Recent Developments: *Vasudhaiva Kutumbakam*, but Really? India's Reversion to Colonial Carriage of Goods by Sea: India's Carriage of Goods by Sea Bill, 2024

Mayank Suri[*] & Aashkaa Jain[**]

Introduction

The century-old *Hague Rules* have found re-adoption in India's proposed domestic legislation on carriage of goods by sea: the Carriage of Goods by Sea Bill, 2024 (India) ('COGSA-2024').[1] Concurrently, the Indian government has adopted the principle of *Vasudhaiva Kutumbakam* or 'the world is one family'.[2]

Most would agree that the members of this global family have highly varied characteristics, and the question arises as how COGSA-2024 will impact these family members. In introspective terms, one might ask which family member's interest did India take most into consideration while proposing COGSA-2024? Although a journalistic investigation might be required to determine the motivations of Parliament, this comment proposes some reasons. The COGSA-2024, very much like *The Carriage of Goods by Sea Act, 1925* (India) ('COGSA-1925' or 'the Act')[3] re-enacts the *Hague Rules*, amended by the *Visby Protocol* (collectively 'Hague-Visby Rules').[4] Our concern in this article is not merely with the age of the convention that this legislation adopts but with its obvious age-related issues in a postcolonial world. We first go through some salient features of COGSA-1925 in an attempt to highlight the similarity/difference with the *Hague-Visby Rules*.

Incorporation of the Hague-Visby Rules into the COGSA-1925 and the COGSA-2024

The COGSA-1925 is an Indian legislation that enacts the Hague-Visby Rules into domestic law. They are incorporated by way of inclusion in a 'Schedule' of the Act ('*Rules*'). The Act itself has several Sections that qualify the application of the *Rules*. Section 2 mandates that the *Rules* 'shall have effect in relation to and in connection with' goods shipped from Indian ports. This section makes no mention that the *Rules* shall apply to goods that are shipped to India from foreign ports. Section 3 removes the 'absolute warranty of seaworthiness' from being implied into contracts to which the *Rules* apply. Section 4 makes it necessary that every document of title issued in pursuance of the *Rules* must contain an express stipulation to that end. Section 5 modifies Article 6 in respect of sailing ships and ships trading between India and Sri Lanka, allowing parties to derogate from the *Rules* by agreement. Section 6 modifies paragraphs 4 and 5 of Article 3 to reduce the prima facie effect of bill of lading statements in cases of bulk cargoes being weighed by a third party with a stipulation to that extent in the bill of lading. Section 7 saves laws in respect of dangerous cargoes and limitation of liability from being affected and provides for a gestation period before COGSA-1925 took effect. Thereafter, the part of the Act that contains the *Rules* starts.

Next we refer to some specific differences between the *Rules* as found in the Schedule of the COGSA-1925 and the *Hague-Visby Rules*. By an amending legislation in the year 2000, the definition of goods was changed to 'include[] any property including live animals as well as containers, pallets or similar articles of transport or packaging supplied by the consignor, irrespective of whether such property is to be or is carried on or under deck'. The *Hague-Visby Rules* exclude live animals and deck cargo from the definition of goods. COGSA-1925 does not incorporate Article 6bis from the *Visby Protocol* that allowed for time extension for claims of third party indemnity. The *Visby* and *SDR Protocols* made substantial changes to Article 4 paragraph 5 in respect of carrier's right to package limitation; COGSA-1925 incorporated all the changes which dealt with the substance of the right and did not incorporate the currency conversion formulas from the *SDR protocol*. COGSA-1925 omits Article 4bis. In Article 9, COGSA-1925 omits the text relating to pound-sterling conversion and debt discharge, keeping

[*] Assistant Professor, Jindal Global Law School.
[**] West Bengal National University of Juridical Sciences, 2022–2027.
[1] Carriage of Goods by Sea Bill, 2024 (India) Bill No 112 of 2024 ('COGSA-2024').
[2] Arun Kumar Kar, 'The Concept of Vasudhaiva Kutumbakam (The World is a Family): Insights from the Mahopanisad' (2023) 49(July–August) *National Journal of Hindi & Sanskrit Research* 42; 'Human-Centric Globalisation: Taking G20 to the Last Mile, Leaving None Behind – Narendra Modi', *Government of India: Press Information Bureau* (Press Release, 7 September 2023) <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1955326>.
[3] Act No 26 of 1925 ('COGSA-1925').
[4] All references to the Hague-Visby Rules (unitalicised) are specific to the *Hague-Visby Rules* as incorporated in the COGSA-2024.

only the text relating to gold value of monetary units. There are no other Articles mentioned in the Schedule. Article 10 is understandably omitted due to the effect of s 2 of the Act mentioned above.

Now to the good stuff, the COGSA-2024. This Bill makes no changes to the COGSA-1925 save in respect of empowering the Central Government to issue directions and make changes to the Schedule and procedural instructions in that regard. All the Sections of COGSA-2024 are a copy of COGSA-1925. Nothing has been changed in the Schedule, the *Hague-Visby Rules*, as incorporated over time in the COGSA-1925, have been copied into the COGSA-2024.

Hereon, our attempt would be to showcase the coloniality of the Hague-Visby Rules and their effects. We will focus our discussion on 'electronic communications' as a means of forming maritime contracts. For this, we will compare the modern convention, the *Rotterdam Rules*, with the largely pre-independence *Hague-Visby Rules*. Our comparative analysis shall follow a 'form and substance' test approach.

Form: Under-Regulation versus Over-Regulation

The *Hague-Visby Rules* tally all of 16 articles while the *Rotterdam Rules* run to 96 articles in 18 different Chapters. While the *Hague-Visby Rules* define 5 things: carriage of goods, carrier, contracts of carriage, goods, and ship, the *Rotterdam Rules* define thirty, including electronic communication. The *Rotterdam Rules* cover many more elements of the transportation chain than the *Hague-Visby Rules*. One may see this as over-regulation versus under-regulation.

Arguably, the choice of degree of regulation is a function requiring society's participation. More participation, more legitimate the perception, and more agreement with the regulation. As the preamble of COGSA-1925 indicates, that was a time when a Colonialist 'Emperor of India' agreed to bring the *Rules* into the legal lives of their subjects. Literature analysing international conventions of colonial antiquity does not beat around the bush when highlighting whose interests were served by those conventions.[5] Kumari Jayawardene, a third-world feminist activist, pointed out that some previously colonised nations resorted to the 'paradoxical strategy of adopting Western models in order to combat Western Aggression'.[6] Ganesh Prashad, a third-world scholar, in his 1964 article 'Law and Colonialism' provides a Babylon of reasons, most of them are important to recount:

> Law has played an important part in the growth and stability of colonialism. In the process it became a great aid in the emergence of a new social order in a colony like India. …
>
> The interests of the British industrial capitalism too demanded a uniform legal system. The purchase of cheap raw materials and the sale of finished goods could not be possible without a stable and strong government and a codified law in India. The Benthamite philosophy proved an anodyne for the rising English middle class not only at home but also in India. …
>
> So the dream of Bentham materialised, in India, if not in England. His principles, not only juristic but also socio-political, were transmitted to India through the media of disciples and followers. …
>
> In India, on the other hand, there was only one sovereign interest, rather, a Paramount Vested Interest. That was the interest of British Imperialism, of the British industrial-cum-finance capitalism. … The needs were stability of the regime, uniformity of administration and certainty of economic exploitation. …
>
> What was the principle of codification? 'Our principle', so said Macaulay, 'is simply this—uniformity when you can have it; diversity when you must have it; but, in all cases, certainty'. This applied only to the form of law, not to its content. The content was determined by the nature of Indo-British relations, by the conditions of colonialism. …
>
> In a sovereign state law is the creation of social order; in a colony it became the creator of social order. …

[5] Ralf Michaels, 'Private Law Theory and the "Global Legal Community"' (2022) 23(6) *German Law Journal* 851; Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities' (2006) 27(5) *Third World Quarterly* 739.
[6] Kumari Jayawardena, *Feminism and Nationalism in the Third World* (Zed Books, 1st ed, 1994).

> The elite of the nineteenth century was, without exception, grateful to the British rulers for the establishment of the new legal order. …
>
> Never was it realised and said that the westernised and codified law was the prop on which rested the whole structure of international and intra-national relations. …
>
> Juristically India continues to be a colony of Britain. And this willingly, gladly and imperceptibly. …
>
> One can say that 'legal' exploitation surpasses economic exploitation in this respect. For, it is felt even after economic drama. Nay, it is not felt at all. Perhaps the main reason is that a substantial portion of the elite comes from the legal profession. It was the direct beneficiary of the new legal system. It was most conspicuous in public affairs and it considerably influenced social thinking. It could not think and speak and write against its benefactor. …
>
> Generations of elite could not discern the social engineering force of the legal system of the colonial period.[7]

It is in this light that COGSA-1925 should be viewed in order to realise that its effect was to structure, streamline, and simplify the act of transporting goods from India to and for colonial interests. The brief statute provided existing elites with the legal mandate to function while conveniently ignoring the importance of detailed regulation for social reforms. It was an ideal statute to allow expansion by a few rather than inclusion of many. The *Hague-Visby Rules* simply note 'the utility of fixing by agreement certain uniform rules of law relating to bills of lading'. In a world of economic inequity, non-transformative rules tend to favour those who are on the monetarily stronger end. Many recognise that the *Hague-Visby Rules* were just that: clarificatory of the practices that were already taking place.[8] Must we then not question whose practices did the *Hague-Visby Rules* acknowledge and thus advantage?

As Nayar noted, the causes of the demise of the Indian shipping industry lay in technological poverty 'but also in the deliberate discriminatory policy of the British colonial state to favour the British shipping industry'.[9] We suppose it is not too hard to then imagine if the same British would have negotiated an international convention keeping in mind the interests of the Indian shipping industry. Even Mahatma Gandhi noted, 'Indian Shipping has to perish so that British Shipping might flourish'.[10] Allied industries like shipbuilding seemed to have faced the same discrimination. As Cynthia Deshmukh noted, 'the Bombay ship-building industry was subordinated to the interests of the ship-building industry in Britain'.[11] Also, pointing out that shipping and ship-building lobbies were powerful pressure groups in the British electoral system.[12] Matching Cynthia's timeline of Bombay shipping, Bhattacharya's note on Calcutta also points out that from the 1830s a steady decline of Indian ship-owning and shipping business took place.[13] Shireen Mosvi pointed out that Gujarat and Lahore on the West Coast of India, above Bombay, had been favoured ship-building locations during the reign of Akbar.[14] Ishrat Alam pointed out that India had a thriving shipping industry before the colonial forces step foot in India.[15] The literature seems to make it quite clear that Indian shipping industry was destroyed during the colonial rule, it is therefore antithetical to imagine that the *Hague-Visby Rules* were made keeping Indian interests in mind.

On the other hand, the *Rotterdam Rules* are preceded by a United Nation's General Assembly ('UNGA') Resolution requesting attention towards the 'interests of all peoples'.[16] While no electoral process is perfect, the question of the legitimacy of a regulation chosen by a peoples' representative versus a Colonialist hardly requires elaboration. The UNGA Resolution also highlighted that divergencies between the laws of different states are an

---

[7] Ganesh Prashad, 'Law and Colonialism' (1964) 25(3–4) *The Indian Journal of Political Science* 76.
[8] Michael F Sturley, 'The Centenary of the Hague Rules: Celebrating a Century of International Conventions Governing the Carriage of Goods by Sea' [2024] (4) *Lloyd's Maritime and Commercial Law Quarterly* 565.
[9] Baldev Raj Nayar, 'Self-Reliance versus Marginalisation: Case of India's Overseas Shipping' (1995) 30 *Economic and Political Weekly* 941.
[10] Ibid.
[11] Cynthia Deshmukh, 'The Rise and Decline of The Bombay Ship-Building Industry, 1736–1850' (1986) 47(1) *Proceedings of the Indian History Congress* 543, 544.
[12] Ibid.
[13] S. Bhattacharya, 'A Note on Indian Participation in Shipping Business in Calcutta, 1800–30' (1978) 39(2) *Proceedings of the Indian History Congress* 760, 760.
[14] Shireen Moosvi, 'Shipping And Navigation Under Akbar' (1999) 60 *Proceedings of the Indian History Congress* 251, 257.
[15] Ishrat Alam, 'Shipping and Ship Building in India During the Seventeenth Century' (2010–2011) 71 *Proceedings of the Indian History Congress* 377, 378.
[16] *Establishment of the United Nations Commission on International Trade Law*, GA Res 2205, UN Doc A/RES/2205(XXI) (17 December 1966).

impediment to the development of world trade. The Resolution noted that all states and interested international organisations were invited to participate in the preparation of the *draft Rotterdam Rules*. In any case, the *draft Rotterdam Rules* were shared with all member states of the United Nations. While the extent of participation may be a question of interest, the process required participation. What the UNGA should have also acknowledged is that consensus for a progressive convention was prejudiced by the inherent lack of development in previously colonised nations. It was not a question of will but a question of incapacity. This was an ideal opportunity for Developed member states to extend an olive branch of maritime development to their fellow counterparts. A situation which would have garnered further support for the *Rotterdam Rules* and many more ratifications than it has today.

The *Rotterdam Rules* note the transformative 'technological and commercial developments' since the past conventions.[17] The *Rotterdam Rules* also note the 'operation of contracts of maritime carriage'. The difference is of scope. This is evident in the difference in the definitions of essentially the same thing—'Contract of carriage'—in the two conventions. The *Rotterdam Rules*' definition is conceptual, it uses language that is aligned with contract law. Whereas the *Hague Rules*' (and COGSA-1925 and COGSA-2024) definition is industry specific, orbiting around the bill of lading. Thus, the *Rotterdam Rules* allow anyone to contract for carriage regardless of their knowledge (hegemonic as it was) of the bill of lading. The *Hague-Visby Rules* require that courts of law use their interpretative powers to expand the scope of 'bills of lading or any similar document of title' to realistically cover other types of documents that have the same function; the *Rotterdam Rules* do this job by express mention. The *Rotterdam Rules* then go a step further by defining 'transport document', thereby disentangling and clarifying the distinction between document (a fact) and contract (a legal concept).

The Indian legislature should have been mindful of the burden that re-subscribing to the *Hague-Visby Rules* puts on the judiciary of the country. Indeed, such a situation is evidenced by the case of the MV *Pichit Samut* and the MV *Eastern Grand*.[18] This case utilised several levels of the judiciary's appellate system. The agent of the shipowner had declined to issue bills of lading to the shipper on the shipowner's (their principal) instructions. The final court of appeal, the Supreme Court of India, had to reaffirm the previous court's orders that the agent was indeed 'personally' liable under Article 3(3) of the *Hague-Visby Rules* as incorporated into domestic law which states 'the carrier, or the master or agent of the carrier…'. Note that in the Indian law of contract, also a colonial endowment, agents are generally not liable for the acts authorised by their principal. In this light, one can see how the limited use of language in the *Hague-Visby Rules* is confusing. On the other hand, Article 18 of the *Rotterdam Rules* uses more descriptive language.

Substance: Electronic Communication

The *Rotterdam Rules* ushered in, as many would think, the much-needed legal recognition of an electronic contract of carriage. Francesco Berlingieri called it a 'novelty' which would allow the rules to be applicable to future forms of contracts of carriage.[19] He also highlighted that 'that so far the attempts to create a workable system allowing the replacement of paper documents by electronic records have not been successful'.[20] Articles 1(17), 1(18), 1(19), 1(20), 1(21), and 1(22) define electronic communication, electronic transport record, negotiable electronic transport record, non-negotiable electronic transport record, issuance of a negotiable electronic transport record, and transfer of a negotiable electronic transport record, respectively. Chapter 3 of the *Rotterdam Rules* (Articles 8–10) provides the legal framework for the use of electronic transport records.

Such detailed provisions are missing from the *Hague-Visby Rules*, as if there is a presumption that the parties to whom the rules apply have created systems of efficient compliance. That presumption only held water in an era of dictatorial, colonial, imperial, authoritarianism. Even in 2024, 100 years since the *Hague Rules*, the United Kingdom's highest court was dealing with cases relating to delivery of cargo without production of the physical bills of lading.[21]

In *The Giant Ace*, the United Kingdom Supreme Court upheld a Court of Appeal judgment acknowledging that delivery by the carrier without production of a bill of lading is a breach of the contract of carriage.[22] The events

[17] *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules)*, 2009, (not yet in force).
[18] *Shaw Wallace & Co Ltd v Nepal Food Corporation* (2011) 15 SCC 56 (Supreme Court of India).
[19] Francesco Berlingieri, 'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (Paper, General Assembly of the AMD, 5–6 November 2009) 57.
[20] Ibid.
[21] *Fimbank Plc v KCH Shipping Co Ltd* [2024] UKSC 38. See also *Unicredit Bank AG V Euronav NV* [2023] EWCA Civ 471.
[22] *Fimbank Plc v KCH Shipping Co Ltd* [2023] 2 Lloyd's Rep 457 ('*The Giant Ace*'), affd [2024] UKSC 38.

that led to this case took place in Jaigarh, India, a port operated by a private entity called JSW Jaigarh Port Ltd.[23] The misdelivery took place when the receivers brought 'trucks into the stockpile and remove[d] the cargo'.[24] This particular port had been identified by the Government of India as underutilizing its container capacity due to poor rail connectivity.[25] It is evident that in such a situation the legislature should have chosen the progressive *Rotterdam Rules* that recognise electronic communication so that private entities can generate proper information flows, something digitalisation has been heralded for. This would allow private entities to quickly communicate the true position of the contract of carriage instead of leaving it to the vagaries of time inherent to paper bills of lading. It may be that a strong lobby of lawyers were against an overly regulating *Rotterdam Rules* since that would have resulted in fewer litigations, and, arguably, less revenue.[26] Tsimplis points out, in illustrating the struggle of environmental law, these sectoral norms in shipping that prioritise financial interests over needed reform.[27]

The judicial burden created by lazy, vague, or empty legislation is evidenced by an 'email' case which reached the heights of the Supreme Court of India. In *Shakti Bhog Foods Ltd v Kola Shipping Ltd*, the Court had to answer the query whether an email exchange validly evidenced the charterparty agreement.[28] Yes, it did, the Court said, but the fact that such a question needed to be answered by the most authoritative court of the country is a clear sign of the failure of law-making and the legal confusion that exists, making the law paradoxical to stated government policy of efficiency through digitalisation: the Maritime India Vision 2030.[29] The *Rotterdam Rules*, by expressly covering electronic communication, would have provided clarity to industry participants and reduced the judicial burden. In a world where electronic communication has become the norm rather than the exception, this legislative omission is inexplicable.

Conclusion

While it may be argued that over-regulation of the kind sought in *Rotterdam Rules* is the reason behind their poor reception globally and in India, the more pressing reason might have to do with the perception that over-regulation is bad for business. However, a cursory comparison of the technical conventions highlights why over-regulation bodes well for an industry like shipping: it enables development in a safe and decentralised manner. Third party service providers are able to enter the market, most of whom would not have the capital strength to be a carrier but may have the requisite capital, knowledge, and skills to provide allied products (like an electronic bill of lading system). One may, thus, question if India has counteracted its aspirations by promoting a convention which seemed prima facie adequate with its brevity but whose under-regulation may be a consequence of being ruled by a few. The organisation responsible for the *Rotterdam Rules* was created with the mandate to 'further the progressive harmonization and unification of the law of international trade'.[30] That law would have ushered a development of practices that already exist in the Developed world and needed introduction in the developing world. These reforms should have been considered by an Indian legislature that wanted to increase the number of entrants in the maritime industry and/or increase trade with other previously colonised nations and with those who would have also needed clear regulation to increase participation. The legislature has been blind to the effect of the Hague-Visby Rules. It has failed to see the English Law hegemony over the practice of maritime contracts and disputes, pushing its subjects into the same coloniality a 100 years later. Confoundingly, the legislature may not have studied the 1977 amendment[31] to *The Inland-Steam Vessels Act, 1917*.[32] That amendment, 60 years after the original Act, ushered changes that went beyond merely changing names.

[23] Ibid [8].
[24] Ibid [9].
[25] Parliament of India – Rajya Sabha Secretariat, 'Department-Related Parliamentary Standing Committee on Transport, Tourism and Culture' (Press Release, 10 August 2023) <https://sansad.in/getFile/rsnew/Committee_site/Committee_File/Press_ReleaseFile/20/173/664P_2023_8_12.pdf?source=rajyasabha>.
[26] MK Gandhi (Mahatma Gandhi), *My Socialism* (Navajivan, 1959) 26, contending that lawyers would not have been happy with the concept of economic equality that proposed the same wages across professions for an honest day's work.
[27] Michael Tsimplis, *Environmental Norms in Maritime Law* (Elgar, 2021).
[28] *Shakti Bhog Foods Ltd v Kola Shipping Ltd* (2008) 2 SCC 134 (Supreme Court of India).
[29] Ministry of Ports, Shipping and Waterways, Government of India, *Maritime India Vision 2030* (Report, 22 February 2021). <https://sagarmala.gov.in/sites/default/files/MIV%202030%20Report.pdf>.
[30] Ibid; *Establishment of the United Nations Commission on International Trade Law* (n 15).
[31] *The Inland Steam-Vessels (Amendment) Act*, Act No 35 f 1977.
[32] Act No 1 of 1917. Accessed at the Assam State Archives on 20 December 2024.