THE MARITIME FORUM JOURNAL

ARTICLES

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ABOUT THE JOURNAL

The Maritime Forum, University of Lagos was established for the purpose of engaging students who aspire to develop a career in the maritime industry through networking and discourse on contemporary issues in the maritime sector. The Forum has over the years walked in its mission to be the umbrella organization of all students interested in the maritime sector by providing a platform for youth led programs, a forum for dialogue and network of future experts in the Maritime Industry

This year's edition, the second edition of the journal aims to enlighten students, legal practitioners, and stakeholders about contemporary issues and provide viable solutions to these problems facing the maritime industry. This is in line with our vision statement of placing the Maritime Industry at the forefront and to lead the revitalization of the Nigerian economy through education and exposure of the youth. The Journal intends to advocate for reforms and innovative solutions on current issues; and to also explicate on subjects that deal with the maritime industry in Nigeria. This piece was an idea conceived, edited and reviewed entirely by students. This work is a result of selflessness and dedication by academics, legal experts and students who contributed articles and wonderful people who made a contribution to this project one way or the other.

My heartfelt gratitude goes to our grand patron; Dr. Taiwo Afolabi MON for giving us this investing in this platform and believing in the youth, Mr. Chidi Ilogu SAN and Foundation Chambers for partnering with us for a first of its kind, Foundation Chambers Maritime Essay Competition, Mrs. Jean Chiazor Anishere for being a strong pillar of support, her constant strong words of inspiration has given us the drive needed to continue in giant strides, Engr. Greg Ogbeifun for his support in every way and for his guidance, Mrs. Margaret

Orakwusi for her constant words of encouragement and for always looking out for the forum. Finally I would like to express my sincere gratitude to Dr. Adewale Olawoyin SAN, the staff adviser of The Maritime Forum for being an amazing mentor, leader, teacher and friend. His contributions towards the advancement of the forum in the nature of time, energy, words of encouragement have been invaluable.

To my 2018/2019 executive team and the editorial team of this year's edition especially 'Seun Braimoh, Editor-in Chief, for nurturing this year's edition and making it a success.

To the reader, I hope you find this year's journal enlightening and useful to your knowledge of maritime. It is my hope that in the nearest future, the Journal will be the legal researcher's first point of call for issues relating to maritime law in Nigeria.

Gbemiga Akinlade,

President,

The Maritime Forum, University of Lagos 2018/2019.

EDITORIAL TEAM

STAFF ADVISER'S NOTE

It gives me utmost pleasure to write the foreword to the second volume of The Maritime Forum Journal. Without doubt, The Maritime Forum has, from humble beginnings, indeed come of age. The broad base of the topics on the Blue Economy and related legal issues would serve as a useful source of information and materials for stakeholders in the maritime industry.

I strongly recommend this Journal to a wide spectrum of readers, particularly students, practitioners and Jurists.

Dr. Adewale A. Olawoyin SAN.

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THE REGULATION OF CONTRACT OF CARRIAGE OF GOODS BY SEA: A CRITIQUE AND A JOURNEY DOWN MEMORY LANE

OOREOLUWA AGBEDE*

A. INTRODUCTION

A contract of carriage generally means just that, a contract of carriage. Carriage here meaning conveyance and transfer of goods and persons from a point hitherto agreed to another agreed point. Hence, a contract of carriage can be defined succinctly to be an agreement, oral or written, which while outlining parties' intention defines the carrier's rights and obligations to the consignor, consignee, passenger and the rights and obligation of the consignor, consignee, passenger to the carrier, spelling out each parties' liability in case of breach of terms and obligations contained in the contract.

Commercial transactions under the common law generally, although needing mutual consent was sometimes one-sided as usually, the party with higher bargaining power had terms which favour them to be included, these exclusion clauses were enforceable due to the popular and general acceptance given to the freedom of contract position which looked at the root of the transaction as a contract and based its enforceability on whether the terms is that agreed upon freely by parties subject to penal or criminal laws and public policy.

This freedom of contract view which reigned in commercial transactions under common law was also the position in a contract of carriage of goods by sea

* Ooreoluwa Agbede is a final year law student at the University of Lagos. He can be reached at agbedeoore@gmail.com; +234 905 353 5202.

with the additional condition that the contract of carriage of goods by sea was covered by a Bill of Lading. The obvious unfairness of the freedom of contract led to various means of balancing the interest of parties in a fair way. The US courts were the first to move against the seemingly unfair English approach to freedom of contract, they refused to enforce the contractual provisions and clauses that excluded liability on the basis of incompatibility with public policy. The difference between the American position and the English standing was noted in *Re Missouri Steamship Company*[1] where the court noted that a contractual clause here can be invalid under American law and still be valid under English law. Later, the US's *Harter Act*, 1893[2] was enacted to codify the US's position of balancing both parties' interests and ensuring the impossibility of the inclusion of terms that unfairly excluded ship owner's liability popularly referred to as "the negligence clause". The 1893 enactment was followed by other enactments in other states in the world which disorganized and changed the international order.

The first law on carriage of goods is the US's *Harter Act* but the first international codification on contract of goods by sea is the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and the Protocol of Signature*, also known as the *Hague Rules* of 1924 which has its roots in the International Conference on Maritime Law of October 1922 where the conference delegates unanimously agreed to make a recommendation to each respective government to adopt a unified rules that will regulate the responsibilities, liabilities, rights and immunities attaching to carriers under the Bills of Lading.

B. THE *HAGUE RULES* OF 1924.

[1] (1888) 42 Ch.D 321.
[2] *Harter Act*, 1893, 46 U.S.G. 14 190-96 (1970).

Due to the unfairness of the practice of sea carriers and shipowners of undertaking no liability and the need to protect cargo owners, the *Hague Rules* were established. It represents the first attempt by the international community to find a generally acceptable means of dealing with the popular habit of unfairly excluding liability through the usage of negligence clause. It has as its object, the establishment of a derogable minimum mandatory liability of carriers which was achieved by the inclusion of standard clauses which outline the risk borne by the carrier and specify the maximum protection claimable from exclusion clauses into the Bill of Lading.

In a normal commercial transaction, a contract has as its essence, mutuality of obligations and consensus between the parties, hence the accepted definition of a contract as a legally binding agreement between parties, however, the *Hague Rules* do not see the need to provide expressly, for the basic obligation of the carrier (delivery of goods) although other obligations are provided for in Article 3. Article 1(b) of the *Hague Rules* disposes of the norm in defining a contract of carriage as it gives more significance to the document issued (Bill of Lading) in the contract rather than the obligations of the parties in the contract. It defines a contract of carriage of goods by providing that the rules apply 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.

Article 3(1) of the *Hague Rules* in a sense provides for the duty of the carrier although it does not expressly call it duty, it provides that the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to

make the ship seaworthy, to properly man, equip and supply the ship, 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. Article 3(2) provides for the duty of the carrier to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried subject to Article 4 which provides for circumstances where the carrier and or the ship will not be liable for loss or damage.

Article 4 expressly provides that the carrier or the ship shall not be liable for damage or loss resulting from unseaworthiness with a proviso that they shall be liable where the damage arises, though from unseaworthiness but majorly from want of due diligence on carrier's part to make the ship seaworthy or that the ship is not properly manned, equipped etc., it hereby places the onus of proof of exercise of due diligence on the carrier. Article 4(2) however excludes liability of carrier or ship in circumstances where the damage or loss arises via any means listed in Article 4(2)(a-q) although, the carrier, except for navigational, managerial fault or liability for fire not caused by fire or privy of the carrier, is liable for the fault and default of his servants or agents (Under Article 4(2)(q) of the *Hague Rules*). Where loss or damage to the goods has resulted, the *Hague Rules* requires notice to be given before or at the time of delivery or within three days of delivery where the damage is not clear, failure to give notice of loss or damage will be seen as an advertent evidence of delivery of goods and where notice is actually given, the suit for loss or damage must be brought within one year after the delivery of the goods or the date the goods should have been delivered.

This provisions of the rules are given overriding superiority over terms agreed by the parties in Article 3(8) which provide thus;

> *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.*

Despite all the applauds due to the *Hague Rules* which includes the eradication of the unfair exclusion of liability practice of shipowners and carriers, laying the foundation for other future rules such as the *Hague-Visby Rules* and *Rotterdam Rules*, it is not infallible.

1. *Limitations and Criticism*

i. Conflict of laws: Article 10 provides that: "*The provisions of this Convention shall apply to all Bills of Lading issued in any of the contracting States*", this has the effect of limiting the scope of application of the *Hague Rules* to shipment between foreign ports i.e. outward shipment or shipment from a port of the contracting state to a foreign port. This creates a conflict of laws situation as it leaves inward shipment to the law of the country from where the goods were shipped. Another problem here was the use of clause paramount which allowed the parties the freedom to choose any other law to regulate their contract, in *Vita Food Products v. Unus Shipping Co*,[3] the *Hague Rules* was held as not regulating the contract by the English Court. It was held to not have the force of law in the exact case.

ii. Unfair exceptions to carrier's liability: Article 4 of the *Hague Rules* does not cover liability for delay, The *Hague Rules* absolves the carrier from liability in respect of

[3] (1939) AC 277 (P.C.).

- loss of or damage to the goods arising or resulting from the fault of the master, mariner, pilot, or the servants of the carrier in the navigation or management of the ship,
- for loss of or damage, loss or damage to the goods due to fire caused by the fault of the crew,
- and loss or damage to the goods arising or resulting from unseaworthiness unless it is caused by the breach of due diligence obligation of the carrier.

Article 4's one-sided protection of the carrier by absolving the carrier of liability in its subsections will later be the backbone of the call for more balanced rules that will protect interests of both the carrier and the owner of the goods without protecting the interests of one party more.

iii. Non Responsibility for damage or loss from navigation or management: The carrier may escape liability for loss or damage by claiming faulty navigation or management. Article 4, Rule 2 provides that:

> *Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from – (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…*

This exception has received several backlashes as to its usefulness in the modern world with advancements in navigation. Taking note of the disjunctively used 'or' in-between navigation and management, the part of the article that removes responsibility and liability of carrier or the ship for damage or loss arising from act, neglect, default of the master, mariner, pilot, or servant of the carrier in the management of the ship does not have recourse to principles of

vicarious liability which should be considered in any situation where it rightfully applies. This defence needed to be considered in line with current technological advancements and realities, as well as the current legal practice, as it should take note of the dynamic nature of law in itself.

iv. Carrier's period of responsibility: The term "tackle to tackle" is used to describe the period of responsibility of the carrier under the *Hague Rules*, the period of responsibility being from the moment the tackle of the ship is hooked at the loading port to when it is unhooked at the discharge port is so limited as it doesn't hold the carrier liable if the loss or damage occurred before or after shipping even though the carrier was in charge and or in possession of the goods. Article 1(e) covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

v. Low maximum carrier's liability: Article 4(5) of the *Hague Rules* sets a limit as to the liability of the carriers to 100-pound sterling per package or unit or the sum's equivalent in any other currency. The rule takes consideration of the time the law was made and the popularity of the commercial practice of adherence to the gold standard, hence the aforementioned sum refers to the gold value not nominal value as provided in Article 9 of the *Hague Rules.* The liability being limited to 100 pounds might have had justifiable reason due to currency value and economic realities then but at this age and time, the 100-pound limit will be very inconsiderate due to it being little compensation. This Article 4(5) is subject to the prior declaration of value by the shipper, in which situation, the higher declared value becomes the limit of the carrier's liability.

vi. Inapplicability of The *Hague Rules* in modern commercial transactions and engagements: Due to modernity and technological advancements, it is not far-fetched to say that the *Hague Rules* have outlived its existence as the advent of the internet age has changed the concept and understanding of commercial relationship, most of the provisions of the *Hague Rules* though very important when discussing the history of carriage of goods by sea, are less significant when discussing the future of carriage of goods by sea as the rule was not drafted with modernity, E-Commerce and technology of this current level being considered. The *Hague Rules* also does not recognize containerization which became popular in the 1960s and container leasing contracts where the container owners and carrier are different and doesn't outline whether in such cases, a package or unit includes the container which will mean the container is part of the cargo and will be under the 100 pound per pound or package limit or excludes the container meaning the container is not part of the cargo and part of the ship.

The *Hague Rules* despite its flaws needs to be applauded as it laid the foundation for other rules, hence without The *Hague Rules* laying the foundation, the other later to be established rules will be non-existent as they will lack a basis to be rooted in. The *Hague Rules* has been updated by its first Protocol of 1968 and its Second Protocol of 1979, none of the protocols addresses any provision concerning basic liability.

C. THE *HAGUE-VISBY RULES* OF 1968

Due to the aforementioned limitations of The Hague, its incompatibility with modern times and the popular conception that The *Hague Rules* was unfavourable to carriers, the movement to make The *Hague Rules* compatible with the current time as of then led the Committee Maritime International (CMI) to initiate a reconsideration of the rules which led the Brussels Diplomatic Conference to adopt a protocol on the amendment of The *Hague Rules*. The 1968 Brussels protocol birthed the amendment of The *Hague Rules*, The *Hague-Visby Rules*.

1. Innovations and Reforms of the Hague-Visby Rules[4]

i. Increase in Maximum Limitation of Liability: The *Hague Rules* in its Article 4(5) sets a limit as to the liability of the carriers to 100-pound sterling per package or unit or the sum's equivalent in any other currency, as explained above, this provision realistic at its inception grew unsatisfactory due to passage of time. Article 4(5) of the *Hague-Visby Rules* in updating the *Hague Rules* to fit the new time 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 in any event shall be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher.

[4] The *Hague-Visby Rules* do not change provisions like Articles 1(b), 3(1), 3(2), 3(6), 3(8), 4 amongst others which have been explained.

ii. The *Hague-Visby Rules* though merely recognises containerization: Unlike the Hague which lacks any provision concerning container transport, Article 4(5)(c) of the *Hague-Visby Rules* provides:

> Where a container, pallet or similar article of transport is used to consolidate 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 or unit.

This means that where goods are kept in containers, the maximum limit of liability provided in Article 4(5) will apply to each package or unit in the container rather than the container as a whole hereby excluding the container from the liability limit.

iii. It widens the scope of the Territorial Application: The *Hague-Visby Rules* in its attempt of plugging the loophole in Article 10 of the *Hague Rules* and the case of *Vita Food Products v. Unus Shipping Co*[5] amended the *Hague Rules* by extending the territorial application, hereby solving the conflict of laws problem of the *Hague Rules*. Article 10 of the Rules Amendments provides that the rule will apply to voyages where the:

- The Bill of Lading is issued in a Contracting State; or
- The carriage is from a port in a Contracting State; or
- The contract contained in or evidenced by the Bill of Lading provides that these Rules or legislation of any State giving effect to them are to govern the contract.

[5] *Supra* n 3.

2. *Limitations and Criticism*

The reforms of the *Hague-Visby Rules* though laudable were still criticised being unidirectional in the sense that the reforms were mostly seen to be in the favour of the shipowner and that the interests of developing states were widely unattended to. The *Hague-Visby Rules* though commendable were not wholesome in resolving the flaws of the pre-existing *Hague Rules*, the limitations and criticisms of the *Hague-Visby Rules* include;

i. The *Hague-Visby Rules* does not amend the definition of contract of carriage in the *Hague Rules*, it still places more importance on the document rather than the mutuality of obligations of the parties under the contract, the *Hague-Visby Rules* does not amend the *Hague Rules* as it doesn't provide for the basic obligation of the carrier (delivery of goods), it just copied the *Hague Rules* by providing the other obligations in Article 3 in its own Article 3.

ii. The *Hague-Visby Rules* does not amend the provision of Article 1(e) of the *Hague Rules*, as such, the period of carrier's liability is still the same and still limited as it only covers the period from the time when the goods are loaded on to the ship till the time when they are discharged from the ship, the period of responsibility of the carrier is only while the goods are on the ship, the provisions of the rules does not take cognisance of period outside when goods are on the ship even if the carrier already has possession, either actual or constructive or when the carrier is in charge of the goods before they are put on the ship.

iii. The unrealistic and unnecessarily wide exemptions from carrier's liability in Article 4 of the *Hague Rules* which excludes carrier from liability for delay, liability in respect of loss of or damage to the goods arising or resulting from fault of the master, mariner, pilot, or the servants of the carrier in the navigation or management of the ship,

loss of or damage, loss or damage to the goods due to fire caused by fault of the crew and loss or damage to the goods arising or resulting from unseaworthiness unless it is caused by the breach of due diligence obligation of the carrier is not amended. The *Hague-Visby Rules* does not take cognisance or modify the favourable exceptions to carrier's responsibility, it does not take note of the advancement in communication technology, vessel navigation and safety which gives the carrier an increased and much higher degree of control over the vessel and cargo, hence the exemption has outlived its purpose and usefulness.

iv. The *Hague-Visby Rules* does not outline the differences between the actual carrier and the legal carrier and who is responsible or who can be sued for damage or loss. It is also not compatible with modernisation, globalisation and global trends, for example, although it recognises containerisation, its regulation of container transport is not voluminous enough.

Because of the criticisms of the improved rules and claims by developing countries that the rules were unidirectional in the sense that it only took care of developed states and that their interests were unattended to, the UNCITRAL re-examined the existing rules and in making the appropriate internationally accepted rules to regulate carriage of goods by sea adopted the UN *Convention on the Carriage of Goods by Sea* in Hamburg in 1978 known as *Hamburg Rules*.

D. THE *HAMBURG RULES* OF 1978.

Due to the previously mentioned criticism of the *Hague Rules* and amongst other reasons; trying to find a "win-win" situation between the interest of the

carrier and goods owner, the popular opinion of developing states that the reformed *Hague Rules*: the *Hague-Visby Rules* was oblivious to their interests and that the Hague Visby Rules was not modern and was not sufficient for the modern commercial realities, the *Hamburg Rules* which aims at establishing a modern, uniform, balanced and worldwide accepted rules for the regulation of the relationship between the shipper and carrier therein providing for the rights and obligations of parties to the contract of carriage of goods by sea was adopted on March 31, 1978, though coming into force on November 1, 1992.

1. Reforms and Innovations of the Hamburg Rules

The *Hamburg Convention* modifies some of the provisions of the *Hague-Visby*, the modifications or amendments made to the previously existing rules include:

i. Widens the scope of application of the Rules: The *Hamburg Rules* amended Article 1(b) of the *Hague Rules* and the *Hague-Visby Rules*, which is that "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, it widened the scope of application of the rules, extending its applicability beyond the former position to all contracts of carriage.

Article 1(6) of the *Hamburg Convention* provides that a "Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to

another, it however separates a mixed contract of carriage which involves carriage by sea and carriage by some other means, making it one of carriage by sea where it is by sea and expressly excluding the convention's application where it is carriage by other modes, hence the convention only regulated a contract of carriage in so far as it is on the sea.

The Convention pursuant to Article 2(1) of the 1978 Rules applies to all contracts of carriage by sea and not only to contracts entered by way of Bills of Lading when:

- the port of loading is in a contracting state
- the port of discharge is in a contracting state
- when any one of an optional group of ports of discharge is in a contracting state
- when the Bill of Lading or other contractual document is issued in a contracting state
- when the *Hamburg Rules* are incorporated by reference in the contract.

Under the *Hamburg Rules*, it does not matter whether there is a Bill of Lading as all that is required is the existence of an enforceable and valid contract of carriage of goods by sea.

ii. Carrier's period of responsibility: Article 1(e) of The Hague and *Hague-Visby Rules* provides that the period of responsibility of the carrier begins with the loading of the ship ending with its discharge from the ship, with the local law of the place governing post-discharge liability. This provision as previously criticised takes zero significance of rules of possession as it does not take cognisance of period outside the load on ship - discharge from ship even if the carrier is already in charge or

possession of the goods, the regulation of the period not regulated is by the freedom of contract which can give rise to unfair contract terms as the carrier in creating the contract can exclude and absolve himself of all liability and responsibility irrespective of fault. The *Hamburg rules* in Article 4 of the *Hamburg rules* provides that "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". The carrier is deemed to be in charge of the goods from the time he has taken over the goods from the shipper or person with authority to put him in charge. The goods are said to be discharged when it is handed to the consignee or put at consignee's disposal in accordance with the contract, law applicable or usage of particular trade applicable at the discharge port. The *Hamburg Rules* abandons the 'tackle to tackle' rule, extending the period of responsibility to from when he has taken over the goods from the sender until when they are regarded by the destination port as out of port.

Article 23[6] makes it impossible for any carrier to directly or indirectly attempt to or add any clause that derogates or reduces his obligations under the convention, it removes the carrier's ability to contract out of the Convention by making any of such derogating clause to be of no effect, but this only affects the derogating clause without affecting others contractual clauses. However, Article 23(2) provides that the

[6] Article 23 provides that any stipulation in a contract of carriage by sea, in a Bill of Lading, or any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of goods in favour of the carrier, or any similar clause, is null and void

carrier can increase his responsibilities and obligations under this Convention.

iii. Disposes of the excess and unnecessary exceptions to carrier's liability, balancing the parties' interests: Part of the criticisms cum flaws of the *Hague-Visby Rules* is the unclear way some of its articles are couched and expressed and it is much-antagonized Article 4(2). For example, the lack of clarity of the rules in defining what will amount to loss or damage after providing that the carrier is liable for "any loss or damage" to the goods (Article 4(5) of the *Hague-Visby Rules*)leaves questions such as "will loss from value reduction from delay in delivery be considered actionable damage?" to be answered by national law, hence under common law, The case of *Koufas v. C. Csarnikow Ltd*[7] also known as The Heron II provides the answer to this, that assessment of damages would be the difference between the market value at the time of contracted delivery and the time of actual delivery.

Article 3(1)(a)[8]and Article 3(2)[9]of the *Hague-Visby Rules* has always had a couchant effect in actual contract due to the popular seventeen exceptions to carrier's liability provided in The Hague- Visby Rules[10] and the fact that the carrier can still contract out of his liability which was popularly done considering the inequality of bargaining power.

The *Hamburg Convention* although failing in providing for the basic obligation of delivery of goods modifies the unnecessary exceptions to

[7] (1969) 1 AC 350.
[8] It provides that the carrier must exercise due diligence in ensuring that the ship is seaworthy.
[9] Which provides that the carrier must exercise due care of the cargo.
[10] See Article 4(2) of the *Hague-Visby Rules* which was the backbone of the claim that the *Hague-Visby Rules* is favourable to the carrier and the call for a new and more balanced rule

the carrier's liability. Article 5(1) of the 1978 Convention provides that the carrier's liability is for any loss which results from loss of or damage to the goods, delay in delivery as long as the occurrence which caused loss, damage or delay took place while he was in charge of the goods unless the carrier proves that all reasonable measures and steps were taken to avoid the occurrence and its effects. The *Hamburg Rules* places the burden of proof on the carrier as the general rule is that the liability for all loss, delay and damage is on the carrier subject to the reasonableness of his actions to avoid the damage in issue, hence, there is a presumption of carrier's liability until rebutted or proven otherwise by the carrier.

Pursuant to Article 5(5) of the *Hamburg Rules*, the carrier is not liable for loss, damage to live animals or delay in delivering the live animal(s) where the loss or damage results from any special risks inherent in their carriage, he is however liable for his servants or agents (Article 5(1) of the *Hamburg Rules*) which may include independent contractors which function outside the ship, within or without the port until the goods are delivered in accordance with contractual terms since the *Hamburg Rules* widened the liability of the carrier beyond the port, Article 10 (1) of the *Hamburg Rules* also provides that the carrier is responsible for loss, damage or delay for which a sub-carrier is liable. The *Hamburg Rules* recognises technological advancements and modernisation as it recognises containerisation in Articles 1(5) and 6(2) takes note of the higher degree of control which the carrier has due to navigational advancements. It states when a delay in delivery can be said to have taken place to be 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 are defined in the convention so as to close the possibility of a loophole existing (Article 5(2)).

For purpose of clarity, the 1978 convention gives a time period for the action to develop from delay of delivery of goods to loss of goods, to be where goods have not been delivered as required by Article 4 within 60 consecutive days after the expiry of the time for delivery as agreed by parties in the contract or according to Article 5(2). The *Hamburg Rules* achieves the aim of balancing of interests by eradicating the excess limitations of liability and still providing instances where the carrier's liability will be limited, Article 6 limits the liability of the carrier:

- To an amount equivalent of 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is higher.
- The liability for delay in delivery 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, it is however provided that the aggregate liability of the carrier under Article 6 cannot exceed the limitation which would be established under Article 6 (1)(a) for total loss of the goods with respect to which such liability was incurred. These limits of liability provided in the convention can however be exceeded by agreement between the carrier and the shipper.

The *Hamburg Rules* apart from modifying some of the popularly criticised provisions of the *Hague-Visby* contains some articles on some issues which were not covered or provided for in any of the already existing rules.

Some of these new inventions of the *Hamburg Rules* are:

i. Article 9 and Article 5 of the 1978 *Hamburg Convention*: They respectively recognise Deck Cargo and Live animals as goods. Article 9 provides for situations where it permits deck cargo to be carried, which are;

- when it is in accordance with terms of agreement with the shipper, in which case a statement to such effect must be inserted by the carrier in the bill of lading or the document evidencing the contract of carriage by sea and where a statement is not inserted to that effect, the burden of proving the existence of the agreement for carriage on deck will be on the carrier but the carrier is not entitled to invoke such an agreement against any third party who has acquired the Bill of Lading in good faith.
- when it is in accordance with the usage of the particular trade, and
- when it is required by statute or any regulation.

Where the goods have been carried on deck contrary to Article (9)(1) or where the carrier does not invoke an agreement for carriage on deck, the carrier is liable for loss of or damage to the goods and delay in delivery which results from the carriage on deck with the extent of his liability determinable in accordance with Article 6 or Article 8 of this Convention as applicable in the particular situation. The convention has been applauded for recognizing deck cargo due to its connection to containerization as containers are usually used to carry goods safely on the ship's deck.

With respect to live animals, the carrier is not liable for loss, damage or delay in delivery which results from any special risks inherent in the live animals' carriage unless proven that the loss, damage or delay in

delivery resulted from the negligence or fault of the carrier, his agents or servant.

ii. Article 10 of the 1978 *Hamburg Convention*: The *Hamburg Rules* recognises the modern commercial practice whereby a carrier and actual carrier are parties to the contract of carriage by sea. The carrier enters into a contract of carriage with the shipper and the actual carrier is entrusted the actual carriage of the goods. The carrier and the actual carrier are jointly and severally liable under Article 10(4) of the Convention, for the carriage such actual carrier undertakes to carry in the *Hamburg Convention* while the carrier also bears responsibility for the entire carriage under the contract of carriage as Article 10(2) of the *Hamburg Convention* provides that all the provisions of the Convention governing the responsibility of the carrier also apply to the responsibility of the actual carrier for the carriage performed by him.

iii. Article 21 and Article 22 of the 1978 *Hamburg Convention*: The *Hamburg Rules* provides for the plaintiff's freedom to choose the court to initiate a judicial or arbitral action subject to the selected court having competence over such matters from its domestic law and the court having situation in any of the places listed in Article 21(1) (a-d) thus:

   a. The principal place of business or, in the absence thereof, the habitual residence of the defendant; or
   b. The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or
   c. The port of loading or the port of discharge; or
   d. Any additional place designated for that purpose in the contract of carriage by sea.

Without prejudice to Article 21(1), an action can be instituted in any Court where the vessel was arrested according to that state's applicable law though the claimant must move the action to one of the preferred jurisdictions in

accordance with Article 21(1) when the defendant petitions it so. Before the action can be moved after the defendant's petition, the court of the place of arrest has to determine the sufficiency of the security which the defendant must furnish to ensure payment of future judgements to be awarded the plaintiff. Where an action has been instituted and/or judgement is given in a competent court as defined in Article 21, no new action[11]on the same grounds can be instituted unless such initial action or judgment is not enforceable in the country where the new action is instituted. An agreement which states where the parties may institute an action, the agreement coming after a claim has arisen from the contract of carriage is effective as provided in Article 21(5) of the *Hamburg Convention*.

The parties to a contract may add arbitration clause that any dispute that may arise relating to carriage of goods shall be referred to arbitration although the carrier may not invoke such clause against a holder who acquired the Bill of Lading in good faith where the charter party contains the provision but the Bill of Lading pursuant to the charter party does not contain any clause that the provision is binding on the holder of Bill of Lading

The 1978 Convention was introduced to provide a more modern and balanced framework that was favourable to developing states, from its provisions hitherto explained above, it is clear that it modified some of the heavily criticised provisions of the Hague and *Hague-Visby Rules*, despite this, its acceptance has not been popular as its adoption has been mainly by developing countries, itis criticised and opposed by shipowners as its increase in carrier's liability affects cost of insurance and freight rate contrary to the

[11] In Article 21(4), the institution of measures with a view to obtaining enforcement of a judgment is not considered as starting a new action, also, the removal of an action to a different court within the same country, or to a court in another country in accordance with Article 21(2) (a) of this Article, is not to be considered as the starting of a new action.

shipowners' economic interest, the low acceptance of the *Hamburg Rules* affected the desired uniformity of rules regulating carriage transactions as different states adopted positions beneficial to their economy, e.g. Richer countries shunned the *Hamburg Rules* and adopted the Hague and the *Hague-Visby Rules*, Australia, Denmark, Sweden, China, Norway, Japan etc. adopted a combination of the Hague, *Hague-Visby* and *Hamburg Rules*.

The *Hamburg Rules* has not gained popularity as it has only 25 parties which dampened the possibility of its having the intended major impact in international trade and commerce as it has had no major impact on world trade, this is in contrast to the acceptance of *Hague Rules* which is popular despite its not being in tune with modernity.

E. *ROTTERDAM RULES* OF 2011

The poor acceptance of the *Hamburg Rules*, the popularity of the *Hague Rules* due to its widespread acceptance and the lack of uniformity in international regulation of carriage of goods by sea caused the maritime industry and the governments to take new steps with the aim of reaching or creating a harmonized and widely accepted and applauded international regime for carriage of goods by sea.

The United Nations Commission on International Trade Law[12] in deciding to commence the setting up of the to be regime established a 2001 working group on transport law with its object being the introduction of uniform rules to govern and regulate cargo claims for sea and multimodal transport which involves a sea leg. The United Nations General Assembly in 2008 approved and adopted the 96 Articles rule presented by the working group called the *Convention on Contracts for the International Carriage of Goods Wholly or Partly*

[12] Hereinafter referred to as the UNCITRAL.

by Sea, with its opening for signature being almost a year after its approval and adoption in Rotterdam in September 2009.

1. *Innovations and reforms of the* Rotterdam Rules.

Some of the reforms and innovations of the *Rotterdam Rules* include:

i. The amended definition of contract of carriage and its effect on the geographical scope of application: The *Hamburg Rules* defines a contract of carriage under the Convention as carriage of goods from one port to another port limiting the applicability to only port to port carriage, expressly excluding its application to the carriage by modes other than sea in case the contract involves the carriage by other modes. The *Rotterdam Rules* define contract of carriage as carriage of goods from one place to another place, it using the wordings of "from one place to another" extends the application to carriage by other modes in addition to the carriage by sea if the parties have so agreed. The definition by the *Rotterdam Rules* widens the spectrum of a contract of carriage subsuming contracts of carriage through other means which are normally regulated by other Conventions making such carriage subject to the *Rotterdam Convention*.

The definition of contract of carriage affects the geographical scope of application of various conventions. For example, The Hague and *Hague-Visby Rules* applying only to tackle-to-tackle required that either the Bill of Lading or the port of loading be located in a contracting state. The *Hamburg Rules* being port to port makes the geographical scope of application to be the port of loading to the port of discharge, both *Hague-Visby* and *Hamburg Rules* will also apply when a national law giving effect to them are incorporated in the Bill of Lading. The *Rotterdam Rules* being from one place to another makes its

geographical scope of application the places of receipt and delivery and the ports of loading and discharge with no reference accorded to place of issuance of Bill of Lading or incorporation of national law.

ii. Liability of carrier and the Period of responsibility of carrier: The provision of the *Rotterdam Rules* on liability for delay is *in pari materia* in spirit to the *Hamburg Rules*, it provides that the carrier is always liable for loss, damage or delay caused by fault of the carrier, the *Rotterdam Rules* maintain the presumed fault principle, as such, once the claimant establishes a prima facie case for loss, the carrier has the option of disproving the claim or asserting that the loss, damage or delay resulted from an excluded peril and the claimant in turn may rebut the carrier's defence by proving that the carrier did not fulfil his obligation to ensure seaworthiness of the ship or that the carrier or any of the persons for whom the carrier is responsible for was responsible for the loss.

The liability for live animals is different as the carrier is not liable for damage, loss or delay in delivery which results from any special risk in the carriage of the live animal(s) under the *Hamburg Rules*. The *Rotterdam Rules* leaves the regulation of liability of live animals untouched, it instead leaves it in the purview of freedom of contract except where the damage, loss or delay in delivery results from any act or omission done with the intent of causing such resulting loss or damage, knowing that such loss or damage would result.

The *Rotterdam Rules* extends the class of people the carrier is responsible for and also increases the limit of liability of the carrier. The carrier under the *Hamburg Rules* is responsible for the servants, agents and subcarrier of the carrier. The extension to this class births the concept of maritime performing parties. The carrier is responsible for

both maritime[13]and non-maritime performing parties, the shipmaster, ship crew and carrier's employees. The limit of liability is slightly increased in the *Rotterdam Rules* from 835 SDRs per package and 2, 5 SDRs per kilogram of the *Hamburg Rules* to the amount of 875 SDRs per package, and 3 SDRs per kilogram.

The period of the carrier's liability is in touch with the reality of the geographical scope of application, hence the period of liability being that which the carrier is in charge of the good, from time of receipt of goods to time of delivery except where the goods are required to be delivered to any other authority.

iii. Electronic Transport Record: The *Rotterdam Rules* coming into force in the 21st century, a century which marks the prime of modernisation, E-communication and E-commerce, had to recognise the developments in the convention. The *Rotterdam Rules* regulates electronic transport documents. It recognises electronic documents in that it widens transport document in the convention to include electronic transport document. Article 8 of the *Rotterdam Convention* provides that anything that is to be or can be contained in a transport document under the convention can be recorded in an electronic transport record subject to the consent of carrier and shipper being obtained for the issuance and subsequent use of an electronic transport record. The effect of the issuance, control, possession or transfer of a transfer document is the same as that of the electronic transport record.

[13] The maritime performing parties is defined as a performing party that performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. It includes the subcarrier, the independent contractor performing their duties or services within the port area.

iv. Deck Cargo and Containerisation: The *Hamburg Convention* recognises Deck Cargo and lays the foundation for Deck Cargo. It provides for situations in which carriage on deck will be recognized, it provides the conditions to be:

- When such Deck cargo carriage is in accordance with the usage of the particular trade;
- When such Deck cargo carriage is required by statute, rules or regulations; and
- When it is in accordance with the agreement with the shipper.

The *Rotterdam Rules* goes the extra mile as it adds the most important situation:

- When the goods are carried in or on containers or vehicles;

The fourth situation as added by the *Rotterdam Rules* requires the container to be fit for deck carriage and for the deck to be fit for the container. The *Rotterdam Rules* in recognising and providing container transport is in line with modern shipping practices.

v. Transfer of rights: The *Rotterdam Rules* in chapter 11 provides for the transfer of rights incorporated and provided in a negotiable transport document. Article 57 in regulating the ways in which the rights incorporated in a negotiable transport may be transferred by the holder provides that the rights in an already issued negotiable transport document may be transferred by document the holder to another person, duly endorsed to the transferee, or in blank, if an order document or without endorsement, if a bearer document or a blank endorsed document or a document made out of the order of a person named and the transfer is between the first holder and the named person.

Article 58 of the *Rotterdam Convention* regulates the liability of the holder of a negotiable transport document when such holder is not the shipper or does not exercise any right under the contract of carriage, it provides that such holder is not liable in his position as holder under the contract although liability will be existent if it is incorporated and ascertainable from the transport document.

vi. Jurisdiction and Arbitration: The *Rotterdam Rules* allow the inclusion of exclusive jurisdiction clauses only in volume contract[14] although their binding superiority on third parties depends on the fulfilment of some conditions being:

- that the court chosen is either in the domicile of the carrier, the place of receipt agreed in the contract of carriage, the place of delivery agreed in the contract of carriage, the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship
- that the clause is contained in a transport document or electronic record,
- that the third party is given adequate notice of the court chosen and that its jurisdiction is exclusive and,
- that the law of the court seized recognizes that that person may be bound by such clause.

The rule for Arbitration in the *Rotterdam Rules* is alike with that of Jurisdiction, in the *Rotterdam Rules*, if present in a volume contract, the agreed place of arbitration is binding on parties to the agreement, it is likewise binding on third parties subject to the 4 conditions for

[14] "Volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

jurisdiction clauses with exception that the fourth condition be replaced by a reference to applicable national law of the place where the arbitral proceeding is instituted by claimant.

The acceptance of *Rotterdam Rules* has been the worst of the 4 conventions, despite the condition for its coming into effect being ratification by 20 states, it coming into effect very soon doesn't seem probable as only four states have ratified[15] it as at February 14, 2019.

F. CONCLUSION

There is a comical contradiction between international conventions regulating the carriage of goods by sea, their weaknesses and their differences in acceptance as the less modern convention is the most accepted convention with more than 45 states having ratified it. The progression in modernity of the rules unexpectedly results in a reduction in state party acceptance, states who ratified the *Hague-Visby Rules* being less than 26 and parties ratifying the *Hamburg Rules* being less than 22[16] and the most modern convention not being in effect due to a sparse number of ratifiers. Some States like Australia, Japan have adopted a hybrid of Hague, *Hague-Visby* and *Hamburg Rules*. China though not ratifying any of the rules incorporates some of the provisions of the *Hamburg Rules* into their Maritime code some of which includes it incorporating the *Hamburg Convention* position on liability of the carrier for delay in delivery and the *Hamburg Rules*' position on carrier's liability for deck cargo. Various states ended up creating their own national or regional laws regulating carriage of goods by sea which leads to a merry-go-round situation as one of the motivations of international regulations of carriage of goods by

[15] Nigeria though being one of the 25 signatories to the *Rotterdam Rules* has not Ratified it, as only Spain, Togo, Cameroon and Congo have ratified the convention

[16] International Conventions Membership List, available at http://www.informare.it/dbase/convuk.htm (accessed April 3 2019).

sea was the desire for uniformity of laws which led to the creation of different rules which in turn led different states to enact its own regional law to protect its interest effectively.

Nigeria ratified The *Hague Rules* and by virtue of section 12 of the 1999 Constitution of the Federal Republic Nigeria requiring enactment of any ratified international law as a local act or law, the process of which is tagged domestication, domesticated the *Hague Rules* in the schedule of *The Carriage of Goods by Sea Act*[17] (COGSA).

The *Carriage of Goods by Sea Act* since its enactment in 1926 has been the leading legislation in Nigeria in respect of regulating carriage of goods by sea pursuant to Bills of Lading contracts. The COGSA states that the Rules subject to the act shall have effect in relation to and in connection with outward carriage of goods from port in Nigeria to any other port whether in or outside Nigeria. Nigeria did not sign or ratify the *Hague-Visby Rules* but we ratified and domesticated the *Hamburg Rules* in the 2005 United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act, the 2005 act however does not in any way whatsoever repeal the 1926 COGSA which poses the question, which is superior amongst them both, for instance, where there is a conflict between Article 3(6) of the *Hague Rules* which provides a 12 month time bar limit and Article 20(1) of the *Hamburg Rules* that provides for a 2 year time bar period? This is usually answered in favour of the *Hamburg Rules* since it was enacted after the *Hague Rules* but some scholars argue that both have the same force since the 2005 Act does not repeal the 1926 Act. What is important, is that the letters of the contract of carriage once voluntarily entered into, will most likely regulate the transaction. Hence where the voluntarily entered into contract has any clause that purports to regulate any part of the transaction of carriage, the contract will have superiority.

[17] Cap. C2, Laws of the Federation of Nigeria, 2004.