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The nautical fault defence - an anachronism or a concept of the future?

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A) Introduction

In context of the carriage of goods by sea, the carrier's liability for loss of or damage to the goods has always been a controversial topic, because the carrier's and the shipper's interests have to be harmonised. In order to find an equitable solution, several liability regimes have been developed and a catalogue of immunities has been established which exempted the carrier from his liability. One of these exonerations is the 'nautical fault' defence of the carrier. This defence exonerates the carrier from liability

> *for loss or damage arising or resulting from act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.*[1]

This dissertation will deal with the nautical fault defence and will examine its significance in former, present and future liability regimes. The meaning and the implications of the nautical fault immunity will be discussed by referring to relevant case law. Additionally, arguments for and against the existence of the nautical fault defence will be discussed to answer the question whether the nautical fault defence can be considered as an anachronism or as a concept of the future.

Finally, and in the light of the conclusions reached in the dissertation, it will be questioned how a liability regime should be formulated.

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[1] Art. IV.2 (a) of the Hague-Visby Rules

B) Historical background

I) Roman and Common Law principles

The general maritime law relating to the carriage of goods by sea is of ancient origin and its foundations can be found in classical Roman Law. Due to the reasoning of Roman Law, the carrier should be held liable for all loss and damage because it could best take precautions against such loss.[2] The shipper was protected by Roman Law because he might not know how his goods had been lost or damaged, nor whether there was anyone whom he could hold responsible.

This strict liability of the carrier formed the basis of most modern developed liability for sea carriage of goods.[3] The Common Law of the 19th century held the carrier of goods by sea absolutely liable for cargo loss or damage, whether or not the carrier was negligent and regardless of the cause of the loss.[4] The carrier could only escape liability if the loss or damage was caused by an act of God, a public enemy, inherent vice of the goods, fault of the shipper or if the goods had been appropriately made the subject of a general average sacrifice.[5]

In response, carriers began to exempt themselves from liability by including wide exception clauses in their bill of lading[6], even in case of their own negligence.[7] This was possible because of the principle of the freedom of contract and the liberty to contract out of the

[2] Mandelbaum, 23 Transportation Law Journal 471, 473
[3] Hare at 483
[4] Astle, The Hamburg Rules, at 2
[5] Ibid at 2
[6] Mitchelhill at 2
[7] However, the exception clauses typically included losses and damage from thieves; heat, leakage and breakage; contact with other goods; perils of the sea; jettison; damage by seawater; frost; decay; collision; strikes; benefit of insurance; liberty to deviate; sweat and rain; rust; prolongation of the voyage; nonresponsibility for marks and numbers; removal of the goods from the carrier's custody immediately upon discharge; limitation of value; time for notice of claims; time for suit. (Yancey, 57 Tulane Law Review 1238, 1240)

liability.[8] This tendency actually became common practice in England, and most of the European and Commonwealth countries followed the British example.[9]

In contrast, United States courts gave more restrictive treatment to the principle of the freedom of contract and they especially did not allow carriers to contract away liability for their own negligence.[10]

The specific defence of 'nautical fault' of the master or crew of a vessel is not found in the Rôles of Oléron, the Consolato del Mare, the Visby Rules, l'Ordonnance de la Marine or the Code Commercial of 1807, nor was the exception permitted before the introduction of the Harter Act of 1893 in the United States of America.[11]

II) The Harter Act

The more restrictive American approach was given effect in the Harter Act, passed in 1893 in the United States of America.

The Harter Act, named after Congressman Harter who led the lobbying for the bill, was the first statutory provision which tried to curtail the carrier's right to contract out of liability.[12] In detail, s 1 of the Act considered it as unlawful for the carrier transporting goods from or between ports of the United States and foreign ports to insert in any bill of lading any clause whereby the carrier would be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to the carrier's charge.

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[8] Hare at 484
[9] Proctor at 29
[10] Mandelbaum at 475
[11] Tetley at 397
[12] Hare at 486

Balancing out this increase in the liability of the carrier, s 3 of the Act exculpated the carrier from his liability for damage or loss resulting from faults or errors in navigation or in the management of the vessel when he had exercised due diligence to make the vessel seaworthy and properly manned, equipped and supplied. But when the carrier had fulfilled his obligation to furnish a seaworthy ship, he was exempt from liability for the negligence or fault of the captain and the crew in their navigation and management of the vessel. The reason behind the introduction of the nautical fault defence was the idea that the shipowner lost his control over the vessel after she had left port because communication with the vessel was often difficult or impossible at this time.[13]

In addition, the section introduced immunities for the carrier, which are perils of the sea, acts of God, public enemies, inherent defects in the goods carried, insufficiency of packaging and deviation for the purpose of saving life or property at sea. Accordingly, the Harter Act recognised the main common law exceptions to liability as described above.

As a result, the Harter Act can be considered as the forerunner of international law relative to the carriage of goods by sea and it laid down the principles taken up by domestic and international carriage regimes.[14]

III) The Hague Rules and the Hague-Visby Rules

After the passing of the Harter Act, about thirty years of instability ensued during which American law differed significantly from that in most other parts of the world.[15] Thereafter, a movement of uniformity developed, prompting the Maritime Law Committee of the International Law Association to draft a set of rules at a conference held in the Hague in

[13] Mandelbaum at 476
[14] Astle, Bills of Lading Law, at 10
[15] ABA, Section of International Law, Reports of the House of Delegates, 22 International Law 247 (1988)

1921. Based primarily on the principles of the Harter Act, the International Convention for the Unification of certain Rules of Law relating to Bills of Lading (the Hague Rules) was finally signed in 1924. Already in 1924 the United Kingdom enacted the Hague Rules by its Carriage of Goods by Sea Act, and the United States of America ratified the Hague Rules in 1936. Afterwards, most of the European shipping nations followed, and by the beginning of World War II, the overwhelming majority of the world's shipping nations had adopted the Hague Rules.[16]

The Hague Rules were amended in 1963 by the Brussels protocol as the result of a review of the legal events and actions arising over the previous four decades, and the amended rules are known as the Hague-Visby Rules.[17] The Brussels protocol especially imposed a higher measure of liability and it served also to shift the pendulum further into the shipowner's arc of responsibility.[18] The protocol has been widely ratified, except by the United States of America, where the prevailing conflict between the shipper's and carrier's interests avoided the ratification of the Visby amendments.[19]

The Hague-Visby Rules followed the example of the Harter Act by stipulating a general liability of the carrier. Further, Art. III.8 and Art. V of the Hague-Visby Rules forbade the contracting out from the liability to the disadvantage of the shipper. As a result, the pendulum of liability swung back against the carrier.[20]

But the Hague-Visby Rules implied concessions in favour of the carrier to balance out his general liability.

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[16] Mandelbaum at 477
[17] Astle, Bills of Lading Law, at 26
[18] Hare at 488
[19] Rendell at 2
[20] Hare at 488

First, Art. IV.1 of the Hague-Visby Rules continued the concept of seaworthiness and due diligence by absolving the carrier from his liability for loss or damage arising or resulting from unseaworthiness when he has exercised due diligence to make the ship seaworthy.

Furthermore, Art. IV.2 of the Hague-Visby Rules introduced a regime of immunities of the carrier which expands the traditional common law exonerations.
The Hague-Visby Rules especially introduced the nautical fault defence on an international level. Due to Art. IV.2 (a) of the Hague-Visby Rules,

> *neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.*

In addition, the carrier's liability is limited to the amount equivalent of 10000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher (Art. IV.5 (a) of the Hague-Visby Rules).[21]
Finally, Art. III.6 of the Hague-Visby Rules discharges the carrier and the ship from all liability in respect of the goods unless suit is brought within one year of their delivery or of the date when they should have been delivered.

IV) The Hamburg Rules

Because the Hague-Visby Rules provided which was perceived by many as an excessive number of opportunities for the carrier to legally avoid liability and because of the possibility of limiting the liability to a certain amount irrespective of the value of the goods lost

or damaged, it was felt that there were strong grounds for revising the Hague-Visby Rules or for the establishment of a new international convention.[22] This situation led to the adoption of the United Nations Convention on the Carriage of Goods by Sea in 1978 (the Hamburg Rules), which came into effect on 1 November 1992.[23] However, the Hamburg Rules had no significant influence on the modernisation of shipping law, because they were only signed by nations which are not major shipping powers.[24] The reason behind this is the fact that the Hamburg Rules favour the shipper and accordingly mainly the interests of the developing countries, because they are more dependant upon the importation on consumer goods (thus they want to give preferences to the shipper) and they have comparatively few shipowning and operating enterprises.[25]

In detail, Art. 5.1 of the Hamburg Rules principally presumes the liability of the carrier for loss of or damage to the goods while the goods were in his charge, unless the carrier proves that he took all measures that could reasonably be required to avoid the occurrence and its consequences. On the other side, Art. 12 of the Hamburg Rules emphasises that the shipper is not liable for loss sustained by the carrier or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. However the burden of proof rests on the carrier to exculpate himself from the liability (Annex II of the Hamburg Rules).

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[21] In terms of Art. IV.5 (d) of the Hague-Visby Rules, a franc means a unit consisting of 65,5 milligrammes of gold of millesimal fineness 900.
[22] Astle, Bills of Lading Law, at 51
[23] Hare at 490
[24] As at August 1998, there are 25 parties: Austria, Barbados, Botswana, Burkina Faso, Cameroon, Chile, Czech Republic, Egypt, Gambia, Guinea, Hungary, Kenya, Lebanon, Lesotho, Morocco, Nigeria, Romania, Senegal, Sierra Leone, Tunisia, Uganda, Tanzania, Zambia. (Hare at 490)
[25] Hare at 489

Furthermore, the Hamburg Rules drastically reduces the number of defences available for the carrier to avoid liability in comparison with the catalogue of immunities of Art. IV.2 of the Hague-Visby Rules. Especially the nautical fault defence was eliminated because it was considered as an unreasonable degree of protection of the carriers.[26]

The liability of the carrier is still limited to a specific amount of money (Art. 6 of the Hamburg Rules), which is fixed by a formula contemplated in Art. 26 of the Hamburg Rules.

Finally, any stipulation which leads to a contracting out of the carrier's liability is null and void in terms of Art. 23.1 of the Hamburg Rules. But a voluntarily increase of the carrier's responsibilities and obligations is possible due to Art. 23.2 of the Hamburg Rules.

Summing up, the Hamburg Rules complete the swing of the liability for cargo loss and damage squarely back onto the shoulders of the carrier.[27]

C) Meaning and implications of the nautical fault defence

As pointed out above, the nautical fault defence is statutorily defined in Art. IV.2 (a) of the Hague-Visby Rules. In terms of this article,

> *neither the carrier nor the ship are liable for loss or damage arising or resulting from any act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.*

[26] Mankabady at 138
[27] Hare at 489

I) Compliance with Art. III.1 of the Hague-Visby Rules

Because a loss of cargo caused by a want of due diligence to make a vessel seaworthy as required of the shipowner by Art III.1 of the Hague-Visby Rules will effectively rule out the possibility of that loss of cargo having been caused by an expected peril under Art. IV.2 of the Hague-Visby Rules, compliance with Art. III.1 is a prerequisite for a successful defence under the immunities of Art. IV.2.[28]

In virtue of Art. III.1 of the Hague-Visby Rules, the carrier has the overall obligation to exercise due diligence before and at the beginning of the voyage to

> *make the ship seaworthy; to properly man, equip, and supply the ship; and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.*

Furthermore, it has to be considered that the nautical fault defence is subject to the *contra proferens* rule under which the exoneration has to be interpreted as narrowly as possible against the interest of the party seeking to apply it, thus the onus of proof is upon the carrier to bring himself within the defence.[29]

To be exempt from liability, the carrier has therefore to prove the cause of loss or damage, that due diligence has been exercised in terms of Art. III.1 of the Hague-Visby Rules and that the nautical defence is applicable.[30]

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[28] Richardson at 47; Hare at 526 and 625
[29] Richardson at 47
[30] Tetley at 400, 401; Hare at 625

II) Error on the part of the master, mariner, pilot or the servants of the carrier

Another prerequisite is that the error has to be on the part of the master, mariner, pilot or the servants of the carrier. Accordingly, the nautical fault defence is inapplicable once negligence on the part of the carrier is established.[31] In such a case, the carrier is personally to blame and he has no right to avoid liability.

III) Navigation or management of the ship

Art. IV.2 (a) of the Hague-Visby Rules distinguishes between an act, neglect or default in the navigation or in the management of the ship.

1) Navigation of the ship

The phrase 'act, neglect or default in the navigation of the ship' was much discussed both in England and in the United States around the turn of the last century. The main reason behind it is that the Harter Act of 1893 introduced the notion of 'faults or errors in the navigation or in the management of the vessel' and that similar terms were commonly used in bills of lading.

[31] Wilson at 251

a) Execution of a voyage

In general, the word navigation includes a broad range of acts in connection with the execution of a voyage.[32] For instance, it was held as a fault in the navigation of the vessel when due to the negligence of the master or crew, the vessel struck a reef,[33] ran aground[34] or collided with another vessel.[35] Furthermore the improper selection of an anchorage,[36] the neglect properly to heed a light upon a reef,[37] the fault of the master in starting without regard to the warnings of the weather bureau as to an impending storm,[38] and failing to put into a port of refuge to repair damage caused by perils of the seas,[39] were faults in navigation within s 3 of the Harter Act.[40]

b) Stowage or discharge included ?

Of cardinal importance is furthermore the issue of when a vessel is in the state of executing her voyage and whether negligent stowage before sailing or discharge after arrival is excused by the nautical fault immunity.

In *Hayn v. Culliford* it was held that the exception of negligence in the navigation of the vessel does not cover negligent stowage by the crew.[41] In this case, bags of sugar, shipped by the plaintiff, were carried in the defendant's steamship from Hamburg to London at an agreed freight. A bill of lading was used stipulating that 'all accidents, loss and damage

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[32] Hare at 631
[33] *The Portland Trader* (1964) 2 LlLR 443
[34] *Complaint of Grace Line* (1974) AMC 1253
[35] *The Xantho* (1887) 12 App Cas 503
[36] *The Etona* (1896) 64 Fed Rep 880; 71 Fed Rep 895
[37] *The E. A. Shores* (1896) 73 Fed Rep 324
[38] *Hanson v. Haywood* (1907) 152 Fed Rep 401
[39] *Carsar v. Spreckels* (1905) 141 Fed Rep 260

from any act, neglect or default whatsoever of the pilot, master or mariners in navigating the ship, the owners of the ship being in no way liable for any of the consequences of the causes above excepted'. Thereafter, oxide of zinc in casks was negligently stowed above the sugar and consequently damaged it.

Denman, J. decided that the plaintiff are entitled to claim compensation for the damage of the sugar, because the shipowner could not rely on the exoneration in the bill of lading. Denman, J. referred to *Good v. London Steam Ship-Owners Association* where improper navigation was considered as something improperly done in the course of the voyage,[42] and he concluded that the ship need to be in a state of motion in order to be in a state of navigation.[43]

This principle was applied in *The Accomac* as well, but it was extended to include the discharge of the vessel.[44] The plaintiffs were the owners of a cargo of rice shipped in the defendant's vessel and carried by her to London. The charterparty excepted the defendants from liability 'for any act, negligence, or default of master or crew in the navigation of the ship in the ordinary course of the voyage'. The Accomac on her arrival went into the Victoria Dock to discharge her cargo, and while this was being done, one of the bilge-pumps was removed because it had been found to be defective during the voyage. But through negligence in the removal of the bilge-pump, the cargo was damaged by water which entered the vessel.

Lord Esher ruled that the vessel was neither being navigated nor on a voyage within the ordinary meaning of the words, because she was finally and intentionally moored in dock

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[40] Carver at § 188
[41] *Hayn v. Culliford* (1879) 3 CPD 410, 418
[42] *Good v. London Steam Ship-Owners Association* 6 CP 563
[43] *Hayn v. Culliford* (1879) 3 CPD 410, 417
[44] *The Accomac* (1890) 15 PD 208

and she was to remain there till her cargo was taken out of her.[45] For this reason, Lord Esher did not apply the exemption clause of the charterparty and he therefore held the defendant liable.

However, there are three decisions which seem to be in conflict with the findings of the above cases.

In *Baerselman v. Bailey* negligent stowage was covered by the exemption clause in the bill of lading.[46] In this case, the action was brought by the plaintiff in respect of damage to eggs loaded in Russia on the defendant's vessel for delivery in London. The bill of lading contained a clause that the shipowner would not be liable for 'any act, negligence, default or error in judgement of the pilot, master, mariners or other servants of the shipowners in navigating the ship, or otherwise'. At the end, the eggs were spoiled by being improperly loaded near some hay.

Lord Esher absolved the shipowner from liability due to the exception clause in the bill of lading by citing *Norman v. Binnington* where under a similar exception clause, damage by rain due to a negligent exposure of the goods during the loading was excused.[47]

But in both cases, the bill of lading did not only mention faults in navigating the ship, but they expanded the exemption from liability by adding the phrase 'or otherwise'. As Lord Esher pointed out, the assumed negligence was in disposing of the loading of the cargo before the ship sailed, and consequently does not arise under the exceptions relating to negligence in navigation.[48] He rather subsumed the facts under the final words 'or other-

[45] Ibid at 211
[46] *Baerselman v. Bailey* (1895) 2 QB 301
[47] *Norman v. Binnington* (1890) 25 QBD 475
[48] *Baerselman v. Bailey* (1895) 2 QB 301, 303

wise', which describe in his opinion other aspects than navigating the ship.[49] Considering this background, the decisions of *Baerselman v. Bailey* and *Norman v. Binnington* do not contradict *Hayn v. Culliford*, because they have at closer sight different grounds. Concerning the meaning of 'navigation of the vessel' they all have in common that an element of motion is required and that the vessel has to be en voyage.

The second case which seems to be inconsistent is *The Carron Park.*[50] In this case, it was agreed that the defendant's steam vessel should load from the agents of the plaintiff a cargo of sugar in New Fairwater and proceed therewith to Greenock. In the charterparty the shipowners were held not responsible 'for any act, neglect or default whatsoever of the pilot, master, crew or other servants of the shipowner during the said voyage'. The agents commenced loading the vessel and during the loading the cargo was damaged by water through a valve in the engine-room having been negligently left open by one of the engineers of the vessel.

The court held that the term 'voyage' included the period of time during which the vessel was being loaded, and that consequently the damage was within the exception and the shipowners were not liable.[51]

However, the decision dealt with the meaning of the term 'voyage' and not with 'navigation of the vessel'. Art. IV.2 (a) of the Hague-Visby Rules makes no mention of 'voyage', referring only to 'navigation or management of the ship', hence the findings of the court can not be transferred to the nautical fault defence of the carrier and the judgement does not contradict the above cases.

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[49] Ibid at 304
[50] *The Carron Park* (1890) 15 PD 203
[51] Ibid at 206

The last case which appears to be in conflict is the one of *Adam v. Morris.*[52] On the arrival of the particular steamship at the port of discharge, the engineer, after filling the boiler, omitted to shut the sea-cock and water thus made its way into the hold and wetted the cargo which consisted of oil-cake. In an action of damages by the cargo owners against the shipowner, the shipowner relied on a clause in the charterparty which exempts the shipowner from liability for 'the accidents of navigation even when occasioned by the negligence, default or error in judgement of the pilot, master, mariners or other servants of the shipowners'.

The Lord President decided that the accident was clearly within the exception clause of the charterparty.[53] Accordingly he considered the accident as an accident of navigation, although the vessel was already in the port of discharge when the negligence occurred. Hence the Lord President did not require an element of motion for the state of navigation and he contradicted the principle laid down in the above stated cases.

However it has to be taken into account, that the Lord President did not put much weight on the negligent act of the engineer in the port of discharge, because 'his negligence is not the matter complained of in this action'.[54] What the plaintiff rather complains of is that the master of the ship, although he was aware of what had occurred, not only refrained from communicating to him that such an accident had occurred, but fraudulently attributed the wetting of the cargo to heavy weather during the voyage.[55]

Furthermore, the master failed to discharge the cargo immediately after the water was discovered. Instead he waited several days until the cargo owner found out the wet state of his cargo by himself. Because of this behaviour, the master did not comply with his duty, when an injury has been caused to cargo by an excepted cause, to repair by all means in his

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[52] *Adam v. Morris* (1890) 18 Sess Cas, 4th series, 153
[53] Ibid at 158
[54] Ibid at 158

power the mischief which has been done and to land the cargo in as good a condition as the circumstances will admit.[56]

The Lord President finally concluded that neither the misrepresentation nor the neglect of the master's duty fall within the exceptions in the charterparty and that the shipowner is liable for the damage to the cargo.[57]

Accordingly he founded his judgement on these two additional facts and he did not consider the question, whether the fault of the engineer was an accident in the navigation of the vessel, as relevant for his decision. Because of this, the Lord President's remarks concerning the meaning of navigation should not be evaluated as a basic objection against the prevailing opinion, that 'navigation' needs an element of motion. As will be seen below, the criteria for an error of management of a ship are somewhat different.

At the end, the Common Law liability of the shipowner has to be taken into account. As dealt with above[58], the Common Law held the carrier of goods by sea absolutely liable for loss of or damage to the goods, except where caused by a particular regime of immunities. This Common Law principle will always bind the shipowner, unless there are in the contract clear and express words which without ambiguity exempt him.[59] Clauses that exonerate the shipowner from his liability thus have to be interpreted restrictively. Accordingly the phrase 'navigation' of the vessel should only comprise the period of time of the actual voyage when the vessel is in motion, without including faults in the acts of stowage or discharge in port.

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[55] Ibid at 158, 159
[56] Ibid at 159
[57] Ibid at 159
[58] See B) I).
[59] *Rathbone v. MacIver* (1903) 2 KB 378, 384

2) Management of the ship

Concerning the second element of the nautical fault defence, which excuses an act, neglect or default of the master, mariner, pilot or the servants of the carrier in the management of the ship, several problems have arisen.

a) Difference between navigation and management

First of all, the difference between the navigation of a vessel and the management of a vessel requires analysis.
As dealt with above, a vessel has to be in a state of motion in order to be in a state of navigation.[60]

In respect of the management of a vessel, two decisions have to be considered.

In *Dobell v. Steamship Rossmore Co.*[61] goods were shipped under a bill of lading incorporating the Harter Act with its section 3, by which the owner of the vessel is not to be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel. The ship's carpenter closed the porthole in such an imperfect manner that it was not watertight and water got in the vessel during the voyage and damaged the cargo.
Kay L. J. saw no difference between the navigation and the management of a vessel and he expressed the opinion that the expression 'faults or errors in navigation or in the management of the vessel' applies to faults or errors in sailing the vessel or in managing the sail-

[60] *Hayn v. Culliford* (1879) 3 CPD 410, 417

ing of the vessel.[62] But in the same instance he made clear that 'it does not seem to me to be necessary to give any decided opinion on this point'.[63] Accordingly his words can be considered as an *obiter dictum* without guiding significance.

In *The Glenochil* Sir F. H. Jeune concluded that the word management goes somewhat beyond navigation and that it includes acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself.[64]

The facts of *The Glenochil* showed that goods were shipped under a bill of lading which incorporated the Harter Act. After the arrival of the vessel at her port of destination, and during the discharge of the cargo, it became necessary to stiffen the ship. For this purpose the engineer ran water into a ballast tank, but negligently omitted first to ascertain that it was safe to do so. However the sounding-pipe and casing became broken owing to heavy weather during the voyage and the cargo was finally damaged by water.

Sir F. H. Jeune held that the negligence consisted of a mismanagement of the ship, because by stiffening the vessel it was intended to do something for her benefit.[65] Gorell Barnes J. added that the management of a vessel implies the intention to do something necessary for the safety of the ship.[66]

Sir F. H. Jeune also referred to the case of *Dobell v. Steamship Rossmore Co.* and made it clear that the opinion expressed by Kay L. J. in that case was merely an obiter dictum which did not bind him.[67]

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[61] *Dobell v. Steamship Rossmore Co.* (1895) 2 QB 408
[62] Ibid at 415
[63] Ibid at 415
[64] *The Glenochil* (1896) P 10, 16
[65] Ibid at 14
[66] Ibid at 18
[67] Ibid at 15

Furthermore Sir F. H. Jeune mentioned his former judgement in the case of *The Ferro* where he ruled that negligent stowage of the cargo was not neglect or default in the management of the ship.[68] In *The Ferro* he pointed out that concerning the words management of the ship, he is 'not satisfied that they go much, if at all, beyond the word navigation'.[69] But three years later in the case of *The Glenochil*, the judge made clear that the illustration he gave in *The Ferro* was not a very happy one and that the word 'management' rather goes somewhat beyond navigation and includes acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself.[70]
Accordingly he decided in *The Glenochil* that there was a failure in the management of the vessel in terms of the Harter Act and that the shipowners are exempted.

Summing up, it has generally been a fault in the management of the vessel, when the act negligently done, or omitted, has been one which was or ought to have been done during the course of the voyage and had reference to the safety of the ship.[71] Accordingly want of proper attention to the pumps,[72] negligence in clearing the ship's deck of water,[73] neglect in clearing a waste pipe,[74] the omission to close a valve in a pipe through which ballast water was being emptied so that it got into the cargo,[75] the improper use of a donkey boiler so as to cause a fire,[76] and allowing a sea-valve to become partially open and admit water into the cargo[77] have all been categorised as faults in the management of the vessel.

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[68] *The Ferro* (1893) P 38
[69] Ibid at 46
[70] *The Glenochil* (1896) P 10, 16
[71] Carver at 193
[72] *The British King* (1898) Fed Rep 872
[73] *The Rodney* (1900) P 112
[74] *The Touraine* (1928) P 58
[75] *The Mexican Prince* (1899) 82 Fed Rep 484
[76] *The Strathdon* (1898) 89 Fed Rep 374
[77] *Hanson v. Haywood* (1907) 152 Fed Rep 401

b) Difference between fault in the management of the ship and the duty of Art. III.2 of the Hague-Visby Rules

Further causative fault in the management of the ship requires distinguishing from the carrier's duty under Art. III.2 of the Hague-Visby Rules to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. The distinction between the management of the ship and the management of the cargo is the main issue in this context.[78] In the first case, immunity is provided for the carrier due to the nautical fault defence. In the latter, the carrier is liable because his failure to comply with the obligation laid down in Art. III.2 of the Hague-Visby Rules caused the loss.[79]

In *The Glenochil* Sir F. H. Jeune distinguished between want of care of cargo and want of care of vessel indirectly affecting the cargo.[80] The former is not excepted, whereas the latter might well be, depending upon the cause of the loss or damage.[81]

This principle has been accepted in the Supreme Court of the United States as being correct[82] and the dictum was later amplified in an English court by Greer L. J. in *Gosse Millard v. Canadian Government Merchant Marine*.[83]

In this case, a cargo of tinplates was shipped in a vessel under a bill of lading incorporating the Hague Rules. During the voyage the vessel sustained damage and had to go into dock for repairs. While these were being executed, the hatches were left open so that the work-

[78] Astle, The Hamburg Rules, at 52
[79] Wilson at 252
[80] *The Glenochil* (1896) P 10, 16
[81] Hare at 632
[82] *Hourani v. Harrison* (1927) 28 LlLR 120, 123
[83] *Gosse Millard v. Canadian Government Merchant Marine* (1927) 29 LlLR 190

men could go in and out of the hold more easily. The hatches were not protected by any tarpaulin when rain was falling and the tinplates were damaged in consequence.

The cargo owners alleged that the shipowners failed properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods as they are obliged in terms of Art. III.2 of the Hague Rules, whereas the shipowners relied on the nautical fault defence of Art. IV.2 (a) of the Hague Rules.

Greer L. J. expressed the distinction as follows: 'If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability'.[84]

In the opinion of Greer L. J., the evidence of the case failed to establish any want of care of the vessel, but only want of care of the cargo, consisting of a failure to use the hatch covers and tarpaulins sufficiently to afford adequate protection of the cargo.[85]

The management of the ship rather refers to matters affecting the ship as a ship and its safety as such, which however might incidentally affect the cargo.[86] The negligence thus have to be negligence towards the ship and not only the negligent failure to use the apparatus of the ship for the protection of the cargo.[87]

According to the point of view of Greer L. J., the shipowners could not rely on the nautical fault defence, because the negligent act of misusing the tarpaulins was not within the management of the ship.

However Greer L. J. was overruled by the two other members of the Court of Appeal. Lord Justice Sargant held that the operation on the vessel in the course of which the hatches

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[84] Ibid at 200
[85] Ibid at 196, 198
[86] Ibid at 196

were left open, and so allowed the penetration of rain, were operations for the purpose of repairing damage to the structure of the ship as a whole and had nothing to do with the care of the cargo.[88] The result might have been different when the hatch had removed for the ventilation of the cargo.[89]

In this respect, the shipowners were protected from liability by the nautical fault defence.

But Greer L. J. view was upheld on appeal by the House of Lords.[90] Viscount Sumner emphasised that the misuse of the tarpaulins was the reason for the damage and he made clear that the particular use of the tarpaulin, which was neglected, was a precaution solely in the interest of the cargo.[91] This special precaution were required as cargo operations while the ship's work was going on and it was not part of the actual repair of the vessel.[92]

The principle laid down in *The Glenochil* was considered to be the correct one to apply[93], hence the use of the tarpaulins to protect the cargo would have been guided by the want of care of the cargo and not by the want of care of the vessel indirectly affecting the cargo. In the end, the House of Lords ruled that the misuse of the tarpaulins can not be seen in context with the management of the ship and that therefore the shipowners are not allowed to rely on the nautical fault defence. They rather failed to properly and carefully load, handle, stow, carry, keep, care for and discharge the cargo in terms of Art. III.2 of the Hague Rules and they are consequently liable for the damage sustained by the cargo owners.

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[87] Ibid at 200
[88] Ibid at 195
[89] Ibid at 195
[90] *Gosse Millard v. Canadian Government Merchant Marine* (1928) 32 LlLR 91, 96
[91] Ibid at 98
[92] Ibid at 98
[93] Ibid at 95

c) Actions affecting both vessel and cargo

In addition, it has to be dealt with the problem when the actions of the master, mariner pilot or the servants of the carrier affect both the vessel and the cargo.

In *The Germanic*, US courts solved this problem by applying the 'primary purpose' test to ascertain whether the operation was conducted in the interest of the vessel or the cargo.[94]

In the case of *The Germanic*, cargo was damaged because of the sinking of the ship after arriving in port. The vessel sunk due to hurried and imprudent unloading, which brought the centre of gravity too high and caused the rolling of the ship. At the end, water entered through an open coal port which was then below the waterline and the ship sunk.

Mr Justice Holmes made clear that the question was whether the damage to the cargo was 'damage or loss resulting from faults or errors in navigation or in the management of said vessel', in which case the shipowner was exempted from liability by s 3 of the Harter Act, or whether it was 'loss or damage arising from negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery' of merchandise under s 1 of the Harter Act, in which case the shipowner could not stipulate to be exempt.[95]

The judge pointed out that in a case which falls within both sections, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss.[96] If the primary purpose is to affect the ballast of the ship, the management of the vessel is affected, but if, as it is the case here, the primary purpose is to get the cargo ashore, the shipowner can not rely on the defence of s 3 of the Harter Act.[97] Accordingly, the shipowner was held liable for the loss of the cargo.

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[94] Hare at 631
[95] *The Germanic* 196 US 589, 596 (1905)
[96] Ibid at 598
[97] Ibid at 597

Besides, it has to be questioned, whether the shipowner is able to use the nautical fault defence although he has not complied with his obligation of Art. III.2 of the Hague-Visby Rules.

The wording of Art. III.2 of the Hague-Visby Rules is as follows: 'Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried'. Because of the phrase 'subject to the provisions of Article IV', it is clear that once it is shown that the act or omission is in the course of the management of a vessel, the exception applies, notwithstanding that it may be also an act or omission in relation to the cargo.[98]

Finally the problem arises, how two separate errors have to be treated, when the one occurred in the management of the ship and the other in the care of the cargo. As stipulated above, a single error is either treated as an error in the course of the management of the ship or in relation to the care of the cargo.

In the case of two errors, the carrier has to separate the damage done by each of the errors.[99] He will only be held responsible for the damage caused by failure to care for the cargo, whereas he can benefit from the exoneration for the damaged caused by failure to care for the ship.[100]

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[98] *Kalamazoo Paper Co. v. C.P.R. Co.* (1950) 2 DLR 369, 378

[99] Astle, The Hamburg Rules, at 53

[100] Tetley at 399

d) Element of motion required?

Besides it has to be examined whether the term 'management of the ship' requires that the vessel is in a state of motion or whether it applies equally to a vessel while she lies in a port of departure or discharge.

In the US courts it has been held that management of the vessel does not include acts of preparing the ship for the voyage in the port of departure. In *International Navigation Co. v. Farr & Bailey Mfg. Co.*[101] crew members left the portholes in a compartment of the particular vessel open before the commencement of the voyage and the cargo was consequently damaged by water coming through such portholes during the voyage.
The shipowner denied liability because the defect involved the management of the ship in terms of s 3 of the Harter Act. Due to s 3 of the Harter Act,

> *neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, if the owner of any vessel transporting merchandise or property to or from any port in the United States of America has exercised due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied.*

The court rejected the shipowner's argument stating: 'Even if the loss occur through fault or error in management, the exemption can not be availed of unless the vessel was seaworthy when she sailed, or due diligence to make her so has been exercised; and it is for the owner to establish the existence of one or the other of these conditions. The word man-

[101] *International Navigation Co. v. Farr & Bailey Mfg. Co.* 181 US 218 (1900)

agement is not used without limitation, and is not, therefore, applicable in a general sense as well before as after sailing'.[102] As a result, the shipowner was held liable.

In United States law, immunity with regard to negligent navigation and management is accordingly conditional upon the exercise of due diligence to make the ship seaworthy[103], and the benefits of s 3 of the Harter Act are not available to the carrier except as to events taking place subsequent to the start of the voyage.[104]

In England, no such limitation has been put on the meaning of the word 'management'.[105] In *Mc Fadden v. Blue Star Line*[106] the ship's engineer had occasion to open a sluice-door in a watertight bulkhead in the lower part of the ship after the goods were on board. Afterwards he failed to screw down the sluice-door so closely as to make it watertight. Because of this, water passed through the sluice-door into the cargo hold and damaged the cargo. The Harter Act was incorporated by the bill of lading and the shipowners referred to the immunities laid down in s 3 of the Harter Act.
Channell J. expressed that the words 'in the management of the vessel' in s 3 of the Harter Act include matters that are complained of during the period of the loading and he gave judgement in favour of the shipowners.[107]

This opinion is supported by the above stated English case of *The Glenochil* where Sir F. H. Jeune uttered that he sees no reason for limiting the word 'management of the vessel' in

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[102] Ibid at 226
[103] Schoenbaum at 120
[104] Carver at 190
[105] Ibid at 190
[106] *Mc Fadden v. Blue Star Line* (1905) 1 KB 697
[107] Ibid at 708

terms of s 3 of the Harter Act to the period of the vessel being actually at sea.[108] It was furthermore held by Gorell Barnes J. that the exemption extend from the time the cargo was taken on board up to the time that the cargo is finally discharged.[109]

Considering the different approaches of US and English courts concerning the interpretation of s 3 of the Harter Act, reference has to be made to its successor, the Hague-Visby Rules.

As pointed out above[110] compliance with Art. III.1 of the Hague-Visby Rules is a prerequisite to claim defence under Art. IV.2 of the Hague-Visby Rules. In terms of Art. III.1 of the Hague-Visby Rules, the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy; to properly man, equip, and supply the ship; and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation. Because Art. III.1 of the Hague-Visby Rules refers to the period of time 'before and at the beginning of the voyage', an act or default within that period of time would necessarily imply a breach of the obligation of Art. III.1 of the Hague-Visby Rules. As compliance with Art. III.1 of the Hague-Visby Rules is a prerequisite to claim defence under Art. IV.2 of the Hague-Visby Rules, the carrier could not then rely on the exception of 'management of the ship' in Art. IV.2 of the Hague-Visby Rules.[111]

Considering the result of a case like this, the American approach, that the shipowner can not escape liability as long as the error in the management of the ship occurred before the vessel started to sail, is reflected in the Hague-Visby Rules. Conversely, the English opinion, that the period of time before the vessel has left the port of departure is within the

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[108] *The Glenochil* (1896) P 10, 16
[109] Ibid at 19
[110] See C) I).

scope of the management of the ship, has not been followed in subsequent liability regimes.

Finally, the different theories on both sides of the Atlantic Ocean can be considered as an occurrence in context with the application of the Harter Act. But after the international introduction of the Hague-Visby Rules, the American approach succeeded. It would be a superfluous construction to first categorise an error arising before the departure of the vessel as an error in the management of the vessel, and then to prohibit the shipowner to use the nautical fault defence because he has breached the overall obligation of Art. III.1 of the Hague-Visby Rules.

As a general conclusion, the 'management of the ship' should not include an act, neglect or default which took place before the start of the voyage.

e) Refrigerated cargo

Finally there is the question, whether the nautical fault defence applies to refrigerated cargo.

In the case of *Foreman v. Federal S. N. Co.*[112] frozen meat was shipped on board a steamship, and it was stated in the bill of lading that the meat was shipped in good order and condition. When the meat was delivered, it was badly damaged, owing to the temperature in the insulated hold where the meat was carried being to high. The high temperature was reached because of an error of the chief engineer who did not use the additional refrigerating machine until the temperature in the insulated holds had been reduced sufficiently. Wright J. decided that the exception of 'in the management of the ship' in Art. IV.2 (a) of the Hague Rules does not include negligence in the due performance of the obligation to

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[111] Carver at 190

care for refrigerated cargo by keeping down the temperatures in the hold by means of the refrigerating machinery.[113] He explained that if management of the ship includes management of the refrigerating machinery resulting in improper temperatures in the hold to the detriment of the cargo, there is in effect nothing left of the obligation properly to care for cargo under Art. III.2 of the Hague Rules.[114]

However, in *Rowson v. Atlantic Transport Co.* the neglect to keep the cooling chambers sufficiently cooled was considered as a fault or error in the management of the vessel.[115] In this case, butter was damaged resulting from the negligence of one of the ship's engineers in the management of the refrigerating apparatus, whereby in the course of the voyage the temperature of the chambers was allowed to rise too high.
But the case differs to the one of *Foreman v. Federal S. N. Co.* in the peculiarity that the refrigerating apparatus was not exclusively used for the butter, but for the ship's provisions as well. Thus the refrigerating apparatus was part of the ship, and its mismanagement has to be regarded as mismanagement of the whole vessel.[116]

As a result, the two decisions do not contradict each other, they rather comply with the general principle of *The Glenochil* as laid down above.[117] As long as the situation is that there was a want of care of the cargo, as in *Foreman v. Federal S. N. Co.*, the shipowner has not fulfilled his obligation properly to care for the cargo and he is liable. But when the cause of the damage is a neglect to take reasonable care of the ship and the cargo is af-

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[112] *Foreman v. Federal S. N. Co.* (1928) 2 KB 424
[113] Ibid at 439
[114] Ibid at 437
[115] *Rowson v. Atlantic Transport Co.* (1903) 2 KB 666, 676
[116] Ibid at 675
[117] See C) III) 2) b).

fected indirectly, as in *Rowson v. Atlantic Transport Co.*, the shipowner is capable of relying on the nautical fault defence.

3) Conclusion

Concerning an 'act, neglect or default in the navigation of the ship' of the nautical fault defence, a sufficient degree of certainty and uniformity has been reached. It is clear that a vessel has to be in a state of motion to be in a state of navigation and that neither negligent stowage, nor discharge is included.

In relation to an 'act, neglect or default in the management of the ship' the situation is more vague. After a period of uncertainty, it is finally undisputed that the management of a vessel does not comprise acts which do not affect the sailing or movement of the ship, but do affect the vessel herself and her safety.

However, the delimitation of a fault in the management of the ship and the duty to take care for the cargo have always been part of a vigorous legal dispute. Although the differentiation between want of care of the cargo and want of care of the vessel indirectly affecting the cargo is commonly accepted, it is difficult for carriers and cargo owners to draw the line exactly between what does and does not constitute an error in the management of the ship.

The resulting uncertainty is exacerbated by the problem of whether the 'management of the ship' includes a fault which took place before the start of the voyage, although arguments have been put forward above[118] that it should not be that way.

[118] See C) III) 2) d).

These uncertainties have bedevilled the nautical fault defence, and have fuelled the debate on whether or not the defence should be retained by any new transport law regime.

D) Arguments for and against the nautical fault defence

In order to be able to assess the necessity of the existence of the nautical fault defence, the arguments for and against the nautical fault immunity will be examined.

I) Arguments against the nautical fault defence

1) As pointed out above[119] the original reason for the introduction of the nautical fault defence through the Harter Act in 1893 was the idea that the shipowner lost his control over the vessel after she left port, because communication with the vessel was often difficult or impossible at that time.
In addition, navigational equipment and ship-management techniques were not very well developed.[120]
With this background, cargo owners accepted at this time the idea that going to sea was a risky business, and that shipowners could not be held responsible for faults or errors in the navigation or in the management of the vessel as long as they had fulfilled their obligation to exercise due diligence to make the vessel seaworthy and properly manned, equipped and supplied.[121] Accordingly the cargo owners agreed that, in case of an accident, the shipowner would bear the cost of repairing or losing the ship, and the cargo owners would

[119] See B) II).
[120] Freudmann at 7
[121] Ibid at 7

bear the cost of repairing or losing the cargo - irrespective of the fact that the shipowner and not the cargo owner is the party actually steering the ship.[122]

This situation has changed drastically. 'Wooden ships have given way to highly automated steel ships with modern navigational devices such as radar and GPS, advanced telecommunication systems have been developed such as satellite communication, and gangs of longshoremen lifting loads of breakbulk cargo have yielded to lines of intermodal containers hoisted aboard ships by cranes'.[123] Furthermore 'training of both officers and crews have become far more rigorous, and the safe operation of ships at sea has given rise to entire consulting and software industries, which are dutifully implementing such programs as ISO 9002 and the International Maritime Organisation's International Safety Management program'.[124]

Because of this change, the historic rationale of the shipowner's inability to control his vessel at sea no longer exists.[125] The shipowner's lack of control over his vessel, captain and crew while out at sea has become a diminishing problem, due to the advanced technologies which enable the shipowner to continuously monitor and control the operation of his vessel through regular communication. This active participation in the voyage by the shipowner is no longer even an option, it is rather a requirement of the ISM Code. Consequently, the nautical fault defence is regarded as an anachronism in many parts of the world.[126]

2) Further, the opponents of the nautical fault defence argue that it is unfair to allow carriers to claim negligence as a reason to avoid liability and that the nautical fault defence

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[122] Ibid at 7
[123] Mandelbaum at 500
[124] Freudmann at 7

protects the worst performer.[127] The carrier just has to prove negligence of his own employees in order to be able to rely on the nautical fault defence, hence he benefits from, or can at least find protection from, employing unreliable persons.

Because the carrier is still in control of the vessel and her cargo even when she has left port, it is inequitable to exonerate him for the negligence of his own employees.[128]

3) Another argument against the nautical fault defence is that it is neither in line with the responsibility of carriers in other modes of transportation, nor with other forms of professional responsibility.[129]

On the one hand, this kind of protection is not available in any other transport convention,[130] and the nautical fault immunity is accordingly a major obstacle to achieving an uniform regime of liability for all modes of transport, which is desirable to promote trade on a global scale and to correspond with the increased importance of the multimodal transport.[131]

The nautical fault defence was removed in the Hamburg Rules, because it runs directly counter to the basic theme of the Hamburg Rules that liability is based on fault.[132]

On the other hand, the nautical fault exoneration is in conflict with the principle that companies and individuals are responsible for their actions[133] and that the risk of loss or damage should be borne by the party who is in a better position to prevent or avoid it.[134]

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[125] Mandelbaum at 488
[126] Schoenbaum at 118
[127] Weitz at 587
[128] Force at 2069
[129] Tetley at 410
[130] Wilson at 251
[131] Weitz at 591
[132] Force at 2069
[133] Freudmann at 7
[134] Weitz at 587

4) Moreover, the nautical fault exception covering the management of the ship is in conflict with the carrier's duty of care of Art. III.2 of the Hague-Visby Rules (as laid down above[135]). This has led to several problems of delimitation which resulted in uncertainty on the side of carriers and shippers.

II) Arguments for the nautical fault defence

1) One of the major arguments in favour of the nautical fault defence is that some apportionment of risk is necessary to avoid the carrier bearing too great a risk.[136] Without such an apportionment of risk, the carrier would be in the worst case, a collision, responsible for all damages to the ship, the crew and the cargo.[137]

However, it has to be taken into consideration that both the carrier and the shipper are insured and that the removal of the nautical fault defence would simply shift the liability from cargo interests to carriers, or respectively from cargo insurers to P & I Clubs. This would consequently result in an increase of P & I premiums, which would be passed back to the shipper by means of higher freight rates.[138] The increased risk of the carrier is thus sufficiently compensated by receiving higher freight rates.

[135] See C) III) 2) b).
[136] Weitz at 588
[137] Weitz at 588
[138] Freudmann at 7

The only aspect in this context which supports the nautical fault immunity is that it is a device for risk distribution on different shoulders by spreading the loss among numerous underwriters.[139]

2) The fact that higher freight costs could be the result of the removal of the nautical fault defence, serves as an argument for the retention of this exoneration as well.[140]
But on the other hand, the shipper could effect a saving by paying lower cargo premiums because the insurer does not have to cover loss or damage to the goods occurring in the scenario of an error in the navigation or in the management of the vessel.[141]
Assuming that the relative cost is the same,[142] the higher freight rates do not constitute a disadvantage for the shipper because he saves the equivalent amount by paying lower cargo premiums.

3) A further argument for the nautical fault excuse is that its deletion would abandon settled terminology, which has been developed over the last century and that a new wave of litigation would be the result.[143] The current situation involves a high degree of international uniformity with a resulting reduction in costs of litigation, which would be jeopardised by the common deletion of the nautical fault defence.[144]
As laid down above, the level of consensus in relation to the meaning and implications of the nautical fault defence is so comprehensive that an overall international uniformity is achieved. Moreover, the argument of retaining the degree of uniformity is not convincing because it would always apply when a former statute gets replaced by a new one. This ar-

[139] Mandelbaum at 488
[140] Makins at 666
[141] Ibid at 667
[142] Berlingieri at 942
[143] Weitz at 588
[144] Ibid at 588

gument would therefore be in every case an obstacle to the modernisation of the law in general.

III) Conclusion

As a conclusion, the arguments for the nautical fault defence could be countered by reasonable objections. The only conclusive aspect is that the risk is distributed between the cargo insurers and the P & I Clubs. In case of an error in the navigation or in the management of the ship, the cargo insurers are finally liable, whereas in every other case of loss or damage to the goods while they are on board the vessel, the P & I Clubs are held responsible at the end. However, it should be the aim of every mode of transport, that the risk is always borne by just one party, and the whole idea behind the allocation of risk is to determine when the risk is borne by the one party and when by the other.

Against this background, it is not a conclusive objection that the risk has to be reallocated, it is rather a necessity when a regime of liability is changed and modernised. As the carrier is in possession of the goods while they are on board of the vessel, it is reasonable that he is generally liable for loss or damage to the goods from the time when the goods are loaded on to the time they are discharged from the ship. He can only escape liability by relying on a limited number of reasonable immunities, which reflect the special risk he has to face because of the peculiarities of the sea. But the nautical fault defence has lost its historic rationale of the shipowner's inability to control his vessel at sea, and it therefore no longer reflects the perils of the seas.

Moreover, the uncertainties in the interpretation of 'errors in the navigation or in the management of the ship' and the permanent conflict of the nautical fault defence with the car-

rier's duty of care of Art. III.2 of the Hague-Visby Rules speak for the abolishment of this exoneration.

Considering on the one hand the inequitable result that the carrier is capable of exonerating himself for the negligence of his own employees and, on the other hand, the fact that the nautical fault excuse is a major obstacle to achieving an uniform regime of liability for all modes of transport, the arguments against the nautical fault defence should be predominant.

As a result, the nautical fault defence has to be considered as an anachronism and it should be removed.

E) Realisation of the removal of the nautical fault defence

This leads to the question, how the necessary abolishment of the nautical fault immunity should be realised and how an appropriate liability regime should be designed.

In order to find a suitable liability regime, a compromise between the competing interests has to be found.

On the one hand, the carriers support the Hague-Visby Rules and oppose the Hamburg Rules.[145] The reason behind it is the fact that the carriers have to face a higher degree of liability under the Hamburg Rules, inter alia because of the elimination of the nautical fault defence.

[145] Mandelbaum at 484

On the other hand, the shippers advocate the Hamburg Rules and not the Hague-Visby Rules[146] because they favour an increased liability of the shipowner and they particularly want to abolish the anachronistic nautical fault immunity.

These divergent opinions have led to a stalemate and there will be no change unless the competing interests can reach some sort of compromise.[147]

I) The Trigger approach of the United States of America

As an attempt to find a solution, the United States of America suggested a compromise known as the 'trigger approach'. In 1988, the U. S. Department of Transportation developed a trigger mechanism under which the United States would give its consent to both the Hague-Visby Rules and the Hamburg Rules at the same time.[148] It was considered that the Hague-Visby Rules would enter into effect immediately, but the effectiveness of the Hamburg Rules would not occur until more than 20 nations trading with the U. S. have enacted the Hamburg Rules.[149]

First of all, it is questionable whether the trigger approach would already be in effect because the Hamburg Rules have only been signed by minor commercial powers, which are not significant trade partners of the United States of America.

Furthermore, the trigger approach found neither acceptance on the side of the carriers, nor on the side of the shippers[150] and it therefore did not help to break the stalemate.

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[146] Rendell at 5
[147] Force at 2054
[148] Mandelbaum at 484
[149] Rendell at 7
[150] Mandelbaum at 485

II) The Scandinavian compromise

Finland, Norway, Sweden and Denmark have incorporated into their Hague-Visby Rules many parts of the Hamburg Rules, which are not incompatible with the text and underlying policies of the Hague-Visby Rules.[151] These countries believe that the Hamburg Rules look to the future and they implemented as much of the Hamburg Rules in the new legislation as it is allowed by the existing Hague-Visby Rules.[152]

The Scandinavian countries have retained the nautical fault and fire immunities, the limits of liability and the one-year limitation period of the Hague-Visby Rules.[153]

As stated above, this dissertation concludes that the nautical fault defence is an anachronism and that it should be removed from a future liability regime. But the Scandinavian compromise retains the nautical fault defence without any change, thus this approach cannot be considered as a solution in the attempt to find an appropriate liability regime.

III) The initiative of the CMI

For the past few years, the Comite Maritime International (CMI) has been engaged in an initiative to assess the opinion in relation to the current transport regimes, and to formulate a direction towards a new regime. This initiative has now picked up speed, with the formation of a working group to analyse the responses to the CMI's questionnaire on Issues of Transport Law, and then to begin the formation of draft principles. It is the CMI's hope that these draft principles will be able to be put before the United Nations in a presentation scheduled for June 2000, and that they will again be discussed at a CMI sponsored confer-

[151] Force at 2053
[152] Mandelbaum at 493
[153] Force at 2053

ence scheduled for September 2000 in Toledo, Spain. The working group will then prepare a follow-up document to be placed before a further conference in Singapore scheduled for March 2001.

In regard to the nautical fault defence, different views have prevailed within the working group, and 'the question whether the exemption should be retained remains open'.[154] But the report of the working group refers additionally to a document approved by the Paris CMI Conference in 1990, where it is stated that at that time the 'strongly prevailing view' was that the exemption should be retained.[155]

However, the working group has not reached a consensual opinion yet, thus it is too early to assess the CMI's initiative. Anyway, it should be hoped that the CMI will help with its initiative to break the stalemate of the past years.

IV) The Proposal of the United States Maritime Law Association

In 1995, the Maritime Law Association adopted a proposal for the revision of the United States Carriage of Goods by Sea Act of 1936. The proposal intends to be an amalgam of the Hague-Visby Rules and the Hamburg Rules and it tries to place U. S. law in line with the Hague-Visby Rules.[156]

At the moment, a new bill is expected to be introduced shortly in the United States of America, and enactment will probably occur in 2000.[157] However, it can not be assessed yet whether the proposal of the Maritime Law Association will be acknowledged in the new bill.

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[154] CMI News Letter, No. 2 - 1999 at 3
[155] Ibid at 3
[156] Weitz at 589

In detail, the nautical fault provision in section 4 (2) (a) of the Draft of the Maritime Law Association reads as follows:

> *The carriers and their ships shall not be responsible for loss or damage arising or resulting from:*
>
> *(a) Act of the master, mariner, pilot, or servants of the ocean carrier in the navigation or in the management of the ship, unless the person claiming for such loss or damage is able to prove negligence in the navigation or management of the ship.*[158]

This modified nautical fault defence aims to be a sensible and workable compromise to obtain the approval of the interests concerned with the carriage of goods by sea.[159]
On the one hand, the carrier's interests are satisfied, because the nautical fault defence is principally retained.
The proposal complies on the other hand with the shipper's interests, because they can avoid the application of this exoneration when they are able to prove negligence in the navigation or management of the ship. Consequently, the modified nautical fault defence no longer would excuse negligence of the master, mariner, pilot or servants of the carrier in the navigation or management of the vessel, when the shipper can prove the negligence.

The reversal of the onus of proof serves as a concession towards the carrier.

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[157] Augello at 1
[158] Mandelbaum at 495
[159] Weitz at 590

Under the Hague-Visby Rules, the onus of proof is upon the carrier that the nautical fault defence is applicable and that his employees acted negligently in the navigation or in the management of the ship.[160]

In contrast, the proposal stipulates that the shipper has the onus of proof of the negligence in the navigation or management of the ship when he wants to avoid that the carrier escapes liability.

The reversal of the onus of proof is however the main criticism of the proposed draft. Generally, the risk of loss or damage should be borne by the party who is in the better position to prevent it, and the party who controls or has access to evidence of how the loss or damage occurred should be required to prove that it did not result from his fault or that it resulted from one of the expected perils.[161]

It is a heavy and sometimes even impossible onus for the shipper to prove negligence on the part of the carrier's employees, because he has no effective means of finding out what has happened on board the carrier's vessel while she was on the sea. Conversely, the carrier, as the owner of the vessel and as the employer of the master and the crew, has the possibility of discovering the happenings on board the ship. For this reason, it should be the obligation of the carrier to prove negligence of his employees and that the nautical fault defence is applicable.

Hence, it is suggested that the hybrid proposal of the U. S. Maritime Law Association is not a suitable liability regime which could break the current stalemate.

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[160] See C) I)

[161] Weitz at 590

V) Mandelbaum's qualified nautical fault defence

Samuel Robert Mandelbaum suggests a qualified nautical fault defence in order to find a fair and logical compromise.[162]

The qualified nautical fault defence should apply to circumstances where the shipowner is unable to exercise reasonable control over his vessel, master and crew, or where the shipowner is unaware of facts and circumstances leading to the negligence of his master and crew in their operation and management of the vessel.[163] As an example, Mandelbaum refers to situations where an unexpected technical problem in communication prevents conveyance of a shipowner's directions to his master and crew, or where a shipowner does not know the negligent propensities of his master and crew due to concealment.[164] Besides, the shipowner should have the burden of presenting evidence to establish his lack of control or lack of knowledge of facts under these circumstances.[165]

This approach is based on the historic rationale for the nautical fault defence, that the carrier has no more control over his vessel, captain and crew once she has left port and is on her voyage. But the qualified nautical fault defence takes into consideration that this scenario is of ancient nature because of the technical improvements of the last century. The qualified nautical fault excuse should therefore only be available in situations in which the historic rationale of the nautical fault defence is still applicable.[166] This is the case in the two above described qualifications, when the shipowner is either unable to exercise reasonable control over his vessel, master and crew, or where he is unaware of facts and cir-

[162] Mandelbaum at 501
[163] Ibid at 501
[164] Ibid at 501
[165] Ibid at 501
[166] Ibid at 501

cumstances leading to the negligence of his master and crew in their operation and management of the vessel.

This compromise should obtain the approval of both the shippers and the carriers.
The shippers should consent because the area of application of the nautical fault exoneration is decreased and the carrier is thus exposed to a higher liability.

The carriers should agree with the modification as well, because it is based on the historic rationale of the nautical fault excuse. The change merely constitutes a transformation of the anachronistic feature of the nautical fault defence into a current and modernised shape. Considering the facts that the existence of the nautical fault defence is disputed since its occurrence in 1893, that the latest introduction of a liability regime, the Hamburg Rules, abolished the defence entirely, and that several unsuccessful attempts to find a compromise have led to a wide reaching stalemate at the end of the last century, the carriers should finally accept the reduction of the scope of application of the nautical fault defence to its historic rationale.

This qualified nautical fault defence should present no major obstacle to achieving an uniform regime of liability for all modes of transport, although it is not available in any other liability regime. Because of the special perils of the sea and the particular risk a carrier has to face, it is arguably justified to retain the nautical fault defence in a qualified form.

F) Conclusion

Although this dissertation proposes that the anachronistic nautical fault defence should principally be removed, the deletion of the exoneration in its entirety is not practicable, because it would be opposed by the carriers. Accordingly, the main issue is to find a workable compromise, which would lead out of the stalemate of the past decades.
The proposal of Mandelbaum constitutes such a compromise. The retention of the nautical fault defence in a qualified form can reach the degree of consensus, which is necessary to adopt an uniform liability regime.

The qualified nautical fault defence can generally be either embedded in a modernised form of the Hague-Visby Rules, or in the Hamburg Rules. But it has to be taken into account that the international trend regarding the drafting of cargo liability regimes points towards the modernisation of the Hague-Visby Rules, rather than introducing a completely new liability regime, such as the Hamburg Rules.[167]

[167] Weitz at 593