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International Carriage of Goods Contracts Defeated by Coronavirus: An Attempt to Identify Carrier's Liability through Multinational Carriage of Goods Conventions



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Abstract

Coronavirus (Covid-19), emerged not only as a health, social and commercial crisis, but also as a transport crisis. The initial reminiscence of the coronavirus chaos on the transport industry may have been the memory of people stranded on the Diamond Princess cruise ship when the vessel was quarantined for days. The Diamond Princess incident happened to be a bitter memory of coronavirus's influence on passenger transport known by the whole world. On the other hand, the crisis freight transport industry experienced went rather behind closed doors. The decline in production was the main factor that led to the crisis in the international transportation market. The global measures taken to stop the spread of the virus resulted in decrease of production rates. In addition, certain animal species and food products were banned from export and import. The decrease in production and the export and import restrictions on products led to a decrease in the global movement of goods. Direct measures implemented over international freight transport also added to the already existing complexities. The closure of ports and state borders, the cessation of railway and airline activities negatively affected the conventional operation of transport vehicles. Labor restrictions and crew quarantine measures created delays in transportation processes. All in all, the measures related to Covid-19 had a direct, negative outcome for international carriage of goods contracts between shippers and carriers, which mostly resulted in delay or impossibility of delivery of goods. This article analyzes the precautionary measures taken by states in the course of the pandemic from the view of contracts of carriage of goods. Carrier's liability will be set forth by virtue of the uniform law rules set up by multinational carriage of goods conventions.

Keywords

COVID-19 · Coronavirus · Transport · Carriage of goods · Conventions



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Introduction

The coronavirus (Covid-19) pandemic marked a period in which unprecedented measures were taken worldwide. Governments imposed numerous restrictions affecting all aspects of life to control the spread of the infection. The transportation market had also experienced disruptions. However, even in the utmost critical times, special attention has been devoted, globally, to the circulation of the supply chain. Keeping the ports open for cargo shipments, maintaining the flow of customs services, and allowing transport vehicles and ships to continue their commercial activities was a top priority.¹

Regardless of efforts to keep the flow of trade, the international transportation industry was severely affected.² The downturn in production was the most prominent factor leading to this turmoil. Governments imposed restrictions ranging from temporary closures of workplaces to staff reductions.³ These precautionary measures resulted in reduced production of goods. Subsequently, export restrictions were imposed to meet the primary needs of the domestic market, especially in the area of medical supplies and equipment.⁴ As the need for these supplies was very critical at the beginning of the pandemic.⁵

Trade restrictions also impacted the container and liner transport.⁶ Limited production meant that the transportation crisis had to be mitigated by consolidating cargo in containers and operating fewer vessels to achieve full capacity.⁷ At the same time, the imbalance of economic shutdowns in all over the world led to instability in container flows, with some terminals overflowing with containers and others experiencing shortages due to containers not returning to their point of origin.⁸ All in all, commercial restrictions have caused a decline in international freight rates. Also, at certain times, supply chains operated at a more domestic level casting a shadow over international freight transportation.

In addition to the decline in production, the movement of goods was also weakened by certain quarantine restrictions directly related to the international carriage of goods. For example, a number of animal and food species were banned from international trade.⁹ Also, the conditions of transportation of certain goods,

¹See 'G20 Trade and Investment Ministerial Statement' (G20 Information Centre, 30 March 2020) <http://www.g20.utoronto.ca/2020/2020-g20-trade-0330.html> Date of Access 1 October 2024.

²For an analysis of possible losses of transport volumes please see 'Joint Statement on the Contribution of International Trade and Supply Chains to a Sustainable Socio-Economic Recovery in Covid-19 Times by UNCTAD/IMO/UNECA/UNECE/UNCLAC/UNESCAP/UNESCWA/UNCTAD' (UNCTAD, 17 September 2020) https://unctad.org/system/files/information-document/IMO-UNCTAD-2020-statement_en.pdf Date of Access 10 October 2024.

³For details see 'Invoking Force Majeure in the Covid-19 Crisis: Some Practical Tips, FIATA Beyond COVID-19' (FIATA, 30 March 2020), <https://fiata.com/beyond-covid-19/practical-resources/fiata-documents.html> Date of Access 10 October 2024.

⁴Alan O Sykes, 'Short Supply Conditions and the Law of International Trade: Economic Lessons from the Pandemic' (2020) 114(4) Am J Int L 647, 647 ff and also see in general 'Export Prohibitions and Restrictions Information Note' (World Trade Organization, 23 April 2020), https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf Date of Access 10 October 2024.

⁵See 'Standards, Regulations and Covid-19-What Actions Taken by WTO Members?' (World Trade Organization, 4 December 2020), https://www.wto.org/english/tratop_e/covid19_e/standards_report_e.pdf Date of Access 10 October 2024 and also see WTO Information Note on Export Prohibitions and Restrictions, in footnote 4.

⁶For the effects of Covid-19 pandemic to the container transport industry see Peter Sand, 'Container Shipping Industry Hard Hit by US Lockdown, BIMCO News and Trends' (BIMCO, 12 June 2020), https://www.bimco.org/news/market_analysis/2020/20200611_container_shipping_industry_hard_hit_by_us_lockdown Date of Access 16 May 2021. Also see 'Container Imbalances and Covid-19: Freight Forwarders' Role in Finding Solutions to the Problems of Today', FIATA Beyond COVID-19 (FIATA, 29 April 2020), <https://fiata.com/beyond-covid-19/cargo/sea-freight.html> Date of Access 16 May 2021.

⁷See the 'UNCTAD Review of Maritime Transport 2020' (UNCTAD), 12 https://unctad.org/system/files/official-document/rmt2020_en.pdf Date of Access 10 October 2024.

⁸For a chart of changes of container volume in different regions of the world see 'Covid-19 Transport Brief: Global Container Shipping and the Coronavirus Crisis', FIATA Beyond COVID-19 (FIATA, 11 May 2020), <https://fiata.com/beyond-covid-19/practical-resources/latest-developments.html> Date of Access 20 May 2021.

⁹See Export Prohibitions and Restrictions Information Note, in footnote 4, 6 ff.

placement of containers containing such goods were subjected to hygiene and disinfection regulations.¹⁰

The conventional operation of transport vehicles was also affected by the closure of certain ports, borders¹¹ and cessation of railway activities. The impact of such restrictions on passenger transport was more visible to the public.¹² However, the suspension of passenger transportation also frustrated the cargo transportation on passenger aircrafts.¹³ Therefore, the industry shifted to loading cargo only to cargo aircrafts or opting for other transport modalities.¹⁴

Labor restrictions and quarantine measures related to crew also hindered and caused delay in the transportation processes. Generally speaking, damage from delay in perishable cargo or in food products usually ends up being a major challenge between the parties to the carriage of goods contract. During the Covid-19 pandemic there was an uncontrollable problem with cargo leftover in ports and terminals due to delays.¹⁵ Even if the cargo arrived on time, delay in the arrival of documents of title, such as the bill of lading, caused disruptions in the delivery process of the freight.¹⁶

All in all, this wide range of restrictions has challenged the conditions of carriage and caused hardships in the performance of carriage of goods contracts. It is estimated that a large number of legal issues related to delay or impossibility of delivery of freight will occupy courts and arbitration tribunals for a long time to come. For this reason, this article analyzes the transport law related measures implemented to contain the Covid-19 virus to determine their significance and effects in international carriage of goods contracts.

In national substantive law, "*force majeure*", "impossibility of performance" and "restitution of claims" are extensively discussed for the coronavirus effect on all types of contracts including the contracts for the carriage of goods.¹⁷ However, in this article our aim is limited to the discussions of the implications of the Covid-19 measures on the carrier-consignor relations within the terms of uniform law rules established by multinational carriage of goods conventions, which are in force today and which are likely to be in force in the future. The article is estimated to be a step, an indicator of potential problems that could arise with the coronavirus related governmental measures. It will be aimed to unravel conflicts related to carrier's liability in transport contracts.

¹⁰For examples of air carriage see Roberto Cassar, 'Evolution or Devolution: Aviation Law and Practice After Covid-19' (2020) 45 (Special Issue) Air & Space L 3, 8.

¹¹See 'Covid-19-Cargo Entry Point' (*Logistic Clusters*, 30 March 2020), https://logcluster.org/sites/default/files/logistics_cluster_covid-19_cargo_entry_points_updates_200330.pdf Date of Access 20 May 2021 and for the updated status of border crossing activity due to Covid-19 see Observatory on Border Crossing Status due to COVID-19 Home, <https://wiki.unece.org/display/CTRBSBC/Observatory+on+Border+Crossings+Status+due+to+COVID-19+Home> Date of Access 23 October 2021.

¹²Please see IATA Covid-19 Government Public Health Mitigation Measures Dashboard, <https://www.iata.org/en/programs/covid-19-resources-guidelines/covid-gov-mitigation/> Date of Access 20 April 2021 and Covid-19 Dashboard on State of Airport Restrictions, <https://www.iata.org/en/programs/ops-infra/covid-19-ais-restrictions/> Date of Access 20 April 2021. Also see ICAO Global Covid-19 Airport Status, <https://www.icao.int/safety/Pages/COVID-19-Airport-Status.aspx> Date of Access 25 April 2021 for further details on passenger and crew related restrictions. For a detailed research on national aviation law responses during Covid-19 pandemic see Benjamyn I. Scott and others, 'National Aviation Law Responses to Covid-19' (2020) 45 (Special Issue) Air & Space L 145, 195-272.

¹³See 'The Challenge of Handling Airfreight Capacities in Covid-19 and Beyond', FIATA Beyond COVID-19 (*FIATA*, 25 May 2020), <https://fiata.com/beyond-covid-19/cargo/air-freight.html> Date of Access 7 May 2021. For updated status of the application of air cargo restrictions of states and airlines see 'COVID-19-Air Cargo Operations' (*IATA*), <https://tact.iata.org/covid-19/country> Date of Access 10 October 2024.

¹⁴For industry strategy shifts on air cargo transport during the coronavirus pandemic see 'Action Cargo: Covid-19' (*IATA*) <https://www.iata.org/en/programs/cargo/> Date of Access 7 May 2021.

¹⁵See 'Maintaining the Flow of Goods is Essential Work in the Battle Against Covid-19', World Shipping Council Industry Issues, Corona Virus COVID-19 (*World Shipping Council*) <https://www.worldshipping.org/industry-issues/coronavirus-covid19/maintaining-flow-of-goods-covid-19> Date of Access 9 May 2021.

¹⁶'Coronavirus: Club Cover and Contracts of Carriage' 3 (*The Swedish Club*, 30 April 2020), https://www.swedishclub.com/media_upload/files/Corona%20virus%20COVID%2019/Coronavirus%20Cover%20and%20Contracts%20of%20Carriage%20Scenarios%20TSC.pdf Date of Access 10 October 2024.

¹⁷Andrew A Schwartz, 'Contracts and Covid-19' (2020) 73 Stan L Rev Online 48, 48 ff; Şahin Akıncı, 'Covid-19'un Borç ilişkilerine ve Bazı Borçlar Hukuku Sözleşmelerine Etkisi' (2020), 19(38) İstanbul Tic Üni Sos Bil Derg 62, 63 ff; Özlem Acar-Ünal, 'Covid-19 Virüsünün Sözleşmelere Etkisinin TBK MD. 138 Hükmü Çerçevesinde Değerlendirilmesi' in Yusuf Çalışkan and Yeliz Bozkurt Gümrükçüoğlu and Others (eds), *Koronavirüs Döneminde Güncel Hukuki Meseleler Sempozyumu Bildiri Tam Metin Kitabı* (İbn Haldun Üniversitesi Yayınları, İstanbul 2020), 285 ff.



I. The Meaning of Coronavirus Restrictions Related to International Carriage of Goods in A Private Law Context

Historically, states have occasionally imposed mandatory public health regulations. The Coronavirus pandemic is not the first pandemic that has ever threatened the world, and it is unlikely to be the last, according to experts.¹⁸ However, export-import bans, market circulation regulations, quarantine restrictions, and government interference in business have more significant transboundary effects in today's commercially interconnected world than ever.

To facilitate the flow of crossborder trade during the Coronavirus pandemic, a group of international organizations called on the international community to standardize measures and take cooperative action to protect public health.¹⁹ However, states tend to implement their own immediate regulations by issuing governmental measures in times of urgency such as the coronavirus crisis.²⁰ In a broad perspective, the measures adopted during this period, whether or not they are related to public health issues, are a reflection of the protection and safeguarding interests of the social policies of states.²¹ Governments seek to organize social life and protect public health by restricting, interfering with, and consenting to the establishment of specific private relationships.²² From the aspect of private international law, the result of such regulatory functions is categorized as "overriding mandatory rules", also known as "international mandatory rules" in some jurisdictions.²³ Their "overriding nature" and their inescapable, imperative character make them applicable in all circumstances and relationships within their scope.

Most states enact rules that claim applicability within the borders of the enacting state. The rules are enforced to all transactions, acts and relationships within the scope of the rule. However, some rules are considered to apply to relations outside the boundaries of the rule-making state.²⁴ In fact, international transport relations are predicted to be strongly influenced by such mandatory rules.

In giving effect to such rules, state courts take a mixed view, unless the rules belong to the *forum's* legal system. Also, international carriage of goods is exhaustively codified by multinational conventions. The supremacy of international conventions requires that their articles be invoked first if the dispute in question falls within the context of a convention.

¹⁸Victoria Y Fan and Dean T Jamison and Lawrence H Summers, 'Pandemic Risk: How Large Are the Expected Losses?' (2018) 96 Bull World Health Organ 129, 129-134; Shaena Montanari, 'Epidemiologists have been warning of a coronavirus outbreak for years and say that another pandemic will happen again' (*Business Insider*, 25 March 2020), <https://www.businessinsider.com/epidemiologists-on-chances-of-future-coronavirus-outbreak-2020-3> Date of Access 10 October 2024. Also, for the explanations of past experiences see Jason Marisam, 'Local Governance and Pandemics: Lessons from the 1918 Flu' (2008) 85(3) U Det Mercy L Rev 347, 347 ff.

¹⁹'Joint Statement on the Contribution of International Trade and Supply Chains to a Sustainable Socio-Economic Recovery in Covid-19 Times', in footnote 2, at 3.

²⁰It must be noted that in the "General Agreement on Tariffs and Trade 1994" (hereinafter "GATT") of the World Trade Organization (WTO), Article 6 puts forward an obligation not to impose export bans unless they opt to be temporary and essential to prevent shortages of food and basic products. For GATT see "General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 Apr 1994), Marrakesh Agreement Establishing the World Trade Organization", Annex 1A, 1867 UNTS 187, 33 ILM 1153.

²¹Axel Flessner and Michael Wilderspin, 'Overriding Mandatory Provisions' in Jürgen Basedow and Giesela Rühl and Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law I* (Edward Elgar Publishing, Cheltenham/Northampton 2017), 1330-1; Belkis Vural-Çelenk, *Application of Third Country Overriding Mandatory Rules-Analytical Comparison of Swiss, Turkish and EU Law* (Schulthess, Zurich 2018) , 48 (181); Andrea Bonomi, *Le Norme Imperative nel Diritto Internazionale Privato* (Schulthess, Zurich 1998), (Imperative), 165 ff; Andrea Bonomi, 'Article 9: Overriding Mandatory Provisions' in Ulrich Magnus & Peter Mankowski (eds), *European Commentaries on Private International Law II (ECPIL)*, (ECPIL), (Otto Schmidt, Cologne 2017), 616 ff; Mustafa Erkan, 'MÖHUK Madde 31 Bağlamında Türk Hukukunda Doğrudan Uygulanan Kurallara Bakış' (2011) 15(2) Gazi Uni Hukuk Fak Derg 81, 83-4.

²²Vural-Çelenk, 48 (181).

²³Bonomi, (ECPIL), 620.

²⁴Vural-Çelenk, 63 (225).



Most of the multiparty carriage of goods conventions used to resolve disputes today were signed after World War II. During that time, the world experienced epidemics of certain diseases, but there weren't many examples of a worldwide public health problem as critical as the Spanish flu of 1918. As a result, these multinational conventions do not contain "all-inclusive" precautions and exclusions for epidemics or pandemics, nor do they provide a framework for the extent to which government action will be recognized and given effect. However, we expect that when these conventions are updated in the near future, they will include detailed clauses related to pandemics or public health issues.

Our article evaluates coronavirus-related measures based on carrier liability. First, because we estimate that it will be an issue to be discussed before the courts in many states. Secondly, the few provisions on governmental orders found in the current conventions on the carriage of goods revolve around carrier's liability. Finally, these conventions were primarily aimed at establishing uniform rules towards the carrier's liability. Yet, all the aspects of a transport contract are not covered in the rules. There might always be a need to resort to conflict of laws response of national laws. Although it would have been interesting to touch upon this subject as well, it will remain outside the scope of this article for further discussion.

II. Reactions of The Multinational Conventions Related to Carriage of Goods Towards Covid-19 Restrictions on Transport

A. Carriage of Goods by Air

The temporary curtailment of passenger travel was a major challenge that Covid-19 posed to the transportation of air cargo. Significant measures were taken worldwide to limit passenger travel, leaving almost the entire fleet of airlines on the ground.²⁵ Conventional, day-to-day air cargo operations include transporting a significant amount of air cargo on passenger flights for cost reasons.²⁶ Therefore, the suspension of passenger traffic has shifted air cargo management from the top to the bottom.

In addition to the temporary suspension of passenger flights, some countries have taken dramatic precautions, such as closing airports, borders, or even airspace, creating a turbulent effect on air travel. Crew-related restrictions were also of paramount importance. Although less significant for air cargo, quarantine measures imposed on flight crews disrupted the logistical processes. The necessity of planning new routes, overflow of cargoes in terminals and warehouses, lack of available aircraft and personnel to manage all the accumulated cargoes along with the increase in market prices ended up in impossibility and hardship in performance of contracts for transportation of cargoes by air.

In order to determine the significance of state intervention in aviation law, it is necessary to evaluate the legal framework of the "Convention on International Civil Aviation" ("Chicago Convention")²⁷ of December 7, 1944. The Chicago Convention, at Article 14, deals with measures taken by States to prevent the spread of disease.²⁸ The authority and obligation of States to take effective steps to control infectious diseases²⁹

²⁵ICAO estimated an average of %59-%60 fall in air passenger travel volume in 2020 compared to 2019. See 'Effects of Novel Coronavirus (Covid-19) on Civil Aviation: Economic Impact Analysis, ICAO Economic Development' (ICAO, 30 December 2020), https://www.icao.int/sustainability/Documents/COVID-19/ICAO_Coronavirus_Econ_Impact.pdf Date of Access 10 October 2024. Also see, 'How Covid-19 is Changing the World: A Statistical Perspective' 18, "Committee for the Coordination of Statistical Activities" (World Trade Organization, May 2020) https://www.wto.org/english/tratop_e/covid19_e/ccsa_publication_e.pdf Date of Access 10 October 2024.

²⁶See 'The Challenge of Handling Airfreight Capacities in Covid-19 and Beyond' report on footnote 13.

²⁷See "International Civil Aviation Organization (ICAO) Convention on Civil Aviation" (hereinafter "Chicago Convention") (Chicago, 7 Dec 1944), 15 UNTS 295.

²⁸Article 14 states "Each contracting State agrees to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the contracting States shall from time to time decide to designate, and to that end contracting States will keep in close consultation with the agencies concerned with international regulations



that may be spread by air transportation is included in this article. Also, through the provision of Article 89, states reserve their rights to act freely in the event of a declaration of a state of emergency, which is what many states have done so far to control the Covid-19. In short, the articles of the Chicago Convention provide a legitimate ground for the air-related responses of the governmental measures to the Covid-19 chaos. However, it must also be stated that the precautions and their enforcement conditions are not defined in the Convention and they are all contingent upon the will of the individual contracting states.³⁰

To assess the carrier's liability, "Unification of Certain Rules for International Carriage by Air" (Montreal Convention) must be taken into account.³¹ Since not all States have signed the Montreal Convention, the liability provisions of the amended "Convention for the Unification of Certain Rules Relating to International Carriage by Air" ("Warsaw Convention")³² are also relevant. Articles from both Conventions are referred to in the sub-paragraphs. Provisions related to governmental measures taken during the pandemic are drafted in the same way. Therefore, only the Montreal Convention will be mentioned in a way that also represents the Warsaw Convention, and the differences will be noted where necessary.

The Montreal Convention applies to "*all international carriage of persons, baggage or cargo performed by aircraft for reward*" as put forward in Article 1. For an air carriage to be international, the agreed place of departure and destination must be located in two Contracting States. If only one of them is found in a Contracting State, then parties must have agreed on a mid-way stopping point in another Contracting State.³³

Article 18 establishes the primary principle of the carrier's liability for damage to cargo.³⁴ The carrier is liable if "*the event which caused the damage so sustained took place during the carriage by air*". The literal meaning of damage occurring during transportation by air may lead to confusion. However, Article 18/3 clarifies that the expression "*during the carriage by air*" stands for the time period when the air carrier holds the cargo in its charge. But the fact of holding the cargo in its charge is not crystal clear by this expression.

relating to sanitary measures applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the contracting States may be parties." Similar articles are present for issues relating rather to security or safety of a nation in Article 9(b) and Article 35(b). However, in a period of emergency as stated in Article 9(b), although the article does not specify the conditions of emergency, a State may restrict or prohibit flying over a part or whole of its territory. The said article formalizes the measures of closure of air space adopted by certain states. As in Article 35(b), for reasons of public order, carriage of cargo may be restricted by States as long as the conditions stated in the article are met.

²⁹Mendes de Leon also declares Covid-19 as included in the type of diseases referred to in Article 14. See Pablo Mendes de Leon, 'National Reflexes Following the Covid-19 Outbreak: Is Sovereignty Back in the Air?' (2020), 45(Special Issue) Air & Space L 17, 25.

³⁰Cassar, 10; Mendes de Leon, 26.

³¹For International Civil Aviation Organization (ICAO) Convention for the Unification of Certain Rules for International Carriage by Air (hereinafter Montreal Convention) (Montreal, 28 May 1999), 2242 UNTS 309.

³²"ICAO Convention for the Unification of certain Rules relating to International Carriage by Air" (hereinafter as "Warsaw Convention" referring to the Warsaw system created with all its amendments). For the Warsaw Convention and all its amendments in a chronological order see "Convention for the Unification of Certain Rules Relating to International Carriage by Air", (Warsaw, 12 Oct 1929), 49 Stat 3000, 137 LNTS 11; "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air" signed at Warsaw on 12 October 1929 (The Hague, 28 Sept 1955), ICAO Doc 7632; "Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier" (Guadalajara, 18 Sept 1961), ICAO Doc 8181; "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw" on 12 October 1929 as amended by the "Protocol Done at the Hague on 28 September 1955" (Guatemala City, 8 Mar 1971), 10 ILM 613 (hereinafter the Guatemala City Protocol); "Additional Protocol No 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw" on 12 October 1929 (Montreal, 25 Sept 1975), ICAO Doc 9145; "Additional Protocol No 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955" (Montreal, 25 Sept 1975), ICAO Doc 9146; "Additional Protocol No 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971" (Montreal, 25 Sept 1975), ICAO Doc 9147; "Montreal Protocol No 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955" (Montreal, 25 Sept 1975), ICAO Doc 9148 (hereinafter the Montreal Protocol No 4).

³³For further clarifications of the applicability see George N Tompkins, *Liability Rules Applicable to International Air Transportation as Developed by the Courts in the United States* (Wolters Kluwer, Alphen aan den Rijn 2010), 75 ff; Paul Stephen Dempsey and Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (McGill University Centre for Research in Air & Space Law, Montreal 2005), 66 ff; Isabella H Ph Diederiks-Verschoor and Pablo Mendes de Leon, *An Introduction to Air Law*, (Wolters Kluwer, Alphen aan den Rijn 2012), 220-1; Özdemir T, *Uluslararası Eşya Taşıma Hukuku (Ziya ve/veya Hasar Sorumluluğu)* (Vedat Kitapçılık İstanbul 2006), 36-37.

³⁴Note that the Article 18 of the Warsaw Convention contains the same provision with slightly different wording.



The fourth paragraph further clarifies the limits of liability. Thus the carrier's liability extends only to the operations performed within the boundaries of an airport, if the activity is performed to fulfil the duties of loading, delivery or transshipment for a contract of carriage by air.³⁵ In such a situation, the event causing the damage or loss is considered to be a result of the carriage by air. However, the air carrier may be held off from liability, if the contrary is proved.

Unlike the transportation of passengers, the problems associated with Covid-19 are less likely to occur while the aircraft is actually in the air. Since air cargo flights operate with few personnel and it is known that the infection is usually transmitted from one host to another by airborne particles, it is unlikely that the event leading to damage would actually occur mid-flight. In a very unlikely hypothetical situation, an ill flight attendant supervising the cargo on a cargo flight could spread the virus on certain cargo packages, which would then be transmitted to others who touched the surfaces. However, this is an overthought idea that not even members of the medical community would find meaningful.

Logically, it could be argued that Covid-19 related issues are more likely to arise in ground operations, customs procedures or, to put it simply, "*operations for loading, delivery and transshipment*" as in the wording of the Article 18, and are likely to be related not to the disease itself, but to the governmental restrictive measures (e.g. quarantines, crew-related restrictions, export/import bans of certain products, additional requirements regarding the method of carriage of air cargo). The Warsaw Convention contains a special provision in Article 18/3 (d), which has the same wording as the principle in Article 18/2 (d) of the Montreal Convention, for such measures affecting the conditions of carriage of cargo.³⁶ According to the Article, if the damage or loss of the cargo is proved to be the result of "*an act of public authority carried out in connection with the entry, exit or transit of the cargo*", the carrier would not be liable.

Since the Covid-19 virus began its global spread, nations have followed a waxing and waning mode of enforcing of restrictions in all aspects of life. As the prevalence of the infection in the community increased, stricter measures were taken. As the spread of the infection declined, measures had been softened. In air cargo transportation, the development of the restrictions did not really monitor ups and downs. In the initial stage, the infection was unknown, sudden and unpredictable for the international trade community. Therefore, for all the public measures concerning the carriage of goods by air, carriers should be able to invoke Article 18/2 (d) of the Montreal Convention for exemption from liability if it constitutes an obstacle to the full performance of the contract. However, for contracts signed after the initial phase of the pandemic, a diligent carrier who is or must be aware of the exceptional circumstance should not have been able to easily claim exoneration simply on the basis of public measures already in force or expected to be adopted in the following time period because of the critical progress of the infection. Even if exoneration is claimed for a cause related to Covid-19 restrictions, the court or the arbitral tribunal should go through the assessment of "to what extent did the measure contribute to the loss or damage".

With respect to the Covid-19 measures, another issue of concern that we expect will be on the minds of the judicial authorities is damage as a consequence of delay. In fact, it is more likely to be the result of the restrictions. Article 18/2 (d) does not cover the liability for delay. However, in a special provision on delay

³⁵There has been debates in the case law regarding the physical and geographical extent of the air carrier's liability. For example, see *Victoria Sales Corp v Emery Air Freight Inc* 917 F 2d 705 706-12 (2nd Cir 1990); *Jaycees Patou, Inc v Pier Air International Ltd* 714 F Supp 81 82-5 (SDNY 1989); *Magnus Electronics Inc v Royal Bank of Canada* 611 F Supp 436 440-9 (ND Ill 1985); *Commercial Union Insurance Company v Alitalia Airlines*, 347 F 3d 448 457-71 (2nd Cir 2003).

³⁶There were a few amendments made in the provision by Guatemala City Protocol Article 5 to the Warsaw Convention. However, with Montreal Protocol No 4, the Article 18 of the Warsaw Convention was put into its final form. When the damage arises connected to the defences, the carrier may rely upon the defence in Article 18(3). The carrier has to prove that the damage has solely resulted from the particular event leading to the specific defence of Article 18(3). Therefore, the provision of Article 18(2) of the Montreal Convention expanded the carrier's freedom of defence by omitting the wording "solely". In the same manner see also Dempsey and Milde, 167; Malcolm A Clarke and David Yates, *Contracts of Carriage by Land and Air* (LLP, London/Singapore 2004), 421-422 (3.589).

in Article 19 of the Montreal Convention³⁷, it is put forward that “*the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.*” In our opinion, this provision actually sets the carrier free from liability if an unforeseeable and unexpected public measure was taken during the performance of the carriage. The governmental action could be have been taken at the place of departure, destination or at an agreed stopping point during the carriage. A possible restriction could also be an order to close the airspace of a third country which is expected to be flown over during the carriage. The carrier may have to take a different route which would cause a delay in delivery of the goods to the place of destination. Therefore, the reason for delay must be proved by the Carrier, together with having all necessary measures been taken to avoid the consequence.

The Montreal Convention leaves out some issues related to the contracts of carriage of goods by air. There is no doubt that the focus of the Convention is on the liability of the air carrier. However, issues related to Covid-19 actions not covered by the Montreal Convention may appear as disputes before courts. These categories of actions will be determined by the competent national law.

B. Carriage of Goods by Sea

1. Scope of the Measures

Maritime transportation has a long history of controversy with piracy, political conflicts, strikes and natural disasters³⁸. The Covid-19 pandemic, however, will have a special place in history because of its enormous impact on globally interconnected economies and world trade. More than four fifths of the world’s freight is transported by sea.³⁹ Therefore, the slightest change in maritime conditions has a ripple effect through international trade and supply chains.

Covid-19’s direct influence on transportation was closely related to the decline in production rates. Commercially, there was less demand than usual for conventional operation of vessels, which led transport operators and freight forwarders to group freight and manage capacity in functional ways by operating fewer vessels.⁴⁰ In addition, in certain parts of the world, port-related restrictions were imposed, ranging from limited operation of port services and customs to temporary closure of certain ports. This required rescheduling and re-routing to keep the supply chain on track. In other words, delay or inability to fulfill the contract of carriage were unavoidable for some commercial contracts.⁴¹

Crew related measures⁴² also added to the maritime transport crisis. From the beginning of the pandemic States adopted varying regulations forcing seafarers to stay on board when approached to a port and quarantine restrictions or vaccination requirements in case of leaving the vessel. Over the course of the pandemic, travel restrictions also prevented crew changes, which resulted in the continuation of voyage without full crew.⁴³ This factor created imbalances of working conditions such as having to work for extended

³⁷In the Warsaw Convention, Article 19 and 20 include a very similar provision with a slightly different wording and are divided into two different articles. The changes of wording made by Article 19 of the Montreal Convention are not considered as essential amendments. For the same conclusion see Tompkins, 240; Clarke & Yates, 422 (3.591).

³⁸“UNCTAD Review of Maritime Transport 2020”, 19.

³⁹See ‘Crew Changes: A Humanitarian, Safety and Economic Crisis’, IMO Media Centre-Hot Topics (*International Maritime Organization*), <https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx>> Date of Access 10 October 2024.

⁴⁰“UNCTAD Review of Maritime Transport 2020”, 12.

⁴¹“UNCTAD Review of Maritime Transport 2020”, 12.

⁴²For an updated map of countries with vessel and crew related restrictions see “COVID-19 Global Port Restrictions Map”, <https://www.wilhelmsen.com/ships-agency/campaigns/coronavirus/coronavirus-map/>> Date of Access 30 May 2021.

⁴³Sally-Ann Underhill and Nick Austin, ‘Steering through the Covid-19 Pandemic’, *Maritime Risk International 2020* (May, 2020), <https://www.reedsmith.com/-/media/files/perspectives/2020/mri-2020-may-reed-smith-pp911.pdf>> Date of Access 10 October 2024.

months at sea for some seafarers and loss of jobs on the part of others.⁴⁴ From a commercial point of view, operations with restricted personnel and labor force shortages negatively influenced carriage of goods by, again, causing delay.⁴⁵

As noted above, infectious diseases were not a primary concern during the formation of the uniform rules in force today. In fact, issues such as the reduction of marine pollution seem to be more of a concern in conventions related to maritime transport. As regards the public law aspect of restrictions, States are in principle not obliged to open their ports and facilities to foreign ships. It is rather a demonstration of their interest in international trade.⁴⁶ Therefore, a sovereign State may exercise and enforce any precautionary measures in any case over its territorial waters. Article 25 of the “United Nations Convention on the Law of the Sea” (“UNCLOS”) regulates “the right of the coastal state to take measures” under necessary conditions. The said article does not specify the conditions and gives the State full discretion to suspend its territorial waters or ports as long as there is no discrimination against foreign vessels. In relation to Article 25, prohibition of discharge, transshipment and loading of cargo; change of crew and provision of services to ships, inspection of the ship and detention unless the legal conditions are met could be examples of the coastal State’s powers.⁴⁷

2. The Hague Rules and The Hague-Visby Rules

The effect of public measures on commercial relations between parties is ruled out by different rules. “The International Convention for the Unification of Certain Rules of Law relating to Bills of Lading” (“the Hague Rules”)⁴⁸ and “the Hague-Visby Rules” (the “Hague Rules as amended by the Visby Protocol of 1968 and the Brussels Protocol of 1979”)⁴⁹, which are generally practiced throughout the world today, apply to contracts for the carriage of goods by the sea where a bill of lading is issued in accordance with the conditions set out therein. According to Article 1, the Hague Rules apply “*only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea*”. The said bill of lading must be issued in a Contracting State, pursuant to Article 10.⁵⁰

In the Hague-Visby Rules, the scope of application of the Hague Rules has been substantially modified. Article 10 of the Rules takes a different approach to the bill of lading. First of all, the international nature of the carriage is emphasized by stating that the Rules apply to bills of lading covering the carriage of goods between ports in two different States. In addition, the bill of lading in question must have been issued in a Contracting State or the carriage must have started from a port in a Contracting State.⁵¹ The Hague-Visby

⁴⁴See in general Crew Changes: A Humanitarian, Safety and Economic Crisis and UNCTAD Review of Maritime Transport 12. Also see in general ‘Repatriation of Stranded Seafarers Necessary for Global Trade’, FIATA Beyond COVID-19 (FIATA, 22 June 2020), http://fiata.com/index.php?id=840&cHash=FIATA_Statement_Seafarers_June_2020> Date of Access 10 October 2024.

⁴⁵UNCTAD Review of Maritime Transport 2020, 22.

⁴⁶Louise de La Fayette, ‘Access to Ports in International Law’ (1996) 11 Int’l J Marine & Coastal L 1, 1.

⁴⁷Erik Jaap Molenaar, ‘Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage’ (2007) 38 (1-2) Ocean Dev & Int’l L 225, 229.

⁴⁸International Convention for the Unification of Certain Rules Relating to Bills of Lading (hereinafter as the Hague Rules) (The Hague, 25 Aug 1924), 51 Stat 233, TS No 931; 120 LNTS 155.

⁴⁹See “Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924” (“the Hague Rules”), as amended by the Protocol of 23 February 1968” (hereinafter “the Hague/Visby Rules”) (Visby 21 Dec 1979), 1412 UNTS 128.

⁵⁰In the Rules, it is not specified that the bill of lading must include a foreign element. However, it has been argued that it has to be international in a sense for the Rules to be applicable. See Paolo Ivaldi, ‘Carriage of Goods by Sea’ in Jürgen Basedow and Giesela Rühl and Franco Ferrari and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law I* (Edward Elgar Publishing, Cheltenham/Northampton 2017), 262.

⁵¹Özdemir, 67. There is a bit of a confusion for the requirement of the bill of lading to apply in The Hague-Visby Rules. Article 3(3) states that the carrier must issue a bill of lading if the shipper requests so. At the same time, in Article 6, the freedom of contract is granted on the behalf of the carrier in case there is no issuance of the bill of lading. Therefore, it is unclear whether the bill of lading is necessary for the application of the Rules. See Francesco Berlingieri, ‘A Comparative Analysis of The Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ 4, https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf > Date of Access 10 October 2024.



Rules also claim applicability if the parties agree in their contract, or if the law of any State gives effect to these Rules.

The carrier's liability in Covid-19 oriented circumstances falls within the scope of Articles 3 and 4. Article 4/2 lists the circumstances that may exempt the carrier from liability. In paragraphs (g) and (h), it is implied that the carrier is exempted from liability if the vessel is seized or quarantine restrictions are applied. Paragraph (j) also provides that the carrier is not liable in the event of partial or general work restrictions.

Covid-19 restrictions relating to ship, the crew and port access appear to fall within the scope of this article granting the carrier immunity from liability. *Schoenbaum* describes these conditions as “*human force majeure benefitting the carrier*”⁵². His description is significant in that the very essence of the Covid-19 could be cited as a typical example of *force majeure* or an “act of God”, but its implications in transport law are human. Article 4 does not deal with the delay in delivery, which could actually have been the essential consequence of a public measure imposed to limit the spread of Covid-19. In fact, the Hague Rules and the Hague-Visby Rules in general do not contain specific conditions for damage caused by delay in delivery.

On the other hand, although the Hague and the Hague-Visby Rules provide a list of exemptions, the court should not resort to a straightforward application of the rule. In the *travaux préparatoires* of the Rules, *Mr. Ripert* gave an example of a very exceptional case where a shipowner directs the ship to a contaminated port, resulting in the ship being quarantined. In such a situation, although “quarantine restrictions” over the ship exempt the carrier from liability, it has been suggested that the shipowner should not benefit from the exemption if the fault lies with him.⁵³ It is not clear from the wording of Article 4 whether the carrier has to have acted diligently and reasonably in order to benefit from an exemption clause. In principle, however, it should be an obligation on his part.⁵⁴ In *Mr. Ripert's* example, the risk assessment and the conduct of the voyage must have been carried out correctly when directing the vessel from one port to another, if it is known that certain states adopt measures to quarantine vessels departing from certain ports.⁵⁵ In such a case, the carrier should not benefit from an exemption for quarantine measures if the routing has not been done wisely according to the conditions of the pandemic.⁵⁶ Although not expressly stated in the Article, if the carrier has an omission or fault for the occurrence of the event or unreasonable dealing during the progress of the happening of the so-called “*human force majeure*” event, liability exemption should not be granted.⁵⁷

It is worth noting that the damage can sometimes be caused by another third party, such as port authorities. In one hypothetical situation, the local port authorities may have conducted an inspection to determine whether sanitary precautions regarding Covid-19 were taken on the vessel.⁵⁸ In another hypothetical situation, port services may have caused delays due to operating with a limited number of

⁵²Thomas J Schoenbaum, *Admiralty and Maritime Law* (6th edn, West, St. Paul 2019), 569 (8-27).

⁵³See The “*Travaux Préparatoires* of the Hague Rules and of the Hague-Visby Rules”, Comité Maritime International, 411, <https://comitemaritime.org/wp-content/uploads/2018/05/Travaux-Preparatoires-of-the-Hague-Rules-and-of-the-Hague-Visby-Rules.pdf> Date of Access 10 October 2024.

⁵⁴Also see Schoenbaum, 570 (7-28).

⁵⁵For the example see “Covid-19: Global Implications for Charterparties” (*Norton Rose Fulbright*, March 2020), <https://www.nortonrosefulbright.com/en-au/knowledge/publications/178f0135/covid-19-global-implications-for-charterparties> Date of Access 10 October 2024. It must be acknowledged that if the master gave the instruction to depart to that particular port without the fault of the carrier, then the carrier is not assumed to be liable according to The Hague-Visby Rules, whereas in Hamburg Rules and in Rotterdam Rules the carrier would be responsible from the acts of the master and the crew in all times. See Berlingieri, 8.

⁵⁶Sometimes the contract specifies a fixed route and/or prohibits deviation from it. In such cases, Article 4(4) may be applicable as it would be reasonable to avoid a contaminated port. For the similar statements about areas with risk of piracy see Simon Rainey QC, ‘Piracy and Contracts of Carriage by Sea’ in Baris Soyer and Andrew Tettenborn (eds), *Carriage of Goods by Sea, Land and Air* (Routledge, Oxon/New York 2014), 13-4.

⁵⁷Marel Katsivela, ‘Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and The Hague-Hague/Visby Rules’ (2010), 40 Rev Gen 413, 441; Schoenbaum, 569 (8-27).

⁵⁸For the practice of free pratique see Underhill & Austin, 9.

personnel.⁵⁹ Although the Hague and Hague-Visby Rules do not contain specific conditions for damage caused by delay, sometimes, delay is equivalent to total loss of perishable goods. Such a situation could be covered by Article 4/2 (q), which stands out as an exemption condition when a fault is not attributable to the carrier, his agents or servants.

Article 4/2 (q), however, has a different aspect from the remaining exemptions of the Article 4/2, in that it imposes an extra burden of proof on the carrier.⁶⁰ He must prove that the damage and loss happened due the act or negligence of a third party and the carrier had no fault or omission in the happening of the incident and its consequences. Paragraph (q)⁶¹ places the onus probandi on the carrier to prove additionally that he has “no fault or omission”, whereas in the other exemption clauses, the carrier only has to prove the occurrence of the incident, such as the application of a quarantine measure listed as a cause of exemption in Article 4/2. The carrier has no further burden of proving that he has no fault or omission. If the carrier’s fault or omission contributes to the result, the party claiming the benefit of the situation must prove the contribution of the carrier’s act and omission to the result.

Finally, under the wording of Article 3, the carrier is responsible for manning the ship and making it seaworthy before departure. The condition of “proper manning of the ship” could be disputed in the imaginary case of a crew member coming into contact with the virus before the voyage, falling ill and infecting others during the voyage. This situation is discussed below, along with the provisions of the “United Nations Convention on the Carriage of Goods by Sea” (“Hamburg Rules”).⁶²

3. The Hamburg Rules

The Hamburg Rules, although not as widely accepted by the international community and practice as the Hague Rules⁶³, are also a milestone in the carriage of goods by sea. The Hamburg Rules cover not only voyages for which a bill of lading is issued, but also any contract for the carriage of goods by the sea which satisfies the conditions of Article 2. The scope of the Hamburg Rules is therefore wider than that of the Hague-Visby Rules.⁶⁴ In addition to the contracts of carriage supported by bills of lading, as mentioned in article 10 of the Hague-Visby Rules, the Hamburg Rules also cover contracts of carriage by sea, if the port of loading or discharge, as provided for in the contract, is situated in a Contracting State. If the carrier has the right to select the port of discharge from a list of ports mentioned in the contract of carriage and the actual port of discharge was one of the listed ports and is located in a contracting state, then the Hamburg Rules also claim applicability.

Article 5 lays down the general principles for carrier’s liability. The carrier is presumed to be liable for damage to and loss of goods or delay in delivery when he is in charge of the goods in accordance with Article 4. The Hamburg Rules do not mention a detailed list of conditions that may exempt the carrier from liability, unlike the Hague and the Hague-Visby Rules. The Rules provide a blanket clause stating that the carrier is relieved of legal responsibility if, in the event resulting to damage, loss or delay, the carrier or his

⁵⁹Underhill & Austin, 9.

⁶⁰Schoenbaum relates to this as the burden of proof and persuasion. See Schoenbaum, 575 (8-29).

⁶¹The wording in in Article 4/2(q) has the following statement: “Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage”.

⁶²“United Nations Convention on the Carriage of Goods by Sea” (hereinafter as the Hamburg Rules) (Hamburg, 31 Mar 1978), 1695 UNTS 3.

⁶³John C Moore, ‘The Hamburg Rules’, (1978-1979) J Mar L & Com 1, 2; Yazicioğlu E, *Hamburg Kuralları’na Göre Taşıyanın Sorumluluğu* (Beta İstanbul 2000), 5 ff.

⁶⁴Also see William Tetley, ‘The Hamburg Rules-A Commentary’ (1979), 4 LMCLQ 1, 7; Robert Force, ‘Comparison of The Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)’ (1995-1996), 70(6) Tul L Rev 2051, 2057; Yazicioğlu, 17 ff.

servants or agents took all the necessary measures to avoid the incidence and the result.⁶⁵ Thus, since the understanding of the Rules is presumed fault or liability on the part of the carrier⁶⁶, he must prove that the incident giving rise to damage, loss or delay was out of its control sphere, as well as having taken all the reasonable measures on its part for the avoidance of the incidence and the consequences.

The Covid-19 measures taken during the carriage could relieve the carrier from responsibility as long as the measures were unforeseeable and the carrier took all necessary steps to prevent the occurrence of the damage, loss or delay in delivery. However, in our opinion, this places an additional burden on the carrier in terms of the burden of proof and is less predictable than the clearly established defences and exceptions of Article 4(2) of the Hague and Hague-Visby Rules.⁶⁷

As the pandemic unfolded, the states tightened and loosened some measures according to the spread of the diseases. Therefore, in theory, a diligent carrier might have been able to anticipate or foresee the precautions to be taken and act accordingly or devise a varied method of implementation. However, the courts must be careful in determining the criteria for assessing the "fault of the carrier". This could also lead to a shift from presumed liability to strict liability if the expectation of diligence on the part of the carrier is set too high.

Sometimes a government action is not the only explanation for a loss, damage or delay. The conduct of the carrier may also contribute to the result. In such situations, Article 5, paragraph 7, could be discussed in terms of partial liability of the carrier.⁶⁸ In this article, it is stated as "*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.*" If the carrier is unable to prove that part of the damage which was beyond his control, by which is meant that he was unable to foresee and take precautions to prevent the consequences, then he would be liable for the whole damage, loss or delay.⁶⁹

One scenario to illustrate would be a case of crew infection causing damage by delay.⁷⁰ In this case, the vessel may also be unseaworthy, as the problems with the crew that began at the beginning of the voyage may also render the vessel unseaworthy.⁷¹ In the Hague Rules and in the Hague-Visby Rules, the carrier is obliged by Art. 3(1) to "*exercise due diligence to properly man, equip and supply the ship*" prior to the commencement of the voyage. Unless the carrier gives assurance as to the liability for unseaworthiness, he is only liable for damage if he exercised due diligence to discover any unseaworthy condition before the beginning of the journey and gives proof as to this action.⁷² Therefore, if the carrier did not have any knowledge of the current infection in crew members at the commencement of the voyage and had exercised

⁶⁵Compared to the Article 4 of The Hague Rules or The Hague-Visby Rules which state the exceptions of liability, Tetley argues that the Rule in the Hamburg Rules is unchanged in principle but edited to be brief and precise. For his comments see Tetley, 7. Similarly see Force, 2066-2067.

⁶⁶James J Donovan, 'The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea' (1979) 4(1) Mar Law 1, 8; Force, 65, at 2060; Berlingieri, 8; Yaziciođlu, 67 ff.

⁶⁷For a similar conclusion see Benjamin W Yancey, 'Carriage of Goods: Hague, Cogsa, Visby, and Hamburg' (1982-1983), 57(5) Tul L Rev 1238, 1252-3; George F III Chandler, 'A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules' (1984) 15(2) J Mar L & Com 233, 244-5.

⁶⁸According to Murray, this paragraph is also operative in situations of *force majeure* and Act of God. See D E Murray, 'The Hamburg Rules: A Comparative Analysis' (1980) 12 Law Am 59, 65.

⁶⁹Force, 2067.

⁷⁰"Coronavirus: Club Cover and Contracts of Carriage", 2.

⁷¹"Coronavirus: Club Cover and Contracts of Carriage", 2.

⁷²Force, 2061.

due diligence to obtain the so-called information⁷³, he should not be liable for unseaworthiness of the vessel. However it should be noted that there is no specific clause in the Hamburg Rules relating to the crew or unseaworthiness of the vessel. Therefore, claims for unseaworthiness have to be evaluated in the light of the general conditions on the liability of the carrier in Article 4.⁷⁴

4. The Rotterdam Rules

“The Convention on the Contracts for the International Carriage of Goods Wholly or Partly by Sea” (“Rotterdam Rules”)⁷⁵, although not yet in force, is expected to be a cornerstone in the carriage of goods by sea. The Rotterdam Rules govern contracts for the carriage of goods by sea, as well as multimodal transport contracts involving a sea leg, and are particularly noteworthy as a new model for carrier liability in international transport law.

The geographical scope of the Rotterdam Rules is defined in Article 5. Subject to the exclusions in Article 6, the Convention covers the contracts of carriage where the place of receipt and the place of delivery of the goods are in two different States. The Rules apply only to contracts of carriage that include a sea leg. Therefore, the conditions of application also focus on the maritime leg of the carriage. It is stated that the ports of loading and discharge must also be in different States. Finally, it is necessary that at least one of the four connecting points mentioned above be located in a Contracting State. In order to determine these connecting points, attention can be paid to the wording of the transport documents or the contract of carriage.⁷⁶

The basis of the carrier’s liability found in Article 17 is similar to both the Hague-Visby Rules and to the Hamburg Rules. The carrier is responsible for damage, loss and delay in delivery of the goods, provided that the event leading to or contributing to the result occurs when the goods are proved to be in his charge. If, on the other hand, if the carrier wishes to contest his presumed liability, he must prove that he is not responsible for the damage, loss or delay.

Article 17/3 of the Rotterdam Rules contains a specific list of exemptions from liability as in the Hague/Visby Rules. Paragraph (d) of the said article exempts the carrier from all or part of his liability in case of quarantine restrictions and other public measures which cause⁷⁷ or contribute to the damage, loss of delay. Paragraph (e) may also be an exception to liability to some extent, as work restrictions also appear to be one of the common preventive measures in relation to Covid-19. In contrast to the Hague-Visby Rules, the Rotterdam Rules clearly state that in order to benefit from the exemption from liability, the carrier must, in addition to the absence of his fault or omission, prove that a quarantine restriction or other public measure has been taken in accordance with Article 17/2.⁷⁸

⁷³A particularly interesting discussion would be about how the due diligence is going to be exercised. The answer would depend closely in the mandatory rules imposed at the departure port. During the progress of the pandemic, many states-imposed rules, enforcing testing on crew members or quarantine measures prior to departure. If no such obligations exist, the carrier may in any case have the crew tested in order to refrain from a potential responsibility arising in the future. On the other hand, if the carrier omits the voluntary testing, it is not easy to say hard and fast that he has not shown due diligence in making the ship seaworthy.

⁷⁴Force, 2061.

⁷⁵“Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea” (hereinafter as “the Rotterdam Rules”) (Rotterdam, 11 Dec 2008), GA Res 63/122, UN Doc A/RES/63/122.

⁷⁶Peter Mankowski, ‘The Rotterdam Rules-Scope of Application and Freedom of Contract’ (2010) 2 Eur J Com Cont L 9, 9-10. For further clarifications as to the application of the Rotterdam Rules see Anthony Diamond QC, ‘The Rotterdam Rules’ (2009) 36 LMCLQ 445, 450; Ellen Eftestøl-Wilhelmsson, ‘The Rotterdam Rules in a European Multimodal Context’ (2010) 16 J Int Mar L 274, 281; David A Glass, *Freight Forwarding and Multimodal Transport Contracts* (2nd Edn, Routledge, Oxon 2012), 355-6; Kara H, *Rotterdam Kuralları’na Göre Taşıyanın Ziya, Hasar veya Gecikmeden Kaynaklanan Zararlardan Sorumluluğu* (Legal İstanbul 2014), 43-61.

⁷⁷A much modern and inclusionary provision was adopted compared to the Hague/Visby Rules. See Katsivela, 440.

⁷⁸Article 4(2) of the Hague/Visby Rules.

Liability for unseaworthiness is also specified as a separate provision in Article 14. The carrier must “properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage”. In contrast to the Hague/Visby Rules⁷⁹, the Rotterdam Rules indicate that the carrier has to properly crew the vessel not only before the voyage but also during the entire carriage. Therefore, if the presence of Covid-19 infection in the crew is discovered during the voyage, the carrier must exercise due diligence and properly crew the vessel so that the voyage can continue and be completed on time. Of course, in some circumstances, it may not be possible for the carrier to fulfill this obligation. In a hypothetical situation where the captain is infected and falls ill during the voyage, it may not be possible to find a replacement in time to continue the voyage to continue or another alternative vessel to load the goods.

In connection with improper manning of the vessel by the carrier, Article 17/5 establishes the basis of the carrier’s liability. The carrier will be held liable unless one of the conditions, such as quarantine measures and restraints of labour, take place as stated in Article 17/3. Therefore, in the hypothetical situation given above, if the sick crew member has been suspended from the ship as part of a quarantine restriction at any moment during the voyage, then the carrier must show due diligence in manning the ship for carry out the rest of the voyage. If this is not possible, the carrier may be exempted from liability by reference to Article 17/5 (b) if he has exercised due diligence in the performance of the contract of carriage. When and if the Rotterdam Rules enter into force, the case law will be predominant in demonstrating the theoretical level of care the carrier must exercise in manning the vessel.

C. Carriage of Goods on Land

1. The CMR

Road transportation is the traditional and dominant mode for moving goods between short distances on land. Even in other modes of transportation, it has a complementary character for delivery and transshipment of goods to and from the aircraft, ship and train. The importance of road transportation has increased even more in Covid-19 pandemic and has shown once again that it is vital for the transportation of basic food and medical supplies.

Covid-19’s influence on road freight transportation seems limited compared to other modes. Nevertheless, the industry lost %40 of its activity in 2020 compared to the previous year.⁸⁰ Covid-19 measures on international road haulage seemed to be concentrated on the driver of the vehicle. Apart from sanitary requirements in vehicles, most states required health checks, border tests or vaccination requirements for drivers, and some even imposed quarantine measures.⁸¹ A few other additional requirements were reported to be related to customs inspection of goods to prevent coronavirus infection.⁸² For international contracts of carriage by road, these measures mostly led to damage, loss and delay.

“The Convention on the Contract for the International Carriage of Goods by Road” (“CMR Convention”)⁸³, applicable mainly in Europe, the Middle East and Asia, is a United Nations Convention aimed at establishing uniform rules for cross-border contracts of carriage of goods by road. The provisions of the CMR Convention

⁷⁹Article 3 of the Hague/Visby Rules.

⁸⁰For the statements of Umberto de Pretto, General Secretary of the International Road Transport Union (IRU) see the video of International Road Transport Union (IRU) Covid-19: Supporting Road Transport to Drive Recovery, (*IRU Coronavirus (COVID-19) Information Hub*, 30 April 2020), <https://www.iru.org/covid19>> Date of Access 10 October 2024. For the statistics in North America also see the Statement of Randy Guillot, Chairman of the American Trucking Associations in The State of Transportation and Critical Infrastructure: Examining the Impact of the COVID-19 Pandemic 2 (*IRU*, 3 June 2020), <https://www.iru.org/resources/iru-library/statement-r-guillot-chairman-ata>> Date of Access 10 October 2024.

⁸¹For more details see in general ‘UNECE/IRU Flyer-Recommendation for Border Crossings During Covid-19’ (*UNECE/IRU*, 27 April 2020), <https://www.iru.org/resources/iru-library/border-crossings-age-covid-19>> Date of Access 10 October 2024.

⁸²See the report of UNECE/IRU Flyer-Recommendation for Border Crossings During Covid-19.

⁸³Convention on the Contract for the International Carriage of Goods by Road (hereinafter CMR Convention) (Geneva, 19 May 1961), 399 UNTS 189.



are relevant for the assessing of the impact of the Covid-19 measures on road transport contracts. Article 1(1) covers the contracts covered by the Convention stating that “*this Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties.*”.

Article 17 deals with the carrier’s liability for damage, loss or delay in delivery. Interference by public authorities, quarantine measures and such other orders are not explicitly mentioned as clear exceptions to the carrier’s liability, either in Article 17 or in any other provision. Nor is there a clear guideline or list of exemptions as mentioned in some of the above-mentioned air and sea transport conventions. The exemption from liability is dealt with in the blanket clause “*circumstances which the carrier could not avoid with consequences of which he was not able to prevent*”.⁸⁴ Unlike the other Conventions, the lack of specification of the typical conditions of such circumstances leads to a broad and different understanding and interpretation in each jurisdiction.⁸⁵

For a Covid-19 effect on the carrier’s liability, a detailed and critical examination of each circumstance must be made in order to assess the claims regarding the exemptions of Article 17/2. Since the world has never experienced such a situation in the almost 70 years of the CMR Convention’s implementation, it is not possible to present and discuss specific case law on the carrier’s liability. However, it is possible to predict the core of the possible conflicts and, in our opinion, they are mostly related to damage caused by delay as in other transport modes of transport mentioned above.

It's not the coronavirus pandemic itself, but its extensions in transport law that almost always stand out as public authority interventions in the transport process. The rather broad coverage of “*unavoidable circumstances*” allows the public measures to be factors for exemptions covered by this term. However, to draw a conclusion from the wording of Article 17, the carrier’s position and actions must be weighed against the duty of care.⁸⁶ Therefore, it should not be possible to make a straightforward decision to exempt carriers in all cases of Covid-19 public measures in the transportation process. For example, in the hypothetical situation of a public measure prohibiting the entry or transit of certain products, the carrier may have had the option of having the truck pass through another state on its way to the destination in order to deliver the goods in the agreed time.⁸⁷ The same could be said for states that require border inspections. The carrier

⁸⁴This expression is adopted from the COTIF-CIM Article 23, which will be dealt with below.

⁸⁵According to Gruber, the “*circumstances which the carrier could not avoid and the consequences of which he was unable to prevent*” has been illustrated to be conceptually equal to the definition of *force majeure* according to French law. For Gruber’s statement see Alexandre Gruber, ‘How Article 17.2 of the CMR is Interpreted by the French Courts’ in Wouter Verheyen (ed.), *CMR 60 Years: Time for Retirement or Future Proof?* (Paris Legal Publishers, Zutphen 2017) 38. Kolacz also demonstrates that in Polish substantive law, quarantine measures are given as examples of a type of *force majeure*. See Marta K Kolacz, ‘Country Report on Article 17.2 CMR’ in Wouter Verheyen (ed.), *CMR 60 Years: Time for Retirement or Future Proof?* (Paris Legal Publishers, Zutphen 2017), 50. In German Law, Eckardt claims that the German legislator contemplated that the concept referred to in Article 17.2 is actually a definition of *force majeure*. On the other hand, Eckardt states that according to the understanding of the Federal Supreme Court, the legislator is mistaken. Instead, the carrier has the onus of proving that even with the utmost diligence, the circumstance and its result could not have been prevented. See, Tobias Eckardt, ‘International Conference 60 Years CMR’ in Wouter Verheyen (ed.), *CMR 60 Years: Time for Retirement or Future Proof?* (Paris Legal Publishers, Zutphen 2017), 41. The phenomenon of ‘unavoidable circumstances’ has been interpreted in many different ways in different laws. Therefore, the uniform law nature of the CMR Convention is hampered by the different understandings. For a detailed consideration of other laws see also Malcolm A. Clarke, *International Carriage of Goods by Road: CMR* (6th edn, Routledge, Oxon 2014), 224-30. For the interpretation of the concept with historical backgrounds also see Andrew Messent and David A. Glass, *Hill & Messent CMR: Contracts for the International Carriage of Goods by Road* (2nd edn, London/New York/Hamburg/Hong Kong 1995), 114. In his discussions regarding the same article in COTIF-CIM Arkan also claims that the expression creates a status including *force majeure*, along with a broader extent. See Sabih Arkan, *Demiryoluyla Yapılan Uluslararası Eşya Taşımaları* (Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara 1987), 101. For the same conclusion also see Jose Manuel Martin Osante and Arantza Martinez Balmaseda, ‘Responsabilidad Del Porteador Ferroviario Por Incumplimiento: Fundamento y Supuestos’ in Alberto Emperanza Sobejano and Andres Recalde Castells (eds), *El Contrato de Transporte Internacional de Mercancías Por Ferrocarril* (Thomson Civitas, Pamplona 2008), 192.

⁸⁶A similar conclusion was reached about events such as strikes by Clarke. See Clarke, 227.

⁸⁷For a similar example, a strike taking place in one customs office is stated as a condition that does not prevent the carrier from taking a different route to have the goods pass through another customs office. For the comment see Messent & Glass, 125.



may have had a reasonable optional route to avoid Covid-19 border testing if the countries of the agreed origin or destination do not apply testing.

In another case, the driver of the truck carrying the goods may have been exposed to the virus prior to transportation and may have been seriously ill or quarantined for a period of time. In such circumstances, the mere fact that quarantine measures have been imposed on the driver should not be taken as a direct application of the exception in Article 17(2).⁸⁸ In particular, in the case where the driver came into contact with the virus and had to remain in quarantine, although from an external point of view it may have appeared to be an "act of God", the question must be asked whether steps could have been taken to avoid the undesired result of damage or delay, such as replacing the driver or taking a different route to avoid the long waiting periods in a transit country.

In connection with this question, another issue of importance would be to determine the criteria for the level of care the carrier must have manifested to prevent or avoid the result. In fact, the degree of care that an individual can show in a particular situation is open-ended.⁸⁹ The duty of care to avoid the undesirable consequences of a particular event must be evaluated on a case-by-case basis. Care must be present in actions of the carrier and in people from whose actions the carrier is responsible for. Most of the time, it is strictly related to the conduct and behavior in a particular incident. The liability system of the CMR Convention is generally described as "fault-based", although there are conflicting judgments in the courts of different countries.

From the carrier's perspective, the cost of replacing or rerouting cargo for reasons related to Covid-19 measures in a particular country should not exceed the estimated compensation a carrier might have

⁸⁸At this point, Articles 14 to 16 need also to be taken into account in relation to Covid-19 restrictions. In case a restrictive measure is taken in the progress of carriage, which interrupts the carriage by creating an unfavorable or impossible condition, the carrier is bound to ask for the instructions of the person entitled to dispose the goods or the sender. If condition leading to impossibility happens after the carriage but before delivery, the instructions shall be received from the sender. The results of denial of giving instructions or extra costs made by the carrier are dealt with in the same articles mentioned above.

⁸⁹Case law might give a clue to unravel the issue. Article 17(2) exemption of "*circumstances which the carrier could not avoid with consequences of which he was not able to prevent*" is very often dealt with in Courts when the freight is damaged or lost by theft at a certain point in carriage. Commonly, the driver's or carrier's choice of a certain motorway or his/her leaving the lorry unattended for a period of time is assessed in detail to determine the conditions of carrier's liability. In a case considered by the 11th Circuit of the Turkish Court of Cassation, copper cables were being carried by road from Turkey to Italy. Instead of using the "secure toll highway" in Italy between Bari and Salerno, the driver chose to use the Foggia motorway where his truck was plundered by armed men. The carrier requested exemption of liability according to the Article 17(2) of the CMR Convention. The Court of First Instance decided that the carrier was exempted from liability, which was then approved by the Regional Court of Justice stating that there was not enough evidence to affiliate the theft with the choice of the motorway. The claimant's appeal was approved and the decision was reversed on the grounds that the burden of proof was on the defendant rather than the claimant. For this reason, the case had to be reheard with the defendant (carrier) being the party to bring the evidence required for his exemption. See Yargıtay 11 HD, 2018/1829, 2019/7402, 21.11.2019, <http://www.kazanci.com> Date of Access 10 October 2024. In a similar case considered by the Supreme Court of Denmark (ND 1997 167 DH), a consignment of fish was loaded on a trailer to be carried from Denmark to Naples/Italy. 70 kilometers to the destination was left when the driver left the trailer in a parking lot located on a highway regularly patrolled by policemen and with a fence and camera to watch the parking area. However, there were no guardsmen to watch over the trucks. Two gunned men hijacked the trailer stealing the goods and leaving the trailer and the driver somewhere else. Here, the Danish Court ruled that the carrier was liable because of not having had the driver take a guarded parking lot. On the other hand, a different approach was taken from the Supreme Court of Norway in an almost identical case (ND 1998 226) as to the details of the incidence. Here the Court ruled that the carrier had taken all measures necessary to avoid the happening of the theft because the guarded parking lots in the area were only for use of the members of the Italian Road Haulage Association and they were located in smaller roads, whereas the driver took the highway for security reasons and was unable to use the guarded parking lots in the area due to the reasons mentioned above. For the brief note about the two cases see Johan Schelin, 'CMR Liability in a Law & Economics Perspective', (Liability), *Stockholm Institute for Scandinavian Law 1957-2010*, 182, <https://scandinavianlaw.se/pdf/46-8.pdf> Date of Access 10 October 2024. In one late decision of the 11th Circuit of the Court of Cassation dated 21 October 2020, a freight of textile products was planned to be carried from Turkey to Jordan by road. On 21 July 2012, at the Syrian border, before the customs inspections were to take place, the lorry was plundered and all of the freight was stolen. The claimant, who was the consignor, claimed that the driver of the lorry was not present during the theft. If he had been present at that time, the theft would not have occurred. Therefore, his actions were equal to willful misconduct and the carrier should not benefit from the limitations of liability in the CMR Convention. From the findings of the case it is understood that around that time, due to the Syrian conflict, the customs duties were not being carried out accordingly. Many trucks have been hijacked or plundered. The present lorry had been stuck at the Syrian border for 7 days for customs inspection and then was subject to theft. The Court of Cassation reversed the judgment of the First Instance Court setting that the loss of the goods was linked to an unavoidable circumstance and whose results the carrier was and would not have been able to prevent, granting an exemption to the carrier by virtue of Article 17(2). See Yargıtay 11 HD, 2019/1522, 2020/4343, 21.10.2020 <http://www.kazanci.com> Date of Access 10 October 2024.

to pay as a result of damage, loss or delay.⁹⁰ On the other hand, measures and precautions underwent rapid changes as the pandemic progressed. News of the mutations of the virus led to sudden, dramatic measures such as the closure of a border. Although the provision of logistical services continued, disruptions occurred, causing temporary closures or long waits at the borders of states. Most of these circumstances were unpredictable for the carrier and most of the time the consequences of delay were unavoidable. In other words, the negative impact of Covid-19 on a contract of carriage must be determined on a case-by-case basis.

2. COTIF and its Annex B – CIM

The Covid-19 crisis may have had the least impact on rail freight. In fact, it is said that during the pandemic a large part of road freight was shifted to the railways.⁹¹ Of course, the decline in global production was accompanied by a decline in rail freight, but government measures had little impact on these outcomes. All over the world, states have generally imposed only sanitary precautions and few crew-related requirements in rail freight transportation.⁹² Therefore, we do not expect many, if any, disputes between parties to a rail freight contract. The legal framework to be followed in the event of a dispute is only briefly touched upon here. In addition, the liability provisions of the CMR Convention and COTIF-CIM⁹³ are almost identical, so that our comments above also apply to rail transport, as long as they correspond to its nature.

In the carriage of goods by rail, COTIF and its Annexes play an important role in modeling the legal context of travel and transportation by rail in Europe. Annex B-CIM is relevant to the carriage of goods by rail. According to Article 1, CIM applies to contracts of carriage by rail for reward when the place of taking over and/or the place of delivery is situated in a State which is a contracting party to the Convention. The conditions set out here are those of mandatory application. CIM may also be applied if the parties to the contract designate it as the applicable law in the paramount clause.

Like the CMR Convention, the CIM Convention does not contain specific clauses relating to force majeure, other emergencies or quarantine restrictions. Article 23 establishes the legal basis of the carrier's liability with its limits and exceptions. The second paragraph excludes the liability of the carrier when the damage, loss or delay in delivery is caused by "*circumstances which the carrier could not avoid and the consequences of which he was unable to prevent*".⁹⁴ Since the CMR also contains the same statement, the conclusions drawn there can also be expressed in relation to the CIM.

Conclusion

The first reminder of the coronavirus chaos in the transportation industry may be the memory of people stranded on the Diamond Princess cruise ship when it was quarantined for days. Compared to passenger transportation, however, the crisis in the freight transportation industry has played out more behind the scenes. Its effects are felt in the form of disputes over damage, loss and delay claims.

⁹⁰For an economical evaluation of CMR liability provisions see Schelin, Liability, 188. Also see Johan Schelin, 'CMR Convention in a Law and Economics Perspective' (CMR) (2016) 21(4) Unif L Rev 434, 436-40.

⁹¹See 'Covid-19 Task Force, Management of Covid-19: First Estimation of the Global Economic Impact of Covid-19 on Rail Transport' (UIC, July 2020), 16, https://uic.org/IMG/pdf/economic_impact_v2.pdf Date of Access 10 October 2024.

⁹²See 'Covid-19 Task Force, RAILSILIENCE: How the Rail Sector Fought Covid-19 During Lockdowns' (UIC, May 2020), 9-10, https://uic.org/IMG/pdf/raisiliencehow_the_rail_sector_fought_covid-19_during_lockdowns.pdf Date of Access 10 October 2024.

⁹³See "Uniform Rules Concerning the Contract of International Carriage of Goods by Rail" (hereinafter "COTIF-CIM") (Berne, 9 May 1980), 1396 UNTS 2; Özdemir, 50-63.

⁹⁴For a detailed analysis of the expression see Arkan, 100.

Interference by public authorities happens to be the exogenous factor challenging carriage of goods contracts due to Covid-19. Carriers' claims for relief from liability for delay or non-performance are likely to be related to the clear lists of relief conditions in some of the carriage of goods conventions. These lists include causes of exoneration such as "quarantine measures", "governmental orders" or any other public interferences especially related to crew.

On the other hand, some conventions such as the CMR for road carriage or the Hamburg Rules for sea carriage do not give a clear guide as to when the carrier may be relieved off from liability. When these Rules are applicable, the carriers have to give proof of an "unavoidable circumstance" taking place as well as "having taken all the measures to avoid the damage, loss or delay".

The article identified the main Covid-19 problems in the carriage of goods and gave examples of certain presumed conflicts in order to make an in-depth analysis of the carrier's liability in each mode of transport. Whether or not a clear listing was provided in the articles of a particular convention did not make a fundamental difference in the way in which the carrier's exemption from liability should be evaluated. It is concluded that in all cases it would not be possible to declare the coronavirus as an "act of God" or *force majeure* in order to obtain a straightforward exemption from liability. When assessing the impact of governmental measures on the carriage, the conduct of the carrier before, after and during the circumstance giving rise to the conflict between the parties should also be carefully examined by the competent judicial authority.

Courts and arbitral tribunals will have to deal with this review in accordance with the basic approach to liability adopted in the particular mode of transport, ranging from the fault-based liability of the sea carrier to the strict liability of the air carrier. In our article, we have done a *prima facie* review of the likely cases that we estimate would be litigated and arbitrated. Over time, case law will develop on the effect of coronavirus on contracts for the carriage of goods covered by uniform rules. From where we stand, however, it is possible to conclude that, regardless of the basic approach to liability in the particular field of transportation, the coronavirus has placed a heavy burden of care and due diligence on the shoulders of carriers and all intermediaries involved in the transportation of goods.



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