

London - IMLS
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Carriage of Goods by Sea under French Law: Peculiarities and Trends

INTRODUCTION

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LEGAL FRAMEWORK

DOMESTIC LAW

- Law n°66-420 of 18 June 1966
- Decree n°66-1078 of 31 December 1966
- Code of Transports

INTERNATIONAL CONVENTIONS

- Hague-Visby Rules
- Hamburg Rules
- Rotterdam Rules

PECULIARITIES AND TRENDS

I - PERIOD OF LIABILITY OF THE CARRIER

II - DECK CARGO

III - EXCEPTIONS

IV - LIMITATION OF LIABILITY

V - LIABILITY OF STEVEDORES

I - PERIOD OF LIABILITY OF THE CARRIER

I - PERIOD OF LIABILITY OF THE CARRIER

- **Hague-Visby Rules**

Art. I-e :

« *'Carriage of Goods'* covers the period from the **time when the goods are loaded on to the time they are discharged from the ship.**»

- **French Domestic Law**

Art. 5422-12 Code of Transports :

« *The Carrier is liable for the loss and damage sustained by the goods from the taking over until delivery ...*»

I - PERIOD OF LIABILITY OF THE CARRIER

- A. CAN WE LIMIT OR EXCLUDE THE LIABILITY OF THE CARRIER FOR THE ENTIRE PERIODS PRECEDING LOADING OR FOLLOWING DISCHARGE?

- B. CAN WE LIMIT OR EXCLUDE THE LIABILITY OF THE CARRIER FOR THE LOADING OR DISCHARGE OPERATIONS?

I - PERIOD OF LIABILITY OF THE CARRIER

A. LIMITATION OR EXCLUSION CLAUSES regarding periods preceding loading or following discharge :

- **French Domestic Law**

Art. 16 L.66:

« This section is applicable to all carriage performed from or to a French port, which is not subject to an international convention to which France is party, and in any event to all carriage operations falling outside the scope of this convention. »

→ Even a carriage subject to the Hague-Visby Rules, would be subject to strict liability (as per French law) before loading and after discharge.

Repealed in 2010 (Code of Transports) → rules of conflict of law.

I - PERIOD OF LIABILITY OF THE CARRIER

- **Hague-Visby Rules**

Art. VII :

« **Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea.** »

- **French Domestic Law**

Art. L.5422-15 Code of Transport :

« **Is null and of null effect any clause having directly or indirectly the purpose or the effect :**

1° to exclude the carrier from the liability provided under article L. 5422-12. »

I - PERIOD OF LIABILITY OF THE CARRIER

B. LIMITATION OR EXCLUSION CLAUSES regarding loading or discharge operations :

FIOS Clauses : Free In and Out (stowed)

- French Caselaw: NO

Supreme Court, 30 Nov. 2010 :

*« Article 29 of the Law of 18 June 1966 deprives of any effect any clause that relieves the sea carrier of liability for the entire operations of loading and discharge of the cargo;
It is therefore rightfully that the Court of Appeal held that **the clause FIOST is not valid under French law.** »*

I - PERIOD OF LIABILITY OF THE CARRIER

Contrary to **Art.II** of the Hague-Visby Rules :

*« Subject to the provisions of Article VI, under every contract of carriage of goods by sea **the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.** »*

and to **Art. 28 D. 1966** :

*« the carrier **undertakes**, despite any contrary clause, in an appropriate manner, **the loading, handling and discharge** of the goods. »*

I - PERIOD OF LIABILITY OF THE CARRIER

UK (The Jordan II (2003)) : YES

Parties are free to determine and allocate responsibility by their own contract

As all cargo work had to be performed by charterers, it follows that they would be liable if it was not properly or carefully carried out

Incorporation of the Hague Visby Rules, specifically Article III r.2 and r.8, did not render the FIOS clauses of the contract null and void.

➔ Shippers were unsuccessful in their claim for damage caused during discharge due to Article IV, Rule 2(q) (*any other cause arising without the actual fault or privity of the carrier*).

II - DECK CARGO

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A. APPLICABLE REGIME

B. CARRIAGE WITHOUT CONSENT

II - DECK CARGO

A. APPLICABLE LEGAL REGIME

- **Hague-Visby Rules** : exclusion from the scope of the Rules

Art. 1 :

« (c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever **except** live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. »

- **French Domestic Law** : no exclusion but right to exclude or limit liability

Art. L5422-16 Code of Transports :

« In derogation of the preceding article, **all clauses concerning liability or indemnity are authorized** for the carriage of live animals and **for the carriage shipped on deck** as per the provisions of article L. 5422-7... »

Exception: « containers shipped on board vessels equipped appropriately for this type of carriage. »

II - DECK CARGO

Legal implication :

- If a **container** is shipped on deck under the H/V Rules and is said to be shipped on deck, **the carrier can limit or exclude its liability**
- If a **container** is shipped on deck under French law and is said to be shipped on deck, **the carrier cannot limit or exclude its liability beyond what is provided under French law.**

II - DECK CARGO

B. CARRIAGE WITHOUT CONSENT

- **Hague-Visby Rules**

Do not contain a provision implying a fault of the carrier for loading on deck without the consent of the shipper.

- **French Domestic Law**

Art. L5422-7 Code of Transports :

« The carrier commits a fault if he loads the cargo on the deck of a vessel, without the consent of the shipper mentioned on the bill of lading...

The consent of the shipper is deemed granted in case of loading of the container on board vessels equipped appropriately for this type of carriage. »

II - DECK CARGO

Legal implications :

- If a container is shipped on deck under the H/V Rules without the consent of the shipper, the carrier is deemed to have committed a fault.
- If a container is shipped on deck under French domestic law without the consent of the shipper, the carrier commits no fault.

Supreme Court, 7 February 2006 :

« The presumption of the consent of the shipper for shipment of a container on deck of a containership does not apply to open top containers. »

II - DECK CARGO

Other implications (Caselaw) :

- Under the Hague-Visby regime, and under French domestic regime, whenever carriage is made on board vessel not specially equipped for the concerned cargo, a liberty clause does not amount to the express consent of the shipper.

« A simple clause of authorisation on the reverse side of the bill of lading does not contain the required consent so long as it is not coupled at the face side with the terms 'shipped on deck'. »

[Supreme Court, 18 March 2008; Supreme Court. 18 Nov. 2014]

≠ UK : Svenska Traktor (1953)

II - DECK CARGO

Other implications (Caselaw) :

- **The fault of the carrier would deprive him of the right to prevail himself of some exceptions linked to the carriage on deck** (eg. Perils of the sea, nautical fault, insufficiency of packing)
(Supreme Court, 29 April 2002)
- **This fault, as such, is not deemed as a wilful misconduct** and the carrier could still invoke the limitation of liability.
(Supreme Court, 14 May 2002)

UK: Kapitan Petko Voivoda (2003): even if instructions not to stow on deck.

III - EXCEPTIONS

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- **Hague-Visby Rules**

18 exceptions - 10 related to external events

- ① Fire
- ② Perils, dangers and accidents of the sea or other navigable waters
- ③ Act of God
- ④ Act of war
- ⑤ Act of public enemies
- ⑥ Arrest or restraint of princes, rulers or people, or seizure under legal process
- ⑦ Quarantine restrictions
- ⑧ Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general
- ⑨ Riots and Civil commotions
- ⑩ Saving or attempting to save life or property at sea

- **French Domestic Law**

9 exceptions - 3 related to external events:

- ① Fire
- ② Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general
- ③ Saving or attempting to save life or property at sea

III - EXCEPTIONS

- **French Domestic Law** : Catch-all exception:

« *Circumstances that constitute an event not attributable to the carrier* »

Reproduces the terms of article 1147 of the Civil Code, which is in fact the legal ground of « ***force majeure*** » in French Civil Law :

« *The debtor is condemned, in the event, to the payment of damages, either by reason of the non-execution of the obligation, or by reason of the delay in the execution, each time he does not justify that the non-execution is due **to an external cause that could not be attributed to him**, provided that there is no bad faith on his part. »*

III - EXCEPTIONS

- **French Domestic Law :**

- ➔ Need to prove the characteristics of a *force majeure*

- **Unforeseen/Unforeseeable**
 - **Insuperable**

- **Hague-Visby Rules :** make no reference to the definition of *force majeure* and does list additional events.

- ➔ No need to prove the characteristics of a *force majeure*.

IV - LIMITATION OF LIABILITY

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- A. ECONOMIC DAMAGE
- B. WILFUL MISCONDUCT

IV - LIMITATION OF LIABILITY

A. ECONOMIC DAMAGE:

- **Hague-Visby Rules**

Art. III-8:

*« Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss **of damage to, or in connection with goods**, arising from negligence, fault or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect... »*

Art.IV-2:

« Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding 666.67 units of account per package or unit or 2 units of account per kilogramme weight of the goods lost or damaged, whichever is higher. »

IV - LIMITATION OF LIABILITY

A. ECONOMIC DAMAGE:

- **French Domestic Law**

Art. L5422-12, Code of Transports :

« *The carrier is liable **for loss or damage occurring to the goods** from the taking over until their delivery, unless he proves that..... »*

Art. L5422-13, Code of Transports :

« *The liability of the carrier is limited, for **the loss and damage occurring to the goods**, to the amounts set by the provisions of paragraph 5 of article IV of the Hague-Visby Rules. »*

Art. L.5422-15 Code of Transports :

« *Is null and of null effect any clause having directly or indirectly the purpose or the effect :*

1° to exclude the carrier from the liability provided under article L.5422-12. »

IV - LIMITATION OF LIABILITY

Legal Implications :

- Under the Hague-Visby Rules, economic damage cannot be excluded contractually but is included within the limitation of liability.
- Under French domestic law, economic damage is not included within the limitation of liability but can be excluded contractually.

IV - LIMITATION OF LIABILITY

- **Exclusion clause (B/L) :**

*« Without prejudice to any applicable limitation of liability as per above, the basis of compensation shall be limited to the sound value of the goods so damaged or lost (excluding insurance, custom fees or taxes) and the freight on a pro-rata basis, if paid. **In no circumstance whatsoever, the carrier shall be responsible for indirect damage, loss of profit or consequential damage.** »*

➔ Civil Law : Exclusion clauses are valid provided:

- ✧ They do not cancel an essential obligation of the contract.
(e.g. Undertaking to carry the goods within a specific time)
- ✧ They do not undermine the fundamental obligation of the contract.
(In a contract of carriage: the obligation to carry the goods to destination)

IV - LIMITATION OF LIABILITY

B. WILFUL MISCONDUCT :

▪ Hague-Visby Rules

Art. IV-5 :

« Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph 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. »

▪ French Domestic Law

Art. 5422-14, Code of Transports :

« **The Carrier** cannot invoke the benefit of the limitation of liability provided in the first and second paragraphs of the present article:

1° If it is proven that the damage resulted from his personal act or omission done with the intent to cause damage or recklessly and with knowledge that damage would probably result. »

IV - LIMITATION OF LIABILITY

Legal Implications :

- Under the Hague-Visby Rules, the limit of liability could be broken in case of a wilful misconduct of the servants, agents and sub-contractors of the carrier.
- Under French domestic law, the limit of liability is broken only in case of a personal fault of the carrier (incl. master, crew).

V - LIABILITY OF STEVEDORES

V - LIABILITY OF STEVEDORES

- **Hague-Visby Rules** : do not contain provisions in this respect.
- **French Domestic Law**

Art. 5422-22, Code of Transports :

« *Stevedores are not liable for damages occurring to goods when they are caused by :*

1° Fire;

2° Facts constituting an event that is not attributable to them;

3° Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

4° A fault of the shipper, in particular the deficient packing, conditioning or marking of the goods ;... »

Art. 5422-23 : limitation of liability applicable for the carrier.

V - LIABILITY OF STEVEDORES

LEGAL IMPLICATIONS :

- Under the Hague-Visby Rules, stevedores cannot benefit of the exceptions and limitations of liability provided to the carrier but can benefit of clauses excluding or limiting their liability (*Himalaya Clause, Waiver to Sue Clause, Circular Indemnity Clause*)
- Under French Domestic Law, the liability of the stevedores is subject to the strict regime of the Code of Transports and all clause reducing or limiting liability is null and void.

CONCLUSION

JURISDICTION CLAUSE

- **BEFORE 2008:** Express consent of the Shipper/ Consignee/Holder
- **SUPREME COURT (Com. Ch. & Civil. Ch.) 16 December 2008 :**

« A jurisdiction clause agreed between a carrier and a shipper and inserted in a bill of lading produces its effects vis-a-vis a third party holder of the bill of lading, so long as, by acquiring the said bill of lading, he succeeded to the rights and obligations of the shipper according to the applicable national law. Otherwise, his consent should be verified in the light of the provisions of article 17 parag.1 of the Brussels Convention. »

JURISDICTION CLAUSE

- **Article 23 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters :**

« 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction.

Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

*(c) in international trade or commerce, in a form which accords with a **usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.** »*

JURISDICTION CLAUSE

- **CASELAW SINCE 2008 :**

- ➔ **Enforceability, considering that according to English law, applicable to the merits, the consignee does succeed in the rights of the shipper.**

CA Aix-en-Provence, 9 Nov. 2011; CA Paris, 11 Dec. 2014; Supreme Court, 17 Feb. 2015

- ➔ **Enforceability, considering that the consignee could not ignore that this type of clauses is part of a usage widely known and observed in the maritime trade.**

CA Versailles 18 Nov. 2010; CA Versailles 27 Jan. 2011; CA Paris 26 June 2012; CA Amiens, 18 Oct. 2012; Supreme Court, 12 March 2013; CA Aix-en-Provence, 17 July 2014; Supreme Court, 23 Sept. 2014.

DO NOT HESITATE TO REFER TO FRENCH LAW!

BETTER ...

**MAKE SURE YOUR JURISDICTION CLAUSE REFERS
TO FRENCH COURTS!**



MERCI !