



FACULTY OF LAW  
University of Lund

Tord Andersson

The contract of carriage by  
sea in liner trade- the Swedish  
and English law

Master thesis  
20 point

Supervisor  
Lars-Göran Malmberg

Field of study  
Transportation Law

Semester  
Autumn Semester 1999

# Contents

<b>SUMMARY</b>	<b>1</b>
<b>ABBREVIATIONS</b>	<b>2</b>
<b>1. INTRODUCTION</b>	<b>3</b>
<b>2. DEFINITIONS</b>	<b>6</b>
2.1 Liner trade	6
2.2 Bill of lading	6
2.3 Sea way bill	7
2.4 Carrier/Shipowner	7
2.5 Actual carrier/Contracting carrier	8
2.6 Cargo owner/Shipper	8
<b>3. BACKGROUND TO THE LAW IN ENGLAND AND IN SWEDEN</b>	<b>9</b>
<b>4. THE LEGAL SOURCES OF TODAY AND THEIR SCOPE OF APPLICABILITY</b>	<b>12</b>
4.1 The English legal sources and their scope of applicability	12
4.2 The Swedish legal source and its scope of applicability	15
4.3 Effects of the differences in the scope of applicability of the mandatory rules	16
<b>5. THE PERIOD OF APPLICABILITY OF THE MANDATORY RULES TO THE CONTRACT</b>	<b>19</b>
5.1 The period of applicability of the Hague-Visby Rules to the contract in English law	19
5.2 The period of applicability of the 13 <sup>th</sup> Chapter of the Swedish Maritime Code to the contract	20

5.3 Effects of the differences in the period of applicability of the mandatory rules to the contract	20
<b>6. THE OBLIGATIONS OF THE CARRIER</b>	<b>22</b>
6.1 The obligation to provide a seaworthy ship	22
6.1.1 The limitation to the duty- due diligence	25
6.1.2 The burden of proof	28
6.2 The duty to care for the cargo	28
6.2.1 The limitations to the duty	30
6.2.2 The burden of proof	31
6.3 The duty to issue a bill of lading	33
6.4 The duty to proceed with due despatch and not to deviate	37
<b>7. DAMAGES AND LIMITATIONS</b>	<b>42</b>
7.1 The amount recoverable	42
7.2 Financial- and time limitations	43
7.3 Loss of right to limitation	44
<b>8. THE CARRIER RESPONSIBLE IN CONTRACT</b>	<b>46</b>
<b>9. DUTIES OF THE SHIPPER/CARGO OWNER</b>	<b>47</b>
<b>10. CONCLUSION</b>	<b>49</b>
<b>11. BIBLIOGRAPHY</b>	<b>52</b>
<b>12. TABLE OF CASES</b>	<b>54</b>
<b>APPENDIX</b>	<b>57</b>

# Summary

The Law of Carriage of Goods by Sea is dominated by international conventions. Both Sweden and England have one of these conventions, the Hague-Visby Rules (HVR), as the basis for their mandatory legislation. Accordingly, the relationship between the parties to a contract of carriage by sea is generally regulated in similar ways in these two countries. The new Swedish Maritime Code from 1994 has then however also been influenced by a later convention, the Hamburg Rules. This is one of the reasons to the fact that dissimilarities of importance do exist, regardless of the common adoption of the HVR, between the Swedish and English law in this field.

The Swedish law applies to a wider group of contracts and during a longer period of time than the English mandatory law. This normally results in that the cargo owner is being more protected, since when the HVR do not apply in English law, the carrier can often avoid liability through clauses in the contract. Even when the HVR are applicable in English law, the Swedish law will, with some exceptions, be more advantageous for the cargo owner. One of the important exceptions to this is the carrier's responsibility for independent contractors.

The influence in Swedish law from the Hamburg Rules seems to have had a positive effect. The solutions in Swedish law, to some of the problems in this field of law, often seem to be preferable to those in English law. It must then only be reminded that different interests might be given different weight in England and in Sweden.

# Abbreviations

-A.C.	Appeal Court, England
-CMI	Comité Maritime International
-COGSA	Carriage of Goods by Sea Act, UK 1971
-DCC	Danish Court of First Instance
-FSC	Finnish Supreme Court
-Hague Rules	International Convention for the Unification of Certain Rules Relating to Bills of Lading, 1924
-Hague-Visby Rules	Protocol to Amend International Convention for the Unification of Certain Rules Relating to Bills of Lading, 1968
-Hamburg Rules	United Nations Convention on the Carriage of Goods by Sea, 1978
-K.B.	King's Bench Division
-Lloyd's Rep.	Lloyd's List Law Reports 1951-1967 Lloyd's Law Report 1968-
-NA	Norwegian Arbitration
-NCA	Norwegian Court of Appeal
-NM Cases	Nordic Maritime Cases
-NSC	Norwegian Supreme Court
-Q.B.	Queen's Bench Division
-S Bill	Swedish Bill 1993/94:195, Nya Sjölagen
-SCA	Swedish Court of Appeal
-SMC	Swedish Maritime Code, Svensk Författningssamling 1994:1009
-S Rep.	Swedish Report 1990:13, Översyn av Sjölagen 2- Godsbefordran till sjöss
-SSC	Swedish Supreme Court
-UNCITRAL	United Nations Commission on International Trade Law, Vienna
-UNCTAD	United Nations Conference on Trade and Development, Geneva

# 1. Introduction

Trade between countries has taken place since time immemorial. One reason for this is of course that some goods can not be obtained or manufactured locally. Beside this there is the economic rationale, with the theory of comparative costs. According to this theory, a country should concentrate its production on products that it can produce at a maximum cost advantage in comparison with other countries. These products shall then be exported to countries in which their production-costs would be higher. This benefits consumers as well as producers and entrepreneurs.

To make this exchange of products between countries possible, transportation is of course necessary. This transportation in its turn obviously needs legal regulation. As we know, this can always create problems, but in this field, with parties often from different countries and the contract often involving performance in different parts of the world, these problems could clearly be more severe. As a response, and partially a solution to this, International Transportation Law is to a substantial degree influenced by international conventions, aiming at achieving a harmonisation between the laws in the different jurisdictions. This is also the case within that part of International Transportation Law that regulates transport of goods by sea, that is the Law of Carriage of Goods by Sea. This area of law is at the same time a part of the vast field of Maritime Law, a field that encompasses rules of differing characters.

The first international convention that was created, and later adopted in a number of countries, for international carriage of goods by sea, was the Hague-Rules (1924). This was a reaction to the widespread use amongst carriers to use clauses in the carriage contract, which excluded their liability, often to a very considerable extent, for damage to the goods, or delay in their delivery. With this convention, certain mandatory duties on the carriers would be created, not possible to avoid through exemption clauses in the individual contract. The drafting of this convention followed, understandably, pressure from countries that often were the countries from which the cargo-owners came, such as the U.S. With time, this convention was regarded as being inadequate, and in 1963 substantial amendments to it

were made. This amended version of the original convention was the Hague-Visby Rules (HVR). The International Law Association's Maritime Law Committee (CMI) had created this convention, as its predecessor. The HVR, as will be shown later, is today the main foundation for the Law of Carriage of Goods by Sea in England and in Sweden. In both countries this convention forms the basis for mandatory legislation. Later even this convention was criticised, for example by the UN through UNCTAD and some developing countries, for being too favourable to the carrier<sup>1</sup>. Therefore the UN gave UNCITRAL the mission to draft a new convention, which was adopted in 1978 in Hamburg. This is the so-called Hamburg Rules. Some of the differences between this convention and the HVR will be examined in the following.

The absolute main purpose for the drafting and adoption of these three above-mentioned conventions has been, as already mentioned, to achieve harmonisation between the laws of the different nations, and following that, predictability for the parties. This has also to some extent been achieved. But the fact that there now are three conventions, all in force in different countries, has in a way the opposite effect. The ambition to get all the main sea trade-nations to adopt the same convention and to give it effect in their respective jurisdiction has not yet been fully materialised. As a result, there still exist differences of importance within this field of law between the different countries, even though the similarities of course are greater. Besides these concrete differences in law, account must of course also be taken of the different approaches to the law by the courts in the various countries.

In the following, attention will be paid to a part of the Law of Carriage of Goods by Sea in two different legal systems, that in England and that in Sweden. There are however several aspects of carriage of goods by sea. The cargo owner can for example choose to enter into a contract with a carrier who runs a line between two different ports in the world, but he can also charter a whole ship or a part of it for a certain time or for a certain voyage. This essay will only deal with the former example, that is the so-called liner trade. This concept will be explained more later. Chartering of ships, regulated by one of the many types of charterparties, will not be dealt with at all. In the following the comparison will also be limited to the mandatory

---

<sup>1</sup> S Bill 1993/1994:195 p. 139

rules in the two countries, which means that the rules of the Common Law will not be dealt with, although they will be shortly mentioned to create clarity at some points. Therefore, when in the following it is being referred to English law, only the mandatory legislation is intended, unless something else is said. Insurance questions will not either be discussed.

The object of this essay will be to examine the duties and rights of the parties to a contract of carriage by sea in liner-trade. Focus will be on the duties of the carrier and the protection of the cargo owner. The main interest will be to try to find the differences that exist between the two legal systems regulating liner trade and to discuss what practical importance these differences might have for the parties to the contract. Following that, the ambition is to find the answers to the questions concerning which legal system that gives the cargo owner the most extensive protection and which system that has found the best solutions to the problems in this area of law. In order to give a coherent description of this area of law, parts where the two legal systems have the same regulation and where this regulation is executed in the same way, will also be presented, albeit more shortly.

In those parts of the essay that deal with areas where the laws in the two systems are the same or very similar, the method used will be clearly descriptive. When it comes to the main part of the following, that is the search for differences in the systems and their practical significance, the method will naturally be more of a comparative kind, albeit even here sometimes descriptive. Following just after here, a short explanation of some important terms will be made, after which the legal background to the regulation of today of liner trade in England and in Sweden will be given. After this follows the very core of this essay, as explained above. Finally, the ambition is to come to a sensible conclusion, which gives the answers to the above questions, or at least parts of these answers.



## 2. Definitions

For reasons of clarity and increased understanding of the questions in the following, something shall be said about the most important terms frequently used hereafter.

### 2.1 Liner trade

This is the definition of the situation when a shipowner (alternatively a charterer, see 2.4) operates his ship between different ports in the world and lets cargo owners have their goods transported on these voyages in exchange for a fee ( the freight ). Cargo owners with a small quantity of goods, for whom the chartering of a whole vessel is normally not a practical solution, most frequently use this mode of transport<sup>2</sup>. These cargo owners are often in a weaker bargaining position than the charterer of a ship, which is the reason why there in the former area are mandatory legislation, whereas in the latter, with few exceptions, there is freedom of contract. The operator of a ship in liner trade normally has goods from several parties on a voyage. These goods are normally delivered to the liner at the port of shipment and then redelivered at the port of discharge. The liner operator accordingly normally performs the loading and discharging operations<sup>3</sup>.

### 2.2 Bill of lading

When the shipper delivers the goods to the carrier/shipowner he normally receives a document called the bill of lading. This document is very important and has several functions. It will be a receipt for the cargo shipped, as it normally will contain a statement as to the quantity, quality and other remarks concerning the condition of the goods at shipment. It will also be prima facie evidence of the contract of carriage, but in the hands of the original shipper, not the contract itself. Should the bill of lading however later be transferred to a third party, it will not only be evidence, but the

---

<sup>2</sup> Wilson, J Carriage of Goods by Sea, p. 6

<sup>3</sup> Falkanger, T Bull, H J Brautaset, L Introduction to Maritime Law, p. 248

contract of carriage itself<sup>4</sup>. The third function of this document is of great importance. This is that the bill of lading is a negotiable document of title. Accordingly, the shipper and the original owner of the goods, can transfer all the rights to the goods whilst they are in transit. This includes the right to demand delivery at the port of shipment and to hold the line operator responsible in accordance with the statements on the bill of lading. This function of the bill of lading is of vital importance for so-called documentary credit. The only person, who can demand delivery, and to whom delivery therefore should be done, is the person with the bill of lading. This person can be the original shipper or consignee, but also a third party, to whom the bill of lading has been endorsed, evidenced by a chain of endorsements.

## 2.3 Sea waybill

This is a document that sometimes can be used instead of a bill of lading, and has also been so used increasingly in the past<sup>5</sup>. As a bill of lading, this document is evidence of the contract of carriage and receipt of the cargo shipped. The absolute main difference is that it is not a negotiable document, which means that it is not a document of title. Instead of delivery against a document, this should be done to the consignee named in the sea waybill. This person may however under certain circumstances be changed<sup>6</sup>.

## 2.4 Carrier/Shipowner

The carrier will normally also be the owner of the ship in liner trade, but there are of course instances where this is not the case. The carrier may instead have chartered the ship in order to use it in liner trade. Questions of this kind are outside the scope of this essay. So, when hereafter the word “carrier” is used, it might refer to both situations. Unless something else is said, it should not be of relevance for the questions later dealt with, whether the carrier is also the owner of the ship or not. It is his responsibility *pro carrier* that is of relevance.

---

<sup>4</sup> Chuah, J.C.T. Law of International Trade, p.151 and *SS Ardennes v. SS Ardennes* [1951] 1 K.B. 55

<sup>5</sup> Falkanger/Bull/Brautaset p.351

<sup>6</sup> See SMC, 13:58

## **2.5 Actual carrier/Contracting carrier**

These two concepts do not exist in the HVR, where only the definition “carrier” can be found. They do on the other hand exist in the Hamburg Rules and in the Swedish Maritime Code (SMC)<sup>7</sup>. The reason for this has been to increase the protection of the cargo owner. This division of the carrier-concept can become relevant in a number of situations. The person who has promised to take on the carriage of goods might not own the ship later used for the transport. The promisor will here normally be considered as the contracting carrier and the owner of the ship as the actual carrier. Another situation where these two definitions can be used is if the contracting carrier, that is the person who has promised to perform the carriage, uses another carrier for some part of the journey. This latter person will then be the actual carrier for the part of the transport performed by him.

## **2.6 Cargo owner/Shipper**

This essay will, as said above, deal with the protection of the cargo owner. This person might also be the shipper, that is the person who delivers the goods to the carrier, but he is far from always this. The shipper can demand from the carrier that someone else shall be named in the bill of lading as the consignee, that is the person to whom delivery shall be made. Then the shipper will not be the same person as the cargo owner. The initial consignee might also later endorse the ownership in the goods to a third person. Since the cargo owner might also be the shipper, some of the duties and rights of the shipper will be dealt with later. In English law the term “shipper” includes both the person who concludes the contract of carriage with the carrier and the person who delivers the cargo to this carrier. In Swedish law however, there are different definitions for these persons. The former is defined as the “avsändare”, the latter as the “avlastare”. Since this essay deals with the protection of the cargo owner, this is the term that will be used in the following. Whether this person also is the shipper or not will not be mentioned in the following, unless it is of importance.

---

<sup>7</sup> The Hamburg Rules art. 1.1 and 1.2, SMC 13:35-37

### 3. Background to the law in England and in Sweden

The Swedish and the English systems have of course fundamental differences in their structures and in their sources. In England the Common Law, that is the legal source created and developed by the courts, still is of the great importance, whereas in Sweden and the other Nordic countries statutes and their preparatory work are the main source for the law.

When it comes to carriage of goods by sea, in liner trade, there is however a common main source within the two legal systems, that is the above-mentioned HVR. England has, just as Sweden, adopted the convention. In order to make a convention like this legally binding within the country, it is in England as in Sweden necessary to transform or incorporate the text of the convention into the law of the country. This has been done in different ways in England and in Sweden.

In England the text of the convention has become part of the domestic law in its entirety, with small additions, through COGSA 1971. In this law it is stated that the provisions in the convention shall have the force of law ( COGSA 1971, 1 ( 2 )). As will be showed later (Chapter 4), the HVR do not always cover a contract of carriage, or maybe not the whole part of it. For these situations, with one small exception as shown later, there is no explicit written law in England. The legal relationship between the parties is here regulated by Common Law, which has a clearly different content than the HVR. In these situations, when Common Law is applicable, the parties can, to a considerable extent, choose to form the legal basis for their relationship themselves, through standard documents or individually drafted contracts. Even though most liner trade contracts in English law will be governed by the HVR, through COGSA 1971, there will still be cases where refuge to the Common Law will have to be made. In English law, in this area, we therefore have two main legal sources.

The Nordic countries<sup>8</sup> could almost here be treated as one entity. The reason for this is that there has been a considerable Nordic legislative co-operation in this field of law, which has led to that the Nordic countries have adopted almost identical Maritime Codes, covering issues as liner trade, but of course other aspects of maritime activity as well. The implementation of the HVR was made in the Nordic countries in the early 1970's. In Sweden it was done in 1973. Until 1985 were however also the Hague Rules applicable, which led to that there were two systems in force at the same time. This year, that is 1985, the Hague Rules were so finally abolished, following which the HVR became solely applicable for liner-trade. In 1978 a new convention was drafted, the Hamburg Rules. The Nordic countries did not ratify this convention, but after that it had been drafted, the Nordic countries respectively appointed committees that should present a proposal to a new Maritime Code. Naturally, these committees had to decide to what extent the new Code should be influenced by the new convention. What made this difficult was that it at this stage was uncertain how many countries that later would choose the new approach to carriage of goods by sea, as found in this new convention, including the question if the Nordic countries themselves later would be signatories of the convention. At the same time, the Nordic countries were of course still bound by the HVR, an obligation that could be violated if the respective countries accepted rules that did not correspond to those in this previous convention. When the Nordic countries in 1994 adopted new Maritime Codes, the solution that was chosen for liner trade was that the HVR still should be the foundation, the primary source for the legislation in this area. Additionally to this, it was decided that some of the rules in the Hamburg Rules should be incorporated into Nordic law, provided that they did not violate the provisions of the HVR. The result of this can today be seen in the 13<sup>th</sup> chapter of the SMC. The Nordic law can accordingly be seen as something of a "cock-tail" of the two conventions<sup>9</sup>, or maybe as a fourth alternative to the already existing three conventions. This addition of some of the Hamburg Rules provisions has among other things had the effect that the Nordic Maritime Codes provide mandatory regulation, unlike England, even when a sea waybill is used, instead of a bill of lading. More about this and other dissimilarities

---

<sup>8</sup> By this is meant Sweden, Norway, Denmark and Finland

<sup>9</sup> Clarke, M The Transport of goods in Europe: patterns and problems of uniform law, LMCLQ feb. 99 p. 51

will be discussed in the next and the following chapters. It is also clear from the above that the Nordic countries have chosen to use the method to transform the international conventions into their domestic legislation by drafting laws that reflect the wording of the conventions, whereas England has incorporated the HVR directly by reference in COGSA 1971. In the following only Swedish law will be compared with the English. Reference to decisions by courts in other Nordic countries will however frequently be made, when it can be assumed that these decisions also reflect Swedish law. Considering the great similarities and the co-operation in the development of the laws, this must often be the case. These Nordic judgements are of course not legally binding for a Swedish court, albeit of importance in interpreting the law.

## 4. The legal sources of today and their scope of applicability

The HVR are, as said before, the foundation for the mandatory regulation in both jurisdiction. Their scope of applicability is though not identical in England and in Sweden. This is what here will be examined.

### 4.1 The English legal sources and their scope of applicability

As understood by now, the main legal source is the HVR. To find the scope of their applicability in English law, it is necessary to search both in this convention itself, because it has been incorporated directly, as well as in COGSA 1971. According to COGSA article 1 (2) the HVR shall have the force of law. Article I (b) in the HVR states the first requirement for their applicability. According to this provision, only contracts of carriage covered by a bill of lading or any similar document will fall within the scope of the convention. With “similar document” is meant another type of document, which is a document of title. The term “covered” has been clarified in the case *Pyrene Co. v. Scindia Navigation Co.*<sup>10</sup> Here it was said that there need not exist an actual bill of lading when, for example, a dispute arises, for the contract to be “covered” by a bill of lading. It is enough that at the time the contract was entered into, it was contemplated that a bill of lading later would be issued. It follows therefore also that where a bill of lading has been issued, which does not correspond to the formal requirements, it can be correct to claim that a bill of lading originally was contemplated<sup>11</sup>. That the contract of carriage is covered by a bill of lading in the above sense is the starting point, the first qualification rule. The second is found in article I (c) of the HVR. This article excludes, from the applicability of the convention, contracts of carriage where the cargo is live animals and cargo that is stated as being carried on deck and is so also carried. The third qualification rule

---

<sup>10</sup> *Pyrene Co. v. Scindia Navigation Co* [1954] 1 Lloyd’s Rep. 32

<sup>11</sup> Chuah, p.215

within the convention itself is article X. The first requirement in this article, for the applicability of the Convention, is that the carriage of goods is between ports in two different states. Then, *one* of the following facts must exist:

- (a) the bill of lading has been issued in a contracting state<sup>12</sup>
- (b) the carriage is from a port in a contracting state
- (c) the contract contained in or evidenced by the bill of lading provides that the HVR or the legislation of any State giving effect to them are to govern the contract

The first two alternative requirements will be commented upon later (4.3). As for the third alternative requirement, it has been shown that a forum-clause, appointing a British court, is not enough to provide that the legislation of the UK should apply, within the meaning of article X (c)<sup>13</sup>. An additional problem could perhaps be caused by the fact that England has two, in a way, separate legal bodies, Equity and Law. Within Law there is then Common Law and Statutory Law. Only within Statutory Law is then the HVR to be found. Therefore, a reference to UK-legislation might be required, not just a reference to UK law.

The UK has however extended the applicability of the HVR, through COGSA 1971. First this is done through article 1 (3), which makes the Rules applicable to domestic trade, which means that it is not necessary for the voyage to be between ports in two different countries. Secondly, through article 1 (6) (b), even contracts not covered by a bill of lading or a similar document of title, but where a non-negotiable document has been issued, can be subject to the HVR. There are however some requirements. The non-negotiable document must be marked as such. Secondly, the contract shall expressly provide that the Rules are to apply *as if the document were a bill of lading*. There has been some uncertainty whether the words “as if the document were a bill of lading” must be used. It now seems clear that these words must not be omitted, if the Rules shall have the force of law<sup>14</sup>. If these words are not used, the Rules might still be incorporated as contractual

---

<sup>12</sup> For the contracting States, see the Appendix

<sup>13</sup> *Hellenic Steel Co. v. Svolmar Shipping Co Ltd (The Komminos S)* [1991] 1 Lloyd's Rep.370



terms. The difference in that case will primarily be that exemption- and limitation-clauses, going further than the Rules permit, still will be valid.

It should be added that where the cargo can be classified as “particular goods”, the parties to the contract of carriage are free, within certain limits, to agree on terms and conditions contrary to those provided for in the HVR<sup>15</sup>. Goods can be classified as particular goods due to its special character or condition, or because of special circumstances of the carriage. The shipment shall further not be in the ordinary course of trade. Examples of cargo falling within this article could be experimental cargoes and nuclear waste<sup>16</sup>. It is finally a requirement that a non-negotiable document, marked as such, is issued and not a bill of lading, for the special rule to apply.

When the HVR do not apply in England, the contract of carriage will fall within the Common Law. This source of law will not be dealt with in the following, primarily since it has lost most of its significance through the HVR. It should though be said here that in those cases when the Common Law applies, which can be the case for example when a sea waybill is used, the protection of the cargo owner will normally not be the same as when the HVR apply. This because of the reason indicated above, that freedom of contract to a large extent is upheld and that carriers therefore can avoid liability by using exemption and exclusion of liability-clauses. In this business, liner-trade, the carrier is also normally the stronger party, which gives reason to believe that he often to a large extent can dictate the terms of the contract. In most cases therefore the cargo owner will be less protected under English law when Common Law shall be applied, than when the HVR apply. This statement will generally be true, though it in some aspect might be a simplification. For the purposes of this essay however, this general assumption will have to suffice and the Common Law will not be dealt with in any more depth.

---

<sup>14</sup> *Browner International Ltd v. Monarch Shipping Co. Ltd* [1989] 2 Lloyd’s Rep. 185

<sup>15</sup> The HVR art. VI

<sup>16</sup> Wilson, p. 175

## 4.2 The Swedish legal source and its scope of applicability

Since the SMC to a large extent has the HVR as its foundation, the similarities to English law are often clear. So also when it comes to the applicability of mandatory rules, even though there are differences of some importance.

The scope of applicability of the 13<sup>th</sup> Chapter of the SMC, which is where liner trade is regulated, is to be found in 13:2. The first difference that is to be noted, in comparison with the English legislation, is that there is no requirement for the contract of carriage to be covered by a bill of lading for the 13<sup>th</sup> Chapter to apply. All that is required in this aspect is that there is a contract of carriage. As in England, the Swedish legislation applies to domestic trade, with the addition that it also applies automatically to inter-Nordic trade. It also applies, as in England, when the port of shipment is in a contracting state, when the transport document has been issued in a contracting state and when this document provides that the HVR or that the law of a convention State shall apply<sup>17</sup>. In these two latter cases, there are however one difference to the UK. The Swedish Maritime Code uses the word “transport document” and not bill of lading. This means, most importantly, that the rules in the 13<sup>th</sup> Chapter also will apply when a sea waybill has been issued in a contracting State or when the HVR or the law of a convention State has been incorporated into a sea-way bill. This increased applicability has its origin in the Hamburg Rules<sup>18</sup>, as has the second difference in this area. This is that the 13<sup>th</sup> Chapter also will apply when the port of discharge is in one of the Nordic countries<sup>19</sup>. Lastly, also influenced by the Hamburg Rules<sup>20</sup>, the Swedish Maritime Code also applies to deck cargo and live animals. Special rules apply in these cases though.

As in English legislation, special terms can be agreed upon, when the cargo can be classified as being “particular goods”. The requirements for being

---

<sup>17</sup> SMC 13:2 2<sup>nd</sup> paragraph

<sup>18</sup> The Hamburg Rules art. 2.1 (d)

<sup>19</sup> SMC 13:2 2<sup>nd</sup> paragraph 2, The Hamburg Rules art. 2.1 (b)

<sup>20</sup> The Hamburg Rules art. 1.5 art. 9

allowed to agree on individual terms, that can be contrary to the other rules in the 13<sup>th</sup> Chapter, seem to be similar to those in English law. There is though no requirement in Swedish law to use a non-negotiable document to be allowed to agree on individual terms<sup>21</sup>.

### **4.3 Effects of the differences in the scope of applicability of the mandatory rules**

Since the use of sea waybills is said to increase<sup>22</sup>, the fact that the HVR do not automatically apply when this document is used, could at first glance be believed to have a significant impact on the protection of the cargo owner. However, since most seaway bills incorporate these rules voluntarily, this is not the case. For the HVR to have the force of law in England in this case, the requirements in COGSA 1971 1 (6) (b) must however be fulfilled. Since 1990 there is also a CMI set of rules, Uniform Rules for Sea Waybills, which the parties to a contract of carriage voluntarily can incorporate into the contract. If the parties make a reference to these rules in their contract, the laws and conventions that would have applied, had a bill of lading been issued, will apply to their contract<sup>23</sup>. What is an important difference in law and in theory might therefore not be such a great difference in practice, provided that the parties do incorporate either the HVR directly or the CMI rules for sea waybills. Some writers on English law, for example Tetley<sup>24</sup>, have additionally to this claimed that the HVR should be directly applicable, in cases where the parties have chosen to use a sea waybill, but where the shipper had the legal right<sup>25</sup> to demand a bill of lading. The reason for this interpretation by Tetley of the HVR is the public order nature of these rules. Whether this argument would have success in an English court must be highly uncertain, especially since it would clearly be against the wording of the HVR. Should it however be successful, the difference to the Swedish Law would diminish even further.

---

<sup>21</sup> SMC 13:4 4<sup>th</sup> paragraph

<sup>22</sup> Falkanger/Bull/Brautaset p. 351, S Bill p.137

<sup>23</sup> CMI Uniform Rules for Sea Waybills art 4 (i)

<sup>24</sup> See for example the opinion of Professor Wm.Tetley, Q.C., as summarized in A Guide to the Hague and Hague-Visby Rules, Richardson, F.C.I.I. p.64

<sup>25</sup> The HVR art. III ( 3 )

With technological development, neither bills of lading nor sea waybills in their original form have to be used. The most important alternative to these traditional methods is to use the system of electronic bills of lading. It is not possible to explain this in any depth here, but the basic difference to a traditional bill of lading is that no actual bill of lading is transferred to the consignee, but a datafreight receipt<sup>26</sup>. The SMC might be applicable when an electronic bill of lading is used, since it only refers to a contract of carriage by sea, not to any other document. In England however, the HVR will not be automatically applicable if an electronic bill of lading is used. The parties can though even in this situation choose to incorporate these rules, either directly in the contract, or by reference to the CMI Rules for Electronic Bills of Lading. These CMI rules are like the above mentioned rules for sea waybills terms that the parties have to incorporate into the contract voluntarily and they will not have the force of law<sup>27</sup> automatically.

As for deck cargo and live animals, the case is clearly that the Swedish Maritime Code provides a more extensive mandatory regulation than English law. All deck cargo is however not excluded from the scope of the HVR in English law. For this kind of cargo to be excluded, it must clearly be stated on the bill of lading that carriage is to be on deck and that carriage then also is on deck. If only an optional right to carry on deck is inserted into the bill of lading, the applicability of the HVR will not be excluded<sup>28</sup>.

The next difference is that the HVR not will be applicable in English law merely because the port of discharge is in the UK. It might well be that the transport goes from a non-convention State, in which also the bill of lading has been issued, to the UK. The bill of lading-holder, the cargo-owner, who then takes delivery in the UK of the goods, will not be able to rely on the HVR in an English court. This is of course also provided that they were not incorporated by the bill of lading and that English law is the applicable law. In this respect also, the Swedish Maritime Code provides a more extensive applicability than the HVR, as incorporated in England.

---

<sup>26</sup> Wilson, p. 168

<sup>27</sup> Greiner, E EDI and the Traditional Bill of Lading p.1 University of Cape Town, LLB Research Option 1997

<sup>28</sup> Svenska Traktors AB v. Maritime Agencies [1953] 2 Lloyd's Rep.124

The applicability of the Swedish mandatory rules is though perhaps less extensive in one aspect. This is when the cargo can be classified as “particular goods”. In English law it is then required that a non-negotiable document is used, to set the mandatory rules aside. In Swedish law, these can be avoided even if a bill of lading is used. To state this clearer, the mandatory rules will apply in English law automatically to a transportation of “particular goods” if a bill of lading is issued, of course provided that the transport falls within the other requirements. In Swedish law, such a transport will not automatically fall within the 13<sup>th</sup> Chapter, provided that the parties have agreed on individual terms. The reason for the additional requirement in English law is to prevent the terms of such an individual contract to bind anyone else than the original shipper and the carrier, that is not to make a consignee of the cargo party to a contract of this kind. On the other hand, according to the preparatory material to the Swedish law, there might in practice not be much difference. It is said there, that should a bill of lading be issued, this would normally lead to that the carriage is of such a character that it will be regulated by the mandatory rules<sup>29</sup>. This since the ownership, to what can be classified as particular cargo, normally is not intended to be transferred during a voyage.

It should be added, that the parties might of course incorporate forum-clauses and choice of law-clauses in their contracts. By using clauses like these, it could be possible for the carrier to avoid the mandatory regulations. However, in both Swedish and English law, the use of clauses of this kind has been clearly restricted<sup>30</sup>. Which system that restricts the use of these clauses the most can not be examined here.

To conclude, it must be said that the Swedish law has a wider scope of applicability than the English mandatory legislation. Normally a wider applicability of the mandatory legislation will be beneficial to the cargo owner, should a conflict arise.

---

<sup>29</sup> S Bill p. 215

<sup>30</sup> SMC 13:60, *The Hollandia* [1983] A.C. 565

# 5. The period of applicability of the mandatory rules to the contract

A contract of carriage may involve several stages, for example part of the carriage being on road and another part being by sea. It may also be agreed that the shipper (cargo owner) is to deliver the goods some days before the loading is to commence, and that the goods during these days will be stored in a warehouse. The question is then when the carrier's responsibility according to the mandatory laws begins.

## 5.1 The period of applicability of the Hague-Visby Rules to the contract in English law

In English law, the period under which the HVR apply is defined in article 1 (e) in the Rules themselves. According to this article, the period covered by the Rules is the time from when the goods are loaded on to the time from when they are discharged from the ship. In circumstances where the carrier is responsible for the loading and discharging, this period is normally interpreted as the "tackle to tackle" period. This means that the HVR apply from the time when the ship's tackle is hooked to the goods at the port of loading until the time when the hook of the tackle is released at the port of discharge<sup>31</sup>. Therefore the carrier will be responsible according to the HVR if the cargo falls, whilst being lifted on board<sup>32</sup>. On the other hand, he will not be responsible if the cargo is in a warehouse waiting for being loaded on the ship, even if it is his control<sup>33</sup>. The parties can however, by agreement, extend the carrier's liability to the period before loading and after discharging<sup>34</sup>.

---

<sup>31</sup> Wilson, p.180

<sup>32</sup> Pyrene v. Scindia Navigation [1954] 1 Lloyd's Rep. 321

<sup>33</sup> Here bailee-responsibility will be relevant, which though is outside the scope of the mandatory HVR

<sup>34</sup> The HVR art. VII

## **5.2 The period of applicability of the 13<sup>th</sup> Chapter of the Swedish Maritime Code to the contract**

The period of responsibility for the carrier in the SMC is not the same as in English law. The reason for this difference is once again the Hamburg Rules<sup>35</sup>. The relevant law is found in 13:24 SMC. According to this provision the period of responsibility covers the time during which the carrier is in control of the goods at the port of loading, during the carriage and at the port of discharge. This can mean that he is responsible before loading, for example when the cargo is stored in a warehouse or terminal waiting to be loaded on board. His responsibility will accordingly come to an end when he no longer is in control of the goods. If there is an agreed time for delivery, or if it follows from law or custom of the port that delivery is to take place at a certain time, the carrier's responsibility will however end at this time<sup>36</sup>. This is of course provided that the carrier at that time has made the goods available for the cargo owner.

## **5.3 Effects of the differences in the period of applicability of the mandatory rules to the contract**

The period under which the carrier is responsible is clearly longer in Swedish law. This difference has some significance, since it is, for example, common that the goods will be placed in a warehouse or at a similar place awaiting loading, after being delivered to the carrier or an agent of the carrier at the port. For this time the carrier can avoid liability in English law<sup>37</sup>. The fact that the carrier does not seem to be responsible according to the HVR automatically as long as he is in control of the cargo, can create problems for the cargo owner, for example when transshipment will take place. If the cargo is being discharged from the ship to the dockside and then

---

<sup>35</sup> The Hamburg Rules art. 4

<sup>36</sup> S Bill p. 236

<sup>37</sup> The HVR art. VII

lies there, waiting to be loaded on another ship, neither the first nor the second carrier has to be liable in English law<sup>38</sup>. In Swedish law, the first carrier would normally remain liable for this period, according to 13:24 SMC.

The difference between the two laws might decrease if the parties to a contract subject to Swedish law choose to define the period when the carrier is deemed to be in control of the goods. Such agreement could possibly have the effect that the carrier's mandatory liability will not begin when the shipper delivers the cargo at a terminal at the port of loading, since the receiver, who is not the carrier, shall not be deemed as an agent of the carrier<sup>39</sup>. The parties can of course not define the moment when the goods shall be deemed to have come in the control of the carrier as they wish. The validity of this agreement must be judged with the mandatory law and its purposes in mind.

---

<sup>38</sup> This was the result of the Canadian case *Falconbridge Nickel Mines v. Chimo Shipping Co* [1973] 2 Lloyd's Rep. 469. It is of course not certain that an English court would come to the same conclusion.

<sup>39</sup> Honka, *New Carriage of Goods by Sea*, p. 35, S Bill p. 236 e contrario



## 6. The obligations of the carrier

The carrier's duties will here be divided into four groups. These duties are those provided for by the respective mandatory regulations. Contracts providing for less responsibility will be "null and void" in English law according to the HVR art. III r.8 and in Swedish law according to 13:4 SMC. The carrier can in both legal systems agree to a more extensive responsibility<sup>40</sup>.

The obligations of the carrier in English and Swedish law have strong similarities. Therefore they will be presented together and not under separate headings. After that, the differences that still might exist will be examined.

### 6.1 The obligation to provide a seaworthy ship

Seaworthiness includes, in both countries, three elements, which are technical seaworthiness, voyage seaworthiness and cargo worthiness<sup>41</sup>. The first element refers to the physical attributes of the ship, such as the engines and the ability of the ship to stand the normal occurrences on the sea. The second element contains the duty to "properly man, equip and supply the ship"<sup>42</sup>. The last element is the ship's ability and suitability to receive and carry the intended cargo. It shall be noted that the ship does not have to be cargoworthy in respect of any cargo, but only reasonably fit for the purpose intended, which means that the requirement is relative to the circumstances and the type of carriage<sup>43</sup>. One important restriction in the concept of seaworthiness is that the ship does not have to be seaworthy after the ship has set sail and started the voyage. In English law, the time at which the ship has to be seaworthy has been defined as "before and at the beginning of the voyage"<sup>44</sup>. The words in the SMC are "before the beginning of the

---

<sup>40</sup> The HVR art. V, SMC 13:4 paragraph 2

<sup>41</sup> SMC 13:12, The HVR art. III (1)

<sup>42</sup> The HVR art. III (1) (b)

<sup>43</sup> Chuah, p. 231, S Bill p. 166

<sup>44</sup> The HVR art. III (1), see also *Maxine Footwear Co. Ltd v. Canadian Government Merchant Marine Ltd* [1959] A.C. 589

voyage”<sup>45</sup>. The small semantic difference aside, there should not be any real difference on this issue.

The interpretation and application of the concept of seaworthiness could however still create some differences between the two countries, even though it is defined in very similar ways in the written laws. One of these *possible* differences will be shortly presented here.

This issue, where some difference might exist, is when works or some similar activity takes place to or on the ship, in connection with the loading, which ultimately results in some defect on the ship or the cargo. There is a Norwegian case dealing with this<sup>46</sup>. In that case, a fire on the ship had damaged the cargo. The claimant argued that the reason for the fire was a defective cable, which had been used for lighting during the loading. This cable defect was according to the claimant something that rendered the ship unseaworthy and accordingly made the carrier liable for the damage to the goods. The Court however did not agree. Instead they said that a cable defect which occurs during loading is not something which renders the ship unseaworthy. For that to be the case, the cable defect, or any other similar defect, has to exist before the work commences. The defect has to “settle” before unseaworthiness exists<sup>47</sup>. As said, this was a Norwegian case. But having the strong resemblance between the Nordic Maritime Codes and the extensive legislative co-operation in this field in mind, there are good reasons to believe that a Swedish court would come to the same conclusion. It does not seem to be clear to what extent English law differs on this issue, that is to what extent the ship can become unseaworthy because of works and repairs being done to and on it, between the beginning of the loading and the commencement of the voyage. There are two cases with, as it seems, contradicting results. The earlier one<sup>48</sup> expresses a different view of the law in England, than in Norway and maybe in the other Nordic countries, as stated in the above Norwegian case. In this English case, fire started as a result of works done with an acetylene torch before the commencement of the voyage. The result was that the cargo was lost. The Court held that the

---

<sup>45</sup> SMC 13:26 paragraph 2

<sup>46</sup> NM Cases 1976.364

<sup>47</sup> Honka, p. 49

<sup>48</sup> Maxine Footwear Co. Ltd v. Canadian Government Merchant Marine Ltd [1959] A.C. 589

ship was unseaworthy because of the fire. This fire and its cause, the work with the torch, were obviously facts and defects that did not exist before the beginning of the loading, but could still render the ship unseaworthy. A later case<sup>49</sup>, which has been criticised<sup>50</sup>, delivers an opinion that seems to conflict with this earlier case. In this case, the ship was said to have been physically sound before the beginning of the loading. Then welding works were done to the ship and this was one of two possible reasons for the fire, which subsequently started. The Court said that even if the welding works had been the cause of the fire, it would not make the ship unseaworthy, since the ship was intrinsically fit. This should mean that if the ship is seaworthy, since it is sound and intrinsically fit, before the beginning of the loading, subsequent works on or to the ship which expose the ship to a risk or which actually cause a defect, will not make the ship unseaworthy.

In both these English cases, work done to or on the ship during the relevant time caused, or might have caused, damage to the cargo. The decisions of the English courts seem hard to reconcile. There is additionally one older case where the creation of a risk to the ship amounted to unseaworthiness<sup>51</sup>. In both the above English cases the work done at least created a risk to the ship. The situation in English law must be considered as uncertain. If the latest case should state the currently relevant law, which normally is the case, then this would lead to a similar legal situation as in Sweden (provided that the Norwegian case reflects Swedish law).

In Swedish and Nordic law, the ship does not really have to be seaworthy at the commencement of the voyage. This is provided that the carrier can show that the defect causing the unseaworthiness would be corrected during the voyage, before danger would have arisen<sup>52</sup>. This can for example be relevant if the ship has left the port without closing the hatches, but where the routine is to close these before the ship reaches the open sea<sup>53</sup>. The situation does

---

<sup>49</sup> A Meredith Jones Co. Ltd v. Vangemar Shipping Co. Ltd ( The Apostolis ) [1997] 2 Lloyd's Rep. 241

<sup>50</sup> Chuah, p. 230

<sup>51</sup> Steel v. State Line Steamship Co. (1877) 3 App. Cas. 72

<sup>52</sup> NM Cases 1956.175 NM Cases 1975.85

<sup>53</sup> NM Cases 1919.364

seem to be the same in English law and this should therefore not be a point of divergence<sup>54</sup>.

### **6.1.1 The limitation to the duty- due diligence**

In neither Swedish nor English law is it an absolute duty to provide a seaworthy ship. The situation is different when the HVR are not applicable in English law, but this will not be discussed here. What is required in Swedish and English law, when the HVR are applicable, is that the carrier has exercised due diligence in making the ship seaworthy. It is not possible to provide an objective formula defining due diligence. Whether this has been exercised must be decided from the facts of each individual carriage. The term due diligence refers of course to all the three aspects of seaworthiness. Since it has to be decided from case to case whether due diligence has been exercised, it is hard to evaluate whether differences exist between Swedish and English law. To do this, extensive case studies would be necessary, and maybe vast technical knowledge. One possible difference, of some importance, will though be discussed at the end of this Chapter.

That the carrier not will be liable for a damage caused by unseaworthiness if he has exercised due diligence in inspecting the ship, but still could not find the defect, should be without doubt in both Swedish and English law<sup>55</sup>. A more interesting question might be what responsibility the carrier has for such defects, that is defects not discoverable by due diligence, if he has performed no inspection at all. It seems as if in both Swedish and English law the carrier would avoid liability in such a situation. A precondition is of course that the carrier or his servants did not initially cause the defect. It seems then as if the carrier, in both Swedish and English law, has three possibilities to avoid liability, when faced with a claim for compensation for damage caused by unseaworthiness. First, he can of course try to show that the ship was not at all unseaworthy at the commencement of the voyage. Secondly, he can try to establish that he has done what the law requires from him, which is to exercise due diligence in making the ship seaworthy.

---

<sup>54</sup> Scrutton, *Charterparties and Bills of Lading*, p. 99, *Mc Fadden v. Blue Star Line* [1905] 1 K.B. 697 at 706

<sup>55</sup> The inspection will fulfil the requirement of due diligence if it was of such a character as a skilled and prudent shipowner would have chosen and it was performed with reasonable skill, care and competence, *Scrutton on Charterparties and Bills of Lading* p. 412

Should neither of these defences be available, his last alternative is to show that the defect was of a kind that would not have been discovered even if the ship had been inspected in a way that fulfilled the requirement of due diligence<sup>56</sup>. So far the laws seem to be similar. Now, let us turn to the possible point of divergence, mentioned above.

This point is the responsibility of the carrier to act with due diligence when he has employed an independent contractor to perform one of his (the carrier's) initial obligations, such as the obligation discussed here, to provide a seaworthy ship. That the carrier is responsible for the due diligence of his employees is of course not disputed in either jurisdiction. If an employee does not act with due diligence to make the ship seaworthy and damage arises due to that, the carrier will be responsible. This is part of the vicarious liability of the employer, motivated among other things by the control over the work this person normally has. When an independent contractor is engaged, the situation is normally different, since the carrier will not generally exercise the same control over such a person. What responsibility will the carrier have in such a situation?

In English law, the carrier seems to have an extensive responsibility in such a situation. This was showed in the famous "Muncastle Castle-case"<sup>57</sup>. In this case the carrier, who was also the shipowner, had had the ship repaired at a shipyard of good repute. When the ship later was used in carriage, seawater entered into the ship and damaged the cargo. The cause of this leak could be traced to the work done by the shipyard company. This company had not acted with due diligence when they performed their work. The question was if this lack of due diligence in the work done by the shipyard company should make the carrier liable for not providing a seaworthy ship, even though the defect could not have been discovered during a subsequent inspection. The Court held that the duty to provide a seaworthy ship is a non-delegable duty and that the carrier accordingly will be responsible if anyone performing work to make the ship seaworthy had not acted with due diligence. He could not escape liability merely by showing that he had exercised due diligence in choosing a skilled and competent independent contractor. The Court however seems to have restricted this strong

---

<sup>56</sup> NM Cases 1973.280, *The Toledo* [1995] 1 Lloyd's Rep. 40

<sup>57</sup> *Riverstone Meat Co. v. Lancashire Shipping Co.* [1961] 1 Lloyd's Rep. 57

identification to situations after the ship has come in the control of the carrier/shipowner. If the carrier buys the ship or employs an independent contractor to build the ship, he will not be responsible for the due diligence of the persons who built the ship. In that situation, all he will have to do is to show that he has exercised due diligence in choosing the contractor and in supervising the work<sup>58</sup>.

In Swedish law, the carrier does not seem to be responsible for the due diligence of independent contractors, with some possible exceptions<sup>59</sup>. The carrier will then have fulfilled his duty if he has acted with due diligence in choosing the contractor and in inspecting the work. There is one Finnish case confirming this view<sup>60</sup>. As in the “Muncaster-castle case”, water entered into the ship and the cause of this leakage was the work done by an independent contractor, a shipyard company. In this Finnish case, the carrier was not held responsible, since he had used a well-known shipyard company and had inspected the work. He was not liable for the due diligence of the shipyard company. As said above, the strong similarity between the Nordic Codes in this area, leads to a high degree of probability that a Swedish court would come to the same conclusion.

It cannot however be said with certainty that the legal situation in Swedish and Nordic law is as described above. Some uncertainty seems to exist<sup>61</sup>. Contributing to this is an earlier Danish case, in which the shipyard company had failed to discover a fault in the ship at inspection<sup>62</sup>. This fault later caused damage to the goods. The carrier was held responsible for the lack of due diligence in the work done by the shipyard company. He could not escape liability merely by employing a shipyard of good repute. In this case the carrier had though not inspected the work done properly, which the carrier had done in the Finnish case mentioned above. The court seems to have emphasised this fact.

---

<sup>58</sup> *Angliss (W) & Co. v. P & Q Steam Navigation Co.* [1927] 2 KB 456

<sup>59</sup> Grönfors, *K Sjölagens bestämmelser om godsbefordran*, p. 156, Falkanger/Bull/Brautaset p. 286

<sup>60</sup> NM Cases 1979.383

<sup>61</sup> Honka, p. 55

<sup>62</sup> NM Cases 1966.45

Even though it does not seem to be able to state with certainty what the Swedish view is on this issue, it seems as if the more likely alternative is that the carrier is not responsible for the due diligence of an independent contractor<sup>63</sup>. It would, as said above, then suffice if the carrier exercises due diligence in choosing the contractor and in inspecting the work done by him. This would then clearly mean that the duty to provide a seaworthy ship, in this aspect, is more extensive in English than in Swedish law.

### **6.1.2 The burden of proof**

It seems as if the same principles for the burden of proof are applied in Swedish and English law. It is first for the cargo interest to show that the ship was unseaworthy at the commencement of the voyage and that the damage to the cargo was a result of this unseaworthiness. After that has been established, it is for the carrier to show that he has acted with due diligence to make the ship seaworthy (or that the defect to the ship was a latent defect as said above)<sup>64</sup>. If the carrier fails in doing this, and only then, will he be liable to pay damages to the cargo owner. More about damages later.

Tetley has presented an alternative view on the English law<sup>65</sup>. He means that on policy grounds the burden of proof should be on the carrier even for the seaworthiness and the causation. This view does not seem to have been supported by English case law, and cannot be considered as an expression of the current English law on this matter. Should it gain support in the future, it would improve the cargo owners' situation.

## **6.2 The duty to care for the cargo**

Understandably, there is in Swedish and English law a duty to care for the cargo. In Swedish law, this duty covers the whole period during which the carrier is in control of the cargo. The relevant Swedish law is found in 13:25 of the SMC. If the words of this article are read literally, they could give the impression that the carrier is liable during a longer period than that mentioned above, concerning the time during which the 13<sup>th</sup> Chapter is to

---

<sup>63</sup> Falkanger/Bull/Brautaset p. 286

<sup>64</sup> Honka, p. 54, Wilson, p. 189-90

<sup>65</sup> Tetley, W. Marine Cargo Claims, p. 375-76

have mandatory applicability (see 5.2 above). According to Honka, this cannot have been the intention of the legislators<sup>66</sup>. 13:25 should then not be given a wider applicability than what follows from 13:24. In English law, the duty to care for the cargo applies during the time period mentioned above (see 5.1), that is the “tackle-to-tackle period”.

The HVR additionally clearly state that the duty to care for the cargo also involves the duty to properly and carefully load, handle, stow, carry, keep and discharge the goods carried<sup>67</sup>. Even though the Swedish law only says that the carrier shall “care” for the cargo, there should be no difference between the laws in this aspect. The word “care” in the SMC shall be read as including those duties enumerated in the HVR.

Courts in England, as well as in the Nordic countries, have explicitly stated that the required care of the cargo is only “reasonable” care<sup>68</sup>. This is of course not a very precise and clarifying term. It has though the important effect that the carrier is not under a duty to have the knowledge or the facilities required to prevent every kind of weaknesses in a particular cargo to lead to damage to the cargo. On the other hand, the carrier will of course need to have the knowledge normally required to carry the kind of cargo that he has undertaken to carry. But to ask for more than that might not be “reasonable”. Further, what is required from the carrier will depend on the type of voyage and the type of cargo to be carried. Even though in neither law the concept of “reasonable” care has explicitly been expressed, it has been developed in similar ways in both legal systems.

Related to the required knowledge of the carrier is article 13:8 in the SMC. This article provides a duty for the shipper to inform the carrier if the cargo is of a character that demands special care. If the shipper has fulfilled this duty, the responsibility of the carrier might increase, since his duty shall be considered in the light of the knowledge he had or ought to have had. This was actually not said in a Swedish or Nordic case, but should be a valid expression even for Swedish law. Instead it was said in an English case<sup>69</sup>.

---

<sup>66</sup> Honka, p. 36

<sup>67</sup> The HVR art. III (2)

<sup>68</sup> *Albacora SRL v. Westcott & Laurance Line Ltd.* [1966] 2 Lloyd’s Rep. 53, NM Cases 1975.85

<sup>69</sup> see the case under footnote 68



Therefore, even though there is no equivalent duty of the shipper in the HVR as in 13:8 of the SMC, a similar duty with the same effects, has been established by English courts. This duty, if not fulfilled, has however only the effect that the carrier's responsibility might lessen. This is one of the many examples where a basic difference between Swedish and English law can be seen, the Swedish emphasis being on statutory law and the English on the law established by the courts. Here, at least, the result seems to be the same.

### 6.2.1 The limitations to the duty

As the case is with seaworthiness, the carrier has no absolute duty to care for the cargo, that is he is not under all circumstances liable for damage to cargo that has been incurred whilst the cargo was in his control. Here the Swedish and English laws at first seem to differ significantly. In the English law, there is the so-called "catalogue" in HVR article IV (2) (a)- (q), providing for a number of situations in which the carrier is not liable for damage to the cargo. It shall be said that these exemptions do not apply when the basis for the claim is unseaworthiness. Such a catalogue of exemptions to liability is not existing in Swedish law. There are however equivalent explicit exemptions as those provided for in HVR IV (a)- (b) (see below). In material law, there should though not be any difference of significance. The Swedish and English laws have merely chosen different ways of expressing the same thing. The Swedish law, SMC 13:25 1<sup>st</sup> paragraph, says that the carrier will avoid liability if the damage was not a cause of neglect by him or any of his servants. Those situations enumerated in HVR article IV (c)- (q), are situations when the carrier or his servants have not been negligent. Accordingly, if the carrier subjected to Swedish law can bring the cause of the damage within any of the "catalogue-situations", he should normally avoid liability under Swedish law, since his or any of his servant's negligence then has not caused the damage. The catalogue was therefore considered unnecessary by the Nordic legislators<sup>70</sup>. As for the exemptions to liability in case of error in navigation or management of the ship<sup>71</sup> and fire<sup>72</sup>, it was considered necessary to have

---

<sup>70</sup> S Bill p. 237

<sup>71</sup> The HVR art. IV (2) (a)

<sup>72</sup> The HVR art. IV (2) (b)

similar express clauses in the Swedish law<sup>73</sup>. This since the carrier in those situations can avoid liability even when he himself or one of his servants has been negligent. In the case of fire, the carrier will however not avoid liability when he himself, as opposed the servants, has been negligent.

There is also in the SMC a duty of the shipper to deliver the goods in such a way that it can be safely loaded, transported and discharged. The other side of this coin will then be that when the shipper has not done this, the carrier might avoid liability, since his negligence has not been the cause of the damage. This will then be an exemption to liability similar to those in the HVR article IV (2) (m)-(o). Since the Swedish provision is using wider terms, it might though be that its scope of applicability is wider than the equivalent articles in the HVR<sup>74</sup>. On the other hand, article 13:5, if not followed, does not automatically lead to that the carrier will avoid liability. It will only be one aspect to consider when judging the negligence of the carrier. The shipper's duty not to ship dangerous cargo will be discussed later (see Chapter 9).

## 6.2.2 The burden of proof

The laws concerning the very duty to care for the cargo are very similar, as shown above. Additionally to this, the rules concerning the burden of proof are clearly of importance. Otherwise materially similar laws might lead to differing judgements.

The laws also seem to part some from each other here. The Swedish approach is the less complicated of the two. It is for the cargo owner to prove that the goods have been damaged whilst in the control of the carrier and that this has caused a loss<sup>75</sup>. The damage can often be shown by comparing the status of the cargo as described in the bill of lading, with the status at discharge. That damage arose during the relevant time will often follow naturally from the circumstances, which will mean that the burden of proof in this respect will shift to the carrier<sup>76</sup>. After damage and the time

---

<sup>73</sup> SMC 13:26 1paragraph 1-2

<sup>74</sup> Article 13:5 in the SMC was a reaction to the judgement in the *Tor Mercia*-case, NM Cases 1977.1

<sup>75</sup> Honka, p. 37

<sup>76</sup> NMCases 1962.308

factor have been proven, it is for the carrier to show that neither his nor any of his servant's negligence has caused the damage. Alternatively he can show that damage did not arise when the goods were in his control. If he fails in doing this, and only then, will he be liable in damages to the cargo owner.

In English law, the burden of proving damage and the loss resulting thereof, is on the cargo owner, just as in Swedish law. If this has been established, and here we have some dissimilarity to the Swedish approach, it is for the carrier to bring the cause of the damage within one of the exemptions in the catalogue. If he succeeds in doing that, he will still be liable, if the cargo owner anyway can prove that the carrier has been negligent<sup>77</sup>.

Normally, there should not practically be any difference between these two methods. If the carrier has been able to show that the cause of the damage was one of the exemptions in the catalogue, his negligence normally cannot have caused the damage. There might however be at least one situation where the carrier's negligence still has caused the damage, even if the carrier can bring the case within one of the catalogue exemptions. His negligence might have been the cause of, for example perils of the sea, leading to the damage, if he has chosen to sail through a storm instead of trying to avoid it. It is also imaginable that his negligence has been the initial cause of some other of the exemptions in the catalogue leading to damage. In Swedish law it would have been for the carrier to show that his negligence did not cause the damage. In English law, after the case has been brought within one of the exceptions, it is for the cargo owner to prove the negligence, as the cause of the damage.

A situation in which this might have practical importance is when there are more than just one cause to the damage, one within the catalogue and one outside of it. Let us for example assume that quarantine restrictions has been the main cause of the damage<sup>78</sup>. Let us also assume that the carrier's negligence contributed to the damage, for example by not trying to limit the damages, but only to a lesser extent, for example ¼ of the damage. In English law, after that the carrier has shown that the cause of the damage

---

<sup>77</sup> Wilson, p. 191-92

<sup>78</sup> HVR art. IV (2) (h)

was quarantine restrictions, as in our example, it will be for the cargo owner to show negligence, to get 1/4 of the damages compensated. If the quarantine restrictions were the cause of the damage to 3/4, the carrier will often be able to show that this was the cause of the damage. If the cargo owner then cannot show that negligence also contributed to the damage, he will not receive any compensation<sup>79</sup>. In Swedish law, after damage and loss have been proven, it would be for the carrier to show to what extent another cause than his negligence caused the damage<sup>80</sup>. In the above example, he would have to show that quarantine restrictions contributed to 3/4 of the damage. The situation seems to be the other way around in England, where the cargo owner has to show that negligence was the cause behind 1/4 of the damage. Situations like this should only be able to arise where negligence has been the minor cause of the damage, the main cause being one of the exemptions in the catalogue. Otherwise the burden of proof for the negligence will not shift to the cargo owner in English law. Even though these differently formulated rules on the burden of proof not normally should affect the decisions of the courts, it can be assumed that there might be cases where the Swedish law proves more favourable to the cargo owner.

### **6.3 The duty to issue a bill of lading**

In both Swedish and English law the shipper has a right to a bill of lading when the cargo has been received by the carrier and when the cargo has been loaded. The bill of lading issued in the first situation is the “received for shipment” bill of lading<sup>81</sup>, the one in the latter situation is the “shipped” bill of lading<sup>82</sup>. The shipped bill of lading is the more important one. The shipper’s right to this bill of lading is however just a right to on his own demand have this document delivered to him<sup>83</sup>. There are no sanctions if no bill of lading is issued because neither party required or demanded one. So far there are no dissimilarities between Swedish and English law.

Now, let us turn to those areas where there might be differences in law. First, the Swedish law enumerates several facts that shall be included in the

---

<sup>79</sup> Constantine SS Co. v. Imperial Smelting Corp. [1942] AC 154

<sup>80</sup> SMC 13:25 3 paragraph

<sup>81</sup> The HVR art. III (3), SMC 13:44 1<sup>st</sup> paragraph

<sup>82</sup> The HVR art. III (7), SMC 13:44 2<sup>nd</sup> paragraph

<sup>83</sup> See footnote 80-81

bill of lading. The English law says that the bill of lading *among other things* shall show the leading marks of the goods, the number of packages or the quantity or the weight and the apparent order and condition of the goods. The first difference is here that the Swedish law requires both the numbers of packages and the quantity or the weight to be included. This is clearly a difference that sometimes might be to the shipper's/cargo owner's advantage. Sometimes however, it is not possible, out of practical reasons, to know more than for example the weight of the cargo. This can be the case for example with bulk cargo. In those cases there should therefore be no practical difference. There are further facts required by Swedish law and not expressly by English. The English law uses however, as said above, the words "among other things", which gives the impression that the shipper can demand further specifications in the bill of lading. The standard bills of lading frequently used also leave room for several of the additional facts required by Swedish law. The difference, if any, created by the more detailed Swedish law, should therefore not be substantial in practical terms.

In English law, the carrier is under no duty to state or show on the bill of lading any marks, number, quantity or weight of the cargo which he has reasonable ground for suspecting not correctly to represent the goods he has actually received. It should be reminded that this information normally is provided to the carrier by the shipper. The carrier is also relieved from this duty when he has had no reasonable means to control the marks, number, quantity or weight of the cargo. Should the carrier in these circumstances use his right not to state or show these facts on the bill of lading, he will not be bound by the bill of lading as to these facts. It does not either seem to be the position of English law that in such circumstances the goods received will be presumed to have been of any certain weight, quantity or so forth. It will then be a question of extrinsic evidence to show what the carrier received. Honka claims that the HVR should not be read according to its wordings here. He means that the carrier is not allowed to omit these particulars in the above mentioned situations, but that he instead then has a right to insert a reservation<sup>84</sup>. This interpretation might be correct in general, but does not seem to be the one accepted in English law<sup>85</sup>. That the carriers often in such situations actually make reservations such as "said to contain"

---

<sup>84</sup> Honka, *New Carriage of goods by sea*, p. 123

<sup>85</sup> Wilson, p. 217, *The "River Gurara"* [1998] *Lloyd's Rep.* 225 at 233

or “weight unknown”, is another thing. The important thing, from a strict law point of view, is that they do not have to make this reservation. The English law does not however relieve the carrier from stating the apparent order or condition of the cargo in the above situations. This can, and should probably, be interpreted as that the goods will be presumed to have been in apparent good order and condition when received by the carrier, in situations where nothing is said on the bill of lading about this<sup>86</sup>.

In Swedish law, the situation is somewhat different, to the advantage of the shipper/cargo owner. In the situations mentioned above, when the carrier has reasonable grounds of suspicions and when he has no reasonable means of checking the cargo, the carrier is not relieved from stating or showing any of the particulars required by Swedish law. This is different in two aspects. Firstly, it refers to more facts than those which the carrier in English law was relieved from stating. Secondly, and more importantly, the carrier must make a reservation for the facts which he suspects might be incorrect or which he reasonably cannot check<sup>87</sup>. He is not relieved from stating these facts on the bill of lading, as in English law. When he has made such a reservation, as for example “said to contain”, the bill of lading will not be prima facie evidence of the relevant facts. If no reservation has been made about the apparent order and condition of the goods, the presumption will be that they were in good order and condition<sup>88</sup>. There is however in Swedish law an additional requirement if the bill of lading has been transferred to a third party acting in reliance on the particulars of the bill of lading. The carrier can then only avoid liability according to the reservation if he did not know or ought to have known that the particulars on the bill of lading were incorrect. He can however still avoid liability if it was expressly noted on the bill of lading that the information to which the reservation referred was incorrect<sup>89</sup>. There is no equivalent express requirement in English law, which is natural, since the carrier according to that law has no similar duty to make reservations in the two above discussed situations in the first place. Should the carrier however insert such a reservation on the bill of lading, in a situation where he knew that the actual circumstances diverged from those which the reservation referred to, he would probably not be entitled to rely

---

<sup>86</sup> Honka, p. 124

<sup>87</sup> SMC 13:48

<sup>88</sup> SMC 13:49 1<sup>st</sup> paragraph

<sup>89</sup> 13:49 3<sup>rd</sup> paragraph

on the reservation, out of normal contract rules. In that case he would then probably, just as in Swedish law, be responsible as if there were no reservation. When the carrier did not realise the true facts, but ought to have realised them, will he then be prevented from relying on the reservation, as in Swedish law? It seems as the answer to this would be no.

To sum this up, the Swedish law, in some situations, merely gives the carrier a right to insert a reservation, whereas he in English law has no duty to make any statement at all on the bill of lading in the same situations. Additionally, the Swedish law seems to provide a better protection of a third party to whom the bill of lading has been transferred, when it concerns reservations on the bill of lading.

The bill of lading will, in the hands of this third party be the very contract of carriage, not just evidence thereof<sup>90</sup>. This party acquires his right, the goods, as reflected by the bill of lading. Both Swedish and English law awards this third party some protection from the carrier's possible objections as to the agreed terms of the carriage and the state of the cargo when received by him, additionally to those discussed above. In the English law, the terms of the bill of lading will be conclusive evidence of the receipt of the carrier of the goods as described therein, when the bill of lading is transferred to the third party. This means that the carrier will be bound by the words of the bill of lading and prevented from presenting evidence to the contrary. The only requirement is that the third party was acting in good faith when he became the holder of the bill of lading<sup>91</sup>. In Swedish law, at least judging from a strict reading of the text, there is the additional requirement that the third party has acted in *reliance* on the facts of the bill of lading<sup>92</sup>. Since the burden of proving this would fall on the third party, his protection would be weaker under Swedish law. The requirement of reliance has been criticised by Honka, who means that it originates from a misconception and should be disregarded, albeit the requirement is clearly expressed in the law<sup>93</sup>. The Swedish legal situation seems to be unclear on this matter.

---

<sup>90</sup> The Ardennes [1951] 1 KB 55

<sup>91</sup> The HVR art. III ( 4 )

<sup>92</sup> SMC 13:49 3<sup>rd</sup> paragraph

<sup>93</sup> Honka, p. 122

The SMC has a specific article concerning the carrier's liability for information in the bill of lading referring to other facts than those connected directly to the goods<sup>94</sup>. This can be facts such as on what date the loading took place and on what ship. If these facts are not correct, the carrier will be responsible for the loss of the third party who has acted in reliance on the bill of lading, if he knew or ought to have known that a third party could be misled by the bill of lading. There is no equivalent article in the HVR and accordingly not in English law. In a similar situation under English law, the same result should however in most cases be reached by applying the estoppel-rule or by the third party suing for breach of contract. The rights to sue in contract will be transferred to the third party through the transfer of the bill of lading<sup>95</sup>.

## **6.4 The duty to proceed with due despatch and not to deviate**

The carrier's responsibility towards the cargo owner involves also the two related duties to proceed on the voyage with due despatch and not to deviate. Although the consequence often is the same, delay in delivery, these two duties will be dealt with on at a time.

The questions of delay in delivery and due despatch are closely related to the carrier's general duty to care for the cargo (see 6.2). The HVR include no specific article concerning damages caused by delay in the delivery of the goods. Therefore, it seems that when the cargo has been damaged, due to delay in delivery, the normal rule in HVR III (2) regarding the duty to care for the cargo shall be applied. It is also possible that the delay does not damage the cargo itself, but leads to purely economical loss for the cargo owner. There is, understandably, no provision for this situation either in the HVR and the position in English law is therefore not clear. In some common law countries these damages will be compensated according to the test in *Hadley v. Baxendale*<sup>96</sup>. In short, this test depends on whether the carrier knew the circumstances leading to the pure economical loss and whether

---

<sup>94</sup> SMC 13:50

<sup>95</sup> COGSA 1992 art. 2 ( 1 )



they formed the basis of the contract. If the answer is yes, the loss shall be compensated. Wilson seems to be of the opinion that this test will be decisive for the cargo owner's possibilities to be compensated for pure economical loss, due to delay, under English law<sup>97</sup>.

In Swedish law, there is an express duty for the carrier to proceed with due despatch and a clear provision making the carrier liable for delay in delivery<sup>98</sup>. This latter provision also clarifies what shall constitute delay. If this delay then has caused damage to the cargo, it will, as in English law, be treated according to the normal rule for damage to the cargo<sup>99</sup>. If there has only been delay and no damage to the cargo, this will also be judged by the normal rules<sup>100</sup>. This seems to mean that the carrier's responsibility for purely economical loss caused by delay will firstly be decided by whether he has been negligent or not, the carrier having the burden of proof for this. Secondly, we have the question to what extent purely economical loss can be compensated. It is then said that this shall be decided by normal rules for damages<sup>101</sup>. This should then mean that purely economical losses could be compensated for, since there is a contractual relationship. If losses of this kind should arise, which normally do not arise, a similar approach as in English law might be used. If the carrier knew that there was a special interest connected with the carriage, he will normally have to compensate for this loss, provided of course that all the other requirements are fulfilled. However, since the main rule in Swedish law is that purely economical loss shall be compensated for, whereas in England the Hadley v. Baxendale-test will be decisive, Swedish law here clearly seems to be the better one for the cargo owner.

In the case of deviation, the result might of course be delay, but that need not be the case. Damage to the cargo, as a result of a deviation, can arise without delay. Except the mentioned duty to perform the journey with due despatch, there is no explicit prohibition to deviate in Swedish law. The situation is the same in the English law, as found in the HVR. It is however

---

<sup>96</sup> Hadley v. Baxendale (1854) 9 Ex 341

<sup>97</sup> Wilson, p. 214

<sup>98</sup> SMC 13:12 1<sup>st</sup> paragraph and 13:28

<sup>99</sup> SMC 13:25

<sup>100</sup> Falkanger/Bull/Brautaset p. 308, SMC 13:28 with reference to 13:25

<sup>101</sup> S Rep. p. 151-52

without doubt that the carrier in both Swedish and English law is liable for unauthorised deviations. What constitutes a deviation will primarily be decided by the contract. If the contract is silent, the direct geographical route is presumed to have been the normal route, and therefore the route intended by the parties. The carrier is allowed to present evidence that another route than this was the customary route and therefore the intended one. Similar principles seem to exist here in Swedish and English law. In Swedish preparatory work to the Maritime Code, it is though claimed that the carrier under Swedish law has a wider discretion in choosing the route, as long as it is suitable for the purpose of the contract<sup>102</sup>.

More interesting are the situations in which a deviation will not be treated as an unauthorised deviation. At first, there seem to be clear differences between Swedish and English law. In Swedish law, a deviation will not be unauthorised if it was made in an attempt to save life or if it was a *reasonable* measure to salvage ships or other property at sea<sup>103</sup>. Under English law, any attempt to save life or property at sea or any reasonable deviation will not be unauthorised<sup>104</sup>. Neither Swedish nor English law stipulates a requirement of reasonableness for saving life. Swedish law has such an explicit requirement for saving property at sea. In English law, there is no stipulation as to a similar requirement. Should this mean that any deviation to save property would be justified under English law? No, this can surely not be the case. There must be a similar requirement of reasonableness in English law, though not an explicit one. This argument is reinforced by the interpretation of the previous Carriage of Goods by Sea Act<sup>105</sup>. The liberty to deviate also, at first sight, seems to be wider under English law, since it also permits other “reasonable deviations” than those to save property. Even though it has not been expressed in the Swedish Maritime Code, the carrier shall not be responsible for damage caused solely from a deviation, which was reasonable, however not done to save life or property<sup>106</sup>. It must be for the carrier, under both laws, to prove that the deviation was reasonable.

---

<sup>102</sup> S Bill p. 224

<sup>103</sup> SMC 13:25 2<sup>nd</sup> paragraph

<sup>104</sup> HVR art. IV ( 4 )

<sup>105</sup> Carver, Carriage By Sea, p. 254

<sup>106</sup> S Bill p. 238

Both Swedish and English law seem to accept clauses giving the carrier wider liberties to deviate than those provided for in their respective legislation<sup>107</sup>. These clauses are subject to interpretation in each case, which may lead to that a court finds them not to be applicable to the kind of deviation which has taken place. In English Common Law, it has been said that these liberty clauses will not be applicable to an extent that would defeat the commercial purpose of the contract<sup>108</sup>. This should be a principle generally applicable to Swedish and English mandatory law, although some additions and adjustments might be necessary.

Under a deviation that is not a breach of the carrier's duties, the carrier will be responsible according to the normal rules in Swedish and English law. He will of course not be liable for damages that are caused directly by the lawful deviation. When an unauthorised deviation has been done, the carrier will in both Swedish and English law be responsible according to the rules described above (6.2) if the damage was caused *by* the deviation. If the deviation was unauthorised, the carrier has acted negligently and will therefore be responsible for the damages, if the cargo owner first has fulfilled his burden of proof. The situation becomes less clear for damages caused *during* the deviation, that is damages that are not directly an effect of the deviation. An example of a damage caused by deviation can be that the crew for some minutes did not look after the cargo because they were occupied with saving human lives. An example of damage caused during deviation can be that water enters into the ship while it is on its way back to the normal route. Honka suggest for Nordic law that the carrier after an unlawful deviation will have strict liability for damages caused during the deviation. He further means that this strict liability should probably be restricted by causality rules, but that only other reasons for the damage would be accepted if they were "extraordinary occurrences"<sup>109</sup>.

Falkanger/Bull/Brautaset also open the possibility for strict liability in Norwegian law<sup>110</sup>. Accordingly, there are strong reasons to believe that there also in Swedish law should be a strict liability in this case. In English law it

---

<sup>107</sup> Honka, p. 102, see NM Cases 1962.296, Wilson p. 206, See however also Scrutton, who seems to be more critical to allow such clauses, in Scrutton, Charterparties and Bills of Lading, p. 489

<sup>108</sup> Leduc v. Ward (1888) Q.B. 475

<sup>109</sup> Honka, p. 104-105

<sup>110</sup> Falkanger/Bull/Brautaset, p. 311

is uncertain whether the carrier after an unauthorised deviation will lose the possibility to avoid liability by proving one of the exceptions in the HVR art. IV (2)<sup>111</sup>. This uncertainty stems from the unclear status of the “doctrine of fundamental breach” in connection with route deviation. If this doctrine should be applicable to deviations, it would mean that the carrier, after a deviation, not would be able to avoid liability by proving any of the exceptions in the HVR, since these through the deviation no longer would apply between the parties. His liability would be strict, except for the few exceptions allowed by Common Law<sup>112</sup>.

After a series of cases in English law, there are strong reasons to believe that the HVR not would automatically be set aside in the above way, after an unauthorised deviation<sup>113</sup>. To what extent the carrier then can claim the exceptions shall be decided through a contractual interpretation. The question seems to be whether the parties intended the relevant exception in the HVR to apply in a situation as the one that has arisen<sup>114</sup>. This would at least not be a strict liability, and Swedish law, with its presumably strict liability, would be more beneficial for the cargo owner. Should the HVR however not be applicable in English law after an unauthorised deviation, there should not be differences of much importance between the laws in this respect. In those situations were the carrier under English law then would avoid liability due to the few exceptions allowed by Common Law, the carrier would under Swedish law probably avoid liability due to the causality rules<sup>115</sup>.

---

<sup>111</sup> Chuah, p. 239

<sup>112</sup> These are Act of God, Act of the Queen’s enemies, Inherent vice and Fault or fraud of the consignor.

<sup>113</sup> *Suisse Atlantique Sociéte’d’ Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, *Kenya Railways v. Antares Co. Pte Ltd. (The Antares)* (Nos 1 & 2) [1987] 1 Lloyd’s Rep. 424, *Wibau Maschinenfabrik Hartman SA v. Mackinnon Mackenzie & Co. (The Chanda)* [1989] 2 Lloyd’s Rep. 494

<sup>114</sup> See the *Antares* at p. 430

<sup>115</sup> A norwegian case illustrating this is *NMCases 1943.92*. It can be assumed that a Swedish Court would reach the same conclusion.

## 7. Damages and limitations

The most relevant remedy for a cargo owner, when a breach of the contract has occurred, are damages. This is therefore the only remedy that will be dealt with here.

### 7.1 The amount recoverable

It has above (6.4) been discussed what possibilities the cargo owner has to be compensated if there has been delay in the delivery. It was then also shown when purely economical loss could be compensated for. These losses must be evaluated in each individual case and there can be no standardised rule.

When the claim instead is based on damage to the cargo, there is such a rule, in both laws. These similarly formulated rules state that the value of the lost or damaged goods shall be the value of such goods at the place and time at which the goods are discharged or should have been discharged. Then follows additional rules for deciding the value of the goods at the said place and time<sup>116</sup>. There has been, and to some extent there still is, uncertainty about whether this rule for the calculation of damages should be treated as excluding compensation for other types of losses than those mentioned in the two respective similar articles, that is decrease of the value in the cargo itself. The English law, as found in the HVR art. IV (5) (b), uses the words “the total amount recoverable”. With a strict textual approach, this would seem to exclude damages for other losses than the decrease in value of the goods. The Swedish law does however not use these words and this is where there is some divergence in the strict wording of the laws. According to the preparatory material to the SMC, it does though seem as other losses also can be compensated. These can be direct costs, such as survey charges and costs for taking care of the damaged goods. These will be compensated according to general rules on damages. Indirect losses are normally not compensated, but can be if the carrier knew the possibility of them arising<sup>117</sup>. Regardless of the wording of the English law, it seems as other

---

<sup>116</sup> SMC 13:29, HVR art. IV (5) (b)

<sup>117</sup> S Bill p. 241-42, S Rep. p. 151, See also the Norwegian case in NMCases 1987.160

losses than those within the article can be compensated for. The decisive test, once again, seems to be if these losses were in the reasonable contemplation of both parties<sup>118</sup>. This test seems to apply to both direct- and indirect losses. Therefore, in principle, indirect losses are compensated for in very similar ways in Sweden and England. For direct losses, the Swedish law might be more rewarding for the cargo owner. Other rules, such as causality-rules and contributory negligence-rules, can of course also be of importance.

## 7.2 Financial- and time limitations

Both the Swedish and the English law impose a limitation to the amount of damages to the benefit of the carrier<sup>119</sup>. This limitation is in English law 666,67 SDR per package or unit and in Swedish law 667<sup>120</sup>. The sum has been rounded in Swedish law, which means that the limitation is slightly higher in Swedish law<sup>121</sup>. Alternatively, the cargo owner can claim 2 SDR per kilo of the goods. The cargo owner can under both laws choose the method that gives the higher sum, or combine the two methods. Under both laws, the carrier can make an undertaking to be responsible for a higher sum, equal to the actual value of the goods. This is though rarely done, since the following increase in the freight rate will be higher than the premium for an insurance to cover the additional value<sup>122</sup>.

There have been problems in deciding what constitutes a “package” or “unit” in connection with containers being used to transport the goods. Both Swedish and English law recognise that when the number of articles, boxes or similar “units” have been enumerated on the bill of lading, these will be the “packages” or “units” which will be the basis for the compensation<sup>123</sup>. This will be the case even when a reservation such as “said to contain” has

---

<sup>118</sup> Wilson, p. 333-34 and Scrutton, Charterparties and Bills of Lading, p. 447-448

<sup>119</sup> SMC 13:30, HVR art. IV (5) (a)

<sup>120</sup> The value of the 1 SDR ( Special Drawing Right) was at the 28<sup>th</sup> of October 11.37120 Skr, information from [www.imf.org/external.np/tre/sdr/1999/sdr9910.htm](http://www.imf.org/external.np/tre/sdr/1999/sdr9910.htm)

<sup>121</sup> It could be interesting to note that there in 1995 were at least nine different package and kilo limitations regimes in the world, see Tetley, William, Package & Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold, Journal of maritime law and commerce, vol. 26 (1995) p. 134

<sup>122</sup> Wilson, p. 199

<sup>123</sup> SMC 13:31, HVR art. IV (5) (a)

been used<sup>124</sup>. Where the number of “units” or “packages” have not been stated on the bill of lading, the container will be considered as one “unit”, in Swedish as well as English law. One difference might however exist. The Swedish law explicitly says that when the container (transportanordningen) is not owned or supplied by the carrier, this will be considered as one “unit” in itself, additionally to the packages inside it<sup>125</sup>. There is no similar express rule in English law. Judging from the words used by the judge in a recent case, the container would not be considered as an additional “unit” when the contents inside it form the basis for the calculation of the damages<sup>126</sup>. This would, if correct, lead to a somewhat higher sum of compensation in Swedish law. There are also rules limiting the carrier’s *total* responsibility, that is his responsibility to all cargo interests of one particular journey. These are identical in the two laws, and will not be presented here<sup>127</sup>. Under both laws the cargo interest must bring suit within one year of the delivery or when delivery should have been done<sup>128</sup>.

### 7.3 Loss of right to limitation

In both Swedish and English law the carrier will lose his right to the financial limitation if the damage was a cause of his act or omission done with the intent to cause damage or done recklessly with knowledge that damage probably would result<sup>129</sup>. As a starting point there is therefore a similarity between the laws here, even though it can be assumed that national evaluations can effect what will be considered as “recklessness”. The same might be the case in deciding whether the carrier “himself”, which in both laws is a requirement, is responsible for the act or omission. Here rules on identification will be relevant.

In Swedish law it is clear that the normal rules will apply when a route deviation has taken place. This means that if the deviation is considered to be such an act as described directly above, he will lose his right to financial

---

<sup>124</sup> Falkanger/Bull/Brautaset, p. 305, Chuah p. 242, The “River Gurara” [1998] Lloyd’s Rep. 225 at 226, See also Bauer, R. Glenn, Conflicting liability regimes, Journal of maritime law and commerce, vol. 24 (1993) p. 72, where it says that it suffices, according to the HVR, that the number of packages appear “anywhere” on the bill of lading.

<sup>125</sup> SMC 13:31, See also Grönfors, p. 175

<sup>126</sup> The “River Gurara” [1998] Lloyd’s Rep. 225 at 226 and 229

<sup>127</sup> See Chapter 9 of the SMC and the Merchant Shipping Act 1979

<sup>128</sup> SMC 19:1.5, HVR III (6) 3<sup>rd</sup> paragraph

limitation and otherwise his liability will be limited as under normal circumstances<sup>130</sup>. In English law it is not clear whether the so-called doctrine of fundamental breach still applies to route deviations (see 6.4). It has been clearly stated by English courts that it does not apply when cargo unlawfully has been loaded on deck<sup>131</sup>. Therefore it could be claimed that it should not apply to route deviations either. Whether the carrier then will lose the protection of the financial limitation-rule, will depend on the contractual interpretation, as described above (6.4). In one well-known case, the financial limitation rule then accordingly did not apply, when cargo unlawfully had been carried on deck<sup>132</sup>.

If the English approach will lead to that the carrier more often, after a deviation, will lose the protection of his financial liability, will depend on what Swedish courts will find to be at least “a reckless deviation with knowledge that damage probably would result”. The requirement of “recklessness” and “knowledge” in Swedish law might perhaps lead to that the carrier more often will have to pay full damages in English law than in Swedish. It has though been claimed that route deviation is a situation *sui generis*, and that therefore the doctrine of fundamental breach still applies to deviations in English law. This means that there still is some uncertainty about whether a route deviation automatically will lead to the carrier losing his right to limitation<sup>133</sup>. Should this be the case, English law would here clearly be less beneficial to the carrier than Swedish law.

In short, if the doctrine of fundamental breach does not apply in English law, which seems to be the more likely alternative, the differences between the laws need not be substantial. It is though being claimed here, that English law possibly in some situations will deprive the carrier of the protection of the financial liability-rule, where Swedish law will not. Should the doctrine of fundamental breach still apply to route deviations, English law would clearly be more advantageous to the cargo owner than Swedish, since the carrier then always would be liable without financial limitation.

---

<sup>129</sup> SMC 13:33, HVR art. IV (5) (e)

<sup>130</sup> S Rep. p. 103-4

<sup>131</sup> *The Antares, The Chanda*

<sup>132</sup> See “*The Chanda*”

<sup>133</sup> Chuah, p. 239



## 8. The carrier responsible in contract

A short note shall be made about a complex area. Therefore only the basic lines in the two laws can be presented.

In English law, in liner trade, the presumption is that the owner of the ship is the “legal carrier” and the party who the cargo owner can sue in contract. This even if the contract was concluded with someone else, for example with a person who has chartered the ship to use it in liner trade. If the master of this charterer signs the bill of lading, the presumption is still that he signs it on behalf of the shipowner. This presumption can be broken if the contract was made with this charterer alone and the master had authority to sign on his behalf and did only sign on his behalf and not on behalf of the shipowner<sup>134</sup>. When there is a demise charter, the presumption is however reversed. Then the charterer will be presumed to be the responsible carrier.

In previous Swedish law the presumption was also that the shipowner was the party who was responsible in contract<sup>135</sup>. The difficulties for the cargo owner to know who to sue, when the party with whom he had made the contract was not the same as the shipowner, lead to that the Swedish law was changed, influenced by the Hamburg Rules<sup>136</sup>. Now the party responsible in the first place is the contracting carrier, not the shipowner as such. These are of course often the same person. If someone else than this contracting carrier performs a specific part of the journey, the starting point is joint and several liability, but liability can for this part of the journey be placed solely with this actual carrier<sup>137</sup>.

The Swedish law here seems to make it easier for the cargo owner to know whom he can sue in contract, thereby perhaps saving him time and expenses. Tort rules can of course also be relevant here, but these are outside the scope of this essay.

---

<sup>134</sup> The “Rewia” [1991] 2 Lloyd’s Rep. 325 at 333

<sup>135</sup> NMCases 1960.349 ( Lulu )

<sup>136</sup> The Hamburg Rules 14:2

<sup>137</sup> SMC 13:35

## 9. Duties of the shipper/cargo owner

As said above, the shipper and the cargo owner may be the same person throughout the whole operation. However, normally they are not. There are under both laws duties imposed on both the shipper and the cargo owner. Some of the duties of the shipper have been mentioned above, but then only those which also were closely related to the carrier's duty to care for the cargo. These will not be repeated here.

The shipper's duties seem to be very similar in Swedish and English law. The shipper can be responsible for damage sustained by the carrier or the ship, if he or any of his servants has acted with fault or neglect<sup>138</sup>. This is a very broad and general rule. There is also a more specific regulation for so-called "dangerous cargo". If such goods are shipped without the knowledge of the carrier, the shipper will be responsible for damage arising due to the character of the goods. The carrier may also at any time land, destroy or in one way or the other render the cargo innocuous. Even if he had received the cargo with knowledge of the dangerous character, he may take the same actions without liability, but then only if and when the cargo becomes a danger to the ship or the cargo<sup>139</sup>. Lastly, the shipper may become liable to the carrier if the information concerning the goods, furnished by him to the carrier, should not be correct and therefore cause damage to the carrier ( this damage to the carrier would normally be his responsibility to the consignee)<sup>140</sup>.

If there are no substantial differences concerning the shipper's duties, there on the other hand seem to be some concerning the cargo owner's main duty, that is to pay the freight. This freight shall be paid when the cargo arrives at the port of discharge, unless the parties have made other arrangements<sup>141</sup>. Freight might also be pre-paid, that is paid by the shipper. The first difference is then that the Swedish law has a stipulation to the advantage of

---

<sup>138</sup> SMC 13:40, HVR IV (3)

<sup>139</sup> SMC 13:41, HVR IV (6)

<sup>140</sup> SMC 13:51, HVR III (5)

<sup>141</sup> SMC 13:10, 13:4 2<sup>nd</sup> paragraph, Wilson p. 271

the cargo owner, which does not seem to have a counterpart in English law. This stipulation says that the consignee (cargo owner) shall *prima facie* not be liable to pay freight, unless this is stated on the bill of lading<sup>142</sup>. In English law, the presumption seems to be reversed<sup>143</sup>. The second difference concerns the duty to pay freight when the cargo arrives at the port of discharge in a damaged condition. The starting point is that freight can be demanded only when the cargo is “preserved” when it arrives at the port. It will then be decided by the courts whether the cargo can be deemed to be “preserved” or not. English courts seem to have adopted a stricter approach here, to the benefit of the cargo owner. In English law, freight cannot be demanded when the cargo commercially has ceased to be what it is described as in the bill of lading, even though the goods still can be used for some other purpose<sup>144</sup>. In two Norwegian cases, freight was payable under similar circumstances<sup>145</sup>. That the Norwegian approach is different from the English is also the conclusion of Grönfors<sup>146</sup>. There is no clear indication as to the Swedish view on this matter, but as said before, it can often be presumed that Nordic courts would give similar judgements. If the cargo is damaged because of inherent vice or because of other similar circumstances for which the shipper is responsible, freight under both laws can be demanded. To summarise, English law seems to be more favourable to the cargo owner in this area than Swedish, provided that the above presumption is correct here. This because the parties rarely do not state when freight is payable, whereas it can be assumed that damage to the cargo more frequently arises.

---

<sup>142</sup> SMC 13:49 2<sup>nd</sup> paragraph

<sup>143</sup> Wilson p. 271

<sup>144</sup> *Astar v. Blundell* [1896] 1 Q.B. 123

<sup>145</sup> NMCases 1948.13, NMCases 1933.294

<sup>146</sup> Grönfors, p. 192-93

# 10. Conclusion

There are manifest similarities between the laws of Sweden and England, for the carriage of goods by sea. As has been shown, there are however also areas where there clearly are dissimilarities and areas where there might be such. It has also been shown that these differences might be of importance. Therefore, the ambition to create real harmonisation between the laws of the different nations does not seem to have been fulfilled, at least not judging from the comparison between England and Sweden.

It must from the above be clear that the Swedish law, with some exceptions, is more advantageous for the cargo owner than the English. First of all, the Swedish mandatory law applies to more contracts of carriage and under a longer period of time. Most important is perhaps that it applies directly even when a sea waybill is used. This seems to be an adjustment with regard to changing trading customs. Then, the fact that the Swedish law applies during the whole period under which the carrier is in control of the goods should be able to support with arguments from the field of law and economics. The person who is in control of the goods is normally the person who to the lowest cost can avoid damage to the goods and therefore should be the person who bears the risk for the goods. The Swedish law so far seems to be the law that has found the best solutions.

The core of this essay has been the carrier's duties, which to a large extent are the same in the two jurisdictions. One of the dissimilarities is though, as it seems, the responsibility for independent contractors. This is also one of the few examples when English law should be to prefer for the cargo owner. The English solution does also seem to be the better one. It should not, as in Swedish law, affect the cargo owner whether the carrier has chosen to use an independent contractor to do the job or if his employees perform it. This can otherwise be a way for the carrier to avoid his duty, which cannot have been the intention of the legislator. Even though the carrier cannot have the same control over the work when he uses an independent contractor, he surely must be able to exercise more control than the cargo owner can.

Concerning another of the duties of the carrier, to care for the cargo, the abolishment in Swedish law of the so-called “catalogue” does not seem to have had any material effect. This abolishment does though, from a purely technical perspective, seem to be a better solution, since it results in a clearer legislation. The burden of proof for the carrier’s neglect to care for the cargo is an area where slightly different rules might apply, if the above analysis is correct. It can then be claimed that the Swedish solution is, besides better for the cargo owner, clearer and in a positive sense less technical, therefore possibly leading to less litigation, which should be desirable. This is however a statement made without empirical research.

The duty to issue a bill of lading is naturally similar in Swedish and English law, but the protection of the third party, when there is a reservation in the bill of lading, might be better in Swedish law. This should enhance the negotiability of the bill, something that should be a positive effect.

The responsibility of the carrier after an unauthorised route deviation is not completely clear in English law. This uncertainty should not benefit anyone, except maybe the lawyers. If the strict liability in Swedish law is the best solution is another question. It might be that this places a too heavy burden on the carrier, which might lead to an increase in the freight charges. On the other hand, when the shipper/cargo owner entered into the contract, he did it with the presumption that a certain route would be used. What at least can be said with certainty concerning unauthorised route deviations, is that a clear judgement from an English court would be welcomed.

As for damages, we have the same uncertainty in English law when a route deviation has been made, even if most factors indicate that the doctrine of fundamental breach will not apply. If that is the case, it might still be that the carrier more often will lose his right to financial limitation in English law than in Swedish. The Swedish solution that the carrier after an unauthorised deviation automatically will lose the possibility of avoiding liability through showing non-negligence, but not the right to financial limitation, might from an English perspective seem illogical. Concerning compensation for purely economical loss in connection with delay, the Swedish law also seems to be clearer than the English and its “Hadley v.

Baxendale- test". This should result in less litigation, a generally desirable effect.

The presumption in Swedish law, that the contracting carrier is primarily responsible, seems to be to prefer in comparison with the English counterpart, that the shipowner primarily is responsible. It should make the situation less complicated, since the cargo owner more easily will know whom he can hold responsible. Once again, this can be supported with arguments from law and economics and its theories on transaction costs.

Many of the differences between the Swedish and English law in this field can be explained by the influence of the Hamburg Rules on the Swedish law. These influences seem to have made the Swedish law clearer and in many ways a better solution to many of the problems in this area. It shall however be reminded that England out of tradition is a strong shipping nation, where maybe the interests of the carriers are more accentuated.

# 11. Bibliography

## Literature:

- Bauer, R.Glenn                      Conflictin Liability-Regimes:  
Hague-Visby v. Hamburg Rules- A  
Case By Case Analysis, Journal of  
Maritime Law and Commerce,  
Vol.24 (1993) pp. 53-74
- Carver                                      Carriage By Sea, 12<sup>th</sup> edition,  
London 1971
- Chuah, J.C.T.                              Law of International Trade, London  
1998
- Clarke, M                                      The transport of goods in Europe:  
patterns and problems of uniform law,  
Lloyd's Maritime and Commercial  
Law Quarterly, Feb. 1999
- CMI Yearbook                                      Antwerpen 1996,1997
- Falkanger/Bull/Brautaset                      Introduction to Maritime Law, 5<sup>th</sup>  
edition, Oslo 1998
- Greiner, E                                      EDI and the Traditional Bill of  
Lading, Cape Town 1997
- Grönfors, Kurt                                      Sjölagens bestämmelser om gods-  
befordran, Stockholm 1982
- Honka, Hannu                                      New Carriage Of Goods By Sea: The  
Nordic Approach Including  
Comparisons With Some Other  
Jurisdictions, Åbo 1997

- Richardson A Guide to the Hague and Hague-Visby Rules, 3<sup>rd</sup> edition, London 1994
- Scrutton, Sir Thomas Edward Charterparties and Bills of Lading, 16<sup>th</sup> edition, London 1955
- Tetley, William Marine Cargo Claims, 3<sup>rd</sup> edition, Montreal 1988
- Tetley, William Package & Kilo Limitations and the Hague, Hague/Visby and Hamburg Rules & Gold, Journal of Maritime Law, Vol. 26 (1995) pp. 133-148
- Wilson, John F Carriage of Goods By Sea, 3<sup>rd</sup> edition, London 1998

**Swedish preparatory material:**

- Swedish Bill 1993/94:195 Nya Sjölagen  
 -Swedish Report 1990:13 Översyn av Sjölagen 2-Godsbefordran till sjöss

**Internet source:**

[www.imf.org/external/np/tre/sdr/1999/sdr9910.htm](http://www.imf.org/external/np/tre/sdr/1999/sdr9910.htm) (the IMF)



## 12. Table of Cases

### Nordic Maritime Cases:

-Urd II	NMCases 1919.364 NSC
-Mariongoula	NMCases 1933.294 NSC
-Björnvik	NMCases 1943.92 NCA
-Høegh Carrier	NMCases 1948.13 NSC
-Pagensand	NMCases 1956.175 SSC
-Lulu	NMCases 1960.349 SSC
-Uruguay	NMCases 1962.308 SSC
-Mercantic	NMCases 1966.45 DCC
-Ice Pearl	NMCases 1973.280 SCA
-Høegh Heron	NMCases 1976.364 NA
-Tor Mercia	NMCases 1977.1 SSC
-Tuulikki	NMCases 1979.383 FSC
-Ny Dolsøy	NMCases 1987.160 NSC

### English cases:

-Hadley v. Baxendale	(1854) 9 Ex 341
-Steel v. State Line Steamship Co.	(1877) 3 App. Cas. 72
-Leduc v. Ward	(1888) Q.B. 475
-Astar v. Blundell	[1896] 1 Q.B. 123
-Mc Fadden v. Blue Star	[1905] 1 K.B. 697
-Angliss (W) & Co. v. P & Q Steam Navigation Co.	[1927] 2 KB 456
-Constantine SS Co. v. Imperial Smelting Corp.	[1942] A.C.154
-The Ardennes	[1951] 1 KB 55
-Svenska Traktors AB v. Maritime Agencies	[1953] 2 Lloyd's Rep.124
-Pyrene Co. v. Scindia Navigation Co.	[1954] 1 Lloyd's Rep.32

-Maxine Footwear Co. Ltd v. Canadian Government Merchant Marine Ltd	[1959] A.C. 589
-Riverstone Meat Co. v. Lancashire Shipping Co.	[1961] 1 Lloyd's Rep. 57
-Albacora SRL v. Westcott & Laurance Line Ltd	[1966] 2 Lloyd's Rep. 53
-Suisse Atlantique Soci�te d'Armentment SA v. NV Rotterdamsche Kolen Centrale	[1967] 1 A.C. 361
-Kenya Railways v. Antares Co. Pte. Ltd (The Antares) (Nos 1 & 2)	[1987] 1 Lloyd's Rep. 424
-Browner International Ltd. v. Monarch Shipping Co. Ltd	[1989] 2 Lloyd's Rep. 185
-Wibau Maschinenfabrik Hartman SA v. Mackinnon Mackenzie & Co. (The Chanda)	[1989] 2 Lloyd's Rep. 494
-Hellenic Steel Co. v. Svolmar Shipping Co. Ltd	[1991] 1 Lloyd's Rep. 32
-The Rewia	[1991] 2 Lloyd's Rep. 325
-The Toledo	[1995] 1 Lloyd's Rep. 40
-A Meredith Jones Co. Ltd v. Vangemar Shipping Co. Ltd	[1997] 2 Lloyd's Rep. 241
-The River Gurara	[1998] Lloyd's Rep. 225

**Other cases:**

Falconbridge Nickel Mines v. Chimo Shipping Co.	[1973] 2 Lloyd's Rep. 469
--	---------------------------



# Appendix

**States which have ratified or acceded the respective Conventions<sup>147</sup>:**

**The Hague-Visby Rules:**

Belgium, Denmark, Ecuador, Egypt, Finland, Greece, Italy, Lebanon, Netherlands, Norway, Poland, Singapore, Sri-Lanka, Sweden, Switzerland, Syria, Tonga, United Kingdom

**The Hamburg Rules:**

Austria, Barbados, Botswana, Burkina Faso, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Kenya, Lebanon, Lesotho, Malawi, Marocco, Nigeria, Rumania, Senegal, Sierra Leone, Tanzania, Tunisia, Uganda, Zambia

---

<sup>147</sup> CMI Yearbook 1997

