Rules on Bill of Lading in Malaysia: A Critical Review

Elina Roslim*

Abstract

The rules on bill of lading in a contract of carriage by sea currently applied in Malaysia was adopted from the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading which is also known as "Hague Rules". Internationally, there are four Rules in existence that provide and elucidate the functions of bill of lading, namely the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. Of these four Rules only the first three have entered into force; the Rotterdam Rules has yet to enter into force. This Research is an attempt to compare the first three Rules relating to bill of lading in reference to Malaysia, the United Kingdom and in international conventions. At the end of this Research, it will propose the best rules to be adopted and formulated by the Government of Malaysia in ensuring impartiality of Rules on bill of lading in a contract of carriage by sea involving international trade.

Keywords: Bill of Lading, Hague Rules, Hague-Visby Rules, Carriage of Goods by Sea, international trade.

1. Introduction

Malaysia is thriving towards becoming a trading nation and this was exhibited by its tremendous growth in international trade throughout the last 3 decades and it plays a large role in Malaysia economy. In 2014, Malaysia's total trade for January-August 2014 was valued at RM957.95 billion, an increase of 7.9% compared with the same period last year. Export was higher by 9.5% to RM505.13 billion while imports rose by 6.1% to RM452.82 billion[1]. Nonetheless, to ensure the sustainability of Malaysia's growth in international trade, its related laws and rules pertaining to international trade must be current and accommodate the needs of the industry players.

In international trading around the world, parties who enter into a contract of sale would prefer the mode of transportation of the goods by sea as it offers the least cost. In a contract of carriage of goods by sea transportation, the important document involve is the bill of lading. This research will analyze rules relating to the bill of lading in international trade and how the rules are applied in Malaysia by focusing on the liabilities, responsibilities and obligations of a carrier of goods in international trading. This research will also look into international law and conventions relating to the same for comparison purposes.

* Advocate, High Court Malaya, Malaysia..

[1] MATRADE. (2014). Trade Performance: January - August 2014, URL: www.matrade.gov.my.

In international sale of goods the most common problem face by parties in a contract of carriage of such goods is the cargo is short delivered and in normal case, it is the *bona fide* purchaser for value who has suffered the loss due to the fact that the goods have lost or damaged during transit, or never been shipped at all[2]. In this situation, and by virtue of the current rules on bill of lading applied in Malaysia, the carrier of the goods may deny liability for the loss if he could prove that he had not received the cargo in the first place due to the clause under Article III, Rule 4[3] that mentioned the bills are only *prima facie* evidence of receipt by the carrier of the goods.

In the case of Grant v Norway (1851) 10 CB 665 the master of the ship has signed bills of lading for goods (12 bales of silk) that had not even board the ship. The court held that, the indorsee (buyer) could not bind the carrier or the shipowner against the statement in the bills of lading as the master has exceeded his authority by signing and issuing bills of lading containing statement as to the quantity of the goods that did not even board the ship in the first place.[4] By virtue of the rule in Grant v Norway, the carrier may escape from being liable towards third party (or the buyer) in the event of short delivery once the carrier could prove that the goods have not even been received even though the bill of lading has clearly mentioned the quantity of the goods.

The above mentioned issue is one of many issues on laws or rules relating to bill of lading currently enforce in Malaysia.

The rules on bill of lading under the current Malaysia Carriage of Goods by Sea Act 1950 (MCOGSA) are governed by the Hague Rules and these rules are known to have serious defects and disadvantages, particularly to the buyer or consignee dealing in international trade. It is timely that the Government looks into these pertinent issues to provide better remedies by resorting to other relevant international laws governing bill of lading and take the best of those rules to be adopted and applied in Malaysia so that this nation may continue to ensure a seamless international trading system.

2. Overview Of Bill Of Lading And The Rules Relating To The Bill In Malaysia

(a) Introduction

Bill of lading is the most common form of transport document used in contemporary shipping[5] It is also one of the most important documents in conducting international trade[6]. In Malaysia, the rules relating to bill of lading are laid down in the First Schedule of the MCOGSA.

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[2] Jeremy M Joseph, 'Carriage of Goods By Sea: Hague-Visby For Malaysia?', (1998) 1 Malayan Law Journal [MLJ].

[3] First Schedule, Carriage of Good Act 1950, Article III, Rule 4 reads; "Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(a), (b) and (c)".

[4] Chuah, J.C.T., Law of International Trade:Cross-Border Commercial Transactions, 4th Edition (2009), pg 185.

[5] Pamel, P.G., Wilkins, R.C., Gervais, B.L., Bills of Lading vs Sea Waybills, and The Himalaya Clause. Presented at the NJI/CMLA, Federal Court and Federal Court of Appeal, Canadian Maritime Law Association Seminar, April 15, 2011, Fairmont Château Laurier, Ottawa.

[6] Chuah, J.C.T., Law of International Trade:Cross-Border Commercial Transactions, 4th Edition (2009), pg 169.

This Act is applied to the Peninsular Malaysia only as the States of Sabah and Sarawak are governed by the Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 and the Merchant Shipping (Implementation of Convention relating to Carriage of Goods by Sea and to Liability of Shipowners and Other) Regulations 1960 respectively.

(b) Nature of Bill of Lading

The bill of lading is neither defined in the MCOGSA nor the international laws. However, its functions can be seen in three important ways: (i) as the best evidence of the contract of carriage, (ii) as a receipt for the goods, and (iii) as a document of title to the property, which can be endorsed and negotiated[7].

(i) Bill of Lading as an Evidence of a Contract of Carriage

The bill of lading is recognized and treated as an evidence of the contract of carriage and this can be seen in the definitions of contract of carriage under Article I of the Hague Rules[8] and more explicitly in the Carriage of Goods by Sea Act 1992 which defines the contract of carriage in relation to bill of lading as the contract contained in or evidenced by the bill.[9] The bill is regarded as an evidence of a contract of carriage, but not the contract itself, as it contains terms and conditions pertaining to the carriage of the goods and it may also contain other relevant agreements between the shipper and carrier. This can be seen in *The Ardennes* [1951] 1 K.B. 55, where it was held that the bill of lading was not in itself the contract between the shipper and carrier, only excellent evidence of it.[10]

(ii) Bill of Lading as a Receipt for the Goods

The bill of lading acts as a receipt for the goods when it is acknowledged by the carrier or his agent that the goods have been shipped or received for shipment. This acknowledgment will also contain statements as to the apparent condition of the goods, the quantity, markings and other relevant information known to the carrier.[11] Once the goods have been shipped, with regards to the shipper, the bill of lading as a receipt is a prima facie evidence that the shipper has performed his duty under the contract and as for the consignee of the bill; it acts as conclusive evidence that the goods have been shipped.

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[7] Mark Christopher Koh, Delivery of Cargo Without Presentation of Bills of Lading and Antedated Bills of Lading, [2000] 4 MLJ cxlv.

[8] Article I (b) of the Rules defines; 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 documents 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.

[9] Section 5(1) of the Carriage of Goods by Sea Act.

[10] Chuah, J.C.T., Law of International Trade:Cross Border Commercial Transaction, 4th Edition, (2009), pg.190.

[11] Ibid at pg.179.

(iii) Bill of Lading as a Document of Title

Due to the nature of shipment of goods by sea carriage, it is understandable that the arrival of the goods will take several days before it reaches the port of discharge or reaches the buyer. Thus, the issue will arise where the buyer needs to sell the goods to third party prior to the physical delivery of such goods. According to the judgment in Sanders Bros v Mclean (1883) 11 Q.B.D. 327, "…A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant as universally recognized as its symbol, and the indorsement and the delivery of the bill of lading operates as a symbolically delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading…"[12]

As a document of title, a bill of lading may be one that is non-negotiable or negotiable document. In the Cami Automotive Inc. v. Westwood Shipping Lines Inc., [2009] FC 664 (Fed. C. Can.), Blanchard J. recognized bill of lading as a document of title that is non-negotiable and negotiable in his judgment: "…In other words, whatever its form, a bill of lading must be presented at the port of discharge to ensure the delivery of the goods. This is because both negotiable (order bill of lading) and non-negotiable (straight bill of lading) bills are documents of title…."[13]

A "straight" bill of lading is a receipt for the goods issued by the carrier or its agent and it is a non-negotiable document. Under this bill of lading, the carrier will deliver the goods to its consignee upon presentation of identification. It is also called consignment bill of lading which means that the goods are consigned to a specified person and it is not negotiable.[14] A straight bill of lading is also a document in which a seller agrees to use a specific transportation to ship goods to a certain location, and the bill is assigned to a specific party. The bill details the type, quality, and quantity of the good. It also serves as the receipt upon arrival at the destination. Because it is assigned to a specific party, it is not only non negotiable but also may not be re-assigned to another party.[15] Despite it is a non-negotiable bill, it is nonetheless a document of title in the hands of the named consignee because it entitles him to take delivery of the goods on production of the bill.[16]

An "order" bill of lading is opposite to the "straight" bill where it is referring to a negotiable bill of lading and it refers to a situation where the delivery of goods by the carrier has to be made in accordance with the orders of the shipper or "To Order" of the consignor.[17] An Order bill or "To Order" bill is commonly used in letter of credit transactions, where in this case, the bank would be the named consignee and the intended consignee would be named as "notify

[12] Ibid at pg.196.
[13] Pamel, P.G., Wilkins, R.C., Gervais, B.L., Bills of Lading vs Sea Waybills, and The Himalaya Clause. Presented at the NJI/CMLA, Federal Court and Federal Court of Appeal, Canadian Maritime Law Association Seminar, April 15, 2011, Fairmont Château Laurier, Ottawa.
[14] http://www.businessdictionary.com/definition/straight-bill-of-lading-B-L.html
[15] http://definitions.uslegal.com/s/straight-bill-of-lading/
[16] As per the House of Lords' judgment in The Rafaela S [2005] UKHL 11.
[17] http://www.businessdictionary.com/definition/to-order-bill-of-lading-B-L.html

party". Although order bill is known as negotiable but it is not a negotiable instrument as in the latter case, it will give third party a better title than the original holder by act of negotiation or indorsement, which is not the intention of order bill of lading.[18]

(c) The Hague Rules and its Application through the Carriage of Goods by Sea Act 1950

Malaysia Carriage of Goods Act 1950 (MCOGSA) was enacted in 1950 and was revised in 1994, which was 20 years ago. MCOGSA has given the force of law to the International Convention for the Unification of Certain Rules of Law Relating to Bill of Lading or better known as the "Hague Rules". The Hague Rules came about after a series of diplomatic conferences held by the International Law Association and the *Comit'e Maritime International* (hereinafter referred to as "the CMI") in the Hague, London and Brussels from 1921 and was finally concluded in 1924. The objective of the Hague Rules was to achieve uniformity in bills of lading and to avoid issues of shipowners excluding themselves from all liability for loss or damage cargo. Prior to these rules, shipowners often thwarted cargo damage claims by inserting limits in bills of lading[19]. To date, the Hague Rules have been adopted by 58 maritime nations including Malaysia.

The application of the Hague Rules can be seen in the First Schedule of MCOGSA. These are the exact replication from the Hague Rules which contain, in total, nine articles mentioning all the rules on the role and effect of bill of lading in Malaysia. The Rules stated in MCOGSA including, among others, the risk, responsibilities and liabilities as well as rights and immunities of carriers. Generally it can be seen in the Rules that most of them are concentrating on carriers' roles with minimum liabilities.

The questions one may ask after referring to these Rules, could be, how these Rules protect the rights of other parties involve directly or indirectly in the contract of carriage? If we refer to some of the main rules for instance; as mentioned earlier in Chapter I, under Article III, the rules provide for minimum responsibilities and liabilities for carriers. Rule 4 of Article III mentioned that the bills are only *prima facie* evidence of receipt and this means the carrier may still deny liability for the loss by simply proving that he had not received the cargo in the first place. Rule 4 reads[20]:

> *Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs 3(a), (b) and (c).*

Other rules that illustrate the concentration to the carriers are those rules on rights and immunities as mentioned in Article IV. Rule 2[21] lists down 17 exceptions or immunities to the carrier from being liable for loss or damage resulting from those 17 acts and almost nothing on

[18] Chuah, J.C.T., Law of International Trade:Cross Border Commercial Transaction, 4th Edition, (2009), pg.198.
[19] Zulkifli Hasan, The Weaknesses of the Hague Rules and the Extent of Reforms Made by the Hague-Visby Rules, [2007] 6 MLJ cxcvii.
[20] Carriage of Goods by Sea Act 1950, First Schedule, Article III, Rule 4.
[21] Carriage of Goods by Sea Act 1950, First Schedule, Article IV, Rule 2

availability of remedy to the shipper or buyer. On an extreme side, it can be seen under Rule 5[22] of the same article that exempt the carrier completely for any loss or damage to or in connection with goods amounting exceeding one hundred pound per package or unit.

These rules, which are replications from the Hague Rules, although seems not practical or just to the parties under the contract of carriage and are not compatible with the current maritime trading practice, are still applicable in Malaysia.

These obsolete and one-sided rules must be reviewed for the betterment of Malaysia's trading system via sea carriage. The effective way of doing this is by referring to the law where Malaysia is very much familiar with that is the English Law.

3. Application of Bill of Lading in the United Kingdom

(a) Introduction

The first law that was enacted on bill of lading in the United Kingdom ("the UK") was the Bills of Lading Act 1855 ("hereinafter referred to as "the 1855 Act"). The 1855 Act was then repealed and replaced by the Carriage of Goods by Sea Act 1992 (COGSA 92) which now complements the UK's application of the Hague-Visby Rules under the Carriage of Goods by Sea Act 1971 (COGSA 71).

(b) Overview of the Bills of Lading Act 1855

The Bills of Lading Act 1855 allows the contractual rights under bills of lading issued by shipowners-carriers in favour of the shippers, to be transferred to the consignees or endorsees of the bills of lading. The purchaser of the cargo from the original shipper can thereby enforce those contractual rights against the shipowner-carrier for any loss or damage to the goods whilst in sea transit.[23] In short, the 1855 Act was enacted to resolve the problems of privity of contract during those times.

Nevertheless, the 1855 Act turned out to be inadequate and has failed to accommodate the needs of the maritime trading industry. For this reason, the Law Commission of England and Wales, jointly with the Scottish Law Commission (hereinafter referred to as "the Law Commission"), undertook a review of the key issues posed by the 1855 Act in the early 1990s.[24] Due to these shortcomings of the 1855 Act, the Law Commission in their report has suggested reformation of the 1855 Act by preparing a Bill which has been passed as the COGSA 92 and which came into force on 16 September 1992.

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[22] Carriage of Goods by Sea Act 1950, First Schedule, Article IV, Rule 5

[23] Sitpah Selvaratnam, Particular Aspects of Legal Reform In Malaysia: Some Comparative Studies, [2007] 4 MLJ cxv.

[24] There were 5 key issues identified by the Commission namely; (i) the separation of contractual rights and liabilities, (ii) the separation of contractual rights from the passing of property, (iii) false statements in the bill of lading, (iv) sea waybills and ship's delivery order and (v) paperless transaction, question of electronic data interchange.

(c) Hague-Visby Rules and its Application through Carriage of Goods By Sea Act 1971 & Carriage of Goods by Sea Act 1992.

The Hague-Visby Rules are the modification of the Hague Rules. In Chapter II we have dealt with the brief overview of the Hague Rules, which was the basis of Malaysia's rules on bill of lading. The CMI who was also involved in the drafting and concluding of the Hague Rules, held a conference in Stockholm in 1963 with the objective to amend the obsolete Hague Rules through a protocol. The protocol was approved in the city of Visby hence the name "Visby Rules" or "Visby Protocol". However, the Protocol was only officially adopted in Brussels in 1968[25]. Today the amended Hague Rules by the Visby Protocol is known as the Hague-Visby Rules[26].

The Hague-Visby Rules is applied in the UK through the COGSA 71. The COGSA 92 complements that of the COGSA 71. The COGSA 71 gives effect to the Hague-Visby Rules, which are concerned with identifying the substantive rights and liabilities of parties to a bill of lading contract. The COGSA 92 deals with the issue of who is subject to those rights and liabilities and to whom the contractual obligations contained in the document are owed.[27] As deliberated earlier in this Chapter, the COGSA 92 is a replacement to the Bills of Lading Act 1855.

Thus, in the UK, the rules governing bill of lading can be seen in two Acts i.e. the COGSA 71 (adopting the Hague-Visby Rules) and the COGSA 92 (replacement of Bills of Lading Act 1855).

4. International Conventions on the Bill of Lading

(a) Introduction

A comprehensive and modernised set of rules on bill of lading and carriage of goods by sea are significant to the parties involved in international sale of goods. For this reason, to date there are four international conventions in existence that provide rules governing both bill of lading and carriage of goods by sea. Each of the last 3 conventions[28] was established to make improvement and modernized the preceding conventions. These efforts were made possible by various international bodies namely the Law Commission, the CMI and the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL").

[25] The Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted at Brussels, February 23, 1968, which entered into force June 23, 1977.

[26] In 1979, the Hague Rules was amended and adopted by another Protocol; The Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924, as Amended by the Protocol of February 23, 1968), adopted at Brussels, December 21, 1979, which Protocol came into force February 14, 1984. Thus, the Hague-Visby Rules in this Research is referring to the Hague-Visby Rules 68/79.

[27] Bassindale J., Title to sue under bills of lading: the Carriage of Goods by Sea Act 1992, J.I.B.L.1992, 7(10), pg. 414-417.

[28] The Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules.

(b) The Hague Rules

The Hague Rules were drafted by the CMI; a private, international association of maritime and they were adopted by a diplomatic convention in Brussels in 1924. However, the Hague Rules were only entered into force in 1931.

The essence of the Hague Rules is basically to provide internationally recognized uniform rules pertaining to bill of lading. It was generally well accepted by the industry in its early years of application until there were changes and developments in the practices and norms of international trading involving carriage of goods by sea transportation mode. The main defects of the Hague Rules, among others, can be seen in Article IV Rule 5, Article IX and Article X.

Article IV Rule 5[29] limits the liability of the carrier for any loss or damage to the goods which amounting to 100 pound sterling and below. The carrier may only be liable to a higher value if the shipper has made a declaration of value in the bill of lading.

Article IX states that, the monetary units in the Convention are to be taken as gold value. This article was criticized as being impractical because, although there is a reference to 'gold value', the provision does not give the weight and the fineness of the gold.[30]

Article X[31] mentioned the scope of application of the Hague Rules which they only apply to the outward shipment ie shipment from a port of the contracting states to a foreign port. Thus if the goods were shipped from any port of a non-contracting state to any port of a contracting state, the law of the former state would apply and not the Hague Rules.

Due to these impediments of the Hague Rules and the changes/development in international trading, the Visby Protocol was later introduced and today, as stated earlier in this research, this protocol is better known as the Hague-Visby Rules.

(c) The Hague-Visby Rules

The Hague Rules is silent on the goods or cargoes in bulk. With the development of the shipping industry, containerization was introduced and this is also not covered in those Rules.

[29] Article IV Rule 5 reads; Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
This declaration if embodied in the bill of lading shall be prima facie evidence, but shall not be binding or conclusive on the carrier.
By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named.
Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connection with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

[30] As per Justice Sinnathuray in Sarathi Co v 'Vishva Prathiba' (Owners of); Port of Bombay India [1980] 2 MLJ 265, HC (Sing).

[31] Article X of the Hague Rules reads; The provisions of this Convention shall apply to all bills of lading issued in any of the Contracting States.

These circumstances, among others, led to the introduction of the Hague-Visby Rules with the objectives to cater for containerization and consolidating articles of transport. It also provides for the application of certain duties and rights of the contractual cargo.[32] Till date, 90 countries have adopted the Hague-Visby Rules including United Kingdom, France, Singapore, German and China.

The Hague-Visby Rules are the modification of the Hague Rules. This was done through a Protocol which was agreed at a conference in Brussels in 1968[33]. The amendment made was to Articles III, IV, IX to the Hague Rules and new clauses were added to meet the current international shipping industry particularly to safeguard the shippers.

One of the main amendment and can be considered as the most pertinent amendment was to the liability of the carrier where the Hague Rules only limit the liability of the carrier to loss amounting to 100 pound and below. And the monetary unit referred in the Hague Rules is in gold value with neither specification of its fineness nor weight[34]. With the Brussels Protocol, the liability of the carrier is increased where the liability in connection with the goods is not 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.[35] Article IV Rule 5(d) of the Hague-Visby Rules further defines that the unit of account above is basing on the special drawing rights (SDR) as defined by the International Monetary Fund.[36]

By providing these clauses, it solved some of the problems faced by the shipping industry in terms of ascertaining the exact amount and value of the goods carried on board and limit of liability in the case of loss or damaged goods during voyage. Even though the Hague-Visby Rules can be seen as a modernization of the Hague Rules, but they are still gaps to be filled, perhaps with a more comprehensive set of rules.

(d) The Hamburg Rules

The UNCITRAL was established in 17 December 1966 with its main objective to achieve three elementary things in international trade, namely; the unification, modernization and harmonisation of international trade[37]. UNCITRAL as a legislature has produced several

[32] Chuah, J.C.T., Law of International Trade:Cross Border Commercial Transactions, 4th Edition, (2009) pg 291.
[33] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Rules), done in Brussels on 23 February 1968.
[34] Quest for the 'gold value' of a 'package' or 'unit': Limitation of Liability under the Hague Rules, Dr Irwin UJ Ooi, [2006] 4 MLJ xlvii.
[35] Article 5(a) of the Hague-Visby Rules reads; 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 shall in any event 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.
[36] Article 5(d) of the Hague-Visby Rules reads; The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.
[37] Adnan Trakic, A Critical Appraisal of UNCITRAL's Contributions in Unification of the Law Governing the International Sale of Goods, [2010] 4 MLJ v.

conventions that have been ratified by many contracting states. One of the conventions is the United Nations Convention on the Carriage of Goods by Sea 1978 which was adopted by a diplomatic conference in Hamburg, on 31 March 1978 or better known as "the Hamburg Rules". This Convention has entered into force on 1 November 1992.

This Convention came into place with the objective to fill the gaps in the existing Hague Rules and the Hague-Visby Rules. It establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea.[38]

The Hamburg Rules' definition to a contract of carriage describes the obligation of the carrier to carry goods from one port to another[39] as compared to the Hague-Visby Rules which the definition of contract of carriage is based on the document issued to that contract. Another improvement made to the Hamburg Rules is on the scope of application where the Hamburg Rules apply to a contract from a port located in a non-contracting State to a port of discharge located in a contracting State.

Above all, the Hamburg Rules are seen to put more responsibility and liability to the carrier and they are seen to be more in favor to the shipper. Article 4 Rule 1 of the Hamburg Rules provides that the period of application as well as the period of responsibility of the carrier, is that during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. This is not the case in the Hague-Visby Rules where the responsibility of the carrier is confine to the period the goods are loaded on the ship to the period the goods are discharged from the ship. One significant improvement in the Hamburg Rules is on the provision of liability of the carrier in the case of delay[40]. The Hague Rules only provide liability of the carrier in the case of loss or damaged goods but silent on the delay of the goods. This measure may solve many disputes with regards to delay of cargoes.

Due to the fact that the Hamburg Rules put more responsibility and liability to the carrier, these Rules have not been gladly accepted by ship owners and insurers because the increase of liability will result in higher insurance costs and the amount of damages recovered from carriers will be higher[41].

This dissatisfactory has led to the emergence of another convention by the UNCITRAL in 2008 namely the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea or better known as the "Rotterdam Rules". However, as

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[38] Ibid.

[39] Article 1 Rule 6 reads: "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; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea.

[40] Article 5 Rule 1 and 2 read; 1. The carrier is liable for loss resulting from loss o f or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. 2. Delay in delivery occurs 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 ◦ diligent carrier, having regard to the circumstances of the case.

[41] Abdul Ghafur Hamid @ Khin Maun Sein, Whither Malaysia: The Hague-Visby or Hamburg Rules? INSAF (Journal of the Malaysian Bar) Vol XXXIII, No 4, pg 94.

mentioned earlier in the abstract of this Research, the Rotterdam Rules has yet to enter into force[42], thus it will not be in the scope of this Research.

4. The Comparison on Rules of Bill of Lading in Malaysia and the United Kingdom and the International Conventions

(a) Introduction

In most countries the rules on bill of lading are derived from the rules adopted through international conventions namely the Hague Rules, Hague-Visby Rules and Hamburg Rules. Between these three rules, Hague Rules and Hague-Visby Rules are the two most common rules adopted by countries into their domestic laws. As explained earlier Malaysia adopts the Hague Rules through its MCOGSA and the United Kingdom adopts the Hague-Visby Rules through its COGSA 71. This Chapter will explore and compare rules on bill of lading as enacted under the three conventions (which also include MCOGSA and COGSA 71) as well as COGSA 92.

(B) The Differences of Rules on Bill of Lading in Malaysia and the United Kingdom as well as International Conventions

In the preceding chapters we have dealt with rules on bills of lading in Malaysia which are based on the Hague Rules. We have also dealt with the scope of the Hague Rules in Chapter IV which we also have stressed on some of its defects and weaknesses.

(i) Application of Rules

Section 2 of the MCOGSA states that the Rules will only apply to shipment from any ports in Malaysia to any other ports in or outside Malaysia. This means that the Rules will not apply to inward shipment i.e. shipment from any ports in foreign countries to any ports in Malaysia, unless that foreign country adopting the Hague Rules. Thus, in the case for inward shipment, the law of that foreign country would otherwise apply. Adding to that, Section 4[43] of the MCOGSA adopted the "clause paramount" technique i.e. requiring an express statement in the bill of lading that the Rules shall apply to the contract. By virtue of Section 4, the parties may contract out of the Hague Rules and opt for foreign law as governing law by simply omitting the express statement that the Rules shall be applied.

The scope of application of rules under the COGSA 71 and COGSA 92 (and the Hague-Visby) is broader in the sense that it covers 3 situations namely; (i) the bill of lading is issued in a contracting state, (ii) the carriage is from a port in a contracting state; and (iii) the contract

[42] According to United Nations Treaty Collection, as of 3 January 2015, the Rotterdam Rules has 25 signatories with only 3 ratifications. Based on Article 94, the Rules will enter into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

[43] Section 4 of the MCOGSA reads; "Every bill of lading, or similar document of title, issued in Malaysia which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the said Rules as applied by this Act."

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; whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.[44] It also covers deck cargo.[45]

In the case of the UK, there is no requirement of a "clause paramount" and this is evidenced by the wordings used in the COGSA 71 that states the "Rules shall have the force of law" which denotes stronger and stringent meaning compared to "shall have effect in relation and in connection with". Thus, if the nature of the contract of carriage falls under one of the above situations, the rules are to be applied mandatorily and there is no escape or loopholes for the parties to contract out of the rules.

Under the Hamburg Rules, the scope of application is further widened to include inward shipment from ports of non-contracting states to ports of contracting states[46], in addition to the scope in the Hague-Visby Rules.

(ii) The Limitation of Carrier's Liability and Responsibility

In the preceding Chapter we have seen carrier's liability under the Hague Rules (or the MCOGSA) that seems very limited and ambiguous. The one that we have dealt with was on the limitation of carrier's liability to loss amounting to 100 pound and below.[47] Although under Article IX of the Hague Rules has clarified the monetary units in the rules referred to the gold value, there is no specification of its fineness or weight. And the limitation of liability amounting to 100 pound is too low for our current industry.

These two provisions have been revised and clarified by the Hague-Visby Rules (or COGSA 71) which increased the liability under Article IV Rule 5(a) where the liability in connection with the goods is not 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.[48] Article IV Rule 5(d) of the Hague-Visby Rules further defines that the unit of account above is basing on the special drawing rights (SDR) as defined by the International Monetary Fund.[49] With the increasing of value of goods as well as shipping costs, the Hamburg Rules has

[44] Article X of the Hague-Visby Rules.
[45] Section 1(7) of the COGSA 71.
[46] Article 2(1)(b) of the Hamburg Rules

[47] Article IV Rule 5 of the Hague Rules provides; Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding 100 pound sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.
[48] Article 5(a) of the Hague-Visby Rules reads; 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 shall in any event 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.
[49] Article 5(d) of the Hague-Visby Rules reads; The unit of account mentioned in this Article is the special drawing right as defined by the International Monetary Fund. The amounts mentioned in sub-paragraph (a) of this paragraph

increased the liability of the carrier to an amount equivalent to 835 units of account per package or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is higher.[50]

With the introduction of SDR into the Hague-Visby Rules and the Hamburg Rules, it allows parties to ascertain the exact amount of limit of liability in the case of goods lost or damaged during voyage according to respective currency.

Under the MCOGSA or the Hague Rules, there is no provision of remedy to the shipper or consignee in the case of delay as the carrier under MCOGSA or the Hague Rules is only liable or responsible in the case of loss or damage cargo or goods. In this era of world without boundaries, the trading industry demands efficient and fast dealings and thus even a one day delay can make the parties incur huge loss. Surprisingly the COGSA 71 or the Hague-Visby Rules as well as COGSA 92 also do not protect the shipper or the consignee for delay in delivery caused by the carrier.

Nonetheless, this gap is addressed in Article 5 of the Hamburg Rules where it provides that the carrier is liable for loss resulting from loss of or damage to the goods or delay in delivery of goods.[51]

MCOGSA provides that under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.[52] Under Article I (e), carriage of goods covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.[53] The same provisions are provided in the Hague Rules and Hague-Visby Rules.

These two provisions denote that the carrier's responsibility and liability with regards to the carriage of goods arise from the time the goods are loaded to the ship until they have been discharged from the ship. This gives a loophole where the carrier may escape from responsibility and liability where the goods are loss or damage at the time prior to the loading and after discharging where it is still under the carrier's care. This is the case where a carrier is in charge of the goods from the time the goods reach the port of loading and until the goods reach the port of discharge. This gap is again covered by the Hamburg Rules where it provides; "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 (port to port)."[54]

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shall be converted into national currency on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case.

[50] Article 6(1)(a) of the Hamburg Rules.

[51] Article 5 (1) of the Hamburg Rules reads: The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

[52] Article II, First Schedule of MCOGSA.

[53] This is also known as "tackle to tackle" where it meant from the moment when the ship's tackle is hooked on at the loading port until the moment when the ship's tackle is unhooked at discharge.

[54] Article 4 (1) of the Hamburg Rules.

Since COGSA 71 adopted the Hague-Visby Rules, the rule of tackle to tackle is also applied under the Act.

(iii) Rights and Immunities of a Carrier

Article IV of the MCOGSA and the Hague Rules provide great immunities to the carrier and this can be seen under Rules 1 and 2 of Article IV. Rule 1 provides that neither the carrier nor the ship will be held liable for loss or damage arising or resulting from unseaworthiness unless caused by lack of due diligence on the part of the carrier to make the ship seaworthy. For this purpose, the burden of proof should always be on the carrier only as it is his sole responsibility to make the ship seaworthy.[55] However, under the rule it provides that the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section. This means the carrier may escape responsibility to proving exercise of due diligence if, for an instance, the master or the pilot or the mariner claiming exemption under the said rule.

Whereas Rule 2 provides; 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 the servants of the carrier in the navigation or in the management of the ship. This is a broad and vast immunity vested upon carrier. Again, in this case, the Hague-Visby Rules provide similar provisions and Hamburg Rules remedied it by provisions under Article 5.[56] Under those

[55] Article III Rule 1 (a) provides that a carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy. This provision puts sole responsibility to the carrier in ensuring the ship is seaworthy.

[56] Article 5 of the Hamburg Rules provides; 1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.
2. …
3. …
4. *(a)* The carrier is liable (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
(ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.
(b) In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipping practices must be held into the cause and circumstances of the fire, and a copy of the surveyors report shall be made available on demand to the carrier and the claimant.
5. With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.
6. …
7. Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery, the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

provisions, the carrier will be held liable for any fault, even the fault is caused by its servants or agents. This way the carrier will always take extra cautious and be responsible upon the acts of its servants or agents.

(iv) Emergence of Containerization

The Hague Rules was enacted way back in 1924 which explains the absence of provisions on containerization. Containerization in merchant fleet was first introduced in 1950s where prior to that cargoes were shipped in break bulk.[57] Under the Hague Rules (and MCOGSA) there is no definition to "package" or "unit" as stated in Article IV Rule 5. Thus, with the emergence of containerization in shipping fleet, the issue arose is whether a package or a unit under the said Rule 5 would refer to a container or to each goods packed in the container.[58] The interpretation of package and unit is important to determine the limit of liability as the owner of the container is not necessarily the owner of the contents of the container and also not necessarily is the carrier.

This defect is however covered under Article IV Rule 5(c)[59] of the Hague-Visby Rules (and COGSA 71). This provision explains on the liability for the loss of the goods in container while at sea. The container regime is further elucidates in the Hamburg Rules, while still retaining what is covered in the Hague-Visby Rules, its Article 6(2) goes further to explain that the container itself is a separate shipping unit if it is not owned or supplied by the carrier.[60]

(v) Absence of Provisions on Electronic Commerce

In this modern world and with the rapid growth of international trading, the application of electronic system is significant and is highly required in any sort of trading particularly in international trading. Although electronic commerce is a convenience tool in today's trading, the provision regarding it, is nowhere to be found in the all the rules on bill of lading discussed in this Research i.e. the Hague Rules/MCOGSA as well as in the Hague-Visby Rules/COGSA 71 and COGSA 92. Even the Hamburg Rules do not provide such clauses. However, earlier we have mentioned on Rotterdam Rules which will not be the subject of discussion in this Research,

[57] http://www.worldshipping.org/about-the-industry/history-of-containerization (2014).

[58] Quest for the 'gold value' of a 'package' or 'unit': Limitation of Liability under the Hague Rules, Dr Irwin UJ Ooi, [2006] 4 MLJ xlvii at lx.

[59] Article IV Rule 5 (c) reads; 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.

[60] As explained in the Explanatory Documentation on the Hamburg Rules by Professor HM Joko Smart in association with the Commonwealth Secretariat (1989). Article 6(2) of the Hamburg Rules reads; For the purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this article, the following rules apply: (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit. (b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

however this Rules provides a framework for the acceptance and use of electronic transport records in carriage by multimodal transportation which includes sea transportation.

5. Recommendation and Conclusion

(a) Recommendations to the Government

In enacting or adopting the best rules to govern the bill of lading in a contract of carriage by sea, reference to the practice of other countries will enable the policy maker and drafter to take the best of those rules and apply them to Malaysia's domestic law. However, at the same time, the practicality and suitability of such rules to the country's domestic laws, customs and policy must be taken into consideration and be given utmost priority.

Based on the preceding chapters, it is obvious that adopting the Hague Rules does not accommodate current practicality of a bill of lading in international trade via sea transportation. Therefore, it is recommended that Malaysian Government ratifies the Visby Protocol and adopts the rules into its domestic laws by enacting a new Bill of Lading Act or make amendment to the existing MCOGSA. However, as the Hague-Visby Rules are also far from being perfect, the Government may adopt some of the provisions under the Hamburg Rules into its future Bill of Lading Act or amended MCOGSA without the need to ratify the Hamburg Rules. The most pertinent provisions that can be adopted from the Hamburg Rules are on the part where it covers for delay in delivery, limit of liability with regards to containership and period of liability which extends farther than the Hague-Visby Rules.

In addition to the above recommendations, as electronic commerce is crucial in today's trading, it is proposed that the Government incorporate framework on electronic documents as in Rotterdam Rules but solely on sea transportation. This is due to the fact that Rotterdam Rules cater for multimodal transportation and thus the framework on electronic commerce as provided in the said Rules may not be suitable to be incorporated in MCOGSA which provides solely on sea transportation. On that portion of issue, an in-depth research needs to be undertaken by the Government as it involves all three modes of transportation namely sea, air and land.

(b) Conclusion

The function of a bill of lading in contract of carriage by sea is paramount and thus the laws and rules governing the bill if not comprehensive, should at least just and equal to all parties involved in the contract of carriage whether directly or indirectly.

The practicality of a bill of lading evolved over times with the development of shipping industry alongside the international trading. Regardless of which rules a country will adopt in governing its carriage of goods involving bill of lading, they must be fit for the practical purpose and function of the said bill with the domestic policy of that country.