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THE HAGUE VISBY RULE: A STEP FURTHER IN MARITIME LEGAL REGIME BY OLATOYE K.A.*

INTRODUCTION

Hague Visby rule is one of the cargo conventions, namely: The Hague Rules, Visby rules and the Hamburg rules, regulating the contract of affreightment at international level. I must sign this note right at this juncture that there cannot be any justifiable write up and a proper understanding of 'the Hague Visby rule' as a step further without a comparative analysis of same with the preceding regime (i.e. the Hague rules) and possibly a little incursion into the succeeding regime of rule (i.e. the Hamburg rules). This is because the phrase 'a step further' portends an improvement while an improvement portrays existing earlier rules improved upon. It is consequently an approach premised on the foregoing assertions I adopt in this essay.

Contract of affreightment² is referred to as contracts for the carriage of goods in a ship expressed in a document known as bill of lading. The Nigerian Carriage of Goods by Sea Act 1926 (COGSA) defines a contract of carriage as a '......contract covered by a bill of lading or any similar document of title in so far as such document relates to the carriage of goods by Sea.³

A bill of lading, which evidences the carriage contract has been described as 'a document signed by the shipowners, or by the master or other agent of the shipowner, which states that certain specified goods have been shipped in a particular ship, and which purports to set out the terms on which the goods have been delivered to and received by the ship. After signature, it is handed to the shipper, who

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^{1.} See Hague Rules Convention 1924, Hague Visby Rules Convention 1968, and Hamburg Rule Convention 1978/79.

^{2.} There are two types i.e. the one by charter party and one evidenced by bill of lading. The later type is the focus of this essay.

may either retain it or transfer it to a third person. The person may be named in the bill of lading as the person to whom delivery of the good is to be made on arrival at their destination, in which case he is known as the consignee, if he is not named in the bill of lading he is usually known as the holder or endorsee of the bill of lading.'

A bill of lading can be said to serve as a receipt for the goods shipped and contains certain admissions as to their quantity and condition when put on board. It is a document of tittle without which delivery of the goods cannot normally be obtained; and it serves as evidence of contract of affreightment, though not contract itself, because the

contract is usually entered into before the bill of lading is signed.

HISTORY AND OBJECTIVE OF THE RULES

Historically prior to 1924, the contract of carriage of goods by Sea was subjected to municipal laws. In the United Kingdom from where we inherited our Maritime Law the law of carriage of goods by sea was governed by common law.

There were two main features of the common law of carriage by sea. First, the liability of the carrier was strict and not dependent on negligence. Thus the carrier was prima facie liable if the goods were not delivered to their destination in the same condition in which they had been shipped. The strict liability of the carrier would seem at first sight to have been to the considerable advantage of the cargo owner. In fact, however, the second feature of the common law routinely negated any advantages.

The freedom of contract prevalent in the last century allowed contracts of carriage to contain wide ranging exemption clauses, to which the common law gave effect. It should be appreciated that whereas ially

^{3.} Article 1, Carriage of Goods by Sea Act, Cap 44 laws of the Federation, 1990.

^{4.} Mbanefo L.N. (SAN) Grautis Review of Business & Property Law Journal (Nigerian & International) February 1989 (2 GRBPL No. 3) P. 84

^{5.} SELWELL V BURDICK (1884) O A.C. 74, 105 per Lord Bramwell

^{6.} Other rules formulated later are The Hague Visby Rules and The Hamburg Rules.

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

This situation created the need for legislative intervention with a view to fashion out a compromise between shipowners and the cargo owners. The intervention would however not be of much importance if restricted to individual states whereby states are allowed to continue to define rights & liabilities of the shipoweners and cargo owners without any attempt at formulating rules that would be of general application. In response to the need for international co-operation, co-ordination and harmonization of rules relating to bills of lading, a meeting of the international Law Association was held at The Hague in 1921. The object was to secure the adoption by the countries represented of a set of rules defining and limiting the respective rights & duties of the parties to a contract of affreightment that is evidenced by a bill of lading.

The rules formulated at the meeting of the International Law Association were called the Hague rules. These rules were revised and embodied in the articles of international convention for the Unification of certain rules of Law Relating to Bills of Lading signed at Brussels, August 25, 1924. The rules made out a deal for both the shipowners and the cargo owners. In general the cargo owners gain because they can bring actions where they could not before. On the other hand various exemptions and limitations on carrier liability are also written into the Hague rules.

^{7.} Abiola Falshe Aluko, "The Applicability of The Hague Visby and Hamburg Rules in Nigeria", Lagos State University Seminar series, 1997, page 1.

^{3.} Mbanefo L.N (SAN) Gravitas Review of Business & Property Law Journal (Nigerian International) February 1989 (also cited as 2 GRBPL No. 3) P. 84

[.] S.2, Carriage of Goods By Sea Act 1926, now Cap 29 of the Laws of the Federation, 990.

The underlying philosophy behind the Hague rules was the protection of the cargo-owner by granting him certain entrenched rights in his relationship with the ship owner. Though generally it is accepted that the Hague and Hague Visby conventions are more favourable to shipowning interests⁷ while the later regime i.e. Hamburg rules favourable to cargo owning interest.

The Brussels convention was ratified by Britain on behalf of Nigeria. This is because The Hague rules have been part of Nigeria law since March 1926 when the first eight articles and part of the ninth article of the sixteen articles of the rules were adopted as schedule appended to the Carriage of Goods by Sea Act enacted in 1926.8

The enactment with the schedule is now cap 29 of the laws of the federation of Nigeria, 1990. However, the rule via the COGSA° is applicable only in respect of outward cargo but not inward shipment¹⁰. Although a few decisions have held that its also applicable to inward shipments. ¹¹

However the Hague rules were drafted in a way that allow for circumvention. For example the general paramount clause which provides that every bill of lading to which the Rules shall apply must contain an express statement that is subject to the rules set out therein has been considered to be a flaw. According to L.N. Mbanefo.

"After four decades of operation the need for the amendment of the Hague rules gathered momentum. Consequently a further conference was commenced in Sweden and at Visby in 1968 it adopted a protocol to the Hague Rules.

The amendments introduced by protocols became known as The Hague Visby Rules. They have been adopted by a number of countries and are said to favour the ship owning and industrial Countries."

In his comment on The Hague Visby Rules Tetley opine thus:

^{10.} Abiola Falase Aluko, Op.Cit;

^{11.} Henry Stephens & Sons V Polish Steamship Co. (1969) NCLR 321. Also Savannah Bank of Nigeria Ltd V Pan Atlantic (1987) 1 NWLR Pt 49 P.212.

^{12.} Mbanefo L.N. (SAN), 2 GRBPL No. 3 P. 84

^{13.} William Tetley, Identity of the carrier Hague Rules, Visby Rules, UNCITRAL, LMCLQ (1977) 519.



"The Visby Rules were the outcome of the successful deliberations of the committee Maritime International Conference in Stockholm in 1963 where changes to the Brussels Convention of 1924 were adopted. The commitment in the historic city of Visby after the conference thereby gave the Visby Rules the name"13

Although there was further amendment to the Visby Rules in 1978 by the Hamburg Rules, that is not the subject of our discuss in this work.

PROVISIONS OF THE RULES

THE HAGUE RULES CONTENT a.

The Hague Rules (the Brussels convention of August 25, 1924) had sixteen articles in all but only the first eight and partly the Ninth Article became part of Nigerian Law when it was scheduled to the Carriage of Goods by Sea Act (COGSA) 1926, now in cap 29 of the laws of the Federation of Nigeria 1990.

The Hague Rules impose on the shipowner certain minimum obligations with regard to the ship and cargo. The shipowner has an obligation to provide a seaworthy ship, to properly man, equip and supply the ship and to make the holds, refrigerating and cooling chambers and all other parts of the ship in which goods are carried fit and safe for the reception, carriage and preservation of such goods.14

The shipowner also has responsibility to the cargo carried on board the vessel. The carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. 15 The Hague Rules tie the hands of the shipowner by making any clauses covenant or agreement in a contract of carriage, relieving the carrier or the ship from liability for loss or damage to the goods, arising out of

^{14.}Article 111 (1) Hague Rules; Also Abiola Falashe Aluko, "Application of the Hague, Hague Visby and the Hamburg Rules in Nigeria" LASU Law Seminar Series 1997, p.5.

^{16.} Article III (8)

^{17.} Article IV (1-4)

^{18.} Abiola Falashe Aluko Op.Cit;

negligence, fault or failure in the duties and obligations provided in negligence, respensing such liability otherwise than as provided in the Rules or lessening such liability otherwise than as provided in the the Rules of its and of no effect. However the shipwoner is not liable rules null, voice as there is exemption from liability in any of the in all clication in Article iv (1-4) of the Hague Rules. 17 For example there is exemption from liability in any loss or damage arising from there is one of God, act of War, quarantine restrictions e.t.c. 18

HAGUE VISBY RULES' PROVISIONS

The Hague Visby Rules are contained, in the main, in ten articles. Article 1 is the definitional section. Article II stipulates the risks covered by Hague Visby Rules. Article III prescribes the responsibilities of the carrier.

Article IV defines the Right and immunities of the parties to a contract of carriage (evidenced by a bill of lading), Article V-VIII cover the carrier's right to limit or assume liability. Article IX excludes the applicability of the Rules to any International convention or national law governing liability for nuclear damage. Finally Article **x** delimits the scope of the applicability of the Hague Visby Rule.19

DEFICIENCIES IN HAGUE RULE THAT HAGUE VISBY RULE IS SET TO RECTIFY.

The Hague Rules were amended following a further International Convention in 1968. This was sequel to the Stockholm Conference of the committee Maritime International in June 1963.

The new rule which essentially was to cure the efficiencies of the earlier regime (i.e. The Hague Rules) were formulated and became known as the Hague Visby Rules promulgated into law by the signatory nations. Nigeria was not a signatory to that convention but

^{19.}The Hamburg Rules has twenty-six articles.

^{20.}Mbanefo L.N. "Bailment and Bills of Lading", The Gravitas Rreview of Business & Property Law Journal (Nigerian and International) December 1988 (1 GRBPL No.1) Page 73.

^{21.}Leventis Technical Ltd V Container Terminal Co. (Nig) Ltd and Ors (Unreported) Suit

No. FHC/L/38/80 of 16/9/81 Fed. H.C., Lagos) 22. Mbanefo L.N., "Hague Visby Versus Hamburg Rules", (Supra) page 90 23. (1980-86) 2 NSC 348.

Britain for instance has promulgated the Rules into the 1971 carriage of goods by seas Act (which came into force in 1977).20

Fewer as the Articles in the Hague Visby Rules appear to be, the regime is a tremendous improvement on the Hague Rules. At this juncture, only the major amendments introduced to the Hague Rules by the Hague Visby Rules shall be examined:-

- JURISDICTION CLAUSE: This is a common plea raised by the 1. defending party whether he be shipper or shipowner that there is a jurisdiction clause in the Bill of Lading which binds the parties to sue in the country named therein 21. Whereas the Hague Rules permit jurisdiction clauses giving jurisdiction to the courts of the nationality of the carrying ship, the carrier or the consignee or other interested party, the Hague Visby Rule makes a radical departure by providing that there is jurisdiction only if:
- The Bill of lading is issued in the contracting state. a.
- The carriage is from a port in a contracting state or b.
- The Bill of Lading stipulates that the Hague Visby Rules or the C. legislation in any state giving effect to them should apply.²²

2. "HIMALAYA CLAUSE"

Article IV of the Hague Visby Rules gives the servants or agents the same, defense of limitation of liability as are available to the carrier. The position under the Hague rules was the device of the "Identity of Carrier" clause used to exclude the liability of such agents or servants as was espoused in the supreme court's decision in ALLIED TRADING CO LTD V GBN LINES.²³ However, an independent contractor is not included and neither is the servant or agent who acts deliberately or recklessly with knowledge that harm would result.

^{24.} Mbanefo L.N., Hague Visby V Hamburg Rules" Op.Cit; page 89 25.(1986) 2 NWLR Pt 23 P. 458

^{26.} Mbanefo L. N. "Hague Visby versus Hamburg Rules"Op.Cit; p. 88

^{28.(1851)} ER 263,

^{29..} Mbanefol. N "Hague Visby Ruler versus Hamburg Rules" (Supra) page 91

PER PACKAGE LIMITATION (OF LIABILITY)

Article IV (5) of the Hague Rules provided a limit of liability of 3. Carrier or the ship of 100 francs per package or unit carried. But Article IV (5a) of the Hague Visby Rules amends and amplifies this to Article 17 (27)

10,000 francs per package or unit or 30 francs per kilogram of gross 10,000 it the goods lost or damage which ever is higher. Article IV weight of packages or units and to consolidate (5c) 101 me number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed to be the unit. To prove the virility of this provision, it was adopted without change by the latter francs per package or unit or 30 francs per kilogram of gross weight of the goods lost or damage which ever is higher. Article IV (5c) further provides that where a container 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 to be the unit. To prove the virility of this provision, it was adopted without change by the latter francs per package or unit or 30 francs per kilogram of gross weight of the goods lost or damage which ever is higher. Article IV (5c) further provides that where a container 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 to be the unit. To prove the virility of this provision, it was adopted without change by the latter regime of Hamburg rules.24

4. TIME BAR OR LIMITATION

Article iii (6) of both the Hague Rules and the Hague Visby Rules provide for a one year time limitation in bringing claims, pursuant to which provision Justice Karibi Whyte in interpreting and applying the Hague Rules in the case of KAYCEE (NIG) V, PROMPT SHIPPING CORPORATION LTD 25 upheld the one year limitation

^{30.}Abiola Falashe Aluko "Applicability of the Hague, Hague Visby and Hamburg Rules in Nigeria LASU Law seminar series (1997) P. 8; Brussels convention 1924 Hague Rules Comite Inter-conference in Stockholm 1963.

period. However, the difference is that while The Hague rules relate only to claims in respect of loss of or damage, Hague Visby include all claims in respect of goods e.g. claims in respect of delay or misdelivery.

5. INDEMNITY AGAINST A SUBCONTRACTOR

Article III (6) of the Hague Visby Rules provides that an action for indemnity against a third person may be brought even after the expiration of the one year time limitation, provided that it is brought within the time allowed by the law of court seized of the case. This was remarked by L.N. MBANEFO²⁶ as marking a departure from the absolute one year time limit granted by Article III (6) of the Hague Rules for bringing an action for loss or damage to goods. It should however be noted that action for indemnity may be brought outside the one year period only if it is commenced within the time not more than three months from the time the person seeking the indemnity has settled the claim or has been served with the process in the action against himself.²⁷

6. EVIDENTIAL EFFECT OF THE BILL OF LADING

The earlier position of law was that the master of a vessel has no authority to sign for goods not shipped. Thus in the case of *Grant Norway* ²⁸ it was held that the usual rule that the master's signature binds the ship owner would not apply where the goods had not been shipped at all. However, under the Hague Visby rules the bill of lading is conclusive evidence of the terms of contract once the bill has been transferred to a third party acting in good faith.²⁹

Under The Hague Rule Via Article III (4), a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described. The Hague Visby rules add the provision that proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

LIABILITY IN TORT

According to Abiola Falashe Aluko in her Article 30 a careful perusal of the Hague Visby rules shows that the defenses and limits of liability provided for by the Hague Visby Rules in any action against the ship owner will apply whether the action is founded in contract or in tort.

EFFECTIVENESS, SUCCESS AND FAIRNESS OF THE HAGUE VISBY TO THE DEVELOPING WORLD

It should be noted that whereas the Hague Visby Rules are presently in force in most of the worlds shipping nations, Nigeria has not acceded Consequently the Nigerian Court has not had the ample opportunity to hand down decisions premised on the interpretations of The Hague Visby Rule.

Nevertheless in most Countries where the Hague Visby rules have been adopted, they are received with enthusiasm and viewed as a relief and respite from the onerous regime of the Hague Rules. Mbanefo posited for instance that the Hague Rules were drafted in a way that allow for their circumvention. For example the General Paramount Clause which provides that every bill of lading to which the Rules shall apply must contain an express statement that it is subject to the rules set out therein was considered to be a flaw by the learned writer and others. The Visby Rules on the other hand were more elaborate, more explicit and easier to interpret.

Moreover, the fact of the retention of most of the Hague Visby Rules by the later regime (Hamburg Rules) e.g. Himalaya clause, per package limitation etc is a testimony to the acceptability of Hague Visby Rules as the instrument of balancing of interest of the shipper/consignee and the carrier.