

CARRIAGE OF GOODS BY WATER LAW

A MARITIME LEGISLATION DRAFTING PROJECT SUBMITTED IN
PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
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Dedication

This project is dedicated to my mum and dad for all their love and care; who through thick and thin made possible my education.

ACKNOWLEDGEMENTS

My bounteous gratitude goes to Professor P.K. Mukherjee who continuously spurred me on when troubles bisected and perplexities overtook me and by whose guidance and corrections this project took shape.

I also owe a debt of gratitude to the Commonwealth Secretariat whose financial support made possible my studies at IMLI.

I cannot but make special mention of Dorianne, Michelle, Josephine and Valerie whose contributions as staff of IMLI, in many diverse ways made my stay in Malta worth the while.

Many thanks also go to my colleagues at the Ghana Shippers' Council whose moral support saw me through.

I wish finally to express my heartfelt thanks to my wife, who imbued me with a moral and physical tune and kept wake with me while I burned the candle at both ends.

Language is perhaps the greatest of all human inventions. Most people think of it merely as the chief means of communication, but it is much more than that; it is the chief medium of thought.

GLANVILLE WILLIAMS
(LANGUAGE AND THE LAW)

DRAFTING INSTRUCTIONS

As part of its efforts to establish a new maritime policy, the government has embarked on an exercise of reviewing and updating its existing maritime legislation.

At a recent meeting, the Cabinet sub-committee on shipping had occasion to consider legislation dealing with the carriage of goods by sea, notably the Hague/Visby Rules and how it has found expression in the maritime legislation of the country.

The sub-committee noted that Ghana inherited the Hague Rules as a colonial legacy in 1930 and in 1961 upon attaining republican status, passed the Bills of Lading Act incorporating the Hague Rules into Ghanaian Law by way of a schedule. It noted further that in 1968, the Visby amendments were adopted at an international conference, among other things, to increase the liability limits under the Hague Rules but Ghana never became a party to the Visby amendments.

It was of great concern to the cabinet sub-committee that since 1924 when the Rules were first adopted, there had been many changes in the shipping industry which had no doubt necessitated a rejuvenation of the said Rules to meet the rapidly changing trends in the shipping industry.

The Hamburg Rules which was adopted in 1978 to deal with the

shortcomings of the Hague Rules has since been ratified by the government.

The government has accepted the recommendations of the sub-committee and has directed that the Hamburg Rules be extrapolated into Ghana's legislation.

In the light of the above, and having regard to its overall maritime policy, you are hereby instructed to draft the appropriate legislation, based on the Hamburg Rules, with a view to addressing the inadequacies of the existing law.

You are also reminded of the international character of this legislation and the need to achieve uniformity. Your draft must take into account the following areas of concern; viz,

(1) The need to strike a fair balance in the allocation of risks, rights and obligations in the rules on liability between carriers and shippers. In this regard you are to note that as regards risks, the existing legislation is heavily skewed in favour of carriers, whereupon the carrier was exempted from liability even in cases of error in navigation and management of his vessel. The legislation must seek to do away with the catalogue of exceptions granted to the carrier under Article 4.(2) of the Hague Rules.

(2) The new legislation must address the issue of deck cargo, having in mind the recent phenomenon of containerisation. The carriage of live animals as well as cargoes for which no bills of lading have been issued must be adequately addressed.

(3) Having regard to the balancing of risks, the carrier's limit of liability must be increased in accordance with the Hamburg Rules for the sake of uniformity. At the same time, the liability of the carrier must in no uncertain terms be based on the notion of presumed fault and due regard must be had in the provisions, in the shift of the burden of proof onto the carrier.

(4) The new legislation should also focus on granting the carrier unit limitation for the torts of his employees.

(5) The Bills of Lading Act, 1961 make it virtually impossible for any disputes arising out of the carriage of goods to be determined in accordance with Ghanaian law and in the courts of Ghana. The manifest injustice suffered by Ghanaian shippers as a result of this situation must be urgently addressed in the new legislation. Adoption of Ghanaian law and forum must be extended to cover arbitrations.

(6) The carrier's exemption from liability for damage caused by fire needs to be maintained with a shift in the burden of proof onto the shipper.

(7) The unwarranted controversies surrounding the application of the existing rules to cases of delay must be unequivocally addressed. The provisions regarding instances of delay must also be drafted to take care of situations where economic losses arise out of delay.

(8) The statutory limitation period of one year under the existing rules has been found to be woefully inadequate and serves against the interest of the shipper. The provisions of the new law must be so drafted as to increase the statutory period for the limitation of actions but at the same time due cognisance ought to be had with regard to similar limitation periods under other unimodal legislation.

(9) The contentious problems with regard to package limitation must be carefully addressed. In particular, packages need to be considered as units when stowed in containers. The use of the container as a unit/packaging unit need to be addressed as well.

(10) Under the existing law, the period of responsibility of the carrier has been fraught with problems. The new legislation must without doubt stipulate the period of responsibility for the carrier. In this regard the legislation should do away with the "tackle to tackle" rule and adopt the "port to port" rule.

(11) The legislation must include a provision that makes it mandatory for all contracts of carriage of goods by water to or from Ghana or within Ghana to incorporate the new law.

(12) The new legislation must of necessity pave the way for the application of the Multimodal Transport Convention. In this regard the drafting must be geared towards eliminating conflicts when the two pieces of legislation come to be applied side by side.

Finally, it is hereby directed that the new law be made applicable to carriage of goods by inland waters as far as is desirable. The points enumerated above are by no means exhaustive. In coming out with this legislation, the overall maritime policy of the government within which is embedded the shipper oriented status of the country, must always be borne in mind.

CARRIAGE OF GOODS BY WATER LAW 1991

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**THE ONE-HUNDRED AND FORTY-FOURTH LAW
OF THE PROVISIONAL NATIONAL DEFENCE
COUNCIL OF GHANA
ENTITLED**

THE CARRIAGE OF GOODS BY WATER LAW 1991

A LAW to give effect to the provisions of the United Nations Convention on the Carriage of Goods by Sea 1978 and to regulate the carriage of goods by water to and from and within ports in Ghana.

DATE OF ASSENT: 20TH APRIL 1991

WHEREAS the Government of Ghana participated in the deliberations in the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules) and accordingly signed the Convention and Final Act on the 31st March 1978;

AND WHEREAS it is expedient to give effect to the provisions of the Convention in order that the said provisions shall have the force of Law in Ghana;

NOW THEREFORE IN PURSUANCE of the Provisional National Defence Council (Establishment) Proclamation, 1981, this law is hereby made:

PART I**GENERAL PROVISIONS**

Short title 1.(1) This law may be cited as the Carriage of and commencement Goods by Water Law and shall enter into force on the date of notification in the official gazette.

Definitions2. In this law:

"actual carrier" means any person to whom the performance of the carriage, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted;

"bill of lading" includes any document or receipt which evidences a contract of carriage by water and the taking over or loading of the goods by the carrier and by which the carrier undertakes to deliver the goods against surrender of the document;

"carrier" means any person by whom or in whose name a contract of carriage of goods by water has been concluded with a shipper;

"consignee" means any person entitled to take delivery of the

goods;

"contract of carriage of water" means any contract whereby the carrier undertakes against payment of freight to carry goods by water from one port to another; however, a contract which involves carriage by water and also carriage by some other means is deemed to be a contract of carriage by water for the purposes of this law only in so far as it relates to the carriage by water;

"goods" includes live animals; where the goods are consolidated in a container, pallet or similar article of transport or where they are packed, "goods" includes such article of transport or packaging if supplied by the shipper;

"port" includes any facility used for receiving vessels for the purpose of loading and unloading of goods carried by water;

"shipper" means any person by whom or in whose name or on whose behalf a contract of carriage of goods by water has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation

to the contract of carriage by water;

"unit of account" means the Special Drawing Right as defined by the International Monetary Fund.

Scope of 3.(1) This law is applicable to all contracts of application carriage of goods by water if:

(a) the carriage of goods by water is from one port in Ghana to another port in Ghana;

(b) the port of loading as provided for in the contract of carriage by water is located in Ghana;

(c) the port of discharge as provided for in the contract of carriage by water is located in Ghana;

(d) one of the optimal ports of discharge provided for in the contract of carriage by water is the actual port of discharge and such port is located in Ghana;

(e) the bill of lading or other document evidencing the carriage of goods by water is issued in Ghana;

(f) the bill of lading or other document evidencing the contract of

carriage by water provides that Ghanaian law is to govern the contract.

- (2) This law is applicable without regard to the nationality of ship, the carrier, the actual carrier, the shipper, the consignee or any other interested person.
- (3) Subject to subsection (4), this law is not applicable to charterparties.
- (4) Where a bill of lading is issued pursuant to a charterparty, this law applies to such a bill of lading if it governs the relationship between the carrier and the holder of the bill of lading not being a charterer.
- (5) Subject to subsection (6), where a contract provides for future carriage of goods in a series of shipments during an agreed period, this law applies to each shipment.
- (6) Where a shipment referred to in subsection (5) is made under a charterparty, subsection (3) shall apply.

Interpretation 4. In the interpretation and application of this of this law, regard shall be had to its international character and the need to promote uniformity.

PART II
LIABILITY OF THE CARRIER

Period of5.(1) Under this law, the responsibility of the responsibility carrier covers the period during which he is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

(2) For the purpose of subsection (1), the carrier is deemed to be in charge of the goods;

(a) from the time he has taken over the goods from:

(i) the shipper or a person acting on his behalf; or

(ii) an authority or other third party to whom pursuant to any laws or regulations which are for the time being in force

applicable at the port of loading, the goods have been handed over for shipment.

(b) until the time he has delivered the goods:

(i) by handing over the goods to the consignee; or

(ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the custom of the particular trade applicable at the port of discharge; or

(iii) by handing over the goods to an authority or other third party to whom, pursuant to any laws or regulations which are for the time being in force applicable at the port of discharge, the goods must be handed over.

(3) If the goods have not been delivered as

required by section 5 within 90 consecutive days following the date of delivery determined in accordance with subsection 2, the person entitled to make a claim may treat the goods as lost.

(4) (a) The carrier is liable:

(i) for loss of 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 to avoid or mitigate its consequences.

(b) Where a fire occurs on board the ship affecting the goods, if the claimant or the carrier so desires, a survey in

accordance with shipping 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) The carrier is not liable for loss, damage or delay in delivery with respect to live animals, where such loss, damage or delay in delivery arises from 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 with respect to 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 the loss, damage or delay in

delivery resulted from measures taken 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.

Limitation of 7.(1)(a) The liability of the carrier for loss liabilityresulting from loss of or damage to the goods according to section 6 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is higher.

(b)The liability of the carrier for delay in delivery according to section 6 is limited to an

amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by water.

(c) In no case shall the aggregate liability of the carrier under both paragraph (a) and (b) exceed the limitation which would be established under paragraph (a) for total loss of the goods with respect to which such liability was incurred.

(2) For the purposes of calculating which amount is higher in accordance with Paragraph (a), the following rules shall apply:

(a) Where a container pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the document evidencing the contract of carriage by water as packed in such article of transport shall be deemed to be packages or shipping units and except as provided herein, the goods in such article of transport shall be deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, such article, if not owned or otherwise supplied by the carrier, shall be considered to be one separate shipping unit.

(3) Nothing in this law shall preclude the carrier and the shipper from entering into any agreement to fix limits of liability exceeding those provided for in subsection (1).

Application 8.(1) The defences and limits of liability to non- provided for in this law apply in any action contractual against the carrier in respect of loss or claims damage to the goods covered by the contract of carriage of goods by water, as well as of delay in delivery whether the action is founded in contract, or in tort or otherwise.

(2) If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this law.

(3) Except as provided in section 9, the aggregate of the amounts recoverable from the carrier and from any persons referred to in subsection (2) shall not exceed the limits of liability under this law.

Loss of right 9.(1) The carrier is not entitled to the benefit to limit of the limitation of liability provided for responsibility in section 7 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with intent to cause such loss, damage or delay or recklessly and with knowledge that such loss, damage or delay would probably result.

(2) Notwithstanding section 8(2), a servant or

agent of the carrier is not entitled to the benefit of limitation of liability provided for in section 7 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

Deck cargo10.(1) The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the custom of the particular trade or is required by statutory rules and regulations.

(2) If the carrier and the shipper have agreed that the goods shall be carried on deck, the carrier shall insert in the bill of lading or other document evidencing the contract of carriage by water a statement to that effect. In the absence of such a statement, the carrier has the burden of proving that an agreement for carriage on deck has been entered into.

(3) The carrier shall not be entitled to invoke an agreement entered into with the shipper under subsection (2) against a third party including a consignee, who has acquired in good faith the bill of lading or other document evidencing the contract.

(4) Carriage of goods on deck contrary to express agreement to carry under deck or in accordance with the custom of a particular trade shall be deemed to be an act or omission of the carrier within the meaning of section 9.

Liability of 11.(1) Where the performance of the carriage or the carrier part thereof has been entrusted to an actual and actual carrier, whether or not in pursuance of a carrier liberty under the contract of carriage by water, the carrier shall still remain responsible for the entire carriage in accordance with this law. The carrier is responsible, in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within

the scope of their employment.

(2) The responsibility of the carrier under this law shall apply mutatis mutandis to the actual carrier for the carriage performed by him and in particular subsections (2) and (3) of section 8 and subsection (2) of Section 9 shall be applicable where an action is brought against a servant or agent of the actual carrier.

(3) Where the carrier through a special agreement assumes obligations not imposed by this law or waives rights conferred by this law, the actual carrier shall be deemed to be bound by such assumption of obligation or waiver if he expressly agrees to be so bound but whether or not the actual carrier so agrees, the carrier shall remain bound by the obligations or waivers resulting from such special agreement.

(4) The carrier and actual carrier shall be held jointly and severally liable to the extent that both are found liable.

(5) The aggregate of the amounts recoverable from the carrier, the actual carrier and their servants and agents shall not exceed the limits of liability under this law.

(6) Nothing in this section shall prejudice any right of recourse as between the carrier and actual carrier.

Through 12.(1) Notwithstanding subsection (1) of section 11, carriagewhere a contract of carriage by water provides explicitly that a specified part of the carriage covered by the said contract is to be performed by a named person other than the carrier, the contract may also provide that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier during such part of the carriage.

(2) Any stipulation in a contract of carriage of goods by water to the effect that the carrier is not liable for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in the charge of the actual carrier, shall be of no effect if no judicial proceedings can be

instituted against the actual carrier in a competent court as provided for under section 22 subsections (1) and (2).

(3) The burden of proving that any loss damage or delay in delivery has been caused by such an occurrence rests upon the carrier.

(4) The actual carrier is responsible in accordance with subsection (2) of section 10 for loss, damage or delay in delivery caused by an occurrence which takes place while the goods are in his charge.

PART III

LIABILITY OF THE SHIPPER

General 13. The shipper is not liable for loss sustained ruleby the carrier or 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.

Special 14.(1) The shipper shall mark or label in a suitable
rules on manner dangerous goods as dangerous.
dangerous goods

(2) Where the shipper hands over goods to a carrier or an
actual carrier as the case may be, the
shipper shall inform him of the dangerous
character of the goods and if necessary, of
the precautions to be taken.

(3) Where the shipper fails to so inform the
carrier or actual carrier and such carrier or
actual carrier does not otherwise have
knowledge of their dangerous character; the
shipper shall be liable to the carrier and
any actual carrier from the shipment of such
goods and the goods may at any time be
unloaded, destroyed or rendered harmless, as
the circumstances may require, without
payment of compensation.

(4) Where subsection (2) of section 14 do not apply
and dangerous goods pose an actual danger to
life or property, such goods shall be
unloaded, destroyed or rendered harmless, as
the circumstances may require, without

payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with this section.

PART V

CLAIMS AND ACTIONS

Notice of 20.(1) Unless notice of loss or damage, damage specifying the general nature of such or delay loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is prima facie evidence of the delivery by the carrier of the goods as described in the document of transport, or if no such document has been issued, in good condition.

(2) Subsection (1) shall be applicable where the loss or damage is not apparent and notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.

- (3) If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.
- (4) Where there is any actual or apprehended loss or damage, the carrier and the consignee must give all reasonable facilities to each other for inspecting and tallying the goods.
- (5) In the case of loss arising out of delay in delivery, no compensation shall be payable unless a notice has been given in writing to the carrier within 60 consecutive days after the day when the goods were handed over to the consignee.
- (6) Where the goods are delivered by an actual carrier, any notice given to him under this section shall have the same effect as if it had been given to the carrier and any notice given to the carrier shall have effect as if given to the actual carrier.

- (7) Unless notice of loss or damage, specifying the general nature of the loss or damage, is given in writing by the carrier or actual carrier to the shipper not later than 90 consecutive days after the occurrence of such loss or damage or after the delivery of the goods in accordance with subsection (2) of section 5, whichever is later, the failure to give such notice shall be prima facie evidence that the carrier or the actual carrier has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents.
- (8) For the purpose of this section, notice given to a person acting on the carrier's or actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper respectively.

Limitation of 21.(1) Any action relating to carriage of goods actions under this law shall be time-barred if judicial or arbitral proceedings are not

instituted within a period of two years.

(2) The limitation period shall commence on the day on which the carrier has delivered the goods or part thereof, or, in cases where no goods have been delivered, on the last day on which the goods should have been delivered.

(3) The day on which the limitation period commences is not included in the period.

(4) Any person against whom a claim is lawfully made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant which period may be further extended by subsequent declarations.

Jurisdiction 22.(1) Any proceedings under this law may be instituted,

(a) in the High Court of Ghana provided that:

(i) the defendant's principal place of business is in Ghana, or where such principal place of business is not in

Ghana, the habitual residence of the defendant is in Ghana; or

(ii) the contract of carriage was entered into in Ghana and the defendant has his place of business, branch or agency in Ghana through which the contract was entered into; or

(iii) the port of loading or discharge is in Ghana;

or

(b) In any place designated for that purpose in the contract of carriage by water.

(2) Notwithstanding the provisions of subsection (1) an action may be instituted in the High Court of Ghana, where the carrying vessel or any other vessel in the same ownership has been arrested in a port in Ghana in accordance with the relevant Ghanaian law for the time being in force.

(3) No judicial proceedings relating to the carriage of goods under this law may be instituted in

a place not specified in subsection (1).

(4) Subsection (3) shall not be interpreted to include measures taken with a view to enforcing a judgement obtained under this law.

(5) Notwithstanding section 22, a designation of where the claimant may institute an action, agreed to by the parties after the claim has arisen shall be valid.

Arbitration 23.(1) Subject to this section, parties may provide by agreement evidenced in writing, that any dispute arising under this law, shall be referred to arbitration.

(2) Where a charterparty contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier shall not be entitled to invoke such a provision against a holder having acquired the bill of lading in

good faith.

(3) The arbitration proceedings shall at the option of the claimant, be instituted in Ghana, provided:

(a) (i) the principal place of business of the defendant is in Ghana or where such principal place of business is not in Ghana, the habitual residence of the defendant is in Ghana; or

(ii) the contract of carriage was entered into in Ghana and the defendant has his place of business, branch or agency in Ghana, through which the contract was entered into; or

(iii) the port of loading or port of discharge is in Ghana;

or

(b) any place designated for that purpose in the arbitration clause or agreement.

- (4) The Arbitrator or arbitration tribunal shall apply this Law.
- (5) Subsections (3) and (4) shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.
- (6) Notwithstanding section 23, an agreement by the parties regarding the place of arbitration after the claim has arisen shall be valid.

PART VI
SUPPLEMENTARY PROVISIONS

Contractual24.(1)(a) Any stipulation in a contract of stipulationscarriage by water contained in any document evidencing the contract of carriage shall be null and void to the extent that it derogates, directly or indirectly from the provisions of this law.

(b)The nullity of such a stipulation shall not affect the validity of the other provisions of the contract or document of which it forms a part.

(c)A clause assigning benefit of insurance of the goods in favour of the carrier or any similar clause shall be null and void.

(2) Notwithstanding subsection (1), a carrier may increase his responsibilities and obligations under this Law.

(3)Where a bill of lading or other document &evidencing the contract of carriage by water is issued, it shall contain a statement that the carriage is subject to Section 24 of this law.

Regulations25.The Secretary for Transport and Communications may
make regulations to facilitate the
administration of this law.

Repeal26.The Bills of Lading Act 1961 (Act 42) is hereby repealed.