The system of liability of articles III and IV of the Hague (Visby) Rules

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Chapter 1

Introduction

1. The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924 is generally known as the ‘Hague Rules’ and those Rules as amended by the Protocols of 23 February 1968 and 21 December 1979 as the ‘Hague Visby Rules’. The abbreviation ‘H(V)R’ refers to either the Hague Rules or the Hague Visby Rules. These are instruments of uniform international private law concerning the carriage of goods under a bill of lading. The H(V)R regulate many of the carrier’s duties under a bill of lading and also provide the carrier with clauses excluding liability for loss of or damage to the cargo.

In this book the construction of art. III(1) and III(2) of the H(V)R and the construction and application of some of the exclusions to liability contained in art. IV of the H(V)R is researched to establish the system of the carrier’s liability for loss or damage under the H(V)R. Because those articles are the same for the Hague Rules as well as for the Hague Visby Rules the abbreviation ‘H(V)R’ is used. For the same reason the expression ‘the Rules’ is also used indicating either the Hague Rules or the Hague Visby Rules.

1.1 When do the H(V)R apply?

2. The application of the H(V)R is not discussed in this book. I shall suffice with a few remarks on the applicability of the H(V)R in this introduction. The Protocol of Signature to the Hague Rules provides that ‘The High Contracting Parties may 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.’

In the United Kingdom treaties and conventions have no direct effect and require to be enacted by the legislator. The enacting legislation for the Hague Visby Rules is the Carriage of Goods by Sea Act (COGSA)1 1971.2 COGSA 1971 repealed COGSA 1924 which had provided that the Hague Rules were to ‘have effect’ in relation to the types of carriage that were identified. In COGSA 1971 the terminology was changed. Art. 1(2) COGSA 1971 provides that ‘The provisions of the [Hague Visby, NJM] Rules (...) shall have the force of law’. This suggests that the primary rules for the application of the Hague Visby Rules in the UK are to be found in art. X of the Hague Visby Rules.3

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1. This abbreviation is used in many English speaking countries for the national enactment of the H(V)R. Thus different COGSAs exist around the world.
1.2 CONSTRUCTION OF THE RULES

In the United States the Hague Rules were incorporated into the domestic law with the enactment of the Carriage of Goods by Sea Act 1936 (COGSA 1936). The U.S.A. are not party to the Hague Visby Rules.

In 1956 the Hague Rules were initially incorporated into the Dutch Commercial Code. In 1991 the system was changed and the Hague Visby Rules were given direct effect by art. 8:371 Dutch Civil Code.

1.2 Construction of the Rules

3. In chapter 2 of this thesis the necessity of uniform construction of the H(V)R is emphasised. If the Rules are applied differently under different legal systems the object of establishing an international regime governing the carriage of goods by sea under a bill of lading would be defeated.

As the formal title of the Hague Rules shows, the intention of the convention was unification of certain rules of law relating to bills of lading. This intention of the Rules has however not been achieved. Over eighty years of case law has created diversity instead of uniformity. This is the failure of the Hague Rules.

1.3 Research question

4. The task of any tribunal which is asked to apply or construe a treaty can be described as the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances. However, if a Rule is applied the same in all legal systems it means there is uniformity of law and the question of what the expressed intention was will not arise. The expressed intention of the parties to a treaty will only become relevant if there is no established uniform construction. Then a tribunal will have to answer the question of how the Rule should construed. Therefore the research question is:

If uniform construction of a Rule does not exist, how should the Rule be construed?

1.4 Method used to answer the research question

5. In chapters 3, 4 and 5 the existing differences in the construction and application of articles III(1), III(2), IV(1) and IV(2) are identified through international law comparison. Per topic of research questions are formulated. These questions are answered under the different legal systems. After having established the existing differences I establish the intended construction. To discover the intended construction of the Rules I have established rules of, and aids to the construction of the H(V)R.

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4. 46 U.S.C. App. § 1300-1315. E.g. § 1303 is also referred to as 'section 3 COGSA'.
7. See infra chapter 2.
1.5 **Researched legal systems**

6. The legal systems considered are primarily: U.S. law, English law and Dutch law. Incidentally Canadian and Australian law are considered and even more incidentally Belgian law. Because of the history of the Rules, English and U.S. law are the most important legal systems for the construction of the Rules. It is widely accepted that the Harter Act is the ancestor of the Hague Rules and that the Hague Rules were greatly influenced by American and English law. In the *Bunga Seroja* case of the Australia High Court this was pointed out by judges Gaudron, Gummow and Hayne:

> ‘... the fact is that the “immediate impetus for the Hague Rules came from the British Empire”. Furthermore, British lawyers and representatives of British carrier and cargo interests dominated the Committees responsible for the drafting of the rules which eventually became the Hague Rules. That being so, it seems likely that the English common law rules provided the conceptual framework for the Hague Rules – certainly the key terms of arts. III and IV are the subject of much common law doctrine. The rules should be interpreted with that framework in mind. That conclusion is strengthened by the fact that there appears to have been very little discussion at the Convention of arts. III, r. 2 and IV, r. 2(c).’

7. The historical background of the Rules and the fact that I am qualified under Dutch law led to the choice to mainly compare Dutch law to Anglo/American law because the latter are two of the most relevant legal systems of maritime law. Of course there are other legal systems which I could have researched. However, a research has to be restricted and I chose the mentioned legal systems for the reasons given above.

1.6 **Topics of research**

8. After a discussion of how to construe the Rules and establishing rules of, and aids to, the construction of the Rules the following topics are discussed:

Chapter 3: the duties of the carrier contained in art. III(1) and III(2);

Chapter 4: the relationship between art. III(1) and (2) and art. IV(1) and (2);

Chapter 5: the application of art. IV(1) and the exceptions provided by art. IV(2), a, b, c and q; These specific elements of art. IV were chosen for different points of interest specific to those elements and because they are amongst the most important of the carrier’s exceptions.

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8. It is important for civil lawyers to note that at common law and the systems derived from the common law a policy of stare decisis exists. That is the doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same. Common lawyers on the other hand should note that in civil law systems various different court decisions can exist at the same time. There is no policy of stare decisis.


Art. IV(1) is either treated as an exemption from liability or as a division of the burden of proof. The nautical fault exception provided by art. IV(2)a is special because, contrary to most exceptions, it is a far reaching exception which can even exculpate the carrier for damage caused by his fault. This and the vagueness of the expression ‘management of the ship’ make the nautical fault exception interesting to research. Also the fire exception is of special interest because of the proviso it contains; the carrier is not responsible for loss or damage caused by fire unless caused by his actual fault or privity. Because of the proviso the fire exception is an almost unbreakable exemption. It is interesting to see how this exception is applied under different legal systems and how the relationship between the duties of the carrier and the fire exception is influenced by the proviso. The ‘perils of the sea’ exception lends itself for discussion because of its wide application and the overwhelming amount of case law that it has given rise to. Finally the ‘catch all’ exception is of interest because of its general wording and the fact that it contains its own division of the burden of proof. The research has led me to the conclusions that the division of the burden of proof (discussed in the last chapter) depends on the specific exception invoked, as does the way the relationship between the duties (or the non fulfilment thereof) and the exceptions is influenced.

9. Of course there are more aspects of liability of the carrier under the Rules. E.g. the question of when the rules actually apply, the ‘said to contain clause’ and limitation of liability are only some of the topics which are also governed by the Rules and play a role in cargo claims. However, I have restricted my research to the duties of the carrier contained in art. III(1) and III(2), the relationship between those duties, some of the exceptions in art. IV and the division of the burden of proof.

10. In Chapter 6 the division of the burden of proof is established.

11. Chapter 7 contains my conclusions. One general conclusion is that, although the Rules contain uniform international private law which was meant to lead to uniformity, that uniformity does not exist. This becomes especially clear for art. IV(1), which is either treated as a division of the burden of proof or as a defence against responsibility for cargo damage. Another example is the application of the fire exception. In the U.S.A. the application of the fire exception differs from the application in the other legal systems researched. Under American law the fire exception can even apply if the fire was caused by the carrier’s failure to exercise due diligence to make the ship seaworthy. There is also a subtle difference between the way the 9th Circuit construes the fire exception and the way the other circuits construe the exception. However, this difference in construction does not seem to lead to a difference in application and effect of the fire exception. As a final example I shall mention the perils of the sea exception. Under U.S. law the perils of the sea defence provided by art. IV(2)c H(V)R is more or less rendered useless as a defence for the carrier. Under English, Australian and Dutch law the construction is more realistic, providing the carrier with an important defence.

In chapter 2 some suggestions are given to improve uniform construction and application of the Rules.

12. See infra § 5.1.
13. See infra § 5.3.
14. See infra § 5.4.
1.7  The UNCITRAL draft convention

12. In 1996 UNCITRAL considered a proposal to include in its work program a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing greater uniformity.\textsuperscript{15} Another issue was the need for a legal basis for the use of electronic bills of lading.\textsuperscript{16} The result is the UNCITRAL Draft Convention on carriage of goods [wholly or partly] [by sea]. The most recent draft in January 2008 (the date of completion of this book) is dated 14 January 2008.\textsuperscript{17} It is thought that the convention will be ready for ratification at the end of 2008.\textsuperscript{18} It has not been decided how many states will be required to ratify before the convention comes into force. The UNCITRAL draft is an important development in the law concerning the carriage of goods by sea. However, it is likely that it will take years before the instrument will have significant effect in practice.\textsuperscript{19} Until then the H(V)R will still be the regime most often encountered. The H(V)R are a very mature regime with 83 years of world wide case law to study. For that reason I have only briefly touched upon the draft proposal and (as the title of this book shows) have focused on the system of liability under the H(V)R.

13. I hope that this book will help to lead to a more uniform construction and application of the H(V)R in the different national legal systems.

\textsuperscript{15} Karan 2004, p. 38. \\
\textsuperscript{16} Van der Ziel 2004a, p. 276. \\
\textsuperscript{17} Document WP.101 of UNCITRAL Working Group III. See <www.uncitral.org>. \\
\textsuperscript{18} Van der Ziel 2006, p. 203. \\
\textsuperscript{19} Compare the Hamburg Rules which were adopted in March 1978 and only came into force on November 1, 1992.