

Springer Series on Naval Architecture, Marine Engineering,  
Shipbuilding and Shipping 5

Víctor Hugo Chacón

# The Due Diligence in Maritime Transportation in the Technological Era

 Springer

# **Springer Series on Naval Architecture, Marine Engineering, Shipbuilding and Shipping**

Volume 5

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Panama  
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ISSN 2194-8445 ISSN 2194-8453 (electronic)  
Springer Series on Naval Architecture, Marine Engineering, Shipbuilding and Shipping  
ISBN 978-3-319-66001-1 ISBN 978-3-319-66002-8 (eBook)  
DOI 10.1007/978-3-319-66002-8

Library of Congress Control Number: 2017949489

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# Preface

The idea of developing a research on this topic arose from my practice in maritime litigation before the Maritime Courts of Panama. Most of the cases related to cargo claims I handled were subject to the application of the Hague/Hague-Visby rules. In some of them, the loss or damages could have been prevented by the application of new technologies. Under the duties and liability standard set in the rules, questions often arise as to what new technologies should be required as part of the obligation to exercise due diligence in making the ship seaworthy and to care cargo? Or, when can carriers be held liable for loss of or damage to cargo that could have been prevented by the application of new technological instruments, methods, or devices? In the absence of a response, there is abundant litigation in the courts around the world. The idea to approximate an answer to these questions became then a thesis proposal, which was accepted as a doctoral dissertation by the University of Hamburg, Germany.

I must express my highest respect and gratitude to my supervisor Prof. Dr. Rüdiger Wolfrum. Without his admission and guidance, as his doctoral student, this work would not have been possible. I conducted this project as an associated researcher of the International Max Planck Research School for Maritime Affairs at the University of Hamburg. That allowed me to make the research at the library of the Max Planck Institute for Comparative and International Private Law in Hamburg. To the board of directors and the staff of the School as well as of the Institute, I express my deepest gratitude. This project was possible thanks to a scholarship granted by the National Secretary for Science and Technology (*Secretaría Nacional de Ciencia y Tecnología—SENACYT*), the Institute for the Promotion of the Human Resources (*Instituto para la Formación y Aprovechamiento de los Recursos Humanos—IFARHU*), both Panamanian institution, and the German Academic Exchange Service (DAAD). To these three institutions, I am deeply indebted.

I must thank also to my colleagues of the IMPRS for maritime affairs, specially to Sarah Gahlen, for her constant and unconditional help, and to Lina Wiedenbach and Young-Kyung Yoon. My high regards go also to the very talented and committed professors, researchers, and doctoral candidates from all around the world

who I had to honor and pleasure to meet in the three years and half I spent at the Max Planck Institute in Hamburg. Their advices and friendship made of this study time in Germany a very productive and enjoyable experience. Among them, I cannot avoid mentioning to Dairo Pascual, his wife Natasha Hadsimanovic, and Dorothea Magnus for being a great source of motivation; to Mr. Roland Jörs, who proved to be an excellent coach; and Mrs. Deirdre Meyer for her proofreading services. Also in Hamburg, I'm very thankful to the wonderful people of the parish communities of St. Theresien and St. Elizabeth. Their kindness made my stay in Europe much warmer. Thanks to my relatives and friends in Panama for their support. I must express my special thanks to Olga and Fula Bourdett for their unique and incomparable love, whose support made possible to finish this work.

Finally, but the most important, I must thank my beloved mother, whose early departure shortly before starting this project made this a challenge, but her exemplary life and efforts to grant me an education are reasons enough to honor her in all my endeavors. Because of her and for her are all my achievements.

Panama, Panama  
June 2017

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# Abbreviations

A.C.	Law Reports, Appeal Cases, England and Wales
A.M.C.	American Maritime Cases
All ER	All England Law Reports
Am. Dec.	American Decisions
Am. J. Comp. L.	American Journal of Comparative Law
Am. L. Rev.	American Law Review
Am. Law Reg.	American Law Register United States
App. Cas.	Law Reports, Appeal Cases (Second Series) England and Wales
B. & Ald.	Barnewall and Alderson's King's Bench Reports
B.C.S.C.	Supreme Court of British Columbia, Canada
Burr.	Burrow's King's Bench Reports tempore Mansfield
C.A.N.Y.	United States Court of Appeal, Second Circuit
C.C.S.N.Y.	Circuit Court, Southern District of New York
C.F.R.	United States Code of Federal Regulations
C.P.D.	Common Pleas Division
Camb.L.J.	Cambridge Law Journal
Can. B. R.	Canadian Bar Review
Ch.D.	Law Reports, Chancery Division, England and Wales
CMI	Comite Maritime International
Co.Rep.	Coke's King's Bench Reports
COGSA	Carriage of Good by Sea Act
Cranch	Cranch's Supreme Court Reports
CSC	Convention on Safe Containers
CSS	Code of Safe Practice for Cargo Stowage and Securing
D.A.R.	Daily Appellate Reporter United States, California
D.C. Cal.	District Court of California
D.C. Mass.	District Court of Massachusetts
D.C.E.D.Wis.	District Court for the Eastern District of Wisconsin
D.C.La.	District Court of Louisiana

D.C.N.Y.	District Court of New York
D.C.Or	District Court of Oregon
D.Md.	District of Maryland
Dig.	Digest of Justinian
DOC	Document of Compliance
Duer	Duer's New York Superior Court Reports
E.D.La.	Eastern District of Louisiana
E.D.N.Y.	Eastern District of New York
E.D.Pa.	Eastern District of Pennsylvania
E.R.	English Report
El. & Bl.	Ellis and Blackburn's Queen's Bench Reports
EWHC	England and Wales High Court (Administrative Court)
Ex. C.R.	Canada Exchequer Court Reports Canada
F. Supp.	Federal Supplement
F.	Federal Reporter, USA
F.Cas.	Federal Cases, USA
Ga.	Georgia Reports
H/H-VR	Hague/Hague-Visby Rules
HGB	Handelsgesetzbuch
How.	Howard's Supreme Court Reports
HR	Hague Rules
Hun	Hun's New York Supreme Court Reports
IMDG	International Maritime Dangerous Goods Code
IMO	International Maritime Organization
ISM	International Safety Management Code
ISPS	International Ship and Port Facility Security Code
ISSC	International Ship Security Certificate
J. Mar. L. & Com.	Journal of Maritime Law and Commerce
J.B.L.	Journal of Business Law
John.	Johnson's New York Reports
K.B.	King Bench
L. Ed	United States Supreme Court Reports, Lawyers' Edition
L.J. Ex.	Law Journal Reports, Exchequer New Series
L.Q.R.	Law Quarterly Review
L.R.A.	Lawyers' Reports Annotated
LASH	Light Aboard Ships:
LI.L.R./LI. Rep.	Lloyd's List Law Reports
Lloyd's Rep.	Lloyd's Law Reports
M.L.J.	Mississippi Law Journal
M.P.R.	Maritime Provinces Report, Canada
N.D.Fla.	Northern District of Florida
O.R.L.R.	Ontario Law Reports
Ont. S.C. App. Div.	Supreme Court of Ontario, Appellate Division
Price Exch.	Price's Exchequer Reports
Pro.	Law Reports, Probate England and Wales

QB	Queen Bench
QBD	Law Reports, Queen Bench Division
RSO	Recognized Security Organization
RvdW	Rechtspraak van de Week Netherlands
S. Ct.	Supreme Court of the United States
S.C.R.	Supreme Court Reports, Canada
S.D.Cal.	Southern District of California
S.D.N.Y.	Southern District of New York
S.D.R.	Special Drawing Rights
S.E.	South Eastern Reporter
Sandford	Sandford's New York Superior Court Reports
SMC	Safety Management Certificate
SMS	Safety Management System
SOLAS	Safety of Life at Sea Convention
SSA	Ship Security Assessment
Str.	Strange's King's Bench Reports
STWC	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
Sup.Ct.Rep.	Supreme Court Reporter United States
Taunt.	Taunton's Common Pleas Reports
U. Pa. L. Rev.	University of Pennsylvania Law Review
U.S.App.	United States Appeals Reports
U.S.C.	United States Code
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention of Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
Va.J.Int'l L.	Virginia Journal of International Law
W.D.Ky.	Western District of Kentucky
W.D.Mich.	Western District of Michigan
W.D.N.Y.	Western District of New York
W.L.R.	Weekly Law Reports England and Wales
Wall. JR.	J.W. Wallace's United States Circuit Court Reports
Wall.	Wallace's Supreme Court Reports
Wend.	Wendell's New York Reports
WL	Westlaw Transcripts United Kingdom
WLR	Weekly Law Reports England and Wales

# Chapter 1

## Introduction

### 1.1 Purpose of the Study

The carriage of goods by sea has been the most useful and effective means of transportation for the international trading of goods. Its paramount importance for the world's economy increased dramatically over the last century when more countries went beyond their borders to compete in the international market creating in large part today's global economy. Boundaries fell away and free trade was opened between all nations. Today, the success of countries' economies is measured, among other factors, on the balance of payment of goods annually imported and exported. This international exchange of goods is possible thanks to vessels that currently move approximately 80% of the world's trade.<sup>1</sup> Because of this, the shipping industry is not only of special importance to the private sector, but to the public sector as well. As a fundamental component of the economic growth and development policy, it has been the subject of public interest and States have endeavored to regulate it.

The maritime transportation is regularly performed under two contractual modalities: charter parties and bills of lading. The research focuses on the latter modality. At the present, the carriage of goods by sea under bills of lading is mostly governed by the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, adopted in Brussels in 1924 and commonly known as the Hague Rules. This regulation orders carriers to perform two duties: to practice due diligence to make the ship seaworthy and to care for the cargo. The prevention of cargo damage or losses is a goal of the liability rules set in the governing regime. It meets a social end too, as the economy and in consequence, the social welfare of most nations, depend on the safe arrival of the products at destination.

Both duties have been constantly impacted by the development of technology. Shipping technology has provided new resources, methods and tools to make the

---

<sup>1</sup>UNCTAD, 'Review of maritime transport 2011', 26.



carriage of goods safer than ever. But which of these technologies can be expected by carriers to be applied as part of their obligation to practice due diligence? It is a question that has required lengthy, complicated and expensive litigation. Considering the increasing costs of submitting cargo claims to the judiciary, for both the parties and the states, at least some general parameters that can shed light on the issue should be provided. This is the aim of this work.

This research is presented in three parts. The first part addresses the evolution of the sea common carriers' liability taken from the historical sources of the maritime law and the current international regulations governing the contract. An overview of these historical developments, from the oldest code containing regulations for the maritime commerce to the latest international conventions on the subject, will point out the carrier's duties and the standard of liability set therein. Special emphasis is given to the historical circumstances and causes that drove the adoption of the Hague Rules. The second part presents the interpretation and construction of the two carriers' duties set out in the Hague Rules by the English and American Jurisdictions. Finally, the third part addresses the analyses on new technologies in the case law of the aforementioned jurisdictions. From the case law on this specific subject, I attempt to extract the parameters or situations in which the courts have required the application of new technologies as part of the duties set in the current governing liability regime.

## 1.2 The Contract of Carriage of Goods by Sea

For the proper understanding of this study, it is necessary to provide first an introductory and general overview of the contract of carriage of goods by sea.

### 1.2.1 Concept

This contract is commonly defined as the contract of a ship for the carriage of goods by water, usually performed, as mentioned, under the modalities of charter parties or bills of lading, or a combination of both.<sup>2</sup> It is a contractual obligation subscribed between a shipper and a carrier, where the latter undertakes the task of transporting the shipper's goods by sea, from a specific place to a specific destination, against the payment of freight. The carrier assumes some risks of the maritime adventure, which makes the obligation to be classified as one of result.<sup>3</sup>

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<sup>2</sup>B.A. Garner and H.C. Black, *Black's law dictionary*, 9th edn. (St. Paul, Minn: West, 2009), 69, 375.

<sup>3</sup>F. Sánchez Calero, *El contrato de transporte marítimo de mercancías: (Reglas de La Haya-Visby, Hamburgo y Rotterdam)*, Colección Grandes Tratados Aranzadi, 2nd edn. (Cizur Menor (Navarra): Thomson Reuters-Aranzadi, 2010), vol. 170, 131.

### 1.2.2 *The Parties Involved*

The contract has a bilateral character. As mentioned above, the shipper and the carrier are the main parties. The international conventions on the subject have underlined some definition of both parties, attending to each parties' participation in the contract and its engagement with the other party. The Conventions provide the following definitions.

#### 1.2.2.1 **The Shipper**

Shipper is defined as the person who ships goods to another or the party who contracts the services of a carrier for the transportation of cargo.<sup>4</sup> The Hague Rules does not present any definition of shipper. The Hamburg Rules include the following definition:

[A]ny person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.<sup>5</sup>

Though the Rotterdam Rules are the newest regulation enacted for this contract, the definition provided is more ambiguous: "shipper is the party who enters into a contract of carriage with a carrier."<sup>6</sup>

#### 1.2.2.2 **The Carrier**

Carrier is the person, individual or organization, engaged in transporting passenger or goods for hire.<sup>7</sup> The same shipowner is the carrier when he personally operates his vessel.<sup>8</sup> At the present, vessels often operate under a charter party. In this case, and depending on the type of charter party, the charterer who then resells space on the chartered ship to other particular shippers becomes the carrier for those particulars who ship goods with him.<sup>9</sup> The Hague Rules do not provide a definition based on the function or the activity of the carrier. That is of general knowledge in the industry. The Rules identify the carrier regarding its status or legal relation to the ship and to the

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<sup>4</sup>Garner and Black, 1503.

<sup>5</sup>The Hamburg Rules Article 1.3.

<sup>6</sup>The Rotterdam Rules Article 1.8.

<sup>7</sup>Garner and Black, 214.

<sup>8</sup>T.J. Schoenbaum, *Admiralty and maritime law*, Practitioner treatise series, 5th edn. ([St. Paul, MN]: Thomson/West, 2011), 795.

<sup>9</sup>S. Girvin, *Carriage of Goods by Sea*, 2nd edn. (Oxford, New York: Oxford University Press, 2011), 18.

shipper. It says then, that the “carriers include the owner or charter who enters into a contract of carriage with a shipper”.<sup>10</sup> The Hamburg and Rotterdam rules present similar descriptions.<sup>11</sup> A more detailed definition of the carrier’s activity and their respective obligations has been developed according to the distinction made by the courts of two types of carriers: Private carrier and Common carrier.<sup>12</sup>

### 1.2.2.2.1 Private Carrier

The private carrier is usually the shipowner who lets the whole ship or its whole cargo capacity for one or more voyages or for a specific period of time.<sup>13</sup> This carrier offers his ship for carriage services to a specific shipper and under special agreement. Such agreement commonly appears in a formal letting of a ship known as a charter party,<sup>14</sup> in difference with the common carrier who usually acts under a bill of lading.<sup>15</sup> As the law of charter parties is still governed by the principle of freedom of contract, the parties in a private carriage enjoy some more liberties.<sup>16</sup> The private carrier reserves the right to bargain and the right to decide whether or not he carries a specific cargo as he chooses.<sup>17</sup> He is not necessarily available, nor obliged, to carry goods for the general public. It must be noticed, however, that the determination of the carrier’s character based on the modality of the contract subscribed is not always exact. A shipper who takes up the full space on a ship for a specific voyage is contracting with a private carrier, even if the contract of carriage is documented in a bill of lading.<sup>18</sup> The opposite may happen when a shipper lets a full deep tank or some other compartment of a vessel under a charter party, but other tanks or hatches of the same vessel are let to other shippers. In this case, beside the charter party, the carrier is to be held as a common carrier.<sup>19</sup> The difference lies in the exclusivity of the contractual relation with the specific shipper for the use of the whole cargo capacity of the chartered ship. Regarding the standard of liability, private carriers are liable if the damage or loss is caused by their negligence in the performance of their duties.<sup>20</sup>

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<sup>10</sup>The HR Article 1(a).

<sup>11</sup>Hamburg Rules article 1.1; Rotterdam Rules article 1.5.

<sup>12</sup>This distinction was evidenced from the time of the decision issued by Lord Holt in the case *Coggs v. Bernard*, 2 Lord Raymond 909, 92 E.R. 107, 90 E.R. 971 (1703).

<sup>13</sup>H.N. Longley, *Common Carriage of Cargo* (Albany, N. Y.: Mathew Bender, 1967), 7.

<sup>14</sup>Schoenbaum, 777–78.

<sup>15</sup>Longley, 7.

<sup>16</sup>Schoenbaum, 779.

<sup>17</sup>N.J.J. Gaskell, R.S.T.C. Chorley, C. Debattista and R.J. Swatton, *Chorley and Giles' shipping law*, 8th edn. (London: Pitman Publishing, 1987), 166.

<sup>18</sup>Longley, 8.

<sup>19</sup>*Ibid.*, 9.

<sup>20</sup>*Ibid.*, 8; Gaskell, Chorley, Debattista and Swatton, 167.

### 1.2.2.2 Common Carrier

Common carriers are those who hold themselves, as a regular business, available to carry any goods, from any shipper who pays their charges, as long as there is enough space on the vessel, following a regularly fixed route.<sup>21</sup> The contract under this modality is usually performed under the form of a bill of lading, but for the reason explained above, such a document is not conclusive to determine the character of the carrier. The common carriers were subject in the past to very strict regulations. Unlike the private carriers who were liable for negligence, the common carriers were subject to statutory regulation including strict liability for damages or loss of the goods.<sup>22</sup> Under common law, common carriers were subject to three main obligations:

- They had a duty to serve all who applied for their services,
- Unreasonableness in their rates of charge and operation was prohibited; and,
- They were held to far stricter liability standards than those applied in general business law.<sup>23</sup>

However, the strictness of the liability standard changed radically with the introduction of the Brussels Convention of 1924, commonly known as the Hague Rules. The liability of common carriers under the Hague Rules is measured attending to their negligent activity or omission resulting in damages or losses, similar to the liability for private carriers. Currently, a large number of companies operate as common carriers that own or hire several numbers of ships and offer carriage of goods throughout the world. They are known as cargo liners, whose development since the last century has enabled the rapid growth of the international exchange of goods. Their importance in the current maritime commerce has grown so much, that the recent Rotterdam Rules included a definition for this type of carrier.<sup>24</sup> Most of the cargo liners perform their services under the Hague Rules, as they carry goods from or to States members of the Convention, or they commonly incorporate these rules in their bills of lading as the applicable law to the contract.

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<sup>21</sup>R. Colinvaux, *Carver's carriage by sea*, British shipping laws, 13th edn., 2 vols. (London: Stevens, 1982), 6; L. Gorton, *The concept of the common carrier in Anglo-American law*, Scandinavian university books (Gothenburg: Läromedelaförl. (Akad.-förl.), 1971), vol. 43, 20; Schoenbaum, 777. See also *Propeller Niagara v. Cordes*, 62 U.S. 7 (1858).

<sup>22</sup>Longley, 8.

<sup>23</sup>K. Hall, J. W. Ely and J. B. Grossman, *The Oxford companion to the Supreme Court of the United States*, 2nd edn. (Oxford, New York: Oxford University Press, 2005), 197.

<sup>24</sup>Rotterdam Rules, Article 1.3: "‘Liner Transportation’ means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operation on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.”.

### 1.2.3 Respective Obligations

The determination of the rights and duties of each party depends on the modality of the contract they submit and the applicable law stated. In a Charter Party, the parties enjoy additional freedom; while under a bill of lading, parties are subject to statutory regulations.<sup>25</sup> The doctrine and jurisprudence have distinguished two general groups of obligations in this contract. First, the express obligations refer to the specific characteristics of the contracted carriage. They include the obligation to provide the ship with the special features offered; the time of departure; the port or place of loading and delivery; the amount of freight; etc. On charter parties, the time period of the charter or the specific voyage hired are also particularly important. These obligations or special conditions are stated in the charter party or the bill of lading.

Second, apart from the terms expressly stated in the contract, or set by statute or implied by custom, the courts have recognized and enforced some general duties that must be accomplished by the parties to give business efficacy to the contract.<sup>26</sup> They are automatically incorporated in the contract, unless the parties have agreed to special clauses establishing the contrary.<sup>27</sup> Although the existence of such general implied obligations is the result of jurisprudential enforcement, courts are not allowed to make new dispositions in the contract.<sup>28</sup> This restriction applies even when they consider it reasonable for the correctness and efficacy of the contract.<sup>29</sup>

#### 1.2.3.1 On the Carrier

For carriers, in the common law, the general arising obligation from this contract is summarized as: “[the carrier] is to carry and deliver in safety, answering for all loss or damage which may happen to them (the goods) while they are in his hand as carrier.”<sup>30</sup> They are relieved of responsibility for loss of or damages to the cargo, when it is caused by an act of God; King’s enemies; defect or infirmity of the goods or their package; or, through a voluntary sacrifice for the safety of the adventure.<sup>31</sup> The access of these exceptions of responsibility is conditional upon the absence of any negligent act by the part of the carrier that exposed the cargo to the cause of loss or damage.<sup>32</sup> To accomplish the main objective of the contract, the common

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<sup>25</sup>T. J. Schoenbaum and A. N. Yiannopoulos, *Admiralty and maritime law: Cases and materials*, Contemporary legal education series (Charlottesville, Va: Michie Co., 1984), 364.

<sup>26</sup>T. E. Scrutton and B. Eder, *Scrutton on charterparties and bills of lading*, 22nd edn. (London: Sweet & Maxwell, 2011), 111.

<sup>27</sup>J. F. Wilson, *Carriage of goods by sea*, 7th edn. (New York: Pearson/Longman, 2010), 9.

<sup>28</sup>Gaskell, Chorley, Debattista and Swatton, 182.

<sup>29</sup>*Ibid.*, 182.

<sup>30</sup>Colinvaux, 20.

<sup>31</sup>*Ibid.*, 20.

<sup>32</sup>*Ibid.*, 20.

law jurisprudence has developed three implied undertakings that must be observed by the carriers.

### 1.2.3.1.1 To Provide a Seaworthy Ship

The seaworthiness of the vessel is generally defined as the condition of being sufficiently staunch, strong and tight, properly equipped and in every way fitted to resist the perils and incidents that a seagoing vessel might ordinarily encounter.<sup>33</sup> Such a condition covers the physical estate of the ship, the crew's competence, the equipment, and its capability to carry the specific cargo. In common law this obligation is absolute and its breach makes the carrier liable regardless of fault.<sup>34</sup> Only when the contract is governed by the Hague/Hague-Visby Rules, is the standard reduced to the exercise of due diligence in making the ship seaworthy.<sup>35</sup>

### 1.2.3.1.2 Reasonable Dispatch

In absence of a specific date for departure, the vessels must proceed and perform the carriage in a reasonable time.<sup>36</sup> The reasonability of the time of departure will vary case by case, and must take into account, firstly, the different elements of the voyage, such as the conditions of the ship; the state of the cargo handling technology; and, the special circumstances known to the parties.<sup>37</sup> Certainly the condition of the ports, the distance to be sailed and the usual weather condition of the route play an important role. The second element to determine the reasonability of the time of dispatch is, if under the actual circumstances, the carrier was diligence in the execution of the voyage.<sup>38</sup> The carrier, however, is not expected to take more than reasonable measures to accomplish this obligation.<sup>39</sup> To assign carrier's liability for unreasonable delay, the courts must assess whether the circumstances that impeded the carrier to perform the

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<sup>33</sup>Garner and Black, 1470, 1699.

<sup>34</sup>Wilson, 9.

<sup>35</sup>HR article 3.1.

<sup>36</sup>Wilson, 15.

<sup>37</sup>M. a. K. H. M. Ganado, *Marine Cargo Delays*, The law of delay in the carriage of general cargoes by sea (London, 1990), 36.

<sup>38</sup>See *Dallas W. Dietrich, AS Atlantic Seaboard Flour Mill v. United States Shipping Board Emergency Fleet Corporation. (The Panola)* 1925 A.M.C. 1173 (2nd. Cir.). "And the courts have laid down the rule that 'reasonable time' for the performance of acts under a contract is such a period of time as suffices for their performance if the one whose duty it is to perform uses such diligence in the performance as a person of ordinary diligence and prudence would use under like circumstances".

<sup>39</sup>In the case *Briddon v. Great Northern Ry. Co.* (1958) 28 L.J. Ex. 51, the court said at 52: "The contract entered into was to carry... without delay, and in a reasonable time under ordinary circumstances. If a snow -storm occurs which makes it impossible to carry the cattle, except by extraordinary effort, involving additional expense, the company are not bound to use such means and to incur such expense.", as quoted by Ganado at 35.

carriage in a reasonable time, were normal or not. As the conditions in navigation may vary, and may be in some circumstances beyond the carrier's control, provisions in bills of lading and charter parties are generally stated releasing the carrier from liability for delays. Some others go further refusing any liability for delay of any type. These clauses are enforceable by American courts, releasing carriers for delays of 2 weeks,<sup>40</sup> or even longer, and denying compensation for damages resulting, for example, from loss of market.<sup>41</sup> Notwithstanding, other courts have been more cautious in recognizing such clauses and assign liability if the unreasonable delay was caused by the carrier's negligence.<sup>42</sup>

### 1.2.3.1.3 Not to Deviate from the Agreed Route

The carriage must be performed not only in a reasonable time, but also, following the agreed route.<sup>43</sup> In absence of any agreement regarding the geographical route, the carrier must proceed along the shortest, safest and usual direction to the destination port. A voluntary change without necessity or reasonable cause from the regular course or route shall be considered a deviation.<sup>44</sup> Deviation means "an intentional and unreasonable change in the geographic route of the voyage as contracted."<sup>45</sup> This concept was introduced into the law of carriage from the marine insurance law.<sup>46</sup> Later, it was extended to other causes other than a geographic deviation, to include: "any variation in the conduct of a ship in the carriage of goods whereby the risks incident to the shipment will be increased."<sup>47</sup> Under this extension, deviation was expanded to include: carrying in a different vessel than the agreed one; carrying partly by rail; dry docking with the cargo on board; unreasonable delay; and, carrying on deck.<sup>48</sup> Other situations that under the same

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<sup>40</sup>See *Parnass International Trade & Oil Corp. v. Sea-Land Service, Inc.* 595 F. Supp. 153, 1985 A.M.C. 485 (S.D.N.Y. 1984) (A short delay of 18 days is not in and of itself unreasonable. It is just such a potential for strikes and port congestion which prohibits carriers from making hard and fast promises such as the one plaintiff contends existed here.); *Pioko Fashions, Inc. v. American President Lines, Ltd.*, 1993 A.M.C. 2615 (W.D. Wash. 1993) (2-week delay in 10,000 mile cargo delivery was not unreasonable deviation as required under limitation in bill of lading); *Quesoro v. Lykes Bros. Steamship Co., Inc.*, 1995 A.M.C. 2054, (S.D.N.Y. 1995).

<sup>41</sup>See *The Panola*, see *supra* note 38.

<sup>42</sup>Ganado, 38.

<sup>43</sup>W. Tetley, *Marine Cargo Claims*, 4th edn., 2 vols. (Cowansville, [Toronto]: Blais; Thomson Carswell, 2008), Vol. 1, 1811.

<sup>44</sup>*Hostetter v. Park*, 137 U.S. 30, 40; 11, S. Ct. 1, 34 L.Ed. 568 (1890).

<sup>45</sup>Tetley, *Marine Cargo Claims*, Vol. 1, 1812; Wilson, 16.

<sup>46</sup>G. Gilmore and C. L. Black, JR., *The Law of Admiralty*, 2nd. Ed. (Mineola N.Y: The Foundation Press, Inc., 1975), 176.

<sup>47</sup>*Spartus Corp. v. S/S Yafo*, 1979 A.M.C. 2294, 2297–98, 590 F.2d 1310, 1313 (5th Cir. 1979).

<sup>48</sup>Longley, 110–12.

construction were considered deviation or quasi-deviation include: Carrier's corrupt or criminal miss delivery<sup>49</sup>; negligence, gross negligence or willful misconduct;<sup>50</sup> negligent stowage<sup>51</sup>; stowage which greatly exceeds weight limitation of flat rack container; and, safe capacity of cargo cranes and related equipment.<sup>52</sup>

However, English courts have restricted the concept to geographical deviation.<sup>53</sup> American jurisprudence still extends the concept to carrying on deck without authorization or in absence of a custom of carrying such goods in above deck stowage<sup>54</sup>; over carriage, miss delivery and change in the route by truck inland.<sup>55</sup> These cases are referred to as "quasi-deviation".<sup>56</sup> The Hague/Hague-Visby rules do not define deviation nor establishes its consequences, but seems to keep the concept strictly for geographical deviation. The reasonableness of a deviation will depend on the law governing the contract; the surrounding circumstances; and the facts attending to the interest of all the parties.<sup>57</sup> In principle, a deviation is reasonable exclusively in case of rescue of life at sea,<sup>58</sup> which is now also a statutory duty established in national and international regulations.<sup>59</sup> The norm introduced by the HR extended it to the rescue of property at sea as well, and to "any reasonable deviation".<sup>60</sup> Consequently, American and English law also recognizes this same

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<sup>49</sup>See *B.M.A. Indus., Ltd. v. Nigerian Star Line, Ltd.*, 1986 A.M.C. 1662, 786 F.2d 90 (2nd Cir. 1986).

<sup>50</sup>See *Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser*, 1975 A.M.C. 33, 507 F.2d 68 (2nd Cir. 1974), cert. denied, 421 U.S. 965, 1975 A.M.C. 2158.

<sup>51</sup>*The Chester Valley*, 1940 A.M.C. 555, 110, F.2d 592 (5th Cir. 1940).

<sup>52</sup>*Rockwell International Corp. v. M.V. Incotrans Spirit*, 1989 A.M.C. 887 (S.D.Tex. 1989).

<sup>53</sup>Wilson, 16, note 53; Tetley, *Marine Cargo Claims*, Vol. 1, 1812. See *The Hill Harmony* [1999] 2 Lloyd Rep. 209, 217.

<sup>54</sup>See *St. Johns Corp. v. Companhia Geral Commercial Do Rio de Janeiro*, 263 U.S. 119, 124, 44 S.Ct. 30, 31, 68 L.Ed. 201 (1923); *Sedco, Inc. v. S.S. Strathewe*, 1986 A.M.C. 2801, 800 F.2d 27 (2nd Cir. 1986).

<sup>55</sup>Tetley, *Marine Cargo Claims*, Vol. 1, 1812.

<sup>56</sup>*Ibid.*, 1812.

<sup>57</sup>*Ibid.*, 1814–15. See *Stag Line v. Foscolo, Mango & Co.* [1932] A.C. 328.

<sup>58</sup>See *Scaramanga & Co. v. Stamp* (1880) 5 CPD 295 (CA), 304.

<sup>59</sup>Girvin, 403. See UK Merchant Shipping Act of 1995 section 93(1), and UNCLOS Article 98.

<sup>60</sup>HR Article 4(4): "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."



cause as valid.<sup>61</sup> In addition, a deviation may be allowed to avoid danger of the ship or to the cargo;<sup>62</sup> or when it is made necessary by some default on the part of the charterer.<sup>63</sup> Carriage of containers on deck has been also considered a reasonable deviation. Containerships are specially designed to transport containers safely on deck, so the cargo is not exposed to greater risks.<sup>64</sup> With the pass of time, it became a well-established trade custom in a world-wide basis.<sup>65</sup>

Unreasonable deviation is regarded as fundamental breach in the common law,<sup>66</sup> and the carrier is held as an insurer of all damages caused to the cargo by the deviation.<sup>67</sup> Both English and American legislations hold the carrier liable for damages or losses resulted from unreasonable deviation and deprive the carrier from relying on any legal or contractual stipulation in his favor.<sup>68</sup> Under the HR an unreasonable deviation will produce similar consequences, depriving the carrier to rely on the exceptions and limitations of liability.<sup>69</sup> In some cases, however, such as the excluded situations listed above, American courts have allowed the limitation per package.<sup>70</sup> Under English law, the contractual freight is also reduced to a

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<sup>61</sup>Section 4.4 of the US COGSA 1936 and UK COGSA 1971.

<sup>62</sup>Girvin, at 403–04: “The danger to the vessel may result from natural causes, such as storms, ice, or fog, or political factors, such as the outbreak of war or the fear of capture by hostile forces.” Citing *Duncan Köster (The Teutonia)* (1982) LR 4 PC 171, 179. Also deviation for urgent repairs might be considered reasonable. See *Kish v. Taylor* [1912] AC 604.

<sup>63</sup>Wilson, 17–19.

<sup>64</sup>See *Du Pont Nemour International, S.A. v. S.S. The Mormacvega*, 493 F.2d 97, 101–02 (C.A.N.Y. 1974); *Electro-Tec Corp. v. S/S Dart Atlantica* (1984) 598 F. Supp. 929 (D.Md. 1984).

<sup>65</sup>See *Konica Bus. Machines v. The Vessel Sea-Land Consumer*, 47 F.3d 314, 315 (9th Cir. 1995), 1995 A.M.C. 1065; *Konica Business Machines, Inc. v. Vessel “Sea-Land Consumer”* 153 F.3d 1076, 1998 A.M.C. 2705, 98 Cal. Daily Op. Serv. 6955, 98 Daily Journal D.A.R. 9595. However, cargo stored in an open “flat rack” container stowed on deck was held as an unreasonable deviation in *Constructores Tecnicos S. de R.L. v. Sea-Land Service Inc.*, 956 F.2d 841, 1992 A.M.C. 1284 (5th Cir. 1991).

<sup>66</sup>Wilson, 20–21.

<sup>67</sup>See *Insurance Co. of North America v. Blue Star (North America), Ltd.* (S.D.N.Y., 1997). Not Reported in F. Supp., 1997 WL 345235 (S.D.N.Y.), 1997 A.M.C. 2434. District Judge Sweet cited: *Du Pont de Nemours Int'l S.A. v. S.S. Mormacvega*, *supra* note 64; *Hearne v. Marine Ins. Co.*, 87 U.S. (20 Wall.) 488, 22 L.Ed. 395 (1874); *Oliver v. Maryland Ins. Co.*, 11 U.S. (7 Cranch) 487, 3 L.Ed. 414 (1813).

<sup>68</sup>Longley, 118; Tetley, *Marine Cargo Claims*, Vol. 1, 1839; see *Encyclopaedia Britannica v. S.S. Hong Kong Producer*, 422 F.2d 7, 16–17 (2nd Cir. 1969), cert. denied, 397 U.S. 964 (1970).

<sup>69</sup>Tetley, *Marine Cargo Claims*, Vol. 1, 1830: “The carrier may lose one or all of the following rights: The package limitations; the 1 year delay for suit; the defense of due diligence at art. 3(1); the exculpatory defenses at art. 4(2)(a) to (q); other limitation and exclusion of the contract such as jurisdiction and arbitration clauses.”

<sup>70</sup>Gilmore and Black, JR., at 181: “The Seventh Circuit has held that an unreasonable deviation did not oust the \$500.00 per package limitation in Cogsa 4(5)”.

reasonable sum if the goods are delivered in the destination port.<sup>71</sup> General average cannot be claimed unless the breach of contract by deviation is waived.<sup>72</sup>

### 1.2.3.2 On the Shipper or Charterer

#### 1.2.3.2.1 Not to Ship Dangerous Goods

Shippers shall not ship dangerous goods without previous notification to the carrier regarding its dangerous condition. The objective of this obligation is to provide the carrier with sufficient knowledge about the potential danger.<sup>73</sup> Such notification enables them to refuse to carry the goods or to take reasonable measures to assure the safety of the vessel, crew and other cargo on board.<sup>74</sup> When the carrier is already aware of the condition, there is no obligation to give notice.<sup>75</sup> Under English law the concept of dangerous goods is not merely restricted to inflammable or explosive goods. It also includes everything that could put the vessel or other cargo in danger, including for example, infected cargo or cargo prohibited or subject to quarantine, or cargo which may not be allowed in the destination country.<sup>76</sup> Notwithstanding, as the determination of what a dangerous cargo is presents frequent problems, the International Maritime Organization adopted in 1965 the International Maritime Dangerous Goods Code (IMDG).<sup>77</sup> This code establishes and regularly updates a list of goods considered as dangerous.<sup>78</sup>

Under the Hague/Hague-Visby Rules, the carrier is allowed to discharge, destroy or render innocuous any inflammable, explosive and dangerous goods loaded without the shipper's knowledge or consent.<sup>79</sup> These actions release them from paying compensation and hold the shipper liable for all damages or expenses directly or indirectly arising from these measures.<sup>80</sup> The situation varies when the carrier has knowledge of the potential danger and the goods become, after loaded, a

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<sup>71</sup>W. a. I.E. R. H. Payne, *Carriage of Good by Sea*, 13. ed. E.R. Hardy Ivamy (London: Butterworths, 1989), 23.

<sup>72</sup>*Ibid.*, 23.

<sup>73</sup>Girvin, 312.

<sup>74</sup>*Ibid.* 312; Wilson, 35. *See Brass v. Maitland* (1856) 6 El. & Bl. 470; 119 E.R. 940.

<sup>75</sup>Girvin, 312.

<sup>76</sup>Wilson, 34. *See Mitchell, Cotts v. Steel* [1916] 2 K.B. 610.

<sup>77</sup>Available at [www.5.imo.org/SharePoint/mainframe.asp?topic\\_id=158](http://www.5.imo.org/SharePoint/mainframe.asp?topic_id=158). (Last visited: May 21st, 2012).

<sup>78</sup>International Maritime Organization, *International Maritime Dangerous Goods Code: IMDG-Code; incorporating amendment 34-08* (London: International Maritime Organization, 2008). The code makes a classification of goods in explosives, gases, flammable liquids, flammable solids, oxidizing substances and organic peroxides, toxic and infectious substances, radioactive materials, corrosive substances, miscellaneous dangerous substances and articles.

<sup>79</sup>The HR, article 4.6.

<sup>80</sup>Wilson, 36. The HR, article 4.6.