The Marine Law Box by Dr. Arun Kasi

What is in this Bulletin?

- ✓ Hague-Visby Rules in Malaysia wef 15 July 2021
- ✓ Innovative Extension to 'Sea Carriage Documents'
- ✓ From Hague to Hague-Visby: Implications?

Upcoming Webinars by Dr. Arun Kasi

- ➢ 06 Aug 2021: Collisions at Sea (AAS)
- ➢ 18 Aug 2021: Maritime Arbitration (LMAA) (UM)
- ➢ 09 Sep 2021: Oil Pollution (Gujarat Maritime Univ.)

Bulletin of
Arun Kasi & Co

International
Maritime Lawyers & Arbitrators
Bulletin No. MLB 2/2021
5 August 2021
https://arunkasico.com

Malaysia switches to Hague-Visby Rules (with SDR Protocol) wef 15 July 2021: Implications?

© Author **Dr. Arun Kasi**, LLB (Hons), LLM, CLP, Barrister (Lincoln's Inn), FCIArb (London), PhD; Advocate & Solicitor in Malaysia, Arbitrator in the panels of AIAC and THAC, Member of LMAA and SCMA; Arbitrator under terms of LMAA/SCMA.

Thanks to **Mr. Ravindra Sahu**, Managing Director of CMA CGM Malaysia Sdn. Bhd. for reading this paper in draft.

Abstract

The Carriage of Goods by Sea Act 1950 that implemented the Hague Rules of 1924 for Peninsular Malaysia has, wef 15 July 2021, been amended in two major aspects. One, switch over to the Hague-Visby Rules of 1968 as amended by the SDR Protocol of 1979. Another, extension of the Rules to all sea carriage documents which will include sea waybills and ship's delivery orders. While the first amendment has put Malaysia on par with major maritime nations, the second one has taken Malaysia a step ahead of them. However, there are a number of shortfalls in the law in Malaysia relating to carriage of goods by sea that have not been addressed by the amendment. This paper introduces the switch-over and the extension of the Rules to sea carriage documents. It then discusses the changes to the law, the most important of which is in relation to liability limitation, bought about by the switch over, with references to domestic and English cases. The amendment will require carriers to ensure reference is made in the bill to the Hague-Visby Rules (SDR) replacing the reference previously made to the Hague Rules.

Implementation of long-awaited switch to Hague-Visby Rules (SDR)

Peninsular Malaysia makes the long-awaited switch to the Hague-Visby Rules of 1968 (as amended by the SDR Protocol of 1979) on 15 July 2021. The change is brought about by the Carriage of Goods by Sea (Amendment) Act 2020 amending the Carriage of Goods by Sea Act 1950. The amendment is a welcome milestone in the development of maritime laws in Malaysia, which amendment has now put Malaysia largely on par with the major maritime nations like the UK and Singapore on this aspect.

Under the 1950 Act, prior to the amendment, the Hague Rules of 1924, which was scheduled to the Act, applied to all shipments from Malaysian ports.[i] The reference to the Malaysian ports here was seemingly limited to Peninsular Malaysian ports as the application of the Act was limited to Peninsular Malaysia.[ii] In the case of bills of ladings issued in Peninsular Malaysia, irrespective of whether the shipment was from a port in Peninsular Malaysia, a statement was required to be included in the bill of lading incorporating the Hague Rules. The application of the Hague Rules was limited to bills of lading,[iii] in line with the scheme of the Hague Rules.

However, the states of Sabah and Sarawak remain with the Hague Rules,[iv] while none for Labuan since it was severed from Sabah and made a federal territory of Malaysia in 1984.

Extension of Hague-Visby Rules to all 'sea carriage documents'

The 2020 Amendment Act amended the 1950 Act in two aspects. First, the 2020 Amendment Act empowered the Minister of Transport to change the rules scheduled to the Act.[v] On 15 July 2021, when the 2020 Amendment Act came into force, the Minister had simultaneously by *Gazette* replaced the Hague Rules in the schedule with the Hague-Visby Rules (as amended by the SDR Protocol).[vi] Secondly, the 2020 Amendment Act has extended the application of the Rules to all 'sea carriage document'.[vii] Although 'sea carriage document' is not defined in the Act, it will include sea waybills and ship's delivery orders. A comparison of the Malaysian law on this aspect, as it is today, with that of the UK and Singapore, runs like this. All three

countries are now under the Hague-Visby Rules. The UK and Malaysia have also implemented the SDR Protocol. Singapore has not adopted the SDR Protocol, but instead has set up its own scheme in place of the SDR Protocol, by which the liability of carrier is limited to specified amounts in SGD.[viii] The UK and Singapore have limited the application of the Rules to bills of lading,[ix] in line with the scheme of the Rules. Malaysia has gone a step ahead to extend the Rules to other sea carriage documents. Again, this is a welcome change. The background to why the other sea carriage documents were not included in the Hague and Hague-Visby Rules was that when the Hague Rules was made, in 1924, these documents were not practically in use. That is not so nowadays with the widespread use of sea waybills, eg. in connection with transhipments, and of ship's delivery orders to split delivery-undertaking in carriage of bulk cargo.

However, it must be noted that an extension of the Rules to other sea carriage documents does not confer the contractual rights under the documents on the consignee. The UK and Singapore have a separate Act to deal with transfer of rights. In the case of the UK, it is the Carriage of Goods by Sea Act 1992, and in the case of Singapore, it is the Bills of Lading Act. Both these Acts are materially similar. By these Acts, the consignee named in the sea waybill or ship's delivery order acquires the contractual rights originally held by the shipper against the carrier. Insofar as Peninsular Malaysia (other than the states of Penang and Malacca) is concerned, the UK Bills of Lading Act 1855 (although now repealed in the UK and replaced with the 1992 Act) is imported into Malaysia by s 5(1) of the Civil Law Act 1956. The 1855 Act has no provision for transfer of the contractual rights in sea waybills and ship's delivery orders. For the states of Penang, Malacca, Sabah and Sarawak, the UK 1992 Act is imported into Malaysia by s 5(2) of the Civil Law Act 1956. Labuan is left in lacuna, since after it was severed from Sabah and declared as a federal territory of Malaysia in 1984, with no statute providing for transfer of contractual rights in bills of lading. When the contractual rights are not statutorily transferred, they are not transferred by any other means.[x] However, in the case of bills of lading, this does not affect common law transfer of constructive possession of the goods, i.e. right to claim possession of the goods from the carrier upon presentation of the bill of lading,

to the transferee of the bill of lading.[xi] It must be noted that the bill of lading, without reliance on any terms of contract embodied within it, is itself a token representing the goods, which enables the lawful holder of the bill to claim the goods represented by the bill by presenting the bill to the carrier.[xii] Another disadvantage of the 1855 Act[xiii] is that it requires, unlike the 1992 Act,[xiv] the property to be transferred at the same time[xv] with the transfer of the bill of lading for the contractual rights to be transferred. Hence, a bank taking a bill of lading in pledge in return for financing will not get the contractual rights, although a court may balance the rigours by finding an implied contract between the bank and the carrier when the carrier presents the bill for collection of goods.[xvi] The 1855 Act has no provision to allow the holder of the bill of lading to take action for the benefit of the true owner of the cargo, while the 1992 Act[xvii] expressly permits such action. However, even in the absence of such permission, the courts have held that such action was permitted.[xviii]

From Hague to Hague-Visby Rules (SDR): the implications

The key differences between the Hague Rules and the Hague-Visby Rules are briefly discussed and compared below. Under the Hague Rules [Art I(4)], the bill of lading is *prima facie* evidence of receipt by the carrier of the goods as described in the bill. Under the Hague-Visby Rules, it is conclusive evidence insofar as a third-party transferee in good faith of the bill is concerned. Even in the absence of a provision as that in the Hague-Visby Rules, the same result would be obtained at common law by the principle of estoppel and detriment.[xix]

Art I(6) of the Hague-Visby Rules now expressly provides that the one-year time limit for cargo claims can be extended by agreement of the parties after the cause of action has arisen. Even in the absence of such an express provision, the same is true under the Hague Rules, as there was nothing to prevent the parties from entering into such an agreement and such an agreement would not be invalided by Art III(8) because it is not more unfavourable to the shipper than that provided in the Rules.

Art I(6*bis)*, newly introduced in the Hague-Visby Rules, extends the time limit for indemnity actions by a carrier to the limits as set by the domestic law subject to a minimum of three months after the settlement by or service of the process on the person making the indemnity claim. In the case of Malaysia, this will be six years[xx] arguably counted from the date when the cause of action originally arose. In the case of England and Wales and of Singapore, likely this will be two years counted from the day of when the liability of the person making the indemnity claim was established.[xxi] In the absence of such an extension, the time limit will be triggered in 2 years.

Art IV(5) brings the most important change, i.e. the liability limit. Under the Hague Rules, the liability of the carrier is limited to £100 per package or unit. This means gold value, per Art IX. *The Rosa S*[xxii] well interpreted the two articles to say that the '£100' must be manipulated to gold value of £100 in 1924, which makes sense by allowing inflation factor. This manipulation will result in about £7,000 per package or unit at the present time, while the resultant manipulation in *The Rosa S* gave a result of SGD9,398 for 1982. However, Malaysian courts, without reference to *The Rosa S*, have held '£100' to merely meant the face value of £100.[xxiii] In the case of the states of Sabah and Sarawak, the '£100' has been modified to 'RM850' around 1960.[xxiv] This leaves some scope for argument as to whether the RM850 should be manipulated to gold value as at 1924 or around 1960. The Hague-Visby Rules (as amended by SDR Protocol) has resolved this problem by providing the liability limit at SDR 666.67 per package or unit or SDR 2 per kilogramme of gross weight of the goods lost or damaged, whichever is higher. There is no need to provide for any separate fluctuation factor in this scheme, as it is embedded in the SDR, which is a basket of five major currencies.[xxv] In that vein, the 'gold value' provision in Art IX has been removed. One SDR costs about £1.06 or USD1.45 at present.[xxvi] Accordingly, the Hague-Visby Rules (as amended by the SDR Protocol) will be more favourable to the carrier in cases where the package limitation applies. But this may turn the other way round if the limitation by gross weights yields a higher amount, as the liability is limited by whichever the amount is higher between the package limitation and gross weight limitation.

There is no liability limit for bulk cargoes in the Hague Rules. Under the Hague-Visby Rules, the limitation by gross weight therein will be applicable in the case of bulk cargoes. This is a clear advantage to the carrier, as the carrier had no limitation in case of bulk cargo under the Hague Rules.

Under the Hague Rules, there was some confusion in the case of containerised cargo as to whether the package or unit was the container itself or the packages or units contained in the container. The English, American and Australian courts have largely preferred that it means the packages or units contained in the container.[xxvii] However, a contrary view had been had by a Malaysian court without reference to those authorities.[xxviii] This problem is solved in the Hague-Visby Rules, which provides that the packages or units will be those contained in the container when such packages or units are enumerated in the bill of lading.

The Hague-Visby Rules disentitles the carrier to the liability limitation where "the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result." This will not be of practical application as the threshold is so high before the carrier will be deprived of the liability limitation benefit in the Rules.

Art IV*bis* has been newly introduced in the Hague-Visby Rules that expressly declares that the protection accorded to the carrier will be available also in tort actions where the action is "in respect of loss or damage to goods covered by a contract of carriage". It is likely that even in the absence of such a provision, the same would be the position.[xxix]

The new article extends the protection to servants and agents, but not to independent contractors. In the absence of such extension, carriers had successfully devised the methodologies of Himalaya clause and circular indemnity clause to extend the protection to servants and agents.[xxx] Typically a bill of lading will contain these clauses which have found their way in the standard BIMCO forms of bills of lading and sea waybills. The carrier or agent would lose the protection only if "the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably

result." This is too high a threshold for a cargo claimant to satisfy, hence it is not one that will be of practical utility.

Art IX has been replaced in entirety with a provision saying the "Convention shall not affect the provisions of any international Convention or national law governing liability for nuclear damage."

Finally, Art X provides a new scheme of application of the Rules. Art X in the Hague Rules provides that the Rules will apply if the bill of lading is issued in a member state. In the case of Malaysia, this was in effect modified to say that the Rules will apply only if the shipment was from a Malaysian port or the bill of lading was issued in Malaysia (by compulsory contractual statement). Art X in the Hague-Visby Rules provides, in wider terms, that the Rules will apply if the bill of lading is issued in a contracting state, or the carriage is from a port in a member state, or the contract provides so. Under this Article, where the contract provides so, the application is with statutory force rather than mere contractual force. The difference between the two is that when the application is by statutory force, the provisions cannot be modified or ousted in a way that the terms are less favourable to the shipper.[xxxi]

Further Reading:

Arun Kasi, *The Law of Carriage of Goods by Sea*, Singapore, Springer, 2021

---

[i] Sec 2.
[ii] Sec 1.
[iii] And similar documents of title.
[iv] Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and Others) Regulations 1960 in the case of Sarawak. Merchant Shipping (Applied Subsidiary Legislation) Regulations 1961 in the case of Sabah.
[v] Sec 6A Carriage of Goods by Sea Act 1950 (as amended now).
[vi] By the Carriage of Goods by Sea (Amendment of First Schedule) Order 2021.
[vii] Secs 4 and 6 Carriage of Goods by Sea Act 1950 (as amended now).
[viii] By the Carriage of Goods by Sea (Singapore Currency Equivalents) Order (1992).
[ix] And similar documents of title.
[x] Doctrine of privity of contract. *Thompson v Dominy* (1845) 14 M & W 403 (Court of Exchequer Chambers); *Howard v Shepherd* (1850) 9 CB 297 (EW Court of Common Pleas).
[xi] (1870) LR 4 HL 317 (UK HL).

[xii] (1870) LR 4 HL 317 (UK HL).
[xiii] Sec 1.
[xiv] Sec 2.
[xv] *Mitsui & Co Ltd v Novorossiysk Shipping Co (The Gudermes)* (CA) [1993] 1 Lloyd's Rep 311.
[xvi] *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, [1923] All ER Rep 656 (CA).
[xvii] Sec 2(4).
[xviii] *Dunlop v Lambert* (1839) 6 Cl & F 600 (HL). Cf *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] AC 774 (HL).
[xix] *Cremer v General Carriers SA (The Dona Mari)* [1973] 2 Lloyd's Rep 366, [1974] 1 All ER 1, [1974] 1 WLR 341 (HC). See *Redgrave v Hurd* (1881) 20 Ch D 1 (CA); *Peekay Intermark Ltd v ANZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 (CA); *Colchester BC v Smith* [1991] Ch 448 (HC, affirmed by the Court of Appeal in [1992] Ch 421 (CA).
[xx] Sec 6 Limitation Act 1953. Cf *Sabarudin bin Othman & Anor v Malayan Banking Bhd and another appeal* [2018] MLJU 304 (MY CA).
[xxi] UK Limitation Act 1980, s. 10. Singapore Limitation Act, s 6.
[xxii] [1988] 2 Lloyd's Rep 574 (EW HC).
[xxiii] *Shun Cheong Steam Navigation Co Ltd v Wo Fong Trading Co* [1979] 2 MLJ 254 (MY FC); *Sebor (Sarawak) Trading Sdn Bhd & Anor v Syarikat Cheap Hin Toy Manufacture Sdn Bhd* [2003] 2 MLJ 486, [2003] 3 AMR 354, [2003] 2 CLJ 381 (MY CA).
[xxiv] Reg 7 of the 1960 Sarawak Regulations. This is incorporated into reference into the Sabah Regulations by reg 3.
[xxv] Defined by the International Monetary Fund (IMF) – comprises a basket of US dollar, Euro, British Pound and Japanese Yen.
[xxvi] Daily exchange rates to convert the SDR units to numerous currencies are published by the IMF. At the beginning of 2021, the exchange rate was about £1.06 or USD1.45 per SDR.
[xxvii] See and compare: *Tank Shipping AS (formerly known as Tank Invest AS) v Vinnlustodin HF and Another (The Aqasia)* [2018] EWCA Civ 276, [2018] 3 All ER 981, [2018] 2 All ER (Comm) 191, [2018] Bus LR 992, [2018] 1 Lloyd's Rep 530 (EW CA); *Owners of Cargo lately on board River Gurara v Nigerian National Shipping Line Ltd (The River Gurara)* [1998] 1 Lloyd's Rep 225 at 228, [1998] QB 610, [1997] 4 All ER 498, [1997] 3 WLR 1128 (EW CA); *The Aegis Spirit* [1977] 1 Lloyd's Rep 93 (US District Court in Washington); *Houlden & Co Ltd and Others v. SS Red Jacket and American Export Lines Ltd; Metal Traders Inc, Third Party; United States Fourth Party (The Red Jacket)* [1978] 1 Lloyd's Rep 300 (US District Court in New York); *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* [2004] 2 Lloyd's Rep 537, [2004] FCAFC 202 (Australia FC); *Empire Distributors v United States Lines* [1987] AMC 455, SD Ga 1986 (US District Court in Georgia).
[xxviii] *Sebor (Sarawak) Trading Sdn Bhd & Anor v Syarikat Cheap Hin Toy Manufacture Sdn Bhd* [2003] 2 MLJ 486, [2003] 3 AMR 354, [2003] 2 CLJ 381 (MY CA).
[xxix] See *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402, [1954] 2 All ER 158, [1954] 2 WLR 1005, [1954] 1 Lloyd's Rep 321 (EW HC).
[xxx] *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co, Griffiths Lewis Steam Navigation Co v Paterson, Zochonis & Co Ltd* [1923] 1 KB 420, [1924] AC 522, [1924] All ER Rep 135 (UK HL); *Midland Silicones Ltd v Scruttons Ltd* [1962] AC 446, [1962] 1 All ER 1, [1962] 2 WLR 186, [1961] 2 Lloyd's Rep 365 (UK HL); *Alder v Dickson* [1955] 1 QB 158, [1954] 3 All ER 397 (EW CA).
[xxxi] Art III(8).