**Answer Guidance for Chapter 21 Practice Questions**

|  |
| --- |
| Describe the principal features of the following;   * Seaworthiness * Perils of the sea * Deviation * The Hague Visby Rules * Default in management of the ship |

* Seaworthy is a word used to describe a ship which is capable of transporting its cargo safely on the intended voyage. It concerns not simply the state of the ship, but its equipment, crew and operating procedures including the passage plan and stowage plan.
* Perils of the sea are those causes of loss or damage to ships or their cargo which are unique to the waterborne transportation. A carrier was not liable at common law nor is he liable under the Hague Visby Rules for loss caused by perils of the sea. Formerly contracts of marine insurance provided an indemnity for, among other things, ‘perils of the sea’, but the standard insuring terms used in the UK and extensively elsewhere now do not mention the term.
* The word deviation is used to describe two connected actions. Narrowly construed, it means an unauthorised departure from a contractual route, and it is in this sense that the word is used in the Hague Visby Rules. It is more widely understood as encompassing the carrying out of a contractual duty in a completely different way from that contemplated by the parties and was the foundation of the doctrine of ‘fundamental beach’, now largely abandoned after *Photo Production Ltd v Securicor Transport Ltd*.
* The Hague Visby Rules establish a regime imposing non-derogatable duties on a carrier of goods by sea. They were made part of English Law by the Carriage of Goods by Sea Act 1971.
* The Hague Visby Rule contains in Art IV r2 a list of defences for a carrier, which includes that of ‘default in the management of the ship’. In effect this means that the carrier is not vicariously liable for errors in ship handling by their servants or agents, but the courts differentiate carefully between such errors and those involving mis-mangement of the cargo, for which the carrier remains vicariously liable or or mismanagement of the ship causing it to be unseaworthy for which the carrier as principal.

|  |
| --- |
| 2. ‘In the history of contracts of carriage of goods by sea the law has swung from a position which was too favourable to the shipper to one which is too favourable to the carrier.’ Discuss. |

**Introduction**

* As with all essays, you should begin with an introduction that sets out what the question is about, why the topic is an important one, and how your essay will go about answering the question set. By providing an outline structure of the discussion to follow, your essay will be clearer and more structured.
* This question is in effect calling for a comparison to be made between the common law duties of a carrier and the duties under the Hague Visby Rules. Consequently,allyou will need to outline are the carrier’s common law duties, outline the duties under Hague Visby, and then evaluate the two positions.

**Carrier’s duties at common law**

* The position differs, at least in theory, whether the carrier is a ‘common carrier’ or not, and you will have to explain what a common carrier is. Common carriers had a strict liability duty to return the goods in the condition they received them, subject only to a limited range of defences. You will need to explain these defences, of which act of God is the most intriguing. Until *Nugent v Smith* it was believed that, where loss was caused by the forces of the nature, the carrier remained liable unless there was nothing he could have done to prevent the loss. *Nugent v Smith* decided that the carrier was only under a duty to take reasonable care to avoid such a loss. Whilst this seems reasonable - after all, why should the carrier be liable for something even though he was not at fault? – we need to recognise that neither was the shipper. In reality, the issue becomes who is to be liable for avoidable loss where no one is at fault and *Nugent* decided it was the shipper.
* Where the carrier was not a common carrier (almost invariably true nowadays) the duty was to take reasonable care of the goods.
* It is important to point out that even totally unavoidable losses from other causes remained with the carrier, for example breaches by independent subcontractors or through crime. This is perhaps best illustrated by examining the strict liability a carrier had for seaworthiness. You can contrast this with the duty of reasonable despatch, which was subject to the defence that delays were beyond the control of the carrier – a common issue in the case of strikes or where loading gear operated by a third party malfunctioned or was not made available at the stipulated time.

**Carriers’ duties under the Hague Visby Rules**

* These duties need outlining, in particular that all duties are simply duties to take reasonable care. Again, taking a particular example might be sensible and the seaworthiness duty is probably the best to choose.

**Evaluation of the respective positions**

* At first sight the common law appears in most instances to impose greater duties on the carrier than under the Hague Visby Rules. Admittedly, the duty of ‘cargoworthiness’is greater under Hague Visby since it applies from loading to sailing, unlike at common law where it applied at loading only. However, this did not mean that the carrier escaped liability at common law if cargo was crushed by other goods loaded on top of it – it was simply that the duty of seaworthiness was not broken.
* The big difference between the common law and the Hague Visby Rules is that the common law permits the carrier to reduce his liability through the use of exclusion clauses. It is certainly arguable that the duties on common carriers, even after *Nugent* unfairly benefited shippers so that the exclusion of the duties of a common carrier simply redressed the balance. This is particularly so as the courts’ response to such an exclusion was to refuse to accept that a carrier could exclude liability for taking reasonable care, except in the case of a clearly worded exclusion.*Commercial Law* deals with this issue in more detail on –594.This approach was taken further in the case of deviations, treating these as fundamental breaches of contract which would deprive the carrier of the benefit of any exclusion clause. It is now at least doubtful that, following the decision in *Photo Productions v Securicor*, that the doctrine of fundamental breach survives even in the case of deviations, though Lord Wilberforce has left open the possibility that it might. That said, the typical contract of carriage will contain a ‘liberty to deviate clause’, which in effect redefines the carrier’s duty in respect of what is a permitted route under the contract so that neither under the common law nor under the Hague Visby Rules would a deviation amount to a breach of contract. This would not fall foul of the fundamental breach rule, nor Art Article III r8 of the Hague Visby Rules, which prevents a carrier contracting out of the Hague Visby duties.
* The outcome is that, at common law, with an appropriately drafted contract, a carrier could exclude liability for negligence, though not for damage deliberately caused by him.
* In contrast, no such exclusion is permitted under the Hague Visby Rules - Art Article III r8 - resulting in the carrier being under a duty to exercise due diligence in the case of seaworthiness and a duty to ‘properly and carefully load, handle, stow,carry, keep, care for and discharge the goods carried’ – Art III r2. You could point out here the difference between the duty of care and the duty to exercise due diligence which is set out in *Commercial Law* on pages 603. However, the carrier has the benefit of a number of defences (though not, it appears, in the case of a breach of the seaworthiness duty. It is not worth looking at these defences in detail in this answer but the Article IV r 2(a) defence of act of master, etc in the management of the ship is worth considering carefully, since it rather anomalously exempts the carrier from vicarious liability for lack of careon the part of his employees.
* You might mention the types of cargo when the Hague Visby Rules do not apply, notwithstanding that there is appropriate documentation – goods carried on deck, live animals, and extraordinary cargos. You might wonder why there are such exclusions.
* You should also consider the effect of Article III (6) and IV (5) which mean that actions must be commenced very promptly under the Rules and that the amounts recoverable may be far below the true measure of loss. That said, similar provisions can be included in a contract of carriage subject to common law.

**Conclusion**

* To a great extent, the evaluation section has performed the function of a conclusion; however, a summary is called for. Both the prima facie position at common law and that under the Hague Visby Rules are misleading. At common law, an apparently no-fault liability on the part of the carrier, which apparently is excessively favourable to the shipper, turns out to be potentially quite close to a no-liability situation if an appropriate exclusion clause is included in the contract. Similarly, although the Hague Visby Rules impose duties which cannot be contracted out of, the error in management of the ship, exception will relieve the carrier of liability in many instances while the financial limits on the sums recoverable mean that in many instances the Rules provide an inadequate protection for the shipper.
* Finally, it could be pointed out that typically the goods would be insured against loss or damage and that the shipper would claim on the insurance rather than claim against the carrier. In consequence, such claims are typically pursued either by uninsured shippers or more often by insurers under a subrogated claim. If carriers effectively exclude liability, the effect is simply to place the loss on the insurer, who in turn will reflect this in increased premiums. In other words, whether the carrier has a widely or narrowly defined duty the totality of the costs of loss or damage are ultimately borne by shippers. That said, in individual cases it may matter a great deal, especially if the shipper is uninsured.

|  |
| --- |
| 3. Carrie runs a small shipping line and Shipton enters into negotiation with her to carry some of his goods from Portsmouth to Santander Spain. Firstly, he wants to transport a crate containing spare parts. Carrie agrees and issues him with a document headed ‘Seawaybill’. As with all of Carrie’s shipping documents, it contains a clause which states that Carrie is not liable for any loss, howsoever caused. Secondly, he wants to transport a container of very valuable antique furniture. They agree that the container will be carried in the hold of the ship. Finally, he wants to transport two crates each containing 1000 cartons of leather goods. The first crate is stored in number 1 hold and the second in number 2 hold. The ship sails and arrives at Santander on 1st April 2018.  When the ship arrives at Santander the crate of spare parts is dropped on the quayside and the goods are damaged. In fact, the container of antiques is carried on deck and is washed overboard by a freak wave. The cartons of leather goods in number 1 hold are damaged because water enters the hold because a hatch cover has not sealed the opening. The cartons in number 2 hold also have water damage, though there seems no reason why this should be so.  Shipton has no insurance and he tries to persuade Carrie to compensate him for his loss, she is very charming but after protracted negotiations she says she will not pay. It is now March 2019. Advise Shipton on his claims against Carrie. |

The question is a long and involved one. Consequently, the approach suggested below deals with one item of cargo in some detail to show how to tackle a question like this, but deals with the remainder in outline only, identifying the key issues and leaving you to flesh out the law.

**Crate containing spare parts**

* The first issue is which system of rules applies, Hague Visby or the common law. Hague Visby only applies if the contract of carriage is ‘covered by a bill of lading or similar document of title’. Until comparatively recently it was accepted that since there was probably no document of title to goods other than a bill of lading – see Lord Wright in *Official Assignee of Madras v Mercantile Bank of India Ltd*- then the words ‘or other document of title’ were redundant. However, as is noted in *Commercial Law* on page 42,mercantile practice may result in a change in the law, whilst in the *Rafaela S* there are suggestions that even sea waybills may be sufficient to bring a contract under Hague Visby. In any event, it is dangerous to rely on the name parties give to a document, as it may be that on closer examination this ‘sea waybill’ is actually a bill of lading. In relation to the crate, since the port of loading is in the UK, a Contracting State, and none of the exclusions seem to apply, then, subject to the documentary issue, the Rules may apply.
* Since we are unsure which system of rules applies we must look at each by considering the carrier’s duties, whether they have been broken, whether there are any defences and what remedy applies.
* Under Hague Visby
  + **Duty**. Under Art IIr2 the carrier has a duty to ‘properly and carefully load, handle, stow, carry, keep, care for and discharge the goods’. Here the goods are damaged on discharge and, notwithstanding the terminology of ArtI (e), it is clear the rules cover the goods ‘tackle to tackle’. It is also possible that the ship was not seaworthy before and at the beginning of the voyage, as required by Art II r1 since Art IIr1(b) makes it clear that the ship must be properly equipped.
  + **Breach/Defences/Burden of proof.**If the damage to the goods was caused because the ship was unseaworthy, then it is for the carrier to prove that he showed due diligence if he is to avoid liability (Art IV r1), but it seems likely that the duty to show the ship was unseaworthy falls on the shipper(*The Hellenic Dolphin)* and this will not be easy, since even if the loading gear was defective and this is what caused the damage, the defect could have arisen after the ship sailed since the duty to supply a seaworthy ship is not a continuing one. Similarly, in relation to the duty over cargo management, it is for the shipper to show the cause of loss,although a sensible inference might be that the goods could not have been properly discharged since they were damaged while being unloaded. Assuming it can be shown that the damage was caused prima facie through a breach of duty, the carrier still has the benefit of Art IV, which lists causes for which he is not responsible. From the facts given, none of these seems a likely cause, with the possible exception of inadequate packaging. The law is now settled following *Volcafe v CASV*  that the carrier can avoid libility under Art IV only if he can establish that he acted with due diligence. - It is clearly the case, in relation to the seaworthiness duty, that it is no defence for the carrier to show that the loss was caused by the negligence of a carefully chosen subcontractor (*Riverstone Meat v Lancashire Shipping*). It appears that the same is true even in relation to the cargo management duty, notwithstanding the difference in wording in Art II r1 (exercising due diligence) and Art III r2 ‘properly and carefully’ – *International Packers v Ocean SS.*
  + **Exclusion of liability.** You should note that if the shipper actually carried out the unloading, the carrier can exclude liability for losses on unloading – see *Jindal Iron & Steel v Islamic Solidarity.* However, Art III r8 prevents any exclusion or limitation of liability below that set out in the Rules.
  + **Remedies**. The remedy is damages, but under the Hague Visby Rules there is a maximum liability of 2SDRs per kilo or 666.7 SDR per package and without doubt the crate is a single ‘package’ for these purposes. However, the shipper is nearly out of time under Art III r6 (d), which requires action to be commenced within one year of the date of delivery. Shipton needs to hurry!
  + **Under the common Law**
    - **Duty.** Carrie is unlikely to be a common carrier but if she is then, absent agreement to the contrary, has a duty to deliver the crate undamaged, subject to limited defences, none of which are likely to apply.
    - **Breach/Defences/Burden of proof.** In fact, Carrie has sought to avoid liability through the use of an exclusion clause. Although there is no reason in principle to prevent exclusion of liability for negligence (see *Mitsubishi Corp v Eastwind Transport Ltd*), exclusion of liability from any cause would seem to leave the carrier with no actionable duties, a position which is inimical to the nature of a contract, and so the clause is likely to be held to be void. It should be noted that if the unloading was carried out by the shipper, there is an argument that at common law Carrie is not responsible for the loss since she delivers the goods to the shipper when the shipper’s tackle engages with the goods at the port of discharge.
    - **Remedies.** Since the exclusion clause is either valid – in which case Carrie is not liable - or void - in which case Carrie is subject to strict liability at common law -, the position is comparatively simple. There is either no remedy or Carrie is liable in damages for foreseeable loss on normal *Hadley v Baxendale* lines.

**The container of antiques**

* The position under Hague Visby is similar to the first piece of cargo except:

1. We do not know what shipping document was used – it may be a bill of lading.

2. Although the goods were carried on deck, this does not take the contract beyond the Hague Visby Rules, notwithstanding the Art I (c) exclusion of goods carried on deck – see *Svenska Traktor v Maritime Agencies*.

3. The loss is apparently caused by a freak wave, providing the carrier prima facie with a defence under Art IV r2 (d). But of course the reason the wave caused the loss was that the carrier had broken an express term of the contract that the goods would be carried in the hold. It is likely the court would determine the wilful breach, not the wave,to be the true cause of the loss.

4. The container is almost certainly the ’package’ for the purposes of the Rules and the financial limit on liability is such as to make the vast majority of the loss irrecoverable.

* At common law, the position is identical to that of the first crate, except if the exclusion clause is effective. Nevertheless, it may be that the wilful breach of contract in stowing the container on deck would trigger arguments that this amounts to a fundamental breach, which deprives the carrier of the benefit of any exclusion clause. This doctrine has been held to be incorrect - *Photo Production Ltd v Securicor Transport Ltd*, but there remains doubt whether something akin to the doctrine of fundamental breach in relation to the carriage of goods might survive.

**The first crate of leather goods**

* Under Hague Visby the issues are identical to the first crate except

1. That we know the cause of the loss and that the Courts will treat water being in cargo holds as good evidence of a breach of the duty to provide a seaworthy ship. However, the key point here is whether the carrier can avail himself of the Art IV r 2(a) defence, negligence by the crew in the management of the ship. Reference should be made to *Gosse Millerd v Canadian Government* and *International Packers v Ocean Steamship* since the facts of our case admit of two possible outcomes.

2.In *The Maersk Tangier* the Court of Appeal held that the financial limits apply to each package or piece as loaded (stuffed) in the container. In *The Maersk Tangier*the bill of lading stated the number of packages or pieces stuffed. In our case we do not know the content of the shipping document and in the absence of any numbers a clear distinction with *The Maersk Tangier* could be drawn.

* At common law there appears to be no additional point to be made.

**The second crate of leather goods**

The key point here is that, at common law, the carrier has strict liability subject to very limited defences, which it is for the carrier to prove. Assuming the exclusion clause is void, the shipper will almost certainly win unless the shipper can show ‘inherent vice’ – ie the goods damaged themselves. Proof of care on his part is not sufficient unless he can show additionally that the damage is through act of God.

The problem under Hague Visby is that the only evidence is that the goods were damaged in the ship. The burden of proof to show a breach of duty by the carrier is on the shipper but it might be readily inferred that this shows a lack of proper care by the carrier, who in turn must then either show that he took all reasonable care or that the damage is attributable to one of the Art IV excluded causes.

**Conclusion**

Only a brief conclusion is needed, perhaps along the lines that, in this case, a carrier who probably evaded the Hague Visby Rules through not using bills of lading is in a worse position than if they applied. Indeed in this case it may well be that it will be the carrier who seeks to demonstrate that seaway bills are ‘other documents of title’ since he stands a better chance of avoiding liability, especially if Shipton delays much longer in issuing his claim.