ISSN : 2437-0681
E-ISSN : 2661-7536

CARRIER'S LIABILITY FOR THE CARRIAGE OF DECK CARGO

DAHMANI Mohamed Seghir
Senior Lecturer
Faculty of Law - University Mohamed Ben Ahmed - Oran 2 - Algeria
maitredahmani.med@gmail.com

Date of send: 01 / 10 / 2021	date of acceptance: 07 / 11 / 2021	date of publication : 08 / 11 / 2021

Cite this article :
DAHMANI Mohamed Seghir, « Carrier's liability for the carriage of deck cargo», Revue droit des transports et des activités portuaires, Volume VIII/N°01, 2021 (PP 51-85).

This article is available via the link :
www.asjp.cerist.dz/en/PresentationRevue/164

Summary :

Generally, goods are not to be stowed on deck, to summaries the reasons, it can be said that the goods on deck, as a matter of fact, are always jettisoned first because they are most accessible. The exposure to sun and heat or cold is another risk which the shipper seeks to avoid by requiring underdeck stowage. Amongst other reasons, deck cargo is certain to be jettisoned before any cargo, and liable to be unduly jettisoned owing to the facility of doing it when cargo under hatches would not be. When jettisoned it is not entitled to general average unless there is an agreement with the shipper and with the consent of the other parties interested in the adventure. That's why some authors consider the deck transport as dangerous.

This paper will be limited in its aims to the liability of the carrier for the carriage of deck cargo. The question of liability of deck cargo has

presented a real difficulty for the jurisprudence since the 19th century owing to the variety of clauses inserted in the bill of lading and the economic gain which the carrier can derive from such carriage.

International conventions have been laid down to cope with this matter such as the Hague Rules or the Hamburg Rules and the Rotterdam Rules.

All these points will be dealt with in this paper : section one reviews the cases when deck cargo is authorized, section two focuses on the consequences when deck cargo is not permitted, section three examines the legal and practical problems posed by stowage of containers on deck, section four deals with deck cargo under the three international Conventions mentioned above.

Introduction

Generally, goods are not to be stowed on deck. To summarize the reasons, it can be said that goods on deck as a matter of fact, are always jettisoned first because they are most accessible. The exposure to sun and heat or cold is another risk which the shipper seeks to avoid by requiring underdeck stowage. Amongst other reasons, deck cargo is certain to be jettisoned before any cargo, and liable to be unduly jettisoned owing to the facility of doing it when cargo under hatches would not be. When jettisoned it is not entitled to general average unless there is an agreement with the shipper and with the consent of the other parties interested in the adventure. That's why some authors consider the deck transport as dangerous[1].

This topic will however, be limited in its aims to the liability of the carrier for the carriage of deck cargo. The question of liability for deck cargo has presented a real difficulty for the jurisprudence since the 19th century owing to the variety of clauses inserted in the bill of lading

[1] - Hassania Cherkaoui, le droit maritime Marocain, A.M.D.M.A ,1er édition, 2014, p.332.

and the economic gain which the carrier can derive from such carriage. The courts, however, have laid down general principles regarding deck stowage. Among these principles, there is a consensus of opinion that the carrier is only entitled to stow on deck where there is a custom in the particular trade or with the consent of the shipper or where deck carriage is permitted by statutory rules or regulations. In such cases the right of the parties to contract out of liability by means of exemption clauses is recognized by the courts. If the carrier does not conform to these requirements, he is liable in full for the loss or damage which occurs to the goods stowed on deck .

The following points will be dealt with in this paper :

Section 1 reviews the cases when deck stowage is authorized.

Section 2 focuses on the consequences when deck stowage is not authorized. There was a special liability before the Hague Rules when the carrier stowed goods on deck contrary to agreement or custom. It has been questioned whether the same liability continues when the Hague Rules are incorporated into the bill of lading.

Section 3 examines the legal and practical problems posed by the stowage of containers on deck.

Section 4 deals with deck cargo under the Hague Rules and the changes introduced by the Hamburg Rules of 1978 and the convention of Rotterdam of 1988.

Section one

when is deck cargo authorized?

The carrier is only entitled to stow on deck if the shipper agrees to the goods being carried on deck or there is a custom in the trade or it is permitted by Statutory Rules or Regulation.

These points will be dealt with accordingly.

1-Deck cargo may be permitted by an agreement with the shipper

For deck cargo to be lawful, the shipper must consent to the goods being carried on deck. In such a case the carrier is free to contract out of liability for such cargo by means of exemption clauses. Thus, in Wright V. Marwood[2], the plaintiff entered with the defendant into an agreement to stow cattle on deck cattle. Upon the shipment of the callte the plaintiff receives from the defendant's agent a bill of lading which contains the following provision "*Not accountable for mortality or for any accident or injury of any kind or nature whatever*". During the voyage the cattle were thrown overboard. It was held that such shipment was lawful.

If an agreement has been entered into to stow on deck, an endorsement to that effect must appear on the face of the bill of lading. A carrier cannot exonerate himself from liability by showing that an oral agreement has been entered into with the shipper if the bill of lading is issued Clean[3]. Nor can he rely on a written freight reservation or agreement with the shipper when the bill of lading contains a statement that the goods are carried on deck[4]. In both cases such oral agreement is effective against the shipper but the rational of these decisions was without doubt an attempt to protect a consignee without notice.

Frequently the endorsement reads "on deck at shipper's risk ". By agreeing to the on deck stowage the cargo owner assumes the risk of damage which is a natural concomitant of deck stowage.

Goods carried on deck with the consent of the shipper are not within the scope of the Hague Rules as long as the bill of lading states that goods are deck cargo and the cargo in question is actually carried

---

2 -(1881) Q.B.D. 62 –Sea also Burton V. English (1883) 12 Q.B.D. 218.
3 - The Delaware 81 U.S 579 (1871).
4 - Schooner St. John N.F.(1923) A.M.C. 1131.

on deck. Therefore, the parties can insert in the bill of lading clauses contrary to the Rules.

The question arises whether the carrier is free from liability where there is no positive statement in the bill of lading but only a general liberty clause permitting such stowage. Some pre-Hague Rules judgements are Armour co. V. Welford Ltd.[5], the Peter Helm[6] and Delawanna Inc. V. Blijdendijk[7]. In all these cases the carrier was exempt from liability .

It would seem however, that all these judgements would be erroneous under the Hague Rules as will be seen further in section four.

2-Custom in the particular trade

A practice when is constantly followed by those engaged in a trade is called a custom. When contracting, it is unnecessary to insert expressly the rule or condition which is established by custom. If the parties intend not to follow it, an intention must be expressed in the contract. However, although a custom can regulate the performance of the contract and is tacitly incorporated in it, it cannot change its intrinsic character. It has been held in Rudy Patrick Seed Company V. Kolusai Kisen Kabushibi[8] that :

"*A general custom override the terms of a written contract* ".

Unless it is reasonable, certain, consistent with the contract, universally acquiesced and not contrary to Law, a custom cannot be enforced by the court[9]. The nature of a binding custom has been illustrated in Royal Exchange Shipping Co. V. Dixon[10] by Brett, M.R., he said :

---

5 - (1921) s. K.B. 473.
6 - (1838) A.M.C 1220.
7 - (1850) A.M.C 1235.
8 - (1935) A.M.C 1205.
9 - Scrutton on charterparties – 18th edition (1974), p.16.
10 - The Times, May 19, 1885, affirmed (1886) 12 app.cas.11.

"*A custom to carry goods on deck must , in order to give rise to an implied assent by shipper, be so general and universal in the trade, and at the port of shipment, that every body shipping goods there must be taken to know that his goods may probably be stowed on deck* ".

Once the generality and universality of the custom has been proved, the shipowner may be protected by custom even though that shipper is unaware of such custom and clean bill of lading has been issued. Thus, in the Del Note[11] there was a general custom which provided that timber may be stowed on deck. Such custom was held binding on the shipper whether he knew it or not.

A shipowner may be justified by usage in stowing cargo in a particular way, e.g on deck , although another way may be safer[12] .But when no such general custom exists, it has been held in the St. John[13] case that the issuance of a clean bill of lading imports under deck stowage. In Searoad (Bahamas) Ltd. V.E1 Dupont de Nemours and Co.[14] a deck loaded cargo of high explosive was lost in heavy whether. The defendants contended that this shipment followed about eight prior shipments loaded on deck to the shipper's knowledge, so that the shipper had either consented to on deck stowage, or the practice was so prevalent on shallow craft bound for these nearby islands as to amount to a custom of the port to ship on deck despite the issue of underdeck clean bill of lading. The court held that the shipowner has failed to prove a custom of the port of Key Largo Florida, to stow explosives on deck when shipped on clean underdeck bills of lading. John R. Brown, ct.j, said;

"That leaves only the contention that for the movement of explosives on shallow craft vessels to the nearby island ports, it was the custom of the port to ship them on deck. The trial Court, however, had

11 - 234 Fed.66.
12 - Gould V. Oliver (1837) 4 Bing N.C. 134.
13 - Supra.
14 - (1966) A.M.C 1405.

ample basis for rejecting this. The proof was equivocal at best, an estimate suggesting only that approximately 50% moved underdeck. It was equivocal both as to the nature of the craft on which such cargos moved and certainly it did not even begin to show as St. John, supra, implied that the cargoes being transported pursuant to clean underdeck bill of lading, the custom was nevertheless for on-deck stowage[15].

Legal and practical problems have arisen from the container revolution. It has been questioned whether the old Law relating to deck cargo, that is that the shipowner is only authorized to stow goods on deck according to custom or agreement with the shipper, is still applicable to container traffic. Lord Denning, MR. said[16] that this Law did not apply to container traffic. Roskill, LJ. Pointed out[17] that the question may hereafter arise and when it does, no doubt evidence will be made available whether there is at present time a custom or practice under which containers may be shipped on deck without express permission from the cargo owners to do so. For the purpose of avoiding repetition I have preferred to deal with the question of custom with respect to containerization in a separate section.

It should be noted finally that, before the Hague Rules, if it was the custom to carry goods on deck in a certain trade, then the bill of lading did not need to mention that the goods were in fact carried on deck. Some authorities regard this pre-Hague Rules principle as having little basis for application now, because the Rules are not silent, but stipulate, at article 1(C) "*which by the contract of carriage is stated as being carried on deck*". Some texts and authors seem to believe that the position of custom still exists under the Rules[18].

15 - Ibid at p. 1411.
16 - Evan El Son (Portsmouth) Ltd. V. Andrea Merzazio Ltd (1976) Aller 930.
17 - Ibid.
18 - W. Tetley, Marine cargo claims, 1st ed. (1965) p.292.

3-Deck carriage must be permitted by statutory Rules or Regulation

Deck stowage may also be authorized when statutory Rules or Regulations make provision to that effect. Thus, in the safety and load line Convention Act, 1932[19] Regulations were made for the carriage of timber as deck cargo. Article 61(1) provides :

"*The Minister of transport shall make Regulations thereafter in this section referred to as the "timber cargo Regulation" as to the conditions on which timber may be carried as cargo in any uncovered space of the deck of any load line ship* ".

But when a clean bill of lading has been issued , it has been held in Searoad Shipping Co. and Searoad (Bahamas) Ltd.V. Dupont de Nemours and Co[20] that this called for under deck stowage, and the coast guard Regulations as to stowage of explosives , and allowing stowage on deck , do not displace the basic contract clauses of the bill of lading .But it has not been decided whether mandatory coast guard Regulations requiring stowage of dangerous goods on deck displace provisions of the bill of lading contract clauses for stowage underdeck .

Section two

Deck stowage not authorized

The principle applying to the unauthorized deck stowage has been accurately set out in Scrutton on charter parties:

"*The effects of deck stowage not so authorized will be to set aside the exceptions of the charter or bill of lading and to render the shipowner liable under his contract of carriage for damage happening to such goods* "[21].

[19] - Brithish Shipping Law, Merchant Shipping Act, Vol. 11 p.1499.
[20] - Supra.
[21] - Supra at page .164.

The shipowner will be in same position as a deviation occurred and will be liable as an insurer. But it has been questioned whether the same liability continues when the Carriage of Goods by Sea Act is incorporated in the bill of lading. The container revolution raised the issue, whether under a clean bill of lading and in the absence of a custom permitting deck stowage, containers stowed on the deck of a container ship constitute an "unreasonable deviation" exposing the carrier to unlimited liability.

1-Insurer's liability for deviation and its effects

It has long been established that when a carrier commits a fundamental breach of the contract contained in the bill of lading he cannot be protected by the exceptions contained therein[22], as when stowing goods on deck while he is not authorized to do so[23]. By placing the goods in another place than that agreed upon he takes upon himself the risk of so doing and must be liable for all damage caused to such goods[24]. By doing so, the shipowner become liable for a deviation. However, various meanings and wide significance have been given to the term "deviation".

In Francosteel Corp. V. N.V. Netherlandsh[25] the Court said :

"*To deviate, lexicographically, means to stay, to wander. As applied in admiralty Law the term "deviation" was originally and generally employed to express the wandering or staying of a vessel from the customary course of the voyage. But in the course of time it has come to mean any variation in the conduct of a ship in the carriage of goods whereby the risk incident to the shipment will be increased, such as carrying the cargo on the deck of the ship contrary to custom and without the consent of the shipper, delay in carrying the goods…Such*

[22] - Pierre Bonassies et Christian Scapel, droit maritime, Lextenso édition, p. 689, Paris 2010.
[23] - Royal Exchange V. Dixon (supra). The Delaware (supra).
[24] - Lilly V. Doubleday (1881) 7 QBD 510.
[25] - (1967) A.M.C 2440.

conduct has been held to be a departure from the course of agreed transit and to constitute a deviation whereby the goods have been subject to greater risk, and, when lost or damaged in consequence thereof, clauses of exception in the bill of lading limiting liability cease to apply "[26].

In Carver's Carriage by sea it is said:

"*A deviation is such a serious matter, and changes the character of the voyage so 'essentially', that a shipowner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different, and therefore he cannot claim the benefit of stipulation in his favor contained in the bill of lading* "[27].

Prior to the passing of the Hague Rules, carriers were held liable as insurers for such deviation. Thus, in the Delaware[28], by stowing the goods on deck under a clean bill of lading, the shipowner became an insurer and was answerable for every loss or damage occasioned to the goods. In the Sarnia[29] a case which involved a shipment of goods wrongly stowed on deck. The shipowner was held guilty of a gross violation of the contract because he exposed the goods to a much greater risk and consequently he must be answerable as an insurer. In the St. John[30] case the rule is stated by M. Justice Reynolds as follow :

"By stowing the goods on deck the vessel broke her contract, exposed them to greater risk than agreed and thereby directly caused the loss. He accordingly became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading for her benefit and must account for the value at destination "[31].

---

[26] - Ibid at p. 2444.
[27] - Carver's Carriage by Sea, 12th ed. (1971) p. 625.
[28] - Supra.
[29] - (1921) 278 Fed .453.
[30] - Supra.
[31] - Ibid at p.1133.

2- Position when the Hague Rules are incorporated in the bill of lading

The question is whether the shipowner is still liable as an insurer when the Hague Rules are incorporated in the bill of lading.

The effects of deviation in the Common Law countries under legislations such as the US or the British Carriage of Goods by Sea Act embodying the Hague Rules have been subject to some litigation H.S. Morgan believes that a deviation which makes a carrier liable as an insurer is a "timeworn statement "[32]. John W. Griffin considers it to be a "misfit of the Law of carriage" the result of which are illogical and unjust[33]. Halsbury considers it to have been pressed to somewhat harsh limits and prefers maintaining the rights of limitation contained in the Hague Rules notwithstanding the deviation[34]. Gilmore and Black, when considering the impact of section 4(4) and the exemption afforded under section 4(2) of the Hague Rules argued strongly that the pre-Hague Rules Law making the carrier an insurer had been modified by the Hague Rules and argued that this concept is obsolete under modern Circumstances. They also opposed the extension of this doctrine to the non –geographical deviation. In their view the shipowner cannot take the advantages of the exemption clauses when his deviation has contributed to the loss, but to go further than that and hold the carrier liable strictly as an insurer for any loss, however caused, occurring during or even after a deviation may be thought directly contradictory of the term of section 4(2). They prefer the abolition of the "insurer" position after a deviation and its substitution by a liability for damage with which the deviation has some causal connection[35].

On the other hand, other writers still consider that the deviation is for a breach of the Hague Rules which makes the carrier lose the benefit

32 - Journal of Marit. Law § commer. Vol.9, no.4, July 1978, p.481.
33 - Knauth Ocean bill of lading, 4th Ed. 1953, p.243.
34 - Journal of Marit. Law § comer. Supra at p. 485.
35 - The Law of Admiralty, 2nd.ed. 1974, 3.41,3.42.

of all contractual and statutory provisions. Knauth notes that the general case Law continues because of the silence of the Hague Rules on the subject. English case Law also supports the view that the Hague Rules did not change the Law of deviation. Thus, in Stag Line Vs. Foscolo[36], in which ship and cargo were lost, Lord Russel of Killowen said:

"They (shipowners) contended that the Act of 1924 freed them from responsibility for loss arising from peril of the sea, notwithstanding any deviation reasonable or unreasonable; in other words that the Act effected an alteration in the Law which had hitherto prevailed. In my opinion the argument is unsound. It was well settled before the Act that an unjustifiable deviation deprived a ship of the protection of exceptions. They only apply to the contract voyage. If it had been the intention of the legislative to make so drastic change in the Law relating to contracts of carriage of goods by sea, the change should and would have been enacted in clear terms"[37].

That being so, many cases were decided which hold firmly to the rule that an unreasonable deviation prevents the shipowner from relying on any of the protections of the Hague Rules. This was clearly stated in Jones and Guerrora Vs. Flying Clipper[38], in which it was said that the pre-existing Law of deviation had not been changed by the Brussel's Convention nor by the Carriage of Goods by Sea Act. In this case, although there was a clean bill of lading obligating the shipowner to stow twenty packages containing automobiles under deck, the shipment was made on the vessel's deck. This resulted in the damage of 8 cases of automobiles. The issue was whether this unjustifiable deviation deprived the carrier of the 500 dollars per package limitation of liability. There was a contention that although stowage on deck when contrary to custom or to agreement was an unjustifiable deviation prior to the passing of the Act, a change had been introduce by the Act. This

[36] - (1932) AC p.328.
[37] - Ibid at p.343.
[38] - (1954) A.M.C 259.

contention was rejected by the Court and the shipowner was made liable as an insurer. Judge Weinfeld, D.J. said :

"*Deck stowage, where under stowage is required, is more than negligence. It is a deviation resulting in abrogation of the contract…To uphold the carrier's convention that the limitation is absolute regardless of a fundamental breach which goes to the very essence of its undertaking would permit any carrier with recklessness to violate the term of the bill of lading knowing that it cannot be called upon to pay more than 500 dollars per package. Such a policy, if upheld, would immunize the carrier against the consequences of its willful action at the expense of an innocent party. There was nothing in the history of the Convention or the Act to warrant such a result. Absent clear congressional purpose, this Court is not prepared to interpret the Act so as to permit the carrier to invoke the defense of valuation limitation in case of unjustifiable deviation*"[39].

The Flying Clipper[40] was followed in Seaboard Shipping Company V. Dupont de Nemours.

Although there is a conflict of authorities with respect to the legal result of an unjustifiable deviation, the rule at present is that on deck stowage when contrary to custom or agreement is an unreasonable deviation depriving the carrier from relying on the exemption clause or limitation of liability[41].

An amendment of the Hague Rules depriving the carrier of the protection of the Rules in the case of damage to cargo resulting from intentional unjustifiable and unreasonable breaches of the contract of Carriage of Goods by Sea 1978, in which no reference to "unreasonable deviation" is made. The Convention states only:

[39]- Ibid at p. 263-264.
[40] - Supra.
[41] - Supra.

"*The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with the knowledge that such loss , damage or delay could probably result* " (article 8).

The Rule appear to be more favorable to the shipowner because it must be shown that he acted recklessly and with knowledge that his action would probably cause loss or damage, though on deck carriage, absent, an agreement or trade usage, is deemed to be an act or omission of the carrier within the meaning of article 9, but liability is limited to that "s*olely resulting from the carriage on deck* ".

Section three

Containerization and deck cargo

Although containers were first used as long as the 1920's, the container revolution may be said to have started in April 1963, where the first "sea land" service opened from Puerto Rico to Baltimore, U.S.A. two ships, the Mobile and the New Orleans, operated this service so successfully that sea land began construction of the first container terminal at Baltimore. Since then the use of containers has increased enormously, and the variety now available to freight forwarders demonstrate their versatility and popularity[42]. As a result of this widespread movement, large numbers of parcels are placed in a single box normally measuring 40 ft *8 ft *8 ft before being loaded on board ship. The use of containers has proved to be beneficial both for the carrier and the shipper. By using a container, the carrier can save a great deal of time in loading and unloading[43]. Shippers also derive advantages from the use of containers, so that expensive export

[42] - Don Benson, M.C. and Geoffrey Whitehead, transport and distribution made simple (1975) p.116-117.
[43] - Journal of Maritime Law § Comm. V.SS Mormaclynx (1971) 2 Lloyd's Rep.476.

packaging can be reduced because there is less handling and re-loading and also because they protect against damage if loaded properly and also against pilferage[44]. On the other hand, there are many reports of the loss of on-deck containers in severe weather, several have in fact been lost overboard in the Atlantic, although this would be an unlikely occurrence when carried on a purpose-built vessel[45].

There was no real problem with respect of cargo on deck before the advent of containerization. When there is no custom permitting deck stowage or agreement with the shipper, the carrier is bound to stow below the weather deck.

The practice of carrying containers of miscellaneous freight on merchant vessels began in 1956 in the carriage of containers on deck, by sea-land in the Puerto Rican Trade. In 1966, container shipping gained acceptance in the North Atlantic Trade, and Moore M.C. Cormack was one of the pioneers in this type of trade from the port of New York. Those engaged in the North Atlantic Trade in April 1967, carried all or portion of their load of containers on deck. It was Container shipping is a relatively new method. It was a common practice to issue clean bills of lading where containers were stowed on deck. This practice had been followed in the Puerto Rican Trade, and as a practical matter, shipping companies often issued the bill of lading on arrival of the cargo at the pier, before the stevedore had established a complete plan of loading, and before it could be foretold with any certainty whether the particular container would be loaded on deck or below deck[46].

A successful containership operation pre-supposes, however, that approximately 30% of the containers will be stowed on deck. The location of the particular container on a fully containerized vessel is

---

44 - Leather Best, In-C V.SS Mormaclynx (1971) 2 Lloyd's Rep.476.
45 - A.D Couper – The Geography of Sea Transport -1st Edition (1972), p. 152.
46 - Dupont de Nemours International SA V. The Mormacvega (1972) A.M.C 2366 at p.2368-2369.

determined by its weight and size in relation to the size and weight of the other containers to be carried on the same voyage, and in many circumstances the determining factor would the time of presentation of the container to the ship. It is usual for the containers that are taken aboard early to be stowed below deck, and the later ones to be secured on deck. This is however not the case on all occasions and therefore it would be impractical to endorse an 'on deck' provisions on the bill of lading at the time the individual containers are accepted by the operators.

1-Containers on deck of a conventional ship

When the United States District Court dealt with the dispute in the case of Encyclopedia Britanica. Inco. V. The Hong Kong Producer[47], comments were made about the difficulties posed by containerization and the growing practice of stowing containerized cargo on the deck of containership and general cargo vessels. The District judge there found that the carrier through its witnesses had established the existence of a custom to carry containers on deck and held him not liable for the six containers stowed on deck.

On Appeal, the carrier continued to press the existence of such a custom. However, the Court of Appeals refuted the evidence presented by the carrier and denied the existence of any custom. First, because a party cannot claim to have proved a valid custom merely by showing that it is the habit of some carriers to stow goods contrary to the wishes of the shippers. Such habit was developed in Royal Co. V. Dixon[48] where the shipowners in violation of their contract with shippers stowed on deck. This practice was held not to amount to a proper mercantile custom. Second, to say that it was the practice of certain ships to carry containers on deck because they were small ships designed for inland trade, has no bearing on any custom of stowing

[47] - (1969)1 Lloyd's Rep. 421 (Lower Court)- (1969) 2Lloyd's Rep.536 on Appeals.
[48] - Supra.

containers on the deck of general ocean going vessels in international trade, or to say that containers have been seen on the various ships in the New York harbor does not create custom. They could be on deck pursuant to contract or in violation of contract as well as pursuant to a custom.

Consequently, The Appeals Court held that where a container of encyclopedias was damaged while stowed on the deck of a conventional freighter without the bill of lading specifying that the container was actually stowed on deck, the carrier unreasonably deviated from the contract of carriage, thus losing the benefit of any package limitation of liability which may otherwise have been available to the carrier. As a result, the carrier was held fully liable for the damage to the containers.

It would seem that in holding so, the Court of Appeals, still treat the old Law relating to deck cargo as applicable to container traffic when a conventional freighter is involved, as appears from its quotation from Carver's Carriage by Sea :

" *Goods ought not to be carried on deck if they are exposed to a greater risk than when stowed in the usual carrying part of the ship , unless the shipper has assented to their being so stowed or unless a custom to carry in that way exist in the particular trade* "[49].

The Court concluded that it is a fundamental breach to stow containers on the deck of a conventional vessel in the absence of a custom so permitting or an assent of the shipper. Consequently, the carrier lost its protection under the Hague Rules.

2-Containers on deck of a containership

The Court of Appeals in Encyclopedia Britanica, pointed out that it might take a different view had the vessel involved been a container ship, thus stating :

[49] - Supra at p. 602.

"*A containership is specially outfitted safely to stow containers on deck. The Hong Kong Producer is a general cargo vessel and has no special rigging for that purpose. What may be an established 'custom' for containership' is no proof of a custom in the port for general cargo vessels* "[50].

The Court reference to "custom for containership" means that in the absence of a loading port custom permitting deck stowage on a specialized containership a deviation occurs.

a -Is there an established custom for containership to carry containers on deck

In Encyclopedia Britanica, the carrier failed to prove a custom of trade or of the port to carry containers on the deck of a breakbulk carrier without a valid stipulation in the bill of lading authorizing on deck carriage. There the Court said that a custom may be established for containerships.

A Containership which is specially outfitted to carry containers on deck no doubt meets the requirement of reasonabless and certainty of a binding custom. Further, the consistency of the custom with contracts appears from the fact that a clause is usually inserted in the bill of lading by containers operators giving themselves an option to stow containers on deck. Nowadays, if not all the containerships, most of them carry containers on deck, thus making the practice almost universal. It is clear therefore, as far as containerships are concerned, there is no doubt of the existence of a binding custom to carry containers on deck.

The case of Dupont de Nemours International V. The Mormacvega[51] arose in 1967. The shipper's freight forwarder delivered a container of 38 pallets of liquid synthetic resin product to the carrier at New York for carriage on the Mormacvega to Rotterdam. The carrier

[50] - Supra at p.544 (footnote no 12).
[51] - Supra.

issued the bill of lading without endorsement concerning stowage. The container was stowed on deck and was lost at sea. Substantial evidence was introduced by the parties on the issue as to whether there existed a custom of the trade in the port of New York which authorized deck stowage of containers on a containership. On appeal this issue was raised again by the parties. The Appeal Court found that the defendant's reliance on custom was not supported by proof. It found that the alleged custom was not sufficiently ancient to warrant reliance on it as part of the contract of carriage, and that the carrier itself followed no uniform practice with respect to the issuance of underdeck or on deck bills of lading for containers.

However, the Court's assumption with respect to custom was ambiguous. In denying proof of custom, the Court found it was impossible for an observer to determine whether containers stowed on the deck of a containership were covered by underdeck or on deck bill of lading, in view of the lack of a fixed practice. The Court states:

"*Plaintiff asserts correctly, that a habit of sloppy practice, not attended by consequent damage followed by litigation, will not serve to show custom or usage contrary to well settled Law*".

Subsequently, assuming custom was proved, the Court seems to contradict itself as follow :

"*Custom may evidence reasonableness, but it is not the only way to show reasonableness*"[52].

It could be said that the Court was justified in reaching this decision in 1967 since containerization in ocean transport had not reached a state of complete development at the time. The situation may be different if the issue arose at the present time owing to the fast development of container traffic, particularly in North America, Europe

[52]- Journal of Mari. Law § Comm. Vol. 4 no 3, April 1973, p.453-454.

and Japan. It has been predicted that eventually 80 per cent of traffic will be containerized in the Atlantic trade.

This does not mean, however, that there exists a custom now or in the future for non-containerships to stow containers on deck. The merchant must be protected because of the risk inherent in such carriage and therefore it would be unreasonable to hold that such carriage constitutes a custom of the trade.

b-Position when the bill of lading is not claused for on deck stowage

In container traffic it has often proved impossible to know beforehand whether, in fact, the goods will be placed on or under deck. In such case the issuance of a below deck bill of lading is inadvisable. It is equally inadvisable for an on-deck bill of lading to be issued, the commercial acceptability of which may be destroyed, only later to discover that the containers have been carried below deck.

It has been established long ago in the St. John case that when there is no such custom and no express contract in a form available in evidence, a clean bill of lading imports underdeck stowage.

In Encyclopedia Britanica, which involved a conventional vessel, the carrier was held liable for the six containers stowed on deck because the bill of lading did not specify that the containers were being stowed on deck. However, the Court of Appeal for the second circuit in the Mormacvega case was faced with the issue of whether the same legal principles as those in Encyclopedia Britanica, apply to the owner of a container vessel causing him to be liable under his contract should those containers be lost or damaged if stowed on deck. The Court of Appeals came to an opposite conclusion. It held the carrier not in breach of contract by stowing containers on a vessel which had been converted from a conventional carrier of general cargo to a containership, despite the fact that the carrier's bill of lading did not specify that the shipment was being stowed on deck.

Apparently, by reaching this decision the Court's assumption was that the Law should be different for containerships.

The Mormacvega was a combination breakbulk and container vessel which had been converted and reconstructed so as to be able to carry 100 containers on deck. The Court found that the conversion had the result of placing the vessel in the structural situation as if she had been designed and constructed, from the keel up, as a containership and that the ship "represented the best possible state of the art in the ocean transportation of shipping containers".

The Court also assumed the containers stowed on the deck of a vessel were not subject to a greater risk than those stowed below deck. The Lower Court, whose findings were approved on appeal, sought to justify its decision by reference to the Neptune[53] case and a quotation from Carver based on the Neptune. In the Neptune, the issue with which the Court was faced was whether the carrier violated his promise to carry below deck when he carried the cargo on the steamship's main deck, which was protected by bulwarks on all sides and under cover of a hurricane deck. Judge Shipman said:

"*By the peculiar construction of these and similar classes of steam vessels, great capacity for carrying freight is combined with rapid transit, and this ensures as well to the benefit of the shipper and the commercial world generally as the shipowner; for if steamers are to be allowed to carry no more freight than they can stow in the holds , without becoming absolute insurers against all perils of the seas, it is evident that this mode of transportation must be abandoned , or the rates of freight so much enhanced to render it impracticable* ".

The carrier, there, was found not liable for stowing the oil in the between decks. In the Mormacvega case, the Court relying on the reasoning in the Neptune case, said that " *the case of a containership, so constructed from the keel , or so reconstructed at great cost, presents*

53 - (1867) 16 LT. 36.

in our judgment a situation in which carriage of containers on deck is not an unreasonable deviation, because the deck of a containership is exactly where containers are reasonably intended to be carried "[54].

This reasoning was approved by the Court of Appeals so that technological innovation and vessel design may justify stowage other than below deck stowage.

It appears that the Court was right in what seems its essential determination that because containerships are designed to carry containers on deck, a clean bill of lading issued by a containership does not import that cargo will be carried underdeck. But whether the decision in the Neptune relating to whether or not stowage in a particular area is carriage below deck supports that conclusion is problematical.

The decision of the Mormacvega case has met on one hand with criticism and on the other hand with approval. One critic, Seymon Seymour found it in conflict with the finding in Hong Kong Producer where five containers of cargo were unexplainedly lost overboard at sea during the voyage. The fact that in that case five containers were washed overboard as compared with the safe arrival of those stowed under deck, rebutted the Court's assumption that containers on the deck of a containership are not subject to greater risks than those stowed below deck. He also contended that the Court's reliance on the Neptune case was unjustified as the stowage on the deck of a ship has nothing to do with the situation in the Neptune case, which involved the use of a "tween deck for the stowage of the cargo"[55].

However, the validity of the contention is questionable where on deck carriage of containers is concerned, the container rather than the vessel affords shelter to the cargo. The vessel may be properly stabilized and its support pedestals staunch and fit for their purpose, but

[54] - Ibid at p.2375.
[55] - Journal of Marit. Law § Comm., Vol.4, no 3, April 1973, p.449-450.

ultimately the safe delivery of the goods depends on the container being fit to withstand the stresses incident to carriage by sea. The real question is therefore whether the goods have been properly stowed and cared for in the circumstances of the particular case[56].

In the "Comite Maritime", it was suggested that when container traffic is involved, there need not be an express agreement for on deck carriage, such agreement may be implied or follow from the common usage of the particular trade[57].

Another critic, Wayne D. Mapp, when referring to Du Pont de Nemours V.SS. Mormacvega observed that even if even the goods are packed into a container there is no guarantee that the container will be stowed below deck. He said that "a bill of lading permitting on deck stowage was once considered to be outside the ambit of the Hague's Rules. In the case of containers this probably is no longer true "[58].

Another case which discussed the issue of stowage on deck on a containerized vessel was that of Peter Rosenbruch V. American Export Isbrandsen Lines (The container forwarder)[59], in which a container packed with household effects and stowed on deck was lost in heavy weather in the North Atlantic. The bill of lading was an underdeck bill. The plaintiff claimed 102,917 dollars for the loss of the container, his argument being that carriage on deck constituted a fundamental breach of the carriage contract thus depriving the carrier of the right to limit his liability. The Court did not accept this argument and gave support to the Tariff Rules of the North Atlantic Conference which allowed the carrier where necessary to stow the container, on or under deck without specific clausing to that effect.

56 - Journal of Marit. Law § Comm., Vol.4, no 2, January 1973, p. 327-328.
57 - Comite Maritime International documentation, 1975, p.11.
58 - Journal of World Trade Law, Vol.12, no 6, November/December 1978.
59 - (1974) 2 Lloyd's Rep.476.

In the Red Jacket[60] this ruling has been widely accepted. This case involved the loss of 50 containers stowed on the deck of a containership. Judge Motley, D.J. said: "*Since this was a containership , it was equipped to carry containers on the weather deck as well as in the hatches. Consequently, a request for below deck stowage, unless the cargo was marked dangerous, would be ignored* "[61]. These decisions, relating to containerships form the basis of the actual Law, where deck carriage of containers is concerned[62].

The most important effect of this conclusion is that the carriage of containers on the deck of a containership is not a fundamental breach even though the bill of lading does not specify where the containers are to be stowed. It would be such a breach if the shipper could show that the commodity in issue was customarily carried below deck even on containership, since there would then be no custom excusing the carrier, he would be exposed to absolute and unlimited liability for the loss attributable to the on-deck stowage.

Section four

Deck stowage under international conventions

(Hague Rules, Hamburg Rules, Rotterdam Rules)

Because of its exposure to a greater risk, most authors[63] seemed to agree that the Deck cargo is excluded from the scope of application of the Hague Rule[64]. This appears from article 1 (C) where goods are defined as:

---

60 - (1978) 1 Lloyd's Rep.300.

61 - Ibid at p.303.

62 - See Pierre Bonassies te Philippe Delebeque in, le droit positif français en 2013, DMF no 18, Juin 2014, p.68.

63 - Philippe Delebeque, droit maritime, 13e édition Dalloz, 2014 , p. 471. -Gael Piette, droit maritime, édition Pédone, 2017, p.497. -Pierre Bonassies, droit maritime, 2ème édition, Lextenso éditions , 2010, p.691.

64 - This expression is used in Great Britain refers to "La Convention de Bruxelles du 25 Aout 1924 pour l'unification de certaines règles en matière de

"*goods, wares, merchandises and articles of every kind whatsoever except …cargo which by the contract of carriage is stated as being carried on deck and is so carried* ".This is the case so long as three conditions are satisfied : the carrier must be authorized by agreement with the shipper to stow on deck; it must be stated in the bill of lading that the cargo is being carried on deck; and it must be actually carried on deck.

In such cases, the carrier is free to insert non-responsibility clauses in the bill of lading, while the carrier or the shipper cannot benefit or be subject to the Rules.

However, The Law relating to deck cargo has changed with the advent of the Hamburg Rules of 1978 and the Rotterdam Rules of 2008.

Deck cargo under all these conventions will be dealt with accordingly.

1-Deck cargo subject to the Hague Rules

With respect to the question of liability arising out of loss or damage to deck cargo, it is convenient to consider whether the cargo was in fact carried on deck and whether the carrier has the right to carry on deck and if such rights existed whether adequate notice was given to the consignee that the goods have been carried on deck.

a-Meaning of deck cargo

It is difficult, if not impossible, to make any general definition of what is and what is not deck cargo. Nevertheless, general principles have evolved from the jurisprudence. Thus, in the William Crane[65] case there was a loss of 80 bales of cotton which had been stowed between

connaissement ". Reference is made to the « Haye » because this town was, historically, the siege of the first attempt of the unification of the maritime law. Alain Le Bayon, Dictionnaire de droit maritime, Presses Universitaires de Rennes, Collection "Didact droit",2004, p.141. Algeria have passed legislation giving statutory effects to the Hague Rules, that was in the 13th of April 1964.

[65] - 50 F. 440.

the main deck and the upper deck. It was held that the steamship was not liable for damage from sea water, because the cotton could not be said to be carried on deck.

In the Kirkhill[66], the Court laid down criteria to distinguish deck cargo. The Court said that the term 'deck' had reference only to open decks which were distinguishable from a covered space on a steamship. In this case the cotton was stowed in the alleyway spaces, it was held that the master could refuse to sign clean bill of lading for cotton stowed there.

In the case of Royal Exchange Shipping Company V. Dixon[67], goods placed in a deck house were held to be loaded on deck and not in the ordinary stowing places of the vessel.

Further, in the Lossiebank[68] the Court appears to lay down similar criteria to those in the Kirkhill by :"it is apparent that the appellant must show that the goods were stowed in any covered in space commonly used in the trade for the carriage of goods because the ship's hospital was not in the 'poop', 'forecastle ', 'deck-house', 'shelter-deck ' or 'passenger space'[69].

In that case stowage of a cargo in the ship's "hospital" which was a steel structure on deck having heavy wooden doors, which were blown in by a hurricane was held proper under-deck stowage.

b- Bill of lading not mentioning on deck stowage

Before the adoption of the Hague Rules, it was felt that some protection must be secured for the consignees or transferees of the bill of lading. It has been established that a bill of lading without endorsement concerning stowage imports that the goods would go

66 - 99 Eed. 575.
67 - Supra.
68 - (1938) A.M.C 1033.
69 - Ibid.

underdeck. Thus, in the St. John[70] case, a written freight reservation or agreement had been entered into by the shipper and the carrier which gave the carrier an option to stow on deck. The cargo which consisted of rosin was loaded and clean receipts without endorsement concerning stowage were given therefore. Upon prepayment of the freight, the ship issued a clean bill of lading in the usual form. Owing to the storm, the rosin was jettisoned. The supreme Court held that a clean bill of lading without endorsement concerning stowage, issued by a vessel which has consented to carry goods "on or under deck, ship's option" amounts to a declaration that the option has been exercised to carry the goods underdeck.

This decision was without doubt an attempt to prelude the circulation of "clean "bill of lading, which would be qualified by a separate agreement between the carrier and the shipper, of which the trade and innocent purchasers would have no notice.

When the Hague Rules were adopted the same protection was secured to the consignee as appears from the definition of "goods" in article 1(C):"…*except …cargo which by the contract of carriage is stated as being carried on deck*…".

If the on-deck carriage is not stated in the bill of lading, the consignee is entitled to assume that the goods are "goods" in which the Hague Rules apply. Thus, in Encyclopedia Britanica Vs. the Hong Kong Producer, goods were shipped on deck under a short form bill of lading which did not mention on deck stowage but incorporated the term of the carrier's regular form bill of lading by reference which contained a clause giving the carrier the right to stow on deck and providing :

"*The shipper represents that the goods covered by this bill of lading need not be stowed on deck and it is agreed that it is proper to and they may be stowed on deck unless the shipper informs the carrier*

[70] - Supra.

in writing before delivery of the goods to the carrier that under deck stowage is required. With respect to goods carried on deck, all risks of loss or damage by peril inherent to such carriage shall be borne by the shipper".

The goods were delivered to the carrier who put them on board before issuing the bill of lading. At that point in time it was impossible for the shipper to "inform the carrier in writing before delivery of the goods to the carrier" that under deck stowage was required.

Where the case was first dealt with in the United States District Court, the carriers were held not liable for the six containers stowed on deck. The finding of the Court was that there had been no breach of the contract of carriage which provided that the carrier could ship on deck unless notified to the contrary by the shipper. Judge Harold R. Tyler, in his judgement said that the bill of lading stating "…*It is agreed that it is proper to and they (goods) may be stowed on deck*…" gave the carrier the unqualified right to stow on deck and he expressly approved the Court's reasoning in Givandan Delawana Vs. the Blijdendijk.

On appeal, the Court took a different view. The carrier was held liable under the Hague Rules because the bill of lading did not specify the wording of article 1(C) "…*cargo which by the contract of carriage is stated as being carried on deck* …".

On the other hand, despite the fact that the regular bill of lading contained a clause which stated : "…It is agreed …", the Court was unable to give a definite answer as to whether there was a valid agreement the parties to stow on deck where there was no endorsement on the face of the bill of lading. The Court found on the evidence, that no agreement regarding deck stowage existed. Its argument was that unless the shipper had notice of the clause giving the carrier the right to stow on deck, they cannot be said to have consented to the on-deck stowage.

Further, the Court relied on the St. John case that if an option is inserted in the bill of lading, but the bill of lading itself contained no

information whatever as to how it was exercised, it could not be left to be exercised by the actual placing of the cargo on deck or under deck.

The Court concluded that the shipper was receiving a clean bill of lading and this was understood as importing underdeck stowage. Consequently, it held that the carrier committed fundamental breach by stowing containers on deck. It also found that the terms of the bill of lading did not bring the cargo within the exception in article 1(C). Accordingly, the carrier was held liable for the full amount of the damage and could not rely on the exemption clause by virtue of the breach of the preliminary obligation of article 3(2) to "…*properly and carefully load , stow , carry, keep*…".

c-Clauses giving liberty to stow on deck

Problems arise when the bill of lading contains a clause permitting deck stowage, but the fact of the bill of lading does not state deck carriage for the purpose of the Hague Rules exclusion.

A bill of lading usually provides that the carrier has no liberty to carry the goods on deck without responsibility for any loss or damage arising therefrom. Before the Hague Rules, the carrier was entitled to introduce such clause at his option without being exposed to any liability[71]. As noted before, this trend is no longer correct under the Rules.

Subsequently, the Hague Rules were adopted and questions of liability arose in respect of deck stowage in cases where the contract was governed by the Rules. Thus, in the English case of Svenska Traktor Vs. Maritime Agencies (Southampton) Ltd[72], The plaintiffs were the consignees of a consignment of tractors stowed on deck and lost overboard. The bill of lading contained a combined general liberty, non-responsibility clause which read :

---

71 - Armour Co. Vs. Walford Ltd (supra), The Peter Helm (supra), Delawana Inco. Vs. Blijdendijk (supra).
72 - (1953) 2 QB. 295.

"*Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or claim arising therefrom*".

The defendants denied liability by relying upon the clause above. The Court discussed the issue of whether the liberty to carry on deck satisfied the spirit of the exception in article 1(C) "stated as being carried on deck". It was made clear that a general liberty to carry on deck is not a statement that cargo is carried on deck sufficient to exclude the obligations imposed by the Hague Rules or to exclude goods so carried from the definition of "goods" in article 1(C).Pitcher, J. said that "such statement on the face of the bill of lading would serve as a notification and a warning to consignees or endorsees (an endorsee is a person whose in favour an endorsement has been made) of the bill of lading to whom the property in the goods passed under the term of section 1 of the bill of lading Act, 1855, that the goods which they were to take were shipped as deck cargo. They would have thus full knowledge when accepting the documents and would know that the carriage of the goods on deck was not subject to the Act. If, on the other hand, there was no specific agreement between the parties as to the carriage on deck, and no statement on the face of the bill of lading that goods carried on deck had in fact been so carried, the consignees or endorsees of the bill of lading would be entitled to assume that the goods were goods the carriage of which could only be performed by the shipowner subject to the obligations imposed by the Act. A mere general liberty to carry on deck is not in my view a statement in the contract of carriage that the goods are in fact being carried on deck[73] ".

Further the Court dealt with the question of whether the shipowner was permitted under this clause to carry on deck. While rejecting the second part of the clause because it was repugnant to article 3(8), the Court proceeded upon the assumption that the shipowner had the right to carry on deck subject to the terms and

[73] - Ibid at p. 300.

provisions of the Act, to properly and carefully load, handle, stow, carry, keep, and care for the goods in question (article 3(2)). Consequently, the Court did not consider deck stowage in these circumstances as a fundamental breach.

There is, however, an argument which says that when a bill of lading contains a general clause with no specific statement of on deck stowage there is an unjustifiable deck carriage and a breach of the whole contract of carriage[74].

d-Oral assurance not to carry on deck

In a case[75] a bill of lading subject to the Hague Rules give complete freedom to a forwarding agent over means and procedure to be followed in transportation of goods subject to any express written instrument. Eight containers were loaded on deck. The vessel met with slight swell and two of the containers were lost overboard. No claim was laid against the shipowner as the bill of lading stipulated that containers were "shipped on deck at shippers risk". The claim was against the forwarding agents who made a promise that the containers would be carried under deck. It was established that an oral promise is binding and would override a written exemption clause. The Court here has been inspired by the Mendelson Vs. Normand[76] case, in which Lord Denning, M.R, said that when a person gives a promise to another, intending that he should act on it by entering into a contract, then it is binding. So far as the Hague Rules were concerned, the point was made by Lord Justice Roskill during the argument that if a carrier made a promise that goods would be shipped underdeck and contrary to that promise they were carried on deck and there was loss, the carrier could not rely on the limitation clause.

74 - The reasons are set by Tetley, Marine cargo claim, supra at p. 194.
75 - Evans and Son (Portsmouth) Ltd .Vs. Andrea Merzazio Ltd. (1976) 2 ALLER 930.
76 - (1970) 1 QB. 177.

Concerning deck cargo not subject to the Hague Rules, it happens when a shipper and a carrier insert a statement to that effect in the bill of lading. In such cases the parties are free to exclude all liability[77].

2-Deck cargo under the Hamburg and the Rotterdam Rules

The question of deck cargo was considered during the UNCITRAL plenary session in 1976. The debate resulted in a draft Convention on the Carriage of Goods by Sea. The draft convention has been considered at the diplomatic conference convened by the United Nations in Hamburg from 6th to 31st March 1978. The outcome of this conference was a new Convention, a Convention which is expected to replace the Hague Rules.

Unlike the Hague Rules the Hamburg Convention applies to goods stowed on deck. Article 9 provides :

"*The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with usage of the particular trade or is required by statutory rules or regulations …*"

In such case, a liberty to carry on deck under the Hamburg Rules may be considered an adequate notice to the consignee as appears from article 9 paragraph 2 "may be carried on deck ". In such cases the carrier cannot exclude liability, instead he will have the same liability as if the goods were stowed underdeck. If the carrier has not given adequate notice to the consignee by inserting in the bill of lading or other document evidencing the contract of carriage that the goods "shall or may be carried on deck " when an agreement has been entered into with the shipper, he is not entitled to invoque such a defense against a third party, including a consignee who has acquired the bill of lading in

[77] - Aetna Insurance Co. Vs Carl Matusek Shipping Co. Inc .(1956) A.M.C 400

good faith. Such provision, as one commentator puts it "enables the buyer of the cargo to be in better position vis-a-vis shipowner's liability than the seller"[78]. In this case the carrier will only be liable for damage or losses resulting from deck carriage and he can also limit his liability under article 6 of the convention. Also, should the shipowner carry goods on deck contrary to express agreement to carry under deck, this would be deemed to be an act or omission within the meaning of article 8. The carrier, therefore, would not be able to limit his liability under article 6.

Despite the fact that the convention, from a point of view of an author[79], has established a regime "well created and complete and clear", only a few states have ratified it[80]. The Hague Rules, however, have been adopted by more than a hundred of states which have passed legislation giving statutory effects to it[81] among them Algeria in article 747 of the Maritime Code.

The Rotterdam Rules are not different from the Hamburg Rules, but they are more precise because they made provisions as to the transport of containers and containerships. They consider this transport like others transports[82]. This is due to the fact that the transport on deck of container is becoming a normal practice, and have been even accepted by the insurers[83].

78 - Hudson, N. Report on the Hamburg Diplomatic Conference in connection with Carriage of Goods by Sea. April 1978. P.5
79 - P. Bonassies and Christian Scapel, supra, p.694.
80 - Alain le Bayon, supra, p.219.
81 - Payne and Ivamy's carriage of goods by sea, tenth edition, by E.R. Hardy Ivamy, Butterworths, London, 1976, p.279.
82 - P. Delebecque, supra, p.561.
83 - P. Bonassies, le droit du transport maritime de conteneurs à l'ère du 21ème siècle, D.M.F 699 Janvier 2009, p.11.

Conclusion

This paper has dealt with the liability of the carrier for loss or damage to goods when carried on deck. Reference has been made to the cases where deck cargo is allowed and to the ability of contracting out of liability and to put the whole risk of the carriage on the shipper.

When the carrier carries on deck when he is not entitled to do so, it has been shown that he loses the protection of all contractual and statutory exceptions. It has also pointed out that such carriage constituted a deviation exposing the carrier to unlimited liability.

A radical change has been produced by the Rules of Hamburg and Rotterdam. They cover all types of carriage including the carrier's right to stow cargo on deck though where adequate notice has been given, then the carrier can claim the protection of exceptions in these Rules. Even if no notice was given, then the carrier is only liable for loss, actually resulting from the carriage on deck and in respect of such loss, is entitled to the limitation of liability benefit, except where there is a breach of an express agreement for underdeck stowage. In the latter case, because of the willful nature of the breach the carrier will lose his right to limit his liability.

The change brought about by these Rules constitutes a positive action since the bargaining power between the carrier and the shipper is equilibrated.

Bibliography

1-International and National Laws

-Carriage of Goods by Sea (Hague Rules), 25 august 1924.

-Règles de Hambourg, 31 Mars 1978.

-Règles de Rotterdam, 11 Décembre 2008.

-Code Maritime Algérien, 23 Octobre 1976.

2-Books in English

-Carver, carriage of goods by sea, 12th ed, London, 1971.

-A.D. Couper, the geography of sea transport, 1st ed, London, 1974.

-Gilmore and Black, the law of admiralty, 2nd ed.1974.

-Don Benson and Geoffrey Whitehead, transport and distribution made simple, London, 1975.

-Knauth, ocean bill of lading, 4th ed, London, 1953.

-Scrutton, on charterparties, 18th ed, 1974.

-W. Tetley, marine cargo claim, 1st ed, London, 1975.

-E.R. Hardy Ivamy, carriage of goods by sea, Butterworths, London, 1976.

3-Books in French

-Alain le Bayon, dictionnaire de droit maritime, Presses Universitaires de Rennes, 2004.

-Pierre Bonassies et Christian Scapel, droit maritime, 2nd Ed, Lextenso éditions, Paris, 2010.

-Hassania Cherkaoui, le Droit Maritime Marocain et comparé ,1er Ed. A.M.D.M.A , 2014.

-Philippe Delebecque, droit maritime, 13ème Ed, Dalloz , Paris , 2014.

-Gael Piette, droit maritime, Editions A Pédone , Pari , 2017.

4 -Periodicals

- Journal of Maritime Law and Commerce, vol 9, no 4 , July 1978.
- Journal of Maritime Law and Commerce , vol 5, no 3, April 1974.
- Journal of Maritime Law and Commerce, vol 4, no 4, April 1973.
- Journal of Maritime Law and Commerce, vol 4 , no 2, January 1973.
- Journal of Maritime Law and Commerce , vol 7, no 4, July 1976.
- Journal of World Trade Law, vol 12, no 6, November /December 1978.
- Droit Maritime Français (DMF), Janvier 2009.