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Shipping Law

# A Long Overdue Change: The Hague-Visby Rules in Malaysia

## Introduction

The Hague Rules<sup>1</sup> impose minimum duties on commercial carriers of goods by sea. The Hague Rules have been – for the best part since the nation's independence – a part of Malaysian law. Consequently, despite their many faults, the Hague Rules have played a crucial role in oiling the wheels of Malaysia's sea trade.

As of July 2021 however, the **Hague-Visby Rules** have now been enacted in West Malaysia.<sup>2</sup> In enacting this improved version of the Hague Rules, the law of carriage of goods by sea in West Malaysia is now in line with that of Malaysia's major trading partners, and (perhaps, more importantly) fit for trade in the 21<sup>st</sup> century.

This Update will explore three key differences between the two sets of Rules (as enacted by the Malaysian Parliament) and the thinking behind them.

## The Changes

- Sea Carriage Documents and their Electronic Forms

The two points to be made here are that:

- (a) the protection under the Hague-Visby Rules is now afforded to a wider range of documents. This is a sea-change from the Hague Rules, which were applicable only to bills of lading; and,
- (b) the Hague-Visby Rules make provisions for, and extend their application to, the electronic forms of sea-carriage documents, a form of documentation that was not contemplated under the Hague Rules.

The Hague Rules applied only to "*contracts of carriage covered by a bill of lading or any other similar document of title*". This meant – in the main – that the protection afforded by the Hague Rules was available only when a bill of lading was issued. The protection was not available when parties issued delivery orders, consignment notes, sea waybills, etc., all documents routinely issued in the execution of domestic and international trade.

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<sup>1</sup> Formally known as the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*.

<sup>2</sup> *Carriage of Goods by Sea (Amendment) Act 2020 (Act (A1613)); Carriage of Goods by Sea (Amendment of First Schedule) Order 2021 (P.U.(A) 305/2021); P.U. (B) 363.*

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## Shipping Law

This restrictive approach, however, has been done away with under the Hague-Visby Rules with the protection afforded by the Hague-Visby Rules now granted to bills of lading (whether negotiable or not), consignment notes, sea waybills, ship's delivery orders and any other document that evidences a contract of carriage of goods by sea. This expansion reflects the modern needs of international commerce where a host of documents are issued (quite apart from the bill of lading) to facilitate trade.

A further change has been to afford protection to the above-mentioned documents even when they are in electronic form. This again reflects the needs of 21<sup>st</sup> - century commerce where the availability of trade documents in electronic form will greatly help facilitate international sales, transportation, insurance, payment and finance, and customs.

It is heartening to note that this taking into account of the electronic form of documents is in keeping with recent developments on the international scene such as UNCITRAL's Model Law on Electronic Transferable Records (formulated in 2017) which is aimed at modernising trade, the legal recognition given to electronic documents of title in the United States by way of amendments to the Uniform Commercial Code in 2003, and the consultation paper titled "*Digital Assets: Electronic Trade Documents*" issued by the Law Commission of England and Wales in April 2021. It is also in keeping with the pressing need to curb physical interaction following the COVID-19 pandemic.

- The One-Year Time Bar

Article III, rule 6 of the Hague-Visby Rules restates the traditional position that suits against the carrier and the ship are time-barred, unless the suits are brought within one year of the delivery of the goods. This is one of the most conspicuous features of the Hague and Hague-Visby Rules.

The net result of this position is that a claim must be brought against the carrier within a short period of the discharge. The reason for this rule – it is said - is that carriers cannot be expected to keep records for long periods of time and must know rapidly to what claims they may be subjected.

The amendments, however, now allow parties to:

- extend this one-year time bar by agreement; and
- bring an indemnity claim against a third party after the expiration of the one-year time limit.

The effect of these amendments is to allow parties to dictate the pace of litigation between them (if any) and to give more time for a recourse action which might otherwise be time-barred.

The indemnity provision, especially, would be valuable where, for instance, "*a charterer seeks an indemnity under a bill of lading against a claim on which he is liable to the carrier or where a bill of lading carrier transhipps for part of the voyage, in each case the carrier himself becomes a shipper under a second contract governed by the Rules*".<sup>3</sup>

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<sup>3</sup> Para 9-167 of Carver on Bills of Lading, 2001.

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## Shipping Law

- The Limitation of Liability

The key reason for a limitation of liability remains that "*carriers may not know what is inside the packages entrusted to them, and that if they do, they do not know for what purpose the contents are intended at destination.*"<sup>4</sup>

The Hague Rules state that the carrier is entitled to limit liability for any loss in connection with goods to an amount not exceeding £100 per package or unit. The Hague Rules go on to state that the monetary units are to be taken to be gold value, that is to say the gold content of 100 pounds in 1924 (when the Hague Rules were framed).

The net effect of this roundabout way of limiting liability is that it became difficult to say for certain the monetary value at which the carrier is entitled to limit liability.

The Hague-Visby Rules resolved this problem by limiting the carrier's or ship's liability for loss or damage in connection with goods to an amount not exceeding 666.67 units of account per package or unit or two units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher. The unit of account is Special Drawing Right, which is in turn determined by the International Monetary Fund or by the State.

If, however, the nature and value of the goods were declared by the shipper before shipment and inserted into the sea-carriage document, the carrier is not entitled to limit liability.

The Hague-Visby Rules go on to disentitle the carrier from the benefit of the 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*". This is a new provision that was absent in the Hague Rules. The conduct in question (i.e. the act or omission) must be attributable to the carrier itself, with mere misconduct by an employee being insufficient to break limitation.<sup>5</sup>

## The Hague Rules in East Malaysia

Despite the numerous benefits of the Hague-Visby Rules, it should be pointed out for the sake of clarity that the Hague Rules remain in force in relation to the carriage of goods by sea from any port in Sabah or Sarawak to any port whether within or outside Sabah<sup>6</sup> or Sarawak<sup>7</sup>.

This difference in the law is due to the unique constitutional arrangements governing both these states and the separate legislation on the transport of goods by sea in these jurisdictions.

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<sup>4</sup> Para 9-222 of Carver on Bills of Lading, 2001.

<sup>5</sup> Para 9-242 of Carver on Bills of Lading, 2001.

<sup>6</sup> Section 3(1) of the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 [Sabah S. 39/1961].

<sup>7</sup> Section 2 of the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 [S. 240/1960].

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Shipping Law

## Conclusion

The enactment of the Hague-Visby Rules is long overdue and is a milestone in the development of Malaysia's maritime laws. This latest development is the latest installment in a long line of maritime laws in Malaysia dating back perhaps to the Undang-undang Laut Melaka (the '*Maritime Laws of Malacca*').

It is hoped that the enactment of these Rules will fortify Malaysia's reputation as trading nation which is home to some of the world's busiest ports.

If you have any queries on the Hague-Visby Rules in Malaysia, please feel free to contact the writer of this Update, [Clive Navin Selvapandian](#), who is both a member of the Malaysian Bar's Shipping and Admiralty Law Committee and Treasurer of the International Malaysian Society of Maritime Law. Queries on ship finance may be addressed to [Por Chuei Ying](#).

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# Client Update: Malaysia

## 2022 JANUARY

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