and carrier are found in articles III and IV of the Brussels Convention. Article III sets out the carrier's obligation to cargo:

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
 - a) Make the ship seaworthy
 - b) Properly man, equip and supply the ship
 - c) Make the holds, refrigerating and cold chambers and all other parts of the ship in which the goods are carried, appropriate and safe for their reception, carriage and preservation.
2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Under article III, a fault standard appears to be applicable. The carrier is to have a duty of due care towards the goods and to be liable for any damage to the goods resulting from his negligence. Article IV modifies this obligation, however, and dilutes the standard, setting out seventeen exceptions to the articles regarding obligations.³

2. International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233 (1924) T.S. No. 931, 120 L.N.T.S. 155 [hereinafter cited as the Brussels Convention].

3. *Id.* Article 4(2) provides:

- Neither the carrier nor the ship shall be responsible for the loss or damage arising or resulting from:
- (a) act, neglect, or default of the master, mariner, pilot or servants of the carrier in the navigation of the ship;
 - (b) fire, unless caused by the actual fault or privity of the carrier;
 - (c) perils, danger, 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 representative or agent;
 - (j) strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *provided*, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own act;

The article IV exceptions in effect create two standards of liability in addition to the article III fault standard.⁴ First is the standard of nonliability for damage caused by errors in navigation, damage to deck cargo, or damage to goods caused by delay in delivery of goods. Another liability standard in the Hague rules is that imposed when there is damage to cargo by fire. Article IV (2)(b), the fire provision, bases liability only on the fault of certain employees.⁵ The provision states that the carrier shall not be responsible for loss or damage resulting from "fire, unless caused by the actual fault or privity of the carrier."⁶ The prominent feature of this exception is that it is necessary to distinguish between the negligence of the shipowner and that of its employees. The negligence of the carrier's employees will not necessarily result in carrier liability; the fault must be that of the carrier itself. In the case of corporate shipowners, some decisions have held that only the negligence of a senior employee or officer will result in carrier liability, not merely that of a mere employee or agent.⁷ The variations from the fault standard in the Hague rules make them inconsistent, contradictory, and confusing to shippers, carriers, and courts.⁸

The burden of proof under the Hague rules has also been problematic for the international maritime community. As was pointed out by Chief Justice Beste, in the nineteenth century decision of *Riley v. Horne*,⁹ the events relevant to the liability of the carrier occur for the most part out of the presence of the shipper, under circumstances making it exceedingly difficult for the shipper to ascertain or approve the cause of damage or loss. Because of this, rules on the burden of proof are of utmost

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- (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 the 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; and
 - (q) any other cause arising without the actual fault and privity of the carrier and without the 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 nor neglect of the carrier contributed to the loss or damage.

4. Approaches to Basic Policy Decisions Concerning Allocation of Risks Between the Cargo Owner and Carrier, U.N. Doc. A/CN.9/63/Add. 1; reprinted in [1972] UNCITRAL Y.B. 287, 288, U.N. Doc. A/CN.9/Ser. A [hereinafter cited as U.N. study].

5. *Id.* at 289.

6. Brussels Convention, *supra* note 2, art. 4 (2)(b).

7. U.N. study, *supra* note 4, at 289. For a sample case, see *Earle & Stoddart v. Wilson Line*, 287 U.S. 420, 425 (1932). See also GILMORE & BLACK, *THE LAW OF ADMIRALTY* 698 (1957).

8. For other works on the inconsistencies of the Hague rules, see Villareal, *Carrier's Responsibility to Cargo and Cargo's to Carrier*, 45 TUL. L. REV. 770, 774 (1971); Chrispeals, *Revision of the Hague Rules*, 7 J. WORLD TRADE L. 252, 256 (1973).

9. [1828] Bing. 217.

importance.

In countries using the Hague rules, the burden of proof is in some situations placed on the carrier and in others on the shipper. Exactly how the burden is allocated is often a matter of some uncertainty, and may vary among countries.¹⁰ Generally, the shipper must make out a prima facie case of damage by proving delivery of the goods to the carrier and receipt in bad order or nonreceipt.¹¹ This done, the burden passes to the carrier, who must show that it falls within an article IV exception.¹² If it manages to do so, the burden may shift back to the shipper.¹³ Once the burden is back on the shipper he must prove that the carrier's fault or negligence caused the exempted act or concurred with the exempted act in producing loss or damage.¹⁴ The burden varies, however, from exception to exception and from country to country. For example, where there are concurrent causes of damage, one of which is accepted and the other not, courts are not in general agreement on the burden of proof.¹⁵

The Hague rules of the Brussels Convention of 1924 were widely signed and ratified, and are still the standard for the world. During the mid-1960's, the United Nations Conference for Trade and Development (UNCTAD) determined that changes in the rules were necessary, and the initiative for the drafting of the Hamburg rules was undertaken.

THE HAMBURG RULES

After ten years of discussion, debate, compromise, and painstaking drafting, the combined efforts of UNCTAD and the United Nations Commission on International Trade Law (UNCITRAL) produced the final form of the draft submitted to the Hamburg conference in March 1978. The final form of the liability standard reads as follows:

The carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage, or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.¹⁶

The approach adopted by the drafters was heavily influenced by the other international conventions. Article XVII (1) of the Convention on the Contract for the International Carriage of Goods by Road (CMR) would hold a carrier liable for all loss or damage occurring to goods in

10. See U.N. study, *supra* note 4, at 289.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 291.

16. United Nations Convention on the Carriage of Goods by Sea, *supra* note 1, art. 5, para. 1.

their charge.¹⁷ This provision is essentially the same as the first part of the draft rules and neither is significantly different from the counterpart provision of the other two international cargo conventions: the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)¹⁸ and the International Convention Concerning the Carriage of Goods by Rail (CIM).¹⁹

The second part of the first section changes the standard to a liability for fault section, since if the carrier can prove that it was not his negligence that caused the loss, he is not liable. This too is closely modeled after the other conventions. The Warsaw convention of 1929 states that the carrier is not liable if "he and his agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures."²⁰ The CIM convention (rail) states that the carrier is not liable if the loss or damage resulted "through circumstances which the . . . [carrier] . . . could not avoid and the consequences of which it was unable to prevent."²¹ The wording of the CMR convention is almost identical of that of the CIM convention.²² Also important to note is the general rule under all three conventions that the carrier bears the burden of proof. This in effect makes the carrier strictly liable for unexplained loss since he will be unable to meet the burden of proof.

The drafting committee felt that adapting the system of one of the three conventions might facilitate the making of contracts for combined transport operations in the preparation of uniform rules applicable to such contracts. The committee pointed out that under the existing regimes, attempts at unification of the rules of liability encounter serious difficulties because of the differences of liability rules for the different modes of carriage.²³ It was believed that to the extent that the liability rules regarding carriage of goods would be brought close to the rules of other types of carriage, these problems would be alleviated.²⁴ A provision was also added to the Hamburg rule to oppose liability for damage to the goods caused by delay in delivery. The 1924 Brussels Convention contained no provision addressing this issue; case law on the subject was conflicting and in most jurisdictions the problem had not been resolved ei-

17. Convention on the Contract for the International Carriage of Goods by Road, *done at Geneva*, May 19, 1956, *entered into force* July 2, 1961, 399 U.N.T.S. 189, 204 [hereinafter cited as CMR].

18. Convention for the Unification of Certain Rules Relating to International Carriage by Air, *done at Warsaw*, Oct. 12, 1929, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention].

19. International Convention Concerning the Carriage of Goods by Rail, *done at Berne*, Oct. 25, 1952, *entered into force* Mar. 1, 1956, 241 U.N.T.S. 357 [hereinafter cited as CIM].

20. Warsaw Convention, *supra* note 18, art. 20, para. 1.

21. CIM, *supra* note 19, art. 27, para. 2.

22. CMR, *supra* note 17, art. 17, para. 2.

23. Working Paper by the Secretariat, Annex 1 to the Report of the Working Group on International Legislation on Shipping in the Fourth (Special) Session, U.N. Doc. A/CN.9, annex; *reprinted in* [1973] UNCITRAL Y.B. 146, 155, U.N. Doc. A/CN.9/Ser. A.

24. *Id.*

ther by court decisions or legislation.²⁵

ANALYSIS AND CRITIQUE OF THE HAMBURG RULES

A. *Criticism of the Hamburg Rules*

A major criticism leveled against the Hamburg rules is that by changing the language of the standard from "due diligence" in the Hague rules to that which is used in the other transport conventions—"liable for loss . . . unless [he] . . . proves that he took all measures which could be reasonable required . . ."—clarity and predictability is being sacrificed.²⁶ It is argued that had the "due diligence" language of the Hague rules been retained, the benefit of existing case law construing the standard and clarifying its application could have been retained.²⁷ As the rules presently stand, the meaning of the standard is vague and ambiguous.

This criticism fails to consider that due to the similarity between the standard in the Hamburg rules and the other transport conventions, the courts might analogize and apply decisions clarifying and construing the standards of the other transport conventions to the Hamburg rules. Specific duties might be slightly different owing to the peculiarities of the different modes of transportation. But the general nature of the duty of care owed could easily be analogized.

Another criticism frequently made is that the Hamburg rules will increase total transportation costs.²⁸ It is alleged that cargo insurance rates will decrease to a considerably lesser extent than the increase in the rates for carrier liability insurance, because of the cost of recovery actions against the carrier or his liability insurer and the legal uncertainty resulting from the allocation of risk between carriers and cargo interests.²⁹ As was pointed out by one delegate in the working group,³⁰ these increases in transportation costs were feared with the enactment of the other transportation conventions, yet the increased costs never materialize. Also, it has been pointed out that the insurance companies are competitive and should be able to redistribute the risk among themselves without a significant increase in costs.³¹

25. See Report of the Working Group on International Legislation on the Work of its Sixth Session, U.N. Doc. A/CN.9/88; reprinted in [1974] UNCITRAL Y.B. 113, 115, U.N. Doc. A/CN.9/Ser. A.

26. Hellawell, *Allocation of Risk Between Cargo Owner and Carrier*, 27 AM. J. COMP. L. 357, 359 (1979).

27. *Id.*

28. Report of the Secretary-General: Analysis of Comments by Governments and International Organizations on the Draft Convention on the Carriage of Goods by Sea, U.N. Doc. A/CN.9/110; reprinted in [1976] UNCITRAL Y.B. 263, 272, U.N. Doc. A/CN.9/Ser. A [hereinafter cited as Report of the Secretary-General].

29. *Id.*

30. Report of the Working Group on International Legislation on Shipping on the Work of its Fourth (Special) Session, U.N. Doc. A/CN.9 (1974); reprinted in [1973] UNCITRAL Y.B. 137, 140, U.N. Doc. A/CN.9/Ser. A.

31. *Id.*

A related criticism is that the shipper is in effect obligated to take out insurance coverage through additional liability insurance taken out by the carrier, the cost of which would be passed to the shipper in a higher freight charge.³² It is argued that it would be preferable if the shipper could decide whether to take out cargo insurance, how much coverage, at what cost, and from which cargo insurer.³³

In answer to this charge, it may again be contended that no overall increase in the cost of freight will attend the new rule since the carrier's cargo insurance premiums will go down proportionately with the increase in the carrier's personal injury insurance. Furthermore, the argument that the shipper should be free to decide whether or not to insure the goods and for how much is weak; seldom if ever would a shipper insure goods for less or more than their value.

The fire clause in the Hamburg rules has also been a source of criticism since it places the burden on the shipper to prove the cause of loss in case of fire damage to the goods. This burden would be difficult for a shipper to sustain since he normally would not be in a position to witness the negligence at the time of its occurrence, and servants of the carrier would be adversarial and probably of little help in determining the cause of the loss. This criticism of the rules is valid, and little can be offered to justify it other than that it was offered as a concession in a compromise between two factions of the working group. One group sought to keep exceptions to carrier liability for both fire and negligence in navigation; the other wanted to abolish both.³⁴ In the compromise, the exception for negligence in navigation was eliminated, but the burden was placed on the shipper to establish any negligence of the carrier in loss due to fire.³⁵

A final criticism of the Hamburg rules is that they do not take into account the special conditions of carriage of goods by sea, that shipowners are without continuous effect control over the captain, crew, and others serving the ship.³⁶ With communication as well developed and effective as it is today, this argument would be no more convincing than for transportation of goods by rail, air, or road. Moreover, for an agency relationship to be found in our law, it is not necessary for the principal to observe and sanction every action of the agent. It is merely necessary that there be the element of right to control the actions of the agent in the relationship.³⁷

32. Report of the Secretary-General, *supra* note 28, at 273.

33. *Id.*

34. Report of the Working Group on International Legislation on Shipping on the Work of its Fourth (Special) Session, *supra* note 30, at 141.

35. *Id.*

36. Report of the Secretary-General, *supra* note 28, at 271.

37. RESTATEMENT (SECOND) OF AGENCY, Sec. 1, states: "(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act."

B. *Support for the Hamburg Rules*

One of the strongest selling points of the present form of the convention is that the rules will simplify contracts and will apply to more than one mode of transportation. Likewise, they should facilitate the eventual formulation of a uniform multimodal transport convention. The rules take into account the technological advances of shipping and navigation and communication. Shipping by sea is not as perilous as it was at the time of the passage of the Hague rules, and a higher standard of care should be expected of carriers.

The carrier bears the risk of loss following from its own negligence under the rules, and in cases where he will not be able to meet the burden of proof, such as in unexplained losses, he will be liable without fault. There will be more incentive for a higher standard care in navigation and handling of goods. Finally, in the words of Hellawell:

The stringent standard of a strict liability would not be acceptable today. The 1978 convention is therefore about the best compromise one could reasonably expect. There is substantial improvement over the Brussels Convention in that it simplifies and almost unifies the rules on burden of proof and eliminates the multiple exceptions of the Brussels Convention, especially the exception for navigation and management of the ship.³⁸

PROSPECTS FOR RATIFICATION OF THE HAMBURG RULES

A valid point that has been raised is that if the rules are not widely ratified there will be forum shopping in current disputes concerning jurisdiction and applicable law.³⁹ Carriers might try to limit the recourse of the shipper to a particular jurisdiction where the Hamburg rules are not in effect. Thus, an important question concerns the outlook for widespread adoption of the rules. According to the U.S. Department of State, of the original twenty-seven signatories and the six countries that have subsequently acceded to the agreement, only Egypt has ratified the convention.⁴⁰ From this information, the prognosis appears bleak, but as is well known, legislative wheels turn slowly. The U.S. Senate has not yet even been presented with the rules for discussion, and this is likely the case in other countries as well.

A survey of official reaction to the Hamburg rules reveals that several countries complained of possible increases in freight rates.⁴¹ A few countries, such as Finland, pointed out that the rules will create more need for personal injury (liability) insurance for carriers and less need for cargo insurance for shippers, thereby injuring the cargo industry and benefit-

38. Hellawell, *supra* note 26, at 367.

39. This information was obtained during a phone call to the State Department on March 24, 1981. Department officials advised that delays in ratification of such conventions are not at all unusual.

40. Report of the Secretary-General, *supra* note 28, at 272.

41. *Id.* at 271.

ting the personal injury industry.⁴² Nations such as Finland do not have a personal injury industry; in fact, that industry is concentrated in a few maritime countries.⁴³ Some maritime nations such as the Netherlands argued that removing the exceptions for error navigation would not cause carriers to be more careful of their handling of cargo, as the danger of loss or damage to the carriers' own property was already a sufficient deterrent.⁴⁴

The vast majority of countries, however, found the convention "an acceptable and workable compromise that takes into account the interest of both shippers and carriers and technological advances in the carriage of goods by sea."⁴⁵ This view appears to promise eventual widespread acceptance and ratification.

CONCLUSION

The Hague rules and predecessor codes were designed at a time when shipping was a more perilous venture, when it was felt that carrier liability had to be limited in view of these perils and of the special nature of ocean transport. Widespread disenchantment with the complexity, inconsistency, and inequities of the Hague rules provided the impetus for the drafting of the Hamburg rules. Technological advances in shipping made the "perils of the sea" and "special nature of ocean transport" arguments no longer viable for limiting carrier liability.

Economic and pragmatic considerations, however, prohibited the imposition of a strict liability standard; rather, a fault standard was preferred by the drafters of the Hamburg rules. A standard based on that of other comparable conventions was adopted because of the potential for facilitating multimodal contracts and because of the anticipation of a multimodal transport convention in the future. The simplification, uniformity, and greater equity of risk distribution in the new rules are substantial improvements over the old rules, and despite some of the criticism of the rules, there are indications that they will eventually be widely ratified.

David K. Schollenberger

42. *Id.*

43. *Id.* at 273.

44. *Id.* at 271. For an extended study of the comments of different governments and a compilation of the data, see Report of the Secretary-General, *supra* note 28, at 263-98.

45. Report of the Secretary-General, *supra* note 28, at 271.