

**‡ THE CARRIAGE OF DANGEROUS GOODS BY SEA UNDER
THE HAGUE RULES, THE HAGUE-VISBY RULES, THE
HAMBURG RULES AND THE ROTTERDAM RULES**

(LAHEY KURALLARI, LAHEY-VİSBY KURALLARI, HAMBURG KURALLARI VE
ROTTERDAM KURALLARI KAPSAMINDA DENİZ YOLUYLA TEHLİKELİ MADDE
TAŞIMACILIĞI)

Esra Öğünç * **

ÖZ

Bu çalışmanın amacı deniz yoluyla tehlikeli madde taşımacılığında Konişmentoya Müteallik Bazı Kaidelerin Tevhidi Hakkındaki Milletlerarası Sözleşme (1924), 1968 tarihli Konişmentoya Dair Bazı Kaidelerin Birleştirilmesi Hakkında 25.8.1924 Tarihli Brüksel Sözleşmesi'nin Tadiline Dair Protokol, Birleşmiş Milletler Denizde Eşya Taşıma Sözleşmesi (1978) ve Tamamen veya Kısmen Deniz Yoluyla Uluslararası Eşya Taşınması Hakkında Birleşmiş Milletler Konvansiyonu (2008) kapsamında taşıtan ve taşıyan arasında risklerin nasıl dağıtıldığını belirlemektir. Riskin taraflar arasında dağıtımını belirlemek için bu çalışma tehlikeli maddelerin tanımını, taşıtanın yükümlülüklerini, taşıyanın haklarını, taşıtanın tehlikeli madde taşımacılığında sorumluluğunun temelini ve kapsamını ve yükümlülüklerin ihlali ile kayıp veya zarar arasındaki nedensellik bağıını incelemektedir.

***Anahtar Kelimeler:** Tehlikeli maddeler, sorumluluk, yükümlülükler, taşıtan, taşıyan*

ABSTRACT

This study aims to determine how the risks are allocated between shipper and carrier regarding the carriage of dangerous goods by sea under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature (1924), Protocol to

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* Koç Üniversitesi Sosyal Bilimler Enstitüsü Özel Hukuk Doktora Öğrencisi, İstanbul Barosu Avukatı.

** Yazarın ORCID belirleyicisi: 0000-0002-3168-878X.

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amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1968), United Nations Convention on the Carriage of Goods by Sea (1978) and United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008). To determine the allocation of the risk between these parties; this study examines the definition of dangerous goods, obligations of the shipper, rights of the carrier, the basis and the extent of the liability of the shipper considering shipment of dangerous goods and causal link between the breach of obligations and loss or damage.

Keywords: *Dangerous goods, liability, obligations, shipper, carrier*

I. INTRODUCTION

The aim of this study is to determine how the risks are allocated between shipper and carrier regarding the carriage of dangerous goods under the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature (1924)¹ (“Hague Rules”), Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1968)² (“Hague-Visby Rules”), United Nations Convention on the Carriage of Goods by Sea (1978)³ (“Hamburg Rules”), United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)⁴ (“Rotterdam Rules”). This study will focus on this issue considering the mentioned international carriage conventions and therefore, other international conventions concerning dangerous goods such as the

¹ For the text of the Convention, see

<<https://www.jus.uio.no/english/services/library/treaties/07/7-04/hague-rules.xml>> accessed 16 January 2022.

² For the text of the Hague-Visby Rules, see

<<https://jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html>> accessed 16 January 2022.

³ For the text of the Convention, see

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/hamburg_rules_e.pdf> accessed 16 January 2022.

⁴ Rotterdam Rules was adopted on 11 December 2008 in New York and the convention was opened for signature on 23 September 2009 in Rotterdam. However, this convention has not entered into force due to inadequate number of ratifications. For the status of the Convention, see

<https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status> accessed 26 November 2021. For the text of the Convention, see

<<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rotterdam-rules-e.pdf>> accessed 16 January 2022.

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International Convention for the Safety of Life at Sea (1974)⁵, the International Convention for the Prevention of Pollution from Ships (73/78)⁶ and the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996)⁷ will not be discussed in this study. In order to determine how the risks are allocated between parties, firstly, which goods can be considered as dangerous will be examined; as circumstances in which the shipper can be liable to the carrier regarding shipment of these goods should be determined. Secondly, obligations of the shipper, rights of the carrier, the basis and the extent of the liability of the shipper regarding shipment of these goods will be examined. Thirdly, causal link will be determined in order to allocate risks between shipper and carrier. The shipper has various duties under the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. Even if the shipper does not fulfil these duties, if the carrier acts negligently then there might be no

⁵ For the text of the Convention, see

<<https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf>> accessed 16 January 2022. Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974 entered into force on 1 May 1981. For information regarding this Protocol and subsequent amendments to the Convention, see <[https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/FocusOnIMOArchives/Focus%20on%20IMO%20-%20SOLAS,%20the%20International%20Convention%20for%20the%20Safety,%20of%20Life%20at%20Sea,%201974%20\(October%201998\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/FocusOnIMOArchives/Focus%20on%20IMO%20-%20SOLAS,%20the%20International%20Convention%20for%20the%20Safety,%20of%20Life%20at%20Sea,%201974%20(October%201998).pdf)> accessed 24 January 2022.

⁶ The Convention was adopted on 2 November 1973 and later Protocol of 1978 was adopted. For information on the history of this convention, see <<https://www.imo.org/en/KnowledgeCentre/ConferencesMeetings/Pages/Marpol.aspx>> accessed 16 January 2022. For the text of the Convention, see <<https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/Documents/MARPOL%201973%20-%20Final%20Act%20and%20Convention.pdf>> accessed 16 January 2022. For the text of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, see <<https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/Documents/MARPOL%20Protocol%20of%201978.pdf>> accessed 16 January 2022.

⁷ This Convention was adopted in 1996 and later, Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 was adopted. For the text of the Convention, see <https://www.hnsconvention.org/wp-content/uploads/2019/04/1996-HNS-Convention_e.pdf> accessed 16 January 2022. For the text of the Protocol of 2010, see <https://www.hnsconvention.org/wp-content/uploads/2019/04/2010-HNS-Protocol_e.pdf> accessed 16 January 2022.

causal link and the shipper may not be liable to the carrier. Therefore, the carrier's negligence and causation will be examined. These examinations will be made by considering articles of relevant international conventions and also decisions of various courts. In addition, for comparative purposes, there will be references to common law regarding carriage of dangerous goods by sea.

II. THE DEFINITION OF DANGEROUS GOODS

In order to determine whether there is a breach of provisions regulating dangerous goods, first, goods which are considered as dangerous should be determined. Under the common law, not only physically dangerous goods but also goods which do not physically harm the other cargo or vessel but cause an economic loss to the carrier are considered as dangerous goods.⁸ These goods are defined as legally dangerous goods and while they do not necessarily physically damage the other cargo or vessel, they “*cause economic loss or similar to the carrier or other cargo owners by the detention, delay or seizure of the vessel.*”⁹ *Mitchell Cotts & Co v. Steel Brothers & Co Ltd*¹⁰ reflects English law approach; as, if goods cause an economic loss to the carrier due to delay, they will be considered as legally dangerous goods.¹¹ In this case, the shippers knew that the consent of the

⁸ Frank Stevens, ‘Duties of Shippers and Dangerous Cargoes’ in D Rhidian Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd’s List 2010) 11.79, 231; FD Rose, ‘Liability for Dangerous Goods’ (1998) Lloyd’s Maritime and Commercial Law Quarterly 480, 481. For information regarding “*unlawful goods*” being considered as dangerous goods in English common law, see Meltem Deniz Güner-Özbek, *The Carriage of Dangerous Goods by Sea* (Springer 2008) 66.

⁹ Armandos Lestos, ‘Do English Law, Hague-Visby Rules and Rotterdam Rules Provides Adequate Legal Frameworks regarding the Carriage of Dangerous Goods’ (2014) 2 Bristol Law Review 107, 112.

¹⁰ *Mitchell Cotts & Co v. Steel Brothers & Co Ltd* [1916] 2 K.B. 610 cited in Güner-Özbek (n 8) 66, fn.115; John F Wilson, *Carriage of Goods by Sea* (7th edn, Longman 2010) 34, fn. 159; Simon Baughen, ‘Obligations Owed by the Shipper to the Carrier’ in D Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea- The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext Publishing Limited 2009) 171, fn. 8; Stephen D Girvin, ‘Shipper’s Liability for the Carriage of Dangerous Goods by Sea’ (1996) Lloyd’s Maritime and Commercial Law Quarterly 487, 495, fn. 67.

¹¹ Güner-Özbek (n 8) 67; Wilson (n 10) 34. For discussion on this case regarding the definition of dangerous goods, see Güner-Özbek (n 8) 66-68; Wilson (n 10) 34; Baughen (n 10) 171; Girvin (n 10) 495-496.

British Government was required for the discharge of goods at Piraeus.¹² Therefore, the shipper was held liable for the economic loss arising from the delay caused by the attempts to obtain the permission which was also refused in the end.¹³ For this reason, even though there were no inherently unsafe goods; because there was an economic loss caused by the delay, goods were considered as legally dangerous goods.¹⁴ This case reflected English law approach by considering these goods as legally dangerous goods. In addition, another wide interpretation regarding definition of dangerous goods is made under common law by arguing that a cargo can be considered as dangerous if it is packed dangerously.¹⁵

The Hague Rules and the Hague-Visby Rules refer to “*goods of an inflammable, explosive or dangerous nature*” under Article IV (6)¹⁶. Therefore, regarding the wording of this article, it only applies to physically dangerous goods.¹⁷ Considering drafting period of the Hague Rules and particularly discussions regarding Article IV (6), this article was aimed at regulating not any dangerous cargo but exceptionally dangerous cargoes such as chemicals.¹⁸ In addition, it is argued that covering goods which are not inherently unsafe under Article IV (6) of the Hague Rules and the Hague-Visby Rules would be “*unreasonable and unjust*” regarding the balance between the carrier and the shipper.¹⁹ The basis of liability in the Hague Rules and the Hague-Visby Rules is fault with the exception of

¹² Güner-Özbek (n 8) 67; Wilson (n 10) 34; Girvin (n 10) 495.

¹³ Güner-Özbek (n 8) 67; Wilson (n 10) 34; Baughen (n 10) 171; Girvin (n 10) 495.

¹⁴ *ibid.*

¹⁵ Güner-Özbek (n 8) 65; Stevens (n 8) para. 11.79, 231.

¹⁶ Article 4 (6) of the Hague Rules and Article IV (6) of the Hague-Visby Rules: “*Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.*”

¹⁷ Michael Tsimplis, ‘Obligations of the Carrier’ in Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para. 15-06, 42.

¹⁸ Güner-Özbek (n 8) 71.

¹⁹ *ibid.* 165.

Article III (5)²⁰ and Article IV (6).²¹ As the liability regarding carriage of dangerous goods is strict liability, goods which are under the scope of Article IV (6) should be “*exceptionally dangerous goods that pose significant risk and significant potential damage.*”²² Therefore, it is argued that extending the scope of dangerous goods to goods which may cause delay is not justified under the Hague Rules and the Hague-Visby Rules.²³ In addition, as under the Hamburg Rules and the Rotterdam Rules, liability of the shipper regarding breach of provisions regulating dangerous goods is strict²⁴, same approach can be taken and for this reason, in accordance with this approach, it can be argued that goods which are not inherently unsafe are not subject to provisions regarding carriage of dangerous goods under the Hamburg Rules and the Rotterdam Rules. However, the House of Lords interpreted Article IV (6) of the Hague Rules in *Effort Shipping Co. Ltd. v. Linden Management S.A. and Another (The “Giannis NK”)*²⁵ and broad interpretation for the definition of dangerous goods was made in this decision.²⁶ Infested cargo was considered as dangerous due to the

²⁰ Article 3 (5) of the Hague Rules and Article III (5) of the Hague-Visby Rules: “*The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.*”

²¹ Güner-Özbek (n 8) 164.

²² *ibid.*

²³ *ibid* 166.

²⁴ Francesco Berlingieri, ‘A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ paper delivered at the General Assembly of the AMD, Marrakesh, 5-6 November 2009, 20 <<https://comitemaritime.org/wp-content/uploads/2018/05/Comparative-analysis-of-the-Hague-Visby-Rules-the-Hamburg-Rules-and-the-Rotterdam-Rules-1.pdf>> accessed 25 December 2021.

²⁵ *The Giannis NK* [1998] 1 Lloyd’s Rep. 337. For discussion on this case, see Güner Özbek (n 8) 68-69; Rose (n 8) 480-482; Lestos (n 9) 114-115; Wilson (n 10) 36; Baughen (n 10) 171; Girvin (n 10) 497-498.

²⁶ Güner-Özbek (n 8) 69; Stevens (n 8) para. 11.80, 231; Rose (n 8) 481-482; Lestos (n 9) 114; Wilson (n 10) 36; Tomotaka Fujita, ‘Obligations and Liabilities of the Shipper’ in Meltem Deniz Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the “Rotterdam Rules”* (Springer 2011) 223, fn. 38; Theodora Nikaki, ‘International Recent Developments: United Kingdom’ (2012) 36 *Tulane Maritime Law Journal* 601, 612.

imposition of a quarantine and an order for the dumping of the cargo.²⁷ The House of Lords decided that the application of this article was not only limited to inflammable or explosive goods.²⁸ In this case, the ground-nut cargo was infested with the Khapra beetle; however, it did not spread to the cargo of wheat and as this type of cargo was prevented to enter in the Dominican Republic and the United States, the shipowner dumped both cargoes to the sea due to the imposition of quarantine.²⁹ While the cargo of wheat was not infested, in other words, there was no physical damage to this cargo; due to the order regarding dumping both cargoes to the sea and the imposition of the quarantine³⁰, there was an indirect damage made to the other cargo by the cargo which was infested with the Khapra beetle and therefore, as these goods caused damage to the other cargo, they were considered as dangerous by the House of Lords.³¹ Goods which do not cause direct physical damage to the vessel or other cargo are considered as dangerous in this case.³² English courts consider pre-existing common law and accordingly, rights and liabilities regarding legally dangerous goods are still available to the carrier.³³ In *Bunge SA v. ADM Do Brasil Ltda and Others (The "Darya Radhe")*³⁴, the issue was whether the cargo which caused delay could be considered as dangerous. In this case, although rats were loaded along with the cargo, they did not have any threat of physical

²⁷ *The Giannis NK* (n 25) 339. For information on this case regarding the definition of dangerous goods, see also Güner-Özbek (n 8) 69; Rose (n 8) 481-482; Lestos (n 9) 114-115; Wilson (n 10) 36; Baughen (n 10) 171; Girvin (n 10) 498.

²⁸ *The Giannis NK* (n 25) 338. For this information, see also Güner-Özbek (n 8) 69; Stevens (n 8) para. 11.80, 231; Rose (n 8) 481. For argument regarding the House of Lords not interpreting Article IV (6) of the Hague Rules literally and not limiting this article's scope of application to goods capable of causing direct damage, see Lestos (n 9) 114. For information about interpretation of Article IV (6) of the Hague Rules by the House of Lords in this case, see Wilson (n 10) 36.

²⁹ *The Giannis NK* (n 25) 337. For summary of the facts of this case, see also Güner-Özbek (n 8) 68-69; Stevens (n 8) 231, fn. 70; Rose (n 8) 480; Lestos (n 9) 114; Wilson (n 10) 36; Girvin (n 10) 497-498.

³⁰ *The Giannis NK* (n 25) 337. For this information, see also Stevens (n 8) 231, fn. 70.

³¹ *The Giannis NK* (n 25) 339.

³² Stevens (n 8) para. 11.80, 231.

³³ Tsimplis (n 17) para. 15-06, 42.

³⁴ *The Darya Radhe* [2009] 2 Lloyd's Rep. 175. For information and discussion on this case, see Wilson (n 10) 37; Nikaki (n 26) 612-613. For comparison between *The Giannis NK* and *The Darya Radhe* regarding the definition of dangerous goods, see M Barış Günay, *Hazırlık Çalışmalarının Işığında Lahey/Visby Kuralları (Rotterdam Kuralları ile Karşılaştırmalı Olarak)* (Yetkin Yayınları 2013) 231.

damage to the cargo or the vessel.³⁵ Tomlinson J stated that there had to be a physical harm to vessel or to the other cargo in order to consider goods as dangerous and therefore, the cargo could not be considered as dangerous under Article IV (6) of the Hague Rules.³⁶ Goods which only caused delay and accordingly, which caused an economic loss to the carrier, could not be considered as dangerous.³⁷ For this reason, the cargo which was loaded with rats could not be considered as a dangerous cargo.³⁸ Therefore, indirect physical danger to the vessel or other cargo is required in order to consider goods as dangerous.³⁹ Tomlinson J differentiated this case from *The Giannis NK* by stating that in that case there was a physical damage to the cargo⁴⁰ and also from the *Mitchell Cotts & Co v. Steel Brothers & Co Ltd* case by stating that in that case there was an issue of the violation of or non-compliance with the municipal law.⁴¹

Article 13 (2)⁴² of the Hamburg Rules refers to “*dangerous character of the goods*” without providing any definition regarding dangerous goods. Regarding the drafting history of the Hamburg Rules, there was a proposal of the Delegation of Mauritius regarding elaboration of the definition of dangerous goods; however, the Delegation of Poland stated that providing a definition of dangerous goods would be almost impossible for the Conference to achieve “*without the aid of specialists familiar with those properties.*”⁴³ This Mauritian amendment was withdrawn.⁴⁴ The Delegation

³⁵ *The Darya Radhe* (n 34) 175. For summary of the facts of this case, see also Nikaki (n 26) 612-613.

³⁶ *The Darya Radhe* (n 34) 175, 188. For information, see also Stevens (n 8) para. 11.81, 231; Wilson (n 10) 37.

³⁷ *The Darya Radhe* (n 34) 175, 185. For information, see also Nikaki (n 26) 613.

³⁸ *The Darya Radhe* (n 34) 175. For information, see also Wilson (n 10) 37; Nikaki (n 26) 613.

³⁹ Wilson (n 10) 37.

⁴⁰ *The Darya Radhe* (n 34) 185.

⁴¹ *ibid* 187.

⁴² Article 13 (2) of the Hamburg Rules: “*Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:*

(a) *The shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and*

(b) *The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.”*

⁴³ United Nations Conference on the Carriage of Goods by Sea, A/CONF.89/14, Hamburg, 6-31 March 1978, ‘Official Records: Documents of the Conference and Summary Records YÜHFD Cilt: XIX Sayı:2 (2022)

of Denmark argued that adopting this amendment would be a step backwards as the list of dangerous goods was not exhaustive and if there would be references to other conventions for this list, then amendments to these conventions later might create problems.⁴⁵ The Chairman stated that he would take it that the Mauritian amendment was rejected.⁴⁶ For this reason, there is no definition of dangerous goods or no reference to a list of dangerous goods under the Hamburg Rules. There is no definition of dangerous goods under the Rotterdam Rules as well.⁴⁷ Interpreting the definition of dangerous goods broadly under the Rotterdam Rules is controversial. It is argued that Article 15⁴⁸ of the Rotterdam Rules is “*unclear*” as whether the danger which is referred under this article is restricted to physical danger or whether legally dangerous circumstances fall under the scope of this article.⁴⁹ In the Rotterdam Rules, terms “*nature*” and “*character*” are used to limit the application of Article 32⁵⁰ as, while goods can cause harm to the other cargo or the vessel; they are not considered as

of the Plenary Meetings and of the Meetings of the Main Committees, 18th meeting, 17 March 1978, A/CONF.89/C.1/SR.18, para. 30, 277

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_conf_89-14_.pdf> accessed 20 January 2022.

⁴⁴ *ibid* para. 32, 277.

⁴⁵ *ibid* para. 35, 277.

⁴⁶ *ibid* para. 36, 277.

⁴⁷ Filippo Lorenzon, ‘Obligations of the Shipper to the Carrier’ in Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis, *The Rotterdam Rules: A Practical Annotation* (Informa 2009) para. 32-02, 91.

⁴⁸ Article 15 of the Rotterdam Rules: “*Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier’s period of responsibility, an actual danger to persons, property or the environment.*”

⁴⁹ Tsimplis (n 17) para. 15-02, 41.

⁵⁰ Article 32 of the Rotterdam Rules: “*When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:*

- (a) *The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and*
- (b) *The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.*”

dangerous if they are not dangerous by their “*nature or character*”.⁵¹ It is stated that this qualification is made in order to avoid broad interpretation regarding the definition of dangerous goods.⁵² Drafting process of Article 32 of the Rotterdam Rules is referred and it is stated that during this process, *The Giannis NK* decision was taken into consideration and the aim was to not to broaden the definition of dangerous goods under the Rotterdam Rules.⁵³ As Article 32 of the Rotterdam Rules refers to “*goods by their nature or character*”, the emphasis is on the nature or character of goods.⁵⁴ However, according to the contrary view, English law approach concerning dangerous goods was not altered; as under the Rotterdam Rules not only “*nature*” but also “*nature and character*” of goods are referred.⁵⁵ It is stated that “*persons*” is a broader term than “*crew*” and “*property*” is broader than “*ship*” or “*other cargo*”.⁵⁶ Under the Rotterdam Rules, a new concept is provided by referring to “*danger to the environment*”.⁵⁷ This new concept is referred under Article 15 and Article 32 of the Rotterdam Rules. The definition of the “*environment*” is not provided under the Rotterdam Rules. According to a view, as the term is not specified as the marine environment, it also covers land and the atmosphere.⁵⁸ Article 32 of the Rotterdam Rules refers to “*goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment.*” For this reason, it is argued that even if goods do not harm the carrier or vessel, they can be considered as dangerous.⁵⁹ Also, due to the reference to danger to the environment, legally dangerous goods are covered under the Rotterdam Rules.⁶⁰ In addition, it is discussed that “*the mere fact of shipping pollutants*” would trigger the shipper’s obligations and liabilities as Article 32 of the Rotterdam Rules refers to danger to the environment.⁶¹ The “*reference to a potential danger to persons, property or the environment*” makes easier to determine circumstances in which goods can be considered

⁵¹ Fujita (n 26) 224.

⁵² *ibid* 223-224.

⁵³ Günay (n 34) 232, fn. 54.

⁵⁴ *ibid* 232.

⁵⁵ Lorenzon (n 47) para. 32-02, 91.

⁵⁶ *ibid*.

⁵⁷ Lestos (n 9) 115; Günay (n 34) 231-232.

⁵⁸ Tsimplis (n 17) para. 15-03, 42.

⁵⁹ Hacı Kara, *Rotterdam Kuralları’na göre Taşıyanın Ziya, Hasar veya Gecikmeden Kaynaklanan Zararlardan Sorumluluğu* (Legal Yayıncılık 2018) 210.

⁶⁰ Baughen (n 10) 183.

⁶¹ Lorenzon (n 47) para. 32-02, 91-92.

as dangerous when compared to the Hague Rules, the Hague-Visby Rules and the Hamburg Rules by arguing that it is more “*precise*”.⁶² As under the Rotterdam Rules, the danger is related to persons, property and the environment, it is also discussed that this better identifies goods which can be considered as dangerous.⁶³ In addition, it is stated that although it is uncertain whether Article IV (6) of the Hague Rules and the Hague-Visby Rules covers legally dangerous goods, as Article 32 (b) makes reference to marking or labelling dangerous goods “*in accordance with any law, regulations or other requirements of public authorities*”, it is argued that “*the regime for dangerous cargo extends to compliance with legal requirements as to marking and labelling of the goods.*”⁶⁴ For this reason, while legally dangerous cargo does not fall under the scope of Article IV (6) of the Hague Rules and the Hague-Visby Rules, it is covered by various provisions of Chapter 7 of the Rotterdam Rules.⁶⁵ Article 13 (1)⁶⁶ of the Hamburg Rules requires the shipper to mark or label dangerous goods as dangerous. However, this obligation should be fulfilled “*in a suitable manner*”.

The Hague Rules and the Hague-Visby Rules do not regulate carrier’s liability regarding delay in delivery and leave this issue to the domestic law.⁶⁷ The carrier can be liable from delay in delivery in accordance with Article 5 (1)⁶⁸ of the Hamburg Rules. This liability is a fault-based liability and it is not unlimited. Regarding allocation of risks between the carrier and the shipper, it is argued that it will be hard to justify extending the meaning of dangerous goods to circumstances in which goods only cause delay or detention as the shipper would be strictly liable, whereas the carrier’s

⁶² José Vicente Guzmán, ‘The Rotterdam Rules: Shipper’s Obligations and Liability’ CMI Yearbook 2010, 159 <<https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf>> accessed 16 January 2022.

⁶³ Berlingieri (n 24) 20.

⁶⁴ Baughen (n 10) 183.

⁶⁵ *ibid* 189.

⁶⁶ Article 13 (1) of the Hamburg Rules: “*The shipper must mark or label in a suitable manner dangerous goods as dangerous.*”

⁶⁷ Güner-Özbek (n 8) 75.

⁶⁸ Article 5 (1) of the Hamburg Rules: “*The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.*”

liability is a fault-based liability and subject to limitation.⁶⁹ Under the Rotterdam Rules, loss or damage due to delay in delivery cannot be claimed under provisions regulating carriage of dangerous goods.

In all of these international conventions, there is no definition of dangerous goods. While there is no definition, it is clear that if goods are dangerous by their nature or character, they are considered as dangerous in all of these conventions. However, broad interpretation regarding the definition of dangerous goods is made in English law. Accordingly, goods which are not physically dangerous and do not even harm other cargo, can be considered as dangerous if there is an order of quarantine and an indirect damage to other cargo. Furthermore, if goods are not packaged properly, these goods can be considered as dangerous if they cause physical damage to the other cargo or to the vessel as referred in this study. In addition, goods which are not inherently unsafe but cause damage to the other cargo or to the vessel or cause an economic loss to the carrier by delay or detention are considered as dangerous. However, when considering wordings of the provisions regarding dangerous goods of the mentioned conventions and drafting history of them, it can be argued that broad interpretation cannot be made. As everything can be dangerous under certain circumstances, ordinarily harmless goods can cause harm but they are not dangerous by their nature or character.⁷⁰ Legally dangerous goods, cargo which is not properly packaged and infested cargo which causes indirect damage to the other cargo or to the vessel should not be considered as dangerous as otherwise there will be a broad application of provisions regulating carriage of dangerous goods and accordingly, the shipper will be subject to the strict liability as referred in this study.

III. OBLIGATIONS AND LIABILITY OF THE SHIPPER AND RIGHTS OF THE CARRIER

The shipper is not prohibited from shipping dangerous goods; however, the shipment of dangerous goods depends on the knowledge about the nature or character of these goods and consent of the carrier.⁷¹ This part of the study aims to determine obligations of the shipper regarding the shipment of dangerous goods and aims to establish circumstances in which the liability of the shipper arises under the Hague Rules, the Hague-Visby

⁶⁹ Güner-Özbek (n 8) 75.

⁷⁰ Fujita (n 26) 223-224.

⁷¹ Lestos (n 9) 134.

YÜHFD Cilt: XIX Sayı:2 (2022)

Rules, the Hamburg Rules and the Rotterdam Rules. Furthermore, the basis of the liability of the shipper, parties to whom the shipper is liable and whether there is a limit to this liability will be determined in this part of the study.

A. The Hague Rules and The Hague-Visby Rules

1. Obligations of the Shipper

Under Article IV (6) of the Hague Rules and the Hague-Visby Rules, carrier, master or agent of the carrier has to have the knowledge about the nature and character of dangerous goods and has to consent to the carriage of these goods. The focus is on the knowledge and consent of the carrier in this study. Knowledge about the nature and character of goods and consent regarding the carriage of these goods by the carrier are two essential elements. The shipper has to inform the carrier about the nature and character of goods; however, risks due to the shipment of these goods should also be determined. Therefore, the term “*knowledge*” needs to be considered.

While under the common law, the term “*knowledge*” covers actual and constructive knowledge⁷²; there is no reference to risks that the carrier should have known under the Hague Rules and the Hague-Visby Rules.⁷³ In addition, while under the common law, the shipper has to give to the carrier notice of the fact that the goods are dangerous; under the Hague Rules and the Hague-Visby Rules, the shipper has to give notice to the carrier regarding nature and character of the dangerous goods.⁷⁴ Under the common law, actual knowledge means the information that is given by the shipper to the carrier regarding contractual cargo and constructive knowledge means that the “*information that the carrier or its agent is expected to have.*”⁷⁵ The standard of the constructive knowledge is based on the “*reasonable professional*” concept⁷⁶ and not that of an expert chemist.⁷⁷ However, it is argued that knowledge is a relative concept and the carrier is expected to know recent developments and published regulations as the required knowledge is the knowledge of an ordinary, experienced, competent prudent

⁷² *ibid* 123-124.

⁷³ FD Rose, ‘Cargo Risks: “Dangerous” Goods’ (1996) 55 Cambridge Law Journal 601, 608.

⁷⁴ Güner-Özbek (n 8) 101.

⁷⁵ Lestos (n 9) 124.

⁷⁶ *ibid*.

⁷⁷ *ibid* 124-125.

and skilful carrier.⁷⁸ For this reason, if the nature or character of the goods can be known by a competent carrier, the shipper has no obligation to notify the carrier.⁷⁹ In other words, if the carrier agrees to carry a good and the dangerous characteristics of this good are known, it will be considered that the carrier also consents to the risks related to these dangerous characteristics.⁸⁰ Regarding the extent of the knowledge of the carrier about the characteristics of goods which are carried and allocation of risk between the shipper and carrier, *The “Athanasia Comminos” and “Georges Chr. Lemos”*⁸¹ can be discussed. In this case, due to the cargo of coal’s emission of methane gas, it mixed with air and this led to an explosion.⁸² Mustill J stated that “*distribution of risk for the consequences of a dangerous situation arising during the voyage*” should be taken into consideration.⁸³ In other words, while the character of the goods was significant to create a dangerous situation, it was not the only factor that needed to be considered.⁸⁴ An evaluation should also be made regarding the shipowner’s knowledge on characteristics of the goods.⁸⁵ Therefore, the consideration would be on whether “*risks involved in this particular shipment were risks which the plaintiffs contracted to bear.*”⁸⁶ In this case, as the cargo did not create risks which the plaintiffs did not contract to bear, the carrier could not claim indemnity from the shipper.⁸⁷ On the other hand, in *Mediterranean Freight Services Ltd. v. BP Oil International Ltd. (The “Fiona”)*⁸⁸, the fuel

⁷⁸ Güner-Özbek (n 8) 105; Lestos (n 9) 124.

⁷⁹ Güner-Özbek (n 8) 104.

⁸⁰ Baughen (n 10) 174.

⁸¹ *The Athanasia Comminos and Georges Chr. Lemos* [1990] 1 Lloyd’s Rep. 277. For information and discussion on this case, see Güner-Özbek (n 8) 64-65; Baughen (n 10) 172-173; Girvin (n 10) 494-495. For discussion on this case regarding carriage risks, see Rose (n 73) 607.

⁸² *The Athanasia Comminos and Georges Chr. Lemos* (n 81) 277. For information, see also Güner-Özbek (n 8) 64; Girvin (n 10) 494.

⁸³ *The Athanasia Comminos and Georges Chr. Lemos* (n 81) 282. For this information, see also Girvin (n 10) 495.

⁸⁴ *The Athanasia Comminos and Georges Chr. Lemos* (n 81) 282. For information, see also Güner-Özbek (n 8) 64.

⁸⁵ *ibid.*

⁸⁶ *The Athanasia Comminos and Georges Chr. Lemos* (n 81) 283. For this information, see also Güner-Özbek (n 8) 65.

⁸⁷ *The Athanasia Comminos and Georges Chr. Lemos* (n 81) 289. For this information, see also Güner-Özbek (n 8) 65; Baughen (n 10) 172-173.

⁸⁸ *The Fiona* [1994] 2 Lloyd’s Rep. 506 (CA); *aff’d* [1993] 1 Lloyd’s Rep. 257. For information regarding this case, see also Güner-Özbek (n 8) 101, fn. 63, 102, fn. 64; Baughen (n 10) 173.

oil cargo shipped on the vessel had unusual characteristics and the information regarding these characteristics was not provided to the carrier and there was no consent of the carrier regarding the shipment of this cargo.⁸⁹ The Court of Appeal applied Mustill J's test in *The Athanasia Comminos* and held that the carrier did not consent to the carriage of this cargo as characteristics of this cargo were different than the one normally carried in the industry.⁹⁰ It is stated that the carrier had to take special precautions to carry this cargo safely.⁹¹ Contracts are significant in determining carrier's knowledge and carrier's consent to the shipment of the cargo. In addition, the level of the knowledge of the carrier to hold liable him/her for the loss or damage due to the carriage of dangerous goods is discussed under the law of the United States.⁹² It is stated that containerization leads to controversy regarding the shipper's duty to warn about goods and the carrier's sufficiency of knowledge under the Carriage of Goods by Sea Act 1936 ("COGSA")⁹³, which is the statute that incorporates the Hague Rules.

Dangerous goods should be classified, packed, marked, and labelled and handled in accordance with the regulations.⁹⁴ Packing of dangerous goods is significant regarding its role in protecting other cargo, the ship and those on board.⁹⁵ It is stated that cargo can be considered as dangerous due to failure to pack it suitably prior to loading.⁹⁶ While the Hague and the Hague-Visby Rules do not expressly provide the duty of the shipper to pack goods properly, this duty is a natural part of the shipper's duties and unless otherwise agreed between the carrier and the shipper, the shipper packs goods.⁹⁷ For this reason, while there is no express provision regulating this matter under these international conventions, the shipper has to pack dangerous goods properly. However, parties might agree that this will be the

⁸⁹ *The Fiona* [1993] 1 Lloyd's Rep. 257, 257-258, 273. For this information, see also Güner-Özbek (n 8) 101, fn. 63, 102, fn. 64; Baughen (n 10) 173.

⁹⁰ Baughen (n 10) 173.

⁹¹ *ibid.*

⁹² Joseph Z Cavanah, 'Dangerous Goods Liability in the Age of Containerization- Warning: This Comment may (or may not) Self-Destruct' (2012) 37 *Tulane Maritime Law Journal* 147, 148.

⁹³ *ibid* 149.

⁹⁴ *ibid* 91.

⁹⁵ *ibid* 93.

⁹⁶ Baughen (n 10) 171.

⁹⁷ Güner-Özbek (n 8) 92.

duty of the carrier. In addition, containers are generally sealed and the carrier has no obligation to open the container and inspect it; therefore, if the shipper does not stow the cargo properly, the shipper will be responsible.⁹⁸ Regarding marking obligation under the Hague Rules and the Hague-Visby Rules, according to Article III (3)⁹⁹, on demand of the shipper, the carrier shall issue a bill of lading which will show “*the leading marks necessary for the identification of the goods*” in accordance with Article III (3) (a), and “*the shipper shall be deemed to have guaranteed to the carrier*” regarding the accuracy of the marks at the time of shipment in accordance with Article III (5).¹⁰⁰ Furthermore, while the duty to mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities is not expressly regulated under the Hague Rules and the Hague-Visby Rules; as the shipper can be subject to relevant applicable law regulations or other requirements of the public authorities regarding this duty, in practice this duty exists even the shipper is subject to the Hague Rules and the Hague-Visby Rules.¹⁰¹

2. Rights of the Carrier

If the shipper fails to give notice to the carrier and goods are shipped without the knowledge of the carrier regarding their dangerous nature and character, they can be “*landed at any place, or destroyed or rendered innocuous by the carrier without compensation*” by the carrier in accordance with Article IV (6) of the Hague Rules and the Hague-Visby

⁹⁸ *ibid* 95-96.

⁹⁹ Article 3 (3) of the Hague Rules and Article III (3) of the Hague-Visby Rules: “*After receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:*

- (a) *The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;*
- (b) *Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;*
- (c) *The apparent order and condition of the goods.*

Provided that no carrier, master, or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received or which he has had no reasonable means of checking.”

¹⁰⁰ For information regarding marking obligation under the Hague Rules and the Hague-Visby Rules, see Güner-Özbek (n 8) 96-97.

¹⁰¹ Berlingieri (n 24) 20.

Rules. In accordance with this article, consent of the carrier, master or agent of the carrier will be taken into consideration. According to this article, the shipper will be liable for “*all damages and expenses directly or indirectly arising out of or arising from such shipment.*” Therefore, the carrier will be able to claim indemnity from the shipper. If the carrier knows dangerous nature of goods and consents to the carriage of them, these goods can be “*landed at any place, or destroyed or rendered innocuous*” by the carrier if they become a danger to the vessel or the cargo in accordance with Article IV (6) of the Hague Rules and the Hague-Visby Rules. However, in this circumstance, the shipper will not be liable for any damages and expenses. It is argued that these measures cannot be taken by the carrier if the cargo only “*poses a risk of delay or detention*” to the vessel as this non-physical damage does not fall under the scope of provisions of the Hague Rules and the Hague-Visby Rules.¹⁰²

3. Basis of the Liability of the Shipper

Under Article IV (3)¹⁰³ of the Hague Rules and the Hague-Visby Rules, the general rule for the liability of the shipper is regulated¹⁰⁴ and accordingly, if there is a damage or loss by the carrier, the shipper will not be responsible for the loss or damage without the shipper’s “*act, fault or neglect*” and also “*his agents or his servants.*” Therefore, for the shipper to be liable for loss or damage, there has to be a fault. However, the liability of the shipper regarding dangerous goods is regulated under Article IV (6) of the Hague Rules and the Hague-Visby Rules. The basis of liability of the shipper under this article was controversial due to Article IV (3) of the Hague Rules and the Hague-Visby Rules. The controversy was on whether the basis of the liability of the shipper was strict liability or fault-based liability.¹⁰⁵

In *The Giannis NK*¹⁰⁶, in which the Hague Rules were applicable, there was a discussion on whether the shipper was strictly liable to the carrier

¹⁰² Güner-Özbek (n 8) 185.

¹⁰³ Article 4 (3) of the Hague Rules and Article IV (3) of the Hague-Visby Rules: “*The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.*”

¹⁰⁴ Güner-Özbek (n 8) 142.

¹⁰⁵ Wilson (n 10) 37.

¹⁰⁶ For information about this case and for discussions regarding the basis of the liability of the shipper, see Güner Özbek (n 8) 142-144; Rose (n 8) 482-484; Lestos (n 9) 119-120; YUHFD Vol. XIX No.2 (2022)

when there was a breach of Article IV (6) of the Hague Rules. The majority of the House of Lords stated that Article IV (6) of the Hague Rules should be regarded as a “*free-standing provision*” which was not subject to the fault-based liability under Article IV (3) of the Hague Rules.¹⁰⁷ In accordance to this, the shipper was held liable for damage even though the shipper did not know the infestation of the cargo.¹⁰⁸ This is a correct interpretation of Article IV (6) regarding the basis of the liability. If there is a breach of Article IV (6), the shipper is strictly liable and so, it is irrelevant whether there is a fault or negligence on the part of the shipper. This approach can be seen under the common law considering *Brass v. Maitland*, which was referred in *The Giannis NK*¹⁰⁹ as in this case while the shipper was unaware of the dangerous nature of the cargo, Lord Campbell C.J. stated that “*the defendants, and not the plaintiffs, must suffer, if from the ignorance of the defendants a notice was not given to plaintiffs.*”¹¹⁰ Therefore, interpretation of Article IV (6) of the Hague Rules and the Hague-Visby Rules regarding the basis of the liability of the shipper is similar to the approach of the common law. The reason behind the strict liability of the shipper is that the shipper is “*directly connected with the goods to be shipped*”, he/she “*has detailed knowledge of the intrinsic factors and characteristics of the goods*” which cause the shipper to have “*an exclusive sphere of influence regarding the carrier’s contractual performance.*”¹¹¹

According to the U.S. Courts in *Serrano v US Lines Co*¹¹² and in *The Stylianos Restis*¹¹³, it was decided that due to Article IV (3) of the Hague Rules, the shipper’s liability under Article IV (6) of the Hague Rules was a

Wilson (n 10) 37. For reference to this case regarding the basis of the liability of the shipper, see Günay (n 34) 231.

¹⁰⁷ *The Giannis NK* (n 25) 342, 348-349. For this information, see also Güner-Özbek (n 8) 143; Rose (n 8) 484; Lestos (n 9) 120; Wilson (n 10) 37; Baughen (n 10) 170.

¹⁰⁸ *The Giannis NK* (n 25) 339. For information regarding liability of the shipper not being dependent on the shipper’s knowledge, see Güner-Özbek (n 8) 144; Rose (n 8) 483; Lestos (n 9) 120; Wilson (n 10) 37.

¹⁰⁹ *The Giannis NK* (n 25) 345.

¹¹⁰ *Brass v. Maitland* (1856) 6 E. & B. 470, 486 referred in *The Giannis NK* (n 25) 345. For information and discussion on *Brass v. Maitland* case regarding strict liability of the shipper, see Güner-Özbek (n 8) 139-140; Lestos (n 9) 117-118; Wilson (n 10) 34-35; Girvin (n 10) 492-493.

¹¹¹ Lestos (n 9) 116.

¹¹² *Serrano v US Lines Co* [1965] AMC 1038 (SDNY 1965) cited in Wilson (n 10) 37, fn. 176.

¹¹³ *The Stylianos Restis* [1974] AMC 2343 (SDNY 1972) cited in Wilson (n 10) 37, fn. 176. *YÜHFD Cilt: XIX Sayı:2 (2022)*

fault-based liability.¹¹⁴ Therefore, the U.S. Courts when interpreting Article IV (6) of the Hague Rules, they also considered Article IV (3) of the Hague Rules and decided that the shipper's liability was fault-based. However, the accuracy of this approach had started to be discussed as in *Senator Linie GmbH & Co KG v. Sunway Line, Inc.*¹¹⁵ ("*Senator v. Sunway*"), strict liability system was accepted regarding liability of the shipper.¹¹⁶ This case was the first U.S. case to impose strict liability upon a shipper of dangerous goods under COGSA.¹¹⁷ In the *Senator v. Sunway*, the Second Circuit made reference to *The Giannis NK* decision which was decided by the House of Lords.¹¹⁸ It stated that Section 1304 (6) of COGSA which corresponded to Article IV (6) of the Hague Rules, imposed strict liability on the shipper¹¹⁹ as the shipper was in the best position to know the nature of the goods.¹²⁰ The shipper stated that it could not be liable as it did not know that the good was dangerous¹²¹; however, this argument was not accepted by the Second Circuit due to the strict liability system.¹²² Similar to *The Giannis NK*¹²³, it was stated that Section 1304 (6) of COGSA was an exception to the fault-based liability system which was regulated under Section 1304 (3) of COGSA.¹²⁴ This was considered as an accurate decision by imposing strict liability on the shipper¹²⁵ due to the issue of safety and due to the fact that the shipper was in a better position to know nature of goods than the

¹¹⁴ Wilson (n 10) 37.

¹¹⁵ *Senator Linie GmbH & Co KG v. Sunway Line, Inc.* 291 F 3d 145, (2nd Cir. 2002) cited in Holly Roark, 'Explosion on the High Seas! The Second Circuit Promotes International Uniformity with Strict Liability for the Shipment of Dangerous Goods: *Senator v. Sunway*', (2003) 33 Southwestern University Law Review 139, 140, fn 2. For discussion on this case and strict liability of the shipper, see Holly Roark, 'Explosion on the High Seas! The Second Circuit Promotes International Uniformity with Strict Liability for the Shipment of Dangerous Goods: *Senator v. Sunway*', (2003) 33 Southwestern University Law Review 139. This case is also discussed in Güner-Özbek (n 9) 147-155; Justin DuClos, 'Liability for Losses Caused by Inherently Dangerous Goods Shipped by Sea', (2007) 20 U.S.F. Maritime Law Journal 61, 66-68.

¹¹⁶ Roark (n 115) 142-143; Güner-Özbek (n 8) 148, 154; DuClos (n 115) 67.

¹¹⁷ Roark (n 115) 143.

¹¹⁸ Roark (n 115) 149, 155; Güner-Özbek (n 8) 150-151.

¹¹⁹ Roark (n 115) 153-154; Güner-Özbek (n 8) 150-151.

¹²⁰ Roark (n 115) 152; Güner-Özbek (n 8) 154; DuClos (n 115) 67.

¹²¹ Roark (n 115) 152; Güner-Özbek (n 8) 149; DuClos (n 115) 67.

¹²² Roark (n 115) 152; Güner-Özbek (n 8) 148, 151, 154-155; DuClos (n 115) 67.

¹²³ Roark (n 115) 155.

¹²⁴ *ibid* 163; Güner-Özbek (n 8) 150-151.

¹²⁵ Roark (n 115) 163.

carrier.¹²⁶ According to the Second Circuit, the strict liability system regulated under Section 1304 (6) of COGSA will promote predictability, fairness and commercial efficiency.¹²⁷ While the strict liability system might be criticized as it causes insurance rates to increase, it is argued that strict liability is “*founded upon sound policy*”¹²⁸ due to the “*issue of safety*” and “*the rationale that the shipper is in the best position to discover the nature of his goods.*”¹²⁹

B. The Hamburg Rules

1. Obligations of the Shipper

Article 13 of the Hamburg Rules regulates the liability of the shipper regarding dangerous goods. The shipper should inform the carrier or the actual carrier about dangerous character of the goods and, if necessary, of the precautions to be taken in accordance with Article 13 (2) of the Hamburg Rules. There was a discussion in the Working Group on the extent of the duty of the shipper to inform the carrier or the actual carrier regarding precautions to be taken. It was stated that the shipper has an obligation to inform the carrier regarding precautions to be taken “*where the carrier could not be expected to have such knowledge.*”¹³⁰ In addition, it was argued that the phrase “*if necessary*” in the article would mitigate “*possible hardship in this regard to the shipper.*”¹³¹ However, Canada and International Chamber of Shipping (“ICS”) proposed that the phrase “*if necessary*” under Article 13 should be deleted and the duty should be absolute.¹³² The rationale behind Canada’s proposal is that if the phrase “*if necessary*” is not deleted, this situation could lead to an uncertainty

¹²⁶ *ibid* 162.

¹²⁷ Güner-Özbek (n 8) 154.

¹²⁸ Roark (n 115) 157.

¹²⁹ *ibid* 162.

¹³⁰ Yearbook of the United Nations Commission on International Trade Law, 1975, Volume VI, A/CN.9/105, ‘Report of the Working Group on International Legislation on Shipping on the work of its eighth session’ (New York, 10-21 February 1975) ‘Consideration of the Report of the Drafting Party’, para. 9 (a), 226-227 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/502/13/PDF/NL750213.pdf?OpenElement>> accessed 20 January 2022.

¹³¹ *ibid* para. 9 (b), 227

¹³² Yearbook of the United Nations Commission on International Trade Law, 1976, Volume VII, A/CN.9/110, ‘Report of the Secretary-General: analysis of comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea’, para. 10, 286 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/603/58/PDF/NL760358.pdf?OpenElement>> accessed 20 January 2022.

YÜHFD Cilt: XIX Sayı:2 (2022)

regarding the duty¹³³ and the rationale behind the ICS's proposal is to protect carriers against "*negligent and dishonest shippers*".¹³⁴ The Delegation of Bulgaria also proposed the deletion of the phrase "*if necessary*" by stating that the shipper was in the best position to know the nature of goods and therefore, the shipper should inform the carrier about the nature and necessary precautions to be taken.¹³⁵ This proposal was not supported as there was a concern regarding enlarging the liability of the shipper¹³⁶ and eventually, the proposal on deletion of the phrase was rejected.¹³⁷ Accordingly, the shipper, if necessary, should inform the carrier about the precautions to be taken under Article 13 (2) of the Hamburg Rules. In addition, regarding the shipper's duty of providing information to the carrier, the Delegation of Mauritius proposed that the duty of the shipper to inform the carrier regarding the nature of goods should be based on international norms and added that this would also be a guideline for the courts when considering whether the shipper fulfilled his/her duty to inform.¹³⁸ However, this proposal was rejected.¹³⁹

The shipper must "*mark or label in a suitable manner dangerous goods as dangerous*" in accordance with Article 13 (1) of the Hamburg Rules. As referred in this study, this duty is not expressly regulated under the Hague Rules and Hague-Visby Rules. During the discussions in drafting process of the Hamburg Rules, this duty was regulated as "*whenever possible*"; however, deletion of this phrase was proposed as it would create "*ambiguity*" and "*cause difficulty in practice*".¹⁴⁰ Finland, United Kingdom and ICS proposed this duty to be an absolute duty by deleting the phrase "*whenever possible*".¹⁴¹ Under Article 13 (1), this duty is absolute and not

¹³³ *ibid* para. 11, 286.

¹³⁴ *ibid* para. 12, 286.

¹³⁵ A/CONF.89/C.1/SR.18 (n 43) para. 39, 278.

¹³⁶ *ibid* para. 40, para. 45, 278.

¹³⁷ *ibid* para. 51, 278.

¹³⁸ *ibid* para. 24, 277.

¹³⁹ *ibid* para. 36, 277.

¹⁴⁰ Yearbook of the United Nations Commission on International Trade Law, 1976, Volume VII, A/CN.9/109, 'Note by the Secretary-General: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea', Article 13, paragraph 1, 235 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/603/55/PDF/NL760355.pdf?OpenElement>> accessed 20 January 2022.

¹⁴¹ A/CN.9/110 (n 132) para. 7, 286.

“whenever possible”. During the drafting period, controversy also arose from the shipper’s duty of marking or labelling goods as dangerous “in a suitable manner”. The Delegation of Tunisia proposed an amendment by replacing that phrase with the phrase “in a manner that complies with regulations in force and with the particular practices” and the Delegation of Germany supported this amendment by stating that the “present text of Article 13 was too vague.”¹⁴² On the other hand, the Delegation of Brazil did not support the amendment by stating that it would cause an “extremely difficult task of learning all the rules and regulations applicable at the various ports concerned” to the shipper.¹⁴³ Therefore, the amendment was rejected.¹⁴⁴ Accordingly, the shipper has to mark or label goods as dangerous in a suitable manner under Article 13 (1) of the Hamburg Rules. If the shipper does not mark or label goods as dangerous in a suitable manner, penalties in this circumstance were discussed during the preparation of the Hamburg Rules. The Delegation of Brazil proposed to provide express provision for penalties if the shipper did not mark or label goods¹⁴⁵; however, this proposal was rejected.¹⁴⁶ The Delegation of Norway considered this proposal as a severe penalty as it would render the shipper liable and provide the carrier the right to destroy goods even if the shipper informed the carrier or the actual carrier about nature of dangerous goods but failed to mark or label goods as dangerous.¹⁴⁷ The Delegation of Kenya considered this proposal as “unjust” if goods could be unloaded, destroyed or rendered innocuous merely because the shipper did not mark or label them as dangerous in case the carrier was informed about the dangerous nature of goods.¹⁴⁸ The Delegation of Spain argued that the main consideration was informing the carrier about the nature of goods; on the other hand, marking or labelling goods was considered as a way but not the

¹⁴² A/CONF.89/C.1/SR.18 (n 43) para. 3, 275-276.

¹⁴³ *ibid* para. 4, 276.

¹⁴⁴ *ibid* para. 9, 276.

¹⁴⁵ United Nations Conference on the Carriage of Goods by Sea, A/CONF.89/14, Hamburg, 6-31 March 1978, ‘Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees’, 19th meeting, 20 March 1978, A/CONF.89/C.1/SR.19, para. 11, 281

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_conf_89-14_.pdf> accessed 20 January 2022.

¹⁴⁶ *ibid* para. 37, 283.

¹⁴⁷ *ibid* para. 13, 281.

¹⁴⁸ *ibid* para. 25, 282.

only way to fulfil this obligation.¹⁴⁹ Accordingly, the Delegation of Oman argued that penalties should be incurred by the shipper if he/she completely failed to inform the carrier.¹⁵⁰ Regarding these discussions, under Article 13 (1) of the Hamburg Rules, there is only a reference to the shipper's duty to mark or label goods as dangerous in a suitable manner and the penalty is not provided if the shipper fails to perform this obligation.

2. Rights of the Carrier

The shipper is liable for loss or damage due to the shipment of dangerous goods without the carrier's knowledge and consent in accordance with Article 13 (2) (a) of the Hamburg Rules and also the carrier can unload, destroy or render innocuous these goods without payment of compensation under Article 13 (2) (b) of the Hamburg Rules. Under the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, if the carrier knows dangerous character of goods, the carrier can unload, destroy or render innocuous these goods without payment of compensation; however, in this situation, under all of these international conventions, the shipper will not be liable to the carrier for the loss and therefore, the carrier cannot claim indemnity from the shipper. Article 13 (2) of the Hamburg Rules also refers to the knowledge of the carrier or the actual carrier regarding dangerous character of goods in case the shipper fails to fulfil his/her duty to inform. The carrier or the actual carrier can unload, destroy or render innocuous these goods "*as the circumstances may require*" without payment of compensation under Article 13 (2) (b) of the Hamburg Rules. During preparation of the Hamburg Rules, words "*as circumstances may require*" caused a controversy as International Shipowners' Association proposed the deletion of these words by stating that in order to protect the ship and the other cargo, the carrier should be free to decide when to dispose dangerous goods, as in an emergency situation, the carrier may not assess "*accurately the protective measures that the circumstances may require.*"¹⁵¹ Deletion of these words was also proposed by the Delegation of Bulgaria during the drafting of the Hamburg Rules.¹⁵² However, this proposal was rejected¹⁵³ as it was considered that the phrase ensured "*safeguard against any arbitrary*

¹⁴⁹ *ibid* para. 31, 282.

¹⁵⁰ *ibid* para. 32, 282.

¹⁵¹ A/CN.9/110 (n 132) para. 19, 287.

¹⁵² A/CONF.89/C.1/SR.19 (n 145) para. 51, 283.

¹⁵³ *ibid* para. 63, para. 64, 284.

decision” of the carrier¹⁵⁴, it ensured that “*the carrier would take a reasonable decision*”¹⁵⁵, it obliged the carrier to “*justify*” his/her decision¹⁵⁶ and it provided “*an objective criterion*” to assess the decision of the carrier.¹⁵⁷ Article 13 (4)¹⁵⁸ refers to circumstances in which dangerous goods become danger to life or property. In this situation, “*they may be unloaded, destroyed or rendered innocuous, as the circumstances may require*” in accordance with this article.

3. Basis of the Liability of the Shipper

The basis of liability can also be controversial under the Hamburg Rules due to the general rule provision and accordingly, there might be a similar discussion which is made under the Hague Rules and the Hague-Visby Rules. The general rule on this matter is regulated under Article 12¹⁵⁹ of the Hamburg Rules. According to Article 12 of the Hamburg Rules, similar to Article IV (3) of the Hague Rules and the Hague-Visby Rules, the shipper is not liable for damage or loss against the carrier if there is no fault or negligence on the part of the shipper or his servants or his agents. While the general rule for the liability of the shipper is fault-based under Article 12 of the Hamburg Rules, strict liability system for the liability of the shipper is established under Article 13 of the Hamburg Rules regarding dangerous goods.¹⁶⁰ In addition, the shipper is liable against the carrier due to the shipper’s servants’ or agents’ fault or negligence in accordance with Article 12 of the Hamburg Rules. Therefore, the shipper’s liability is strict in these situations.

¹⁵⁴ *ibid* para. 52, 283.

¹⁵⁵ *ibid* para. 54, 283.

¹⁵⁶ *ibid* para. 58, 284.

¹⁵⁷ *ibid* para. 62, 284.

¹⁵⁸ Article 13 (4) of the Hamburg Rules: “*If, in cases where the provisions of paragraph 2, subparagraph (b), of this Article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment or compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of Article 5.*”

¹⁵⁹ Article 12 of the Hamburg Rules: “*The shipper is not liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor is any servant or agent of the shipper liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.*”

¹⁶⁰ Berlingieri (n 24) 20, Fujita (n 26) 227.

4. Liability of the Shipper to the Actual Carrier

The actual carrier is defined under Article 1 (2)¹⁶¹ of the Hamburg Rules. Under Article 13 (2) (a) of the Hamburg Rules, if the shipper fails to inform the carrier or an actual carrier of the dangerous character of the goods and, if necessary, of the precautions to be taken and the carrier or actual carrier does not otherwise have knowledge of their dangerous character, the shipper is liable to the carrier or actual carrier for the loss resulting from the shipment of these goods. The actual carrier is not defined under the Hague Rules and the Hague-Visby Rules and the shipper is not liable to the actual carrier under these conventions. Therefore, this renders the shipper's liability broader in the Hamburg Rules compared to the Hague Rules and the Hague-Visby Rules. Regarding the duty to inform dangerous character of the goods, the Delegation of Norway stated that it was sufficient if the shipper informed the "*person who received the dangerous goods*" and accordingly, the shipper would fulfil his/her obligation.¹⁶² The duty was not to inform both the actual carrier and the carrier.¹⁶³ The Delegation of Austria proposed that the words "*Where the shipper hands over dangerous goods to the carrier or an actual carrier*" should be deleted.¹⁶⁴ This amendment proposal made by the Delegation of Austria was rejected¹⁶⁵ as it did not clearly state that the information should be given to the person who received the dangerous goods.¹⁶⁶ As referred in this study, according to Article 13 (2) of the Hamburg Rules, the shipper must inform the actual carrier of the dangerous character of the goods and, if necessary, of the precautions to be taken where the shipper hands over dangerous goods to the actual carrier. According to this article, if the shipper hands over dangerous goods to the carrier, then the shipper must inform the carrier of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and the carrier or actual carrier does not have knowledge of their dangerous character, then the shipper will be

¹⁶¹ Article 1 (2) of the Hamburg Rules: "*'Actual carrier' means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.*"

¹⁶² A/CONF.89/C.1/SR.19 (n 145) para. 6, 281.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*, para. 2, 280.

¹⁶⁵ *ibid.* para. 9, 281.

¹⁶⁶ *ibid.* para. 6, 281.

liable to the carrier and actual carrier in accordance with Article 13 (2) (a) of the Hamburg Rules.

C. The Rotterdam Rules

1. Obligations of the Shipper

The carriage of dangerous goods is regulated under Article 15 and Article 32 of the Rotterdam Rules. The shipper shall inform the carrier regarding dangerous nature or character of goods “*in a timely manner before they are delivered to the carrier or a performing party*” in accordance with Article 32 (a) of the Rotterdam Rules. Duty to inform is regulated under the Hague Rules, the Hague-Visby Rules and the Hamburg Rules; however, words “*in a timely manner*” are used in the Rotterdam Rules. The notice regarding dangerous nature or character of goods can be given in any form.¹⁶⁷ If the carrier or performing party knows dangerous nature or character of goods and the shipper fails to fulfil his/her duty to inform, the shipper will not be liable by proving the knowledge of the carrier or performing party regarding dangerous nature or character of goods in accordance with Article 32 (a) of the Rotterdam Rules.¹⁶⁸ As there is an express reference to the performing party under Article 32 (a) of the Rotterdam Rules, knowledge of this party will suffice.¹⁶⁹ While the duty of disclosure is owed only to the carrier¹⁷⁰, if the shipper fails to do so, knowledge of the carrier and performing party on dangerous nature or character of the goods are taken into consideration and the shipper will be liable to the carrier for loss or damage if the carrier or performing party does not otherwise know dangerous nature or character of the goods.¹⁷¹

The shipper has to mark or label dangerous goods in accordance with Article 32 (b) of the Rotterdam Rules. While the shipper has to mark or label dangerous goods “*in a suitable manner*” under Article 13 (2) of the Hamburg Rules, this duty is more specifically defined under the Rotterdam Rules and the shipper has to mark or label dangerous goods “*in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods*” under Article 32 (b) of the Rotterdam Rules. It is argued that this article puts a “*heavy burden on the shipper*” as the shipper has to consider every law regarding

¹⁶⁷ Lorenzon (n 47) para. 32-04, 92.

¹⁶⁸ *ibid* para. 32-05, 92-93.

¹⁶⁹ *ibid* para. 32-05, 93.

¹⁷⁰ Baughen (n 10) 182, fn. 54.

¹⁷¹ *ibid* 182.

dangerous goods that applies during the whole carriage.¹⁷² If the shipper fails to perform this duty, he/she will be liable to the carrier for loss or damage resulting from this failure under Article 32 (b) of the Rotterdam Rules. In the drafting proposal by the Swedish delegation, it was stated that this obligation was only applicable to the “*intended carriage*”.¹⁷³ In other words, if carrier “*suddenly decides to transport goods through another country or by another type of transport mode*”, the shipper will not be liable if the goods are not labelled in accordance with the law of this country.¹⁷⁴ Therefore, the shipper is not liable if there is a deviation from ordinary route.¹⁷⁵ However, in the drafting proposal of the Swedish delegation, it was argued that this provision does not provide a solution regarding this issue if the voyage was not agreed upon and left to carrier to decide.¹⁷⁶ Furthermore, another criticism to this article is made by considering this duty as “*burdensome*”¹⁷⁷ owing to the fact that, even if this duty is applicable to the “*intended carriage*”, if there is a shipper of a container carried by road, sea and rail, the shipper should mark goods in accordance with the rules applicable to all stages of the voyage considering “*the national law of the countries through which the container has to travel*.”¹⁷⁸ If the shipper fails to fulfil this duty, then the shipper will be liable for loss or damage resulting from this failure to the carrier and this liability is strict and unlimited.¹⁷⁹

2. Rights of the Carrier

Under Article 15 of the Rotterdam Rules, the carrier or performing party can unload, destroy or render goods harmless; however, the carrier or performing party can take these measures not only regarding dangerous goods as in the case of the Hague Rules, the Hague-Visby Rules and the

¹⁷² Stevens (n 8) para 11.87, 232.

¹⁷³ United Nations Commission on International Trade Law, Working Group III (Transport Law) Seventeenth Session, New York, 3-13 April 2006, ‘Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]- Shipper’s obligations: drafting proposal by the Swedish delegation’, A/CN.9/WG.III/WP.67, para. 28, 9 <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V06/511/18/PDF/V0651118.pdf?OpenElement>> accessed 20 January 2022.

¹⁷⁴ *ibid.*

¹⁷⁵ Stevens (n 8) para. 11.88, 232.

¹⁷⁶ A/CN.9/WG.III/WP.67 (n 173) para. 28, 9.

¹⁷⁷ Lorenzon (n 47) para. 32-06, 93.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid* para. 32-07, 93.

Hamburg Rules, but also these measures can be taken regarding goods which “*reasonably appear likely to become during the carrier’s period of responsibility an actual danger*” in accordance with Article 15 of the Rotterdam Rules. The aim of the Working Group by including these words was to include all risks.¹⁸⁰ Therefore, if there are goods that become dangerous where they do not reasonably appear likely to become so, these circumstances will not fall under the scope of this article.¹⁸¹ By the inspection of goods and the planned carriage, if “*a reasonable person*” can understand that goods “*pose a real danger*”, then these goods can be considered as goods which are “*reasonably appear likely to become an actual danger*”.¹⁸² It is also argued these words could be interpreted as “*there is objectively a real risk of danger to persons, property or the environment*”.¹⁸³ Measures regarding unloading, destroying or rendering goods harmless can be taken by the carrier or performing party if goods are or reasonably become an actual danger to “*persons, property or the environment*” under Article 15 of the Rotterdam Rules. While the Hague Rules and the Hague-Visby Rules refer to danger to the ship or other cargo under Article IV (6); the Hamburg Rules refer to danger to life and property under Article 13 (4) and later, the Rotterdam Rules make reference to danger to the “*persons, property and environment*” under Article 15 and Article 32. While Article 15 of the Rotterdam Rules emphasizes the fact that measures such as unloading, destroying or rendering goods harmless can be taken by the performing party; the shipper is not liable to the performing party for loss or damage as the shipper is only liable to the carrier under Article 32 (a) of the Rotterdam Rules.¹⁸⁴ In other words, breach of the shipper’s obligations gives rise to a liability to the carrier and not to other parties.¹⁸⁵

¹⁸⁰ United Nations Commission on International Trade Law, ‘Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)’, A/CN.9/621, para. 250, 58 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V07/837/76/PDF/V0783776.pdf?OpenElement>> accessed 20 January 2022.

¹⁸¹ Lorenzon (n 47) para 32-03, 92.

¹⁸² Tsimplis (n 17) para. 15-05, 42.

¹⁸³ *ibid.*

¹⁸⁴ Lorenzon (n 47) para. 32-10, 94, Baughen (n 10) 185.

¹⁸⁵ Baughen (n 10) 185.

3. Basis of the Liability of the Shipper

The basis of shipper's liability is regulated under Article 30¹⁸⁶ of the Rotterdam Rules. According to Article 30 (2) of the Rotterdam Rules, the shipper is not liable if the loss or damage is not attributable to the fault of shipper's or other persons' which are stated in Article 34¹⁸⁷ of the Rotterdam Rules. This article also emphasizes the existence of the fault for the shipper or other persons within the meaning of Article 34 to be liable. According to Article 34 of the Rotterdam Rules, the shipper is also liable for the acts or omissions of his/her employees, agents, subcontractors or any person to which he/she has entrusted the performance of any of his/her obligations. Article 30 of the Rotterdam Rules establishes the general principle for the basis of the liability of the shipper.¹⁸⁸ However, under Article 30 (2), it is stated that this provision does not apply to the shipper's obligations regarding dangerous cargo.¹⁸⁹ Article 32 of the Rotterdam Rules provides special liability regime for dangerous goods.¹⁹⁰ Even though the general principle is fault-based liability, there are exceptions to this rule.¹⁹¹ Article 31 (2)¹⁹² of the Rotterdam Rules establishes strict liability of the

¹⁸⁶ Article 30 of the Rotterdam Rules: “1. *The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.*

2. *Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.*

3. *When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.”*

¹⁸⁷ Article 34 of the Rotterdam Rules: “*The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.*”

¹⁸⁸ Lestos (n 9) 121.

¹⁸⁹ Lorenzon (n 47) para. 30-04, 88.

¹⁹⁰ Lestos (n 9) 121.

¹⁹¹ Stevens (n 8) para. 11.61, 227.

¹⁹² Article 31 (2) of the Rotterdam Rules: “*The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.*”

shipper.¹⁹³ Accordingly, if there is a breach of Article 31 (2) and Article 32 of the Rotterdam Rules, the shipper will be strictly liable to the carrier.¹⁹⁴ The reason for strict liability is due to “*public policy and safety, and not only the relation between shipper and carrier.*”¹⁹⁵ It was stated that the carrier would be exposed to “*enormous loss and damage if dangerous goods are loaded on to his vessel without his knowledge and consent*” and therefore, widest protection was needed to be provided to the carrier.¹⁹⁶ Regarding proper packaging of dangerous goods, the Working Group did not accept this obligation to be regulated under the shipper’s obligations with respect to dangerous goods and therefore, the shipper would be liable if he/she fails to fulfil this obligation under Article 27 (1)¹⁹⁷ of the Rotterdam Rules and accordingly, his/her liability would be a fault based liability.¹⁹⁸

4. Extent of the Liability of the Shipper

The issue on the extent of the liability of the shipper was discussed during the preparation period of the Rotterdam Rules. The Delegation of Germany argued for a limitation of the shipper’s liability as otherwise it was stated that the liability regime would be “*unbalanced to the detriment of the shipper.*”¹⁹⁹ The Observer for Sweden supported German proposal by

¹⁹³ Lorenzon (n 47) para. 31-03, 89-90.

¹⁹⁴ Stevens (n 8) para. 11.61, 227; Baughen (n 10) 185, 189. For information regarding the breach of Article 31 (1) and Article 32 of the Rotterdam Rules triggering strict liability, see Fujita (n 26) 221-225.

¹⁹⁵ Stevens (n 8) para. 11.63, 228.

¹⁹⁶ United Nations Commission on International Trade Law, Working Group III (Transport Law) Nineteenth Session, New York, 16-27 April 2007, ‘Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]- Comments of the International Chamber of Shipping (ICS), BIMCO and the International Group of P&I Clubs on the draft convention’, A/CN.9/WG.III/WP.87, 4 <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V07/815/90/PDF/V0781590.pdf?OpenElement>> accessed 20 January 2022.

¹⁹⁷ Article 27 (1) of the Rotterdam Rules: “*Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.*”

¹⁹⁸ Stevens (n 8) para. 11.89, 233.

¹⁹⁹ United Nations Commission on International Trade Law, Forty-First Session, Summary record of the 870th meeting, New York, 18 June 2008, ‘Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (continued)’, A/CN.9/SR.870, para. 26, 4 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/394/04/PDF/N0839404.pdf?OpenElement>> accessed 20 January 2022.

stating that it would be beneficial for both parties as “*it would make it easier for the shipper to insure its liability.*”²⁰⁰ The Observer for the Netherlands stated that obligations referred were “*related not only to contractual relations but also to safety and the proper performance of the transport itself.*”²⁰¹ The Delegation of France argued that the liability of the shipper concerning obligations relating to dangerous goods should not be limited.²⁰² As in the end, the Delegation of Germany stated that the intention for limitation of liability was only for contractual limitation for monetary liability but not the shipper’s “*substantive obligations*”²⁰³, there was no agreed limitation of the liability of the shipper regarding his/her obligations regarding dangerous goods. It became clear that the liability of the shipper would be unlimited in these circumstances. As under all of the mentioned international conventions, the shipper is strictly and unlimitedly²⁰⁴ liable to the carrier, it cannot be stated that the obligations of the shipper have increased dramatically under the Rotterdam Rules compared to the Hague Rules, the Hague-Visby Rules and the Hamburg Rules.²⁰⁵

5. Liability of the Shipper for Loss arising from Delay

In Article 30 (1) of the Rotterdam Rules, the basis of the shipper’s liability to the carrier is limited with the “*loss or damage sustained by the carrier*” and there is no reference to economic loss caused by delay.²⁰⁶ As the term “*delay*” is not referred in Article 30 of the Rotterdam Rules, it caused a controversy on whether “*loss caused by delay*” was covered under the Rotterdam Rules.²⁰⁷ The Working Group of the Rotterdam Rules discussed whether or not to include losses or damages arising from delay in delivery under the liability of the shipper regarding dangerous goods.²⁰⁸ It was suggested that the liability arising from delay should be limited “*as a matter of fairness*”.²⁰⁹ However, limitation on liability of the shipper

²⁰⁰ *ibid* para. 30, 4.

²⁰¹ *ibid* para. 42, 6.

²⁰² *ibid* para. 44, 6.

²⁰³ *ibid* para. 46, 6.

²⁰⁴ Guzmán (n 62) 161-162; Fujita (n 26) 227-228.

²⁰⁵ Fujita (n 26) 227-228, Berlingieri (n 24) 21, Guzmán (n 62) 156, 161-162.

²⁰⁶ Baughen (n 10) 184.

²⁰⁷ Lestos (n 9) 121-122; Günay (n 34) 232.

²⁰⁸ A/CN.9/621 (n 180) paras. 180-184, 42-45, paras. 233-237, 55-56. For information regarding the view of majority which argued for limitation of liability, if liability for delay was to be included in the Rotterdam Rules, see Stevens (n 8) para. 11.65, 228.

²⁰⁹ A/CN.9/621 (n 180) para. 233, 55.

concerning losses or damages arising from the delay could not be agreed by the Working Group. As no “*acceptable limitation*” could be decided, “*delay*” was not included in the article.²¹⁰ Accordingly, the issue will be decided by the applicable national law.²¹¹ However, according to *Stevens*, as the Rotterdam Rules do not explicitly state that the shipper is not liable for delay, “*loss or damage*” could be construed to include also the loss arising from the delay.²¹² If the loss due to delay cannot be considered within the meaning of Article 30 (1) of the Rotterdam Rules, then, whether the shipper is liable for delay will be determined in accordance with the applicable national law.²¹³ However, it is stated that the liability of the shipper arising from delay regarding dangerous goods is not covered under the Rotterdam Rules and the issue is left to the applicable national law.²¹⁴ This argument can be made regarding the drafting process of the Rotterdam Rules.²¹⁵

6. Liability of the Documentary Shipper

Regarding the liability of the shipper under the Rotterdam Rules, the liability of the documentary shipper should also be determined. In Article 1 (9)²¹⁶ of the Rotterdam Rules, the documentary shipper is defined and according to this definition, the documentary shipper is “*a person, other than the shipper, that accepts to be named as ‘shipper’ in the transport document or electronic transport record.*” The issue on whether the documentary shipper is liable from failure of the obligations regarding dangerous goods can be solved by Article 33²¹⁷ of the Rotterdam Rules. According to Article 33 (1) of the Rotterdam Rules, “*a documentary shipper*

²¹⁰ *ibid* paras. 234-237, 55-56. For this information, see also *Stevens* (n 8) para. 11.65, 228; *Baughen* (n 10) 184.

²¹¹ A/CN.9/621 (n 180) paras. 234-237, 55-56. For this information, see also *Stevens* (n 8) para. 11.65, 228.

²¹² *Stevens* (n 8) para. 11.66, 228.

²¹³ *ibid* para. 11.67, 228; A/CN.9/621 (n 180) paras. 235-236, 55; *Baughen* (n 10) 184.

²¹⁴ *Günay* (n 34) 232.

²¹⁵ For the drafting process of the Rotterdam Rules about this issue, see *Fujita* (n 26) 214-216.

²¹⁶ Article 1 (9) of the Rotterdam Rules: “*‘Documentary shipper’ means a person, other than the shipper, that accepts to be named as ‘shipper’ in the transport document or electronic transport record.*”

²¹⁷ Article 33 of the Rotterdam Rules: “*1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper’s rights and defences provided by this chapter and by chapter 13.*

2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.”

YÜHFD Cilt: XIX Sayı:2 (2022)

is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13." As it is stated that the documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to chapter 7 and entitled to the shipper's rights and defences provided by chapter and chapter 13, the documentary shipper will also be liable if there is a failure to fulfil obligations regarding dangerous goods. Therefore, duties which are owed by the shipper due to Article 32 and by the documentary shipper due to Article 33, will be exclusively to the carrier.²¹⁸ The liability of the documentary shipper is not a "substitute" for the liability of the shipper²¹⁹ and therefore, the shipper is not exempt from liability when a documentary shipper is liable.²²⁰ The shipper and documentary shipper are, however, not jointly and severally liable.²²¹

IV. CAUSATION

This chapter focuses on the causal link between the shipper breaching his/her obligations and the loss or damage. This causal link should exist for the establishment of the liability of the shipper. This chapter of the study aims to establish circumstances in which this link cannot be formed as, if it cannot be formed, the shipper will not be liable to the carrier.

As referred in this study, the shipper will be liable to the carrier if the shipper fails to inform the carrier about the goods of an inflammable, explosive or dangerous nature under Article IV (6) of the Hague Rules and the Hague-Visby Rules, dangerous character of the goods under Article 13 (2) of the Hamburg Rules and dangerous nature or character of the goods under Article 32 (a) of the Rotterdam Rules. The shipper will not be liable to the carrier if the carrier knows the nature or character of dangerous goods and gives his/her consent to this carriage under the Hague Rules and the Hague-Visby Rules. In addition to duty to inform the carrier about dangerous goods, there are also other duties of the shipper which need to be performed in order to be not to be held liable to the carrier under the Hamburg Rules and the Rotterdam Rules. Under Article 13 (2) of the Hamburg Rules, the shipper needs to inform the carrier about the

²¹⁸ Lorenzon (n 47) para. 32-10, 94.

²¹⁹ Fujita (n 26) 227.

²²⁰ *ibid.*

²²¹ Stevens (n 8) para. 11.73, 229.

precautions to be taken if necessary and also needs to mark or label these goods as dangerous in accordance with Article 13 (1) of the Hamburg Rules. The shipper shall inform the carrier regarding dangerous nature or character of goods in accordance with Article 32 (a) of the Rotterdam Rules and the shipper needs to mark or label goods as dangerous under Article 32 (b) of the Rotterdam Rules. The shipper will be liable to the carrier for loss or damage if he/she fails to fulfil these obligations.²²² While under Article IV (6) of the Hague Rules and the Hague-Visby Rules, if the shipper fails to fulfil his/her duty to inform, he/she will be liable for all damage directly or indirectly arising from the shipment of dangerous goods and under the Hamburg Rules, the shipper is liable for the loss due to this shipment; Rotterdam Rules are considered as “*more restrictive*” than these conventions²²³ by stating that the shipper will be liable to the carrier for loss or damage arising from not fulfilling his/her obligations.²²⁴ The shipper is liable for loss or damage resulting from not fulfilling his/her obligations which are regulated under Article 32 (a) and under Article 32 (b) of the Rotterdam Rules. However, under Article 13 (2) (a) of the Hamburg Rules, it is stated that the shipper is liable for the loss resulting from shipment of dangerous goods. Therefore, loss or damage from which the shipper is liable can be different under these conventions.

The shipper can also be partially or fully exempt from the liability, if the carrier acted in negligence regarding his/her duties.²²⁵ For instance, the carrier has the duty of seaworthiness under Article III (1)²²⁶ of the Hague Rules and the Hague-Visby Rules and Article 14²²⁷ of the Rotterdam Rules.

²²² *ibid* para. 11.92, 233.

²²³ *ibid* para. 11.93, 233.

²²⁴ *ibid* para. 11.92, 233.

²²⁵ Baughen (n 10) 175.

²²⁶ Article 3 (1) of the Hague Rules and Article III (1) of the Hague-Visby Rules: “*The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:*

- (a) *Make the ship seaworthy;*
- (b) *Properly man, equip and supply the ship;*
- (c) *Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.”*

²²⁷ Article 14 of the Rotterdam Rules: “*The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:*

- (a) *Make and keep the ship seaworthy;*
- (b) *Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and*

In addition, while the Hamburg Rules do not provide a specific provision regarding seaworthiness, Article 5²²⁸ of the Hamburg Rules, which is a

(c) *Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.*"

²²⁸ Article 5 of the Hamburg Rules: "1. *The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.*

2. *Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.*

3. *The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this Article.*

4. (a) *The carrier is liable*

(i) *For loss or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;*

(ii) *For such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.*

(b) *In case of fire on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in accordance with shipment practices must be held into the cause and circumstances of the fire, and a copy of the surveyor's report shall be made available on demand to the carrier and the claimant.*

5. *With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.*

6. *The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.*

7. *Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto."*

general article on the basis of the liability of the carrier, regulates the seaworthiness duty of the carrier and the broad wording of this article makes easier “*for the courts to interpret and extend the obligation of seaworthiness to new developments.*”²²⁹ To determine whether there is a breach of the seaworthiness duty, it should be considered whether this duty is an absolute duty or a due-diligence duty and in addition, the period of the duty should be regarded. Under Article III of the Hague Rules and the Hague-Visby Rules, Article 5 of the Hamburg Rules and Article 14 of the Rotterdam Rules, the carrier has to exercise due-diligence and therefore, it is not an absolute duty unlike the common law.²³⁰ Under Article III (1) of the Hague Rules and the Hague-Visby Rules, the duty covers before and at the beginning of the voyage and under Article 14 of the Rotterdam Rules, the duty is not limited to the beginning of the voyage but it continues during the voyage.²³¹ It is argued that this extension can be justified due to the need for the compliance with regulations which are concerned with safety and protection of the environment²³² and due to the improvement of the technology in communication.²³³ In addition, while the duty of seaworthiness does not require the carrier to “*exercise due diligence by inspecting and opening every container*” when goods are carried in containers,²³⁴ the carrier has the “*obligation to assess the apparent order and condition.*”²³⁵ Therefore, for the carrier to be not liable, the carrier has to prove that he/she exercised due diligence before and at the beginning of the voyage under the Hague Rules and the Hague-Visby Rules.²³⁶ Under the Rotterdam Rules, this duty extends to the continuation of the voyage²³⁷ and it was defined as “*an obligation merely to act reasonably using the skill and the care of a prudent carrier*” to render the vessel seaworthy during the

²²⁹ Delphine Aurélie Laurence Defossez, ‘Seaworthiness: The Adequacy of the Rotterdam Rules Approach’, (2015) 28 U.S.F. Maritime Law Journal 237, 243.

²³⁰ Talal Aladwani, ‘The Supply of Containers and Seaworthiness- The Rotterdam Rules Perspective’, (2011) 42 Journal of Maritime Law & Commerce 185, 199.

²³¹ Tsimplis (n 17) para. 14-01, 39.

²³² Aladwani (n 230) 201.

²³³ *ibid* 204.

²³⁴ *ibid* 192.

²³⁵ *ibid* 193.

²³⁶ M Fehmi Ülgener, ‘Obligations and Liabilities of the Carrier’ in Meltem Deniz Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the “Rotterdam Rules”* (Springer 2011) 143.

²³⁷ *ibid* 145.

voyage.²³⁸ While the issue is not expressly dealt under the Rotterdam Rules, according to a view, English law approach in which seaworthiness is an overriding obligation of the carrier may still apply in this circumstance.²³⁹ For this reason, it is argued that Article 14 of the Rotterdam Rules provides an overriding obligation and accordingly, the carrier has the obligation of seaworthiness throughout the voyage.²⁴⁰ The carrier cannot rely on indemnity if the shipper shows that carrier's negligence is the effective cause of the loss.²⁴¹ If the carrier breaches this duty when there is a carriage of dangerous goods, then the cause of the loss or damage needs to be established. If the loss or damage was at least partly caused by the negligence of the carrier, then the shipper might not be liable.²⁴²

In *The Fiona* and *Northern Shipping Co. v. Deutsche Seereederei G.m.b.H. and Others (The "Kapitan Sakharov")*²⁴³, the causation link was examined.²⁴⁴ In *The Fiona*, the loss was caused by the carrier due to the breach of Article III (1) of the Hague-Visby Rules and it was also caused by the shipper as there was a lack of information regarding dangerous characteristics of the cargo.²⁴⁵ However, as there was a breach of Article III (1) of the Hague-Visby Rules, the shipper would not be liable under Article IV (6) of the Hague-Visby Rules as the duty of seaworthiness of the carrier was an overriding obligation.²⁴⁶ In *The Kapitan Sakharov*, it was decided that the breach of Article III (1) of the Hague Rules by the carrier did not need to be the "dominant cause" of the loss; however, it was sufficient to

²³⁸ Aladwani (n 230) 205.

²³⁹ Lorenzon (n 47) para. 32-12, 94.

²⁴⁰ Baughen (n 10) 186, fn. 65.

²⁴¹ *ibid* 186.

²⁴² *ibid* 175.

²⁴³ *The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255. For information and discussion on this case regarding the extent of contribution of unseaworthiness, see Güner-Özbek (n 8) 191; Baughen (n 10) 175.

²⁴⁴ For discussion regarding these cases on this issue, see Güner-Özbek (n 8); Baughen (n 10) 175.

²⁴⁵ *The Fiona* [1993] 1 Lloyd's Rep. 257, 284. For this information, see also Güner-Özbek (n 8) 190; Baughen (n 10) 175. For summary of the facts of this case, see Girvin (n 10) 498. For discussion on this case regarding unseaworthiness as a contributory factor to the loss, see Güner-Özbek (n 8) 190-191; Baughen (n 10) 175.

²⁴⁶ *The Fiona* [1993] 1 Lloyd's Rep. 257, 286. For this information, see also Güner-Özbek (n 8) 190-191; Baughen (n 10) 175.

show that it was the “*effective cause*” of the loss.²⁴⁷ In this case, there was a breach of Article III (1) of the Hague Rules as the cargo was wrongfully stowed below deck.²⁴⁸ Therefore, the causation link between the loss or damage and the shipper’s failure to inform the nature or character of goods to the carrier could not be established in these cases due to the breach of Article III (1) of the Hague Rules and the Hague-Visby Rules by the carrier. For this reason, the carrier could not request indemnity from the shipper under Article IV (6) of the Hague Rules and Hague-Visby Rules. In other words, if the breach of the seaworthiness obligation is not the cause of the loss, the carrier can claim indemnity under Article IV (6) of the Hague Rules and the Hague-Visby Rules.²⁴⁹ For the establishment of the liability of the shipper, the only cause of the loss or damage should be the breach of the shipper’s obligations regarding dangerous goods. If the loss or damage is not completely or partly due to the shipper’s breach of his/her obligations and if the unseaworthiness is a “*necessary contributory factor to the loss*”, then the carrier cannot claim indemnity from the shipper.²⁵⁰

The shipper will be exempt from liability not only when the carrier fails to perform his/her duty of seaworthiness, but also all types of negligence of the carrier will exempt the shipper from liability.²⁵¹ The carrier has the duty of caring the cargo during the voyage under Article III (2)²⁵² of the Hague Rules and the Hague-Visby Rules.²⁵³ It is stated that a much higher degree of care in loading, stowing and caring for goods should be exercised by the carrier if he/she carries dangerous goods.²⁵⁴ However, under Article III (2) of the Hague Rules and the Hague-Visby Rules, an overriding obligation is not provided unlike Article III (1) of the Hague Rules and the Hague-Visby Rules.²⁵⁵ Article 13 (1) of the Rotterdam Rules regulates this duty of the

²⁴⁷ *The Kapitan Sakharov* (n 243) 269. For this information, see also Güner-Özbek (n 8) 191; Baughen (n 10) 175.

²⁴⁸ Baughen (n 10) 175.

²⁴⁹ Güner-Özbek (n 8) 191.

²⁵⁰ *ibid* 192.

²⁵¹ *Lestos* (n 9) 127; Baughen (n 10) 175.

²⁵² Article 3 (2) of the Hague Rules: “*Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.*” and Article III (2) of the Hague-Visby Rules: “*Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.*”

²⁵³ Güner-Özbek (n 8) 123.

²⁵⁴ *ibid*.

²⁵⁵ *ibid* 192.

carrier. In order to determine if the carrier can claim indemnity from the shipper, it is stated that there has to be a distinction between circumstances in which the carrier's failure to properly to look after goods is due to the lack of information which should be provided by the shipper regarding nature or character of these goods and circumstances in which the failure is independent from this lack of information.²⁵⁶ If the damage is due to failure of the duty of the carrier which is regulated under Article III (2) of the Hague Rules and Hague-Visby Rules, independent from the lack of information which should be provided by the shipper, then the carrier cannot claim indemnity from the shipper.²⁵⁷ However, if the carrier was not informed regarding dangerous nature or character of goods and this is the cause of his/her failure to act properly and carefully, then the carrier will not be deprived of his/her rights under Article IV (6) of the Hague Rules and Hague-Visby Rules.²⁵⁸

For the liability of the shipper regarding the shipment of dangerous goods, there has to be a causal link between the breach of the obligations by the shipper and the loss or damage. However, if the carrier breaches his/her obligations such as duty of seaworthiness or duty of caring of goods by acting negligently, then the carrier cannot claim indemnity from the shipper under rules regulating dangerous goods. Even if the breach of the obligations by the shipper under provisions regulating his/her obligations regarding the shipment of dangerous goods and the breach of obligations by the carrier by acting negligently are both causes of the loss, the carrier cannot claim indemnity under the rules regulating dangerous goods. However, regarding the duty of care of goods, if the damage is due to the carrier's breach of this obligation which is dependent on the knowledge of nature or character of these goods, the carrier can claim indemnity from the shipper under rules regulating dangerous goods.

V. CONCLUSION

Article IV (6) of The Hague Rules and the Hague-Visby Rules refers to "*goods of an inflammable, explosive or dangerous nature*", Article 13 (2) of the Hamburg Rules refers to "*dangerous character of the goods*", Article 32 of the Rotterdam Rules refers to "*goods by their nature or character*" and goods "*reasonably appear likely to become, a danger to persons, property*

²⁵⁶ *ibid.*

²⁵⁷ *ibid* 192-193.

²⁵⁸ *ibid* 192.

or the environment.” It is clear that the definition of dangerous goods is not provided under the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. While under English law, dangerous goods are interpreted broadly; it is controversial whether in the mentioned conventions, the scope of dangerous goods is broad or not. In these international conventions, there are references to dangerous “*nature*” or “*character*” of goods. If these words are interpreted broadly and accordingly, goods which cause an economic loss to the carrier by delay or detention of the vessel are considered as dangerous, then the liability of the shipper will be subject to the special rules on dangerous goods. This situation will breach the balance between the shipper and the carrier. If there is a shipment of goods which are not dangerous, then the liability of the shipper in these situations is subject to general liability provisions which impose fault-based liability system on the shipper. In addition, considering drafting history of these conventions and wordings of the provisions regarding dangerous goods; it can be argued that broad interpretation cannot be made. For this reason, broad interpretation should not be adopted when interpreting the mentioned conventions regarding dangerous goods. While the shipment of dangerous goods is not prohibited, the shipper has to fulfil his/her obligations in order to be not liable for the loss or damage. Accordingly, knowledge of the carrier regarding dangerous goods is essential for establishing whether the shipper is liable or not. The duty to mark or label goods is regulated under the Hamburg Rules and the Rotterdam Rules. The shipper has to fulfil this duty to avoid liability to the carrier. It cannot be argued that there is a significant increase regarding obligations of the shipper under the Rotterdam Rules compared to the Hague Rules, the Hague-Visby Rules and the Hamburg Rules; as under all of these conventions, the shipper is subject to strict and unlimited liability under special rules for dangerous goods. As the strict liability of the shipper is exceptional under these international conventions and the general rule for the liability of the shipper is fault-based liability, the application of articles regulating dangerous goods should only be limited to goods which are dangerous by nature or character as referred in this study. Article IV (6) of the Hague Rules and the Hague-Visby Rules, Article 13 of the Hamburg Rules and Article 15 of the Rotterdam Rules regulate rights of the carrier for circumstances in which dangerous goods are carried. In addition, even if the shipper breaches his/her obligations, if the carrier also breaches his/her obligations due to negligence, the shipper is not liable to the carrier under special rules on dangerous goods. For the liability of the shipper, there has

to be the causal link between the breach of obligations by the shipper and the loss or damage. As a result, how risks are allocated between the shipper and the carrier regarding carriage of dangerous goods by sea under the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules are examined in this study.

VI. BIBLIOGRAPHY

Books and Articles

- Aladwani T, 'The Supply of Containers and Seaworthiness- The Rotterdam Rules Perspective' (2011) 42 *Journal of Maritime Law & Commerce* 185.
- Baughen S, 'Obligations Owed by the Shipper to the Carrier' in D Rhidian Thomas (ed), *A New Convention for the Carriage of Goods by Sea- The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Lawtext Publishing Limited 2009).
- Cavanah JZ, 'Dangerous Goods Liability in the Age of Containerization- Warning: This Comment may (or may not) Self-Destruct' (2012) 37 *Tulane Maritime Law Journal* 147.
- Defossez DAL, 'Seaworthiness: The Adequacy of the Rotterdam Rules Approach' (2015) 28 *U.S.F. Maritime Law Journal* 237.
- DuClos J, 'Liability for Losses Caused by Inherently Dangerous Goods Shipped by Sea' (2007) 20 *U.S.F. Maritime Law Journal* 61.
- Fujita T, 'Obligations and Liabilities of the Shipper' in Meltem Deniz Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the "Rotterdam Rules"* (Springer 2011).
- Girvin SD, 'Shipper's Liability for the Carriage of Dangerous Goods by Sea' (1996) *Lloyd's Maritime and Commercial Law Quarterly* 487.
- Güner-Özbek MD, *The Carriage of Dangerous Goods by Sea* (Springer 2008).
- Günay MB, *Hazırlık Çalışmalarının Işığında Lahey/Visby Kuralları (Rotterdam Kuralları ile Karşılaştırmalı Olarak)* (Yetkin Yayınları 2013).
- Kara H, *Rotterdam Kuralları'na göre Taşıyanın Zıya, Hasar veya Gecikmeden Kaynaklanan Zararlardan Sorumluluğu* (Legal Yayıncılık 2018).

- Lestos A, ‘Do English Law, Hague-Visby Rules and Rotterdam Rules Provides Adequate Legal Frameworks regarding the Carriage of Dangerous Goods’ (2014) 2 Bristol Law Review 107.
- Lorenzon F, ‘Obligations of the Shipper to the Carrier’ in Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis, *The Rotterdam Rules: A Practical Annotation* (Informa 2009).
- Nikaki T, ‘International Recent Developments: United Kingdom’ (2012) 36 Tulane Maritime Law Journal 601.
- Roark H, ‘Explosion on the High Seas! The Second Circuit Promotes International Uniformity with Strict Liability for the Shipment of Dangerous Goods: *Senator v. Sunway*’, (2003) 33 Southwestern University Law Review 139.
- Rose FD, ‘Cargo Risks: “Dangerous” Goods’ (1996) 55 Cambridge Law Journal 601.
- Rose FD, ‘Liability for Dangerous Goods’ (1998) Lloyd’s Maritime and Commercial Law Quarterly 480.
- Stevens F, ‘Duties of Shippers and Dangerous Cargoes’ in D Rhidian Thomas (ed), *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd’s List 2010).
- Tsimplis M, ‘Obligations of the Carrier’ in Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis, *The Rotterdam Rules: A Practical Annotation* (Informa 2009).
- Ülgener MF, ‘Obligations and Liabilities of the Carrier’ in Meltem Deniz Güner-Özbek (ed), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the “Rotterdam Rules”* (Springer 2011).
- Wilson JF, *Carriage of Goods by Sea* (7th edn, Longman 2010).

Online Resources

- Berlingieri F, ‘A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ paper delivered at the General Assembly of the AMD, Marrakesh, 5-6 November 2009 <<https://comitemaritime.org/wp-content/uploads/2018/05/Comparative-analysis-of-the-Hague-Visby-Rules-the-Hamburg-Rules-and-the-Rotterdam-Rules-1.pdf>> accessed 25 December 2021.
- Guzmán JV, ‘The Rotterdam Rules: Shipper’s Obligations and Liability’ CMI Yearbook 2010 <<https://comitemaritime.org/wp-content/uploads/2018/06/Yearbook-2010.pdf>> accessed 16 January 2022.

International Convention for the Prevention of Pollution from Ships (73/78)
<<https://www.imo.org/en/KnowledgeCentre/ConferencesMeetings/Pages/Marpol.aspx>> accessed 16 January 2022,
<<https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/Documents/MARPOL%201973%20-%20Final%20Act%20and%20Convention.pdf>> accessed 16 January 2022.

International Convention for the Safety of Life at Sea (1974)
<<https://treaties.un.org/doc/Publication/UNTS/Volume%201184/volume-1184-I-18961-English.pdf>> accessed 16 January 2022.

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, and Protocol of Signature (1924)
<<https://www.jus.uio.no/english/services/library/treaties/07/7-04/hague-rules.xml>> accessed 16 January 2022.

International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996) <https://www.hnsconvention.org/wp-content/uploads/2019/04/1996-HNS-Convention_e.pdf> accessed 16 January 2022.

Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973
<<https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/Documents/MARPOL%20Protocol%20of%201978.pdf>> accessed 16 January 2022.

Protocol of 1978 relating to the International Convention for the Safety of Life at Sea, 1974 and subsequent amendments to the International Convention for the Safety of Life at Sea (1974)
<[https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/FocusOnIMOArchives/Focus%20on%20IMO%20-%20SOLAS,%20the%20International%20Convention%20for%20the%20Safety,%20of%20Life%20at%20Sea,%201974%20\(October%201998\).pdf](https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/ConferencesMeetings/FocusOnIMOArchives/Focus%20on%20IMO%20-%20SOLAS,%20the%20International%20Convention%20for%20the%20Safety,%20of%20Life%20at%20Sea,%201974%20(October%201998).pdf)> accessed 24 January 2022.

Protocol of 2010 to the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996
<https://www.hnsconvention.org/wp-content/uploads/2019/04/2010-HNS-Protocol_e.pdf> accessed 16 January 2022.

- Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1968) <<https://jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html>> accessed 16 January 2022.
- United Nations Commission on International Trade Law, Forty-First Session, Summary record of the 870th meeting, New York, 18 June 2008, ‘Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*)’, A/CN.9/SR.870 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/394/04/PDF/N0839404.pdf?OpenElement>> accessed 20 January 2022.
- United Nations Commission on International Trade Law, ‘Report of Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)’, A/CN.9/621 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V07/837/76/PDF/V0783776.pdf?OpenElement>> accessed 20 January 2022.
- United Nations Commission on International Trade Law, Working Group III (Transport Law) Nineteenth Session, New York, 16-27 April 2007, ‘Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]- Comments of the International Chamber of Shipping (ICS), BIMCO and the International Group of P&I Clubs on the draft convention’, A/CN.9/WG.III/WP.87 <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V07/815/90/PDF/V0781590.pdf?OpenElement>> accessed 20 January 2022.
- United Nations Commission on International Trade Law, Working Group III (Transport Law) Seventeenth Session, New York, 3-13 April 2006, ‘Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]-Shipper’s obligations: drafting proposal by the Swedish delegation’, A/CN.9/WG.III/WP.67 <<https://documents-dds-ny.un.org/doc/UNDOC/LTD/V06/511/18/PDF/V0651118.pdf?OpenElement>> accessed 20 January 2022.
- United Nations Conference on the Carriage of Goods by Sea, A/CONF.89/14, Hamburg, 6-31 March 1978, ‘Official Records: *Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees*’, 18th meeting, 17 March 1978, A/CONF.89/C.1/SR.18

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_conf_89-14_.pdf accessed 20 January 2022.

United Nations Conference on the Carriage of Goods by Sea, A/CONF.89/14, Hamburg, 6-31 March 1978, 'Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees', 19th meeting, 20 March 1978, A/CONF.89/C.1/SR.19

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_conf_89-14_.pdf accessed 20 January 2022.

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008)

https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status accessed 26 November 2021,

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rotterdam-rules-e.pdf> accessed 16 January 2022.

United Nations Convention on the Carriage of Goods by Sea (1978)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/hamburg_rules_e.pdf accessed 16 January 2022.

Yearbook of the United Nations Commission on International Trade Law, 1975, Volume VI, A/CN.9/105, 'Report of the Working Group on International Legislation on Shipping on the work of its eighth session' (New York, 10-21 February 1975) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/502/13/PDF/NL750213.pdf?OpenElement> accessed 20 January 2022.

Yearbook of the United Nations Commission on International Trade Law, 1976, Volume VII, A/CN.9/109, 'Note by the Secretary-General: comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/603/55/PDF/NL760355.pdf?OpenElement> accessed 20 January 2022.

Yearbook of the United Nations Commission on International Trade Law, 1976, Volume VII, A/CN.9/110, 'Report of the Secretary General: analysis of comments by Governments and international organizations on the draft Convention on the Carriage of Goods by Sea' <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/603/58/PDF/NL760358.pdf?OpenElement> accessed 20 January 2022.

Table of Cases

Brass v. Maitland (1856) 6 E. & B. 470.

Mitchell Cotts & Co v. Steel Brothers & Co Ltd [1916] 2 K.B. 610.

Senator Linie GmbH & Co KG v. Sunway Line, Inc. 291 F 3d 145, (2nd Cir. 2002).

Serrano v US Lines Co [1965] AMC 1038 (SDNY 1965).

The Athanasia Comminos and Georges Chr. Lemos [1990] 1 Lloyd's Rep. 277.

The Darya Radhe [2009] 2 Lloyd's Rep. 175.

The Fiona [1994] 2 Lloyd's Rep. 506 (CA); *aff'd* [1993] 1 Lloyd's Rep. 257.

The Giannis NK [1998] 1 Lloyd's Rep. 337.

The Kapitan Sakharov [2000] 2 Lloyd's Rep. 255.

The Stylianos Restis [1974] AMC 2343 (SDNY 1972).