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COMPARISON OF INTERNATIONAL CONVENTIONS WITH TURKISH
LAW RELATED TO THE CARRIER'S LIABILITY FOR LOSS, DAMAGE
AND DELAY UNDER THE CONTRACT OF CARRIAGE BY SEA

Research dissertation presented in partial fulfilment of the requirements for the degree
of LLM in International Commercial Law

(QQI)

Law School, Griffith College Dublin

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2020

Candidate Declaration

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I certify that the dissertation entitled: Comparison of International Conventions with Turkish Law Related to the Carrier's Liability for Loss, Damage and Delay under the Contract of Carriage by Sea

submitted for the degree of: LLM in International Commercial Law

is the result of my own work and that where reference is made to the work of others, due acknowledgment is given.

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List of Abbreviations

FIO	Free-in-and-out clause
SDR	Special Drawing Rights
TCC	Turkish Commercial Code
TCPC	Turkish Civil Procedure Code
TGNA	Turkish Grand National Assembly
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference for Trade and Development

Abstract

In this dissertation, the evolution of the law applicable to the carriage of goods by sea is analysed and also the main differences and similarities of international conventions on the carriage of the goods by sea and Turkish Law related to the carrier's liability for loss of or damage to the goods and delay in delivery under the contract of carriage by sea were examined. Provisions regulating the carrier's liability under Turkish Commercial Code and The Hague Rules, The Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules were compared. It was shown that the balance between cargo interest and ship interest is the main subject of the maritime law and due to the technological developments and current needs of the parties of the carriage contract of goods by sea, the carrier's liability regimes have been changed by international conventions. After the definition of the carrier and the scope of international conventions and Turkish Law are explained, provisions under international conventions related to the duties of the carrier, carrier's liability for loss, damage and delay, carrier's period of liability, exemption from liability, limitation of liability, carrier's liability for the act of other parties, burden of proof, notice requirement and time for suit were compared with Turkish Law in order to determine whether Turkish Law is in conformity with these international conventions. This research was conducted by doctrinal and comparative methodology as well as historical legal research to understand the evolution of international maritime law. As a result of this research, it was deduced that Turkish Commercial Code was drafted by considering related provisions of The Hague Rules because of that Turkey is a contracting state, as well as the Hague-Visby Rules and the Hamburg Rules. It was shown that the reason why Turkish Law adopts some provisions of the Hamburg Rules is that the Hague Rules do not cover the carrier's liability for delay in delivery. However, it is found that Turkish Law does not refer to the Rotterdam Rules.

I. INTRODUCTION

The conflict between cargo interest and ship interest has been always an issue between nations. Even in 6th century, in Roman law, the carrier was obliged to act in good faith and liable for the safety and delivery of the goods, and also for the loss of and damage to the goods.¹ In 16th century, it was accepted that the master should be liable for loss and damages arising from the act of the master or his crew and not be liable for loss and damages arising from sea perils and pirates etc.² At this time, law of merchant was applicable to the disputes between cargo interest and ship interest.³

In early 19th century, both common law countries and civil law countries acknowledged that the carrier was liable for loss of or damage to the goods unless he proved that his negligent act did not cause the loss or there were 'excepted causes' which were 'act of God act of public enemies, fault of shipper or inherent vice of the goods'.⁴ In late 19th century, the International Law Association prepared a model draft in 1882 explaining the conditions for liability of carrier. Even though this document had not been accepted in a widespread manner, it affected the Hague Rules in 20th century.⁵ Therefore, not only the balance between cargo interest and ship interest, but also the liability of the carrier for loss, damage and delay has always been an issue for international law.

There are multiple international documents regulating the rights and obligations of the parties of an agreement of carriage of goods by sea. In 25 August 1924, the Hague Rules were adopted under International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ("the Hague Rules").⁶ This Convention was amended in 1968 by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading which is known as the Hague-Visby

¹ Samuel Robert Mandelbaum, 'International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules' (1995) 5 *J Transnat'l L & Pol'y* 1, 7-8 citing Eric Fletcher, *The Carrier's Liability* 36-37 (1932).

² *ibid* 8

³ *ibid* 7

⁴ *ibid* 8 citing Michael F. Sturley, 1 *The Legislative History of the Carriage of Goods by Sea Act* 3-4 (1990)

⁵ *ibid* 10 citing Michael F. Sturley, 1 *The Legislative History of the Carriage of Goods by Sea Act* 3-4 (1990) *supra* note 49, at 4.

⁶ International Convention for the Unification of Certain Rules of Law relating to Bills of Lading [1924] 120 *LNTS* 187

Rules (“the Hague-Visby Rules”).⁷ Furthermore, the Hague-Visby Rules were amended in 1979 by the Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968 (“SDR Protocol”).⁸ Another document is the United Nations Convention on the Carriage of the Goods by Sea which was adopted in 1978 (“the Hamburg Rules”).⁹ Final document is the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea which was adopted in 2008 (“the Rotterdam Rules”).¹⁰

Turkey is a contracting state to the Hague Rules¹¹, however has not ratify or accede the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. Under this work, above-mentioned three main international conventions will be examined and be compared with the Turkish Law related to carrier’s liability for damage, loss and delay in delivery. The aim of this work is to identify the provisions of Turkish Law are whether compatible with the international conventions and at the same time to examine the developments concerning the responsibility of the carrier in international law.

II. INTERNATIONAL CONVENTIONS

Maritime law is an important subject under international law due to the fact that technological developments have result in growth in international commerce by sea transportation.¹² Therefore, parties of such international agreement have needed ‘security and predictability’ related to their rights and obligation, jurisdiction, applicable law and also enforceability.¹³ Therefore, international documents and conventions became necessity for international maritime law.

⁷ The Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading [1968] 1412 UNTS 128.

⁸ The Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968 [1979] 1412 UNTS 146.

⁹ United Nations Convention on the Carriage of the Goods by Sea [1978] 1695 UNTS 3.

¹⁰ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea [2008] UN Doc A/RES/63/122 (currently not in force).

¹¹ Accession of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Law No.: 6469 Official Gazette [Resmi Gazete = R.G.], 22 February 1955 No. 8937, enacted: 14 February 1955.

¹² Athanassios Nicholas Yiannopoulos, ‘The Unification of Private Maritime Law by International Conventions’ [1965] 30 Law Contemp Probl 370, 370.

¹³ *ibid* 371.

1. The Hague Rules and The Hague-Visby Rules

Technological improvements resulted in expanded international sea transportations, therefore standard rules became a necessity for merchants in maritime countries.¹⁴ As a result, several conventions and rules had been drafted such as Conference on the International General Average Rules (York-Antwerp Rules) in 1864, 1877, 1890¹⁵ and Convention for Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea.¹⁶

After First World War affected maritime sector, importance of the uniformed rules was realized.¹⁷ Due to the recommendation of the Imperial Shipping Committee in 1921, the meetings of the International Law Association had started for unification of the rules related to the carriage of goods by sea and bills of lading at Hague and the Hague Rules was submitted to the International Law Association.¹⁸ Upon the request of the International Law Association from Comité Maritime International, a Diplomatic Conference took place in 1922. Following the several meetings, the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading which is known as the Hague Rules was signed in 1924 at Brussels.¹⁹

In Diplomatic Conference on Maritime Law in 1967, Comité Maritime International drafted several changes on the Hague Rules and these changes which are called as Visby Rules were incorporated into the Hague Rules in 1968 by a Protocol which amended the International Convention for the Unification in Certain Rules of Law relating to Bills of Lading (“the Visby Amendment”).²⁰

The Hague Rules referred to pounds sterling²¹ while determining the carrier’s liability and stated that the gold value²² of this monetary unit shall be taken into consideration.

¹⁴ C W O'Hare, 'The Hague Rules Revised: Operational Aspects' (1976) 10 Melb U L Rev 527, 529.

¹⁵ Benjamin W Yancey, 'York-Antwerp Rules 1950' (1952) 6 Loy L Rev 121, 123-124.

¹⁶ Convention For the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea dated [1944] Treaty No: 135(a) 205 LNTS 220.

¹⁷ O'Hare, 'The Hague Rules Revised' (n 14) 530.

¹⁸ Francis Reynolds, 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules' (1990) 7 Austl & NZ Mar LJ 16, 16.

¹⁹ O'Hare, 'The Hague Rules Revised' (n 14) 531-532.

²⁰ O'Hare, 'The Hague Rules Revised' (n 14) 532.

²¹ The Hague Rules, art 4(5).

²² The Hague Rules, art 9.

On the other hand, Visby Rules changed article 4(5) of the Hague Rules and referred to Franc Poincare as a monetary unit. However, due to fluctuating world economy and currency exchange rates, the International Monetary Fund recommended the Special Drawing Rights (“SDR”) as a new monetary unit and the Hague-Visby Rules was adopted SDR and was amended in 1979 by the Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968.²³

2. The Hamburg Rules

Upon cooperation of the United Nations Conference for Trade and Development (“UNCTAD”) and the United Nations Commission on International Trade Law (“UNCITRAL”), UNCTAD created a working group for assessment of international maritime legislation and its conformity with current needs.²⁴ The Working Group included representatives of different member states which have different types of legal systems and also which have economic interest.²⁵ The Working Group prepared a draft convention and this draft was reviewed and approved by UNCITRAL in 1976.²⁶

In following, in the conference held by UNCITRAL in Hamburg for revision of out-dated Hague-Visby Rules, UNCITRAL tried to overcome the conflict between the cargo interest and the carrier and also ‘traditional maritime nations’ and ‘developing world’.²⁷ In diplomatic conference, the United Nations Convention on the Carriage of Goods by Sea was adopted in 31 March 1978²⁸ and in Resolution 48/34, United Nations General Assembly declared the aim of Convention as ‘the progressive harmonization and unification of international trade law’.²⁹

²³ Hrvoje Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (1988) 119 *Uporedno Pomorsko Pravo i Pomorska Kupoprodaja* 177, 188-189.

²⁴ Sinha Basnayake, 'Introduction: Origins of the 1978 Hamburg Rules' (1979) 27 *Am J Comp L* 353, 353.

²⁵ *ibid* 354-355 citing UNCITRAL, Report on Fourth Session (1971) para 16, II Yearbook 9,12.

²⁶ *ibid* 355, citing UNCITRAL, Report on Ninth Session (1976) paras 34-45, VII Yearbook 13-20.

²⁷ Samuel Robert Mandelbaum, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions' (1996) 23 *Transp LJ* 471, 482 citing Benjamin W Yancey, 'Carriage of Goods: Hague, Cogsa, Visby, and Hamburg' (1982-1983) 57 *Tul L Rev* 1238, 1249-1250.

²⁸ Hrvoje Kacic, 'The Provisions regarding the Carrier's Liability under the Hamburg Rules' (1989) 122 *Uporedno P/omorsko Pravo* 191, 192.

²⁹ UNGA Res 48/34 (1 February 1994) GAOR 48th Session UN Doc No A/RES/48/34.

3. The Rotterdam Rules

After the Hamburg Rules, it was seen that the Hamburg Rules could not achieve to create uniformity in international level and also carrier's liability became more 'complex' during time.³⁰ Therefore, The Comité Maritime International worked on the draft of new convention and created the preliminary draft, in following the final draft of the convention was prepared by UNCITRAL and the Working Group III which was created by UNCITRAL.³¹ The aim of the Rotterdam Rules was to regulate the relationship between the carrier and cargo in international shipments which includes sea travels at some point.³² As a result, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted by General Assembly in 2009.³³ In Resolution 63/122, General Assembly explained the reasons why a new convention was needed as lack of uniformity and incompatibility with 'modern transport practices'; moreover explained the primary aim of the Rotterdam Rules as creating uniformed and modernized rules concerning 'the carriage of goods involving a sea leg' and also to provide certainty and predictability.³⁴

III. TURKISH LEGISLATION

In Ottoman Empire³⁵, the first regulation related to maritime law was Commercial Maritime Code dated 1863 which was adopted from French Commercial Code.³⁶ After Turkish Republic had been founded in 1923, Turkish Commercial Code was regulated in 1926³⁷, however had not included any provisions related to maritime law.³⁸ Provisions in respect to maritime law were added into Turkish Commercial Code in

³⁰ Regina Asariotis, 'Reflections on the Rotterdam Rules' in Malcolm Clarke (eds) *Maritime Law Evolving* (Hart Publishing 2013) 131.

³¹ Sabena Hashmi, 'The Rotterdam Rules: A Blessing' (2012) 10 *Loy Mar LJ* 227, 227-228.

³² Michael F Sturley, 'General Principles of Transport Law and the Rotterdam Rules' (2010) 2 *EJCL* 98, 98.

³³ UNGA Res 63/122 (2 February 2009) GAOR 63rd Session UN Doc No A/RES/63/122.

³⁴ *ibid.*

³⁵ Commercial Maritime Code was regulated by the Ottoman Empire due to the fact that at the date of - the adoption of Commercial Maritime Code in 1864, the Ottoman Empire had not been dissolved yet.

³⁶ Ercimet Saray, 'Tanzimat Sonrası Kanunlaştırma Çalışmalarının Kaynakları ve Metodolojisi (Resources and Methodology of Post-Tanzimat Law Activities)' [2019] 2/1 *BIJAR* 9, 20.

³⁷ New Commercial Code, Law No.: 865 Official Gazette [Resmi Gazete = R.G.], 28 June 1926 No. 406, enacted: 29 May 1926.

³⁸ Law on the Enforcement and Implementation of the Turkish Commercial Code and Justice Commission Report (1/487), 'Turkish Commercial Code Preamble' (General Directorate for Laws, 2007) <<http://www.kgm.adalet.gov.tr/Tasariasamalari/Kanunlasan/2011Yili/kanmetni/6103ss.pdf>> accessed 5 June 2020 (Turkish Commercial Code Preamble).

1929.³⁹ Due to the deficiencies in 1929 dated Code, it was abolished and maritime law was regulated under fourth book of 1956 dated Turkish Commercial Code.⁴⁰ 1956 dated Turkish Commercial Code had been in force until 2012 and New Turkish Commercial Code (“TCC”) has been entered into force in 2012.⁴¹

Regarding the relationship between international conventions and Turkey, Turkey is a contracting state to the Hague Rules⁴², however has not ratify or accede the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. On the other hand, the provisions of TTC related to liabilities of carrier had been drafted with consideration of above-mentioned Conventions.⁴³ Moreover, maritime codes of European countries and especially German law were used as source while preparing the draft of TCC.⁴⁴

IV. COMPARISON OF THE HAGUE RULES, THE HAGUE-VISBY RULES, THE HAMBURG RULES, THE ROTTERDAM RULES AND TCC

1. DEFINITION OF CARRIER

‘A carrier is the person who undertakes the carriage actually or through a contract’.⁴⁵ In order to examine the carrier’s liability under above-mentioned international conventions and TCC, it is important how the carrier is defined under above legal documents.

1.1. The Hague Rules and The Hague-Visby Rules

According to the Hague/Hague-Visby Rules article 1(a), both the owner and the charterer are considered as carrier.⁴⁶ According to Tetley, ‘the charterer(s) and

³⁹ Turkish Commercial Code Maritime Law, Law No.: 1440 Official Gazette [Resmi Gazete = R.G.], 20 May 1929 No. 1197, enacted: 13 May 1929.

⁴⁰ Turkish Commercial Code, Law No.: 6762 Official Gazette [Resmi Gazete = R.G.], 9 July 1956 No. 9353, enacted: 29 June 1956.

⁴¹ Turkish Commercial Code, Law No.: 6102 Official Gazette [Resmi Gazete = R.G.], 11 February 2011 No. 27846, enacted: 13 January 2011.

⁴² Accession of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Law No.: 6469 Official Gazette [Resmi Gazete = R.G.], 22 February 1955 No. 8937, enacted: 14 February 1955.

⁴³ Nil Kula Değirmenci, *Maritime Law in Turkey* (1st edn, Onikilevha 2017) 14.

⁴⁴ *ibid* 15.

⁴⁵ *ibid* 96.

⁴⁶ The Hague Rules, art 1(a).

shipowners should be held jointly and severally (solidarily) liable⁴⁷ and this view is accepted by Reed J in *Canastrand Industries Ltd. v the Lara S.*⁴⁸ On the other hand, in *Freedom General Shipping SA v Tokai Shipping Co ltd, The Khian Zephyr*, it is stated by Robert Goff J that interpretation of the Hague/Hague-Visby Rules as 'implied joint venture between the owner and the charterer' is not acceptable under English Law and according to English Law, contracting carrier is the carrier under the Hague/Hague-Visby Rules.⁴⁹ In *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)*, Court decided that in order to decide whether charterer or shipowner was the carrier, signature in the bill should be taken into consideration⁵⁰ and this decision was criticized by Tetley claiming both charterer and shipowner should be regarded as carrier.⁵¹

1.2. The Hamburg Rules

The Hamburg Rules define 'actual carrier' in article 1(2)⁵² due to that the Hague/Hague-Visby Rules do not provide an adequate solution for identification of the carrier, and by this article, if a person who enters into the carriage contract does not perform the carriage obligation in person, then the other persons such as 'shipowner or ship operator' will be considered as actual carrier.⁵³ Furthermore, the Hamburg Rules regulated the liability of the actual carrier under article 10.⁵⁴ However, the Hamburg Rules do not provide any guide to how the carrier will be identified and this absence has caused the different approaches of the courts on this matter.⁵⁵

1.3. The Rotterdam Rules

Due to lack of guidance for identification of the carrier in the Hague/Hague-Visby Rules or the Hamburg Rules, the Rotterdam Rules have a special article for the

⁴⁷ William Tetley, 'Demise of the Demise Clause' (1999) 42/2 McGill Law Journal 807, 831.

⁴⁸ *Canastrand Industries Ltd. v the Lara S* [1993] 2 F.C.R. 553.

⁴⁹ *Freedom General Shipping SA v Tokai Shipping Co ltd, The Khian Zephyr* [1982] 1 Lloyd's Rep 73.

⁵⁰ *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] 1 Lloyd's Rep. 571.

⁵¹ William Tetley 'Case Comment: The House of Lords decision in *The Starsin*' (2004) 35 Journal of Maritime Law & Commerce 122.

⁵² The Hamburg Rules, art 1(2).

⁵³ Jan Ramberg, 'The Vanishing Bill of Lading &(and) the Hamburg Rules Carrier' (1979) 27 Am J Comp L 391, 393.

⁵⁴ The Hamburg Rules, art 10.

⁵⁵ Stefano Zunarelli, 'The Carrier and the Maritime Performing Party in the Rotterdam Rules' (2009) 14 Unif L Rev 1011, 1012.

clarification of the identification of the carrier. Under article 37, the Rotterdam Rules explain how to determine the carrier.⁵⁶ Additionally, article 1(6) of the Rotterdam Rules defines ‘performing party’ and article 1(7) defines ‘maritime performing party’.⁵⁷

1.4. Turkish Law

According to article 1138 of TCC, the carrier is the person who undertakes to carry the goods in return for freight (a) under voyage charter contract by assigning the whole ship or a part of the ship or (b) under contract of carriage without assigning any specific ship.⁵⁸ Additionally, TCC refers ‘actual carrier’ term under article 1191 and regulates the liability of actual carrier.⁵⁹ In the preamble, it is explained that due to the absence of any provision under the Hague Rules and former Turkish Commercial Code related to the liability of the actual carrier, article 10 of the Hamburg Rules is incorporated into TCC.⁶⁰ In addition, Turkish Supreme Court uses not only the terms “actual carrier” and ‘contractual carrier’⁶¹ but also uses ‘sub-carrier’ term which is corresponding to actual carrier.⁶²

2. SCOPE

2.1. The Hague Rules and The Hague-Visby Rules

In article 1(b), while defining ‘contract of carriage’, the Hague Rules state explicitly that provisions under this Convention will only be applied to ‘contracts of carriage covered by a bill of lading’.⁶³ According to article 5, the Hague Rules will not be applied to charter-parties.⁶⁴ Article 10, states that in order for the Hague Rules to be applied, there should be a bill of lading issued in a contracting state which results in that

⁵⁶ The Rotterdam Rules, art 37.

⁵⁷ The Rotterdam Rules, art 1(6) and 1(7).

⁵⁸ TCC, art 1138/1.

⁵⁹ TCC, art 1191.

⁶⁰ Draft Turkish Commercial Code and Report of the Justice Committee No: 1/324 (Turkish Grand National Assembly, Session : 23, Legislative Year :2, 2017) 36; Turkish Commercial Code Preamble (n 38) 362.

⁶¹ Yargıtay 11. Hukuk Dairesi (Supreme Court 11th Civil Chamber) 10.10.2018, Esas No. (Case No.) : 2017/101, Karar No. (Judgment No.) : 2018/6208.

⁶² Yargıtay 11. Hukuk Dairesi (Supreme Court 11th Civil Chamber) 14.12.2015, Esas No. (Case No.) : 2015/5836, Karar No. (Judgment No.) : 2015/13401.

⁶³ The Hague Rules, art 1(b).

⁶⁴ The Hague Rules, art 5.

the Hague Rules are only applicable to 'the outward shipments' from the contracting states to another contracting state or non-contracting state.⁶⁵ On the other hand, any shipments from a non-contracting state to a contracting state, the Hague Rules will not be applied.⁶⁶

Related to application of the Hague Rules, in *Vita Food Products, Incorporated v Unus Shipping Company, Limited (In Liquidation)*, Privy Council held that if the national law required a paramount clause inserted into the bill of lading for application of the Hague Rules and there was no paramount clause in the bill of lading, then the Hague Rules would not be applied.⁶⁷ As a result of *Vita Food Products, Incorporated Appellant; v Unus Shipping Company, Limited (In Liquidation)*, by The Visby Amendment in 1968, article 10 of the Hague Rules is amended to eliminate such applications the courts and now state that 'each contracting state shall apply the provisions of this Convention'.⁶⁸

Article 10 of the Hague-Visby Rules provides two more situations which the Hague-Visby Rules will be applicable, in addition to the one specified under the Hague Rules. These additional situations are a) if 'the carriage is from a port in a contracting state' and b) if parties agreed on the application of the Hague-Visby Rules.⁶⁹ Therefore, scope of the Hague-Visby Rules became more clear and certain.

Moreover, the Hague/Hague-Visby Rules are applicable to neither live animals nor deck cargo.⁷⁰ The reason why the Hague/Hague-Visby Rules do not cover deck cargo is because at the time the rules were drafted, deck carriage was considered as highly risky and might cause loss of or damage to the cargo.⁷¹

⁶⁵ Zulkifli Hasan and Nazli Awang, 'The Weaknesses of the Hague Rules and the Extent of Reforms Made by the Hague-Visby Rules' (2007) 2007 M.L.J 1, 2.

⁶⁶ *ibid* 3.

⁶⁷ *Vita Food Products, Incorporated v Unus Shipping Company, Limited (In Liquidation)* [1939] A.C. 277.

⁶⁸ The Hague-Visby Rules, art 10; The Visby Amendment, art 5; Hasan and Awang (n 65) 8-9; Paul Todd, *Principles of the Carriage of Goods by Sea* (Routledge 2016) 325-326.

⁶⁹ The Hague-Visby Rules, art 10.

⁷⁰ The Hague/Hague-Visby Rules, art 1(c); Kacic, 'The Provisions regarding the Carrier's Liability under the Hamburg Rules' (n 28) 192.

⁷¹ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 19.

2.2. The Hamburg Rules

The Hamburg Rules have also similar provisions to the Hague-Visby Rules; however the Hamburg Rules go a step further and provides two additional circumstances which the Hamburg Rules will be applied. Under article 2, the Hamburg Rules also give importance to not only the port of loading but also the port of discharge including both stated in the contract and also the actual port of discharge.⁷² The Hamburg Rules is applicable whether or not bill of lading is issued.⁷³ Therefore, the scope of application of the Hamburg Rules is increased in comparison to the Hague-Visby Rules. Similar to the article 5 of the Hague/Hague-Visby Rules, it is expressly stated in article 2(3) that the Hamburg Rules will not be applied to charter-parties.⁷⁴

Different from the Hague-Visby Rules, in order to the Hamburg Rules to apply, a paramount clause inserted into the bill of lading is required according to article 23(3) and 15(1)(l).⁷⁵

Additionally, different from the Hague/Hague-Visby Rules, the Hamburg Rules are applicable to live animals and deck cargo⁷⁶; especially for deck cargo, the Hamburg Rules consider that the deck carrier no longer pose a risk for the cargo due to technological developments.⁷⁷

2.3. The Rotterdam Rules

The scope of the Rotterdam Rules is regulated under article 5, 6 and 7. In article 5, the Rotterdam Rules express that carriage should be international which means ports should be in different states and one of the ports of loading or discharge, or the place of delivery and receipt in a contracting state, the Rotterdam Rules will be applicable.⁷⁸

⁷² The Hamburg Rules, art 2.

⁷³ UNCITRAL, 'Status of the Hamburg Rules' (13 May 1994) UN Doc No A/CN.9/401/Add.1, 3, para 11.

⁷⁴ The Hamburg Rules, art 2(3).

⁷⁵ UNCITRAL, 'Status of the Hamburg Rules' (13 May 1994) UN Doc No A/CN.9/401/Add.1, 24; Robert Force, 'Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)' (1995-1996) 70 Tul L Rev 2051, 2081.

⁷⁶ Reynolds (n 18) 30; The Hamburg Rules, art 1(5).

⁷⁷ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 19.

⁷⁸ The Rotterdam Rules, art 5(1).

Similar to the Hamburg Rules, both inward and outward shipments are covered under the Rotterdam Rules.⁷⁹ On the other hand, the Rotterdam Rules does not make any distinction as contractual port of discharge or actual port of discharge as in the Hamburg Rules article 2(1)(c). Moreover, the place where the bill of lading is issued for determining the application of the Convention, which is a traditional ‘connecting factor in maritime conventions’ is ruled out by Rotterdam Rules and considered as unrelated.⁸⁰ In article 7, the Rotterdam Rules follow the footsteps of the Hague-Visby Rules and the Hamburg Rules and state that the Rotterdam Rules will not apply to charter-parties.⁸¹

2.4. Turkish Law

TCC regulates the maritime contracts under the fourth session of fifth book. Under this session, different types of contracts are regulated as bareboat charter contract under article 1119, time charter contract under article 1331, affreightment contracts including voyage charter contracts and contract of carriage under 1138, also bill of lading under article 1228. Therefore, TCC applies not only bills of lading but also charter-parties.

3. LIABILITY OF CARRIER FOR LOSS, DAMAGE AND DELAY

The carrier’s liability for loss of and damage to the goods are regulated under the Hague Rules, the Hague Visby Rules, the Hamburg Rules and the Rotterdam Rules and delay in delivery under the Hamburg Rules and the Rotterdam Rules. Under this chapter, the differences under these conventions will be examined and compared with Turkish Law.

3.1. Duties of Carrier

In order to examine the carrier’s liability for loss, damage or delay in delivery, it is important to mention the duties of the carrier. According to article 3(1) of the Hague Rules, carrier is obliged to exercise due diligence for seaworthiness, voyage-worthiness

⁷⁹ Peter Mankowski, 'The Rotterdam Rules - Scope of Application and Freedom of Contract' (2010) 2 EJCL 9, 9 citing Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland and Michael Tsimplis, *The Rotterdam Rules - A Practical Annotation* (London, 2009), para. 5-06.

⁸⁰ *ibid* 11.

⁸¹ The Rotterdam Rules, art 7.

and cargo-worthiness of the ship⁸² and this provision has not been amended by the Visby Amendment. The obligations of the carrier should be performed ‘before and at the beginning of the voyage’. In article 3(2), it is stated that carrier must fulfil his obligations to ‘load, handle, stow, carry, keep, care for and discharge’ of the cargo ‘properly and carefully’ and contrary to article 3(1), the carrier must perform these duties through the voyage.⁸³

On the other hand, the Hamburg Rules do not include any specific provision related to due diligence of the carrier.⁸⁴ Unlike the Hague/Hague Visby Rules, the Hamburg Rules do not give expressly the carrier the responsibility to make the ship seaworthy, but the carrier is obliged not to damage the goods negligently.⁸⁵

Different from the Hague/Hague-Visby Rules and the Hamburg Rules, the Rotterdam Rules state the basic duties of the carrier under article 11 which are carriage and delivery of the goods.⁸⁶ Under article 13 and 14, the Rotterdam Rules adopts the principles set out in the Hague/Hague Visby Rules related to duties of the carrier.⁸⁷ In the Rotterdam Rules, article 14 is similar to article 3(1) of the Hague/Hague-Visby Rules with slight differences which is that the carrier should perform his duties ‘before, at the beginning of, and during the voyage’.⁸⁸

Therefore, the Rotterdam Rules widen the carrier’s duty by adding the term ‘during the voyage’ into the text.⁸⁹ Article 13 of the Rotterdam Rules is similar with the article 3(2) of the Hague Rules. Under article 13(2) of the Rotterdam Rules, the parties can agree on that shipper/consignee will perform ‘loading, handling, stowing or unloading’ of the

⁸² The Hague Rules, art 3(1).

⁸³ The Hague Rules, art 3(2); Todd (n 68) 312.

⁸⁴ Francesco Berlingieri, ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ [2010] UNCITRAL bibliography 43rd sess., 6.

⁸⁵ Force (n 75) 2063.

⁸⁶ Theodora Nikaki, ‘The Carrier’s Duties under the Rotterdam Rules: Better the Devil You Know’ (2010) 35 Tul Mar LJ 1, 7.

⁸⁷ *ibid* 14.

⁸⁸ The Rotterdam Rules, art 14.

⁸⁹ Nikaki, ‘The Carrier’s Duties under the Rotterdam Rules’ (n 86) 7-8.

cargo and add into the bill of lading a free-in-and-out (“FIO”) clause.⁹⁰ Related to FIO clauses, the Rotterdam Rules correspond to the Hague/Hague-Visby Rules.⁹¹

TCC regulates the carrier duties under article 1141 and Turkish lawmakers adopted the system of the Hague Rules.⁹² Additionally, in article 1178(1) of TCC, it is stated that the carrier should act ‘properly and carefully’ while loading, stowing, handling, carrying, preserving and discharging the cargo which is similar to the article 3(2) of the Hague/Hague-Visby Rules and article 13 of the Rotterdam Rules.

3.2. Loss, Damage and Delay

3.2.1. The Hague Rules and The Hague-Visby Rules

The Hague/Hague-Visby Rules focus on the risk allocation between carrier and the shipper in case of loss of or damage to the goods.⁹³ The Hague/Hague-Visby Rules do not include any provision stating directly the liability of the carrier from loss and damage but mention in several articles. In article 3(6), the Hague/Hague-Visby Rules, the liability of the carrier from loss and damage is mentioned by implicitly. According to article 3(8) of the Hague/Hague-Visby Rules, the liability of the carrier for loss and damages under the Hague/Hague-Visby Rules is the minimum level of liability which cannot be reduced and also the exemption from liability for carrier cannot be extended. In this article, the Hague/Hague-Visby Rules reject the freedom of contract related to liability of carrier and the contracts in contract with this article will be null and void. In *Owners of Cargo on Board the Morviken v Owners of the Hollandia (The Hollandia, The Morviken)*, the Court held that the parties’ choice of forum was invalid due to article 3(8) of the Hague-Visby Rules because the substantive law in this forum (the Hague Rules) regulated lower liability amounts than the United Kingdom provided (the

⁹⁰ Marel Katsivela, 'Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague/Visby Rules' (2010) 40 Rev Gen 413, 454.

⁹¹ Katsivela (n 90) 455, citing Diego Esteban Chami, "The Obligations of the Carrier" (2009), <<http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Diego%20Chami%20-%20obligations%20of%20the%20Carrier.pdf>> .

⁹² TCC, art 1141; Turkish Commercial Code Preamble (n 38) 343-344.

⁹³ C R Dunlop, 'The Hague Rules, 1921' (1922) 4 J Comp Legis & Int'l L 3d ser 24, 24.

Hague-Visby Rules).⁹⁴ On the other hand, the Hague/Hague-Visby Rules do not prevent the extension of the carrier's liability.⁹⁵

Article 4 of the Hague/Hague-Visby Rules regulates the liability of the carrier for loss and damages arising from unseaworthiness of the ship and declares that the carrier will be liable for such loss and damages if carrier does not perform due diligence in article 3(1). Article 4(6) of the Hague/Hague-Visby Rules, states that if it is necessary for the carrier to protect the ship and/or cargo to take any action to cause loss of or damage to the goods with 'dangerous nature', the carrier who has accepted to carry such goods, will be liable to contribute to the general average. In *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)*, a cargo of fuel oil caused the explosion and damaged to tanker and carrier claimed indemnity from the shipper under article 4(6) of the Hague/Hague-Visby Rules.⁹⁶ In this case, shipper knew the cargo is in dangerous nature but did not warn the carrier.⁹⁷ Court held that carrier was not entitled to receive the indemnity because he failed to exercise due diligence under article 3(1) of the Hague/Hague-Visby Rules and even if the shipper did not inform the carrier and not received his consent related to the carriage of such cargo in accordance with article 4(6), the shipper could claim that the carrier failed to exercise due diligence because article 3(1) was 'overriding article'.⁹⁸

In maritime law, basic principle is to carry the cargo under deck; therefore the Hague/Hague-Visby Rules adopted this principle⁹⁹ and exclude deck cargo.¹⁰⁰ In order to the Hague/Hague-Visby Rules not apply, firstly parties have to agree that the cargo will be carried on deck and it should be stated in bill of lading and secondly the cargo has to be carried actually on deck.¹⁰¹ In *Svenska Traktor AB v Maritime Agencies*

⁹⁴ *Owners of Cargo on Board the Morviken v Owners of the Hollandia (The Hollandia, The Morviken)* [1983] 1 Lloyd's Rep. 1.

⁹⁵ Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (n 23) 178.

⁹⁶ *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)* [1994] 2 Lloyd's Rep. 506.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ William Tetley, 'Deck Carriage under the Hague Rules' (1977) 3 Mar Law 35, 35.

¹⁰⁰ The Hague/Hague-Visby Rules, art 1(c).

¹⁰¹ Ilian Djadjev, *The Obligation of the Carrier Regarding the Cargo: The Hague Visby Rules* (2017 Springer), 156.

(*Southampton*)¹⁰², Court held that the liberty clause as ‘Steamer has liberty to carry goods on deck’ didn’t mean that the cargo would actually carrier on deck and not considered as an express statement.¹⁰³ Therefore, the Hague/Hague-Visby Rules are applicable if the bill of lading includes a liberty clause for carriage on deck.¹⁰⁴

The Hague/Hague-Visby Rules do not provide any provision related to the delay in delivery and not regulate the liability of carrier for delay in delivery of the cargo.¹⁰⁵ The reason why the Hague/Hague-Visby Rules do not cover the delay in delivery was that, the time the Hague/Hague-Visby Rules were drafted, the time of the sea voyages was unpredictable.¹⁰⁶ There is no unanimity whether the Hague/Hague-Visby Rules are applicable to damages arising from delay and in most case, the national law is decisive on this subject-matter.¹⁰⁷ However, if delay in delivery causes the loss such as deterioration of the cargo, then The Hague/Hague-Visby Rules become applicable due to the wording of the Hague/Hague-Visby Rules as ‘loss or damage’.¹⁰⁸

3.2.2. The Hamburg Rules

The main focus of the Hamburg Rules is the liability of the carrier for loss, damage and delay in delivery.¹⁰⁹ The Hamburg Rules regulates the liability of the carrier under article 5.¹¹⁰ Article 5(1) provides a general rule stating that carrier is liable for loss of or the damage to the goods and also from the delay in delivery. This article is important because ‘delay in delivery’ is included in the scope of the carrier’s liability differently from the Hague/Hague-Visby Rules. While the Hamburg Rules were drafted, sea voyages had become more predictable with the help of new technologies. Therefore, it

¹⁰² *Svenska Traktor AB v Maritime Agencies (Southampton)* [1953] 2 Lloyd's Rep. 124.

¹⁰³ Tetley, 'Deck Carriage under the Hague Rules' (n 99) 39.

¹⁰⁴ James B Wooder, 'Deck Cargo: Old Vices and New Law' (1991) 22 J Mar L & Com 131, 135.

¹⁰⁵ UNCITRAL, 'Status of the Hamburg Rules' (13 May 1994) UN Doc No A/CN.9/401/Add.1, 4; Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 8; Rand R Pixa, 'The Hamburg Rules Fault Concept and Common Carrier Liability under U.S. Law' (1979) 19 Va J Int'l L 433,442.

¹⁰⁶ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 21.

¹⁰⁷ Alexander von Ziegler, 'Delay and the Rotterdam Rules' (2009) 14 Unif L Rev 997, 998, supra 5

¹⁰⁸ Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (n 23) 186-187.

¹⁰⁹ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 2.

¹¹⁰ The Hamburg Rules, art 5.

became reasonable for carrier to become liable for the delay in delivery and as a result, the Hamburg Rules regulates the liability of the carrier for delay.¹¹¹

Related to the liability of the carrier due to delay in delivery, there were conflicting court decisions. At this point, there are two important cases on the liability of the carrier due to delay in delivery, which are *The Parana*¹¹² and *Heron II*¹¹³. These cases were related to delay in delivery of 'non-perishable, fungible goods'.¹¹⁴ Therefore, they are not considered loss of or the damage to the cargo due to late delivery; these cases are directly related to late delivery. In *The Parana*, the shipper/consignee suffered from the loss in the market prices due to carrier's delay in delivery.¹¹⁵ In this case, the Court held in 1877 that it was not the custom to rules for damages due to loss of the market value; therefore such loss was not recoverable by the carrier.

In *Dunn v Bucknall Bros*, the Court stated that '*The Parana* is not an authority' and in case the arrival time of the ship and fluctuations in the market has some level of certainty, then loss of the shipper/consignee due to fall in the market value of the cargo is recoverable by the carrier who delivered the cargo late.¹¹⁶ However, in this case, the Court did not decide such recovery.

In *Heron II*, the carrier delivered the sugar (cargo) late and during this time, the price of the sugar fell in the market; therefore the shipper/consignee suffered loss because of such fluctuations in the market value.¹¹⁷ The Court rejected *The Parana* and held that the carrier was liable for the market loss of the shipper/consignee due to late delivery.¹¹⁸ As a result, it is important that the Hamburg Rules set out rules in the matter of the liability of the carrier for delay in delivery.

¹¹¹ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 21.

¹¹² *The Parana* [1877] 2 P.D. 118.

¹¹³ *Koufos v C Czarnikow Ltd (The Heron II)* [1967] 2 Lloyd's Rep. 457.

¹¹⁴ Richard A Epstein, 'Beyond Foreseeability: Consequential Damages in the Law of Contract' (1989) 18 J Legal Stud 105, 125.

¹¹⁵ *The Parana* [1877] 2 P.D. 118.

¹¹⁶ *Dunn v Bucknall Bros* [1902] 2 K.B. 614.

¹¹⁷ *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 A.C. 350.

¹¹⁸ *Koufos v C Czarnikow Ltd (The Heron II)* [1967] 2 Lloyd's Rep. 457; see also *Owners of Cargo Lately Laden on Board the Ardennes v Owners of the Ardennes (The Ardennes)* [1950] 7 WLUK 7.

Article 5(2) defines the delay in delivery and sets out the rules concerning when delay occurs. This article considers two different scenarios, one of which that the delivery time is not drafted under the carriage contract and the other one is that parties of the carriage contract have not determine any delivery time. According to this article, if parties have agreed on a schedule for delivery of the cargo, then carrier is obliged to stick to this schedule. However, when parties have not agreed on such schedule and the liability of the carrier is to deliver the cargo within reasonable time.

Article 5(3) of the Hamburg Rules states a ‘fiction’ and regulates that if delay lasts longer than 60 day following agreed delivery time, then this may be considered as loss of the goods but not delay in delivery.¹¹⁹

Article 5(4)(a) of the Hamburg Rules focuses on the fault and neglect of the carrier and is similar with article 4(2)(q) of the Hague/Hague-Visby Rules which mentions ‘actual’ fault and neglect of the carrier. Moreover, even though the Hague/Hague-Visby Rules do not cover the liability for live animals, the Hamburg Rules provide a special provision for the liability for live animals under article 5(5) and regulate that the carrier will not be liable only if loss, damage and delay occurs due to special risk of the carriage of live animals.

Article 5(7) of the Hamburg Rules is drafted considering at the times when there are causes for damage, loss or delay other than carrier’s fault and/or neglect. According to this article, carrier will be liable to the extent that he causes such loss, damage or delay by his fault.¹²⁰

Even though the Hague/Hague-Visby Rules do not cover deck cargo, the Hamburg Rules regulate deck cargo under article 9 and state that in case the carrier carries deck cargo without due process of the Hamburg Rules, then carrier will not be entitled to claim that he takes measures and the carrier will be liable for the loss.¹²¹

¹¹⁹ Ziegler, 'Delay and the Rotterdam Rules' (n 107) 1004.

¹²⁰ James J Donovan, 'The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea' (1979) 4 Mar Law 1, 11.

¹²¹ Wooder (n 104) 143.

Similar to the article 3(8) of the Hague/Hague-Visby Rules, article 23 of the Hamburg Rules also protects the consignee/shipper by forbidding any agreement which lessen the liability of the carrier under the Hamburg Rules.¹²² On the other hand, it is possible to widen the liability of the carrier.¹²³

3.2.3. The Rotterdam Rules

The liability of the carrier for loss, damage and delay is regulated under article 17 of the Rotterdam Rules. In article 17, the Rotterdam Rules simplify the language of the rules and just mention the fault of the carrier but not the negligence.¹²⁴ Article 17(5)(a) of the Rotterdam Rules has similar provision with the Hague/Hague-Visby Rules article 4(1) and regulated the liability of the carrier by referring to due diligence of carrier. Moreover, the Rotterdam Rules regulates the liability of carrier when there are combined causes for loss, damage or delay under article 17(6) and this article is similar with article 5(7) of the Hamburg Rules. In this article, the aim is to give freedom to court for apportion of liability when there are more than one causes ('concurrent causes') one of which due to the fault of the carrier.¹²⁵

In article 21, the Rotterdam Rules define when the delay in delivery occurs and this article is different from the Hamburg Rules. Article 5(2) of the Hamburg Rules accepts that the delay in delivery may occur even if the parties have not agreed on a specific time for delivery. On the other hand, if the parties have not agreed on the delivery time, then the carrier will not be liable for delay according to the Rotterdam Rules.¹²⁶ Therefore, it can be stated that the Rotterdam Rules narrow down the scope of the liability of carrier for delay. In the early drafts of this article, it was regulated that in absence of any agreement regulating the delivery time, the carrier would be still liable to deliver the good within reasonable time.¹²⁷ However, this part of the draft article was

¹²² Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 38.

¹²³ The Hamburg Rules, art 23(2).

¹²⁴ The Hamburg Rules refer both fault and neglect of the carrier in the provisions. However, negligence is considered as a form of fault (Janno Lahe, 'The Importance of Distinguishing between Forms of Fault in the Law of Delict' (2009) 16 *Juridica Int'l* 94, 95).

¹²⁵ Katsivela (n 90) 426-427.

¹²⁶ Ziegler, 'Delay and the Rotterdam Rules' (n 107) 1000.

¹²⁷ UNGA 'Report of Working Group III (Transport Law) on the Work of its Tenth Session' (7 October 2002) UN Doc A/CN.9/525, 11, para 29.

criticized on the ground that the wording of 'reasonable time' was 'too subjective' and caused different decisions of courts in different jurisdictions; additionally this article would cause imbalance between the obligation of the carrier and the shipper/consignee.¹²⁸ Finally, Working Group III decided to revise the previous version of this article and brought a condition which is an agreement regulating the delivery time, for the liability of the carrier for delay.¹²⁹

The Rotterdam Rules regulate the deck cargo under article 25. Even though, for the Hague/Hague/Visby Rules to be applied, it must not be specified in the bill of lading that the cargo will be carrier on deck, the Rotterdam Rules cover the deck cargo if the conditions under article 25(1) are met.¹³⁰ The Rotterdam Rules make a distinction under article 25(2) and the first possibility is that in case conditions under article 25(1)(a) or (c) are met, the carrier will not be liable for loss, damage and delay arising from special risks of deck carriage; additionally in the second possibility, in case the condition under article 25(1)(b) is met for deck carriage, then the carrier will be held liable.¹³¹ The term of 'special risk' is used for deck cargo under the Rotterdam Rules, but it is used for live animals under the Hamburg Rules. Even though, the Rotterdam Rules do not refer to 'special risks' of the carriage of live animals, the Rotterdam rules set out a special liability regime for live animals under article 81 and declare that the liability of the carrier can be limited or excluded in the carriage of live animals.¹³²

Article 73(1) of the Rotterdam Rules restricts any provision in the contract lessening the obligations of the carrier, which is similar with the Hague/Hague-Visby Rules¹³³ and the Hamburg Rules¹³⁴.

¹²⁸ UNGA 'Report of Working Group III (Transport Law) on the Work of its Thirteenth Session' (24 May 2004) UN Doc A/CN.9/552, para 21.

¹²⁹ UNGA 'Report of Working Group III (Transport Law) on the Work of its Nineteenth Session' (17 May 2007) UN Doc A/CN.9/621, paras 180-184.

¹³⁰ Francesco Berlingieri, 'The Rotterdam Rules: The Maritime Plus Approach to Uniformity' (2009) 1 *EJCL* 49, 53.

¹³¹ Jose Ma Alcantara and Frazer Hunt and Svante O Johansson and Barry Oland and Kay Pysden and Jan Ramberg and Douglas G Schmitt and William Tetley and Julio Vidal, 'Particular Concerns with Regard to the Rotterdam Rules' (2010) 2 *Cuadernos Derecho Transnacional* 5, 8.

¹³² Katsivela (n 90) 453-454.

¹³³ The Hague/Hague-Visby Rules, art 3(8).

¹³⁴ The Hamburg Rules, art 23.

3.2.4. Turkish Law

The former TCC did not cover the liability of the carrier for delay, Turkish Obligations Code was applied to claims arising from delay in delivery.¹³⁵ Additionally, according to article 1019 of former TCC, the carrier was liable if the carrier failed to perform due diligence for seaworthiness, voyage-worthiness and cargo-worthiness of the ship.¹³⁶ Considering this provision, Turkish Courts decided that this article covered the liability of the carrier for damage and loss and also delay in delivery.¹³⁷

In new TCC, article 1178 and following articles regulate the liability of carrier. Article 1178(2) is a similar provision with the Hamburg Rules article 5(1) and states that carrier will be liable for loss, damage and delay. In general preamble, Turkish Lawmakers declared that in fact the Hague Rules cover the delay in delivery but, as a result of a translation mistake, the Hague Rules have been interpreted as inapplicable to delay and as a consequence, former TCC¹³⁸ covered only loss and damage but not delay.¹³⁹ Turkish Lawmakers explained that the reason for inserting delay in new TCC article 1178(2) was that in fact the Hague Rules cover the loss and damages arising from delay.¹⁴⁰ As explained above, the Hague Rules may cover the loss arising from delay such as deterioration of the goods¹⁴¹, but in fact the Hague Rules leave the liability of carrier for delay to the domestic law.¹⁴²

At this point, the question is whether the Hague Rules cover liability of the carrier for delay if the cargo is not perishable or carrier performs due diligence. In this situation, the Hague Rules intentionally leave the carrier's liability for delay out of the scope due

¹³⁵ Turkish Commercial Code Preamble (n 38) 357.

¹³⁶ Turkish Commercial Code, Law No.: 6762 Official Gazette [Resmi Gazete = R.G.], 9 July 1956 No. 9353, enacted: 29 June 1956, art 1019.

¹³⁷ Yargıtay 11. Hukuk Dairesi (Supreme Court 11th Civil Chamber) 28.02.2018, Esas No. (Case No.) : 2016/7050, Karar No. (Judgment No.) : 2018/1536; Yargıtay 11. Hukuk Dairesi (Supreme Court 11th Civil Chamber) 31.05.2018, Esas No. (Case No.) : 2016/10471, Karar No. (Judgment No.) : 2018/4700.

¹³⁸ Turkish Commercial Code, Law No.: 6762 Official Gazette [Resmi Gazete = R.G.], 9 July 1956 No. 9353, enacted: 29 June 1956, art 1061.

¹³⁹ Turkish Commercial Code Preamble (n 38) 359.

¹⁴⁰ *ibid.*

¹⁴¹ Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (n 23) 186-187.

¹⁴² Ziegler 'Delay and the Rotterdam Rules' (n 107) 998.

to unpredictability of sea voyages.¹⁴³ The wording of the TCC article 1178(2) is similar with article 5(1) of the Hamburg Rules and the liability of the carrier for delay in the Hamburg Rules is broader than the Hague Rules. Therefore, even though the motive of the Turkish Lawmaker is to make TCC in compliance with the Hague Rules, TCC widens the scope of the carrier's liability by adopting article 5 of the Hamburg Rules.

Regarding the conditions for deck carriage, TCC incorporates article 9 of the Hamburg Rules into article 1151.¹⁴⁴ On the other hand, different from the Hamburg Rules, TCC sets out a general rule related to deck carriage and states that the carrier is not permitted to carry the goods on deck under article 1151(1). According to article 1243, article 1151 is a mandatory provision and parties cannot enter into an agreement in contrary with article 1151.¹⁴⁵

In regard to live animals, TCC regulates under article 1199(2) that the carrier is entitled to receive payment for carriage of the live animals though the animals have died during sea voyage.

Article 1178(4) and 1178(5) of TCC have the same wording related to the liability of the carrier for delay with the Hamburg Rules article 5(2) and 5(3).¹⁴⁶ Additionally, article 1183 of TCC adopts article 5(7) of the Hamburg Rules and consequently is similar with article 17(6) of the Rotterdam Rules.

Moreover, in harmony with above-mentioned international conventions, TCC states under 1243(1) that any provisions under carriage contracts or bills of lading which limit or exclude the liability of the carrier are null and void. Article 1244 of TCC lists the exemptions of the article 1243 and states that parties may limit or exclude the liability of the carrier in case of deck carriage, carriage of live animals,¹⁴⁷ special conditions of the carriage or the cargo¹⁴⁸ or for the period before loading onto ship and after

¹⁴³ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), para 21.

¹⁴⁴ Turkish Commercial Code Preamble (n 38) 345.

¹⁴⁵ Değirmenci (n 43) 114.

¹⁴⁶ Turkish Commercial Code Preamble (n 38) 359.

¹⁴⁷ TCC, art 1244(1)(a).

¹⁴⁸ TCC, art 1244(1)(b).

unloading from the ship.¹⁴⁹ Therefore, for live animals and special conditions of the carriage or the cargo, TCC allow parties to lessen the liability of the carrier which is similar with article 81 of the Rotterdam Rules, but different from the Rotterdam Rules, TCC also allows parties to lessen the liability of the carrier for deck cargo.¹⁵⁰

3.3. Period of Responsibility

3.3.1. The Hague Rules and The Hague-Visby Rules

Responsibility period of the carrier has a crucial role while determining whether the carrier is liable for loss and damage, therefore most of the disputes are related to responsibility period of the carrier.¹⁵¹ The responsibility period of the carrier is not specifically mentioned under the Hague/Hague-Visby Rules. On the other hand, in article 1(e), it is regulated the period of carriage of goods, therefore according to this article the responsibility period of the carrier starts at the time of loading of the cargo and continues until the time of discharge of the cargo from the ship.¹⁵² This responsibility period is also known as 'tackle to tackle'.¹⁵³ Therefore, despite that responsibility period of the carrier can be extended according to article 7 of the Hague/Hague-Visby Rules¹⁵⁴, in general the Hague/Hague-Visby Rules are not applicable before loading or after discharge even though the cargo is in carrier's charge.¹⁵⁵ In *Trafigura Beheer BV v Mediterranean Shipping Co SA*, Court held that the Hague Rules were not applicable after the discharge of the cargo.¹⁵⁶

¹⁴⁹ TCC, art 1244(1)(c).

¹⁵⁰ The Rotterdam Rules, art 25.

¹⁵¹ Su Tong-jiang and Wang Peng, 'Carrier's Liability Under International Maritime Conventions and the UNICITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' (2009) 24/4 Transport 345, 346.

¹⁵² The Hague/Hague-Visby Rules, art 1(e).

¹⁵³ 'This classic rule is better known as 'tackle to tackle'. It traditionally meant from the moment when a ship's tackle is hooked on at the loading port until the moment when the ship's tackle is unhooked at discharge.' Tong-jiang and Peng (n 151), 346; Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 52.

¹⁵⁴ Tong-jiang and Peng (n 151) 346; Force (n 75) 2059.

¹⁵⁵ UNCITRAL, 'Status of the Hamburg Rules' (13 May 1994) UN Doc No A/CN.9/401/Add.1, 3, para 14.

¹⁵⁶ *Trafigura Beheer BV v Mediterranean Shipping Co SA (MSC Amsterdam)* [2007] 2 Lloyd's Rep. 622

In *Captain v Far Eastern Steamship Co*, the cargo was transhipped and between two shipments, the cargo was damaged while the cargo was in transit storage.¹⁵⁷ In this case, there were two separate bills of lading and the Court held that the Hague Rules were not applicable to the damage occurred during transit storage for the reason that this period of the carriage was not related to the carriage of goods by sea.¹⁵⁸ On the other hand, in *Mayhew Foods v Overseas Containers*, the court held that the Hague-Visby Rules were applicable ‘from the port of shipment to the final port of discharge’ and the period of responsibility of carrier continued during the time between discharge of the cargo for transhipment, stored on land and loading onto other ship.¹⁵⁹

The important point for the application of the Hague/Hague-Visby Rules is when the cargo is crossed the ship’s rail; therefore the carrier’s responsibility starts when the cargo is at the ship’s rail.¹⁶⁰ Related to this subject, in *Pyrene Co. LD. v Scindia Navigation Co. LD.*, damage occurred while the cargo being lifted for loading but before the cargo was crossed the ship’s rail and Judge Delvin J. interpreted article 1(e) by considering article 2 and decided that the carrier was responsible during the whole period of loading under the Hague Rules.¹⁶¹

3.3.2. The Hamburg Rules

The Hamburg Rules give more importance on the responsibility period of the carrier and regulates this subject under article 4. The Hamburg Rules extend the responsibility period and adopt ‘port to port’ rule.¹⁶² The Hamburg Rules consider the period when the carrier is in charge of the cargo¹⁶³ before loading or after discharge and therefore increase the liability of the carrier accordingly.¹⁶⁴ Therefore, the Hamburg Rules overcome the problem whether the Hague/Hague-Visby Rules are applicable to the period before the loading of the cargo but after the carrier takes over the cargo.¹⁶⁵

¹⁵⁷ *Captain v Far Eastern Steamship Co* [1979] 1 Lloyd's Rep. 595.

¹⁵⁸ *ibid.*

¹⁵⁹ *Mayhew Foods v Overseas Containers* [1984] 1 Lloyd's Rep. 317.

¹⁶⁰ Herbert A C Umezuruike, 'Bills of Lading in the Hamburg Rules' (2001) 14 Nigerian LJ 50, 53.

¹⁶¹ *Pyrene Co. LD. v Scindia Navigation Co. LD.* [1954] 1 Lloyd's Rep. 321.

¹⁶² Tong-jiang and Peng (n 151) 346.

¹⁶³ Scott M Thompson, 'The Hamburg Rules: Should They Be Implemented in Australia and New Zealand' (1992) 4 Bond L Rev [i] 168, 173.

¹⁶⁴ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 14-15.

¹⁶⁵ Tong-jiang and Peng (n 151) 346.

On the other hand, in article 4(2), the Hamburg Rules limit the carrier's responsibility period.¹⁶⁶ According to article 4(2), in case that the carrier receives the cargo before the port of loading, the Hamburg Rules are not applicable between the time of receive the cargo and the arrival of the cargo to the port, in a similar manner, they are not applicable between the time of leaving the cargo to the port of discharge and handing over the cargo to the consignee.¹⁶⁷ As a result, different from the Hague/Hague-Visby Rules, the Hamburg Rules focus on 'the period during which the carrier is in charge of the goods' but limit this period with port of loading and port of discharge.¹⁶⁸

3.3.3. The Rotterdam Rules

Since 'tackle-to-tackle' rule under the Hague/Hague/Visby Rules and 'port-to-port' rule under the Hamburg Rules, the Working Group focused on the extension of the period of responsibility to 'door-to-door' rule.¹⁶⁹ On the other hand, the Working Group considered that in case of adoption of 'door-to-door' rule, the Rotterdam Rules should not cause any conflict between the Rotterdam Rules and any other international conventions regulating land transport.¹⁷⁰ In article 12, The Rotterdam Rules regulates the responsibility period of the carrier as from the receipt of the cargo until the delivery of the cargo. Therefore, the Rotterdam Rules do not limit the period of responsibility between the port of loading and port of discharge as in the Hamburg Rules.

Despite the 'door-to-door' rule, in article 12(3), the Rotterdam Rules enable parties to prefer 'port-to-port' or 'tackle-to-tackle' rules in their contract¹⁷¹, thus the Rotterdam Rules acknowledge the freedom of contract and avoid providing concrete period of responsibility different unlike the Hague/Hague-Visby Rules and the Hamburg Rules. Under the Rotterdam Rules, the only period which the carrier is responsible regardless

¹⁶⁶ Donovan (n 120) 6.

¹⁶⁷ Francesco Berlingieri, 'Period of Responsibility and Basis of Liability' in European Institute of Maritime and Transport Law (eds), *The Hamburg Rules : A Choice for the E.E.C.?* (Maklu Uitgevers 1994) 86-87.

¹⁶⁸ The Hamburg Rules, art 4(2).

¹⁶⁹ UNGA 'Possible Future Work on Transport Law: Report of Secretary General' (2 May 2001) UN Doc A/CN.9/497, para 26.

¹⁷⁰ UNGA 'Report of the Working Group on Transport Law on the work of its ninth session (7 May 2002) UN Doc A/CN.9/510, para 32.

¹⁷¹ William Tetley, 'Transports de cargaison par mer, les Règles de Rotterdam, leur adoption par les Etats-Unis, le Canada, l'Union Européenne et les pays transporteurs du monde?' (CISDL, 21 May 2011) <<https://www.cisd.org/wp-content/uploads/2018/05/Conf%C3%A9rence-Charles-D-Gonthier-William-Tetley.pdf>> accessed 12 July 2020.

of the contract between parties is between ‘the beginning of the initial loading’ and ‘completion of the final unloading’.¹⁷² Therefore, the Rotterdam Rules prevent parties to enter into a contract which determine the responsibility period of the carrier lesser than ‘tackle-to-tackle’ rule.¹⁷³ Even though, the Rotterdam Rules may seem as extending the responsibility period of carrier comparing with the Hague/Hague-Visby Rules and the Hamburg Rules, considering article 12(3), it can be stated that the Rotterdam Rules do not impose more responsibility on the carrier than the Hague/Hague-Visby Rules.

As a result, in case the parties of the carriage contract agree that the carrier will be responsible for the period after the cargo loading onto the ship, then another international convention or domestic law will be applied the damages occur before loading of the cargo onto ship.¹⁷⁴ Consequently, the Rotterdam Rules are criticized for not providing a satisfactory resolution due to being ‘not door-to-door enough’.¹⁷⁵

3.3.4. Turkish Law

The responsibility period of the carrier is regulated under article 1178(2) and (3) in TTC. In preamble, Turkish lawmakers declared that TCC adopted the Hamburg Rules article 4 related to the responsibility period of the carrier.¹⁷⁶ Article 1178(3) of TCC is similar with article 4(2) of the Hamburg Rules. On the other hand, in article 1178(2), in order to hold the carrier liable, TTC requires that damage, loss or delay be occurred during the period which the carrier in charge of the goods; however TCC does not refer to port of loading or port of discharge. Therefore, in case the carrier receives the cargo in a different place than the port of loading, the carrier will be responsible for the period between the receipt of the cargo and the arrival to the port of loading.

Moreover, according to article 1244(1)(c), the agreements which limits or excludes the carrier liability/responsibility within the period before loading of the cargo onto ship and after unloading the cargo from the ship are valid. Consequently, period of

¹⁷² The Rotterdam Rules, art 12(3)(a) and (b).

¹⁷³ Tomotaka Fujita, ‘The Coverage of the Rotterdam Rules’ (ComiteMaritime, 2018) <<https://comitemaritime.org/wp-content/uploads/2018/05/the-coverage-of-rotterdam-rules-BA2010-T.Fujita.pdf>> accessed 13 July 2020.

¹⁷⁴ Tetley (n 171).

¹⁷⁵ Theodora Nikaki, ‘The UNCITRAL Draft Instrument on the Carriage of Goods [wholly or partly] [by Sea]: multimodal at last or still all at sea?’ (2005) J.B.L.647, 656-658.

¹⁷⁶ Turkish Commercial Code Preamble (n 38) 359.

responsibility of the carrier under TCC may seem broader than ‘port-to-port’ rule of the Hamburg Rule¹⁷⁷ at the first step, for the reason that parties can agree on ‘tackle-to-tackle’ rule under article 1244(1)(c), it can be stated that TCC does not entirely adopt the Hamburg Rules and is more similar with the Rotterdam Rules.

3.4. Exemption from Liability

3.4.1. The Hague Rules and The Hague-Visby Rules

The Hague/Hague-Visby Rules contain a list of exemptions of the carrier liability under article 4(2). According to article 4(2), in case that one of the events listed under this article occurs, the carrier will not be liable from any loss of or damages to the cargo. On the other hand, these exemptions are applicable only if the carrier perform due diligence to make the ship seaworthy according to article 3(1), because article 3(1) is an overriding obligation.¹⁷⁸ In *Maxine Footwear Co v Canadian Government Merchant Marine*, Canada Privy Council held that in case the carrier did not meet his obligations for seaworthiness of the ship, the carrier could not enjoy the exemptions under article 4 of the Hague Rules.¹⁷⁹

The ‘controversial’ exemption under the Hague/Hague-Visby Rules is nautical fault exemption in article 4(2)(a).¹⁸⁰ ‘Nautical fault is navigation or management fault of ‘master, mariner, pilot, or other servants of the carrier’ while maintaining the ship through sea carriage.’¹⁸¹ The reason why nautical fault exemption is inserted in the Hague/Hague-Visby Rules is to provide balance between the carrier and the shipper/consignee because at the time of preparing these Rules, carriage by sea had extreme risk and technologies of navigation and communication were not advanced.¹⁸² One of the recent cases concerning nautical fault is *Tasman Orient Line CV v New*

¹⁷⁷ The Hamburg Rules, art 4.

¹⁷⁸ Sarah C Derrington, 'Due Diligence, Causation and Article 4(2) of the Hague-Visby Rules' (1997) 3 Int'l Trade & Bus L Ann 175, 176; Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (n 23) 184; *Alize 1954 v Allianz Elementar Versicherungs A* [2020] 3 WLUK 22.

¹⁷⁹ *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105.

¹⁸⁰ Mandelbaum, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions' (n 27) 477.

¹⁸¹ Liang Yonggang and Li Zhongsheng, 'Abolishing the Exemption of Liability for Fault in Ship Management in the Nautical Fault Exemption System' (2006) 2006 China Oceans L Rev 537, 537

¹⁸² Yonggang and Zhongsheng (n 181) 540.

Zealand China Clays Ltd (The Tasman Pioneer).¹⁸³ In this case, while the master had charge of navigation and management of the, the ship had been grounded in consequence of that the master took another route and the Court held that the shipowners/charterers were entitled to claim the exemption under article 4(2)(a) of the Hague Rules whether the act of the master is intentional or not, and the only exception is the barratry.¹⁸⁴ Another point related to nautical fault is whether this exemption will be applied in case of unseaworthiness. In *Alize 1954 v Allianz Elementar Versicherungs A*, Court held that if the vessel became unseaworthy due to 'negligence in the navigation or management of the vessel', the carrier could not claim any exceptions under article 4(2) as a defence including nautical fault.¹⁸⁵ The Hague/Hague-Visby Rules have a special article for reasonable deviation under article 4(4), however do not explain whether the carrier still claim a liability defences or benefit from liability limitation in case of unreasonable deviation.¹⁸⁶

3.4.2. The Hamburg Rules

Unlike the Hague/Hague-Visby Rules, the Hamburg Rules do not provide a list of exemptions.¹⁸⁷ Under the Hamburg Rules, three exemptions are specifically mentioned which are concerning to the fire, live animals and the measures to save life and property.¹⁸⁸ The exemptions under the Hague/Hague-Visby Rules in article 4(2)(c) to (q) are the situations for which the carrier are not liable under the Hamburg Rules.¹⁸⁹ The common understanding of the Hamburg Rules is that the liability of the carrier is based on his presumed fault and neglect.¹⁹⁰ In case of one of the events in article 4(2)(c) to (q) of the Hague/Hague-Visby Rules occurs, the carrier will not be liable for loss, damage and delay under the Hamburg Rules, because the carrier was not at fault or

¹⁸³ *Tasman Orient Line CV v New Zealand China Clays Ltd (The Tasman Pioneer)* [2010] 2 Lloyd's Rep. 13.

¹⁸⁴ *ibid* para 28.

¹⁸⁵ *Alize 1954 v Allianz Elementar Versicherungs A* [2020] 3 WLUK 22.

¹⁸⁶ Katsivela (n 90) 457.

¹⁸⁷ Force (n 75) 2065.

¹⁸⁸ The Hamburg Rules, art 5(4), 5(5) and 5(7).

¹⁸⁹ Force (n 75) 2066-2068.

¹⁹⁰ Final Act of the United Nations Conference on the Carriage of Goods By Sea, Annex-II 'Common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea' (1978) Un Doc. No A/CONF.89/13.

neglect.¹⁹¹ Both the Hamburg Rules and the Hague/Hague-Visby Rules lead the same/similar results.

One of the major differences in the Hamburg Rules in comparison with the Hague/Hague-Visby Rules is the exclusion of nautical fault exemption.¹⁹² On the purpose of redressing balance between the risks of carrier and shipper, the Hamburg Rules abolish the exemption from liability arising from faults in navigation or management of the ship due to the improved technology in communication and shorter times in sea voyages.¹⁹³ Therefore, related to the immunities of carrier, The Hamburg Rules protect the carrier lesser than the Hague/Hague-Visby Rules.¹⁹⁴ Nautical fault exemption raises discussions between the supporters and opponents. According to opponents, this exemption allow the carrier to escape from liability for the faulty acts of his own employees and the carrier is advantageous and on the other hand, for supporters, in case the nautical fault exemption is eliminated, then the carrier will be liable for damages to both vessel and cargo even in collision, additionally, leaving this well-established exemption may cause different court decisions of different countries.¹⁹⁵

Fire exemption is regulated under article 5(4) of the Hamburg Rules and difference of this article from the article 4(2)(b) of the Hague/Hague-Visby Rules is that in case the fire is caused by the fault or neglect of the agents or servants of the carrier, the carrier will liable for loss of or damage to the goods or delay in delivery under the Hamburg Rules, but not in the Hague/Hague-Visby Rules. The Hague/Hague-Visby Rules require the actual fault of the carrier to hold his liable.¹⁹⁶

The Hamburg Rules consider 'special risks' of carriage of live animal and regulate this exemption under article 5(5), even though the carriage of live animals is out of the scope of the Hague/Hague-Visby Rules.

¹⁹¹ Force (n 75) 2066-2068.

¹⁹² UNCITRAL, 'Status of the Hamburg Rules' (13 May 1994) UN Doc No A/CN.9/401/Add.1, 3, para 15.

¹⁹³ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, paras 16-18.

¹⁹⁴ Force (n 75) 2069.

¹⁹⁵ Leslie Tomasello Weitz, 'The Nautical Fault Debate (the Hamburg Rules, the U.S. COGSA 95, the STCW 95, and the ISM Code)' (1998) 22 Tul Mar LJ 581, 587-588.

¹⁹⁶ Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 8; Force (n 75) 2071.

Related to measures for saving life and property, different from the Hague/Hague-Visby Rules, the Hamburg Rules impose a condition for measure to save life to be reasonable. There is not such condition for measures to save life under the Hamburg Rules.¹⁹⁷

Moreover, deviation exemption is mentioned under article 4(4) the Hague/Hague-Visby Rules even though the Hamburg Rules does not refer to deviation. On the other hand, in case of any loss, damage or delay due to deviation to save life or property, the carrier can claim that he was not at fault or neglect which is necessary for the liability of the carrier under the Hamburg Rules.¹⁹⁸

3.4.3. The Rotterdam Rules

Exemptions from liability are regulated under article 17(3) of the Rotterdam Rules and similar to the Hague/Hague-Visby Rules, the Rotterdam Rules provide a list of exemptions. The Rotterdam Rules preserve all exemptions in article 4(2) of the Hague/Hague-Visby Rules except nautical fault in article 4(2)(a).¹⁹⁹ Related to nautical fault, the Rotterdam Rules follow the lead of the Hamburg Rules and eliminate this exemption. Additionally, the Rotterdam Rules regulate different system for fire exemption from the Hague/Hague-Visby Rules and the Hamburg Rules by excluding the fire outside the ship and just allowing the fire on ship as a defence.²⁰⁰ Furthermore, concerning measures to save life and property, on one hand, the Hague/Hague-Visby Rules do not mentioned the reasonableness of such measures²⁰¹; on the other hand, the Hamburg Rules necessitates the reasonableness of the measures just for saving property.²⁰² Different from these conventions, the Rotterdam Rules apply reasonableness test to measures to save either life or property.

¹⁹⁷ Benjamin W Yancey, 'Carriage of Goods: Hague, Cogs, Visby, and Hamburg' (1982-1983) 57 Tul L Rev 1238, 1523.

¹⁹⁸ Force (n 75) 2069.

¹⁹⁹ Alexander von Ziegler, 'The Liability of the Contracting Carrier' (2009) 44 Tex Int'l L J 329, 342.

²⁰⁰ UNGA 'Report of Working Group III (Transport Law) on the Work of its Fourteenth Session' (21 December 2004) UN Doc A/CN.9/572, paras 58-62; Philippe Delebecque, 'Obligations and Liability Exemptions of the Carrier' (2010) 2 EJCCL 87, 91; Katsivela (n 90) 443-444.

²⁰¹ The Hague/Hague-Visby, art 4(2)(1).

²⁰² The Hamburg Rules, art 5(6).

The Rotterdam Rules expands the list of exemption in the Hague/Hague-Visby Rules by adding subparagraphs (i), (n) and (o) into article 17(3).²⁰³ These newly added exemptions are as follow;

- Considering article 13(2), the Rotterdam Rules provide carrier the defence in article 17(3)(i) related to damages occur during ‘loading, handling, stowing, or unloading’ of the cargo if there is a FIO clause in the bill of lading.²⁰⁴
- Article 17(3)(n) sets out an exemption related to measures to prevent any damage to the environment, but does not define ‘environment’ or ‘damage to environment’ and does leave the interpretation of these terms to courts.²⁰⁵
- Article 17(3)(o) provides two different exemptions one of which related to dangerous cargo²⁰⁶ and the other one is related to common safety or preserving human life and other properties from sea perils²⁰⁷.

Moreover, article 17(2) of the Rotterdam Rules is similar with the article 4(2)(q) of the Hague/Hague-Visby Rules. However, the difference between these articles is that if there is even a minor contribution of the fault of the carrier or his agents to the loss or damage, the Hague/Hague-Visby Rules do not apply exemption clauses; on the other hand, under the Rotterdam Rules, the carrier may prove that ‘one’ of the causes is not attributable to his or his agents’ fault.²⁰⁸

According to overriding article²⁰⁹ principle under the Hague/Hague-Visby Rules, the carrier cannot benefit from liability exemption unless he proves the he exercised due diligence to make the ship seaworthy; on the other hand according to article 17(5) of the Rotterdam Rules,

²⁰³ Delebecque (n 200) 91.

²⁰⁴ Ziegler, 'Delay and the Rotterdam Rules' (n 199) 344.

²⁰⁵ Katsivela (n 90) 459.

²⁰⁶ The Rotterdam Rules, art 15.

²⁰⁷ The Rotterdam Rules, art 16.

²⁰⁸ Katsivela (n 90) 429.

²⁰⁹ *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105.

[T]he issue of the seaworthiness of the ship would become relevant ... when the cargo claimant could prove unseaworthiness as a cause of damage to rebut the carrier's invocation of one of the 'excepted perils'.²¹⁰

Additionally, carrier's obligation to care of the cargo under article 13(1) is not subject to the exemptions, because different from article 3(2) of the Hague/Hague-Visby Rules, article 13(1) does not include any words as 'subject to provision of'.²¹¹

Deviation is regulated under article 24 of the Rotterdam Rules.²¹² Notwithstanding the Hague/Hague-Visby Rules do not clarify the carrier's liability for unreasonable deviation; the Rotterdam Rules protect the carrier and entitle him to claim a defence including salvage defence and to benefit from limitation provisions even though deviation is considered as breach of contract according to applicable law.²¹³

3.4.4. The Turkish Law

Exemptions from liability are regulated under articles 1179 to 1182. The system of TCC is a combination of the Hague/Hague-Visby Rules and the Hamburg Rules. Article 1179 sets out the general rule which is the carrier is not liable for loss, damage and delay unless the carrier or his servants do not cause it intentionally or negligently. TCC divides the exemptions as absolute grounds for non-liability and probable grounds for non-liability. Absolute grounds are drafted under articles 1180, 1181 and 1186(5) and probable grounds are under 1182.²¹⁴

In case one of the events listed as absolute grounds occurs, the carrier could not be held liable for loss, damage or delay.²¹⁵ Article 1180 of TCC is similar with article 4(2)(a) and (b) of the Hague/Hague-Visby Rules and set out the liability exceptions for nautical and management fault, and also fire.²¹⁶ Additionally, article 1180(2) states that if there is doubt related to the cause of the loss, damage and delay, it is deemed that the cause of

²¹⁰ UNGA 'Report of Working Group III (Transport Law) on the work of its twelfth session' (16 December 2003) UN Doc A/CN.9/544, 1, para 117.

²¹¹ Si Yuzhou and Henry Hai Li, 'The New Structure of the Basis of the Carrier's Liability under the Rotterdam Rules' (2009) 14 Unif L Rev 931, 938.

²¹² Katsivela (n 90) 457-458.

²¹³ The Rotterdam Rules, art 24; Katsivela (n 90) 457-458.

²¹⁴ Değirmenci (n 43) 121-123.

²¹⁵ *ibid* 121.

²¹⁶ Turkish Commercial Code Preamble (n 38) 360.

such loss/damage/delay is not nautical fault.²¹⁷ Similar with interpretation of the Hague/Hague-Visby Rules²¹⁸, Turkish Supreme Court decided that if the carrier failed to perform due diligence to make the ship seaworthy and employ enough crew, he was not entitled to benefit from fire exemption.²¹⁹ Article 1181 is similar with the Hamburg Rules article 5(6) which is related to measures to save life and property, and the lawmakers prefer to adopt the Hamburg Rules instead of article 4(2)(l) of the Hague/Hague-Visby Rules, therefore they add 'reasonable measures' term into this article for measures to save property.²²⁰ Article 1186(5) regulates the situation where the shipper intentionally misstates the nature or value of the cargo; however, in this case the carrier can be still liable for delay in delivery.²²¹ This article is similar with article 4(5) of the Hague Rules and 4(5)(h) of the Hague/Visby Rules.

Probable grounds for non-liability are listed under article 1182(1) of TCC and in case the occurrence of probable grounds, it will be deemed there is not any fault or neglect of the carrier.²²² The list under article 1182(1) is similar with article 4(2) of the Hague/Hague-Visby Rules without subparagraph (l) which is regulated under article 1181 of TCC.²²³

In article 1182(2), TCC adopts the approach of *Maxine Footwear Co v Canadian Government Merchant Marine*²²⁴ concerning article 4(2) of the Hague/Hague-Visby Rules and states that if these probable grounds occur due to the act of the carrier which lead to the carrier's liability, the carrier is not relieved from liability.

Furthermore, concerning deviation, TCC incorporated article 4(4) of the Hague/Hague-Visby Rules into article 1220 and states that the carrier will not be liable for deviation for saving life, property and any other reasonable deviation.

²¹⁷ Değirmenci (n 43) 122.

²¹⁸ See Chapter 3.4.1; *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105.

²¹⁹ Yargıtay 11. Hukuk Dairesi (Supreme Court 11th Civil Chamber) 14.01.2016, Esas No. (Case No.) : 2015/11478, Karar No. (Judgment No.) : 2016/280.

²²⁰ Turkish Commercial Code Preamble (n 38) 360.

²²¹ Değirmenci (n 43) 123 citing Rayegan Kender, Ergon Cetingil, Emina Yazıcıoğlu, *Deniz Ticareti Hukuku* (14th edn, Onikilevha, 2014) 217.

²²² Değirmenci (n 43) 123.

²²³ Turkish Commercial Code Preamble (n 38) 360.

²²⁴ *Maxine Footwear Co v Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105.

3.5. Limitation of Liability

3.5.1. The Hague Rules and the Hague-Visby Rules

The Hague Rules state the liability limitation of the carrier in article 4(5) which is 100 pound sterling per package. Due to the avoid any confusions on if nominal value or face value of the currency or its gold value of 100 pound sterling will be applicable, the Hague Rules declare in article 9 that the gold value will be taken into account.²²⁵ In *The Rosa S.*, the Court held that considering article 9, the pound sterling mention under article 4(5) was referred to gold value but 'not nominal or paper value'.²²⁶ However, the conversion date of gold value of pound sterling into the national currency is not mentioned under the Hague Rules. In *Yemgas Fzco v Superior Pescadores S.A. Panama*, the Court stated that, under the Hague Rules, the date when the gold value of the pound sterling was to be converted into national currency is the date of delivery or the date when the cargo should have been delivered.²²⁷ Furthermore, in the Hague Rules, the limitation of liability is regulated with reference to loss of or damage to the goods but there is no reference to delay in delivery since the Hague Rules do not cover carrier's liability for delay.²²⁸

In 1960's, the limitation amount under the Hague Rules was regarded as low and additionally, article 4(5) was problematic on bulk cargoes and containerized cargoes.²²⁹ In respect to bulk cargo, in *Vinnlustodin HF v Sea Tank Shipping AS (Aqasia, The)*, the Court held that the word 'unit' under article 4(5) of the Hague Rules was not applicable to bulk cargoes.²³⁰ Furthermore, the Hague Rules do not provide any solution whether the container itself or the cargoes within this container will be considered as package/unit.²³¹

²²⁵ Hasan and Awang (n 65) 3.

²²⁶ *The Rosa S.* [1988] 2 Lloyd's Rep. 574.

²²⁷ *Yemgas Fzco v Superior Pescadores S.A. Panama (The Superior Pescadores)* [2014] 1 Lloyd's Rep. 660, para 59; *Yemgas FZCO v Superior Pescadores SA Panama (The Superior Pescadores)* [2016] 1 Lloyd's Rep. 561, para 41.

²²⁸ Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 33.

²²⁹ Paul Todd, *Principles of the Carriage of Goods by Sea* (Routledge 2016) 322.

²³⁰ *Vinnlustodin HF v Sea Tank Shipping AS (Aqasia, The)* [2016] 2 Lloyd's Rep. 510.

²³¹ Hasan and Awang (n 65) 3.

By the Visby Amendment, the pound sterling is replaced with Franc Poincare. Moreover, the Visby Amendment abolishes the gold value reference in article 9 of the Hague Rules and creates new dual system which is 10.000 francs per package/unit or 30 francs per kilo of the cargo lost/damaged, and also applies 'whichever is the higher'.²³² Concerning the problems related to containerized cargo in the Hague Rules, the Visby Amendment eliminates this problem with article 4(5)(c)²³³ by stating that unless the cargoes within the container listed in the bill of lading, the whole container will be considered as one package/unit.²³⁴

In *AP Moller-Maersk A/S (t/a Maersk Line) v Kyokuyo Ltd*, the cargo was containers loaded with tuna loins and bags of tuna and the claimant claimed that the cargo was damaged.²³⁵ After the Court decided that the Hague-Visby Rules applied to the dispute, they decided that the waybills included enough enumeration of tuna loins, therefore each loin was considered as separate unit under the Hague-Visby Rules.²³⁶ Under this case, the Court also discussed whether the result would be different if the Hague Rules applied to the case and declared that even though this is an academic issue, each tuna loins would constitute a separate units under the Hague Rules.²³⁷ Additionally, the Visby Amendment explains the calculation of compensation based on the value of the goods 'at the place and time' of discharge.²³⁸ Moreover, by the Visby Amendment, under article 4(5)(d), it is stated that the date of conversion into national currency is subject to law of the Court.²³⁹

Due to fluctuations in national currencies, the limitation method of the Hague-Visby Rules became unstable.²⁴⁰ Therefore, in 1979, SDR Protocol was adopted and provides new monetary unit which is SDR. The basic formula with similar with the Visby Amendment and SDR Protocol replaces 10.000 francs with 666,67 SDR and 30 francs

²³² The Visby Amendment, art 2(a); The Hague-Visby Rules, art 4(5)(a).

²³³ The Visby Amendment, art 2(c).

²³⁴ William Tetley, 'Per Package Limitation and Containers under the Hague Rules, Visby & (and) Uncitral' (1978) 4 Dalhousie LJ 685, 704-705.

²³⁵ *AP Moller-Maersk A/S (t/a Maersk Line) v Kyokuyo Ltd* [2018] 2 Lloyd's Rep. 59.

²³⁶ *ibid* para 92.

²³⁷ *ibid* paras 94-100.

²³⁸ The Visby Amendment, art 2(b), the Hague-Visby Rules, art 4(5)(b).

²³⁹ The Visby Amendment, art 2(d); William Tetley, 'Loss and Damage under Marine Claims' (1964) 10 McGill L J 105, 116.

²⁴⁰ Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (n 23) 188-189.

with two SDR.²⁴¹ Moreover, SDR Protocol mentions that SDR is defined by IMF and also considers the countries which are not member of IMF.²⁴² In addition, SDR Protocol declares that conversion date of SDR to national currency is to be determined by national law.²⁴³

One of the problems of the Hague/Hague-Visby is whether the liability limitations are applicable in case of unauthorized deck cargo. In *Wibau Maschinefabrik Hartman SA v Mackinnon Mackenzie (The Chanda)*, the Court held that liability limitations did not apply when the carrier carried the cargo on deck.²⁴⁴ However, *The Chanda* is overruled by more recent case *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* in which the Court gave importance to the term 'in any event' under article 4(5) and decided that the liability limitations applied in case of unauthorized deck carriage.²⁴⁵

Moreover, it was stated in *Parsons Corporation and Others v C.V. Scheepvaartonderneming (The Happy Ranger)* that liability limitations were applicable in case of that the carrier failed to fulfil his obligations under article 4(2) of the Hague/Hague-Visby Rules.²⁴⁶ In this case, Lord Tuckey made reference to *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd*²⁴⁷ and stated that the liability limitations applied even if the carrier failed to exercise due diligence to make the ship seaworthy under article 3(1) of the Hague-Visby Rules.²⁴⁸

The Hague/Hague-Visby Rules set out the exception to the liability limitation under article 4(5)²⁴⁹ and this is the situation when the shipper declares the nature and the value

²⁴¹ Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (n 23) 189.

²⁴² SDR Protocol, art 2(2).

²⁴³ SDR Protocol, art 2(2).

²⁴⁴ *Wibau Maschinefabrik Hartman SA v Mackinnon Mackenzie (The Chanda)* [1989] 2 Lloyd's Rep. 494

²⁴⁵ *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)* [2003] 2 Lloyd's Rep. 1.

²⁴⁶ *Parsons Corporation and Others v C.V. Scheepvaartonderneming (The Happy Ranger)* [2002] 2 Lloyd's Rep. 357.

²⁴⁷ *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd* [1969] 2 Lloyd's Rep. 277

²⁴⁸ *Parsons Corporation and Others v C.V. Scheepvaartonderneming (The Happy Ranger)* [2002] 2 Lloyd's Rep. 357, paras 35-39.

²⁴⁹ The Hague Rules 4(5), The Hague-Visby Rules 4(5)(a).

of the cargo before shipment and inserts into the bill of lading.²⁵⁰ Additionally, in 4(5)(e) of the Hague-Visby Rules, it is stated that the carrier cannot benefit from liability limitation if he acts 'recklessly or with the knowledge that damage would probably result' that constitutes 'serious misconduct',²⁵¹ even though there is no such provision under the Hague Rules.²⁵² Furthermore, by article 3(3) of the Visby Amendment, the Hague-Visby Rules set limit to the aggregate amount recoverable from the carrier and his agents and servants.²⁵³

3.5.2. The Hamburg Rules

Liability limitations based on SDR are regulated under article 6 of the Hamburg Rules and these limits are 25 per cent higher than SDR Protocol.²⁵⁴ The Hamburg Rules also use similar system with the Visby Amendment and SDR Protocol which apply the limits per package or per kilogram whichever is higher.²⁵⁵ In contrary to the Hague/Hague-Visby Rules²⁵⁶, the Hamburg Rules are applicable regardless of that the shipper declares the nature and the value of the cargo and inserts into the bill of lading before shipment.²⁵⁷ Moreover, although delay in delivery is not regulated under the Hague/Hague-Visby Rules, the Hamburg Rules set out liability limitation rules concerning delay under article 6(1)(b) which is 2.5 time of the freight payable, but limit the liability amount with total freight amount.²⁵⁸ In case not only damage but also loss of the cargo occur, article 6(1)(c) limits the liability of the carrier with the amount under article 6(1)(a).²⁵⁹ In article 6(2)(a), the Hamburg Rules clarify the problem related to

²⁵⁰ Tetley, 'Per Package Limitation and Containers under the Hague Rules, Visby & (and) Uncitral' (n 234) 698.

²⁵¹ Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (n 23) 189-190.

²⁵² Force (n 75) 2075.

²⁵³ The Hague-Visby Rules, art 4bis(3); Kacic, 'Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules' (n 23) 190.

²⁵⁴ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 23.

²⁵⁵ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 24.

²⁵⁶ The Hague/Hague-Visby Rules, article 4(5) 'unless the nature and value of the good have been declared by the shipper before shipment and inserted in the bill of lading'.

²⁵⁷ Frances M Hannah, 'Adoption of the Hamburg Rules in Australia and New Zealand' (1993) 9 Austl & NZ Mar LJ 33, 53.

²⁵⁸ Donovan (n 120) 13.

²⁵⁹ Thompson (n 163) 177.

containerized cargo and reach the same solution provided by court practices under the Hague/Hague-Visby Rules.²⁶⁰

Article 10(5) of the Hamburg Rules regulates the aggregate liability amount which is recoverable from the carrier and actual carrier, their agents and servants and is similar with article 4*bis*(3) of the Hague-Visby Rules.²⁶¹ Article 8 of the Hamburg Rules regulates misconduct of the carrier and is similar with the Hague-Visby Rules article 4(5)(e).²⁶² In article 9, the Hamburg Rules consider two situations related to deck carriage one of which is the carriage of the cargo contrary to article 9(1)²⁶³ and the other one is the carriage of the cargo on deck despite of express agreement for under-deck carriage²⁶⁴. For former situation, the carrier can benefit from liability limitation and for latter situation, the carrier is deemed to act recklessly and with knowledge of such loss, damage or delay.²⁶⁵

Article 6(3) refers to article 26 which explains the unit of account. Article 26(1) defines SDR as similar with article 2(2) of SDR Protocol and article 26(2) sets out liability limitations related to countries which are not member of IMF that still cause problems due to currency.²⁶⁶ SDR is uniformed way to avoid domestic inflation and differentiated currencies, but it is not enough to solve 'the general world inflation'.²⁶⁷ Therefore, to overcome this problem, the Hamburg Rules create an alternative way under article 33 which allow a conference just related to article 6 and 26, upon requests of 1/3 the contracting states even though general revision/amendment conference can be held upon requests of 1/4 of the contracting states under article 32.²⁶⁸ Additionally, the Hamburg Rules determine the conversion date as the date of judgment.²⁶⁹

²⁶⁰ C C Nicoll, 'Do the Hamburg Rules Suit a Shipper-Dominated Economy' (1993) 24 J Mar L & Com 151, 155.

²⁶¹ The Visby Amendment, art 3(3); D E Murray, 'The Hamburg Rules: A Comparative Analysis' (1980) 12 Law Am 59, 67.

²⁶² John O Honnold, 'Ocean Carriers and Cargo; Clarity and Fairness - Hague or Hamburg' (1993) 24 J Mar L & Com 75, 94; Force (n 75) 2075.

²⁶³ The Hamburg Rules, art 9(3).

²⁶⁴ The Hamburg Rules, art 9(4).

²⁶⁵ Force (n 75) 2078.

²⁶⁶ Hannah (n 257) 52.

²⁶⁷ John C Moore, 'The Hamburg Rules' (1978) 10 J Mar L & Com 1, 10.

²⁶⁸ *ibid.*

²⁶⁹ The Hamburg Rules, art 26(1).

3.5.3. The Rotterdam Rules

The Rotterdam Rules regulate liability limitation rules under chapter 12 from article 59 to 61 and adopt a similar system with SDR Protocol and the Hamburg Rules by using SDR and adopting per package/per kilogram system. In comparison with the Hamburg Rules and the Hague/Hague-Visby Rules, the Rotterdam Rules slightly increase the liability limitations which are 5 per cent higher for per package limitation and 20% higher for per kilo limitation under article 59(1).²⁷⁰

Both the Hamburg Rules and the Hague/Hague-Visby Rules refer to 'loss of and damages to the goods' for liability limitation; on the other hand the Rotterdam Rules mention the liability limitations for breaches of the carrier's obligations under the Rotterdam Rules.²⁷¹ The reason of this change is the other convention cause uncertainty whether these limitations are applicable to misdelivery or misinformation.²⁷² Moreover, under article 59(1), the exceptions of application of mentioned liability limitation is stated as declaration of the value of the cargo by inserting into the contract, and also parties' agreement on higher limitation amounts. Even though the agreement of parties on increased limitation amounts are accepted under the Hague/Hague-Visby Rules²⁷³ and the Hamburg Rules²⁷⁴, the declaration of value exception is mentioned only under the Hague/Hague-Visby Rules²⁷⁵, but not under the Hamburg Rules.

Related to the containerized goods, article 59(2) of the Rotterdam Rules is similar with article 4(5)(c) of the Hague-Visby Rules and article 6(2)(a) of the Hamburg Rules. The only difference is that the Rotterdam Rules add the carriage of the cargo in or on vehicle which is defined under article 1(27) as road or railroad vehicle because the Rotterdam Rules aim to prevent abuses in the Hague/Hague-Visby system which considers the

²⁷⁰ The Rotterdam Rules, art 59; Diego Esteban Chami, 'The Rotterdam Rules from an Argentinean Perspective' (2009) 14 Unif L Rev 847, 854.

²⁷¹ The Rotterdam Rules, art 59(1).

²⁷² UNGA 'Report of Working Group III (Transport Law) on the work of its twenty-first session' (30 January 2008) UN Doc A/CN.9/645, 40, para 189.

²⁷³ The Hague/Hague-Visby Rules, art 5(1).

²⁷⁴ The Hamburg Rules, art 23(2).

²⁷⁵ The Hague/Hague-Visby Rules, art 4(5).

vehicles as single unit for liability limitation.²⁷⁶ Additionally, article 59(3) of the Rotterdam Rules is identical with article 26(1) of the Hamburg Rules.

Article 60 regulates the liability limitation in case of delay and determines different limitations for damage and loss due to delay and economic loss due to delay. In case damage and loss occur due to delay, the liability limitation is subject to article 59(1) and calculation is subject to article 22; on the other hand, in case economic loss occurs due to delay, then the liability limitation is 2.5 times of the freight amount.²⁷⁷ Concerning the economic loss due to delay, the Rotterdam Rules leave per package/per kilogram system and consider the freight payable which is similar with article 6(1)(b) of the Hamburg Rules. In the second sentence of article 60, similar with the article 6(1)(c) of the Hamburg Rules, the Rotterdam Rules states that the total liability amount in case both damage/loss and delay occurs, cannot be more than the liability amount according to article 59(1) in case of loss of the entire cargo.²⁷⁸ In article 61, the Rotterdam Rules set out the exception of liability limitation which is similar to the article 8 of the Hamburg Rules and article 4(5)(e) of the Hague-Visby Rules. Additionally, article 20 of the Rotterdam Rules states the aggregate amount recoverable from the carrier and maritime performing party(ies) similar with the article 10(5) of the Hamburg Rules.²⁷⁹ Related to the deck cargo, the Rotterdam Rules, similar with article 9(3) of the Hamburg Rules²⁸⁰, states under article 25(5) that the carrier loses to benefit from liability limitation if he carries the cargo on deck in despite of the agreement indicating expressly the carriage of the cargo under deck.²⁸¹

Moreover, in article 22, the Rotterdam Rules adopt the calculation principle for compensation under the Hague-Visby Rules article 4(5)(b).²⁸²

²⁷⁶ Kate Lannan, 'Behind the Numbers: The Limitation on Carrier Liability in the Rotterdam Rules' (2009) 14 *Unif L Rev* 901, 921-922; UNGA 'Proposals by the International Road Transport Union (IRU) concerning articles 1 (7), 26 and 90 of the draft convention' (27 March 2007) UN Doc A/CN.9/WG.III/WP.90, 2, para 3.

²⁷⁷ De Kundan Jha, 'The Rotterdam Rules - Should India Ratify' (2013) 2013 *Rev Drept Mar* 69, 77-78.

²⁷⁸ Lannan (n 276) 925.

²⁷⁹ Lannan (n 276) 925; Murray (n 261) 72.

²⁸⁰ Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 43.

²⁸¹ Berlingieri 'The Rotterdam Rules' (n 130) 54.

²⁸² Alexander von Ziegler, 'Compensation for Damage: The Rotterdam Rules Appraised' (2010) 2 *EJCCL* 51, 54.

3.5.4. Turkish Law

Limitation of liability is regulated under article 1186 of TCC. Article 1186(1) adopts the limitation amounts and system in SDR Protocol and sets out the exception identical in the Hague/Hague-Visby Rules article 4(5) which is declaration of the nature and the value of the cargo before shipment and inserts into the bill of lading. Related to conversion of SDR to Turkish Liras, TCC accepts the date of actual payment or any other day which parties agreed on.²⁸³ Article 1186(2) adopts the calculation system for compensation in the Hague-Visby Rules article 4(5)(b). Moreover, article 1186(3) is related to the containerized goods and identical with the Hague-Visby Rules and the Hamburg Rules.²⁸⁴

Since the Hague/Hague-Visby Rules do not cover the carrier's liability for delay in delivery, TCC incorporates article 6(1)(b) and (c) of the Hamburg Rules into article 1186(6) and (7).²⁸⁵ Additionally, Turkish lawmakers insert article 6(1)(4) of the Hamburg Rules into article 1186(a) for the reason that this article enables parties to determine a higher liability limitation for delay.²⁸⁶ Moreover, article 1187 of TCC is similar with article 4(5)(e) of the Hague-Visby Rules which regulates loss of benefit from liability limitations.²⁸⁷

3.6. Liability of the carrier for acts of other parties

3.6.1. The Hague Rules and the Hague-Visby Rules

The general rule which is that the carrier is liable for fault or neglect of his agents and servant, is regulated under article 4(2)(q) of the Hague/Hague-Visby Rules.²⁸⁸ In *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)*, Court held that the carrier was liable for the neglect of his servants to exercise due diligence to make the ship seaworthy because the carrier's duty to make ship seaworthy

²⁸³ TCC, art 1186(1).

²⁸⁴ The Hague-Visby Rules, art 4(5)(c); The Hamburg Rules, art 2(a).

²⁸⁵ Turkish Commercial Code Preamble (n 38) 361.

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

²⁸⁸ Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 13.

was non-delegable.²⁸⁹ This decision was approved by *Alize 1954 v Allianz Elementar Versicherungs*.²⁹⁰ Therefore, the carrier is liable for loss and damage arising from the acts of his agents/servants related to the duties under article 3(1) and (2).²⁹¹ There are two exceptions to this general rule which are article 4(2)(a) and (b).²⁹² According to article 4(2)(a), the carrier is not liable for act of his 'master, mariner, pilot or servants' related to both navigation and management of the ship.²⁹³ Additionally, in article 4(2)(b), it is stated that the carrier is liable only if the reason of the fire is actual fault of the carrier, therefore the carrier is not liable in case the acts of the crew cause the fire.²⁹⁴

Article 4*bis*(2) narrows down the scope of 'agents' by excluding independent contractors because the Hague-Visby Rules are not applicable before loading and after discharge of the cargo.²⁹⁵ The Hague/Hague-Visby Rules do not apply to non-contracting/performing carrier which is actual carrier, but only applicable to contracting carrier.²⁹⁶

3.6.2. The Hamburg Rules

According to article 5(1), the Hamburg Rules cover the carrier's liability for his servants and agents. The Hamburg Rules do not refer to independent contractors but neither exclude them; therefore independent contractors providing service in port area may be regarded as agents.²⁹⁷ Article 5(4)(a) states that if the claimant proves, the carrier will be liable for loss, damage and delay due to fire arose from the act of carrier's servants and agents. This article is different from the Hague/Hague-Visby Rules which requires the

²⁸⁹ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] 1 Lloyd's Rep. 57; R Glenn Bauer, 'Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules - A Case by Case Analysis' (1993) 24 J Mar L & Com 53, 60; Force (n 75) 2063.

²⁹⁰ *Alize 1954 v Allianz Elementar Versicherungs A* [2020] 3 WLUK 22.

²⁹¹ Dunlop (n 93) 29.

²⁹² Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 13.

²⁹³ Honnold (262) 77.

²⁹⁴ Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 8.

²⁹⁵ *ibid* 13.

²⁹⁶ UNCITRAL, 'Status of the Hamburg Rules' (13 May 1994) UN Doc No A/CN.9/401/Add.1, 5, para 23; Mandelbaum, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions' (n 27) 486.

²⁹⁷ Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 13.

actual fault/neglect of the carrier.²⁹⁸ Moreover, even though the carriage of live animals is not covered by the Hague/Hague-Visby Rules, the Hamburg Rules regulates such carriage under article 5(5) and hold the carrier liable for fault and neglect of his agents and servants.²⁹⁹ Additionally, carrier's liability for his servants and agents is mentioned under article 5(7) regulating concurrent cause.

Different from the Hague/Hague-Visby Rules, the Hamburg Rules regulate the responsibilities of the actual carrier under article 10.³⁰⁰ According to article 10(1), even if the carrier entrusts whole or part of the carriage to the actual carrier, the carrier will be responsible for whole carriage including acts of actual carrier and actual carrier's agents and servant.³⁰¹ Additionally, 'their liability is joint and several'.³⁰² According to article 11, if the carrier satisfies the conditions one of which is to make a carriage contract explicitly specifying that some part of the carrier will be performed by a specific and named actual carrier, and the other one is that the actual carrier can be sued in a competent court, than any provision eliminating liability of the carrier for the period the cargo is in charge of actual carrier, can be inserted into the contract and be valid. Even in this case, the carrier will liable for any loss, damage or delay while he is in charge of the cargo.³⁰³

3.6.3. The Rotterdam Rules

According to article 17(2) and (4) of the Rotterdam Rules, the carrier is liable if the one of the persons under article 18 causes loss of or damage to the cargo or delay by his fault.³⁰⁴ Under article 18, the Rotterdam Rules listed the persons that the carrier is liable for their acts and omissions. Comparing with the Hague/Hague-Visby Rules and the Hamburg Rules, the Rotterdam Rules increase the number of these persons by including

²⁹⁸ The Hague/Hague-Visby Rules, art 4(2)(b); Force (n 75) 2070-2071.

²⁹⁹ Force (n 75) 2071-2072.

³⁰⁰ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 30; Force (n 75) 2079.

³⁰¹ UNCITRAL, 'Status of the Hamburg Rules' (13 May 1994) UN Doc No A/CN.9/401/Add.1, 5, para 22.

³⁰² The Hamburg Rules, art 10(4).

³⁰³ The Hamburg Rules, art 11(2); Force (n 75) 2079-2080.

³⁰⁴ John S Mo, 'Determination of Performing Party's Liability under the Rotterdam Rules' (2010) 18 Asia Pac L Rev 243, 252; Nikaki, 'The Carrier's Duties under the Rotterdam Rules' (n 86) 8.

maritime and non-maritime performing parties.³⁰⁵ Therefore, the carrier is liable for loss, damage and delay during the carriage even if maritime and non-maritime performing parties cause such loss, damage and delay.³⁰⁶ Moreover, in article 20, it is stated that in case a maritime performing party is held liable, the carrier will also be liable according to article 17 and 18 and their liability will be 'joint and several'.³⁰⁷

3.6.4. Turkish Law

In article 1179(1), TCC sets out the general rule which is that the carrier is liable for the loss of or damage to the cargo or delay caused by the intentional or negligent act of his servants. This article is drafted based on article 4(2)(q) of the Hague/Hague-Visby Rules.³⁰⁸ Article 1179(2) defines the servants as people who works for the ship (master and crew of the ship), people employed to work for carrier's company, people authorized to represent the carrier (agents) and any other person who provides service for the performance of the affreightment contract even if such person is not employed under carrier's company.³⁰⁹

Article 1191 is adopted from the article 10 of the Hamburg Rules for the reason that the Hague Rules do not provide any provision related to actual carrier.³¹⁰ Additionally, in 1192, TCC gives an opportunity to carrier to limit his liability for the part of the carriage which is performed by the actual carrier. The conditions for such contract are similar with article 11 of the Hamburg Rules. However, different from the Hamburg Rules, TCC necessitates the actual carrier can be sued before Turkish Courts.³¹¹ Moreover, TCC goes a step further from the Hamburg Rules and inserts article 1191(2) as an additional provision to make easier for the cargo interest to have the necessary information about the actual carrier.³¹² According to this article, the actual carrier's

³⁰⁵ Berlingieri (n 84) 13; Katsivela (n 90) 419, citing E Gold, A Chircop, H Kindred *Maritime Law*, Collection Essentials of Canadian Law, Toronto, Irwin Law, 2003, p. 437-438 and Francesco Berlingieri, "A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules", (2009) <http://www.comitemaritime.org/draft/pdf/Comparative-analysis.pdf> .

³⁰⁶ The Rotterdam Rules 17(1) and 18; Nicholas Bond, 'The Maritime Performing Party and the Scope of the Rotterdam Rules' (2014) 28 *Austl & NZ Mar LJ* 95, 96.

³⁰⁷ Frank Smeele, 'The Maritime Performing Party in the Rotterdam Rules 2009' (2010) 2 *EJCL* 72, 85.

³⁰⁸ Turkish Commercial Code Preamble (n 38) 360.

³⁰⁹ Değirmenci (n 43) 121.

³¹⁰ Turkish Commercial Code Preamble (n 38) 362.

³¹¹ Turkish Commercial Code Preamble (n 38) 362.

³¹² *ibid.*

name/trade name and business address must be stated under the contract of carriage and in case at time of signing the contract of carriage, the actual carrier has not been identified yet, the name/trade name and business address of the actual carrier must be notified to cargo interest at the time of identification of the actual carrier, at the latest when the cargo is delivered to actual carrier. Otherwise, the responsibility of the carrier continues through the whole carriage.³¹³

3.7. Burden of Proof

3.7.1. The Hague Rules and The Hague-Visby Rules

The Hague/Hague-Visby Rules do not provide any provision concerning the initial burden of proof.³¹⁴ Considering the general rule which is that ‘the burden rests on the party who must prove facts essential to his case’, the cargo interest bears the burden of initial proof.³¹⁵ After the cargo interest prove by the clean bill of lading that he delivers undamaged goods to the carrier but received damaged goods, then the burden of proof is shifted to the carrier.³¹⁶ At this point the carrier bears the burden to prove that ‘the cause of the loss or damage’ is not attributable to carrier, or he has exercised due diligence to make the ship seaworthy or the one of the exemptions listed under article 4(2) has occurred.³¹⁷

Related to unseaworthiness under article 3(1) of the Hague/Hague-Visby Rules, article 4 stated that the carrier bears to prove to exercise due diligence.³¹⁸ Shifting of burden of proof related to seaworthiness explained under *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream) (No.1)*.³¹⁹ Related the obligations of the carrier under 3(2) of the Hague/Hague-Visby Rules, in *Volcafe Ltd and others v Compania Sud Americana De Vapores SA*, the Court held that ‘the carrier bore the

³¹³ TCC, art 1191(2).

³¹⁴ Berlingieri, ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ (n 84) 13.

³¹⁵ C W O’Hare, ‘Cargo Disputes and the Metronome Syndrome (Part 1)’ (1982) 8 Monash U L Rev 233.

³¹⁶ Force (n 75) 2086.

³¹⁷ Kacic, ‘Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules’ (n 23) 183; Force (n 75) 2086.

³¹⁸ Caslav Pejovic, ‘The Basis of Carrier’s Liability: From Roman Law to the Rotterdam Rules’ (2017) 20 Asian Bus Law 15, 27.

³¹⁹ *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream) (No.1)* [2002] 1 Lloyd’s Rep. 719.

burden of proving that' he did not breach his obligations under article 3(2).³²⁰ Moreover, according to article 4(2)(q), the carrier bears the burden of proving that he or his agents and servant do not contribute to the loss of and damage to the goods by their fault and neglect.

Shifting of burden of proof is explained in *The Hellenic Dolphin* case.³²¹ However, in *The Hellenic Dolphin*, the concurrent causes were not examined.³²² Related to concurrent causes, the Hague/Hague-Visby Rules do not contain any provision.³²³ In *Schnell et al v The Vallescura*, U.S. Supreme Court held that if there was concurrent causes and 'it was impossible to determine what damage was due to which of the two causes', then the carrier was liable for whole damage/loss.³²⁴ In *Samuel Son & Co Ltd v The Kapitonas Gudin*, Federal Court of Canada referred to Tetley and quoted that;

[W]here the damage is caused in part by an act or fault for which the carrier is responsible and in part by an act or fault for which the carrier is not responsible, the carrier must be able to make proof sufficient to separate the damage resulting from one cause from the damage resulting from the other, or in the alternative be held responsible for the whole claim.³²⁵

In *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)*, Court held that it was not enough for the carrier to prove one of the exemptions under article 4(2) of the Hague Rules, the carrier remained liable because there were concurrent causes one of which was peril of the sea and the other was unseaworthiness under article 3(1) of the Hague Rules.³²⁶

³²⁰ *Volcafe Ltd and others v Compania Sud Americana De Vapores SA* [2019] 1 Lloyd's Rep. 21; Joshua McKersey, 'The Perennial Question - The Burden of Proof in Cargo Claims under the Hague Rules: *Volcafe Ltd v Cia Sud Americana de Vapores SA* [2019] AC 358' (2019) 33 Austl & NZ Mar LJ 29, 31-32.

³²¹ *The Hellenic Dolphin* [1978] 2 Lloyd's Rep. 336; Todd (n 68) 318.

³²² Todd (n 68) 319.

³²³ Katsivela (n 90) 427.

³²⁴ *Schnell et al v The Vallescura* [1934] A.M.C. 1573; Tetley, 'Loss and Damage under Marine Claims' (n 239) 113.

³²⁵ *Samuel Son & Co Ltd v The Kapitonas Gudin* [2002] FCT 101.

³²⁶ *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd's Rep. 210.

3.7.2. The Hamburg Rules

Under the article 5(1), the Hamburg Rules accept ‘the principle fault tor neglect’ of the carrier; therefore the carrier bears the burden of proof.³²⁷ The carrier may escape from liability if he proves that all reasonable measures are taken by him or his servants/agents.³²⁸ Due to presumed fault principle, the Hamburg Rules differ from the burden of proof principle under the Hague/Hague-Visby Rules which the cargo interest bears the initial burden of proof.³²⁹ Related to fire, the Hamburg Rules leave the presumed fault principle and lay the burden of proof on claimant/cargo interest.³³⁰ Additionally, with article 5(7), the Hamburg Rules acknowledge the principle set out in *Schnell et al v The Vallescura* related to concurrent causes.³³¹

3.7.3. The Rotterdam Rules

Different from the Hague/Hague-Visby Rules, the Rotterdam Rules provide the shifting the burden of proof in detail.³³² ‘Neither the Hague-Visby Rules nor the Hamburg Rules make any reference to the initial burden of proof lying on the claimant’.³³³ On the other hand, according to article 17(1) of the Rotterdam Rules, the claimant bears the initial burden of proof.³³⁴ Therefore, the Rotterdam Rules adopt the Hague/Hague-Visby system but differ from the Hamburg Rules.³³⁵ At this point, the carrier should prove that ‘the cause or one of the causes of the loss, damage or delay is not attributable to the fault of’ neither the carrier nor the persons for whom the carrier is responsible³³⁶ or such loss, damage or delay occur due to the excepted perils listed under article 17(3).³³⁷ The

³²⁷ Final Act of the United Nations Conference on the Carriage of Goods By Sea, Annex-II ‘Common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea’ (1978) Un Doc. No A/CONF.89/13.

³²⁸ Pejovic (n 318) 27-28.

³²⁹ Force (n 75) 2085.

³³⁰ Donovan (n 120) 11.

³³¹ *Schnell et al v The Vallescura* [1934] A.M.C. 1573; Donovan (n 120) 11; Yancey (n 197) 1253.

³³² Katsivela (n 90) 421.

³³³ Tetley (n 171).

³³⁴ Yuzhou and Li (n 211) 932.

³³⁵ Berlingieri, ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ (n 84) 8.

³³⁶ The Rotterdam Rules, art 17(2).

³³⁷ Berlingieri, ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ (n 84) 8-9.

excepted perils under article 17(3) 'are referred to as presumptions of absence of fault'.³³⁸

In article 17(4), the Rotterdam Rules go a step further and regulate that if carrier proves one of the above arguments, the claimant should prove a) the fault of the carrier causes or contribute to the cause of the loss/damage/delay or b) there are other events other than the excepted perils which contribute to the loss/damage/delay. At this point, the carrier bears the burden of proving these events are not attributable to his fault.³³⁹

In article 17(5), it is stated that the claimant bears the burden of proving that the cause of the loss/damage/delay is or probably is the carrier's failure of his obligations under article 14.³⁴⁰ This article is similar with the Hague/Hague-Visby Rules system³⁴¹ but lays a 'lighter' burden of proof on the claimant than the Hague/Hague-Visby Rules because it is enough for the claimant to prove probable cause.³⁴² At this point, the carrier can be relieved from liability by proving that he exercised due diligence which is similar with the Hague/Hague-Visby system.³⁴³

Article 17(6) regulates concurrent causes and contrary to *The Vallescura*³⁴⁴ principle, this article does not provide any principle about liability apportionment and Working Group III intentionally gave courts freedom on this matter.³⁴⁵

3.7.4. Turkish Law

Article 4 of TCC refers to Turkish Civil Procedure Code ("TCPC") concerning the adducing evidence and TCPC adopts that the burden of proof lays on the party that claim rights on his benefit from the legal result linked to the fact.³⁴⁶ Therefore, the

³³⁸ Katsivela (n 90) 424; UNGA 'Report of Working Group III (Transport Law) on the work of its fourteenth session' (21 December 2004) UN Doc A/CN.9/572, 1, para 54.

³³⁹ The Rotterdam Rules, art 17(4)(b).

³⁴⁰ The Rotterdam Rules, art 17(5)(a).

³⁴¹ Todd (n 68) 366-367.

³⁴² The Rotterdam Rules, art 17(5)(a).

³⁴³ The Rotterdam Rules, art 17(5)(b).

³⁴⁴ *Schnell et al. v The Vallescura* [1934] A.M.C. 1573.

³⁴⁵ Katsivela (n 90) 426-427; UNGA 'Report of Working Group III (Transport Law) on the work of its fourteenth session' (21 December 2004) UN Doc A/CN.9/572, 1, para 73.

³⁴⁶ Turkish Civil Procedure Code, Law No.: 6100 Official Gazette [Resmi Gazete = R.G.], 4 February 2011 No. 27836, enacted: 12 January 2011, art 190.

claimant bears the initial burden of proof under TCC. At this point, the claimant/cargo interest must prove that the loss/damage/delay occurs within the carrier's period of responsibility. According to article 1179(1) of TCC, the carrier bears the burden of proving that the damages are not caused by the neglect or intentional act of the carrier or his agents and servant. Turkish Lawmakers declares that article 1179(1) adopts the article 4(2)(q) of the Hague/Hague-Visby Rules.³⁴⁷ The liability of the carrier is based on his presumed fault and neglect under article 1179(1), which results that if the loss/damage/delay occurs during the carrier's period of responsibility, it is a legal presumption that the carrier causes such loss/damage/delay by his fault. This approach is similar to article 5(1) of the Hamburg Rules.

In article 1182(1), TCC lists excepted perils in article 4(2)(c) to (p) of the Hague/Hague-Visby Rules and states that if damage/loss/delay occurs due to these reasons, it is presumed that the carrier and his servants are faultless and there is a causal link between these excepted perils and the loss/damage/delay.³⁴⁸ At this point, the burden of proof shifts to the cargo interest and the cargo interest should prove that these excepted perils are arising from the act of the carrier which leads to the carrier's liability.³⁴⁹ Moreover, article 1182(3) provides a presumption for the benefit of the carrier. According to this presumption, if it is probable that the loss/damage/delay is arisen from one of these excepted perils, it is presumed that this loss/damage/delay is arisen as a result of this excepted peril.³⁵⁰ Article 1183 of TCC adopts the article 5(7) of the Hamburg Rules for the reason that the Hague/Hague-Visby Rules do not provide such provision.³⁵¹

3.8. Notice Requirement

3.8.1. The Hague Rules and The Hague-Visby Rules

Even though the consignee is required to give notice to the carrier related to the loss and damage, the failure of giving such notice effects the liability of the carrier. In the

³⁴⁷ Turkish Commercial Code Preamble (n 38) 360.

³⁴⁸ Turkish Commercial Code Preamble (n 38) 360.; Değirmenci (n 43) 123.

³⁴⁹ TCC, art 1182(2).

³⁵⁰ Değirmenci (n 43) 124.

³⁵¹ Turkish Commercial Code Preamble (n 38) 361.

Hague/Hague-Visby Rules, notice requirement is regulated under article 3(6). At this point, it important to state that the Hague/Hague-Visby Rules do not cover delay in delivery, therefore, notice requirements are not applicable to delay.³⁵²

Related to the apparent loss and damage, there are two alternatives under this article.³⁵³ The first alternative is regulated under subparagraph 1 of article 3(6) as the consignee should give written notice to carrier or his agents regarding the loss of or damage to the goods 'before or at the time of the removal of the goods into the custody of the person entitled to delivery', also in case the consignee fails to give such notice, it will be prima facie evidence of delivery of the goods in accordance with bill of lading.³⁵⁴ The Hague/Hague-Visby Rules describe the time when the notice should be given as the time of the removal of the goods but not the time of discharge.³⁵⁵ The second alternative is regulated under subparagraph 2 of the article 3(6) as in case that a survey or inspection is made by attendance of both parties, and the 'the status, number and weight of the goods' are determined at the time of receipt of the goods by consignee throughout the survey/inspection, a written notice is not required since this survey or inspection is deemed as notification.³⁵⁶

Subparagraph 1 of article 3(6) regulates the non-apparent loss and damage and states that the notification period for non-apparent loss and damages is three days commencing from the delivery of the goods.³⁵⁷ However, this article is criticized due to that three-day period is a short period because in some cases, the loss of or damage to the goods become apparent after three days or upon detail examination.³⁵⁸

In case that the consignee fails to give notice for loss of or damages to the goods within the time period under article 3(6) of the Hague/Hague-Visby Rules, the consignee will not lost his right to claim damages, but the burden of proof will be shift to the consignee

³⁵² Didem Algantürk Light, 'Notice of Loss, Damage and Delay under the Hague-Visby Rules – Rotterdam Rules – New Turkish Commercial Code' [2014] 13/26 İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi 1, 5.

³⁵³ *ibid* 3.

³⁵⁴ The Hague Rules, art 3(6) para 1.

³⁵⁵ Tetley, 'Loss and Damage under Marine Claims' (n 239) 118.

³⁵⁶ The Hague Rules, art 3(6) para 2; Light (n 352) 4.

³⁵⁷ The Hague Rules, art 3(6) para 1.

³⁵⁸ Kofi Mbiah, 'The Hague Rules v the Hamburg Rules: A Time for Needed Change in Ghanaian Law on the Carriage of Goods by Sea' (1993-1995) 19 Rev Ghana L 201, 206.

because the bill of lading will constitute 'prima facie evidence of the delivery by the carrier of the goods' in accordance with the bill of lading.³⁵⁹ Even though in any case the consignee bears the burden of proving that the loss and damage has been occurred during the period of responsibility of the carrier, the notice requirement under article 3(6) still has impact on the consignee because the consignee overcomes the burden of proof by a clean bill of lading and notice of loss and/or damage.³⁶⁰

3.8.2. The Hamburg Rules

Notice requirement is regulated under article 19 of the Hamburg Rules. Similar to the Hague/Hague-Visby Rules, the Hamburg Rules provides two alternatives for apparent loss of or damage to the goods, one of which is under article 19(1) and the other one is under article 19(3).

Article 19(1) is generally similar to subparagraph 1 of article 3(6) of the Hague/Hague-Visby Rules; though there are some differences such as the notice should indicate 'the general nature of such loss and damage' and also the Hamburg Rules gives the consignee one working day to notify the carrier. This one-day period for notice is criticized because this period provides opportunity for 'fraudulent claims fraudulent claims where goods are damaged' after delivery of the goods until the goods reach the warehouse of the consignee.³⁶¹ Additionally, the Hamburg Rules regulate the situation where there is not any document of transport, and state that in this case, it will be deemed as the goods are delivered in good condition if any notice has not been given to the carrier.

Article 19(3) is similar with subparagraph 2 of the article 3(6) of the Hague/Hague-Visby Rules. This article provides clearer rule than the Hague/Hague Visby Rules because it states that in case of mutual survey or inspection, this survey/inspection eliminates the requirement to give notice only for the loss or damages determined during such survey/inspection.

³⁵⁹ Light (n 352) 6.

³⁶⁰ Tetley, 'Loss and Damage under Marine Claims' (n 239) 119.

³⁶¹ Moore (n 267) 9.

Concerning the non-apparent loss and damages, article 19(2), by referring article 19(1), states that the notice period is fifteen consecutive days following the day on which the consignee has handed over the goods. In this article, the Hamburg Rules enlarge the notice period in article 3(6) of the Hague/Hamburg Rules from three days to fifteen days.

Different from the Hague/Hague-Visby Rules, the Hamburg Rules regulate the notice requirement in case of delay in delivery under article 19(5). This article provides sixty consecutive days to the consignee to give notice of delay. Even though failure of the consignee to give notice of loss and damage shifts the burden of prove to the consignee, but not affect the right to claim damages, notice of delay is 'a condition precedent to any action for delay' and claim compensation.³⁶²

Contrary to the Hague/Hague-Visby Rules, article 19(7) of the Hamburg Rules regulates the notification requirement of the carrier. According to this article, the carrier should notify the shipper concerning the loss or damage within 90 consecutive days commencing from the day on which the loss or damage occurs or the delivery date of the goods. Therefore, it is possible for the carrier to give notice to the shipper even after a year from the discharge of the goods, if the loss or damage has not occurred until this date.³⁶³ The failure of the carrier to give notice provides prima facie evidence that the carrier does not suffer loss or damage arising from the fault or neglect of the shipper or his agents/servants.

Both article 19(6) and 19(8) explain to whom the notice must be given. According to article 19(6), the contracting carrier and the actual carrier are authorized to receive the notices send to each other. Furthermore, in article 19(8), it is stated that both the masters and the officer of the ship are authorized to receive the notices in the name of the carrier or the actual carrier; and also the persons acting on the shippers' behalf are authorized to receive notices in the name of the shipper.

³⁶² Moore (n 267) 9.

³⁶³ *ibid* 9-10.

3.8.3. The Rotterdam Rules

The Rotterdam Rules explain the notice of loss, damage and delay under article 23. Similar with the above-mentioned conventions, there are two alternatives for apparent loss of or damage to the goods under the Rotterdam Rules. First alternative is set out under article 23(1) as the written notice of loss and damage to the carrier. Despite the fact that the Hamburg Rules provide a day for notice for apparent loss and damage, article 23(1) of the Rotterdam Rules does not provide such time to the consignee and, similar with subparagraph 1 of article 3(6) of the Hague/Hague-Visby Rules, states that the notice should be given 'before or at the time of the delivery'. The difference of this article from the Hague/Hague-Visby Rules is that the Hague/Hague-Visby Rules refer to 'the time of the removal of the goods', on the other hand, the Rotterdam Rules refer to 'the time of delivery'. The second alternative is related to the joint inspection of the cargo and regulated under article 23(3) which is similar with article 19(3) of the Hamburg Rules.

Related to the non-apparent loss and damage, article 23(1) of the Rotterdam Rules provides seven working days for giving notice of loss and damage. The Rotterdam Rules redress balance between the Hague/Hague-Visby Rules providing three days and the Hamburg Rules providing fifteen days.³⁶⁴ Rotterdam Rules prefer to determine the time period based on working days instead of consecutive days as in the Hamburg Rules.³⁶⁵ As a result of inserting the term 'working day' into convention, seven working days under the Rotterdam Rules may extend to nine consecutive days in total.³⁶⁶

In article 23(2), the Rotterdam Rules highlight that failure to give notice will 'not affect the right to claim compensation for loss of or damage to the goods' 'nor shall it affect the allocation of the burden of proof set out in article 17'.³⁶⁷ However, the wording of this article is not considered as satisfactory for the reason that the actual aim of this article was to indicate that even though the consignee gives notice to the shipper, he will

³⁶⁴ The Hague/Hague-Visby Rules, art 3(6); The Hamburg Rules, art 19(2).

³⁶⁵ The Hamburg Rules, art 19(2).

³⁶⁶ Light (n 352) 5.

³⁶⁷ The Rotterdam Rules, art 23(2).

still bear ‘the burden of proving that the loss or damage occurred when the goods were in the custody of the carrier’.³⁶⁸

Article 23(4) of the Rotterdam Rules the time period for notice of delay is reduced to twenty-one consecutive days in comparison with article 19(5) of the Hamburg Rules.³⁶⁹ In article 23(4), the time period commences from the delivery of the good, in contrary to the Hague/Hague-Visby Rules and the Hamburg Rules.³⁷⁰ On the other hand, while the Rotterdam Rules determine the time period for non-apparent loss and damage under article 23(1) as working days, the time period under article 23(4) is determined as consecutive days which is similar with the Hamburg Rules.³⁷¹ Moreover, similar with article 19(5) of the Hamburg Rules, the Rotterdam Rules also state that in case the consignee fails to give notice of delay as in article 23(4), the result of such failure will be ‘the loss of compensation’.³⁷²

Article 23(5) of the Rotterdam Rules is similar with the article 19(6) of the Hamburg Rules, but the Rotterdam Rules replace the term ‘actual carrier’ with ‘maritime performing party’.³⁷³

3.8.4. Turkish Law

TCC regulates the notice requirement under article 1184 and 1185. Article 1184 is adopted paragraph 610 of the German Commercial Code and there not any provisions under above-mentioned conventions which are comparable with article 1184.³⁷⁴ According to article 1184(1), the consignee can apply to court for determining the status, size, amount or weight of the goods before receive the goods. Moreover, article 1184(2) states that the expenses and fees of such inspection are covered by the applicant. In case that the consignee applies to court for such inspection and as a result

³⁶⁸ Berlingieri, ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ (n 84) 16.

³⁶⁹ Light (n 352) 5.

³⁷⁰ Selim Cığır, ‘Claims for compensation for delay in delivery and notice requirements under article 23.4 of the Rotterdam Rules’ [2015] 21 JIML 39, 47; The Hague/Hague-Visby Rules, art 3(6); The Hamburg Rules, art 19(5).

³⁷¹ The Hamburg Rules, art 19(5).

³⁷² Cığır (n 370) 45.

³⁷³ Light (n 352) 4.

³⁷⁴ Light (n 352) 3.

of inspection, any loss or damage for which the carrier is liable is discovered, than the expenses and fees of this inspection are covered by the carrier.³⁷⁵ Article 1185(2) is a similar version of article 1184(1). Considering that article 1184(2) is more related to the procedural law rather than the substantive law and article 1185(2) provides the same result, it can be stated that article 1184 is not a necessary article to be regulated under TCC, but may be regulated under TCPC.

Article 1185 is drafted in consideration of article 3(6) of the Hague/Hague-Visby Rules, article 19 of the Hamburg Rules as well as practices under international arena.³⁷⁶ Article 1185(1) regulates the notice requirement concerning apparent and non-apparent loss and damages and adopts subparagraph 1 of article 3(6) of the Hague/Hague-Visby Rules. However, TCC does not indicate the result of the failure to give such notice under this article, but under article 1185(4). Article 1185(2) is similar with the paragraph 2 of article 3(6) of the Hague/Hague-Visby Rules and article 19(3) of the Hamburg Rules. This article states that if a survey or inspection is made by attendance of the parties, by the court or by an expert, the written notice is not required.

Prima facie evidence principle is regulated under article 1185(4) similar to the above-mentioned conventions.³⁷⁷ Article 1185(4) states that if the consignee fails to send notice the carrier concerning the loss or damage or to apply for survey or inspection, there is a presumption that the carrier delivers the goods in accordance with the bill of lading; even though any loss or damage is discovered afterwards, the carrier benefits from the presumption that such loss or damage occurs due to a reason for which the carrier is not liable. These presumptions are rebuttable.

For the reason that the Hague/Hague-Visby Rules do not cover delay in delivery, article 1185(5) of TCC adopts the article 19(5) of the Hamburg Rules.³⁷⁸ Furthermore, article 1185(6) is a combination of article 19(6) and (8) of the Hamburg Rules. Even though TCC inserts above-mentioned articles of the Hamburg Rules into article 1185, article

³⁷⁵ TCC, art 1184(2).

³⁷⁶ Turkish Commercial Code Preamble (n 38) 361.

³⁷⁷ The Hague/Hague-Visby Rules, art 3(6); The Hamburg Rules, art 19(1); The Rotterdam Rules, art 23(1).

³⁷⁸ Turkish Commercial Code Preamble (n 38) 361.

19(7) of the Hamburg Rules is not considered as essential to be adopted and not inserted into TCC.

3.9. Time for Suit

3.9.1. The Hague Rules and The Hague-Visby Rules

Limitation period is an important subject related to the liability of the carrier for loss, damage and delay in delivery because the limitation period demonstrates the period which the carrier can be held liable. In the Hague Rules, period to bring suit is regulated under subparagraph 4 of article 3(6) as 'one year after delivery of the goods or the date when the goods should have been delivered'.³⁷⁹ In *Trafigura Beheer BV v Golden Stavraetos Maritime Inc (The Sonia)*, the cargo should have been delivered to Lagos, however, upon the rejection of the cargo by the consignee, the ship was rerouted to Greece to another consignee.³⁸⁰ The Court held that the limitation period commenced to run from the date of delivery in Greece, but not from the date when the cargo should have been delivered in Lagos.³⁸¹ Subparagraph 4 of article 3(6) refers to the carrier and the ship concerning the time bar period; therefore this article 'considers the time from the standpoint of the claimant rather than from that of the defendant'.³⁸²

By the Visby Amendment article 1, subparagraph 4 of article 3(6) of the Hague Rules is replaced by a new provision and an additional paragraph is added to the Hague Rules.³⁸³ As a result article 1(2) of the Visby Amendment, under the Hague-Visby Rules, the parties of the carriage contract can extend the one year limitation period by an agreement.³⁸⁴ Therefore, it can be stated that the Visby Amendment gives importance to the parties' freedom of contract. This version is considered necessary for the reason that in some jurisdictions, the agreement of the parties related to the extension of the

³⁷⁹ The Hague Rules, art 3(6); see also *Compania Colombiana de Seguros v Pacific Steam Navigation Co (The Colombiana)* [1963] 2 Lloyd's Rep. 479.

³⁸⁰ *Trafigura Beheer BV v Golden Stavraetos Maritime Inc (The Sonia)* [2003] 2 Lloyd's Rep. 201.

³⁸¹ *ibid.*

³⁸² Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 36.

³⁸³ The Visby Amendment, art 1(2) and 1(3).

³⁸⁴ The Visby Amendment, art 1(2); The Hague-Visby Rules, art 3(6) sub-paragraph 4.

limitation period was valid as contrary to the limitation period under the law.³⁸⁵ Moreover, by article 1(3), the Visby Amendment inserts a new provision to the Hague Rules which regulates the actions against third parties for indemnity.³⁸⁶ According to this article, it is possible to extend the limitation period for at least three months ‘commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with the process in the action himself’ if this action is brought within the period under ‘the law of the Court seized of the case’.³⁸⁷ This provision gives cargo insurers, ‘by virtue of subrogation’ an addition three months to file actions against carriers for recovery.³⁸⁸

3.9.2. The Hamburg Rules

Under the Hamburg Rules, the limitation period is regulated in article 20. The Hamburg Rules provide more detail provision than the Hague/Hague-Visby rules related to the limitation period. In article 20(1), the limitation period is extended to two years considering on year period under the Hague/Hague-Visby Rules. Different from the Hague/Hague-Visby Rules, the Hamburg Rules do not refer to the carrier and the ship, but refer to ‘any action relating to the carriage of goods under this convention’.³⁸⁹ Additionally, the Hamburg Rules refers not only judicial proceedings but also arbitral proceedings.³⁹⁰ Related to the commencement date of the limitation period, article 20(2) of the Hamburg Rules follows the footsteps of the Hague/Hague-Visby Rules and starts the limitation period from the date when the goods are delivered or should have been delivered.³⁹¹ On the other hand, unlike the Hague/Hague-Visby Rules, the Hamburg Rules go a step further and provide that in case of the delivery of the part of the goods, the limitation period commence on the date of delivery. Moreover, in article 20(3), the

³⁸⁵ Kacic, ‘Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules’ (n 23) 188.

³⁸⁶ The Visby Amendment, art 1(3); The Hague-Visby Rules, art 3(6*bis*).

³⁸⁷ The Hague-Visby Rules, art 3(6*bis*).

³⁸⁸ Kacic, ‘Analysis of the Provisions regarding Liability under the Hague and Hague/Visby Rules’ (n 23) 188.

³⁸⁹ The Hamburg Rules, art 20(1).

³⁹⁰ *ibid.*

³⁹¹ Robert Schilling, ‘The Effect on International Trade of the Implementation of the Hamburg Rules From the Point of View of the Shipper’ (Commite Maritime, 1979) 20 <<https://comitemaritime.org/wp-content/uploads/2018/06/1979-COLLOQUIUM-HAMBURG-RULES.pdf>> accessed 10 August 2020.

Hamburg Rules makes clear that the first day of the commencement of the limitation period is included.

In article 20(4) of the Hamburg rules, it is stated that the defendant can extend the limitation period during the running of this period by a written declaration. However, this article is considered as impractical.³⁹² Similar with the Hague-Visby Rules, article 20(5) of the Hamburg Rules provide similar opportunity for the person held liable to bring an action for indemnity and allow extension of the limitation period if the action is commenced within the time period under 'the law of the State'.³⁹³ This article is similar with article 6bis of the Hague-Visby Rules with a slight difference which is that the Hague-Visby Rules states the minimum extension period as three months, but the Hamburg Rules states as 90 days. Therefore, both the Hague-Visby Rules and the Hamburg Rules allow the application of the domestic laws.³⁹⁴ As a result, even though the Hague Rules do not include any provisions which can be comparable with the Hamburg Rules, the Visby Amendment provides similar provisions with the Hamburg Rules.³⁹⁵

3.9.3. The Rotterdam Rules

The Rotterdam Rules regulates the limitation period under articles 62 to 65. Under article 62(1) of the Rotterdam Rules, similar to the Hamburg Rules, the limitation period is two years. Additionally, different from the Hague/Hague-Visby Rules, but similar with the Hamburg Rules, the Rotterdam Rules do not just refer to the carrier and the ship related to the limitation period. 'Therefore, it applies both to any action of the shipper or consignee against the carrier or any maritime performing party as well as to any action of the carrier or any maritime performing party against the shipper, documentary shipper controlling party or consignee'.³⁹⁶

³⁹² Murray (n 261) 80.

³⁹³ The Hamburg Rules, art 20(5); John F Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education Limited 2010) 224.

³⁹⁴ Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (n 84) 36.

³⁹⁵ Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), UN Doc. No A/CN.9/306, para 44.

³⁹⁶ Berlingieri 'The Rotterdam Rules' (n 130) 58.

Article 62(2) of the Rotterdam Rules is similar with the article 20(2) of the Hamburg Rules but with a differences which is that according to the Hamburg Rules, if only a part of the goods are delivered, the limitation period commences on the day of delivery; however, according to the Rotterdam Rules, under the same situation, the limitation period commences ‘on the last day on which the goods should have been delivered’.³⁹⁷ Additionally, the Rotterdam Rules incorporates article 20(3) of the Hamburg Rules into article 62(2).

Article 63 of the Rotterdam Rules is similar with the article 20(4) of the Hamburg Rules. However, under this article, the Rotterdam Rules highlight that limitation period is not ‘subject to suspension or interruption’ but there is not any provision concerning suspension and interruption under the Hamburg Rules or the Hague/Hague-Visby Rules.³⁹⁸

In regard to the limitation period, the Rotterdam Rules make reference to national law in both article 64 and 65.³⁹⁹ Article 64 adopts the article 20(5) of the Hamburg Rules and also article 3(6*bis*) of the Hague/Hague-Visby Rules⁴⁰⁰ and article 65 regulates ‘the action against the person identified as the carrier’ and refer to the presumption under article 37(2). According to article 37(2), there is a presumption that the registered owner of the ship is the carrier; but this presumption can be rebutted by the shipowner by proving that bareboat charterer or another person identified by the shipowner is the carrier and indicating his address. The bareboat charterer also has the same opportunity for rebutting the ‘presumption of being the carrier’. According to article 65, the claimant can institute an action after two-year period but within the limitation period of the national law of the court⁴⁰¹ or within ninety days from the identification of the carrier or the rebuttal of the presumption under article 37(2).⁴⁰² The aim of this article is to protect the claimant in case that ‘the identity of the contractual carrier is not

³⁹⁷ The Rotterdam Rules, art 62(2); The Hamburg Rules, art 20(2).

³⁹⁸ Berlingieri, ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ (n 84) 36.

³⁹⁹ Berlingieri ‘The Rotterdam Rules’ (n 130) 59.

⁴⁰⁰ Alcantara, Hunt, Johansson, Oland, Pysden, Ramberg, Schmitt, Tetley and Vidal (n 131) 10.

⁴⁰¹ The Rotterdam Rules, art 65(a).

⁴⁰² The Rotterdam Rules, art 65(b).

ascertained until late in the day and, possibly, only after the claim has been initially instituted against the wrong defendant'.⁴⁰³

3.9.4. Turkish Law

TCC regulates the limitation period under article 1246 and according to article 1246(1), this limitation period applies to both bareboat charter contract, time charter contract, affreightment contracts including voyage charter contracts and contract of carriage and also bill of lading. According to article 1246(2), the limitation period commences when the damages become due. At this point, it is stated that the relevant provisions under Turkish Code of Obligations⁴⁰⁴ will be applied for determining the commencement date of the limitation period.⁴⁰⁵ Article 1246(1) is subject to article 1188 which regulates the time bar which will be applied to the action brought against the carrier for loss of or damage to the goods and delay in delivery.

Article 1188(1) states that the right to bring an action relating to loss of or damage to the goods or delay in delivery, is lost if judicial proceedings have not been instituted within one year. It is important to state that there are two types of periods in Turkish Law as prescription periods and extinction periods,

[I]n Turkish law there are some important differences between prescription periods and extinction periods. Prescription periods provide a defence to the debtor. The debtor has the right to refuse performance without affecting the substantive right. The extinction periods on the contrary affect the right itself. In court proceedings, a defence of prescription is not raised ex officio, but only if the debtor makes an explicit plea, whilst the lapse of an extinction period must be established ex officio. In contrast with the prescription period, the extinction period runs without suspension. It is interrupted only by instituting an action before a court or an arbitral tribunal.⁴⁰⁶

One-year period under article 1188 is an extinction period, even though the period under article 1246 is a prescription period. Therefore, one-year period under article 1188 of TCC is similar with the period of time for suit under article 62 of the Rotterdam Rules

⁴⁰³ Alcantara, Hunt, Johansson, Oland, Pysden, Ramberg, Schmitt, Tetley and Vidal (n 131) 10.

⁴⁰⁴ Turkish Code of Obligations, Law No.: 6098 Official Gazette [Resmi Gazete = R.G.], 4 February 2011 No. 27836, enacted: 11 January 2011.

⁴⁰⁵ Turkish Commercial Code Preamble (n 38) 55.

⁴⁰⁶ Francesco Berlingieri (ed), *Time Barred Actions* (2nd edn, Lloyd's of London Press Ltd 1993) 8-9.

due to article 63 and this limitation period is not subject to suspension or interruption..⁴⁰⁷

Article 1188(2) of TCC regulates the commencement of one-year period and adopts article 20(2) of the Hamburg Rules for the reason that the delivery of part of the goods is also covered.⁴⁰⁸

Furthermore, article 1188(3) is a different version of article 3(6*bis*) of the Hague-Visby Rules, article 20(5) of the Hamburg Rules and article 64 of the Rotterdam Rules. According to this article, the person held liable can file an action for indemnity after the expiration of one-year period; however, this person lost his right to file an action if he has not institute the action for indemnity within ninety days 'commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself'.⁴⁰⁹ This ninety-day period is also an extinction period. In this article, even though the Hague-Visby Rules state the minimum period as three months, TCC prefers to state ninety days as in the Hamburg Rules and the Rotterdam Rules.⁴¹⁰ Additionally, article 1188(4) of TCC adopts article 20(4) of the Hamburg Rules.

Different from the above-mentioned conventions, TCC provides an additional provision under article 1189. According to article 1189, states that if the party against whom the action is filed, stall the aggrieved party until the time period for instituting the action is expired, this party cannot benefit from expiration of extinction periods.⁴¹¹ In this case, the time period for instituting the action commences at the time when the aggrieved party become aware of this situation.⁴¹² The reason of this provision is to make TCC in conformity with the precedent established by Turkish Supreme Court.⁴¹³

⁴⁰⁷ The Rotterdam rules, art 63.

⁴⁰⁸ Turkish Commercial Code Preamble (n 38) 362.

⁴⁰⁹ TCC, art 1182(3); The Hamburg Rules, art 20(5).

⁴¹⁰ The Hague-Visby Rules, art 3(6*bis*); The Hamburg Rules, art 20(5); The Rotterdam Rules, art 64.

⁴¹¹ TCC, art 1189(1).

⁴¹² TCC, art 1189(2).

⁴¹³ Turkish Commercial Code Preamble (n 38) 362.

V. INTERNATIONAL CONVENTIONS AND HIERARCHY OF NORMS IN TURKEY

According to the Turkish Constitution⁴¹⁴, source of law in hierarchical order is the constitution, codes, law-amending ordinances, international treaties.⁴¹⁵ In Turkish Constitution, there is not a single provision regulating the hierarchy of norms in Turkey, therefore, hierarchy of norms can be understood as reviewing different articles such as article 11 of the Turkish Constitution states that the laws cannot be in conflict with the Turkish Constitution.⁴¹⁶ According to article 90 of the Constitution, ratification and accession of an international treaty necessitates the adoption of Turkish Grand National Assembly (“TGNA”) a law approving the ratification and/or accession.⁴¹⁷ After an international treaty duly comes into effect has the force of law.⁴¹⁸ However, according to article 90(5), it cannot be applied to the Constitutional Court on the grounds that international treaties are unconstitutional. However, the Constitutional Court has power to examine the constitutionality of the laws.⁴¹⁹ As a result, it is possible to state that Turkish lawmakers do not consider the domestic law and international treaties completely equal and attribute more importance to the international agreements.⁴²⁰

On the other hand, in case that the domestic law and international treaties are considered in the same hierarchical line and *lex superior derogat legi inferiori* principle is not applicable, then the question will be whether *lex posterior derogate legi priori* principle is applicable or not.⁴²¹ In Turkey, TCC entered into force in 2012⁴²² after the Hague Rules entered into force in 1955⁴²³. Under these circumstances, Turkish Courts do not accept the superiority of the international conventions and apply the more recently

⁴¹⁴ Turkish Constitution, Law No.: 2709 Official Gazette [Resmi Gazete = R.G.], 20 October 1982 No. 17844, enacted: 18 October 1982.

⁴¹⁵ International Business Publications, *Turkey Privatization Programs and Regulations Handbook* (Volume 1, 2015 edn, International Business Publications 2015) 39.

⁴¹⁶ Turkish Constitution, art 11.

⁴¹⁷ Turkish Constitution, art 90(1).

⁴¹⁸ Turkish Constitution, art 90(5).

⁴¹⁹ Turkish Constitution, art 148.

⁴²⁰ Değirmenci (n 43) 12.

⁴²¹ Serap Yazıcı, 'Update: A Guide to Turkish Public Law and Legal Research' (NYU Law Global, October 2017) <https://www.nyulawglobal.org/globalex/Turkey1.html#_International_Treaties> accessed 30 July 2020.

⁴²² Turkish Commercial Code, Law No.: 6102 Official Gazette [Resmi Gazete = R.G.], 11 February 2011 No. 27846, enacted: 13 January 2011.

⁴²³ Accession of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Law No.: 6469 Official Gazette [Resmi Gazete = R.G.], 22 February 1955 No. 8937, enacted: 14 February 1955.

enacted rules which in this case is TCC.⁴²⁴ In 2017, Turkish Supreme Court applied SDR limitation in article 1186 of TCC⁴²⁵ in despite of that the Hague Rules state liability limitations in pound sterling under article 4(5). By contrast with the approach of Turkish Supreme Court, some scholars have the opinion that Turkish Courts are obliged to apply The Hague Rules to dispute arising from both international and domestic carriages and in order to TCC to be applicable, 'the carriage should be outside the scope of the Hague Rules'.⁴²⁶

VI. CONCLUSION

The balance between cargo interest and ship interest is the main subject of the Hague/Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. Under this dissertation, main differences and similarities between these international conventions and Turkish Law related to the carrier's liability for the loss of or damage to the cargo or delay in delivery are analysed. Related to the duties of the carrier, the system of the Hague/Hague-Visby Rules and the Rotterdam Rules' systems are similar and TCC adopts this system in general. Related to loss, damage and delay, the main difference is that the Hague/Hague-Visby Rules do not cover delay in delivery and in order to overcome this problem, TCC adopts related provisions of the Hamburg Rules. Concerning the carrier's period of responsibility, each conventions provide different periods and it is stated by the Turkish Lawmakers that provisions of TCC are based on the Hamburg Rule system. For exemptions from liability, the Hague/Hague-Visby Rules and the Rotterdam Rules prefer to list these exemptions and TCC adopts this system but also incorporates some provisions of the Hamburg Rules. For liability limitation, different from the Hague Rules, TCC incorporates SDR Protocol. Related to the carrier's liability for acts of other persons, Turkish Lawmakers insert related provisions of the Hamburg Rules into TCC. Furthermore, TCC provides a combined system of the Hague Rules and the Hamburg Rules with respect to the burden of proof and the notice requirements. In regard to the time for suit, despite the fact that the Hague/Hague-Visby Rules provide one-year period for instituting the action, the

⁴²⁴ Degirmenci (n 43) 13; Hakan Karan, 'The Carrier's Liability for Breach of the Contract of Carriage of Goods by Sea under Turkish Law' (2002) 33 J Mar L & Com 91, 94.

⁴²⁵ Yargıtay 11. Hukuk Dairesi (Supreme Court 11th Civil Chamber) 31.05.2017, Esas No. (Case No.) : 2016/529, Karar No. (Judgment No.) : 2017/3255.

⁴²⁶ Karan (n 424) 95-96.

Hamburg Rules and the Rotterdam Rules increase this period to two years. TCC provides one-year period for time for suit as in the Hague/Hague-Visby Rules but fills the gaps by adopting relevant provisions under the Hamburg Rules.

For the reason that the Turkey is a contracting state to the Hague Rules⁴²⁷, TCC is generally based on the Hague Rules system. On the other hand, the several provisions in the Visby Amendment, SDR Protocol and the Hamburg Rules which are not considered as contradictory with the Hague Rules, are incorporated into TCC to be adapted to the developing maritime law and to overcome the problems or to fill the gaps in the Hague Rules.⁴²⁸ However, TCC does not refer to the Rotterdam Rules. Therefore, it can be stated that the TCC system is a combination of the Hague Rules, the Visby Amendment, SDR Protocol and the Hamburg Rules. However, Turkey does not prefer to be a signatory to neither of these conventions.



⁴²⁷ Accession of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, Law No.: 6469 Official Gazette [Resmi Gazete = R.G.], 22 February 1955 No. 8937, enacted: 14 February 1955.

⁴²⁸ Turkish Commercial Code Preamble (n 38) 342-343.

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GRADEMARK REPORT

FINAL GRADE

GENERAL COMMENTS

70/100

Instructor

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Comment 1

Structure and layout is excellent.

Treatment of the law is comprehensive.

Student offered excellent comparisons and points of analysis.

Extensive research present.

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