

International Max Planck Research School for Maritime Affairs  
at the University of Hamburg

Lina Wiedenbach

# The Carrier's Liability for Deck Cargo

A Comparative Study on English and Nordic Law  
with General Remarks for Future Legislation

 Springer

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Law with General Remarks for Future  
Legislation

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# Preface

This book arose from my doctoral thesis written during my time as a scholar of the International Max Planck School for Maritime Affairs in Hamburg.

Upon its publication, I am in particular indebted to the International Max Planck Research School for Maritime Affairs. The time as a scholar of the Research School broadened my field of knowledge in maritime law much beyond the topic of my own subject of research and granted valuable insights into the shipping reality. I am grateful to my supervisor Prof. Dr. Ulrich Magnus for his continuous support and sound advice. I am grateful also to the Max Planck Institute for Comparative and International Private Law in Hamburg for putting its facilities and administrative support at the disposal of me and the other scholars of the Research School. In particular, I would like to thank Michael Friedman at the Institute for proof-reading. I would like also to use this opportunity to express my appreciation for having been given the chance to spend the last years in the good company of and with support of my fellow scholars and associates of the Research School. Without you, many days spent at the Institute would not have passed by as fast and many evenings time spent outside of the Institute been much less enjoyable. Last but not least, thank you Adrian for always being there.

Hamburg, Germany  
February 2015

Lina Wiedenbach



# Abbreviations

AC	Law Reports, Appeal Cases
ADHGB	Allgemeines Deutsches Handelsgesetzbuch
AfS	Arkiv for sjørett
AIMU	American Institute of Marine Underwriters
AMC	American Maritime Cases
App. Cas.	Law Reports, Appeal Cases
CA	Court of Appeal
CDT	Code des transports
CI	Containerisation International
CLR	Commonwealth Law Reports
CMI	Comité maritime international
COGSA	Carriage of Goods by Sea Act
Com. Cas.	Commercial Cases
CP(D)	Law Reports, Common Pleas Division
CSP	Commercial Sea Port at Vyborg
Dir. mar.	Il diritto marittimo
DMF	Droit Maritime Français
Doug. KB	Douglas' King's Bench Reports
dwt	Dead weight tonnage
EDI	Electronic data interchange
ER	English Reports
EU	European Union
Ex. D	Law Reports, Exchequer Division
FCL	Full container load
FED	Forsikrings – og erstatningsretslig domssamling
F.Supp.	Federal Supplement
HGB	Handelsgesetzbuch
HL	House of Lords
ICC	International Chamber of Commerce
ICC	Institute Cargo Clauses



ICJ	International Court of Justice
JIML	Journal of International Maritime Law
J Mar L & Com	Journal of Maritime Law and Commerce
JT	Juridisk tidskrift
ILA	International Law Association
IMO	International Maritime Organization
IMDG Code	International Maritime Dangerous Goods Code
ISO	International Organization for Standardization
KB	Law Reports, King's Bench Division
L.C.	Lord Chancellor
LCL	Less than full container load
Ld. Raym.	Lord Raymond's King's Bench Reports
L.J.	Lord Justice
Li. L. Rep.	Lloyd's List Law Reports (1919–1950)
Lloyd's Rep.	Lloyd's Law Reports (1951–)
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LQR	Law Quarterly Review
LR	Law Reports
M & W	Meeson & Welsbys Exchequer Reports [ER 105]
MT Convention	Multimodal Transport Convention
ND	Nordiske domme i sjøfartsanliggender
NJA	Nytt juridisk arkiv
NMCs	Nordic Maritime Codes
NOU	Norges offentlige utredninger
NSWLR	New South Wales Law Reports
NTHR	Nederlands tijdschrift voor handelsrecht
NZLR	New Zealand Law Reports
P	Law Reports, Probate
P&I	Protection and indemnity
QB(D)	Law Reports, Queen's Bench Division
RCJB	Revue critique de jurisprudence belge
Rt	Norsk retstidende
SCR	Supreme Court Reports
SDR	Special drawing right
SMC	Swedish Maritime Code
SOL	Shipowner liability
SOU	Statens offentliga utredningar
STC	Said to contain
SvJT	Svensk juristtidning
TLR	Times Law Reports
TranspR	Transportrecht
Tul. L. Rev.	Tulane Law Review
UCP	Uniform Customs Practice for Documentary Credit
UCTA	1977 Unfair Contract Terms Act

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties



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# Chapter 1

## Introduction

Deck carriage [...] remains an unsettled issue in modern carriage by sea law, while legislators and courts continue to wrestle with the challenge of adapting that law to constant technological changes.<sup>1</sup>

Carriage on deck without authorisation has long constituted a serious breach of contract. This state of law originates in the perception that the deck is not a proper place to stow goods. At the time of the drafting of the 1924 Hague Rules, the deck was a dangerous and unusual place to stow cargo, made use of only in certain local trades. In order not to interfere with the freedom of contract in these trades, deck carriage with authorisation was excluded from the scope of the Rules and their mandatory liability regime.

Since then, technical developments have made deck carriage considerably safer and today the deck is a common place to stow goods; not least the introduction of the container in the mid-1950s triggered a steady increase of the amount of cargo carried on deck. The container's solid steel structure together with the design of modern container vessels protects containerised goods from many traditional risks involved in the stowage on deck.

However, while shipping realities have changed, the law has not. Despite two attempts to modernise and harmonise the international law through the 1978 Hamburg Rules and the 2009 Rotterdam Rules, the 1924 Hague Rules in their unamended or amended form (through the 1968 Visby Protocol), remain the central Convention. Against this reality, not only have national legislators and decision makers had to find ways to apply the dated Rules to novelties which have arisen in modern trade, they have also had to find ways to cope with problems not covered by the Rules in the first place. The carriage of cargo on deck involves problems of both types.

It is not possible to generalise the wide variety of national approaches taken in this area. Significant differences are found within the common law sphere alone,

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<sup>1</sup>Tetley (2008), p. 1617.

and an attempt to rationalise the law relating to deck cargo, even under the Hague and the Hague-Visby Rules, is dangerous. This study, therefore, shall focus on the carrier's liability for deck cargo in Nordic<sup>2</sup> and English law – two legal opposites in this aspect for reasons other than the systems' various traditions in civil and common law, although the Nordic countries as well as England adhere to the Hague-Visby Rules. Whereas the Nordic countries industriously endeavour to adjust the law on contracts of carriage to the latest commercial and economic changes (introducing the new Nordic Maritime Codes in 1994 largely based on the 1978 Hamburg Rules,<sup>3</sup> and being now again at the drafting table on the occasion of the introduction of the 2009 Rotterdam Rules), England takes a rigid attitude – if not the most rigid attitude among the seafaring nations belonging to the common law tradition – towards changes of the traditional common law regime.

This has resulted in that while the Nordic countries apply a mandatory special liability regime for deck cargo (based on Art. 9 of the Hamburg Rules), authorised deck carriage is left in England to be governed by common law, under which a carrier may even exclude liability through a sufficiently clearly drafted clause.

The purpose of this study is to evaluate which *liability regime* for deck cargo best fulfils the needs of modern trade. As a side effect, the study may also profit maritime actors as useful advice when dealing with deck cargo under the current circumstances. The evaluation will be based essentially on a comparison of the “progressive Nordic approach” and the “traditional English approach”, inevitably involving also intermediate solutions, such as the possibility to include deck cargo under the general liability scheme (Chap. 6).

As already indicated, the heart of the matter is closely connected with the carrier's *right* to stow cargo on deck, as the liability largely depends on whether cargo has been stowed on deck with or without such a right (Chap. 5). Other issues of relevance for the understanding of the subject matter include the general characteristics of, respectively, Nordic and English maritime law (Chap. 4), the developments in international law (Chap. 3) and an overview of the realities to which the law is applied (Chap. 2).

Finally, a few reservations should be made. This study deals with the carrier's liability towards the cargo interest<sup>4</sup> for loss of or damage to general cargo<sup>5</sup> in liner trade. Deck cargo issues arising under a charter party or on the occasion of jettison

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<sup>2</sup> Indeed, there is no “Nordic law” in the term's true sense. However, the Swedish, Norwegian, Danish and Finnish Codes were drafted in close collaboration, resulting in four codes with essentially identical content as to contracts of affreightment – see Sect. 4.1.1.

<sup>3</sup> Without officially adopting the Hamburg Rules, the Nordic countries have extended the scope of application of the Hague-Visby Rules on essentially every matter excluded under Art. I of the Hague-Visby Rules – see Sect. 4.1.4.3.

<sup>4</sup> Which is somewhat imprecisely referred to as “shipper” in this work, but which includes also, unless nothing else is indicated, a consignee or other third party holder of the bill of lading or an insurer entitled to claim damage based on a right of recourse.

<sup>5</sup> As opposed to bulk cargo. The term in this context, thus, includes also containerised goods in accordance with the use of general cargo under the 1994 Nordic Maritime Codes, although the

are accordingly not an object of the study, although case law from these fields may sometimes be relevant and, thus, is occasionally cited.

## **Reference**

Tetley W (2008) Marine cargo claims, 4th edn. Thomson Carswell, Cowansville

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writer is aware that the term general cargo is often used differently in shipping to connote cargo which is neither bulk nor containerised.