Pakistan Journal of Criminology
Vol. 16, No. 03, July—September 2024 (327-340)

The Liability of Maritime Carrier under the Iraqi Transport Law and International Conventions

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Abstract

Everywhere carriers incur a measure of liability for the safety of the goods. Carriers are liable for any damage or for the loss of the goods that are in their possession as carriers unless they prove that the damage or loss is attributable to certain excepted causes. Damaged and lost items can unfortunately be a common problem when shipping freight. Legal responsibilities arise due to loss or damage during transit while cargo is in their care. This study intends to investigate the nature of the liability of the maritime carrier when this liability is realized, and the extent to which it can be paid or disposed of given the risks realized from the transportation process, which may result in damage or loss of the goods, and the damage that may cause to the consignee because of this damage or loss.

Keywords: Maritime transport, Carrier liability, Cargo damage.

Introduction

Transport operations differ according to how they are carried out, It may be by planes, vehicles, or ships, and the maritime transport of goods in the field of international trade is the most common type of transport, as most of the international trade is handled through the sea, and this is based on the maritime transport contract, which has increased in importance with the development Maritime traffic, and with the tremendous development of ships, which increased in size and increased the degree of their absorption of goods, in addition to providing them with the latest equipment (Dowidar 2002).

In the contract for the maritime transport of goods, the marine carrier is considered the strongest economic party, through the conditions it dictates to the shipper in the shipping document, especially those that exempt him from liability in the event of loss or damage to the goods. These conditions caused severe damage to shippers, which led to disputes between shippers. The carriers, to reduce these disputes, several international agreements and treaties appeared, and perhaps the most important of them is the international agreement on unifying some rules related to bills of lading of 1924 called the Brussels Convention, and the Rotterdam Convention of 2008(Al-Smadi 2017).

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Objectives of the study:

- To determine the legal basis for the carrier's liability.
- To clarify the legal provisions exempting the maritime carrier from liability for the transportation of goods.
- To shed light on the legal rules that regulates the liability of the marine carrier for the transportation of goods under Iraqi Transport Law No. (80) Of 1983, and international agreements concerning the liability of the carrier.

Research Questions:

Whereas the marine carrier undertakes, under the contract of carriage, to transport the goods from one port to another, this commodity may be damaged or destroyed as a result of his fault, which requires his accountability for the damage to the consignee as a result of this damage or loss, and then a problem arises that is considered the most prominent in maritime transport operations, and it is related to the nature of the responsibility of the maritime carrier for the safety of the goods which is :

1. When does the liability of the maritime carrier arise?
2. What is the extent to which the liability of the maritime carrier can be paid or disposed of?

Methodology:

The study followed the comparative approach between the provisions of the Iraqi Transport Law No. (80) Of 1983 and international agreements; Brussels Agreement of 1924, and the Rotterdam Convention of 2008.

The Legal Nature of The Marine Carrier's Liability

The liability of the carrier is of great importance in the contract of maritime transport, for that there are various legislations regulate it, but they differ in determining the basis and nature of this liability, as follows:

Legal Nature of The Carrier's Liability Under International Agreements

International and national maritime legislation differ on the legal basis for the liability of the maritime carrier of goods due to the different legal systems of liability from contractual liability to tort liability and their implications for the field of evidence and the parties to the liability lawsuit (Al-Zaqerd 1996)

a. Nature of The Marine Carrier's Liability under the Brussels Convention Of 1924

Under the liability of the maritime carrier under the Brussels Convention, the shipper is not required to prove the carrier's fault. If he wants to defend this

responsibility, he must prove the foreign fault. These general rules are the same ones adopted by the treaty in regulating the liability of the carrier. Article (2/4) of the Convention stipulates that: ((Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (q) Any other cause arising without the actual fault or privity of the carrier, or the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage)).

This text establishes his responsibility for his own mistakes and the mistakes of his followers. If he wants to ward off responsibility, it is not sufficient for that to merely prove the absence of a causal relationship between his action and the actions of his followers and the damage that occurred, but he must attribute this damage to its real cause, and from that, the mere occurrence of damage requires the liability of the carrier(Yunus 1978).

Thus, the general legal basis for the liability of the maritime carrier under Brussels 1924 is (the assumed liability, as the carrier's obligation to transport the goods and hand them over to the rightful owner is an obligation to achieve a result and not an obligation to exercise care), so that he cannot get rid of the responsibility unless he proves the availability of the foreign reason that led to damage. (Al-Sharqawi 2011; Hosni 1989).

b. Nature of The Marine Carrier's Liability under the Rotterdam Rules 2008

The Rotterdam Rules attributed the delivery period of the goods to the will of the two parties to the contract of carriage, i.e., the carrier and the shipper, and relied on the responsibility of the carrier during the agreement period not to deliver the goods. This provision is in favour of the shippers, as Article (17/1) of the Rotterdam Rules stipulates that:
(The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.)

It is clear to us from Article (17/1) that the Rotterdam Convention establishes the liability of the carrier for the loss or damage of the goods if the claimant proves that the damage to the goods occurred during the period of the carrier's obligation that was determined by the will of the two parties in the contract of carriage, i.e. it set balanced rules to a large extent as a basis for The

responsibility of the carrier and the shipper, in which the rules of justice are observed.

Article (17/2) stipulates that ((The carrier is relieved of all or part of its liability under paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or the fault of any person referred to in article 18)).

As it is clear at the outset, the responsibility within the framework of this agreement is not objectively based on mere damage, but rather a personal responsibility based on the idea of the supposed error, meaning that the carrier accepts the presumption of error, so the claimant only needs to prove that the damage occurred while the goods were in the custody of the carrier, it is assumed that an error occurred on the part of the carrier (Malash 2009).

Thus, the liability of the carrier under this agreement appears to be based on the presumption of error or assumed error, However, the difference is that this presumption is a simple presumption that can prove the opposite, so Article (17/2) of the agreement authorizes the carrier to absolve himself of liability if he proves that the damage to the goods or the economic losses resulting from the delay is not attributable to a mistake committed by him or one of his subordinates and the like under Article (18/2) of the agreement.

Meantime, the Rotterdam Rules 2008 agreed with the Hamburg Rules 1978 which based the responsibility of the marine carrier for damage or loss of goods on (presumed error), but the difference is that this latter agreement gave the carrier the possibility to ward off liability by proving that he and his employees and agents had taken reasonable measures to avoid the occurrence of the accident causing the damage except in the case of damage to the goods as a result of fire and damage to the goods as a result of negligence In taking reasonable measures to extinguish the fire or avoiding or mitigating its consequences. In these two cases, the burden of proof is reversed, and it becomes the shipper to prove the fault of the carrier in the occurrence of the fire, or in failure to take reasonable measures to extinguish the fire and avoid its consequences and mitigate them (Berlingieri 2010).

However, the Rotterdam Convention entitles the carrier in Article (17/2) to dispose of the liability by denying the presumption of the supposed fault, if he proves that the cause of the loss, damage, or delay is not attributable to a fault committed by him or one of the excluded events or circumstances mentioned in the Convention specifically Article (18/3) of the agreement.

Legal Nature of The Carrier's Liability Under Iraqi Law

The responsibility of the maritime carrier in Iraqi law is a contractual responsibility that arises because of a breach of a contractual obligation, which is an obligation to achieve a result or an end. Therefore, the responsibility of the marine carrier ensues as soon as the result is not achieved, and since the responsibility of the carrier is the result of his failure to implement his obligation arising from the contract of maritime transport, it is necessary to determine the start time and the end of the maritime transport contract to ascertain whether or not that process of an obligation arises from a breach of this contract (Nasser and Amin 2019).

Where Article (27/1) of the Iraqi Transport Law No. (80) of (1983) states that ((the responsibility of the carrier begins when it receives the thing and ends with its delivery to the addressee under the provisions of the law)).

Article (46) of the same law stipulates that (the carrier guarantees the safety of the thing during its implementation of the transport contract and is responsible for the damages that fall to him, and he may not deny his responsibility for the loss or damage of the thing or the delay in its delivery except by proving force majeure or a self-defect in the thing or the error of the sender or the addressee)(Awad 2023).

It is clear from the two aforementioned texts that the responsibility of the maritime carrier begins when it receives the goods and ends when it delivers them to the consignee (Jouda and Amin 2020), and that the carrier guarantees the safety of the goods during this period, and he cannot pay his responsibility for its loss, damage, or delay in delivery except by proving the foreign reason that led to the events Harm.

There is no doubt that the Iraqi legislator by adopting and keeping with the approach followed in the Brussels Agreement of 1924, was successful in protecting the interests of shippers.

Provisions of Liability of The Marine Carrier

The responsibility of the marine carrier is established when certain reasons are fulfilled that require the carrier to be held accountable for them, and certain reasons may be realized that would exempt the marine carrier from liability despite the realization of the reasons for it.

a. Cases of Liability of The Marine Carrier

Previously the study stated that the obligation of the marine carrier is an obligation to achieve a result, which is transporting the goods and delivering them in sound condition to the designated place and at the agreed date or a reasonable

date. If the result is not achieved, the marine carrier is considered in breach of its obligation arising from the maritime transport contract.

He shall be questioned about the mistake made by him or his marine subordinates, which led to the non-performance of an obligation, and it is useless for the carrier to prove that he has exercised the necessary care to implement the contract. The shipper is not obligated to prove an error on the part of the carrier (Jouda and Amin 2020), because this error is presumed until the carrier proves that the non-performance of his obligation is due to an unavoidable foreign reason, such as the error of the shipper or third parties, force majeure, or an intrinsic defect of the goods (Taha 1995).

So, to determine the responsibility of the marine carrier, reference must be made to the maritime transport contract, to the provisions of legislation and general rules whose provisions do not conflict with the nature of this contract, and to maritime customs(Awad 1992).

However, three situations lead to the maritime carrier's liability, which are:

i. Losing of The Goods Case

What is meant by perishing: is the disappearance of the substance of the thing, its destruction, or the failure to find it, as the carrier is unable to deliver the thing to the consignee to end the obligations imposed on him by the contract of carriage.

This destruction is of two types: either the destruction is complete, or it may be partial destruction. Hence, the carrier may lose the entire quantity of the goods or part thereof.

The maritime carrier is responsible for the loss of the goods, whether in whole or in part, as Article (132) of the Iraqi Transport Law No. (80) of (1983) stipulates that ((the carrier is responsible for the loss or damage of anything and the delay in its delivery unless he proves that he and his subordinates have taken The measures that they would have taken carefully in managing their private affairs, had they found in the same circumstances, not to deviate from the care of the usual man, and which would avoid loss, damage, or delay and its consequences)).

It is noted that it is customary to tolerate a slight shortage resulting from the process of loading and unloading, or that results from the nature of the goods and their exposure to various weather factors during the sea voyage, such as grains that are exposed to drying during the sea voyage, and their weight is reduced by something easy to tolerate.

It has been customary to tolerate this amount of shortage because it cannot be avoided, and the carrier is considered responsible if the consignee can prove the carrier's fault for the partial shortage in the quantity of the goods, even within the limits of the amount (Al-Baroudi 1975). There are two opinions regarding defining what is meant by road incapacitation:

ii. Damaged Goods

Damage means that the goods arrive in full in terms of their quantity, but in a defective state, whether the defect includes all or part of the goods. The consignee has the right to prove that damage occurred to the goods while they were in the custody of the carrier, or that the carrier or one of his subordinates contributed to the increase in the damage.

However, if the bill of lading is clean, that is, empty regarding the condition of the goods, then it is assumed that the carrier received the goods in good condition, then he is asked about all damage to the goods, and the carrier can prove against the shipper the opposite of what was stated in the bill of lading and that the goods were damaged when shipped

However, the carrier cannot prove the opposite of what was stated in the bill of lading against the consignee, and the carrier can prove that he is not responsible for the damage caused to the goods, even if the bill of lading is clean, whether against the shipper or the consignee, if he can prove that the information provided by the shipper about the goods is incorrect or the damage to the goods was due to an intrinsic defect**.**

The carrier may stipulate that he is not responsible for the damage to the goods due to insufficient packaging. Of course, the shipper or the consignee can prove the responsibility of the carrier if either of them can prove that the damage to the goods was not a result of lack of packaging or its insufficiency. The issue of inadequate packaging is a relative matter. Certain packaging may be sufficient in certain circumstances and insufficient in others.

The carrier is considered responsible for the damage to the goods if its cause is unknown, and if the damage to the goods occurred for a reason for which the carrier is responsible and another from which he is exempt, except that they overlap so that it is impossible to separate their effects, then the carrier is considered responsible for all damage to the goods (Makki 1975).

The carrier is asked about the damage that befalls the goods due to a defect in the ship itself, and he is also asked about the damage that occurred due to the ship's action, because the carrier's obligation is (an obligation to achieve a result), and this responsibility is considered a contractual responsibility because

the ship's action is attributed to him. Mechanical machines are stipulated in Article (231) of the Civil Code.

iii. Delay in Delivery Case

What is meant by delay is the arrival of the goods at a later time than the agreed-upon arrival time or reasonable time for such arrival and the carrier shall be liable for the delay in delivery of the goods.

The delay occurs if the goods are not received on the date agreed upon or the date on which the ordinary carrier delivers them in similar circumstances if there is no such agreement.

Delay does not cause harm to the lost, but rather economic damage to the shipper, so he misses out on earnings or claims compensation if the place of the delivery date was agreed upon, so Once the date comes without delivery taking place, the responsibility rests on the carrier, and nothing remains but to prove the causal relationship between the error and the damage.

But if the date is not agreed upon, he must prove the date on which the ordinary carrier delivers the thing that the carrier may be able to prove the opposite of.

The arrival date of the goods may be specified in the bill of lading, and at that time the carrier will be asked about the delay in the arrival of the goods at the specified date. The delay to the schedules announced by the carrier from time to time, especially about ships that operate in regular shipping lines, as is shown in those schedules the dates of the ships' arrival at the different ports (Pharaon 1976).

It is noted that the reason for the delay in the arrival of the goods to the required place at present is mostly not due to the delay in the arrival of the ship to the intended port, but rather due to the goods not being shipped inadvertently at the time required to be shipped or unloaded by mistake at a port other than the intended port and then reloaded again.

When one of these three cases (loss, damage, delay in delivery) is achieved, the responsibility of the maritime carrier towards the shipper or the consignee arises.

Cases of Exemption from the Liability of the Marine Carrier

The maritime carrier shall be liable for the errors made by him or his affiliates during his execution of the maritime transport contract unless there is a reason that exempts him from responsibility. The reason for exemption may be legal, stipulated in the law, or it may be consensual, such as being mentioned in the bill of lading.

I. The legal reasons for exempting the carrier from liability.

As the study mentioned the maritime carrier should achieve an end or a result, so the liability arises once it does not deliver the goods to the consignee intact at the agreed date, but the carrier can pay responsibility if proves that the failure to implement the obligation or the delay in implementation is due to a foreign reason. as Article (425) of the Iraqi Civil Code stipulates that ((the obligation expires if the debtor proves that fulfilling it has become impossible for him for a foreign reason that he has no hand in)).

The foreign reason in this field, through which the carrier can deny its responsibility, is either force majeure or the shipper's fault, or the intrinsic defect of the goods, as follows:

a. Force majeure: Force majeure, as we know, is an accident that cannot be expected or avoided, and the carrier is not involved in its occurrence and makes the carrier's implementation of his obligation impossible. due to his circumstances (Makki 1975).

Since force majeure is considered a reason to pay the responsibility of the marine carrier, then the burden of proving it falls on him, Force majeure is a matter of facts left to the discretion of the subject judge (Al-Assiouty 1966).

b. Shipper's error: The marine carrier is not responsible if it proves that the loss or damage to the goods is due to the shipper's fault, such as a defect in the packing or packing of the goods, or the captain's failure to inform him of the true nature of the goods, so that the captain can place them in the ship's holds in the appropriate manner and place, as if they were The goods, for example, are of the type that are damaged when not preserved in an air-conditioned or refrigerated place. The responsibility of the carrier also ends if the consignee made a mistake that was the cause of the damage as if he was late in receiving the goods despite his confirmation of receipt, which caused the damage to the goods.

c. Intrinsic Defect of The Goods: The responsibility of the maritime carrier is negated if it is proved that the damage to the goods is the result of an intrinsic defect in it, as if the goods were damaged quickly, so the sea voyage and its atmospheres could not bear the heat or cold, and some commentators believe (Al-Baroudi 1975).

The general and specific reasons for exempting the carrier from liability under international agreements.

If the agreement between the carrier and the shipper to exempt the carrier from responsibility for the loss or damage of the goods or the delay in their

delivery is (invalid) considering international maritime treaties from Brussels 1924 to Rotterdam 2008, as well as in domestic laws as is the case in Iraqi law.

The carrier is legally exempted from liability if there are reasons mentioned in international conventions. These reasons are divided into general reasons and special reasons that exempt the marine carrier from liability. As follows:

i. General grounds for exemption from liability

The general reason for legally exempting the sea carrier from liability is a reflection of the legal basis for this responsibility, in the sense that the difference in the different legal bases in the treaties and laws in question leads to a difference in the general reasons for exemption from liability, and since the legal basis for the responsibility of the marine carrier in each of the Brussels Treaty of 1924 is (assumed responsibility) and in the Rules of Rotterdam 2008 it is (the difference between presumed fault and presumed liability), the general reasons for exempting the maritime carrier from liability vary according to the treaties in question, as follows:

A. General grounds for exemption under the 1924 Brussels Convention

As mentioned the general legal basis for the responsibility of the maritime carrier under the Brussels Convention is (assumed responsibility), as the carrier's obligation to preserve and transport the goods from the port of departure to the port of arrival and to hand them over to the owner of the right therein is an obligation to achieve a result or an end and not an obligation to exercise care so that no The carrier can get rid of liability unless it proves that the damage to the goods is due to a foreign cause, such as the shipper's fault (Hosni 1989). Or the self-defect of the goods or the fault of others (Al-Fiqi 2008), or force majeure (Al-Sharqawi 2011).

B. General grounds for exemption under the 2008 Rotterdam Convention rules

Rotterdam balanced between the interests of the carriers and the interests of the shippers about the legal basis contained therein for the liability of the maritime carrier, and decided that the legal basis should be based on (presumed liability), meaning that the carrier must, to deny his responsibility, prove that he did not commit a mistake by providing evidence that he has taken the necessary care to avoid damage to the goods, in addition to his adherence to the reasons for the legal exemption contained in Article (17/3) to sever the causal relationship between the error and the damage caused.

There is no doubt that the inclination of its Rotterdam rules in terms of (assumed liability) is a preference from it to the provision contained in the Convention Brussels 1924, on the provision contained in the Hamburg Rules 1978, and this preference comes in the interest of the shippers or rather in the interest of establishing a balance between the conflicting interests of each of the carriers and shippers, by establishing the basis of liability on (presumed liability) with the enumeration of many reasons that the carrier can uphold one of them to exempt from Responsibility (Al-Sharqawi 2011).

ii. Special reasons for legal exemption from liability

As for the special reasons for the legal exemption from liability, they are like the general reasons for exemption. They have a special description according to adapting the nature of this responsibility and the basis on which it is based, and they can be represented by the following (Al-Fiqi 2008).

A. Special reasons for exemption under international agreements

According to the 1924 Brussels Convention, there are (17) legal situations in which the carrier is exempt from liability if it proves one of them, which are listed in Article 4 of the Convention. Similarly, the Rotterdam Convention of 2008, enumerated the reasons for the legal exemption of the maritime carrier from liability in a list of (15) reasons included in Article (17/3) as: Act of God; Perils, dangers, and accidents of the sea or other navigable waters, War, hostilities, armed conflict, piracy, terrorism, and civil commotions, Fire on the ship …etc.

B. The specific reasons for exempting the carrier from liability under Iraqi Transport Law

Referring to the special reasons for exemption concerning the Iraqi legislator, find that the legislator has stipulated the cases that exempt the marine carrier from liability in the Transport Law, as referred to in Article (135) as follows:

First: The thing must be loaded in the places designated for it on the ship, but it may be loaded on its deck in the following cases:

A. The express agreement recorded in writing in the bill of lading or any document evidencing the contract of carriage.
B. If the nature of the thing requires its transportation on the deck of the ship.
C. If the transfer took place under a legal text.

Second: If the thing is loaded on the deck of the ship under the first paragraph of this article, the carrier is not responsible for the loss or damage of the thing or the delay in its delivery resulting from transportation in this way.

Third: The carrier shall be responsible for the loss, damage, or delay in delivery if the transportation takes place on the deck of the ship in violation of the provisions of Paragraph First of this Article and he is not entitled to insist on limiting responsibility under with the provisions of this law.

Also, Article (132) of the same law stipulates that ((the carrier shall be liable for the loss or damage of the thing and the delay in its delivery unless he proves that he and his subordinates have taken the measures they would have taken carefully in managing their affairs had they found in the same circumstances not to deviate from the care of the man which would avoid loss, damage or delay and avoid its consequences)).

From observing the text, the carrier and his followers must take the necessary measures to avoid the accident not occurring, and these are the measures that the usual man will take in the same circumstances.

Likewise, the provisions of Article (47) of the Iraqi Transport Law, stipulate that ((the carrier is not liable for the loss or damage of the thing if it was transported under the protection of the sender or the consignee unless the cause of the loss or damage was the dangers of transportation, fraud or error of the carrier or his subordinates)).

Finally, there is a case mentioned by the Iraqi legislator in the text of Article (139) that the carrier is not liable punitively ((if a mistake, including negligence, on the part of the carrier or his subordinates combined with another reason to cause loss, damage or delay in delivery, then the carrier is not liable for that except to the extent attributed to his fault or negligence, provided that he proves the amount of loss, damage, or delay in delivery resulting from that reason)).

Conclusion

The Iraqi legislator derived the provisions of the marine carrier's liability from the Hamburg Convention of 1978, but he did not transfer the provisions of the agreement but rather tried to violate them in places where the national interest or traditions required that**.**

It is a contractual responsibility in which the carrier is committed to achieving an end and not to exerting care so that the carrier cannot prove that he did not make a mistake when the required result was not achieved. This liability centres on guaranteeing loss, damage, and any damage resulting from its improper implementation of the contract of carriage. It is based on the assumed error on the part of the carrier and his subordinates. It started from the moment of loading under the cranes and ended with the unloading of the goods at the unloading port of discharge.

Recommendations

- The Necessity to enact an Iraqi maritime law consistent with modern maritime legislation and international maritime conventions.
- The need to join international conventions related to maritime transportation, such as the Rotterdam Convention, and quoting from it in recent additions.
- Adopting the principle of Judgmental loss of the goods, i.e., goods are considered lost if the period specified for their delivery has passed and no one has received them.
- Limit the maximum liability of the maritime carrier to the amount of one package or unit, as stipulated in international conventions.
- Reconsider the cases of exemption from liability in line with international conventions.

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