

THE MALAYSIAN CARRIAGE OF GOODS BY SEA (AMENDMENT) ACT 2020 (COGSA) – EFFECTS ON CARRIER LIABILITY

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ABSTRACT

When it comes to the law of carriage of goods by sea, Malaysia has been a signatory to the international regime of the Hague Rules (1924). Effective 15th July 2021, The Carriage of Goods by Sea (Amendment) Act 2020 and the Carriage of Goods by Sea (Amendment of First Schedule) Order 2021 amended the law in this area. The effect of these amendments is that the modified version of the Hague Visby Rules as amended by the 1979 Protocol will be given the force of law in Malaysia.

This paper will discuss the effects of the Hague Visby Rules in connection to the *new* Malaysian COGSA and compare it with the previous regime of the Hague Rules. Essentially it includes new changes made in the Hague Visby Rules. It is to be noted that this paper will only discuss carriage of goods by sea in West Malaysia. This amendment does not apply within or outside the states in East Malaysia, namely Sabah and Sarawak as the Hague Rules remain in force there due to the constitutional arrangement and the separate legislation on carriage of goods by sea governing these two states.

Keywords: Malaysian COGSA, Hague Rules, Hague Visby Rules, Carrier Liability.

INTRODUCTION

The Malaysian Carriage of Goods by Sea (Amendment) Act 2020 and the Carriage of Goods by Sea (Amendment of First Schedule) Order 2021 has amended the Malaysian Carriage of Goods by Sea Act 1950 as of 15 July 2021. With this amendment, the legal framework for Malaysia's Carriage of Goods has progressed from the Hague Rules to the Hague Visby Rules and Special Drawing Rights (SDR) Protocol.[1] The effect of this amendment is that the modified version of the Hague Visby Rules as amended by 1979 Protocol is the law in Malaysia. Before this amendment, the Hague Rules (1924) was in force under the First Schedule of the Carriage of Goods by Sea Act.

Law that gives the legal effect to this Act is in accordance with section 1(2) of the Carriage of Goods by Sea (Amendment) Act 2020 [Act A1613]. The Minister of Transport has appointed 15 July 2021 as the date for Act A1613 to come into operation. Act A1613 was gazetted on 4 February 2020 to amend a few provisions in the Carriage of Goods by Sea Act 1950 (Act 527) including to empower Malaysian Minister of Transport to amend First Schedule to the said Act 527 by order published in a Gazette.

The purpose of the amendment to Act 527 is to improve the current legislation and ensure it to be in line with the provisions of the relevant international instruments. Prior to Act A1613, the provisions in the First Schedule to Act 527 adopted the provisions in the Hague Rules. The Hague Rules are international laws that aim to coordinate the rights and responsibilities of seaborne trade. The Hague Rules have been around since 1924 and are outdated, the procedures provided under this instrument are seen as no longer in line with the global practice in the maritime trade industry.

It is to be noted that this segment only applies to carriage of goods by sea in West Malaysia. It does not apply to states in East Malaysia, namely Sabah [2] and Sarawak [3] as the Hague Rules remain in force there due to the constitutional arrangement and the separate legislation on carriage of goods by sea governing these two states.

SCOPE OF APPLICATION

The Rules set out in the First Schedule of the Carriage of Goods by Sea (Amendment) Act 2020 (COGSA) will affect carriage of goods by sea of ships carrying goods from any port in Malaysia to any other port whether in or outside Malaysia.

Article 10 of Hague Rules states it will only apply when the bill of lading is from a “member state.” Under Malaysian COGSA, the rules applied only when a shipment was coming from a port in Malaysia or where the bill of lading is issued in Malaysia. Under the Hague Visby Rules, (Article 10) this area is covered with a much larger scope, which is, the “Convention shall not affect the provisions of any international Convention or national law governing liability for nuclear damage.”

Bill of Lading

COGSA applies to sea carriage documents and not just the bill of lading. As known previously, during the pre-amendment period, the rules in the First Schedule of COGSA have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Malaysia to any other port whether in or outside Malaysia.[4] The Hague Rules applied to carriage contracts made pursuant to a bill of lading or other equivalent document of title.

With the implementation of the Hague-Visby Rules, the application of COGSA is widened to apply sea carriage documents as well. Sea carriage documents are defined as[5] “a negotiable document of title that is similar to a bill of lading and that contains or evidences a contract of carriage of goods by sea, a bill of lading that, by law, is not negotiable, a bill of lading and a non-negotiable document including a consignment note and a document of the kind known as a sea waybill or as a ship's delivery order which either contains or evidences a contract of carriage of goods by sea”. The extension has made leeway for the development of technology. It now covers electronic sea carriage documents as well. The application applies as per Article 1(b).[6]

The Hague Visby Rules provide a limitation period which is one year, if agreed by the parties is open to be extended through agreement. This applies also to Hague Rules, and it will not be

invalid just because it is not favorable to the shipper. Time limit for indemnity action (by carrier) is expanded under Hague Visby Rules where it is set under the national law. It is minimum three months after the claimant makes the claim.[7] Duration of the cause of action is six years [8] from the occurrence of the incident.

Application to deck cargo

COGSA now applies to cargo carried on or above deck as opposed to before this. This is in contrast to the Hague Rules' position. Previously the definition of goods excludes "cargo which by the contract of carriage is stated as being carried on deck and is so carried".

If the shipper wants the carrier to be subjected to liabilities [9] under Hague Visby Rules for a particular stowage requirement, then the shipper must notify the carrier in writing about the particular requirement at the time or before the contract of carriage was signed. The carrier will not have the protection of limitation for loss or damage to goods if he transports goods on or above deck against the wishes of the shipper.

OBLIGATION OF CARRIER

The obligation of a carrier is the same with the Hague Rules. There have been no changes. The carrier is responsible for "exercising due diligence to the seaworthiness of the ship before and at the beginning of the voyage and to carefully load, handle, stow, carry, keep, care for and discharge the goods carried" is the same. A bill of lading serves as the carrier's "prima facie" receipt of goods.

LIABILITY OF CARRIER

Time bar

The Hague Rules' Article 3(6) and the Hague Visby Rules' Article 3(6) are identical. However, Article 3(6)*bis* of the Hague Visby Rules allows for an extension for the purpose of indemnification. There were problems with the Hague Rules in this area. The carrier can claim from the shipowners when the damage occurs if the cargo owners sue him for this damage. The carrier's action will fail against the shipowner if the claim is served after the time limit

stipulated. The carrier is liable for the amount claimed by the shipowner [10] when the cargo owners lose the action against the carrier. The carrier who is not the shipowner is in trouble. This problem [11] posed in the Hague Rules has been solved by Article 3(6)*bis* Hague Visby Rules.

Hague Visby Rules' time bar is a year, however it can be extended with the agreement of relevant parties.[12] Any action against third party can be brought after the expiry of one year or as agreed by the parties, only if it is brought within the allowed time of less than here months, beginning with the claimant's settlement of the indemnification claim and receipt of process against him[13] In Malaysia, time limit[14] to bring a claim for indemnity is six years from the time cause of action starts. After the cause of action arises, Hague Visby Rules allows for an "extendable" one year time limit of the cargo claims so long as it is extended by the parties.

In short, the time limit for indemnity under Hague Visby Rules is "extended" to what is set by the national laws of a state, which is three months after the indemnity is settled by the claimant. For Malaysia, the time limit is six years from the time of the cause of action, as mentioned above.

LIMITATION OF LIABILITY

By far this is the most important change brought about by the Hague Visby Rules to the Malaysian COGSA.

Limitation to package or unit

The liability limit is in a much better position [15] as compared to the previous regime. For Hague Rules, carrier liability is limited to "£100 per package or unit". It means gold value under Article 9 of the Hague Rules. In the case of *Rosa S* [16] the courts found that "£100" must be stipulated to the same value in 1924, taking into account inflation at that time. This amount, in today's term will amount to in the whereabouts of "£7,000 per package or unit". It is worth noting that the *Rosa S* case in 1982 worked out \$9,398 in Singapore dollars.

In Malaysia, following the case of *Rosa S*, the "£100" is taken in face value of "£100".[17] For Sabah and Sarawak, it stood at "RM850" in 1960.[18] The question arises as to the benchmark for the amount of RM850, whether it should be tied to gold value of 1924 or 1960. 1924 is the

year the Hague Rules was conceptualized. This problem is now solved by the Hague Visby Rules (as amended by SDR Protocol), limiting the liability to “SDR 666.67 per package or unit or SDR 2 per kilogramme of gross weight of the goods lost or damaged, whichever is higher”. The amount will not fluctuate, it is controlled by the SDR basket of five major currencies.[19] The gold value in Article 9 of the Hague Rules is no more. Today, one SDR is around £1.06 or 1.45 USD.[20]

Where package limitation is concerned, the Hague Visby Rules is a better convention for the carrier. It is submitted that this may not be the case when the gross limitation weights are higher than the package limitation, the gross weight will apply.[21] One is based on the number of packages and the other on gross weight.[22] Package limitation is “666.67 units of account per package” while gross weight is limited to “2 units of account per kilogramme”. What applies is the higher amount. It is to be noted that this is a positive move for cargo claimants.

There is an additional phrase being “goods lost or damaged” in the Hague Visby Rules compared to Hague Rules. In *The Limnos* [23] case, the court held that only the gross weight limitation is to be taken into account and it will only apply where the goods are damaged or lost and the quantity of goods affected.[24] Summing it up would be to say that Hague Visby Rules applies to bulk cargo cases and the limitation is gross weight limitation.

Limitation of containerized cargo

One area of confusion under Hague Rules is that of containerised cargo. Is the ‘package or unit’ the container or the goods in the container? There is no clear explanation of this issue. Courts in Australia and the United Kingdom have taken it to mean package or unit in the container.[25] The Malaysian courts, however, have decided the other way,[26] which is a package or unit is taken as the container. This confusion is solved with the advent of Hague Visby Rules. Today, in Malaysia, the package or unit are those specified on the bill of lading as being contained in the container. However there still remain two different opinions in this area.

The first view was in the case of *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co*,[27] where the court said that laying the content of a container is insufficient, the number of packages must also be stated in the bill of lading, following the “as packed” requirement under Article 4 Rule 5(c) of the Hague Visby Rules. The contention in this case is a cargo of posters and print. The container carrying the cargo was described on the bill of lading as one

container, said to contain 200945 pieces of posters and prints. These were packed in 2000 bundles but it was not indicated on the bill of lading. The Australian Federal Court interpreted “as packed” in Article 4 Rule 5(c) as the goods enumerated on a bill of lading to be “units” of which has been packed into the container as compared to being packed up in bundles, separately. The court said, it must be clearly indicated in the bill of lading as to the number of items packed in a container as well as if the items were packed together. As such, since the bill of lading stated that the container contained 200,945 pieces, the court decided that the cargo did not come under the requirements of "as packed" within the requirements of Article 4 Rule 5(c). Accordingly, the court noted that only one container was listed on the bill of lading, and as such it was taken as a single package.

The second view was in 2017, in the case of *The Maersk Tangier*,^[28] where the number of cargo were unpacked tuna, loaded into the containers. It was then shipped but it was stated in the sea waybill. The English High Court in declining to follow the case of *El Greco* held that all that was needed was a statement identifying and listing it “as packed.” However, there was no requirement for this word to be included in the bill of lading. This would then mean that the container is the unit or package as stated in Article 4 Rule 5(c) for the purposes of limiting liability.

Another area of contention is where the Hague Visby Rules sets a very high threshold before a carrier can apply the liability limitation where “the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.” It is arguable and is difficult to prove intent and recklessness by the carrier. Evidence plays an important role here. In a commercial transaction of goods, the claimant’s main interest will be to solve the case, however this seems a difficult task now.

Article 4bis

The carrier, besides having recourse in contract can also commence a tort action following this new article of *4bis* (1) in Hague-Visby Rules, “in respect of loss or damage to goods covered by a contract of carriage”. It is argued that even if this article did not exist, the position would be the same.^[29]

This Article states that the carrier’s defences and liability are available whether there exists a contract between the carrier and cargo owner or otherwise. In the case of *The Captain*

Gregos,^[30] the court held that this Article would apply when the two parties mentioned above have a contract. However, the cargo owner or the buyer can sue the carrier or shipowner for negligence even when there is no contract between the two in cases where the cargo is damaged, and the buyer has not received the bill. It is to be noted that this is an anomaly and as such *The Captain Gregos* case will not come under the Hague Visby Rules.

Alternatively, in such cases, the action to be looked at is an action in tort. Under Article 4bis (2), protection is extended to the servants and agents, but not to independent contractors. Thus, action against servants and agents will be in tort. In any event before this Article was introduced, carrier have used the “Himalaya Clause” to protect its servants, agents and independent contractors alike.^[31] A bill of lading will contain clauses of the standard BIMCO ^[32] forms of bills of lading and sea waybills. A carrier or agent will lose protection if “the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.” The threshold for a cargo claimant as such is too high, therefore it is not practical.

CONCLUSION

With the legal framework for Malaysia’s Carriage of Goods shifting from the Hague Rules to the Hague Visby Rules and Special Drawing Rights (SDR) Protocol as of 15 July 2021, the liability limit for carrier is in a much better position ^[33] as compared to the previous regime. Although this version of the Hague Visby Rules with SDR is a modified version which is not used in most maritime countries, Malaysia’s move to adopt it can be said to be a bold move. It is in the direction in line with developments in technology and the maritime industry. How successful will it be, only time will tell.

ENDNOTES

1. <http://www.admiraltylawguide.com/conven/sdrprotocol1979.html> (accessed on 22/1/2021)
2. Section 3(1) of the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961.
3. Section 2 of the Merchant Shipping Regulations 1960.

4. Section 2 Malaysian COGSA.
5. Article 1(b) Hague Visby Rules.
6. Article 1(b) Hague Visby Rules.
7. Art 1(6 bis) Hague Visby Rules.
8. Sec 6 Limitation Act 1953. Cf *Sabarudin bin Othman & Anor v Malayan Banking Bhd and another appeal* (2018).
9. Article 3(3) Hague Visby Rules.
10. Sturley, M. F. (1993). Changing liability rules and marine insurance: conflicting empirical arguments about Hague, Visby, and Hamburg in a vacuum of empirical evidence. *J. Mar. L. & Com.*, 24, 119.
11. Nousia, K. P. (2017). Carrier liability under the rotterdam rules. *Nomiki Bibliothiki*.
12. Article 3 Rule 6 Hague Visby Rules.
13. Article 3 Rule 6bis Hague Visby Rules.
14. *Sabarudin bin Othman & Anor v Malayan Banking Bhd and another appeal* [2018] MLJU 304.
15. Article 4(5) Hague Visby Rules.
16. 2 Lloyd's Rep 574 (EW HC) [1988].
17. *Shun Cheong Steam Navigation Co Ltd v Wo Fong Trading Co* [1979] 2 MLJ 254 (MY FC); *Sebor (Sarawak) Trading Sdn Bhd & Anor v Syarikat Cheap Hin Toy Manufacture Sdn Bhd*.
18. Regulation 7 Sarawak Regulations. Regulation 3 Sabah Regulations.
19. IMF provides the definition. It is composed of the US dollar, the euro, the British pound, and the Japanese yen.
20. IMF publishes SDR currency converter daily.
21. <https://arunkasico.com/bulletin-mlb-2-2021/>; accessed 20/12/2021.
22. Article 4(5)(a), 4(5)(d) Hague Visby Rules.
23. *Serena Navigation Ltd v Dera Commercial Establishment (The Limnos)* [2008]

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24. Kasi, A. (2021). Hague/Hague-Visby Rules: Carriers' Liability and Time Limitations. In *The Law of Carriage of Goods by Sea* (pp. 323-362). Springer, Singapore.
25. *Tank Shipping AS (formerly known as Tank Invest AS) v Vinnlustodin HF and Another (The Aqasia)* [2018] EWCA Civ 276, [2018] 3 All ER 981, [2018] 2 All ER (Comm) 191, [2018] Bus LR 992, [2018] 1 Lloyd's Rep 530 (EW CA); *The Aegis Spirit* [1977] 1 Lloyd's Rep 93 (US District Court in Washington); *Houlden & Co Ltd and Others v. SS Red Jacket and American Export Lines Ltd; Metal Traders Inc, Third Party; United States Fourth Party (The Red Jacket)* [1978] 1 Lloyd's Rep 300.
26. *Sebor (Sarawak) Trading Sdn Bhd & Anor v Syarikat Cheap Hin Toy Manufacture Sdn Bhd* [2003] 2 MLJ 486, [2003].
27. [2004] 2 Lloyd's Rep 537, [2004] FCAFC 202 (Australia FC).
28. *Kyokuyo Co Ltd v AP Møller-Maersk A/S (trading as 'Maersk Line') (The Maersk Tangier)* [2018] EWCA Civ 778, [2018] 3 All ER 1009, [2018] 2 All ER (Comm) 503, [2018] 2 Lloyd's Rep 59, [2018] All ER (D) 90 (Apr) (EW CA).
29. *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, [1954] 2 All ER 158, [1954] 2 WLR 1005, [1954] 1 Lloyd's Rep 321 (EW HC).
30. *Cia Portorafti Commerciale SA v Ultramar Panama Inc (The Captain Gregos)* [1990] Lloyd's Rep 310, [1990] 3 All ER 967 (EW CA).
31. *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co, Griffiths Lewis Steam Navigation Co v Paterson, Zochonis & Co Ltd* [1923] 1 KB 420.
32. BIMCO is most widely used charter parties, bills of lading and other standard agreements.
33. Article 4(5) Hague Visby Rules.

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