HAVE THE MARITIME LAWS BEEN FRAGMENTED?

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This paper intends to discuss a brief analysis of the current international conventions on the "Carriage of Goods by Sea"; – the Hague-Visby Rules of 1968 and the Hamburg Rules of 1978 – against the background of world problems on the complexities of maritime trade, and the legal impact of these accords not only on trade relations between shipowners and shippers of goods, but more distinctively when such conventions are applied as laws by Admiralty courts of acceding states. For the consensus is that, at these times when there is an enormous demand for trade through sea transport among nations, by which international disputes may arise in respect of the parties' rights and liabilities on loss or damage to goods in the course of sea transit, the need for a responsive Maritime Code to the modern requirements of shipping trade is inevitable.

Advocates know of the old Brussels Convention of 1924 which came into force in June, 1931. This Convention, to some acceding states, is known as the "Hague Rules of 1924", whilst in the United Kingdom and in some other countries which also legislated on it, it has been described as the "Carriage of Goods by Sea Act, 1924".

By text of the 1924 Rules, their main objective was to produce an international convention with which to standardise most of the important terms of bills of lading. The scheme, as indicated by their preamble, was to give the force of national law to rules designed to unify internationally the "responsibilities", "liabilities", "rights" and "immunities" attaching to carriers under bills of lading. In a nutshell, these Rules require the contracting states, by municipal legislation, to apply the provisions of the Convention to every bill of lading issued in their respective territory.

But one gathers that this objective of the old Convention has only been partially achieved – since even after a period of 52 years from its effectivity – many states have not adopted a uniform system of applying the Hague Rules. In fact, by 1955, or 24 years since the effectivity of these Rules, only 36 sovereign states had ratified or acceded to the Convention –as many nations had not embodied them in their municipal laws at all, while others differed in the way they had

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adopted them. And, in other states, as correctly observed by English courts in the cases of *Dobell* v. *Rossmore,* and *Vita Food Products* v. *Unus Shipping Co.* – "the Rules, in some states, are enforced only as a matter of contract". This lip service to the Rules indicated the latter's confused state in adoption and enforcement.

Apart from the Rules' purpose of uniformity, one also gathers that the other thrust of the Brussels Convention of 1924, was to redress the imbalance which long existed between shipowner and shipper of goods on aspects of loss or damage to goods in the course of sea transit. For preceding the emergence of the Hague Rules, inequality in sea trade, stood originally on the footing that – "sea carriers were absolutely liable for loss or damage to cargo in their possession". They were actually "insurers" of the shipper's goods in the strict sense of the word. Such was the prevailing predicament of shipowners under the common law system.

And, indeed, the common law had no monopoly of this concept of "carrier's absolute liability", since even under the civil law system the evidentiary requirements on carriers to establish proof of their "exercise of extraordinary diligence and care over the goods" as a condition *sine qua non* to avoid liability, signified to a certain degree an observance of the same concept. For example, in the Philippines, a civil law country, in respect of the "legal issue on sea carriage of goods", it would be utterly difficult for a trial lawyer to impress upon the trial court, and more so on the appellate court, that his client had established the *quantum of proof* of extraordinary diligence in his care of and custody over the goods.

Owing to this responsibility, the shipowners sought, by law and by contract, to restrict or limit this heavy liability. In Europe, historical records revealed that the English shipowners petitioned in 1733 for Parliament to intervene in this inequality. Years later, the first government interference occurred which obviously favoured the shipowners. The provisions of the early statute designed to protect the shipowners' interest, had in fact, been reenacted by sections 502 and 503 of the British Merchant Shipping Act 1894, which excluded the shipowners' liability for damage or loss caused by fire on board and for loss of undeclared valuables. The shipowners, too, by reason of the courts application of the principle of "freedom of contract" began inserting contractual stipulations in charter parties and bills of lading, either to reduce, limit or completely exclude their liability to cargo-owners. These acts of shipowners, exacerbated in result the inequalities in sea trade between the contracting parties and were the moving factors for establishment of conference committees for preparation of the Hague Rules.

It is the opinion of some legal writers that, in place of wide exceptions clauses exempting shipowners from almost every conceivable loss or damage to goods occurring in the course of a sea transport, the 1924 Hague Rules produced a more or less balanced division of risk as between ship and cargo. But to a practitioner's point of view, this supposed "division of risk", to a large extent encouraged the development of the so-called overlapping system of insurance, that is to say, the system whereby the shipper or consignee effects insurance on the cargo, while the ship effects a separate liability insurance; consequently, in the event of loss or damage, these two sets of insurers become the chief litigants in the admiralty court as to which of them is to bear the loss and in what proportions. As a result, the cost of goods' transport by sea increased disproportionately

to the value of the goods being transported, and the carrier as well as the cargo owner have become less vigilant in the exercise of their duties of care over the goods despite their awareness of those duties in the Hague Rules.

There existed other valid objections to the 1924 Hague Rules: the first, was that the Hague Rules were badly drafted – as they did not really remedy the imbalance of "rights and responsibilities" over the goods between the carrier and cargo owner, owing to the existence of 18 liability exceptions in the Rules which, by any legal measure, held the shipowner immune to any liability in respect to actions on "loss or damage to cargo"; the second, was that instead of providing uniformity of rules on sea carriage – they had thrown the shipping laws of trading states into a state of confusion and uncertainty.

In practice, these objections find support in these observations:

(i) As regards the 18 immunities, one of which states under Rule 2 (a) of Article IV of the Rules that – "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from "act, neglect or default of the master, mariner, pilot, or servants of the carrier in the navigation or in the management of the ship". In legal effect, this all-embracing immunity provision means that, "the shipowner shall always remain fully protected from liability, even if the loss or damage to cargo was proximately caused by the negligent act or omission, or even by error, or failure to observe local or international navigational rules, by those authorized to navigate and manage his ship". Almost all shipper-states and insurance underwriters frown upon this provision as being too over-protective of the shipowners' interests. And why not? Would it not be highly absurd, and grossly inequitable, for cargo owners or their insurers, not to have a legal remedy at all against the carrier, for the total or partial loss or damage to their cargo, caused by the negligent or faulty navigation or management of the ship? Perhaps, it might appear too critical, if one were to say, that this provision on "negligent navigation" and "error or default" in navigation, had really no place in the Rules, owing to the fact that, the basic reason and intent for its inclusion in the U.S. Harter Act, 1893 – whence said provision was borrowed by the framers of the 1924 Rules – was to confine only its application to major disaster of ship and not to cargo. But, since the language of this provision in the Rules was so broad, the Admiralty courts had applied this immunity even to "acts of seamanship" less than disaster which affected only the cargo.

(ii) The provisions on "package and unit limitation", whose objective was mainly to protect shipowners in the case of packages of an unexpectedly high value, lacked too any real precision in construction.

The problem centered on the limitation figure itself. The main thrust of the 1924 Convention was to set the "limit on per package" according to the value of the quantity of gold contained in 100 gold sovereigns. But Art. IX of the Rules, gave contracting States, other than those who used sterling as a unit of currency, a liberty or option to convert this limitation figure into their national currencies, when they enacted their own domestic legislation. The result was that, instead of a uniform limit common to all Hague Rule countries, there had grown up a variety of different limits. For instance, in the United Kingdom, the English Act of 1924, previously set the limit at –100 pounds sterling per package, until the Gold

Clause Agreement of 1950 which provided, when applicable, for a limit of –200 pounds sterling, and only to be further amended in 1977 when the new Act of 1971 took effect, providing for gold francs as a new unit of currency on limitation. In the U.S., her Carriage of Goods By Sea Act, 1936 provided for $500 U.S. dollars, while in other countries, like the Philippines, her Carriage of Goods By Sea Act, 1924, provided for P1,000.00 per package. These various limitations could have been avoided had the Convention not allowed them to be so under Article IX.

(iii) A problem on "conflict of laws" had equally arisen under the 1924 Convention. Owing to the absence of a specific provision in the Rules as to the voyage that should be covered", the Hague Rule countries devised their own system of coverage – an act, directly opposed to the vision of uniformity in the Rules. In the U.K., the Privy Council in *Vita Food Products* v. *Unus Shipping* revealed problems in applicability of the Convention when no "clause paramount" was inserted in the bill of lading. In some European countries, the Hague Rules would *ipso facto* cover the contract of carriage upon the issuance by the carrier of a bill of lading, whilst in some civil law countries, like the Philippines, the Hague Rules would not generally apply to outward shipments, despite the issue of a bill of lading evidencing the contract of carriage. To solve this conflict of law problems, the U.S. had earlier adopted the application of the Hague Rules to both inward and outward shipments.

(iv) On question of procedure, maritime lawyers have always been faced with difficulty in identifying "the Hague Rules carrier" in a situation involving "transhipping carriers", and in cases of "demise clauses" in contracts of carriage, because the Rules had not envisaged these problems. Equally uncertain were the parties to be "named in the writ" of a court action by reason of ambiguity of words used in referring to the shipowner, or party in control or possession of the ship, as merely the "carrier" or the "ship".

Even on the question of evidence, the 1924 Hague Rules appeared to be deficient. Article III, r.4 of the 1924 Convention had provided that a bill of lading should be *prima facie* evidence of receipt by the carrier of the goods as therein described. However, what was to happen when the bill of lading was negotiated to a third-party who was a *bona fide* holder? The Convention had provided no answer and obviously different solutions had been adopted in different countries.

England, the United States and other common law countries all had doctrine of estoppel but its effects varied. In French law, a bill of lading had "*force probante irrefutable*" vis–a–vis a third party holder in good faith. However, most civil law countries had no doctrine of estoppel but supplemented Art. III, r.4 by their national rules of law relating to misrepresentations in bills of lading. On the other hand, some countries, like Belgium, for instance, were reported to have taken the view that Art. III, r.4 prevailed over any domestic law on the subject of misrepresentation.

These defects in the 1924 Hague Rules, caused a clamour in 1955 for changes in the Rules. In 1959, the International Maritime Committee prepared its draft amendments to the 1924 Convention. It appeared surprising, however, why amongst their six main proposals for alteration amending the 1924 Hague Rules, the most controversial provision of the Rules on "negligent navigation" and

"error or default" in navigation, was not among those proposed to be amended. More appalling was the complete absence of any intent or suggestion, in the number of positive recommendations for possible amendments of the 1924 Rules, to amend, revise or delete any of the unreasonable or impractical provisions of the 18 liability exceptions.

In any event, at the diplomatic conference in Brussels on February 23, 1968, the Protocol embodying the amendments was ratified by 18 countries, and these amended Rules became officially known as the "Hague Visby Rules". These amended Rules were also the basis of the English newly enacted – "Carriage of Goods By Sea Act, 1972" – which came into force in the United Kingdom on June 23, 1977.

By reason of space and time constraint, I feel obliged to omit an indepth discussion on the ramifications of the Hague–Visby Rules. However, as a general observation, it is perceived that the Hague–Visby Rules are basically the same in construction and in substance as the old 1924 Hague Rules, but for some amendatory provisions as regards – the broadening of definition of the word "goods" which may now include both "deck cargo" and "live animals"; the deletion of the requirements of a "clause paramount" in bills of lading as a condition precedent for the Rules to govern the contract of carriage; the extension of the Rules applicability to even "non-negotiable receipts" provided the parties do agree; the change of the shipowner's maximum liability from 100 gold sovereigns per package or unit to 10,000 gold francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged; the right now given to shipowners' servants, if sued on tort, to avail themselves of the same "liability exceptions" and "limits of liability" as originally reserved only for their employers; the recognition of a new mode of "transport by containers"; and the "conclusive effect" of bills of lading in the hands of third-parties acting wholly in good faith.

It must be emphasized, however, that the retention in the Hague–Visby text of the entire liability exception clauses of the old 1924 Hague Rules, and its inability to accept new consensus for additional amendments on the lines of those which have been mentioned earlier, sowed resentment and even disgust among shipper states – as in the case of developing nations in the Group of 77 – for they regarded the Hague-Visby Rules as largely an assertion of the "protectionist policy" that would safeguard only the vast interests of shipowners and shipbuilding industries. To a large extent, such observation may be well taken. It may be recalled that Hugo Grotius, a great 17th century international lawyer, once defended in fact, this "protectionist policy", by pleading "public policy" as the basis for it. The same view was shared and openly expressed by Dr. Lushington, the great English Admiralty judge, when he decided *"The Amalia"* case. And, in affirmation of this policy at this modern times, Lord Denning M.R. confessed in *"Alexander Towing Co.* v. *Millet – The Bramley Moore"*, that the shipowner's right to limit his liability "is not a matter of justice", but has its "justification in convenience""

It is, as has been already pointed out, a weakness of the Hague-Visby Ru[illegible] that they did not reflect a new consensus of amendments that would h[illegible] satisfied the legal requirements of a modern sea transport conventi[illegible]s a lawyer deeply involved in the study and practice of maritime laws [illegible]sider the Hague-

Visby as still based essentially on the concepts of sea carriage of goods under the U.S. Harter Act of 1893. I would therefore consider it the result of "the Harter Compromise" : – this was that a shipowner should not be entitled to contract out of liability to exercise due diligence to make the ship seaworthy but that, once the voyage had begun, he should be entitled to rely on certain exceptions, including those of "negligent navigation and negligent management" of the ship.

To remove the influence of that compromise, the United Nations Commission For International Trade Law, or Uncitral, for short, worked for several years on a new convention known as the "Hamburg Rules, 1978". Its primary objective was the revision of both the 1924 Hague Rules and the 1968 Hague-Visby amendments. More importantly, under this Convention's "24 amendatory provisions", the old system of carrier's rights, duties and immunitites contained in Articles III and IV of both the 1924 Hague Rules and 1968 Hague-Visby Amendments, specifically the defenses of "negligent navigation and management" of the vessel, have been dismantled. Instead, Article 5 (1) of the Hamburg Rules provides that "the carrier shall be liable for loss, damage or delay while in charge of the goods, unless he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences". But it must be said that the loss of the "18 liability exceptions" or the so called Policy–Based–Defences, from the text of the 1978 Hamburg Rules, was not achieved without stiff opposition. At Uncitral conferences, there had been tenacious and consistent support of retaining "negligent navigation" as a defense by shipowner states such as the United States, Japan, U.S.S.R., Poland and Belgium. Those who favoured their elimination were Norway, France, Spain. the Latin American states, Australia, India and the developing countries.

It is, as one can deduce from the text of this new Convention, that the framers of the Hamburg Rules hoped to be able to clear up a great number of old problems with the Hague Rules and reduce to a minimum number the new problems for the world's shipping trade. But, in result, the contentious questions are : Will the maritime nations eventually agree to substitute the Hamburg Rules for the Hague Rules, and assuming that they do, could the Hamburg Rules remove substantially the imbalance in shipping trade. Or, might it be true that the maritime law is doomed to be fragmented into two or more different systems, for as of now, some countries are enforcing the one system and some the other. Whether any one of these hypotheses will eventually emerge, is indeed a question quite difficult to answer at this early stage.

Setting aside these contentious provisions of the three Conventions, I feel obliged to comment, however, that the 1924 Hague Rules and the 1968 Visby Amendments are not bad laws. It is beyond question that they need further amendments to conform with the legal requirements of a modern sea carriage convention. This will come in due time. But, for the present, there is every reason for appreciating the vital role played by the Hague Rules in the shipping trade of many nations; amongst which being that they have not only stood the test of time but have indeed greatly reduced that "imbalance of rights and responsibilities" of shipowners and shippers, which greatly improved every nation's shipping trade, at least.