Introduction

There are currently two international regimes, the Hague-Hague-Visby Rules (HVR) and the Hamburg Rules (HR) applicable to the carriage of goods by sea. In the UK, the HVR is given the force of law by the Carriage of Goods by Sea Act 1971. Little need be said about the HR except that it has not been ratified by any of the major maritime nations.[1] However, though unpopular, some of its concepts have found their way into the new Convention, the Rotterdam Rules (RR), which was adopted on 11 December 2008 by the General Assembly of the UN and will be opened for signatures on 23 September 2009. If accepted, it will be the basis of the new law governing contracts for the international carriage of goods wholly or partly by sea.[2]

The legal problems engendered by the carriage of deck cargo are manifold. A carrier could be exposed to claims not only from the shippers of the goods, but also from third parties such as stevedores and consignees of bills of lading, the charterer, and the owners of other goods carried on or below deck. Further, should the deck stowage affect the stability of the ship as to render her unseaworthy, a claim based on a breach of the implied undertaking of seaworthiness under common law or, as the case may be, Article III rule 1 of the HVR could be brought.[3] Needless to say, any suit based on breach of contract would invariably raise and question the applicability of contractual and/or statutory provisions on exception and limitation of liability.

This paper will focus only on the issue of liability - the right of the carrier to except (avoid) or limit (restrict) his liability when goods are carried on deck in breach of contract. At common law, the parties to a contract of carriage are free to negotiate their own terms on exception and limitation of liability. In a contract of carriage regulated by the HVR, the exceptions are contained in Article IV rule 2 (a)-(q), and the right to limit in Article IV rule 5. Under the RR, a totally new scheme of liability applies to deck carriage[4] The law on limitation of liability will be discussed separately.

Exceptions of Liability Under Common Law

Though the HVR is applicable to the carriage of almost all goods, it does not apply to live animals and, in some instances, the carriage of deck cargo by Article 1(c), 'live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried' will not be governed by the HVR.[5] Thus, under current law, only deck cargo which is stated as being carried on deck and is in fact carried on deck will be governed by the general principles of the common law.[6]

An implied term

Dating as far back as 1867, the House of Lords in Royal Exchange Shipping Co Ltd v Dixon[7] held that there is an implied term in a contract of carriage of goods by sea that the goods are to be stowed under deck. Thus, in the absence of legal requirement, express agreement or custom/usage/practice, the only approved or recognized location of stowage is below deck. The House ruled that, whether the bill of lading did or did not contain the words "under deck", any unauthorized carriage of goods on deck would constitute a breach of contract. The crucial legal issue that arises in such a case is whether the carrier is entitled to rely on an exception clause to exonerate him from liability. And should he admit liability or be found liable for the damage or loss, would he be able to reduce the extent of his liability under the contract (should the contract contain a limitation of liability provision) or under a relevant statutory limitation law?

In this connection, it is necessary to consider whether a breach of the implied (or an express) term, that the cargo would be carried under deck, constitutes a fundamental breach of the contract. The doctrine of fundamental breach, a loved and much used rule of law before the advent of a pair of House of Lords’ decisions in Suisse Atlantique[8] and Pinto Production[9] is based on the principle that a breach of contract may be so heinous that it should automatically discharge the exceptions clauses altogether. The law maritime has always applied the doctrine of fundamental breach in cases of geographical deviation: The implied condition not to deviate from the contractual or customary route is regarded as of such supreme importance that a breach would naturally deprive the carrier of the right to rely on any of the contractual exceptions.[10] Moreover, it is necessary to recall that even causation is irrelevant in such a case: the fact that the loss has not resulted from the unjustifiable deviation is not a defence.[11] And although the doctrine of fundamental breach fell out of favour, the law lords were prepared to concede that the law of deviation is to be considered as ‘a body of authority sui generis with special rules derived from historical and commercial reasons’. Is the obligation to stow below deck in the same league as the implied condition not to deviate?

The pointed, almost moralistic, issue is: should a carrier who has committed such a gross breach of contract be allowed to rely on contractual exceptions? Two cases directly in point. Dixon[12] and Evans v Andrea Merzario Ltd[13] have been often cited as having supported the rule that a fundamental breach of a contract would automatically negate the operation of an exception clause.

In Dixon[14] the carrier strenuously denied liability on the grounds that the short delivery occurred by reason of the excepted perils of 'jettison and the dangers and accidents of the sea and navigation ...'. The House of Lords held that, as the carrier was in breach of contract, he could not rely on any of the exception clauses to free himself from liability. At first sight, one could be tempted to assume that the basis of the ruling is that, as the carrier had committed a fundamental breach of contract, he had no right to rely on any of the exception clauses, which could only be invoked if he had performed his part of the bargain. In other words, his non-performance of a somewhat significant term of the contract had disqualified him of the right to plead the exceptions. Supposedly, to the layman, such a result is exactly what one could reasonably expect, for in allowing a carrier the right to rely on an exception (or limitation) of liability clause would undermine an important obligation of his contract, that is, to stow the cargo below deck. After all, the term has been implied[15] by reason of the sensitivity of the common law, to ensure that an important aspect of the contract of sea carriage is performed. Avoidance (and even restriction) of liability would be regarded by most as inherently repugnant to and
inconsistent with the duty to stow below deck. Though an unauthorized carriage of cargo on deck undoubtedly constitutes a breach of contract, is the breach serious enough to be classified as a "fundamental breach" with its draconian legal consequences?

First, it is observed that nowhere in Dixon was the expression "fundamental breach" mentioned in any of the speeches of the law lords. A scrutiny of Lord Halsbury's speech would reveal that his judgment was in fact premised on causation. He held that the loss was not caused by jettison, but by the unauthorized deck stowage. His words were: "The exception in the bills of lading of 'jettison' cannot avail the shipowners, who broke their contract in stowing the cotton upon deck and thereby directly caused the loss to the merchants." He stressed that: "The jettison of this cargo was the direct result of its being stowed upon deck."[16]

Lord Watson, on the other hand, clearly preferred the path of construction[17]... at the time when jettison was made ... they were being carried in breach of the contract, and were not within the exceptions specified in the bills of lading, which have exclusive reference to goods safely stowed under hatches." In other words, his interpretation of the contract was that the exception clauses may be applied only to goods carried in the ordinary way, under deck.

Almost 60 years later, Evacan came before the Court of Appeal. The shipper's container which was shipped on deck fell overboard when the vessel encountered bad weather. The carrier denied liability on the basis that he was protected by exception clauses and, alternatively, pleaded the right to limitation of liability under a printed clause in the contract. To this, the shipper argued that, as the carrier had committed a fundamental breach, he could not rely on either the exception or limitation clauses. The Court ruled that the carrier could not rely on either of the defences. This outcome has led to assertions being made that the case promoted the doctrine of fundamental breach, contrary to the stand earlier pronounced by the House of Lords in Suisse Atlantique. Though Suisse Atlantique was not cited, a close examination of the speeches of the Lord Justices will reveal that the Court had applied the rule of construction of the contract, rather than that of fundamental breach. Roskill LJ was adamant that "This is not a case of fundamental breach. It is a question of construction. Interpreting the contract ... I feel driven to the conclusion that none of these exemption clauses can be applied, because one has to treat the promise that no container would be shipped on deck as overriding any question of exemption condition. Otherwise ... the promise would be illusory."[18]

Neither of these two landmark cases had advocated or invoked the device of fundamental breach; the judgment in Dixon was based on causation, and Evans, on rule of construction of the contract. Today, the matter is governed by the law laid down in both Suisse Atlantique and Photo Production, where the general principle of contract law is now clearly one of construction of the contract: such a dispute is not to be resolved by a classification of contractual terms, but by whether, looking at the contract as a whole the wording of the exception clause is sufficiently clear as to be applicable to the substituted (on deck) mode of carriage.

Indeed, it is to be observed that, more recently, the rule of construction was applied in several cases, the most notable of which is the Court of Appeal's decision in Daewoo-Heavy Industries & Amor v Kipper Shipping Ltd. [19] albeit with reference to limitation of liability under the HVR. If not already dead, the death-knell of the fundamental breach rule can be heard (again) ringing loud and clear in this Court. [20] As will be seen later, the applicability of limitation provisions, whether under common law or the HVR, is to be resolved in the same way as the same exemptions. In summary, the obligation to carry under-deck, though an extremely important one, cannot be said to be "overriding" in the same sense as the strict obligation not to deviate. As these cases are concerned directly with the HVR, they will be discussed later.

Exceptions of Liability under the Hague-Visby Rules: Article 4 Rule 2(A) - (Q)

As was discussed, goods which are carried on deck without a notation on the face of the bill of lading are governed by the HVR and treated as normal goods. In the absence of an express declaration, the HVR will still apply even if there is an agreement between the carrier and the shipper that the goods are to be carried on deck[22].

In the absence of agreement, the undeclared deck carriage will constitute a breach of Article III rule 2 which provides that: "Subject to the provisions of Article IV, the carrier shall properly and carefully ... stow ... care for ... the goods carried."[23] By no stretch of imagination can a carrier be regarded as having "properly" and "carefully" cared for goods in stowing them on deck, when they should have been stowed below deck. Is a carrier which has committed such a breach entitled to rely on one of the immunities set out Article IV rule 2 (a) to (q) of the HVR?

The opening phrase of Article III rule 2 serves immediately to forestall the application of the traditional common law rule of fundamental breach earlier discussed. It appears to give a carrier the right to escape from all responsibility even when he is in blatant breach of contract. Should the deck cargo be washed overboard in a storm, could the carrier still plead, as a defence, that the loss had arisen or had resulted from, for example, "Perils, dangers and accidents of the sea ..." (Article IV rule 2(c)) or "any other cause arising without the fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier ... " (Article IV rule 2(q))?

But, as propounded in Suisse Atlantique and Photo Production, the matter has to be resolved by employing rules of construction; thus, the wording of Article IV rule 2 has to be scrutinized. It states: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from ... (a) ... (q)." The test is: was the loss caused by the carrier in failing to properly and carefully[24] stow the goods (negligence) or by one of the excepted perils listed in Article IV rule 2?

As was recalled, this was precisely the stance taken in Dixon. The matter is one of causation. A carrier will not be found automatically with liability in the event of a breach of contract resulting from an improper or unauthorized carriage of cargo on deck. As in the case of a breach of the implied undertaking to provide a seaworthy ship under common law[25] or of Article III rule 1 of the HVR, liability under Art III rule 2 will only fall upon the carrier if the breach had caused the loss.

It is obvious that if the loss sustained would not have occurred had the cargo been stowed below deck, there would be little chance for the carrier to escape from liability. Thus, in spite of the liberal opening words of Article III rule 2, a loss caused by improper deck stowage is unlikely to be covered by any of the excepted perils listed in Article IV rule 2 (a) – (q).

And, should there be an agreement that the cargo is to be carried on deck (but with no express statement in the bill of lading to that effect), the carrier would still be in breach of Article III rule 2, if the cargo was not properly lashed on deck. As in the case above, he could still rely on the exceptions in Article IV rule 2, if the loss was not caused by his failure in lashing them securely.

Exceptions of Liability Under the Rotterdam Rules
The RR, if ratified, will replace the two existing versions of the Hague Rules and the Hamburg Rules. One of the impetuses for the need to replace the existing conventions was that they have to be brought up to date in order to take into account containerization and specialized deck vehicles of carriage, which essentially constitutes the backbone of the carriage of deck cargo.

In order to rally the carriage of all goods under its jurisdiction, an all-embracing definition of “goods” is provided in Article 1(24). By this provision, “wares, merchandize, and articles of every kind whatsoever”, in any manner of stowage, on or under deck, authorized or unauthorized, are governed by the Rules. To ensure that all goods are ensnared, the new Convention has jettisoned the clumsy formulae of exclusion of deck cargo adopted by the HVR. Without exception, all goods carried on deck are now regulated by the Rules. Having brought deck carriage under its wings, the Rules then proceed to provide specific provisions on liability for the carriage of deck cargo in Article 25: a new regime of liability appears on the horizon. The Rules make a distinction between permissible and non-permissible deck carriage. But before proceeding to discuss the specific provisions on liability for deck carriage, it is necessary briefly to describe the general legal framework set out in Article 17 of the Rules, in particular Article 17(2) and (3).

A fault-based regime of liability: Article 17(2) and (3)

Once a claimant has established a prima facie case of loss [25] the carrier may, as a defence, plead either that the absence of fault on his part (or any person referred to in Article 18) or that one (or more) of the events enumerated in Article 17(3)(a)–(o) caused or contributed to the loss [27]. The strategy of this two-prong approach is that, if the carrier is able to prove the absence of fault, the loss would, in all probability, fall under one of the circumstances listed in the latter: the alternatives are mutually exclusive.

In the context of deck cargo, Article 25, for the purpose of liability, makes a distinction between permissible and non-permissible deck carriage.

Permissible deck carriage

Article 25(1) of the RR enumerates three categories of permissible deck carriage:

(a) Such carriage is required by law.
(b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles.
(c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.

The first part of Article 25(2) [28] clarifies that the provisions of the Convention relating to the liability of the carrier apply to the loss of goods carried on deck pursuant to paragraph 1. This is perhaps stating the obvious, for if the deck carriage is authorized by the Rules, it is only natural that they should apply. Its objective is to affirm that, in the event of a loss of goods that have been authorized for deck carriage, the defences in Article 17, which are of general application, will be available to the carrier [29].

However, it is interesting to note that Article 25(1)(a) and (c) have been given the same treatment, whilst no special provision has been framed for a case falling under Article 25(1)(b):

(a) Permissible deck carriage under Art 25(1)(a) and (c)

The second part of the Article states: “the carrier is not liable for loss... to such goods ..., caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs (a) or (c) of this article.” No definition is given to “special risks”. Presumably, they refer to goods being washed overboard in a storm, or being exposed directly to the elements to which they would not otherwise have been so exposed, if they were stowed below deck.

The rationale for this allocation of liability is that under (a), neither the shipper nor the carrier has a choice as to place of stowage, as the deck carriage is sanctioned by law. Under (c), the carrier is permitted by the contract of carriage or customs/usage/practice of the trade to stow the goods on deck. Whether by agreement or by trade usages, the shipper is aware (or ought to have been aware) of the dangers of deck carriage and is therefore deemed to have accepted the risks associated with such a mode of carriage. The carrier cannot be made liable for damage caused by the inherent risks attendant upon the carriage on deck. The liability of the carrier for a loss sustained as a result of any other cause(s) would, as indicated by the first part of Article 25(1), be settled in accordance with the Rules, in particular, Article 17.

(b) Permissible deck carriage under Article 25(1)(b)

Subparagraph (b) is innovative and has not appeared in any of the earlier Conventions. It deals specifically with container shipment. Would it be right to draw the inference that, as subparagraph (b) has been conspicuously omitted from Article 25(1), the carrier is liable for any loss caused by the special risks involved in their carriage on decks specially fitted to carry containers and vehicles? Can the corollary, that the carrier is liable for loss caused by the special risks associated with their carriage on the deck of such specially fitted ships, be assumed?

It is significant to note that there are two sides to this Article: The containers or vehicles [30] must be suitable for deck carriage, and the decks must be “specially fitted” for the carriage of such containers or vehicles. In other words, peats and pods must fit.

If the deck of the vehicle of carriage is specially fitted for the particular containers or vehicles, she should be able to weather the ordinary vicissitudes of the carriage for which she has been so designed to endure. Should she fail to meet expectations, she is, to coin a new phrase, not “deck-cargo-worthy”, as she has been “sold” as being capable to withstand the hazards involved with deck carriage, liability has to rest with the carrier. This is similar to the common law notion of “cargoworthiness” applicable to under-deck stowage, namely, that the ship must be fit to receive and carry the particular cargo [31]. Further, Article 25(1)(b) is in accord with Article 14(c) under which the carrier is obliged to “make and keep ... parts of the ship in which the goods are carried, and any containers supplied by the carrier ... fit and safe for their reception, carriage and preservation”.

Unless the loss can be attributed to one of the causes listed in Article 17(3) (a) to (o), the carrier has to shoulder the blame. It is regrettable that the position under Article 25(1)(b) has not been made more explicit by the new Rules.

Non-permissible Deck Carriage
The phrase “only if” in Article 25(1) [32] indicates that, other than the circumstances described in (a), (b) and (c), any other deck carriage would be unauthorized and would constitute a breach of contract, attracting the rules on liability specially designed in Article 25(3) for such deck carriage. “If goods have been carried on deck in cases, other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of … the goods … that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.”

At first sight, this could be grasped as a hint of the return of the traditional doctrine of fundamental breach, for the carrier is liable for the loss and is not entitled to plead any of the exceptions in Article 17. The word “exclusively” is significant, and a distinction has to be drawn between a loss of goods exclusively, and not exclusively, caused by reason of their carriage on deck.

(a) Exclusively caused by their carriage on deck

In simple terms, “exclusively” means “solely”. It is safe to say that if the sole or only cause of the loss of the goods is caused by their (unauthorized) carriage on deck, none of the defences spelt out in Article 17 can possibly apply. Causation is the determining consideration for liability. Thus, if the loss is solely caused by the conditions to which the goods have been improperly exposed, the carrier is liable and is precluded by reason of causation from pleading one of the defences set out in Article 17(3)(a)-(o). Such a loss would not have resulted if the goods were stowed under deck.

As the deck carriage is not permitted by the Rules, the carrier would not be able to rely on Article 17(2), because he would not be able to prove that the cause of loss is not attributable to his fault [33]. By the same token, none of the causes listed in Article 17(3)(a)-(o) can be relevant, as there can be no contributory causes, the loss having been “exclusively caused” by the deck carriage. The “exclusivity” rules out all the other enumerated excepted causes.

(b) Not exclusively caused by their carriage on deck

But if a loss not exclusively (but is only partially) caused by their carriage on deck, there would still be room for the operation of one of the defences contained in Article 17(3). This is clarified in Article 17(2) and (3). The new Convention recognizes that there could be more than one cause of loss and is prepared to apportion liability which is expressly provided for in Article 17(6). [34]

Limitation of Liability

The right to limitation of liability, though second best in monetary terms, is invaluable to a carrier. In a contract of carriage governed by the HVR, they are entitled to, because of the generous wording of Article 4 rule 5(a) of the HVR [35], the right to limit their liability even if they had committed a serious breach of contract resulting from an unauthorized carriage of cargo on deck. This was re-affirmed by the Court of Appeal in the recent case of Daeowo [36]. The magical formula of “in any event” in Article 4 rule 5(a), construed to mean “in any case”, was held to be wide enough to confer upon the carrier the benefit of limitation “whether or not the breach of contract was particularly serious” and “whether or not the cargo was stowed under deck.” [37] The Appeal Court had also decided that such a breach of contract, though serious, is not in the same class as a breach of the implied term not to deviate (geographically). [38] Applying the reasoning in The Kea Tyne, [39] The Antares (No 1) [40] and The Happy Ranger, [41] the Court held that, although the obligation to carry under deck was an extremely important one, it could not be said that it was “overriding” [42]

However, it is to be observed that, even though the carrier may be able to rely on limitation under Article 4 rule 3, in spite of having carried cargo on deck without authority, the watchdog provision in Article 4 rule 5(e) may well deny him the right. Any damage that has 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” would not qualify for limitation.

Under the RR, limitation of liability is governed by Articles 59 and 61. The carrier’s right to limitation is firmly entrenched in Articles 59(1) which states: “Subject to articles 60 and 61(1) the carrier’s liability for breaches of its obligations under this Convention is limited to 875 units of account per package…” This benefit will be lost only, as stated in Article 61(1): “… if the claimant proves that the loss resulting from the breach of the carrier’s obligations under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result”. Such a right to limitation is almost impossible to break, for the burden imposed on the claimant is indeed onerous. As worded, it is virtually impossible for any claimant to demolish the carrier’s right to limitation.

Conclusion

The HVR and the RR offer an exhaustive list of exemptions. In a contract of carriage governed by these Rules, it is not possible for the carrier to expand the list or to decrease the prescribed level of limitation set by the Rules. Any contractual provision relieving or lessening the liability of the carrier will be declared “null and void and of no effect”. [43] As is the position under common law, the carrier’s liability is not absolute. As was seen, the effectiveness of exceptions is determined by the cause of the loss, and the right to limitation, by a construction of the wording of the provision. [44]

In a contract of carriage of deck cargo governed by common law, the parties are at liberty to make their own terms. And as the doctrine of fundamental breach no longer applies, the carrier would do well to protect himself with a properly couched exception clause. In such a laissez-faire environment, exception and limitation clauses can be worded to apply, even when the carrier has failed to honour his contractual obligation to stow the goods under deck. Thus, a carrier would be well-advised to ensure that a comprehensive exculpatory clause is put in place to exonerate him from liability specifically for unauthorized deck carriage. To ensure full coverage and protection, the exemption clause should make specific references to loss caused by perils of the sea, jettison, negligence of the master and crew, and unseaworthiness/unseaworthiness of the ship. Above all, the exception should be worded to protect the carrier for loss of deck cargo from “any cause whatsoever”.

Paper by Susan Hodges, Cardiff Business School, Cardiff University.

[1] Implemented by 32 States, which is estimated to represent overall about 5% of the world trade.
[2] It is difficult to predict whether the RR will be ratified by UK and 20 other States. This paper essentially will discuss the topical legal issues relating to the liability regime of deck carriage governed under the common law, the HVR and the RR.
[3] On seaworthiness, see Article 14 of the RR.
[4] See Articles 17 and 25 of the RR.
[5] Obviously, should the contract contain an additional clause incorporating the HVR, then common law will not apply. Unlike the HVR, the RR and the contract doesn’t apply to all goods, so it is best to say, neither deck cargo nor live animals are excluded from their definition of “goods”.
[6] See Svenska Traktor v Maritime Agencies [1955] 2 QB 295, where it was held that a clause bestowing the carrier with the liberty to stow the cargo on deck will not take the contract of carriage out of the clutches of the HVR. There has to be a statement that the goods are in fact carried on deck.
[7] (1887) LR 12 App Cas 11, HL. Henceforth referred to simply as “Dixon”.
[8] [1967] 1 AC 361, HL.
[9] [1980] AC 827, HL.
[10] This is the position under US law.
[11] This demonstrates the importance of the implied condition not to deviate.
[12] (1887) LR 12 App Cas 11, HL.
[14] 125 bales of cotton shipped were carried on deck. All the bills of lading, except for 25 bales, contained the words “under deck”. During heavy weather, the ship took the ground and in order to get her off, the 125 bales of cotton stowed on the fore deck were jettisoned.
[15] As are the implied terms of carriage and seaworthiness.
[16] (1887) LR 12 App Cas 11 at 15, HL.
[17] (1887) LR 12 App Cas 11 at 19, HL.
[18] Geoffrey Lane LJ [1976] 2 Lloyd’s Rep 165 at 171, CA, remarked: “The effect of their agreement was to remove from the new terms the restrictions or exemptions contained in those trading conditions. Any other conclusion would be to destroy the business efficacy of the new agreement from the day it started.”
[19] [2003] 2 Lloyd’s Rep 1, CA. Henceforth referred to simply as “Daewoo”.
[20] See also The Nia Tyhi [1982] 1 Lloyd’s Rep 606; The Antares (No 1) [1987] 1 Lloyd’s Rep 424 CA; and The Happy Ranger [2002] EWCA Civ 694, CA which are discussed later.
[21] In fact, if Lloyd LJ in the Court of Appeal in The Antares (No 1) [1987] 1 Lloyd’s Rep 424, CA, had his way, he would even go so far as to assimilate deviation cases under ordinary law of contract.
[22] The HVR will also apply if the bill of lading states that the cargo is stowed on deck, contains a clause which provides that the HVR apply to the deck cargo, and the goods are in fact stowed on deck.
[23] Under common law, this is the duty to take reasonable care of the goods.
[25] Under common law, this has been held in The Europa [1906] P 84, and under the HVR, by Article IV rule 1.
[26] In this paper, the word “loss” is used in the generic sense to cover loss of, damage to delay in the delivery of the goods, as described in Articles 17 and 25 of the RR.
[27] It is noted that Article 4 rule 2(a) of the HVR (the exemption of “Act, neglect, or default of the master, master, pilot or the servants of the carrier in the navigation or in the management of the ship”) has been deleted, and Article IV rule 2(b) (the exemption for “Fire, unless caused by the actual fault or privity of the carrier”) has been amended to read simply as “Fire on the ship”.
[28] Article 25(2) of the RR: “The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of the goods carried on deck pursuant to paragraph 1 of this article.”
[29] The heading of Article 17 of the RR is captioned as “Basis of liability”.
[30] “Container” and “vehicle” are defined in Article 1(26) and Article 1(27) of the RR respectively.
[31] See the classic cases on seaworthiness: Tattersall v National S S Co (1884) 2 QB 297, Cargo per Meen King v Hughes [1995] 2 QB 550; and Stanton v Richardson (1874) 9 CP 390.
[32] Article 25(1) of the RR: “Goods may be carried on the deck of a ship only if (a)…”
[33] Article 17(2) of the RR: “The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.”
[34] Article 17(6) of the RR: “When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstances for which it is liable pursuant to this article.”
[35] Article 4 rule 5(a) of the HVR: “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 … in an amount exceeding…”
[36] [2003] 2 Lloyd’s Rep 1, CA.
[37] Per Lloyd LJ. [2003] 2 Lloyd’s Rep 1 at 13, CA.
[38] In The Antares (No 1) [1987] 1 Lloyd’s Rep 424 at 430, Lloyd LJ observed: “Whatever may be the position with regard to deviation clauses strictly so-called… I can see no reason for regarding the unauthorized loading of deck cargo as a special case.”
[39] [1962] 1 Lloyd’s Rep 606. Sheen J decided that the carrier’s liability was limited to the amount set out in Article 4 rule 5 of the HVR, even though the cargo was stowed on deck under a clean bill of lading which stated that it was to be “shipped under deck.”
[40] [1967] 1 Lloyd’s Rep 424, CA. It is noted that in The Antares (No 1), the Court of Appeal held that the unauthorized deck carriage did not negate the operation of the HVR time-bar (Article 3 rule 6), as the breach of contract did not constitute a fundamental breach. Note the words “in any event” in Article 3 rule 6.
[41] [2002] 2 Lloyd’s Rep 357, CA. In The Happy Ranger, the court held that a carrier could still limit his liability even though he had failed, in breach of Article 3 rule 1, to provide a seaworthy ship.
[43] See Article III rule 8 of the HVR and Article 79(1) of the RR.
[44] See Article 4 rule 5(a) of the HVR.