A LEGAL EXAMINATION OF THE CONCEPT OF CARRIERS LIABILITY IN INTERNATIONAL CARRIAGE OF GOODS BY SEA. THE CASE OF KENYA.

BY

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A DISSERTATION SUBMITTED TO FACULTY OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF A BACHELOR'S DEGREE IN LAW OF KAMPALA INTERNATIONAL UNIVERSITY

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CERTIFICATION

The undersigned certifies that, he has read and hereby recommends for the acceptance by the Kampala International University a dissertation entitled: **A legal examination of the concept of carriers liability in international carriage of goods by sea, with particular Interest in Kenya, as one of the Shipping nations.** In partial fulfillment of the degree of bachelor of laws.

SIGNATURE .....

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DATE.

Tutorial P
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10/6/2016

DEDICATION

I dedicate this Research Paper to my mom, whose patience, sacrifice and commitment to my education made this possible. God bless her abundantly.

ACKNOWLEDGEMENT

I thank God for his love and grace that have seen me through the rough tides of this demanding academic journey.

I am highly indebted to my supervisor for being available to me all the time and tirelessly working with me in spite of his other commitments. Without his scholarly advice and educative assistance this work would not have the approach and format it has.

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LIST OF INTERNATIONAL INSTRUMENTS

The Hague Rules 1926

The Hague-Visby Rules

The Vienna Convention 1980

The Hamburg Rules

SOLAS International Convention For The Safety Of Life At Sea

International Maritime Dangerous Goods Codes (IMDG)

TABLE OF CASES

1.1 General Introduction

1.2 Background

In a world comprising cargo owning nations, and ship owning nations, and where most nations are both, there is a continual balancing of risk allocation concerning the damage or loss of sea-borne cargo. Therefore, on the fields of international trade and business law, the international law community such as united nation has sought uniformity and harmonization on cargo liability that would equitably address the often-conflicting interests of shippers and carriers. Historically, there have been several well known attempts at establishing uniform international law in this field, including: the Hague Rules (1924); the Hague/Visby Rules (1968); the Hamburg Rules (1978); and so forth. However, it is not likely to be resolved with all parties satisfied.

During the 1970's pressure mounted from developing countries and major shipper nations for a full re-examination of cargo liability regimes in Hague-Visby Rules. The Hamburg Rules establishes a relative uniform legal regime governing the rights and obligations of shippers, carriers and consignees under a contract of carriage of goods by sea. It was prepared at the request of developing countries, and its adoption by States has been endorsed by such intergovernmental organizations as the United Nations Conference on Trade and Development (UNCTAD), the Organization of American States (OAS) and the Asian-African Legal Consultative Committee (AALCO). A draft of the Convention was prepared by UNCITRAL and finalized and adopted by a diplomatic conference on 31 March 1978. There are many countries incorporating the Hamburg Rules into their national law in search for better protection for the goods owner. However, it remains the least applicable law with regard to this area of law to date.

The historical development of carriage of goods by sea can, hence, be traced from the 15th century where global voyages gave rise to the concept of **"the law**

of merchant". Since then, this concept developed by application of the above mentioned international conventions which were introduced in the 20th century to cover different aspects of maritime activities.

The Hague rules and Hague-Visby rules as stated above are examples of such rules they were established due to the initiative of the **international convention for the unification of certain rules of law relating to Bills of landing and its additional protocol**. These negotiations were in progress for some years and culminated in the establishment of the above laws/rules. The Hague rules were amended, on adoption of the **protocol to amend** the international convention for the unification of certain rules of law relating to Bills of Lading and become known as The Hague -Visby rules.

The **Carriage of Goods by Sea Act (cap 392**), Kenya laws, was enacted as Kenya's initiative of ratifying the Hague rules and hence incorporating its provisions in Kenya. The provisions of these rules are contained in the schedule. ***Thornton's Legislative Drafting* (page 292)**, sets out the function of a schedule: "*The use of schedules is a legitimate and helpful device for the clearer presentation and more efficient communication of the content of legislation. The general practice is for matters of principle to remain in the sections of the statute while lesser matters of machinery or detail may be arranged in schedules. The principal purpose of this arrangement is to enable the presentation of the main sections of the enactment uncluttered by material of secondary or incidental importance. It is essential to bear in mind that the device is no more than one of presentation, for the schedule is as much part of the enactment as is the section introducing it or indeed any other section*"

From the above it is submitted that the schedule to cap 392 has the force of law in Kenya. As stated in **Carl ronning v. societe navale chargeurs delmas vieljeux [1984] eKLR.**

With regard to **The Hague Visby rules** Kenya has not incorporated these in the Kenyan statute by amendment or in the legal regime by independent legislation. They thus continue to be effective in Kenya by way of the

application provision i.e. **article 10** of the Hague Visby rules or by way of paramount clause or a clause in the bill of lading expressly stating them to be the law governing that contract/transaction. In addition to this Kenya being a shipping nation has enacted a litany of laws and established bodies to facilitate this area of law, some of these include the Kenya ports authority and its enabling act, Kenya bureau of standards, marine authority and its act, merchant shipping act e.t.c. these will be discussed further in subsequent chapters.

Some terms need to be defined for a proper understanding of this area of law;
International trade[1]: Is the exchange of capital goods, services across international borders or territories. It controls trade across boarders with the transfer of ownership and possession of goods from one country to another[2].
International business[3]: On the other hand comprises commercial transactions that take place between two or more regions, countries and nations beyond their political boundaries.
An international sale of Goods contract: Refers to an agreement of transfer property between parties in different countries/ regions for a money consideration called the **price**. For the contract to contract to exist there must be an offer to contract addressed to a person and indicate an intention for the offer or to be bound on acceptance[4]. This contract is the basis of international trade and business transactions. **Incoterms:** Refers to international commercial terms which govern documentation, delivery and payment under an international contract of sale. They include CIF (Last Insurance and Freight), FOB (Free in Board) among others; these are arrangements for transportation of goods. The lncoterms are intended primarily to clearly communicate the tasks, costs and risks associated with the transportation and

[1]Wikipedia.

[2] Article Hamburg Rules

[3]wikipedia

[4]UN convention on contracts for the International sale of Goods

delivery of goods. **In carriage of goods by sea,** the exporter/seller/agent of seller of exporter has concluded a **Contract of carriage** with a ship owner whereby the latter undertakes to carry the goods in his ship, from the exporter. This is also called **"The contract of Affreightment"[5].**

Article 1(1) defines the person by whom or in whose name the contract of carriage of goods by sea has been concluded with the shipper/exporter as the **carrier**. **Article 1(1)** defines the **shipper** to be any person by whom or in whose name or on whose behalf a contract of carriage has been concluded with a carrier or any person by whom or whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

Goods[6] include goods, wares, merchandise and article of every kind whatsoever, except live animals and cargo which by the contact of carriage is stated as being carried on deck and is so carried· a **Bill of lading:** is a document which evidence a contract of carriage by sea and the taking over of loading of the goods by the carrier and by which the carrier undertakes to deliver the goods against surrender of documents. A provision in the document that the goods are to be delivered to the order of a named person or to order or bearer constitutes such an undertaking

A consignee[7] is the person entitled to take delivery of the goods. This is upon production of a bill of lading (negotiable instrument)

1.3 Statement of the problem.

This paper arms at analyzing the carrier's liability when it comes to performing his/her duty to the different parties involved in the contract of affreightment. This is because thee has always been controversy as regards the exact nature

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5.Article 1(6) Hamburg Rules.

6.Un convention on contracts for the international sale of Goods

7 Article 1 (7) Hamburg Rules.

and scope of the obligation imposed on the carrier. This is not withstanding scholarly and judicial opinion as well as international instruments as well as local law incorporating these instruments in the domestic law. Of particular focus is how far the carrier can exonerate him/herself from liability.

1.4 Objectives of the study.

This paper aims to provide a comprehensive and update summary of the state of the carrier's liability in light of international trade. Related to this is the analysis of the law that governs to what extent he/she can be liable.

This paper assesses how the carrier can be protected by the law given that there is a limit to his/her role of responsibility. This paper also seeks to analyze the extent to which the international conventions/rules have been incorporated by shipping nations by observing Kenya's attitude towards the some.

1.5 Hypothesis

The study focuses on the parameters of the concept of carrier's liability in the various legal regimes and their effectiveness in regulating this industry hence;
The absence of a uniform international instrument on the concept of carrier's liability has contributed to ambiguity to the concept. The failure of local legislation to produce a comprehensive law on the subject has contributed to the stagnation of this concepts development. Further failure of local legislation in ratification of international instruments that seek streamline, this area has been a cause for stagnation

1.6 Scope of the study.

The study aims to review the carrier's obligation in the shipping industry both internationally and nationally by analyzing the law of Kenya which regulates carriage of goods by sea in international trade and business.

1.7 Significance of the study

The study provides an important background and recommendations of the carrier's liability. The research highlights the essence of the concept of carrier's liability i.e. the marine industry as impacted on by the current realities.

The research attempts to widen the existing scope of knowledge, through a comparative study of the nature, extent and effect of international levels, hence adding to the existing body of knowledge. Lastly the study is made as a partial fulfillment of the requirement for the award of a Bachelors of Law degree at Kampala international university.

1.8 Literature review

As a legal concept created to set a standard which may be applied to a multitude of factual circumstances, carrier's obligation has developed from its ancient roots until this day into both a ubiquitous and multifaceted concept. This concept affects marine, marine insurance, carriage of goods by sea e.t.c

The united nations commission on international trade law (UNCITRAL) approved on June 1978, the draft convention on contracts for the international carriage of goods wholly or partly by sea, which aimed at creating a modern and uniform law concerning the international carriage of goods.

This was expected to be of substantial benefit for shippers, particularly those in developing nations. Harmonization and modernization of the legal regime in this area would increase commercial confidence when doing business internationally.

This study aims at providing and understanding of the carrier's obligation under the carriage of Goods. It is thus important to analyze the position of the law regarding this concept i.e. national, international, common law.

Dr Sze Ping Fat, Solicitor, Sydney and Melbourne; The common carrier's strict liability, **A concept or fallacy?** Discussed strict liability of a common carrier of it even existed as a separate and distinct legal concept at common

law insofar as such liability ought to be viewed purely as a matter of construction of the carriage contract.

In has conclusion he stated that the inconsistencies in those early English decisions and the different opinions expressed by both judges and commentators on the issue, that carrier's liability ought to be decided according to contractual principles in light of the reference to a contract of carriage in the rules, thus there is a strong case for treating the carriers liability as a matter of status where the Hague/Visby rules apply by force of law.

David Tiplady, introduction to the Law of International Trade, London; Is another writer who brought out the issue o conflict in regard to the law applicable in international trade. This is because in international sale, transactions will by definition have contract with more than one law districts/jurisdiction.
As a result a party contemplating litigation is forced with two questions i.e. in which jurisdiction will the action be brought and which law will be applied by the court hearing the case. This belongs, as per the writer, to the area of law known as "the conflict of laws" or "private international law".

Vita Foods Products Inc V. Unus Shipping Co. LTD[8] Discussed this issue. The parties chose to use English law to regulate their contract because they had contracted out of the law and since the Hague rules were applied by English law only to voyage from English ports, the parties had completely removed themselves from the reach of the rules. However, as the **Hollandia**[9] demonstrates this can no longer happen, since the applicability of the rules has widened and being given the force of law they have pre-emptive effect over any choice of law which the parties may make.

[8] (1939) Al 277
[9] (1992)3 AIIER1141

The status of the **Vita Foods Case** lies in the statement of Lord Wright regarding the so called proper law of contract, this statement has 3 elements.

a) Parties have the liberty to choose which law will apply to their contract

b) Not necessary that the chosen law have any connection to the contract

c) The only limit to this freedom are intention expressed bonafide and legal.

Nevertheless **Vita foods** leaves several important questions regarding the proper law of a contract unanswered, i.e. what laws applies in default of choice, does the proper law (however ascertained) regulate all possible issues under a contract or are certain of them determined by a different system and what is the scope of the qualifications to the freedom of choice to which lord Wright draws our attention.

Three International conventions: The Hague-Visby and Hamburg rules were prepared. They, with different texts and legislative styles have become the main reasons for lack of uniformity in the field of carriage of goods by sea to day.
Kenya as a shipping nation incorporated the Hague and Hague Visby rules. Therefore it is bound by the same principles and conclusions that come as a result of the application of the rules.

1.9 Methodology

The study of methodology adopted was quantitative in Nature as it is based on published literature in libraries and online resources, library research was conducted and most of the court decisions recent or old were considered in order to ascertain the legal and judicial interpretation of the developments in the shipping industry.

1.10 Chapterisation

The research is divided into 5 chapters. The first covers the introduction, scope of the study, rationale of the study, literate review and methodology. Chapter two deals with the definition of the different liabilities/obligations in performing

his/her duties, how his obligation could be found in the contract of carriage and the time at which the carrier is expected to exercise his duty, chapter four, deals with the legal implication and the defenses available to a carrier in performing his contractual obligations. Chapter five is the conclusion and recommendations on the position of the law are light of the development in the shipping industry.

2. Carrier's liabilities; the concept and the laws applicable

2.1 Introduction

A carrier is defined as an individual or organization (such as a ship-owner) that contracts to transport goods for a fee[10]. A carrier will be responsible in contract to whoever engages his services.

In addition every consignee of goods named is a bill of lading, and every endorsee of the bill of lading to whom the property in the goods there mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of such goods as of the contract contained in the bill of lading had been made with himself.

In determining passing of risk and property in the goods, recourse is to be had to the appropriate sale of goods law governing that transaction. Terms like ***CIF (cost Insurance freight), FOB (free on board)*** play an important role in assessing who bears the risk of loss or damage between the buyer and seller of goods in international sale contracts. ***The Kenyans sale goods act***[11] may provide assistance on this subject as it explains when goods pass i.e. ascertained, bulk, and unascertained goods. This act is premised on the concept of "risk passed with the passing of the property in the goods"

The Vienna convention 1980 also seeks to harmonize the different approaches of what would constitute such. However like most international conventions, the extent of their effectiveness is measured by the willingness and participation of the nations through singing and ratifying the convention, hence accepting the standards stated by such convention and incorporating them in their local legal regime.

Kenya has not ratified the Vienna convention of 1980 and as such does not subscribe to the provisions contained therein.

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[10] ***(Blacks law dictionary vol 18).***

[11] ***(cap 31)***

2.2 Application of The Hague – Visby rules and The Hamburg rules

These are international instruments which regulates the relationship between the carrier shippers and consignee of goods.

They seek to standardize the principles that will be applied in relation the contract of carriage, liability of the carriers, defenses and immunities that he /she may rely on and what amounts to goods of extra.

The Hague rules are a result of ***the international convention for the unification of curtain rule after relating to bills of loading*** it was signed at Brussels *on august 25, 1924* .The rules were designed to bring certainty and legal uniformity to what was then, as it was today, the most important conduit of international trade in corporeal movable property.

These rules became known as The Hague /Visby on the adoption of the **protocol to amend the international convention for the unification of cirtain rules of law relating to bills of loading.** It came into force on *June 23 1977.*

The Hamburg rules are the results of ***the United Nations convention on the carriage of goods by sea***. Which was adopted in Hamburg and came into force in 1992

They were adopted largely as an answer to the concerns of developing nations that the Hague rules were unfair in some respects .they have not been an overwhelming success ,Although they have been in force since 1992, nor have they been ratified by most of the major trading or shipping nations.

2.2.1 Definitions and scope of application

Both rules attempt to provide a definitive explanation of who a *carrier is, what a contract of carriage constitutes, meaning of shipper, consignee and bill of loading*

The huge/Visby rules indicate that a ***carrier*** includes the owner or charterer who enters into a contract of carriage with a shipper ,the Hamburg rules widens this by starting that any person by whom or in whose name a

contract of carriage of goods by sea has been concluded with a shipper is the carrier.

Hague/Visby rules fail to define a ***shipper***; however the Hamburg rules seek to resolve this deficiency by stating that a shipper means any person by whom Or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea.

What/who constitutes a ***consignee*** was also left out by the Hague/Visby rules .The Hamburg rules however very clearly state that such is the person entitled to take delivery of the goods

A ***contract of carriage*** is the most paramount aspect of carriage of goods by sea. The Hague/Visby rules have a limited definition of what a contract of carriage is, compared to the Hamburg rules .The former provides that such contract applies to contract of carriage covered by a bill of loading or similar document of title ... The latter ,on the hand, states that contract of carriage means any contract where by the carrier undertakes against payment of freight to carry goods by sea from one port to another ,i.e. widening the scope of what constitutes a contract of carriage by including the phrase any contract.

The Hamburg rules go a step further and define what constitutes a ***bill of lading,*** that is, a document which evidences a contract of carriage by sea ,and the taking over loading of the goods by the carrier .This is in contrast to the Hague/Visby rules which completely omit to describe what a bill of lading is .

With regard to ***application*** article of the Hague/Visby rules lay out the conditions for the rules to be effective. It states that the rules apply if the goods are transported between two different states and;

a) A bill of loading is issued in a contracting state.
b) The carriage begins in the part of a contracting state.

c) The contract of carriage specifically incorporates the rules by reference.

The Hamburg rules represents a clearer attempt to avoid the problem of application i.e. too narrow in scope of application that arose under the Hague /Visby rules.

The first major change is found in **article 2,** which states the rules apply to all contracts of carriage by sea and not only contracts by way of bills of loading, when ;

(a) The port of loading is in a contracting state.

(b) The port of discharge is in a contracting state

(c) When any one of an optional group of ports of discharge in a contracting state

(d) When the bill of lading or other contractual document is issued in a contracting state.

(e) When the Hamburg rules are incorporated by reference in the contract of carriage.

The most obvious difference to the Hague/Visby rules is the extension of application from only the bills of lading to all contracts of carriage by sea .this not only extend the application but also avoids the potential for disputes regarding what exactly a bill of loading is and whether it comes within such a definition.

2.2.2 Period of responsibility Vis a Vis Basis of liability

The Hague/Visby rules state the liability of the carrier as beginning with loading on the ship to the discharge from the ship **(ARTICLE10).**

However with regard to seaworthiness the carrier is only required to provide a seaworthy vessel at the beginning of the voyage.

Complete freedom of contract is maintained for the regulation of liability before loading and after discharge.

ARTICLE4 of the Hamburg rules extends the carriers liability to all times under which the carrier has taken over the goods from the sender until such times as they are regarded as being out of port and in storage warehouse or onward transit etc.

There are three main ways of breaching a contract of carriage by sea i.e. loosing or damaging the goods, delivering them short of their destinations or delay in carriage .***Article 5 (1) Hamburg rules*** reiterates this by stating that the carrier is liable for the loss resulting from loss of or damage to the goods as well as from delay in delivery.
This loss ,damage, delay is only attributed to the carrier if such took place within the period of responsibility described in article ***1(e) of the Hague/ Visby rules*** and ***article 4 of the Hamburg rules.***

In addition these laws provide for situations where the carrier would be particularly liable/ responsible .Theses include
A. If the shipper does not exercise due diligence to make the ship sea worthy article ***3 a, Hague Visby rules***
B, failure to exercise due care of the cargo ***3(2) Hague Visby***
Under the Hamburg rules liability would result if the carrier fails to show that he took all reasonable steps to avoid the loss, ***article 5 (1)***
The carrier under the Hamburg rules therefore in order to remove liability must take all reasonable measures to avoid the loss.
Both the Hague Visby rules and Hamburg rules contain provision that describe circumstances when the carriers will not be liable for loss or damage .These can be found in ***article 5*** and ***article 6*** of the Hague Visby and Hamburg rules respectively.

Some of these exceptions/ defenses from liability include act of God act of war act of public enemies, necessity etc.

2.3 The carriage of goods by sea act [12](COGSA).

This act regulates the carriage of goods by the sea. It was enacted as a ratification of the Hague rules. It is therefore Kenyans attempt /Initiative to incorporate the Hague rules into the national law of Kenya. The schedule to this act incorporates the provisions of the Hague rules mutatis mutandis. **CARL RONNING V. SOCIETE NAVALE CHARGEURS DELMAS VIELJIEUX[13]** *considered the legal effect of having these rules in the schedule o the act. The question was whether this gives give them similar weigh as if they were contained in the body of the act. Courts conclusion was that the schedule is part of the act and whatever is contained therein is not legally inferior to the body of the act.*

This is reiterated by **Thornton's Legislative Drafting[14]** *"... It is essential to bear in mind that the device is no more than one of presentation, for the schedule is as much part of the enactment as is the section introducing it, or indeed any other section"*

Sadly, the protocols that amended the Hague rules i.e. resulting in them being referred to as the Hague Visby rules have not been incorporated in our national law. They continue to be effective by use of the ***paramount clause*** within the bill of lading which expressly provides that the Visby rules regulate the contract of carriage. Such was the case in, **FRIENDLY CONTAINERS MANUFACTURERS V. MITCHEL COTTS KENYA LTD[15]; *the*** *plaintiff purchased goods in India and contracted a carrier for transportation to the port of Mombasa. The carrier failed to discharge this duty resulting in loss to the plaintiff.*

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[12] cap 392

[13] [1984]eKLR

[14] page 292

[15] [2001] Eklr

The outcome of this case depended on the limitation period provided under Article 3 r 6 of The Hague Visby rules which is to the effect that actions brought after one year from the arising of the cause of action will fail.
There was an attempt to claim that the rules don't apply and consequently the limitation period is inapplicable as well. Court however held that the Hague Visby rules apply because of the application of clause 5 of the bill of lading which incorporated them in the contract.

Kenya therefore by Being a incorporating statute of the Hague rules ,it sadly, inherits problems contained in those rules, i.e.

a) Vague, ambiguous wording which complicate the allocation of liability for loss or damage to cargo.

b) Exemption from losses which are within the carrier control and should thus be borne by the carrier e.g. exemption from liability for the negligence of servants and agents in the navigation and management of the vessel.

c) The use of undefined and uncertain terms e.g. reasonable deviation, due diligence, property and carefully loaded and discharge.

These issues have been major causes of concern in the international carriage of goods. This local law does nothing to address them hence uprooting the uncertain position of international carriage into the national context.

2.4 The merchant shipping act[16] Vis -a- Vis the safety convention

Section 7 of the carriage of goods by sea act (cap 392) is to the affect that the provisions of the ***merchant shipping act of 1967*** which relate to the carriage of dangerous goods still operates,

This is ***found in section 230*** of the ***merchant shipping act*** which states;

Subject ***to subsection 2***, *the safety convection including all its related instructions shall unless excepted by this act apply to all Kenyan ships and all*

[16] (1957)

other ships engaged on international voyages while in in Kenyan waters ,section 230(1)

By the term *safety convention* the section refers to the SOLAS convection i.e. the ***international convection for the safety of life at sea***. This convention ensures that ships flagged by signatory states comply with minimum safety standards in construction, equipment and operation.

Chapter VI of the convention relates to carriage of dangerous goods. it requires the carriage of all kinds of dangerous goods to be in compliance with the ***international maritime dangerous goods codes (IMDG)***

This code is intended to protect crew members and to prevent marine pollution in the transportation of hazardous materials by sea vessels.

This code includes articles setting out obligations for various goods that are given the status of dangerous or Hazardous .These include *flammable gases toxic gasses ,flammable liquids ,flammable solids ,radioactive materials etc.*

The Hague, Hague Visby and the Kenyan carriage by sea act have similar provisions which are to the effect that dangerous goods which the carrier has not consented to, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising but of or resulting from such shipment.

From the above statement, the shipper has the obligation to disclose the nature of the goods to the carrier failure of which will render the carrier exempt from liability as a result of loss damage even if such was due to the initiative of the carrier .The carrier for this purpose has the right to destroy such goods.

2.5 Kenya ports authority[17]

This law establishes the Kenya ports authority, a state corporation with the responsibility to "maintain, operate, improve and regulate all scheduled

[17] ***(KPA) Act 1978***

seaports" on the Indian Ocean coastline of Kenya, including principally Kilindini Harbour at Mombasa. Other KPA ports include Lamu, Malindi, Kilifi, Mtwapa, Kiunga, Shimoni, Funzi and Vanga. The KPA was established in 1978 through an act of Parliament and is located in Mombasa. At the port of Mombasa the Kenya Ports Authority's core business is to provide:

- Safenavigation
- Pilotage
- Berthing
- Mooring
- Pollutioncontrol
- Stevedoring
- Shorehandling
- Storage services

Despite this the port has been plagued by various issues detrimental to the efficient conclusion or comencement to international carriage of goods by sea and international trade, generally. These include delays, congestion, hefty clearance charges.

*"The pile-up of cargo at the port of Mombasa is causing anxiety among exporters as delays in clearance put orders worth millions of dollars at stake. Traders said a flood of uncollected containers has jammed the facility, with slow clearance by Kenya Revenue Authority (KRA) and Kenya Ports Authority (KPA) adding to their losses. The ships meant to dock at Mombasa port are forced to bypass the facility to dock at other ports due to clearance headache."(***African business pages)**

2.6 Kenya maritime authority act[18]

This act establishes the Kenya Maritime Authority (KMA) this authority was set up in June 2004 as the semi-autonomous agency in charge of regulatory

[18] **cap 370**

oversight over the Kenyan maritime industry. Maritime safety and security is one of the Authority's core functions. As the pacesetter of the Kenyan maritime industry, KMA thus strives to strengthen national maritime administration through enhancement of regulatory and institutional capacities for safety and security, fostering effective implementation of international maritime conventions and other mandatory instruments on safety & security, promoting maritime training, coordinating Search and Rescue, preventing marine pollution and promoting preservation of the marine environment as well as promoting trade facilitation and maritime investments.
The enactment of a new Merchant Shipping Act, 2009 has enhanced delivery of services by the Authority in these areas.

Foreign Ships calling at the port of Mombasa, Kenya are inspected by KMA ship surveyors in accordance with (IOMOU) Indian Ocean Memorandum of Understanding on Port State Control to which Kenya is a member. This is to ensure that ships comply with safety of life and safe manning regulations, protection of the marine environment regulations and load line regulations, among others. As part of our core mandate Kenya Maritime Authority is responsible for the operation of the Regional Maritime Rescue Co-ordination Centre (RMRCC), now also known as the Mombasa Information Sharing Centre(ICS). The Centre provides a communication center where seafarers can call in for help in cases of distress while at sea, in a large area covering Tanzania, Seychelles and Somalia as well as receiving and responding to piracy alerts and requests for information or assistance at all times. Kenya Maritime Authority has been in the lead in promoting maritime training and education in Kenya. Kenya's recent entry into the International Maritime Organization's (IMO) White list status was an affirmation that Kenya's maritime education now meets international standards, enabling its seafarers to compete for jobs on international ships. As the pacesetters of the Kenyan maritime industry and in solidarity with the International Maritime Organization's (IMO) 'Go to sea campaign', the Authority has intensified its focus on boosting the image of the

maritime industry and supporting cadet recruitment among the youth, including the recruitment of female cadets. The Authority is further committed to implementing International Maritime Organization(IMO) programs aimed at the integration of women in the maritime sector in answer to Millennium Development Goal number three, " Promoting gender equality and empowerment of women" in the maritime sector. In this regard, KMA hosts the Association of Women in the Maritime Sector in East and Southern Africa (WOMESA), which aims at mainstreaming the role of women in the maritime sector.

By regulating and overseeing orderly development of merchant shipping and related services, the Authority aims to make a positive impact on trade facilitation in Kenya and in the promotion of maritime investments in the country.

Section 5 of the act states the functions of the authority these include;

a) administer and enforce the provisions of the **Merchant Shipping Act, 2009** and any other legislation relating to the maritime sector for the time being in force;

(c) advise government on legislative and other measures necessary for the implementation of relevant international conventions, treaties, and agreements to which Kenya is a party;

(d) undertake and co-ordinate research, investigation, and surveys in the maritime field;

(e) discharge flag State and port State responsibilities in an efficient and effective manner having regard to international maritime conventions, treaties, agreements and other instruments to which Kenya is a party;

(f) develop, co-ordinate and manage a national oil spill contingency plan for both coastal and inland waters and shall in the discharge of this

responsibility be designated as the "competent oil spill authority";

(g) maintain and administer a ship register;

(h) deal with matters pertaining to maritime search and rescue and co-ordinate the activities of the Kenya Ports Authority, the Kenya Navy and any other body engaged during search and rescue operations;

(i) enforce safety of shipping, including compliance with construction regulations, maintenance of safety standards and safety navigation rules;

(j) conduct regular inspection of ships to ensure maritime safety and prevention of marine pollution;

(k) oversee matters pertaining to the training, recruitment and welfare of seafarers;

(l) plan, monitor and evaluate training programmes to ensure conformity with standards laid down in international maritime conventions;

(m) conduct investigations into maritime casualties including wreck;

(n) undertake enquiries with respect to charges of incompetence and misconduct on the part of seafarers;

(o) ensure, in collaboration with such other public agencies and institutions, the prevention of marine source pollution, protection of the marine environment and response to marine environment incidents;

(p) regulate activities with regard to shipping in the inland waterways including the safety of navigation; and

(pp) implement and undertake co-ordination in maritime security;

(q) Undertake any other business which is incidental to the performance of any of the foregoing functions.

2.7 Other institutions that facilitate international trade within Kenya.

2.7.1 Customs Declaration and Clearance

For you to export from and import goods to Kenya, you need to declare and clear with the Customs Services Department of KRA. The KRA Customs Services Department is established by an Act of Parliament and has the mandate of customs and excise administration. It Administers the **East African Customs Management Act**[19]**.** It works in Collaboration with other regulators such as KPA, KEBS, KEPHIS and Port Health. Its specific responsibilities are to:

i) Collect and account for Customs and Excise taxes such as import duty, excise duty and VAT on imports

ii) Collect trade statistics on imports and exports

iii) Protect society from illegal entry and exit of prohibited goods such as weapons and illegal drugs

iv) To implement and enforce bilateral, regional and international trade agreements/ arrangements

The Customs Services Department is currently undertaking a Reform and Modernization Programme aimed at transforming it into a modern customs administration in accordance with a range of internationally The Customs Services Department processes the customs declaration entry lodged by you or your agent. They check among other things, that the entry and supporting documents are in order and the correct customs duty has been paid. The Customs Services Department must give you a release order before goods can be released to you.

Customs procedures are mandatory in the movement of goods across borders and Customs offices are based at all major entry/exit points Countrywide

[19] 2004

2.7.2 The Kenya bureau of standards (KEBS)

KEBS was established by the **Standards Act[20].** It started its operations in July 1974. Its aims and objectives include preparation of standards relating to products, measurements, materials, processes, etc. and their promotion at national, regional and International levels; certification of industrial products; assistance in the production of quality goods; improvement of measurement accuracies and dissemination of information relating to standards. One of its key mandates is inspecting the quality of goods entering Kenya to ensure compliance with the set standards. This task will mainly be discharged through the PVoC programme. The primary objective of this programme is to ensure quality of products, health and safety, and environmental protection for Kenyans.

PVoC is expected to:

a) Block unfair competition from sub-standard products and especially stop the influx of counterfeit products
b) Speed up release process of imports
c) Reduce importation costs
d) Reduce the number of destructions or re-exportation of consignments.

2.7.3 The Horticultural Crops Development Authority(HCDA)

If you wish to export fresh produce, then you need to be licensed then you will deal with HCDA.

The Horticultural Crops Development Authority (HCDA) was established under the **Agriculture Act[21],**. The Authority is responsible for developing, promoting, coordinating and regulating the horticultural industry in Kenya. The roles of HCDA include:

a) Licensing fresh produce exporters

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[20] **Chapter 496 of the laws of Kenya**

[21] **Chapter 318**

b) Ensuring that all players adhere to international quality standards
c) for fresh produce, including Maximum Residue Levels for pesticides
d) Advising growers, exporters and processors on marketing of
e) horticultural produce and its post harvest handling
f) Disseminating appropriate information to investors, exporters and
g) producers for planning purposes
h) Collaboration with the stakeholders in the development and promotion of
i) the sub-sector
j) Registration of horticultural nurseries, inspection of the same for
k) The purpose of certification, and training of nurserymen. HCDA operates from its headquarters in Nairobi but also has field offices
l) In Central and Rift Valley provinces.

2.7.4 Pest Control Products Board (PCPB)

When dealing with import and/or export of pest control substances, it is required that you register with the PCPB.

PCPB was established under **the Pest Control Products Act**[22] It's functions are to regulate the importation, exportation, manufacture, distribution and use of products used for the control of pests. These products must be registered with PCPB and organizations involved in this sector must sign a code of conduct based on the FAO code which requires stringent control in manufacture, packaging, labelling and distribution of pest control products. Importation of these products is subject to prior authorization by PCPB.

2.7.5 Compliance with Health and Safety Standards

If you intend to trade in products that can have an impact on the health and safety of Kenyans, then you will need to comply with the relevant standards. Such products include food, drugs and chemical substances. The Public Health Department in the Ministry of Health regulates the

[22] **(Cap 346).**

importation and/or exportation of these products and is governed by the **Public Health Act[23] and the Food, Drugs and Chemical Substances Act[24].** The Chief Public Health Officer is represented at the ports of Entry/exit by port public health officers

2.7.6 Marine Transport

This is the most likely mode of transport you will use to move your goods to and from Kenya's customers and suppliers located around the world. It is preferred to air transport because it is cheaper and more convenient for heavy and bulky cargo. Marine transport is available at the Port of Mombasa which serves all cargo originating from and destined to world ports, and at Lake Victoria for cargo movement between Kisumu and jinjer and port bell in Uganda and mwanza and musoma in Tanzania.

To organize marine transport, you will need to deal with a shipping agent. Shipping agents connect exporters/importers to the ship carriers that will carry his/her goods. You need not get directly involved as your clearing and forwarding agent can do this for you. There are several shipping agents in Kenya with offices in Mombasa and Nairobi. The **Kenya Ships Agents Association,** which is their umbrella body, provides these services and any further details required for effective export or import.

ANTOLITHO LTD V. DHL GLOBAL FORWARDING KENYA LTD[25]; *in this case the defendants(clearing agents)agreed to ship the goods from the* ***UK to Mombasa*** *.they were to provide services relating to freight forwarding customs clearing and transport of the goods until delivery to the plaintiffs premises. They however, failed to arrange for pre-shipment inspection and to obtain a certificate of conformity. As a result the plaintiffs could not clear the goods within time upon arrival in Mombasa, which resulted in extra costs being incurred.*

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[23] **Cap 242**

[24] **Cap 254**

[25] **[2011] Eklr**

Court *stated that; the responsibility for shipment had been delegated by the plaintiff to the defendant(clearing agents) and therefore held them responsible for failing to accomplish their duty to the principle(plaintiff/shipper) and as such liable for the loss suffered by him.*

The above case demonstrates some of the risks available in contracting clearing agents while at the same time acknowledging the convenience of having them active. This is because sea carriages are usually conducted between different countries; it becomes expensive and time consuming for one to fly from country to country for the purpose of ensuring custom clearance personally. It is more convenient and economical for one to contract the services of these agents.

2.8 Conclusion

The above discussion explains the laws and bodies that will be active prior to shipping or during discharge I.e. at the port of loading or discharge, by taking note of the port of Mombasa in Kenya. It also seeks to examine the law that will apply and the obligations and liabilities that arise there under while the actual carriage of goods is taking place at sea.

3. Nature of obligation imposed on the carrier

3.1 Introduction

The law imposes upon the carrier obligations /responsibilities in relation to the transportation of the cargo, between the port of loading and the port of (discharge as the case may be) breach of which will render him liable.

The nature of these obligations may be ***absolute ,exercise of due diligence or proper and carefully conduct*** .This nature changes with change in the legal regime applicable in that particular circumstance .

Under common law, the duty is absolute whereas under Hague, Hague /Visby and Hamburg rules the duty takes the nature of due diligence, proper and careful conduct...

As stated earlier ,Kenya is a signatory of the Hague rules by virtue of ***statute law miscellaneous amendments act not 1968*** which attached the provision of the Hague /Visby rules to the schedule of ***the carriage of goods by sea act cap 392***

Because of this, due diligence and proper and carefully would apply to carriers operating in Kenya, absolute duties would have only been applicable if the Hague and Hamburg rules were absent.

3.2 Absolute duty

As indicated above, this duty is available in common law. In ***forward v. pittard***[26]

It was stated that *the degree of responsibility by the custom of the realm that is by the common law a carrier is in the nature of an insurer... To prevent litigation, collusion and the necessity to go into circumstances, impossible to be unraveled...*

In other words the carrier strands in the position of an insurer of the goods not only against the disappearance or destruction but against all forms of damage to the goods.

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26 (*1785)1T.R .27*

Such carrier may be able to rely on some defenses available in common law in some circumstances. These may be, *act of God act of enemies the state by pirates opponents during war etc.*this position has been reiterated in the Kenyan context by the case of **TRUE FRUITS KENYA LTD V. COMPAGNIE GENERAL MARITIME**[27] *which stated that the only defence that can be validly given in cases where liability of the common carrier I being determined is that the damage to the goods arose solely from an act of God, hostilities involving the state or from the fault of the consignor or inherent vice of the goods themselves. Court further stated that the onus of establishing those exceptions lay on the carrier.*

With regard to seaworthiness the common law duty is strict, that is, the carrier has an absolute duty to provide a seaworthy ship /vessel. This however does not mean that he has to provide a perfect vessel.

The carrier is only required to provide a vessel that can withstand any kind of hazard and one that is fit for the purpose of the contracted voyage.

President of India V. West Coast steamship co[28] Stated; *the vessel required is not an accident free ship, nor an obligation to provide ship/gear capable of withstanding all conservable hazards...The obligation though absolute, means nothing more or less than the duty to furnish a ship and equipment reasonably suitable for the intended use or service.*

Therefore, if such a ship was provided the above obligation will be discharged, the carrier would not be responsible for any loss unless on other ground such as breach of duty to exercise due care for the cargo.

3.2.1 Common law doctrine of stages

It is well to emphasize that an absolute obligation of the carrier of goods by sea to provide a seaworthy ship is not continuous under common law. It requires,

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[27] **[2009]eklr**

[28] *[1963] Lloyd's ref.278.*

for example, that the ship must be fit to receive her cargo at the commencement of loading only as a ship for the ordinary perils of lying afloat in harbour and need not be fit for sailing. Then on the completion of each stage she must have the degree of fitness which is required for the next stage.

For example in ***Reed (A E) & Co v Page, Son & East Ltd*** [29]barge *the Jellicoe*, had a carrying capacity of 170 tons was seaworthy when the loading commenced, but at the end of loading 190 tons were put on board, and after the loading was finished and while she was remaining alongside the steamer waiting for a tug to tow her she sank, and her cargo was lost. The court held when the loading of *the Jellicoe* was finished a new stage of adventure commenced, and as at that stage *the Jellicoe* was, due to her over-loaded state, unseaworthy for this new stage of the employment.

The reason for the vessel to be seaworthy at a particular time only was elaborately stated by in ***McFadden v Blue Star Line***[30] by Channell J at pp.703-5:

... the warranty of seaworthiness in the ordinary sense of that term, the warranty, that is, that the ship is fit to encounter the ordinary perils of the voyage, is a warranty only as to the condition of the vessel at a particular time, namely, the time of sailing; it is not a continuing warranty, in the sense warranty that she shall continue fit during the voyage. If anything happens whereby the goods are damaged during the voyage, the ship-owner is liable because he is an insurer except in the event of the damage happening from some cause in respect of which he is protected by exceptions in his bill of lading. His liability for anything happening after the ship has sailed depends, not upon there being a breach of a warranty that the ship shall continue fit, but upon his position as carrier. So, too, it is clear that the warranty of the ship being fit to encounter the perils of the voyage does not attach before she sails and while she is still loading her cargo. There is, of course, no warranty at the time the goods are put on board that the ship is then ready to start on her voyage; for while she is still loading

[29] [1927] 1 KB 743

[30] [1905] 1 KB 697

there may be many things requiring to be done before she is ready to sail. The ordinary warranty of seaworthiness, then, does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed: it takes effect at the time of sailing, and at the time of sailing alone...

When a voyage is in stages the warranty is that the ship on starting on each particular stage is fit for that stage. Thus, if she is going to stop at an intermediate port, she must have sufficient coals to take her to that port, but she is not bound to have sufficient coals to take her the whole voyage. It is treated as a separate warranty for each stage of the voyage. I think one must apply exactly the same rule to the loading stage of a vessel whilst she remains in her port of loading. I think the warranty is that at the time the goods are put on board she is fit to receive them and to encounter the ordinary perils that are likely to arise during the loading stage; but that there is no continuing warranty after the good are once on board that the ship shall continue fit to hold the goods during that stage and until she is ready to go to sea, notwithstanding any accident that may happen to her in the meantime. And the reason for so holding is precisely the same as that which exists with respect to the warranty of fitness to encounter the perils of the voyage; as soon as the goods are on board they are in the custody of the carrier, and he is liable for any accident which then happens because he is an insurer of them unless he is protected by some clause in his bill of lading.

Thus absolute common law undertaking of seaworthiness is not continues one but applies at the beginning of each separate stage of voyage, while stages are marked either by the completion of a particular operation, e.g. loading, or by changes in the nature of the operation to be performed, e.g. river transit or ocean transit. Lord Penzance held in ***Quebec Marine Insurance Co v Commercial Bank of Canada***[31]

[31](1870) LR 3 PC 234 at p.241

... there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward, of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions, but it has been equally well decided that a vessel, in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped and in all respects seaworthy for each of these stages of the voyage, respectively, at the time she enters upon each stage; otherwise the warranty of seaworthiness has not been complied with. It was argued that the obligation thus cast upon the assured to procure and provide a proper condition of equipment of the vessel to encounter the perils of each stage of the voyage necessarily involves the idea that between one stage of the voyage and another be should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires, and no doubt that is so.

Bunker was held to be a part of the equipment of a steamship, insufficiency of which on one of the voyage stages will render ship unseaworthy.

Kenyan law expressly departs from this common law position by providing in ***section 3 of the carriage of goods by sea act*** that; *the absolute warranty of seaworthiness is not to be implied. There shall not be implied in any contract for the carriage of goods by sea. Any absolute undertaking by the carrier to provide a seaworthy ship.*

3.3 Due diligence

In *the Hague and the Hague Visby rules* due diligence is described in terms of making the ship/vessel seaworthy, cargo worthy and properly manning ,equipping and supplying the ship

The Hague/Visby rules don't define what due diligence or seaworthiness amounts to, however, ***blacks law dictionary 8th***: states that; ***seaworthiness*** *describes a ship/vessel which can withstand ordinary stress of wind and waves*

and other weather that a seagoing vessel is expected to encounter. It also includes the capability of the ship to carry the intended cargo, where as, ***Due diligence*** *is the diligence reasonably expected from and ordinarily exercised by person who seeks to satisfy a legal requirement or to discharge an obligation*

Article III: Of the Hague/Visby rules and Hague rules require the carrier to exercise due diligence before and at the begging of the Voyage and to make the vessel seaworthy. This position has been reiterated in ***part one of the Kenyan act schedule***. This act however inherits the shortcomings of the Hague Visby rules by not defining what due diligence or seaworthiness is..

In ***the Kapitan Sakharov:*** A test was set to examine whether the carrier exercised due diligence. This test had to show that the vessel, its servants, agents or independent contactors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage i.e. reasonably fit to encounter the ordinary incidents of the voyage.

Therefore in considering whether the carrier had exercised due diligence to provide a seaworthy ship, an objective test must be applied, that is, the conduct of a reasonably prudent carrier at the time of exercising due diligence. However, it should be noted that, the standard of due diligence is not similar in every case but varies according to the facts, circumstances of each case and knowledge available at the time of exercising the duty.

3.3.1 Due Diligence and Latent Defects

Latent Defect is defined by the **Blacks Law Dictionary**[32]*as "A product imperfection that is not discoverable by reasonable inspection and for which a seller is generally liable."*

In other wards, latent defect is one which cannot be discovered by a person of competent still using ordinary care.

[32] ibid

The local regime and international law have similar provisions in relation to latent defect. Neither the carrier nor the ship is responsible for the loss or damage resulting from latent defects not discoverable by due diligence.

This is only a defect of the vessel itself and not of the cargo

In *the* ***Happy Ranger***[33]; the carrier ordered a new vessel from shipbuilders, which was delivered in February 1998. She was then contracted to carry a process vessel to Saudi Arabia. During the loading operation one of the ransom hooks broke due to a defect. The design of the vessel and the hooks... Etc, was approved by Lloyds registry and another reputable agency. But the new owner failed to test the hooks to this maximum capability when the vessel was delivered, a test which should not have taken more than an hour, it was held that the carrier had failed to exercise due diligence to make the vessel seaworthy, with regard to testing the hooks.

The carrier in the above case could not rely on the latent defect defense the defect could have been discovered by him upon testing of the Hooks.

3.3.2 Delegation of the Duty.

The test of due diligence take into account the conduct of a reasonable prudent carrier. Therefore, the duty to exercise due diligence is a personal one, i.e., it must be exercised by the carrier , though it can also be exercised by one of his agents, servants or independent contractors but if they fail to comply with the obligation the ultimate responsibility still lies with the carrier.

In *Peterson Steamship Ltd V Robin Hood Mills Ltd*[34];

The condition, that is, of the exercise of Due Diligence to make a vessel seaworthy is not fulfilled merely because the ship-owner is personally diligent. The condition requires that the diligence shall in fact have been exercised by the ship-owner or by those whom he employs for the purpose" pg 40.

The carrier can delegate the exercise of due diligence especially if he does not have experience in these matters, but if the delegate was not diligent the carrier

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[33] *(2006) Lloyd's*

[34] *(1937)58. Rep 33*

will not be able to defend himself by claiming that he delegated the duty to another person as the duty to provide a seaworthy vessel is a personal one and the responsibility non-delegatable.

Hence, merely diligent choice of a person or diligently choosing a responsible person such as a professional surveyor, is insufficient to establish that due diligence was exercised in making the vessel seaworthy. If the delegate is not diligent this causes the carrier to fail to show his own diligence, whereas if the delegate is diligent this establishes the diligence of the carrier who delegates the task of making the vessel seaworthy.

The Muncaster Castle[35] Demonstrates this position; Cargo was damaged by seawater entering the Cargo compartment because a filter from a ship repairing company had failed to seal an opening in the vessel some months before the damage. After the inspection by a Lloyd's register of shipping surveyor, the filters replacement of the inspection covet was negligent. The replacement was not supervised by the senior officers on board the vessel and this was lack of exercising "Due Diligence" There was no question of the surveyors being diligent or not.

3.4 The "Proper and Careful" Obligation.

This is one of the least considered and most important obligations place upon the carrier.

The carriage of Goods by Sea[36], is to the effect that' "*subject to the provisions of Article 4, the carrier shall* ***properly and carefully load****, handle, stow, carry, keep, care for, and discharge the goods carried.*"

The same is provided for under ***Act 3(2) of The Hague and Hague Visby rules***. The Kenyan Act by adopting this provision upholds the obligation of properly and careful conduct in relation to the Cargo transportation and applies this to the carriers subjected to this carriage by ***Sea Act Cap 392.***

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[35] *(19610 Lloyds rep 57;*

[36] *Act (part1 Kenya responsibilities/Liabilities: schedule) Cap 392*

As stated it is one of the least considered and most important articles of The Hague and Hague/ Visby Rules is art. 3(2), which lists the basic obligations of the carrier as follows;

"Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, *keep, care for,* and discharge the goods carried."

And one of the least commented on obligations of art. 3(2) is to "carry, keep [and] care for" the goods.

It is noteworthy that the obligation is not only to "carry" but also to "keep" and to "care for". This is very explicit language.

3.4.1 Stringent Obligation

Care of the cargo under The Hague or Hague/Visby Rules is a stringent obligation, because art. 3(2) states that the carrier shall "properly and carefully" care for the goods. The obligation therefore is not only to act "carefully" but also "properly". There is nothing in The Hague or Hague/Visby Rules referring to *due diligence* to care for the cargo. The only references to "due diligence" in The Hague and Hague/ Visby Rules are at arts. 3(l) and 4(1), both in respect to making the vessel seaworthy, and at art. 4(2) (p) which refers to latent defects of the ship "not discoverable by due diligence". Nevertheless, courts, particularly in the United States, continue to refer to due diligence to care for cargo.

The reference to due diligence in caring for cargo has resulted in further errors. Some courts have stated that the carrier need prove only due diligence to care for cargo in order to exculpate itself. This is incorrect - the carrier must prove the cause of the loss that he exercised due diligence to make the vessel seaworthy in respect of the loss, and then he may prove one of the exculpatory exceptions listed at art. 4(2) (a) to (q). At this point, lack of *proper* and careful care of cargo is an argument available to the claimant, who uses it to show the true cause of the loss and to contradict the exculpatory exceptions raised by the carrier

3.4.2 A Personal Obligation of the Carrier

The duty to look after the cargo carefully and properly is an obligation personal to the carrier. In consequence, carriers may not be excused for improper care of cargo by arguing that the loss or damage is attributable to their having followed the advice of competent independent contractors whose services they retained. In this regard, a number of English decisions have stressed the similarity between the carrier's personal duty of due diligence in respect of seaworthiness and its personal duty of proper care of the goods carried. In *International* ***Packers London Ltd.* v. *Ocean Steam Ship Co., Ltd.***, McNair J. held[37].

"The obligation imposed by Art. III, r. 2, like the obligation imposed by Art. III, r. 1, to exercise due diligence to make the ship seaworthy, is an obligation imposed upon the ship-owner himself which he cannot escape on proof that he employed a competent independent contractor who was in fact negligent.... I can see no difference in principle between the ship owner's obligation under Art. III, r. 1, and that under Art. III, r. 2. As a matter of law, therefore, I would hold that the defendants would be liable if the surveyor gave negligently wrong advice."

This interpretation of art. 3(2) was approved by Lord Merriman in ***Riverstone Meat Co.* v. *Lancashire Shipping Co.*** (*The Muncaster Castle)*[38],the landmark House of Lords decision on the carrier's non-delegable duty of due diligence as regards seaworthiness under art. 3(1). It was also reiterated by McNair J. in *Leesh River Tea Co.* v. *British Indian Steam Navigation Co*[39]. Keeping caring for and carrying the cargo may therefore be considered to be "non-delegable" responsibilities of the carrier.

3.4.3 Not an Absolute Obligation

The obligation under art. 3(2), although a stringent one, is not absolute. The carrier must fulfill his obligations "properly and carefully", which does not

[37] [1955]2lloydsp236

[38]

[39] [1966]1lloydsn

mean, however, in a manner absolute and perfect. Lord Pearson, in ***Albacora S.R.L. v. Westcott & Laurance Line Ltd.***, statted[40]

"The word 'properly' adds something to 'carefully', if 'carefully' has a narrow meaning of merely taking care. The element of skill or sound system is required in addition to taking care."

Lord Reid believed that "properly" meant in accordance with a sound system and went on

"... The obligation is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods."

Proper care of the cargo involves a consideration of whether the carrier and its servants, agents and contractors have acted competently in accordance with contemporary industry standards

Because the obligations imposed by art. 3(2) are not absolute, but remain subject to art. 4, the carrier may avoid liability by proving that the loss or damage was in fact caused by one of the exceptions of art. 4(2)(a) to (q

3.4.4 Burden of Proof

The burden of proof in relation to care of cargo is the same as in the case of stowage, and is initially on the claimant. Because most, if not all, of the evidence is available to the carrier, however, the burden of proof soon shifts to the carrier, once the claimant has made initial proof of improper care.

3.4.5 Obligations When Receiving Cargo

Obligation to study cargo

The carrier must study cargo carefully before loading, in order to be able to care for it. This was stated in ***Drummond Coal Co. v. Interocean Shipping Co***[41].:

The carrier, in studying cargo, must learn from the past and must employ modern methods and up-to-date practices. Roskill J. in ***The Flowergate*** **[1967]1lloyds** p.46 gave a warning to carriers of future shipments of cocoa:

[40][1966]2lloyds

[41] 1985 AMCP.1162

"... I wish to make it clear that my decision in favour of the defendants on the facts of this case does not, and must not, be understood to involve that shipowners can in future safely and without financial risk to themselves continue to accept cocoa for shipment in West Africa for delivery in North-West Europe whatever its moisture content may be and then, if and when damage occurs, successfully set up the same defence as that which has succeeded in this case. This case has revealed much regarding the shipment and carriage by sea of cocoa which seems not to have been hitherto generally known among shipowners and their masters and officers and others immediately concerned with the day-to-day practical side of the problem. If in the future, and in the light of what is now known, shipowners continue to accept cocoa for shipment merely on the strength of its apparent condition, and heedless of the implications of what its pure condition may in fact be by reason of its moisture content, they may find it said against them hereafter that they have engaged themselves to carry that cocoa safely to destination, whatever that moisture content may ultimately prove to be."

Obligation to refuse cargo

A carrier is not obliged to accept cargo if he cannot give it proper stowage and care during the voyage. Rather he should refuse the cargo or advise the shipper that he cannot provide proper stowage and care. Thus in ***The Ensley City***[42], it was stated:

"There is no absolute obligation on a vessel to accept a cargo. Indeed, it should not be accepted unless it can be given the type of stowage that its character requires, and the placing of conditions in a bill of lading does not relieve the vessel of the obligation to take appropriate care of the cargo."

In other words, when the carrier cannot properly and carefully carry cargo which is presented to him for carriage, the carrier should either refuse the cargo or obtain the consent of the shipper to carry the goods under special

[42] AMC 1589

terms and conditions. A non-responsibility clause in the bill of lading may be ineffectual, being contrary to art. 3(8), as may be the exculpatory exceptions of art. 4(2) such as inherent defect or insufficient packing because of disclosure of the particular nature of the cargo by the shipper. **THE GRUMANT**[43]

"Waterman Steamship Corporation accepted a hazardous cargo of sodium hydrosulfite... having done so, 'it then accepted the obligations to carry [the cargo] to safety'. ***Verbeeck* v. *Black Diamond Steamship Corp.***

Instructions for special cargoes

We have seen that the carrier is obliged to study cargo; but the shipper has the reciprocal obligation to give special instructions for special cargoes (i.e. unusual shipments. American courts have not hesitated to apply this principle. In ***Tenneco Resins, Inc. v. Davy International, AG 1990 AMC 402*** for example, where chemical catalyst was shipped in metal drums, the manufacturer of the catalyst neglected to stencil on the sides of the drums, in plain view and in accordance with industry practice, the international umbrella symbol indicating that the drums were not watertight. On most of the drums, the symbol was instead stenciled onto the lids of the drums, where it was invisible to the carrier after the drums were placed on pallets and stacked in tiers on flats and stack masters prior to loading. Nor did the manufacturer instruct the carrier prior to loading as to the need to keep the drums dry. The Court exempted the carrier from liability for moisture damage to the catalyst, on the ground that the shipper had failed to meet its obligation to advise the carrier of any special requirements of the cargo. The Court noted that: "This view places the burden of inspection and ascertainment of special stowage needs on the party most likely to know of or best equipped to discover such needs."

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[43] [1973]2 LLOYDS

In ***Cigna Insurance Co. of Puerto Rico* v. *M/V Skanderborg***, the carrier was not responsible where tins of olive oil were ruined by rust as a result of being packed by the shipper in unventilated containers provided by the carrier, where the inadequacy of the packing was non-apparent to the carrier and the shipper had given no special instructions as to the type of containers needed. Special shipping instructions are not necessary if the care required by certain commodities is well known in the trade. Once a carrier receives special instructions, he must follow those instructions, or negotiate new terms and conditions, or refuse the goods. Otherwise, he will be responsible for the consequences. In ***Transatlantic Marine Claims Agency, Inc.* v. *S.S. Zyrardo*** for example, the carrier was found liable for the deterioration of a cargo of bananas where it had failed to heed the charterer's instructions calling for the ventilation of the storage holds sixty hours after the closing of the compartments, in order to rid the compartments of high levels of carbon dioxide and ethylene, which accelerate the ripening process.

3.4.6 Lack of Due Diligence, Improper Care of Cargo and Exculpatory Exceptions

The courts, in the final analysis, must decide whether the cargo loss or damage results from: a) a lack of due diligence to make the vessel seaworthy; b) improper care of the cargo or c) one of the exculpatory exceptions protecting the carrier.

In ***Royal Ins. Co. of America* v. *S/S Robert E. Lee***, the Court had to consider all three of those issues, in a claim resulting from the puncturing of a LASH barge carrying bags of wheat flour, causing the wetting of most of the bags. The Court found that the carrier had exercised due diligence to make the barge seaworthy at the beginning of the voyage, but had failed to keep and care properly for the cargo, in permitting the barge to be moored at an unsafe pier prior to its towage to the carrying ship, where there was a danger of its being punctured. The defense of error of navigation was dismissed, the carrier having failed to discharge its burden of proving that the barge had been holed while it

was being towed to the carrying ship and that an error of navigation had caused the holing.

If the vessel is not properly equipped to handle the cargo, the courts are likely to find that the vessel is unseaworthy and that there has been a lack of due diligence to equip the ship properly before and at the commencement of the voyage. In ***A.R. Lantz Co, Inc. v. United Trans-Caribbean***[44] the Court found that the vessel was unseaworthy to carry frozen shrimp, because it was missing the necessary spare parts to maintain the refrigeration unit and one generator was inoperative, making the "vessel's refrigeration system unsuitable before the vessel broke ground." In making this decision, THE COURT found that improper maintenance and the inoperative refrigeration equipment made the vessel unseaworthy.

It appears that if the cargo is negligently stowed, to the point of compromising the safety of the vessel or other cargo, the court will find the vessel unseaworthy, as illustrated by the finding in ***Waterman Steamship Corp. v. Virginia Chemicals, Inc***. In that case, the negligent stowage of the hazardous cargo, which was flammable when mixed with water, caused a fire. The negligent stowage prevented early discovery of the fire, as well as preventative safety measures and easy disposal of the cargo once ignited. The Court found that stowing the hazardous cargo of sodium hydrosulfite in a lower hold and then walling in the cargo with palletized tape "...[was] negligent and rendered the vessel unseaworthy."

Courts also strive to distinguish cases where the loss or damage results from lack of proper care of the cargo from those where the effective cause of the harm is one of the exculpatory exceptions of art. 4(2)(a) to (q) of the Hague or Hague/Visby Rules.

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[44] *188 AMC 2486*

Hence where for example, a fruit cargo was damaged when a fire on board disabled the ship's refrigeration control panel, making it impossible to refrigerate the fruit properly. The Court found that the real cause of the loss was the fire, which, although it did not directly ignite the cargo, nevertheless validly exculpated the carrier from liability under the fire.

When the loss is due to both a validly excepted cause and lack of proper care, the carrier is responsible, unless he can separate the loss resulting from each cause. This was clearly stated by the U.S. Supreme Court in ***The Vallescura:***
"... the carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril."
If the carrier can separate the losses, then he is responsible only for the loss caused by his improper care.

3.5 Conclusion

This section aimed at revealing the various standards of liability that the carrier of goods is obligated to observe in the various contexts stated. Majorly international instruments have been referred to and Kenya as a shipping nation discussed in terms of these instruments. Acting bellow these standards renders the carrier negligent and hence liable.

4. Basis of liability and possible Defenses.

4.1 Basis of liability.

As stated earlier, there are three main ways of breaching a contract of carriage of goods by sea, these are; losing or damaging the goods, delivering the goods short of their destination or delay in the carriage. This statement has been echoed by ***Hague/Visby rules, our local law (cap392) which incorporates these rules and the Hamburg rules.***

As per ***Article 5(1) of the Hamburg rules***, liability for loss, damage or delay is placed on the carried; however, it goes a step further by stating that only if the occurrence which led to the loss took place while the goods were in his charge, will the carrier be liable.

Therefore, there are two main systems on which liability is built; the first is the ***presumed fault based system*** under which the carrier is liable the moment the loss or damage occurs, unless he proves that the loss or damage was not a result of any fault or wrong doing on his part. This system derives from the *Hamburg rules*[45] the other system is referred to as *the* ***proved fault based system***, under which the carrier is not liable unless the cargo owner proves that the loss was a result of the carrier's faults. This system is a result of the application of the *Hague* ***Visby rules. Article IV (r.I)*** indicates that the carrier will not be liable for the loss or damage caused by unseaworthness unless caused by want of due diligence on his part.

Hence, it will be up to the cargo owner to prove that the carrier did not exercise due diligence if he seeks to rely on this rule, to attribute liability for loss on the carrier. The carrier on the other hand has the burden of proving due diligence.

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[45] *(Article 5(1)).*

4.2 Causation.

To establish responsibility of the carrier; it is important for the shipper/ cargo owner to prove that it was the acts or omissions of the carrier which either caused or contributed to the loss or damage.

4.2.1 Where unseaworthness was not the cause of the loss.

The Hague/Hague-Visby rules, direct that for the cargo owner/ shipper to succeed he has to establish unseaworthness and hence cancel the contract on that ground. The carrier has to prove either another cause for the loss/ damage or the fact he acted with due diligence on his part in order to escape liability.
This means that if seaworthiness was not the cause of the loss, the carrier will not be liable for any loss of or damage to the goods/ cargo, *Article IV rule 1.*
This position is reiterated by cap *392 of the laws of Kenya; Part 4 of the schedule to the law.*

4.2.2 Where there was more than one cause.

If besides unseaworthness, there were other causes which contributed to the damage or loss e.g. act of God, act of war etc, then we have two or more effective causes and the carrier will be liable for the loss or damage caused by unseaworthyness and will be able to limit his responsibility to this loss or damage alone i.e. loss caused by unseaworthness. If unseaworthness did not contribute to the loss or damage he will not be liable for it.
The Europa[46] illustrates this. Part of the loss that related to the Cargo in the 'tween Decks' was caused by the collision, while that of the cargo in the lower hold was caused by the unseaworthy condition of the vessel. The court held the carrier responsible for the damage to the cargo in the lower deck but as for the cargo loaded in the 'tween deck' he was exempted from any loss or damage caused by collision as this was on exception in the contract.

[46] [1108] p84

Where there is more than one cause for the loss or damage and the court is not sure what exactly caused it, and then the court will look for the most probable cause. If unseaworthness was a probable cause then the court will hold the carrier liable for any unseaworthnes existing before and at the begging of the voyage.

In the ***Subro Valour***[47]; there was a fire in the engine room for which there were three possible causes: A discarded cigarette, material which had been shelved too close to the engine exhaust falling or mechanical damage to the insulating of the wiring, which may have been cause by improper installation of the shelves. There was no evidence to support the first two causes, and thus the court considered the unseaworthy condition of the vessel before and the beginning of the voyage to be the cause of the fire.

4.2.3 The uncontrollable causes.

These are listed in **Article IV rule 2 of the Hague Visby rules and part 4 of the schedule cap 392**. Under these circumstances, the carrier will not be liable for any loss that materialized due to existence of any of these circumstances. Some of these include:-

Fire: this provides an exception to the carriers' liability, unless caused by the actual fault or privity of the carrier. In ***Lennard`s Carrying Co. Ltd. V Asiatic Petroleum Co. Ltd.***[48]. The defendant ship owners were aware of the defective condition of the ships` boilers, which caused a fire leading to the loss of the plaintiffs goods. The House of Lords held that the company was liable.

Perils of the sea. Canadian Rice Mills Ltd V Union Manne and General Insurance Co. Ltd[49]**.** Explained this position thus; Damage caused by storm, the occurrence and ferocity of which are unexceptional, can constitute a loss of peril of the sea. The court was referring to incidents, which are normal or usual in a particular voyage. It held that "any accidental ingress of water into the

[47] (1995) Lloyd's Rep 509

[48] (1915) AC 705

[49] (1941) AC 55

vessel was a peril of the sea. the entry of sea water through an opening by which it was not supposed to enter was accidental even if the sea conditions were entirely normal for those waters at that time of the year. Thus, storms that were seasonal and frequent, and therefore to be expected, are nevertheless outside the ordinary accidents of wind and sea (and are thus accidental).They may happen on the voyage but it cannot be said that they must happen.'

Inherent vice; This will apply when shipper fails to inform the carrier about peculiar characteristics of the goods, necessitating special treatment during the voyage., such an omission will also entitle the carrier to invoke the defence.***Albacore SRL V Westcott and Lawrence Line Ltd***[50]; illustrates this point. Fish was shipped from Glasgow to Genoa during September. The cargo deteriorated owing to lack of refrigeration. The carriers had been given no warning/special instruction and didn't know that refrigeration was necessary. The House of Lords decided that the defendant carrier was protected under this defence.

Insufficiency of packaging. This is related to inherent vice i.e. inherent vice of packaging. The carrier will not be liable if he is unaware that the package is inadequate. ***The Luckey Wave***[51]. In this case, coiled steel wire was carrier from port of discharge to Durban. A warehouse inspection, two days after the goods were loaded, disclosed that a portion of the goods had been broken loose from its straps and were damaged. Court noted that there was nothing to show that the damage had occurred during the two days when the goods were in the warehouse since the bill of lading acknowledges that the goods had been loaded in a good condition. It was upon the carriers had mishandled it and this defence was applicable.

[50] (1966) LIR 62

[51] (1985) 1LLR80

4.3 Carriers Immunity/Limits of liability.

This concept is discussed in relation to the common law perspective as well as from the perspective of international instruments and the local law that seek to incorporate these in the domestic legal regime.

4.3.1 Exclusion clause (Limitation of liability clause).

Under the common law, the duty to provide a seaworthy vessel is an absolute one. However the carrier can exempt himself from liability of the unseaworthness of the vessel i.e. contract out of the duty to provide a seaworthy vessel.

The bill of lading, charter party, contract of carriage, as the case may be, may contract a clause exempting the carrier from liability for loss or damage to the cargo shipped on board their vessel. Such documents usually have an express obligation of seaworthiness, which makes it essential since in such a circumstance a general exclusion of liability clause in the contract will be applicable to it provided the clause is clearly worded.

Bank of Australia and Other V Clan Line Steamers Ltd[52], In this case a clause in the contract of carriage provided that "No claim that may arise in respect of goods shipped by this steamer will be recoverable unless made at the point of delivery within 7 days from the date of the steamer`s arrival damage arising from there." Another clause stated "The ship owners shall be responsible for loss or damage arising from any unseaworthness of the vessel when she sails on the voyage." Cargo of wool arrived to the destination damaged by the sea water owing to the fact that the Bill of lading was subject to an express condition making the ship owners liable for the damage resulting from the unseaworthness, the provisions of the exclusion clause applied.

The rationale was that since there was an express provision to provide a seaworthy ship, the exclusion clause in the contract applied to it. In the alternative, if the seaworthiness obligation was implied then the express and

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[52] (1916) 1K.B39

clause limiting liability would not extend to it but only relate to the express provisions of the contract.

In, ***Nelson Line (Liverpool) Ltd V James Nelson and Sons Ltd***[53], it was stated that, where there is in a contract an absolute promise with an exception engrafted upon it, the exception is to be construed strictly, and extends only so far as it is expressed worth clearness and certainty. The parties to an agreement may contract themselves out of their duties, but, unless they prove such a contract, the duties remain; and such a contract is not proved by producing language which may mean that and may mean something different, i.e. ambiguous language.

The Nelson case only confirms the importance of expressively inclusion clause in the contract but also acknowledges that the court will examine the exclusion clause carefully in order to decide whether it protects the carrier.

4.3.2 Limitation in compensation.

This concept arises under cap 392 of the laws of Kenya part 4(5) of the schedule.

This part directs that the carrier shall not be liable for loss or damage of goods to an amount exceeding the 100 pounds per package or unit, or the equivalent of that sum in another currency. The Act under this part further states that by agreement another maximum amount may be fixed, but that maximum shall not be less than the figure above the named i.e. 100 pounds. Further, the carrier is not held liable for loss or damage if the nature or value has been knowingly misstated by the shipper in the bill of lading.

The above is a significant improvement over *Article 4(5) of the Hague Visby rules* which attracted much criticism and controversy due to its uncertainty. These provisions are terribly ambiguous with what exactly constitutes a package of unit being unclear. Also, the monetary limits for such a loss were also very low. The Kenyan law although may contain similar defect with regard to what

53. (1908) A.C 16

constitutes a package/ unit can still be considered an improvement as it tries to cure further uncertainties in regard to the amount.

The Hamburg rules attempt to provide a more clearer situation that the above laws. *Article 6(1)(a)* seeks to define the unit i.e. 835 units of account per package or 2.5 units account per kilogram.

Article 6(2) states that "where a container, pallet or similar article of transport is used to consolidate the goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units.

Therefore, enumeration on the bill of lading should be able to provide conclusive evidence of the quantity shipped. This provides a fairer method of compensation to the shipper and the carrier as it provides more certainty and foreseeability.

4.3.3 Deck cargo.

Carrying goods on the deck is inherently more dangerous than if they are stowed in the hold below the deck. *The Hague Visby rules and the carriage of goods by sea Act cap 392* therefore allows the carrier to exclude liability for this risk, in *article 1(i) and section 1(d) respectively.* Under these laws, the shipper and the carrier must have agreed in advance to carry the goods on deck, and furthermore the goods must in fact be carried on a deck. If the contract gives the carrier a liberty to carry the goods on deck, this will be a valid ground for exclusion of liability. If the carrier decides to carry the goods on the deck for his own benefit, he would be precluded fro relying on the exclusion of liability clause that he would generally have for deck Cargo.

In ***The Steamship Mutual***[54], it was necessary to consider whether cargo carried on deck fell within the definition of "goods." If not the carriage of the deck cargo was excluded from the scope of the rules.

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[54] **(2011) EWHC**

The case involved the carriage of sand fitted tanks on deck from Italy to USA. During the voyage, one of the tanks was lost and another damaged. The bill of lading stated "all cargo carried on deck at the shippers/ receivers risk."
The court held that the natural meaning of this remark on the face of the bill of lading`s effect was to categorize the cargo as deck cargo and hence did not fall within the application of the rules.

4.3.4 Conclusion (Loss to limits of liability.)

A carrier is a liable, therefore, in carrying out his/ her obligation to the consignee/ shipper as the case may be. In case of the damage to the goods, he may be able to rely on the defenses discussed above. However, as per the provisions of *Article 4(5)(a)*Of *The Hague Visby rules*, such carrier will not be entitled to the benefit of the limitation of liability; if it is proved that the damage resulted from an act or omission of the carrier done with the intent to cause damage or recklessly and with knowledge that damage would probably result. This event would constitute loss of the carriers' limitation of liability. *The Hamburg rules Article 8* echoes the above concept and goes further to include intentional Article 4(5) or omissions of the servant or agent of the carrier as effectively resulting in such agent or servant becoming unable to benefit from the stated defenses/ immunities/ limits to liability.

5. Conclusion and Recommendations.

5.1 Introduction.

During the previous chapters, it has been shown that there are various legal regimes governing the carriage of goods by sea. These laws state what would constitute liabilities and immunities which will be available for the carrier. These laws, hence, regulate the relationship between the carrier and the shipper or consignee of the goods. The Hague rules, Hague Visby rules, Hamburg rules, carriage of goods by sea act Cap 392 among others constitute the current law on Carriage Sea.

These laws are not perfect. They do not provide definitive provisions that would render development in this area obsolete. Hence they contain lacunas that need to be addressed, hence, the importance of the following recommendations.

.2 Application problems.

The carriage of goods by sea Act (Cap 392) is the local law that adopted both the Hague rules and the Hague Visby rules. This Act did so without any major modifications hence importing the lacunas present in the laws into the Kenyan context.

The major weakness, in regard to application, in The Hague rules was the fact that the rules only applied to bill of lading. This problem was resolved partially by the *Hague-Visby rules which, under Article 10,* provides applicability if goods are transferred between two different states and;

(a) A bill of lading is issued in a contracting state

(b) Carriage begins in a contracting state

(c) The contract of carriage incorporates the rules by references.

The above provisions/ laws do not extend the application from only bill of lading. Hence, to cure this, these need to be rules that extend the application to all contracts of carriage of goods by sea. This will also avoid the potential for disputes regarding what exactly a bill of lading is and whether the contract in question comes within such definition.

There has been significant uncertainty under The Hague Visby rules and subsequently Cap 392 as to which contracts are covered by the rules. Article *1(b) and 2 of the Hague Visby and section 1(c) of Cap 392* apply the bill of lading and other similar documents of the title. However, these laws further state that the use of non-negotiable receipts will only avoid the provisions of the rules under certain limited conditions. This shows that there is ambiguity regarding the exact range of operation in this area.

5.3 Seaworthiness Vis a Vis period of Responsibility.

The current law, with regard to seaworthiness, creates certain problems.

Limiting the carriers` obligation to cover, only the period before and the beginning of the voyage can leave some owners in a negative position. For example, where some cargo is loaded at **port A** at which stage the vessel was seaworthy in all respects. The vessel then sailed to **port B** and loaded another cargo, but, during the journey to **port B** the vessel suffered some problems and became unseaworthy but the carrier did not take any action to remedy the unseaworthness. The vessel, hence, sailing from **port B** sinks shortly afterwards due to this unseaworthness. Under the current law, the cause of the loss of the cargo shipped at **port B** is unseaworthness and the owners can sue the carrier for their loss. The carrier will, thus, be unable to use the protections/ immunities in **Article IV of The Hague Visby rules and Cap 392**. This is because the obligation of seaworthiness is an over-riding one and should be satisfied before the carrier can use the protections.

On the other hand, the cargo shipped from **port A**; the carrier would be in breach of his obligation to exercise the due care of the cargo which is not an over-riding obligation because it is made subject to Article IV which means the carrier can use the protection of article iv r2 to escape liability. This means the owners of the cargo loaded in **port A** will not be in the same position as those whose cargo was loaded at **port B.**

The period to exercise the duty should thus be extended to cover the whole voyage in order to satisfy and comply with the new developments in the maritime industry.

The extension of the carrier to cover the whole journey should not however, impose on the carrier an extra burden. His obligation should still be able to exercise due diligence to make the vessel seaworthy and keep her in sea worthy condition.

5.4 The Negligence clause.

Article 4(2)(a) of the Hague Visby rules is commonly termed the *negligence clause* and excludes liability from the carrier for acts, neglects or default of the master, mariner, pilot or servant of the carrier in the navigation in the management of the ship. *Cap 392* replicates this provision verbatim.

This clause is clearly unfair. Its practical use in the shipping industry as a whole is questionable and may have the consequence of making the carrier exempt where he should have been liable for loss or damage.

The most obvious solution to the above is to place the liability for all loss, damage or delay clearly on the carrier unless he can show that he took all reasonable steps to avoid the loss.

Whatever the damage and unpredictability of life at sea, the carrier is in far more control over such situations than the shipper is therefore, it makes sense to place the obligation of ensuring safety wholly on the carrier.

5.5 Burden of proof and order of proof

As discussed earlier, the burden of proving unseaworthness in some circumstances lies on the shipper/owner, who inspite of the fact that he does not process any information regarding what happened onboard the vessel is tasked with the onus of establishing the unseaworthness of the vessel to support his claim. This is unfair. This is difficult considering that the carrier is the one who possesses all the information about the condition of the vessel, the cause of unseaworthness , and what took place on board the and led to the

damage or loss. To make the other party responsible for proving the unseaworthness will be difficult and inequitable as well as causing delay in trial.

It is essential thus to change the burden and order of proof to one which is fairer and more expedient. It is suggested that the carrier should carry the burden of proving unseaworthiness of the vessel.

Hence the Cargo-owned/shipped should prove the loss or damage they have suffered and that this took place while the cargo was in the carriers charge; then the carrier should prove the cause of loss and that the vessel was seaworthy, or if it was unseaworthy he should prove that he exercised due diligence to make her seaworthy. Otherwise he can prove that although the vessel was unseaworthy and he failed to exercise due diligence, neither unseaworthiness nor his failure contributed to the loss or damage.

5.6 Uniformity in the law

At present, the transport legislation prevailing in the various countries, Kenya included, is not always complete and the interpretation of rules varies from country to country. That is detrimental to the development of trade and the carriage of goods by sea. International trade benefits from legal certainty and from modern rules that are in line with day-to-day practice.

Hence it is suggested that a uniform law that apply for carriage by road, by rail and by sea be made. This would be more economical for the modern way of transport since container transport is more prevalent. This often involves a combination of transport by sea vessel, river vessel, road and of train. Such a law would take this made of transport into account and hence streamline the law of carriage of goods.

Ratification is also an essential aspect of ensuring uniformity in the law. The Hague/Visby rule of which Kenya is a member have been ratified by most of the shipping nations. However, this law is not perfect as it contains some lacunas and uncertainties as discussed earlier. The Hamburg rules was meant

to be a solution to these uncertainties and uncertainties in the Hague/Visby rules which still subsist in spite of a law that clearly addresses them because the shipping nations fail to adopt the more efficient law into their local legal regime.

In this circumstance it is suggested that advocacy be initiated in Kenya for the Hamburg to be adopted or it an international level for a more certain and uniform to cover all forms of carriage.

Another quality that would ensure this area of law keeps up with the changing times is the use of electric mail and such other forms. This is non existent because of the lack of a legal framework defining the extent to which such means of communication can be used. If the law made it clear that the use of digital transport documentation is permitted, this would result in a quicker transfer of the goods carried and lower transaction costs.

5.7 conclusion

It cannot be denied that the Hague/Visby rules continue to dominate this area of law. They still constitute the rules that govern carriage of goods by sea globally. They have withstood the changes of over 70 years of application and technological change and despite some difficulty in application and uncertainties these still remain.

However, the rules are not perfect. There are serious shortcomings in their scope of application, inconsistencies in interpretation and imbalance in interests, rights and liabilities of carriers' vis-à-vis shippers'. Hence in this era of fair trade, new approaches to the issue of global poverty and inequality, perhaps it is time to allow for a fairer, clearer and more level playing field in the area of carriage of goods.

The Hamburg rules provide significant improvements in terms of certainty of law clarify of contracts and fairness in the allocation of liabilities and thus

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