Mitigation of Common Law Liabilities on the Charterparty, Bill of Lading incorporated

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= Abstract =

용선계약서에 근거하여 선하증권이 발행되거나 일국의 국내법에 해이그 비스비 국제조약을 채택하거나 선하증권이 용선계약에 직접 관련되지 않는 경우 선주 또는 운송인은 과실에 의하지 않는 한 책임으로부터 벗어나게 된다. (해이그 비스비 규칙 10조 와 3조 1항의유권해석에 근거함). 반면, 용선계약이 전혀 선하증권과 관련되어 있지 않는 한 선주와 운송인은 비록 과실이 없다할 지라도 이를 입증하는 노력이 허용되지 않는다. 즉 Common Law의 엄격책임을 지게 되는 것이다. 이러한 용선계약과 관련한 Common Law의 엄격책임은 선하증권에 용선계약을 편입(Incorporation)하거나 국제조약(해이그 비스비 규칙)과 이러한 국제규칙을 국내법에 채택함으로서 완화될 수 있다. 선주와 운송인의 감황성의무가 Common Law하에서 엄격책임이 요구되지만 후자의 경우에는 통상적인 주의의무가 요구된다고 할 것이 대표적인 예가 될 수 있다.

I. Introduction

The main reason for the development of the Hague Rules and Visby

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amendments was that the common law position reduced the value of bills of lading as negotiable documents, and the international conventions were intended to remedy this situation.

There were two main features of the common law of carriage by sea (which still applies where the conventions do not). First, the liability of the shipowner was strict, and not dependent in negligence. Thus, the carrier was prima facie liable if the goods were not delivered to their destination in the same condition in which they had been shipped, unless he could show that the reason for the loss or damage was due to an excepted peril. The strict liability of the shipowner would seem at first sight to have been to the considerable advantage of the cargo-owner.

In fact, however, the advantages were routinely negated by the second feature of the common law. The freedom of contract prevalent in the last century allowed contracts of carriage to contain wide ranging exemption clauses, to which the common law gave effect.

It should be appreciated that whereas charterers and shipowners are quite often in a roughly equal bargaining position, carriers generally are in a much stronger position than shippers under bills of lading. Thus, the terms in the carriage contract tended, especially towards the end of the last century, to favour the shipowners as against holders of bills of lading. Exemption clauses became so widely drawn that virtually all liability for loss of, or damage to goods, was effectively excluded.

Therefore, if neither the Hague nor Hague-Visby Rules apply directly to charterparties, the common law prevails. However, unlike the common law rules, if the Hague or Hague-Visby Rules are made applicable, the shipowner’s responsibility in respect of seaworthiness is restricted in an important respect. If the Rules apply, the shipowner’s common law freedom to exclude liability for unseaworthiness is seriously curtailed. The Rules will only apply to charterparties where they are expressly incorporated, but may be directly incorporated by legislation into bill of lading contracts.

This means that the shipowner’s obligation of seaworthiness which is implied under the common law is softened by the charterparties or bill of lading incorporating the Rules.
In general, liability under the Hague–Visby should be for lack of due diligence (in effect, negligence) only. The carrier should not be liable for excepted perils, which in essence are perils which are not his fault. These are not the common law excepted perils, but are defined in the Rules themselves.

II. The common law, Statutes and International Convention applicable on the charterparty, bill of lading incorporated

1. The statute and International Convention

The Hague–Visby Rules were incorporated into the law of the UK through the enactment of the Carriage of Goods by Sea Act 1971 and which came into force internationally in 1977, but by no means all jurisdictions have adopted them.

In the UK, the original initiative for attempting to modify the old Hague Rules was a reaction against the view taken by the House of Lords on the definition of unseaworthiness: The carrier can be liable for any negligent work done on the ship prior to the voyage, including that of contractors. Ironically, however, the point proved controversial, and the proposal which started the ball rolling was removed from the new Rules, eventually modified.\(^1\)

Even under the law of the UK, the Hague–Visby Rules do not apply to all contracts of carriage.\(^2\) where they do not apply, the contract is

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1) In the Muncaster Castle(1961) a fitter in a ship repair yard had failed to harden up nuts on some inspection covers, with the result that seawater got into the hold. The House of Lords held the carrier liable under the Hague Rules, though he was not personally at fault in any way. It was this decision which prompted the revision process culminating in the Hague–Visby Rules, but because no agreement could be reached the Muncaster Castle was left alone.

2) Article 10 of the Hague–Visby Rules, stating when the Rules apply, is a new provision. They apply whenever a bill of lading is issued in a contracting state, or the carriage is from a port in a contracting state, or the bill of lading contract either incorporates the Rule or provides that the law of contracting state is to govern them.
governed by the principles of the common law.

The duties are essentially imposed on the shipowner or carrier at common law, by way of implied terms in the contract of carriage, and the liabilities thereby imposed are strict. In other words, they do not depend on proof of negligence, and it is no defence for the shipowner to argue either that he was unaware of the circumstances giving rise to the breach, or that he was unable to avoid infringement of the implied duty.

The rigours of strict liability are softened in two respects. First, as regards liability for the voyage itself, the shipowner or carrier is protected by a wide range of excepted perils. These cover essentially circumstances which are beyond his control, and since they relate primarily to care of the cargo. The excepted perils also apply to the implied undertaking not to deviate, and to proceed with reasonable despatch on the voyage, but they do not apply to the approach voyage, or to the seaworthiness obligation, which relates only to the condition of the vessel at the beginning of the voyage. Therefore, if the shipowner or the carrier have breached his duty on the seaworthiness of the ship, their liabilities are not so softened that common law’s strict liabilities apply.

Perhaps more important from the point of view of the shipowner or the carrier, however, is the unlimited freedom allowed by the common law to contract out of the implied undertaking. The contract of carriage can be freely rewritten by the parties, and if the shipowner enjoys superior bargaining power, he can impose terms which significantly reduce his liability, and widen the protection afforded by the common law excepted perils.

Where the Hague-Visby Rules apply to the contract of carriage, the position is different in a number of respects.

Under Article III(1) the carrier shall be bound, before or at the beginning of the voyage, to excercise due diligence to: (1) make the ship seaworthy. (2) properly man, equip and supply the ship. (3) 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 III(2) imposes duties for the voyage itself, unlike Article III(1) which applies only before or at the beginning of the voyage, requiring the carrier ‘properly to load, handle, stow, carry, keep, care for and discharge the cargo’ Article III(2) is subject to a long list of excepted perils contained in Article IV.

It should be noted that unlike the common law, the shipowner’s duty is not strict but one of due diligence, which is in effect a duty not to be negligent.

The major difference between the Rules and the common law, however, is that by virtue of Article III(8) the carrier cannot restrict his liability by contracting out, further than that imposed by Article III(1) and (2). Nor can he by contract add to the list of excepted perils contained in Article IV. The Rules thus impose a minimum standard of liability on the carrier.

The general effect of the both the Hague Rules and the Hague–Visby Rules is to lighten the carrier’s duties to the extent that strict duties are replaced in Article III by duties of due diligence (in effect, negligence). The carrier should not be liable for excepted perils, which in essence are perils which are not his fault (see Article IV). The carrier is not entitled to reduce his duties still further, however, and any provision in the contract purporting to do so is void. He can still increase his obligations.

2. The common law considered

Although nearly all bill of lading are governed by either the Hague or

3) Thus, Article III (8) provides:
‘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 these Rules, shall be null and void and of no effect.’
whereas Article V provides:
‘A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the Rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.’
Hague-Visby Rules, it is still possible for the common law to apply where carriage is from a state which has not adopted them, in either original or revised form. Also, the Hague and Hague-Visby Rules do not apply to charterparties, unless expressly incorporated, so it is still necessary to consider the common law, albeit briefly.

As indicated above, at common law liability is strict, and the carrier is liable for loss of or damage to the cargo unless the loss or damage was caused by an excepted peril, or he is protected by an exemption clause in the contract. In reality, the common law excepted perils are legal history, because where the common law applies the contract of carriage invariably stipulates expressly the limits to the carrier’s liability.4)

For the sake of completeness, however, common law excepted perils include: (1) Acts of God, (2) An act of the Queen’s enemies, (3) Inherent vice of the goods themselves, (4) The negligence of the owner of the goods and (5) A general average sacrifice.

In practice, however, it cannot be overemphasized that the common law position rarely obtains, because it only applies to the extent that is not altered or excluded by the terms of the contract. There is no principle against contracting out. In reality, the shipowner’s liability is invariably defined by the charterparty or bill of lading contract.

Neither the Hague nor Hague-Visby Rules apply directly to charterparties, so that the shipowner’s liabilities are governed by the common law. They are intended to apply to bill of lading contracts, and in the UK by virtue of the provisions of the Carriage of Goods by Sea Act 1971, the Hague-Visby Rules are incorporated by law into many bills of lading, whatever their express terms.

However, although neither the Hague nor Hague-Visby Rules apply directly to charterparties, they can still be relevant to them. Quite a number of the standard form charterparties expressly incorporate either the Hague or Hague-Visby Rules, and define the responsibilities of the parties according to their terms. Or some parts of either the Hague or

4) See, for example, Gencon clause 2 and Baltimore clause 13
Hague-Visby Rules may be incorporated (usually including Articles III(1) and (2)). Indeed, only in the older pro-shipowner dry-cargo charters, such as the Gencon voyage and Balttime time forms, are the liabilities imposed on the shipowner considerably less onerous than the provisions of Article III of the Hague-Visby Rules.

But since in the UK, the Hague-Visby Rules may be automatically incorporated into bills of lading issued in pursuance of the charterparty, and any provision purporting to restrict the shipowner's liabilities further than that allowed by the Rules will be void by virtue of Article III(8), even the terms of the Gencon or Balttime forms may not significantly benefit the shipowner. His duties to any cargo owner (apart from the charterer himself) will automatically be defined by the Hague-Visby Rules, even though his duties towards the charterer are less stringent. In reality, therefore, even shipowners using the Gencon or Balttime forms will often be unable to avoid the minimum standards imposed by the Hague-Visby Rules.

3. An example: The legal principles of seaworthiness

It is necessary to distinguish between the obligation of the shipowner to provide a ship which is seaworthy at the beginning of the voyage from the obligation to stow the cargo, and the obligation to care for the cargo after the voyage has started.

The duty of the shipowner to provide a seaworthy ship is implied at common law whether or not it is expressly included in the charterparty (or other contract of carriage), and it is strict. In other words the shipowner will be liable whether or not it is his fault that the vessel is unseaworthy.

It is quite a wide-ranging obligation, covering not only any defect in the ship itself, but also in its tackle or equipment. It covers insufficiency of bunker fuel, and even for example incompetence of the crew, as in HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.5)

5) HongKong Fir Shipping Co. Ltd. v. Kawasaki Kisen Ltd. [1962]
The seaworthiness obligation also encompasses a strict duty to ensure that the vessel is able to carry the cargo provided by the charterer, as for example in Stanton v. Richardson.

The seaworthiness obligation applies only at the start of the voyage so that, if the vessel is fit to receive the cargo provided by the charterer on loading, and is seaworthy on sailing, there is no breach of this particular duty if it defects arise on the voyage.

The onerous nature of the obligation can be freely limited or excluded at common law, however, and many standard forms do so.\(^6\) However, it must be excluded expressly, and in the clearest terms, because the courts adopt a clear presumption that an exemption clause does not apply to unseaworthiness.

In Stanton v. Richardson (1874)\(^7\), the ship was fit to carry any cargo apart from that provided by the charterer, because the pumps, although quite sufficient for all other purposes, were incapable of dealing with the extra moisture draining from the charterer’s cargo (wet sugar). This made the vessel unseaworthy, so that the shipowner was in breach of his implied obligation at common law.

Unlike the common law rules, if the Hague or Hague–Visby Rules are made applicable, the shipowner’s responsibility in respect of seaworthiness is limited in an important respect. Under Article III (1), the duty is not strict, but one of due diligence. As with the common law, the III (1) obligation applies only to the beginning of the voyage, stowage and care of the cargo during the voyage being covered by Article III (2).

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2Q1B 26. Hong Kong Fir concerned a time Charterparty, but its Principles are equally applicable to voyage charters and bill of lading contracts. The Court of Appeal, though accepting that the incompetence of the crew rendered the vessel unseaworthy when handed over, held that the charterers were not entitled to repudiate, and that the shipowners were therefore entitled to damages for wrongful repudiation.

6) See, for example, clause 2 of the Gencon charter and clause 13 of Baltico.

7) Stanton v. Richardson (1874) LR 9 CP 390. The obligation to provide a seaworthy vessel is not a condition but an innominate term, whether or not the charterer is entitled to repudiate for unseaworness will depend on how serious the breach is. Stanton v. Richardson concerned a voyage charterparty, where a relatively short time may well be sufficient, especially if the market for the cargo to be carried is volatile (as it is for sugar).
The most important difference between the common law and the Rules, however, is that by virtue of Article III (8), where the Rules apply the carrier cannot exclude his obligations below that provided for by them. Thus, if the Rules apply, the shipowner’s common law freedom to exclude liability for unseaworthiness is seriously curtailed.

As explained above, the Rules will only apply to charterparties where they are expressly incorporated (but many of the standard forms do), but may be directly incorporated by legislation into bills of lading contracts. Thus there may be little advantage in the shipowner further restricting his liability under the charter.

Common law liability for care for the cargo is also strict, subject to the common law excepted perils, and subject to exemption clauses contained in the contract of carriage itself.

If the Hague or Hague–Visby Rules apply (whether Hague or Hague–Visby makes no difference for these purposes), by Article III (2) the carrier’s duty is again reduced to a duty to take care which is in effect a duty not to be negligent.

Article III (2) is also made expressly subject to Article IV. Article IV of the Rules provides a list of excepted perils. These are considerably wider than the common law excepted perils, essentially encompassing anything that is not the shipowner’s fault.

As with liability for unseaworthiness, however, the carrier is not entitled to reduce his liability further than allowed by the Rules.

The relationship between Article III(1) and IV is shown by the Privy Council decision of Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd. (1959)\(^8\). The vessel was damaged by fire after loading was completed, but before she sailed. Fire is an excepted peril under the Hague Rules (which were incorporated into the bill of lading), by virtue of Article IV(2)(b). However, the fire, which was caused by use of an acetylene torch to thaw out frozen scupper pipes, resulted in the vessel becoming unseaworthy, and she had to be scuttled, along with the

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8) Maxine Footwear Ltd. v. Canadian Government Merchant Marine Ltd. (1959) AC 589
cargo. Thus, the shipowner was in breach of his obligation to make the vessel seaworthy 'before and at the beginning of the voyage', as required by Article III(1). Whereas Article III(2) is made expressly subject to Article IV, Article III(1) is not, and Lord Somervell of Harrow held that the shipowner was liable for a breach of Article III(1), although the unseaworthiness was caused by an Article IV(2) excepted peril:

'Article III(1) is an overriding obligation. If it is not fulfilled and the non-fulfillment causes the damage the immunities of Article IV(2) cannot be relied on.'

III. Hague-Visby III(1) and Gencon Charterparty clause 2

The extent of the shipowner's duty to provide a seaworthy vessel, to stow the cargo and to carry it to its destination depends at the end of the day on the terms of the charterparty. Though as explained above, clauses purporting to limit the shipowner's liability in respect of seaworthiness are restrictively construed, it can be done, so long as the terms of the charterparty are sufficiently clear. Liability for stowage can be freely limited at common law, as can liability for the care of the cargo on the voyage.

It should be borne in mind, however, that whatever the terms of the charterparty, the liability of the shipowner under a bill of lading contract to the owner of the cargo, if someone other than the charterer, may be compulsorily governed by the Hague-Visby Rules. It follows that the shipowner may not gain significantly by stringently limiting the extent of his duty in the charterparty, because he may find himself liable to the cargo owner in any event.

There is a considerable variation between older and newer standard forms. Under the older (dry-cargo) forms such as Gencon the shipowner's obligation is very limited indeed, and takes no account whatever of the Hague of Hague-Visby Rules. In the more modern dry-cargo forms,
such as Multiform, and in all the tanker forms, the obligation is more extensive, being brought into line with either the Hague Rules or the more recent Hague-Visby Rules.

The present clause 2 of Gencon is based on the 1922 revision, although other clauses of the charterparty have been substantially revised since then. It is very restrictive indeed, limiting the owner’s responsibility to the improper or negligent stowage of goods and personal want of due diligence to make the ship seaworthy, and to provide adequate stowage and manning levels:

'Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers / Charterers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

It may have been the intention of the draftsmen of this charterparty to draft this clause in the light of what later became Article III (1) of the Hague, and later Hague-Visby Rules. Like Article III (1), the carrier’s obligations regarding seaworthiness and manning levels are limited to the exercise of due diligence. Whether or not this was intended, however, the Gencon 2 duty is less strict than the duty imposed by the Hague or Hague-Visby Rules (which are identical for present purposes). Liability for unseaworthiness, for example, is limited to personal act or default of the owners or manager, whereas there is no such limitation in the Hague or Hague-Visby Rules.

As noted above, however, a clause such as Gencon clause 2 may not significantly benefit the shipowner, because he may be unable to limit his liability to the cargo owner in terms anything like so favourable to him. It may be partly for this reason that more modern standard forms, and all the tanker forms, incorporate either the Hague or Hague-Visby Rules directly, because the shipowner will be liable to the cargo owner (unless
the charterer himself owns the cargo) to that extent anyway.

In The C Joyce (1986)\(^9\), the shipowners under a Gencon charterparty were liable to the cargo-owner, who was indorsee of bills of lading, on the basis of the Hague Rules, although they would not have been liable on the basis of cause 2 of Gencon. The shipowners claimed an indemnity from the charterers, arguing an implied term in the charterparty requiring the charterers to indemnify term should bills of lading be issued in terms more onerous than the charterparty terms. This contention was rejected by Mr Justice Bingham, although presumably had an express indemnity been incorporated into the charterparty it would have been enforceable (assuming that charterers could be found willing to agree to it)!

By contrast with Gencon, in all tanker forms, and the newer dry-cargo forms, the responsibility of the shipowner is brought into line with either the Hague or Hague-Visby Rules (which are identical for present purposes).

Intertankvøy 76 may be regarded as typical of the tanker forms, and indeed the Intertankvøy clauses were taken directly from Shellvoy 3. Clause 1(a) of Intertankvøy requires the owner

'before and at the beginning of the loaded voyage [to] make the vessel seaworthy and in every way fit for the voyage, with her tanks, valves, pumps and pipelines tight, staunch, strong and in good order and condition and with a full and efficient complement of master, officers and crew for a vessel of her type, tonnage and flag.'

This is essentially in line with Article III (1) of the Hague Rules, and in any case the responsibilities of Article III of the Hague Rules are incorporated by Clause 25:

'25. Responsibility and Immunities:

The provisions of Article III (other than Rule 8), IV, VIII and IX of the Carriage of Goods by Sea Act, 1924 of the United Kingdom [i.e. Hague Rules, the 1924 Act still being in force in the UK in 1976] shall apply to this Charter Party and shall be deemed to be inserted in extenso therein.

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This Charter Party and shall be deemed to be a contract for the carriage of cargo by sea to which the said articles apply and Owners shall be entitled to protection of the said articles in respect of any claim made hereunder...

Intertankvoy, clause 28 requires a paramount clause in any bill of lading issued under the charter. The purpose of this provision is to ensure that the Hague Rules are incorporated not only into the charterparty itself, but also into any bill of lading contract with the cargo owners.

Clause 31, on the other hand, requires that bills of lading are to be signed 'without prejudice to the charterparty' and for an indemnity should the owners suffer due to the terms of the bill of lading being more onerous than those of the charterparty. This is also standard among the thankers forms.

**VI. Conclusion**

At common law, liability is strict, subject to exemption clauses expressly incorporated into the contract of carriage. The obligation on the carrier to provide a seaworthy vessel is exactly the same for bill of lading contracts as for voyage charterparties. Under the Hague or Hague–Visby Rules, Article III (1) requires the carrier only to exercise due diligence to make the vessel seaworthy, but Article III (8) prevents him from further reducing his liability by contracting out, except in so far as provided by the Rules themselves.

As explained above, common law liability for care for the cargo is also strict, subject to the common law excepted perils, and subject to exemption clauses contained in the contract of carriage itself. However, either incorporating the Rules into charterparties or bill of lading contract, if the Hague or Hague–Visby Rules apply (whether Hague or Hague–Visby makes no difference for these purposes), by Article III(1) or III (2) the carrier’s duty is again reduced to a duty to take care which is in effect a duty not to be negligent.
Moreover, Article III (2) is also made expressly subject to Article IV. Article IV of the Rules provides a list of excepted perils. These are considerably wider than the common law excepted perils, essentially encompassing anything that is not the shipowner’s fault.

As with liability for unseaworthiness, however, the carrier is not entitled to reduce his liability further than allowed by the Rules.

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(Statute)
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