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Nautical Fault

**A Historical and Multi-jurisdictional Study of the Exemption for Errors
Relating to Navigation and Management of the Vessel in Modern
Carriage Law**

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Abstract

Nautical fault is the favourite problem child of many commentators and interests in the shipping industry. The debate surrounding the nautical fault exemption has recently been revived in the context of the negotiation and drafting of the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly] [By Sea]. Indeed, the concept of nautical fault has been debated in academic, legislative, and industry circles for decades, with the issue resurfacing each time an attempt is made to modernize the law of carriage of goods by sea, either domestically or internationally. The frequency of debate by no means implies a comprehensive understanding of nautical fault. Rather, the importance of nautical fault and the role it plays in modern carriage law is often misunderstood and underplayed. The majority of commentators and cargo interests view the nautical fault exemption solely as an anachronistic holdover from an earlier era in shipping.

This thesis challenges the modern assumptions surrounding nautical fault by demonstrating both its importance and its relevance to the modern law of carriage of goods by sea. This thesis therefore attempts to reconcile all the factors impacting and impacted by nautical fault, and provide a clear, complete and comprehensive study of the exemption. It examines the history, rationale, and jurisprudence underlying the nautical fault exemption. It investigates the challenges posed by failed attempts to modernize international carriage law and unilateral actions by a variety of states. Finally, it recognizes the importance of uniformity in international carriage of goods, an ideal currently under siege for which the UNCITRAL Draft Convention provides little relief.

Legislators and drafting committees have at times differed in their approaches to the nautical fault exemption, thus undermining the uniformity that had been achieved in the international carriage of goods by sea during the first half of the 20th century. Only armed with an understanding of the scope, meaning and pervasive nature of the nautical fault exemption, can legislators and drafting committees hope to achieve a workable solution, palatable to both carrier and cargo interests, to the increasing disunity plaguing carriage today.

Further, the shipping industry and the interests involved have changed dramatically since the emergence of the nautical fault exemption in the 19th century. An examination of the historical development of carrier liability and nautical fault provides a background against which a discussion of recent developments may unfold. This thesis considers the lessons learned along with those that ought to have been learned, during past attempts at creating a modern, uniform law of carriage. We are currently entering uncharted waters with respect to the UNCITRAL Draft Convention, and therefore this thesis investigates the this recent push for harmonization and its impact on nautical fault.

This thesis concludes with the proposal that nautical fault is an integral part of the law of carriage whose importance must not be underestimated, and as such a careful examination of any and all implications of the removal of the exemption from uniform law is recommended.

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Glossary of Acronyms and Abbreviations

All E.R.	All England Reports
AMC	American Maritime Cases
BIMCO	The Baltic and International Maritime Council
CIFFA	Canadian International Freight Forwarders Association
C.L.R.	Commonwealth Law Reports (Australia)
CMI	Comité Maritime International
CMR	Geneva Convention on the Contract for the International Carriage of Goods by Road, 1956
COA	Contract of affreightment
COTIF	Berne Convention Concerning International Carriage by Rail, 1980
D.L.R.	Dominion law Reports (Canada)
DMF	Droit Maritime Français
E.R.	English Reports
ETL	European Transport Law
Ex. C.R.	Exchequer Court Reports (Canada)
F.C.	Federal Court Reports (Canada)
F.L.R.	Federal Law Reports (Australia)
Hague Rules	International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924
Hamburg Rules	United Nations Convention on the Carriage of Goods by Sea, 1978
HGB	Handelsgesetzbuch (Commercial Code of Germany)
ICS	International Chamber of Shipping
IMO	International Maritime Organization

ISM Code	International Management Code for the Safe Operation of Ships and for Pollution Prevention
ISPS Code	International Ship & Port Facility Security Code
IUMI	International Union of Marine Insurance
JIML	Journal of International Maritime Law
JMLC	Journal of Maritime Law and Commerce
K.B.	Reports of the King's Bench Division (England)
Ll. L.Rep	Lloyd's List Law Reports
Lloyd's Rep.	Lloyd's Reports (Pre 1950, titled Lloyd's List Law Reports)
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
MARPOL	International Convention for the Prevention of Pollution from Ships
MTSA	US Maritime Transportation Security Act 2002
MLAANZ	Maritime Law Association of Australia and New Zealand
NIT League	National Industrial Transportation League
NYPE	New York Produce Exchange
NVOC	Non-vessel operating carrier
NVOCC	Non-vessel operating common carrier
OLSA	Ocean liner service agreement
P	Probate, Divorce and Admiralty Decisions of the English High Court of Justice
Q.B.	Reports of the Queen's Bench Division (England)
S.C.R.	Supreme Court Reports (Canada)
SMA	Society of Maritime Arbitrators (New York)

SMS	Safety Management System
SOLAS	International Convention for the Safety of Life at Sea, 1974
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978
Tul. Mar. L.J.	Tulane Maritime Law Journal
U.B.C. L.Rev	University of British Columbia Law Review
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Draft Convention	UNCITRAL Draft convention on the carriage of goods [wholly or partly] [by sea]
UNCTAD	United Nations Conference on Trade and Development
UNIDROIT	Institut International pour L'Unification du Droit Privé
U.S.	United States Supreme Court decisions.
U.S. COGSA	United States Carriage of Goods by Sea Act, 1936.
USF Mar. L.J.	University of San Francisco Maritime Law Journal
Visby Protocol	Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968
Va. L. Rev.	Virginia Law Review
Warsaw Convention	Convention for the Unification of Certain Rules relating to International Carriage by Air of 1929, as amended by the Hague Protocol 1955 and the Montreal Protocol 1975.
WSC	World Shipping Council

Introduction

In antiquity, carriage of goods by sea was instrumental in the development of large-scale commerce. In modern times, sea carriage remains the foundation upon which global commerce is built. Central to the shipping industry is the relationship between cargo interests and carriers. This relationship, governed by contract, domestic law and international law, has at its very core the balance between the obligations incumbent on the carrier and the limitations and exemptions from which he benefits. Of those exemptions, one that has been a central issue in carriage litigation for well over a century is nautical fault. This exemption has its roots in the exculpatory clauses incorporated by shipowners into bills of lading in the 19th century. The modern incarnation of nautical fault is found enacted in Article IV(2) of the Hague and Hague-Visby Rules, which provides “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) 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.”

Nautical fault, despite its longstanding presence in shipping practice, statutory instruments, and uniform liability regimes, is a subject of controversy. It is an issue that is frequently discussed; yet often misunderstood. Too easily dismissed as an anachronistic holdover from the time of wooden ships and iron men, commentators have the tendency to underplay both its importance and relevance to the modern law of carriage. The same may be said of legislators. On two separate occasions, UNCITRAL drafting committees have declined to include the nautical fault exemption in uniform law. The first instrument, the Hamburg Rules, failed to gain widespread acceptance. The second instrument, the Draft Convention on the Carriage of Goods [Wholly or Partly] [By Sea], was completed by the Working Group in January 2008, and is due to be presented for consideration during the 41st Session of the Commission in 2008. As such, a detailed study of nautical fault is long overdue. This thesis grapples with the issues surrounding the nautical fault exemption from many perspectives: historical, multi-jurisdictional, international, political and comparative. It endeavours to recast the debate surrounding

nautical fault, which has been distorted by assumptions and misunderstandings, by examining the exemption fully and in context.

Against this background, the first Chapter traces the historical development of the carrier's liability and the origins of the exemption for nautical fault. It outlines the transition from onerous carrier liability under common law to widespread freedom of contract as a result of technological advancements in shipping and the increase in world trade. It considers the impetus for exemption's first appearance in statutory form in the United States Harter Act of 1893, along with the proliferation of domestic legislation that followed. Chapter 2 examines the factors impacting the negotiation and drafting of the Hague Rules, with a particular focus on the nautical fault exemption. This foundational chapter details the emergence of an incredibly successful uniform liability regime governing the carriage of goods by sea. It provides, therefore, a comparative base for assessing subsequent efforts at achieving a harmonized carriage regime. Chapter 3 delves into the rationale for the nautical fault exemption, accounting for all motivating factors, including political, commercial, and practical ones. In Chapter 4, the author undertakes a comparative and multi-jurisdictional study of the meaning of the nautical fault exemption. All aspects of the exemption are examined in great detail, providing useful insights into the operation of nautical fault in a number of key common law and civil law jurisdictions. For further clarity and understanding, Chapter 5 considers the application of the exemption for nautical fault within the context of certain common errors that have been judicially considered over the past century. Chapter 6 explains and illustrates the manner in which nautical fault has been expanded and applied in contexts other than as a defence to cargo claims under bills of lading. It demonstrates that by virtue of the exemption's incorporation into charterparties and its employment in the recovery of general average contributions, nautical fault has permeated the shipping industry far beyond the traditional bill of lading relationship. In contrast to the previous chapter, Chapter 7 addresses the allegations of a recent narrowing of the nautical fault exemption. It canvasses the impact of recent uniform law along with judicial trends, in order to uncover whether such allegations are truly well founded. Chapter 8 addresses the genesis, the drafting process, the politics and the failure of the Hamburg Rules. Building on the

discussion of the Hague Rules in Chapter 2, the forces giving rise to the two carriage regimes are compared and distinguished. It seeks to understand how the fault-based liability regime and the absence of nautical fault contributed to the failure of the Hamburg Rules. Chapter 9 draws extensively from the law of multiple jurisdictions in examining the recent trend in unilateral adoption of carriage regimes. Domestic carriage regimes are reflective of modern commercial compromises made by national shipping interests, and as such serve as potential indicators for international reforms in carriage of goods by sea. Chapter 10 examines the UNCITRAL Draft Convention on the Carriage of Goods, in particular highlighting the removal of nautical fault and the emergence of freedom of contract. It concludes by asking whether the drafters of this new Convention have failed to learn from the lessons of the Hamburg Rules. Chapter 11 builds on the foregoing conclusions by addressing the question of whether one can justify a change with regard to nautical fault, in light of the key findings and ideas of this thesis. It examines the implications of change, along with the realities facing the shipping industry today. The final Chapter makes general observations concerning the future of nautical fault, the quest for uniformity in the law of international carriage of goods by sea and the UNCITRAL Draft Convention. Challenging the common perception of nautical fault, it proposes that nautical fault is an important and integral part of maritime law. As such, it concludes by proposing a careful examination of the ramifications of any change, and an informed and measured approach to the debate surrounding nautical fault.

If one were to state the principal purpose of this thesis, it would be to provide and contribute to a greater understanding of the nautical fault exemption and its meaning within the law of carriage of goods by sea. This previously nonexistent study on nautical fault provides practitioners, legislators and commentators with a wealth of information and the tools with which to address nautical fault both in the context of private practice and legal reform.

A few comments about the multi-jurisdictional nature of this thesis are in order. This thesis considers the law and doctrine of many jurisdictions, with a particular focus on the United Kingdom, United States, France, Canada and other Commonwealth

nations. Rather than divide each chapter, multiple jurisdictions are considered as one body of material, and mention is made only where differences emerge or where comparative scholarship is instructive. The result is most encouraging. With the exception of certain minor variations in the interpretation of the Hague Rules, and in particular nautical fault, one finds that overall the similarities greatly outnumber the differences. Moreover, the frequency with which French authors and jurists refer to English and American authors and jurisprudence, and vice versa, is impressive, and stands as a shining example of many decades of the successful functioning of uniform law in this area.

Finally, by way of introduction to the subject, the etymology of the term “nautical fault” bears consideration. Today, the term is in essence synonymous with the exemption found in Art. IV(2)(a) of the Hague and Hague-Visby Rules. Nautical fault is a direct English translation of the French terminology: *faute nautique*. It is derived from the wording in the French law of the 2nd of April, 1936, which incorporated the articles of the Hague Rules into French domestic law.¹ In the original French language version of the Hague Rules, the phrase “*fautes commises dans l’administration et la navigation du navire*” was used,² however concerns were raised by the French Parliament about the

¹ Marais, G. *Les Transports de Marchandises Par Mer et Jurisprudence: Loi du 2 Avril 1936* (1948) Pichon & Durand-Auzias, Paris, at p. 41. Note that in France laws are identified by the date on which they are passed, and not the name of the particular Act or Statute.

² This was not without contention. French representatives contested the wording during the three years of diplomatic conferences leading up to the 1924 Hague Rules. Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 393, contains the objection made in 1921 by Mr. Dor concerning the wording: “I shall be extremely obliged to Sir Norman Hill if he tells me how we are going to translate into French “navigation and management.” I have tried for the last ten years, and have not succeeded. If you say “navigation and administration du navire”, that is no good, because “administration” is too wide, and it will cover negligence in respect of the cargo. For instance, we had a great number of cases in which the Marseilles Court were holding that “management” did not cover shortage of the cargo, and the Aix Court of Appeal for a good many years held that the Marseilles Court was wrong, and that “navigation” being the nautical side of the ship, “management” would most surely mean the “administration”, and therefore covered all the handling of the cargo and covered the cargo of shortage of cargo. So that if we had cargo, so many bags, missing, it was covered by the exception “management.” Of course it was wrong, and after a good many years the Court of Appeal of Aix recognized it was wrong. But if you put it in French, “administration”, it would certainly cover the handling of the cargo. If you put “navigation and direction du navire”, it does not mean much. What is the “direction du navire”? Our distinction of course is between what we call “fautes nautiques” and “fautes commerciales”, the nautical faults and the commercial faults; but that is not translation. We cannot

potential difficulties concerning the interpretation of the word “*administration*”,³ which does not necessarily have exactly the same meaning as the English term “management”. The French Parliament felt that “*administration du navire*” may be interpreted far too broadly and would therefore exonerate the carrier from liability for errors relating to the stowage of goods.⁴ A simpler formula was devised for the domestic legislation using the term “nautical fault” to refer to all faults or errors in the navigation or management of the vessel, while the term “commercial fault” or *faute commerciale* was used to refer to faults or errors in relation to the loading, handling, stowing, caring for, and discharging of the cargo. Moreover, the French legislature sought to use the term *faute nautique* as it was familiar to the French judiciary, on the basis that it had previously been used in certain bills of lading.⁵ It has been noted by French commentators that the meaning of the term *faute nautique* in their domestic law corresponds exactly with the meaning of the expression used in Art. IV(2)(a) of the Hague Rules.⁶ Ripert explains that “[t]his difference of expression should not be considered as difference of substance: ‘*fautes nautiques*’ are both ‘*fautes*’ of navigation and ‘in the management’.”⁷ The direct English language translation of the term has since become popular for use when referring to the notion of exemption for errors in navigation or management of the vessel.⁸

translate the rule which reads “act, neglect and default of the master”, and so on, “in the navigation or in the management of the ship” by just the “*fautes commerciales*” of the master or pilot or mariners. Therefore, I would be much obliged to Sir Norman Hill if he would give me the way to translate it. You must not forget that this is not only a question between British shipowners and cargo owners.”

³ Marais, G. *Les Transports de Marchandises Par Mer et Jurisprudence: Loi du 2 Avril 1936* (1948) Pichon & Durand-Auzias, Paris, at p. 41.

⁴ Wolfson, R. “The English and French Carriage of Goods by Sea Enactments” (1955) 4 Int’l & Comp. L.Q. 508, at p. 525.

⁵ Chaiban, C. *Causes Legales D’Exoneration du Transporteur Maritime dans le Transport de Marchandises* (1965) Pichon & Durand-Auzias, Paris, at p. 76.

⁶ Marais, G. *Les Transports de Marchandises Par Mer et Jurisprudence: Loi du 2 Avril 1936* (1948) Pichon & Durand-Auzias, Paris, at p. 41; Fraikin, G. & Lafrage, G.H. “Le Transport Sous Connaissance En Droit Francais” in *Le Transport Maritime Sous Connaissance A L’Heure Du Marche Commun* (1966) M. De Juglart & P. De La Pradelle (Eds.), Pichon & Durand-Auzias, Paris, at p. 213, where Fraikin and Lafrage confirm that it is now a given that *faute nautique* corresponds exactly with error in the navigation or management of the vessel as found in the Hague Rules.

⁷ The great French commentator Ripert, as quoted in Wolfson, R. “The English and French Carriage of Goods by Sea Enactments” (1955) 4 Int’l & Comp. L.Q. 508, at p. 525.

⁸ See for example: Weitz, L. “International Maritime Law: The Nautical Fault Debate” (1998) 22 Tul. Mar. L.J. 581; Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen. In Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 501, Carver notes that the exemption of 4(2)(a) is “sometimes referred to by the briefer French phrase ‘*faute nautique*’ or ‘nautical fault’.”

Chapter 1

The Historical Development of Carrier Liability and the Nautical Fault Exemption

Compared to many fundamental concepts in maritime law that have their roots in antiquity, nautical fault is a relatively recent construct. As maritime law developed, through antiquity and into the Middle Ages, carriers had few exceptions to liability. By the 16th and 17th centuries in Europe and America, at common law, carriers remained burdened with strict liability for the goods they carried. To mediate the effects of the common law, shipowners began to insert exculpatory clauses into their bills of lading during the 19th century. The nautical fault exemption was therefore born out of the ability of the 19th century shipowners to contractually limit their liability, and within decades had found its way into national legislation and subsequently international uniform law.

1.1. A BRIEF HISTORY OF CARRIER LIABILITY

“In the dawn of recorded history, when mythology and history were too intermingled to separate the legendary from the authentic, commerce by means of ships was drawing the nations together.”⁹ In 2650 B.C. an unknown scribe listed the accomplishments of Pharaoh Snefru, which included importing forty ships filled with cedar logs from Phoenicia.¹⁰ Despite the rise of large-scale ocean commerce during the Late Bronze age in Egypt and the Middle East, by the last millennium B.C. the Phoenicians, Judeans, Greeks and Etruscans had overshadowed the early Egyptian prominence in commercial shipping.¹¹ Although there had undoubtedly been a large body of pre-existing customary law,¹² it was during this period that written maritime law, and

⁹ Hughes, R. *Handbook of Admiralty Law*, 2nd Ed. (1920) West Pub. Co., St. Paul, Minnesota, at p. 1.

¹⁰ Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 2-3.

¹¹ *Ibid.*

¹² In fact, not only was there a common custom of seamen and merchants in existence, there had also been earlier examples of written maritime law. For example, *The Law of Babylon*, codified by Hammurabi around 2200 B.C. but based on earlier Sumerian laws, included rules regarding collisions, botomry, and reimbursement for leased vessels (*Ibid.* at p. 5).

in particular the Rhodian Laws, emerged.¹³ There is debate surrounding their origin, with authors placing their emergence at differing dates ranging between the 2nd and the 9th centuries B.C.¹⁴ Many view Rhodian Law as the first authoritative and comprehensive maritime code, regulating not only Greek and then Roman commerce, but forming the basis for maritime law for the next one thousand years.¹⁵ It is, however, difficult to discern the extent of the influence of Rhodian Law on subsequent legal systems, as the majority of the laws were lost by modern times, and the remainder survive only through the *Digest of Justinian*, compiled by the Roman Emperor Justinian during the 6th century A.D.¹⁶ Nevertheless, we do see the impact of the Rhodian law on Roman law, as Roman jurists considered that “all nautical matters in litigation are decided by the Rhodian law unless some other is found contrary thereto...”¹⁷

Roman law on maritime matters has been described as “[a] well-developed system of commercial law [that] defined the rights and obligations of the parties to commercial and maritime contracts, and embodies whatever the Romans found useful in Greek law and practice.”¹⁸ This included such topics as general average; “shipowner’s responsibility; ownership of ships; charterparties; freight; collision; salvage; and

¹³ Tetley, W. *Maritime Liens and Claims 2nd Ed.* (1998) Blais, Montreal, Canada, at p. 7; Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 5.

¹⁴ For example Tetley, *ibid*, dates their origin to 800 B.C., while Hare, *ibid*, notes that they were compiled in the 3rd or 2nd century B.C.; Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 7, dates them as well to the 3rd or 2nd century B.C.; Fayle, E. *A Short History of the World’s Shipping Industry* (1933) Dial Press, New York, at p. 58, places their emergence in the 3rd and 4th century B.C.; Gilmore, G. & Black, C. *The Law of Admiralty 2nd Ed.* (1975) Foundation, Minneola, N.Y, at p. 3, are fairly critical of the date, commenting: “A strong tradition says that a maritime code was promulgated by the Island of Rhodes, in the Eastern Mediterranean, at the height of its power; the ridiculously early date of 900 B.C. has even been assigned to this suppositious code – a date accepted uncritically by some legal scholars.”

¹⁵ Flanders, H. *A Treatise on Maritime Law* (1852) Little, Boston and Co., Boston, at p. 4; See Gold, *ibid*, who states “These excellent [Rhodian] laws not only served as a rule of conduct to the ancient maritime states, but, as will appear from the attentive comparison of them, have been the basis of all modern regulations respecting navigation and commerce.” There are those however, who question whether the Rhodian code actually existed, see for example Gilmore & Black, *ibid* at p. 3-4.

¹⁶ Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 5; Flanders, *ibid* at p. 4-5. The Rhodian laws were arranged under one title, *De Lege Rhodia de Jactu*, meaning ‘Of the Rhodian Law of Jettison’. (Tetley, W. *Maritime Liens and Claims 2nd Ed.* (1998) Blais, Montreal, Canada, at p. 8).

¹⁷ Quoted in Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 12; Tetley, *ibid* at p. 8 quotes Emperor Antninus as stating “I, indeed, am Lord of the World, but the law is lord of the sea. Let it be judged by Rhodian Law, prescribed concerning nautical matters, so far as no one of our laws is opposed.”

¹⁸ Fayle, E. *A Short History of the World’s Shipping Industry* (1933) Dial Press, New York, at p. 57.

maritime loans.”¹⁹ With respect to liability for the cargo, a Roman vessel was not obliged to accept cargo, however once it agreed to carry the cargo, the shipowner and crew became responsible for its safekeeping.²⁰ The shipowner was viewed as insuring the safety of the goods delivered and obligated to prevent fraud and robbery.²¹ Where there was loss or damage to goods, the shipowner was liable to cargo interests under *action de recepto*, or praetorian action.²² The shipowner’s liability was not absolute, and Roman law provided for exemptions in certain situations. By the time of the *Digests of Justinian*, losses resulting from shipwrecks and pirate attacks were excused on the basis of *vis major*.²³ Many owners sailed aboard their own ships, managing the business of carriage, however a large number of shipowners “were capitalists pure and simple who took no part in the management of their ship but let them out on hire...to people with more knowledge of the business.”²⁴ Similar to modern times, the charterer was obligated to pay hire, and once having done so, the charterer could then employ the ship as he pleased and receive all the freight.²⁵ Importantly, charterers were treated under Roman law as the owner of the vessel, and as such were liable to cargo interests in the same manner as the owner.²⁶ A contract for freight, recorded in a written “charter-party”, dating from 236 A.D., provides an interesting example.²⁷ The charterparty provided for a specified voyage at a lump sum of freight, 100 drachmas of silver, where the captain of the vessel, who was also the shipowner, bound himself to “provide adequate equipment and a proper crew, to load the goods in two days, and to deliver them safe and undamaged by

¹⁹Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 5, where Hare describes the various maritime legal provisions and topics found in the *Digests of Justinian*.

²⁰ Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 14.

²¹ Mandelbaum, S. “International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules” (1995) 5 J. Transnational L. & Policy 1, at p. 8

²² Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 8-9.

²³ Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 14. Gold notes however, that in earlier Roman law, shipwreck was not an excuse to liability for cargo loss or damage; Mandelbaum, S. “International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules” (1995) 5 J. Transnational L. & Policy 1, at p. 8.

²⁴ Fayle, E. *A Short History of the World’s Shipping Industry* (1933) Dial Press, New York, at p. 58.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid* at p. 59.

seawater.”²⁸ Roman law, strikingly similar to modern carriage law in many ways, provided a well-organized and comprehensive body of maritime law that served as a key influence in subsequent maritime codes and laws.

As the Roman Empire disintegrated, Europe was plunged into the Dark Ages and wide-scale shipping and commerce suffered.²⁹ It has been said that “[t]he merchant dared not risk his person or property in foreign ports.”³⁰ Nevertheless, maritime law was never extinguished and several early maritime codes did emerge between the 7th and the 9th centuries.³¹ What is most significant of the time, was that with the end of the Roman Empire coastal communities in the Mediterranean reorganized into city-states. These new city-states, particularly the Italian ones, gained commercial power during the Crusades by providing marine transportation as well as goods and supplies.³² By the 11th and 12th centuries this had resulted in competitive wealthy trading centres with large fleets, consequently; “maritime law was quickly codified and maritime courts sprang up in most of the cities.”³³

There are a large number of Mediterranean sea-codes and compilations,³⁴ among the most important hail from Venice, Amalfi, Trani on the Adriatic coast, Pisa, Genoa,

²⁸ *Ibid.* Interestingly, the charterparty also provided that if unloading at the port of discharge was not completed within four days, the merchant must pay the owner 16 drachmas *per diem* as demurrage.

²⁹ Dotson, J. *Freight Rates and Shipping Practices in the Medieval Mediterranean* (1969) Ph.D. Thesis, John Hopkins University, at p. 13, who states that between the 5th and 10th centuries commerce suffered a severe decline, noting in particular the raids from Normans and Moslems that seared the coasts of Italy, Southern France and the Iberian Peninsula.

³⁰ Flanders, H. *A Treatise on Maritime Law* (1852) Little, Boston and Co., Boston, at p. 6. Flanders also described the treatment if shipwrecked. The goods were confiscated, and in certain places shipwrecked persons were enslaved. (*Ibid.*).

³¹ The Byzantine Rhodian Sea Law, which was a codification of earlier Rhodian law along with newer customs and usages, appeared between 7th and the 9th centuries (Tetley, W. *Maritime Liens and Claims* 2nd Ed. (1998) Blais, Montreal, Canada, at p. 10; Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 6; Dotson, J. *Freight Rates and Shipping Practices in the Medieval Mediterranean* (1969) Ph.D. Thesis, John Hopkins University, at p. 8). Building on the Byzantine Rhodian Sea Law, was the 9th century *Basilica*, a large codification of Byzantine law under Emperor Basil I, which contained a collection of maritime provisions containing a reinterpretation of the Byzantine Rhodian Sea Law (Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 16; Tetley, *ibid* at p. 11; Dotson, *ibid.*).

³² Gilmore, G. & Black, C. *The Law of Admiralty* 2nd Ed. (1975) Foundation, Mineola, N.Y., at p. 4; Gold, *ibid* at p. 18.

³³ Gold, *ibid.*

³⁴ Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 6, noting a dozen.

Marseille, Jerusalem, Barcelona and the island of Oleron.³⁵ Much has been written about the codes, in particular the *Consolato del Mare* of Barcelona and the Rolls of Oléron, which contain principles of law and reported cases.³⁶ Not only are the codes a key source for the development of modern maritime law, they also provide in certain instances, detailed information on the developments at the time. During the later middle ages, or medieval period, as trade flourished in the city-states, shipping became increasingly regulated. “[T]he regulations of the Italian City States, at any rate, for ensuring the safety of life and property at sea were directly in advance of anything known to English Law a hundred years ago.”³⁷ For example, the Venetian Statutes provided for limits with respect to length and breadth of ships of various sizes, and elaborate regulations on equipment, ballasting, stowage and manning.³⁸ In essence, the Venetian Statutes ensured that vessels were seaworthy, fully equipped and properly manned. Moreover, contracts of the time also addressed the vessel’s seaworthiness. Often the freight contract or charterparty included a clause whereby the shipowner undertook to ensure that his vessel was seaworthy, properly equipped and fully manned.³⁹ This was intended to secure the safe arrival of the merchant’s cargo.⁴⁰ Interestingly, Genoese contracts from the 13th century were often very detailed with regard to the condition of the vessel,⁴¹ while Venetian contracts tended to be much less detailed due to the fact that such matters were closely

³⁵ See Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 18-19, who briefly describes each of the cities, except Barcelona, and their contribution. Barcelona, and its contribution, the *Consolato del Mare*, is discussed at p. 27.

³⁶ Tetley, W. *Maritime Liens and Claims 2nd Ed.* (1998) Blais, Montreal, Canada, at p. 13-21; Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 7-8; Gilmore, G. & Black, C. *The Law of Admiralty 2nd Ed.* (1975) Foundation, Mineola, N.Y, at p. 5-7; Gold, *ibid* at p. 27-28.

³⁷ Fayle, E. *A Short History of the World’s Shipping Industry* (1933) Dial Press, New York, at p. 75-76.

³⁸ Fayle, *ibid*, describes the detail in which the regulations prescribed equipment requirements, the supervising of ballasting, and safety requirements such as the towing of a long boat behind the vessel.

³⁹ Dotson, J. *Freight Rates and Shipping Practices in the Medieval Mediterranean* (1969) Ph.D. Thesis, John Hopkins University, at p. 90.

⁴⁰ *Ibid*, at p. 68.

⁴¹ Dotson, *ibid*, at p. 90 provides an excerpt from a 13th century Genoese contract specifying that the two galleys are to be provided with “three boats of eight oars for each boat, and well prepared, armed and furnished with one hundred men for each galley with its boat, for each galley twenty of the men are to be furnished with armour and [another] twenty [are to be] arbalesters with arbalest of double wood or of horn and all the rest of the men are to be armed with fressetis and lances with all the gear and necessities sufficient for each galley and with oars necessary for rowing ad planum et aposticum and with sails and anchors and cables and all other gear to sufficiency.”

regulated in Venice.⁴² In addition, it was practice in Genoa, for the contracts to provide for inspections, particularly in cases of voyages overseas to Africa and the Levant.⁴³ A representative committee, composed of two to four merchants whose goods were aboard the vessel, would inspect the total equipment of the vessel.⁴⁴ Without the consent of the committee, the ship was not allowed to sail, nor could the shipowners delay the sailing beyond the date fixed by the contract.⁴⁵ There were also increased documentary requirements. Many of the city-states made it compulsory for vessels to carry a Scribe, who kept a book or register detailing the charterparties and agreements along with their terms, the crew information, and all goods aboard the vessel including identifying marks and their owners.⁴⁶ An extract from this book was issued to the cargo owners as a receipt.⁴⁷

The liability of a shipowner for loss or damage to goods remained predominantly unchanged from Roman times. In general, shipowners were liable for damage to goods, but not for the consequences of acts of God or *force majeure*.⁴⁸ There were, however, variations. For example, under Venetian law, the shipowner was not liable for damage to silk goods carried on deck with the shipper's consent.⁴⁹ As well, shipowners began to benefit from global limitations on liability. The *Consulato del Mare* provided that the liability of each owner or co-owner of the vessel was limited to the value of their share of the vessel.⁵⁰ Similarly, a 13th century Reglement de Valence provided that "The ship

⁴² *Ibid*, at p. 91.

⁴³ Byrne, E. *Genoese Shipping in the Twelfth and Thirteenth Centuries* (1930) Mediaeval Academy of America, Cambridge, Massachusetts, at p. 34.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, at p. 35.

⁴⁶ Mankabady, S. "Comments on the Hamburg Rules" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 28; Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 10; Fayle, E. *A Short History of the World's Shipping Industry* (1933) Dial Press, New York, at p. 78; Kendall, L. & Buckley, J. *The Business of Shipping 7th Ed.* (2001) Cornell Maritime Press, Maryland, at p. 337.

⁴⁷ Mankabady, *ibid*; Karan, *ibid*.

⁴⁸ Fayle, E. *A Short History of the World's Shipping Industry* (1933) Dial Press, New York, at p. 79. Where, however, the act of god necessitated sacrifices for the common safety, those losses would fall under general average requiring pro rata contributions from cargo interests and the shipowner (*Ibid*).

⁴⁹ *Ibid*, at p. 78.

⁵⁰ Lustgarten, L. "The Liability of the Carrier by Water in Quebec" (1963) B.C.L. Thesis, McGill University, at p. 44.

owners have no liability than up to their share in the ship – the master of the ship cannot make liable the land property of the ship owner without his consent.”⁵¹

Liability was also addressed by contract. A charterparty made in 1263 for a voyage between Pisa and Bugea, contained a clause stipulating that the shipowner will “observe all terms of the contract unless prevented by tempest or other Act of God. The penalty for any default is to be double damages.”⁵² Contractual liability clauses are also found in the judgements of the Rolls of Oléron, which reflect a similar legal situation to that prevailing in the Mediterranean in the middle ages.⁵³ Due to the prevalence of the wine trade in that region, many charterparty clauses relating to liability specifically addressed the wine trade.⁵⁴ For example, liability for loss or damage caused by negligent stowage of the casks or using insufficient tackle for discharge was specifically provided for by contract.⁵⁵ Perhaps the strictest liability of the middle ages was found in the decrees issued by the Council of the Hanseatic League,⁵⁶ where calling at an unscheduled port or selling the goods without permission was punishable by death.⁵⁷

The body of maritime law that emerged from Europe in the middle ages, in particular *Consolato del Mare* of Barcelona and the Rolls of Oléron, served as an important basis for later European law. It has been noted that “[t]he maritime laws of England and France share a common source, because the written maritime laws of both countries began with the Roles of Oléron.”⁵⁸ In England, the primary source of maritime law, was a collection of prior laws that included the Rolls of Oléron, entitled the Black Book of Admiralty, compiled sometime during the 14th and 15th centuries.⁵⁹ During that

⁵¹ *Ibid.*

⁵² Fayle, E. *A Short History of the World's Shipping Industry* (1933) Dial Press, New York, at p. 82.

⁵³ *Ibid.*, at p. 96.

⁵⁴ *Ibid.*, at p. 97.

⁵⁵ *Ibid.*

⁵⁶ The Hanseatic towns, Hamburg, Lubec, Bremen and others formed a league that stretched from the bottom of the Baltic to Cologne on the Rhine (Flanders, H. *A Treatise on Maritime Law* (1852) Little, Boston and Co., Boston, at p. 21-22).

⁵⁷ Flanders, *ibid.*

⁵⁸ Tetley, W. *Maritime Liens and Claims 2nd Ed.* (1998) Blais, Montreal, Canada, at p. 27.

⁵⁹ Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 39, states that it was compiled during the 14th century, and later elaborated

time, there was a struggle for jurisdiction between the Courts of Admiralty and the common law courts, or Courts of Common Pleas, which continued well into the 19th century.⁶⁰ By the mid-17th century, the Admiralty jurisdiction was significantly reduced, and it remained so for the next two hundred years.⁶¹ As such, by the mid-17th century in England, the jurisdiction of the courts of common law had been extended to include maritime litigation.⁶² The English courts, “by adopting the common carrier’s liability by land as the origin of the custom at common law, obliged carrier’s to deliver goods in the same state as that in which they had received them, and imposed strict liability on all of them regardless of whether they were common carriers or not.”⁶³ There is debate as to the origin and the legal foundation of the strict liability of the common carrier;⁶⁴ however,

during the 15th century. While Tetley, *ibid*, at p. 31, states that it was first compiled during the reign of Henry the VI in the 15th century.

⁶⁰ Tetley, *ibid*, at p. 33-35; Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 11-12.

⁶¹ Tetley, *ibid*, at p. 33; Hare, *ibid*, at p. 12.

⁶² Gorton, L. *The Concept of the Common Carrier in Anglo-American Law* (1971) Laromedelaferl, Gothenburg, at p. 94.

⁶³ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 11. Interestingly enough, “in maritime law, there is no good reason for distinguishing between a common carrier, who is a person not having any right to refuse to carry goods, and a private carrier, who is one reserving the right to accept cargo interests offers, because both of them are carriers undertaking to transport cargo by sea, this separation belongs to land transport rather than sea carriage.” (Karan, *ibid*, at p. 11, f.n. 15). Other authors have argued that there is no reason why a carrier should not be characterized as a common carrier, citing 19th century jurisprudence holding a shipowner liable as a common carrier for refusing to carry the plaintiff and his luggage by sea. (Glass, D. & Cashmore, C. *Introduction to the Law of Carriage of Goods* (1989) Sweet & Maxwell, London, at p. 160.) Nevertheless, the distinction between common carriage and private carriage has taken on meaning over time. Essentially, all shipowners who “offer their ships as general ships for the transit of the goods of any shipper” are common carriers. (Boyd, S. *Scrutton on Charterparties and Bills of Lading*, 20th Ed. (1996) Sweet & Maxwell, London, at p. 200). Where a ship is chartered to one shipper and contains an express stipulation in the contract of affreightment, the law does not consider him to be a common carrier (Boyd, *ibid*, at p. 201). The distinction between private and public carriage has implications with respect to liability: “The common carrier was chargeable as an insurer of the goods, accountable for any damage or loss happening in the course of the conveyance. There were only narrow exceptions to this liability...By contrast, the shipowner engaged in private carriage was not subject to insurer’s liability, but was only liable for loss or damage to the extent this was proximately caused by a breach of an obligation contained in a contract of carriage.” (Bauer, G. “The Measure of Liability for Cargo Damage Under Charter Parties: A Second Look” (1990) 21 JMLC 397, at p. 398, quoting Professor Schoenbaum).

⁶⁴ In *Nugent v. Smith* (1876) 1 C.P.D. 423 at p. 430, Cockburn C.J. opined that “the strict liability of carriers was introduced by custom in the reigns of Elizabeth I and James I as an exception to the ordinary rule that bailees were bound to use ordinary care.” (Boyd, S. *Scrutton on Charterparties and Bills of Lading*, 20th Ed. (1996) Sweet & Maxwell, London, at p. 203). This view is opposed by Oliver Wendell Holmes who argues that strict liability actually predates the law of bailment, and thus the present liability of common carriers is a survival of the old law (Holmes, O. *The Common Law* (1881) Little Brown, Boston, at p. 184). For a comprehensive and in-depth discussion of the different theories surrounding the

several authors have generally characterized the carrier's liability as arising from the breach of the bailment relationship.⁶⁵ Moreover, aside from the legal foundation underlying the carrier-shipper relationship, there was also a public policy rationale behind the onerous liability placed on carriers: "at common law it was believed that a cargo owner who shipped his goods by a marine carrier should be afforded special protection; he was prevented, by geographic remoteness, from closely supervising the passage of his goods and he was particularly susceptible to collusion between dishonest carriers and thieves."⁶⁶ The carrier was, however, afforded a measure of protection at common law. The carrier would not be held liable for cargo damage provided the damage resulted from: i) an act of god, ii) act of public enemies, iii) shipper's fault, or iv) inherent vice of the goods.⁶⁷ The carrier only benefited from the four exemptions provided that neither his fault, nor the fault of his servants, had contributed to the loss.⁶⁸ In all other instances, the carrier was liable regardless of the absence of fault. Given that strict liability was a fairly

origin of carrier liability see Ping-fat, S. *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at pp. 2 – 9.

⁶⁵ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 11; De Wit, R. *Multimodal Transport: Carrier Liability and Documentation* (1995) LLP, London, at p. 29.

⁶⁶ Sturley, M. *Benedict on Admiralty*, 6th Ed., Volume 2A (1990) Matthew Bender & Co, New York, at p. 2-1. This is essentially a restatement of the original justification for the liability of common carriers. Lord Holt in *Coggs v. Bernard* (1703) 2 Ld.Raym. 909 (K.B.) at p. 918 opined that the reason for the common carrier's liability is to avoid "collusion whereby the carrier may contrive to be robbed on purpose and share the spoil." See also Gilles, S. "Negligence, Strict Liability, and the Cheapest Cost-Avoider" (1992) 78 Va. L. Rev. 1291, at p. 1362 – 1367, who examines the rationale in *Coggs v. Bernard*, along with other 18th century common carrier liability cases, in the context of a cheapest cost-avoider analysis.

⁶⁷ Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 4; The list of the exemptions vary slightly, with Scrutton and Knauth omitting 'shipper's fault' (Boyd, S. *Scrutton on Charterparties and Bills of Lading*, 20th Ed. (1996) Sweet & Maxwell, London, at p. 200; Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 116), and Karan adding a 5th exemption: general average (Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, p. 12), while Carver added jettison (Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 421-422). Lord Tenterden, also lists what appears to be the classic three exemptions: "it thus appears that at common law a shipowner, like a common carrier, insures the goods he carrier against all events but the vice of the goods themselves (b), the act of God (c), or the King's enemies." (Tenterden, Lord C. A *Treatise of the Law Relative to Merchant Ships and Seamen* (1901) Shaw & Sons, London, at p. 586).

⁶⁸ There appears to be a divergence in the literature concerning the burden proof with regard to the carrier's fault and the availability of the exemptions. In Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 4, it is the carrier that must prove that its negligence had not contributed to the loss or damage in order to benefit from the exemptions. Where as according to Karan, the carrier was able to benefit from the exemptions provided cargo interests were unable to prove that the loss or damage had been occasioned by the fault of the carrier (Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 12).

rare occurrence at that time, in many instances carriers have been described as an “insurer” of the goods.⁶⁹ This level of strict liability imposed on the carrier was not unique to England; rather this approach was adopted both in common law nations, including the United States,⁷⁰ and in civilian nations.⁷¹

Although a similar level of strict liability was found in French law, the theoretical foundation for such liability in France differed slightly from the English approach. In France, the *droit commun* places the carrier under a very strict *obligation de résultat*, meaning that “the contracting party undertakes a duty to obtain the required result”.⁷² The shipowner is therefore under the obligation to ensure that the cargo is delivered in the same quantity and condition to the specified destination. The result is that the carrier is presumed liable for any loss or damage to the goods unless he can prove that he falls within the narrow range of exonerating circumstances that amount to *forces majeures* or *cas fortuits*.⁷³ Note that the notion of *forces majeure*, it stricter than the notion of act of God, in that it must be *imprévisible*, or unforeseeable, and *inévitabile*, or inevitable.⁷⁴ Other continental systems, such as Dutch law and Belgian law, held the carrier liable in

⁶⁹ Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 116; Maude, F. & Polluck, C. *Law of Merchant Shipping* (1881) Henry Sweet, London, at p. 76; Temperley, R. *Carriage of Goods by Sea Act, 1924* (1932) Steven & Sons, London, at pp. 44-45; Tenterden, Lord C. A. *Treatise of the Law Relative to Merchant Ships and Seamen* (1901) Shaw & Sons, London, at p. 586; Best CJ in *Riley v. Horne* (1828) 130 ER 1044 (Com Pleas), at p. 1045 held that the carrier is liable as “an insurer” with the rationale being, “In a state of society such as that we live in – in which we are supplied with the necessaries and conveniences of life by an interchange of the produce of the soil and industry of every part of the world – so much property must be entrusted to carriers, that is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible; and that they should be such as to provide for the safe conveyance of property...”; The United States Supreme Court in *Niagara v. Cordes*, 62 U.S. 7 (1858) held that common carriers by water, like common carriers by land, in the absence of legislative provisions providing otherwise, are insurers of the goods, and as such are liable for all loss or damage.

⁷⁰ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 12.

⁷¹ Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 4.

⁷² De Wit, R. *Multimodal Transport: Carrier Liability and Documentation* (1995) LLP, London, at p. 33-34.

⁷³ Song, S. *A Comparative Study on Maritime Cargo Carrier's Liability in Anglo-American and French Laws* (1970) PhD Thesis, Cornell University, Ann Arbor, Michigan, at p. 124; De Wit, *ibid*, at p. 34 provides the four exceptions: *cas fortuity*, *force majeure*, *vice proper de la chose* and *faute d'un tiers ou de créancier*. The first two translate to coincidence and overwhelming force, which are considered to be when there is a force against which the debtor is helpless. While the third is inherent defect, and the fourth is fault of the creditor.

⁷⁴ Clarke, M.A. *Aspects of the Hague Rules: A Comparative Study in English and French Law* (1976) Martinus Nijhoff, The Hague, at p. 121.

the same manner as under the French *droit commun*.⁷⁵ German law did as well, holding the shipowner liable for loss or damage to goods, unless the existence of overwhelming force, or *force majeure*, or inherent vice of the goods or their packing, could be proven.⁷⁶

In England, the common law emphasised the care and custody of the goods, as exemplified by the characterization of the carrier as a bailee for reward,⁷⁷ conversely in France the emphasis was placed on the seaworthiness of the ship.⁷⁸ The suitability of the ship was paramount, deriving from the notion of *louage de chose*, or letting, wherein the thing let would be fit for the purpose intended, thus a horse would be sound for ridding and a vessel fit for the sea.⁷⁹ This principle is found in the French maritime legislation of the time. In 1681, Louis the XIV, under the direction of the Finance Minister Colbert, promulgated *L'Ordonnance de la Marine*, which was a national maritime code unique on the continent at the time.⁸⁰ It had its roots in Roman law, the Hanseatic League, Rolls of Oléron, and the *Consolato del Mare*,⁸¹ but for the first time a code was created that “would complete the law already in existence and would reconcile and digest the great variety of ancient customary usages into one consistent and uniform body of positive legislation.”⁸² Article 12 of *L'Ordonnance de la Marine* stipulated that “*Le capitaine perd son fret et répond des dommages-intérêts de l'affrètement, si celui-ci prouve que lorsque le*

⁷⁵ De Wit, R. *Multimodal Transport: Carrier Liability and Documentation* (1995) LLP, London, at p. 34.

⁷⁶ *Ibid*, at p. 35. This however changed with the 1897 *Handelsgesetzbuch*, or German Commercial Code, where the carrier became liable for loss or damage caused by circumstances which a normally diligent carrier could not avoid (*Ibid*).

⁷⁷ *Coggs v. Bernard* (1703) 2 Ld.Raym. 909 (K.B.), at p. 918 “The law charges this person, thus entrusted, to carry goods against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable.”

⁷⁸ Clarke, M.A. *Aspects of the Hague Rules: A Comparative Study in English and French Law* (1976) Martinus Nijhoff, The Hague, at p. 113.

⁷⁹ *Ibid*, at p. 114.

⁸⁰ Li, M. *L'Etat de Navigabilité du Navire* (2005) D.E.S.S. Thesis, Université de Droit, D'Economie et des Sciences D'Aix-Marseille, France. Available online at: www.cdmtdroit.u-3mrs.fr, at p. 5; Hughes, R. *Handbook of Admiralty Law, 2nd Ed.* (1920) West Pub. Co., St. Paul, Minnesota, at p. 6 has rather whimsically commented that “The *Ordonnance de la Marine* of Louis XIV vindicates France from the charge that her people are not fitted for maritime enterprise. It was published in 1681, and is a learned and accurate digest of marine law and usages.” Flanders, H. *A Treatise on Maritime Law* (1852) Little, Boston and Co., Boston, at p. 24, has described *L'Ordonnance* as a “monument of wisdom and learning.”

⁸¹ Gold, E. *Maritime Transport: The Evolution of International Marine Policy and Shipping Law* (1981) Lexington Books, Toronto, at p. 54; Tetley, W. *Maritime Liens and Claims 2nd Ed.* (1998) Blais, Montreal, Canada, at p. 24.

⁸² Gold, *ibid*.

navire a fait voile, it était hors d'état de naviguer."⁸³ Thus, should the shipper be able to demonstrate that when the vessel set sail she was unseaworthy, the Captain forfeits his right to freight and is responsible for any damages suffered by the shipper. Later, this exact provision was reproduced in Article 297 of the French *code de commerce* of 1807.⁸⁴

A brief review of certain key developments in carrier liability over the last few thousand years, demonstrates that in effect, carrier liability for loss or damage to goods remained fairly consistent. The nature and number of exempted perils fluctuated from Roman times, to Medieval Europe, to the common law liability of England, America and Continental Europe, however at no time was the carrier's own fault or negligence excused. Carrier's liability, which for two thousand years had in effect been strict liability, was about to change. This change would come about not through judicial or legislative means, but rather through changes in market forces brought on by advancements in shipping.

1.2. THE CONTRACTUAL ORIGINS OF THE NAUTICAL FAULT EXEMPTION

At common law, the carrier is entitled to limit his liability for nautical fault.⁸⁵ In order to minimize exposure to liability under the common law regime, contractual exemptions from liability in the bills of lading became popular practice near the end of

⁸³ Li, M. *L'Etat de Navigabilité du Navire* (2005) D.E.S.S. Thesis, Université de Droit, D'Economie et des Sciences D'Aix-Marseille, France. Available online at: www.cdmt.droit.u-3mrs.fr, at p. 5; Clarke, M.A. *Aspects of the Hague Rules: A Comparative Study in English and French Law* (1976) Martinus Nijhoff, The Hague, at p. 114.

⁸⁴ Clarke, *ibid*; Li, *ibid*; Tetley, W. "The Lack of Uniformity and the Very Unfortunate State of Maritime Law in Canada, the United States, the United Kingdom and France" [1987] LMCLQ 340, at p. 342, has argued that the 1807 *code de commerce* is one of the great national laws, on the basis of its international and long-term success.

⁸⁵ *Lyon v Mells* (1804) 102 ER 1134 (K.B.), per Lord Ellenborough at 1138; *Steel v State Line SS Co* (1877) 3 A.C. 72 (H.L.), at 88 per Lord Blackburn; See Ping-fat, S. *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 90.

the nineteenth century.⁸⁶ Previously, in the mid 18th century, carriers had attempted to escape the severe common law liability through contractual exemptions, however, the adverse reactions from cargo interests restricted this practice.⁸⁷ The only exemption the shipowner was able to secure in the 18th century was for liability as a result of “dangers of the sea.”⁸⁸ Indeed, a bill of lading issued in 1713 stipulated that the shipowner was not responsible for cargo loss or damage resulting from “the Danger of the Seas”.⁸⁹ In the intervening century however, the nature of shipping fundamentally changed. The financial position of the shipowner was greatly improved both by technological advancements in shipping, such as steam power and steel,⁹⁰ and by the increase in world trade.⁹¹ As the shipowner’s bargaining power increased, the scope of his liability to cargo interests decreased. In its initial form, the exemption only provided an excuse for “errors in navigation” where there had been no negligence on the part of the shipowner, however as the carriers’ bargaining power increased this was expanded over time to include errors in management.⁹² The exemption clause for ‘error in navigation and management of the vessel’ therefore “originated in the nineteenth century subsequent to the advent of

⁸⁶ Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 2. Available online only at: <http://tetley.law.mcgill.ca/maritime>; Wilson, J.F. *Carriage of Goods by Sea*, 3rd Ed. (1998) Pitman, London, at p. 256.

⁸⁷ Todd, P. *Modern Bills of Lading*, 2nd Ed. (1990) Blackwell Law, Oxford, at p. 136; As a result of a 1795 case, *Smith v. Sheppard*, wherein the strict liability of carriers was exemplified, the shipowners became so alarmed that, according to Lord Tenterden, they attempted to have a bill passed that would limit their common law liability. The bill passed the Commons but was thrown out by the Lords, and thus the shipowners were left attempting to alter their liability by contract. (Boyd, S. *Scrutton on Charterparties and Bills of Lading*, 20th Ed. (1996) Sweet & Maxwell, London, at p. 208).

⁸⁸ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 13.

⁸⁹ Kendall, L. & Buckley, J. *The Business of Shipping 7th Ed.* (2001) Cornell Maritime Press, Maryland, at p. 339-340.

⁹⁰ McDowell, C. & Gibbs, H. *Ocean Transportation* (1954) McGraw-Hill Book Co., New York, at pp. 27-30 describes the advent of the steamship in 1807 and subsequent developments throughout the 19th century. Palmer, S. *Politics, Shipping and the Repeal of the Navigation Laws* (1990) Manchester University Press, Manchester, at p. 8, notes that the first commercial use of steam was the Clyde, that went into service in 1812. It nevertheless took time to develop. Steam use on the Irish Sea and coastal routes developed in the 1920s, with the trans-Atlantic trade developing only in the 1940s. (Palmer, *ibid*, at p. 8).

⁹¹ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 13.

⁹² Wilson, J.F. *Carriage of Goods by Sea*, 3rd Ed. (1998) Pitman, London, at p. 256; *Gosse Millerd v. Canadian Government Merchant Marine* [1927] 29 Ll. L. Rep. 190 (C.A.), at p. 91, Lord Justice Scrutton discussed the original wording of the contractual exemption: “The original wording of the English bills was either ‘perils of navigation’, ‘negligence in navigations’, ‘negligence in the cause of the voyage’.”

steamships and the handling of complicated machinery.”⁹³ As the nature of shipping fundamentally changed, the documentation changed along with it: “The rapid development of ocean steamers, built of iron and steel, with Scotch boilers, reciprocating engines and screw propellers, in the decades following the Civil War, resulted in a great expansion of safe and rapid ocean trade, accompanied by an elaboration of shipping documents, banker’s drafts, bills of lading, insurance policies, and devices for the assertion of subrogated tort and contract claims for losses and damages and for avoiding or defending such claims.”⁹⁴ It has been noted that by virtue of the superior bargaining power of the ship owners, extensive exculpatory clauses were inserted into the bills of lading resulting in virtually little or no liability on the part of the carriers.⁹⁵ In particular,

⁹³ Lee, S & Kim, S. “A Carrier’s Liability for Commercial Default and Default in Navigation or Management of the Vessel.” (2000) 27 *Transp. L.J.* 205 at p. 210.

⁹⁴ Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 119.

⁹⁵ Sturley, M. *Benedict on Admiralty*, 6th Ed., Volume 2A (1990) Matthew Bender & Co, New York, at p. 2-1 to 2-2. Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 116, has noted that a shipowner was able to carry goods “when he liked, as he liked, and wherever he liked.” The lack of responsibility on the part of carriers has been judicially noticed in a rather amusing fashion by the 9th Circuit in *Tessler Bros v. Italpacific Line* 1974 AMC 937; 494 F.2d 438 (9 Cir 1974):

“The plight of cargo owners was aptly expressed in *Them Damaged Cargo Blues*, by James A. Quinby:
It is much to be regretted,

That your goods are slightly wetted,
But our lack of liability is plain.
For our latest Bill of Lading,
Which is proof against evading,
Bears exceptions for sea water, rust and rain.
Also sweat, contamination,
Fire and all depreciation,
That we’ve ever seen or heard of on a ship.
And our due examination,
Which we made at destination,
Shows your cargo much improved by the trip.
It really is a crime,
That you’re wasting all your time,
For our Bill of Lading clauses make it plain,
That from ullage, rust or seepage,
Water, sweat or just plain leakage,
Act of God, restraint of princess, theft or war,
Loss, damage or detention,
Lock out, strike or circumvention,
Blockade, interdict or loss twixt ship and shore,
Quarantine or heavy weather,
Fog and rain or both together,
We’re protected from all these and many more.
And it’s very plain to see,
That our liability,
As regards your claim is absolutely nil.
So try your underwriter,

shipowners inserted clauses exempting themselves from the negligence of both themselves and their servants.⁹⁶ The exemption clauses had become all encompassing, so much so that it inspired one commentator remark that “there seems to be no other obligation on a ship owner than to receive the freight.”⁹⁷ The analysis regarding the liability of the shipowner therefore shifted from a fault based analysis to a contractual analysis. Lord Tenterden remarked at the time that “The question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which either according to the general rules of law, or the particular contract of the parties, afford an excuse for the non-performance of the contract.”⁹⁸ With regard to relations between the parties, the result of the proliferation of exemption clauses proved chaotic. At the time, US Congress remarked that bankers were in doubt as to the validity of their security against bills of lading, the cargo underwriters were unaware of the risks they had covered when issuing the policies, and carriers and shippers were in constant litigation.⁹⁹

In France, the provisions of the *code de commerce* with their focus on the vessel proved to be inadequate to deal with the expanding liner trade, and therefore the carrier’s liability became rooted in the general law of obligations,¹⁰⁰ found in article 1147 of the *code civil*.¹⁰¹ The result is that carriage was subject to the general law of contractual

He’s a friendly sort of blighter,
And is pretty sure to grin and foot the bill.”

(Also quoted in Kendall, L. & Buckley, J. *The Business of Shipping 7th Ed.* (2001) Cornell Maritime Press, Maryland, at p. 334.)

⁹⁶ Tenterden, Lord C. *A Treatise of the Law Relative to Merchant Ships and Seamen, 14th Ed.* (1901) Shaw & Sons, London, at p. 587.

⁹⁷ Scrutton, T. *Charterparties and Bill of Lading* (1984) at p. 210, as cited in Lee, S & Kim, S. “A Carrier’s Liability for Commercial Default and Default in Navigation or Management of the Vessel.” (2000) 27 *Transp. L.J.* 205, at p. 209.

⁹⁸ Tenterden, Lord C. *A Treatise of the Law Relative to Merchant Ships and Seamen, 14th Ed.* (1901) Shaw & Sons, London, at p. 579.

⁹⁹ 79 Cong. Rec. 4757, quoted in Sturley, M. *Benedict on Admiralty, 6th Ed.*, Volume 2A (1990) Matthew Bender & Co, New York, at p. 2-3. See also Wolfson, R. “The English and French Carriage of Goods by Sea Enactments” (1955) 4 *Int’l & Comp. L.Q.* 508, at p. 508, describing the demand for legislative action to remove the chaos and abuse that had resulted from the existence of an unlimited freedom of contract.

¹⁰⁰ Clarke, M.A. *Aspects of the Hague Rules: A Comparative Study in English and French Law* (1976) Martinus Nijhoff, The Hague, at p. 115.

¹⁰¹ French Civil Code, 1804, art. 1147: *Le débiteur est condamné, s’il y a lieu, au paiement de dommages et intérêts, soit à raison de l’inexécution de l’obligation, soit à raison du retard dans l’exécution, toutes les fois qu’il ne justifie pas que l’inexécution provient d’une cause étrangère qui ne peut lui être imputée,*

obligations, with the carrier's primary obligation under contract to deliver the goods at the destination in the same good order and condition as received, failing that he was presumed liable, unless he could prove that his failure to perform his obligation was due to a *cause étrangère*.¹⁰² Carriers were nevertheless able to make use of exemption clauses, as art. 1134 of the *code civil* espoused the general principle of freedom of contract.¹⁰³ Shippers protested that such exemption clauses were against public order,¹⁰⁴ however, the French Cour de Cassation upheld exemption clauses inserted in bills of lading.¹⁰⁵

The repercussions of the changes in shipping were not only amongst the parties to the bills of lading, but became a concern amongst certain governments at the time. Despite having a strong merchant fleet in the earlier part of the 19th century,¹⁰⁶ by the mid 19th century however the American owned fleet began to decrease in size as wealthy investors found more profitable alternatives in railroads and factories.¹⁰⁷ What did remain of the American flag merchant fleet was all but destroyed by the Civil War several years later.¹⁰⁸ The decline in the American fleet was drastic. "Whereas in 1860 two thirds of all

encore qu'il n'y ait aucune mauvaise foi de sa part. [Author's translation: The debtor is ordered to pay damages and interest, should there be any, that result from his failure to perform the obligation, or by his delay in performance, provided the failure to perform cannot be justified by a *cause étrangère* and an absence of bad faith on his part.]

¹⁰² Clarke, M.A. *Aspects of the Hague Rules: A Comparative Study in English and French Law* (1976) Martinus Nijhoff, The Hague, at p. 116.

¹⁰³ Art. 1134 of the French Civil Code, 1804, espoused the general principle of contractual freedom, provided it is not illegal or contrary to public policy.

¹⁰⁴ Sauvage, F. *Du Transport des Marchandises par Mer* (1955) Pichon et Durand-Auzias, Paris, at p. 8.

¹⁰⁵ It was held by the Cour de Cassation on several occasions in the late 19th century that carriers were entitled to rely on the faults of their master and crew. The Cour de Cassation accepted the validity of the exoneration clause in their decision of 23 février 1864, D. 1864.1.167, while in their decision of 23 juillet 1878, S. 1879.1.423, they set aside a judgment by the Tribunal de Commerce d'Algiers holding that an exemption for the fault of the crew was contrary to public order. (Song, S. *A Comparative Study on Maritime Cargo Carrier's Liability in Anglo-American and French Laws* (1970) PhD Thesis, Cornell University, Ann Arbor, Michigan, at p. 219 and p.220); See also Sauvage, F. *Les Clauses de Non-Responsabilité des Fautes dans le Contrat de Transport Par Mer en France et a L'Étranger* (1910) Pichon et Durand-Auzias, Paris, at p. 127-129, detailing judgments from the late 19th century validating exemption clauses.

¹⁰⁶ McDowell, C. & Gibbs, H. *Ocean Transportation* (1954) McGraw-Hill Book Co., New York, at p. 21 describes 1800-1840 as the most glorious period in American Maritime history, with over 90% of the country's imports and exports carried on American vessels.

¹⁰⁷ Sweeney, J. "The Prism of COGSA" (1999) 30 JMLC 543, at p. 549.

¹⁰⁸ The American Civil War began in 1861 and lasted until 1865. Sweeney. *ibid*, at p. 551; McDowell, C. & Gibbs, H. *Ocean Transportation* (1954) McGraw-Hill Book Co., New York, at p. 20-23, describing the changes in American shipping from the war of Independence to the Civil War; Safford, J. "The Decline of

export and import tonnage was carried in American bottoms, this had fallen by 1866 to thirty percent, and nine years later to twenty-seven percent... The decline continued at a precipitous rate; in 1881 it was sixteen percent and in 1910 it was but 8.7 percent.”¹⁰⁹ Conversely, Great Britain’s merchant fleet, supported by the Royal Navy, “ruled the waves”.¹¹⁰ In the mid-19th century, the British fleet was more than twice the size of its nearest maritime rival, the United States.¹¹¹ Not only was the British fleet superior in size and numbers but in organization as well, for in 1874, the first modern P&I Club, Steamship Owners’ Mutual Protection and Indemnity Association was organized.¹¹²

By the late 19th century, cargo owning and shipping interests were lobbying the United States government to alter the balance that had become so heavily weighted in favour of the British shipowners¹¹³ Similarly, French shippers were not pleased with the situation, however unlike their American counterparts, they had managed to obtain a few measures of protection through legislation.¹¹⁴ A particular point of indignation was a

the American Merchant Marine, 1850-1914: A Historiographical Appraisal” in *Change and Adaptation in Maritime History: The North Atlantic Fleets in the Nineteenth Century* (1985) Fischer, L. & Panting, G. (Eds.) Memorial University of Newfoundland, St. Johns, at p. 53, noting that the Civil War wreaked havoc on the American shipping industry; Kendall, L. & Buckley, J. *The Business of Shipping 7th Ed.* (2001) Cornell Maritime Press, Maryland, at p. 8.

¹⁰⁹ Safford, J. “The Decline of the American Merchant Marine, 1850-1914: A Historiographical Appraisal” in *Change and Adaptation in Maritime History: The North Atlantic Fleets in the Nineteenth Century* (1985) Fischer, L. & Panting, G. (Eds.) Memorial University of Newfoundland, St. Johns, at p. 53.

¹¹⁰ Sweeney, J. “The Prism of COGSA” (1999) 30 JMLC 543, at p. 551. By 1900, it has been estimated that 52% of the world’s shipping was carried by the British merchant marine (Howarth, *Sovereign of the Seas*, at cited by Sweeney, J. “Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary” (1993) 24 JMLC 1, at p. 9, f.n. 39). It has also been estimated that at the time, that nearly all of the American export trade was carried by 20 British liner companies (Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 120).

¹¹¹ Palmer, S. *Politics, Shipping and the Repeal of the Navigation Laws* (1990) Manchester University Press, Manchester, at p. 1-2; Palmer, S. “The British Shipping Industry, 1850-1914” in *Change and Adaptation in Maritime History: The North Atlantic Fleets in the Nineteenth Century* (1985) Fischer, L. & Panting, G. (Eds.), Memorial University of Newfoundland, St. Johns, at p. 89 noting that “the sailing tonnage of the United States amounted to 1.5. million tons against Britain’s 3.4 million.”

¹¹² Sweeney, J. “The Prism of COGSA” (1999) 30 JMLC 543, at p. 552.

¹¹³ US cargo interests, however, were not the only ones lobbying their government. In 1890, the Glasgow Corn Trade Association complained to the British Prime Minister that “carrier’s bills of lading are so unreasonable and unjust in their terms as to exempt [the carriers] from almost every conceivable risk and responsibility.” (Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 10). French cargo interests shared the same concerns as well (*Ibid*).

¹¹⁴ The position of the shippers was recognized in article 353 of the *code commercial* which allowed insurance against the negligence or faults of the master and crew, which is significant given that French public policy was opposed to allowing insurance against negligence. As well, the shipper had the benefit of articles 221 and 222 of the *code commerciale* which imposed heavy personal responsibility on the master

result of the appearance of bills of lading “which not only excused the carrier from every negligence, but also imposed a lien on the cargo for any indebtedness of the cargo owner, whether connected with the particular shipment or wholly unrelated thereto...”¹¹⁵ In 1889, the Supreme Court of the United States, proceeded in a unanimous decision to invalidate exemption clauses for negligence on the grounds of public policy.¹¹⁶ In effect, these clauses became valid on one side of the Atlantic and invalid on the other, as British courts were willing to enforce such clauses on the basis of liberty or freedom of contract, much as their French counterparts had.¹¹⁷ In response to the decisions of the American courts, British carriers began inserting forum selection clauses stipulating England and applicable law clauses providing for English law.¹¹⁸ It has been noted that “before the American courts could invalidate these new clauses in turn, Congress acted to protect

where there was loss or damage to cargo. (Song, S. *A Comparative Study on Maritime Cargo Carrier's Liability in Anglo-American and French Laws* (1970) PhD Thesis, Cornell University, Ann Arbor, Michigan, at p. 220)

¹¹⁵ Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 120.

¹¹⁶ *Liverpool & Great Western Steam Co. v. Phenix Insurance Co.*, 129 U.S. 397 (1889). In this instance cargo, shipped in a British ship from New York to Liverpool, was lost due to the negligent actions of the crew in grounding the vessel near Holyhead, Wales. The bill of lading contained a clause exempting the shipowner from “negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew...” (*Ibid.* at p. 438). Justice Gray wrote “...the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and as it is everywhere held, an exception, in the bill of lading, of perils of the sea or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants has contributed...It [is] against the public policy of the law to allow stipulations which will relieve [the carrier] from the exercise of care or diligence, or which, in other words, will excuse it for negligence in the performance of its duty, the company remains liable for such negligence.” (*Ibid.* at p. 438 and 441). It should be noted though that the U.S. Federal Courts had been invalidating such clauses on the grounds of public policy for decades prior to the Supreme Court judgment. See *Niagara v. Cordes*, 62 US 7 (1858), as well as *The Branthford City*, 29 F 373 (1886).

¹¹⁷ See *The Ferro* [1893] P. 38, enforcing and applying such a clause, as well as *Tattersall v. National Steamship Co.* (1884) 12 Q.B. Div. 297. See also Lord Justice Scrutton opining on the acceptability of such defences in the 19th cen. English courts in *Gosse, Millerd, Ltd. v. Canadian Government Merchant Marine* (1927) 29 Ll. L. Rep. 190 at pp. 190-191 (H.L.). It has been noted however, that with regard to the enforcement of such clauses that the English courts were more lenient than their French counterparts, and thus English carriers were subject to less liability than the French shipowners. (Clarke, M.A. *Aspects of the Hague Rules: A Comparative Study in English and French Law* (1976) Martinus Nijhoff, The Hague, at p. 117).

¹¹⁸ Sweeney, J. “Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary” (1993) 24 JMLC 1. at p. 8.

American public policy.”¹¹⁹ The result, the Harter Act, has been described as “originally conceived as an instrument of international trade war.”¹²⁰

1.3. INCORPORATION INTO STATUTE: THE HARTER ACT

The drafters of the Harter Act were not the first to contemplate a compromise between cargo and carriers in the form of certain mandatory duties, in exchange for exemption regarding matters of navigation. In 1882, a committee established by the International Law Association, consisting of Liverpool merchants, shipowners, underwriters and lawyers prepared a model bill of lading that could be adopted voluntarily by shipping interests that included such as compromise.¹²¹ “The carrier should be liable for negligence ‘in all matters relating to the ordinary course of the voyage’ such as the stowage and care of cargo, but should be exempt from liability for ‘accidents of navigation’ even though losses might be attributable to the negligence of the crew.”¹²² The International Law Association’s efforts in the end were unsuccessful, as a final agreement was never reached.¹²³ One of the notable shortcomings was the fact that the different interests of various trades were not taken into consideration.¹²⁴ The initiatives of the International Law Association did not go unnoticed by the United States, as a Congressional Report on the first bill concerning exemption clauses in bills of lading did note their efforts.¹²⁵

¹¹⁹ *Ibid.* Technically, Sweeney’s statement should be restricted to the U.S. courts, as the U.S. Federal Court had already held in 1886 that the exclusive law and jurisdiction clauses were against public policy. See *The Branthford City* 29 F 373 (1886).

¹²⁰ Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana, at p. 46.

¹²¹ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 15; Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 6-7; Mandelbaum, S. “International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules” (1995) 5 J. Transnational L. & Policy 1, at p. 10.

¹²² Sturley, *ibid.*

¹²³ This was owing to difficulties of the parties to reach consensus concerning the division of liability and exemptions (*Ibid.*).

¹²⁴ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 17.

¹²⁵ Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 10, f.n. 61.

Nevertheless, the first truly successful compromise between the carriers and shipping interests was achieved when the Harter Act was enacted in 1893.¹²⁶ It has been described as follows: “[A] shipowner should not be entitled to contract out of liability to exercise due diligence to make the ship seaworthy but that, once the voyage had begun, he should be entitled to rely on certain exemptions including those of negligent navigation and negligent management of the ship.”¹²⁷ This compromise bore itself out in the wording of s.3 of the Harter Act, entitled “Limitation of Liability for Errors of Navigation, Dangers of the Sea and Acts of God” which stipulated: “If the owner of vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, 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...”¹²⁸

The primary purpose of the bill, that was to become the Harter Act, was the protection of United States cargo owners against the English monopoly.¹²⁹ Congressman Harter explained to the House: “[The bill] is a measure which deprives nobody of any right, but which by its operation deprive some foreign steamship companies of certain privileges which for many years they have exercised, to the great disadvantage of American commerce.”¹³⁰ Similarly, Justice Brown, in *The Delaware*, when opining on the Harter Act commented that “the evil to be remedied being one produced by the

¹²⁶ “It was the first national statute which established a compromise between carriers’ and shippers’ interests by mitigating the strict nature of the common law, limiting the long list of exemption clauses, and nullifying unreasonable clauses in the list.” Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 19. See also Wheeler, E. “The Harter Act: Recent Legislation in the United States Respecting Bills of Lading” (1899) 33 ALR 801, at p. 801.

¹²⁷ Diamond, A. “The Hague-Visby Rules” [1978] LMLCQ 225, at p. 263.

¹²⁸ 46 U.S.C. § 192.

¹²⁹ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 20; Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 13. In particular, the Bill was regarded as a trade protection measure, particularly for Midwestern grain farmers and flour millers (Sturley, *ibid*).

¹³⁰ Sturley, *ibid*.

oppressive clauses forced upon the shippers of goods by the vessel owners.”¹³¹ Originally, the bill strongly favoured cargo interests, prohibiting clauses that weakened or reduced the obligations to furnish a seaworthy vessel or reduced the obligation to care for the cargo.¹³² There was concern however that the objective of the bill would impede the ability of United States shipowners to compete with the English carriers, therefore exemptions such as nautical fault were added,¹³³ and the absolute duty to furnish a seaworthy ship was reduced to a due diligence obligation.¹³⁴ Congressman Lind, speaking to the House on the Senate amendments to the bill, explained the rationale: “Now, after a master, owner, or charterer has taken every precaution that human ingenuity can suggest in equipping, manning, and in furnishing his vessel, nevertheless, if out on the high seas in stress of weather or in storms, when every man is worn out with watching, if a man falls asleep on the watch or commits any fault of navigation whereby injury results, the master, owner, or charterer is held responsible under the law. To this extent the bill relieves domestic shipping from those burdens.”¹³⁵ The original nautical fault exemption was narrower as it excused the carrier from liability “for damage or loss resulting from error of judgment in navigation or in the management of said vessel, if navigated with ordinary skill and care.”¹³⁶ The exemption was expanded when the bill was amended by the Senate to cover “loss or damage resulting from faults or errors in navigation or in the management” of the vessel thus removing the qualification that it be navigated with ordinary care or skill.¹³⁷ Carver has characterized the reasoning at the time for the nautical fault exemption as resulting from “partly the idea that the master when at sea was out of control of the carrier, partly an assumption that it was difficult to prove what a master should have done in particular circumstances, and also an assumption that the master and crew would in any case act prudently in navigation in the interests of their

¹³¹ *The Delaware*, 161 U.S. 459 (1896) at p. 474.

¹³² Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 12.

¹³³ Sweeney, J. “Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary” (1993) 24 JMLC 1, at p. 12.

¹³⁴ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 20.

¹³⁵ Quoted in Sweeney, J. “Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary” (1993) 24 JMLC 1, at p. 12, f.n. 49.

¹³⁶ Michael Harter introducing the legislation, H.R. 9176, 52d Cong., 1st Sess (1892), as quoted by Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 12-13, quoted also by Sweeney, *ibid*, at p. 12-13.

¹³⁷ Sturley, *ibid*, at p. 14.

own safety and that of the owner's property."¹³⁸ It has been argued however that the eventual scope of the provision was intended to be significantly less expansive. "Apparently, with negligent navigation the drafters had in mind the idea of immunizing the owners only from liability for catastrophic losses in collisions or groundings, but they used language which could easily be expanded to include all acts of seamanship occurring on a vessel."¹³⁹ Although, this is difficult to confirm as "the record is lamentably void as to the bargaining that produced these policy-based defences in the unreported committee hearings and unrecorded proceedings in the House and Senate."¹⁴⁰ After the Senate had amended the bill, it was viewed that "the result was a more balanced compromise between cargo and carrier interests."¹⁴¹ The amended bill passed through the Senate without debate, the House concurred with the amendments without any dissent, and therefore President Harrison signed it on the 13th of February 1893.¹⁴²

1.4. PROLIFERATION OF NATIONAL LEGISLATION

The Harter Act proved to influence other nations, as just over a decade later similar legislation had been enacted in several countries.¹⁴³ Australia,¹⁴⁴ New Zealand,¹⁴⁵ Canada,¹⁴⁶ and Morocco,¹⁴⁷ Fiji,¹⁴⁸ all adopted legislation styled after Harter.¹⁴⁹ Other

¹³⁸ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 447.

¹³⁹ Sweeney, J. "UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods" (1991) 22 JMLC 511, at p. 516.

¹⁴⁰ Sweeney, J. "The Prism of COGSA" (1999) 30 JMLC 543, at p. 553-554.

¹⁴¹ Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 13, although Sturley notes that regardless of the compromise the prime purpose remained the protection of domestic cargo interests from British carriers.

¹⁴² Sturley, *ibid*, at p. 14; Sweeney, J. "Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary" (1993) 24 JMLC 1, at p. 12-13.

¹⁴³ Sweeney, J. "The Prism of COGSA" (1999) 30 JMLC 543, at p. 555; Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 122; Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 20; Sturley, *ibid*, at p. 15-18.

¹⁴⁴ Sea Carriage of Goods Act, 3 Commonwealth Acts 37 (1904).

¹⁴⁵ Shipping and Seaman Act, Acts No. 96, (1903).

¹⁴⁶ Water Carriage of Goods Act, 9&10 Edw. VII, ch. 61 (1910).

¹⁴⁷ Code de Commerce Maritime (Maritime Commercial Code), 1919.

¹⁴⁸ Fiji Ordinance XIV of 1906.

¹⁴⁹ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Sweeney, J. "The Prism of COGSA" (1999) 30 JMLC 543, at p. 555; Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 122; Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 20; Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 15-18. Note that Cole, S. *The Hague Rules Explained: Being the Carriage of Goods by Sea Act, 1924*

nations, such as Denmark, Finland, France, Iceland, the Netherlands, Norway, South Africa, Spain and Sweden, had all contemplated introducing legislation modelled after the Harter Act.¹⁵⁰ The Harter Act was not simply copied; rather several nations altered the provisions to a certain extent,¹⁵¹ in most cases rendering them more onerous on the carrier.¹⁵² The Canadian Water Carriage of Goods Act of 1910, altered the benefits for both cargo interests and carriers.¹⁵³ With regard to cargo interests, forum selection clauses that lessened the jurisdiction of the Canadian courts were prohibited,¹⁵⁴ and a specific package limitation was added in order to prevent carriers from inserting clauses in the bill of lading limiting his liability to a lower amount.¹⁵⁵ With regard to carriers, they benefited from an expanded list of exemption clauses.¹⁵⁶ It was this formula found in the Canadian Water Carriage of Goods Act, that ultimately formed the basis for the Hague Rules. Although the Hague Rules did differ in certain respects from the Canadian

(1925) Effingham Wilson, London, contains the texts of many of the early pre-Hague national acts and their amendments, including the U.S., Canada, and Australia.

¹⁵⁰ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 23; Karan, *ibid*; Sturley, *ibid*, at p. 17-18.

¹⁵¹ The Dominion Acts, Canada, New Zealand, and Australia, were not uniform in their provisions, thus giving rise to difficulties. (Maclachlan, D. *Treatise on the Law of Merchant Shipping*, 7th Ed. (1932) Sweet & Maxwell, London, at p. 364).

¹⁵² Australia's Act was more generous to cargo interests in several respects: it removed the due diligence qualification to the seaworthiness obligation, in essence rendering it "absolute" and it prohibited choice of law clauses that avoided the application of Australian law for shipments outbound shipments from Australia (Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 15). New Zealand, followed Australia's example, essentially copying the Australian Act directly (*Ibid*).

¹⁵³ Water Carriage of Goods Act, 9&10 Edw. VII, ch. 61 (1910).

¹⁵⁴ *Ibid*, section 5: "...any stipulation or agreement purporting to oust or lessen the jurisdiction of any Court having jurisdiction at the port of loading in Canada in respect of the bill of lading or document, shall be illegal, null, and void, and of no effect."

¹⁵⁵ *Ibid*, section 8: "The ship, the owner, charterer, master or agent shall not be liable for loss or damage to or in connection with goods for a greater amount than one hundred dollars per package..." See also Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 21.

¹⁵⁶ Water Carriage of Goods Act, *ibid*, section 6 and 7. The list now included: latent defects, fire, any reasonable deviation, strikes, and losses arising without the carrier's actual fault or privity or without the fault or neglect of his agents, servants or employees.

Water Carriage of Goods Act,¹⁵⁷ the carrier's exemptions, including nautical fault, were essentially taken verbatim.¹⁵⁸

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¹⁵⁷ For example, time for suit was expanded, the package limitation was increased, and the notice of claim provisions were altered. See Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 24; Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 23-24.

¹⁵⁸ Sturley, *ibid.*

Chapter 2

Incorporation Into Uniform Law

After the First World War it became apparent that uniformity in bills of lading terms, and in the legal regimes governing them, was desirable in order to facilitate international trade. Moreover, an international regime was also considered desirable and advantageous by the shipping industry,¹⁵⁹ as at the time, there existed a general divergence in the treatment of exemption clauses. Certain nations permitted shipowners to exempt themselves from liability by contract, notably, England, France, Sweden, and Norway.¹⁶⁰ While other nations, such as the United States and those nations who had implemented legislation based on the Harter Act, prohibited exemption clauses.¹⁶¹ A desire for legal uniformity, however, was not the only impetus driving the push for uniform law. The question of responsibility for the goods had become an urgent problem due to the phenomenal increase in pilferage following the First World War. “One of the greatest difficulties which after the war troubled business men was how to check the enormous increase in theft and pilferage from goods in transit. Shipowners estimated that the evil was twenty times as great as before the war.”¹⁶² Underwriters would only cover three-quarters of the value of the lost goods, with the aim of making shippers more diligent with respect to packing, and forcing shipowners to properly supervise their employees.¹⁶³ Exemption clauses in bills of lading limiting the shipowner’s liability therefore became a key issue to be resolved.

¹⁵⁹ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448.

¹⁶⁰ Cole, S. *The Hague Rules Explained: Being the Carriage of Goods by Sea Act, 1924* (1925) Effingham Wilson, London, at p. 16.

¹⁶¹ Aside from nations that had implemented Harter Act based legislation, certain other nations also prohibited or curtailed the ability of carriers to lessen their liability. For example, at the time the Japanese Commercial Code, Article 592, provided that: “Even by express agreement a shipowner cannot exempt himself from his liability for damage caused by his fault, or by the serious fault of a seaman or of any other person employed, or by the unseaworthiness of the ship.” (Cole, *ibid*, at p. 18).

¹⁶² Cole, *ibid*, at p. 20. Cole explains that “the root of the evil was widespread individual dishonesty: one of the results of war.”

¹⁶³ *Ibid*.

In the end, the impetus for an international regime came from the United Kingdom. The overseas dominions, in particular Canada, Australia and New Zealand, where cargo interests and importers were politically powerful,¹⁶⁴ were pressuring the Imperial Government to create a uniform regime throughout the entire British Empire.¹⁶⁵ In 1921, the Imperial Shipping Committee, appointed by the Imperial Government, issued a report concluding that “there should be uniform legislation throughout the Empire on the lines of the existing Acts dealing with shipowners’ liability, but based more precisely on the Canadian Water Carriage of Goods Act, 1910...and not the Harter Act which it closely resembles...because it embodies the latest experience.”¹⁶⁶ England, however, had become concerned that domestic legislation might result in its shipowners being placed at a disadvantage with regard to international competition.¹⁶⁷ As well the shipowners agreed and preferred to have uniform regulation rather than differing regulations for different ports.¹⁶⁸ An appeal was therefore made to the International Law Association (ILA) to tackle the issue through an international conference.¹⁶⁹ In 1921, a draft based on the Canadian Water Carriage of Goods Act was prepared by the Maritime Law Committee of the ILA, and was adopted at the ILA’s Conference at The Hague later that year.¹⁷⁰ This draft, entitled the “Hague Rules of 1921” was subsequently amended by the Comité Maritime International (CMI), and then again during the Diplomatic

¹⁶⁴ Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 18.

¹⁶⁵ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Sturley, *ibid*; Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 22; Maclachlan, D. *Treatise on the Law of Merchant Shipping*, 7th Ed. (1932) Sweet & Maxwell, London, at p. 364.

¹⁶⁶ Imperial Shipping Committee, “Report of the Imperial Shipping Committee on the Limitation of Shipowners’ Liability by Clauses in Bills of Lading and on Certain Other Matters Relating to Bills of Lading,” Report issued February 25th, 1921, sections of which are reproduced in Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 18-21.

¹⁶⁷ Diamond, A. “The Hague-Visby Rules” [1978] LMLCQ 225.

¹⁶⁸ Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 19.

¹⁶⁹ Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 125; Sturley, *ibid*; Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 22.

¹⁷⁰ Knauth, *ibid*, at p. 125-126; Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448; Karan, *ibid*, at p. 23.

Conferences held at Brussels in 1922, 1923 and 1924.¹⁷¹ The resulting document became the Hague Rules of August 25th, 1924.

2.1. NEGOTIATION AND DRAFTING OF THE HAGUE RULES

Several aspects concerning the negotiation and drafting of the Hague Rules prove to be of particular interest with regard to establishing a context for the examination of the nautical fault exemption.

2.1.1. The Balance of Power

During the end of the 19th century, the shipowners were in a superior bargaining position in relation to the cargo interests, however, thirty years later the power balance had shifted such that a compromise was possible. By the time of the Hague Rules Diplomatic Conferences, the wartime destruction from submarines had left British carriers in a weakened financial state.¹⁷² As well, “the collapse of the international coal export trade after the First World War had disastrous consequences for British shipowners.”¹⁷³ Moreover, “[b]y 1924, the industry was suffering from depression, labour troubles, and reckless competition, and therefore desperately needed protection.”¹⁷⁴ It was these changed circumstances, paired with a glut in cargo-carrying capacity from reckless over-expansion in shipbuilding,¹⁷⁵ that in the end prompted carriers to accept the shippers’ bill of lading proposals in the initial draft. This situation was described by Sir Norman Hill, the representative of the Liverpool Steamship Owners Association, at the Hague Diplomatic Conferences: “. . .the all-powerful shipowners are at their wits end to

¹⁷¹ Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 448.

¹⁷² Sweeney, J. “The Prism of COGSA” (1999) 30 JMLC 543, at p. 558; Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 86.

¹⁷³ Palmer, S. “The British Shipping Industry, 1850-1914” in *Change and Adaptation in Maritime History: The North Atlantic Fleets in the Nineteenth Century* (1985) Fischer, L. & Panting, G. (Eds), Memorial University of Newfoundland, St. Johns, at p. 107, noted that the coal cargo’s impact in developing and sustaining the shipping industry of Britain was significant, and thus the collapse of the industry was disastrous.

¹⁷⁴ Sweeney, J. “The Prism of COGSA” (1999) 30 JMLC 543, at p. 558.

¹⁷⁵ Jamieson, A. *Ebb Tide in the British Maritime Industries: Change and Adaptation, 1918-1990* (2003) University of Exeter Press, Exeter, at p. 13, notes that “[t]oo many ships chasing too little cargo led to ever lower freight rates and this was the crippling reality for world shipping in the 1920s and 1930s.” Sweeney, *ibid*; Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 86.

secure freights to cover their working expenses. Voyage after voyage is being made at a dead loss. Vessels by the hundreds are lying idle in port. At the moment any cargo owner could secure any conditions of carriage he required provided he would only offer a freight that could square the yards.”¹⁷⁶

As a result of this change in the balance of power, the initial draft of the text based on the Canadian Water Carriage of Goods Act was therefore altered in favour of cargo interests. The cargo interests succeeded in: i) increasing the carrier’s limitation of liability, ii) extending the time for suit from sixty days to one year, iii) including a provision that prohibits the carrier from lessening his liability except as provided for in the rules, and iv) ensuring that taking delivery of the goods, without submitting written notice of loss prior to removing them from the custody of the carrier, would no longer deprive cargo interests of the right to sue.¹⁷⁷ The carriers, however, were able to extend the list of exemptions to cover certain events that were unavoidable.¹⁷⁸ With regard to the list of exemptions, it was noted at the time by Lord Justice Scrutton that a general provision might very well have the same effect.¹⁷⁹ Sir Norman Hill later commented that “[i]t would have been absolutely impossible to secure agreement to the Rules without an Article setting out in detail the exceptions to which the shipowners and cargo owners are accustomed. They would never have acted on an assurance that the Law Courts would construe any form of general words as covering those, and only those, exceptions.”¹⁸⁰

The reaction to the Hague Rules of 1921 among cargo interests was not entirely favourable, primarily due to the fact that the Rules were drafted for voluntary

¹⁷⁶ Sir Norman Hill, who in essence represented shipowning interests, in the Hague Conference Report, at 38, quotation reprinted in Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 86.

¹⁷⁷ See Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 23-24; Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 24. With respect to taking delivery without submitting written notice of loss, it had previously been that notice-of-claim provisions in bills of lading which barred all claims for loss or damage if written notice was not given to the carrier prior to removing the cargo from his custody were considered valid (Sturley, M. “History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 24. See *The Westminster* (1904) 127 F. 680, and *The Persiana* (1911) 185 F. 396).

¹⁷⁸ Acts of war, quarantine restrictions, riots and civil commotions, insufficiency or inadequacy of marks, and latent defects not discoverable by due diligence. See Sturley, *ibid*, at p. 24-25; See Karan, *ibid*.

¹⁷⁹ Cole, S. *The Hague Rules Explained: Being the Carriage of Goods by Sea Act, 1924* (1925) Effingham Wilson, London, at p. 90.

¹⁸⁰ Sir Norman Hill as quoted by Cole, *ibid*.

incorporation, and thus were not binding on the parties.¹⁸¹ As a result of cargo opposition to the voluntary principle, during the Brussels Diplomatic Conferences, the draft was amended in favour of cargo. Not only did the Hague Rules become mandatory, but a distinction between apparent and non-apparent damage to the goods was also added.¹⁸² Arguably, the superior bargaining power that the carriers possessed thirty years earlier had ceased to exist, replaced instead by a balance tipped slightly in favour of cargo interests.

2.1.2. Commercial Men

It is important to note that the drafts of the Hague Rules were negotiated not by politicians or diplomats, but rather by commercial men who represented economic and industry interests. As addressed *infra*, this differs markedly when compared with both the Hamburg Rules and the recent UNCITRAL Draft Convention. Among the 44 delegates at the ILA Conference at the Hague, only four were affiliated with political or diplomatic interests, while the remainder were from the private commercial sector.¹⁸³ These individuals included a coal merchant, shipowners, barristers, lawyers, an underwriter, the chairman of Lloyd's, the managing director of Produce Brokers, an adjuster, shippers,

¹⁸¹ Knauth notes that "the voluntary principle of the 1921 Hague Rules was promptly and vigorously assailed by groups of shippers, under the leadership of the Corn Trade." (Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 126); See also Colinvaux, R. *The Carriage of Goods by Sea Act, 1924* (1954) Steven & Sons, London, at p. 7-8; Cole, S. *The Hague Rules Explained: Being the Carriage of Goods by Sea Act, 1924* (1925) Effingham Wilson, London, at p. 5, noting that after the drafting of the 1921 Hague Rules, an atmosphere of doubt and suspicion had begun to form, with certain shipowners wondering whether too many concessions had been given.

¹⁸² When the damage was apparent, notice of loss or damage must be given before removing the goods otherwise there would be a presumption of proper delivery, but where the damage was not apparent the consignee was granted extra time to submit his notice (Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 30). As a trade off for gaining the added notification time, cargo interests had to sacrifice a potential two year time bar that had been proposed as part of compromise legislation drafted by Sir Norman Hill, a leading spokesman for carriers in Britain, and Andrew Jackson, a leading representative of cargo interests in Britain. Many of the suggestions made by Hill and Jackson, were incorporated into the draft Rules at the CMI meeting in 1922 (Sturley, M. "History of COGSA and the Hague Rules" (1991) 22 JMLC 1, at p. 26-27).

¹⁸³ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 168-74; Frederick, D. "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules" (1991) 22 JMLC 81, at p. 88, f.n. 23.

bankers, and professors.¹⁸⁴ This avoided political infighting,¹⁸⁵ as well as protracted negotiations, and eventually produced results that were accepted by groups on all sides of the shipping industry. The initial draft, for example, was completed after only a month,¹⁸⁶ and adopted at the Hague Conference after only a few amendments.¹⁸⁷

2.1.3. Discussion With Respect to Nautical Fault

Surprisingly, during the drafting conferences from 1921 to 1924, there was comparatively little discussion surrounding either the presence or the substance of the nautical fault exemption. The wording of the provision in text submitted to the ILA 1921 Hague Conference was “4(2). Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) faults or errors in the navigation or in the management of the ship.”¹⁸⁸ The text of Article IV(2)(a) was derived verbatim from the Canadian Water Carriage of Goods Act,¹⁸⁹ which was practically identical to the Harter Act.¹⁹⁰ On the second day of proceedings, 31st of August 1921, Sir Norman Hill proposed what would be the only change to the wording of the provision: “This clause, Article 4, is the shipowners’ clause. Now, Sir, I would venture to remind the Committee that we have dealt with the cargo interests clause in Article 3, and we have agreed and accepted the actual words that the cargo interests have put forward imposing the obligations on the ship with regard to seaworthiness, and, what is more important, we have accepted Article 3(2)... We have not sought to weaken or qualify those in any way. When we come to Article 4(2) our big point is the navigation point, and what we have asked is that we

¹⁸⁴ Comité Maritime International, *ibid.*

¹⁸⁵ Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 88

¹⁸⁶ Sturley, M. “The History of COGSA and the Hague Rules” (1991) 22 JMLC 1, at p. 20. A month after the draft was completed it was well received by the International Chamber of Commerce, and in the two months that followed, over three thousand copies were circulated in Great Britain, the Dominions, Continental Europe, and the United States (Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 125).

¹⁸⁷ Sturley, *ibid.*, at p. 23.

¹⁸⁸ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules* (1997) CMI Headquarters Pub., Antwerpen, Belgium, at p. 391.

¹⁸⁹ Water Carriage of Goods Act, 9&10 Edw. VII, ch. 61 (1910), section 6: “...faults or errors in navigation or in the management of the ship...”.

¹⁹⁰ Harter Act, 46 U.S.C. ss 190-192 (1893), section 3: “...faults or errors in navigation, or in the management of the said vessel...”

should have the words which from time immemorial have certainly appeared in all British bills of lading. “Faults or errors” have not appeared. They have been added. Our old words were: “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”, and we would ask, Sir, in our clause to have our old words; leave out “faults or errors”, and put in our old words instead.”¹⁹¹

Cargo interests accepted the change in wording with no objection.¹⁹² The only concern with regard to the wording of the provision in the opinion of cargo was the fact that it stipulated “in the navigation or in the management” as opposed to “or in the navigation and management” and courts may therefore interpret “management” widely so as to include stowage.¹⁹³ Cargo interests were reassured that the wording would in no way go back on the obligations the carriers had accepted in respect of stowage in Article 3, and therefore the wording remained unchanged.¹⁹⁴

The only other issue with the provision that arose during the three years of diplomatic conferences was the difficulty surrounding the use of the term “management” because it did not translate readily into French. The issue was discussed during the Hague Conference in 1921, and during the Diplomatic Conferences of October 1922 and October 1923.¹⁹⁵ The issue arose because when “management” was translated into French, the closest term was “*administration*”, however its meaning was wider and it could conceivably include all handling of the cargo.¹⁹⁶ This was a point of contention as it was felt by some attendees that the focus was on British cargo and carriers, and thus English wording, negating the fact that the wording could not be translated into French

¹⁹¹ Comité Maritime International, *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924, The Hague Rules, and of the Protocols of 23 February 1968 and 21 December 1979, The Hague-Visby Rules (1997)* CMI Headquarters Pub., Antwerpen, Belgium, at p. 391.

¹⁹² *Ibid.*, Mr. McConechy: “On behalf of the interests I am here to represent, I am quite willing to accept what is printed here as amended by Sir Normal Hill.”

¹⁹³ *Ibid.*, at p. 391-392.

¹⁹⁴ *Ibid.*, at p. 391-393.

¹⁹⁵ *Ibid.*, at p. 393-397.

¹⁹⁶ *Ibid.*, at p. 393.

without seriously impacting the French interests.¹⁹⁷ Mr. Dor was fairly expressive with regard to his discontent on this point: “I am afraid that British interests are so largely and so ably represented in this meeting that the meeting may lose sight of the fact that you are not laying down rules for the British Empire, but for the world, and that it is no good your rules being accepted by the British owners only. Sir Norman Hill was saying for instance, “Well, the British cargo owners are content to have that long enumeration”, but you do not know if all the Continental cargo owners will be content. In the same way, in the matter of “management” we cannot possibly put in French the English word “management”; therefore you have to find out some way of expressing that in something which is legal French, and I leave it to Sir Norman Hill.”¹⁹⁸ In the 1922 Diplomatic Conference, the issue arose again, with attendees noting that despite searching no better term has been found, and by the 1923 Diplomatic Conferences it was admitted that despite the fact that many would have preferred another expression for the word “management”, it would be too difficult to alter the provision now.¹⁹⁹ The English wording for the provision thus remained unaltered after Sir Norman Hill’s amendment at the 1921 Hague Conference, and the final French version read: “4(2) *Ni le transporteur ni le navire ne seront responsables pour perte ou dommage resultant ou provenant: (a) des actes, negligence ou defaut du capitaine, marin, pilote ou des preposes du transporteur dans la navigation ou dans l’administration du navire.*”²⁰⁰

2.2. THE HAGUE RULES

The Hague Rules came into force on June 2nd, 1931. The Rules were a success, and the desired uniformity of the law of carriage of goods had arguably been achieved. By the time of the 1968 Visby Protocol,²⁰¹ there were 73 states who were parties to the

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*, at p. 395-397. Some other terms were suggested such as “technical management of the ship” which would translate into “administration technique” which was more precise. The term “manoeuvre” was suggested by Swedish and Scandinavian interests, but it was realized to be substantively quite different from “management” and thus rejected. As a translation for “management”, the term “exploitation” was suggested but again its meaning was wider than what the term “management” covered in English. (*Ibid.*)

²⁰⁰ *Ibid.*, at p. 393.

²⁰¹ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 23 February 1968. The Visby Protocol was aimed at addressing certain problems

Hague Rules, including most of the major maritime nations of world.²⁰² Of the nations that did not ratify the Hague Rules, many of them adopted or implemented the Hague Rules into national statutes, for example Carriage of Goods by Sea Acts,²⁰³ or incorporated them into commercial codes that were already in force.²⁰⁴ The popularity of the Hague Rules has continued to grow as evidenced by the most recent CMI *Yearbook* listing 93 state parties to the Convention.²⁰⁵ Of the major trading nations, the vast majority operate under the Hague and Hague-Visby system, for example in 2004, 46.27% of Canada's waterborne trade was conducted with Hague-Visby Rules countries, 19.87% with Hague Rules countries, and 2.65% with Hamburg Rules nations.²⁰⁶ Depending on

with the Hague Rules, in particular the limitations of liability and the notion of a package in a containerized industry. The Visby Protocol was initially drafted by the CMI, and amended during debates at the Stockholm Conference in 1963. The draft was presented at the Diplomatic Conference in Brussels, 1967, and during an adjourned session in February 1968, the protocol was signed, amending the Hague Rules (Yancy, B. "The Carriage of Goods: Hague, COGSA, Visby and Hamburg" (1983) 57 Tul. L. Rev. 1238, at p. 1248). The Visby Protocol addressed certain problems. Notably, by virtue of Art. 3, it provided that all the carriers servants and agents are entitled to the carriers' defences and limits of liability. Moreover, the monetary limits of liability were raised, and the 'package' issue was addressed. It should be noted however, that the Visby Protocol did not amend or alter the defences available to the carrier, including nautical fault.

²⁰² Comité Maritime International, "Uniformity of the Law of Carriage of Goods by Sea" in *CMI Yearbook 1995*, Scandinavian University Press, Stockholm, at p. 107.

²⁰³ Canada, for example, had domestically implemented the Hague Rules in the Carriage of Goods by Water Act 1936, but had never actually ratified the Hague Convention. Moreover, Australia, New Zealand, and the Union of South Africa also domestically implemented the Hague Rules (Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at pl. 457). Carriage of Goods by Sea Acts were also enacted in Norway, Denmark, Sweden, Finland, Spain, Portugal, Japan, although these nations did formally adhere to the convention, while Yugoslavia, Liberia, Tunis and the Republic of Ireland, never formally adhered to the convention but passed acts based on it (See Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana, at p. 56-57 for further information on the domestic statutes of these nations).

²⁰⁴ Indonesia and Greece, although not adhering to the Convention, inserted the Hague Rules into their codes in substance and in form, while Soviet Russia, Syria, and Lebanon, also inserted provisions echoing the principles of the Hague Rules. Conversely, Belgium, Switzerland, the Netherlands and Turkey gave force of law to the Hague Rules by inserting them into their commercial codes. See Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana, at p. 58-59 detailing the amendments to the codes of the above nations.

²⁰⁵ Comité Maritime International, *CMI Yearbook 2005-2006*, CMI Headquarters Pub., Antwerp, Belgium, at p. 411-413, giving the status of parties to the Hague Rules. Note that this number includes nations that have since denounced the Hague Rules in favour of Hague-Visby, or Hamburg.

²⁰⁶ Transport Canada, "Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water" (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 8. Available online from the Canadian Maritime Law Association website at:

www.cmla.org/papers/2004/TransportReport-Oct.4.%202004.pdf. See also Thornton, S. "An Optimal Model for Reforming COGSA in the United States: Australia's COGSA Compromise" (2001) 29 *Transp. L.J.* 43, at p. 53, noting that the vast majority of Australia's trading partners fall under the Hague-Visby regime. Ping-fat, S. *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 210 notes that none of Australia's major trading partners have adopted the Hamburg Rules.

the source, it has been estimated that today 75% to 85% of the world's trade is conducted under the Hague and Hague-Visby Rules.²⁰⁷ It has been argued that the Hague Rules have “acquired the status of international customary shipping law – *lex maritima*, thereby also becoming part of the international customary trade law – *lex mercatoria*.”²⁰⁸ Despite the fact that uniformity is currently breaking down, one cannot help but think that the uniformity achieved and the impact made by the Hague Rules has far exceeded the intentions of its drafters.²⁰⁹

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²⁰⁷ Tetley, W. “Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ’99.” (2003) 28 Tul. Mar. L.J. 1, at p. 9, providing the figure of 75%. Hare, J. “The Pendulum of Liability: Harter, Hague, Hamburg to UNCITRAL Draft”, Lecture at University of Cape Town, South Africa (August 10, 2005), providing the figure of 85%.

²⁰⁸ Lejnicks, M. “Diverging Solutions in the Harmonisation of Carriage of Goods by Sea: Which Approach to Choose?” (2003) 8 Unif. L. Rev. 303, at p. 304.

²⁰⁹ Especially given the fact that, according to Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana, at p. 6, “the Brussels Convention was not conceived as a comprehensive and self-sufficient code regulating the carriage of goods by sea.”

Chapter 3

Rationale for the Nautical Fault Exemption

Many explanations have been put forward to justify the nautical fault exemption, some given at the time when it was being incorporated into statute or uniform law, and others given *ex post facto*. Certain justifications for the existence of the exemption in uniform law have come under attack as the nature of shipping has evolved over the years, while others, particularly those concerned with risk allocation and the balance of interests, remain relevant despite technological developments in shipping.

3.1. THE HISTORICAL RATIONALE

The historical rationale behind the exemption resides in the inherent nature of merchant shipping prior to the advent of the 20th century shipping industry. That period in the history of shipping has been characterized as “days of wooden ships and iron men” when “cargo was carried in wooden sailing ships whose course was subject to the winds, reliable charts were few, navigational aids could not yet cope with cloudy weather and uncharted shoals, and shipowners could not communicate with ships at sea.”²¹⁰ In the late 19th century, the expansive nature of the justification had narrowed slightly and centred more on the lack of communication, given that shipping had for the most part evolved from wooden ships to steam and steel. During the drafting of the Harter Act, it was considered that “since communications were often difficult or impossible, and because [the shipowners] could not control their ships after departure, [they] were not held liable for the negligence or fault of the captain and crew in their navigation and management of the vessel after it had left port.”²¹¹ In *The Lady Gwendolyn*, Sellers, LJ implied that it would be unjust to render the shipowner liable for navigation given the fact that it is “so

²¹⁰ Honnold, J. “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) 24 JMLC 75, at p. 104.

²¹¹ Mandelbaum, S. “Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions” (1996) 23 Transp. L.J. 471, at p. 476; Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 88 states, “Once the ship started her voyage, she cut all her links with the land, and was left alone against maritime hazards for days and months...the carrier lost all control over the ship, cargo and, more importantly, his servants and agents.”

much in control of the master, officers and crew and so much out of the control of the owners...²¹² It is this justification that has been, above all others, subject to criticism.²¹³ When descriptors such as “out-moded”, “out-dated” and “anachronistic” are used, in many instances it is with regard to this historical justification of the exemption.²¹⁴ No one could possibly deny that communication and shipping technologies have greatly evolved; “Steel-built engine vessels which are more durable and safer at sea have replaced wooden-hulled sailing ships. Thanks to an increase in their speeds the period when ships are at sea has been reduced. The invention of radar and other similar equipment, and the preparation of modern charts have minimized the possibility of shipwreck and iceberg collisions, and groundings. Carriers can now keep in contact with their vessels wherever they are, through computerized radios and satellite control and instruct their servants and agents.”²¹⁵ This causes certain authors to question the logic behind the exemption’s continued existence; “With improved technology in navigation, the ‘nautical fault’

²¹² *The Lady Gwendolyn* [1965] 1 Lloyd’s Rep. 335 (C.A.), at p. 337-338.

²¹³ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 Transp. L.J. 43, at p. 46 notes “Many oppose the continuance of this defence, as it is felt to no longer be a realistic ground for the exoneration of liability. It is argued that advances in communication technology, vessel navigation and safety, and employee education and training provide the carrier with a higher degree of control of the vessel and cargo than was available when the defence was adopted.”; Mandelbaum, S. “Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions” (1996) 23 Transp. L.J. 471, at p. 500, argues “the world has changed a great deal since the Hague Rules were adopted in 1924. Wooden ships have given way to highly automated steel ships. Marconi’s wireless has been replaced with satellite communications. Gangs of longshoremen lifting loads of breakbulk cargo have yielded to lines of intermodal containers hoisted aboard ships by cranes. Formerly isolated national economies now compete fiercely in global commerce...The nautical fault defence might be revised, as its historic rationale has been virtually eliminated.”; Weitz, L. “International Maritime Law: The Nautical Fault Debate” (1998) 22 Tul. Mar. L.J. 581, at p. 587, referring to the exemption as “an anachronism”.

²¹⁴ Wilson, J.F. *Carriage of Goods by Sea*, 3rd Ed. (1998) Pitman, London, at p. 256, noting its antiquity and that that defence is considered now “anachronistic” in many circles. Hill notes that with regard to the P&I Clubs who support the defence, even they acknowledge it is out dated: “But it is acknowledged over coffee in Club management board or conference rooms that the negligent navigation and management defence was an anomaly and a historical survivor which should have been buried in history years ago.” (Hill, C. “The Clubs Reaction to the Coming into Effect of the Hamburg Rules” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 196); Bauer, G. “Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Cases by Case Analysis” (1993) 24 JMLC 53, at p. 54, has wryly commented that nautical fault “certainly must have originated in the days of sail when the owner lost control over his ship as soon as it vanished over the horizon.”

²¹⁵ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 89.

defence becomes more difficult to justify.”²¹⁶ Certainly, the days of ‘iron men and wooden ships’ have long since ended, nevertheless despite the advances in shipping technology carriers remain exposed to dangers characteristic of sea carriage unparalleled in other forms of transport. This is exemplified by the fact that this justification remains present in modern jurisprudence. A Canadian court noted that “[i]n maritime matters the safety of the ship and the expeditious and efficient pursuit of the voyage are recognized as taking precedence over the cargo, because it is recognized sea traffic involves a constant struggle with incalculable and unusual possibilities of peril.”²¹⁷ A similar sentiment was recently echoed by the Tribunal de Commerce de Marseille, in denying the claim of cargo interests whose container was lost overboard during a typhoon; “*un aspect de faute nautique exonératoire de responsabilité pour le capitaine, ce qui se comprend aisément, l’activité nautique restant à hautes risques et perils et, dans leur lutte contre les éléments déchainés comme un typhoon, les marins, si expérimentés soient-ils, ne sont jamais certains de sortir vainqueurs, quand bien même des progrès considérables ont été accomplis dans la conduite des navires et qu’en l’espèce, il ne saurait y avoir faute, le commandant Figuières démontrant que le capitaine a tout fait pour manoeuvrer au mieux son navire et défendre la sécurité de l’équipage et de cargaison.*”²¹⁸

3.2. PROTECTIONISM

Providing protection for shipowners in order to prevent ruinous liability is a concept that has stretched back for centuries. *Boucher v. Lawson*, decided in 1734, concerned shipowners who were held personally liable for the master’s theft of a cargo of

²¹⁶ Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 207.

²¹⁷ *Seaway Distributors v. Newfoundland Container Lines* (1982) 52 N.S.R. (2d) 566 (N.S. Dist. 1), at p. 573.

²¹⁸ Tribunal de Commerce de Marseille, 12 décembre 2003, (Ville de Tanya), DMF 2004, 630, at p. 633. [Author’s translation: One aspect of the nautical fault exemption as it applies to the captain that must be understood, is that maritime activities remain perilous and involve high risk, and as they grapple with the myriad of elements such as typhoons, the sailors, regardless of how experienced they are, are never certain to emerge victorious, even though considerable progress has been made with respect to vessel operations, as such there is no fault, as Commander Figuières has demonstrated that the captain did everything in his power to properly navigate his vessel, and protect the safety of the crew and the cargo.]

silver and gold.²¹⁹ It was this case that resulted in statutory relief from the British Parliament, ensuring that the shipowners' liability was limited, with the purpose of protecting the industry and encouraging investment.²²⁰ Similarly, the United States Limitation of Liability Act,²²¹ in the words of the Supreme Court, "was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe."²²² The notion that the shipowner needed protection in the form of limited liability in order to prevent ruin in the event of an incident and to stimulate investment in merchant shipping was among the original arguments put forward to justify the nautical fault exemption.²²³ The investment in sea transport was proportionally greater when compared both to other forms of transport and the overall value of the goods carried in the vessel.²²⁴ When a disaster occurred, the carrier generally suffered the greatest loss, his vessel, as opposed to the losses suffered by cargo interests, and if that loss had been expanded to include responsibility for nautical fault, then the carrier would have likely suffered economic ruin.²²⁵ Historically, this was even more so the case given that until the later half of the 19th century, the shipowners frequently had a portion of direct investment in the cargo itself.²²⁶ In today's shipping industry, arguably the risk in respect of investment and ruin has increased. Carriers continue to have large investments in their vessels, as well, bulk carriers and tankers with their increased cargo capacity have even expanded the potential liability, with the effect that liability for nautical fault may

²¹⁹ Sweeney, J. "Limitation Shipowner Liability: Its American Roots and Some Problems Particular to Collision" (2001) 32 JMLC 241, at p. 243.

²²⁰ *Ibid.*, at p. 243-244; Griggs, P. et al. *Limitation of Liability for Maritime Claims 4th Ed.* (2005) LLP, London, at p. 5, note that the United Kingdom Responsibility of Shipowners Act 1733, allowed a shipowner to limit his liability for theft by the master or crew, up to the value of the ship and the freight. Griggs, further comments that "this was an early example of legislation designed to promote the development of the merchant fleet." (Griggs, *ibid.*)

²²¹ Limitation of Liability Act, Act of Mar. 3, 1851, ch. 43, 9 Stat. 635 (1851).

²²² *Moore v. The American Transportation Co.*, 65 U.S. 1 (1861), at p. 39.

²²³ Note that this argument was also the corner stone of the policy to grant shipowners the ability to limit their liability. For a discussion on the limitation of liability by the tonnage of the vessel see Hill, C. *Maritime Law 5th Ed.* (1998) LLP, London, at p. 375.

²²⁴ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 88.

²²⁵ *Ibid.*

²²⁶ Williams, B.K. "The Consequences of the Hamburg Rules on Insurance" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 251.

still cause economic ruin.²²⁷ The distinction in today's industry however is the widespread use of Hull and Machinery insurance and P&I Clubs that enable the carrier to protect their maritime assets and reduce their exposure to ruinous risk.²²⁸ Nevertheless, the argument that the shipowner is in need of protection is still being utilized.²²⁹ This line of reasoning has not only been employed in the context of individual shipowners, but with regard to the industry as a whole. When the shipping industry was in its developing stages, there was the belief that the fledgling industry needed protection for it to survive. This same sentiment has more recently been expressed in the context of the fleets of developing nations. During the Hamburg Conferences, it was advocated that the "fleets of emerging maritime nations, particularly those of the developing countries, would thereby be better protected or 'nursed' through their 'infant-industry' stage" if the nautical fault exemption was retained."²³⁰

3.3. INCENTIVE AND RISK ALLOCATION

It has been argued that the carrier's existing responsibilities under the Hague Rules are sufficient such that care will be taken, given that those on board the vessel will not wish to "unnecessarily endanger the vessel and thereby themselves."²³¹ In other words, it would be futile to impose liability for cargo damage caused by negligent navigation, as the crew's interest in their safety provides ample incentive for careful navigation.²³² Another incentive is provided by the fact that collision would not only

²²⁷ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 89.

²²⁸ *Ibid.*

²²⁹ Rosaeg, E. "The applicability of Conventions for the carriage of goods and for multimodal transport." [2002] LMCLQ 316, at p. 318: "Arguably, carriers have more to lose than shippers by not having mandatory rules. Shipper can obtain protection by other means if needed. Carrier's on the other hand, need mandatory legislation to legitimate that the risk distribution is fair. This is probably why attempts to circumvent the Hague-Visby Rules are rare – they are the best the carriers can hope for."

²³⁰ Shah, M. "The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 20.

²³¹ Japikse, R.E. "Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 186.

²³² Kimball, J. "Shipowner's Liability and the Proposed Revision of the Hague Rules" (1975) 7 JMLC 217, at p. 251.

affect the records of the crew, but possibly have criminal consequences as well.²³³ Essentially, the same argument applies to shipowners. It has been argued that “adequate incentives are provided by [the shipowner’s] interest in protecting the investment in the ship,” such that the aids and equipment for safe navigation will be provided.²³⁴ It has been noted that the foundation for the above argument is a theory that postulates the following: the carrier must “bear enough of the risk to have an incentive to exercise due care, but once that threshold level is achieved the remaining risks should be left to the cargo owner.”²³⁵ This theory on the optimum division of risk is aptly described by Diamond: “[I]t simply doesn’t matter what level of liability is imposed on shipowners – whether it be high or low – so long as there is some level of liability which can be enforced so as to chastise the wayward shipowner and so as to encourage the recalcitrant or slothful shipowner to forsake indolence and to prefer the exercise of due diligence.”²³⁶ There has been criticism with respect to the application of this theory to nautical fault, in that from an economic theory perspective carriers do not simply face a choice between negligent and careful navigation.²³⁷ Rather, carriers will undertake a cost-benefit analysis, essentially assessing the magnitude of any potential loss as against the costs of possible precautions.²³⁸ If the carrier’s only economic incentive is the value of his vessel, given that his liability to cargo is exempted, precautions may be inadequate in instances where

²³³ Berlingieri, F. “The Period of Responsibility and the Basis of Liability of the Carrier” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 99.

²³⁴ Honnold, J. “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) 24 JMLC 75, at p. 107. There is, however, a weakness to this assertion according to Honnold. The vested interest in providing radar and navigational aids and charts to avoid collisions and groundings, arguably does not extend to “maximum care to prevent seepage or bleeding of sea-water into cargo holds, care in stowage adequate to prevent shifting of cargo in heavy weather or adequate securing of on deck containers.” (*Ibid*). In response to Honnold, one may argue that the above problems listed would evidently fall under a breach of the Art. 3 Hague Rules duty to carefully load, handle, stow, carry, keep, care for, and discharge the cargo carried. In essence, the Art. 3 obligation already renders the carrier liable for deficiencies in the areas listed by Honnold, and therefore the author is unsure how eliminating the nautical fault exemption would have any bearing on improving the practice of carriers in those instances.

²³⁵ Sturley, M. “Changing Liability Rules and Marine Insurance” (1993) 24 JMLC 119, at p. 127-128; See also Williams, B.K. “The Consequences of the Hamburg Rules on Insurance” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 255

²³⁶ Diamond, A. “A Legal Analysis of the Hamburg Rules” (1978) in *The Hamburg Rules* (Lloyd’s of London Seminar, Sept. 28, 1978) as quoted by Sturley, *ibid*, at p. 128.

²³⁷ Sturley, *ibid*.

²³⁸ *Ibid*.

the value of the cargo is significant.²³⁹ The criticism of the above justification is therefore, from an economic perspective, that the shipowner's vested interest in his vessel alone is not sufficient exposure to loss to ensure adequate precautions and care in certain instances. Arguably, the notion of the value of the cargo significantly influencing the shipowners' precautions in practice is flawed. If the nautical fault exemption is eliminated, the carrier is still only exposed to loss up to the value of the package or weight limitation, rather than the true value of the cargo. Finally, economic theory does not necessarily undermine the existence of the nautical fault exemption, given that it has also been utilized in support of limited carrier liability.²⁴⁰

3.4. HINDSIGHT AND DISCRETION

A justification for nautical fault has been put forward that can perhaps be characterized as an 'agony of the moment' style argument. "[I]t was thought unfair if, after the event, through an investigation by experts a ship's command could be criticized with hindsight in far quieter circumstances, with resultant liabilities; such a perspective could negatively burden the decision-making at sea when immediate or quick action is

²³⁹ *Ibid.* Sturley notes that the most serious risks have been taken in instances where the cargo carried is worth considerably more than the ship. The argument is therefore "imposing liability for the cargo on the carrier provides the incentive necessary for the carrier to take greater care of the vessel and the cargo – an incentive that the carrier's interest in the vessel alone [is] inadequate to provide." (*Ibid.*)

²⁴⁰ Lord Diplock notes that "goods in transit inevitably run the risk of being lost or stolen, damaged or destroyed. The risk can be reduced but not eliminated, by physical precautions taken by those persons having custody of the goods during transit." (Diplock, L. "Conventions and Morals – Limitations Clauses in International Maritime Conventions" (1970) 1 JMLC 525, at p. 525). His Lordship goes on to argue that the costs involved in precautions will be passed on through freight, eventually increasing the cost of the goods at destination. Such expenditures are unproductive where they exceed the cost of any loss or diminution in the value of the goods which would have occurred had the precautions not been taken. (Diplock, *ibid.*) His Lordship finds therefore that "the economic aim of any law relating to the contract of carriage should be to encourage custodians of goods in transit to take those precautions, and no more, which on this basis are economically productive." (Diplock, *ibid.*, at p. 526). See also Williams, B.K. "The Consequences of the Hamburg Rules on Insurance" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 255, arguing that the carrier's basis for liability is based not on an 'indemnity' function for loss but rather to simply penalize him if he fails in his duties under the Rules. Cargo will still need cargo insurance to cover the entire journey and potential areas where the carrier is not responsible, therefore, it is suggested that any more liability than needed to produce the incentive to take care of the cargo would be unproductive. (Williams, *ibid.*)

required.”²⁴¹ This notion has been recognized by the judiciary. In *The Marilyn L*, the shipowner was held to be protected by the exemption where the master and crew made erroneous navigational and ballasting decisions, with the court commenting that “mariners acknowledge that the master is obliged to make navigational decisions which may result in the selection of a course which, after the voyage has ended, may prove to have been the unwise course.”²⁴² Nevertheless the court found that despite the fact that less adverse conditions would have been experienced on another route, it was the master’s privilege to select the route that he thought best and his error in judgment does not expose the owner to liability.²⁴³ Similarly, in *The Naples Maru*, the vessel encountered stormy weather on the journey, and the claimant argued that the damage resulted from moisture and sweat caused by the failure to sufficiently ventilate the cargo.²⁴⁴ The Court commented that “it is not for the court to say when it was safe to open the hatches and the ventilators. This is solely in the discretion of the master. This court can only reverse his judgment where there appears to be a clear abuse of discretion on his part.”²⁴⁵

3.5. COMMERCIAL COMPROMISE

The nautical fault exemption has been referred to extensively as part of a “compromise” between shipowning and cargo interests. Lord Sumner has noted “the intention of this legislation in dealing with the ability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship.”²⁴⁶ This compromise has been characterized as weighing in

²⁴¹ Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 186.

²⁴² *Georgia-Pacific Co. v. M/S Marilyn L.*, 1971 AMC 2157 (E.D. Vir. 1971), at p. 2165.

²⁴³ *Ibid.*, at p. 2166.

²⁴⁴ *Philippine Sugar Centrals Agency v. S.S. Naples Maru*, 1937 AMC 1238 (S.D.N.Y. 1937).

²⁴⁵ *Ibid.*, at p. 1244.

²⁴⁶ *Gross Millerd v. Canadian Government Merchant Marine* [1929] A.C. 223 (H.L.), at p. 236.

favour of the shipowners, or as favouring cargo interests, depending on the commentator. The compromise has also been regarded as fair and even, being the result of negotiation by individuals within the shipping industry: "...the exemption's principle is often seen ...to justly match the carrier's liability for commercial faults (such as due care for the cargo), which liability was and is hailed to constitute the cornerstone of the Rules."²⁴⁷ What is significant is that the compromise was a result of negotiation between commercial parties involved in shipping. It has been argued that at their core, liability regimes are simply commercial compromises that allocate the risks between carriers and cargo interests.²⁴⁸ The risk allocation between cargo interests and carriers has been referred to as the "famous compromise", both in the context of the Harter Act and in the Hague Rules. It was this commercial meeting of the minds, that enabled carrier interests to gain the nautical fault exemption, in exchange for liability for failing to care for the cargo and exercise due diligence to render the vessel seaworthy.

3.6. CONCLUSION

The variations in the above justifications are symptomatic of the controversial and multifaceted nature of the nautical fault exemption. Those who oppose the exemption often use certain older justifications, particularly the historical ones, as straw-man arguments. While those interested in maintaining the exemption, assert its continued relevance today. Throughout this study of nautical fault, it becomes clear that neither side is without merit, however, the respective positions become difficult to evaluate given the multitude of arguments and justifications. The problematic question that nevertheless has yet to be answered is whether the existence of the nautical fault exemption in modern carriage law remains justified.

²⁴⁷ Japikse, R.E. "Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 186.

²⁴⁸ Sturley, M. "Carriage of Goods by Sea" (2000) 31 JMLC 241, at p. 250.

Chapter 4

The Meaning and Scope of Article IV(2)(a) of The Hague Rules

The central element involved in defining the nautical fault exemption, is the task of distinguishing it from the carrier's obligation to provide a seaworthy vessel and his duty to care for the cargo. To illustrate: A bulk cargo arrives partially damaged because an electrical lamp in the cargo hold was left on, scorching a portion of the cargo. There are three possibilities. First, if the lamp had been on during loading and a crewman had forgotten to turn it off, the vessel is unseaworthy. Secondly, if the lamp in the cargo hold had been erroneously turned on during the voyage by a crewman intending to turn on the deck light, this is a fault in the management of the ship. Thirdly, if the lamp was turned on to inspect the cargo and never turned off, then it is an error in the management of the cargo.²⁴⁹ The exemption is therefore highly contextual and the question of its meaning and scope is not one that can be addressed briefly.

Article IV(2) provides: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) 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." Although the wording of Art. IV(2)(a) determines its scope to a certain extent, the boundaries of the nautical fault exemption have been delineated through its application in practice, as its effects are often dependent on the facts of the situation at hand. For example, the act of opening the wrong valve when ballasting the ship causing the flooding of the cargo hold, on one hand has been held to fall within the exemption,²⁵⁰ while on the other hand the carrier has been denied the protection of Art. IV(2)(a).²⁵¹ This

²⁴⁹ This example can be found, although in a slightly different format, in Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 273, where it is based loosely on a decision of the Norwegian Supreme Court.

²⁵⁰ *Firestone Synthetic Fibers Co v. M.S. Black Heron*, 324 F.2d 835 (2 Cir. 1963), where the 2nd Circuit held that the carrier was immune from liability to cargo interests as the aim of the engineer was to ballast the ship, which is an act of management, rather than attempting to care for the cargo.

²⁵¹ *Hydaburg Cooperative Assoc. v. Alaska Steamship Co. (The Coastal Rambler)*, 1969 AMC 363 (9 Cir. 1968), where the 9th Circuit Court of Appeals held that due to the fact that there were indistinct markings on the pipe outlets, this rendered the vessel unseaworthy and thus the carrier was denied the benefit of article IV(2)(a).

distinction in judicial reasoning resulted from a slight variation in the facts of those two incidents.²⁵² Gilmore & Black have noted that “[t]he distinction between a loss due to improper stowage or unseaworthiness on the one hand and a loss resulting from faults or errors in the navigation or management of the vessel on the other hand requires in many instances a close and discriminating attention to the specific facts of the case.”²⁵³

Nevertheless, the meaning and general scope of the exemption can be determined through a thorough examination of the wealth of jurisprudence and doctrinal commentary generated over the past century therefore distinguishing the factual situations that fall under the exemption from those that do not.

4.1. DEFINITION OF ARTICLE IV(2)(A)

The meaning of the wording of Article IV(2)(a) has been interpreted both judicially and through doctrinal commentary. One may consider that there are in effect four central issues to be addressed: firstly, the notion of action and inaction; secondly, which individuals fall within the scheme of the exemption; and thirdly, the nature of the action; and fourthly, whether the vessel or means of transport constitutes a “ship”.

4.1.1. “Act, Neglect or Default”

It has been argued that the wording “act, neglect or default” is somewhat broader than that of the original exemption found in the Harter Act of “faults or errors”.²⁵⁴ In practice, this is of no consequence, given that American courts have held that the exemption has the same meaning regardless of whether the contract of carriage was governed by the Harter Act and U.S. COGSA.²⁵⁵ With regard to jurisprudence from

²⁵² Despite the fact that the erroneous actions taken by the seamen in ballasting the vessels were essentially the same, the distinction arose due to the fact that in *The Coastal Rambler*, *ibid*, the Court criticized the markings on the pipe outlets, finding them inadequate, thus rendering the vessel unseaworthy, while in *The Black Heron*, the carrier was able to benefit from Art. IV(2)(a) as the ballast system was considered to be in order (*Firestone Synthetic Fibers Co v. M.S. Black Heron*, 324 F.2d 835 (2 Cir. 1963)).

²⁵³ Gilmore, G. & Black, C. *The Law of Admiralty*, at p. 134, as quoted by Justice Rives in *Heinrich C. Horn v. CIA De Navegacion (The Heinz Horn)* [1970] 1 Lloyd’s Rep. 191 (5 Cir. 1969), at p. 202.

²⁵⁴ Poor, W. *American Law of Charter Parties and Ocean Bills of Lading*, 5th Ed. (1968) Matthew Bender, New York, at p. 174.

²⁵⁵ *Spencer Kellogg v. Great Lakes Transport Co. (The Fred W. Sargent)*, 1940 AMC 670 (E.D. Mich. 1940) at p. 675, holding that “the words ‘in the navigation or in the management of the ship’ have been

jurisdictions other than the United States, the difference in wording appears to also have no effect given that Harter Act jurisprudence was and is routinely relied on when considering the nautical fault exemption.²⁵⁶

Nautical fault is not restricted to errors and improper actions. The wording of the exemption also includes the failure to act and the non-performance of duties.²⁵⁷ In *The Olivebank*, where the court of first instance found the cargo was damaged but that “the decision not to close the skylight or vent covers was a management decision,” the claimants argued on appeal that the decision could not have been a management decision because it was not an act but rather an omission.²⁵⁸ The 5th Circuit Court of Appeals held that the claimants “have misconstrued the district court’s use of the phrase ‘management decision’. Neglect by management also relieves liability under COGSA.”²⁵⁹

Along with failures to act, the wording of the nautical fault exemption encompasses actions that go beyond simple faults. The words ‘Act, neglect or default’ have been found to encompass gross fault, or *une négligence grossière*.²⁶⁰ In addition, it has been noted by commentators that the protection afforded by the exemption also

held by the British courts to have the same meaning in the British Act as in our Harter Act... I hold that the Congress intended these words as used in the Carriage of Goods by Sea Act, 1936, to have the same meaning as those assigned to them in the long line of decisions construing these words as used in the Harter Act.”; Robertson, D. et al. *Admiralty and Maritime Law in the United States* (2001) Carolina Academic Press, Durham, at p. 320 have noted that “because COGSA and the Harter Act are very similar, it often makes no difference which statute applies, and it remains common for courts to cite Harter Act decisions when construing comparable provisions in COGSA.” The defence as found in marine insurance law has also been held to have the same meaning as that of COGSA. See Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 5 (Available online only at: <http://tetley.law.mcgill.ca/maritime>), referencing *Larsen v. Insurance Co. of N. America* 362 F.2d 261 (9 Cir. 1966).

²⁵⁶ For example, the Canadian Federal Court of Appeal, who relied on both *The Ferro* [1893] P. 38 (P.D.) and *The Glenochil* [1896] P 10 (P.D.) (Div Ct) when considering whether an error that resulted in the loss of cargo overboard was an error in management or one in relation to the cargo (*Carling O’Keefe Breweries v. CN Marine* [1990] ETL 654 (Fed. C.A.), at p. 666). In denying the time charterer the benefit of the nautical fault exemption, the Court of Appeal opined “in the present case, there was at the very least, to adopt the words of Sir Francis Jeune in the *Glenochil*, at page 16, a ‘want of care of the cargo’ rather than a ‘want of care of the vessel indirectly affecting the cargo’.” (*Carling, ibid*).

²⁵⁷ In *The Sanfield*, 92 F. 663 (1898), the failure for twenty days to open a sluice gate which would have emptied the bilges was held to be an error in management of the vessel.

²⁵⁸ *Folger Coffee Co. v. Olivebank*, 2000 AMC 844 (5 Cir. 2000), at p. 849.

²⁵⁹ *Ibid*, at p. 849.

²⁶⁰ Rodière, R. “Faute nautique et faute commerciale devant la Jurisprudence française” DMF 1961, 449, at p. 453. Although where the fault is too great or is incompetence of an exceptional nature, it can be viewed as a failure on the part of the shipowner to exercise due diligence to make the vessel seaworthy. This is considered *infra*.

includes wilful fault and wilful misconduct by the master.²⁶¹ Furthermore, one author has commented that intentional acts are within the scope of nautical fault, thus covering malicious acts, barratry, and felonious acts.²⁶² The Federal Supreme Court of Germany has interpreted the exemption for error in navigation or management of the vessel to include not only negligent conduct, but intentional acts as well.²⁶³ Justice MacKinnon, of the English Commercial Court, in considering loss arising from the abandonment of a vessel, opined that “even if it had been the grossest and deliberate and wilful desertion of the ship in calm weather, I think that would still be an act, neglect or default of the master [in the navigation or management of the ship] for which, under these words, the owners would be relieved. With regard to that, I must bear in mind that it has been held that even culpable recklessness on the part of the captain or crew is, vis-à-vis the owner, an act, neglect or default for which under such a clause he is relieved of responsibility.”²⁶⁴

4.1.2. Error of the “Master, Mariner, Pilot or Servant of the Carrier”

The error or fault must be one committed either by the master, mariner, pilot or a servant of the shipowner. For the exemption to apply therefore, the error or the fault must not be one that is attributed to the shipowner personally.²⁶⁵ If the resulting damages are the consequences of the shipowner’s own negligence, such as instructing the vessel to

²⁶¹ Herber, R. “The Hamburg Rules: Origin and Need for the New Liability System” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 39. Note that this statement would only relate to the protection of the carrier, due to the fact that if cargo interests take action against the master or the crewman, their ability to rely on the exemption for protection is limited by the wording of art. IV bis 4 of Hague-Visby, “Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.”

²⁶² Chaiban, C. *Causes Legales D’Exoneration du Transporteur Maritime dans le Transport de Merchandises* (1965) Pichon & Durand-Auzias, Paris, at pp. 94-96.

²⁶³ *Cargo Interests on Board MV Cita v. Time-charterers of MV Cita* (2006) I ZR 20/04 (Federal Supreme Court), available at: www.onlinedmc.co.uk. In this instance, the Federal Supreme Court held that where the watch officer set a new course, failed to turn on the watch-keeping alarm, was alone on the bridge, and then fell asleep resulting in the ship grounding, the time-charterer was not liable to cargo interests by virtue of the nautical fault exemption as incorporated into s. 607 of the German Commercial Code (HGB).

²⁶⁴ *Bulgaris v. Bunge (The Theodoros Bulgaris)* [1933] 45 Ll. L. Rep. 74 (K.B.), at p. 81.

²⁶⁵ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 271; Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 16 (Available online only at: <http://tetley.law.mcgill.ca/maritime>); Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 285.

forgo the use of a pilot, then the exemption offers no protection.²⁶⁶ For smaller shipping operations, or non-corporate owners, it is possible that the shipowner may also be the master of the vessel. In such instances, where the shipowner in essence wears two hats, there have been different approaches depending on the jurisdiction. Under English law, where “the master is himself owner or part owner and is sued as such, the exception... will protect him as to his negligence as master, though not as to his negligence as owner.”²⁶⁷ Conversely, the nautical fault exemption as incorporated into the German Commercial Code (HGB), at provision 607, has been interpreted by the German courts such that “*si le transporteur est lui-même capitaine de son navire, il n’est pas libéré de la responsabilité pour fautes nautiques commises par lui-même en sa qualité de capitaine.*”²⁶⁸

The wording of Art. IV(2)(a) does not expressly stipulate that the shipowner’s own actions or knowledge do not fall within the exemption. Certain national codes have therefore amended the wording of the original nautical fault exemption in order to clarify when the shipowner may become liable. The German nautical fault exemption, found in s.607 of the Commercial Code (HGB), stipulates: “If the loss is due to any conduct in the navigation or management of the ship or to fire, the carrier shall only be liable if there is actual fault or privity on his part.”²⁶⁹ Similarly, in the Greek Code of Private Maritime Law, Article 138 stipulates “[i]f loss or damage arises from an act or omission in the

²⁶⁶ Boyd, S. *Scrutton on Charterparties and Bills of Lading*, 20th Ed. (1996) Sweet & Maxwell, London, at p. 238, gives the examples of a shipowner negligently appointing a drunken captain or negligently giving orders that no pilot should be employed. For an example where the personal negligence of the shipowner was demonstrated see *City of Lincoln v. Smith* [1904] A.C. 250 (P.C.).

²⁶⁷ Boyd, *ibid*; See also Cooke, J., et al, *Voyage Charters* (1993) LLP, London, at p. 754. See also *Westport Coal v. McPhail* [1898] 2 Q.B. 130. Conversely, a Norwegian Arbitration tribunal, ND 1974.315 NA Sotra, decided that where the master is also the shipowner, he is not protected. The Judicial Committee criticized the decision: “It must be right that the carrier can invoke an exemption from liability in such situations to the same extent as if he had not been master or crew.” (Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 272). It has been noted that since the introduction of the Norwegian Maritime Code, the result will likely follow the view of the Judicial Committee (Falkanger, *ibid*).

²⁶⁸ Markianos, D. “Le Transport Maritime Sous Connaissance En Droit Allemand” in *Le Transport Maritime Sous Connaissance A L’Heure Du Marche Commun* (1966) M. De Juglart & P. De La Pradelle (Eds.), Pichon & Durand-Auzias, Paris, at p. 40. [Author’s translation: if the shipowner is himself acting as master of his vessel, he is not exonerated from liability for *fautes nautiques* committed by himself when acting in his capacity as master.]

²⁶⁹ *Handelsgesetzbuch*, (HGB) Commercial Code of Germany, Chapter 5, s. 607.2.

navigation or handling of the ship, the carrier shall not be liable except for faults of his own...²⁷⁰ The expression, ‘actual fault or privity’, as used in the HGB, is frequently used to describe when the liability of the shipowner is engaged based on what is considered to be his personal fault. The expression ‘actual fault or privity’ has been described as “a term of art in English law borrowed from the fire and tonnage limitation rules of the Merchant Shipping Act 1894.”²⁷¹ The Limitation of Liability Act of 1851 of the United States contained a similar expression: “privity or knowledge”.²⁷² Subsequently, the expression ‘actual fault or privity’ has been used in a number of conventions and statutes in order to describe under what conditions the shipowner may be relieved from all or a portion of liability where the fault is not his own. As such, jurisprudence under other conventions with respect to this issue is frequently used when determining whether the nautical fault is one that may be attributed to the shipowner personally. In particular, it has been suggested that when considering the nautical fault exemption, inspiration may be drawn from the jurisprudence arising under the Limitation of Shipowner’s Liability Convention, and the Limitation Convention, both of which expressly stipulate that the shipowner must be personally free from fault in order to limit his liability.²⁷³ Moreover, jurisprudential analysis under both Art. IV(2)(b) and Art. IV(2)(q) of the Hague Rules, proves instructive in determining when the fault is such that it is attributable or imputed to the shipowner, as the expression “actual fault or privity of the carrier” is used.²⁷⁴

²⁷⁰ Karatzas, T. & Ready, N. *The Greek Code of Private Maritime Law* (1982) Martius Nijhoff Pub, The Hague, at p. 39.

²⁷¹ Gaskell, N. et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 344; See also Treitel, G., & Reynolds, F. *Carver on Bills of Lading* (2001) Sweet & Maxwell, London, at p. 503 for a discussion on the origin of the expression.

²⁷² Chen, X. *Limitation of Liability for Maritime Claims: A Study of U.S Law, Chinese Law and International Conventions* (2001) Kluwer, The Hague, at p. 60. Chen, at p. 61, further notes that the American definition of ‘privity or knowledge’ is in essence viewed as carrying the same meaning as ‘actual fault or privity’.

²⁷³ Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 16 (Available online only at: <http://tetley.law.mcgill.ca/maritime>). The wording “actual fault or privity” of the owner is found in the Limitation of Shipowner’s Liability Convention, Brussels October 10, 1957, Art. 1, while “acts or faults” of the owner was used in the Limitation Convention, Brussels August 25, 1925. For an excellent article on the limitation of liability under the two aforementioned conventions, see Heeney, P. “Limitation of Maritime Claims” (1994) 10 MLAANZ 1.

²⁷⁴ Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 82-84, suggests using Art. IV(2)(q) in order to elucidate when the shipowner is personally liable under Art. IV(2)(a).

The meaning of the expression ‘actual fault or privity’ has been described as follows: “Actual fault or privity implies some culpability on the part of the owner. It may consist in being privy to the neglect, unskilfulness or improper act or omission of a servant or agent. It may be the neglect or the imprudent or wrongful act of the shipowner himself. But the shipowner must in some way be to blame... A failure to make himself aware of what he ought to know is or may be an actual fault.”²⁷⁵ Where the vessel is personally owned, the act, fault or knowledge, must be that of the owner himself.²⁷⁶ In modern shipping, however, ships are almost exclusively owned by corporate bodies. “In law, a personality is attributed to a corporation by a fiction. Since a corporation is not a living person with mind and hands to carry out its intention, the attribution of liability to a corporation was originally solved by the development of a concept known as the ‘alter ego’.”²⁷⁷ The concept of the ‘alter ego’, and the notion of ‘actual fault or privity’, arose in the House of Lords decision of *Lennard Carrying Co. v. Asiatic Petroleum Co.*²⁷⁸ The House of Lords considered the instance where cargo was destroyed as a result of the stranding of the vessel, which subsequently caught fire. Both the shipowners and the managing owners were limited liability corporations. One individual, Lennard, was a director of both companies and took an active part in the management of the vessel. The shipowners argued that the loss occurred without their fault or privity, and as such the House of Lords considered whether the fault of Lennard, in knowing or having means to know of the defective boilers, was the fault of the company itself. Viscount Haldane, in his seminal speech, opined as follows: “[A corporation] has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who really is the directing mind and will of the corporation, the very ego and center of the personality of the corporation. That person may be under the direction of the shareholders in a general meeting; that person may be the board of directors itself, or it may be, and in

²⁷⁵ *James Patrick & Co Pty Ltd v. Union SS Co of New Zealand* (1938) 60 CLR 650 (Aust. H.C.), at p. 670; It has been noted that actual knowledge is not required, rather constructive knowledge is sufficient (Chen, X. *Limitation of Liability for Maritime Claims: A Study of U.S Law, Chinese Law and International Conventions* (2001) Kluwer, The Hague, at p. 62).

²⁷⁶ Gaskell, N. et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 344.

²⁷⁷ Mandaraka-Sheppard, A. *Modern Admiralty Law* (2001) Cavendish Publishing, London, at p. 919.

²⁷⁸ *Lennard Carrying Co v. Asiatic Petroleum Co.* [1915] A.C. 705 (H.L.)

some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company... It must be upon a true construction of [s. 502 of the Merchant Shipping Act 1894] in such a case as the present one that the fault or privity is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing *respondeat superior*, but somebody for whom the company is liable because his action is the very action of the company itself.”²⁷⁹ Accordingly, the shipowners were unable to limit their liability. *Lennard Carrying Co.* is the seminal judgment on the alter ego of the shipowner, and as such has been followed extensively.²⁸⁰

It has been suggested that actions by the board of directors of a corporation would be considered to be the actual fault or privity of the corporation, while actions by junior and middle management would not,²⁸¹ however this proposition is debatable. Exactly what level of position in a corporate structure is the alter ego of the shipowner is difficult to pinpoint precisely. The Privy Council in *Lennard’s Carrying Co.* opined about individuals in relation to the board of directors of a corporation, however, subsequently, the notion of the alter ego has been extended to include management personnel. In *The Lady Gwendolen*, the English Court of Appeal found that the marine superintendent, along with the manager of the traffic department, had failed to detect the master’s repeated occurrences of excessive speed and dangerous navigation that eventually led to a collision.²⁸² The Court of Appeal reasoned that “where, as in the present case, a company has a separate traffic department, which assumes responsibility for running the

²⁷⁹ *Ibid.*, at pp. 713-714.

²⁸⁰ See *Societe Anonyme Des Minerais v. Grant Trading Inc. (The Ert Stefanie)* [1989] 1 Lloyd’s Rep. 349 (C.A.) where the owners of the vessel were denied limitation for losses resulting from the errors of the management company; *The Garden City* [1982] 2 Lloyd’s Rep. 382 (Q.B.) where Justice Staughton held that the fault of the chief navigator was not imputed to the shipowner, as he was not the directing mind, but the fault of director of the technical and investment department would have been the fault of the shipowner had his fault been causative; *Meredith Jones v. Vangemar Shipping (The Apostolis)* [1997] 2 Lloyd’s Rep. 241 (C.A.), the Court of Appeal held, at p. 258, that the claimants had failed to prove that the welding, which had allegedly cause the fire aboard ship, was an incident persistent enough over time such that the general manager of the firm of ship managers appointed by the shipowner, should have been aware of it.

²⁸¹ Gaskell, N. et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 344.

²⁸² *The Lady Gwendolen* [1965] 1 Lloyd’s Rep. 335 (C.A.). In this instance, the shipowner was Arthur Guinness Son & Co., known commonly as the Guinness Brewery.

company's ships, I see no good reason why the head of that department, even though not himself a director, should not be regarded as someone whose action is the very action of the company itself, so far as it concerns anything to do with the company's ships."²⁸³ As such, the shipowners were not entitled to limit their liability.

When considering jurisprudence on the notion of whose action is the action of the company itself, caution must be exercised when referring to United States jurisprudence. "In the United States, courts have long obtained a reputation for their dislike for the Limitation of Liability Act of 1851 and the term 'privity or knowledge' has been used as a convenient point of attack by U.S. courts to deny the right to limitation."²⁸⁴ Accordingly, one may find 'privity or knowledge' much lower down in the corporate hierarchy, than one would when relying on the notion of 'actual fault or privity' as found in Commonwealth jurisprudence. A 5th Circuit Court of Appeals decision imputed the privity and knowledge of the master of the vessel to the corporation on the basis that he had significant autonomy in managing the vessel, such as recruiting the crew and arranging the charters.²⁸⁵ Moreover, United States district courts and courts of appeal have held that the privity or knowledge of the corporation is that of his employees with supervisory or discretionary powers.²⁸⁶ A particularly striking example is *In re Hercules Carriers Inc*, where the 11th Circuit Court of Appeal considered the instance of an allision with a bridge in Florida causing both the loss of property and lives while the vessel was under the command of a pilot.²⁸⁷ It was determined that the cause of the allision was the vessel's excessive speed in poor visibility, and the Court of Appeals faulted the vessel's crew for their failure to countermand the negligence of the pilot.²⁸⁸ Nevertheless, the Court of Appeals found that the shipowner was privy to the negligence of the crew, on

²⁸³ *Ibid*, at p. 345.

²⁸⁴ Chen, X. *Limitation of Liability for Maritime Claims: A Study of U.S Law, Chinese Law and International Conventions* (2001) Kluwer, The Hague, at p. 60.

²⁸⁵ *Continental Oil Company v. Bonaza Corporation*, 706 F.2d 1365 (5th Cir. 1983).

²⁸⁶ Chen, X. *Limitation of Liability for Maritime Claims: A Study of U.S Law, Chinese Law and International Conventions* (2001) Kluwer, The Hague, at p. 64; See also *Spencer Kellogg & Sons Inc. v. Hicks (The Linseed King)*, 285 U.S. 502, holding that the knowledge of the manager of the linseed oil factory in New Jersey, who was instructed to inform the master of the motor launch that it was not to be used during the winter, was imputed to the executive officers of the Spencer Kellogg's company, when the launch sank after collision with ice while carrying plant workers.

²⁸⁷ *In re Hercules Carriers Inc.*, 768 F.2d 1558 (11th Cir. 1985)

²⁸⁸ *Ibid*, at pp. 1566-1567.

the basis that the shipowner had permitted the practice of allowing navigational decisions to be made by the pilots when onboard.²⁸⁹ When considering actual fault or privity of the shipowner with respect to the nautical fault exemption, the use of commonwealth jurisprudence on limitation is therefore preferred.

In the context of the nautical fault exemption, it has been argued that the owner's fault or privity would be satisfied by the fault of senior management personnel: "errors of senior employees are covered...[thus] if the technical inspector acquires equipment which he should have realized was inadequate, or the personnel manager hires an officer he should have realized was incompetent, then these actions will be deemed to have been carried out by the owner."²⁹⁰ Whose actions can be imputed to the shipowner has been considered in several instances involving a nautical fault. When there is a simple navigational error by the master or the crew, often that will be difficult to impute to the owners of the vessel. For example, the Privy Council opined that negligent navigation on the part of the captain, officers and crew in colliding with a lighthouse was not an act that could be characterized as the actual fault or privity of the shipowners.²⁹¹ Where the analysis becomes more complex, is often where there is an incident and a representative or a superintendent of the shipowner is contacted. The Supreme Court of Canada considered the issue of whose fault is attributable to the shipowner in the instance where a vessel had rubbed the bank of a canal resulting in the wetting of cargo.²⁹² The assistant marine superintendent stationed at the head office had received the Captain's call reporting the incident. The Captain was instructed to proceed to Montreal based on the fact that there was no change in the list or draft of the vessel, nevertheless, on arrival the cargo was wetted. The claimant contended that the owners had intervened and taken control of the vessel, and thus were not protected from liability under the nautical fault exemption. The Supreme Court of Canada held that the assistant marine supervisor was not the "alter ego" of the shipowner as described by the House of Lords in *Lennard*

²⁸⁹ *Ibid*, at pp. 1571-1572.

²⁹⁰ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 271-272.

²⁹¹ *Robin Hood Mills v. Paterson Steamships (The Thordoc)* [1937] 3 D.L.R. 1 (P.C.), in this instance, the Privy Council was considering an action for limitation.

²⁹² *Leval & Co. v. Colonial Steamships* [1961] S.C.R. 221.

*Carrying Co. v. Asiatic Petroleum Co.*²⁹³ Conversely, in *The Isis*, the United States Supreme Court considered the instance where a vessel's rudder became damaged through stranding in a river prior to her first port of discharge.²⁹⁴ Once the vessel reached the port of discharge, the owner's managing representative instructed that the rudder should be repaired at the home port, thus the bent rudder was subsequently lashed into position for the remainder of the voyage. The Supreme Court held that when the vessel grounded for the second time, the carrier was responsible as the owner had taken control of the vessel, and thus the exemption was unavailable. The Supreme Court opined that "here is a case where master and crew have surrendered their management and have made their appeal to the owner to resume control himself...An owner intervening in such circumstances must be diligent in inspection or forfeit his immunity. Negligence at such a time is not the fault of servants employed to take the owner's place for the period of the voyage. It is the fault of the owner personally, exercising his judgment to determine whether the voyage shall go on."²⁹⁵ Similarly, in *Campbell Soup Co. v. Federal Motorship Co.*, where the owner of a vessel sent a wreck master to supervise repairs at a port of refuge, the cargo was entitled to recover for damage suffered after the vessel had left the port of refuge.²⁹⁶ In the *West Cajoot*, the vessel grounded during her voyage from Manila to Los Angeles, and pulled into Kobe for repairs.²⁹⁷ The 9th Circuit Court of Appeals found that "at Kobe, the vessel was boarded by the agent of her operators...by the port superintendent and other officials of the United States Shipping Board. These officials, who unquestionably can be regarded as the responsible representatives of the shipowner, [discussed ways to handle the ship and cargo]...under such circumstances, if the West Cajoot sailed from Kobe in an unseaworthy condition, the fault is attributable to the shipowner, and cannot be regarded as a fault of navigation or management."²⁹⁸

Finally, the error must be one by master, mariner, pilot or servant of the carrier, as opposed to, for example, an agent. If the negligence concerning the management or

²⁹³ *Ibid*, at p. 227, relying on the test found in *Lennard Carrying Co v. Asiatic Petroleum Co.* [1915] A.C. 705 (H.L.).

²⁹⁴ *May v. Hamburg-Amerikanische (The Isis)*, 1933 AMC 1565 (S.C.).

²⁹⁵ *Ibid*, at pp. 1571-1572.

²⁹⁶ *Campbell Soup Co. v. Federal Motorship Co.*, 1935 AMC 634 (S.D.N.Y. 1935).

²⁹⁷ *United States of America v. Los Angeles Soap Co. (The West Cajoot)*, 1936 AMC 850 (9 Cir. 1936).

²⁹⁸ *Ibid*, at p. 859.

navigation of the vessel is committed by an individual not falling within one of the four specified categories of individuals, then the carrier is liable.²⁹⁹ As well, in the instance of multiple tortfeasors, all must fall within the specified categories. It has been stated that “if the damage was caused partly by the chief officer’s negligence and partly by the negligence of the repairer’s men, that would not give the shipowners the protection they seek.”³⁰⁰

4.1.3. “In the Navigation or in the Management”

Neither the Harter Act, the Hague or Hague Visby Rules define the meaning or the effect of the words “navigation” or “management”. One commentator has described “navigation” as covering steering and manoeuvring the vessel, while “management” relates to the ship’s condition, the manning and the equipment.³⁰¹

The term “navigation” means manoeuvring and other seafaring matters rather than the commercial operation of the vessel.³⁰² A classic example would be, for instance, steering the wrong course.³⁰³ The House of Lords has recently defined navigation as embracing matters of seamanship and including “choices as to the speed or steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart.”³⁰⁴ The term “navigation” is not restricted to when the vessel is “steaming forward” but covers the situation where the vessel is propelled simply by the current.³⁰⁵

²⁹⁹ Cooke, J., et al, *Voyage Charters* (1993) LLP, London, at p. 754.

³⁰⁰ *Minister of Food v. Reardon Smith Line (Fresno City)* [1951] 1 Lloyd’s Rep. 265 (K.B.), at p. 270. Justice McNair relies on the *Accomac* (1890) 15 P.D., noting that the Court of Appeal in that instance “took the view that a finding of joint negligence by two persons, one being within the exception and the other without, would disentitle the shipowner to rely upon the exception. In *The Fresno City* however, that point was not at issue, “but it seems to me quite plain that this is not a point which it was the umpire’s intention should be open for argument before me”, therefore Justice McNair’s comment is obiter.

³⁰¹ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 271-272

³⁰² Poland, S. & Rooth, T. *Gard Handbook on P&I Insurance* (1996) Gard, Arendal, Norway, at p. 275.

³⁰³ *The Satya Kailash* [1982] 2 Lloyd’s Rep. 465 (K.B.); [1984] 1 Lloyd’s Rep. 588 (C.A.).

³⁰⁴ *Whistler International Ltd. v Kawasaki Kisen Kaisha (The Hill Harmony)* [2001] 1 All ER 403 (H.L.), at p. 422.

³⁰⁵ *General Cocoa Co. v. S.S. Lindenbank*, 1979 AMC 283 (S.D.N.Y. 1978), where a vessel ran aground after drifting for a period of time. The claimants argued that the carrier could not benefit from the error in navigation defence as the vessel was not navigated at the time, citing Black’s Law Dictionary defining navigation as the act of ‘traversing the sea’ implying that a ship should be steaming forward. The court responded that such a description would be too narrow, and that a full bridge watch was maintained at the time thus the vessel was being navigated when she went aground.

The term “management” has been described by Lord Atkins as referring to the handling of “the ship as a ship”, although it may also affect the safety of the cargo.³⁰⁶ It has been noted that “the word ‘management’ is not a term of art.”³⁰⁷ Lord Sumner has explained that “[management] has no precise legal meaning and its application depends on the facts, as appreciated by persons experienced in dealing with steamers.”³⁰⁸ Sir Francis Jeune notes “the word “management” goes somewhat beyond – perhaps not much beyond – navigation, but far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself...[and] I see no reason for limiting the word “management” to the period of the vessel being actually at sea.”³⁰⁹

An error, which is one in the navigation and the management of the vessel, has been defined as “an erroneous act or omission, the original purpose of which was primarily directed towards the ship, her safety and well-being, and towards the common venture generally.”³¹⁰ It has been noted, however, in *The Rodney*, that “[t]he acts need not be done merely for the safety of the vessel or for her maintenance in a seaworthy condition. If you extend them to keeping the vessel in her proper condition, then the act in this case is an act done in the management of the vessel.”³¹¹ There are however limits to what the phrase ‘navigation or in the management’ will cover. In *The Santa Ana*, the vessel struck a concealed underwater obstruction in the defendant’s dry docking facility, causing water entry and damaging the cargo.³¹² The 9th Circuit Court of Appeals

³⁰⁶ *Hourani v T&J Harrison* (1927) 28 Ll. L.R. 120 (C.A.), at p. 125.

³⁰⁷ *The Dagny Skou* [1980-1981] 1 S.L.R. 2000 (C.A.), at p. 202; *Minnesota Mining & Manufacturing (Australia) v. The Ship Novoaltaisk* [1972] 2 N.S.W.L.R. 476, at p. 481, as Macfarlan J. noted “the word ‘management’ is not a term of art.”

³⁰⁸ *Suzuki & Co Ltd. v. Beynon & Co. Ltd.* (1926) 42 T.L.R. 269 (H.L.), at p. 274.

³⁰⁹ *The Glenochil* [1896] P 10, at p. 16, where an engineer negligently failed to check a sounding pipe before ballasting the vessel. In this instance the accident occurred in port during the discharge of the cargo.

³¹⁰ Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 3 (Available online only at: <http://tetley.law.mcgill.ca/maritime>), based on *Kalamazoo Paper Co. v. C.P.R. (The Nootka)* [1950] SCR 356. See also *Seaway Distributors v. Newfoundland Container Lines* (1982) 52 N.S.R. (2d) 566 (N.S. Dist. 1), at p. 573.

³¹¹ *The Rodney* [1900] P 112, at p. 117, where a boatswain used a metal poker to clear a pipe that carries off water and had cause flooding in his quarters, but negligently poked a hole in it causing water to enter the forehold and damage a portion of the cargo.

³¹² *Grace Line v. Todd Shipyards (The Santa Ana)* [1975] 1 Lloyd’s Rep. 276 (C.A.)

commented that with regard to the negligent maintenance of a dry dock falling under the exemption, “a reading of the many cases giving context to the words “navigation” and “management” makes it evident [the defendant] was doing something else.”³¹³ Similarly, the Eastern District Court of Virginia has also placed a limit on what the exemption will cover. In the limitation proceedings of *The Mimi*, an able-bodied seaman named Gun Gun Supardi “went bezerk without warning”, murdered the four officers on board, ordered the remaining four men into the lifeboats at knife point and scuttled the vessel by opening the sea valves.³¹⁴ The District Court held “we do not find sec. 1304(2)(a), which refers to loss due to an act of the master or crew in navigating or managing the vessel, to be applicable. Certainly Supardi’s acts in murdering and scuttling could not be deemed acts of navigation or management.”³¹⁵ Finally, it has been held that theft by stevedores does not constitute an error in management. The English Commercial Court held, “I am not satisfied that the act of the stevedores...in stealing the cargo while they ought to be discharging it, can be held to be an act in the management of the ship; and therefore I have come to the conclusion that the defendants fail to bring themselves within the protection of Clause (a) [of Rule 2 of Art. IV].”³¹⁶

4.1.4. **“The Ship”**

With contracts for the carriage by sea being frequently combined with inland portions of the journey, an increasing numbers of cargo claims for loss or damage to cargo are occurring during an inland leg of the journey. Multimodal carriage has often proven complex and problematic with regard to carrier liability.³¹⁷ This led the Supreme

³¹³ *Ibid.*, at p. 286. Note that the Court of Appeals finding with regard to the dry dock owner being shielded by the exemption are obiter, as it had already been held that the Himalaya clause could not be extended to cover non-carriers such as dry dock owners.

³¹⁴ *Mimi Lim. Proc.*, 1977 AMC 1841 (E.D. Vir. 1977), at p. 1847.

³¹⁵ *Ibid.*, at p. 1848. The court, however, did find that the carrier was protected by 1304(2)(q) as his fault did not contribute to the loss complained of. Evidently ‘murdering’ would not fit within the exemption, however the act of opening the sea valve thus causing the loss of the ship and cargo is an act that has been held to be an act of management.

³¹⁶ *Brown & Co. v. Harrison* [1927] 27 Ll. L. Rep. 415 (K.B.), at p. 418; See also *Leesh River Tea Co. v. British India Steam Navigation Co. (The Chyebassa)* [1966] 2 Lloyd’s Rep. 193 (C.A.) where the English Court of Appeal held that a felonious act of stevedores was not an act done in the management of the vessel with Art. IV(2)(a).

³¹⁷ See Crowley, M. “The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem” (2005) 79 Tul. L. Rev. 1461, in particular pp. 1478-1485; See also Waid, R. “Piloting in Post-Kirby Waters: Navigating the Circuit Split Over Whether the Carmack Amendment

Court of the United States to recently clarify the issue somewhat by holding that maritime law governed the limitation of liability of an inland rail carrier for cargo damage, by virtue of the reasoning that where the contract involves a substantial ocean leg, the entire contract is a maritime contract.³¹⁸ In light of recent decisions such as *Kirby*, and with the standard industry practice of contractually extending the limitations of liability in the bill of lading to cover agents, intermediaries and independent contractors entrusted with the goods,³¹⁹ it becomes easy to lose sight of the fact that the nautical fault exemption applies to errors in navigation or management of *the ship*. The protection of the nautical fault exemption therefore may only extend to the ship, as illustrated in *The Sealand Express*.³²⁰ In this instance, the truck and the driver who received the cargo directly from the vessel to deliver it to the consignee erroneously took a route under an overpass highway that was too low for the load with the result that the cargo was damaged. The 5th Circuit Court of Appeals held that the error in navigation exemption could not extend to protect the truck as “the truck used to transport the varnishing machine from Houston to Nuevo Laredo was not a “ship” as defined by COGSA.”³²¹ The definition of “ship” can also be quite restrictive. The 9th Circuit Court of Appeals has found that where cargo was transferred to lighters, and subsequently damaged, “COGSA saves the carrier harmless only for errors of management with respect to the “ship,” and “ship” as used in the Act, has been judicially defined to exclude lighters.”³²² Conversely, the Exchequer Court of Canada, held that where the goods were loaded onto lighters to take them ashore, but fell off and sank, the Hague Rules applied, as the lighter was a “ship” within the meaning of the Rules.³²³ As such, despite the fact that Himalaya Clauses are frequently employed to

Applies to the to the Land Leg of an Intermodal Carriage of Goods on a Through Bill of Lading” (2007) 34 Transp. L.J. 113.

³¹⁸ *Norfolk Southern Railway Co. v. James N. Kirby Pty, Ltd.*, 2004 AMC 2705 (U.S. 2004). At p. 2707, Justice O’Connor aptly began the judgment with the statement that “This is a maritime case about a train wreck”.

³¹⁹ See for example the discussion in *Kirby*, *ibid*, at p. 2717-2720, concerning the Himalaya Clause in the bill of lading and its application to independent contractors, such as Norfolk Southern, whose services have been retained to perform the contract.

³²⁰ *Vistar S.A. v M/V Sealand Express*, 1986 AMC 392 (5 Cir. 1985).

³²¹ *Ibid*, at p. 395

³²² *Isthmian Steamship Co. v. California Spray-Chemical Co.*, 1961 AMC 2476 (9 Cir. 1961), at p. 2484.

³²³ *Falconbridge Nickel Mines v. Chimo Shipping* [1969] 2 Lloyd’s Rep. 277 (Exch. C. Can.), at p. 291-292. Note that the Exchequer Court was the Admiralty Court of Canada, and the predecessor to the current Federal Court of Canada.

extend the limitations under the bill of lading to parties other than the shipowner, only navigational and management errors relating to a ship are exempted from liability.

4.2. SCOPE IN RELATION TO THE CARRIER'S OBLIGATIONS UNDER THE HAGUE RULES

Where the scope of the exemption often proves problematic is the intersection between faults that are excusable under the nautical fault exemption, and those that trigger carrier liability for failing to fulfil obligations with respect to the cargo or the seaworthiness of the vessel.

4.2.1. Article III(2): Care of the Cargo

Arguably, the element of the defence that has fostered confusion and spawned considerable litigation over the past century is the distinction between fault in the management of the vessel and fault with respect to the carrier's duty to take proper care of the cargo.³²⁴ One commentator has characterized distinguishing between these two faults as "probably one of the most, if not the most, difficult features of the Rules."³²⁵ Gilmore & Black have noted that "Few clear-cut concepts have appeared for dealing with the problem; the feel of it can only be acquired by reading the cases."³²⁶ The distinction between improper management of the ship and improper handling of the cargo is still regarded, over a century after it was first considered by the courts, as a "hot bone of contention".³²⁷ This is clearly distinguished from the errors in navigation aspect of the

³²⁴ Wilson, J.F. *Carriage of Goods by Sea*, 3rd Ed. (1998) Pitman, London, at p. 257; Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 3 (Available online only at: <http://tetley.law.mcgill.ca/maritime>). For a discussion by the Cour d'Appel de Montpellier on the distinction between nautical fault and fault in respect of the cargo as found in the Hague Rules from a French perspective see Cour d'Appel de Montpellier, 19 mars 1969, (Regina Pacis), DMF 1969, 727. For doctrinal commentary on the distinction between *fautes nautiques* and *fautes commerciales*, see Fraikin, G. *Traité de la Responsabilité du Transporteur Maritime* (1957) Pichon et Durand-Auzias, Paris, at pp. 201-203.

³²⁵ Astle, W. *Shipowners' Cargo Liabilities and Immunities* (1967) H.F. & G. Witherby Ltd. London

³²⁶ As quoted by Parks, A. & Cattell, E. *The Law of Tug, Tow and Pilotage* (1994) Cornell Maritime Press, Maryland, at p. 59.

³²⁷ Japikse, R.E. "Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 185.

exemption, where courts have little difficulty distinguishing between it, and a failure to care for the cargo.³²⁸

The carrier's duty to care for the cargo is expressed in Article III(2) of the Hague Rules, which provides: "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." In France, the obligation to care for the cargo is characterized as "*de fournir à la marchandise les soins diligents d'un professionnel competent*," and should he fail in that obligation, his failure is *faute commerciale* for which he is held liable.³²⁹ The distinction between the obligation to care for the cargo and error in management is best expressed in the words of Lord Justice Greer: "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; for if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved."³³⁰ Lord Justice Greer's judgment is considered the leading opinion on this matter, and has been relied on extensively in subsequent judgments and cited in many doctrinal works.³³¹ Recently, the English

³²⁸ Healy, N. & Sharpe, D. *Cases and Materials on Admiralty, 4th Edition* (2006) West Pub. Co., St. Paul, Minnesota, at p. 341.

³²⁹ Seriaux, A. *La faute du transporteur* (1984) Economica, Paris, at p. 145. [Author's translation: to treat the merchandise with the same care as a diligent and competent professional would.] An example is found where the Cour d'Appel de Paris denied the carrier the benefit of the nautical fault exemption for the disappearance of the cargo where it was determined that the carrier failed to properly supervise the cargo in the Ghanan port (Cour d'Appel de Paris, 14 mars 1985, DMF 1987, 364).

³³⁰ *Gosse Millerd v. Canadian Government Merchant Marine* (1927) 29 Ll. L.R. 190, at p. 200. Lord Justice Greer further clarifies the distinction by commenting that "In my judgment, the reasonable interpretation to put on the Articles is there is a paramount duty imposed to safely carry and take care of the cargo, and that performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1) negligence in caring for the safety of the ship; (2) failure to take care to prevent damage to the ship, or some part of the ship; or (3) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for ship's purposes." Lord Justice Greer's judgment in the Court of Appeal was the dissenting judgment, however, the House of Lords subsequently upheld Greer's judgment and allowed the appeal in *Gosse Millerd v. Canadian Government Merchant Marine* (1928) 32 Ll. L. Rep. 91.

³³¹ See *International Packers v. Ocean Steam Ship Co.* [1955] 2 Lloyd's Rep. 218 (Q.B.), at p. 234; *Kalamazoo Paper Co. v. C.P.R.* [1950] S.C.R. 356, at p. 365; Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 5 (Available online only at: <http://tetley.law.mcgill.ca/maritime>); Wilson, J.F. *Carriage of Goods by Sea*, 3rd Ed. (1998) Pitman, London, at p. 257; Marais, G. *Les Transports de Marchandises Par Mer et Jurisprudence: Loi du 2 Avril 1936* (1948) Pichon & Durand-Auzias, Paris, at p. 39; Ping-fat, S. *Carrier's*

Commercial Court relied on Lord Justice Greer's characterization of the distinction when considering the excessive heating of the bunker oil that was believed to have led to an explosion.³³² Justice Morison held that the shipowner could rely on Art. IV(2)(a) on the basis that "[t]he heating of the bunker tank was to facilitate the transfer of oil from it to the engines. It was a single act which did not relate in any way to the care of the cargo; albeit it may have indirectly adversely affected the cargo."³³³

In *Hourani v. T&J Harrison*, Lord Justice Banks draws the distinction between "damage resulting from some act relating to the ship herself and only incidentally damaging the cargo" and an act dealing "solely with the goods and not directly or indirectly with the ship herself,"³³⁴ and thus it was held that although the act of stowing and discharging the cargo does affect both the ship and the cargo, they couldn't be regarded as matters concerning the management of the ship.³³⁵ In *The Ferro*, Justice Barnes is adamant with respect to stowage, "[i]t seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of the cargo."³³⁶

The actual act of stowing or discharging cargo can generally be clearly distinguished from an act in relation to the management of the vessel,³³⁷ nevertheless in

Liability under the Hague, Hague-Visby and Hamburg Rules (2002) Kluwer Law International, The Hague, at p. 91-92.

³³² *Compania Sud American Vapores v. MS ER Hamburg Schiffahrtsgesellschaft* [2006] 2 Lloyd's Rep. 66 (Q.B.)

³³³ *Ibid.*, at p. 82.

³³⁴ *Hourani v T&J Harrison* (1927) 28 Ll. L.R. 120 (C.A.), at p. 123.

³³⁵ *Ibid.*, at p. 124. In this instance, the stevedores pillaged the cargo, and Banks L.J. holding for the Court of Appeal, found that on the basis of English and American authorities that these acts could not come within the expression of acts done in the management of the ship.

³³⁶ *The Ferro* [1893] P. 38, at p. 46. In this instance a cargo of oranges were damaged due to the manner in which they were stowed, with the result that the carrier was held responsible.

³³⁷ In *MacNamara v. The Hatteras* [1930] 38 Ll. L. Rep. 232 (Irish Free State, Adm. Div.), at p. 235, it was found that an error in stowage, with respect to a cargo of tobacco, could not be a fault or error in the management of the ship. In *Carling O'Keefe Breweries v. CN Marine* [1990] ETL 654 (F.C.A.), over 4000 cases of beer in 3 containers were lost overboard as a result of being stowed on deck and secured with wire rope lashings instead of superior fittings, and thus the Federal Court of Appeal held that this was not an error in management, rather there was a want of care of the cargo. In *General Chemical Company v. Barge Joseph J. Hock*, 1934 AMC 507 (2 Cir. 1934), it was held that the discharge of cargo causing damage is negligence in relation to care of the cargo and not an error in management. In the Cour de Cassation, 26 fevrier 1991, (Aude), DMF 1991, 358, the French Cour de Cassation held that where a vessel was discharging and developed a list, due to an error in the discharging process, causing damage to cargo, the error was a *faute commerciale*. Although an error in stowage, has been held by the Cour de Cassation to be

certain factual situations the distinction between acts in relation to the care of the cargo and the management of the vessel can prove difficult to draw. There are actions that are clearly connected with the vessel, such as engines and steering gear, and actions clearly connected with the cargo, such as refrigeration or stowage. There are actions, however, that may be connected with both; “There are some parts of the ship which for this purpose are regarded as *ancipitis usus*; for instance, the hatches may in one aspect be regarded as part of the outer skin of the vessel as when decks are actually or potentially swept by seas, so that the proper battening down of the hatches with tarpaulins and cleats is as much a part of the management of the ship as closing the portholes. Under other circumstances, as in dock or in calm waters, the hatches belong to the management of the cargo, either because they have to be removed for ventilation or kept tight to keep wet from perishable cargo.”³³⁸ Where an action could be connected to both the cargo and the management of the vessel, the courts of various jurisdictions have not responded in a consistent fashion. Justice Rand, of the Supreme Court of Canada, has found that if the act or omission is one which is both care of the cargo and error in management, then the carrier will benefit from the exemption.³³⁹ Similarly, the Cour de Cassation of France has found that where one error was both *faute nautique* and *faute commerciale*, the carrier is

a *faute nautique* where it affected the stability and security of the whole vessel, however this judgment is older and perhaps may be decided differently today (Cour de Cassation, 4 juillet 1972, (Hildegard Doerenkamp), DMF 1972, 717).

³³⁸ *Forman & Ellams v. Federal Steam Navigation* [1928] 30 Ll. L. Rep. 52 (K.B.), at p. 60.

³³⁹ In *Kalamazoo Paper Co. v. C.P.R.* [1950] S.C.R. 356, The Supreme Court of Canada held that an error to utilize pumping facilities was an error in management, yet at p. 366, Rand J. found that the omission was also in respect of the cargo, but stated: “the further question is whether an act or omission in management is within the exception when at the same time and within the same mode it is an act or omission in relation to care of the cargo. It may be that duty to the ship as a whole takes precedence over duty to a portion of the cargo; but, without examining the question, the necessary effect of the language of Article III(ii) “subject to the provisions of Article IV” seems to me to be that once it is shown that the omission is in the course of management, the exception applies, notwithstanding that it may be also an omission in relation to the cargo. To construe it otherwise would be to add to the language of paragraph (a) the words “and not being a neglect in the care of the goods.” Rand’s statement, if read carefully would most certainly interpret it as stating that if the act or omission is one which is both care of the cargo and error in management, then the carrier is not responsible. Tetley has stated “[i]f both ship and cargo have been affected by the same error, then the carrier is usually exculpated, because the whole venture is implicated.” (Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 5 (Available online only at: <http://tetley.law.mcgill.ca/maritime>)). On the other hand, Wilson interprets Rand’s judgment as taking “the view that the negligent conduct in question was directly primarily to ensure the safety of the vessel.” (Wilson, J.F. *Carriage of Goods by Sea*, 3rd Ed. (1998) Pitman, London, at p. 258, f.n. 94). There is a distinction there as Tetley’s argument, and presumably Rand’s judgement, are meant irrespective of entering into a primary purpose analysis, and if the act affects both, the carrier is exonerated. Wilson, on the other hand seems to imply that the carrier is only exonerated if the primary purpose of the act is with regard to management.

exonerated.³⁴⁰ Yet this position is contentious.³⁴¹ More recently, Rodière has noted that as the carrier must actually establish that the fault is *nautique* in order to exempt himself from liability, then the two categories of fault, *nautique* and *commerciale*, are not on an equal plane and there is a presumption that the fault committed is *commerciale*.³⁴² Under British law, it has been noted that “[i]f both the ship and cargo are affected by the same error, the carrier can usually avoid responsibility, as the whole venture is involved, but each case will be decided on the individual facts of the case. Where two errors occur, one being management of the ship and the other care of the cargo, the carrier must distinguish between the damage caused by each or be responsible for all.”³⁴³ The Italian position is such that where there is an act that has elements of both nautical fault and error in respect of the cargo the carrier is liable. The Corte Di Cassazione considered the instance where two containers had been lost during the voyage where the route had been selected with knowledge of, and despite, adverse weather condition.³⁴⁴ The Corte De Cassazione held that for the carrier to be relieved of liability by virtue of nautical fault, the carrier must prove that there was no other cause of the loss, which in this instance would be to demonstrate that there were no errors with respect to stowage.³⁴⁵

In the United States, it has been noted that “the United States Supreme Court had addressed the distinction between error in management and error in care of the cargo but has not articulated a clear test. The Ninth Circuit, noting that no precise definitions exist, advocates a case-by-case determination using the following test: If the act in question has the primary purpose of affecting the ship, it is ‘in navigation or in management’; but if

³⁴⁰ Cour de Cassation, 6 juillet, 1954, DMF 1954, 714. See also Pontavice, E. *Droit et Pratique des Transports Maritimes et Affrètements* (1970) Delmas et Cie., France, at p. 17, stating that a fault whose nature affects both the safety of the vessel and the safety of the cargo falls within the nautical fault exemption.

³⁴¹ Chaïban, C. *Causes Legales D’Exoneration du Transporteur Maritime dans le Transport de Merchandises* (1965) Pichon & Durand-Auzias, Paris, at pp. 93-94; See also Fraikin, G. *Traité de la Responsabilité du Transporteur Maritime* (1957) Pichon et Durand-Auzias, Paris, at p. 203 who notes that where two faults, one commercial and one nautical, cause the damage the carrier can only be exonerated where he can prove that the nautical fault caused the damage exclusively.

³⁴² Rodière, R. & du Pontavice, E., *Droit Maritime*, 12th Ed. (1997) Dalloz, Paris, at p. 346.

³⁴³ Lloyd’s of London Press. *A Guide to the Hague and Hague-Visby Rules: An LLP Special Report* (1985) LLP, London, at p. 29.

³⁴⁴ Corte di Cassazione, May 18, 1995, *Agenzia Marittima Aldo Spadoni v. Insurance Co. of North America*, (1996) 1 Unif. L. Rev. 378, at p. 378.

³⁴⁵ *Ibid.*

the primary purpose is to affect the cargo, it is not ‘in navigation or management’.”³⁴⁶ The act of distinguishing between care of the cargo and errors in management has been termed by some authors as the “primary purpose test”.³⁴⁷ It should be noted that although this line of reasoning and manner of characterization is an American legal construct, it is not restricted solely to the United States, and has been utilized by certain European commentators.³⁴⁸ In *The Germanic*, the United States Supreme Court opined on the primary purpose test where the vessel arrived at port covered with heavy coat of ice, and during the simultaneous loading and discharge, the vessel listed and sank.³⁴⁹ Justice Holmes, speaking for the United States Supreme Court, opined, “[i]f the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section [of the Harter Act] removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and the object of the acts which cause the loss.”³⁵⁰

³⁴⁶ *Shaver Transportation Co. v. The Travelers Indemnity Co.*, 1980 AMC 393 (D.C. Ore. 1979), at p. 399, referencing for the test, *Grace Lines v. Todd Shipyards*, 1974 AMC 1136, at p. 1153 (9 Cir. 1974). In this instance the shipowner’s failure to provide uncontaminated load lines was viewed as an error in the care and custody of the cargo.

³⁴⁷ Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 4 (Available online only at: <http://tetley.law.mcgill.ca/maritime>), “In the United States, the “primary purpose” test is employed to differentiate between whether the impugned operation was conducted principally in the interests of the ship or of the cargo.”; Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 631, “There are times when the actions of the crew affect both vessel and cargo. The United States has solved this dilemma by applying the ‘primary purpose’ test to ascertain whether the operation was conducted in the interests of the vessel or the cargo.”

³⁴⁸ For example, one European commentator notes the distinction between care of the cargo and error in management as “There is a case of improper care of the goods when equipment of the ship is misused or neglected which exclusively or primarily serve the purpose of proper care of the goods, or when the use actually made of it was so directed at such care (e.g. an omission to start up or adequately adjust a refrigerator for the preservation of a fruit cargo...); conversely, there is a case of erroneous management of the ship when equipment of the vessel was misused or neglected which is exclusively or primarily meant to serve ship’s purposes or when the use actually made of it was so directed at such purpose (e.g...negligent filling of tanks...)” (Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 185).

³⁴⁹ *Oceanic Steam Navigation Co. v. Aitken (The Germanic)*, 196 U.S. 589 (1904).

³⁵⁰ *The Germanic*, *ibid*, at p. 597. For a discussion and application of Justice Holmes’ holding by the Supreme Court of Canada see *Kalamazoo Paper Co. v. C.P.R.* [1950] S.C.R. 356, at p. 370; See also Greenwood, E. “Problems of Negligence in Loading, Stowage, Custody, Care, and Delivery of Cargo” (1971) 45 Tul. L. Rev. 790, at pp. 801-802. For U.S. cases applying the primary purpose test see *Leon*

Acts that have their primary purpose as one in relation to cargo are therefore not considered management of the vessel. Examples are: failing to ventilate,³⁵¹ failing to close ventilation lids,³⁵² stowing cargo in a position where other cargo may damage it,³⁵³ failing to heat cargo,³⁵⁴ and failing to cool cargo,³⁵⁵ among others.³⁵⁶ With regard to what

Bernstein Co. v. Wilhelm Wilhelmsen (M.S. Titania), 1956 AMC, 754; 232 F.2d 771(5 Cir. 1956) and *General Cocoa Co. v. S.S. Lindenbank*, 1979 AMC 283 (S.D.N.Y. 1978), at p. 294.

³⁵¹ In *Schnell v. The Vallescura* 293 U.S. 296 (1934), the Supreme Court held that although during certain parts of the voyage heavy weather prevented ventilation, the evidence showed that ventilation during other portions of the voyage could have been accomplished and therefore the carrier was liable to the cargo owner for damage to a cargo of fresh onions as a result of his negligence in the care of the cargo. The Court opined “the failure to ventilate the cargo was not a ‘fault or error in navigation or management’ of the vessel from the consequences of which it may be relieved by s. 3 of the Harter Act... The management was of the cargo...” (*The Vallescura, ibid*, at p. 303). For further discussion on *The Vallescura*, and other U.S. Supreme Court judgments that have considered the exemption for error in management, see Baer, H. *Admiralty Law of the Supreme Court*, 3rd Ed. (1979) Michie Co, Charlottesville, Virginia, at pp. 507-512. There has been extensive litigation with regard to ventilation, as certain cargos need extra ventilation, for example potatoes and rice. See *Canada Rice Mills v Union Marine & General Ins. (The Segundo)* [1941] 67 Ll.L. Rep. 549 (P.C.), at p. 533 for the Privy Council’s consideration of a damaged shipment of rice. In *Brown & Williamson v. S.S. Anghyra*, 1958 AMC 472 (E.D. Vir. 1957), the master shut down the dynamo for the purpose of ensuring that the crew complied with blackout regulations, however the court found the resulting damage to the tobacco from a failure to ventilate it was an error in caring for the cargo: “while the primary purpose of the dynamo may have been associated with the operation of the ship in normal circumstances, it may be that the primary purpose changed when the vessel was at anchorage under blackout orders.” (*S.S. Anghyra, ibid*, at p. 487).

³⁵² *Lockett & Co. v. Cunard (The Samaria)* 1927 AMC 1057 (E.D.N.Y. 1927), where a ventilator lid was negligently left open while crewmen were using a hose to press up a ballast tank, when the hose burst, the cargo was wetted through the open lid, the court considered this to be an error in the care of the cargo.

³⁵³ In *Knott v. Botany Worsted Mills*, 179 U.S. 69 (1900), the cargo, bales of wool, were stowed forward of a bulkhead that was not watertight, while sugar was stored aft of the bulkhead. The ship was trimmed by the stern, so that sugar drainage would run aft, but cargo aft was subsequently discharged, and the vessel became trimmed by the bow, therefore causing the run off from the sugar to damage the wool. The Supreme Court held that the loss was primarily caused by the stowage of the wool forward without ensuring that no changes in stowage would bring the vessel down by the head. The Court opined: “The primary cause of the damage was negligence and inattention in the loading in the loading or stowage of the cargo, either regarded as a whole, or as respects the juxtaposition of wet sugar and wool bales placed far forward. The wool should not have been stowed forward of the wet sugar, unless care was taken in the other loading, and in all subsequent changes in the loading to see that the ship should not get down by the head.” (*Knott, ibid*, at p. 73). In *The Exmoor* 1939 AMC 1095 (2 Cir. 1939), the carrier was held liable when tobacco was damaged from heat and decay that was caused by valonia (acorn cups) being stowed in the same compartment. On the other hand, in *Warner Moore v. S.S. Milwaukee Bridge*, 1928 AMC 1063 (2nd Cir.), drums of acid carried as deck cargo began to leak during the voyage, the crew then jettisoned certain drums and hosed the deck down, nevertheless a cargo of flour stored under deck suffered acid and water damage. The 2nd Cir. Court of Appeals found this related primarily to the management of the vessel and not to care and custody of the cargo.

³⁵⁴ *The Massasoit* 1928 AMC 1458 (D.N.J. 1928), failing to heat creosote.

³⁵⁵ *The New York* 1929 AMC 53 (2 Cir. 1928), where the Second Circuit Court of Appeals dealt with a failure to keep pears cool. As well see *Barr v. International Mercantile Marine Co.*, 29 F.2d 26 (2Cir. 1928), where a failure to care for the refrigeration equipment, thus failing to keep the cargo cool, was an error primarily in respect of cargo.

³⁵⁶ For further case law and examples see Healy, N. & Sharpe, D. *Cases and Materials on Admiralty* (1974) West Pub Co., St Paul, Minnesota, at pp. 483-486; Sturley, M. *Benedict on Admiralty*, 6th Ed., Volume 2A

activities have their primary purpose in relation to cargo, *Benedict* notes that “if the negligence complained of is in the performance or non-performance of an act which is an ordinary incident of storage on land, as for instance, negligence in ventilating, cooling or heating the goods, then management of the ship is not involved.”³⁵⁷ In the United States, if the error is one of failure to care for the cargo, concurrent with an error in management, the burden rests on the carrier to prove what damage resulted from the exception, as failing to distinguish between the two kinds of damage results in the carrier’s liability.³⁵⁸

Courts in jurisdictions other than the United States have also utilized the language of ‘primary purpose’. In *The Iron Gippsland*, the Supreme Court of New South Wales considered the situation where a cargo of automotive diesel oil was contaminated via the inert gas system in the vessel.³⁵⁹ The Court found that “[i]t is true that inert gas systems were installed on tankers fundamentally for the protection of the vessel. However, the purpose of the inert gas system is primarily to manage the cargo, not only for the protection of the cargo but for the ultimate protection of the vessel from adverse consequences associated with that cargo. Thus, essentially the inert gas system is concerned with the management of the cargo and, in my view, damage occasioned to the cargo by mismanagement of the inert gas system cannot be categorized as neglect or fault in the management of the ship.”³⁶⁰ In another Australian case, *The Tenos*, a cargo of wool was damaged as a result of water escaping through the negligence of the crewmen testing for leaks in tanks used for the carriage of vegetable oil.³⁶¹ It was held that “these activities...did not have anything to do with the management of the ship and the primary purpose was to undertake activities which were in relation to a part of the ship which was

(1990) Matthew Bender & Co, New York, at pp. 13-12 to 13-18; Schoenbaum, T. *Admiralty and Maritime Law*, 3rd Ed. Volume 2. (2001) West Group, St. Paul, Minnesota, at p. 131; Note, a particularly comprehensive list is found in Song, S. *A Comparative Study on Maritime Cargo Carrier’s Liability in Anglo-American and French Laws* (1970) PhD Thesis, Cornell University, Ann Arbor, Michigan, at pp. 54-56.

³⁵⁷ Sturley, M. *Benedict on Admiralty*, 6th Ed., Volume 2A (1990) Matthew Bender & Co, New York, at p. 13-20.

³⁵⁸ *Bunge Co. v. Alcoa Steamship Co. (S.S. General Artigas)*, 1955 AMC 725 (S.D.N.Y. 1955), concerning a cargo of damaged wheat where the cause could have been rain coming down the ventilators, or smothering steam erroneously turned on during the voyage.

³⁵⁹ *Caltex Refining v. BHP Transport (The Iron Gippsland)* [1994] 1 Lloyd’s Rep. 335 (S.C. N.S.W.).

³⁶⁰ *Ibid.*, at p. 358. The Court, at p. 359, went on to hold the carrier liable for a failure to properly and carefully carry, keep and care for the goods pursuant to art. III, r. 2 of the Rules.

³⁶¹ *Chubu Asahi Cotton Spinning Co. v. The Ship Tenos* [1968] 12 F.L.R. 291.

solely used for the purpose of carrying cargo.”³⁶² Similarly, the Swedish Supreme Court found in relation to a failure to close two bilge valves that “[t]he closing of the valves primarily benefits the vessel, because the failure to close the valve may endanger the safety of the vessel.”³⁶³

In France, the criteria for distinguishing between *faute nautique* and *faute commerciale* is to look to “*l’objet de l’opération litigieuse*.”³⁶⁴ Indeed, it has been noted that this is the key criterion to distinguishing between management of the vessel and care of the cargo.³⁶⁵ To illustrate, where there is an error with regard to plugging in a power cord, if it is to aid the function of the vessel, then it is a nautical fault, yet the fault is commercial where it powers the refrigeration system for the cargo.³⁶⁶ The Cour de Cassation has held that where an error was committed during ballasting, the fault with be nautical fault where the act of ballasting was intended for the equilibrium and safety of the vessel.³⁶⁷ This has been the traditional French view with regard to distinguishing between the two characterizations. Although this remains in theory the manner in which nautical fault is distinguished from commercial fault, as recent doctrinal texts have attested to,³⁶⁸ in practice this has been altered to a certain extent. The French tribunals have become increasingly hostile towards allowing carriers to benefit from the nautical

³⁶² *Ibid*, at p. 301.

³⁶³ ND 1961.282 SCC Malevik (Summarized by Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 272-273). See also ND 1957.30 NSC Trinidad, where the Norwegian Supreme Court found that where a light had been left on scorching some of the cargo of grain, the fact of turning on the wrong switch in this instance constituted fault in the management of the cargo.

³⁶⁴ Remond-Gouilloud, M. *Droit Maritime*, 2nd Ed. (1993) Ed. A. Perdone, Paris, at p. 376. [Author’s translation: the intention of the act that is the source of the litigation.]

³⁶⁵ Bonassies, P. & Scapel, C. *Droit Maritime* (2006) Librairie générale de Droit et de Jurisprudence, Paris, at p. 703-704: “*Pour identifier la faute dans l’administration du navire et la distinguer de fautes voisines, que l’on a parfois qualifiées de fautes dans l’administration de la cargaison, un critère a été d’abord privilégié, celui de la destination de l’acte fautif: cet acte intéressait-il la navire – impliquant alors une faute nautique – ou, au contraire, la cargaison – impliquant alors une faute commerciale?*” [Author’s translation: To identify faults in the management of the vessel, and distinguish it from other faults, such as those that have often been qualified as faults in the management of the cargo, one criteria above all is privileged, that of the intent of the faulty act: is this act aimed at the vessel – therefore implicating nautical fault – or to the contrary, the cargo – thereby implicating commercial fault.]

³⁶⁶ *Ibid*, at p. 376.

³⁶⁷ Cour de Cassation, 17 juillet 1980, DMF 1981, 209, although the Cour de Cassation expressly noted that errors in ballasting do not necessarily constitute nautical fault.

³⁶⁸ Bonassies, P. & Scapel, C. *Droit Maritime* (2006) Librairie générale de Droit et de Jurisprudence, Paris, at p. 703-704; Remond-Gouilloud, M. *Droit Maritime*, 2nd Ed. (1993) Ed. A. Perdone, Paris, at p. 376.

fault exemption. As such, the French judiciary taken to approaching the manner in which one distinguishes between commercial and nautical faults in a particularly narrow fashion. The Cour d'Appel de Versailles and the Cour de Cassation have recently held that although the ballasting act in question was aimed at the stability of the vessel, the carrier was liable for commercial fault as he could not prove that the error had in fact affected the stability and the security of the vessel.³⁶⁹ This restrictive approach by the French judiciary is not restricted to the distinction between commercial and nautical fault, rather the Tribunaux are using all means at their disposal to effectively neutralize the nautical fault exemption.³⁷⁰

Distinguishing between an act which would constitute an error in management, and one for which the carrier is liable for failing to properly and carefully care for the goods, despite nuances in the jurisprudence, has been viewed as not terribly problematic by certain commentators. One author has commented that “[t]rue, there still exist differing nuances with a potentially different outcome and there will still be borderline cases, but doctrine and jurisprudence have anyway created a visible path in developing general criteria helpful enough to have demarcation issues largely resolved and to have the bulk of cases so decided.”³⁷¹ Other commentators, however, adopt the opposing view. Gaskell has argued that “the distinction is nearly always a difficult, and somewhat artificial, one and the [*Iron Gippisland*] case shows the reluctance of the courts to allow the defence, even where the ‘management’ relates to both the cargo and the ship.”³⁷² With regard to the distinction between the two concepts, one French commentator has complained, “*l’interprétation de ces formules a donné lieu à d’innombrables difficultés.*”³⁷³ Certain legislators have therefore chosen to amend the wording of Art.

³⁶⁹ Cour d'Appel de Versailles, 20 décembre 2001 (Fort Fleur d'Épée), DMF 2002, 251; Cour de Cassation, 3 décembre 2003, (Fort Fleur d'Épée), DMF 2004, 626.

³⁷⁰ Bonassies, P. & Scapel, C. *Droit Maritime* (2006) Librairie générale de Droit et de Jurisprudence, Paris, at p. 702. For further discussion on the restrictive approach to the nautical fault exemption by the French courts, see Chapter 7: Restricting the Availability of the Nautical Fault Exemption.

³⁷¹ Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 185.

³⁷² Gaskell, N. et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 279.

³⁷³ Remond-Gouilloud, M. *Droit Maritime*, 2nd Ed. (1993) Ed. A. Perdone, Paris, at p. 376. [Author's translation: the interpretation of these formulas has given rise to innumerable difficulties].

IV(2)(a) in light of slightly differing interpretations in various jurisdictions. The distinction drawn in jurisprudence has been codified in Turkish law in order to give clarity to the provision. In the Turkish Commercial Code of 1956, which incorporates the Hague Rules, article 1062(II) stipulates: “If the loss was caused by the act (of the carrier’s servants or of the ship’s company) in the navigation or in the management of the ship, or by fire, the carrier is liable only for his own fault. Measures which are taken mainly in the interest of the cargo do not pertain to the management of the ship. In the case of doubt, loss is presumed not to have arisen from the management of the ship.”³⁷⁴ German legislators have also seen fit to amend the text of the exemption in the interests of clarity. The German Commercial Code (HGB), provision 607, incorporates the nautical fault exemption but then expressly stipulates that “The management of the ship does not include such conduct that is primarily directed towards the care of the cargo.”³⁷⁵ This added stipulation in provision 607 of the HGB therefore expressly indicates that it is the aim or the object of the act that is determinative.³⁷⁶ Finally, the Greek Code of Private Maritime Law, in article 138, provides “...If loss or damage arises from an act or omission in the navigation or handling of the ship, the carrier shall not be liable except for faults of his own. Navigation or handling of the ship shall not include measures taken principally in the interest of the cargo.”³⁷⁷

4.2.2. Article III(1): Due Diligence to Make the Ship Seaworthy

Similar to acts in relation to cargo, difficulties have often existed when distinguishing an error in management or navigation from one which is an omission to exercise due diligence to render the vessel seaworthy. Article III(1) provides: “The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to (a) Make the ship seaworthy. (b) Properly man equip and supply the ship. (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are

³⁷⁴ Karan, H. “The Carrier’s Liability for Breach of The Contract of Carriage of Goods by Sea Under Turkish Law” (2002) 33 JMLC 91, at p. 102.

³⁷⁵ German Commercial Code, HGB s. 607.2.

³⁷⁶ Markianos, D. “Le Transport Maritime Sous Connaissance En Droit Allemand” in *Le Transport Maritime Sous Connaissance A L’Heure Du Marche Commun* (1966) M. De Juglart & P. De La Pradelle (Eds.), Pichon & Durand-Auzias, Paris, at p. 39.

³⁷⁷ Karatzas, T. & Ready, N. *The Greek Code of Private Maritime Law* (1982) Martius Nijhoff Pub., The Hague, at p. 39.

carried, fit and safe for their reception, carriage and preservation.” In this instance, as with the section above, errors in management generally pose much more difficulty with regard to the demarcation of the nautical fault exemption than do errors in navigation.³⁷⁸

Under the Harter Act, the exercise of due diligence was a condition precedent to benefit from the exemption of error in navigation and management.³⁷⁹ Essentially, any exoneration of carrier liability was conditional on due diligence having been exercised to render the ship seaworthy,³⁸⁰ and any failure to do so, regardless of whether it is causally linked to the loss or not, pre-empts the carrier from relying on the exemption.³⁸¹ Under the Hague Rules, the nautical fault exemption has been characterized as “unconditional and absolute.”³⁸² Arguably, this is not entirely the case as the obligation to exercise due diligence to render the vessel seaworthy has been interpreted to be an “overriding obligation”³⁸³ and therefore the nautical fault exemption is subject to Art. III(1).³⁸⁴ Moreover, even where there has been a want of due diligence on the part of the carrier, the exemption remains available provided the want of due diligence was not causative of

³⁷⁸ Ping-fat, S. *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 94, after an discussion on error in management of the vessel involving several pages, simply notes “the other limb of the exception, relating to errors in navigation, appear to have posed fewer problems.”

³⁷⁹ *May v. Hamburg-Amerikanische (The Isis)*, 1933 AMC 1565 (S.C. 1933). See also Poor, W. *American Law of Charter Parties and Ocean Bills of Lading*, 5th Ed. (1968) Matthew Bender, New York, at p. 169.

³⁸⁰ Schoenbaum, T. *Admiralty and Maritime Law*, 3rd Ed. Volume 2. (2001) West Group, St. Paul, Minnesota, at p. 130, f.n.1.

³⁸¹ Hendrikse, M. & Margetson, N. “A Comparative Law Study of the Relationship between the Obligations of Sea Carriers and the Exceptions” [2005] ETL 161, at p. 167.

³⁸² Schoenbaum, T. *Admiralty and Maritime Law*, 3rd Ed. Volume 2. (2001) West Group, St. Paul, Minnesota, at p. 130, f.n.1.

³⁸³ The expression ‘overriding obligation’ was coined by the Privy Council in *Maxine Footwear Co v. Canadian Government Merchant Marine* [1959] 2 Lloyd’s Rep. 105 (P.C.), at p. 113, where was determined that the duty to exercise due diligence to provide a seaworthy vessel is an overriding obligation, and therefore where the carrier is in breach of this overriding obligation and that breach is causative of the loss or the damage, Art. IV(2) may not be relied upon. The Dutch Supreme Court, in *Quo Vadis*, held that the obligation to exercise due diligence to ensure seaworthiness is an overriding obligation (Hendrikse, M. & Margetson, N. “A Comparative Law Study of the Relationship between the Obligations of Sea Carriers and the Exceptions” [2005] ETL 161, at p. 166).

³⁸⁴ Lord Somervell of Harrow, in considering the nature of the obligation to exercise due diligence to make the vessel seaworthy, opined as follows: “Article III, rule 1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art. IV cannot be relied on. This is the natural construction apart from the opening words of Art. III, rule 2. The fact that the rule is made subject to the provision of Art. IV and Rule 1 is not so conditioned makes the point clear beyond argument.” (*Maxine Footwear Co v. Canadian Government Merchant Marine* [1959] 2 Lloyd’s Rep. 105 (P.C.), at p. 118).

the loss and damage.³⁸⁵ Where there are several contributing causes, one of them being a failure to exercise due diligence, then the carrier is liable for the loss or damage. In *The Fred W. Sargent*, it was determined that where “unseaworthiness of the vessel, caused by failure of the carrier to exercise due diligence, and negligence in the management of the ship concur in causing the loss, the carrier is liable for the loss.”³⁸⁶ This is further illustrated by *The Coastal Rambler*, where a seaman put a hose and its stream of water into the wrong sounding pipe damaging the cargo.³⁸⁷ The 9th Circuit Court of Appeals found the carrier liable as a result of indistinct markings on the pipe, commenting that “in our view, there may have been error in the management of the ship, but in a series of events one may find unseaworthiness and negligence in “management of the ship” causing damage. The presence of the latter does not vitiate the former.”³⁸⁸ In *The Theodegmon*, a vessel grounded in the Orinoco River; consequently the cargo claimant asserted a steering gear breakdown while the carrier claimed error of the pilot.³⁸⁹ It was held by the English Commercial Court that as the carrier could not demonstrate due diligence with respect to the steering gear, it was liable to cargo interests.³⁹⁰ In *The Irish Spruce*, imprudent navigation and unseaworthiness in the form of the absence of the Admiralty List of Radio Signals on board the vessel both contributed to the loss of the plaintiff’s cargo; thus the Southern District Court of New York found the carrier liable.³⁹¹ In *Maxine Footwear*, thawing pipes with a torch was considered both an error in management and a failure to exercise due diligence, therefore the Privy Council held the carrier liable for the loss.³⁹² Finally, the English Commercial Court in *The Tolmidis*, where the vessel was flooded, partially by a hole in the vessel caused by a failure to

³⁸⁵ Cooke, J., et al, *Voyage Charters* (1993) LLP, London, at p. 752.

³⁸⁶ *Spencer Kellogg v. Great Lakes Transport Co. (The Fred W. Sargent)*, 1940 AMC 670 (E.D. Mich. 1940), at p. 678.

³⁸⁷ *Hydaburg Cooperative Assoc. v. Alaska Steamship Co. (The Coastal Rambler)*, 1969 AMC 363 (9 Cir. 1968).

³⁸⁸ *Ibid*, at p. 366-367.

³⁸⁹ *Phillips Petroleum Co. v. Cabaneli Naviera (The Theodegmon)* [1990] 1 Lloyd’s Rep. 52 (Q.B.).

³⁹⁰ *Ibid*, at p. 77.

³⁹¹ *American Smelting v. S.S. Irish Spruce* [1976] 1 Lloyd’s Rep. 63 (S.D.N.Y. 1975). This judgment illustrates the difficult nature of the distinction. Although the Southern District Court of New York would have been right to hold the carrier liable where both navigational error and unseaworthiness caused the grounding, on appeal to the 2nd Circuit Court of Appeals, in *American Smelting v. S.S. Irish Spruce*, 548 F.2d 56 (2 Cir. 1977), the Court of Appeals reversed the lower courts holding on the basis that it disagreed that unseaworthiness, in this instance the absence of the list of radio signals, was in fact a cause of the stranding.

³⁹² *Maxine Footwear Co. v. Canadian Government Merchant Marine* [1959] 2 Lloyd’s Rep. 105 (P.C.).

exercise due diligence and partially by errors made in the management of the vessel, found the carrier liable as the vessel was unseaworthy.³⁹³ It is considered therefore well settled law that where two concurrent actions cause the loss, with one being a failure to exercise due diligence, the carrier is liable.³⁹⁴

When the damage is the result of concurrent actions, the analysis is generally not terribly problematic, however, the difficulty arises when one must decide whether to characterize a single action either as a failure to exercise due diligence or as an error in management or navigation. In *The Farrandoc*, a second engineer turned the wrong valve when attempting to ballast and damaged the cargo.³⁹⁵ The act of turning the wrong valve was not considered an error in management, rather the crewman had not been given instruction as to the piping and thus the carrier was liable for unseaworthiness on the basis of the crewman's lack of knowledge.³⁹⁶ In order for a vessel to be considered seaworthy with respect to manning she must "be provided with a crew, adequate in number and competent for the voyage with reference to its length and other particulars, and have a competent and skilled master of sound judgment and discretion."³⁹⁷ Where crewmen are untrained for the particular vessel, or are incompetent, generally the carrier will not benefit from the exemption and the vessel will be characterized as unseaworthy.³⁹⁸

³⁹³ *Metals and Ores v. Compania De Vapores (The Tolmidis)* [1983] 1 Lloyd's Rep. 530 (Q.B.). The crew had left the high sea suction valve partially closed, the low sea suction valve fully open, and the pump discharge valve partly open, see p. 538.

³⁹⁴ In *Carl I. Dingfelder v. S.S. Carnia*, 1933 ANC 1397 (E.D.N.Y. 1933), where onions were damaged as a result of negligence and unseaworthiness, the carrier is liable.; In *Smith, Hogg & Co v. Black Sea and Baltic General Insurance (The Lilburn)* (1940) 67 Ll. L. Rep. 253 (H.L.), the Lords found that where the ship was so carelessly loaded that she was unseaworthy and developed a list, paired with an error in management when taking on bunkers so that the list worsened sinking the vessel, the shipowner was held liable.

³⁹⁵ *Robin Hood Flour Mills v. N.M. Patterson (The Farrandoc)* [1968] 1 Ex. C.R. 175; [1967] 2 Lloyd's Rep. 276 (Exch. C. Can).

³⁹⁶ *Ibid.*

³⁹⁷ *The Framlington Court*, 1934 AMC 272, at p. 277 (5 Cir. 1934).

³⁹⁸ Justice Solomon in *Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha* [1961] 1 Lloyd's Rep. 159 (Q.B.), at p. 168 sets out the test as to whether the incompetence of a crew member has rendered the vessel unseaworthy: "Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this master and crew, with their state of knowledge, training and instruction?" In *M/V Wishing Star Lim. Proc.*, 1994 AMC 170 (Dist. Puerto Rico 1991), two vessels collided port to port caused by the abrupt turn of the *Wishing Star* across the bow of the other. The court held it was not an error in navigation, rather having an unlicensed helmsman alone on the bridge keeping an inadequate look out, who

The nature of the act or error committed by the crewmember may aid in its characterization. If the nature of the act is such that it may be viewed simply as an error then the carrier will likely benefit from the exemption. Rather if the nature of the act was so egregious that it is considered evidence of manifest incompetence, then this may call into question whether the shipowner exercised due diligence to properly man the vessel. In *The Patraikos 2* where a vessel ran aground, the Singapore High Court found that “I cannot overlook the fact that even at the eleventh hour, had [the second officer] slowed/stopped the engines and/or steered the vessel hard to starboard instead of port, he would have still avoided the rocks...I regard such action not as indicative of causal negligence but of sheer incompetence.”³⁹⁹ The Court went on to hold that the carrier was unable to benefit from Art. IV(2)(a) and was liable for failing to exercise due diligence in appointing a competent second officer.⁴⁰⁰ Similarly, in *The Eurybates*, the Eastern District Court of Louisiana considered that the actions of the crew demonstrated incompetence; “The errors of the crew of the *Eurybates* can be described only as extremely gross fault. To mistake the lights of a naval fleet for those of fishing vessels, to fail to monitor these vessels for approximately thirteen minutes while proceeding on a course which would take the *Eurybates* in close proximity to the vessels, and finally to order a hard port turn which placed the *Eurybates* directly in the path of the naval vessels, contrary to the rules of navigation, is more than just error. This level of performance raises a presumption that the collision was not caused merely by an error in navigation by an otherwise competent crew; these actions must be presumed to be those of a crew that was incompetent. Clearly not all errors in navigation constitute incompetence, but errors of a sufficiently aggravated nature, such as errors of the master and the crew of the *Eurybates*, transcend ordinary fault and constitute proof of incompetence, in the absence

was never asked whether he was licensed or knew how to use a radar and was allowed to take the mid-watch after two hours sleep, was unseaworthiness. In *Standard Oil v. Clan Line (The Clan Gordon)* (1923) 17 Ll. L. Rep. 120 (H.L.), the master of the vessel had extensive experience, but did not have knowledge of the particular vessel including her design and stability. The master ordered to ballast tanks to be emptied causing the ship to capsize, and losing the cargo. Lord Atkinson rejected the error defence and found that the lack of familiarity with the vessel on the part of the master constituted unseaworthiness.

³⁹⁹ *The Patraikos 2* [2002] 4 S.L.R. 232, at p. 274.

⁴⁰⁰ *Ibid*, at p. 277.

of contrary proof.”⁴⁰¹ The District Court therefore found that the carrier did not discharge his burden to exercise due diligence in employing his crew.⁴⁰² In a similar instance, considered by the District Court of Puerto Rico, a small vessel suddenly, inexplicably and without warning turned into the path of an oncoming vessel one hundred and six times the size of the smaller one.⁴⁰³ The District Court held that the turn to port was not a nautical fault rather it was evidence of incompetence, and as such the shipowner was liable on the basis that the vessel was unseaworthy.⁴⁰⁴ A French arbitral award has distinguished between a simple *faute nautique* where a crewman did not take note of a reef, and one where “*la faute procède d’une incapacité foncière du capitaine, impliquant un comportement fautif du transporteur lui-même, susceptible de mettre en cause l’obligation général de diligence qui pèse sur lui.*”⁴⁰⁵ The English Court of Appeal in *The Star Sea* has cautioned however, “we do not accept (as the [trial] Justice in his judgment recognized) that one mistake or more than one mistake renders a crew member incompetent. Anyone can make a mistake without the conclusion being drawn that he had either a “disabling want of skill” or “disabling lack of knowledge”.⁴⁰⁶ Nevertheless, The Court of Appeal did go on to hold that the master had “a disabling lack of knowledge” due to the fact that the master had no formal training in fire fighting and was unaware of the need to use the CO2 system on board or the method by which it needed to be used.⁴⁰⁷ The Norwegian Supreme Court has proven to be quite strict in this regard. In the *Faste Jarl*, the vessel ran around because the chief mate was drunk and fell asleep while on

⁴⁰¹ *Eurybates Lim. Proc.*, 1981 AMC 2350 (E.D. La. 1981).

⁴⁰² *Eurybates Lim. Proc.*, *ibid.* See also *Bangladesh Shipping Corp. v. OMI Corp.*, 1990 AMC 798 (S.D.N.Y. 1989), at p. 819, where the court finds the vessel unseaworthy as a result of the crewman’s actions “in the close quarters situation [which] were woefully wanting in competent seamanship and common sense.”

⁴⁰³ *In re Complaint of G&G Shipping Co. Ltd. of Anguilla*, 767 F. Supp. 398 (D. P.R. 1991).

⁴⁰⁴ *Ibid.*, at p. 412.

⁴⁰⁵ Award of 10 June 1986, Chambre arbitrale maritime de Paris, summarized by Rodière, R. & du Pontavice, E., *Droit Maritime*, 12th Ed. (1997) Dalloz, Paris, at p. 346. [Author’s translation: the fault results from a deep incompetence of the master that implies a fault on the part of the carrier himself, such that one must question whether he exercised his general obligation of due diligence].

⁴⁰⁶ *Manifest Shipping v. Uni-Polaris Insurance (The Star Sea)* [1997] 1 Lloyd’s Rep. 360 (C.A.), at p. 374.

⁴⁰⁷ *Ibid.*

duty.⁴⁰⁸ The Norwegian Supreme Court held that the vessel was unseaworthy due to the chief mate's intoxication.⁴⁰⁹

Conversely, the Hanseatic Court of Appeal in Hamburg has adopted a more lenient approach in holding that, where the vessel stranded due to the fact that the first officer who was keeping watch on his own,⁴¹⁰ had switched off the watch keeping alarm⁴¹¹ and fallen asleep, it could not be assumed that he was incompetent simply because he was tired when the vessel sailed and had insufficient knowledge of the applicable regulations on watch-keeping.⁴¹² The Hanseatic Court of Appeal overturned the Regional Court's holding that the vessel was unseaworthy, and granted the carrier the benefit of the nautical fault exemption found in s. 607.2.1. of the German Commercial Code (HGB).⁴¹³ The Federal Supreme Court of Germany subsequently affirmed the decision of the Hanseatic Court of Appeal.⁴¹⁴ Similarly, in *The Captayannis S*, the master's decision to cross the Columbia River Bar during stormy weather and without a pilot was described by the Oregon District Court as "an exceedingly gross error in navigation and a decision of sheer lunacy," but nevertheless the carrier benefited from the exemption.⁴¹⁵ In several other instances, egregious errors have been considered to be within the bounds of the exemption rather than evidence of incompetence.⁴¹⁶

⁴⁰⁸ ND 1992.163 NSC *Faste Jarl* (Norwegian Supreme Court), summarized in English in Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 469.

⁴⁰⁹ *Ibid.*

⁴¹⁰ As opposed to with a second watch keeper as required by the STCW 1978.

⁴¹¹ The purpose of which is to ensure that the watch-keeper does not fall asleep.

⁴¹² *Cargo Interests on Board MV Cita v. Time-charterers of MV Cita* (2003) 6 U 220/00 (Hanseatic Court of Appeal Hamburg) available at: www.onlinedmc.co.uk.

⁴¹³ *Ibid.*

⁴¹⁴ *Cargo Interests on Board MV Cita v. Time-charterers of MV Cita* (2006) I ZR 20/04 (Federal Supreme Court), available at: www.onlinedmc.co.uk

⁴¹⁵ *Wilbur-Ellis Co. v. M/V Captayannis*, 1969 AMC 2484 (D.C. Ore. 1969), at p. 2488.

⁴¹⁶ For example in *Director General of India Supply Mission v. S.S. Janet Quinn*, 1972 AMC 1227 (S.D.N.Y. 1971), where collision was caused by master misinterpreting a prolonged blast as a short-blast whistle signal, but the court found that this was not incompetence given the master was fully qualified. In the *President of India v. West Coast Steamship Co. (The Portland Trader)* [1963] 2 Lloyd's Rep. 278 (D.C. Ore. 1962), at p. 285, the master was zigzagging through an area with shallow reefs during the night time with poor visibility without radar or loran, rather than waiting a few hours until daylight. Justice Kilkenny, of the District Court of Oregon, at p. 285, commented that the master's behaviour was "foolhardy" and "hazardous" and displayed "exceptionally poor judgment" but nevertheless held that the carrier benefited from the exemption. Affirmed *President of India v. West Coast Steamship Co. (The Portland Trader)*, 327 F.2d 638 (9 Cir. 1964).

This distinction between unseaworthiness and nautical fault has also been described in relation to defects that can or cannot be rectified during the ship's voyage. *Benedict on Admiralty* makes this distinction as follows: "Unseaworthiness is to be distinguished from neglect or default in management in that even if on sailing, the ship is not in a safe condition to complete the voyage, she is not unseaworthy if, in the course of the voyage, the defect will be remedied. For instance, on sailing, a porthole may be left open which might normally be closed in the course of the voyage. In such a case, a failure to close the port-hole is an error in management."⁴¹⁷ For example, in *The Silvia*, the failure to close a porthole that was open in an obvious place and the crewman was aware that it was open, was characterized by the United States Supreme Court as a careless failure that constituted an error in management.⁴¹⁸ Conversely, the United States Supreme Court has held that where there was a failure to close a port hold and those in command of the vessel were unaware of this, then due diligence to make the vessel seaworthy had not been exercised.⁴¹⁹ In certain instances this can be difficult to distinguish, as various defects can be rectified after sailing, yet the carrier fails to benefit from the exemption. For example, the House of Lords considered the instance where a vessel had struck a reef off Jamaica and sunk. The Lords however dismissed the shipowner's assertion of the nautical fault defence as the vessel was considered unseaworthy having left Vancouver for St. Thomas without an extra safety margin of coal

⁴¹⁷ Sturley, M. *Benedict on Admiralty*, 6th Ed., Volume 2A (1990) Matthew Bender & Co, New York, at p. 13-20; See also Poor, W. *American Law of Charter Parties and Ocean Bills of Lading*, 5th Ed. (1968) Matthew Bender, New York, at p. 177, who echoes the same sentiment: "unseaworthiness is to be distinguished from neglect or default in management in the even if on sailing, the ship is not in a safe condition to complete the voyage, she is not unseaworthy if, in the course of the voyage, the defect will be remedied. For instance, on sailing a port-hole may be left open which might normally be closed in the course of the voyage. In such a case, a failure to close the port-hole is an error in management." Note that although *Benedict's* quote refers to error in management prior to the commencement of the voyage there has been a divergence of opinion on whether an act committed before the voyage commences can fall under the exemption. In Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 293, it is stated that "the carrier cannot benefit from the exemption of fault in management of the ship if the fault has been committed before the voyage begins."

⁴¹⁸ *The Silvia*, 171 U.S. 462 (1898). See also *S.S. Steel Navigator v. Catz-American Co.*, 1928 AMC 388 (2 Cir. 1928), where a vessel sailed having left the manhole cover open, expecting to take on a cargo in that tank at the next stop, the cargo was cancelled, the tank was filled with ballast water, which therefore spilled over damaging cargo in another hold. The Second Circuit Court of Appeals overturned the district court, finding that this pertained to management of the vessel.

⁴¹⁹ *International Navigation Co. v. Farr & Bailey*, 181 U.S. 218 (1901), where there was a failure to close a port hole near the waterline and the officers were unaware of this, the Supreme Court found that the vessel was unseaworthy.

thus necessitating the stop in Jamaica.⁴²⁰ It is considered therefore that even if one can technically rectify the defect of insufficient coal or bunkers by stopping to refuel, the vessel was still considered unseaworthy.⁴²¹ An example of a defect that cannot be remedied is stowage. In *Paterson Steamships v. Canadian Co-operative Wheat Producers*, the shipowners had loaded a cargo of grain in bulk without precautions to keep it from shifting.⁴²² The vessel subsequently encountered a gale and tried to shelter near an island for fear of the cargo shifting rather than maintaining her course, at which point she grounded.⁴²³ The Privy Council held that the grounding was not error in navigation or management but rather the vessel was unseaworthy.⁴²⁴

The distinction between an issue of seaworthiness and one of nautical fault in any particular instance is also dependent on the nature of the voyage. The seaworthiness of a vessel is a relative concept to be evaluated in relation to the particular voyage.

“Seaworthiness is a relative term depending for its application upon the type of vessel and the character of the voyage. The general rule is that the ship must be staunch and strong and well equipped for the intended voyage.”⁴²⁵ In *The Wychwood*, the vessel stuck a reef off Bermuda, and the plaintiff alleged that the failure to provide a large-scale chart of the waters immediately adjacent to Bermuda rendered the vessel unseaworthy.⁴²⁶ The Exchequer Court of Canada found that the shipowner benefited from the Art.IV(2)(a), as it was not the intention of the master to approach Bermuda, rather it was “due to

⁴²⁰ *Northumbrian Shipping Co. v. Timm & Son* [1939] 2 All ER 648 (H.L.), at p. 656 and 660. Interestingly enough, the vessel had technically enough coal on the basis of calculations, just not a contingency supply if the voyage took longer. As well, the Lords did not characterize the error as one of deviation, as one might expect, rather it was considered unseaworthiness.

⁴²¹ Sturley, M. *Benedict on Admiralty*, 6th Ed., Volume 2A (1990) Matthew Bender & Co, New York, at p. 7-15, has noted that “to be seaworthy a vessel must be adequately supplied with bunkers for the voyage undertaken. It has been held that to be adequate the bunkers should be 20 percent to 25 percent greater than the tonnage of bunkers which is estimated will be consumed on the contemplated voyage, under normal circumstances.

⁴²² In *Paterson Steamships v. Canadian Co-operative Wheat Producers* [1934] All ER 480 (P.C.).

⁴²³ *Ibid.*

⁴²⁴ *Ibid.*, at p. 488. A defect in securing the cargo was also held to render the vessel unseaworthy in *Falconbridge Nickel Mines v. Chimo Shipping* [1969] 2 Lloyd’s Rep. 277 (Exch. C. Can.), where a tractor and generating set lashed to barges to lighten the vessel for discharging fell overboard. The Exchequer Court of Canada held that the loss was not a result of an error in management or navigation, rather due diligence was not exercised to adequately secure the equipment.

⁴²⁵ *The Framlington Court*, 1934 AMC 272, at p. 277 (5 Cir. 1934).

⁴²⁶ *Apex (Trinidad) Oilfields v. Lunham & Moore Shipping (The Wynchwood)* [1962] 2 Lloyd’s Rep. 203 (Exch. C. Can).

misjudgement and to an error in navigation that the vessel found herself in those waters.”⁴²⁷

Finally, the distinction between an act relating to the seaworthiness of the vessel and one for which the shipowner is exempt under Art. IV(2)(a), may also involve whether the act was prior to the commencement of the voyage. Although, this is not always the case, as demonstrated by *Benedict’s* statement *supra*. A simple example is found in *The Lady Serena*, wherein the cargo of phosphate was damaged as a result of a valve in the hold suction line being jammed open and the London Court held that as the defect in the valve occurred before the beginning of the voyage, the vessel was unseaworthy.⁴²⁸ In *The John Weyerhaeuser*, the carrier was denied the benefit of the error in management exemption as he knew prior to the voyage that increased water had been found in the bilges and failed to make an adequate inspection to locate the defect in the overboard discharge valve.⁴²⁹ The difficulty of determining when the voyage commences is illustrated by *Maxine Footwear*, where several pipes were blocked by ice and one of the vessel’s officers in thawing them with an acetylene torch inadvertently caused the ship to catch fire prior to the vessel leaving port.⁴³⁰ The Exchequer Court of Canada, upheld by the Supreme Court of Canada, held that the crewman’s negligence was in the management of the ship and the carrier was protected by Art. IV(2)(a). The Privy Council disagreed and allowed the appeal. The Supreme Court of Canada held that the plaintiff’s goods were loaded prior to the commencement of the fire, however the Privy Council opined as follows; “In their Lordships opinion “before and at the beginning of the voyage” means the period from at least the beginning of the loading until the vessel starts on her voyage...On that view the obligation to exercise due diligence to make the vessel seaworthy continued over the whole of the period from the beginning of loading until the ship sank.”⁴³¹ The issue of the availability of the nautical fault exemption prior to the

⁴²⁷ *Ibid*, at p. 208. Note that the finding with regard to Art. IV(2)(a) is obiter, as the claimant had taken suit against the time charterer and the court found that the time charterer was not “the carrier”, but had the owner been sued he would have been protected.

⁴²⁸ *Fisons Fertilizers v. Thomas Watson (The Lady Serena)* [1971] 1 Lloyd’s Rep. 141 (M&C London).

⁴²⁹ *Iligan International Corp. v. S.S. John Weyerhaeuser*, 1974 AMC 1718 (S.D.N.Y. 1974).

⁴³⁰ *Maxine Footwear Co. v. Canadian Government Merchant Marine* [1959] 2 Lloyd’s Rep. 105 (P.C.).

⁴³¹ *Ibid*, at p. 113.

commencement of the voyage is contentious and can differ between jurisdictions. This subject is therefore discussed in further detail in the section that follows.

4.3. OTHER FACTORS IMPACTING THE SCOPE OF ARTICLE IV(2)(a)

There are several other factors that bear mention as in certain factual situations they impact the scope of the nautical fault exemption. Chief among those factors, and certainly the most contentious, is whether the nautical fault exemption may protect the shipowner from liability resulting from faults committed prior to the commencement of the voyage.

4.3.1. Commencement of the Voyage

There has been debate, uncertainty and divergence of opinion as to whether a fault committed before the commencement of the voyage may be characterized as an act, neglect, or default for which the carrier is exempt from liability by virtue of the nautical fault exemption. Commencement of the voyage is the defining characteristic of seaworthiness, as by virtue of Art. III(1) of the Hague Rules, the “carrier shall be bound before and at the beginning of the voyage to exercise due diligence” to make the vessel seaworthy. It has been observed that “assuming both error in management or negligent navigation and facts otherwise indicative of failure to exercise due diligence to make the vessel seaworthy, the shipowner escapes liability for damage to cargo only if the error in management or negligent navigation occurred following the “commencement” of the voyage.”⁴³² Similarly, it has been confidently stated by one author that “the carrier cannot benefit from the exemption of fault in management of the ship if the fault has been committed before the voyage begins.”⁴³³ Whereas on the other hand, another comments that “[e]rror in the navigation or management of the ship may occur before the commencement of the voyage, as well as afterwards.”⁴³⁴ This has been characterized as a jurisdictional difference by the English Commercial Court in *The Aquacharm*: “It seems

⁴³² Greenwood, E. “Problems of Negligence in Loading, Stowage, Custody, Care, and Delivery of Cargo” (1971) 45 Tul. L. Rev. 790, at p. 803.

⁴³³ Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 293.

⁴³⁴ Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 5 (Available online only at: <http://tetley.law.mcgill.ca/maritime>).

that in the United States management of the vessel does not, or may not, include acts done by the master in preparation of the voyage... There is no such limitation in English law. The word “management” applies equally whether the vessel is in the harbour or on the high seas.”⁴³⁵ English law, however, is unsettled in this matter as commencement of the voyage can play an important role in when an act can be characterized as either a failure to exercise due diligence or an error in management. This is demonstrated by the reasoning of the Judicial Committee of the Privy Council in *Maxine Footwear*, in finding that because an error in thawing the pipes of the vessel, which otherwise would have been an error in management, occurred prior to the beginning of the voyage, the vessel was therefore unseaworthy.⁴³⁶

There is a considerable volume of jurisprudence, predominantly American, holding that the nautical fault exemption is unavailable to the carrier where the voyage had not yet commenced. The United States Supreme Court in 1901 stated that “the word ‘management’ is not used without limitation, and is not, therefore, applicable in the general sense as well before as after sailing.”⁴³⁷ This has necessitated in-depth examination by the courts to determine at which point the voyage actually commenced. In *The Newport*, the captain ordered a steam valve opened to aid the ship in getting underway, however a crewman erroneously opened the wrong valve flooding the cargo hold with steam thus damaging the plaintiff’s cargo.⁴³⁸ The 9th Circuit Court of Appeals found that the voyage had not yet commenced, and therefore the defence of error in management was unavailable to the carrier.⁴³⁹ In *The Del Sud*, the vessel had cast off all her lines except two and was in the process of being pivoted by a tug when she stuck the dock, after which the master failed to inspect for damage with the result that seawater subsequently entered the hold, damaging the cargo.⁴⁴⁰ The 5th Circuit Court of Appeals overturned the trial judge’s decision that the voyage had not commenced and thus the vessel was unseaworthy, instead holding that the voyage had in fact commenced and thus

⁴³⁵ *Actis Co. v. The Sanko Steamship Co. (The Aquacharm)* [1980] 2 Lloyd’s Rep. 237 (Q.B.).

⁴³⁶ *Maxine Footwear Co. v. Canadian Government Merchant Marine* [1959] 2 Lloyd’s Rep. 105 (P.C.).

⁴³⁷ *International Navigation Co. v. Farr & Bailey* (1901) 181 U.S. 218.

⁴³⁸ *G. Amsinck & Co. v. Pacific Mail S.S. Co. (The Newport)*, 7 F.2d 452 (9 Cir. 1925).

⁴³⁹ *Ibid.*

⁴⁴⁰ *Mississippi Shipping Co. v. Zander and Co. (S.S. Del Sud)*, 1959 AMC, 2143 (5 Cir. 1959).

the exemption of error in management is available to the carrier.⁴⁴¹ Where there was an error in ballasting in *The Canada Mail*, the court found that “even though the failure to stop the flow of water upon reaching the top of the tank is found to be an error in management for which the shipowner would not be responsible had it occurred after the commencement of the voyage, the same error may be a lack of due diligence on the part of the shipowner to make the vessel seaworthy when such conduct occurs before the beginning of the voyage.”⁴⁴² In *Louis Dreyfus*, while loading, the vessel’s engine room flooded due to an open valve in the seawater cooling process, however the 5th Circuit held that the carrier could not argue error in management on the basis of the engineer’s error because the voyage had not yet commenced.⁴⁴³ There have however been instances where the commencement of the voyage has been viewed as immaterial by the American courts. In *The John Miller*, cargo damage was caused by an error in navigation when the vessel grounded as she was moving to a temporary anchorage, and the cargo interests argued that the defence did not apply as the voyage had not yet commenced.⁴⁴⁴ The Southern District Court of New York rejected that argument holding that “[t]he exception of the carrier and the ship for loss or damage arising from negligence or default of the master, mariner, pilot or servant of the carrier in the navigation or management of the ship is unconditional...”⁴⁴⁵

Recently, in *The Jalavihar*, the 5th Circuit Court of Appeals has called the previous jurisprudence into question in some respects.⁴⁴⁶ In this instance a vessel grounded while moving to her next anchorage due to an error in navigation. The cargo

⁴⁴¹ *Ibid.* The 5th Circuit opines at p. 2148, “in a very real sense the voyage had begun. The ship had no further purpose at the dock. She was made ready for sea. She was being turned around for the purpose of leaving...the ship was literally and figuratively in the sole command of the master on the bridge.” Interestingly enough, the court opined in obiter that “had the Santos coffee been immediately damaged by the inrush of water, the Section 4 defence would have been absolute whether the ship was deemed to be on her voyage, making ready for her voyage, or simply undocking preparatory to commencing her voyage.”

⁴⁴² *American Mail Line v. United States of America (The Canada Mail)*, 1974 AMC 1536 (W.D. Wash. 1974).

⁴⁴³ *Louis Dreyfus Co. v. 27,946 Long Tons of Corn*, 1988 AMC 1053 (5 Cir. 1987).

⁴⁴⁴ *Isbrandtsen Co. v. Federal Insurance Co. (The John Miller)*, 1952 AMC 1945 (S.D.N.Y. 1952), *affd.* 205 F.2d 679 (2d Cir. 1953).

⁴⁴⁵ *Ibid.*, at p. 1946.

⁴⁴⁶ *Usinas Siderurgicas De Minas Geras v. Scindia Steam Navigation Co. (The Jalavihar)*, 1997 AMC 2762 (5 Cir. 1997). For synopsis and commentary see Koehl, E. “Fifth Circuit Symposium: Fifth Circuit – Admiralty” (1998) 44 *Loyola L. Rev.* 481, at p. 505-506, and Tabrisky, J. “Recent Developments in the Carriage of Cargo” (1998) 22 *Tul. Mar. L.J.* 535, at p. 539-541.

interests claimed, on the basis of *Louis Dreyfus*, that because the error was committed before the commencement of the voyage the exemption couldn't apply. The 5th Circuit Court of Appeals noted that "we interpret *Louis Dreyfus* to stand for the proposition that a failure of a shipowner and its employees to detect a manufacturing flaw, if it occurs before the commencement of the voyage, is best viewed as a failure to exercise due diligence, and not an error in management."⁴⁴⁷ The 5th Circuit also noted *The Del Sud*, highlighting the fact that, firstly, the case concerned an error in management, and secondly in obiter it was stated that had the facts been different the defence would have been absolute.⁴⁴⁸ The 5th Circuit Court of Appeals determined that "we see no reason to restrict the navigational error exception to errors occurring after the commencement of a voyage...[therefore] navigational error that occurs prior to the commencement of a voyage is excepted under 46 U.S.C. app s.1304(2)(a)."⁴⁴⁹ Moreover, the Court also opined that; "COGSA's exception for navigational or managerial error, however, is not restricted to navigational errors occurring after the commencement of a voyage."⁴⁵⁰ This decision has generated positive commentary. It has been noted that the effect of the holding that "errors in navigation and management could be made prior to the commencement of the voyage, [is that it] greatly reduced the significance of voyage commencement as a singular, dispositive factor in distinguishing such errors from the failure to exercise due diligence in making the vessel seaworthy."⁴⁵¹ The decision has been viewed as simplifying the analysis, as it is argued to be much simpler to determine the nature of the fault as opposed to when the voyage has actually commenced.⁴⁵² Moreover, "deciding the precise point at which a voyage commences is problematic and would continue to result in a great deal of litigation on the issue," had the 5th Circuit Court of Appeals not settled the question.⁴⁵³ From a policy perspective, the decision has been considered to be an improvement in the law: "Requiring that all damages, latent or

⁴⁴⁷ *The Jalavihar*, *ibid*, at p. 2767.

⁴⁴⁸ *Ibid*, at p. 2768.

⁴⁴⁹ *Ibid*, at p. 2769-2770.

⁴⁵⁰ *Ibid*, at p. 2769.

⁴⁵¹ Brown, C. "The Fifth Circuit Alters the Analysis for Determining General Average Events" (1998) 22 Tul. Mar. L.J. 659, at p. 662.

⁴⁵² *Ibid*, at p. 672.

⁴⁵³ Brewer, R. "The Fifth Circuit Holds that COGSA Defenses Are Absolute" (1998) 72 Tul. L. Rev. 1421, at p. 1429

immediate, occurring before the commencement of the voyage be deemed a failure to exercise due diligence is unnecessarily restrictive and imposes an enormous burden on the carrier.”⁴⁵⁴

In Germany, the 5th Book of the Commercial Code “Handelsgesetzbuch” (HGB), ss. 476 seq., governs maritime matters. Section 607, para 2, of the HGB stipulates that the carrier and its servants are exempted from liability where they have acted in the management or navigation of the vessel. While section 559 of the HGB provides that the carrier is liable for damage caused by lack of seaworthiness or cargoworthiness of the ship. The German tribunals have found the “navigation” portion of the exemption fairly clear,⁴⁵⁵ however the distinction between management of the vessel and activities directed at the seaworthiness of the vessel have proved more opaque. In practice the distinction is made as follows: “If an act rendering the ship unseaworthy took effect only after the beginning of the voyage, ss. 607 para 2 HGB applies; if the act took effect at an earlier stage, even if undiscoverable, then ss. 559 HGB applies, and ss. 607 para 2 is inapplicable.”⁴⁵⁶ In essence, the German tribunals have interpreted the exemption to be only applicable after the commencement of the voyage.

4.3.2. Deviation

The doctrine of deviation has been present in maritime law long before sailing vessels evolved into steamships. The doctrine is rooted in marine insurance,⁴⁵⁷ where a “marine underwriter was deemed to have contracted only for the risks inherent to the expeditious prosecution of the voyage by the agreed or customary route.”⁴⁵⁸ As such, where there was an unauthorized geographic deviation, the insurance contract became invalid, and cargo interests lost their protection.⁴⁵⁹ As a result, the carrier was therefore

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Herber, R. “German Law on the Carriage of Goods by Sea” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 353.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Bauer, G. “Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Cases by Case Analysis” (1993) 24 JMLC 53, at p. 56.

⁴⁵⁸ Nikaki, T. “The Quasi-Deviation Doctrine” (2004) 35 JMLC 45, at p. 45.

⁴⁵⁹ Tetley, W. *Marine Cargo Claims*, 3rd Ed. (1988) Blais, Montreal, Canada, at p. 100.

deemed to have become an insurer of the cargo for any loss or damage that resulted.⁴⁶⁰ By virtue of Art. IV(4), the Hague Rules have moderated the somewhat harsh effects of the doctrine, by permitting the carrier to be exonerated where the deviation is 'reasonable'.⁴⁶¹ The United States COGSA, s. 1304(4), adds the following proviso to the Hague Rules text; "provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable." The added proviso therefore underscores the notion that if the carrier were to call at an unscheduled port to increase its own revenues, this amounts to a prima facie unreasonable deviation resulting in potentially increased liability for the carrier.⁴⁶² Determining whether a deviation is reasonable has been characterized as "a question of fact in the light of the interests of all the parties to the common venture as contracted for."⁴⁶³ In other words, where the benefit of the deviation rests with the carrier, it is an indicator that the deviation was unreasonable. Lord Justice Greer has opined that a reasonable deviation is one either "in the interests of the ship or the cargo-owner or both, which no reasonably minded cargo-owner would raise any objection to."⁴⁶⁴

In the context of the nautical fault exemption, where the shipowner unreasonably deviates, the shipowner loses the benefit of the exemption. The seminal case with regard to unreasonable deviations is *Stag Line v. Foscolo Mango*.⁴⁶⁵ The House of Lords considered the instance where due to the drunkenness of the crew, a test of the super heater aboard the vessel had to be delayed, and thus the engineers aboard to do the test could not leave the vessel with the pilot. The vessel, therefore, had to detour later to drop the engineers off at another port, where upon leaving the port she struck a rock. The carrier pleaded nautical fault, however, the House of Lords held that where there is an unreasonable or unauthorized deviation, Art. IV(2)(a) does not operate to protect the

⁴⁶⁰ Nikaki, T. "The Quasi-Deviation Doctrine" (2004) 35 JMLC 45, at p. 45; Tetley, *ibid*, at p. 100.

⁴⁶¹ Article IV(4) of the Hague Rules provides: "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

⁴⁶² Nikaki, T. "The Quasi-Deviation Doctrine" (2004) 35 JMLC 45, at p. 46-47.

⁴⁶³ Tetley, W. *Marine Cargo Claims*, 3rd Ed. (1988) Blais, Montreal, Canada, at p. 730.

⁴⁶⁴ *Stag Line v. Foscolo Mango* (1931) 39 Ll. L. Rep. 101 (C.A.), at p. 111.

⁴⁶⁵ *Stag Line v. Foscolo Mango* (1931) 41 Ll. L. Rep. 165 (H.L.).

shipowner. Similarly, in *The Cepheus*, where a chartered tanker deviated 12 hours to bunker for the following voyage then stranded 8 days later while trying to berth in adverse weather conditions, the tribunal denied the shipowner the availability of the error in navigation defence and he was precluded from recovering general average.⁴⁶⁶

Not all deviations are unacceptable or unreasonable.⁴⁶⁷ In *The Belleville*, the vessel detoured 15 miles off the regular route to drop off a pilot and subsequently grounded.⁴⁶⁸ The Southern District Court of New York held that the deviation was not unreasonable and thus the carrier was protected by the error in navigation exemption. Similarly, in *The Al Taha*, the vessel was supposed to bunker at Boston's outer anchorage but rather moved to the inner anchorage for bunkering as well as the replacement of a repaired boom.⁴⁶⁹ When leaving the inner anchorage the pilot negligently grounded the vessel, and cargo interests argued that the vessel deviated and was thus deprived of the exemption. Justice Phillips rejected the argument, holding that the Art. IV(2)(a) exemption persists during a lawful deviation.⁴⁷⁰ The Eastern District Court of Virginia has found that where the master changes course in order to avoid severe weather conditions, but erroneously selects a less advantageous course, this is not a deviation.⁴⁷¹ Indeed, erroneous decisions concerning which course is preferable has been argued to constitute errors in the navigation or management of the vessel.⁴⁷²

⁴⁶⁶ *Transportes Del Este v. Afran Transport (The Cepheus)*, 1990 AMC 1058 (Arb. NY 1990). The majority found that the carrier was liable as he was unable to prove that the deviation was not a factor in the berthing error which occurred during icy and foggy conditions. There was a strong dissent on the part of Nicolas Healy who found that there was no evidence that if the vessel had arrived earlier the result would have been different and that the deviation was reasonable. Healy would have allowed the carrier's general average claim and split the damages resulting from the grounding between the carrier and cargo interests.

⁴⁶⁷ *Leon Bernstein Co. v. Wilhelm Wilhelmsen (M.S. Titania)*, 1956 AMC 754, 232 F.2d 771 (5 Cir. 1956), where the vessel was requisitioned by England for the Falkland Islands war, necessitating the transshipment of the cargo. The cargo was finally delivered short, but the carrier was not liable as the deviation of transshipping was a reasonable deviation because of the requisition.

⁴⁶⁸ *American Metal Co. v. M/V Belleville*, 1970 AMC 633 (S.D.N.Y. 1968).

⁴⁶⁹ *Lyric Shipping Inc. v. Intermetals Ltd. (The Al Taha)* [1990] 2 Lloyd's Rep. 117 (Q.B.).

⁴⁷⁰ The shipowners had conceded that their vessel had deviated, otherwise Phillips J. hinted that the doctrine of deviation must be subject to the *de minimus* principle and such a case may have fallen within this principle.

⁴⁷¹ *Georgia-Pacific Co. v. M/S Marilyn L.*, 1971 AMC 2157 (E.D. Vir. 1971), at p. 2166.

⁴⁷² Tetley, W. *Marine Cargo Claims*, 3rd Ed. (1988) Blais, Montreal, Canada, at p. 730.

4.3.3. Servants and Agents of the Carrier

Article IV(2) reads “Neither the carrier nor the ship shall be responsible for loss or damage arising from (a) Act, neglect, or default of the master...”. The exemption therefore protects the shipowner from the actions of the master, yet the master himself, along with other servants and agents of the carrier, are not protected under the nautical fault exemption. In *The Perseus*, cargo was damaged when a vessel came into contact with a rock as a result of the master misjudging the distance.⁴⁷³ The claimants filed suit against the owners and the master, and the owners were found to be protected under U.S.COGSA. The Eastern District Court of Michigan examined the issue and found that under the common law, including the Laws of Oleron, the master and crew were liable for acts of negligence in the operation of the vessel. It was then considered that the Harter Act, “as it originally passed the House of Representatives in December 1892, exempted the vessel, the owner, the agent and master from liability [for errors in navigation]...however, the House Bill was amended in the Senate ...and as enacted into law, it exempted the vessel owner, agent and charterers, but specifically deleted the master as one who was not liable.”⁴⁷⁴ The Court concluded that with regard to U.S.COGSA, “it was not the intention of Congress to give immunity to a master for his negligent acts committed during the navigation of a vessel.”⁴⁷⁵ By operation of the Hague Rules alone, therefore, only the carrier is exempted from liability for nautical fault. In practice however, provided that the bill of lading contains a Himalaya clause,⁴⁷⁶ the

⁴⁷³ *International Milling Co. v. S.S. Perseus* [1958] 2 Lloyd’s Rep. 272 (E.D. Mich. 1957).

⁴⁷⁴ *Ibid.*, at p. 273.

⁴⁷⁵ *Ibid.*, at p. 275.

⁴⁷⁶ The purpose of the Himalaya clause is essentially to extend the defences and limitations that are available to the carrier, to his servants and agents. The Himalaya clause derives its name from the English Court of Appeal case of *Adler v. Dickson (The Himalaya)* [1957] 2 Lloyd’s Rep. 267 (C.A.) where an injured passenger was able to take suit against the employees of the carrier on the basis that the terms of the passenger ticket did not expressly or by implication benefit the servants of the vessel. As a result of *Adler v. Dickson*, carriers began inserting such clauses into their bills of lading. The two seminal cases that tested the validity of such clauses were in relation to cargo damage resulting from the activities of stevedores. In *Scruttons v. Midland Silicons* [1962] A.C. 446, (H.L.) at p. 474 where Lord Reid laid out the four conditions by which a stevedore would benefit under the contract, adopting an approach based on agency: “I can see a possibility of success of the agency argument if (first) the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier in addition to contracting for these provisions on his own behalf, is also contracting as an agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.” Subsequently, in *New Zealand Shipping v. A.M. Satterthwaite (Eurymedon)* [1975] A.C. 154 (P.C.), the

servants and agents of the carrier will benefit from the exemption.⁴⁷⁷ Note however, that this issue only arises under the Hague Rules, where no party other than the “carrier” may benefit from the nautical fault exemption, along with the other limits of liability provided for. The Hague-Visby Rules, by virtue of Art. IV *bis*(2), provides that if “an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules.” The protection provided under Art. IV *bis*(2), is however qualified by Art. IV *bis*(4), that denies a servants or agent the benefit of the defences and limits of liability where the damages are proved to have resulted from their act or omission done with “intent to cause damage or recklessly and with knowledge that the damage would probably result.”

Privy Council approved Lord Reid’s conditions and applied them to allow the stevedores to benefit from the clause. The seminal judgment on Himalaya Clauses in the United States is *Robert C. Herd & Co. v. Krawill Mach. Co.*, 1959 AMC 879 (S.C. 1959), where the United States Supreme Court rejected the notion that the carrier’s defences apply by force of law to the agents and servants of the carrier, however the Court hinted that by a properly expressed contract, the defences could be extended to stevedores and others. Himalaya Clauses have now received general acceptance by the courts and are regularly enforced by the courts of most jurisdictions. The Supreme Court of Canada in *International Terminal Operators v. Miida Electronics (Buenos Aires Maru)* [1986] 1 S.C.R. 752 (S.C.C.) upheld the Himalaya clause, although mostly on bailment inspired reasoning (*ibid*, at p. 782-794). For an in-depth analysis of the Himalaya clause in Canadian law see Tetley, W. “The Himalaya Clause – Revisited” (2003) 10 JIML 40, at pp. 50-52. Previously, Australia had used a bailment reasoning to protect stevedores where actions in tort were brought, as found in *Gilbert Stokes v. Dalgety* [1948] 81 Ll. L. Rep. 337 (Sup. Ct. N.S.W.). But the clauses have since been upheld in *Carrington Slipways Pty. v. Patrick Operations Pty. (The Cape Comorin)* (1991) 24 N.S.W.L.R. 745 (C.A. N.S.W.) and *Godina v. Patrick Operations Party* [1984] 1 Lloyd’s Rep. 333 (N.S.W. C.A.). For discussion on the Himalaya clause in Australian law see Grime, R. “Bills of Lading” in *Australian Maritime Law* (1991) M. White (Ed.) Federation Press, Sydney, at p. 86-89.

An example of a Himalaya clause is provided in *New Zealand Shipping v. A.M. Satterthwaite (Eurymedon)* [1975] A.C. 154 (P.C.) at p. 165, where the bill of lading stipulated: “It is hereby expressly agreed that no servant or agent of the carrier (including every independent contractor from time to time employed by the carrier) shall in any circumstances whatsoever be under any liability whatsoever to the shipper, consignee or owner of the goods or to any holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the forgoing provisions of this clause, every exemption, limitation, conditions and liberty herein contained and every right, exemption from liability, defence and immunity of whatsoever nature applicable to the carrier or to which the carrier is entitled hereunder shall also be available and shall extend to protect every servant or agent of the carrier acting as aforesaid and for the purpose of all the forgoing provisions of this clause the carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.” For a large number of Himalaya clauses drawn from multiple bills of lading see Gaskell, N. et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 383 and ff.

⁴⁷⁷ It has been noted by Griggs, P. et al. *Limitation of Liability for Maritime Claims 4th Ed.* (2005) LLP, London, at p. 156 that “the common use of Himalaya clauses in bills of lading may reduce the instances in which a servant or agent can be held liable to a claimant.”

4.3.4. Barges and LASH Barges

Incidents involving barges and lash barges⁴⁷⁸ have been regarded as problematic and have often, although not always, fallen outside the scope of the error in navigation exemption. In *The Atlantic Forest*, where cargo was damaged due to the negligent navigation of a three-barge tow, the Eastern District Court of Louisiana, finding that the exemption must be construed narrowly, held that the defence of error in navigation is unavailable where the tow is not the ship designated under the bill of lading to be laden with cargo.⁴⁷⁹ In *The Acadia Forest*, the towline running from a tug to a lash barge snapped, and the barge collided with a lock damaging the cargo.⁴⁸⁰ The Eastern District Court of Louisiana found that the defence was unavailable to the defendants as the lash barge was not a “ship” within the meaning of the Act.⁴⁸¹ The 5th Circuit Court of Appeals however allowed the appeal, holding that the defendant would be protected by the exemption through the legal gymnastics of characterizing the entire lash flotilla as the offending ship.⁴⁸²

⁴⁷⁸ LASH stands for Lighter Aboard Ship, and for a detailed explanation of the lash system see *Wirth Limited v. S/S Acadia Forest*, 1976 AMC 2178 (5 Cir. 1976), at p. 2180.

⁴⁷⁹ *Agrico Chemical Co. v. SS Atlantic Forest*, 1979 AMC, 801 (E.D. La. 1978), at pp. 809-810, the Court held that “in construing the exemptions under COGSA, this Court must construe them narrowly, since the purpose of the COGSA defences was to give the carrier a narrowly defined protection...it is all too obvious that Congress was referring to the same ship in the error in navigation clause as that ship which it required the carrier to exercise due diligence to make seaworthy, equip and supply, and make the holds fit and safe for the carriage of goods. The carrier had to perform these duties on the ship designated in the bill of lading as the vessel to be laden with the cargo. Obviously it would not have been for the specific benefit and protection of the cargo owner if Congress required that any random ship owned by the carrier be made seaworthy. Congress never intended to let any vessel, as long as owned by the carrier and causing the damage to the cargo, take advantage of the error in navigation clause.” This case has attracted commentary, see Hoskins, D. “Lash Carriage under COGSA – Defining the Maritime Kangaroo” (1979) 53 Tul. L. Rev. 1500. The title derives from rather interesting reasoning, “The kangaroo metaphor was used by Chief Judge R. Brown [in *The Acadia Forest*, 1976 AMC 2178, at p. 2187] to place in its proper perspective the question whether LASH barges are ships within the meaning of the Carriage of Goods by Sea Act (COGSA): Is a kangaroo any the less a kangaroo because during part of its existence it is carried in a specially adapted berth aboard another kangaroo? Our answer is no. And upon the same rationale...a LASH barge is no less a COGSA “ship”...simply because it is designed to be carried during part of the voyage by the mother ship.” (Hoskins, *ibid.*, at footnote 2).

⁴⁸⁰ *Wirth Limited v. S/S Acadia Forest* [1974] 2 Lloyd’s Rep. 563 (E.D. La. 1974).

⁴⁸¹ *Ibid.*, at p. 566-567.

⁴⁸² *Wirth Limited v. S/S Acadia Forest*, 1976 AMC 2178 (5 Cir. 1976).

In Canada, barges and lighters have been found to qualify as a ‘ship’ within the Hague Rules.⁴⁸³ The exact opposite has been found by the 9th Circuit Court of Appeals where cargo was transferred to lighters,⁴⁸⁴ and subsequently damaged; “COGSA saves the carrier harmless only for errors of management with respect to the “ship,” and “ship” as used in the Act, has been judicially defined to exclude lighters.”⁴⁸⁵

In *Barge DXE-78*, the owner of a tank barge was allowed to benefit from the nautical fault exemption, where the barge grounded, necessitating the equalizing of the tanks to bring the barge to an even keel, causing damage to the cargo.⁴⁸⁶ The Eastern District Court of Louisiana, subsequently upheld by the 5th Circuit Court of Appeals, held that the acts were errors in navigation and management, and that given that the tug and the tank barge were under common ownership, they were considered to be one vessel and thus able to invoke the exception.⁴⁸⁷ In *The Alice*, the Eastern District Court of New York found that where cargo was damaged when a barge stranded due to a fouled towline, the owner was exempt from liability for the error in management and navigation.⁴⁸⁸ There is thus a line of jurisprudence extending the benefit to barges,⁴⁸⁹ however caution must be exercised, as the issue is contentious and replete with conflicting authorities.

⁴⁸³ *Falconbridge Nickel Mines v. Chimo Shipping* [1969] 2 Lloyd’s Rep. 277 (Exch. C. Can.), at p. 291-292.

⁴⁸⁴ Lighters are an uncovered form of barge.

⁴⁸⁵ *Isthmian Steamship Co. v. California Spray-Chemical Co.*, 1961 AMC 2476 (9 Cir. 1961), at p. 2484.

⁴⁸⁶ *Commerce Oil Co. v. Barge DXE-78*, 1957 AMC 2473 (E.D. La. 1957), holding at p. 2476 that the manipulation of the cargo valves “were done reasonably and in an attempt to correct the trim of the barge.”

⁴⁸⁷ *Ibid.* This was upheld by the 5th Circuit Court of Appeal in *Commerce Oil Co. v. Barge DXE-78*, 1958 AMC 815 (5 Cir. 1958).

⁴⁸⁸ *The Alice*, 1932 AMC 256 (E.D.N.Y.).

⁴⁸⁹ In *Insurance Co. of North America v. Southern Transportation Co. (The Bathgate)*, 1928 AMC 487 (3 Cir. 1928) where a both tug and tow are owned by the same company, the two vessels as a unit comprise the carrier and thus may benefit from the exemption in the situation where they grounded during a heavy fog; In *Royal Insurance Co. v. S.S. Robert E. Lee*, 1991 AMC 1750 (S.D.N.Y. 1991), it would appear that the court would have extended the benefit of the error in navigation defence to a barge, however in this instance the barge’s owner was found to have breached its carrier’s duty to properly keep and care for the cargo. In *M/V Frank Phipps Lim. Proc.*, 1983 AMC 1288 (E.D. La. 1982), the court allowed a tug and tow of lash barges to benefit from the error in navigation exemption by characterizing them as “a ship” under COGSA; In *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 (1927) a collision with an anchored vessel that damaged the cargo on the board was held to be an error of navigation for which the owner was exempt from liability.

Chapter 5

Application of The Nautical Fault Exemption in Specific Instances

Certain common errors have been judicially considered repeatedly over the years. Despite the fact that each decision will turn on the facts at hand, there are nevertheless certain errors that have come to be treated fairly consistently by the judiciary, such as groundings and collisions. Whereas errors with respect to storms, hatches and tarpaulins have been known to be contentious, with judicial reasoning and decisions varying greatly. Finally, both the shipping industry and judicial attitudes have evolved over time with the result that certain errors, such as ones concerning refrigeration equipment, have become less likely to be excused.

5.1. REFRIGERATION

Just over a century ago, Justice Kennedy in *Rowson v. Atlantic Transport* considered a case of cargo loss which resulted from the negligence of the crew with respect to the refrigeration machinery.⁴⁹⁰ It was held that the cargo of butter was damaged during the voyage by the negligence of those in charge of the refrigeration system, and thus the carrier was exempt as such negligence was considered “within the meaning of the Harter Act, negligence in the management of the ship of which that machinery is a part.”⁴⁹¹ On appeal, the Court of Appeal noted the fact that the refrigeration system was installed partly to preserve the cargo and partly to preserve the food used by the crew, and therefore held that the apparatus was part of the ship, and therefore mismanagement of it was mismanagement of the ship and therefore the carrier was allowed to benefit from the exemption.⁴⁹² In *Forman & Ellams v. Federal S.N. Co*, the cargo of meat was

⁴⁹⁰ *Rowson v. Atlantic Transport Co.* [1903] 1 K.B. 114 (K.B.).

⁴⁹¹ *Ibid*, at p. 116.

⁴⁹² *Rowson v. Atlantic Transport Co.* [1903] 2 K.B. 666 (C.A.). Note that the House of Lords in *Gosse Millerd v. Canadian Government Merchant Marine* [1928] 32 Ll. L. Rep. 91 (H.L.) expressed doubts concerning the correctness of the Court of Appeal’s decision in *Rowson*, but declined to actually overrule it; “My Lords, I do not think it necessary or desirable to discuss whether the Court of Appeal was right in their application of the principle in that particular case...” (at p. 94). It remains therefore valid law, although one may very easily marginalize it by distinguishing it on the facts from any instance that may arise. Cooke, J., et al, *Voyage Charters* (1993) LLP, London, at p. 756 has noted that “on the facts of the

damaged following the mismanagement of the refrigeration system used to cool the cargo, and the English Commercial Court held that the damage did not occur in the management of the vessel.⁴⁹³ Justice Wright opined that “many modern steamships like the *Rimutaka* have holds which are insulated and which can be cooled by elaborate refrigeration machinery and apparatus. All this constitutes parts of the ship and of its equipment, but these are solely provided for the care of the special cargo. The ship can, as a sea going vessel, be safely and efficiently navigated and managed even though the refrigerating equipment is in disorder and the cargo is perishing.”⁴⁹⁴ Justice Wright noted Justice Kenedy’s finding in *Rowson*, commenting that where “the same refrigeration machinery is used for the crew’s food and the cargo, these facts ought not to affect the conclusion that, *quoad* the refrigeration of the cargo holds, it is the management of the cargo and not the ship which is involved.”⁴⁹⁵

Subsequent cases, in various jurisdictions, have tended to hold fairly consistently that errors relating to refrigeration systems are not errors in management of the vessel.⁴⁹⁶ A Belgian court, in *The M.S. Wladyslaw*, held unequivocally that supervising and controlling the normal functioning of the refrigeration unit of a series of refrigerated containers during the voyage constitutes “management of the cargo”.⁴⁹⁷ Similarly, in *The Heinz Horn*, where the negligent operation of the refrigeration system caused damage to a cargo of bananas, the 5th Circuit Court of Appeals found that “since the operation of the refrigeration system herein so directly affected the condition of the cargo, we conclude that the damages related thereto fall within the liability created by sect.1303(2) [of

Rowson case, a very large part of the equipment was devoted to the ship’s provisions and the result might have been different if the preservation of the ship’s provisions had been merely incidental to the main function of preserving the cargo.”

⁴⁹³ *Forman & Ellams v. Federal S.N. Co* [1928] 30 Ll. L. Rep. 52 (K.B.).

⁴⁹⁴ *Ibid*, at p. 60.

⁴⁹⁵ *Ibid*, at p. 62.

⁴⁹⁶ For example see *The Samland*, 7 F.2d 155 (S.D.N.Y. 1925), the carrier was held liable for failing to observe the condition of the thermometers in the refrigeration compartments; *Barr v. International Mercantile Marine Co.*, 29 F.2d 26 (2Cir. 1928), where a failure to care for the refrigeration equipment, thus failing to keep the cargo cool, was an error primarily in respect of cargo; *Gosse Millerd v. Canadian Government Merchant Marine* [1928] 32 Ll. L. Rep. 91 (H.L.) where the House of Lords expressed doubts concerning the correctness of the Court of Appeal’s decision in *Rowson*.

⁴⁹⁷ Hof van Beroep te Antwerpen, October 27, 1992 (*The M.S. Wladyslaw*) [1993] ETL 727, at p. 727.

COGSA].”⁴⁹⁸ The 5th Circuit Court of Appeals did however leave open the possibility that it may not always be so, “for there may be circumstances where the operation of a refrigeration system has more to do with the management or navigation of a vessel than with the care of the cargo.”⁴⁹⁹

5.2. GROUNDING

Grounding, along with collision with channels or locks, for the most part has tended to be one of the clearest examples of what one would envision as an error in navigation of the ship. Where the use of the exemption with respect to grounding has been denied by the courts is often on the basis of the subsequent actions of the carrier. If the master ignores the potential damage and continues on the voyage, this has been regarded as falling within the nautical fault exemption. On the other hand, if there is intervention, either in the form of removal of the cargo, or a temporary port for repairs, courts have in certain instances characterized this action in such a way as to deprive the carrier of the benefit of the exemption. Where reliance on the exemption has also been denied is where the competence of the master or crewman who has made the error is called into question.

A classic example of the operation of the nautical fault exemption is found where the 2nd Circuit Court of Appeals held that despite the allegations by the claimant of unseaworthiness, defective steering mechanism and incompetent crew, the carrier was exempt from liability as the pilot misjudged a turn and gave the wrong commands causing the vessel to run aground.⁵⁰⁰ There is extensive jurisprudence holding where the grounding was the result of faults, errors or negligence on the part of the pilot, the shipowner is exempt for liability under the nautical fault exemption.⁵⁰¹ In *The Santa*

⁴⁹⁸ *Heinrich C. Horn v. CIA De Navegacion (The Heinz Horn)* [1970] 1 Lloyd’s Rep. 191, at p. 202 (5 Cir. 1969).

⁴⁹⁹ *Ibid.*, at p. 202.

⁵⁰⁰ *Grace Line Lim Procs (The Santa Leonor)* 517 F.2d 404 (2 Cir. 1975), at p. 406 and 409.

⁵⁰¹ *Bunge North American Grain Co. v. Steamer Skarp* [1932] Ex. C.R. 212, where the vessel stranded twice in areas well known to be dangerous, the Exchequer Court of Canada held that the carrier was exempt from liability of the errors in navigation of the pilot under the Harter Act; See *Shell Petroleum Co. v. Dominion Tankers* [1940] 3 D.L.R. 646, where the Supreme Court of Canada held that where the vessel

Leonor, where the vessel ran aground in Patagonian Channels of Chile due to momentary error of the pilot, the Southern District Court of New York stated “this is exactly the kind of situation in which Congress intended to exempt the shipowner from liability.”⁵⁰² The operation of the exemption is the same where straight forward acts, errors or negligence on the part of the qualified master or crewman result in grounding.⁵⁰³ Grounding has even fallen under the exemption where the master has displayed “exceptionally poor judgment,”⁵⁰⁴ or his decision was characterized as one “of sheer lunacy.”⁵⁰⁵

Failure to utilize charts or updated notices that are available on board when the vessel grounds, fall under the exemption, while failure to provide up to date charts, do not. This distinction is clarified when examining “stranding cases, when stranding has been found due to the use of a chart not containing the current correction. If notices to mariners are on board from which the chart might be corrected, the failure to make use of them is a neglect or default in the navigation or management, for which the ship owner is not liable. On the other hand, if, on sailing, the ship is not supplied with the necessary navigational data, then a condition of unseaworthiness may exist.”⁵⁰⁶ In *The Iristo*, the 2nd Circuit Court of Appeals found that although the outdated chart did not indicate a wreck on the outer reef of the coast to where the vessel was sailing and on which it subsequently grounded after having mistaken the wreck for an approaching steamer, the “Notices to Mariners” did disclose its existence and therefore the vessel was seaworthy

stranded as a result of the pilot dozing for a few moments, the carrier was exempt from liability for nautical fault; See also *American Independent Oil Co. v. M.S. Alkaid*, 1968 AMC 748 (S.D.N.Y. 1967).

⁵⁰² *Grace Line Lim Proc (The Santa Leonor)* (1973) 397 F.Supp. 1258 (S.D.N.Y. 1973), at p. 1277.

⁵⁰³ *Harold W. Holcombe v. Joseph R. Ferlita (The Doromar)*, 1950 AMC 756 (5 Cir. 1969), where the grounding of the vessel off Cuba at night on a Cay where there is no light was held to be an error in navigation.

⁵⁰⁴ *President of India v. West Coast Steamship Co. (The Portland Trader)* [1963] 2 Lloyd’s Rep. 278 (D.C. Ore. 1962), at p. 285. In this instance, the master was zigzagging through an area with shallow reefs during the night time with poor visibility, rather than waiting a few hours until daylight. Justice Kilkenny, of the District Court of Oregon, at p. 285, commented that the master’s behaviour was “foolhardy” and “hazardous”. Contrast this with *The Patraikos 2* [2002] 4 S.L.R. 232, where the second officer’s failure to take action in preventing the ship from running aground was characterized as “incompetent” and thus falling outside the exemption.

⁵⁰⁵ *Wilbur-Ellis Co. v. M/V Captayannis*, 1969 AMC 2484 (D.C. Ore. 1969), at p. 2488, referring to the master’s decision to cross the Columbia River Bar in stormy weather without a pilot.

⁵⁰⁶ Poor, W. *American Law of Charter Parties and Ocean Bills of Lading*, 5th Ed. (1968) Matthew Bender, New York, at p. 177-178.

and may benefit from the exemption.⁵⁰⁷ Where the task of securing the charts or other navigational data is delegated to the officers of the ship, their failure to secure them is not an error for which the carrier is excused.⁵⁰⁸ Note, that even where the ship is not supplied with updated charts, if the master did not rely on the chart and simply made a navigational error then the carrier is not responsible, as there must be a causal link.⁵⁰⁹

Actions affecting the cargo as a result of the grounding have been held to be errors in management of the vessel. The Supreme Court of Canada considered an appeal with regard to the grounding of a vessel, which had later been beached to prevent sinking.⁵¹⁰ Cargo interests alleged that there was an error with respect to the cargo as once the vessel was beached, all available pumping facilities were not used, and thus the cargo was damaged.⁵¹¹ The Supreme Court held that the failure to utilize pumping facilities was an error in management on the part of the master.⁵¹² Similarly, in a judgment of the Southern District Court of New York, it was held that the failure to pump water out of a hold after an accident is an error in management.⁵¹³ In *Leval & Co. v. Colonial Steamships*, the vessel struck the side of a canal and upon reaching port it was

⁵⁰⁷ *Middleton & Co. v. Ocean Dominion Steamship Co. (The Iristo)*, 1943 AMC 1043 (2 Cir. 1943), where at p. 1048, the court opined: “we hold that the *Iristo* was properly found seaworthy because of the notices on board which disclosed the existence and location of the wreck and that the failure to bring the chart down to date, or other wise to use the information available, when navigating in the vicinity of Bermuda, was a fault ‘in navigation or management’.” See also *United States Steel Products v. American & Foreign Ins. Co. (The Steel Scientist)* 1936 AMC 387 (2 Cir. 1936), where it was held that the vessel was seaworthy even though her charts were outdated, because there existed records on board from which her charts could be up dated.

⁵⁰⁸ *Gianni Gladioli v. Standard Export Lumber (The Maria)*, 1937 AMC 934 (4 Cir. 1937), holding that the duty of seaworthiness is non-delegable, and therefore where the ship was defectively equipped by the ship’s officers, this is not bad seamanship but rather unseaworthiness.

⁵⁰⁹ See *Director General of India Supply Mission v. S.S. Maru*, 1972 AMC 1695 (2 Cir. 1972), where despite the fact that the up to date charts were not on board, it was established that the stranding of the vessel was solely caused by the master’s error; See also *Director General of India Supply Mission v. S.S. Janet Quinn*, 1972 AMC 1227 (S.D.N.Y. 1971), where collision was caused solely by bad seamanship, not related to the outdated Suez Canal chart on board; See also *Charles I. Waterman v. The Aakre*, 1941 AMC 1263 (2 Cir. 1941), where the 2nd Circuit Court of Appeals found that the use of an old chart is not unseaworthiness where the master knows the error in the old chart, rather the stranding of the vessel off Nova Scotia was an error in navigation.

⁵¹⁰ *Kalamazoo Paper Co. v. C.P.R.* [1950] S.C.R. 356.

⁵¹¹ *Ibid.*

⁵¹² *Ibid.*

⁵¹³ *Campbell Soup Co. v. Federal Motorship Co.*, 1935 AMC 634 (S.D.N.Y. 1935). Conversely, in *Atlantic Transport Co. of West Virginia v. Rosenberg Bros. (The Manchuria)*, 1929 AMC 1539 (9 Cir. 1929), it was held that where the vessel’s chain locker is not watertight, this is unseaworthiness, and damage to the cargo cannot be attributed to the negligence of the crew is not removing the water with a bilge pump.

discovered that the hull had been holed and water was entering the bilge.⁵¹⁴ The crew failed to take steps to prevent further water entering the vessel resulting in damage to the cargo, however the Supreme Court of Canada held that that “the failure to take these steps was negligence in the management of the ship on the part of the master and, accordingly, the case falls within the exception in Art. IV, para. 2(a).”⁵¹⁵ In *The Isla Fernandina*, the vessel ran aground and had to be lightened to get off the bank.⁵¹⁶ Justice Langley, of the English Commercial Court, held that with regard to the cartons of bananas lost in the attempts to refloat the vessel, the carrier was protected by Art. IV(2)(a).⁵¹⁷ Similarly, where a cargo of lubricating oil was contaminated with seawater, by the stranding of the vessel which holed one of her tanks, and the subsequent opening of the valves to bring the vessel to an even keel by equalizing the cargo, it was held that both events fell within the exemption and were not in connection with the care and custody of the cargo.⁵¹⁸

The carrier is exempt from responsibility for damage resulting from grounding when it is characterized as an error in navigation, nevertheless the carrier must exercise reasonable care to protect the cargo from further damage. In *The West Cajoot*, the 9th Circuit Court of Appeals held that although the carrier was excused from the damage caused by the grounding of the vessel, the carrier was responsible for failing to remove a cargo of coconut oil from the deep tanks while in dry dock so they could be examined for leaks.⁵¹⁹ In *The Naftoporos*, the error of the master caused the grounding and the shipowner asserted that the vessel was a constructive total loss.⁵²⁰ The court found the carrier liable to cargo interests for negligence with regard to the cargo in the form of

⁵¹⁴ *Leval & Co. v. Colonial Steamships* [1961] S.C.R. 221.

⁵¹⁵ *Ibid*, at p. 229.

⁵¹⁶ *Rey Banano Del Pacifico v. Transportes Navieros Ecuatorianos (The Isla Fernandina)* [2000] 2 Lloyd’s Rep. 15 (Q.B.).

⁵¹⁷ *Ibid*, at p. 34. However, one of the carrier’s three generators for the refrigeration of the cargo of bananas failed while the vessel was on the bank, with the result that the remaining two had insufficient power to preserve the cargo. Langley J. held that the carrier was responsible for damage arising from the failure of the generator, despite arguments that it was an error in management, as it was determined that the failure was in respect of care of the cargo in that the vessel should have had sufficient power capacity in the event of a generator failure (*Ibid*, at p. 34-35).

⁵¹⁸ *Commerce Oil Co. v. Barge DXE-78*, 1957 AMC 2473 (E.D. La. 1957).

⁵¹⁹ *United States of America v. Los Angeles Soap Co. (The West Cajoot)*, 1936 AMC 850 (9 Cir. 1936).

⁵²⁰ *Office of Supply Government of the Republic of Korea v. M.V. Naftoporos*, 1987 AMC 697 (S.D.N.Y. 1985).

failing to pursue the possibility of salvaging the coal cargo.⁵²¹ The United States Supreme Court considered the instance where a vessel stranded and crewmembers left behind the vessel along with three crewmembers; the mate returned months later to salvage the cargo.⁵²² The United States Supreme Court held that negligent navigation and the grounding were not the source of liability, rather the master was grossly negligent in leaving the cargo on board without attempting to refloat the vessel or remove and store the cargo.⁵²³ A Belgian court has opined that even where the shipowner properly abandons the voyage due to shipwreck, he must nevertheless provide the best possible care of the cargo based on the duty to properly manage the cargo.⁵²⁴ In *The Ville d'Aurore*, the Cour d'Appel d'Aix-en-Provence held that the carrier was exonerated for wet cargo as a result of the *faute nautique* of grounding on a wreck clearly indicated on the charts.⁵²⁵ The carrier was not however exonerated from the *faute commerciale* of failing to prevent further cargo damage by discharging the wet containers and taking action to preserve the as yet undamaged portion of the cargo in the affected containers.⁵²⁶ Conversely, the Chambre Arbitrale Maritime de Paris considered the instance where the master veered off his route and struck a coral reef, which necessitated having the vessel re-floated and towed to port.⁵²⁷ A portion of the cargo of barley was destroyed and the remainder was discharged, however, it sat for five months fermenting in the heat. The Chambre Arbitrale Maritime de Paris found that the carrier had promptly contacted cargo interests but failed to receive instructions with respect to a new destination. As such the carrier was not liable for either the cargo destroyed during the grounding, or for the cargo destroyed after discharge, by virtue of the nautical fault exemption.⁵²⁸ Similarly, in a Hong Kong Court of Appeal decision, the vessel grounded on rocks on the coast of the

⁵²¹ *Ibid*, the Southern District Court of New York also found the carrier responsible for prematurely declaring the vessel and the cargo as a constructive total loss, as it was more economically advantageous to the shipowner, and then simply selling the stranded vessel and the coal to a Panamanian corporation for 1\$.

⁵²² *The Propeller Niagra v. Cordes*, 62 U.S. 7 (1858). Given the age of the case one can thus understand why the delay before the master returned was five months on a stranding between Buffalo and Chicago.

⁵²³ *Ibid*.

⁵²⁴ Hof van Beroep te Antwerpen, September 17, 1980 (The M.S. Fortuna) [1981] ETL 378.

⁵²⁵ Cour d'Appel d'Aix-en-Provence, 23 septembre 1999, (Ville d'Aurore), DMF 2001, 598, at p. 599.

⁵²⁶ *Ibid*, at p. 601-602.

⁵²⁷ Sentence 626 du 10 juin 1986, Chambre Arbitral Maritime de Paris, DMF 1987, 173.

⁵²⁸ *Ibid*, at p. 174.

People's Republic of China and the crew abandoned the vessel.⁵²⁹ The Court of Appeal held that the shipowner was not responsible for the looting of all the cargo aboard during a four day period, due to the fact that there was a typhoon warning in force and the local authorities were unable to contain the looting.⁵³⁰

A failure to inspect the vessel or cargo after an allision could be considered an error in management. In *The Del Sud*, the ship struck the dock, such that it was felt throughout the ship, but the master ignored the reports and continued the voyage without inspecting the ship for damage.⁵³¹ The cargo was damaged when seawater entered the hold, however, the 5th Circuit Court of Appeals held that the failure to inspect was an error in management of the vessel.⁵³² Upon examination of precedents such as *The Del Sud*, one cannot help but question what standard of behaviour or seamanship the courts are promoting. If the master or crew ignores potential hull damage that may cause damage to the cargo as well, the shipowner is protected, however, if the shipowner's agents intervene, or if the problem is addressed, then the shipowner becomes exposed to liability. It would, in essence, appear to be a promotion of wilful blindness. Evidently, the policy behind such decisions has not been well thought out, if at all.

5.3. COLLISION

Almost without exception, collisions are considered to be a result of negligent navigation as opposed to a failure to exercise due diligence to render the vessel seaworthy. Schoenbaum comments, "the defence of error in navigation normally poses little difficulty, especially when it results in a collision or a stranding."⁵³³ There is extensive jurisprudence on this point.⁵³⁴ It should also be noted that collisions with

⁵²⁹ *Taitexma Enterprise Corporation v. Tillemont Shipping Corporation S.A.*, HCA 1994 CL – 70 (H.K. C.A.)

⁵³⁰ *Ibid.*

⁵³¹ *Mississippi Shipping Co. v. Zander and Co. (S.S. Del Sud)*, 1959 AMC 2143 (5 Cir. 1959).

⁵³² *Ibid.*

⁵³³ Schoenbaum, T. *Admiralty and Maritime Law*, 3rd Ed. Volume 2. (2001) West Group, St. Paul, Minnesota, at p. 130.

⁵³⁴ Cour d'Appel d'Aix-en-Provence, 23 septembre 1999, (Ville d'Aurore), DMF 2001, 598, where collision with a wreck that was clearly indicated on the charts was considered *faute nautique*; See also *Director General of India Supply Mission v. S.S. Janet Quinn*, 1972 AMC 1227 (S.D.N.Y. 1971), where

structures, or allisions, appear to pose little difficulty; as such an allision with a wharf is considered an act in the navigation or management of the ship.⁵³⁵ Similarly, damage to cargo resulting from the ingress of water originating in the ballast tank due to allision with the wall of a lock is also exempted under the Art. IV(2)(a).⁵³⁶

There are however instances where collisions are considered to be the result of a failure to exercise due diligence to make the vessel seaworthy. An example of an instance where a collision would be an issue of unseaworthiness would be when there is an error in connecting the steering apparatus such that on sailing, the vessel turns the wrong way.⁵³⁷ A further example of where a collision may be an issue of seaworthiness is where the training or certifications of the crewmember responsible for the collision are inadequate. To illustrate, where the 3rd mate at the wheel was making his first voyage when the vessel collided and the master was not present standing watch, the 2nd Circuit Court of Appeals held that the carrier did not exercise due diligence in selecting the crew.⁵³⁸

If there is a collision and both vessels are to blame, “as a consequence of the principle of divided liability adopted by Article 4 of the 1910 Collision Convention and of the exoneration from liability for nautical fault, the owners of the goods carried on each vessel may only claim damages from the owners of the non-carrying vessel in proportion to its fault.”⁵³⁹ A vessel therefore benefits from the nautical fault exemption in relation to any damage to cargo carried on board that vessel. This is not the case in the United States, however, as it never became a party to the Collision Convention.⁵⁴⁰ The law of the United States allows cargo claimants to “recover the full extent of [their]

collision caused solely by bad seamanship fell under the exemption; See also *Daisy Philippine Underwear Co. v. United States Steel Products*, 82 F.2d 752 (2d Cir. 1936), the failure to use the charts resulting in a collision is an error in navigation; See also *The Spartan*, 1931 AMC 1 (2 Cir. 1930);

⁵³⁵ *The Seaway* [2004] SGCA 57 (C.A. Singapore) available at: www.onlinedmc.co.uk.

⁵³⁶ *Insurance Co. of North America v. S.S. Georgis A Georgilis*, 1983 AMC 1916 (S.D.N.Y. 1983).

⁵³⁷ Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 203.

⁵³⁸ *Protomac Transport v Ogden Marine Inc.* 909 F.2d 42 (2 Cir. 1990).

⁵³⁹ Berlingieri, F. “The Period of Responsibility and the Basis of Liability of the Carrier” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 95.

⁵⁴⁰ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 235.

damages from the non-carrying vessel, including physical loss or damage, loss of value due to delay, cargo contribution to general average and lost pre-paid freight.”⁵⁴¹ The non-carrying ship then seeks contribution from the carrying ship, thus rendering the nautical fault defence *de facto* inapplicable in such situations. This results in odd situations where the carrier ship will pay one half of the loss of its own cargo if both vessels are to blame, however, the carrying ship pays none of the loss of its own cargo if it is the only ship is to blame. It has been noted that “this curious anomaly in American jurisprudence that the carrier pays more if its navigators are half at fault than if they are solely at fault, has long been a source of friction. Both American and foreign interests complain of it.”⁵⁴² To rectify the situation, in the United States a clause must be incorporated into the bill of lading should carriers wish to benefit from the exemption with respect to the cargo on board in a collision situation. This clause is referred to as the Both-to-Blame Collision Clause, which provides that where there is a collision resulting from the nautical fault of the carrier, the cargo owners will indemnify the carrier for all liability paid to the non-carrying ship, insofar as such liability represents claims by the cargo owner against the non-carrying ship that the non-carrying ship can recover against the carrier.⁵⁴³ In essence, the Both-to-Blame Collision Clause entitles the carrier to recover any cargo liability that the carrier incurs for which he would otherwise be exempt by virtue of Art. IV(2)(a).

⁵⁴¹ Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 642; See also Strathy, G. & Moore, G. *The Law and Practice of Marine Insurance in Canada* (2003) Butterworths, Toronto, at p. 243-244.

⁵⁴² Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 211.

⁵⁴³ Both-to-Blame Collision Clause: “If the ship comes into collision with another ship as a result of the negligence of the other ship and 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, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier. The foregoing provisions shall also apply where the owners, operators or those in charge of any ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.” (Drawn from Clause 31(b) of NYPE 93); A practically identical clause is found in BIMCO’s Gentime, Appendix A – Protective Clauses, Clause F “Both –to-Blame Collision Clause, which can be found in Glass, D *et al.*, *Standard Form Contracts for the Carriage of Goods* (2000) LLP, London, at pp. 59 and ff, along with many other standard form contracts; For further examples of Both-to-Blame Clauses, Gaskell, N. *et al.* *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 345 and ff, provides six different examples drawn from multiple standard form bills of lading.

5.4. STORMS

In general, when a seaworthy vessel sails in disregard of a storm warning or bad weather reports, it has been found to be an error in navigation.⁵⁴⁴ The same is true where the vessel sails through a storm despite the fact that there was another route available.⁵⁴⁵ In *The Mars*, a cargo of bagged cocoa beans was damaged through a lack of ventilation resulting from the master sailing right through the centre of a storm.⁵⁴⁶ The claimant argued that the damage could have been avoided had the master sailed around the storm, however, the 3rd Circuit Court of Appeals held that the vessel was exonerated as it was an error in navigation.⁵⁴⁷ Similarly, the Southern District Court of New York has found that where the master decided to head back into the pacific storm, which caused the twisting of the hatch cover resulting in cargo damage, the carrier is exonerated under the error in navigation defence.⁵⁴⁸ Nevertheless, the 5th Circuit Court of Appeals has found that the carrier may only benefit from the exemption if the vessel is seaworthy for the voyage or for the expected bad weather or storm.⁵⁴⁹

The Federal Court of Canada, in *The Washington*, has taken a rather strict view of the nautical fault exemption where master stayed on course despite the fact that it converged with the storm's course.⁵⁵⁰ Justice Heald denied the shipowner the protection of the nautical fault exemption, concluding "that the master's negligence referred to in maintaining his course and speed on Nov. 18 and 19 in view of the weather reports he was receiving was an error constituting a negligent failure to use the apparatus of the ship for the protection of the cargo..."⁵⁵¹

In France, there has been some inconsistency with respect to storms. In a Cour d'Appel de Paris decision, *The Aubrac*, it was found that where the master decided to sail

⁵⁴⁴ *The Iowa* 1938 AMC 615 (D.C. Ore. 1938); *Hanson v. Haywood Bros.* 152 F. 401 (7 Cir. 1907).

⁵⁴⁵ *Yawata Iron & Steel v. Anthony Shipping*, 1975 AMC 1602 (S.D.N.Y. 1975).

⁵⁴⁶ *Hershey Chocolate Co. v. S.S. Mars*, 1961 AMC 1727 (3 Cir. 1960).

⁵⁴⁷ *Ibid.* Although the carrier was held liable for damage to cargo that was a result of the use of hooks and contact with exposed structural portions of the ship.

⁵⁴⁸ *Yawata Iron & Steel v. Anthony Shipping*, 1975 AMC 1602 (S.D.N.Y. 1975).

⁵⁴⁹ *Texas & Gulf S.S. v. Parker*, 263 F. 864 (5 Cir. 1920).

⁵⁵⁰ *The Washington* [1976] 2 Lloyd's Rep. 453 (Fed. Ct. T.D.)

⁵⁵¹ *Ibid.*, at p. 460. Justice Heald opined that as the ship came through the weather undamaged, this weighed in favour of a failure to care for the cargo.

regardless of the weather reports, he was not protected under the exemption peril of the sea as he was aware of the risks and the incoming weather.⁵⁵² In doctrinal commentary however, the decision to hold the carrier liable has been criticized, as it is agreed that this error should have been characterized as *faute nautique* on the part of the master, thus exempting the carrier.⁵⁵³ On appeal at the Cour de Cassation, the carrier pleaded *faute nautique*, but the Cour held that as *faute nautique* was not pleaded before the Cour d'Appel, the carrier was therefore precluded from pleading it for the first time in cassation.⁵⁵⁴ In general, French courts are less forgiving in instances of sailing into storms, and the masters are granted less deference with regard to their navigational decisions. In a decision by the Cour de Paris, the weather services were announcing a typhoon, and thus the master altered course to try to avoid it.⁵⁵⁵ Nevertheless a day later the course of the typhoon had altered, the ship encountered heavy weather and lost containers. The Cour de Paris found that the master could have taken a different route giving even more latitude to the typhoon and thus the carrier was liable. In *The Ras Mohamed*, the Cour d'Appel d'Aix-en-Provence rejected the carrier's defence that sailing into heavy weather as a result of a route choice was a *faute nautique*, rather the action was viewed as a failure in relation to the cargo.⁵⁵⁶ Interestingly, four years later the Cour d'Appel d'Aix-en-Provence, in *the Al Hoceima*, exonerated a carrier of all responsibility on the basis of *faute nautique* where despite adverse weather, the Captain nevertheless left the safety of the port to continue the voyage.⁵⁵⁷ The claimants argued that the fault was in reality one in relation to the cargo, as the master ran the risk through the storm in order for the cargo to arrive in port early.⁵⁵⁸ The Cour d'Appel rejected the argument holding that "...le capitaine, en reprenant son voyage malgré des conditions

⁵⁵² Cour d'Appel de Paris, 12 janvier 1984, (Aubrac), DMF 1984, 413. For a comparison of this judgment with a later judgment of the Cour d'Appel D'Aix-en-Provence, 19 mars 1994, also holding that sailing into a storm was not an error in navigation as such weather was expected, see Bonassies, P. "Le droit positif français en 1993 (fin)" DMF 1994, 163, at p. 167-168.

⁵⁵³ Poupard, "Note" following the Cour d'Appel de Paris judgment at p. 425-426.

⁵⁵⁴ Cour de Cassation, 22 juillet 1986, (Aubrac), DMF 1988, 119, at p. 119.

⁵⁵⁵ Cour de Paris, 24 April 1992, summarized by Bonassies, P. "Le droit positif français en 1992 (III)" DMF 1993, 139, at p. 142.

⁵⁵⁶ Cour d'Appel d'Aix-en-Provence, 19 janvier 2001, (Ras Mohamed), DMF 2001, 820. The Cour d'Appel reasoned that the fault must have been *faute commerciale* as it did not compromise the safety of the entire maritime voyage.

⁵⁵⁷ Cour d'Appel d'Aix-en-Provence, 14 mai 2004, (Al Hoceima), DMF 2005, 322, at pp. 325-326.

⁵⁵⁸ *Ibid*, at p. 331.

*météorologiques très mauvais, a commis une faute purement nautique, relative à la sécurité du navire, et qui a entraîné sa perte, cette faute ne pouvant dès lors être qualifiée de commerciale.*⁵⁵⁹ As well, the decision to sail in bad weather can be characterized as *faute nautique*,⁵⁶⁰ provided the cargo is adequately stowed for the anticipated weather.⁵⁶¹ In a recent decision by the Chambre Arbitral Maritime de Paris, the arbitral tribunal excused the shipowner and charterer for a certain percentage of the liability to cargo interests on the basis of the *nautical fault* of the captain, but the carriers were liable for the remaining percentage on the basis that the cargo had not been adequately stowed and lashed for the storm encountered.⁵⁶²

5.5. BALLASTING

“Negligence in the handling of ballast is in legal contemplation a “classic case” of excusable negligence in the navigation or management of the ship.”⁵⁶³ There is a long line of jurisprudence concerning simple errors in ballasting. In *The Glenochil*, it was held that the owner was exempt from liability for the negligent manner in which ballasting was carried out at the port of discharge.⁵⁶⁴ In another instance, a failure to harden down a ballast tank lid, causing water damage to cargo, was characterized as an error exempt under Art. IV(2)(a).⁵⁶⁵ Similarly, the act of overfilling the ballast tank, allowing it to overflow through an open manhole and damage cargo, has been viewed as a fault in the

⁵⁵⁹ *Ibid*, at p. 325-326. [Author’s translation: the captain, in resuming his voyage despite the very bad weather, committed a fault of a purely nautical nature, relative to the safety of the vessel, and that caused the loss complained of, thus this fault cannot be characterized as commercial fault.]

⁵⁶⁰ Bonassies, P. “Le droit positif français en 1995” DMF 1996, 243, at p. 254.

⁵⁶¹ In la Cour d’Appel d’Aix-en-provence, 31 mai 1994, it was held that where the cargo was stowed on deck, thus failing to appreciate the weather’s effect on the cargo, the nature of the error is *commerciale* (Bonassies, *ibid*).

⁵⁶² Sentence 1105 du 14 janvier 2005, Chambre Arbitral Maritime de Paris, DMF 2005, 562. The *faute nautique* of the captain was the fact that he had sailed at excessive speeds, in heavy weather, made hazardous route alterations, and sailed perpendicular to both the wind and the swell.

⁵⁶³ *General Foods Co. v. S.S. Mormacsurf*, 1959 AMC 1842 (S.D.N.Y. 1959), at p. 1847.

⁵⁶⁴ *The Glenochil* [1896] P 10, during the discharge of the cargo, the second engineer had run water into a ballast tank but negligently omitted to check the condition of the sounding-pipe and casing after having encountered heavy weather during the voyage, thus the cargo was wetted.

⁵⁶⁵ *Minister of Food v. Reardon Smith Line (Fresno City)* [1951] 2 Lloyd’s Rep. 265 (K.B.). In this instance the chief engineer was negligent as after having instructed a crewmember to harden down the tank lids, he simply pumped up the tanks without ensuring that they had actually been made watertight.

management of the vessel.⁵⁶⁶ In *The Titania*, the master decided to fill the deep tanks with ballast to give the vessel better trim, and the mate forgot to replace a manhole, through which water escaped damaging the cargo.⁵⁶⁷ The 5th Circuit Court of Appeals held that it was an error in management, “as a last link in the chain of causation, the damage here came about because the manhole cover was off. But sea water would not have been in the deep tank had it not been determined that the ship should be ballasted to trim her for expected heavy weather. That was the real and underlying cause of the damage. And without a doubt, that act of ballasting to trim had as its main and principle aim to general care and safety of the whole vessel to protect ship, crew, cargo and freight as she ploughed ahead into the area of typhoons.”⁵⁶⁸ In *The Mormacsurf*, after cargo stored in a deep tank had been discharged, on the way to the next port, the deep tank was run up for ballast but was overpumped causing damage to cargo.⁵⁶⁹ The 2nd Circuit Court of Appeals, held that as the ballasting was required for the safety of the vessel as a whole, this constituted error in the management of the vessel: “the choice between improper care and management is often difficult. However, looking to the primary purpose of the ballasting operation, it was clearly for the welfare of the entire ship without regard to care of any particular cargo or even cargo as a whole. The negligent pumping in trimming the ship was management intimately connected with her navigation.”⁵⁷⁰ The Supreme Court of Norway considered the instance where in heavy seas the master ordered water to be pumped into two non-cargo tanks for stability but by mistake the water was directed to the cargo tank.⁵⁷¹ It was held that the measures taken were for the safety of the ship, thus the carrier was able to benefit from the exemption of errors in management.⁵⁷² The French courts, in contrast, have been known to be strict with regard to errors in

⁵⁶⁶ *Orient Insurance Co. v. M.S. Argentina*, 1961 AMC 1228 (S.D.N.Y. 1961); *Leon Bernstein Co. v. Wilhelm Wilhelmsen (M.S. Titania)*, 1956 AMC 754 (5 Cir. 1956).

⁵⁶⁷ *Leon Bernstein Co. v. Wilhelm Wilhelmsen (M.S. Titania)*, 1956 AMC 754 (5 Cir. 1956).

⁵⁶⁸ *Ibid.*, at p. 756.

⁵⁶⁹ *General Foods Co. v. S.S. Mormacsurf*, 1960 AMC 1103 (2 Cir. 1960).

⁵⁷⁰ *Ibid.*, at p. 1104.

⁵⁷¹ NMCases 1979.108 (Gevostar) Supreme Court Norway, as summarized in Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 47.

⁵⁷² *Ibid.*

ballasting,⁵⁷³ nevertheless the Cour d'Appel de Rouen has found; “*que l’erreur ou la negligence commises au cours de la fin des opérations par un remplissage excessif des ballasts se situent dans un domaine proprement nautique.*”⁵⁷⁴ Other European courts have also been unforgiving of ballasting errors. A Belgian court in *The Arnold Maursk*, acknowledged the necessity of refilling ballast for the safety of the vessel, but found that this necessity does not negate the carrier’s obligation to protect the cargo by preventing the escape of ballast water into the holds.⁵⁷⁵ As such, the Belgian court held that the escape of ballast water is a mismanagement of the cargo, thus rendering the carrier liable.⁵⁷⁶ The Belgian Court of Cassation, the Hof Van Cassatie, upheld the lower court decision finding that in certain instances the failure to prevent the infiltration of ballast water into the cargo holds does not constitute an error in navigation or management of the vessel, rather it constitutes a lack of diligence with respect to the cargo.⁵⁷⁷ Similarly, another Belgian court has also held that improperly closing a manhole cover in a ballast tank such that it is not watertight, constitutes mismanagement of the cargo on the basis that a carrier is required to prevent the penetration of ballast water into the holds in order to prevent cargo damage.⁵⁷⁸

Often, distinguishing between nautical fault and care of the cargo or unseaworthiness in instances of ballasting is contentious when it involves the certifications of the crewmembers, the training they have received with regard to the particular vessel, or the condition of the ballasting system. In *The Farrandoc*, the fact that the second engineer who made the ballasting error had not been instructed on the piping system in the vessel, had not received training, and was hired only at the beginning of that voyage, caused the Exchequer Court of Canada to determine that the issue was one

⁵⁷³ In Cour de Cassation, 17 juillet 1980, (Kenosha), DMF 1981, 209, several bales of material were wetted as a result of water entry due to a ballasting error. The Cour held that as the intent of the ballasting operation was not directed at the safety or stability of the vessel, then the carrier was unable to benefit from the exemption and was liable.

⁵⁷⁴ Cour d’Appel de Rouen, 9 février 1982, (Kenosha), DMF 1982, 669, at p. 674. [Author’s translation: the error or the negligence committed during the ballasting operations in overfilling the ballast tanks falls within the proper domain of nautical fault.]

⁵⁷⁵ Hof van Beroep te Antwerpen, December 12, 1990 (The Arnold Maersk) [1992] ETL 388.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ Hof van Cassatie van Belgie, September 25, 1992 (The Arnold Maersk) [1993] ETL 213.

⁵⁷⁸ Hof van Beroep te Antwerpen, June 29, 1983 [1984] ETL 84.

of unseaworthiness, and not error in management.⁵⁷⁹ While in *Instituto Cubano v. Star Line*, when molasses were damaged as a result of a ballasting mistake, it was held that the unsealed cargo valve, the ultimate cause of the loss, “was an error in care and custody of the cargo outweighing error in management in improper ballasting.”⁵⁸⁰

5.6. HATCH COVERS AND TARPAULINS

Attempting to generally distinguish between acts involving hatches that fall into the nautical fault exemption and those which do not has often proved difficult in the past, given that a myriad of decisions exist on both sides of the issue. Justice Wright describes hatches as a quintessential example of a part of the vessel that may be related to either care of the cargo or error in the management of the vessel: “...the hatches may in one aspect be regarded as part of the outer skin of the vessel as when decks are actually or potentially swept by seas, so that the proper battening down of the hatches with tarpaulins and cleats is as much a part of the management of the ship as closing the portholes. Under other circumstances, as in dock or in calm waters, the hatches belong to the management of the cargo, either because they have to be removed for ventilation or kept tight to keep wet from perishable cargo.”⁵⁸¹

There are many instances where errors with respect to hatches have been found to relate to the care of the cargo. The 2nd Circuit Court of Appeals has found that the act of opening hatches to ventilate the cargo and failing to close them during heavy weather does not fall within the exemption.⁵⁸² Where a hatch, which was inadequately secured, was forcibly opened and thrown back in a gale, the Queen’s Bench Admiralty Court held that the carrier was liable for the resulting damage to the cargo of cement on the basis of the breach of the obligation to carefully carry the cargo.⁵⁸³ The House of Lords, in *Gosse Millerd*, determined that where tarpaulins covering the hatches were removed to

⁵⁷⁹ *Robin Hood Flour Mills v. N.M. Patterson (The Farrandoc)* [1968] 1 Ex. C.R. 175; [1967] 2 Lloyd’s Rep. 276 (Exch. C. Can).

⁵⁸⁰ *Instituto Cubano v. Star Line*, 1958 AMC 166 (Arb. N.Y. 1957).

⁵⁸¹ *Forman & Ellams v. Federal Steam Navigation* [1928] 30 Ll. L. Rep. 52 (K.B.), at p. 60.

⁵⁸² *Andean Trading Company v. Pacific Steam Navigation*, 263 F. 559 (2 Cir. 1920).

⁵⁸³ *The Bulkness* [1979] 2 Lloyd’s Rep. 39 (Q.B.).

effectuate repairs to the vessel, and the cargo was damaged by rainwater, “such negligence was not negligence in the management of the ship” but rather in management of the cargo.⁵⁸⁴ Similarly in the Singapore case of *The Santiago del Estoro*, cargo arrived damaged due to lack of ventilation in the hold, and the court held the carrier liable for failing to care for the cargo by omitting to use mechanical ventilation where the hatches could not be opened due to weather and failing to open them when the weather permitted.⁵⁸⁵ The Supreme Court of Canada considered the instance where cargo of nails was damaged as a result of the loosening of the tarpaulins that covered the hatches.⁵⁸⁶ The majority excused the carrier on the basis of the peril of the sea exemption found in Art. IV(2)(c) of the Hague Rules yet the dissent found that it would have been an error in the care of the cargo following the House of Lords decision in *Gosse Millerd*.⁵⁸⁷

Conversely, in other instances the carrier has been protected by the nautical fault exemption. When tarpaulins have been stripped from hatch covers in heavy weather allowing seawater into the hold damaging cargo, it has been held that the failure of the ship’s officers to fit locking bars or to lash the hatches fell within the Art. IV(2)(a) exemption.⁵⁸⁸ The Eidsivating Court of Appeal, Norway, considered an instance where the hatches were not properly closed, the wedges holding the tarpaulin came loose, and the cargo became contaminated by water.⁵⁸⁹ There were heavy seas and the tarpaulin cover had been strengthened, but it nevertheless gave way.⁵⁹⁰ The Court of Appeal found that “in view of the time of year and the nature of the voyage, covering the hatches was

⁵⁸⁴ *Gosse Millerd v. Canadian Government Merchant Marine* [1928] 32 Ll. L. Rep. 91 (H.L.), at p. 95.

⁵⁸⁵ *The Santiago del Estoro* (1984) Unrep. Suit No. 671 and 672 of 1984, Singapore. (Summarized in Meng, T. *The Law in Singapore on Carriage of Goods by Sea 2nd Ed.* (1994) Butterworths Asia, Singapore, at p. 361-362).

⁵⁸⁶ *Keystone Transports v. Dominion Steel & Coal Co.* [1942] S.C.R. 495

⁵⁸⁷ *Ibid*, at p. 508.

⁵⁸⁸ *International Packers v. Ocean Steam Ship Co.* [1955] 2 Lloyd’s Rep. 218 (Q.B.), however, Justice McNair at p. 238, held that where the cargo was further damaged at port by the failure to discharge the cargo in the wetted hold, the carrier was responsible as it was an error that related to the care of the cargo.

⁵⁸⁹ ND 1987.229 NCA Ulla Dorte (Summarized in Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 273).

⁵⁹⁰ Ulla Dorte, *ibid*, as described in Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 47.

essential for the safety of the ship,” and therefore the carrier benefited from the exemption for errors in management of the vessel.⁵⁹¹

Hatches and tarpaulins have proven to be a contentious area of law with regard to the nautical fault exemption. In this respect, these acts provide an example of the often fact specific nature of the defence. One would be wise to take note of Lord Sumner’s caution in *Gosse Millerd*, when considering this area of the law; “it is never wise to try to decide case B because part of the ship mishandled is “like” the part mishandled in case A.”⁵⁹²

5.7. OTHER EXAMPLES RELATING TO ERROR IN MANAGEMENT

Damage resulting from leaking drainage pipes has been considered by various courts on several occasions. In several instances, sailors’ negligently clearing drainage pipes leading from their quarters or washrooms has been held to be an error in management.⁵⁹³ In *The Touraine*,⁵⁹⁴ a crewman negligently forced an iron rod into a pipe that carried wastewater from the crew quarters in order to clear it, while in *The Rodney*,⁵⁹⁵ a boatswain negligently used a metal poker to clear a pipe that carried off water and had caused flooding in his quarters. In both instances, the damage caused to the pipes had resulted in cargo being wetted, and in both instances the acts were held to be an error in the management of the vessel.⁵⁹⁶ Similarly, where a crewman clearing a toilet with an iron rod punched a hole in the pipe, causing water damage to the cargo in a hold below, the court held that the damage was due to error in management.⁵⁹⁷ Failing to replace the caps to pipes has also been found to be within the exemption.⁵⁹⁸ On the other

⁵⁹¹ Ulla Dorte, *ibid*, as summarized by Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 273.

⁵⁹² *Gosse Millerd v. v. Canadian Government Merchant Marine* [1928] 32 Ll. L. Rep. 91 (H.L.), at p. 97.

⁵⁹³ *The J.L. Luckenbach* 1933 AMC 980 (2 Cir. 1933), where negligently poking a hole in a blocked drain pipe causing water to enter the cargo hold is an error in management of the vessel.

⁵⁹⁴ *The Touraine* [1927] All ER 372 (Adm. Div.).

⁵⁹⁵ *The Rodney*, [1900] P 112 (Div Ct).

⁵⁹⁶ *The Touraine* [1927] All ER 372 (Adm. Div.). *The Rodney*, [1900] P 112 (Div Ct).

⁵⁹⁷ *Kalbfleisch Co. v. United States of America (The Culberson)*, 1931 AMC 1987 (D.C. Mass. 1931).

⁵⁹⁸ In *Gold Dust Co v. Munson Steamship Lines (The Munindies)*, 1931 AMC 245 (E.D.N.Y. 1930), it was held that where a 2nd asst. engineer in filling a double bottom tank negligently allowed the water to

hand a failure to drain the fresh water sanitary system after it had been shut off in below freezing temperatures was found to have caused a pipe to part, and this was held “not to constitute an error in management; rather, it concerns the care and custody of the cargo, i.e., to prevent water damage to the cargo.”⁵⁹⁹

It has been noted that “sounding bilges and pumping bilges are regarded as essential acts of daily management of any ship, whether laden or in ballast; hence errors and negligence in sounding and pumping out bilges are deemed errors in management and are excused.”⁶⁰⁰ Also where the cap has been left off the sounding pipe during a storm such that seawater entered the bilges and a hold, causing damage to the cargo of sugar, this has fallen within the exemption.⁶⁰¹ It has been noted however, that if the scuppers are clogged or dirty permitting sweat to damage the cargo, the carrier is unable to benefit from the exemption.⁶⁰² Conversely, it has also been held that a failure to keep the scuppers clear is an error in management.⁶⁰³ These examples serve to underscore the often subjective or fact specific nature of the jurisprudence.

Errors involving valves have in certain instances been held to be errors in management. The Supreme Court of Canada considered a situation in which a crewman was instructed to pump up the boilers, close the sea-cock valve off, and take certain covers off the air-pump. He instead removed the cover off the sea-cock causing an ingress of water and damage to the cargo, and this was considered to be an error in management.⁶⁰⁴ In a Norwegian judgment, two bilges valves were not properly closed after drainage causing cargo damage.⁶⁰⁵ The Norwegian Court exempted the carrier from

overflow through the sounding pipes, the caps of which had been removed, into the shaft alley, then through another sounding pipe into the cofferdam, then into the cargo bilges, and then into the cargo causing damage, that it was an error in management

⁵⁹⁹ *International Produce Inc. v. S.S. Frances Salman* [1975] 2 Lloyd’s Rep. 355 (S.D.N.Y. 1975).

⁶⁰⁰ Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 201. See also *The British King*, 89 F. 872 (S.D.N.Y. 1898); See also *The Ontario*, 106 F. 324 (S.D.N.Y. 1900).

⁶⁰¹ *Spreckels Sugar Co. v. S.S. Point Chico*, 1941 AMC 1468 (5 Cir. 1941).

⁶⁰² Knauth, A. *The American Law of Ocean Bills of Lading*, 4th Ed. (1953) AMC, Baltimore, at p. 201. See *The Cornelia* 1926 AMC 1337 (S.D.N.Y. 1926).

⁶⁰³ *The Hudson*, 172 F. 1005 (1909).

⁶⁰⁴ *Richardson & Sons v. SS. Burlington* [1931] S.C.R. 76.

⁶⁰⁵ “The Malevik” ND 1961.282 (Summarized by Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 272-273).

liability, holding: “The valves must be considered to be for the benefit of both the cargo and ship. The former is benefited in that the opening of the valves allows the release of water collected in the cargo holds. The closing of the valves primarily benefits the vessel, because the failure to close the valves may endanger the safety of the vessel...In the instance case, where damage was clearly caused by the failure to close the valves properly, the emphasis must be placed on the function the valves play with respect to the safety of the vessel. Hence the actual omission is best considered a fault in the management of the ship.”⁶⁰⁶ Conversely, the failure to tighten a storm valve, wetting the cargo, has been found by a Canadian Court to be an error with regard to due diligence preventing the carrier from relying on the Art. IV(2)(a) exemption.⁶⁰⁷ In *The Lady Serena*, the cargo of phosphate was damaged as a result of a valve in the hold suction line being jammed open, and the London Court held that as the defect in the valve occurred before the beginning of the voyage, the vessel was unseaworthy.⁶⁰⁸ In another instance, it was held by the Southern District Court of New York that the error in management defence was unavailable due to a failure to adequately inspect the overboard discharge valve which had caused the excessive water in the bilges.⁶⁰⁹ Importantly, it has been found that where the carrier cannot prove why or by whom a sea valve was opened causing damage to oil cargo, he may not benefit from the error in management defence as such as act might have related to the care of the cargo.⁶¹⁰ Finally, when the loss was due to a non-return valve stuck in the open position, it has been held that this cannot qualify as an error in management, the issue rather being one of seaworthiness.⁶¹¹

Finally, activities such as weight distribution, cleaning, pumping, and ventilating have been found to be in relation to the management of the vessel. In *The Marilyn L*, a

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Australian Newsprint Mills Ltd. v. Canadian Union Line Ltd.* [1952] 1 D.L.R. 850 (B.C.S.C.).

⁶⁰⁸ *Fisons Fertilizers v. Thomas Watson (The Lady Serena)* [1971] 1 Lloyd's Rep. 141 (M&C London).

⁶⁰⁹ *Iligan International Corp. v. S.S. John Weyerhaeuser*, 1974 AMC 1718 (S.D.N.Y. 1974).

⁶¹⁰ *Standard Shipping Co. v. Luckenbach Steamship Co. (The Mary Luckenbach)*, 1940 AMC 1582 (Arb. NY 1940). There was a dissenting arbitrator however, who found at p. 1588 that the sea valve had no legitimate use in connection with the discharge of the cargo and its purpose is wholly related to management of the vessel, therefore the carrier should benefit from the exemption.

⁶¹¹ *Brazil Oiticica Inc. v. S.S. Bill*, 1942 AMC 1607 (D.C. Ma 1942), this was the case even though the fact that the possibility of non-return valve getting stuck in the open position due to the sticky quality of the oil carried, would not have been anticipated by the crew and had never been seen before by the surveyors.

cargo of plywood had arrived damaged, and it was argued that the metacentric height of the vessel was such that the weight distribution should have been increased by additional ballasting by the defendant.⁶¹² It was held that a failure to adjust the metacentric height was a default in the navigation or management of the vessel under Art. IV(2)(a).⁶¹³ In *The Dagny Skou*, the Court of Appeal of Singapore considered the instance in which the crew was cleaning two deep tanks by the rock and roll method, however the tanks were overfilled and flooded a cargo hold. The Court of Appeal held that as the tanks were constructed for a dual purpose, one for carrying cargo and the other for fuel oil, the cleaning was done for the purposes of the ship and thus was an error in the management of the vessel.⁶¹⁴ The Norwegian Supreme Court had found that where a crew member erroneously pumped fresh water into the inspection pipe for a cargo hold rather than replenishing the ship's fresh water, the fault was in the management of the vessel.⁶¹⁵ Finally, inadequate ventilation has been found in certain instances to constitute an error in management,⁶¹⁶ while in others it falls to be viewed as a failure to care for the cargo.⁶¹⁷

5.8. OTHER EXAMPLES RELATING TO ERROR IN NAVIGATION

The length of this section stands in stark contrast to the proceeding section, thus demonstrating the fairly straightforward nature of the error in navigation aspect of the nautical fault exemption. The aforementioned examples illustrate that the main issue regarding the navigation aspect of the defence is in distinguishing between error and the incompetence of the master or crewmembers. Nevertheless, there are two further examples of error in navigation worth mentioning. First, where a vessel declines towage assistance following a casualty, as per the Iceland Supreme Court, this is an error in

⁶¹² *Georgia-Pacific Co. v. M/S Marilyn L.*, [1972] 1 Lloyd's Rep. 418, 1971 AMC 2157 (E.D. Vir. 1971)

⁶¹³ *Ibid.*, at p. 429 and 2166.

⁶¹⁴ *Dagny Skou*, [1980-1981] 1 S.L.R. 2000 (C.A. Singapore), at p. 203.

⁶¹⁵ ND 1975.85 NSC *Sunny Lady* (Summarized by Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 273).

⁶¹⁶ *The Devanha* [1927] 27 Ll. L. Rep. 281 (M&C London), Justice Cooper found that where ventilators were improperly used damaging a cargo of sheepskins, it was a fault in the management of the ship and the carrier is protected under Art. IV(2)(a).

⁶¹⁷ *The Erik Boye* [1929] 34 Ll. L. Rep. 442 (Adm. Div.), Justice Hill holding that failing to have proper ventilation for a cargo of flour was a defect for which the carrier is liable.

navigation.⁶¹⁸ Second, the failure to keep the vessel anchored head-on into Force 6 winds causing the rolling of the vessel, which strained and broke the lashings of the generator stored on deck, constituted an error in navigation.⁶¹⁹

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⁶¹⁸ ND 2000.91 ISC Vikartindure (Summarized in Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 272).

⁶¹⁹ *General Electric v. M/V Lady Sophie*, 1979 AMC 2554 (S.D.N.Y. 1979).

Chapter 6

Expanding the Boundaries and Application of Nautical Fault

In the classic cargo claims scenario, Art. IV(2)(a) of the Hague-Visby Rules, if applicable, would be invoked by the carrier as a defence to a claim for cargo damage, generally by the holder of the bill of lading. The application of the nautical fault exemption has subsequently been expanded, as a result of developments in two notable areas. Firstly, it has become common practice in many charterparty agreements to incorporate the Hague or Hague-Visby Rules, thus expanding the application of the nautical fault exemption to situations which would not ordinarily arise in the context of disputes under bills of lading. Secondly, due to the development of the notion of actionable fault in general average, the carrier may rely on the nautical fault exemption in certain instances to claim general average contribution, even where the peril results from the negligence of his own employees. In this Chapter, therefore we examine the application of the nautical fault exemption in the context of general average and charterparties.

6.1. INCORPORATION OF THE NAUTICAL FAULT EXEMPTION INTO CHARTERPARTIES

In relation to the traditional carrier and cargo claimant dispute, Art. IV(2)(a) would be utilized to defend against a claim concerning cargo damage. The scope of Art. IV(2)(a) in those instances would therefore be with regard to the obligations found in Art. III(2), concerning the loading, handling, stowage, carriage, custody, care and discharge of the cargo. With regard to charterparties, the substance of the relationship between the shipowner and the charterer extends far beyond the obligations found in Art. III(2) of the Hague Rules. Loss or damage suffered by the parties may very well be unrelated to the aforementioned cargo obligations, and therefore the protection afforded by Art. IV(2)(a) may very well be expanded by virtue of its incorporation into a charterparty. The scope of

Art. IV(2)(a) with respect to disputes under a charterparty is contentious.⁶²⁰ There is a divergence of opinion as to whether Art. IV(2), once incorporated into a charterparty, must be given the same scope and interpretation as in a bill of lading, or whether its scope is thereby extended to cover acts, faults, loss or damage that would not have arisen in a traditional carrier-shipper bill of lading relationship.

6.1.1. Clause Paramount

The Hague or Hague-Visby Rules, by their own terms, do not apply to charterparties. As such a ‘Clause Paramount’, which has the effect of incorporating the provisions of Hague, Hague-Visby or U.S.COGSA into a charterparty, has become a common feature of most charterparties.⁶²¹ The wording varies depending on which standard form contract is used, nevertheless, the effect is in essence similar.⁶²² It has been

⁶²⁰ Wilford, M et al. *Time Charters*, 5th Ed. (2003) LLP, London, at p. 579 and ff., noting that with respect to the United States Carriage of Goods by Sea Act, when incorporated into a time charterparty, the extent to which the Act is restricted by the fact that section 2 relates only to cargo has been a matter of debate.

⁶²¹ Astle, W. *International Cargo Carriers’ Liabilities* (1983) Fairplay Publications, London, at p. 39; Bauer, G. “The Measure of Liability for Cargo Damage Under Charter Parties: A Second Look” (1990) 21 JMLC 397, at p. 402 notes that “in both voyage charters and time charters it is usual to include a clause intended to regulate the liabilities between owner and charterer regarding the carriage of cargo. This clause may take the form of a ‘general exceptions’ clause, listing those categories of damage or loss for which the owner is not liable, such as act of God, perils of the seas, etc., or the charter party may simply annex or include a Clause Paramount.” Despite being a common practice, it has been noted by a Norwegian arbitral tribunal that the reason for the practice may be somewhat misunderstood: “the reason why the Clause [Paramount] was attached to the C/P appears to be that shipowning and shipbroking circles hold a certain vague and somewhat erroneous belief that the Paramount Clause may be useful to the shipowner. The representatives of the shipping industry who have given evidence before this Tribunal this characterized the Clause as one of ‘the usual protectives’, but admitted that they did not have a clear idea of its legal implications.” (*Rederi A/B/ Walltank v. M/S/ Granvill*, Oslo, Arbitration, as quoted by Bauer, *ibid*, at p. 404). With respect to bareboat charters, both Barecon 89 and Barecon 2001 provide that all documents issued by the charterers shall contain a clause paramount (Davis, M. *Bareboat Charters 2nd Ed.* (2005) LLP, London, at p. 123). Regardless, unlike voyage and time charters, the bills of lading bind the bareboat charterers and not the owners, meaning that the bareboat charterer is the “carrier” under the Hague and Hague-Visby Rules (Davis, *ibid*).

⁶²² The New York Produce Exchange Form, September 14, 1993 (NYPE 93), issued by the Association of Ship Brokers and Agents (U.S.A.) contains in Clause 31(a), entitled Clause Paramount, the statement “This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, the Hague Rules, or the Hague-Visby Rules, as applicable, or such other similar national legislation as may mandatorily apply by virtue of origin or destination of the bills of lading, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said applicable Act. If any term of this bill of lading be repugnant to said applicable Act to any extent, such term shall be void to that extent but no farther.” While the New York Produce Exchange Form, October 3, 1946 (NYPE 1946), contains in Clause 24, the statement “U.S.A. Clause Paramount: The bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the

noted that “as spot trading of commodities has grown – particularly oil trading, which was virtually unheard of before the 1970’s – more and more charter party cargo losses have been subject to the Hague Rules.”⁶²³ In the context of time charters in particular, it is almost standard procedure these days to incorporate the Hague or Hague-Visby Rules.⁶²⁴ The courts have given full effect to the clause paramount.⁶²⁵ In *The Saxon Star*, the House of Lords held that it was plainly the intent of the parties to incorporate the Hague Rules and thus such intention should be given effect, despite the fact that the Hague Rules expressly stipulate that they are not to apply to charterparties.⁶²⁶ Once the Hague or Hague-Visby Rules have been included in a paramount clause, they become part of the charterparty contract between the parties, as if each word of the Rules had

carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading is repugnant to said Act to any extent, such term shall be void to that extent, but no further.” BIMCO’s 1999 Gentime, which is an undated version of the Baltimore, contains a clause paramount in Clause B of Appendix A – Protective Clauses: “Clause Paramount: The International Convention for the Unification of Certain Rules of Law relating to the Bills of Lading signed at Brussels on 24 August 1924 (“the Hague Rules”) as amended by the Protocol signed at Brussels on 23 February 1968 (“the Hague-Visby Rules”) as enacted in the country of shipment shall apply to the Contract. When the Hague-Visby Rules are not enacted in the country of shipment, the corresponding legislation in the country of destination shall apply, irrespective of whether such legislation may only regulate outbound shipments. When there is no enactment of the Hague-Visby Rules in either the country of shipment or in the country of destination, the Hague-Visby Rules shall apply to this Contract, save where the Hague Rules as enacted in the country of shipment or if no such enactment is in place the Hague Rules as enacted in the country of destination apply compulsorily to this Contract. The Protocol signed at Brussels on 21 December 1979 (“the SDR Protocol 1979”) shall apply where the Hague Visby Rules apply whether mandatorily or by this Contract. The Carrier shall in no case be responsible for loss of or damage to cargo arising prior to loading, after discharging, or while the cargo is in the charge of another carrier, or which respect to deck cargo and live animals.” (Glass, D *et al.*, *Standard Form Contracts for the Carriage of Goods* (2000) LLP, London, at p. 65).

⁶²³ Chandler, G. “After Reaching a Century of the Harter Act: Where Should We Go From Here?” (1993) 24 JMLC 43, at p. 45.

⁶²⁴ Davis, D. “Rights to Routes: The Hill Harmony” [1999] LMLCQ 461, at p. 463; Pritchett, R. “The New York Produce Exchange Charterparty: The Clause Paramount and Responsibility for Cargo Operations and Seaworthiness” (1983) 14 JMLC 69, at p. 87 notes that “it has long been a common practice in the time chartering of vessels for parties to seek to incorporate the terms of the Hague Rules into their agreement.”

⁶²⁵ See *Nissho-Iwai Co. v. M/T Stolt Lion*, 1980 AMC 867 (2d Cir 1980), holding that where charterers and vessel owners incorporate United States COGSA, either expressly or impliedly into the charterparty, it will be given effect.

⁶²⁶ *Adamastos Shipping v. Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd’s Rep. 73 (H.L.). The House of Lord’s decision has been cited and followed with respect to the Clause Paramount in the New York Produce Form 1946, Clause 24. See *Aliakmon Maritime Co. v. Trans Ocean Continental (The Aliakmon Progress)* [1978] 2 Lloyd’s Rep. 499 (C.A.); *Actis Co. v. The Sanko Steamship Co. (The Aquacharm)* [1982] 1 Lloyd’s Rep. 7 (Q.B.); *Seven Seas Transportation v Pacifico Union Marina (The Satya Kailash)* [1982] 2 Lloyd’s Rep. 465 (Q.B.), and *Seven Seas Transportation v. Pacific Union Marina (The Satya Kailash)* [1984] 1 Lloyd’s Rep. 588 (C.A.).

been written into the charterparty.⁶²⁷ There is divergence, however, in the treatment of the provisions of the Hague or Hague-Visby Rules once they have become part of the charterparty. This divergence is with respect to whether the provisions of the Rules become paramount over other charterparty terms. Certain authors have argued that under English law, the Hague or Hague-Visby Rules are given primacy over other terms of the charterparty.⁶²⁸ Lord Denning and Lord Justice Goff in *The Aegios Lazaros*, considered that where a Gencon charterparty incorporated the Hague Rules by virtue of the phrase "...Paramount clause deemed to be incorporated in this Charter Party," then the Hague Rules provisions superseded all inconsistent charterparty terms.⁶²⁹ Although, this is not always the case. In *Marifortuna Naviera S.A. v. Government of Ceylon*, Justice Mocatta opined that "it would be wrong to place too much weight on the word "Paramount" ...I see no reason...for thereby giving the provisions of this clause greater weight than the provisions of clause 21."⁶³⁰ Justice Mocatta went on to hold that a specific charterparty clause, inconsistent with the nautical fault exemption, prevailed over the rights and immunities in the Hague Rules.⁶³¹ The American law is also inconsistent. Certain American courts have considered that when COGSA is incorporated, it is no more than any other general contract term, while other courts have considered that COGSA provisions are intended to prevail.⁶³² Nevertheless, one must recall that in essence it is an issue of contract interpretation, and as such, will vary depending on the wording of the clause paramount and the facts of the case.

Hague, Hague-Visby and COGSA are generally incorporated by reference, however one may also decide to only incorporate certain provisions. When the

⁶²⁷ In *Pohang Iron & Steel Ltd. v. Norbulk Cargo Services Ltd.* [1996] 4 HKC 701 (H.K. H.C.), the Hong Kong court held that the Hague-Visby time period, incorporated by virtue of a paramount clause, became in reality part of the contract between the parties, thus all liability was extinguished after the passage of one year; Davies, M. & Dickey, A. *Shipping Law* 3rd Ed (2004) Lawbook Co, Pyrmont, Australia, at p. 356 states: "The effect of the Clause Paramount is that the rules are read as if they had been written into the charterparty, and meaningless and superfluous words relating to bills of lading are reinterpreted or ignored."

⁶²⁸ Pritchett, R. "The New York Produce Exchange Charterparty: The Clause Paramount and Responsibility for Cargo Operations and Seaworthiness" (1983) 14 JMLC 69, at p. 91-92.

⁶²⁹ *The Aegios Lazaros* [1976] 2 Lloyd's Rep. 47 (C.A.), at p. 50 & 53.

⁶³⁰ *Marifortuna Naviera S.A. v. Government of Ceylon* [1970] 1 Lloyd's Rep. 247 (Q.B.), at p. 255-256.

⁶³¹ *Ibid.*, at p. 257.

⁶³² Pritchett, R. "The New York Produce Exchange Charterparty: The Clause Paramount and Responsibility for Cargo Operations and Seaworthiness" (1983) 14 JMLC 69, at p. 94-95.

incorporation is by reference, parties are then subject to the entire statute. The French Cour de Cassation has found that once parties have incorporated the Hague Rules by reference into their charterparty, they cannot then derogate from those provisions which they could not have derogated from had the Hague Rules been applicable by law.⁶³³ In the United States, the 5th Circuit Court of Appeals has noted that where the charterparty has incorporated United States COGSA, “[t]he parties must have presumed to have intended to incorporate all the effects of that statute.”⁶³⁴ Despite this, shipowners occasionally challenge the application of the due diligence standards in cargo damage cases where the charterparty contains a clause paramount.⁶³⁵ Nevertheless, it has been argued that “...COGSA is incorporated in charter parties within the Clause Paramount, to the benefit of both owners and charterers. As the *measure* of liability between them, it provides substantial benefits to both, so that any attempt to read out one or more of COGSA’s provisions must be carefully scrutinized, lest *all* of its benefits be lost.”⁶³⁶

6.1.2 **“Loss or Damage”**

One of the difficulties that arises with respect to the incorporation of the nautical fault exemption is interpreting the wording “loss or damage”. Justice Devlin, in *The Saxon Star*, commented that “loss or damage” should be restricted to such loss or damage that was in relation to or had connection with the operations listed in s. 2 of U.S. COGSA.⁶³⁷ The House of Lords, however disagreed and held that “loss or damage” in Art. IV(2) was not restricted to the physical loss or damage of goods, and as such that the

⁶³³ Cour de Cassation, 4 février 1992, (Hilaire Maurel), [1992] ETL 783.

⁶³⁴ *Heinrich C. Horn v. CIA De Navegacion (The Heinz Horn)* [1970] 1 Lloyd’s Rep. 191 (5 Cir. 1969).

⁶³⁵ Chandler, G. “The Measure of Liability for Cargo Damage Under Charter Parties” (1989) 20 JMLC 395, at p. 395.

⁶³⁶ *Ibid*, at p. 402.

⁶³⁷ *Adamastos Shipping v. Anglo-Saxon Petroleum (The Saxon Star)*[1957] 1 Lloyd’s Rep. 79 (Q.B.), at p. 87, “The last question asks whether the words ‘loss or damage’ in section 4(1) and (2) of the Act relate only to physical loss of or damage to the goods. The words themselves are not qualified or limited by anything in the section. The Act is dealing with responsibilities and liabilities under contracts of carriage of goods by sea, and clearly such contractual liabilities are not limited to physical damage. A carrier may be liable for loss caused by the shipper by delay or misdelivery, even though the goods themselves are intact. I can see no reason why the general words “loss or damage” should be limited to physical loss or damage. The only limitation...[is] the loss or damage must, in my opinion, arise in relation to the “loading, handling, stowage, carriage, custody, care and discharge of such goods.”...I should give the same meaning to ‘in relation to’ as to in connexion with”.” Devlin J. was asked to express a view as to whether the loss of voyages would fall under s.4, and he commented that he viewed it as unlikely. The House of Lords did deal with the question, and found that the wording allowed for recovery for losses resulting from fewer voyages than intended.

wording could be interpreted to cover the loss to the charterers resulting from the reduction in the number of voyages under the charter due to negligence.⁶³⁸ Lord Keith of Avonholm, opined, “it does not follow that loss or damage is limited to physical loss of, or damage to, goods...[O]n the view that the subject-matter of the contract here was voyages, the loss of voyages naturally falls under the words ‘loss or damage’.”⁶³⁹ Arriving at the same holding by slightly different reasoning, Lord Somervell of Harrow opined, “I agree with the learned Judge that ‘loss or damage’ in the Act is not limited to physical damage to the goods. I also agree that the loss or damage must arise in relation to the ‘loading, handling, stowage, carriage, custody, care and discharge of such goods.’... The claim is, in my opinion, in relation to loading and carriage of goods...”⁶⁴⁰ More recently, the English Court of Appeal in the *Ot Sonja*, also adopted an expansive view of the wording ‘loss or damage’ in the context of a voyage charter, holding that a “wide construction” was the correct approach.⁶⁴¹

Reasoning similar to Lord Somervell of Harrow’s is found in *Australian Oil Refining v. R.W. Miller & Co.*, where the vessel collided with the charterer’s wharf prior to loading, causing damage.⁶⁴² The charterparty contained Clause 15, which repeated verbatim the text of Art.IV(2)(a), as well as Clause 33, which incorporated the Hague Rules. The High Court of Australia held that Art. IV(2)(a) as incorporated by Clause 33 is “limited to loss or damage in relation to the loading, handling, stowage, carriage, custody, care and discharge of the goods the subject of the contract of carriage contained in the charterparty.”⁶⁴³ With regard to Clause 15, however, it was held that the expression “loss or damage” did in fact cover the damage to the charterer’s wharf, as one must examine the relationship between the parties and not attribute meaning to the expression

⁶³⁸ *Adamastos Shipping v. Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd’s Rep. 73 (H.L.), Note in the footnote *ibid*, that Devlin J. did not formally deal with the particular point of recovery for lost voyages.

⁶³⁹ *Ibid*, at p. 97.

⁶⁴⁰ *Ibid*, at p. 100.

⁶⁴¹ *Cargill International S.A. v. CPN Tankers (The Ot Sonja)* [1993] 2 Lloyd’s Rep. 435 (C.A.), at p. 443-444. In this instance, financial losses were incurred by the charterer pumping cargo into a non-contaminated tank and carrying out contamination testing, and the Court of Appeal held that this was ‘loss or damage’ that arose in relation to the goods.

⁶⁴² *Australian Oil Refining v. R.W. Miller & Co.* [1968] 1 Lloyd’s Rep. 448 (H.C. Aust.).

⁶⁴³ *Ibid*, at p. 456, per Justice Owen.

that normally is used in more limited relationships with more limited contractual obligations.⁶⁴⁴ A slightly more expansive view of Art. IV(2)(a) has been taken in *The Satya Kailash*, where claimants, owners of the primary carrying vessel, had chartered the defendant's vessel for the purpose of lightening in order to enter a port.⁶⁴⁵ The defendant's vessel caused damage to the plaintiff's vessel during lightening operations due to the defendant's crew's negligent navigation. The charter provided an exemption for "errors of navigation" in Clause 16, and in Clause 24 incorporated the Hague Rules. Justice Staughton concluded "that the loss or damage in this case was within art. IV(2)(a). It was, on a broad construction, in relation to the loading of the vessel. It all occurred while the loading was in process, or very nearly so, when the vessel was either arriving to load, or departing from loading."⁶⁴⁶ Conversely, Justice Staughton found that Clause 16 was not broad enough to cover negligent navigation.⁶⁴⁷ The Court of Appeal in *The Satya Kailash*, upheld the ruling yet gave Art. IV(2)(a) an even more expansive scope.⁶⁴⁸ The Court of Appeal addressed the reality that in an ordinary bill of lading dispute the claim will be of the kind relating to the cargo, but in a charterparty situation there are more obligations involved,⁶⁴⁹ and found for the defendant, holding that "we can see no reason why, in principle, the benefit of immunities contained in s.4 of the United States Act should not be available to the respondents in respect of damage caused to the appellants in performance of this activity, even though such damage did not fall within any of the range of activities specified in s. 2."⁶⁵⁰ The Court of Appeal therefore, in adopting such

⁶⁴⁴ *Ibid*, at p. 452, per Chief Justice Barwick. There was a strong dissent by Justice Windeyer arguing at p. 455 that Clause 15 should be read *contra proferentem* and given that it covered the same loss or damage as art. IV(2)(a), it should be restricted to the cargo and thus damage to the charterer's wharf was outside the exemption. Justice McTiernan, at p. 542, also dissented for similar reasons.

⁶⁴⁵ *Seven Seas Transportation v. Pacific Union Marina (The Satya Kailash)* [1982] 2 Lloyd's Rep. 465 (Q.B.).

⁶⁴⁶ *Ibid*, at p. 473.

⁶⁴⁷ *Ibid*, at p. 474-475.

⁶⁴⁸ *Seven Seas Transportation v. Pacific Union Marina (The Satya Kailash)* [1984] 1 Lloyd's Rep. 588 (C.A.).

⁶⁴⁹ *Ibid*, at p. 594: "Of course when the United States Act is incorporated into an ordinary bill of lading contract, it is unlikely that problems of this kind will arise; for in such a case a claim by the bill of lading holder will naturally arise in relation to one of the matters specified in s.2...But where, as here, the act is incorporated into a charter-party, difficulties arise because of the more extended range of obligations imposed on the shipowner under what is after all a contract of services. These will generally include an obligation to proceed to a place specified in the charter or as ordered to load cargo. In the present case, however, the cargo was not to be loaded at a specified place, but from a mother ship."

⁶⁵⁰ *Ibid*, at p. 596. It was determined that the general wording "loss or damage" was not restricted to matters specified under s.2, but included other contractual activities performed under the charter. At p. 595, The

an expansive view of the scope of the nautical fault exemption, has effectively divorced Art. IV(2)(a) from the obligations found in Art. III(2), with regard to the notion of loss or damage.

6.1.3. “Navigation or Management”

With respect to the incorporation of nautical fault into charterparties, the issue has arisen as to the scope of a fault “in the navigation or management” of the vessel. The House of Lords in *The Hill Harmony*, recently considered the scope of Art. IV(2)(a) with respect to its incorporation into a NYPE charterparty.⁶⁵¹ The owners of the vessel remained responsible for “navigation” under the charterparty, and benefited from Art. IV(2)(a) by virtue of the Hague-Visby Rules being incorporated into the charterparty. The charterers in this instance had ordered the master on two voyages between Japan and Vancouver to take the shortest route, the northern great circle route, as recommended by Ocean Routes. Instead, the master disregarded the orders and took a southerly rhumb line course, with the result that both voyages took a total of 296 hours longer. The charterers subsequently deducted 90,000\$ from hire for bunkers consumed and time taken. The owner’s claim for hire was dismissed at arbitration on the basis that the master failed to prosecute the voyage with utmost dispatch and to follow the charterer’s orders with respect to the employment of the vessel. In the High Court, Justice Clark allowed the owners claim on the basis that the master’s decision as to his route was a decision with regard to navigation, not employment, and therefore even if the master had not prosecuted the voyage with the utmost dispatch the breach was one for which the owner is protected under Art. IV(2)(a).⁶⁵² The Court of Appeal upheld the decision holding that

Lord Justices justified this conclusion relying on the speeches of Lord Keith and Viscount Simons in *Adamastos Shipping v. Anglo-Saxon Petroleum (The Saxon Star)* [1958] 1 Lloyd’s Rep. 73 (H.L.), as having held that unlike *Devlin J.* where the wording was restricted to s.2, the two Lords simply held that “loss or damage” covered the subject matter of the contract which was voyages.

⁶⁵¹ *Whistler International Ltd. v Kawasaki Kisen Kaisha (The Hill Harmony)* [2001] 1 All ER 403 (H.L.). It should be noted however that NYPE also contains an exemption for “errors in navigation” in clause 16. This differs from the nautical fault exemption, in that it has been interpreted so as to be confined to non-negligent acts or omissions. See Koh, P. “Errors of Navigation in NYPE Form: Reflections on the Emmanuel C” [1983] LMCLQ 597, in particular pp. 598-600.

⁶⁵² *Whistler International Ltd. v Kawasaki Kisen Kaisha (The Hill Harmony)*[1998] 2 Lloyd’s Rep. 367 (Q.B.), at p. 372, Clark J. stating “in my judgment an order as to where the vessel was to go, as for example to port A or B to load or discharge or to port B via port C to bunker would be an order as to employment which the master would be bound to follow, subject of course (as all parties agreed) to his overriding

a routing instruction was an order with regard to navigation rather than employment, and that the master's decision had been made in the interests of safety of the vessel and was bona fide.⁶⁵³ These two decisions were heavily criticized.⁶⁵⁴ One commentator argued "[q]uestions of navigation must be connected with the safety of the vessel, her crew and cargo and are normally taken once the voyage has started."⁶⁵⁵ Another author, concerned about the implications of the holding, commented "[t]his surely cannot be right, particularly when the incorporation of the Hague or the Hague-Visby Rules into time charterparties (almost standard procedure in this day and age) has such a devastating effect in respect of routing and the obligation to prosecute a voyage with the utmost dispatch, because of the Art. IV, r. 2 exception "negligence in the navigation of the ship".⁶⁵⁶ In the House of Lords, the appeal was allowed. Lord Hobhouse opined as follows: "The meaning of any language is affected by its context. This is true of the words 'employment' in a time charter and of the exception for negligence in the 'navigation' of the ship in a charterparty of contract of carriage. They reflect different aspects of the operation of the vessel. 'Employment' embraces the economic aspect – the exploitation of the earning potential of the vessel. "Navigation' embraces matters of seamanship... What is clear is that to use the word 'navigation' in this context as if it includes everything which involves the vessel proceeding through the water is both mistaken and unhelpful... where seamanship is in question, choices as to the speed or

responsibility for the safety of his ship. An order as to how to get from where the ship was to port A, B or C would not, however, be an order as to employment but an order as to navigation... In my judgment these considerations lead to the conclusion that a decision whether to proceed across the Pacific by taking the great circle route of the rhumb route or course would also be a decision in and about navigation of the vessel and not in and about her employment." Clark J. did acknowledge however the implications of the holding, "it is true... that one decision or the other would be likely to have important financial consequences for the charterers, (and perhaps the owners), but that is true of many decisions which masters take."

⁶⁵³ *Whistler International Ltd. v Kawasaki Kisen Kaisha (The Hill Harmony)* [2000] Q.B. 241 (C.A.). The Court of Appeal, at pp. 261-262, held that the matter was one of navigation, and as long as the master's decision was made bona fide, whether the decision was reasonable or not was irrelevant as the owners were protected... "so far as the application of art IV, r 2(a) is concerned, I consider that the judge was right in construing the term 'navigation' as therein appearing as extending to a decision taken, in the course of voyage planning, to steer a particular course or courses having regard to the weather to be anticipated."

⁶⁵⁴ Gaskell, N. et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at p. 278, notes with disapproval the fact that the implication of the Court of Appeal decision is such that "a decision as to navigation could be made while a vessel was still in port and the carrier would not be liable even if the master's decision was unreasonable."

⁶⁵⁵ Davenport, B. "Rhumb Line or Great Circle? That is a Question of Navigation" [1998] LMLCQ 502, at p. 504.

⁶⁵⁶ Davis, D. "Rights to Routes: The Hill Harmony" [1999] LMLCQ 461, at p. 463.

steering of the vessel are matters of navigation, as will be the exercise of laying off a course on a chart. But it is erroneous to reason...that all questions of what route to follow are questions of navigation.”⁶⁵⁷ The House of Lords held that the owners breached the contract by failing to prosecute the voyage with utmost dispatch and failing to comply with the charterer’s orders regarding employment, noting “the [nautical fault] exemption did not provide a defence...any error which the master made in this connection was not an error in the navigation or management of the vessel; it did not concern any matter of seamanship.”⁶⁵⁸ One commentator has noted that “the consequence of these findings as to the proper definition of “navigation” was that...[it] had to relate to seamanship and [could not] cover a refusal by the master to obey the charterer’s orders in a situation where the safety of the vessel was not at issue. The practical significance of the decision is that the economic interests of time charterers will not longer be put in jeopardy as a result of an unjustifiable excess of caution on the part of the master.”⁶⁵⁹

“Management” can also take on new meaning in the context of a charterparty agreement. In *The Aquacharm*, where the vessel had been refused entry to the Panama Canal on the basis that she exceeded the permitted draught, it was found that the master had failed to use reasonable care to comply with the time charterer’s orders as to loading.⁶⁶⁰ Justice Lloyd, of the English Commercial Court, held that the Hague Rules Art. IV(2)(a) operated to exempt the shipowner from the master’s error in management of

⁶⁵⁷ *Whistler International Ltd. v Kawasaki Kisen Kaisha (The Hill Harmony)* [2001] 1 All ER 403 (H.L.), at pp. 421-422. Lord Hobhouse at p. 417 noted, “the vessel was fit to sail by the shorter northern route and the master did not have any good reason for preferring the longer southern route. It was not a good reason that he preferred to sail through clam waters or that he wanted to avoid heavy weather. Vessels are designed and built to be able to sail safely in heavy weather. The classification society rules require, as does clause 1 of the NYPE form, the maintenance of these safety standards. It is no excuse for the owners to say that the shortest route would (even if it be the case) take the vessel through the heavy weather which she is designed to be able to encounter.”

⁶⁵⁸ *Ibid.*, at p. 422. The Lords relied on, among other decisions, *Lord (owners) v. Newsum* [1920] 2 Ll. L. Rep. 276 (K.B.). In *Lord*, it was held at p. 849, 279, that the masters choice to proceed by a route close to the coast, as opposed to the route farther from the coast as recommended by the British Admiralty, resulting in an inability to complete the voyage due to German submarines, was not a decision in the navigation or management of the vessel, rather it was a breach of the utmost dispatch clause: “[I]t cannot be said to be navigation of the steamer when the Master is in port deliberating, not how he shall proceed and how the steamer shall run or anything of that kind, but by which of two routes he shall proceed to his destination.”

⁶⁵⁹ Baughen, S. “Navigation or Employment? The Hill Harmony” [2001] LMLCQ 177, at p. 179.

⁶⁶⁰ *Actis Co. v. The Sanko Steamship Co. (The Aquacharm)* [1980] 2 Lloyd’s Rep. 237 (Q.B.).

failing to comply with the charterer's orders.⁶⁶¹ Arguably, this is a rather expansive view of the notion of error in management.

6.1.4. Period of Application

An issue has also arisen as to the period of application of the nautical fault exemption, as under a bill of lading situation the period of application would be restricted to 'tackle-to-tackle' as the Hague-Visby Rules apply "from the time when the goods are loaded on to the time when they are discharged from the ship."⁶⁶² In *The Obelix*, where cargo interests under a voyage charter suffered damages as a result of delay, due to a collision involving the vessel prior to loading, the charterparty contained a clause incorporating U.S. COGSA's mutual exceptions from liability.⁶⁶³ Cargo interests argued that the exemptions should not apply until the cargo was loaded, however 5th Circuit Court of Appeals held the carrier to be exonerated under 1304(2)(a), responding that "were COGSA applicable by law this argument would be persuasive. However, the parties are free to contract as they wish, and in this instance they chose to apply the COGSA exceptions to the entire term of the charter."⁶⁶⁴ This was also the case in *The Marilena*, where the 4th Circuit Court of Appeals held that when U.S. COGSA 1304(1) through (3) are incorporated into a charterparty, these provisions extend for the entire term of the charter and not simply from loading and unloading.⁶⁶⁵ In *Louis Dreyfus*, however, where the charterparty had simply incorporated U.S. COGSA, the claimant suffered delay damages where the engine room was flooded during loading, due to an error by an engineer.⁶⁶⁶ The 5th Circuit Court of Appeals held that "because the critical error of the engineer in this case occurred before the commencement of the voyage, [the

⁶⁶¹ *Ibid*, at p. 241.

⁶⁶² Article 1(e) of the Hague and Hague-Visby Rules. This rule has traditionally been referred to as 'tackle-to-tackle' application.

⁶⁶³ *Arth H. Mathiesen v. M/V Obelix*, 1987 AMC 2183 (5 Cir. 1987). The Clause stipulated "Owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy and to have her properly manned, equipped and supplied and neither the vessel nor the Master or Owners shall be or shall be held liable for any loss or damage or delay to the cargo for causes excepted by the U.S. Carriage of Goods by Sea Act, 1936 or the Canadian Water Carriage of Goods Act, 1936."

⁶⁶⁴ *Ibid*, at p. 2189. Note that the 5th Circuit Court of Appeals did find that if the parties had incorporated the entire COGSA, then 1301(e) would apply and the decision would be more difficult, however, the court did not speculate as to what the solution would have been as it was not the case in this instance.

⁶⁶⁵ *United States v. M/V Marilena*, 1969 AMC 1155 (4 Cir. 1969).

⁶⁶⁶ *Louis Dreyfus Co. v. 27,946 Long Tons of Corn*, 1988 AMC 1053 (5 Cir. 1987).

carrier] is not shielded from liability by sec. 1304(2)(a).”⁶⁶⁷ A similar approach with regard to application was taken in another 5th Circuit Court of Appeals decision, *The An Ning Jiang*.⁶⁶⁸ In that instance, it was held that the Hague-Visby Rules applied by virtue of the clause Paramount, but only tackle-to-tackle, while the law of the United States, including COGSA, applied by virtue of a United States governing law clause, to any damage that occurred outside the tackle-to-tackle period.⁶⁶⁹

6.1.5. Delay and Payment of Hire

The fact that the exemption is incorporated into charterparties also has an effect with regard to hire during instances of delay. Generally, “the financial risk for delay of the vessel due to bad weather, strikes of pilots or stevedores, etc., during the charter period normally rest on the charterers.”⁶⁷⁰ As such, often where the vessel is detained by virtue of nautical fault, the charterer is unable to go off-hire. In *The Aquacharm*, the vessel when loaded exceeded the permitted draught for the Panama Canal, contrary to the charterer’s instructions, and as a result was not permitted to go through the Canal.⁶⁷¹ The off-hire clause provided that “...in the event of the loss of time from deficiency of men or stores, fire breakdown or damage to hull machinery or equipment or by any other cause preventing the full working of the vessel the payment of hire shall cease for the time thereby lost.” The charterer contended that the vessel was off-hire during the nine-day delay, yet Justice Lloyd held that the owners were protected by Art. IV(2)(a) from the consequences of the master’s error in management of failing to comply with orders, with the result that the shipowners were entitled to hire.⁶⁷² In the *Aliakmon Progress*, the vessel struck a quay, due to crew negligence, and damaged her stem plating necessitating temporary repairs, and then permanent repairs.⁶⁷³ The owners claimed for hire while the charterers cross-claimed for delays and the consequential loss of losing anticipated cargo

⁶⁶⁷ *Ibid*, at p. 1062.

⁶⁶⁸ *Foster Wheeler Energy Corp. v. An Jiang MV and Industrial Maritime Carriers*, 2004 AMC 2409 (5 Cir. 2004)

⁶⁶⁹ *Ibid*.

⁶⁷⁰ Gorton, L. et al. *Shipbroking and Chartering Practice*, 6th Ed. (2004) LLP, London, at p. 277.

⁶⁷¹ *Actis Co. v. The Sanko Steamship Co. (The Aquacharm)* [1980] 2 Lloyd’s Rep. 237 (Q.B.).

⁶⁷² *Ibid*, at p. 241.

⁶⁷³ *Aliakmon Maritime Co. v. Trans Ocean Continental (The Aliakmon Progress)* [1978] 2 Lloyd’s Rep. 499 (C.A.).

due to the delays. The Court of Appeal held that the owners were not responsible for acts falling under Art. IV(2)(a) and therefore were entitled to hire, while the charterer's claim failed as it arose out of the negligence of the master and thus was excluded by virtue of Art. IV(2)(a).⁶⁷⁴ Frequently, however, the issue of nautical fault in the context of the charterparty, where there is a grounding, collision with a quay or vessel when entering, leaving or manoeuvring in a port, is muddled with the issue of nominating a safe port.⁶⁷⁵ A final point to note is that attention must be paid to the off-hire clause in the charterparty as it may impact the reasoning of the court. Should for example, nautical fault be expressly provided for as an off-hire event, it stands to reason that a court may view this as superseding any immunity provided by virtue of Art. IV(2)(a) of the Hague-Visby Rules.

6.1.6. Demurrage

Although the exemption for nautical fault has been interpreted so as to shield the shipowner from charterers' claims for delay or to prevent charterers from suspending hire, the exemption is not necessarily beneficial for the owner with respect to demurrage.⁶⁷⁶ It has been noted that "while in the common law systems it is hardly conceivable that the shipowner should be free to claim demurrage for delays caused by the defective condition of his ship or the poor quality of his employees, there is very little case law to indicate these limitations."⁶⁷⁷ Nevertheless, the English Commercial Court has considered this very issue. In *The Union Amsterdam*, laytime had expired and demurrage had begun to accrue, when the vessel grounded on her way to berth due to negligent navigation.⁶⁷⁸ The owners contended that demurrage continued to accrue and

⁶⁷⁴ *Ibid.*

⁶⁷⁵ Cassegrain, J. "Responsibilities and Liabilities of the Time-Charterer" in *Time Charters: Why the Confusion?* (1977) LLP, London, at pp. 5-7; *Slebert Shipping v. Associated Transport (The Star B)*, SMA (Arb. at N.Y., November 2003), where the vessel grounded both as a result of negligent navigation of the master and the pilot, and an unsafe condition of the port;

⁶⁷⁶ Demurrage is a certain rate to which the owners are entitled to once the time allotted under the charterparty for loading or discharge has expired. In essence, the demurrage rate is a form of liquidated damages, and as such the owners do not have to prove their loss (Gorton, L. et al. *Shipbroking and Chartering Practice*, 6th Ed. (2004) LLP, London, at p. 243).

⁶⁷⁷ Tiberg, H. *The Law of Demurrage* 4th Ed. (1995) Sweet & Maxwell, London, at p. 54. Tiberg further notes that "the usual formula is that the charterer is liable for delay unless it arises through the fault of the shipowner or those for whom he is responsible." (*Ibid.*)

⁶⁷⁸ *Blue Anchor Line v. Alfred C. Toepfer (The Union Amsterdam)* [1982] 2 Lloyd's Rep. 432 (Q.B.).

drew attention to the fact that they were exempted under Art. IV(2)(a) for errors in navigation. Justice Parker held that the owners cannot avail themselves of the exemption in this instance and thus the charterers are excused from their obligation to pay demurrage. It was reasoned that the exemption would have protected the owners as a defence to a claim in damages for delay by the charterers, but in this instance the “owners have, by negligent navigation or management, so prevented her [from being available] and...it does not lie in their mouths to say that the vessel was being detained by the charterers during the period when by their negligence she was grounded.”⁶⁷⁹ Similarly, in *Marifortuna Naviera S.A. v. Government of Ceylon*, the English Commercial Court considered the instance in which the vessel had given notice that she would be ready to load the next day; however en route to the port, due to negligent navigation, she collided with another vessel.⁶⁸⁰ She arrived in port on time, however due to the need for surveys and repairs, loading did not begin until 13 days later. The shipowners claimed demurrage, and argued that Art. IV(2)(a) protected them from any damages suffered by the charterers. The Court dismissed the shipowner’s claim, on the basis of contractual interpretation. The Court’s reasoning was that Clause 21 of the Gencon charterparty, which provided that where the vessel is not ready to load in accordance with definite notice owners would be responsible for expenses incurred including demurrage, prevailed over the clause paramount.⁶⁸¹ As such, the owners were not entitled to demurrage. This is an interesting case, as Justice Mocatta’s opinion, despite having discussed Art. IV(2)(a), did not outright reject the notion that it could be used to recover demurrage. However, from statements in obiter noting the possibility “that as a matter of construction art. 4, r. 2 of the Hague Rules only protects against claims for damages,” it would appear that Art. IV(2)(a) may not be a vehicle through which a shipowner can recover demurrage arising out of nautical fault.⁶⁸²

⁶⁷⁹ *Ibid*, at p. 436.

⁶⁸⁰ *Marifortuna Naviera S.A. v. Government of Ceylon* [1970] 1 Lloyd’s Rep. 247 (Q.B.)

⁶⁸¹ *Ibid*, at p. 257.

⁶⁸² *Ibid*, at p. 254.

6.1.7. Conclusion

The operation of the nautical fault exemption when Harter, Hague or Hague-Visby is incorporated into charterparties, or even where the wording of Art. IV(2)(a) is incorporated, demonstrates that the scope of the provision in these instances is much more expansive than its general operation in a simple bill of lading situation.⁶⁸³ One may surmise that the scope of Art. IV(2)(a), and the wording therein, remains to a certain extent a contentious issue when incorporated into a charterparty, as demonstrated by the fact that the issue was litigated up to the House of Lords only a few years ago. Nevertheless, the trend in this instance generally is for courts to take an expansive approach with regard to the interpretation of the provision.

6.2. GENERAL AVERAGE

The nautical fault exemption has proved to be exceptionally beneficial to carriers with respect to seeking contribution for general average events. As previously discussed, the nautical fault exemption is generally employed to shield the carrier with respect to cargo claims and certain claims by charterers. In this instance however, the nautical fault exemption enables carriers to take suit for general average contribution where they would otherwise be unable. In the context of general average, therefore the nautical fault exemption has proven to be particularly expansive.

6.2.1. The Origin and Development of General Average

The concept of general average has existed in relation to carriage of goods by sea almost from its inception. Rhodian Law is credited with being the originator of the concept, dating from as early as 1000 BC to 800 BC.⁶⁸⁴ One of the earliest definitions of general average is found in Roman Law in the *Digest of Justinian*: “The Rhodian law

⁶⁸³ For example see *Luria Brothers v. Eastern Transportation Co. (The R.W. McDonald)*, 1937 AMC 778 (2 Cir. 1937), where the carrier was held not liable for the negligent selection of an anchorage or ineffective distress signals, which were considered to be errors in management.

⁶⁸⁴ The dates vary depending on the source. In Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 369, the Rhodian Law is dated at 800 BC, while Rose, F. *General Average: Law and Practice 2nd ed.* (2005) LLP, London, at p. 1, footnote 3, states that it is at least as old as 1000BC, and finally Dockray, M. *Cases & Materials on the Carriage of Goods by Sea 3rd Ed* (2004) Cavendish, London, at p. 355, dates the concept to 900BC.

decrees that if in order to lighten a ship merchandise is thrown overboard, that which has been given for all shall be replaced by the contribution of all.”⁶⁸⁵ Originally, the concept of general average was restricted to cases of jettison,⁶⁸⁶ however, by the end of the 18th century the concept had expanded to encompass all losses provided they were incurred in accordance with the principles of general average.⁶⁸⁷ It was also during this time that the term “general average” began to be used to describe this concept. Although the term “average” first appeared in this context around the 16th century,⁶⁸⁸ the term “general average” first appeared in reported English and American jurisprudence by the end of the 18th century.⁶⁸⁹ By the beginning of the 19th century, what has been described as “the classic definition of general average given by an English Judge,”⁶⁹⁰ was enunciated by Justice Lawrence in *Birkley v. Presgrave*: “All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average and must be born proportionately by all those who are interested.”⁶⁹¹

The need for a uniform practice or regime in relation to general average became clear in the 19th century. The York-Antwerp Rules were initially drafted in 1864, but have since been amended several times, in 1877, 1890, 1924, 1950, 1974, 1994, and 2004.⁶⁹² The York-Antwerp Rules, defines general average as follows: “There is a general average act when, and only when, any extraordinary sacrifice or expenditure is

⁶⁸⁵ *Digest of Justinian*, Book XIV, Title 2, Fr. 1, as quoted in English in Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 365, footnote 9; Rose, F. *General Average: Law and Practice 2nd ed.* (2005) LLP, London, at p. 1. For Latin and English transcriptions of the Digest and Institutes of Justinian pertaining to general average see Lowndes & Rudolf, *The Law of General Average and the York-Antwerp Rules* 12th Ed. (1997) Ed. by Wilson, D. & Cooke J., Sweet & Maxwell, London, Appendix 1 at p. 749 and ff.

⁶⁸⁶ Tetley, *ibid*, at p. 365, footnote 8.

⁶⁸⁷ *The Copenhagen* (1799) 165 E.R. 180, at p. 182, where Lord Stowell stipulates that in order for a loss to be general average, it must be incurred “for the general benefit and preservation of the whole”.

⁶⁸⁸ Davies, M. & Dickey, A. *Shipping Law 3rd Ed* (2004) Lawbook Co, Pyrmont, Australia, at p. 537.

⁶⁸⁹ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 366. See *The Copenhagen* (1799) 165 E.R. 180, at p. 182, for the first use of the term in English jurisprudence. For the first reported American jurisprudence containing the term see *Campbell v. The Alknomac* 4 Fed. Cas. 1155 at p. 1156 (No. 2,350) (D. S.C. 1798) (Tetley, *ibid*).

⁶⁹⁰ Rose, F. *General Average: Law and Practice 2nd ed.* (2005) LLP, London, at p. 1.

⁶⁹¹ *Birkley v. Presgrave* (1801) 1 East 220, at p. 228, as quoted by Rose, *ibid*.

⁶⁹² Davies, M. & Dickey, A. *Shipping Law 3rd Ed* (2004) Lawbook Co, Pyrmont, Australia, at p. 538; Dockray, M. *Cases & Materials on the Carriage of Goods by Sea 3rd Ed* (2004) Cavendish, London, at p. 355.

intentionally and reasonably made or incurred for the common safety for the purposes of preserving from peril the property involved in a common maritime adventure.”⁶⁹³ The York-Antwerp Rules are not a convention, rather they are given force of application by virtue of incorporation into the contract. For example, the P & O Nedlloyd Bill provides at clause 22(2): “Any general average on a vessel operated by the Carrier shall be adjusted according to the York/Antwerp Rules of 1994 or any subsequent amendment thereto authorized by the CMI...”⁶⁹⁴ Even though they are not imposed on parties by force of law, “general average is almost universally agreed and adjusted according to the York-Antwerp Rules, as produced by the CMI.”⁶⁹⁵ Nevertheless, it should be noted that claims for general average independently of the York-Antwerp Rules have been allowed.⁶⁹⁶

6.2.2. Conduct Barring Recovery of General Average Contributions

In general, a carrier may not request general average contributions where the general average event has resulted from his own negligence.⁶⁹⁷ Nevertheless, despite the possibility of faulty conduct on the part of the shipowner or the cargo owner giving rise to the general average act, Rule D of the York-Antwerp Rules mandates that a general average adjustment must take place. Rule D does however provide for the instance where one of the parties to the common venture is at fault by stipulating the following:

⁶⁹³ This passage is unchanged from the last three incarnations of the York-Antwerp Rules. It is found in Rule A of the 1974 York-Antwerp Rules, Rule A of the 1994 York-Antwerp Rules, and Rule A(1) of the York-Antwerp Rules 2004. Another modern definition of general average is found in the Maritime Code of the People’s Republic of China, article 193: “General average refers to a special sacrifice resulting from an intentional and reasonable measure adopted or special expenses incurred for the common safety of the vessel, cargo or other property which encounter a common danger during the same voyage at sea.” (An English translation of the Maritime Code is found as an appendix at p. 429 and ff. of Mo, J. *Shipping Law in China* (1999) Sweet & Maxwell Asia, Hong Kong.)

⁶⁹⁴ Gaskell, N. et al. *Bills of Lading: Law and Contracts* (2000) LLP, London, at pp. 348-354 provides general average clauses from 10 different bills of lading.

⁶⁹⁵ *Ibid.*, at p. 355.

⁶⁹⁶ Dockray, M. *Cases & Materials on the Carriage of Goods by Sea 3rd Ed* (2004) Cavendish, London, at p. 355.

⁶⁹⁷ Gilmore, G. & Black, C. *The Law of Admiralty 2nd Ed.* (1975) Foundation, Minneola, N.Y., at p. 266 state “A vessel owner at fault is not able to collect general average contribution from the cargo owner.” This principle is not by any means restricted to the shipowner or carrier, as in *McKay Massey Harris v. Imperial Chemical Industries of Australia & New Zealand (The Mahia No. 2)* [1959] 2 Lloyd’s Rep. 433 (S.C. Vic), it was found by Justice Lowe of the Supreme Court of Victoria, at p. 451, that where the damage resulted from the negligence of the stevedores, the cargo interests were entitled to recover from the stevedores the amount paid as general average contribution to the carrier under the bill of lading.

“Rights of contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure; but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.”⁶⁹⁸ Essentially, each party’s general average contribution is calculated without considering fault, however, the existence of fault may later affect a party’s obligation to make the calculated contribution.⁶⁹⁹ In practice, this means that where the party claiming general average contribution was at fault, and such fault gave rise to the general average event, the other party may refuse to pay. Moreover, where a party not at fault has already contributed, for example where the salvage award has been paid or by the sacrifice of their goods, they may claim an indemnity from the party at fault.

In 1889, Lord Watson opined that the shipowner cannot “be permitted to claim recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save.”⁷⁰⁰ More recently, in the *Faste Jarl*, the Norwegian Supreme Court determined that the vessel was unseaworthy due to the chief mate’s intoxication, which resulted in the vessel running aground.⁷⁰¹ As a result of a general average adjustment, the expenses incurred to refloat the vessel were distributed between the vessel and the cargo.⁷⁰² The Norwegian Supreme Court held that due to the unseaworthiness of the vessel, the cargo owners were entitled to claim against the vessel owner for indemnification of the general average contribution.⁷⁰³ Similarly, in *The Hasselt*, the Supreme Court of Canada, held that where the shipowner had failed to exercise due diligence to properly train his crew to fight fire at sea, with the result that they

⁶⁹⁸ The Chinese Maritime Code, Article 197, has enacted this principle as follows: “The possibility that the accident resulting in the occurrence of the special sacrifice or special expenses might have been caused by the fault of one party does not affect the party’s right to demand sharing of the general average concerned. However, the innocent party and the party in fault may make a claim against the fault in question or raise defences for the fault respectively.” (English translation of the Chinese Maritime Code is found as an appendix at p. 429 and ff. of Mo, J. *Shipping Law in China* (1999) Sweet & Maxwell Asia, Hong Kong).

⁶⁹⁹ Davies, M. & Dickey, A. *Shipping Law* 3rd Ed (2004) Lawbook Co, Pyrmont, Australia, at p. 543.

⁷⁰⁰ *Strang, Steel & Co. v. A. Scott & Co.* (1889) 14 App Cas 601, at p. 608.

⁷⁰¹ ND 1992.163 NSC *Faste Jarl* (Norwegian Supreme Court), summarized in English in Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 469.

⁷⁰² *Ibid.*

⁷⁰³ *Ibid.*

exacerbated the fire and caused general average damage with the water, the shipowner was precluded from recovering the cargo interests' share of general average.⁷⁰⁴ Failure to exercise due diligence to ensure that the vessel was seaworthy is the fault that is perhaps the most commonly relied on by cargo interests to preclude the carrier from recovering general average contribution,⁷⁰⁵ although, the argument is often unsuccessful.⁷⁰⁶

6.2.3. Actionable Fault

In general, a carrier may not request general average contributions where the general average event has resulted from his own negligence.⁷⁰⁷ More specifically, "at common law a carrier is not entitled to obtain contribution in general average from cargo, if the peril which necessitates the extraordinary sacrifice or expenditure arises as a result of his *actionable fault* or negligence in law or that of his employees."⁷⁰⁸ Most jurisdictions, therefore, will allow a carrier at fault but protected by contractual

⁷⁰⁴ *Century Insurance Co. of Canada v. N.V. Bocimar S.A. (The Hasselt)* (1987) 39 D.L.R. (4th) 465 (S.C.C.).

⁷⁰⁵ *Guinomar of Conakry v. Samsung Fire & Marine Insurance Co. Ltd. (The Kamsar Voyager)* [2002] 2 Lloyd's Rep. 57 (Q.B.), where the shipowner declared general average after a wrongly fitted spare piston damaged the engine. Justice Dean held that the vessel was unseaworthy on the basis of the cracked piston, and as such the fault was actionable and therefore the carrier was unable to recover the cargo interests' general average contribution; *Goulandris Brothers v. B. Goldman & Sons (The Granhill)* [1957] 2 Lloyd's Rep. 207 (Q.B.), where at p. 219 and ff, Justice Pearson considered Rule D in relation to allegations of unseaworthiness; *Ever Lucky Shipping v. Sunlight Mercantile (The Pep Nautic)* [2004] 1 S.L.R. 171 (C.A.), where the Singapore Court of Appeal held that despite exemption clauses in the bills of lading excluding all liability for deck cargo, the shipowner was not absolved of actionable fault on the basis that the vessel was unseaworthy, and as such, he was denied recovery in general average.

⁷⁰⁶ For a recent instance of where the shipowner was able to demonstrate due diligence to render the vessel seaworthy and successfully claim general average contribution, see *Demand Shipping v. Ministry of Food Government of the People's Republic of Bangladesh (The Lendoudis Evangelos II)* [2001] 2 Lloyd's Rep. 304 (Q.B.), where Justice Cresswell, at p. 312, held that a grossly irresponsible act of one crewmember did not render the vessel unseaworthy; See also *Christian Anderson v. Attorney General of New Zealand (The Danica Brown)* [1995] 2 Lloyd's Rep. 264 (Q.B.) where the vessel broke down while sailing off Canada, due to the failure of a thrust roller bearing. Justice Waller nevertheless held that the shipowner had exercised due diligence and was entitled to succeed in this claim for general average contribution; See also *Jugoslavenska Oceanska Plovidba v. American Smelting and Refining (The Admiral Zmajevic)* [1983] 2 Lloyd's Rep. 86 (Q.B.), where Justice Lloyd, at p. 90, held that where there was an engine breakdown, the owners had exercised due diligence through periodic inspections and could therefore succeed in their claim for contribution; *Consolidated Mining and Smelting Co. of Canada v. Straits Towing* [1972] 2 Lloyd's Rep. 497 (Fed. Ct.), where cargo-laden barges had sunk at their moorings after being left unattended. The plaintiff alleged unseaworthiness, but Justice Cattanauch held that the defendants benefited from the peril of the sea defence and as such were entitled to general average contribution.

⁷⁰⁷ Gilmore, G. & Black, C. *The Law of Admiralty 2nd Ed.* (1975) Foundation, Minneola, N.Y., at p. 266 state "A vessel owner at fault is not able to collect general average contribution from the cargo owner."

⁷⁰⁸ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 369 [Emphasis Added].

exemptions to claim contribution from cargo interests who contracted on those terms.⁷⁰⁹ In essence, the notion of ‘fault’ with respect to liability for general average contributions means ‘actionable fault’, so a shipowner can thus rely on an exemption clause in the contract of carriage to recover a general average contribution where the event which gave rise to the general average act arose from an excepted peril.⁷¹⁰ Carver has stated that the test for an actionable wrong is as follows: “whether, had the general average sacrifice or expenditure not been made, the person making it would have been liable in damages, to the person against whom he is claiming contribution, for the loss or damage to that person’s interest in the adventure which the sacrifice or expenditure was intended to avert.”⁷¹¹ With the result therefore that where the carrier’s fault is not actionable under the Hague or Hague-Visby Rules, such as by virtue of Art. IV(2)(a), the carrier is entitled to claim general average.⁷¹² This is the law in the vast majority of jurisdictions, including the United Kingdom and the Commonwealth countries.⁷¹³

American law, however, approaches general average differently. “[T]he mere fact that the negligent carrier is immunized from liability for the loss or damage sustained by cargo by one or more provisions of the Carriage of Goods by Sea Act (COGSA) does not permit him to claim a general average contribution from cargo.”⁷¹⁴ In *The Irrawaddy*, the United States Supreme Court held that although the carrier was protected under the Harter Act from liability for damage to cargo, the carrier could not claim general average contribution where the master had been negligent.⁷¹⁵ The Supreme Court reasoned that the Harter Act did not confer affirmative rights for use by the shipowner in cases of general average stemming from his servant’s negligence.⁷¹⁶ In essence, the Supreme

⁷⁰⁹ Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 777.

⁷¹⁰ Hudson, N. “General Average – Defences and “Due Diligence” Disputes: A New Approach Needed” [1976] LMCLQ 416, at p. 416.

⁷¹¹ Carver as quoted by Rose, F. *General Average: Law and Practice* 2nd Ed. (2005) LLP. London, at p. 81.

⁷¹² Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 777; Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 371.

⁷¹³ Davies, M. & Dickey, A. *Shipping Law* 3rd Ed (2004) Lawbook Co, Pyrmont, Australia, at p. 543; Tetley, *ibid*.

⁷¹⁴ Tetley, *ibid*.

⁷¹⁵ *Flint v. Christall (The Irrawaddy)*, 171 U.S. 187 (1898)

⁷¹⁶ *Ibid*.

Court viewed the exemptions in the Harter Act as operating only as a shield to defend against a cargo claim. As a result of *The Irrawaddy*, carriers began to insert clauses into the bills of lading providing for cargo contribution in general average where the cause of the peril is one for which the carrier is not responsible for under statute. The United States Supreme Court in *The Jason* addressed the validity of such clauses, where a seaworthy vessel stranded off Cuba through the negligence of her navigators.⁷¹⁷ The bill of lading contained a clause essentially stipulating that cargo interests shall not be exempt from general average payments in instances where the cause of the disaster is one for which the carrier is excused under the Harter Act. The United States Supreme Court held “in our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence...the provision in question is valid, and entitled him to contribution under the circumstances stated.”⁷¹⁸ As a result of *The Jason*, such a clause inserted into a bill of lading was titled a Jason Clause. After the United States Carriage of Goods by Sea Act, 1936, came into force, the scope of the Jason Clause was expanded becoming the modern New Jason Clause.⁷¹⁹ When a New Jason Clause is incorporated in bills of lading, it allows a carrier to claim general average from cargo regardless if the general average event resulted from negligence in the navigation or management of the vessel. The clause is now commonplace and recovery for general average expenses when nautical fault has caused the incident is unquestioned.⁷²⁰ Recently, the 5th Circuit Court of

⁷¹⁷ *The Jason*, 225 U.S. 32, 2004 AMC 2387, in reprint (1912).

⁷¹⁸ *Ibid.*, at p. 55.

⁷¹⁹ Davies, M. & Dickey, A. *Shipping Law* 3rd Ed (2004) Lawbook Co, Pyrmont, Australia, at p. 543; The New Jason Clause reads: “In the event of an accident, danger, damage or disaster before or after the commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods.” (Clause 31(c) of the New York Produce Exchange Form, 1993). The BIMCO Gentime contains an identical clause, however, it contains an added stipulation absent from the above NYPE clause, that provides: “The foregoing provisions shall also apply where the owners, operators or those in charge of any vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect to a collision or contract.” (Clause F, Appendix A, Gentime 1999, re-printed in Glass, D *et al.*, *Standard Form Contracts for the Carriage of Goods* (2000) LLP, London, at p. 65).

⁷²⁰ *Folger Coffee Co. v. Olivebank*, 2000 AMC 844 (5 Cir. 2000), where water entered the vessel through an error in management of not closing the skylight or vent covers, causing the vessel to lose electrical

Appeals considered the instance in which water entered the vessel through an error in management of not closing the skylight or vent covers, causing the vessel to lose electrical power, and necessitating salvage in rough weather.⁷²¹ As the bill of lading contained a New Jason Clause, it was found that “once the vessel establishes that a general average act occurred, the cargo owner may only avoid liability by establishing the vessel was unseaworthy at the start of the voyage and that the unseaworthiness was the proximate cause of the general average event. If the cargo owner proves unseaworthiness, the vessel may still prevail by proving that it exercised due diligence to make the vessel seaworthy prior to the voyage.”⁷²² The 5th Circuit Court of Appeals therefore held that cargo was not relieved of its obligation to contribute to general average.

It has been argued that the New Jason Clause is probably superfluous in English law and certain other jurisdictions, however it is wise to include it nevertheless.⁷²³ Certainly, it is the practice in all Canadian bills of lading, charterparties and contracts of affreightment to include the New Jason Clause, just in case general average were to be adjusted under American law.⁷²⁴ This practice has been both noted and approved by Canadian courts.⁷²⁵ Indeed, the Supreme Court of Canada, in *The Orient Trader*, allowed a shipowner to claim general average contribution on the basis of the broad scope of a New Jason Clause in the bill of lading, even where there had been an unreasonable deviation.⁷²⁶

power, necessitating salvage in rough weather, nevertheless cargo was not relieved of its obligation to contribute to general average; *United States Steel Products v. American & Foreign Ins. Co. (The Steel Scientist)* 1936 AMC 387 (2 Cir.1936), where the grounding was a result of negligent navigation, the court ordered that the general average contribution be paid to the vessel owner.

⁷²¹ *Folger Coffee Co. v. Olivebank*, 2000 AMC 844 (5 Cir. 2000).

⁷²² *Ibid.*, at p. 847.

⁷²³ Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 777.

⁷²⁴ Strathy, G. & Moore, G. *The Law and Practice of Marine Insurance in Canada* (2003) Butterworths, Toronto, at p. 330.

⁷²⁵ *Ibid.*, citing several jurisprudential examples.

⁷²⁶ *Drew Brown Ltd. v. The Orient Trader and Owners (The Orient Trader)* [1973] 2 Lloyd’s Rep. 174 (S.C.C.), see in particular, Justice Laskin’s judgment at p. 182-185.

6.2.4. Nautical Fault and General Average Events

It has been noted that “the operation of the actionable fault bar is considerably reduced in practice by the Hague(-Visby) Rules exemption of negligence in navigation and management.”⁷²⁷ Indeed, were it not for the nautical fault exemption, general average expenditures or sacrifices made in the context of groundings, allisions, collisions, for example, would likely not be recoverable. The use of the nautical fault exemption to enable a shipowner to claim general average contribution, provided the vessel is seaworthy,⁷²⁸ is a common practice in both bill of lading and charterparty situations. A New Jason Clause, when inserted into a charterparty, and combined with a Clause Paramount, enables the shipowner to claim general average contributions from charterers in instances of negligence navigation or management of the vessel. To use an old common law maxim, in this instance, the nautical fault exemption is operating as both a sword and a shield.

The exemption for nautical fault has proven to be particularly valuable to shipowners in the context of groundings.⁷²⁹ In *The Isla Fernandina*, the Gencon charterparty incorporated a New Jason Clause and Paramount Clause by virtue of clause 38, with the effect that Art. IV(2)(a) of the Hague Rules was applicable.⁷³⁰ The vessel was grounded as a result of negligent navigation and cargo loss ensued, in part through

⁷²⁷ Rose, F. *General Average: Law and Practice* 2nd Ed. (2005) LLP. London, at p. 87.

⁷²⁸ *The Hellenic Glory* [1979] 1 Lloyd’s Rep. 424 (S.D.N.Y.), where Justice Broderick held that although the owner was protected from liability arising from crew negligence in the management of the vessel by virtue of COGSA 1304(2)(a), the failure to replace an engine pin actually rendered the vessel unseaworthy and as such the shipowners were not entitled to general average contributions; *Smith, Hogg & Co v. Black Sea and Baltic General Insurance (The Lilburn)* (1940) 67 Ll. L. Rep. 253 (H.L.), where the vessel was beached to prevent sinking, and the House of Lords held that the shipowner was unable to recover general average contribution from the cargo insurers on the basis that the vessel was unseaworthy. The House of Lords agreed with the Court of Appeal’s finding that the nautical fault exemption did not operate to allow the shipowner to claim general average where the dominant cause of the loss was unseaworthiness.

⁷²⁹ In *The Torepo* [2002] 2 Lloyd’s Rep. 535 (Q.B.), the pilot, through negligent navigation, grounded the vessel, and therefore on the basis of the nautical fault exemption, the claimant charterer failed in his claim to recover what was paid to salvors as salvage remuneration and the return of the general average security they had posted; *United States Steel Products v. American & Foreign Ins. Co. (The Steel Scientist)* 1936 AMC 387 (2 Cir.1936), where the grounding was a result of negligent navigation, the court ordered that the general average contribution be paid to the vessel owner.

⁷³⁰ *Rey Banano Del Pacifico v. Transportes Navieros Ecuatorianos (The Isla Fernandina)* [2000] 2 Lloyd’s Rep. 15 (Q.B.).

unloading in order to lighten the vessel to get her off the bank.⁷³¹ Justice Langley of the English Commercial Court determined that the vessel was seaworthy, denied the cargo claim for the loss of cartons caused by the attempts to refloat the vessel and held that shipowner was entitled to recover general average expenses from the charterer.⁷³² Similarly, in *The Jalavihar*, the charterparty incorporated a New Jason Clause and thus when the vessel ran aground the owners declared general average.⁷³³ The 5th Circuit Court of Appeals considered that navigational and managerial error, an excepted cause under U.S. COGSA, gave rise to the general average event. The Court of Appeal therefore held that the owners could recover in general average pursuant to the New Jason Clause.⁷³⁴

In the context of a collision, Lord Merriman, considered the question of whether cargo owners could recover their contribution to general average by way of damages against a wrongdoing vessel, which had carried their cargo.⁷³⁵ Lord Merriman noted that both Art. IV(2)(a) of the U.K. Carriage of Goods by Sea Act, and Rule D of the York-Antwerp Rules were applicable, before opining that “notwithstanding the majority of blame attributed to the *Greystoke Castle*, she was entitled to obtain the general average contribution from the cargo, a result which is in accordance with the general commercial practice throughout the world.”⁷³⁶ Abandonment was considered in *Bulgaris v. Bunge*, where the vessel developed a list, the steering gear broke down, and a fresh gale was coming, as such the master and crew abandoned ship onto a passing steamer.⁷³⁷ The vessel was subsequently salvaged, and the shipowner claimed against cargo for general average. Justice MacKinnon allowed the shipowner to recover general average contribution, noting that had the vessel been improperly abandoned this fault would not

⁷³¹ *Ibid.* Subsequent cargo damage was also at issue in this instance, having occurred later in the voyage as a result of the failure of the ship’s generators.

⁷³² *Ibid.*, at p. 34.

⁷³³ *Usinas Siderurgicas De Minas Geras v. Scindia Steam Navigation Co. (The Jalavihar)*, 1997 AMC 2762 (5 Cir. 1997).

⁷³⁴ *Ibid.*

⁷³⁵ *Owners of Cargo in M.V. Greystoke castle v. Owners of S.S. Cheldale* (1944) 77 Ll. L. R. 395 (Adm. Div.), at p. 400.

⁷³⁶ *Ibid.*, at p. 401.

⁷³⁷ *Bulgaris v. Bunge (The Theodoros Bulgaris)* [1933] 45 Ll. L. Rep. 74 (K.B.), at p. 75.

be actionable as it would constitute an error in the navigation or management of the ship.⁷³⁸

Finally, a decision that bears mention is *The Oak Hill*, where different qualities of pig iron were separated by holds and shipped under a voyage charter from Quebec to Italy.⁷³⁹ The charterparty contained a nautical fault exemption and incorporated the York-Antwerp Rules. The vessel ran aground in the St. Lawrence River, but was re-floated by discharging the cargo, received repairs, re-loaded and continued the voyage. At Genoa it was discovered that the different types of pig iron were intermixed when they were re-loaded, and the cargo owners brought suit. The shipowner pleaded nautical fault and general average, specifically Rule XII,⁷⁴⁰ with regard to the cargo loss. The Supreme Court of Canada found that the grounding was caused by the error in navigation of the pilot, for which the shipowner was absolved, and that the unloading, repairs and reloading properly constituted a general average act.⁷⁴¹ The Supreme Court however, found that there was nothing in the York-Antwerp Rules that relieved the master of his responsibility to see that the cargo is properly handled and cared for during the carrying out of the general average procedure.⁷⁴² The shipowner was therefore held liable for cargo damage on the basis of the following reasoning: “[T]he expenses incurred in handling the cargo at Levis were a direct consequence of the general average act, but the combined negligence of the master and of the surveyors and stevedores who were acting as his servants which occasioned the damage, was not attributable to the general average act; it constituted a separate and independent cause... [the shipowners] have not shown that the damage complained of was ‘the direct consequence of the general average

⁷³⁸ *Ibid.*, at p. 81. Despite opining that improperly and unnecessarily abandoning the vessel would have been an error in navigation or management of the vessel entitling the shipowner to recover general average, Justice MacKinnon held that based on the facts at hand, the vessel was not improperly abandoned.

⁷³⁹ *Federal Commerce v. Eisenerz (The Oak Hill)* [1975] 1 Lloyd’s Rep. 105 (S.C.C.)

⁷⁴⁰ Rule XII provides: “Damage to or loss of cargo, fuel or stores caused in the act of handling, discharging, storing, reloading and stowing shall be made good as general average, when and only when the costs of those measures respectively is admitted as general average.”

⁷⁴¹ *Federal Commerce v. Eisenerz (The Oak Hill)* [1975] 1 Lloyd’s Rep. 105 (S.C.C.), at p. 110.

⁷⁴² *Ibid.*

act’.⁷⁴³ Accordingly, it is therefore important to note that despite the wording of Rule XII and the existence of nautical fault, a failure to care for the cargo during the general average procedure may result in liability for cargo loss or damage.

6.2.5. Artificial General Average

One particular aspect of general average that has developed over the past century is the notion of ‘artificial general average’.⁷⁴⁴ When the York-Antwerp Rules first came into being, general average expenditures and sacrifices were only made against imminent perils. Over the intervening years, the requirement of the existence of a peril was negated in certain instances where expenditures were made for the ‘safe prosecution of the voyage’.⁷⁴⁵ By virtue of Rules X and XI, where a vessel enters a port or place of refuge as a result of an accident or sacrifice for repairs necessary for the safe prosecution of the voyage, the port expenses, the costs of discharging cargo, fuel or stores, wages and maintenance of the master, officer and crew, reasonably incurred along with fuels and stores consumed shall be allowed as general average expenses.⁷⁴⁶ It has been noted that “because there is no ‘peril’ requirement in Rules X(b) and XI(b), claims may be made for general average expenses at the port of discharge, even when there is no peril.”⁷⁴⁷ This has been considered to be quite extraordinary, and has attracted criticism. In particular cargo insurers are hostile to the notion and consider that “allowances in general average should be restricted to those incurred while the vessel is actually ‘in grip of a peril’”. This would entail excluding port of refuge expenses, temporary repairs and costs of transshipment of cargo to the destination.”⁷⁴⁸ In light of artificial general average, Art. IV(2)(a) is particularly important for the shipowner. When there is a grounding, as

⁷⁴³ *Ibid*, at p. 114. Justice Ritchie also quoted with approval the holding of the trial judge: “These acts of neglect, even if committed during the general average procedure cannot, in my view, be held as those of the plaintiff so as to prevent the latter from successfully recovering the damages to its cargo.”

⁷⁴⁴ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 381.

⁷⁴⁵ *Ibid*, at p. 381.

⁷⁴⁶ Rule X(a) and (b), Rule XI(a) and (b), of the York-Antwerp Rules, 1994 and the York-Antwerp Rules, 2004. The main distinction between the two versions of Rules X and XI is the 1994 version uses the phrase “admitted as general average” while the 2004 version uses the phrase “allowed as general average”. The principles nevertheless remain unchanged.

⁷⁴⁷ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 383; The York-Antwerp Rules 2004, Rules X(b) and XI(c) also do not require a “peril”.

⁷⁴⁸ Dockray, M. *Cases & Materials on the Carriage of Goods by Sea 3rd Ed* (2004) Cavendish, London, at p. 356.

exemplified by a number of the aforementioned cases,⁷⁴⁹ the shipowner then becomes entitled to recover a portion of all the associated port and maintenance costs, along with the costs of temporary or permanent repairs. Were it not for the nautical fault exemption, the shipowner would not only be liable for any ensuing cargo damage, but also, for example, repairs to the vessel, salvage costs, and port and maintenance expenses.

6.2.6. Conclusion

The foregoing demonstrates that nautical fault has not only expanded its application through the notion of actionable fault, but also has become a key element in determining the recovery of general average expenditures. Moreover, it is truly in the context of artificial general average that the impact of the exemption is felt. All the expenditures for the safe prosecution of the voyage, now accepted as general average under the York-Antwerp Rules, are generally recoverable by virtue of nautical fault when the vessel has grounded or collided. Regardless of assertions that the exemption is being restricted and marginalized in practice, it would be difficult to imagine an article in the Hague Rules that could prove to be more beneficial to the carrier than nautical fault.

⁷⁴⁹ *Rey Banano Del Pacifico v. Transportes Navieros Ecuatorianos (The Isla Fernandina)* [2000] 2 Lloyd's Rep. 15 (Q.B.); *The Torepo* [2002] 2 Lloyd's Rep. 535 (Q.B.).

Chapter 7

Restricting The Availability of the Nautical Fault Exemption

Despite the expansive application of the nautical fault exemption in certain areas of carriage, recent developments in other areas may serve to curtail reliance on the exemption. Firstly, certain recent uniform laws, notably the STCW Convention, the ISM Code, and the ISPS Code, potentially impact the use of the exemption, although to what extent is as of yet uncertain given the very few cases to date. Secondly, certain commentators have argued that the courts are becoming increasingly hostile towards the nautical fault exemption. Despite the assertions of certain commentators, in most jurisdictions it is premature to pronounce on a clear judicial trend of restricting the application of the nautical fault exemption. The exception however is France, where in the last few years the courts have blatantly and unabashedly interpreted nautical fault so strictly that there is concern that it's effectiveness as an exemption will be completely neutralized.

7.1. THE IMPACT OF RECENT UNIFORM LAW

The ability of the carrier to rely on the nautical fault exemption is becoming increasingly restricted as a result of recent uniform law. In the past two decades several conventions and codes in particular have come into force that have increasingly regulated the manning and safety aspects of the shipping industry. Although these instruments do not deal with nautical fault *per se*, the obligations contained therein have the potential effect of restricting the availability of the exemption by imposing further obligations on the shipowner that must be fulfilled in order to have exercised due diligence to make the vessel seaworthy.

7.1.1. STCW Convention

Given that human error is a significant factor contributing to accidents and incidents, it was felt by the international community that crew training required

attention.⁷⁵⁰ The 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) has been updated by amendments adopted by IMO in July 1995, and entered into force on February 1, 1997.⁷⁵¹ The 1978 Convention, despite its aims of creating standards to ensure seafarers are qualified for their duties, has been described as weak,⁷⁵² and virtually worthless.⁷⁵³ The 1995 reforms aimed to right the past failures, and thus produced a series of new articles which were paired with several carried over from the old regime, with the aim, again, to ensure that “seafarers on board ships are qualified and fit for duties.”⁷⁵⁴ The amendments included new standards of competence extended to cover more categories of crewmen, criteria for the evaluation of candidates for certification, obligations on the shipowner to demonstrate competent and qualified personnel, and mandatory minimum rest periods.⁷⁵⁵ The STCW may impact the availability of the nautical fault exemption by virtue of the fact that it defines “in considerable detail what are to be considered competent masters, officers, and seaman,”⁷⁵⁶ thus making it more difficult to demonstrate due diligence to properly man the vessel. Where a shipowner, therefore, fails to exercise due diligence to ensure the ship’s crewmembers have proper certificates, are familiarized with the characteristics of the ship, and are provided with the documentation required by the STCW, the ship will be unseaworthy on the basis that it was improperly manned. Previously, shipowners had the obligation to ensure that their crews were competent, held the proper certifications and were trained for the vessel,⁷⁵⁷ however the STCW in essence raises the bar by

⁷⁵⁰ Power, V. “European Union Shipping Law” in *Shipping Law Faces Europe: European Policy, Competition and Environment* (1995) Kegels, T. (Ed.) Maklu, Antwerpen, at p. 70.

⁷⁵¹ 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, opened for signature July 7, 1978, and amended July 7, 1995.

⁷⁵² Power, V. “European Union Shipping Law” in *Shipping Law Faces Europe: European Policy, Competition and Environment* (1995) Kegels, T. (Ed.) Maklu, Antwerpen, at p. 70.

⁷⁵³ Sperling, G. “The New Convention on Standards of Training, Certification, and Watchkeeping: What, if Anything, Does it Mean?” (1998) 22 Tul. Mar. L.J. 595, at p. 597;

⁷⁵⁴ *Ibid.*, at p. 599.

⁷⁵⁵ Pamborides, G. *International Shipping Law: Legislation and Enforcement* (1999) Kluwer Law International, The Hague, at p. 168.

⁷⁵⁶ Sperling, G. “The New Convention on Standards of Training, Certification, and Watchkeeping: What, if Anything, Does it Mean?” (1998) 22 Tul. Mar. L.J. 595, at p. 614-615.

⁷⁵⁷ See *The Garden City* [1982] 2 Lloyd’s Rep. 382 (Q.B.), where Justice Staughton commented that the shipowners “would have been foolish to entrust the safety of one of their ships to an officer who produced only certificates of competence and opinions such as are in evidence in this case. A responsible shipowner should and would make further enquiries.” (*Ibid.*, 395-396); See also *The Makedonia* [1962] 1 Lloyd’s Rep. 316 (Adm. Div.) where Justice Hewson faulted the shipowner for hiring a both a chief engineer and a

ensuring precise standards of competence are met, and detailed records are kept, thus enabling claimants and authorities to more easily identify any failures on the part of the shipowners. The ISM Code is discussed below, however it is worth noting that the new regulations in the STCW, “particularly those concerning certification, familiarization, and communication are closely related to [obligations] contained in the ISM Code.”⁷⁵⁸

As the transitional period provided for in the STCW 1995 has only lapsed fairly recently,⁷⁵⁹ there are as of yet no key judgments that serve to exemplify the operation of the convention in practice. Nevertheless, two decisions under the old STCW serve to illustrate the potential impacts of the new regime. In *The Torepo*, a vessel ran aground, and cargo was required to contribute to salvage and general average.⁷⁶⁰ The claimants sought to recover those contributions while the carrier sought to defend itself under error in navigation.⁷⁶¹ The claimants made several allegations with respect to the vessel being unseaworthy focusing on bridge team management and defects in personnel and experience, which included contending that “there ought to have been a system which complied with the relevant international regulations such as IMO STCW Convention 1978...the system was either non-existent or not proper...[and] there ought to have been on board the bridge at the material time...a dedicated look-out who was properly qualified to act as such in accordance with the STCW Regulations 11/4 and A-11/4.”⁷⁶² Justice Steel however determined that based on the evidence neither the master nor the owners had any reason to believe that the lookout was not competent to fulfil his

second engineer without taking the time to ensure that they were properly qualified, and accordingly held him liable for a failure to exercise due diligence.

⁷⁵⁸ Weitz, L. “International Maritime Law: The Nautical Fault Debate” (1998) 22 Tul. Mar. L.J. 581, at p. 593.

⁷⁵⁹ Although the STCW 1995 entered into force February 1, 1997, the Convention provided for a transitional period until February 1, 2002, wherein the parties to the Convention may continue to issue, recognize and endorse certificates conforming to previous regulations to seafarers who began training before August 1, 1998. (Pamborides, G. *International Shipping Law: Legislation and Enforcement* (1999) Kluwer Law International, The Hague, at p. 169).

⁷⁶⁰ *The Torepo* [2002] 2 Lloyd’s Rep. 535 (Q.B.).

⁷⁶¹ The Hague-Visby Rules did not govern, as the carriage was under a series of overlapping charterparties, nevertheless, the Shell Time form contained a clause, 27(a), which exonerated the carrier in the same manner that Art. IV(2)(a) of Hague-Visby does. The vessel was subsequently voyage chartered but pursuant to the terms of the time charter, thus the nautical fault exemption applied in respect of cargo interests.

⁷⁶² *The Torepo* [2002] 2 Lloyd’s Rep. 535, at p. 540-541.

function.⁷⁶³ Despite the fact that the claimants failed to prove that the casualty resulted from causative unseaworthiness, as the cause was found to be pilot error for which the carrier was exempt, the case demonstrates the potential effects that the Convention may have on manning requirements and seaworthiness. The Cour d'Appel de Bordeaux recently considered a somewhat similar instance, in which the vessel *Heidberg*, collided with port installations while a pilot was on the bridge.⁷⁶⁴ The captain had left the bridge of the vessel in order to stop ballasting operations, leaving a junior member of the crew and the pilot on the bridge. The carrier pleaded *faute nautique*, however the Cour d'Appel denied the carrier the benefit of the exemption, finding that the carrier had not ensured the proper cohesiveness and functioning of the crew.⁷⁶⁵ In particular, the Cour d'Appel found that given the master left the bridge without being replaced, the lookout was engaged in another task, and there was a lack of information exchange between the master and the pilot, these actions constituted breaches of Rule 2-1 of STCW 78.⁷⁶⁶

The key impact of the STCW 1995, with respect to carrier liability, is that it provides the claimants, the courts, and the authorities with a clear benchmark against which the actions and the practices of shipowners can be judged. Given that the convention is aimed at addressing human error, which provides the basis of the error in navigation or management exemption, the shipowner may have a higher burden to meet in order to demonstrate that appropriate measures were taken to prevent and guard against the occurrence of such errors.

7.1.2. ISM Code

The importance of properly implemented safety and management procedures cannot be underestimated, as statistical studies have demonstrated that upwards of 80% of all shipping accidents are caused by human error.⁷⁶⁷ Indeed, in a span of 18 years,

⁷⁶³ *Ibid*, at p. 547.

⁷⁶⁴ Cour d'Appel de Bordeaux, 31 mai 2005, (*Heidberg*), DMF 2005, 839, at p. 847.

⁷⁶⁵ *Ibid*, at p. 844.

⁷⁶⁶ *Ibid*, at p. 843. The Cour d'Appel does note however that the carrier did not breach the fundamental principles of STCW 78.

⁷⁶⁷ Huybrechts, M. "The International Safety Management Code: From Human Failure to Achievement" [1999] ETL 17, at p. 18, who further argues that acts or omissions of humans contribute to every accident, including structural or equipment malfunctions.

between 1980 and 1997, 167 bulk carriers and 1,352 lives were lost at sea.⁷⁶⁸

Accordingly, efforts were made to address the human factor and minimize the number of human errors both on board and ashore that led to shipping casualties.⁷⁶⁹ The result, the International Safety Management Code (ISM Code),⁷⁷⁰ therefore has the objective of providing an international standard for the safe management and operation of ships.⁷⁷¹

The aim of the ISM Code is summarized by Lord Donaldson as follows: “In the short and medium term, it is designed to discover and eliminate sub-standard ships, together with substandard owners and managers, not to mention many others who contribute to their survival and, in some cases, prosperity. In the longer term its destination is to discover new and improved methods of ship operation, management and regulation which will produce a safety record more akin to that of the aviation industry.”⁷⁷² The ISM Code was enacted by virtue of incorporation into the SOLAS Convention,⁷⁷³ as Chapter IX on May 19, 1994, and provided for the following compliance times: 1) Ro-ro passenger ferries operating between ports in the EU by July 1, 1996, 2) Passenger ships no later than July 1, 1998, 3) Oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed craft of 500 gross tonnage and upwards by July 1, 1998, and 4) Other cargo ships and mobile offshore drilling units of 500 gross tons and upwards, not later than July 1, 2002.⁷⁷⁴ As the ISM Code was enacted as a chapter in SOLAS, it became force of law in

⁷⁶⁸ Lord Donaldson of Lynton. “The ISM Code: The Road to Discovery?” [1998] LMCLQ 526, at p. 531.

⁷⁶⁹ Pamborides, G. *International Shipping Law: Legislation and Enforcement* (1999) Kluwer Law International, The Hague, at p. 153.

⁷⁷⁰ International Management Code for the Safe Operation of Ships and for Pollution Prevention, rendered mandatory under Ch. IX, SOLAS Convention, 1974. The ISM Code is also published: IMO. *International Safety Management (ISM) Code 2002* (2002) IMO, London.

⁷⁷¹ ISM Code, Preamble. The objectives of the Code are set out in greater detail in article 1.2 of the Code entitled Objectives. They include safety at sea, prevention of human injury or loss of life, and damage to the environment. They also enumerate a list of safety management objectives for companies as well as dictating that the safety management system should ensure 1) compliance with mandatory rules and regulations, and 2) that applicable Codes, guidelines and standards recommended by the organization, Administration, classification societies and maritime industry organizations are taken into account.

⁷⁷² Lord Donaldson of Lynton. “The ISM Code: The Road to Discovery?” [1998] LMCLQ 526, at p. 527.

⁷⁷³ Safety of Life at Sea Convention (SOLAS) 1974, adopted November 1, 1974, in force May 25, 1980.

⁷⁷⁴ Rodriguez, A. & Hubbard, M. “The International Safety Management (ISM) Code: A New Level of Uniformity” (1999) 73 Tul. L. Rev. 1585, at p. 1593-1594; Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at p. 16.

the 145 countries party to SOLAS, which when combined have 98.53% of the world's tonnage.⁷⁷⁵

In general, the ISM Code provides a framework under which shipowners are required to specify objectives in relation to safety management, develop procedures in order to obtain the safety management objectives, and maintain records detailing the implementation of the safety management procedures.⁷⁷⁶ Specifically, the shipowner,⁷⁷⁷ has the obligation to develop and implement a Safety Management System (SMS), which if compliant with the ISM Code, will enable the shipowner to obtain a Document of Compliance (DOC) from the Flag State certifying compliance with the ISM Code.⁷⁷⁸ As well, a separate Safety Management Certificate is issued “to a ship to signify that the Company and its shipboard management operate in accordance with the approved SMS.”⁷⁷⁹ Article 1.4 of the ISM Code specifies that each SMS must include the following: (1) “a safety and environmental-protection policy;”⁷⁸⁰ (2) “instructions and procedures to ensure safe operation of ships and protection of the environment in compliance with relevant international and flag State legislation;”⁷⁸¹ (3) “defined levels of authority and lines of communication between, and amongst, shore and shipboard personnel;”⁷⁸² (4) “procedures for reporting accidents and non-conformities with the provisions of this Code;”⁷⁸³ (5) procedures to prepare for and respond to emergency situations;”⁷⁸⁴ and (6) “procedures for internal audits and management reviews.”⁷⁸⁵

⁷⁷⁵ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 465; De Maeyer, F. “A Cargo Underwriter’s Approach” [1999] ETL 45, at p. 45.

⁷⁷⁶ Tetley, W. *Marine Cargo Claims, 4th Ed.*, in “Chapter 15: Due Diligence to Make the Vessel Seaworthy”, at p. 48. Available online at: <http://tetley.law.mcgill.ca/maritime>.

⁷⁷⁷ Which for the purposes of the ISM Code includes, the shipowner, the bareboat charterer, manager, and any organization with has assumed responsibility for the operation of the vessel.

⁷⁷⁸ Sahatjian, L. “The ISM Code: A Brief Overview” (1998) 29 JMLC 405, at p. 406; Gold, E. et al. *Maritime Law* (2003) Irwin Law, Toronto, at p. 227; Allen, C. “The ISM Code and Shipowner Records: Shared Safety Goals vs. Industry’s Privacy Needs” (1998) 11 U.S.F. Mar. L.J. 1, at p. 5; Özçayir, Z. *Port State Control* (2001) LLP, London, at p. 324-326.

⁷⁷⁹ Poulos, G. “Legal Implications of the ISM Code: New Impediments to Sea Fever” (1996) 9 U.S.F. Mar. L.J. 37, at p. 44; ISM Code Article 13.4 & 13.5; Sahatjian, *ibid.*

⁷⁸⁰ ISM Code Article 1.4.1.

⁷⁸¹ *Ibid.*, Art. 1.4.2.

⁷⁸² *Ibid.*, Art. 1.4.3.

⁷⁸³ *Ibid.*, Art. 1.4.4.

⁷⁸⁴ *Ibid.*, Art. 1.4.5.

⁷⁸⁵ *Ibid.*, Art. 1.4.6.

Many of the obligations under the ISM Code relate to or impact the navigation and management of the vessel. Article 7 of the ISM Code entitled Development of Plans for Shipboard Operations, stipulates: “The Company should establish procedures for the preparation of plans and instructions for key shipboard operations concerning the safety of the ship and the prevention of pollution. The various tasks involved should be defined and assigned to qualified personnel.” There are a number of subjects that have been recommended to be included in the operational documentation of the SMS procedures manuals that may have a bearing on navigation, for example: bridge and engine room watchkeeping arrangements, special requirements in bad weather and fog, fitness for duty and avoidance of excessive fatigue, operational and maintenance instructions for equipment, verifying that up-to-date nautical charts are carried, manoeuvring data, emergency procedures, tests of engines and steering gear, and port information.⁷⁸⁶ Furthermore, the ISM Code provides numerous responsibilities for the master of the vessel, including those related to implementing the safety and environmental-protection policy, verifying that specified requirements are observed, and reviewing the SMS and reporting deficiencies to the shore based management.⁷⁸⁷ Finally, the ISM Code obliges the shipowner to have a designated person ashore (DPA), who is one or more of the employees of the shipowner, to serve as the line of communication between the highest level of the management of the shipowner and the vessel, and whose duties include monitoring the safety and pollution prevention aboard each vessel and ensuring adequate resources and shore-based support.⁷⁸⁸

The ISM Code is not directly concerned with issues of civil liability, nevertheless, the aforementioned obligations under the ISM Code have the potential to impact the availability of the nautical fault exemption in several ways. Certain articles arguably

⁷⁸⁶ Appendix 6 of the ICS/ISF Guidelines identify subjects recommended to be in the SMS procedures manuals, see Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at p. 114-115, for a more complete list.

⁷⁸⁷ ISM Code, Article 5, specifically 5.1.1, 5.1.4, and 5.1.5.

⁷⁸⁸ ISM Code, Article 4; See Pamborides, G. *International Shipping Law: Legislation and Enforcement* (1999) Kluwer Law International, The Hague, at p. 150, who notes that the inclusion of the stipulation that the DPA must have “...direct access to the highest level of management”, has generated a lot of speculation regarding both its meaning and its potential effects on industry practices.

increase the obligations incumbent on the shipowner to satisfy his duty exercise due diligence to both make the vessel seaworthy and to properly crew the vessel. In addition, the designation of the DPA provides a direct link through which the shipowner may become privy to errors and deficiencies in the safety and management of the vessel. Finally, the obligations with respect to documenting and recording the implementation of the SMS results in a wealth of documentation concerning vessel operations, now available to claimants and their attorneys. With respect to the potential impacts of the ISM Code on shipowner liability, it must be underscored that these are for the most part speculative. Unfortunately, despite the fact that the ISM Code has now been in force for certain classes of vessels for over a decade, to date there is little jurisprudence under the Code. As such, although many commentators agree on the forecasted effects, only time will tell whether they play out as envisioned in the context of actual disputes.

7.1.2.1. *Obligation to Exercise Due Diligence to Make the Vessel Seaworthy*

A failure to fully comply with the ISM Code, may be characterized as a failure on the part of the shipowner to exercise due diligence to make the vessel seaworthy. Currently, “the objective standard of seaworthiness with which the vessel and owner must comply will now be tested against the requirements of the [ISM] Code and Chapter IX of SOLAS.”⁷⁸⁹ There is as of yet no judicial authority on whether simply the absence of a DOC or SMS, is in itself sufficient to constitute unseaworthiness,⁷⁹⁰ or whether something more will be required. It has nevertheless been confidently stated that wherever cargo loss or damage can be attributed to negligence, errors or actions on the part of the crew resulting from the shipowner’s lack of compliance with the ISM Code, the shipowner will be unable to avail himself of the nautical fault exemption.⁷⁹¹

The following case considered the ISM Code in relation to the obligation to exercise due diligence, despite the fact that compliance with the Code was not yet

⁷⁸⁹ Chance, C. “Legal Implications of the International Safety Management Code”, cited by Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at pp. 131-132.

⁷⁹⁰ Michel, K. War, *Terror and Carriage by Sea* (2004) LLP, London, at p. 739. Moreover, judicial research current to January 2008 has also failure to uncover any authority speaking to that point.

⁷⁹¹ Baughen, S. *Shipping Law* 3rd Ed. (2004) Cavendish Publishing, London, at p. 129.

required for that vessel at the time of the incident. In *The Eurasian Dream*, a fire consumed a car carrier, resulting in the total loss of the cargo.⁷⁹² Justice Cresswell considered whether the vessel was unseaworthy, as the claimants alleged, or if the carrier should benefit from Art. IV(2). Before ruling, Justice Cresswell considered the implications of ISM Code: “The ISM Code became mandatory for passenger ships, tankers of all types and bulk carriers on July 1, 1998 and will become mandatory for all other types of ships...on July 1, 2002. The International Association of Classification Societies (IACS) noted that the number of phase 2 ships (of which the *Eurasian Dream* was an example) holding Safety Management Certificates on June 30, 1998 was 1704 out of a total of approximately 17,000 classes with IACS. The fact that the vessel did not hold a Safety Management Certificate at the time of the fire was no more than a reflection of the fact that none would be required until 2002. [Despite the fact that the ship was not obliged to be ISM certificated,] the ship was provided with copies of the fleet ISM procedural documentation and was subject to the same company procedures as all other vessels in the fleet. Captain Haakansson said that: ...the ISM Code...is a framework upon which good practices should be hung. Even for companies – or for that matter vessels – who have waited until the last minute to apply for certification the principles are so general and good that a prudent manager/master could very well organize their company/vessels work following those guidelines.”⁷⁹³ Justice Cresswell then held that the vessel was unseaworthy due to the fact that, among other reasons,⁷⁹⁴ the master was new to the vessel and car carriers in general, the master and crew were ignorant of the particular hazards of carriers and the ship’s fire fighting systems, they were not properly trained and given drills, there was no ship specific manual dealing with fire prevention and control, the emergency procedures manual was inadequate, and there was a substantial amount of ship specific documentation required by SOLAS and dealing with

⁷⁹² *Papera Traders Co. v. Hyundai Merchant Marine (The Eurasian Dream)* [2002] 1 Lloyd’s Rep. 719 (Q.B.).

⁷⁹³ *Ibid.*, at p. 739.

⁷⁹⁴ Other reasons included, inadequacies in the vessel’s fire fighting equipment and communications equipment, the training of the master was inadequate in that he was simply directed to read all the literature on board the vessel, which was not given to the master in advance, was not related to his lack of prior experience, it was a vast amount of documentation and would have occupied two to three weeks of his time while aboard the vessel (*Ibid.*, at p. 742-743.).

essential subjects absent from the vessel.⁷⁹⁵ It is difficult to determine from the judgment to what extent the standard of seaworthiness was influenced by the requirements of the ISM Code, nevertheless the case provides an instructive example of the use of the ISM Code as a standard for use by courts to measure whether the carriers actions were sufficient to satisfy his obligation to exercise due diligence to provide a seaworthy vessel.

The Chambre Arbitrale Maritime de Paris recently found that a captain's errors in travelling at an excessive speed, during a storm, in a direction perpendicular to the wind, constituted *nautical fault*.⁷⁹⁶ The Tribunal, in considering the loss of sixty-one containers, however held the carrier liable for two-thirds of the loss, on the basis of errors relating to the lashing of the containers.⁷⁹⁷ What proves to be interesting about this arbitral decision is its mention of the ISM Code, in a fashion similar to Justice Creswell's consideration in *The Eurasian Dream*. The Tribunal expressed its discontent with the carrier for not having established precise and complete instructions concerning the stowing and lashing of containers, and noted that the only material on board the vessel on the topic was a half page text.⁷⁹⁸ The Tribunal stated that certainly no formal breaches of the ISM Code could be imputed to the carrier on the basis that it was not in force at the time of the incident, however given the Code was in existence at the time, the carrier should have nonetheless developed and established precise instructions and procedures in accordance with the Code.⁷⁹⁹ It is clear that the Tribunal is therefore using the ISM Code as the benchmark standard for how a reasonable shipowner would behave.

It has been argued that presumably error in the "management" of the vessel, as found in Art. IV(2)(a), also extends to management of the SMS.⁸⁰⁰ It is possible therefore

⁷⁹⁵ *Ibid*, at pp. 742-744. Cresswell J. held that the vessel ought to have had the following documentation: (a) the characteristics of car carriers in general and the *Eurasian Dream* in particular, (b) the carriage of vehicles in general and on the *Eurasian Dream* in particular, (c) the danger of fire on car carriers, (d) the precautions to be taken to avoid fire on car carriers, (e) the importance of gas tight doors in fire fighting, (f) the importance of using CO₂, (g) procedures for evacuating fire zones.

⁷⁹⁶ Sentence 1077 du 18 novembre 2002, Chambre Arbitrale Maritime de Paris, DMF 2003, 995, at p. 997.

⁷⁹⁷ *Ibid*.

⁷⁹⁸ *Ibid*, at p. 996.

⁷⁹⁹ *Ibid*.

⁸⁰⁰ Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at p. 130.

that in a cargo claim “the question whether or not the ship was unseaworthy/uncargo-worthy or whether there had been a failure to care for the cargo as a consequence of a failure in the management of the safety system could prove crucial.”⁸⁰¹ Instinctively, one may postulate that if there is a deficiency in the SMS itself or if it was not properly implemented and cargo damage ensues, then the vessel would be unseaworthy, while if there was a single error committed in adhering to the procedures of the SMS by an otherwise competent and well trained crew member and cargo damage ensued, a court may perhaps find that the error constituted an error in the management of the vessel. Although this may not be likely, as one commentator suggests, “if a satisfactory SMS is in place, but the owner or operator has failed to live up to it on the occasion in question, this may result in arguments either that the ship is unseaworthy because the SMS is not in fact being implemented properly (in breach of Article III, Rule 1) or that the owner failed to properly care for the cargo, in breach of Article III, Rule 2.”⁸⁰²

The essential element that impacts the analysis on whether the shipowner exercised due diligence to make the vessel seaworthy, can be characterized with the following question: was there a proper functioning system in place? Indeed, the aspects of due diligence affected by the ISM Code’s implementation will centre on whether the appropriate procedures were established and properly implemented. One author has commented that “[t]here surely can be no doubt that [the ISM Code] will have an impact on the assessment of the steps taken by the shipowner to comply with the requirement of exercising due diligence to make the ship seaworthy. To prove due diligence, shipowners will now be called upon to prove full implementation and understanding of the ISM Code, both on shore and onboard.”⁸⁰³

7.1.2.2. Properly Man the Vessel

Although the obligation incumbent on a shipowner to exercise due diligence to render the vessel seaworthy in essence includes providing a properly trained and

⁸⁰¹ *Ibid.*

⁸⁰² Chance, C. “Legal Implications of the International Safety Management Code” in Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at p. 132.

⁸⁰³ Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 234.

competent crew, the notion of properly manning the vessel and all its attendant duties bears separate consideration. As mentioned previously, the ISM Code seeks to address the human contribution to maritime incidents, through training and properly implemented procedures. As such, the ISM Code has a significant number of guidelines and policies relating directly to the master and crew of the vessel. For example, Article 6.1 contains the following stipulations: “The Company should ensure that the Master is: 1. Properly qualified for command; 2. Fully conversant with the Company’s safety management system; and 3. Given the necessary support so that the master’s duties can be safely performed.”⁸⁰⁴ Moreover, the following extracts from Article 6 are particularly relevant with respect to crew members; “6.2. The Company should ensure that each ship is manned with qualified, certified and medically fit seafarers in accordance with national and international requirements...6.3 The Company should establish procedures to ensure that new personnel transferred to new assignments...are given proper familiarization with their duties. Instructions which are essential are to be provided prior to sailing should be identified, documented and given...6.5 The Company should establish and maintain procedures for identifying any training which may be required in support of the SMS and ensure that such training is provided for all personnel concerned.”⁸⁰⁵ The ISM Code therefore impresses upon the shipowner the obligation to ensure that all mariners aboard the vessel are fully competent and fully trained to carry out their duties in light of the requirements of the vessel to which they are assigned and in accordance with the vessel’s SMS.

⁸⁰⁴ Moreover, Article 6.4 provides that the “Company should ensure that all personnel involved in the Company’s SMS have an adequate understanding of relevant rules, regulations, codes and guidelines.” In addition Article 6.7 provides that the “Company should ensure that the ship’s personnel are able to communicate effectively in the execution of their duties related to the SMS.”

⁸⁰⁵ ISM Code, Articles 6.2, 6.3., & 6.5; Weitz, L. “International Maritime Law: The Nautical Fault Debate” (1998) 22 Tul. Mar. L.J. 581, at p. 592-593, has indicated that among the duties and obligations in the ISM Code the following three are important with regard to selection and training of crew: “(1) The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers, (2) The Company should ensure that all personnel involved in the Company’s SMS have an adequate understanding of the relevant rules, regulations, codes and guidelines, and (3) The Company should [arrange for] the ship’s personnel [to] receive relevant information on the SMS in a working language understood by them.” (Quoting para. 6.2., 6.4. & 6.6. of the ISM Code); See also Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at pp. 121-122, for passages of articles impacting the master and the crew of the vessel.

If the vessel is not properly manned, in other words if the crew member is not certified, or if he is not trained for the specific vessel, then that mariner's error will not enable the shipowner to benefit from the nautical fault exemption. As aptly stated by one commentator: "[I]t must be stressed that even though negligence is an 'accepted peril' according to the Hague/Visby Rules, incompetence is not."⁸⁰⁶ This is well established in the jurisprudence, particularly where engineers or masters were not familiar with the specific vessel, or plans of the ballast or other systems had not been given to them.⁸⁰⁷ Although in the past, a failure to properly train the crew has at times been difficult to prove. "There was very little prospect of mounting a successful challenge to the exemption of crew negligence prior to the ISM Code, because there was little chance of showing, other than the most obvious cases, that the ship was not properly manned for the purposes of Article III... My feeling is that the ISM Code may well widen the effect of the Rules, for example, by reducing the number of cases in which the defence of crew negligence is found to be the sole cause of a loss. A number of cases which are presently regarded as arising out of crew negligence, will certainly be viewed in the future as

⁸⁰⁶ Pamborides, G. *International Shipping Law: Legislation and Enforcement* (1999) Kluwer Law International, The Hague, at p. 154.

⁸⁰⁷ In *Robin Hood Flour Mills v N.M. Paterson (The Farrandoc)* [1967] 1 Lloyd's Rep, 232 (Can. Ex. Ct. Que.), the second engineer opened the wrong valve during pumping operations and water entered the hold and damaged the cargo. The shipowners attempted to rely on 4(2)(a), but Justice Smith found at p. 235, that "this officer was engaged on the same day [of the incident]. Apparently he was engaged solely on the basis of the fact that he held a second engineer's certificate. There is no evidence to show that any inquiry was made as to this man's previous experience or record, nor does it appear that he was questioned as to whether or not he was familiar with the type of engine room machinery and piping on board the *Farrandoc*." Justice Smith then went on to hold that the shipowner was liable for lack of due diligence to make the vessel seaworthy because he did not check the experience and competence of the second engineer and did not make available to him a plan of the engine room's piping system. In *The Makedonia* [1962] 1 Lloyd's Rep. 316, Justice Hewson held the shipowners responsible for a lack of due diligence to make the vessel seaworthy as the chief engineer and the second engineer were found to be unqualified and there was no plan of the ballast and fuel system. In *Standard Oil v. Clan Line (The Clan Gordon)* (1923) 17 Ll. L. Rep. 120 (H.L.), the master of the vessel had extensive experience, but did not have knowledge of the particular vessel including her design and stability. The master ordered to ballast tanks to be emptied causing the ship to capsize, and losing the cargo. Lord Atkinson rejected the error defence and found that the lack of familiarity with the vessel on the part of the master constituted unseaworthiness. In *Manifest Shipping v. Uni-Polaris Insurance (The Star Sea)* [1997] 1 Lloyd's Rep. 360 (C.A.), Lord Justice Leggatt found at p. 374, that if a crew member does not have adequate knowledge about a particular vessel, in this instance operation of the CO2 fire-fighting system, or training, in this instance adequate fire fighting training, then the crew member is incompetent and the vessel is unseaworthy. Justice Solomon in *Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha* [1961] 1 Lloyd's Rep. 159 (Q.B.), at p. 168 sets out the test as to whether the incompetence of a crew member has rendered the vessel unseaworthy: Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this master and crew, with their state of knowledge, training and instruction?

arising not solely by crew negligence, but instead by a lack of systems on board the ship, or through inadequate training.”⁸⁰⁸ With the ISM Code in force, the cargo claimant now has available to him, among other things, documents detailing: the SMS, the qualifications and experience of the crewman, the support that was given and the relevant procedures, what familiarisation was given on joining the ship and the instructions, documents, procedures, and training, as well as the plans and checklists prepared with regard to particular operations, and who has access to the plans.⁸⁰⁹ In the instance of a ballasting error, for example, if the carrier is unable to provide the above documents or demonstrate that the appropriate training and plans were given to the crewmember, the vessel may be considered unseaworthy and thus reliance on the nautical fault exemption becomes problematic.

A illustrative example of a case that most certainly would have been decided differently is a Hanseatic Court of Appeal of Hamburg case where the first officer, trained as a second officer, was keeping watch alone and without knowledge of the regulations on watch-keeping, when the vessel grounded.⁸¹⁰ In commentary on the judgment, it is noted that “[i]n view of the clear allocation of responsibilities on all levels of management and the high standard of information and documentation set by the ISM Code, it would seem problematic to deny the liability of the carrier if certain precautionary organizational measures relating to watch-keeping were not taken. Particularly the fact that master and crew did not have notice of requirements of the Merchant Shipping (Certification and Watchkeeping) Regulation would suggest a different approach to the question of the carrier’s fault in organising his business and in the management of the vessel.”⁸¹¹

⁸⁰⁸ Martyr, P. as quoted by Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at p. 130-131. One authors advises cargo interests that when faced with the defence of error in navigation, the first inquiry must be as to the expertise of the crew (Kasanin, M. “Cargo Rights and Responsibilities in Collision Cases” (1977) 51 Tul. L. Rev. 880, at p. 884).

⁸⁰⁹ Anderson, *ibid*, at pp. 122-123.

⁸¹⁰ *Cargo Interests on Board MV Cita v. Time-charterers of MV Cita* (2003) 6 U 220/00 (Hanseatic Court of Appeal of Hamburg) available at: www.onlinedmc.co.uk. Affirmed by *Cargo Interests on Board MV Cita v. Time-charterers of MV Cita* (2006) I ZR 20/04 (Federal Supreme Court), available at: www.onlinedmc.co.uk. In this instance the carrier was exempted under the error in navigation provision of the German Commercial Code, HGB 607.

⁸¹¹ *Ibid*, in commentary following the decision by Bracker Boehlhoff & Luebbert.

A further illustration of a judicial approach to the failure to properly train the crew in accordance with applicable law and guidelines, is found in the decision by the Turku Court of Appeal in Finland, where it was determined that a cargo of pig iron had been damaged due to improper lashing and securing of the cargo.⁸¹² The Court of Appeal came to this conclusion solely on the basis of non-compliance with the IMO Code of Safe Practice for Solid Bulk Cargoes, 1987, which had not been applied on board. The Court of Appeal determined that the master and the crew of the vessel were obliged to know the requirements of the Code, and as they did not, the vessel was therefore unseaworthy.⁸¹³

The *Eurasian Dream*, discussed *supra* in the context of the failure to exercise due diligence, has become the preferred example of authors when examining the potential effects of the ISM Code. This is the case primarily due to the fact that there is a complete lack of ISM related jurisprudence. Few authors note however, the impractical nature of the ISM Code requirements in certain respects as they relate to training the crew. On the facts of the *Eurasian Dream*, it has been noted that “it would have taken the Master several weeks to read all the manuals relevant to his command of the vessel, some 150 manuals running to some 75-100 pages each; and even then he would have probably missed the CO2 manual as it was in the Chief Engineer’s cabin.”⁸¹⁴ With respect to the training and preparation of the crew or the master in certain instances, the requirements of the ISM Code may prove to be impractical when faced with certain realities of the shipping industry. One author has noted that “[e]ven in the best-run companies a master may have to join a vessel with precious little time to get to grips with the minutiae of its SMS.”⁸¹⁵

⁸¹² NMCases 1995.76 Ra (Turku Court of Appeal, Finland), as summarized in Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 51

⁸¹³ *Ibid.*

⁸¹⁴ Kverndal, S. “The ISM and ISPS Codes: Influence on the Evolution of Liabilities” in *Liability Regimes in Contemporary Maritime Law* (2007) D. Rhidian Thomas (Ed.), Informa, London, at p. 155.

⁸¹⁵ *Ibid.*, at p. 154.

7.1.2.3. *Actual Fault or Privity*

As previously discussed, Art. IV(2)(a) does not protect the carrier where faults committed can be imputed to the carrier himself. The ISM Code provides that the ‘designated person ashore’ (DPA), who is appointed in relation to each ship, must have direct access to the highest level of management within the company. The DPA has the obligation to monitor safety and ensure that defects in the vessel are detected, reported and corrected quickly.⁸¹⁶ This has potentially profound implications with respect to the actual or imputed knowledge of the shipowner. It has been noted that “it will be but a short step to attribute to the designated person a substituted status as the directing mind of the company...[and it will be] very difficult for a shipowner to deny the knowledge or disclaim the actions or inactions of its designated person in relation to ISM Code obligations.”⁸¹⁷ Another commentator is certain that the DPA creates a direct link to the directing mind of the corporation: “...the DPA’s duty to report to what must surely be the ‘alter ego’ or the directing mind of ‘the Company’ bridges the gap between the inadequacies on board ship and the knowledge or privity of the owner/manager.”⁸¹⁸ As such, where the DPA is advised of a problem or a failure with respect to a certain system on board, and action is not or the problem is not corrected promptly, then the shipowner will be considered privy to the fault or errors.⁸¹⁹ There is a general agreement among authors that the ISM Code will render it much more difficult for carriers to demonstrate their lack of ‘actual fault or privity’,⁸²⁰ with one author predicting “there can be little doubt that a shipowner which sails its ships in disregard of the Code should fail the test of an absence of fault or privity.”⁸²¹ In the United States, in particular, where the courts have demonstrated a tendency to be particularly expansive in their interpretation of the notion

⁸¹⁶ Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 230 and p. 401; Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 290.

⁸¹⁷ Hare, *ibid*, at p. 233.

⁸¹⁸ Kverndal, S. “The ISM and ISPS Codes: Influence on the Evolution of Liabilities” in *Liability Regimes in Contemporary Maritime Law* (2007) D. Rhidian Thomas (Ed.), Informa, London, at p. 157.

⁸¹⁹ Edelman, P. “The Maritime Industry and the ISM Code” (1999) 8 *Currents Int’l Trade L.J.* 43, at p. 45.

⁸²⁰ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 290; Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 233 and 401; Kverndal, S. “The ISM and ISPS Codes: Influence on the Evolution of Liabilities” in *Liability Regimes in Contemporary Maritime Law* (2007) D. Rhidian Thomas (Ed.), Informa, London, at p. 157; Edelman, *ibid*, at p. 45.

⁸²¹ Hare, *ibid*, at p. 401.

of ‘privity or knowledge’, there is concern that the ISM Code will have a tremendous impact. “Since the owner’s ‘privity or knowledge’ of unseaworthy conditions is the most common basis for denying limitation, some attorneys believe that limitation of liability in the United States will be effectively eliminated once the ISM Code is implemented.”⁸²² Under United States law, the courts have determined that the ‘privity and knowledge’ of the shipowner includes the privity and knowledge of individuals such as the managing agent, an officer of the corporation, a manager and a supervising employee, including in particular supervisory shore side personnel.⁸²³ An American commentator has concluded, “given the broad scope of the duties of the “Designated Person” under the ISM Code, it is a virtual certainty that the courts will impute the knowledge of the “Designated Person” to the owner.”⁸²⁴

One may therefore also predict, that where cargo interests can demonstrate that the DPA negligently advised the master with regard to an incident, or failed to ensure that systems are in place and are being adhered to, and such faults caused loss or damage to cargo, the shipowner will be deemed to be privy to the faults and denied the benefit of the nautical fault exemption.

7.1.2.4. Documentary Evidence and Discovery

In 1969, the 2nd Circuit Court of Appeals opined that “it is almost impossible for the shipper to prove that the carrier was negligent or lacked due diligence because as a practical matter all evidence on those issues is in the carrier’s hands.”⁸²⁵ It has been widely argued that with the implementation of the ISM Code, cargo interests will no

⁸²² Poulos, G. “Legal Implications of the ISM Code: New Impediments to Sea Fever” (1996) 9 U.S.F. Mar. L.J. 37, at p. 46, relying on commentary in Lloyd’s List and Fairplay.

⁸²³ Poulos, *ibid*, at p. 50; See also *In re Hercules Carriers Inc.*, 768 F.2d 1558 (11th Cir. 1985), for a particularly expansive view of ‘privity or knowledge’ of the shipowner. The 11th Circuit Court of Appeals considered the instance where the vessel collided with a bridge in Florida while under the control of a pilot causing both property loss and loss of life. The Court of Appeals found that excessive speed in poor visibility was the principle cause of the collision, but nevertheless held the shipowner fully responsible on the basis that it was lax in enforcing the regulations and guidelines that the master retained responsibility for the navigation of the vessel, and in effect demonstrated a policy of instructing crews not to countermand pilots.

⁸²⁴ Poulos, *ibid*, at p. 51.

⁸²⁵ *Encyclopedia Britannica, Inc v. S.S. Hong Kong Producer* [1969] 2 Lloyd’s Rep. 536 (2 Cir. 1969), at p. 543.

longer be finding themselves empty handed with regard to documentary evidence. By virtue of the requirements under the ISM Code, the SMS not only provides procedures by which a shipowner may verify that it is in fact in continual compliance with the rules and regulations, it mandates that these procedures must be documented and recorded.⁸²⁶ Indeed, the mandated written documentation includes comprehensive safety and environmental programs, training requirements for master and crew, and internal audits.⁸²⁷ Moreover, copies of vessel and equipment maintenance procedures, including inspections, discrepancy reports and corrective actions, are also kept aboard the vessel.⁸²⁸ Finally, the ISM Code requires that the SMS contain procedures for the internal reporting of and corrective action relating to any “non-conformities, accidents and hazardous situations”,⁸²⁹ including “near-accidents”.⁸³⁰

The result is that there is now a wealth of documentation concerning ship operations that may be available to interested parties.⁸³¹ The potential impact of such documents for claimants or litigants with respect to maritime liability disputes has not gone unnoticed; “[p]rior to ISM implementation deadlines it may well have been hoped that such evidence would exist – it can now be presumed that it will exist or, if it does not, then the ship operator may need a very good explanation as to why it does not exist!”⁸³² Moreover it is thought that the existence of voluminous written documentation may lead to speculative litigation, as one author notes that “[t]ransparency may indeed

⁸²⁶ Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at p. 18.

⁸²⁷ Rodriguez, A. & Hubbard, M. “The International Safety Management (ISM) Code: A New Level of Uniformity” (1999) 73 Tul. L. Rev. 1585, at p. 1599.

⁸²⁸ Allen, C. “The ISM Code and Shipowner Records: Shared Safety Goals vs. Industry’s Privacy Needs” (1998) 11 U.S.F. Mar. L.J. 1, at p. 12.

⁸²⁹ ISM Code, Article 9.

⁸³⁰ Allen, C. “The ISM Code and Shipowner Records: Shared Safety Goals vs. Industry’s Privacy Needs” (1998) 11 U.S.F. Mar. L.J. 1, at p. 12, noting that the United States Coast Guard has interpreted the ISM Code to require both the reporting of actual accidents, and the reporting of “near-accidents”.

⁸³¹ Pamborides, G. “The ISM Code: Potential Legal Implications” noted that “[i]n general the new Code introduces transparency in shipping and something which will shed light on the everyday operations of a ship, and area which up until now has remained as an exclusive privilege of the shipowner. This is now bound to change, giving access to such information to all other interested parties.” (As quoted by Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at p. 19).

⁸³² Anderson, P. “The ISM and ISPS Codes: A Critical Analysis of Content, Philosophy and Legal Implications” in *Liability Regimes in Contemporary Maritime Law* (2007) D. Rhidian Thomas (Ed.), Informa, London, at p. 178.

lead to an open invitation to plaintiffs to press claims hoping that examination of documents may lead to discovery of shortcomings.”⁸³³ Should the claimant find any deficiencies in the documentary evidence, this will likely lead the court to draw an adverse inference against the carrier. It has been noted that “the documentation chain is almost invariably going to contain some imperfections, and these are likely to be exploited by claimants – the greater the volume of documentation, the greater the risk of inconsistencies... There is also a risk that more documentation will make things look worse than they actually are – many non-compliances may be minor, but in the hands of a skilled claimant lawyer they will be made to look like a chapter of disasters... The claimant lawyer will also be looking for additional documents in order to establish what systems were or should have been in place... He will then consider whether, under the circumstance, the system was adequate and whether it was being operated properly.”⁸³⁴

One aspect of the issue that has yet to be fully addressed, however, is whether all the documentation produced by virtue of the requirements of the ISM Code will be discoverable by civil litigants. Neither SOLAS nor the ISM Code address whether documentation produced in compliance with the Code, such as records and reports, are discoverable by claimants or admissible against the shipowner.⁸³⁵ An American Professor has argued that several evidence rules may be implicated, for example, the documents may be privileged under the work-product doctrine,⁸³⁶ they may be barred as evidence of remedial actions under the Federal Rules of Evidence, and the documents could constitute hearsay but may be admissible as a party admission or under the business

⁸³³ Somers, E. “Effects of ISM on the Limitation of Liability: the End or a New Beginning?” [1999] ETL 37, at p. 41.

⁸³⁴ Anderson, P. *ISM Code: A Practical Guide to the Legal and Insurance Implications* (1998) LLP, London, at p. 119-120.

⁸³⁵ Allen, C. “The ISM Code and Shipowner Records: Shared Safety Goals vs. Industry’s Privacy Needs” (1998) 11 U.S.F. Mar. L.J. 1, at p. 29.

⁸³⁶ *Ibid*, at p. 15. The work-product doctrine is a construct of American evidence law by virtue of which, all documents including internal reports and memorandum, including those not prepared by an attorney, will be privileged if they were prepared in anticipation of litigation. See *Hickman v. Taylor*, 329 U.S. 495 (1947) at p. 510-511, where the United States Supreme Court first used the term “work product doctrine”. It is a more expansive doctrine than the solicitor-client privilege and the litigation privilege known to Canadian and English solicitors, and both jurisdictions have rejected it. See *Strass v. Goldsack* (1975) 58 D.L.R. (3d) 397 (Alta. C.A.), at p. 426, where the Alberta Court of Appeal, a Canadian Provincial Court of Appeal, explicitly rejected the approach.

records exception.⁸³⁷ Under English law however, it has been argued that documentation produced under the ISM Code will likely not be privileged on the basis of the *Waugh v. British Railways* case.⁸³⁸ In that instance, the question arose whether an internal Railway Inspectorate Report was privileged following an incident.⁸³⁹ The House of Lords questioned whether the report was created for the sole or dominant purpose of obtaining information for contemplated litigation or for the purposes of legal advice.⁸⁴⁰ The House of Lords held that as the aim of the report was with respect to safety analysis, it was not privileged and therefore discoverable.⁸⁴¹ Documentation produced for the purposes of compliance with the ISM Code, can therefore hardly be argued to fall within either the solicitor-client privilege or the litigation privilege, given that their sole or dominant purpose is compliance. One is therefore left to conclude that whether the documentation produced by virtue of the ISM Code is discoverable or admissible will likely be determined on a case-by-case basis depending on the facts, and will arguably vary considerably from jurisdiction to jurisdiction.

Contrary to the speculations above, it has been argued that the documentation of shipboard operations as required by the ISM Code is not by any means a drastic departure from the existing practice. Rather, most companies already maintain manuals for key shipboard operations, deck and engine logs, survey reports and maintenance records, which have in the past often been relied on by plaintiff's counsel to establish negligence or unseaworthiness.⁸⁴² Nevertheless, one cannot discount that the ISM Code documentation relating to the training requirements, internal audits, accidents and near accidents, if discoverable and admissible, is a potentially powerful tool in the arsenal of any attorney.

⁸³⁷ Allen, *ibid*, at pp. 15-16.

⁸³⁸ Özçayır, *Z. Port State Control* (2001) LLP, London, at p. 333.

⁸³⁹ *Waugh v. British Railways Board* [1980] A.C. 521 (H.L.)

⁸⁴⁰ *Ibid*, at p. 531-533.

⁸⁴¹ *Ibid*, at p. 533 & 538.

⁸⁴² Poulos, G. "Legal Implications of the ISM Code: New Impediments to Sea Fever" (1996) 9 U.S.F. Mar. L.J. 37, at p. 49.

7.1.3. The ISPS Code

Although the events of September 11, 2001 created an impetus with respect to the development and implementation of a security code, it has been noted that the development of a security code was advancing prior to 2001.⁸⁴³ Nevertheless, after 2001 the work intensified with the IMO Assembly adopting a resolution calling for a thorough review of existing measures to prevent terrorist acts against ships and improve security aboard and ashore.⁸⁴⁴ A diplomatic conference was convened in December 2002 to adopt new security regulations, the most far reaching of which was the International Ship and Port Facility Security Code, the ISPS Code, which came into force on July 1, 2004, through its incorporation into the SOLAS Convention.⁸⁴⁵

Under the ISPS Code, the shipowner must undertake a ship security assessment and ensure that a ship security plan is created for each ship that conforms to the extensive mandatory requirements of the ISPS Code and have the plan approved by the Administration of the Flag State.⁸⁴⁶ Moreover, the shipping company must obtain a ship security certificate, and in order to do so, a company security officer for the company and a ship security officer for each vessel must be appointed.⁸⁴⁷ It is the company security officer and the ship security officer who bear the responsibility for ensuring that the aforementioned ship security plan is prepared, approved, and then kept on board each vessel.⁸⁴⁸ Where vessels are non-compliant or do not carry the necessary certificates and

⁸⁴³ Kverndal, S. "The ISM and ISPS Codes: Influence on the Evolution of Liabilities" in *Liability Regimes in Contemporary Maritime Law* (2007) D. Rhidian Thomas (Ed.), Informa, London, at p. 164.

⁸⁴⁴ Balkin, R. "The International Maritime Organization and Maritime Security" (2006) 30 Tul. Mar. L.J. 1, at p. 16; Michel, K. *War, Terror and Carriage by Sea* (2004) LLP, London, at p. 745, notes that following September 11, 2001, the United States was one of the primary sponsors of regulating security and safety in the shipping industry.

⁸⁴⁵ Balkin, *ibid*, at p. 16-17 describes the diplomatic conference held in 2002, noting that it attracted a great deal of interest. Balkin at p. 17 also describes the tacit amendment procedure by virtue of which the ISPS Code, incorporated as Chapter XI-2 of SOLAS, entered into force automatically for all state parties to the SOLAS Convention.

⁸⁴⁶ Kverndal, S. "The ISM and ISPS Codes: Influence on the Evolution of Liabilities" in *Liability Regimes in Contemporary Maritime Law* (2007) D. Rhidian Thomas (Ed.), Informa, London, at p. 164. Kverndal notes that the ISPS Code allows, in certain instances, the ship security plan to be approved by a substitute for the Flag State, such as a recognized security organization in accordance with articles 4.3 and 9.2 of the ISPS Code.

⁸⁴⁷ Balkin, R. "The International Maritime Organization and Maritime Security" (2006) 30 Tul. Mar. L.J. 1, at p. 18-19; Michel, K. *War, Terror and Carriage by Sea* (2004) LLP, London, at pp. 800-801.

⁸⁴⁸ Balkin, *ibid*, at p. 19.

documentation, they “run the risk of not being allowed to enter their chosen ports of call.”⁸⁴⁹

ISPS Code compliance has become not only an issue between the vessel owner and the Flag State, it has evolved from simply a statutory requirement to become a contractual requirement as well. Owners, charterers, brokers and insurers have rendered compliance with the ISPS Code a standard contractual requirement.⁸⁵⁰ For example, both BIMCO’s voyage charterparties and time charterparties contain clauses mandating ISPS compliance.⁸⁵¹ Moreover, even without express compliance clauses, it could very well be argued that the failure to become ISPS compliant would render the vessel unseaworthy, in particular, in the context of voyage charters. “A vessel is not seaworthy unless she is in possession of the documents necessary to her legal and efficient performance of the voyage undertaken, such as those required by the law of her flag, by her classification society and by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel’s ports of call.”⁸⁵² With respect to any damage or loss, the unseaworthiness would have to be causative of that loss. Given the subject matter of the ISPS Code, the most likely scenario would be loss or damage arising from the vessel being detained or turned away from the port of delivery on the basis of non-compliance with the ISPS Code.⁸⁵³ In the context of time charterers, non-compliance with the ISPS Code causing delays may have ramifications with respect to the payment of hire.⁸⁵⁴ Arguably, it would depend on the facts of the case, in particular the wording of the offhire clause, and whether delays resulting from ISPS non-compliance constitute an off-hire event under the charterparty. Nevertheless, one author has concluded that where an

⁸⁴⁹ *Ibid.*, at p. 20.

⁸⁵⁰ Kverndal, S. “The ISM and ISPS Codes: Influence on the Evolution of Liabilities” in *Liability Regimes in Contemporary Maritime Law* (2007) D. Rhidian Thomas (Ed.), Informa, London, at p. 164.

⁸⁵¹ The 2005 ISPS/MTSA Clauses for Time Charterparties and Voyage Charterparties are re-printed in Kverndal, *ibid.*, at pp. 167-168.

⁸⁵² Cooke, J., *et al.*, *Voyage Charters* 2nd Ed. (2001) LLP, London, at p. 205.

⁸⁵³ The ISPS Code mandates that in order to enter a ISPS compliant port, a vessel must demonstrate that it has obtained a “Declaration of Security” at each of the last ten ports that it has entered. If the vessel cannot demonstrate this, it is prevented from entering ISPS compliant ports, and as such may very well be considered unseaworthy for the purposes of trading to ISPS compliant ports. See Williams, R. “The Effect of Maritime Violence on Contracts of Carriage by Sea” (2004) 10 JIML 343, at pp. 349-351.

⁸⁵⁴ Michel, K. *War, Terror and Carriage by Sea* (2004) LLP, London, at p. 806-812, for an extensive review of English jurisprudence on timecharters in relation to regulatory requirements, delay and off-hire clauses.

offhire clause contains the wording “whatsoever” after “any other cause”, particularly in the context of the NYPE form, and the vessel is “unable to work on account of security considerations, [it] may lead to argument as to whether or not the vessel should be considered as offhire during such period.”⁸⁵⁵

The volume of available documentation created by virtue of ISM Code compliance provides the litigant with a wealth of discovery material to use when mounting a claim against the shipowner for loss or damage. In this respect, the ISPS Code differs. The documented procedures required under the ISPS Code, such as the ship security plan and the company security plan, are confidential with access restricted to a limited number of individuals.⁸⁵⁶ As such, one could argue that its practical significance with respect to discovery in civil litigation is limited. In general, it has been noted that the ISPS Code “sets a practical rather than a legal standard of what is required of a reasonable and prudent shipowner.”⁸⁵⁷ Nevertheless, despite increased shipowner obligations under the ISPS Code, it appears that its potential effects, if any, with respect to carriage litigation centre on document and compliance oriented delays. As such, its impact in relation to the nautical fault exemption is likely to be minimal.

7.2. THE JUDICIAL TREND TOWARDS A RESTRICTIVE VIEW OF THE EXEMPTION

It has been noted on numerous occasions that the courts are becoming increasingly hostile to the concept of nautical fault, or that where the exemption is pleaded it is often unsuccessful in the current judicial climate. Assertions of restrictive treatment of the exemption by the judiciary are rarely supported by jurisprudential examples.⁸⁵⁸ Rather the statements are made as if such a trend was widely known fact,

⁸⁵⁵ Michel, K. *War, Terror and Carriage by Sea* (2004) LLP, London, at p. 813.

⁸⁵⁶ Anderson, P. “The ISM and ISPS Codes: A Critical Analysis of Content, Philosophy and Legal Implications” in *Liability Regimes in Contemporary Maritime Law* (2007) D. Rhidian Thomas (Ed.), Informa, London, at p. 178.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ For example, Sturley, M. “An Overview of the Considerations Involved in Handling the Cargo Case” (1997) 21 Tul. Mar. L.J. 263, at p. 308, states that “In view of the difficulties in establishing negligence in the navigation or management of the ship, and the courts’ hostility towards the defence, it is not surprising

and should thus be taken for granted. Indeed, most maritime law practitioners, particularly with respect to cargo claims, can attest to the noticeable decline in claims litigation in recent years. Is the fact that nautical fault is less frequently pleaded with success evidence of a judicial hostility towards the defence? Arguably, it is difficult to say. In practice, there are several factors that have impacted the volume of jurisprudence on the topic of the nautical fault exemption. It has been noted that “even where the Hague or Hague-Visby Rules are applied, in practice the defences available to the carrier have become more restricted. In the context of the Hague Rules, this means that in many countries it is increasingly difficult for the carrier to prove the exercise of due diligence to make the ship seaworthy, and it more difficult for him to rely on some of the exceptions listed in Article 4 Rule 2.”⁸⁵⁹ The ever increasing number of regulations, codes and conventions that impact the manning, management and maintenance of vessels has arguably impacted the notion of seaworthiness, render it increasingly difficult for the shipowner to demonstrate due diligence. In addition, there has been a marked increase in arbitration in the past several decades, evidently resulting in a marked decline in cargo claims litigation. Alternative dispute resolution and the increasing amount of regulatory requirements only partially explain that there are fewer successful applications of the exemption in recent years. Although such a statement regarding the decline of the successful use of the exemption may be technically accurate, one may very well argue that it is due to the fact that the clearer instances of application are being settled, while only the most contentious and uncertain areas are being litigated. Despite statements that the protection offered by the defence is being eroded, one cannot help but take note of the fact that in other instances it is being expanded. This is exemplified by nautical fault in the context of charterparties, where the courts have most certainly not adopted a restrictive approach to the interpretation of the defence. Specifically, in the United States, the 5th Circuit Court of Appeals recently held that the nautical fault exemption is available before the commencement of the voyage, thus expanding the previous scope of

that the defence rarely succeeds, particularly in recent years.” However Sturley provides no jurisprudential support for his statement; See also Delwaide, L. “The Hamburg Rules: A Choice for the EEC? Conclusion” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 206: “...the Court’s decisions show a growing reluctance to admit the existence of nautical fault...”.

⁸⁵⁹ Goldie, C. “Effect of the Hamburg Rules on Shipowners’ Liability Insurance” (1993) 24 JMLC 111, at p. 112.

the defence. For one to pronounce on a clear judicial trend, is perhaps an oversimplification of what in practice is a much more complex phenomenon. That being said, three nations can exemplify differing approaches with regard to trends. France is truly the only nation where there is a definite, clear and easily discernable trend to judicially restrict the exemption. In contrast, in the United States, certain authors have commented on the trend towards a restrictive interpretation, yet an examination of the past century of jurisprudence fails to reveal a hostile judiciary. Finally, in Germany, the courts have acknowledged hostility towards the exemption, yet they have openly refused to judicially restrict the exemption on the basis that the legislature has expressly chosen not to amend the applicable provision of the German Commercial Code (HGB).

7.2.1. France

Under French law, the exemption of nautical fault is the main departure from the *droit commun* liability of carrier which is a strict *obligation de resultat*.⁸⁶⁰ France has always had a strong principle of vicarious liability, and prior to the Law of 2 April 1936 and the Law of 18 June 1966, carriers would be held liable for acts such as the master mistreating a crewman, or even a master shooting a seaman on board the vessel.⁸⁶¹ It has been noted that *faute nautique* is often pleaded before the French courts, yet the decisions of the courts have not always been consistent.⁸⁶² In recent years, however, a trend is most certainly developing. “*Le champ d’application de ce cas excepté a fluctué au gré d’une évolution jurisprudentielle constante dans son hostilité, pour finalement être réduit à une application restrictive voire résiduelle.*”⁸⁶³ Not only are the courts more hostile to the defence, “*ils expriment surtout leur reticence à venir admettre l’exonération du transporteur pour faute nautique.*”⁸⁶⁴ In 2001, the Cour de Cassation considered the

⁸⁶⁰ Song, S. *A Comparative Study on Maritime Cargo Carrier’s Liability in Anglo-American and French Laws* (1970) PhD Thesis, Cornell University, Ann Arbor, Michigan, at p. 124.

⁸⁶¹ *Ibid*, at p. 217.

⁸⁶² Rodière, R. & du Pontavice, E., *Droit Maritime*, 12th Ed. (1997) Dalloz, Paris, at p. 345.

⁸⁶³ Tassel, Y. & Le Bayon. “40 ans D’Application des Cas Exceptés de Responsabilité des Règles de La Haye-Visby” [2005] DMF 908, at p. 912. [Author’s translation: The field of application of this exemption has fluctuated due a constant jurisprudential evolution in its hostility, with the application finally being reduced to a restrictive and residual application.]

⁸⁶⁴ Molfessis, N. “Observations” following the judgment of the Cour de Cassation, 20 fevrier 2001, DMF 2001, 919, at p. 922. [Author’s translation: they are expressing above all their reticence to allow the exoneration of the carrier for nautical fault.] Similarly, Bonassies, P. & Delebecque, P. “Le droit positif

instance in which a cargo of sugar was wetted as a result of an error in ballasting on the part of a crewmember.⁸⁶⁵ The Cour d'Appel de Paris in that instance had found that “*une manoeuvre de ballastage, destinée à assurer la stabilité et, par là, la sécurité du navire étant une operation nautique, la faute commise à cette occasion par l'un des officiers, exonère le transporteur maritime de sa responsabilité.*”⁸⁶⁶ The Cour de Cassation annulled the decision, holding that to benefit from the exemption the carrier must prove that his error actually affected the stability and the safety of the vessel, otherwise he is liable.⁸⁶⁷ The Cour de Cassation opined that “*le caractère nautique d'une operation n'entraînant pas nécessairement le caractère nautique de la faute commise au cours de cette operation...*”⁸⁶⁸ This is a departure from the jurisprudence in other jurisdictions where it is the purpose of the act, rather than its unintended effects, that is the defining characteristic. This is also a departure from the earlier leading French jurisprudence. Previously, it was irrelevant whether the fault of the master or the crewmember actually affected the stability or security of the vessel; the only relevant criteria was the object or purpose of the faulty act, thus if the purpose of the act was in relation to the management of the cargo (loading, stowing discharging) it was not a nautical fault.⁸⁶⁹ In commentary, it has been previously noted that the French position was in line with the position adopted by the American courts, with particular reference made to *The Germanic*.⁸⁷⁰ This, however, is not the case today. The 2001 Cour de Cassation decision has been followed

français en 2003” [2004] DMF (H.S.) 1, at p. 81, have noted that the French courts are openly hostile towards nautical fault.

⁸⁶⁵ Cour de Cassation, 20 février 2001, DMF 2001, 919.

⁸⁶⁶ Molfessis, N. “Observations” following the judgment of the Cour de Cassation, 20 février 2001, DMF 2001, 919, at p. 921. Note that it is practice in France to have several pages of doctrinal commentary following decisions, that quote from the courts and often explain the reasoning, as the French justices, unlike their Commonwealth and American brethren, tend to simply have a page or two at the most that simply records the decision and the briefest of reasons. [Author’s translation: an act of ballasting, aimed at assuring the stability and the safety and security of the ship is a operation ‘nautique’, as the fault was committed by one of the officers, the carrier is exonerated of responsibility.]

⁸⁶⁷ Cour de Cassation, 20 février 2001, DMF 2001, 919, at p. 920.

⁸⁶⁸ *Ibid.* [Author’s translation: the nautical character of the act does not necessarily mean that the fault committed during that act is nautical.]

⁸⁶⁹ Cour de Cassation, 26 février 1991, (Aude), DMF 1991, 358, where during discharge The Aude listed, due to an error in the discharging, causing the crewmen to sacrifice cargo in order to right the vessel, and the Cour de Cassation found this to be a *faute commerciale*. See also Lafage, G.H. “Faute commerciale at faute nautique” DMF 1963, 105, at p. 111 noting that to determine whether a fault is nautical or not, one must look to the type of act and the purpose of the act.

⁸⁷⁰ Bonassies, P. “Le droit positif français en 1991 (III)” DMF 1992, 147, at p. 160. In *Oceanic Steam Navigation Co. v. Aitken (The Germanic)*, 196 U.S. 589 (1904), the United State Supreme Court opined with respect to the “primary purpose text” in the context of an error in ballasting.

in *The Fort Fleur d'Epee*, where a ballasting error had wetted the cargo and the carrier pleaded *faute nautique*.⁸⁷¹ The Cour d'Appel de Versailles held the carrier liable for *faute commerciale* as he failed to satisfy his obligation to prove that the inundation resulting from the error had affected the stability and safety of the vessel.⁸⁷² In commentary following *The Fort Fleur d'Epee*, Tassel suggested that either *faute nautique* will soon effectively disappear as an exonerating defence, or through restrictive interpretation the only errors that may be characterized as *faute nautique* are ones that would fall under the strictest interpretation of the English phrase 'error in navigation'.⁸⁷³ The Cour de Cassation heard the appeal of the *Fort Fleur d'Epee*, and rejected it on the basis that the carrier had not demonstrated that the infiltration of ballast water affected the safety and stability of the vessel.⁸⁷⁴ The analysis in relation to incidents that affect the safety and the stability of the vessel has continued in subsequent cases. In *The MSC Regina*, the Cour d'Appel de Rouen found that the existence of a *faute nautique* was not established even though the carrier proved that "*le capitaine a fait un mauvais choix de route et adopté une vitesse excessive, il n'est pas démontré que ces fautes étaient de nature à intéresser l'équilibre et la sécurité du navire.*"⁸⁷⁵ The Chambre Arbitral Maritime de Paris considered the instance where sixty-one containers were lost overboard in a storm, while the captain was travelling both at an excessive speed and perpendicular to the direction of the wind.⁸⁷⁶ The Tribunal acknowledged that as the navigational errors affected the safety of the entire maritime adventure as opposed to simply the safety of the containers, then this constituted *faute nautique*. Nevertheless, the Tribunal found also that errors in

⁸⁷¹ Cour d'Appel de Versailles, 20 décembre 2001, (*Fort Fleur d'Epee*), DMF 2002, 251.

⁸⁷² *Ibid*, at p. 255.

⁸⁷³ Tassel, Y. "Observations" following the judgement of the Cour d'Appel de Versailles, 20 décembre 2001, (*Fort Fleur d'Epee*), DMF 2002, 251, at p. 259. As well, Bonassies, P. "Le droit positif français en 2002" [2003] DMF (H.S.) 1, at p. 71, comments that the judgement in the *Fort Fleur d'Epee*, "*ce n'est peut-être pas encore (ou pas tout à fait) le requiem de la faute nautique, mais le refoulement continue – et la chose est certainement justifiée.*" [Author's translation: is not quite yet, or rather not entirely, requiem for nautical fault, however the repression continues, which is certainly justified.]

⁸⁷⁴ Cour de Cassation, 3 décembre 2003, (*Fort Fleur d'Epée*), DMF 2004, 626, at p. 629.

⁸⁷⁵ Cour d'Appel de Rouen, 11 septembre 2003, (*MSC Regina*), DMF 2004, 622, at p. 624. In this instance, a container went overboard, and the Cour d'Appel held the carrier liable, on the basis of faulty lashing. [Author's translation: the captain selected the wrong route and travelled at an excessive speed, because the carrier had not demonstrated that these faults were of a nature that would affect the safety and the stability of the vessel.]

⁸⁷⁶ Sentence 1077 du 18 novembre 2002, Chambre Arbitral Maritime de Paris, DMF 2003, 995, at p. 997.

relation to the lashing of the containers caused two-thirds of the damage, and accordingly held the carrier liable to cargo interests.⁸⁷⁷

Restricting the notion of *faute nautique* in relation to errors affecting the cargo is not the only means by which the French tribunals have sought to narrow the exemption. It has been noted that in order to neutralize the effects of the exemption, the French tribunals will, where there is a *faute nautique*, examine the actions of the carrier, master and crew in order to find some inadequacy that can be characterized as a failure to exercise due diligence.⁸⁷⁸ A prime example of this is the recent decision by the Cour d'Appel de Bordeaux in *The Heiberg*.⁸⁷⁹ In that instance, the Captain left the bridge for the engine room in order to stop the ballasting operation, leaving a seaman without extensive training and the pilot alone on the bridge. A collision followed which extensively damaged the cargo, and the shipowner pleaded *faute nautique*. The Cour d'Appel de Bordeaux refused to allow the shipowner to benefit from the exemption on the basis that “...*si la faute du commandant du navire a bien été une faute nautique puisqu'elle a été commise à l'occasion du pilotage du navire, cette faute a été elle-même la suite et le résultat des fautes de l'armateur qui ne s'était pas assuré de la cohésion de l'équipage.*”⁸⁸⁰

The restrictive judicial attitude towards nautical fault has prompted one author to comment; “*la faute nautique n'a pas la faveur des tribunaux français. Ils ne peuvent l'éliminer de leurs décisions, puisqu'elle leur imposée par les texts. Ils font tout pour en réduire le domaine. Cela ne saurait étonner eu égard au caractère contradictoire de la notion, laquelle veut que l'entreprise maritime soit d'autant responsable que son préposé est fautif.*”⁸⁸¹ Indeed, the future of the nautical fault

⁸⁷⁷ *Ibid.*

⁸⁷⁸ Bonassies, P. & Scapel, C. *Droit Maritime* (2006) Librairie générale de Droit et de Jurisprudence, Paris, at p. 702.

⁸⁷⁹ Cour d'Appel de Bordeaux, 31 mai 2005, (*Heidberg*), DMF 2005, 839.

⁸⁸⁰ *Ibid.*, at p. 844. [Author's translation: even if the master of the vessel's fault is a nautical fault on the basis of its relation to the pilot of the vessel, this fault followed and was the result of the shipowner's failure to assure the proper cohesiveness and functioning of the crew.]

⁸⁸¹ Molfessis, N. as quoted by Bonassies, P. “Le droit positif français en 2001” DMF (H.S.) 2002, 1, at p. 72. [Author's translation: the nautical fault exemption finds no favour with the French tribunals. They cannot actually eliminate the exemption as it is imposed on them by law. They are however doing

exemption under French law is bleak, as it is evidently a notion whose popularity is in decline.⁸⁸² Given this, it is therefore highly unlikely that the judicial trend in France towards a restrictive interpretation of *faute nautique* will reverse itself.

7.2.2. United States

Greenwood, in 1971, after a review of jurisprudence involving due diligence to make the vessel seaworthy, the obligation to care for the cargo, and the nautical fault exemption, concluded: “It would be of interest, no doubt, to state, if the situation warranted such a statement, that a comparison of recent cases in this area with the landmark decisions of the past shows a discernable trend in favour of either the shipper or the carrier. However, in this writer’s opinion, no such statement is possible. During the period when personal injury plaintiffs have enjoyed greater and greater assistance from the courts...it would appear that cargo plaintiffs...have been able to do little more than to hold the ground already held by them.”⁸⁸³ On the other hand, Sturley, over twenty years later, argued that “[i]n view of the difficulties in establishing negligence in the navigational management of the ship, and the courts’ hostility towards the defence, it is not surprising that the defence rarely succeeds, particularly in recent years.”⁸⁸⁴ Sturley, however, provides no support, jurisprudential or otherwise, for his statement.⁸⁸⁵ A review of American jurisprudence on nautical fault fails to produce judgments or opinions that

everything possible to reduce its scope. This is not surprising given the contradictory character of the exemption, which is that the maritime carrier is not responsible for the faults of his officials.]

⁸⁸² Bonassies, P. & Scapel, C. *Droit Maritime* (2006) Librairie générale de Droit et de Jurisprudence, Paris, at p. 706; Bonassies, P. & Delebecque, P. “Le droit positif français en 2005” [2006] DMF (H.S.) 1, at p. 60 comment that it is without a doubt that that *faute nautique* is being interpreted in an increasingly strict manner, however they attribute it to the fact that it is a notion from a past era; Bonassies, P. & Delebecque, P. “Le droit positif français en 2004” [2005] DMF (H.S.) 1, at p. 85, noting the increasingly strict interpretation of the notion of *faute nautique*.

⁸⁸³ Greenwood, E. “Problems of Negligence in Loading, Stowage, Custody, Care, and Delivery of Cargo” (1971) 45 Tul. L. Rev. 790, at p. 806.

⁸⁸⁴ Sturley, M. “An Overview of Considerations in Handling the Cargo Case” (1997) 21 Tul. Mar. L.J. 263, at p. 308. See also Sturley, M. “Proposed Amendments to the US Carriage of Goods by Sea Act: A Response to English Criticisms” [1999] LMLCQ 519, at p. 527, stating “[u]nder US law as currently applied, however, the [nautical fault] defence is very rarely successful.”

⁸⁸⁵ In Sturley, M. “Uniformity in the Law Governing the Carriage of Goods by Sea” (1995) 26 JMLC 553, at p. 577, he comments “shippers certainly have trouble understanding why they should lose any recovery for cargo damage when a carrier is able to prove that its own employees were negligent. Court also have trouble understanding this, with the result that the navigational fault defence is rarely, if ever, successful in the United States.” Again, no support is provided in the article for the above statement. Although, Sturley’s statement has been taken as a given and is quoted by several authors with approval. See Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 632.

are overtly hostile to nautical fault in any manner even remotely resembling the French courts. It would perhaps be overly simplistic to note the fact that there are fewer instances of the successful use of the nautical fault exemption in American courts and attribute it to the hostility of the courts. Rather, one cannot discount the fact that the scope of the exemption, though not entirely settled, can be described as fairly well delineated such that settlement has become much more likely in practice. The grey areas, where courts are perhaps not as likely to find in favour of the carrier are the ones being pleaded. As well, comments such as Sturley's statement become slightly more difficult to justify in light of *The Jalavihar* in 1997, in which the 5th Circuit Court of Appeals adopted a view of the exemption that is arguably much wider than what courts had previously found.⁸⁸⁶ It would appear that Greenwood's view of the body of jurisprudence is preferable, as there are instances where the balance swings in favour of the carrier and others where the shipper benefits, yet overall one would have a difficult time discerning a clear trend from the American jurisprudence.

7.2.3. Germany

The Hanseatic Court of Appeal of Hamburg recently displayed a notable respect for the express wording in the German Commercial Code (HGB) despite having voiced its awareness of opposition to the notion of nautical fault. The Hanseatic Court of Appeal of Hamburg in 2003 overturned the Regional Court's holding that where a first officer, qualified as a second deck officer, had insufficient knowledge concerning watch-keeping regulations and had turned off the watch-alarm, fallen asleep, and grounded the vessel, the carrier was not protected by the nautical fault exemption.⁸⁸⁷ The Higher Regional Court considered what it felt to be clear wording in s.607, which provides: "1. The carrier shall be liable for any fault on the part of his servants and the crew. 2. If the loss is due to any conduct in the navigation or management of the ship or to fire, then carrier shall only be liable if there is actual fault or privity on his part. The management of the ship does not include such conduct that is primarily directed towards the care of the cargo." The

⁸⁸⁶ *Usinas Siderurgicas De Minas Geras v. Scindia Steam Navigation Co. (The Jalavihar)*, 1997 AMC 2762 (5 Cir. 1997), where the Court of Appeals saw no reason to restrict the nautical fault exemption to errors occurring after the commencement of the voyage.

⁸⁸⁷ *Cargo Interests on Board MV Cita v. Time-charterers of MV Cita* (2003) 6 U 220/00 (Higher Regional Court Hamburg) available at: www.onlinedmc.co.uk.

Hanseatic Court of Appeal therefore “found itself prevented from reducing the scope of application of this provision by way of judicial construction, since the legislature had to date, in spite of a) the well-known concerns about this provision and b) the technical developments in shipping, not seen the need for any adjustment.”⁸⁸⁸ In 2006, the Federal Supreme Court affirmed the decision of the Hanseatic Court of Appeal, finding that the Court of Appeal had correctly adjudged that the defendant was not liable due to the exemption of liability for errors in navigation and management of the vessel.⁸⁸⁹ The Federal Supreme Court held that all the contributing causes of the loss, setting a new course, switching off the watch-alarm, watch keeping with only one person, and fatigue, were in fact measures relating to the navigation and management of the vessel. Moreover, the Federal Supreme Court stated that based on the express wording of s. 607 of the HGB, the exemption for errors in navigation or management of the vessel applies both in cases of negligence and in cases of intent.⁸⁹⁰ Unlike the Court of Appeal who considered judicially reducing the scope of the exemption, but found itself prevented from doing so, the Federal Supreme Court saw no reason to judicially restrict the exemption, and opined in obiter on the potentially expansive nature of the exemption. The *MV Cita* provides a clear example of judicial resistance to narrowing the scope of the nautical fault exemption. The argument could be made that this is perhaps the best approach, given that such decisions should be left to the legislature. Regardless of one’s opinion with regard to legal reform, when compared with the French approach, the German one, at least from the vantage point of legal certainty, is preferable.

7.3. A NARROW EXCEPTION?

Can nautical fault be accurately characterized as a narrow and restricted exemption that rarely finds any success with the judiciary? A certain number of commentators would arguably find such a characterization to be an accurate representation of nautical fault. Experts in a field generally have a sense of the trends in

⁸⁸⁸ *Ibid.* Description of the court’s reasoning by Bracker Boehlhoff & Luebbert.

⁸⁸⁹ *Cargo Interests on Board MV Cita v. Time-charterers of MV Cita* (2006) I ZR 20/04 (Federal Supreme Court), available at: www.onlinedmc.co.uk.

⁸⁹⁰ *Ibid.*

their domain. If several reputable scholars and practitioners have indicated a trend with respect to a certain topic, one should not discount it. Nevertheless, to attribute a decline in the successful use of the nautical fault exemption solely to judicial hostility may in some respects be an erroneous assumption given the number of factors at play. Aforementioned factors such as alternative dispute resolution and settlement do have a significant impact.

Recent uniform law would appear to expand the obligations incumbent on a shipowner with respect to seaworthiness. Just prior to the turn of the millennium, journals and texts were filled with commentary on the codes and conventions and their sizable impacts on carrier liability. Such notable predictions as “the ‘designated person’ [under the ISM Code] will constitute the epicentre of the strongest ‘earthquake’ ever to hit the seas”⁸⁹¹ left little doubt as to the impending waves of change. However, the potentially far-reaching implications of the ISM Code with respect to cargo claims have remained just that, potential implications. One author has referred to them as “the dog that did not bark”.⁸⁹² They have yet to materialize, as ten years after the ISM Code has come into force there remains a lack of jurisprudence. The same is true of the STCW Convention. The ISPS Code as well has not provided a boon for attorneys, and as such is a Code whose presence is widely felt in the shipping industry rather than the courts. It bears mention however, that despite the paucity of civil litigation centred around loss or damage resulting from the failure of shipowners to comply with one or more of their obligations under the aforementioned codes and conventions, the new uniform law has most certainly impacted the shipping industry in other areas and has arguably been a powerful weapon in the fight against substandard shipping.⁸⁹³

⁸⁹¹ Pamborides, G. *International Shipping Law: Legislation and Enforcement* (1999) Kluwer Law International, The Hague, at p. 178.

⁸⁹² Shaw, R. “The ISM Code and STCW Convention – Their Impact on Marine Insurance Coverage and Claims” in *Marine Insurance at the Turn of the Millennium Volume 1* (1999) Huybrechts, M. (Eds) Intersentia, Antwerpen, at p. 71.

⁸⁹³ See for example Özçayır, Z. *Port State Control* (2001) LLP, London, at pp. 344-345 detailing the successes of the inspection campaigns of vessels subject to the ISM Code conducted by the Paris MOU and Tokyo MOU. See also Michel, K. War, *Terror and Carriage by Sea* (2004) LLP, London, at pp. 741-745, for a discussion on the Paris MOU and port state control in light of the ISM Code and the ISPS Code.

In relation to the narrowing of the nautical fault exemption, one jurisdiction where the trend is both obvious and uncontested is France. The overt judicial hostility towards the nautical fault exemption is unmistakable. Perhaps this ensures that any subtle movements in other jurisdictions pale in comparison, and therefore go undetected. One may state with certainty that there is a general movement away from policy-based defences in shipping, towards fault-based approaches. This is true politically, as evidenced by both UNCITRAL Conventions.⁸⁹⁴ Whether this political view is finding root in the judiciaries of countries other than France is less clear. What can be said conclusively is that nautical fault generally remains a viable and key exemption in the shipowners' arsenal. To date, the effects of recent uniform law appear to have more significance in the academic journals than the courts. While the judicial hostility towards the defence, seems to have truly flourished only in France. One may therefore state that nautical fault is in theory narrowed by recent developments, but in practice, those who must be truly concerned are shipowners who have the misfortune to find themselves before the French tribunals.

⁸⁹⁴ The Hamburg Rules, and the current UNCITRAL Draft Convention.

Chapter 8

A Failed Attempt at Modernization: The Hamburg Rules

The Hamburg Rules stand in stark contrast to the Hague Rules, both in their content and in their lack of success. Of the differences between the two conventions, one of the most notable is the glaring absence of the nautical fault exemption from the Hamburg Rules. There were many factors that have contributed to the lacklustre support that the Hamburg Rules have garnered, however chief among those is the carrier liability regime. The decision to eliminate nautical fault was a contentious one, that was influenced both by the changes in the shipping industry in the intervening years since the drafting of the Hague Rules and by the political nature of the drafting and negotiation process that produced the Hamburg Rules. Persuasive arguments were made on both side of the liability issue with respect to the impact any changes would have on the shipping industry as a whole. Due to the stillborn nature of the Hamburg Rules, the theories and arguments concerning the impact of the liability scheme remain unproven and untested. Nevertheless, a detailed discussion of the forces giving rise to the negotiation and drafting of the Hamburg Rules, the factors impacting the decision to eliminate nautical fault, and the reaction to the proposed liability scheme is warranted. Many of the criticisms aimed at the Hamburg Rules have resurfaced with respect to the UNCITRAL Draft Convention, demonstrating that perhaps the lessons from the failure of the Hamburg Rules have yet to be learned.

8.1. NEW PLAYERS IN A CHANGING INDUSTRY

By the 1960s, technical advancements in shipping had begun to revolutionize carriage by sea. The industry as it was in the time of the Harter Act and the Hague Rules, was becoming unrecognisable when compared to what shipping had become half a century later. Moreover, technology was evolving at an exponential rate. Advancements such as the ‘container revolution’ were far beyond anything that the drafters of the Hague Rules could have anticipated. One commentator has observed that “without the container

the global village would still be a concept, not a reality.”⁸⁹⁵ The container revolution began in the late 1950s, and by the 1970s had expanded to all trading routes and revolutionized liner shipping “from a stagnating industry at the very limits of its technological capacity into a transport system of almost unlimited dynamism.”⁸⁹⁶ Previously, the liner trades were using general cargo or break bulk ships, where cargo arrived at the vessel by truck or boxcar and was subsequently broken into small quantities that were then loaded onto the vessel by slings and booms.⁸⁹⁷ Impact of the container revolution with respect to labour costs was drastic. “By 1960, labour costs in port accounted for 80% of the total cost of a typical voyage. It was estimated that the average handling time per voyage fell from 157 hours for a non-containerised ship to 31 hours for a containerised ship, reducing cargo handling costs 65 to 80%.”⁸⁹⁸ Those nations whose merchant fleets failed to adapt suffered drastic falls in market share and became marginalized in world shipping.⁸⁹⁹ While other nations, such as Great Britain, made great progress in adapting to the changes in the shipping industry in the 1960s.⁹⁰⁰ Not only was the technological and logistic side of shipping becoming increasingly modernized, the players involved were also changing.

By the time UNCITRAL was preparing to consider reforming the rules of carriage in the late 1960’s, the interests involved in shipping differed greatly from those involved during the 1920’s. Former colonies had now become independent nations in their own right, with their own agendas.⁹⁰¹ In the intervening years since the Hague Convention,

⁸⁹⁵ C.C. Tung, CEO of Orient Overseas Container Line, quoted in Broeze, F. *The Globalization of the Oceans: Containerisation from the 1950s to the Present* (2002) Int’l Maritime Economic History Assoc., St. John’s, Newfoundland, at p. 1.

⁸⁹⁶ Broeze, F. *The Globalization of the Oceans: Containerisation from the 1950s to the Present* (2002) Int’l Maritime Economic History Assoc., St. John’s, Newfoundland, at p. 3.

⁸⁹⁷ Mandelbaum, S. “International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules” (1995) 5 J. Transnational L. & Policy 1, at p. 4.

⁸⁹⁸ *Ibid.*

⁸⁹⁹ Rajnayar, B. *The State and Market in India’s Shipping* (1996) Manohar, New Delhi, at pp. 360-361 & 365, describes how India’s expansion in tonnage during the 1960s, particularly in dry bulk and general cargo, suffered a dramatic fall in market share due to “the failure of Indian shipping to adapt to the container revolution.” (*Ibid.*, at p. 361).

⁹⁰⁰ Jamieson, A. *Ebb Tide in the British Maritime Industries: Change and Adaptation, 1918-1990* (2003) University of Exeter Press, Exeter, at p. 137-141.

⁹⁰¹ Robertson, D. et al. *Admiralty and Maritime Law in the United States* (2001) Carolina Academic Press, Durham, at p. 323.

shipping had taken on an important role in the economies of developing nations, as exports had begun to account for a high percentage of their gross national product.⁹⁰² By the early 1970's, the developing nations accounted for approximately 65 percent of all maritime shipments, while owning only a fractional percentage of the world's maritime fleet.⁹⁰³ Indeed, fleet ownership was squarely in the hands of the traditional maritime nations. In 1970, the traditional maritime nations controlled more than 83 percent of the world's gross registered tonnage, while developing nations owned 6.7 percent, with African countries owning a total of 0.8 percent of the world's tonnage.⁹⁰⁴ As such, developing nations were viewed as 'users' of shipping services rather than suppliers.⁹⁰⁵ An international development strategy was adopted by the United Nations in 1970, which included the following objective: "to promote, by national and international action, the earnings of developing countries from invisible trade and to minimize the net outflow of foreign exchange from these countries arising from invisible transactions, including shipping."⁹⁰⁶

⁹⁰² Frederick, D. "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules" (1991) 22 JMLC 81, at p. 107.

⁹⁰³ *Ibid*, citing Haiji, "UNCTAD and Shipping" (1972) 6 World Trade L. 58, at p. 58; Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 32, noting the reverse statistic, that while newly independent nations were responsible for 65% of the shipments in maritime commerce, industrialized nations owned 93% of the mercantile fleet.

⁹⁰⁴ Iheduru, O. *The Political Economy of International Shipping in Developing Countries* (1996) University of Delaware Press, Newark, at p. 22. Iheduru, argues that world maritime power is distressingly skewed in favour of traditional maritime nations, and he is particularly critical of the lack of consideration that the topic of maritime power and its effects on Africa have received. At p. 33, he quotes an Africanist historian as noting that "with few notable exceptions historians of Africa have turned their back on the [shipping] problem, and ignored the sea and Africa's interactions with it...Africa's comparative underdevelopment in maritime economics and technology has found expression in an underdeveloped maritime history." Some African nations however were exceptionally successful with respect to the size of their merchant fleets. For example, in 1967, Liberia replaced Great Britain as the nation with the largest merchant fleet in the world (Jamieson, A. *Ebb Tide in the British Maritime Industries: Change and Adaptation, 1918-1990* (2003) University of Exeter Press, Exeter, at p. 1).

⁹⁰⁵ Brooks, M. *Fleet Development and the Control of Shipping in Southeast Asia* (1985) Institute of Southeast Asian Studies, Singapore, at p. 98, also discusses first world nations, who are not traditional shipowning nations, such as Canada and Australia, and therefore follow a 'user' orientation as well. For an examination of nations dependent on foreign shipping and traditional shipowning nations in the 1970s and 1980s see Brooks, at pp. 98 and ff.

⁹⁰⁶ Iheduru, O. *The Political Economy of International Shipping in Developing Countries* (1996) University of Delaware Press, Newark, at p. 22-23.

The dissatisfaction with the Hague Rules had become, for the traditional maritime nations,⁹⁰⁷ centred around the rules for unit limitation of liability (the monetary value along with the rules determining the unit), time bars, the law of agency in the context of non-delegable duties and the use of carrier defences.⁹⁰⁸ Conversely, the developing nations had focused their ire on other issues. Their dissatisfaction revolved around the carrier's 17 exculpatory provisions, including the "catch-all" exemption, and in particular the existence of the fire and nautical fault defences.⁹⁰⁹ Essentially, it was viewed by the developing nations that the allocation of risk was slanted heavily in favour of the carrier. An UNCITRAL report from the last UN session of 1969 describes the statements of the representatives from the developing countries: "[They] stated that present-day legislation in the field reflected, in many respects, an earlier economic phase of society, as well as attitudes and practices which seemed unduly to favour ship-owners at the expense of the shippers."⁹¹⁰ Moreover, it was felt that the existing carriage regime, in particular the

⁹⁰⁷ Although notably it was such cargo-oriented states as the U.S., Canada, Australia and France, that pushed for improvements. See Herber, R. "The Hamburg Rules: Origin and Need for the New Liability System" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 44.

⁹⁰⁸ Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)" (1975) 7 JMLC 69, at p. 72-73. With respect to the agency complaints, they centred around two judgments: *Riverstone Meat Co. v. Lancashire Shipping Co (The Munster Castle)* [1961] 1 Lloyd's Rep. 57 (H.L.), which rejected the carrier's assertion that hiring a competent repairer or inspector was sufficient to demonstrate due diligence, and *Adler v. Dickson (The Himalaya)* [1955] 1 Q.B. 158, [1957] 2 Lloyd's Rep. 267 (C.A.) which opened the door for use of such Himalaya clauses to extend the benefit of the carriers exemptions to other parties in the maritime transaction, such as stevedores as exemplified in *Scruttons v. Midland Silicons* (1962) A.C. 446 (H.L.)). The traditional maritime states were concerned about the non-delegable nature of the seaworthiness obligation and preferred to implement a duty to make a careful selection of repairers or inspectors (Sweeney, *ibid*). Secondly, there was concern about the extent of the use of the carriers defences, particularly where wilful acts were involved and where it was extended beyond the crew, for example to the stevedores (*Ibid*).

⁹⁰⁹ Shah, M. "The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 5; Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)" (1975) 7 JMLC 69, at p. 73-74. Other contentions regarding carrier's potential liability revolved around the limits of liability, the possibility of over-all limitation and the fact that Article 3 was subject to Article 4 (Sweeney, *ibid*).

⁹¹⁰ Report of the United Nations Committee on International Trade Law on the work of its Second Session, para 26, U.N. Doc. A/7747, quoted in Werth, D. "The Hamburg Rules Revisited – A Look at the US Options" (1991) 22 JMLC 59, at p. 64; See Basnayake, S. "Carriage of Goods by Sea" (1979) 27 Am. J. Comp. L. 353, at p. 354, noting that developing nations felt that the existing international regimes did not strike a fair balance between shippers and shipowners; See also Shah, M. "The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 6, who makes an interesting comparison with respect to the dissatisfaction of the developing nations by noting that: "some fifty years after the adoption of the Hague Rules, we find,

exemption for nautical fault, was harmful to the economies of the developing nations.⁹¹¹ Sweeney has commented on the position of the developing nations in a more politically oriented fashion; “Dissatisfaction of the developing world stems essentially from the belief that the operation of traditional maritime law (along with other aspects of world trade) impairs the balance of payments position of developing states so as to insure continued poverty and perpetual under-development in an industrial age.”⁹¹² It was this state of affairs, that initiated a re-examination of the uniform law on carriage of goods by sea.

8.2. A POLITICAL PROCESS

Arguably, the Hamburg Rules were born out of a fundamentally different process than the Hague Rules. As opposed to the Hague Rules Diplomatic Conferences, which was attended by merchants, cargo interests, shipowners, insurers, underwriters, lawyers and adjusters, with many hailing from the same nation yet representing opposing commercial interests,⁹¹³ the negotiations culminating in the Hamburg Rules were infinitely more politicised. Several commentators have noted that the defining feature of the Hamburg Rules was that it was born out of political agreement rather than

again, primarily the users of shipping services, in this case the developing countries, raising at the political level practically the very same complaints generated earlier by shipper interests in the then British Dominions, Western Europe and United States – excessive exemptive privileges for carriers, exoneration from negligence in key shipowner operations such as navigation, and restrictive jurisdiction clauses in Bills of Lading.”

⁹¹¹ Herber, R. “The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, Its Future and the Demands of Developing Countries” in *Yearbook Maritime Law Vol I* (1984) Arroyo, I. (Ed.) Kluwer Law, Antwerp, at p. 85-87. Herber argued that with respect to the impetus for the Hamburg Rules, “it was mainly the basic political decision of the Hague Rules which formed the subject of economic investigation: The rule providing for legal exoneration of the carrier from liability for damages caused by fault or neglect of the crew in connection with the management or navigation of the ship. It seemed to be clear that such a rule was contrary to the interest of the shipper who had to insure this risk on his own. And, in addition, this situation was considered to be detrimental to the interests of the Developing Countries in particular which were considered mainly to be in a position of predominantly cargo-interested countries... It was, therefore, from the beginning of the work in UNCTAD and UNCITRAL an important issue for Developing Countries to do away with this exception for nautical fault.” (*Ibid*).

⁹¹² Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)” (1975) 7 JMLC 69, at p. 73; repeated in Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 520-521; Also quoted in Yancy, B. “The Carriage of Goods: Hague, COGSA, Visby and Hamburg” (1983) 57 Tul. L. Rev. 1238, at p. 1250, and Werth, D. “The Hamburg Rules Revisited – A Look at the US Options” (1991) 22 JMLC 59, at p. 65.

⁹¹³ Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 88-90.

commercial compromise.⁹¹⁴ It has been noted that one particularly frustrating aspect of the conferences for more commercially oriented observers was how politically minded the delegates were.⁹¹⁵ The “delegates, selected under political auspices, formally represented countries and voted on specific draft provisions as such.”⁹¹⁶ The absence, therefore, of official commercial delegates resulted in political compromises rather than the economic bargaining that characterized the Hague Conferences.⁹¹⁷ These political compromises are exemplified in the vague language of the Hamburg Rules, which was a necessity in order to obtain consensus.⁹¹⁸ One author has noted that the interaction between the groups of first world nations, and the group containing Asia, Africa, South America and Yugoslavia, was “so inflexible that when agreement was reached no one dared even insert a comma for fear that the whole deal would be upset.”⁹¹⁹ A further difficulty with the politicised nature of the negotiations resided in the fact that many delegates represented nations with conflicting interests and were therefore unable to advance a consistent position.⁹²⁰ Delegates from many of the traditional maritime nations were forced to represent cargo interests, shipowners, banking and underwriters among others, while the developing nations were almost exclusively representing cargo interests, thus enabling them to form a unified group and achieve political majorities.⁹²¹ Moreover,

⁹¹⁴ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 35; Frederick, *ibid* at p. 105; Chandler, G. “After Reaching a Century of the Harter Act: Where Should We Go From Here?” (1993) 24 JMLC 43, at p. 45; Conversely, Donovan, J. “The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea” (1979) 4 Mar. Law. 1, at p. 1 comments that “the experience in Hamburg has proven that the international commercial community can resolve differences in an international forum.” As optimistic as that statement is, unfortunately almost 30 years later it is clear that it was woefully inaccurate.

⁹¹⁵ Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 97.

⁹¹⁶ *Ibid*, at p. 103-104.

⁹¹⁷ *Ibid*, at p. 105.

⁹¹⁸ Chandler, G. “A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules” (1984) 15 JMLC 233, at p. 236, noting “because of the very delicate balance between the conflicting groups vagueness was utilized to obtain consensus and avoid debate that threatened to disrupt resolution of other issues.”; Tetley, W. “The Hamburg Rules – A Commentary” [1979] LMCLQ 1, at p. 5, has described this process that took place during the Hamburg Conferences as “compromise by drafting”.

⁹¹⁹ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 35

⁹²⁰ Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 105.

⁹²¹ *Ibid*, at p. 105-106.

the developing countries in UNCITRAL possessed a 2/3 majority.⁹²² The developing nations, however, could not impose their will without inciting revolt among the traditional maritime nations, again resulting in the vague language of compromise found in the text.⁹²³ Despite its many inadequacies, the procedural change from private conferences with experts in the industry, to the use of intergovernmental organizations with a heavier and lengthier politicised process, has been argued as been inevitable.⁹²⁴

The politicised nature of the Hamburg Rules conferences, and the voting majorities of the developing nations, resulted in serious changes with regard to the liability of shipowners. The provisions regarding the basis of liability were re-written, removing entirely the nautical fault exemption. One commentator explains that, “under the Hague Rules process, the shipowners had sufficient commercial power to insist on liability exceptions for negligent navigation and management. The difference in the 1970’s was less the carriers’ commercial bargaining power – which was still great – than their inability to translate that strength into a political majority in the UNCITRAL process.”⁹²⁵ The fact that the erosion of the carriers’ defences was a political process rather than a commercially oriented one has not been well received by certain commentators. Japikse in particular has questioned the political process; “What are the true motives of the Hamburg Rules? Are they of purely commercial nature and, if so, why then is the matter not left to the commercial interests themselves, being parties of

⁹²² Herber, R. “The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, Its Future and the Demands of Developing Countries” in *Yearbook Maritime Law Vol 1* (1984) Arroyo, I. (Ed.) Kluwer Law, Antwerp, at p. 85.

⁹²³ Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 *JMLC* 81, at p. 105-106.

⁹²⁴ This change has been argued by Herber, R. “The Hamburg Rules: Origin and Need for the New Liability System” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 36-38, to be necessary for two reasons. The first of which was that international organizations are growing and therefore it would have been exceptional to maintain the previous informal procedure used at the Brussels Conferences, which included no secretariat, and no drafts at a government level. Global participation therefore is the most important aspect in favour of the shift to the use of international organizations. The second reason centres around the fact that the Visby Protocol did not satisfy many states, who were displeased with being unable to address issues such as liability as the CMI program prevented any discussion of problems not specifically envisaged by the Protocol.

⁹²⁵ Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 *JMLC* 81, at p. 112.

equal standing and force? In other words, why should not first an attempt at a commercial consensus be preferred?”⁹²⁶

8.3. THE DRAFTING OF THE RULES AND THE NEGOTIATIONS SURROUNDING THE NAUTICAL FAULT EXEMPTION

A Working Group on International Legislation on Shipping, composed of seven members, was convened by UNCITRAL.⁹²⁷ Due to objections, however, the Working Group was expanded to twenty on members in March of 1971.⁹²⁸ The Working Group held six sessions from January 1972 to February 1975 wherein the Draft Convention on Carriage of Goods by Sea was prepared.⁹²⁹ The liability provision, or what would become Art. 5 of the Rules, was the subject of considerable attention, and was discussed in five out of the six sessions.⁹³⁰ The notion of liability based on fault was supported by both carrier and shipper nations on the Working Group, although a split developed between those who wanted the provision harmonized with the fault-based regimes of Warsaw, CIM, and CMR, and the majority who felt ocean transport was sufficiently distinct and involved vastly different risks such that fully harmonizing the provisions would be impossible.⁹³¹ The United States and the United Kingdom proposed altering the existing list of the Hague Rules Art. IV, but the majority of the delegates, including practically all the developing nations, supported a drastic reform wherein the carrier’s liability would be

⁹²⁶ Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 191.

⁹²⁷ Chile, Egypt, Ghana, India, U.S.S.R., U.K. and U.S.A. (Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)” (1975) 7 JMLC 69, at p. 77).

⁹²⁸ Sweeney, *ibid.* The members of the working group for all sessions were: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Tanzania, U.S.S.R., United Kingdom, U.S.A. and Zaire. Spain attended the first few meetings but was then replaced by the Federal Republic of Germany. (*Ibid.*) Of the ten largest shipowning nations, Japan, Norway, U.K., U.S.S.R., U.S.A., and Germany, were in the working group, while Liberia, Greece, Panama, and Italy were not. (*Ibid.*)

⁹²⁹ Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 523.

⁹³⁰ Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)” (1975) 7 JMLC 69, at p. 103-117; Sweeney, “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” *ibid.*, at p. 524.

⁹³¹ Sweeney, “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)” *ibid.*, at p. 102-103.

expressed in a single paragraph.⁹³² When discussing the merits of the two policy based exceptions, nautical fault and fire, the United Kingdom opposed any changes to the existing system on the basis of a likely 1-2% increase in freight rates, and its negative effects on general average and salvage.⁹³³ The Polish and Belgian delegates supported the United Kingdom position on the retention of nautical fault and fire, although the United Kingdom and Poland were open to a compromise on error in management.⁹³⁴ The United States disagreed with the United Kingdom position,⁹³⁵ and put forward a proposal that amended the existing Hague Rules with the effect for nautical fault that the claimant must make out a prima facie case for loss resulting from poor navigation or management, but the carrier may rebut it by demonstrating that he was not at fault.⁹³⁶ Japan responded by opposing any changes to the policy-based exceptions for negligent navigation, management or fire.⁹³⁷ India, supported by Brazil, Nigeria, Singapore, Tanzania and Spain, adopted the opposing position arguing that neither of the policy-based exemptions should be found in the general principle of fault-based liability.⁹³⁸ Russia suggested a compromise wherein the Working Group would submit a text to the Drafting Committee retaining the two exemptions in square brackets.⁹³⁹ At the end of the debates, the majority, Argentina, Australia, Brazil, Chile, Egypt, France, Ghana, India, Nigeria, Norway, Singapore, Spain, Tanzania, and the United States, favoured no exemption for

⁹³² *Ibid*, at p. 103. The provision stated that neither the carrier nor the shipowner is responsible for loss or damage “arising without the actual fault or privity of the carrier, or without the fault or neglect of the servants or the agents of the carrier,” with a second paragraph placing the burden of proof on the carrier. (*Ibid*).

⁹³³ *Ibid*, at p. 104. The objections with regard to salvage and general average were such that the carrier would be unlikely to give guarantees for cargo in those situations if one removed the element of risk borne by cargo for matters of navigation (*Ibid*).

⁹³⁴ The U.K. and Poland noted that they would agree to eliminate the error in navigation element of the defence in the interests of eliminating friction, provided however that fire and error in navigation were retained. (*Ibid*).

⁹³⁵ The U.S. discussed the compromise nature of the Harter Act and its aims, but felt that the U.K. proposal necessitated “a shift from the present methods of vessel ownership to the single-ship corporation operating with minimum capital.” (*Ibid*, at p. 105-107).

⁹³⁶ Frederick, D. “Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules” (1991) 22 JMLC 81, at p. 108. The text of the U.S. proposal may be found at Frederick, *ibid*, at p. 108, footnote 113; Sweeney, *ibid*, at p. 109.

⁹³⁷ Frederick, *ibid*, at p. 111; Sweeney, *ibid*, at p. 109.

⁹³⁸ Sweeney, *ibid*, at p. 110.

⁹³⁹ *Ibid*.

negligent navigation and management, while Belgium, Japan, Poland, U.S.S.R., and the United Kingdom, opposed its deletion.⁹⁴⁰

During the Drafting Committee's deliberations, the exemptions for nautical fault and fire were debated again. Nigeria proposed a "horse-trader's compromise" in which the defence of negligent navigation was eliminated, but the fire exception was retained.⁹⁴¹ France, Egypt and Spain indicated that they would support such a compromise, while India, Ghana, and Singapore, pressed for the complete elimination of the fire defence.⁹⁴² Belgium, Poland, Japan, United Kingdom, West Germany and the U.S.S.R. attempted to reintroduce the exemption of negligent navigation and management, but those attempts failed.⁹⁴³ On the vote, twelve states voted to keep the compromise text,⁹⁴⁴ while five states voted to reintroduce the nautical fault exemption.⁹⁴⁵ This was noted as "a substantive change accomplished by the cargo-owning majority."⁹⁴⁶ The draft convention was debated in the Sixth (Legal) Committee of the General Assembly, and endorsed by the General Assembly in December 1976.⁹⁴⁷

The Diplomatic Conference was held in Hamburg from 6 – 31 March 1978.⁹⁴⁸ "When the 78 Delegations from States and observers from 8 intergovernmental and 7 non-governmental organizations started to discuss the UNCITRAL Draft Convention at the Diplomatic Conference in Hamburg, it became obvious in the general debate that the

⁹⁴⁰ *Ibid.*, at p. 111.

⁹⁴¹ *Ibid.*, at p. 112.

⁹⁴² *Ibid.*, at p. 115.

⁹⁴³ Frederick, D. "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules" (1991) 22 JMLC 81, at p. 112; Sweeney, *ibid.*, at p. 116.

⁹⁴⁴ Including a provision on fire which read: "In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to the fault or negligence on the part of the carrier, his servants or agents." (Sweeney, *ibid.*, at p. 117).

⁹⁴⁵ *Ibid.*, at p. 116.

⁹⁴⁶ Frederick, D. "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From Hague Rules to the Hamburg Rules" (1991) 22 JMLC 81, at p. 112, although Frederick notes that perhaps this change was not as great as the cargo interested nations would have desired.

⁹⁴⁷ Sweeney, J. "UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods" (1991) 22 JMLC 511, at p. 526.

⁹⁴⁸ Herber, R. "The Hamburg Rules: Origin and Need for the New Liability System" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 40.

deletion of the so-called nautical fault exception proposed by the Commission was one of the key stones which had to be decided upon.”⁹⁴⁹ It was decided that Articles 5, 6, and 8 would be negotiated together as a package, instead of independently of each other, therefore the President of the Conference and Chairman of the first Committee, Prof. Chafik, appointed a special “Package Deal” Committee of fourteen of the attending states.⁹⁵⁰ After several days of unproductive negotiation, Chairman Chafik reduced the group to five nations, the Netherlands, U.S.S.R., Mexico, Norway, and the United States.⁹⁵¹ “The Netherlands and the U.S.S.R. proposed retention of nautical fault, an amended but weaker fire defence, and unbreakable limits...[while] Mexico proposed no nautical fault, a vastly weaker fire defence, and a new vague compromise on unbreakability.”⁹⁵² Norway’s proposal was that nautical fault would be removed but that a formula for unbreakable limits would be inserted.⁹⁵³ The United States then suggested 3 SDR per kilo with no nautical fault or fire defences, but with unbreakable limits, and the U.S.S.R. and the Netherlands countered with 1.5 SDR per kilo limit and that the fire defence must remain unchanged.⁹⁵⁴ The United States responded with the proposal of 2.75 SDRs with no nautical fault or special fire defence.⁹⁵⁵ When consensus was finally reached, the compromise consisted of: “2.5 SDR per kilo with a complex fire defence, (Article 5(4)), no nautical fault defence, and unbreakable limits (Article 8).”⁹⁵⁶ The

⁹⁴⁹ Herber, *ibid*; See also Bauer, G. “Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Cases by Case Analysis” (1993) 24 JMLC 53, at p. 55, noting that during the diplomatic conference, there was extensive controversy concerning the elimination of the defence of error in navigation and management.

⁹⁵⁰ Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 527; Herber, *ibid*, at p. 41. Note however, Herber mentions that the group consisted of “about ten delegations”, nevertheless Sweeney reported directly from the diplomatic conference, and has written extensively about the negotiations over the past twenty years, therefore his precise figure of fourteen attending nations, with reference to the Official Records, is to be preferred.

⁹⁵¹ Sweeney, *ibid*, at p. 527.

⁹⁵² *Ibid*.

⁹⁵³ *Ibid*.

⁹⁵⁴ *Ibid*, at p. 527-528.

⁹⁵⁵ *Ibid*, at p. 528.

⁹⁵⁶ *Ibid*. See also Herber, R. “The Hamburg Rules: Origin and Need for the New Liability System” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 41.

entire text of the new convention was voted on at midnight on March 30, 1978,⁹⁵⁷ and was signed on Friday, March 31, 1978.⁹⁵⁸

8.4. THE DEBATE SURROUNDING THE EFFECTS OF THE LIABILITY SCHEME

8.4.1. Fault-Based Liability

Rather than the enumerated list of exemptions as had been found in uniform law to date, the Hamburg Rules provided a single basis of liability: “The carrier is liable for loss resulting from the loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in art. 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”⁹⁵⁹

The result of the above provision is that when an error in navigation or management of the vessel occurs, it is “never exempted anymore: it cannot then be proved that the carrier, his servant or agent ‘took all measures that could reasonably be required to avoid the occurrence and its consequences’. The carrier will, accordingly, become liable for cargo damage arising, for instance, from a collision attributable to the fault of his vessel.”⁹⁶⁰ In such an instance, the carrier will be held liable even where there is negligence on the part of a compulsory pilot,⁹⁶¹ or where the other vessel is partially to

⁹⁵⁷ Of the seventy eight states present, sixty eight voted in favour, none opposed and three abstained.

⁹⁵⁸ Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 529.

⁹⁵⁹ Article 5.1.

⁹⁶⁰ Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 189.

⁹⁶¹ Where the Hague-Visby Rules specifically exempted the shipowner for the acts of a pilot under Art. IV(2)(a), the Hamburg Rules remain silent. Arguably, as the master of the vessel in many instances remains ultimately responsible for the implementation of the pilot’s orders, it would be difficult for the carrier to prove that all measures were taken to avoid the occurrence. For example, Section 35 of the English Pilotage Act 1983 renders the shipowner liable for any loss or damage “caused by the vessel or by any fault of the navigation of the vessels” regardless of whether the pilotage was compulsory or not.” (Pilotage Act 1983, s.35 as cited in Douglas, R. *The Law of Harbours and Pilotage* 4th Ed. (1993) London: LLP, at p. 199.) Moreover, the new English Pilotage Act 1987, s.22, allows the pilotage authority, where there is

blame as well.⁹⁶² What has been acknowledged to be the largest repercussion of the single basis for liability is the removal of the protection of the nautical fault defence for the carrying vessel in instances of collision.⁹⁶³ Other forms of navigational error such as grounding and improper anchoring will also render the carrier liable, as will all the instances of error in management previously discussed. It has been noted that the elimination of the nautical fault defence is bound “to affect the outcome of an indeterminable number of factually sensitive cases.”⁹⁶⁴ On the other hand, some commentators view the resulting change in the liability of the carrier as less drastic. For instance, when reviewing jurisprudence where the carrier has benefited from the nautical fault exemption, one author predicts that not all of the factual situations if now litigated under the Hamburg Rules would result in liability.⁹⁶⁵ Furthermore, whether the carrier will actually be held responsible for the negligent acts of a compulsory pilot has been questioned.⁹⁶⁶ Another commentator considered an analysis that determined, among other

organisational fault or similar fault, to limit its liability to £1000 (Gault, S. (Ed.) *Marsden on Collisions at Sea*, 13th Ed. (2003) Sweet & Maxwell, London, at p. 618). Although this is arguably not with respect to cargo liability, it demonstrates that the law may very well be unsympathetic to shipowners who suffer losses resulting from the actions of a compulsory pilot. This is not the case in the United States however, by virtue of the Supreme Court decision in *The China*, 74 U.S. (7 Wall) 53 (1868), which resulted in the rule that “under U.S. law the shipowner cannot be held personally liable for the negligence of a compulsory pilot. The ship may be liable *in rem*, but not her owner. The compulsory pilot is not considered the owner’s servant.” (Bauer, G. “Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Cases by Case Analysis” (1993) 24 JMLC 53, at p. 62).

⁹⁶² Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 189; Lüddeke, C. *The Hamburg Rules: From Hague to Hamburg Via Visby 2nd Ed.* (1995) LLP, London, at p. 12.

⁹⁶³ Goldie, C. “Effect of the Hamburg Rules on Shipowners’ Liability Insurance” (1993) 24 JMLC 111, at p. 116.

⁹⁶⁴ Force, R. “A Comparison of the U.S. Carriage of Goods by Sea Act – Present Text and Proposed Changes – and The Hamburg Rules” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 414.

⁹⁶⁵ Bauer, G. “Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Cases by Case Analysis” (1993) 24 JMLC 53, at p. 61-63. Bauer appears to argue that although negligence is not excused, where for example the master makes “only an error in judgment” the carrier would not be liable provided the master “acted in all ways reasonably required under the circumstances.” (*Ibid*, at p. 61). It becomes evident that Bauer’s interpretation of the text of the provision differs significantly from Japikse’s interpretation above. On a purely textual interpretation one would tend to agree with Japikse as all measures “reasonably required to avoid the occurrence” does not appear to leave room for errors. In any event, even Bauer, who provides a very carrier friendly interpretation of the provision, finds that most jurisprudence would if litigated today, hold in favour of cargo (*Ibid*, at p. 62).

⁹⁶⁶ *Ibid*, at p. 62 argues that as it is only the carriers servants or agents that must take all reasonable measures, if the courts adopt the view “that a compulsory pilot is not the servant of the owner, groundings, collisions or other accidents caused by compulsory pilots may still be excused under Hamburg.” Certain courts have found that the pilot is not the servant of the owner. A Belgian court, in the *M.S. Duburg* held

things, the causes of cargo claims by reviewing of all major claims⁹⁶⁷ covering a period just shy of four years⁹⁶⁸ at United Kingdom Mutual Steam Ship Assurance Association.⁹⁶⁹ The analysis demonstrated that almost half the claims were concerning bad stowage, hatch cover defects and bad handling, while a further fifteen percent of the claims were incidents of inadequate tank cleaning, shell plate failure, fire and sinkings.⁹⁷⁰ On the basis of these statistics, it was argued that the incidents that resulted in major claims are those for which the shipowner is currently held liable for under the Hague-Visby Rules, thus the application of the Hamburg Rules would not significantly alter his liabilities.⁹⁷¹ Arguably, this is questionable given that the statistics are based on claims brought within the context of the Hague-Visby Rules, and would not account for claims not brought on the basis that the carrier is exempted. Using existing claim demographics, although potentially informative, cannot address the difficult question of how, in practice, the carrier's liability would change as a result of the Hamburg Rules. What is desperately needed, and unfortunately does not exist is reliable empirical data on the actual effects of the Hamburg Rules.⁹⁷² Without such data, "making an argument about what will happen in real-world transactions if certain changes take place in the legal rules governing those

that the captain of a vessel has no authority over a pilot, who is therefore an independent advisor and is not an agent of the captain or of the owner of the vessel (Hof van Beroep te Antwerpen, February 10, 2003 (The M.S. Duburg) [2003] ETL 633). For a similar holding, see also *Rechtbank van Eerste Aanleg te Dendermonde*, June 28, 1991 [1992] ETL 107. As well, the English common law adopts the position that a shipowner should not be vicariously liable for a compulsory pilot: "The opinion I have thus formed in this case is founded upon the general principles of reason and justice; that no one should be chargeable with the acts of another who is not an agent of his own election and choice; and I further think, that it would be contrary to all sense of equity, to say to the owners of a foreign vessel, 'You shall take a pilot of our selection, of our appointment; be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible for his conduct, unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing.'" (*The Maria* (1839) 166 E.R. 508 (Adm.), at 514). Perhaps, the position of the common law as not viewing the carrier vicariously liable for the pilot, may aid to inform the characterization that a compulsory pilot is not the servant of a carrier.

⁹⁶⁷ A claim for which the amount paid and the amount of any outstanding estimate together totalled at least \$100,000.

⁹⁶⁸ 20th February 1987 through to 20th December 1991.

⁹⁶⁹ Goldie, C. "Effect of the Hamburg Rules on Shipowners' Liability Insurance" (1993) 24 JMLC 111, at p. 116.

⁹⁷⁰ *Ibid.*

⁹⁷¹ *Ibid.*

⁹⁷² See Sturley, M. "Changing Liability Rules and Marine Insurance" (1993) 24 JMLC 119, who demonstrates that although advocates on both sides of the Hamburg debates have 'predicted' what the effect of the change in liability scheme will be, there is no empirical evidence to support such assertions. Sturley concludes that without such empirical evidence, "making an argument about what will happen in real-world transactions if certain changes take place in the legal rules governing those transactions" is a futile endeavour (*Ibid.*, at p. 148-149).

transactions” is a futile endeavour.⁹⁷³ One commentator, after noting arguments relating to potential freight rate increases and insurance, concludes as follows: “the writer desires to avoid the role of prophet. . . The writer’s ignorance of the type of economic impact the Hamburg Rules would have on the shipowner and the impact they were intended to have is equalled only by that of the academic proponents of the rules.”⁹⁷⁴

8.4.2. The Insurance Debate

Without a doubt, a large percentage of the discussion surrounding the elimination of the nautical fault exemption has centred around its effects on the costs and structure of insurance in the shipping industry. Moreover, both the opponents and the proponents of the exemption use opposing sides of the same economic and insurance-based argument to support their position. The difficulty arises however, when attention is drawn to the fact that there is comparatively little statistical data available with which to support the assertions being made.⁹⁷⁵ After reviewing the various positions, one is left with the impression that perhaps the insurance debate cannot be resolved. Nevertheless, understanding the issues involved is beneficial as the same arguments were again put forward during the drafting of the new UNCITRAL Draft Convention.

The Hamburg Rules were created with the aim of reducing shipping costs, particularly for developing countries.⁹⁷⁶ One of the main arguments in support of the Hamburg liability scheme is that it would reduce shipping costs by addressing the problem of “double insurance” or “overlapping insurance”. The current division of risks between cargo interests and carriers under the Hague-Visby system, requires a dual system of insurance, i.e. the cargo interests obtain insurance for a given loss, while the

⁹⁷³ *Ibid*, at p. 148.

⁹⁷⁴ Yancy, B. “The Carriage of Goods: Hague, COGSA, Visby and Hamburg” (1983) 57 Tul. L. Rev. 1238, at p. 1259. Yancy goes on to conclude, despite having proclaimed his ignorance with respect to the economic impact, that “it certainly seems a truism of common sense that the Hamburg Rules can result only in increased insurance premiums for the shipowner; these eventually will become embodied in freight rates, and the customer, as usual, will be the ultimate loser.” (*Ibid*).

⁹⁷⁵ See Lee, S. “The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules” (2002) 15 Transnat’l Law. 241; Sturley, M. “Changing Liability Rules and Marine Insurance” (1993) 24 JMLC 119; Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511.

⁹⁷⁶ Chandler, G. “A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules” (1984) 15 JMLC 233, at p. 237.

carrier insures himself against liability with respect to cargo for the same loss.⁹⁷⁷ Furthermore, extra expenses are incurred through cargo underwriters bringing recourse actions against shipowners as well as by virtue of the fact that two insurance companies have to keep documents and staff dealing with the same issue.⁹⁷⁸ Although initially hopes were expressed that altering the shipowner's basis for liability under Hamburg would result in cargo interests no longer needing to procure insurance,⁹⁷⁹ it has become clear that cargo insurance is still desired for several reasons. For example, P&I insurance does not extend from the warehouse to the place of destination,⁹⁸⁰ the shipowner has an overall limitation of liability,⁹⁸¹ cargo insurance affords protection against an insolvent carrier,⁹⁸² and finally it allows cargo interests to collect directly from their insurer.⁹⁸³ Given that cargo insurance therefore will not be eliminated,⁹⁸⁴ the debate centres on whether, as a result of shifting the liability to the carrier, cargo interests will incur less expense, as they will no longer need to insure for risks for which the carrier was exempt under the Hague-Visby Rules. Interestingly enough with regard to the "double insurance" debate, one author draws parallels between one's jurisdictional influences and one's stance with respect to the debate: "Supporters of the Hamburg Rules, who appear to have been influenced by civil law traditions, have argued that double insurance and overall

⁹⁷⁷ Honour, J.P. "The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 241; Sturley, M. "Changing Liability Rules and Marine Insurance" (1993) 24 JMLC 119, at p. 143.

⁹⁷⁸ Honour, *ibid.*

⁹⁷⁹ Sturley, M. "Changing Liability Rules and Marine Insurance" (1993) 24 JMLC 119, at p. 143

⁹⁸⁰ Honour, J.P. "The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 241.

⁹⁸¹ Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)" (1975) 7 JMLC 69, at p. 108. Selvig, E. "The Hamburg Rules, the Hague Rules and Marine Insurance Practice" (1981) 12 JMLC 299, at p. 307.

⁹⁸² Honour, J.P. "The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 241-242; Sturley, M. "Changing Liability Rules and Marine Insurance" (1993) 24 JMLC 119, at p. 144.

⁹⁸³ Sturley, *ibid.*; Selvig, E. "The Hamburg Rules, the Hague Rules and Marine Insurance Practice" (1981) 12 JMLC 299, at p. 312, notes that on average cargo interests will be able to obtain compensation for their losses much faster from their insurers than from the shipowner's P&I club; Diamond, A. "The Division of Liability As Between Ship and Cargo (Insofar As It Affects Cargo Insurance) under the New Rules Proposed by UNCITRAL" [1977] LMCLQ 39, at p. 44, noting the fear that if the Hamburg Rules came into force, the cargo owners will likely have to deal directly with the carrier's liability insurer.

⁹⁸⁴ Lee, S. "The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules" (2002) 15 *Transnat'l Law*. 241, at p. 249 notes that to a certain degree double insurance would be unavoidable under the Hamburg Rules.

insurance costs would be decreased by adopting the Hamburg Rules. Opponents, who are seemingly influenced by common law traditions, assert that these costs are even lower under the Hague or the Hague-Visby Rules than under Hamburg Rules.⁹⁸⁵

Opponents of the “double insurance” argument suggest that altering the liability system would not save costs for cargo interests as there would be a corresponding increase in freight. There are several prongs to the argument that should the risk be shifted from the shippers and cargo insurance, to carriers and P&I insurance, the result would be an increase in freight rates. The basic argument is; if the risk shifts, then cargo owners would either need to take out less cargo insurance, or the cargo insurance rates would decrease. The result would be that carriers would be required to procure more liability insurance, and therefore would pass on the increased cost in the form of freight. Opponents of the Hamburg liability scheme argue that liability insurance is costlier than cargo insurance; thus in the end shippers would end up paying higher costs in freight than they would actually save from paying less for cargo insurance.⁹⁸⁶ The converse is argued, however, that P&I insurance is less expensive than cargo insurance and thus shifting the risk to the P&I Clubs will in the end reduce the shipper’s costs.⁹⁸⁷ One is left in a difficult position when attempting to evaluate the argument, as both sides in the debate supply credible supporting arguments.⁹⁸⁸ Putting aside the debate as to which insurance is more

⁹⁸⁵ *Ibid*, at p. 241.

⁹⁸⁶ Shah, M. “The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues” in *The Hamburg Rules on the Carriage of Goods by Sea (1978)* S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 11; Kimball, J. “Shipowner’s Liability and the Proposed Revision of the Hague Rules” (1975) 7 JMLC 217, at p. 250; Williams, B.K. “The Consequences of the Hamburg Rules on Insurance” in *The Hamburg Rules on the Carriage of Goods by Sea (1978)* S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 259; Diamond, A. “The Division of Liability As Between Ship and Cargo (Insofar As It Affects Cargo Insurance) under the New Rules Proposed by UNCITRAL” [1977] LMCLQ 39, at p. 44; Meng, T. “The Carriage of Goods by Sea Act 1972 and the Hamburg Rules” (1980) 22 Malaya L. Rev. 199, at p. 211.

⁹⁸⁷ Selvig, E. “The Hamburg Rules, the Hague Rules and Marine Insurance Practice” (1981) 12 JMLC 299, at p. 316; Zamora, S. “Carrier Liability For Damage or Loss to Cargo In International Transport” (1975) 23 Am. J. Comp. L. 391, at p. 394.

⁹⁸⁸ With regard to P&I insurance being the costlier of the two, it has been argued that with regard to the risk distribution, cargo insurance is able to spread the risk of a major catastrophe over several insurers, while in P&I insurance that risk has been concentrated on one insurer (McGilchrist, N. “The New Hague Rules” [1974] LMCLQ 255, at p. 260). The opposing argument is that P&I insurance is mutual insurance and thus not profit driven, whereas cargo insurance inherently will have a measure of profit built in and therefore be the costlier of the two (Selvig, E. “The Hamburg Rules, the Hague Rules and Marine Insurance Practice”

costly, the question must still be addressed as to whether an increase in the carrier's premiums would be passed on in the form of freight. As a preliminary matter, the question of whether the calls would increase is far from settled. Certain authors attest that they are bound to increase,⁹⁸⁹ while others assert that an increase is not likely.⁹⁹⁰ It is acknowledged, that in any event, it is difficult to predict as it is based on a multitude of factors.⁹⁹¹ Furthermore, if the data exists to aid in predicting such increases, insurance companies are unwilling to release it as they consider it to be confidential.⁹⁹²

Nevertheless, presuming liability premiums do increase, the potential of a resulting increase in freight is hotly contested. Moreover, as with the debates above, credible arguments exist on both sides. It has been predicted that carriers would avoid increasing the freight rates because of the competitive nature of the market.⁹⁹³ The opposing

(1981) 12 JMLC 299, at p. 316), or in other words P&I insurers can provide carriers with lower cost insurance than cargo insurers can provide for cargo interests because "economically, P&I clubs would seem to be more efficient and able to pursue more cost-saving measures than profit minded cargo insurance companies" (Lee, S. "The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules" (2002) 15 *Transnat'l Law*. 241, at p. 254).

⁹⁸⁹ Honour, the General Manager for the West of England Ship Owners Mutual Insurance Association, argued that alterations in the law such as the Hamburg Rules that increase the liability of the shipowner, "are bound to increase the cost of insuring the risk, and such increase may be fairly substantial... One is led to the conclusion that the new Convention will, to what extent it is impossible to say, increase the cost of goods to the consumer arising from the increase in freights which will be inevitable as a result of the increase in the cost of P&I Insurance to the shipowner." (Honour, J.P. "The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at pp. 240 and 249). Notably, there have been reports of higher P&I rates for carriers that are trading to countries with the Hamburg Rules (Sturley, M. "Changing Liability Rules and Marine Insurance" (1993) 24 JMLC 119, at p. 146, f.n. 113).

⁹⁹⁰ "It is not likely that an increase in carrier's liability due to a removal of exceptions under the Hague-Visby Rules will result in an equivalent increase in the liability insurance premium. Due to the fact that the safety of marine cargo transport is inherently unpredictable..." (Lee, S. "The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules" (2002) 15 *Transnat'l Law*. 241, at p. 254).

⁹⁹¹ Sweeney, J. "UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods" (1991) 22 JMLC 511, at p. 531, noting that P&I club rates structures "can be highly individualized, and also dependent on fierce competition, fleet size and claims experience."

⁹⁹² Sweeney, J. "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part 1)" (1975) 7 JMLC 69, at p. 108, when discussing the implications of the elimination of the nautical fault defence, states: "it was unlikely that solicitation of information from insurance companies would provide as hard factual basis to determine whether a change in the law would cause a change in rates since the marine insurance industry was highly competitive and regarded any information used in fixing rates as proprietary information to be kept confidential."

⁹⁹³ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY at p. 92. Karan argues that "competition between conference and non-conference liner carriers and between liner and tramp carriers would curtail their ability to raise rates." See also See Hellawell, R. "Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 *Am. J. Comp. L.* 357, at p. 366-367 noting the effect of competition on freight rates.

argument is that the increase in liability will result in increased costs which the carrier will have no choice but to pass on in order to remain in business.⁹⁹⁴ Concern has been expressed that regardless of need or necessity, carriers may simply use the Hamburg Rules as an excuse to raise freights even if their costs have not risen.⁹⁹⁵ Certain authors have cautioned that an argument based on a potential increase in freight rates is inherently difficult to make.⁹⁹⁶ There appears to be primarily two reasons for this. First, there are no reliable figures to support such assertions.⁹⁹⁷ This has led one commentator to argue that after “years of futile searches for reliable data the effort to resolve the economic argument had to be abandoned. Neither economic proposition is provable to its opposition, and the economic situations of both the maritime industry and maritime insurers are sufficiently troubled and unique so that past changes in the law do not

Shah, M. “The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 12, noted that “since liner freights rise in any case even now, under the Hague Rules, in most trades from 10 to 20 percent annually, fear of additional substantial freight rate increases identifiably escalating from the deletion of the negligence exception was not entertained seriously by the majority of representatives who spoke on the subject.”

⁹⁹⁴ Williams, B.K. “The Consequences of the Hamburg Rules on Insurance” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 259; Sturley, M. “Changing Liability Rules and Marine Insurance” (1993) 24 JMLC 119, at p. 147.

⁹⁹⁵ Zamora, “Carrier Liability For Damage or Loss to Cargo In International Transport” (1975) 23 Am. J. Comp. L. 391, at p. 394-395.

⁹⁹⁶ Shah, M. “The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 12; Sturley, M. “Changing Liability Rules and Marine Insurance” (1993) 24 JMLC 119, at p. 147; Hellawell, R. “Allocation of Risk Between Cargo Owner and Carrier” (1979) 27 Am. J. Comp. L. 357, at p. 366-367;

⁹⁹⁷ Several authors have noted the fact that statistics are unavailable or that reliable data is simply absent from the debate. See Tetley, W. “The Hamburg Rules – A Commentary” [1979] LMLCQ 1, at p. 4; Kimball, J. “Shipowner’s Liability and the Proposed Revision of the Hague Rules” (1975) 7 JMLC 217, at p. 250; Honour, J.P. “The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 243; Shah has noted, “in regard to the possibility of freights rising, despite wide inquiry within UNCTAD and UNCITRAL no reliable supporting figures could be secured.” (Shah, M. “The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 11). When a joint CMI/ICC working group tried to secure data in 1975, they were told by the industry: “it is impossible to provide true statistical information based on an extremely hypothetical situation.” (Shah, *ibid*). Sturley has argued that the insurance debate cannot be resolved because at its core it is an ‘empirical argument’ yet “there has been very little reliable empirical evidence anywhere in these debates.” (Sturley, M. “Changing Liability Rules and Marine Insurance” (1993) 24 JMLC 119, at p. 148). Honka noted that “such assertions have not been verified with ‘cold’ figures. It remains the target for uncertainty what the empirical facts in this respect are.” (Honka, H. “Introduction” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 8).

provide useful analogies.”⁹⁹⁸ It is worth noting however, that some figures are available, albeit on a small scale or within the context of specific industries.⁹⁹⁹ Secondly, those projections in rating practice are speculative in any event given the unpredictable nature of shipping and marine insurance.¹⁰⁰⁰

The final contentious point involved in this heated debate is whether cargo insurance rates would actually decrease if liability for nautical fault was shifted to the carriers. The assumption made by supporters of the Hamburg Rules that cargo insurance rates would decrease is based on the simple theory that if the carrier has increased liability, then the cargo insurers will see a decrease in costs.¹⁰⁰¹ On the other hand, opponents have argued that regardless, cargo underwriters would refuse to lower the rates.¹⁰⁰² The response from supporters has been that as the cargo insurance industry is

⁹⁹⁸ Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 531.

⁹⁹⁹ Lee, S. “The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules” (2002) 15 *Transnat’l Law*. 241, at footnote 103, notes that in the U.K. the main freight forwarders association changed its liability regime from one with almost non-existent liability to one where the forwarder is now liable for carriage subject to a few exemptions. Lee has argued this was a change in magnitude that was greater than the Hague to Hamburg liability shift, yet after the change the industry reported that rates had not increased, nor has liability insurance premiums. Nicoll, C. “Do the Hamburg Rules Suit a Shipper-Dominated Economy?” (1993) 24 JMLC 151, at p. 175-176, obtained data from P&I Services, who represented the majority of liability insurers in the New Zealand market. Based on the 1983 figures, cargo liability costs the carrier 15.6 cents per tonne of shipment. If, taking the worst-case scenarios predicted by P&I club managers in London, liability to cargo was to increase under Hamburg by 25%, that would raise the cargo liability figure to 19.5 cents a tonne. Liability to cargo would therefore even be able to double, yet it would only translate into a freight increase of 15.6 cents per tonne, providing the carrier passed that cost on.

¹⁰⁰⁰ Shah, M. “The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 12, notes that “[t]he exclusion of the negligence exemption could not, in any case, per se necessarily affect freight and insurance charges uniformly in all markets. Neither cargo nor P&I insurance markets are tariff based or organically inter-related, Premiums are experience-rated and vary in different trades. Further, the assumption by western market insurers that present day freight and insurance premium levels are the most economical is itself highly questionable. They might be much higher than perhaps they ought to be.”

¹⁰⁰¹ Selvig, E. “The Hamburg Rules, the Hague Rules and Marine Insurance Practice” (1981) 12 JMLC 299, at p. 313; Herber, R. “The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, Its Future and the Demands of Developing Countries” in *Yearbook Maritime Law Vol 1* (1984) Arroyo, I. (Ed.) Kluwer Law, Antwerp, at p. 92; Sweeney, J. “UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods” (1991) 22 JMLC 511, at p. 532-533, argues that given “cargo insurance protects shippers against unit limitation of liability, global limitation of liability, general average, salvage claims and other unexpected charges...[s]uch insurers feel that these instances of carrier non-liability will not fully sustain the existing premium structure of cargo insurance.”

¹⁰⁰² Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 92.

highly competitive, the underwriters would be forced to pass on the benefit of a decrease in costs to their clients.¹⁰⁰³ A further argument from opponents is that cargo insurance premiums are not based on risk statistics, and therefore a change in risk would not translate into a benefit.¹⁰⁰⁴ Nevertheless, it has been noted that in practice, most insurers prefer to establish a loss record in advance prior to reducing rates, and therefore changes in premium levels may only occur in the long run if the new liability regime has had a substantial impact on their net subrogation recoveries.¹⁰⁰⁵

Contrary to what would likely be intuitive, cargo insurers have maintained that the nautical fault exemption is “extremely important”.¹⁰⁰⁶ The cargo insurers subscribe to the view that the increase in carrier liability will impact on freight.¹⁰⁰⁷ It would appear therefore that the supporters of the Hamburg liability regime are the cargo interests themselves, while those preferring the Hague-Visby exemptions and nautical fault are the shipowners, the P&I clubs, and the cargo insurers. One of the arguments made to explain cargo insurers’ opposition to the Hamburg Rules fault-based liability scheme is that “reducing the cargo losses that shippers bear reduces the scope of the risks that cargo insurers carry and, in this competitive industry, reduces the level of premiums they can charge.”¹⁰⁰⁸ Indeed, certain authors considered cargo insurance premiums bound to decrease as carrier liability increased, making “serious inroads into hitherto so profitable ‘nautical fault risk’ sector.”¹⁰⁰⁹ In addition it has been argued that “the only change [with

¹⁰⁰³ Selvig, E. “The Hamburg Rules, the Hague Rules and Marine Insurance Practice” (1981) 12 JMLC 299, at p. 313 and 316.

¹⁰⁰⁴ Lee, S. “The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules” (2002) 15 Transnat’l Law. 241, at p. 242, who notes that cargo insurance premiums are not based on risk statistics are reliable statistics are not available, rather “underwriters use a variety of variables to set premiums, such as the size of the account, the length of time the client has been with the insurer and even the insurer’s institution.”

¹⁰⁰⁵ Sturley, M. “Changing Liability Rules and Marine Insurance” (1993) 24 JMLC 119, at p 146.

¹⁰⁰⁶ Mankabady, S. “Comments on the Hamburg Rules” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 53.

¹⁰⁰⁷ Gahmberg, H. “Carrier Liability and Insurance” in *New Carriage of Goods by Sea* (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 271-272.

¹⁰⁰⁸ Honnold, J. “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) 24 JMLC 75, at p. 106. It should be noted, however, that Honnold is an ardent supporter of the Hamburg Rules.

¹⁰⁰⁹ Lejniaks, M. “Diverging Solutions in the Harmonisation of Carriage of Goods by Sea: Which Approach to Choose?” (2003) 8 Unif. L. Rev. 303, at p. 305. Lejniaks argues that the cargo insurance industry was one of the main reasons that the vast majority of the world’s nations refrained from adopting the Hamburg Rules. He concludes this argument by stating: “The insurance industry plays a very important role in the

regard to Hamburg liability] would be in the market share between cargo insurers and P&I Clubs. By reason of the carrier's liability for nautical fault and fire, P&I Clubs, which are generally based in a small number of countries such as the UK and Scandinavia, would get a bigger share from the market whereas cargo insurers, which are domestic, would lose substantial business."¹⁰¹⁰ For example, Germany is a cargo country, and as such it has been suggested that would oppose increased liabilities for carriers, on the basis of the loss of business for the cargo insurers.¹⁰¹¹ Commentators have argued that the Hamburg liability scheme would not be problematic for cargo insurers if they were also able to insure carriers.¹⁰¹² In this respect, the shipping industry is contrasted with other forms of transport where Hamburg style risk allocation was accepted without complaint by insurers, however, in air, rail, and road transport the same segment of the insurance industry provides both carriers and shippers with insurance cover.¹⁰¹³

Interestingly enough, all the above arguments have been made with the assumption that cargo is always insured.¹⁰¹⁴ This however may in fact be somewhat of an erroneous presumption. Authors have remarked that even with the shift in liability, cargo will still need to insure, and in theory the reasoning is sound. In practice, however, it appears that few commentators have investigated the extent to which cargo currently does insure. In the mid-1990's a relatively new container vessel was lost on a voyage from Denmark to Iceland, and of the 2000 consignments only 600 of them were insured.¹⁰¹⁵

global economy and, as may be seen from this example, also has an important impact on the law. Not that the industry is admitting as much but, as the saying goes, murder will out." (*Ibid*, at p. 305).

¹⁰¹⁰ Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 96; Tetley, W. "The Hamburg Rules – A Commentary" [1979] LMCLQ 1, at p. 5 comments on the position of the P&I Clubs who initially were not opposed to the increased responsibilities of the Hamburg Rules as it would provide additional business.

¹⁰¹¹ Herber, R. "The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, Its Future and the Demands of Developing Countries" in *Yearbook Maritime Law Vol 1* (1984) Arroyo, I. (Ed.) Kluwer Law, Antwerp, at p. 95.

¹⁰¹² Honnold, J. "Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?" (1993) 24 JMLC 75, at p. 106

¹⁰¹³ Selvig, E. "The Hamburg Rules, the Hague Rules and Marine Insurance Practice" (1981) 12 JMLC 299, at p. 312-314.

¹⁰¹⁴ See Sturley, M. "Carriage of Goods by Sea" (2000) 31 JMLC 241, at p. 250 stating that with regard to cargo claims, "most disputes are between two insurers."

¹⁰¹⁵ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 297, citing Bursell, "How Prevalent is Insurance in Sea Carriage?" (1998) in *Cargo Liability in Future Maritime Carriage*.

Indeed, cargo frequently moves without insurance cover on short trade routes such as the North Sea routes.¹⁰¹⁶ It is possible therefore that in the push by cargo interests for a shift in liability in order to reduce insurance costs, advocates for cargo have failed to investigate what percentage of cargo does actually incur insurance expenses. One may posit therefore that cargo interests overall would have been better served by some other benefit under the Rules, as the potential expenses or savings that would materialize according to the insurance debate may very well be simply academic.

8.4.3. Litigation and Friction Costs

With the elimination of the nautical fault exemption in favour of a broadly worded liability provision, concerns have arisen with regard to the settlement of claims, both privately and through litigation. It has been widely suggested that the new and ambiguous wording will result in extensive and unproductive litigation.¹⁰¹⁷ Moreover, with regard to settlements, the new provision will lead to added friction costs in the process of settlement.¹⁰¹⁸ Justice Haight has commented that “The Hamburg rules might well be sub-titled: ‘The Reasonable Man Puts to Sea’ ... Everything will now turn upon whether the carrier’s employees ‘took all measures that could reasonably be required.’ In such soil are the seeds of controversy sown; and lawyers share in the harvest.”¹⁰¹⁹

¹⁰¹⁶ Selvig, E. “The Hamburg Rules, the Hague Rules and Marine Insurance Practice” (1981) 12 JMLC 299, at p. 108.

¹⁰¹⁷ Williams, B.K. “The Consequences of the Hamburg Rules on Insurance” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 257; Chandler, G. “A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules” (1984) 15 JMLC 233, at p. 237; Honour, J.P. “The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at pp. 239-240; See also Sturley, M. “Changing Liability Rules and Marine Insurance” (1993) 24 JMLC 119, at p. 133, for a discussion of this view from an economics and law perspective.

¹⁰¹⁸ Goldie, C. “Effect of the Hamburg Rules on Shipowners’ Liability Insurance” (1993) 24 JMLC 111, at p. 113-114; See Hellowell, R. “Allocation of Risk Between Cargo Owner and Carrier” (1979) 27 Am. J. Comp. L. 357, at p. 363, on the elimination of friction costs. See also Sturley, *ibid.*, at p. 133 for a discussion of this perspective.

¹⁰¹⁹ Judge Haight, The Speakers’ Papers for the Bill of Lading Convention Conference (New York) at Haight-4, as quoted by Werth, D. “The Hamburg Rules Revisited – A Look at the US Options” (1991) 22 JMLC 59, at p. 71, footnote 79.

A vast body of law has been developed with regard to the Hague and Hague-Visby Rules, such that practically all the different points of construction on any individual provision of the Rules has been adjudicated on by one or more courts.¹⁰²⁰ By the late 1970's, it was comparatively rare for any litigation to revolve around the interpretation of the Rules, and therefore the vast majority of cargo claims were settled out of court.¹⁰²¹ Under the Hague and Hague-Visby Rules, in the case of routine damage claims the shipowners and the Clubs would often negotiate and settle claims for less than the full amount if the claims were litigated and won.¹⁰²² "The possibility of successful reliance on Article 4 Rule 2 of the Hague Rules has in the past at least encouraged cargo interests to accept reasonable settlements."¹⁰²³ P&I Clubs have been concerned about the percentage of legal and commercial costs for years, and Hill notes that "[c]osts form a much larger proportion of total claims expense than outsiders to the P&I world would imagine – twenty to thirty percent would not be unrealistic."¹⁰²⁴ It was therefore projected that the likely effect of the Hamburg Rules becoming the dominant legal regime would be increased costs in the handling and resolution of cargo claims.¹⁰²⁵ In essence this is not only the actual liability payments with regard to claims, but also costs in relation to claims, as "the old certainties of the Hague Rules, certainties of interpretation and meaning which have been produced by decades of laborious litigation, will disappear as the commercial world has to start again and try to make sense of the Hamburg Rules."¹⁰²⁶ This sentiment has been expressed by Professor Tetley; "The drafting is also vague and the meaning of many articles will not be known without litigation so that the delicate balance between carriers and shippers has been replaced by a new and confusing

¹⁰²⁰ Honour, J.P. "The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978" in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at pp. 239-240. This is particularly so in the courts of England and the United States (*ibid*).

¹⁰²¹ *Ibid*, at pp. 240.

¹⁰²² Goldie, C. "Effect of the Hamburg Rules on Shipowners' Liability Insurance" (1993) 24 JMLC 111, at p. 113.

¹⁰²³ *Ibid*.

¹⁰²⁴ Hill, C. "The Clubs Reaction to the Coming into Effect of the Hamburg Rules" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 197.

¹⁰²⁵ *Ibid*.

¹⁰²⁶ Goldie, C. "Effect of the Hamburg Rules on Shipowners' Liability Insurance" (1993) 24 JMLC 111, at p. 115.

relationship.”¹⁰²⁷ Claims that otherwise would have been settled under Hague-Visby, now will be litigated or arbitrated.¹⁰²⁸ The impact of the Hamburg Rules with regard to litigation may differ between civilian and common law jurisdictions. It has been predicted that the wording of the new provision will give rise to extensive litigation in the common law countries, but that “...civil law lawyer[s] will be more prepared to handle this rule because it closely resembles the general rule of contract law liability usually found in civil codes.”¹⁰²⁹

Increased litigation will arise not only on the basis of the new wording, but with regard to its uncertain effects as well, as “in the great majority of cases it will be apparent whether or not the damage is connected with the navigation/management of the ship. In such a case the parties involved will accept that the carrier (and his P&I insurer) will be exempt from liability. In other words, the cargo insurer will compensate the cargo owner without seeking recourse from the carrier/P&I insurer. Under the Hamburg Rules...the carrier will, for example, be liable for damages caused by grounding – assuming that the carrier or his servant has been negligent. Once the cargo insurer has paid the cargo owner, he must evaluate whether anyone on the carrier’s side is to blame...But evaluating questions of negligence is not always easy, nor will the cargo insurer’s evaluation always be accepted by the opposing party. There is therefore an incentive for litigation, which can be both lengthy and expensive.”¹⁰³⁰ As one admiralty attorney put it, the removal of the nautical fault defence in favour of a single basis of liability, ensures that the resulting confusion will likely result in “a lifetime endowment” for lawyers.¹⁰³¹

¹⁰²⁷ Tetley, W. “Article 9 to 13 of the Hamburg Rules” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady, British Institute of International and Comparative Law, Chameleon Press, London, at p. 207. Tetley continues to comment that “the Hamburg Rules which were intended to create order and correct errors in the Hague Rules may have created disorder by making almost random changes favouring one side or the other without changing the ultimate result.” (*Ibid*).

¹⁰²⁸ Honour, J.P. “The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 240.

¹⁰²⁹ Weitz, L. “International Maritime Law: The Nautical Fault Debate” (1998) 22 Tul. Mar. L.J. 581, at p. 586.

¹⁰³⁰ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 297.

¹⁰³¹ Buglass, L. *Marine Insurance and General Average in the United States: An Average Adjuster’s Viewpoint*, 3rd Ed. (1991) Cornell Maritime Press, Centreville, Maryland, at p. 448.

The argument has been made that it is simply familiarity with the existing system that draws opposition to Hamburg.¹⁰³² This has led one author to comment that “[t]o argue against the Hamburg Rules on the principle ground that they will herald a period of uncertainty and confusion is, with respect to those who advance this argument, a little like refusing to update computer software because it takes a certain investment in to learn the new program and derive the full benefits from the innovation.”¹⁰³³ Other authors have noted that it is inevitable that such an argument is tabled; “The argument that a new Convention would invite prolific litigation is always put forward whenever any new legal text is drafted.”¹⁰³⁴ In fact opponents of the Hague Rules made the same litigation and friction argument at the time of its implementation.¹⁰³⁵ Nevertheless, the criticism of the new wording does have a measure of validity to it. This is particularly the case where the status quo has now been in existence since the birth of uniform carriage law. The reluctance to delineate the boundaries of new wording through litigation is understandable, given that it can take years, decades even, as exemplified by the fact that the meaning of “navigation” was debated up to the House of Lords in 2000.¹⁰³⁶

8.4.4. Varied Reactions to the Elimination of the Nautical Fault

Unsurprisingly, the notable absence of the nautical fault exemption from the Hamburg Rules invited a flood of commentary, both positive and negative. Somewhat surprisingly however, is the argument that the elimination of nautical fault is in essence a non-event. Force has commented that the loss of the error in management aspect of the defence, “ultimately, may prove to have comparatively little impact on carrier

¹⁰³² “[The Hamburg Rules are] revolutionary, an upset to tradition, a rude awakening from the comfortable and familiar legal life of world maritime transport. We Club men have basked in the easy familiarity of the Hague Rules for close on seventy years. We know it backwards. Furthermore, we British are traditionalists...we dislike change, particularly sweeping changes, we distrust it. It interrupts and detracts from the things we value most in the development of law – continuity and certainty.” (Hill, C. “The Clubs Reaction to the Coming into Effect of the Hamburg Rules” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 197).

¹⁰³³ Nicoll, C. “Do the Hamburg Rules Suit a Shipper-Dominated Economy?” (1993) 24 JMLC 151, at p. 179.

¹⁰³⁴ Shah, M. “The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 13.

¹⁰³⁵ Sturley, M. “Changing Liability Rules and Marine Insurance” (1993) 24 JMLC 119, at p. 133.

¹⁰³⁶ *Whistler International Ltd. v Kawasaki Kisen Kaisha (The Hill Harmony)* [2001] 1 All ER 403; [2001] 1 Lloyd’s Rep. 147 (H.L.).

liability.”¹⁰³⁷ In support of this assertion, Force argues that American cases have routinely demonstrated that when the error threatens both the cargo and the vessel, the error is classified as a failure to properly care for the cargo.¹⁰³⁸ Force’s assertion is by no means uncontested, as exemplified by Professor Tetley’s statement, on the basis of English, European, and Commonwealth jurisprudence, that “where the single error that causes the cargo loss or damage is both in the management of the ship and in the care of the cargo, the carrier normally is not responsible, because the error relates to the whole venture.”¹⁰³⁹ As well, it has been noted that the issue of error in management has “no internationally uniform interpretation”¹⁰⁴⁰ and remains “a hot bone of contention”¹⁰⁴¹ with respect to distinguishing between it and care of the cargo. Given therefore the lack of consensus as to the extent, impact, and application, of the error in management defence it would perhaps be premature to postulate that the removal of it would have little effect on carrier liability.

The removal of the nautical fault exemption did elicit a fair amount of support.¹⁰⁴² One author commented that “[a]t Hamburg the delegates finally if gingerly grasped the

¹⁰³⁷ Force, R. “A Comparison of the U.S. Carriage of Goods by Sea Act – Present Text and Proposed Changes – and The Hamburg Rules” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 386. Force does acknowledge, however, that the elimination of error in navigation, especially in a collision situation, would most certainly be a change to the existing Hague system. Nevertheless, Force argues that this change is more illusory than real given the courts tendency to find that there was a failure to exercise due diligence or the occurrence of “both to blame” situations in U.S. law (*Ibid*, at p. 387).

¹⁰³⁸ *Ibid*. Arguably, this is not the strongest position, given the wealth of case law granting immunity to carriers on the basis of error in management. As well, given that the Hamburg Rules were created with the aim of establishing an international uniform framework for the carriage of goods, it is suggested that Force may want look beyond the American borders before declaring the change in international law to be a somewhat of a non-event.

¹⁰³⁹ Tetley, W. *Marine Cargo Claims*, 4th Ed., Ch. 16, at p. 7 (Available online only at: <http://tetley.law.mcgill.ca/maritime>).

¹⁰⁴⁰ Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 185. Although, Japikse does note that some progress has been made in defining the boundaries of the exception.

¹⁰⁴¹ *Ibid*.

¹⁰⁴² See for example, Werth, D. “The Hamburg Rules Revisited – A Look at the US Options” (1991) 22 JMLC 59, at p. 80; Tetley, W. “The Hamburg Rules – A Commentary” [1979] LMLCQ 1, at p. 7; Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 97; Selvig, E. “The Hamburg Rules, the Hague Rules and Marine Insurance Practice” (1981) 12 JMLC 299, at p. 324.

nettle and abolished the archaic principle of ‘error in navigation’.”¹⁰⁴³ Supporters of the Hamburg Rules commented that its “deletion of out-moded and/or unfair rules such as the defence of error of navigation is justified in order to bring cargo liability into the Twenty-First Century.”¹⁰⁴⁴ Of the arguments in this vein, one in particular that has been repeated on numerous occasions is the fact that the defence is unique to transportation law.¹⁰⁴⁵ It has been argued that the special exemptions of the Hague Rules “create practical difficulties when, as is increasingly common, carriage to destination requires different types of transport – road, rail, sea and air...[and] none of the other international conventions grant the carrier immunity for negligent loss or damage.”¹⁰⁴⁶ Article 5(1) of the Hamburg Rules on the other hand is “patterned broadly on the comparable basic rule on the liability of the air carrier in the Convention for the Unification of Certain Rules relating to International Carriage by Air of 1929, as amended by the Hague Protocol 1955 (Warsaw Convention).”¹⁰⁴⁷ It has therefore been argued that “the deletion of the nautical fault defence and the adoption of the Hamburg Rules would place sea transport in line with modern jurisprudence and with other international conventions in the field of transport, such as the CMR, CIM, and the Warsaw Convention.”¹⁰⁴⁸ Conversely, it has been argued that the unique nature of nautical fault is not a reason for its abolition, in that sea carriage is in fact unique from other modes of transportation: “There is no comparison between the quantity of cargo that may be carried by air or by road or by railway. If the carrier were to be liable in respect of loss or damage to the goods carried

¹⁰⁴³ Tetley, *ibid.*

¹⁰⁴⁴ Chandler, G. “After Reaching a Century of the Harter Act: Where Should We Go From Here?” (1993) 24 JMLC 43, at p. 45.

¹⁰⁴⁵ For example, Tetley who notes that with respect to Hamburg, the nautical fault principle “which is found in virtually no other modern law of transport, has disappeared.” (Tetley, W. “The Hamburg Rules – A Commentary” [1979] LMLCQ 1, at p. 7.

¹⁰⁴⁶ Honnold, J. “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) 24 JMLC 75, at p. 98.

¹⁰⁴⁷ Shah, M. “The Revision of the Hague Rules on Bills of Lading Within the UN System – Key Issues” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 17-18.

¹⁰⁴⁸ Weitz, L. “International Maritime Law: The Nautical Fault Debate” (1998) 22 Tul. Mar. L.J. 581, at p. 587. See also Nicoll, C. “Do the Hamburg Rules Suit a Shipper-Dominated Economy?” (1993) 24 JMLC 151, at p. 179, who describes Hamburg as “a cohesive instrument to a large degree consistent in its overall structure with other transport regimes.”; Honnold, J. “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) 24 JMLC 75, at p. 98, argues that Hamburg’s handling of the carrier’s liability was “a necessary step towards preparation of the 1980 Multimodal Convention.”

arising out of faults in the navigation of the vessel, litigation would increase enormously without any real advantage for anybody.”¹⁰⁴⁹

Conversely, the removal of nautical fault was not well received by some, as is exemplified by Chen’s statement: “this time-honoured provision was ruthlessly eliminated from the Hamburg Rules.”¹⁰⁵⁰ Lord Roskill, in a 1978 address argued that “[t]he law had always distinguished between the fault of the shipowner himself and the shipowner’s responsibility for the negligence of his servants. For the former he must remain responsible; for the latter he has historically always been allowed to disclaim responsibility. The Hague Rules had worked well for fifty years and should not be changed lightly.”¹⁰⁵¹ Opponents of Hamburg have argued that the supporters of the new liability structure fail to recognize the valid reaction from shipowners in refusing to support Hamburg: “Why should we? What’s in it for us?”¹⁰⁵² Pragmatically, “shipowners, insurers (both P&I and cargo), charterers, etc. resent having one-sided solutions imposed upon them and naturally resist such actions.”¹⁰⁵³ The alteration of the liability structure was argued to have a “notable impact on the carrier’s position and finds no compensation in an introduction of new exemptions or defences.”¹⁰⁵⁴ Not only has the widely used exemption been eliminated, it will now become increasingly difficult for shipowners to recover general average contributions.¹⁰⁵⁵ Furthermore, it has also been argued that the removal of the carrier’s exemptions is inequitable. “In contrast to the

¹⁰⁴⁹ Berlingieri, F. “The Period of Responsibility and the Basis of Liability of the Carrier” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 95.

¹⁰⁵⁰ Chen, X. “Chinese Law on Carriage of Goods by Sea under Bills of Lading” (1999) 8 *Currents Int’l Trade L. J.* 89, at p. 97.

¹⁰⁵¹ Address to the British Association of Average Adjusters in 1978, described by Buglass, L. *Marine Insurance and General Average in the United States: An Average Adjuster’s Viewpoint*, 3rd Ed. (1991) Cornell Maritime Press, Centreville, Maryland, at p. 448.

¹⁰⁵² Chandler, G. “After Reaching a Century of the Harter Act: Where Should We Go From Here?” (1993) 24 *JMLC* 43, at p. 45.

¹⁰⁵³ *Ibid.*

¹⁰⁵⁴ Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 189.

¹⁰⁵⁵ Goldie, C. “Effect of the Hamburg Rules on Shipowners’ Liability Insurance” (1993) 24 *JMLC* 111, at p. 115. Although it has been noted that where larger sums of money have been claimed from cargo interests for general average contributions, it has become almost normal practice for cargo interests to refuse to pay (*ibid.*). The Hamburg Rules, therefore, may not change the litigation situation drastically with regard to general average, it may simply make the task of recovery all the more difficult.

carrier's enhanced cargo liabilities, his possibility of recovery from sub-contractors where their negligence has brought about those liabilities, remains restricted...It looks rather inconsistent and unbalanced...and indeed unjust."¹⁰⁵⁶ With regard to pilots, for example, the carrier is often faced with compulsory pilotage areas, and in the vast majority of instances the pilotage authorities are exempt from responsibility to the carrier under statute.¹⁰⁵⁷ Previously, the carrier was protected from liability for cargo damage under the Hague Rules for the pilot's error in navigation, but under Hamburg the carrier benefits from no such protection. It is probable, therefore, that under the Hamburg Rules the carrier will be responsible for cargo loss or damage resulting from the negligent actions of pilots. Nevertheless, the argument has been made that under the Hamburg Rules only the "servants or agents" must take all reasonable measures to avoid the occurrence, which "if the courts uphold the precedent that a compulsory pilot is not the servant of the owner [then] groundings, collisions or other accidents...will be excused under Hamburg."¹⁰⁵⁸

The elimination of nautical fault has been noted for its effect on general average. "The elimination of that [nautical fault] defence would greatly alter general average practice as it is known today. Since the end of the 19th century, general average sacrifices have included numerous claims of carriers, not merely for cutting away of the mast or anchors as the result of a peril, but also where the carrier has been at fault. Exonerating ocean carriers for the fault of their servants is not an ancient phenomenon but emerged in

¹⁰⁵⁶ Japikse, R.E. "Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 191.

¹⁰⁵⁷ For example, s.10 (1) of the Legal Succession to the South African Transport Services Act, 9 of 1989, stipulates the harbours of South Africa to be compulsory pilotage harbours, while s.10 (7) provides that Portnet, the body operating the South African harbours, "...and the pilot shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot." In England, shipowner liability for errors of pilotage is governed by s.16 of Pilotage Act, U.K. 1987, c.21, while s. 22 exempts the pilotage authority from all liability for the acts of a negligent pilot. In Belgium, the Law of 30 August 1988 exempts the State from liability for damage resulting from the culpable acts or omissions of the pilots who are its employees. A Belgian court has found that this exemption from liability in favour of the State will also apply in the instance where a pilot de facto took over command of a vessel in disregard of the advice that had been given to him (Hof van Beroep te Antwerpen, October 26, 1988 [1990] ETL 678). See also Hof van Beroep te Antwerpen, September 26, 2005 (The M.S. Iberian Express) [2006] ETL 368, where the Belgium court considered restricted liability of the provider of pilotage services in the Port of Antwerp.

¹⁰⁵⁸ Bauer, G. "Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Cases by Case Analysis" (1993) 24 JMLC 53.

the last 100 years. This principle permits an ocean carrier to escape liability for the negligence of his servants in the navigation and management of the ship.”¹⁰⁵⁹ In essence, the exemption not only permits the carrier to escape liability, but to claim general average expenses as well. For example, in collision cases, general average is very often declared and the carrier is generally able to recover the cargo interests’ proportion of the general average.¹⁰⁶⁰ It has been cautioned that without the nautical fault exemption cargo owners will refuse to pay contribution in general average and thus in instances of collision, “[t]he situation would become more complicated in case[s] where general average is declared.”¹⁰⁶¹ Moreover, concern has also been expressed that carriers under Hamburg will be hesitant to provide security to salvors on behalf of the cargo interests.¹⁰⁶²

Finally, it has been argued that the elimination of the defence was a necessary policy decision. As mentioned previously, the Hamburg Conference was a political rather than a commercial and economic conference, and regardless of the economic, insurance and commercial arguments made elsewhere, the exemption has become somewhat of an anomaly when regarded in the context of modern legal systems. Arguably, “a statutory exception of the general rule that the contractor has to be liable at least for the grave fault of his main employees in performing the basic obligations of the contract would not fit into the law making policy of nearly any legislator.”¹⁰⁶³ Moreover, a provision or contractual waiver such as the nautical fault exemption which relieves the carrier from liability in the event of the fault or neglect of his servants, the master or the officers, in the navigation or management of the vessel, would if stipulated in a contract, not be valid

¹⁰⁵⁹ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 373.

¹⁰⁶⁰ Honour, J.P. “The P & I Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978” in *The Hamburg Rules on the Carriage of Goods by Sea* (1978) S. Mankabady (Ed.), British Institute of International and Comparative Law, Chameleon Press, London, at p. 243.

¹⁰⁶¹ Berlingieri, F. “The Period of Responsibility and the Basis of Liability of the Carrier” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 96, who outlines the difficulties that will arise in both-to-blame situations and general average situations with regard to litigation and apportionment of fault between the parties.

¹⁰⁶² See Karan, H. *The Carrier’s Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY, at p. 90.

¹⁰⁶³ Herber, R. “The Hamburg Rules: Origin and Need for the New Liability System” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 44.

under the laws of most nations.¹⁰⁶⁴ It has been observed that with regard to the debate concerning the elimination of nautical fault, “this is a matter of legal policy and far from economic considerations.”¹⁰⁶⁵

8.5. THE POSITION OF CERTAIN INTERNATIONAL ORGANIZATIONS

Over a decade after the Hamburg Rules were drafted, the fault-based liability regime failed to find support with either the CMI or the International Group of P&I Clubs.

During the CMI Paris Conference in 1990, the Hamburg Rules were discussed along with potential future improvements to the Hague-Visby system of liability. This conference demonstrated that the maintenance of the nautical fault exemption was far from being a dead issue from a legislative perspective. The CMI representatives dealt with the nautical fault exemption differently from the participants at the Hamburg Conference. As in the Hamburg Conference, “it was mainly the exception of liability for nautical fault of the servants which spilt up the opinions.”¹⁰⁶⁶ With respect to the CMI delegates however, “a majority was in favour of retaining this exemption in order not to overburden the carrier.”¹⁰⁶⁷ The CMI Conference approved a document entitled “Uniformity of the Law of the Carriage of Goods by Sea in the 1990’s”, which stated; “Two different views have been expressed in respect of this [nautical fault] defence: the first is that it should be retained; the second is that the defence should be abolished. The strongly prevailing view is that the exemption should be retained because it ensures a more balanced spreading of the risks and because its abolition would not ensure a more significant uniformity. In favour of the second view, it can be said that the defence is unique in respect of the carrier by sea and that the spreading of risk and the avoidance of undue concentration of risks ensured by the exception of the perils of the sea, by the

¹⁰⁶⁴ *Ibid*, noting as well that “modern laws against unfair contract practices do not allow for such a waiver of main obligations of the carrier.”

¹⁰⁶⁵ *Ibid*.

¹⁰⁶⁶ *Ibid*, at p. 43.

¹⁰⁶⁷ *Ibid*.

limitation of liability of the carrier and by the global limitation of liability.”¹⁰⁶⁸ Of the delegations present, twenty-two of them supported maintaining the nautical fault exemption,¹⁰⁶⁹ while only nine were in favour of deleting it.¹⁰⁷⁰

The fault-based liability scheme of Hamburg has proved to be even less popular with the International Group of P&I Clubs. Following the coming into force of the Hamburg Rules, the P&I Clubs reacted by altering their club rules, creating amendments to the bills of lading, and issuing circulars to their members describing such changes.¹⁰⁷¹ Primarily, unless the Club exercises its discretion to decide otherwise, costs incurred by members as a result of carriage on terms less favourable than those of Hague or Hague-Visby are not covered.¹⁰⁷² Gard, for example, altered their rules with the effect that Rule 34: Cargo Liability, which covers cargo loss or damage,¹⁰⁷³ stipulates that “the cover under this Rule 34.1 does not include:…(ii) liabilities, costs and expenses which would not have been incurred by the Member if the cargo had been or could have been carried on terms no less favourable to the Member than those laid down under the Hague or Hague-Visby Rules (save where the contract of carriage is on terms less favourable to the Member solely because of the incorporation by operation of law of the Hamburg Rules).”¹⁰⁷⁴ If a shipowner therefore voluntarily adopts the Hamburg Rules or any portion thereof, his cover will be jeopardized. The P&I Clubs also prepared a clause for incorporation into bills of lading, which “is designed to ensure that where one or other of the Hague, Hague-Visby or Hamburg Rules regimes would be applicable on its own terms by reason of the location of the port of shipment or by reason of the port of

¹⁰⁶⁸ Berlingieri, F. “The Period of Responsibility and the Basis of Liability of the Carrier” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 95.

¹⁰⁶⁹ Those delegations were: Australia-New Zealand, Belgium, Denmark, Germany, Greece, India, Indonesia, Ireland, Japan, Korea, Norway, Panama, Peru, Russia, Sweden, Switzerland, United Kingdom, United States and Yugoslavia.

¹⁰⁷⁰ Those delegations were: Brazil, Canada, Chile, France, Italy, Morocco, Nigeria, Senegal and Spain.

¹⁰⁷¹ Hazelwood, S. *P & I Clubs: Law and Practice*, 3rd Ed. (2000), LLP, London, at p. 167.

¹⁰⁷² *Ibid.*

¹⁰⁷³ Rule 34.1 “The Association shall cover the following liabilities when and to the extent that they relate to cargo intended to be or being or having been carried on the Ship: (a) liability for loss, shortage, damage or other responsibility arising out of any breach by the Member, or by any person for whose acts, neglect or default he may be legally liable, of his obligation properly to load, handle, stow, carry, keep, care for, discharge or deliver the cargo or out of unseaworthiness or unfitness of the Ship…” (Poland, S. & Rooth, T. *Gard Handbook on P&I Insurance* (1996) Gard, Arendal, Norway, at p. 257).

¹⁰⁷⁴ Poland, S. & Rooth, T. *Gard Handbook on P&I Insurance* (1996) Gard, Arendal, Norway, at p. 257

discharge, the Hague or Hague-Visby Rules have been preferred.”¹⁰⁷⁵ Technically the wording of the clause cannot prevent a claimant from bringing proceedings in a state that has ratified the Hamburg Rules. The clause does, however, restrict the application of the Hamburg Rules as much as is legally possible, to render them inapplicable when at all possible, and ensure the carrier is not viewed as voluntarily incorporating more the onerous Hamburg duties.

8.6. THE LIMITED SUCCESS OF THE HAMBURG RULES

A multitude of arguments have been made as to what the potential result of the Hamburg Rules liability scheme will be, however, the lack of success of the regime ensured that those theories were never tested. The Hamburg Rules came into force in November of 1992, fourteen years after it was agreed upon, once having reached the requisite number of twenty ratifications.¹⁰⁷⁶ At the time Hamburg came into force, fifteen of the states that had ratified it were from the Continent of Africa,¹⁰⁷⁷ making sixteen with Cameroon joining shortly thereafter, and with a fair number of them being land locked states.¹⁰⁷⁸ Subsequent ratifications have not improved the situation or the desirability of the Hague Rules.¹⁰⁷⁹ One commentator noted with regard to the countries willing to accept the Hamburg Rules, “[they are] hardly an imposing group of trading nations and not a list to get too excited about because they do not include the world’s

¹⁰⁷⁵ Hazelwood, S. *P & I Clubs: Law and Practice*, 3rd Ed. (2000), LLP, London, at p. 167-168. The text of the sample clause can be found in Appendix II(i) entitled “Hamburg Rules Clauses” at p. 414, of Hazelwood’s text.

¹⁰⁷⁶ For an explanation of the factors and lobbying that finally created enough interest for the Hamburg Rules to come into force see Katz, S. “New Momentum Towards Entry Into Force of the Hamburg Rules” [1989] ETL 297. Katz attributes the sluggishness in adherence to the Hamburg Rules in part to a well organized group of ocean carriers effectively campaigning against the Rules (*Ibid*, at p. 298).

¹⁰⁷⁷ Botswana, Burkina Faso, Egypt, Guinea, Kenya, Lesotho, Malawi, Morocco, Nigeria, Senegal, Sierra Leone, Tunisia, Uganda, United Republic of Tanzania. See also Delwaide, L. “The Hamburg Rules: A Choice for the EEC? Conclusion” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 215.

¹⁰⁷⁸ Such as Botswana, Lesotho, Uganda, Zambia, Burkina Faso, Burundi, Malawi.

¹⁰⁷⁹ According to UNCITRAL, as of January 15, 2008, the 33 parties to the Hamburg Rules are: Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Dominican Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Syrian Arab Republic, Sierra Leone, Tunisia, Uganda, United Republic of Tanzania, Zambia. Available at: www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html.

major seafaring and industrial nations. In fact these nations control no more than 2% of the world shipping tonnage and most probably even less of the world's trade."¹⁰⁸⁰ Given that the developing nations provided the impetus for the Hamburg Rules, it is somewhat ironic therefore that Professor Nubukpo, examining the Rules a decade after their creation, concluded that they have little that is attractive to developing nations.¹⁰⁸¹ In 1994, a conference entitled "The Hamburg Rules: A Choice for the EEC?" concluded with one observer remarking that "the general feeling of the speakers at this Symposium [was that] the Hamburg Rules are not acceptable and not good enough as such."¹⁰⁸²

It has been noted by one author that to date the only jurisprudence beginning to emerge on the Hamburg Rules is out of Chile.¹⁰⁸³ This is not entirely the case, as for example, the Moroccan courts have also applied the Hamburg Rules,¹⁰⁸⁴ nevertheless, it is indicative of the scant nature of the body of Hamburg Rules jurisprudence. Indeed, not only is there a lack of jurisprudence interpreting the Hamburg Rules, certain courts have recently demonstrated hostility towards their application. The Cour d'Appel de Paris considered a cargo claim for shortage ascertained at discharge in Conakry, Guinea.¹⁰⁸⁵ The court of first instance held that the Hamburg Rules applied on the basis that the port of discharge was in a State party to the Hamburg Rules.¹⁰⁸⁶ The Cour d'Appel de Paris held that the Hamburg Rules did not apply, regardless of the port of discharge, on the basis that France had not ratified the Hamburg Rules. Equally dismissive of the Hamburg Rules is the instance where the Cour de Cassation considered carriage between Thailand

¹⁰⁸⁰ Kisteman, K. "The Hamburg Rules: A Marine Underwriter's Viewpoint" Paper presented at the Seminar on The Hamburg Rules (Gold Reef City, South Africa, 20 September 1991), at p. 1.

¹⁰⁸¹ Nubukpo, C. "La Convention des Nations Unies sur le Transport International de Marchandises par Mer Dix Ans Après" [1989] DMF 538, at p. 557. Nubukpo argues that it is actually the Hague Rules that have proved to be more attractive to the developing nations.

¹⁰⁸² Delwaide, L. "The Hamburg Rules: A Choice for the EEC? Conclusion" in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 215.

¹⁰⁸³ Rozas, R. "The Hamburg Rules Enforcement in Chile", unpublished paper, at p. 3.

¹⁰⁸⁴ Cherkaoui H. "Chronique de Jurisprudence Marocaine" [2002] DMF 629, at p. 752-753, in which Cherkaoui discussed to decisions from the Court of Appeal of Casablanca dealing with the application of the Hamburg Rules to the dispute, and the limitation of liability under the Rules.

¹⁰⁸⁵ Cour d'Appel de Paris, 3 décembre 1997, DMF 1998, 588.

¹⁰⁸⁶ Article 2(1)(b) of the Hamburg Rules provides that it is applicable where the port of discharge is located in a Contracting State.

and Senegal, with Senegal being a State party to the Hamburg Rules.¹⁰⁸⁷ The Cour de Cassation found that the Court of Appeal had correctly exercised its powers of interpretation in holding that the Hague Rules were applicable since they were referred to by a Paramount Clause in the bill of lading.¹⁰⁸⁸ Similarly, the Chambre Arbitral de Paris considered a dispute in which the shipment was outbound from Morocco, a State party to the Hamburg Rules, and the claimant pleaded that the Hamburg Rules applied to the dispute.¹⁰⁸⁹ The arbitral tribunal commented that the Hamburg Rules had only a few signatories who were States with little impact in the maritime community, moreover, a new convention to replace the Rules is currently being drafted by UNCITRAL with the help of CMI.¹⁰⁹⁰ The arbitral tribunal concluded that on the basis that France has not ratified the Hamburg Rules, and the fact that the parties had incorporated the Hague Rules by virtue of a clause Paramount, the Hague Rules thus governed the dispute.¹⁰⁹¹ Nor have the Hamburg Rules found favour with the Corte di Cassazione, the Supreme Court of Italy. The Court of Appeal of Naples had determined that the Hamburg Rules applied to damaged cargo discharged in Naples on the basis that Law No. 40 of January 25, 1983 authorized their ratification. The Corte di Cassazione however determined that the Hamburg Rules did not apply because although their ratification was authorized by Parliament, they were never in fact ratified.¹⁰⁹²

As a result of the failure of the Hamburg Rules over political and commercial bargaining tables, we are left without any practical experience drawn from its actual application to validate or disprove its critics and supporters. This leaves us in the unfortunate position of resurrecting the same arguments for use with regard to the new UNCITRAL Draft Convention. If there were lessons to be learned from the application of the Hamburg Rules in practice, they have been lost. Moreover, an opportunity to modernize uniform carriage law was also lost. With outdated carriage regimes, and no

¹⁰⁸⁷ Cour de Cassation, 28 mai 2002, (World Apollo) [2003] ETL 67.

¹⁰⁸⁸ *Ibid.* Moreover, the Cour de Cassation found that there was no binding rule to conflict with the parties choice of governing law.

¹⁰⁸⁹ Sentence 1090 du 24 juin 2003, Chambre Arbitral Maritime de Paris, DMF 2004, 747.

¹⁰⁹⁰ *Ibid.*, at p. 749.

¹⁰⁹¹ *Ibid.*

¹⁰⁹² Corte di Cassazione, February 14, 2001, Brendani AB v. Magazzini Generali & Frigoriferi S.p.A., 2002 Dir. Mar. 227, summary available at: www.comitemaritime.org/jurisp/ju_hamburg.html

viable international alternative, states therefore began enacting their own carriage regimes, thus fracturing the uniformity that existed at the time of the Hamburg Rules.¹⁰⁹³

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¹⁰⁹³ Sweeney, who was present during the diplomatic conferences, commented with particular foresight at the completion of the draft that “if this draft convention fails, the prospect for the harmonious conduct of world trade will be diminished as a multiplicity of local rules will surely take the place of the Hague Rules.” (Sweeney, J. “The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V)” (1977) 8 JMLC 167, at p. 194).

Chapter 9

An Alternative to Uniform Law: National Initiatives

By the 1980's and 1990's, and particularly after it was evident that the Hamburg Rules were not a success, many nations found themselves with wholly outdated carriage regimes and began to turn to domestic solutions. Despite the unwillingness of the vast majority of trading nations to adopt the Hamburg Rules, it has nevertheless been noted that the Hamburg Rules do have many strengths. This has evidently not gone unnoticed by domestic legislatures as much of the resulting domestic legislation proved to be inspired by both the Hague-Visby and the Hamburg Rules. Several nations have opted to incorporate certain aspects of the Hamburg Rules into domestic legislation or national maritime codes, while at the same time retaining elements from the Hague and Hague-Visby Regime. Those nations, in pursuing an alternative to the existing carriage regimes, have attempted to create a solution that is widely accepted in practice by domestic shipping interests and may be viewed as a modern alternative by the international shipping community. What is significant however is that those nations, with few exceptions, have retained the Art. IV(2)(a) defence of the Hague Rules, even those who have chosen to eliminate the other Art. IV defences.

9.1. THE PEOPLE'S REPUBLIC OF CHINA

At one time, China was one arguably the world's leading maritime power. For over four centuries during the Song-Yuan Period, China had reached a level of maritime technology and trade that was centuries ahead of the European powers.¹⁰⁹⁴ This balance of power changed during the 16th century, when European advancements essentially

¹⁰⁹⁴ Deng, G. *Chinese Maritime Activities and Socioeconomic Development c.2100 B.C – 1900 A.D.* (1997) Greenwood Press, Connecticut, at p. 163. The Song-Yuan Period ran from 960 to 1368 A.D. At the time, the Chinese technology had reached such a level that it was in effect technologically similar to the European maritime powers of the late 15th century. (*Ibid*); Mo, J. *Shipping Law in China* (1999) Sweet & Maxwell Asia, Hong Kong, at pp. 5-10 detailing the history of shipping in China dating from 6,000 years ago. In particular at p. 7-8, Mo describes the seven maritime adventures of Zheng He during the Ming Dynasty between 1405 and 1433, where he was ordered to sail seven times to Southeast Asia, the Middle East and North Africa, with approximately 27,000 people aboard hundreds of ships for each journey. The largest vessel used for the voyages measured 140 meters long and 57 meters wide.

eclipsed the prior developments by the Chinese.¹⁰⁹⁵ This was largely due to the embargo on overseas trade and intermittent military blockages along the coasts, which began during the 14th century reign of Ming Dynasty.¹⁰⁹⁶ Foreign trade and shipping in China continued to be heavily restricted for centuries, continuing well into the 19th century.¹⁰⁹⁷ It was not until after the Opium Wars in the mid 19th century, that Chinese markets began to open for foreign traders.¹⁰⁹⁸ By the 1960's however, it was predicted that China would inevitably become one of the world's leading shipbuilding and operating nations.¹⁰⁹⁹ Such predictions held true, and over the past 30 years, China has rapidly become a heavy player in the shipping industry. Over 90% of China's import and export goods are transported by sea,¹¹⁰⁰ and her fleet is rapidly expanding.¹¹⁰¹ To date, this trend has shown no signs of reversal.¹¹⁰² China's ever-increasing foreign international trade and continually expanding shipping interests have ensured that China has become one of the world's major shipping nations. Despite having a long history of maritime trade, "the ancient Chinese culture, in particular Confucianism, disrespected the merchants and their wealth...[t]his led to the underdevelopment of commercial law in Chinese legal history."¹¹⁰³ As a result, there was no Chinese equivalent to the mercantile and shipping law found in the Western nations.¹¹⁰⁴ As China did not have a domestic maritime law, nor

¹⁰⁹⁵ Deng, G. *Chinese Maritime Activities and Socioeconomic Development c.2100 B.C – 1900 A.D.* (1997) Greenwood Press, Connecticut, at p. 163.

¹⁰⁹⁶ Mo, J. *Shipping Law in China* (1999) Sweet & Maxwell Asia, Hong Kong, at p. 11

¹⁰⁹⁷ *Ibid.* During the first half of the 19th century, the only port open to foreign traders was Guangzhou. Moreover, it was illegal to build any vessels that could carry over 28 people. (*Ibid.*)

¹⁰⁹⁸ *Ibid.*

¹⁰⁹⁹ Harbron, J. *Communist Ships and Shipping* (1962) Adlard Coles Ltd., London, at p. 249. Harbron however viewed the past state of Chinese shipping rather negatively, commenting at p. 249 that "until the coming of the Communist regime in late 1949 China...displayed incredible ineptitude where shipping was concerned and allowed almost the entire industry to be operated by foreign concerns."

¹¹⁰⁰ Li, K. & Ingram C. *Maritime Law and Policy in China* (2002) Cavendish Publishing, London, at p. 6; Zhang, L. "Shipping Law and Practice in China" (1990) 14 *Tul. Mar. L.J.* 209, at p. 209; Mo, J. *Shipping Law in China* (1999) Sweet & Maxwell Asia, Hong Kong, at p. 2.

¹¹⁰¹ Li, *ibid.*, at p. 1, has noted that "the annual growth rate is about 13% in number of ships and 7.7% in tonnage, which is much higher than the world average of 1.1% and 1.3% respectively." In 1974, China's fleet was ranked twenty-third in size in the world, but by the end of 1984, China ranked ninth (Zhang, *ibid.*, at p. 210.). Another impressive example is, from the years 1961 through to 1985, the size of the China Ocean Shipping Company's fleet, a state-owned enterprise, increased from just under 50 vessels, to 614 vessels. (Zhang, *ibid.*, at p. 211).

¹¹⁰² Chan, F. et al. *Shipping and Logistics Law: Principles and Practice in Hong Kong* (2002) Hong Kong University Press, Hong Kong, at p. 242 and p. 638.

¹¹⁰³ Mo, J. "Maritime Law" in *Chinese Law* (1999) Wang, G. & Mo, J. (Eds), Kluwer Law International, The Hague, at p. 678.

¹¹⁰⁴ *Ibid.*

were they party to any of the international conventions,¹¹⁰⁵ the law as applied to maritime matters was simply the principles of China's civil law, which was also uncodified.¹¹⁰⁶

Originally, the drafting of the Maritime Code began in the early 1950s,¹¹⁰⁷ with the study and the translation of Russian Maritime Law.¹¹⁰⁸ The drafting of the Maritime Code was interrupted during the period from 1963 to 1981 as a result of various political events.¹¹⁰⁹ When the drafting resumed, it became evident that neither the Hague Rules, nor the Hamburg Rules, were desirable to follow. China is a developing nation with a large volume of export and import, and thus the cargo interests favoured the Hamburg Rules. Cargo interests presented the following major arguments in favour of a Hamburg Rules inspired Maritime Code: Firstly, it was considered that neither the Hague nor the Hague-Visby Rules "are fair in distributing the risks in the carriage of goods by sea between the shipowners and cargo interests"; secondly, "that the Hamburg Rules are the trend in the development of international maritime law in this field"; and thirdly, "as a developing country, China was all for the adoption of the Hamburg Rules in 1978."¹¹¹⁰ Conversely, China possesses a strong merchant marine and a long coastline, therefore, carrier interests raised similar objections to Hamburg as were raised in the other prominent maritime nations.¹¹¹¹ In particular it was argued that none of the other powerful maritime nations have adopted the Hamburg Rules.¹¹¹² It has been noted that "[t]he PRC cannot be labelled as being predominantly "shipowning" or "cargo nation"; it is both."¹¹¹³ In order to balance the needs of cargo interests and carriers, China

¹¹⁰⁵ Chen, X. "Chinese Law on Carriage of Goods by Sea under Bills of Lading" (1999) 8 Currents Int'l Trade L. J. 89, at p. 90; Li, L. "The Maritime Code of the People's Republic of China" [1993] LMLCQ 204, at p. 205-206.

¹¹⁰⁶ Li, *ibid*, at p. 204.

¹¹⁰⁷ Beaumont, B. & Yang, P. *Chinese Maritime Law and Arbitration* (1994) Simmonds & Hill, London, at p. 61; Mo, J. *Shipping Law in China* (1999) Sweet & Maxwell Asia, Hong Kong, at p. 15.

¹¹⁰⁸ Li, K. & Ingram C. *Maritime Law and Policy in China* (2002) Cavendish Publishing, London, at p. 2.

¹¹⁰⁹ Zhengliang, H. & Huybrechts, M. "The Underlying Principles & Highlights of the Maritime Code of the P.R. China" [1995] ETL 287, at p. 287.

¹¹¹⁰ Zhengliang & Huybrechts, *ibid* at p. 290.

¹¹¹¹ Chen, X. "Chinese Law on Carriage of Goods by Sea under Bills of Lading" (1999) 8 Currents Int'l Trade L. J. 89, at p. 90.

¹¹¹² Zhengliang, H. & Huybrechts, M. "The Underlying Principles & Highlights of the Maritime Code of the P.R. China" [1995] ETL 287, at p. 290.

¹¹¹³ Beaumont, B. & Yang, P. *Chinese Maritime Law and Arbitration* (1994) Simmonds & Hill, London, at p. 76.

compromised by borrowing from both the Hague-Visby and the Hamburg Rules,¹¹¹⁴ thus creating, in the words of one commentator, “a balance between all shipping interests.”¹¹¹⁵ On November 7th, 1992, the Maritime Code was passed with an overwhelming majority of the legislators,¹¹¹⁶ and was promulgated by the President of the People’s Republic of China, to enter into force on July 1st, 2003.¹¹¹⁷ In Chinese, the words for the Maritime Code are *Hai Shang Fa*, when translated literally mean ‘law relating to maritime commerce (or trade)’.¹¹¹⁸

The Maritime Code “appears to have been the first major effort to draw from both the Hague-Visby Rules and the Hamburg Rules.”¹¹¹⁹ The Maritime Code, in Article 51, substantively maintains the carrier defences that are found in Hague-Visby, although they have been reformatted into twelve defences rather than seventeen.¹¹²⁰ Article 51 provides: “The carrier shall not be liable for the loss of or damage to the goods occurring during the period of the carrier’s responsibility arising or resulting from any of the following causes: (1) Fault of the Master, crew members, pilot or servant of the carrier in the navigation or management of the ship...”¹¹²¹ It was felt that the Hague-Visby defences, including

¹¹¹⁴ Chen, X. “Chinese Law on Carriage of Goods by Sea under Bills of Lading” (1999) 8 *Currents Int’l Trade L. J.* 89, at p. 90.

¹¹¹⁵ Beaumont, B. & Yang, P. *Chinese Maritime Law and Arbitration* (1994) Simmonds & Hill, London, at p. 76. The authors go on to comment that the Maritime Code is in effect a fair distribution between the shipowning interests and the cargo interests highlighting “[t]he cautious way in which only a pinch of the Hamburg Rules has been sprinkled into the Hague-Visby Rules [as] indicative of this.” (*Ibid*).

¹¹¹⁶ Li, K. & Ingram C. *Maritime Law and Policy in China* (2002) Cavendish Publishing, London, at p. 2 notes that it passed with “98 votes in favour out of a total of 101 votes, which was rare in Chinese legislation.”

¹¹¹⁷ Maritime Code of the People’s Republic of China, Order No 64, 1993. English translations of the Maritime Code can be found in Chan, F. et al. *Shipping and Logistics Law: Principles and Practice in Hong Kong* (2002) Hong Kong University Press, Hong Kong, at Annex 1, p. 659 and ff; Li, K. & Ingram C. *Maritime Law and Policy in China* (2002) Cavendish Publishing, London, at p. 55 and ff; Beaumont, B. & Yang, P. *Chinese Maritime Law and Arbitration* (1994) Simmonds & Hill, London, at p. 79 and ff; Zhang, L. “Recent Maritime Legislation and Practice in the People’s Republic of China” (1994) 6 *U.S.F. Mar. L.J.* 273, at p. 302 and ff.

¹¹¹⁸ Mo, J. *Shipping Law in China* (1999) Sweet & Maxwell Asia, Hong Kong, at p. 1.

¹¹¹⁹ Sturley, M. “Uniformity in the Law Governing the Carriage of Goods by Sea” (1995) 26 *JMLC* 553, at p. 561.

¹¹²⁰ Maritime Code of the People’s Republic of China, Order No. 64, 1993, Chapter 4: Carriage of Goods by Sea, Art. 51. See also Mandelbaum, S. “Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions” (1996) 23 *Transp. L.J.* 471, at p. 495.

¹¹²¹ Maritime Code of the People’s Republic of China, Order No. 64, 1993. For a judicial discussion of the defence of error in navigation and management of the vessel, or Art. 51(1) of the Maritime Code, see *Insurance Companies v. Hanzhou Shipping Co. and Ningbo Shipping Co.*, as summarized in Chen, X.

nautical fault, were important for protecting carriers, while cargo interests were protected by adopting the stricter rules with respect to deck cargo as found in the Hamburg Rules.¹¹²² Other provisions for the benefit of cargo interests also include the carrier's responsibility for delay,¹¹²³ an increased period of responsibility,¹¹²⁴ and a definition of "carrier" in line with the Hamburg Rules.¹¹²⁵ The Maritime Code has also clarified the burden of proof with regard to the carrier's defences, in that it stipulates that in order for the carrier to be entitled to exoneration under Article 51, he must bear the burden of proof.¹¹²⁶

It is noteworthy that Article 2 of the Maritime Code stipulates that "the provisions concerning contracts of carriage of goods by sea as contained in Chapter IV of this Code shall not be applicable to the maritime transport of goods between the ports of the People's Republic of China."¹¹²⁷ Domestic cabotage in China is regulated by local Chinese regulations, wherein the "carriers undertake strict liability for loss or damage to the cargo carried unless the loss or damage is caused by force majeure, an inherent vice of the cargo, or the negligent act or omission of the cargo-owner."¹¹²⁸ As well, the carriers do not benefit from a package limitation and are thus liable for all losses to the full

"Chinese Law on Carriage of Goods by Sea under Bills of Lading" (1999) 8 *Currents Int'l Trade L. J.* 89, at p. 96-97.

¹¹²² Chen, *ibid*, at p. 90.

¹¹²³ Article 50 of the Maritime Code of the People's Republic of China, Order No. 64, 1993. Although it should be noted that the article renders the carrier liable for delay only where the carrier has failed to deliver the goods within the time expressly agreed upon. Failing an express agreement, there will be no liability for delay.

¹¹²⁴ Article 46 of the Maritime Code of the People's Republic of China, Order No. 64, 1993, stipulating in the case of containerized goods, that the carrier shall be liable for the entire period during which the carrier is in charge of the goods, starting from the time the carrier has taken over the goods at the port of loading, until the goods have been delivered at the port of discharge.

¹¹²⁵ Article 42 of the Maritime Code of the People's Republic of China, Order No. 64, 1993, which includes the notion of both the contracting carrier and the performing or actual carrier.

¹¹²⁶ Maritime Code of the People's Republic of China, order No. 64, 1993, Article 51: "...The carrier who is entitled to exoneration from the liability for compensation as provided for in the preceding paragraph shall, with the exception of the causes given in the sub-paragraph (2) [Fire], bear the burden of proof." See also Li, L. "The Maritime Code of the People's Republic of China" [1993] *LMLCQ* 204, at p. 210.

¹¹²⁷ Article 2(2) of the Maritime Code of the People's Republic of China, July 1, 1993.

¹¹²⁸ Chan, F. et al. *Shipping and Logistics Law: Principles and Practice in Hong Kong* (2002) Hong Kong University Press, Hong Kong, at p. 645.

extent.¹¹²⁹ During the drafting of the Maritime Code, domestic carrier interests lobbied firmly to harmonize the two regimes, however it was to no avail.¹¹³⁰

Apart from the unfortunate disparity between the Chinese domestic regulations and the Maritime Code, the Chinese initiatives, with respect to the law of carriage, do manage to balance broad aspects of both the Hague-Visby and the Hamburg Rules. Dr. Hazelwood has commented along these lines stating that “[t]he drafters of the new Chinese Code went on a ‘window shopping’ exercise with a view to selecting the best products that they saw from the jurisdictions around the world for incorporation into their shopping basket.”¹¹³¹ The result has been, according to one commentator, that China has “at a stroke, done what other leading maritime nations have been struggling to achieve in a piecemeal fashion over many decades... [thus] the PRC puts a number of the so-called leading maritime nations to shame.”¹¹³² With roughly a quarter of the world’s population, and with ever increasing trade fuelling the current shipping market, China’s initiative in this respect cannot be ignored.

A discussion on Chinese maritime law would not be complete without a brief mention of Hong Kong. In Hong Kong, the Hague-Visby Rules are in force by virtue of being included in a schedule to the 1994 Carriage of Goods by Sea Ordinance.¹¹³³ Post 1997, Hong Kong maintained its Common law legal system inherited by virtue of its previous status as a British colony.¹¹³⁴ It has been noted that “to the relief of many, the status of Hong Kong as a free port and an international shipping centre has been successfully maintained in the years since 1997.”¹¹³⁵ As between mainland China and

¹¹²⁹ Chan, *ibid*; Li, K. & Ingram C. *Maritime Law and Policy in China* (2002) Cavendish Publishing, London, at p. 10. Carrier are however exempted from liability for any delay in delivery (Li & Ingram, *ibid*).

¹¹³⁰ Li & Ingram, *ibid*, at p. 8.

¹¹³¹ Hazelwood, S. “New Maritime Code – maritime insurance”, a Paper for the International Conference on Maritime Law, 11-14 October 1994, Shanghai Maritime University, at p. 9, as quoted in Li & Ingram, *ibid*, at p. 8.

¹¹³² Beaumont, B. & Yang, P. *Chinese Maritime Law and Arbitration* (1994) Simmonds & Hill, London, at p. 76.

¹¹³³ Carriage of Goods by Sea Ordinance, No. 104 of 1994, December 16, 1994. (Hong Kong).

¹¹³⁴ Li, M. *L’Etat de Navigabilité du Navire* (2005) D.E.S.S. Thesis, Université de Droit, D’Economie et des Sciences D’Aix-Marseille, France. Available online at: www.cdmt.droit.u-3mrs.fr, at p. 7.

¹¹³⁵ Chan, F. et al. *Shipping and Logistics Law: Principles and Practice in Hong Kong* (2002) Hong Kong University Press, Hong Kong, at p. 639.

Hong Kong, is it thought that carriage will be treated “international” thus invoking the application of the Maritime Code, rather than the domestic cabotage regulations.¹¹³⁶ It appears therefore that despite the differences between the legal systems of mainland China and Hong Kong, “there are signs that Hong Kong maritime law and mainland Chinese maritime law are interacting with each other to keep in line with international maritime practices.”¹¹³⁷

9.2. THE NORDIC NATIONS

Several nations, following the failure of the Hamburg Rules, opted to modernize their carriage law by drawing from the preferred elements of the Hamburg Rules while maintaining certain features of the Hague-Visby Regime, notably certain Article IV(2) exemptions. The Nordic countries are the prime example as they have incorporated large portions of the Hamburg Rules into their maritime codes, including the Hamburg inspired liability scheme of presumed fault, yet have explicitly retained the nautical fault exemption of the Hague-Visby Rules.

The Nordic countries are considered to be Denmark, Finland, Iceland, Norway and Sweden, however in the context of the Maritime Codes, Iceland is not included.¹¹³⁸ The Nordic countries have a long history of cooperation with respect to legislation, based on many reasons including historical, cultural and political similarities, for example, the languages spoken in Denmark, Norway and Sweden, all have a common ground.¹¹³⁹ There is also long history of cooperation with regard to maritime legislation, exemplified by the fact that a Maritime Code was introduced in Sweden-Finland in 1667.¹¹⁴⁰ In the 1890s, Maritime Codes were reformed in Denmark, Norway, and Sweden, resulting in virtually identical codes being enacted in 1893.¹¹⁴¹ Finland eventually adopted similar

¹¹³⁶ *Ibid*, at p. 645.

¹¹³⁷ *Ibid*, at p. 639.

¹¹³⁸ Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 15.

¹¹³⁹ *Ibid* at p. 15.

¹¹⁴⁰ *Ibid*, at p. 16

¹¹⁴¹ Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 26.

legislation in June of 1939, however it was structured differently.¹¹⁴² All the Nordic countries implemented the 1968 Visby Protocol into their national legislation in the early 1970s; however by the 1980s it was felt that new legislation was needed.¹¹⁴³ The national maritime law committees of each of the Nordic countries were instructed by their respective governments to co-operate in preparing new legislation governing the carriage of goods by sea.¹¹⁴⁴ The committees, as well as interest groups, debated over several major issues including whether the liability regime should reflect Hague-Visby or Hamburg.¹¹⁴⁵ Solutions were eventually reached, and on October 1st, 1994, the Nordic countries respectively adopted four maritime codes.¹¹⁴⁶ Despite the fact that they do differ slightly in their respective structure and numbering systems, the codes can collectively be referred to as the Nordic Maritime Code, as in substance the codes are identical.¹¹⁴⁷

With regard to the liability scheme, the Nordic Maritime Code has eliminated the enumerated defences of Hague, replacing them with “a general formula of the same nature as in the Hamburg Rules.”¹¹⁴⁸ The formula, in part, reads: “The carrier is liable for loss resulting from the goods being lost or damaged while they are in his charge on board

¹¹⁴² Falkanger, *ibid*; Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 16.

¹¹⁴³ Honka, *ibid*.

¹¹⁴⁴ *Ibid*.

¹¹⁴⁵ *Ibid*, at p. 17.

¹¹⁴⁶ The four Maritime Codes, were presented to their respective governments in 1993-1994, and all four entered into force on October 1, 1994. (Honka, *ibid*, at p. 17). Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, at p. 26, however notes that the dates of enactment of the codes were as follows: the Norwegian Code on 24 June 1994, the Danish on 16 March 1994, the Finnish on 5 July 1994, and the Swedish on 9 June 1994.

Note that “only the chapter on the carriage of goods was really revised, however, while the others either remained wholly or practically unchanged under new section numbers or consisted of other legislation, such as the ship arrest rules, brought into the Code’s framework.”(Tiberg, H. “Swedish Maritime Law 1989-1995” [1996] LMCLQ 519, at p. 519). A translation of The Finnish Maritime Code, Chapter 13: Carriage of Goods by Sea, can be found as Appendix 1 in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 421. The English translation of the Norwegian Maritime Code is available online at <http://folk.uio.no/erikro/WWW/NMC.pdf>. The Norwegian Maritime Code can also be found online through www.lovdata.no/info/lawdata.html.

¹¹⁴⁷ “The structure of the Finnish and Swedish versions of the Code are identical, with the provisions divided into chapters and sections. The carriage of goods by sea is treated in Chapter 13, ss. 1 – 61. The Danish and Norwegian versions of the Code are identical, with the provisions divided into sections. The carriage of goods by sea is treated at ss. 251-311 inclusive.” (Tetley, W. “The Demise of the Demise Clause?” (1999) 44 McGill L.J. 807, at p. 845, footnote 193); See also Falkanger, T. et al. *Scandinavian Maritime Law: the Norwegian Perspective* (2004) Universitetsforlaget, Oslo, in Preface.

¹¹⁴⁸ Ramberg, J. “New Scandinavian Maritime Codes” (1994) II Dir. Mar. 1222, at p. 1223.

or ashore, unless he proves that neither his fault or neglect nor the fault or neglect of any one for whom he is responsible has caused or contributed to the loss.”¹¹⁴⁹ The Nordic Maritime Code, however, explicitly retains the defence of nautical fault, along with the defence of fire. The exemption can be found in the Swedish and the Finnish Codes, at Chapter 13, Section 26.1, whereas in the Norwegian and Danish Codes it is found at section 276.1. The provision reads: “The carrier is not liable if he proves that the loss results from 1) fault or neglect of the master, any member of the crew, the pilot or any other person performing work in the vessel’s service in the navigation or in the management of the vessel...”¹¹⁵⁰ This formulation of carrier’s liability, the general provision along with the retention of nautical fault and fire, was a result of a decision on the part of the Nordic countries to alter the formula in favour of Hamburg, but only in so much as the substance of the provision remained unaffected.¹¹⁵¹ In essence, the Nordic countries felt that provided nautical fault and fire were not eliminated, the rest of the catalogue of exemptions was unnecessary.¹¹⁵² By proving that any of the eliminated exceptions were the sole cause, the carrier will in essence have proved that neither he, nor his servants or agents were at fault.

9.3. CANADA

Canada, despite being bordered by three oceans and a major inland waterway, “is not a maritime state in the true sense of this expression.”¹¹⁵³ Although Canada has a large foreign and international trade sector, the vast majority of trade passes by road and rail to the United States or overseas by foreign flagged vessels.¹¹⁵⁴ “Canada is a nation of importers and exporters, of shipper and consignees, but not a carrier nation in ocean

¹¹⁴⁹ Chapter 13, Section 25, of the Finnish Maritime Code. The remainder of the provision reads: “The carrier is not liable for loss resulting from measure to save life of from reasonable measures to save vessels or other property at sea. Where fault or neglect on the part of the carrier combines with another cause to produce loss, the carrier is liable only to the extent that the loss is not attributable to fault or neglect on his part.” A translation of The Finnish Maritime Code, Chapter 13: Carriage of Goods by Sea, can be found as Appendix 1 in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 421.

¹¹⁵⁰ Finnish Maritime Code, 13:26.1.

¹¹⁵¹ Honka, H. “New Carriage of Goods by Sea – The Nordic Approach,” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at pp. 22-23.

¹¹⁵² *Ibid*, at p. 42.

¹¹⁵³ Gold, E. et al. *Maritime Law* (2003) Irwin Law, Toronto, at p. 23.

¹¹⁵⁴ *Ibid*.

trade.”¹¹⁵⁵ Canada’s national flag fleet is therefore quite small. Nevertheless, this was not always the case, as Canada in previous centuries had a rather extensive merchant marine, primarily owing to its position as an important extension of British Imperial shipping.¹¹⁵⁶ This connection also resulted in Canadian maritime law being firmly rooted in British law,¹¹⁵⁷ including Canadian shipping legislation in the early 20th century, which was very closely related to prior British legislation.¹¹⁵⁸

In the early 1980s Canadian academics studied the potential impact of the Hamburg Rules from the perspective of Canadian interests.¹¹⁵⁹ It was concluded that the Hamburg Rules would be an improvement on the Carriage of Goods by Water Act 1936, and thus their adoption was recommended.¹¹⁶⁰ In 1984 Transport Canada published a consultation paper recommending the Hamburg Rules, however shipowners, P&I Insurance, cargo insurers and legal experts preferred adopting the Hague-Visby Rules.¹¹⁶¹ Consensus between various industry groups was not reached, therefore a two-pronged approach was agreed upon which involved adopting the Hague-Visby regime immediately with a provision to bring into force the Hamburg Rules when a sufficient number of Canadian trading partners had ratified them.¹¹⁶² In 1993, Canada implemented the Hague-Visby Rules in Part I of the Carriage of Goods by Water Act 1993.¹¹⁶³ Part II of the Act permitted the implementation of the Hamburg Rules in the future,¹¹⁶⁴ and required the Minister of Transport to submit in 1999 a report evaluating whether the Hamburg Rules should replace the Hague-Visby Rules, and then continue this process

¹¹⁵⁵ Tetley, W. “Canadian Comments on the Proposed UNCITRAL Rules” (1978) 9 JMLC 251, at p. 252.

¹¹⁵⁶ Gold, E. et al. *Maritime Law* (2003) Irwin Law, Toronto, at p. 23.

¹¹⁵⁷ Tetley, W. “A Definition of Canadian Maritime Law” (1996) 30 U.B.C. L.Rev. 137.

¹¹⁵⁸ Gold, E. et al. *Maritime Law* (2003) Irwin Law, Toronto, at p. 24.

¹¹⁵⁹ “The Future of Canadian Carriage of Goods by Water Law” report by Dalhousie Ocean Studies Program, of Dalhousie University, discussed in Transport Canada, “Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water” (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 3.

¹¹⁶⁰ *Ibid.*

¹¹⁶¹ *Ibid.*

¹¹⁶² Transport Canada, “Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water” (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 3.

¹¹⁶³ Carriage of Goods by Water Act 1993, c. 21 (Canada).

¹¹⁶⁴ *Ibid.*, Section 10.

every five years.¹¹⁶⁵ By 1999, the Minister's report concluded that "Canada would continue, for the time being, to be party to the Hague-Visby Rules 1968/1979, in accordance with the practice of most of its major trading partners."¹¹⁶⁶ In the 2004 Transport Canada consultation paper and report, it was noted that "the overall lack of support [the Hamburg Rules] have received from the international community has resulted in their no longer being considered at viable replacement for the Hague/Visby Rules."¹¹⁶⁷ The report therefore recommended that the Hague-Visby Regime remain, and the Hamburg Rules be reconsidered in the next review cycle ending January 1, 2010.¹¹⁶⁸ Although the liability regime is entirely based on Hague-Visby and will remain so until at least 2010 if not longer, the recent Marine Liability Act has however, implemented certain important advantages for cargo claimants.¹¹⁶⁹

9.4. AUSTRALIA

The events leading up to the current carriage regime in Australia resemble the series of positions adopted by the Canadian legislators. In 1991, the Carriage of Goods by Sea Act,¹¹⁷⁰ which provided for the implementation of the Hague-Visby Rules, came into force. The Act contained a provision that brought the Hamburg Rules into force in late 1994, unless steps were taken to delay their entry.¹¹⁷¹ Australian cargo interests supported the Hamburg Rules, while the carriers supported the existing regime, and thus the Australian government in search of alternative regimes, consulted with members of the

¹¹⁶⁵ *Ibid*, Section 4.

¹¹⁶⁶ Tetley, W. "Canadian Maritime Legislation and Decisions 1999-2001" [2001] LMCLQ 551, at p. 553.

¹¹⁶⁷ Transport Canada, "Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water" (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 5.

¹¹⁶⁸ *Ibid*.

¹¹⁶⁹ The 1993 Carriage of Goods by Water Act is no longer in force, having been replaced by the Marine Liability Act 2001, c. 6, in force August 8, 2001, which covers carriage of goods in Part 5. Section 44 of the Marine Liability Act now governs the Minister's responsibility to present the House of Parliament with a report every five years considering whether Hague-Visby should be replaced by Hamburg. The Marine Liability Act does implement Hague-Visby, as did its predecessor, however, in s.46 a significant advantage has been gained for cargo interests wherein right of access to Canadian litigation and arbitration has been granted to plaintiffs in cargo claims regardless if the contract of carriage contains an arbitration or jurisdiction clause selecting a forum other than Canada.

¹¹⁷⁰ Carriage of Goods by Sea Act, No. 160 of 1991, in force Oct. 31, 1991.

¹¹⁷¹ Hetherington, S. "Australian Hybrid Cargo Liability Regime" [1999] LMCLQ 12, at p. 12.

shipping community prior to the 1994 deadline.¹¹⁷² The trigger was delayed for another three years in 1994,¹¹⁷³ and the Minister then directed that discussions should be held “with a view to developing a [cargo liability] regime which provides fair and reasonable protection for both shippers and carriers.”¹¹⁷⁴ The Department of Transport gathered experts from carriers, cargo interests, marine insurance, and legal advisors, and by 1995 a report was released, which was then endorsed by industry.¹¹⁷⁵ Further industry comments were sought on the suggested changes to Australia’s carriage regime in 1996.¹¹⁷⁶ In order to buy time, in 1997 the Carriage of Goods by Sea Amendment Act, repealed the trigger mechanism thus ensuring that the Hamburg Rules would not come into force.¹¹⁷⁷ Amendments to the carriage regime were made, and on July 1st, 1998 the Carriage of Goods by Sea Regulations 1998, came into force.¹¹⁷⁸ The Hague-Visby defences, including nautical fault, have remained, however, the period of responsibility of the carrier has been extended, deck cargo is included, as is liability for delay in certain circumstances, and the amendments cover EDIs and sea waybills.¹¹⁷⁹ “Australia’s position is that it has remained within the internationally popular framework of Hague-Visby Rules, while satisfying the bulk of its national maritime shipping industry’s

¹¹⁷² Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 Transp. L.J. 43, at p. 51.

¹¹⁷³ Hetherington, S. “Australian Hybrid Cargo Liability Regime” [1999] LMCLQ 12, at p. 12.

¹¹⁷⁴ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 Transp. L.J. 43, at p. 51.

¹¹⁷⁵ Davies, M. “Australian Maritime Law Decisions 1997” [1998] LMLCQ 394, at p. 394-395; Thornton, *ibid*, at p. 52; Hetherington, S. “Australian Hybrid Cargo Liability Regime” [1999] LMCLQ 12, at p. 12.

¹¹⁷⁶ Hetherington, *ibid*, at p. 13.

¹¹⁷⁷ Davies, M. & Dickey, A. *Shipping Law* 3rd Ed (2004) Lawbook Co, Pyrmont, Australia, at p. 171; Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 JMLC 595, at p. 611; Hetherington, *ibid*; At the time, it was thought unlikely that the Hamburg Rules would ever be implemented in Australia in their entirety, and the piecemeal nature of their implementation had been noted: “on the Hamburg Rules [Ian Davis] said it is still a very long way from achieving international recognition as its adoption has so far been piecemeal and tentative.” (“Halfway to Hamburg: Australia to amend COGSA” [1997] Fairplay 10th July, at p. 22.); See also Cremean, D. *Admiralty Jurisdiction: Law and Practice in Australia and New Zealand 2nd Ed.* (2003) The Federation Press, Sydney, at p. 50-51, discussing the “Amended Hague Rules”.

¹¹⁷⁸ Davies, M. “Australian Maritime Law Decisions 1998” [1999] LMCLQ 406, at p. 406;

¹¹⁷⁹ Hetherington, S. “Australian Hybrid Cargo Liability Regime” [1999] LMCLQ 12, at p. 13-14; See also White, M. *Australian Maritime Law*, 2nd Ed. (2000) Federation Press, Sydney, at p. 79-80 discussing the implications of Article 4A (delay) with respect to the exemptions under Article 4(2); See also Davies, M. & Dickey, A. *Shipping Law* 3rd Ed (2004) Lawbook Co, Pyrmont, Australia, at pp. 173 and ff. discussing the overall effect of the modified provisions.

priorities.”¹¹⁸⁰ Certain commentators have viewed Australia’s compromise between the Hague-Visby Rules and the Hamburg Rules as a model for modern reform of outdated carriage law.¹¹⁸¹

9.5. OTHER NATIONS

Many nations whose transportation law was in need of modernization, decided in the 1990s to opt for a carriage regime based predominantly on Hague-Visby, despite the fact that the Hamburg Rules had entered into force. Often, these new carriage statutes, may have a few modern elements and modifications inspired by Hamburg, but the general scheme, and in particular the liability scheme, opted for is the Hague-Visby scheme.

Japan amended its carriage of goods regime and ratified the Hague-Visby Rules in 1992, bringing the new legislation into force in June 1993.¹¹⁸² Although it is largely based on the Hague-Visby Rules, Japan’s legislation includes liability for delay, an extended period of responsibility, and applies to both inbound and outbound shipments.¹¹⁸³ Also in 1992, Greece acceded to the both the Hague and the Hague-Visby Rules.¹¹⁸⁴ The ratification was made by Law 2107/1992, which by virtue of its Article 2 renders the rules applicable to “any sea carriage performed under a Bill of Lading between ports belonging to different States as well as to sea carriage between Greek ports.”¹¹⁸⁵ The result being that anywhere Greek law is applicable, the Hague and Hague-Visby Rules will be enforced, even if the carriage is between non-contracting States.¹¹⁸⁶ In 1994, New Zealand enacted a new Maritime Transport Act, which essentially adopts

¹¹⁸⁰ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 *Transp. L.J.* 43, at p. 52.

¹¹⁸¹ *Ibid.*

¹¹⁸² Transport Canada, “Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water” (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 5. Available online from the Canadian Maritime Law Association website at: www.cmla.org/papers/2004/TransportReport-Oct.4.%202004.pdf.

¹¹⁸³ *Ibid.*

¹¹⁸⁴ Timagenis, G. “Greece Acceded to Hague and Hague/Visby Rules” [1993] *ETL* 535, at p. 535.

¹¹⁸⁵ Article 2 of Law 2107/1992 (Gov. Gazette 203A/29.12.1992) (Greece); Timagenis, *ibid.*

¹¹⁸⁶ Timagenis, *ibid.*

the Hague-Visby Rules, but has been modified to cover sea waybills.¹¹⁸⁷ South Africa has also incorporated the Hague-Visby Rules into its domestic legislation, but modified it with regard to waybills as well.¹¹⁸⁸ A South African commentator has explained; “South Africa did not adopt the Hamburg Rules, but followed the direction of the United Kingdom and incorporated the Hague-Visby Rules into our domestic legislation even though the South African sea carriage industry is shipper dominated. However, this seems to be the result of a strong carrier/ship owner interest with considerable support from the marine insurance industry.”¹¹⁸⁹ German shipowners also proved to be influential when it became clear that the German law on carriage was in serious need of modernization. Based on strong shipowner opposition, and a reticence on the part of major maritime states to adopt the Hamburg Rules, amendments based on the Visby Protocol were made to the German Commercial Code (HGB).¹¹⁹⁰

Several nations have recently adopted new maritime codes. The Republic of Madagascar, at the turn of the millennium, reformed their 1966 National Maritime

¹¹⁸⁷ Maritime Transport Act 1994, No. 104 (New Zealand); Nicoll, C. “Significant Carriage of Goods by Sea Reform in New Zealand” (1995) 26 JMLC 443, at p. 463, comments that “[i]n view of the Ministry of Transport’s consistent support of the Hamburg Rules it is surprising that nothing have been done by legislation even to anticipate their adoption.”

¹¹⁸⁸ Carriage of Goods by Sea Act 1 of 1986, s. 1(c). (South Africa), amended by the Shipping General Amendment Act 23 of 1997 (giving force to the Visby SDR Protocol of 1979). See Staniland, H. “The New Carriage of Goods by Sea Act in South Africa” [1987] LMCLQ 305, for a discussion of the differences between the former South African shipping legislation, ss. 307-311 of the Merchant Shipping Act 57 of 1951, and the new Act.

¹¹⁸⁹ Lourens, M. “An Overview of the Regimes Governing the Carriage of Goods By Sea” (1999) 10 Stellenbosch L. Rev. 244, at p. 248.

¹¹⁹⁰ Herber, R. “German Law on the Carriage of Goods by Sea” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 346. The amendments were brought in by The Law to Amend the Commercial Code and Other Law (Second Maritime Law Amendment Act) of 25 July 1986 (Ashton, R. “A Comparative Analysis of the Legal Regulation of Carriage of Goods by Sea Under Bills of Lading in Germany” (1998) Available at: www.mlaanz.org/docs/99journal7d.html). In 1998, the German law with respect to transport on inland waterways was harmonized with the maritime provisions of the HGB. See Herber, R. “German Transport Law Reform Act, June 25, 1998” [2000] ETL 23; See also Trappe, J. “The Reform of German Transport Law” [2001] LMCLQ 392.

It should be noted that Germany has a history of domestically incorporating law based on the uniform law, but in a hybrid form. The Law of August 10th, 1937, amended the Commercial Code with the principles from the Hague Rules, but with modifications such as the fact that it applies to all contract for the carriage of any cargo from the time the goods are taken into the custody of the carrier until their delivery to the consignee (Yiannopolous, A. *Negligence Clauses in Ocean Bills of Lading* (1962) Louisiana State University Press, Louisiana, at p. 51). Germany’s tendency to incorporate uniform law into domestic legislation without having acceded to the uniform law itself, as it did with the Visby Protocol, has caused problems in certain instances. See Rubin, D. & Windahl, J. “Is Germany a Hague-Visby State under Scandinavian Law?” [2000] ETL 459.

Code.¹¹⁹¹ The Code, described as modern, complete and balanced, has retained the nautical fault defence.¹¹⁹² Poland has also recently adopted a new maritime code.¹¹⁹³ The Polish Maritime Code entered into force on June 4th, 2002,¹¹⁹⁴ and contains the original Hague Rules list of carrier exemptions, including nautical fault, along with certain newer modifications with regard to the responsibility of the carrier.¹¹⁹⁵ Russia enacted a new Code of Commercial Navigation in 1999, which is similar to the Chinese Maritime Code in that the nautical fault exemption can only be invoked by the carrier when there is transport involving a foreign port, and not in the case of cabotage.¹¹⁹⁶ Finally, in both the recently enacted Algerian Maritime Code,¹¹⁹⁷ and the Latvian Maritime Code,¹¹⁹⁸ the liability regimes were inspired by the Hague Rules rather than the Hamburg Rules.¹¹⁹⁹

9.6. ELIMINATION OF NAUTICAL FAULT

As mentioned above, the majority of nations have specifically incorporated or enacted the nautical fault defence, or selected the Hague-Visby liability regime over the Hamburg one; nevertheless there are instances where the defence has been eliminated. Korea, in 1993, revised their Commercial Code, and the Hague-Visby Rules, not Hamburg, inspired the revisions.¹²⁰⁰ The Koreans, however, “took liberties” when

¹¹⁹¹ Delebecque, P. “Le nouveau code maritime de Madagascar” [2001] DMF 931. The National Maritime Code, Law July 5, 1966, was reformed by virtue of Law No. 99-028 of the Republic of Madagascar.

¹¹⁹² Delebecque, *ibid*, at p. 934.

¹¹⁹³ The previous maritime code dated from 1961 (Zuzewicz, I. “Le Nouveau Code Maritime Polonais” [2003] DMF 975, at p. 975).

¹¹⁹⁴ Zuzewicz, *ibid*, at p. 977. The new Maritime Code was promulgated in the Law Journal of the Republic of Poland 2001, No. 138, 1545.

¹¹⁹⁵ Zuzewicz, *ibid*, at p. 982.

¹¹⁹⁶ Litvinski, D. “Le Nouveau Code de la Navigation Commerciale de la Fédération de Russie” [2000] DMF 601, at p. 148.

¹¹⁹⁷ Algerian Maritime Code, 1998, Law 98-05 of 25/05/1998.

¹¹⁹⁸ Latvian Maritime Rules (Maritime Code) – Cabinet Rule No. 168 (1994).

¹¹⁹⁹ Boukhatmi, F. “Les Nouvelles Dispositions de la Loi 98-05 Portant Code Maritime Algérien” [2000] DMF 610, at p. 1040 and p. 1048. Boukhatmi notes that the Algerian legislators were not inspired by the Hamburg Rules in particular, which is contrary to the general approach of Algeria who tends to harmonize with recent private international codes. (Boukhatmi, *ibid* at p. 1040); Lejnieks, M. “Diverging Solutions in the Harmonisation of Carriage of Goods by Sea: Which Approach to Choose?” (2003) 8 Unif. L. Rev. 303, at p. 304, footnote 7, notes that Chapter 22 of the Latvian Maritime Code entitled Carriage by Sea contains the Hague Rules based liability regime.

¹²⁰⁰ Sturley, M. “Uniformity in the Law Governing the Carriage of Goods by Sea” (1995) 26 JMLC 553, at p. 562.

incorporating the Hague-Visby amendments into their domestic law.¹²⁰¹ Art. 789 of the Korean Carriage of Goods Law for Maritime Commerce contains the Hague-Visby defences, although the nautical fault and fire defences were specifically eliminated.¹²⁰² Chile also eliminated the nautical fault defence, preferring instead the Hamburg liability regime. The fault-based regime of Hamburg has been specifically incorporated into its Chilean Code of Commerce, with the result that Article 5.1 of Hamburg forms the basis for Article 984, Title V of Book III of the Code.¹²⁰³ Nevertheless, Korea is the only notable example, of the countries not a party to the Hamburg Rules, who opted for a Hamburg based liability regime.

9.7. THE UNITED STATES

In the United States, there has been long standing frustration at the out-moded carriage regime still in force.¹²⁰⁴ In the 1980's Congress was unwilling to act, as underwriters, carriers and the Maritime Law Association (MLA) favoured the Visby Protocol, while the cargo interests favoured the Hamburg Rules.¹²⁰⁵ As the government was unwilling to be caught in the middle of the dispute between the various commercial interests, other bodies attempted to resolve the deadlock.¹²⁰⁶ The American Bar Association, with the support of the MLA, proposed in 1987 that the Visby Protocol be ratified, but that further changes should also be implemented such as the elimination of the nautical fault defence.¹²⁰⁷ The proposal failed when major cargo interests declined to

¹²⁰¹ Mandelbaum, S. "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions" (1996) 23 *Transp. L.J.* 471, at p. 492.

¹²⁰² Korean Commercial Code, CH. IV, 1, at Art. 787 – 89, cited in Mandelbaum, *ibid.*

¹²⁰³ Rozas, R. "The Hamburg Rules Enforcement in Chile" unpublished paper, at p. 3. Although Chile is a signatory to the Hamburg Rules which have been in force there since the 1st of November 1992.

¹²⁰⁴ Which is COGSA 1936, based on the Hague Rules, as the United States never ratified the Visby Protocol.

¹²⁰⁵ Force, R. "A Comparison of the U.S. Carriage of Goods by Sea Act – Present Text and Proposed Changes – and The Hamburg Rules" in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 373, noting that the state of affairs was such that "neither the carrier interests who favoured Visby amendments nor the shipper interests which favoured Hamburg had enough support to prevail." Congress would have admittedly enacted any changes that the major interests agreed on, but it was a stalemate between the two sides.

¹²⁰⁶ Sturley, M. "Uniformity in the Law Governing the Carriage of Goods by Sea" (1995) 26 *JMLC* 553, at p. 569.

¹²⁰⁷ Mandelbaum, S. "International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules" (1995) 5 *J.*

support it.¹²⁰⁸ These failures, coupled with the failure of the Hamburg Rules to provide an acceptable international regime, resulted in calls in the early 1990s for a domestic solution to the problem. A United States commentator, in response to the question “Is there a way out of this impasse?” replied: “The answer is yes, if we follow what we did for the Harter Act; when faced with an unsatisfactory international situation, seek a commercial solution among U.S. commercial interests.”¹²⁰⁹

9.7.1. The Compromise

In 1992, the MLA convened an Ad Hoc Liability Study Group “to attempt to reach a commercial compromise that could be presented to Congress with consensus support from the industry.”¹²¹⁰ The cargo interests and shipper groups had made “the elimination of the navigational fault defence a precondition to their support of any new legislation in this field.”¹²¹¹ It has been therefore noted that as a “matter of political necessity” the nautical fault exemption would have to be eliminated in order to obtain a successful compromise.¹²¹² The carriers on the other hand were unwilling to lose the defence. “Carriers view the exemption of nautical fault as an important device of risk distribution among insurers in major casualties. It works to spread the loss among numerous underwriters, with little effect on the world’s cargo premiums.”¹²¹³ Moreover, in the United States the total elimination of the nautical fault exemption would have the effect that “the rule in *Schnell v. Vallescura* would require the carrier either to prove absence of negligence or to prove the extent to which the loss is attributable to each cause. Carrier interests suspect[ed] that in many courts this burden would be impossible

Transnational L. & Policy 1, at p. 21-22; Sturley, *ibid*, at p. 569; Sturley, M. “Proposed Amendments to the Carriage of Goods by Sea Act” (1996) 18 Hous. J. Int’l L. 609, at p. 614-615.

¹²⁰⁸ Mendelsohn, A. “Why the U.S. Did not Ratify the Visby Amendments” (1992) 23 JMLC 29, at p. 52.

¹²⁰⁹ Chandler, G. “After Reaching a Century of the Harter Act: Where Should We Go From Here?” (1993) 24 JMLC 43, at p. 46.

¹²¹⁰ Sturley, M. “Proposed Amendments to the Carriage of Goods by Sea Act” (1996) 18 Hous. J. Int’l L. 609, at p. 616.

¹²¹¹ Sturley, M. “Uniformity in the Law Governing the Carriage of Goods by Sea” (1995) 26 JMLC 553, at p. 577.

¹²¹² *Ibid*.

¹²¹³ Mandelbaum, S. “International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules” (1995) 5 J. Transnational L. & Policy 1, at p. 28.

to carry.”¹²¹⁴ The proposal therefore tried to respond to cargo interests by eliminating the traditional version of nautical fault, but attempted to cater to carrier concerns by changing the burden of proof structure. The rationale was that in imposing “on the cargo claimant the burden of proving the carrier’s negligence in navigation or management ... in cases where the carrier has a legitimate defence to liability, that defence will not be lost on mere allegations of negligence in navigation or management unless the cargo claimant can prove the case.”¹²¹⁵ The proposed compromise found in the new Art. IV(2)(a) stipulated that carriers and their ships shall not be responsible for loss or damage arising or resulting from: “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 the management of the ship.”¹²¹⁶ The study group’s final proposal was submitted to the MLA in 1996, and was presented as a bill before the Senate’s Sub-Committee on Surface Transportation and Merchant Marine on April 21st, 1998.¹²¹⁷

9.7.2. The Resulting Discussion

The COGSA bill has called “radical” and described as “a substantial rewrite of both Hague-Visby and Hamburg elements and the incorporation of radically new definitions and ideas.”¹²¹⁸ Nevertheless, the qualified nautical fault proposal has received a measure of support.¹²¹⁹ One commentator has asserted, “a qualified nautical fault

¹²¹⁴ Sturley, M. “Proposed Amendments to the Carriage of Goods by Sea Act” (1996) 18 Hous. J. Int’l L. 609, at p. 630.

¹²¹⁵ *Ibid*, at p. 631.

¹²¹⁶ Quoted in Weitz, L. “International Maritime Law: The Nautical Fault Debate” (1998) 22 Tul. Mar. L.J. 581, at p. 589; and in Force, R. “A Comparison of the U.S. Carriage of Goods by Sea Act – Present Text and Proposed Changes – and The Hamburg Rules” in *New Carriage of Goods by Sea*. (1997) H. Honka (Ed.) Institute of Maritime and Commercial Law, Abo, at p. 387. Subsequently the numbering the provisions were altered such that s. 9(2)(d) dealt with the claimants burden of proving negligence in navigation or management. See Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] LMCLQ 126, at p. 130; and Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 JMLC 595, at p. 601.

¹²¹⁷ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 Transp. L.J. 43, at p. 49-50. Note that the final version of the bill was presented on September 24th, 1999 as it had to be re-written as the Senate declined the 1998 draft (*Ibid*).

¹²¹⁸ Myburgh, P. “Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?” (2000) 21 Victoria U. Wellington L. Rev. 355, at p. 369.

¹²¹⁹ Especially from shipping interests. The National Industrial Transportation League considers “the revisions to COGSA [to] represent a balanced compromise between the Hague-Visby and Hamburg Rules

defence would be equitable to both sides to the debate, and still retain its traditional rationale.”¹²²⁰ It has been argued that the amendment reflects modern shipping realities, by “eliminat[ing] the navigational fault exemption and instead provid[ing] for an allocation of responsibility where loss or damage is attributable partially to the fault of the carrier and partially to exempted perils in the act.”¹²²¹ On the other hand, the proposal to eliminate the traditional nautical fault defence “has promoted intense opposition from influential ocean carriers, which continue to see the value in the defence and remain sceptical about the wisdom of the proposal generally.”¹²²² It has also attracted criticism from academics, particularly with regard to the burden of proof. Under the proposal, the carrier may become liable for nautical fault if the cargo claimant can satisfy his burden of proving negligence.¹²²³ “In many cases, this would be an onerous, if not impossible, burden to discharge, because the cargo claimant usually lacks ready access to the facts needed to make such proof. The benefit derived from the abolition of the carrier’s defence of error in navigation or management of the ship is thus lessened in practice.”¹²²⁴

9.7.3. The Failure of COGSA 1999

In early 2000, it appeared that the proposed legislation would be put through Congress as it had the requisite support. “Senator Hutchinson [had] indicated to the press

and will lead to global uniformity in the treatment of cargo liability.” (Taylor, L. “Proposed Changes to the Carriage of Goods by Sea Act: How Will They Affect the United States Maritime Industry at the Global Level” (1999) 8 *Currents Int’l Trade L.J.* 32, at p. 37).

¹²²⁰ Mandelbaum, S. “Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions” (1996) 23 *Transp. L.J.* 471, at p. 501.

¹²²¹ Taylor, L. “Proposed Changes to the Carriage of Goods by Sea Act: How Will They Affect the United States Maritime Industry at the Global Level” (1999) 8 *Currents Int’l Trade L.J.* 32, at p. 34.

¹²²² Papavizas, C. & Kiern, L. “1999-2000 U.S. Maritime Legislative Developments” (2001) 32 *JMLC* 349, at p. 368; Wood, S. “Multimodal Transportation” (1998) 46 *Am. J. Comp. L.* 403, at p. 410, notes that the elimination of the defence produced a “furore among carriers [in the United States] and abroad.”; In particular the AWO, which represents carriers operating on United States inland waterways, is opposed to the proposal citing their biggest concern as the fact that they would become responsible for errors of navigation and management, which arguably is justified given their accident rate is higher due to congested waterways, bridges and docks (Taylor, *ibid.*, at p. 37). BIMCO also opposed the proposal arguing that in eliminating nautical fault it overturns the well-founded principle in shipping that the vessel owner is not liable where crew negligence has put the cargo and vessel at risk (Taylor, *ibid.*).

¹²²³ Asariotis, R. & Tsimplis, M. “The Proposed US Carriage of Goods by Sea Act” [1999] *LMCLQ* 126, at p. 130. For a scathing response to this article see Sturley, M. “Proposed Amendments to the US Carriage of Goods by Sea Act: A Response to English Criticisms” [1999] *LMCLQ* 519; For an equally scathing response to Sturley, see Asariotis, R. & Tsimplis, M. “The Proposed amendments to the US Carriage of Goods by Sea Act: a Reply to Professor Sturley’s Response” [1999] *LMCLQ* 530.

¹²²⁴ Tetley, W. “The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea Law” (1999) 30 *JMLC* 595, at p. 601-602.

that she was firmly behind the U.S. COGSA proposal by the United States Maritime Law Association, and that she was prepared to see it through. Furthermore, the proposal [had] obtained significant support from such organizations as NITLeague and the American Institute of Marine Underwriters.”¹²²⁵ It had been anticipated that Senator Hutchinson would have been able to push the proposed legislation through Congress during the 106th Session, in 2000, however, she was reassigned from Chairman of the Surface Transportation and Merchant Marine Subcommittee to chair another committee.¹²²⁶ “The Senator was a supporter of U.S. COGSA reform, well-versed in maritime cargo shipping concerns and not easily replaceable in such matters.”¹²²⁷ The Senator’s departure slowed the progress of the reform, and by 2002 “the COGSA reform effort was focused on negotiating the elements of the International Cargo Liability Convention drafted by the [CMI] at the request of [UNCITRAL].”¹²²⁸ It has now been agreed that “it seems unlikely that this bill will be of congressional priority in the near future,”¹²²⁹ or even at all.¹²³⁰

9.8. CONCLUSION

The past two decades have shown that due to an ever-increasing dissatisfaction with the current international regime, many nations have adopted a unilateral approach to the modernization of the law of carriage of goods by sea. Despite domestic legislation and statutory instruments providing the impetus for the Hague Rules close to a century ago, one may question whether the same is true today. The Harter Act provided a

¹²²⁵ De Orchis, “Speech to the Maritime Administrative Bar Association Regarding Status of Cargo Liability Regimes” January 26, 2001. Available at: www.marinelex.com/marinelex/statuscargo.cfm. Note that the NITLeague, is the National Industrial Transportation league, which is a group of shippers and associations of shippers that conduct industrial and commercial enterprises of all size throughout the United States (Taylor, L. “Proposed Changes to the Carriage of Goods by Sea Act: How Will They Affect the United States Maritime Industry at the Global Level” (1999) 8 Currents Int’l Trade L.J. 32, at p. 37).

¹²²⁶ Papavizas, C. & Kiern, L. “1999-2000 U.S. Maritime Legislative Developments” (2001) 32 JMLC 349, at p. 368.

¹²²⁷ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 Transp. L.J. 43, at p. 50.

¹²²⁸ Papavizas, C. & Kiern, L. “2001-2002 U.S. Maritime Legislative Developments” (2003) 34 JMLC 451, at p. 477.

¹²²⁹ Thornton, S. “An Optimal Model for Reforming COGSA in the United States: Australia’s COGSA Compromise” (2001) 29 Transp. L.J. 43, at p. 50.

¹²³⁰ Papavizas, C. & Kiern, L. “2001-2002 U.S. Maritime Legislative Developments” (2003) 34 JMLC 451, at p. 478, noting that “[a]lthough many in the maritime industry consider that COGSA’s sixty-seven years puts it past retirement age, COGSA will likely live to celebrate more birth-days beyond the 108th Congress if COGSA reform is to wait for the UN convention.”

template for many European and Commonwealth nations, and due to its proliferation, a *de facto* uniform regime began to develop. With respect to the recent domestic carriage regimes, they differ significantly in certain respects, thus adding to the breakdown of uniformity in the law of carriage of goods. Given the divergent nature of the domestic carriage regimes, they do not provide a template for reforms in the same manner as the Harter Act did. They do however provide indicators of successful commercial compromises between carrier and cargo interests that may be used by international drafting committees as a barometer for what would be palatable to the shipping industry. Moreover, what does emerge from the foregoing is that despite inherently divergent carriage regimes, nautical fault remains a key element. Demonstrating therefore, the continued relevance and importance of nautical fault.

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Chapter 10

UNCITRAL Draft Convention on the Carriage of Goods

The uniform carriage of goods regime created by the Hague Rules, had become fragmented with many carriage regimes in place, from Hague, to Hague-Visby, to Hamburg, to the growing body of national legislation. Despite the widespread applicability of the Hague and Hague-Visby regime, it was recognized that they failed to meet “the world’s needs for a modern, uniform law on the subject.”¹²³¹ In other words, they were outdated. The Hamburg Rules had failed to unify the carriage regime, twenty years of consultations on the reform of the Hague-Visby Rules were unproductive;¹²³² therefore a new process began.

10.1. PRELIMINARY WORK BY THE CMI

There was a general recognition in the 1990’s that the uniform system of carriage of goods had begun to fracture to the point where action needed to be taken. In May 1994, the Executive Council of the CMI decided that carriage of goods by sea required the further attention of the CMI and appointed a Working Group to consider the problem.¹²³³ The Working Group sent out questionnaires to the national associations to compile their views on the necessary direction to take.¹²³⁴ In response to the question as to whether the CMI should push for the adoption of the Hamburg Rules, all but one association, Spain, replied in no uncertain terms: no.¹²³⁵ Rather, the most favourable

¹²³¹ Sturley, M. “The United Nations Commissions on International Trade Law’s Transport Law Project: An Interim View of a Work in Progress” (2003) 39 *Tex. Int’l L.J.* 65, at p. 67. Sturley, M. “Uniformity in the Law Governing the Carriage of Goods by Sea” (1995) 26 *JMLC* 553, examining the diverse legal regimes in place and advocating the need for uniform law on carriage of goods.

¹²³² Tetley, W. “Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ’99.” (2003) 28 *Tul. Mar. L.J.* 1, at p. 15, noting that after twenty years of consultations and negotiations with pressure groups, CMI’s consideration of reforming the Hague-Visby Rules, was finally abandoned in 1998 without so much as a vote or a final text.

¹²³³ Comité Maritime International, *CMI Yearbook 1995*, Scandinavian University Press, Stockholm, at p. 107.

¹²³⁴ *Ibid.* There were twenty-eight national maritime associations that replied to the questionnaire, as did the International Chamber of Shipping. (*Ibid.*, at p. 115).

¹²³⁵ *Ibid.*, at pp. 123-138.

option was to amend the Hague-Visby regime,¹²³⁶ and interestingly enough the majority of respondents were opposed to a new convention.¹²³⁷ After receiving the replies from the various national associations, in May 1995 an International Sub-Committee on the Uniformity of the Law on Carriage of Goods by Sea was established,¹²³⁸ with the aim of studying “the most relevant issues with proposals as to the best manner in which they should be solved with a view to obtaining international uniformity.”¹²³⁹ Over the course of two years the International Sub-Committee met four times, during which carrier liability and nautical fault remained a contentious subject.¹²⁴⁰ In 1997, the International Sub-Committee released a report detailing the discussions on the various aspects of carriage.¹²⁴¹ With respect to the discussions concerning the nautical fault exemption, “there was a clear majority in favour of the maintenance of the errors in navigation defence, whilst the views were almost equally balanced in respect of the maintenance or abolition of the fault in the management defence.”¹²⁴²

¹²³⁶ *Ibid*, at pp. 158-170.

¹²³⁷ *Ibid*, at pp. 170-173. Ireland and Indonesia were in favour of a new convention, while the United States and Switzerland gave positive responses that were qualified.

¹²³⁸ *Ibid*, at p. 107.

¹²³⁹ Comité Maritime International, *CMI Yearbook 1997*, Scandinavian University Press, Stockholm, at p. 288.

¹²⁴⁰ During the first session in November 1995, the representatives hailing from Ireland, Australia and New Zealand, Poland and Japan, proposed retaining the list of exemptions including error in navigation, but would be willing to delete error in management, while the representatives hailing from the Netherlands, Portugal, Korea, and the U.K. would keep the list, including errors in management, but suggested shifting the burden of proof (Comité Maritime International, *CMI Yearbook 1995*, Scandinavian University Press, Stockholm, at p. 234-235). The representatives from Canada, Venezuela, Spain, Finland, and the U.S. were in favour of deleting the nautical fault exemption (*CMI Yearbook, 1995, ibid*, at p. 235). During the second session in March 1996, the subject of nautical fault proved decisive again with eleven members suggesting that the list of defences in Hague-Visby at present be retained, with Bonassies from France suggesting the only way to overcome to problem with the error in navigation defence was to return to the original Harter solution (where is was only applicable after cast off), and finally with four other members suggesting that various differing combinations of the three defences, fire, error in management or error in navigation, be retained (Comité Maritime International, *CMI Yearbook 1996*, Scandinavian University Press, Stockholm, at p. 370). During the third session in September 1996, the discussion focused on whether the catalogue approach of Hague-Visby was preferable to the Hamburg approach, with the representatives voting 13 in favour of the catalogue and 3 opposed (*CMI Yearbook 1996, ibid*, at p. 395). With regard to nautical fault, a vote was held as well. As far as retaining the error in management defence, 8 were in favour, 7 were opposed, and with regard to retaining the error in navigation defence, 10 were in favour, and 4 were opposed (*CMI Yearbook 1996, ibid*, at p. 394). The fourth session in February of 1997, did not deal with the issue of nautical fault or carrier liability (*CMI Yearbook 1996, ibid*, at p. 403-419).

¹²⁴¹ Comité Maritime International, *CMI Yearbook 1997*, Scandinavian University Press, Stockholm, at p. 288, with the report found at pp. 291-356.

¹²⁴² *Ibid*, at p. 290. See the summary of the various positions at pp. 318-320.

10.2 THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW PROPOSAL

At the twenty-ninth session of the Commission in 1996, “it was proposed that the Commission should include in its work programme a review of current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved.”¹²⁴³ This has been credited as the starting point for UNCITRAL’s work on the Draft Convention, which at the time was referred to as the draft instrument on transport law.¹²⁴⁴ In the proposal, UNCITRAL noted that with regard to information gathering the CMI, among other organizations, should be consulted.¹²⁴⁵ In 1998, CMI welcomed the invitation to cooperate with the Secretariat,¹²⁴⁶ and set up a structure to organize the project and carry out a study on the issues,¹²⁴⁷ nevertheless they incorporated the pre-existing International Sub-Committee on the Uniformity of the Law on Carriage of Goods by Sea.¹²⁴⁸ In 1999, the CMI working groups sent out questionnaires to all the CMI member organizations with a view to collecting information that would be used to harmonize the law of carriage of goods.¹²⁴⁹ Originally, when the CMI considered the project in 1998 issues of liability were not included, however in 1999 CMI recommended that the project be extended to

¹²⁴³ “Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninth Session 28 May-14 June 1996”, reprinted in Comité Maritime International, *CMI Yearbook 1996*, Scandinavian University Press, Stockholm, at p. 354-355.

¹²⁴⁴ UNECE “Comments to the UNICTRAL draft Instrument on Transport Law”(2002) Document A/CN.9/WG.III/WP.21/Add.1, at p. 3.

¹²⁴⁵ “Report of the United Nations Commission on International Trade Law on the Work of its Twenty-Ninth Session 28 May-14 June 1996”, reprinted in Comité Maritime International, *CMI Yearbook 1996*, Scandinavian University Press, Stockholm, at p. 355.

¹²⁴⁶ At the thirty-first session, in 1998, CMI made a statement to the effect that it welcomed the invitation to cooperate in soliciting views and preparing an analysis of the information, and that the analysis would allow the Commission to make an informed decision (UNCITRAL, “Transport Law: Preliminary draft instrument on the carriage of goods by sea” 8 January, 2002, Document A/CN.9/WG.III/WP.21, at p. 4).

¹²⁴⁷ Comité Maritime International, “Issues of Transport Law: Report of the CMI Steering Committee” in *CMI Yearbook 1998*, Scandinavian University Press, Stockholm, at p. 109-110. A Steering Committee was established to oversee the various Working Groups and International Sub-Committees and dialogue with other international organizations involved. A Working Group and International Sub-Committee on the Uniformity of the Law on Carriage of Goods by Sea (liability aspects), a Working Group on Issues of Transport Law, and a Working Group on EDI were convened (*Ibid*).

¹²⁴⁸ *Ibid*.

¹²⁴⁹ UNCITRAL, “Transport Law: Preliminary draft instrument on the carriage of goods by sea” 8 January, 2002, Document A/CN.9/WG.III/WP.21, at p. 5.

draft provisions relating to liability.¹²⁵⁰ The previous work by the CMI on carrier liability was therefore incorporated into the project.¹²⁵¹ The CMI's International Sub-Committee's terms of reference were: "To consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law; and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability."¹²⁵² After four meetings in 2000, the International Sub-Committee had prepared a draft Outline Instrument by the end of the year.¹²⁵³ The draft Outline Instrument addressed the liability of the carrier in Art. 5.¹²⁵⁴ There was a consensus that the Hague-Visby liability system should be retained, however, views were divided as to whether errors in navigation and management should be deleted.¹²⁵⁵ A specific provision was not drafted, but in view of the potential of the instrument to extend to door-to-door, in addition to the Hague-Visby enumerated regime,

¹²⁵⁰ Comité Maritime International, "Draft Instrument on Carriage of Goods [Wholly or Partly] [By Sea]", available at: www.comitemaritime.org/draft/draft.html; Tetley, W. "Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA '99." (2003) 28 Tul. Mar. L.J. 1, at p. 4. "The report of the 29th session [of UNCITRAL] makes clear that a review of the liability regime was not the main objective of the project and within the CMI it was at that time the subject of the work being undertaken by the International Sub-Committee on the Uniformity of the Law on Carriage of Goods by Sea ("the Uniformity Sub-Committee) chaired by Professor Francesco Berlingieri... However, it became clear from consultation with the international organizations... that there was a strong desire that liability issues should be developed and that Professors Berlingieri's report on the work of the Uniformity Sub-Committee should not be put to one side." (Beare, S. "Liability Regimes: Where we are, how we go there, and where we are going." [2002] LMCLQ 306, at p. 307).

¹²⁵¹ See quotation from Beare, *ibid.*

¹²⁵² Comité Maritime International, "Issues of Transport Law" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 112.

¹²⁵³ Comité Maritime International, "Draft Outline Instrument" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at pp. 122. For reports on the first four meetings see Comité Maritime International, "Report of the First Meeting of the International Sub-Committee on Issues of Transport Law – 27th and 28th January 2000" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium; Comité Maritime International, "Report of the Second Meeting of the International Sub-Committee on Issues of Transport Law – 6th and 7th April 2000" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium; Comité Maritime International, "Report of the Third Meeting of the International Sub-Committee on Issues of Transport Law – 7th and 8th July 2000" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium; Comité Maritime International, "Draft Report of the Fourth Meeting of the International Sub-Committee on Issues of Transport Law – 12th and 13th October 2000" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium.

¹²⁵⁴ Comité Maritime International, "Draft Outline Instrument" in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 131.

¹²⁵⁵ *Ibid.*

two additional options, one modelled on Article IV(2)(q) of Hague-Visby¹²⁵⁶ and the other on Article 17 of the CMR,¹²⁵⁷ were suggested.¹²⁵⁸ The draft Outline Instrument was discussed at the CMI Conference in Singapore in February 2001.¹²⁵⁹ At the Singapore Conference, the liability provision modelled on Article 17 of the CMR which imposed a “more stringent basis of liability,” received no support, and “the Conference by a large majority favoured a regime based on the Hague-Visby Rules, setting out first the duties of the carrier and then its liabilities and exemptions.”¹²⁶⁰ The International Sub-Committee, pursuant to that discussion, continued work and revision on the draft instrument,¹²⁶¹ including circulating a draft for comment to all the national associations and amending the draft on the basis of replies and comments.¹²⁶² The final revision took place in November 2001,¹²⁶³ with the finished document adopted by the CMI Executive on December 10, 2001, after three and a half years of intensive work.¹²⁶⁴

¹²⁵⁶ “The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when it receives the goods and the time of delivery, as well as for delay in delivery, unless the carrier can prove that the loss, damage or delay did not result from any fault or neglect on the part of the carrier or its servants or agents.”

¹²⁵⁷ “ (i) The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when it receives the goods and the time of delivery, as well as for the delay in delivery. (ii) The carrier shall however be relieved of liability if the loss, damage or delay was caused by: (a) The wrongful act or neglect of the claimant; (b) The instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier; (c) Inherent vice of goods; (d) Perils, dangers, and accidents of the sea or other navigable waters; (e) Saving or attempting to save life or property at sea; (f) Circumstances which the carrier could not avoid and the consequences of which it was unable to prevent. (iii) The burden of proving the loss, damage or delay was due to one of the causes specified in 2(a)-(f) shall rest upon the carrier.” (Modeled on the Convention on the Contract for the International Carriage of Goods by Road, 1956).

¹²⁵⁸ Comité Maritime International, “Draft Outline Instrument” in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 131-132.

¹²⁵⁹ UNCITRAL, “Transport Law: Preliminary draft instrument on the carriage of goods by sea” 8 January, 2002, Document A/CN.9/WG.III/WP.21, at p. 7. For a discussion of the conclusions at the conference see Girvin, Stephen, “The 37th Comité Maritime International Conference: a report” [2001] LMCLQ 406.

¹²⁶⁰ Berlingieri, F. “Basis of liability and exclusions of liability.” [2002] LMCLQ 336, at p. 337.

¹²⁶¹ See Comité Maritime International, “Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law – 16th to 18th July 2001” in *CMI Yearbook 2001*, CMI Headquarters Pub., Antwerpen, Belgium.

¹²⁶² Comité Maritime International, “Draft Instrument on Carriage of Goods [Wholly or Partly] [By Sea]”, available at: www.comitemaritime.org/draft/draft.html. For a synopsis of the comments received see Comité Maritime International, “Synopsis of the Responses of National Associations, Consultative Members and Observers to the Consultation Paper and Other Comments on the Draft Outline Instrument” in *CMI Yearbook 2001*, CMI Headquarters Pub., Antwerpen, Belgium.

¹²⁶³ See Comité Maritime International, “Draft Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law – 12th and 13th November 2001” in *CMI Yearbook 2001*, CMI Headquarters Pub., Antwerpen, Belgium.

¹²⁶⁴ Tetley, W. “Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA ’99.” (2003) 28 Tul. Mar. L.J. 1, at p. 4-5; Comité Maritime International, “Draft Instrument on Carriage of Goods [Wholly

10.3 CMI DRAFT INSTRUMENT ON TRANSPORT LAW 2001

The CMI Draft Instrument on Transport Law¹²⁶⁵ was in essence a template. “[I]t is important to emphasize that the Draft Instrument is not a final draft in the traditional sense. There are two reasons for this. First, the CMI no longer has the role of preparing draft Conventions for consideration at a diplomatic conference... Secondly, UNCITRAL did not ask for a final draft.”¹²⁶⁶ Rather, UNCITRAL wanted a preliminary working document,¹²⁶⁷ and the terms of reference of the International Sub-Committee were simply “to prepare the outline of an instrument...[and] drafts provisions.”¹²⁶⁸

The provisions on carrier liability were modelled after the Hague-Visby Rules, Art. IV(2), although with a few significant changes.¹²⁶⁹ Article 6.1 concerns the basis of liability for the carrier, with 6.1.1 providing a basic rule similar to Art. IV(2)(q) of the Hague-Visby Rules,¹²⁷⁰ and 6.1.3 providing an enumerated list of exempted perils.¹²⁷¹ Provision 6.1.2 contains the nautical fault exemption: “Notwithstanding the provisions of article 6.1.1 the carrier is not responsible for loss, damage or delay arising or resulting from (a) act, neglect or default of the master, mariner, pilot or other servants of the carrier in the navigation or in the management of the ship...”¹²⁷² The nautical fault exemption

or Partly] [By Sea]”, available at: www.comitemaritime.org/draft/draft.html; Beare, S. “Liability Regimes: Where we are, how we go there, and where we are going.” [2002] LMCLQ 306, at p. 308.

¹²⁶⁵ CMI Draft Instrument on Transport Law, December 10, 2001 [2002] LMLCQ 418-441; Comité Maritime International, *CMI Yearbook 2001*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 532; Available online at: www.comitemaritime.org. It should be noted that the version published in Lloyd’s Maritime and Commercial Law Quarterly contains only the provisions of the draft instrument, while the versions in the CMI Yearbook and online contain explanatory notes on each provision.

¹²⁶⁶ Beare, S. “Liability Regimes: Where we are, how we go there, and where we are going.” [2002] LMCLQ 306, at p. 308.

¹²⁶⁷ *Ibid*, at p. 309.

¹²⁶⁸ Comité Maritime International, “Issues of Transport Law” in *CMI Yearbook 2000*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 112.

¹²⁶⁹ Berlingieri, F. “Basis of liability and exclusions of liability.” [2002] LMCLQ 336, at p. 337.

¹²⁷⁰ “6.1.1 The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence that caused the loss, damage or delay took place during the period of the carrier’s responsibility as defined in article 4, unless the carrier proves that neither its fault nor that of any person referred to in article 6.3.2(a) caused or contributed to the loss, damage or delay.”

¹²⁷¹ Although the list has been modified, for example the exemption of “war” has been expanded by adding “hostilities, armed conflict, piracy and terrorism”. Provision 6.1.3., however has been termed a modified presumption regime in the accompanying CMI notes to the provision.

¹²⁷² CMI Draft Instrument on Transport Law, December 10, 2001 [2002] LMLCQ 418-441. Provision 6.1.2(b) contains the exemption for fire.

however is presented in the draft in square brackets thus indicating its contentious nature.¹²⁷³ Comments submitted by the national associations regarding the draft, prior to the final revision in November 2001, included the suggestion by the Netherlands that nautical fault “should be listed between [].”¹²⁷⁴ Other associations had also noted that the divisive nature of the exemption should be indicated.¹²⁷⁵ The accompanying explanations to provision 6.1.2 stipulated that there was little support for the “management” element of the defence, but the exemption “was justified on the basis that, should it be removed, there would be a considerable change to the existing position regarding the spreading of risks of sea carriage, which would of course impact the insurance position.”¹²⁷⁶ The explanatory notes for the provision also raise the point that should the exemption be removed, support exists for an exemption addressing the nautical fault of a compulsory pilot.¹²⁷⁷

10.4. RESPONSES TO THE INCLUSION OF NAUTICAL FAULT

Despite the support for the nautical fault exemption at the International Sub-Committee meetings and the Singapore conference, there were critics of the presence of the exemption in the draft instrument. Professor Berlingieri notes that although the exemption for nautical fault is supported, there is growing interest in abolishing the error in management portion of the defence.¹²⁷⁸ In addition, Berlingieri argues that navigational fault should be abolished as well, pointing to the fact that the argument to

¹²⁷³ Asariotis, R. “Allocation of liability and burden of proof in the Draft Instrument on Transport Law.” [2002] LMCLQ 382, at p. 390, noting that the provision has been expressly left open for discussion.

¹²⁷⁴ Comité Maritime International, “Synopsis of the Responses of National Associations, Consultative Members and Observers to the Consultation Paper and Other Comments on the Draft Outline Instrument” in *CMI Yearbook 2001*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 440.

¹²⁷⁵ For example, Japan, replied that “this Association strongly wishes that the draft Instrument should refer to the different views on the issue in the commentary, since the issue has long been discussed and various views have been expressed in ISC and in Singapore Conference.” (Comité Maritime International, “Synopsis of the Responses of National Associations, Consultative Members and Observers to the Consultation Paper and Other Comments on the Draft Outline Instrument” in *CMI Yearbook 2001*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 439).

¹²⁷⁶ CMI Draft Instrument on Transport Law, December 10, 2001 [2002] LMLCQ 418-441. Note accompanying provision 6.1.2.

¹²⁷⁷ “There is also a view that even if this exemption is removed an exemption should remain for “act, neglect or default of a compulsory pilot in the navigation of the ship”, on the ground that this covers a situation in which the carrier can justifiably feel aggrieved at being expected to answer.”

¹²⁷⁸ Berlingieri, F. “Basis of liability and exclusions of liability.” [2002] LMCLQ 336, at p. 342.

maintain the exemption, the insurance argument, is not supported by any reliable data.¹²⁷⁹ Secondly, Berlingieri argues “on the basis of a logical allocation of the risks, the fact that the shipper should bear the risk of loss, damage or delay resulting from the fault of the servants of the carrier is lacking any justification and is contrary to the general rule that exists in most jurisdictions.”¹²⁸⁰ UNCTAD released a commentary on the draft instrument in February 2002 that was extremely critical with regard to the provision 6.1.2.¹²⁸¹ It referred to the exemption as unsustainable, and commented that “[t]his approach is without parallel in any existing Transport Convention and no justification exists for its continued availability in any new international regime.”¹²⁸² UNCTAD even rejects the notion of an exemption concerning compulsory pilotage, reasoning that “[a]s a matter of commercial risk allocation, one of the parties to any contract of carriage (including charterparties) has to take responsibility for the actions of the pilot. The carrier is clearly in a much better position than a shipper or a consignee to take on this responsibility and to protect its interests.”¹²⁸³ Regardless, the inclusion of the exemption in the draft instrument was a testament to its continued popularity in certain circles, despite the objections to its presence.

10.5. UNCITRAL DRAFT CONVENTION

The UNCITRAL Draft Convention has inspired effort and cooperation in many respects. Several governments have indicated their willingness to support and participate in the process of achieving uniformity through the new Draft Convention.¹²⁸⁴ Furthermore, certain nations have also placed domestic legislation on hold pending the

¹²⁷⁹ *Ibid.*

¹²⁸⁰ *Ibid.*

¹²⁸¹ UNCTAD, “Draft Instrument on Transport Law – Comments Submitted by the UNCTAD Secretariat”, February 6, 2002, UN Doc. A/CN.9/WG.III/W.P.21/Add.1, at pp. 22-23.

¹²⁸² *Ibid.*, at p. 23.

¹²⁸³ *Ibid.*

¹²⁸⁴ For example see Transport Canada, “Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water” (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 6, recommending that “Transport Canada continue to make efforts in UNCITRAL, in consultation with industry and in cooperation with like-minded countries, to develop a new international regime of liability for the carriage of goods by sea which would achieve a greater uniformity than the Hague/Visby Rules.”

outcome of the Draft Convention.¹²⁸⁵ It is an ambitious project, given that the Draft Convention aims to cover all aspects of contracts for the carriage of goods by sea.¹²⁸⁶ In 2003, the president of the CMI, Patrick Griggs, commented that the UNICITRAL Draft Convention “seems to be the best, and probably the last, chance of restoring international uniformity in th[e] area [of carriage of goods].”¹²⁸⁷ After the CMI draft instrument was delivered to UNCITRAL in December of 2001, the draft, with only minor changes was converted into the UNICITRAL Preliminary Draft Instrument on the Carriage of Goods by Sea, dated January 8, 2002.¹²⁸⁸ UNCITRAL then established a working group, Working Group III (Transport Law), to whom the draft was referred.¹²⁸⁹

10.5.1. The Working Group Sessions

The Working Group considered the Draft Convention at its first meeting, (the ninth session), held in New York from April 15 to 26, 2002.¹²⁹⁰ The Working Group discussed provision 6.1.2., and in its report, noted “[a] strong argument was made that, given the central aim of the draft instrument was modernization, then exemption from liability for errors in navigation and management in the ship was out of date, particularly

¹²⁸⁵ The United States placed the efforts with respect to the new COGSA on hold to focus on the UNCITRAL process. Canada has also stalled triggering domestic legislation that would implement the Hamburg Rules, partially due to the fact that the convention does not impact Canadian trade and is stagnant internationally, but also due to Canada’s active work with UNCITRAL since 1999 on the development of a new convention (Transport Canada, “Marine Liability Act, Part 5: Liability for the Carriage of Goods by Water” (2004) Consultation paper dated September 2004, Transport Canada, Government of Canada, Doc. TP 14307E, at p. 6).

¹²⁸⁶ Delebecque, P. “Le Projet CNUDCI d’Instrument Sur le Transport de Merchandises Par Mer” [2003] DMF 915, at p. 917.

¹²⁸⁷ Griggs, P. “Obstacles to Uniformity of Maritime Law” (2003) 34 JMLC 191, at p. 195. For an opposing view, see Tassel, Y. “Projet CNUDCI: Une Double Critique de Fond” [2004] DMF 3, at p. 9, who after reviewing the progress on the project so far, concludes that the project far from simplifying the situation in carriage law actually complicates it. Tassel, at p. 9, considers that the work on the project to date is “une forte régression” or a significant regression in the law of carriage.

¹²⁸⁸ UNCITRAL, “Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea”, January 8, 2002, UN Doc. A/CN.9/WG.III/WP.21.

¹²⁸⁹ Comité Maritime International, “Draft Instrument on Carriage of Goods [Wholly or Partly] [By Sea]”, available at: www.comitemaritime.org/draft/draft.html;

¹²⁹⁰ UNCITRAL, “Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002)”, 7 May 2002, UN Doc. A/CN.9/510. For a discussion of who was present, including national representatives of UNCITRAL member states, other states active in the maritime community, and several international organizations, for a total of over 50 people present, see Delebecque, P. “Le Projet CNUDCI d’Instrument Sur le Transport de Merchandises Par Mer” [2003] DMF 915, at p. 916-917.

in light of other conventions dealing with other modes of carriage.”¹²⁹¹ Two arguments were raised in defence of nautical fault. First, concern was raised that marine transport was unique and that the elimination of the defence would have adverse economic impacts on the parties.¹²⁹² Secondly, it was argued that “it was not appropriate to compare sea with road, rail and air transport, notwithstanding technological advancements on vessel security and monitoring of vessels at sea.”¹²⁹³ During the second meeting, or tenth session, of the Working Group, five months later, the question of the nautical fault exemption arose again.¹²⁹⁴ During the meeting, the working group decided that provision 6.1.2., para (a), should be deleted.¹²⁹⁵ The removal of nautical fault was justified on the grounds that there was considerable opposition to it, and that a similar exemption had been removed from the Warsaw Convention in 1955 to reflect improved navigation techniques.¹²⁹⁶ It was felt that the deletion of nautical fault “would constitute an important step towards modernizing and harmonizing international transport law,”¹²⁹⁷ and despite the fact that the insurance argument was raised, the Working Group deleted 6.1.2.(a).¹²⁹⁸ Keeping the exemption only with regard to compulsory pilotage was suggested, however the Working Group rejected the idea.¹²⁹⁹

10.5.2. The Removal of Nautical Fault

It has been reported that the removal of the nautical fault defence was done after extensive debate between the members of the Working Group,¹³⁰⁰ although this debate is

¹²⁹¹ UNCITRAL, “Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002)”, 7 May 2002, UN Doc. A/CN.9/510, at p. 16.

¹²⁹² *Ibid.*

¹²⁹³ *Ibid.*

¹²⁹⁴ UNCITRAL, “Report of the Working Group on Transport Law on the work of its tenth session (Vienna, 16-20 September 2002)”, 7 October 2002, UN Doc. A/CN.9/525.

¹²⁹⁵ *Ibid.*, at p. 15.

¹²⁹⁶ *Ibid.*, at p. 14.

¹²⁹⁷ *Ibid.*, at p. 15.

¹²⁹⁸ *Ibid.*

¹²⁹⁹ *Ibid.*, at p 17. It was suggested that error in navigation when under compulsory pilotage should be listed under 6.1.3. as one of the exempted perils. It was rejected with the justification that pilotage should not exonerate the carrier because the pilot was regarded as assisting the carrier. As well, it would be unfair to burden the shipper with liability for pilots, as the carrier was actually involved and maintained control of those situations. Thus the Working Group refused to expand the list of exemptions.

¹³⁰⁰ Transport Canada, “Agenda for Meeting of International Marine Policy & Liability sector of Transport Canada on discussion of Draft UNCITRAL Transport Law Convention”, October 7, 2004, at p. 15.

Available online from the Canadian Maritime Law Association website at:

www.cmla.org/papers/2004/TransportReport-Oct.4,%202004.pdf

not reflected in the Working Group reports.¹³⁰¹ This was one of the first substantive decisions taken by the Working Group over the first three meetings.¹³⁰² The decision generated controversy, and both the removal of the exemption and the timing of the removal were opposed: “the carrier interests felt that the elimination of the exception was still premature...they did not feel it should be deleted except as part of a compromise under which carriers received some other benefit.”¹³⁰³ Moreover, during the tenth session, the Working Group rejected the suggestion that the defence remain in square brackets pending a decision made at a later stage on a liability package.¹³⁰⁴ The dangers of considering the articles individually rather than as a whole, in relation to equitable risk allocation has also been commented on by the International Group of P&I Clubs.¹³⁰⁵

After the decision was taken during the tenth session, there have subsequently been several attempts to reintroduce nautical fault in one form or another, however all have proved unsuccessful.¹³⁰⁶ In late 2002 and early 2003, the Working Group received replies to a questionnaire it had sent out on door-to-door transport and the scope of the Draft Convention.¹³⁰⁷ Several of the replies contained strong arguments for the retention

¹³⁰¹ In total two paragraphs were devoted to the decision, which do not reflect extensive debate, nor the contentious nature of the decision taken. See UNCITRAL, “Report of the Working Group on Transport Law on the work of its tenth session (Vienna, 16-20 September 2002)”, 7 October 2002, UN Doc. A/CN.9/525, at p. 14-15, para. 35-36.

¹³⁰² Sturley, M. “The United Nations Commissions on International Trade Law’s Transport Law Project: An Interim View of a Work in Progress” (2003) 39 *Tex. Int’l L.J.* 65, at p. 95.

¹³⁰³ *Ibid.*

¹³⁰⁴ UNCITRAL, “Report of the Working Group on Transport Law on the work of its tenth session (Vienna, 16-20 September 2002)”, 7 October 2002, UN Doc. A/CN.9/525, at p. 15.

¹³⁰⁵ In a response to a questionnaire inviting comments on the UNCITRAL draft, the International Group stated: “The primary purpose of international carriage conventions is not only to promote international uniformity but also to ensure an acceptable and fair balance of rights and liabilities and thus allocation of risk between the parties to the carriage contract... The Working Group is and has been considering the provisions of the Instrument on an article by article basis, in particular those articles relating to the carrier’s rights, liabilities and responsibilities that have quite correctly been described as the heart of the Instrument. The IG believes that in considering these articles individually rather than as a whole, the Working Group is in danger of overlooking the principle and accordingly preserving an equitable allocation of risk between carrier and cargo interests.” Found in UNCITRAL, “Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies”, 31 January 2003, UN Doc. A/CN.9/WG.III/WP.28, at p. 38.

¹³⁰⁶ Transport Canada, “Agenda for Meeting of International Marine Policy & Liability sector of Transport Canada on discussion of Draft UNCITRAL Transport Law Convention”, October 7, 2004, at p. 15. Available online from the Canadian Maritime Law Association website at:

www.cmla.org/papers/2004/TransportReport-Oct.4,%202004.pdf

¹³⁰⁷ The answers to the questionnaires are published in two UN documents: UNCITRAL, “Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies”, 31 January 2003, UN Doc.

of nautical fault. The Institute of Chartered Shipbrokers (ICS) noted the piecemeal adoption of the Hamburg Rules, and argued that any new convention must address the reasonable requirements of the major liner companies, such as error in navigation, in order to succeed.¹³⁰⁸ The ICS supported the retention of error in navigation, but suggested that error in management could be removed, with the reasoning being: “The purely pragmatic view that without retention there will be a much harder route to securing adoption of the draft instrument...[and] change in the spread of risk impacting upon insurance.”¹³⁰⁹ The International Group of P&I Clubs, in response to the argument that the nautical fault defence is out of step with other conventions and does not reflect technological advances in shipping, stated; “we believe that it is misleading to compare sea transport with other forms of transport. Cargo quantities and values (and therefore frequently claims) are much greater, transit times are longer and the carriage is subject to many more factors over which the carrier has no control. Furthermore, even though sophisticated navigational aids are now in place on most ships, the master and other senior officers are faced with greatly increased workload, partly resulting from increased legislation and inspections. Further, a master is often called upon to make immediate and difficult decisions with limited information quite possibly in the face of competing interests, which if loss or damage occur are likely to be closely scrutinized with the benefit of hindsight.”¹³¹⁰ The International Group also addressed pilot error, noting that it comprised 5% of all major claims in an analysis conducted,¹³¹¹ and suggested that should nautical fault be eliminated, at the minimum it should be retained in respect of pilot error.¹³¹² There was also support for the removal of the nautical fault exemption.¹³¹³

A/CN.9/WG.III/WP.28, and UNCITRAL, “Preparation of a draft instrument on the carriage of goods [by sea]: Addendum to compilation of replies”, 18 September 2003, UN Doc. A/CN.9/WG.III/WP.28/Add.1.

¹³⁰⁸ Institute of Chartered Shipbrokers, replies to the UNCITRAL questionnaire on the draft instrument, found in UNCITRAL, “Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies”, 31 January 2003, UN Doc. A/CN.9/WG.III/WP.28, at p. 7.

¹³⁰⁹ *Ibid.*, at p. 8.

¹³¹⁰ In UNCITRAL, “Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies”, 31 January 2003, UN Doc. A/CN.9/WG.III/WP.28, at p. 39. The International Group also notes that in an analysis of all claims arising between 1987 and 1997, at a major club, 40% of all major claims were cargo claims, and Deck Officer Error, which relates to error in the navigation or management of the ship, represented 25% of all major claims. One can therefore understand the International Group argument that the risk allocation would most certainly change should the exemption be eliminated.

¹³¹¹ See *ibid.*

¹³¹² In UNCITRAL, “Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies”, 31 January 2003, UN Doc. A/CN.9/WG.III/WP.28, at p. 40.

Interestingly, the International Union of Marine Insurance (IUMI),¹³¹⁴ “believes that the present risk allocation should be modified...[and] is in favour of eliminating the error in navigation or management.”¹³¹⁵ These replies however, were considered after the initial decision to remove nautical fault had already been taken.

During the twelfth session of the Working Group, reinstating error in navigation was discussed again. Several delegations favoured the exemption, and one of the arguments for reinstating it was made on the basis that “an error might be easy to characterize in hindsight, but that it was often the error of the master, forced to make rapid decisions in bad weather, and that no shipowner would generally interfere with his masters decisions in these circumstances.”¹³¹⁶ It was also cautioned during the meeting that the removal of the exemption, when paired with the burden of proof, would result in carrier liability wherever it could be demonstrated that there was any navigational fault.¹³¹⁷ The United States delegation, despite supporting the elimination of the defence,

¹³¹³ The United States submitted a proposal dated August 7th 2003 that advocated retaining the Hague-Visby style list of carrier exemptions, although with the elimination of the nautical fault defence found at Article 6.1.2.(a). (“Proposal by the United States”, 7 August 2003, UN Doc. A/CN.9/WG.III/WP.34, at p. 5). On the September 17th 2003, the European Shippers’ Council, the Asian Shippers’ Group, and the National Industrial Transportation League, issued a Joint Shippers’ Declaration stating the positions that should be advocated by national governments at the UNCITRAL Working Group, and included in the list the elimination of nautical fault and error of navigation. (“Joint Shippers’ Declaration of European Shippers’ Council, Asian Shippers’ Group, The National Industrial Transportation League” (2003) 2003 Tripartite Shippers Meeting September 11-13, 2003 Margaux, France. Available at: www.europeanshippers.com/public/statements/archives/030917declaration.htm.)

¹³¹⁴ Who represent 53 national marine insurance associations from markets all over the world. IUMI members cover 80% of the world premium in marine insurance, and represent both carriers and cargo. In the International Union of Marine Insurance replies to UNCITRAL questionnaire, in UNCITRAL, “Preparation of e draft instrument on the carriage of goods [by sea]: Addendum to compilation of replies”, 18 September 2003, UN Doc. A/CN.9/WG.III/WP.28/Add.1., at p. 5.

¹³¹⁵ *Ibid*, at p. 6. The IUMI note that “no statistical records are available to evaluate the reduction of cargo insurers risks, but underwriters estimate that the reduction of risk would be less than 4%.

¹³¹⁶ UNCITRAL, “Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003)”, 16 December 2003, UN Doc. A/CN.9/544, at p. 40.

¹³¹⁷ *Ibid*, at p. 28-29 it was argued that “the elimination of the exception based on navigational error could have unintended consequences. It was suggested that in most cases where goods were lost or damaged at sea, the claimant would generally have a plausible argument that the carrier might have been able to reduce the loss by having made a different navigational decision, and that thus a navigational error had been made. Under the current law, the argument would not succeed because navigational error was listed as an “excepted peril”. However, it was suggested that if navigational error was deleted from the list of “excepted perils”, as the Working Group had decided it should be, and if the burden of proof was not adjusted accordingly, the carrier would have to prove the apportionment of the cause of the loss, which was considered to be virtually an “insuperable burden”. The view was expressed that the practical result would be that the carrier would be fully liable in most cases for all of the damage when there was any navigational

noted the burden of proof issue and commented that “the elimination of the navigational fault may well have the unintended effect of depriving the carrier of every statutory defense in any case in which navigational fault could plausibly be argued.”¹³¹⁸

Nevertheless, the prevailing view was that the deletion of the error in navigation should remain.¹³¹⁹

10.5.3. Subsequent Drafts and Negotiations

An updated draft of the instrument was released in September of 2003.¹³²⁰ Several provisions had been altered, and the Draft Convention had been renumbered and reorganized. Carrier liability is dealt with in Chapter 5, with the basis of liability, the provision that previously contained nautical fault, found in Article 14.¹³²¹ Error in navigation and management remained eliminated, while the fire defence is retained, although found in “Chapter 6: Additional provisions relating to carriage by sea”, and specifically, Article 22 entitled ‘Liability of the Carrier’.¹³²² All exempted perils of a purely maritime character were removed from Article 14, and placed in Article 22.¹³²³

fault, and that it could render irrelevant the “excepted peril” provisions in most cases where the damage occurred at sea.”

¹³¹⁸ UNCITRAL, “Proposal by the United States of America”, 7 August 2003, UN Doc.

A/CN.9/WG.III/WP.34, at p. 6.

¹³¹⁹ *Ibid.*

¹³²⁰ UNCITRAL, “Draft instrument on the carriage of goods [wholly or partly] [by sea]”, 4 September 2003, UN Doc. A/CN.9/WG.III/WP.32.

¹³²¹ *Ibid.*, at p. 20. Briefly, Article 14 contains a basic liability provision that provides for carrier liability for loss resulting from loss, damage or delay, unless the carrier proves that neither his fault, nor the fault of his servants or agents. Nevertheless, Article 14 also contains a list of exempted perils, wherein if the carrier proves that the loss, damage or delay was caused by one of them, then it is presumed that the loss, damage or delay was not caused by the carrier or his servants or agents. This provision has attracted criticism, in particular with regard to the list of exempted perils. See for example, Delebecque, P. “Les Travaux du Comité Droit des Transports du CMI sur le Projet CNUDCI” [2004] DMF 820, at p. 820, who asks what is the use of having a list of exempted perils in Article 14 when we consider that the carrier is by virtue of law liable unless he can establish that he is without fault.

¹³²² *Ibid.*, at p. 32.

¹³²³ Berlingieri, F. “Background Paper on the Basis of the Carrier’s Liability” in *CMI Yearbook 2004*, CMI Headquarters Pub., Antwerp, Belgium, at p. 144. These exemptions include: (a) saving or attempting to save life or property at sea, (b) perils, damages and accidents of the sea or other navigable waters, and (c) fire on the ship, unless caused by the fault or privity of the carrier.

Error in navigation was reconsidered with respect to pilot error in the fourteenth session of the Working Group in December 2004.¹³²⁴ It was proposed that notwithstanding the deletion of error in navigation, pilot error should be introduced into the list of excepted perils in the following form: “act, neglect or default of the pilot in the navigation of the ship.”¹³²⁵ Although arguments similar to those made in relation to pilotage in previous sessions of the Working Group were raised, it was also argued that pilot error would not be covered under the general liability rule,¹³²⁶ or the peril of the sea exemption.¹³²⁷ Conversely it was suggested that it was covered, as one may prove absence of fault under Article 14.¹³²⁸ Although the Working Group opted not to introduce such an exemption, it was acknowledged that there was confusion as to whether Article 14 would in fact cover compulsory pilots.¹³²⁹ In 2005, a draft entitled “Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]” was released, and although it made no substantive changes with regard to nautical fault, the provisions regarding the basis of carrier liability and the exemptions were reorganized.¹³³⁰ The basis of liability and the exemptions, including those of a purely maritime character, were now all contained in Chapter 6, in particular Article 17, entitled “Basis of Liability”.¹³³¹ A subsequent draft was released in February of 2007, however the basis of liability

¹³²⁴ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)” 21 December 2004, UN Doc. A/CN.9/572.

¹³²⁵ *Ibid*, at p. 18.

¹³²⁶ Article 14(1).

¹³²⁷ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)” 21 December 2004, UN Doc. A/CN.9/572, at p. 18.

¹³²⁸ *Ibid*.

¹³²⁹ *Ibid*.

¹³³⁰ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 8 September 2005, UN Doc. A/CN.9/WG.III/WP.56.

¹³³¹ *Ibid*, at p. 20. Article 17(2) provides that the basis of carrier liability is fault based, and that the carrier may prove that an exempted peril caused or contributed to the loss, damage, or delay, to be relieved of all or part of its liability. This is subject however to several qualifications, including that if the claimant proves that the fault of the carrier, or the fault of any person (including any performing party and their subcontractors, employees and agents) acting at the carrier’s request or under the carrier’s supervision or control, caused or contributed to the exempted peril on which the carrier relies, then the carrier is liable for all or part of the loss, damage or delay. (Article 17(2)(a) in conjunction with Article 19). One of the results is that the last defence where the carrier was exonerated despite the existence of fault that existed as of the 2003 draft, fire, has thus been narrowed from “Fire on the ship, unless caused by the fault or privity of the carrier”, to read “Fire on the ship” (Article 17(3)(f)). When taken in conjunction with the rest of Article 17, the defence of fire therefore is significantly narrowed.

remained unaltered.¹³³² The Working Group did not consider the issue of the carrier's basis of liability at the fifteenth session held in April 2005,¹³³³ or the sixteenth session in December 2005.¹³³⁴ In 2006, the CMI noted that the text of Article 17 is considered to be "broadly acceptable" by the Working Group.¹³³⁵ The carrier's basis of liability went unconsidered during the both the seventeenth and eighteenth sessions in 2006,¹³³⁶ before being addressed at the nineteenth session held in April 2007.¹³³⁷ Prior to considering the text of Article 17, the Working Group impressed on the delegates that the article as drafted "was the result of a broad and carefully negotiated consensus that emerged from intense discussions in the Working Group over several sessions," and that "caution should be exercised in suggesting any changes to the carefully balanced text."¹³³⁸ Article 17(3) contains the list of fifteen exemptions, which upon consideration proved to be contentious. A number of delegations advocated the removal of the exemptions entirely, as it was argued that the list was overly generous to carriers.¹³³⁹ Certain other delegations suggested that the removal of error of navigation from this Article should be reconsidered, or at the very least born in mind when assessing the overall balance of liabilities.¹³⁴⁰ The Working Group concluded that the Article 17(3) should be approved as drafted, as the majority of the Working Group supported the list of exemptions, citing in particular the delicate balance and consensus that had been reached in the negotiations of this article in previous sessions.¹³⁴¹

¹³³² UNCITRAL, "Draft convention on the carriage of goods [wholly or partly] [by sea]", 13 February 2007, UN Doc. A/CN.9/WG.III/WP.81.

¹³³³ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)" 13 May 2005, UN Doc. A/CN.9/576.

¹³³⁴ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its sixteenth session (Vienna, 28 November – 9 December 2005)" 4 January 2006, UN Doc. A/CN.9/591.

¹³³⁵ Comité Maritime International, "Draft Convention on the Carriage of Goods [Wholly or Partly] [By Sea]", 2006, available online at: www.comitemaritime.org/draft/draft.html

¹³³⁶ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its seventeenth session (New York, 3-13 April 2006)" 24 April 2006, UN Doc. A/CN.9/594; UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its eighteenth session (Vienna, 6-17 November 2006)" 27 November 2006, UN Doc. A/CN.9/616.

¹³³⁷ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)" 17 May 2007, UN Doc. A/CN.9/621.

¹³³⁸ *Ibid.*, at p. 17.

¹³³⁹ *Ibid.*

¹³⁴⁰ *Ibid.*

¹³⁴¹ *Ibid.*

The basis of liability was not considered at the twentieth session held in October 2007,¹³⁴² however following that session the most recent version of the Draft Convention was released.¹³⁴³ Chapter 5, Article 18, now provides for the basis of liability, which is essentially identical in meaning to the previous draft, save several minor changes.¹³⁴⁴ Despite having been raised during the nineteenth session, error in navigation was in effect a dead issue. It was unlikely that the tide of opinion on the matter would have changed sufficiently to enable the error in navigation exemption to be seriously reconsidered. This was particularly the case that late in the drafting process, as strong emphasis had been placed on the fragile consensus that has been achieved thus far. By the fortieth session of the Commission held during June-July of 2007, the Working Group informed the Commission that it planned to complete its third and final reading by the end of 2007, with a view to submitting the draft convention for consideration during the forty-first session of the Commission in 2008.¹³⁴⁵ At the twentieth session held in October 2007, the Working Group did in fact conclude its third reading.¹³⁴⁶ The twenty-first session took place in January 2008,¹³⁴⁷ and according to the Canadian Delegate on the Working Group, the work on the Draft Convention has been completed.¹³⁴⁸ The Working Group was therefore able to complete its work on schedule, and accordingly the Draft Convention will be presented to the Commission during its forty-first session in June 2008. There is the possibility that certain contentious issues may be raised during the Commission session in June,¹³⁴⁹ however nautical fault is most certainly not one of them.

¹³⁴² UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)" 2 November 2007, UN Doc. A/CN.9/642.

¹³⁴³ UNCITRAL, "Draft convention on the carriage of goods [wholly or partly] [by sea]", 14 November 2007, UN Doc. A/CN.9/WG.III/WP.101.

¹³⁴⁴ The changes were predominantly variations in wording aimed at clarifying certain provisions. Notably, three of the exemptions found in (g) (h), (i) and (k) of Article 17(3), along with provisions (4) and (5) of Article 17. See UNCITRAL, "Draft convention on the carriage of goods [wholly or partly] [by sea]", 14 November 2007, UN Doc. A/CN.9/WG.III/WP.101, at pp. 16-18, footnotes 31-36.

¹³⁴⁵ UNCITRAL, "Annotated Provisional Agenda: Working Group III (Transport Law), Twenty-first session (Vienna, 14-25 January 2008)" 7 November 2007, UN Doc. A/CN.9/WG.III/WP.100, at p. 11.

¹³⁴⁶ *Ibid.*, at p. 12.

¹³⁴⁷ *Ibid.*

¹³⁴⁸ Interview with Tracy Chatman, Transport Canada Policy Advisor (International Marine Policy) Member of the Canadian Delegation for the UNCITRAL Working Group III, (6 February 2008).

¹³⁴⁹ *Ibid.*, who noted that the issue of volume contracts may be raised, but cautioned that generally the Commission session does not consider substantive issues unless there is tremendous support to do so.

10.6. PILOTAGE WITHOUT THE BENEFIT OF NAUTICAL FAULT

A potential exemption for compulsory pilotage discussed in relation to nautical fault, and to date unresolved by the Working Group, bears closer examination. At the time of the removal of nautical fault from the Draft Convention, during the tenth session, it was argued that an exemption should be retained for instances where the error in navigation is committed under compulsory pilotage.¹³⁵⁰ At the time, the Working Group rejected the notion of compulsory pilotage as an exempted peril. Nevertheless, although the issue arose again during the fourteenth session, the Working Group maintained their objection to an exempted peril for error of the pilot in the navigation of the ship.¹³⁵¹ What spawned confusion and was left unresolved was whether the carrier would be responsible for the errors of a compulsory pilot.¹³⁵² Currently, Article 19 of the Draft Convention, entitled “Liability of the carrier for other persons” provides as follows: “The carrier is liable for the breach of its obligations under this Convention caused by acts or omissions of: (a) Any performing party; (b) The master or crew of the ship; (c) Employees or agents of the carrier or a performing party; or (d) Any other person that performs or undertakes to perform any of the carrier’s obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.”¹³⁵³ The question remains, is the carrier liable for the faults of a compulsory pilot by virtue of the foregoing text?

Liability with regard to pilotage is one of the older issues in maritime law. During medieval times, Article XXIII of the Laws of Oleron stipulated that if a pilot’s actions brought the ship to grief “and the merchants sustain damage thereby, he shall be obliged to make full satisfaction of the same, if he hath wherewithal; and if not, lose his head.”¹³⁵⁴ The English case of *Re Rumney and Wood*, rendered August 1, 1541, involved

¹³⁵⁰ UNCITRAL, “Report of the Working Group on Transport Law on the work of its tenth session (Vienna, 16-20 September 2002)”, 7 October 2002, UN Doc. A/CN.9/525, at p. 17.

¹³⁵¹ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)” 21 December 2004, UN Doc. A/CN.9/572.

¹³⁵² Article 14(1).

¹³⁵³ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 14 November 2007, UN Doc. A/CN.9/WG.III/WP.101.

¹³⁵⁴ This is an English translation of a French text published by Cleirac, and quoted by Haight, Jr., C. “Babel Afloat: Some Reflections on Uniformity in Maritime Law” in *The Healy Lectures* (2005) Kimball, J. (Ed.) LLP, London, at p. 61. Cleirac, a French author, published in the middle of the 17th century his

two pilots who permitted their vessels to go aground the shoals of the Isle of Peytewe.¹³⁵⁵ Anthony Husse, the president of the Admiralty Court, found the pilots guilty of negligence, sentenced them to imprisonment for a year and forbade them from ever piloting ships again.¹³⁵⁶ Today, pilots remain criminally liable for faults and errors on their part, however the punishments are decidedly less severe.¹³⁵⁷ Moreover, pilots are civilly liable for negligent acts, although the limits of liability are so low as to render suit almost pointless.¹³⁵⁸ What is and has been infinitely more variable over the years is whether the shipowner is liable to third parties for the negligent acts of a pilot.

Prior to considering the liability of the shipowner for the negligent actions of a pilot, one must distinguish between compulsory and voluntary pilotage. Compulsory pilotage can be traced as far back as the Romans,¹³⁵⁹ and historically, it has its origins in

work “Us et Coustumes de la Mer”, which contains both the Laws of Oleron and the Laws of Wisby (Hughes, R. *Handbook of Admiralty Law*, 2nd Ed. (1920) West Pub. Co., St. Paul, Minnesota, at p. 6); Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 351 also quotes *The Rolls of Oleron*, “Yf a shyp is lost by defaulte of the lodeman the maryners may, if they please, bring the lodeman to the windlass...and cut off his head withoute the maryners being bounde to answer before any judge...”

¹³⁵⁵ The Latin text of the judgment is reported at p. 102, Vol I, *Select Pleas in the Court of Admiralty*, A.D. 1390-1404 and A.D. 1527-1545, with the English translation at p. 213, as referenced by Parks, A. & Cattell, E. *The Law of Tug, Tow and Pilotage* (1994) Cornell Maritime Press, Maryland, at p. 981.

¹³⁵⁶ Parks & Cattell, *ibid*, at p. 981-982, who quotes the judgement condemning the pilots: And I dismiss, absolve and discharge you and each of you as being unworthy, unfit, unskilful, inexperienced, lazy, negligent and careless men from the charge, care and practice of conducting, commanding, and piloting any ships whatsoever as well from any ports whatsoever within this famous realm of England as to ports over the seas.

¹³⁵⁷ For example, section 21 of the United Kingdom Pilotage Act 1987 provides for criminal liability in the form of fines and terms of imprisonment for certain acts and omissions causing or likely to cause damage, injury or death.

¹³⁵⁸ Mandaraka-Sheppard, A. *Modern Admiralty Law* (2001) Cavendish Publishing, London, at p. 862; Section 22(2) of the United Kingdom Pilotage Act 1987 provides for limitation in the amount of £1000 for civil liability where the pilot was negligent; Parks, A. & Cattell, E. *The Law of Tug, Tow and Pilotage* (1994) Cornell Maritime Press, Maryland, at p. 1011 note that “suits against pilots are relatively rare either because of low limits of statutory liability...or because the pilot is usually without sufficient financial resources to make it worthwhile to attempt to pursue recovery.” For a discussion of the statutory limits of liability in various jurisdictions in the United States see Parks, A. & Cattell, *ibid*, at pp. 1014-1018.

¹³⁵⁹ The United State Supreme Court opined as follows on the origins of compulsory pilotage: “The obligation of the captain to take a pilot, or be responsible for the damages that may ensue, was prescribed in the Roman Law. The Hanseatic ordinances, about 1457, required the captain to take a pilot under the penalty of the mark of gold. The maritime law of Sweden, about 1500, imposed a penalty for refusing a pilot of 150 thalers, one-third to go to the informer, one-third to the pilot who offered, and the residue to poor mariners. By the maritime code of the Pays Bas the captain was required to take a pilot under a penalty of 50 reals, and to be responsible for any loss to the vessel. By the maritime law of France, ordinance of Louis the XIV, 1681, corporal punishment was imposed for refusing to take a pilot, and the vessel was to pay 50 livres, to be applied to the use of the marine hospital and to repair damages from the

the need for security and the protection of life and property in harbour areas.¹³⁶⁰

Compulsory pilotage refers to instances where “a vessel is compelled by statute to take on a licensed pilot to conduct the vessel over certain well-defined pilotage grounds, or, upon failure to do so, is liable for the payment of half-pilotage, or the entire pilotage fee, or subjects the owner and/or master to criminal penalties, whichever may be required by the particular statute involved.”¹³⁶¹ Voluntary pilotage is simply where a pilot is engaged by the shipowner, his servants or his agents, without being compelled to do so by statute.¹³⁶² This distinction, depending on the jurisdiction, is often pivotal to establishing shipowner liability for the actions of a pilot.

Traditionally, under English common law the shipowner was not liable for the actions of a compulsory pilot, as illustrated by an Admiralty judgment rendered in 1839: “The opinion I have thus formed in this case is founded upon the general principles of reason and justice; that no one should be chargeable with the acts of another who is not an agent of his own election and choice; and I further think, that it would be contrary to all sense of equity, to say to the owners of a foreign vessel, ‘You shall take a pilot of our selection, of our appointment; be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible for his conduct, unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing.’”¹³⁶³ The reasoning was in essence that the compulsory pilot could not be characterized as the shipowner’s servant or agent.¹³⁶⁴ This is opposed to a voluntary pilot, who was clearly treated as the servant of the carrier, with the result that the carrier was vicariously liable for the pilot’s actions.¹³⁶⁵ The defence of compulsory pilotage was also found in the United Kingdom Merchant

stranding. In England (3 George, ch. 13), if a vessel were piloted by any but a licensed, a penalty of £20 was to be collected for the use of the use of superannuated pilots, or the windows of pilots. In the United States, provisions more or less stringent, requiring the payment of a sum when no pilot is taken, are found to be in the statutes of ten of the states. The earliest of these statutes is Massachusetts of 1783.” (*Ex Parte McNeil*, 80 U.S. 236 (1872), at pp. 239-240).

¹³⁶⁰ Hill, C. *Maritime Law*, 6th Ed. (2003) LLP, London, at p. 463.

¹³⁶¹ Parks, A. & Cattell, E. *The Law of Tug, Tow and Pilotage* (1994) Cornell Maritime Press, Maryland, at p. 1018-1019.

¹³⁶² Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 355.

¹³⁶³ *The Maria* (1839) 166 E.R. 508 (Adm.), at 514.

¹³⁶⁴ Mandaraka-Sheppard, A. *Modern Admiralty Law* (2001) Cavendish Publishing, London, at p. 864.

¹³⁶⁵ Fogarty, A. *Merchant Shipping Legislation, 2nd Ed.* (2004) LLP, London, at p. 313.

Shipping Act 1894, at s. 633: “An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.”¹³⁶⁶ By the 20th century however, the defence of compulsory pilotage was being eroded. The 1910 Collision Convention, Article 5 provided that “The liability imposed by the preceding articles shall attach, in cases where the collision is caused by the fault of the pilot, even when the carrying of the pilot is obligatory.”¹³⁶⁷ In the United Kingdom, the Pilotage Act 1913, eliminated the defence by stipulating that “...the owner or master of a vessel navigating under circumstances in which pilotage is compulsory shall be answerable for any loss or damage caused by the vessel or by any fault of the navigation of the vessel in the same manner as he would if pilotage were not compulsory.”¹³⁶⁸ The United Kingdom is not alone, the Commonwealth nations,¹³⁶⁹ along with France and Germany,¹³⁷⁰ have all abolished the defence of compulsory pilotage. Justice Dube, of the Federal Court of Canada, in *The Irish Stardust*, opined on the matter; “At first blush it does appear harsh for owners of a ship to be liable for damage occurring to their ship while she is being navigated by a pilot who has been imposed upon them and who is not one of their servants. But the role of the pilot is to provide local knowledge about areas foreign to the master of the ship; he does not relieve the master of his responsibilities. The officers and the crew on the bridge are there for a

¹³⁶⁶ Merchant Shipping Act 1894, (1894) 57 & 58 Vict. c. 60, s. 633.

¹³⁶⁷ International Convention for the Unification of Certain Rules of Law with Respect to Collision Between Vessels, Brussels, September 23, 1910.

¹³⁶⁸ Section 15 of the Pilotage Act, 1913, U.K. 2 & 3 Geo. 5, c. 31; Hill, C. *Maritime Law*, 6th Ed. (2003) LLP, London, at p. 466 notes that the Pilotage Act 1913 repealed s. 633 of the Merchant Shipping Act 1894. Hill also notes that there is in fact an exception to the rule that shipowners are responsible for a compulsory pilot found in the Defence of the Realm Act, 1914, which applies in war time to enable the government to put ships in the full control of pilots regardless if the ship is navigating in a compulsory pilotage area.

¹³⁶⁹ Parks, A. & Cattell, E. *The Law of Tug, Tow and Pilotage* (1994) Cornell Maritime Press, Maryland, at p. 1018. See also p. 991 for a discussion specifically on the elimination of the defence in Canadian law; See also *Dumurra v. Maritime Telegraph & Telephone Co.* [1977] 2 F.C. 679 (F.C.A.) where the Canadian Federal Court of Appeals found the shipowner liable for damaged caused by a collision with underwater cables, despite the fact that she was under compulsory pilotage; See also Pilotage Act, R.S.C. 1985, c. P-14, at s. 41 which does not exempt the shipowner or the master from liability for loss or damage cause by his vessel where the pilot was negligent.

¹³⁷⁰ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 248 notes the following: “France has abolished all pilotage defences in its internal Law no. 67-545 of July 7, 1967, at art. 5, as did Germany by its Commercial Code, art. 737.”

purpose, to be on guard, alert and ready to provide quick assistance.”¹³⁷¹ More recently, the Justice Clark, of the English Commercial Court, in *The Cavendish*, held that s.16 of the Pilotage Act 1987 maintained the master-servant relationship between the carrier and a compulsory pilot that was established by s. 15 of the Pilotage Act 1913, thus rendering the carrier liable both with respect to third parties and with respect to damage done to the vessel itself.¹³⁷²

There are several jurisdictions that retain the defence of compulsory pilotage. In the United States, where the pilot is compulsory, the shipowner and the master are relieved from *in personam* liability for the faults of the pilot.¹³⁷³ The compulsory pilotage defence, however, does not provide a defence to a suit against the vessel *in rem*.¹³⁷⁴ Moreover, the sole cause of the loss or damage must be the fault of the pilot, as when the master or the crew have contributed to the incident then the defence fails.¹³⁷⁵ In essence the United States have retained the common law reasoning for the defence. The compulsory pilot is not considered to be a servant or an agent of the shipowner, and as such, the shipowner cannot be held personally liable for their actions.¹³⁷⁶ The common law rule is also retained in South Africa. Under Roman Dutch law, the South African common law, the liability of the shipowner to third parties is determined as follows: “If the cause of the damage was the action of the pilot, and there was no contribution to that cause by wrongful acts of the shipowner’s own employees demanding apportionment of liability, there would be no claim against the shipowner because the pilot was the servant

¹³⁷¹ *The Irish Stardust* [1977] 1 Lloyd’s Rep. 195 (F.C.T.D.), at p. 205

¹³⁷² *Gibraltar Ltd. v. Port of London Authority (The Cavendish)* [1993] 2 Lloyd’s Rep. 292.

¹³⁷³ Bauer, G. “Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Cases by Case Analysis” (1993) 24 JMLC 53, at p. 62; Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 247-248; Parks, A. & Cattell, E. *The Law of Tug, Tow and Pilotage* (1994) Cornell Maritime Press, Maryland, at p. 1018-1025; *The China*, 74 U.S. (7 Wall) 53 (1868) at p. 67-69.

¹³⁷⁴ Bauer, *ibid*; Tetley, *ibid*, at p. 247; Parks & Cattell, *ibid*, at p. 1025.

¹³⁷⁵ Parks & Cattell, *ibid*, at p. 1025

¹³⁷⁶ *The China*, 74 U.S. (7 Wall) 53 (1868); Bauer, G. “Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Cases by Case Analysis” (1993) 24 JMLC 53, at p. 62.

nor of the shipowner, but of Portnet [who operates and controls South African ports].”¹³⁷⁷ Similarly, Liberia also allows the defence of compulsory pilotage.¹³⁷⁸

The interpretation of Article 19 of the Draft Convention by various jurisdictions, may in fact be informed by whether that jurisdiction retains the defence of compulsory pilotage. The Draft Convention does not expressly provide for liability with respect to pilotage. Rather, the Working Group has left the issue of whether a carrier will be liable for the actions of a compulsory pilot to the interpretation of national law and national jurisprudence.¹³⁷⁹ Article 19(d) of the Draft Convention provides that the carrier is liable for “[a]ny other person that performs or undertakes to perform any of the carrier’s obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.”¹³⁸⁰ Traditionally, a compulsory pilot is neither requested nor under the master’s control *per se*. Where a vessel is under compulsory pilotage, in all the aforementioned jurisdictions, the master retains command of the vessel.¹³⁸¹ While the pilot has the con, however, he supersedes the master with respect to the command of the vessel in matters of navigation, during which time he has sole control of navigation.¹³⁸² Nevertheless, the master has the obligation to intervene where he ascertains that the pilot is manifestly incompetent or in situations of emergency to preserve the safety of his ship, cargo or crew.¹³⁸³ Article 19(d) is therefore not self-evident in the context of compulsory pilotage. It is no wonder that

¹³⁷⁷ Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 365.

¹³⁷⁸ Tetley, W. *International Maritime and Admiralty Law* (2002) Yvon Blais, Cowansville, Quebec, at p. 247.

¹³⁷⁹ Interview with Tracy Chatman, Transport Canada Policy Advisor (International Marine Policy) Member of the Canadian Delegation for the UNCITRAL Working Group III, (6 February 2008).

¹³⁸⁰ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 14 November 2007, UN Doc. A/CN.9/WG.III/WP.101.

¹³⁸¹ Mandaraka-Sheppard, A. *Modern Admiralty Law* (2001) Cavendish Publishing, London, at p. 859; Parks, A. & Cattell, E. *The Law of Tug, Tow and Pilotage* (1994) Cornell Maritime Press, Maryland, at p. 1008.

¹³⁸² Hare, J. *Shipping Law and Admiralty Jurisdiction in South Africa*, (1999) Juta & Co, Cape Town, at p. 365; Parks & Cattell, *ibid*; See also the *M.S. Duburg*, where a Belgian court held that the captain of a vessel has no authority over a pilot, who is therefore an independent advisor and is not an agent of the captain or of the owner of the vessel (Hof van Beroep te Antwerpen, February 10, 2003 (The M.S. Duburg) [2003] ETL 633). For a similar holding, see also *Rechtbank van Eerste Aanleg te Dendermonde*, June 28, 1991 [1992] ETL 107.

¹³⁸³ Parks & Cattell, *ibid*; Hare, *ibid*, at p. 360.

the Working Group found it difficult to pronounce with any certainty whether the above wording would in fact include compulsory pilots, and have accordingly left it to national law. Arguably, those jurisdictions that maintain the defence of compulsory pilotage will have a greater tendency to view Article 19 as a provision providing for vicarious liability, and as such to interpret it to be inapplicable to pilots, in line with their domestic law on the matter. In particular, recent English decisions characterizing the compulsory pilot as a servant of the owner, would most certainly lend favour to an interpretation of Article 19 that renders the shipowner vicariously liable. Jurisdictions that have abolished the defence are more difficult to predict, however it would stand to reason that Article 19 would be interpreted in accordance with their existing domestic policy on the matter. It would also appear that the policy of certain international bodies runs counter to those who would like to retain pilotage as an exempted peril. UNCTAD has commented that: “This is difficult to justify. As a matter of commercial risk allocation, one of the two parties to any contract of carriage (including charterparties) has to take responsibility for actions of the pilot. The carrier is clearly in a much better position than a shipper or consignee to take on this responsibility and to protect its interests. Traditionally, and contractually, under most standard charterparty forms, the carrier is responsible to the charterer for any actions of the pilot.”¹³⁸⁴

This is an issue that will likely arise often should the Draft Convention come into force. Compulsory pilotage is fairly universal for most harbours. Moreover, most groundings, collisions, and allisions tend to happen when manoeuvring in tight quarters in port, near shore or in channels. A significant number of the aforementioned cases in previous chapters, where the shipowner was exempt from liability for the negligence of a compulsory pilot by virtue of the nautical fault exemption, would likely be decided differently under the Draft Convention.¹³⁸⁵ If such is the case, a shipowner is unlikely to

¹³⁸⁴ UNCTAD, “Draft Instrument on Transport Law – Comments Submitted by the UNCTAD Secretariat”, February 6, 2002, UN Doc. A/CN.9/WG.III/W.P.21/Add.1, at p. 23.

¹³⁸⁵ For example, see *Lyric Shipping Inc. v Intermetals Ltd. (The Al Taha)* [1990] 2 Lloyd’s Rep. 117 (Q.B.); *Grace Line Lim Procs (The Santa Leonor)* 517 F.2d 404 (2 Cir. 1975); *The Torepo* [2002] 2 Lloyd’s Rep. 535 (Q.B.); *Bunge North American Grain Co. v. Steamer Skarp* [1932] Ex. C.R. 212 where the vessel stranded twice in areas well known to be dangerous, the Exchequer Court of Canada held that the carrier was exempt from liability of the errors in navigation of the pilot under the Harter Act; *Shell Petroleum Co. v. Dominion Tankers* [1940] 3 D.L.R. 646, where the Supreme Court of Canada held that

find any satisfaction by pursuing or impleading the employers of the negligent pilots. Statutory immunity for pilotage authorities from liability for the negligent acts of pilots is a common occurrence.¹³⁸⁶ Clarity with respect to the issue of liability for the faults of the compulsory pilot, if it is to be forthcoming, will undoubtedly only happen once the issue has been considered by the courts.

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where the vessel stranded as a result of the pilot dozing for a few moments, the carrier was exempt from liability for nautical fault; See also *American Independent Oil Co. v. M.S. Alkaid*, 1968 AMC 748 (S.D.N.Y. 1967); *Grace Line Lim Proc (The Santa Leonor)* (1973) 397 F.Supp. 1258 (S.D.N.Y. 1973).

¹³⁸⁶ For example, s.10 (7) of the Legal Succession to the South African Transport Services Act, 9 of 1989, provides that Portnet, the body operating the South African harbours, along with the pilot "...shall be exempt from liability for loss or damage caused by a negligent act or omission on the part of the pilot." In England, the Pilotage Act, U.K. 1987, c.21, at s. 22 exempts the pilotage authority from all liability for the acts of a negligent pilot; In Belgium, the Law of 30 August 1988 exempts the State from liability for damage resulting from the culpable acts or omissions of the pilots who are its employees; In Canada, s. 39 of the Pilotage Act, R.S.C. 1985, c. P-14, provides that neither Canada nor the pilotage authority is liable for any damage or loss as a result of the fault, neglect or wrongful act of a licensed pilot.

10.7. VOLUME CONTRACTS: A RETURN TO FREEDOM OF CONTRACT IN SHIPPING

After an examination of the carrier liability provisions, one may question whether the UNCITRAL Draft Convention is in danger of repeating the mistakes of the Hamburg Rules by eliminating nautical fault, and not providing enough incentive for the carrier interests to support the Draft Convention. Due to the recent developments with respect to the treatment of volume contracts in the Draft Convention, nothing could be farther from the truth.

Article 1(2) of the Draft Convention defines a volume contract to mean “a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time.”¹³⁸⁷ The notion of a volume contract is not novel, rather it is a well-established construct that has been commonly used for some time. The use of volume contracts is particularly common in the dry bulk, oil and other non-liner trades, where they are often referred to as contracts of affreightment (COA) or tonnage contracts.¹³⁸⁸ In the 1980s, both BIMCO and INTERTANKO issued standard form volume contracts governing bulk dry cargoes and tanker trade respectively.¹³⁸⁹ As well, the Hamburg Rules specifically provided for volume contracts in Article 2(4): “If a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment.”¹³⁹⁰ As such, it is a

¹³⁸⁷ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 14 November 2007, UN Doc. A/CN.9/WG.III/WP.101, Article 1(2). Note that the definition of volume contract also provides that “The specification of the quantity may include a minimum, a maximum or a certain range.”

¹³⁸⁸ Beare, S. “UNCITRAL Draft Convention on the Carriage of Goods” in *CMI Yearbook 2005-2006*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 399; Comité Maritime International, “Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International” 17 February 2006, UN Doc A/CN.9/WG.III/WP.66, at p. 2.

¹³⁸⁹ Comité Maritime International, “Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International” 17 February 2006, UN Doc A/CN.9/WG.III/WP.66, at p. 2. The BIMCO standard COA was VOLCOA, since reissued in 2004 as GENCOA, while the INTERTANKO standard COA is INTERCOA, which has been adopted by BIMCO. (*Ibid*).

¹³⁹⁰ For further discussion on volume contracts under the Hamburg Rules see Ramburg, J. “The Vanishing Bill of Lading & the Hamburg Rules Carrier” (1979) 27 *Am. J. Comp. L.* 391, in particular at pp. 404-405, where Ramburg puts forward the notion that the provisions governing charterparties in the Rules were quite sufficient to protect the independent bill of lading holders under volume contracts.

concept familiar to the industry, nevertheless, it is being treated in a manner that is to date unprecedented.

The flash point of discussion and controversy surrounding volume contracts is Article 83, entitled “Special rules for volume contracts”, which provides for the freedom to derogate from the obligations and liabilities found in the draft convention in the context of volume contracts.¹³⁹¹ Article 83 does, however, restrict the freedom to derogate with respect to certain obligations, notably, the obligation to exercise due diligence to properly crew, equip and make the vessel seaworthy.¹³⁹² Moreover, by virtue of Article 83(5) certain protections have been put in place in relation to third parties.¹³⁹³ Despite the aforementioned restrictions, the introduction of freedom of contract in relation to volume contracts has proven to be contentious both within the Working Group

¹³⁹¹ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 14 November 2007, UN Doc. A/CN.9/WG.III/WP.101. Article 83(1) to (3) provides: “1. Notwithstanding article 82, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations, and liabilities than those set forth in this Convention provided that the volume contract contains a prominent statement that it derogates from this Convention, and: (a) Is individually negotiated; or (b) Prominently specifies the sections of the volume contract containing the derogations.

2. A derogation pursuant to paragraph 1 of this article shall be set forth in the volume contract and may not be incorporated by reference from another document.

3. A carrier’s public schedule of prices and services, transport document, electronic transport record, or similar document is not a volume contract for the purposes of this article, but a volume contract may incorporate the provisions of such documents by reference as terms of the contract.”

¹³⁹² UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 14 November 2007, UN Doc. A/CN.9/WG.III/WP.101. Article 83(4) provides: “Paragraph 1 of this article does not apply to rights and obligations provided in articles 15, subparagraphs (a) and (b), 30 and 33 or to liability arising from the breach thereof, nor does paragraph 1 of this article apply to any liability arising from an act or omission referred to in article 64.” Article 15(a) and (b) provide that “the carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to: (a) Make and keep the ship seaworthy; (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage...”. Article 30 imposes on the shipper the obligation to provide information, instructions, and documents relating to the goods that are not otherwise reasonably available to the carrier, while Article 33 concerns the shipper’s obligations in relation to dangerous goods. The final limitation on the freedom to derogate is in relation to Article 64, which refers to the loss of the benefit of limitation of liability where loss or delay is attributable to acts or omissions “done with the intent to cause such loss or recklessly with the knowledge that such loss would probably result.” Any liability, therefore, that is resulting from the aforementioned acts or omissions cannot be derogated from by virtue of Article 83.

¹³⁹³ *Ibid.* Article 83(5) provides: “The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 1 of this article, apply between the carrier and any person other than the shipper provided that: (a) Such person received information that prominently states that the volume contract derogates from this Convention and expressly consents to be bound by such derogations; and (b) Such consent is not solely set forth in a carrier’s public schedule of prices and services, transport document, or electronic transport record.”

and the shipping industry generally. A large portion of this controversy derives from the far-reaching implications of freedom of contract with respect to volume contracts. Depending on the source somewhere between 80 to 90 per cent of liner carriage is under volume contract.¹³⁹⁴ The use of volume contracts is also becoming more prevalent as the liner shipping and freight-forwarding industries become increasingly concentrated.¹³⁹⁵ CIFFA has forecast the following: “Based on the pervasive volume contract environment in liner shipping today, it is said that only about 10% of the world container traffic would be subject to the liability provisions of the new convention. Given the freedom of contract, one can conclude that in theory 100% of all liner (container) traffic could be under volume contracts, each tailored to qualify under article [83].”¹³⁹⁶ The fact that such a high percentage of liner shipping would have the freedom to derogate from the mandatory applicable minimum levels of carrier liability, is entirely novel in the context of existing liability regimes. Both the Hamburg Rules and the Hague-Visby Rules, where applicable, govern the individual shipments under volume contracts.¹³⁹⁷ It is therefore both the novel and radical departure from existing international regimes, along with the expansive scope of the freedom of contract, which has resulted in this issue becoming one of the key issues debated by the Working Group. Indeed, “one delegation indicated that the treatment of the issue of freedom of contract in volume contracts would determine its position with regard to the adoption of the draft convention.”¹³⁹⁸

¹³⁹⁴ UNCTAD, “Comments from the UNCTAD Secretariat on Freedom of Contract under the draft instrument” 18 February 2005, Document A/CN.9/WG.III/WP.46, at p. 2; Hooper, C. “Slowly But Surely” (2005) 20 *Currents* 5, at p. 7.

¹³⁹⁵ UNCTAD, *ibid*, at p. 2-3.

¹³⁹⁶ Canadian International Freight Forwarders Association. “CIFFA Submission to Transport Canada on the UNCITRAL Draft Convention”, May 1, 2007. Available online at: www.ciffa.com/downloads/2007/05/10/TC%20Submission%20on%20Uncitral%20Draft%20Conv%20May%201%202007.pdf

¹³⁹⁷ Article 2(4) of the Hamburg Rules expressly provides for the application of the Rules with respect to individual shipments under volume contracts. Article V of the Hague-Visby Rules provides for application of the Rules where bills of lading are issued under the charterparty, and is not as precise as the Hamburg Rules, however it is thought that the use of the term charterparty is wide enough to encompass volume contracts. See Comité Maritime International, “Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International” 17 February 2006, UN Doc A/CN.9/WG.III/WP.66, at p. 3.

¹³⁹⁸ UNCITRAL, “Annotated Provisional Agenda: Working Group III (Transport Law), Twenty-first session (Vienna, 14-25 January 2008)” 7 November 2007, UN Doc. A/CN.9/WG.III/WP.100, at p. 11.

The incorporation of freedom of contract into the Draft Convention happened relatively late in the drafting process as compared with other topics. The initial instrument, as drafted by the CMI and presented to the Working Group, contained no provisions with respect to freedom of contract.¹³⁹⁹ Rather the discussion surrounding freedom of contract began during the eleventh session, where a proposal was made to the effect that competitively negotiated contracts between “sophisticated parties” should be given special treatment by allowing them the freedom to negotiate their own terms.¹⁴⁰⁰ Major concerns were expressed during the session in reaction to the proposal, the first of which was the concern that as volume contracts had few distinctive characteristics, it would be nearly impossible to create a clear definition.¹⁴⁰¹ In addition, because of compulsory application of the current regimes, the Hague or Hague-Visby Regimes, to individual shipments, such contracts cannot be imposed on small shippers. Concern was therefore expressed that by creating an opting-out possibility, “that protection would be lost and the parties would be faced with the situation that prevailed in the 19th century.”¹⁴⁰² Given the large percentage of container trade that is performed under volume contracts, delegates also worried that excluding such contracts, and the individual shipments under them, would undermine the scope of the Draft Convention with the effect that it would be virtually non-existent in many trades.¹⁴⁰³ Finally, concern was expressed for the effects such an opting-out provision would have in relation to non-vessel operating carriers, as its interaction with certain national legislation would have the effect that they would be prevented from opting-out, thus having highly detrimental effects on freight-forwarding interests.¹⁴⁰⁴ Despite concerns, interest was expressed in

¹³⁹⁹ UNCITRAL, “Transport Law: Preliminary Draft Instrument on the Carriage of Goods by Sea”, January 8, 2002, UN Doc. A/CN.9/WG.III/WP.21.

¹⁴⁰⁰ UNCITRAL, “Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March – 14 April 2003)”, 9 May 2003, UN Doc. A/CN.9/526, at p. 55.

¹⁴⁰¹ *Ibid*, where it was noted in particular: “Expressions such as ‘contract of affreightment’, ‘volume contract’, ‘tonnage contract’, and ‘quantity contract’ were also used and depending on the legal system, appeared to be treated as synonymous. The characteristics of such contracts were: that the carrier undertook to perform a ‘generic’ obligation (i.e. generally defined duty which later needs to be further specified) to carry a specified quantity of goods; that no ships were as yet nominated in the contract; that the cargo consisted of a large quantity which was to be carried in several ships over a certain period of time; that the freight was calculated on the basis of an agreed unit or lump sum; and that the risk of delay was borne by the carrier.”

¹⁴⁰² *Ibid*, at p. 56.

¹⁴⁰³ *Ibid*.

¹⁴⁰⁴ *Ibid*.

relation to the exclusion for competitively negotiated contracts, and as such it was indicated that draft provisions would be circulated before the next session.¹⁴⁰⁵

Accordingly, prior to the twelfth session, the United States put forward a proposal to the Working Group addressing, among other things, the notion that parties to an ocean liner service agreement (OLSA) should be permitted to depart from the provisions of the Draft Convention.¹⁴⁰⁶ The United States argued that OLSAs are competitively negotiated liner service contracts that should be subject to the Draft Convention, except to the extent that parties agree to derogate from some or all of the provisions.¹⁴⁰⁷ The concept of an OLSA is not unfamiliar to the United States, as United States shipping legislation has specifically provided for such contracts.¹⁴⁰⁸ Indeed, it was the United States that had pushed for freedom of contract, as one commentator notes, it was “a point on which the US has insisted from the outset.”¹⁴⁰⁹ The head of the United States delegation on the Working Group, Mary Helen Carlson, has gone so far as to describe a failure to include a provision allowing parties to mutually negotiated agreements to derogate from the terms

¹⁴⁰⁵ *Ibid*, at pp. 56-57.

¹⁴⁰⁶ UNCITRAL, “Proposal by the United States of America”, 7 August 2003, UN Doc. A/CN.9/WG.III/WP.34, at p. 6-9.

¹⁴⁰⁷ *Ibid*, at p. 6-7. The United States, suggested that OLSA be defined in the draft convention as follows: “(a) An “Ocean Liner Service Agreement” is a contract in writing (or electronic format), other than a bill of lading or other transport document issued at the time that the carrier or performing party receives the goods, between one or more shippers and one or more carriers in which the carrier or carriers agree to provide a meaningful service commitment for the transportation by sea (which may also include inland transport and related services) of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agree to pay a negotiated rate and tender a minimum volume of cargo.” (*Ibid*, at p. 8).

¹⁴⁰⁸ The United States Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998, defines a “Service Contract” in section 3(19): “a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non-performance on the part of any party.” (Comité Maritime International, “Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International” 17 February 2006, UN Doc A/CN.9/WG.III/WP.66, at p. 4). Chester Hooper, a member of the United States delegation to the Working Group has commented that the definition of an OLSA which the United States proposed to the Working Group, is in fact narrower than the definition of a service contract as found in domestic law (Hooper, C. “Slowly But Surely” (2005) 20 *Currents* 5, at p. 7).

¹⁴⁰⁹ Beare, S. “UNCITRAL Draft Convention on the Carriage of Goods” in *CMI Yearbook 2005-2006*, CMI Headquarters Pub., Antwerpen, Belgium, at p. 399.

of the convention as a “deal breaker”.¹⁴¹⁰ The United States proposal, despite having a certain measure of support, was found to be problematic by many delegations. Although the United States proposal was briefly discussed during the twelfth session,¹⁴¹¹ it was not until the fourteenth session that the issue was considered in depth by the Working Group.¹⁴¹² In the interim, several nations had put forward position papers on the subject of freedom of contract. The Chinese delegation, despite noting that “there are many problems in respect of the definition of OLSAs,” supported freedom of contract to a certain extent in a position paper submitted after the twelfth session.¹⁴¹³ The Chinese delegation suggested that the term “agreement concluded through free negotiation” should be used rather than seeking to define OLSAs, volume contracts or COAs.¹⁴¹⁴ In addition, it was argued by the Chinese that it was necessary to limit the freedom of contract, by rendering null and void any lessening of liability with respect to: i) the obligation of seaworthiness, ii) deviation, and iii) any acts or omissions done with intent to cause loss, damage or delay, or recklessly and with knowledge that loss, damage or delay would probably result.¹⁴¹⁵ Denmark, Finland, Norway and Sweden, otherwise known as the Nordic countries, were equally cautious, supporting “the American *idea* of the non-mandatory approach to OLSAs, but with certain reservations.”¹⁴¹⁶ The Nordic countries felt that it was of the utmost importance that a clear definition of OLSA is

¹⁴¹⁰ Carlson, M. “U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention” (2007) 31 Tul. Mar. L.J. 615, at p. 636.

¹⁴¹¹ UNCITRAL, “Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003)”, 16 December 2003, UN Doc. A/CN.9/544, at pp.23-25, where the Working Group acknowledged support for the continued attempts at defining criteria where freedom of contract should be permitted: “The situation where a contract is freely negotiated; the situation where the focus of the contract is on the use of the vessel and not on the carriage of the goods; the situation of non-liner trade; and the situation where the object of the chartering is the whole or a large part of the vessel.” (*Ibid*, p. 24).

¹⁴¹² UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)” 21 December 2004, UN Doc. A/CN.9/572, at pp. 22-31.

¹⁴¹³ UNCITRAL, “Proposal by China on Chapter 19 of the Draft Instrument and the Issue of Freedom of Contract”, 29 April 2004, UN Doc. A/CN.9/WG.III/WP.37. The Chinese argued that non-mandatory application can be quite successful in practice, noting the success of the Chinese Maritime Code. The Chinese Maritime Code governs voyage charters, and is mandatory where bills of lading are issued, but is non-mandatory in relation to voyage charterparty contracts. There are however limits as the carrier cannot exempt himself from the obligation of seaworthiness or the obligation not to deviate. (*Ibid*, at p. 2).

¹⁴¹⁴ *Ibid*, at p. 4.

¹⁴¹⁵ *Ibid*, at p. 5. Most of the exceptions to freedom of contract suggested by the Chinese were inspired by similar provisions in the Chinese Maritime Code. Equity was also a factor: “we think the contract should not exempt the liabilities resulting from intentional or gross negligence according to the principle of equity.” (*Ibid*).

¹⁴¹⁶ UNCITRAL, “Comments from Denmark, Finland, Norway and Sweden (the Nordic countries) on the freedom of contract”, 30 September 2004, UN Doc. A/CN.9/WG.III/WP.40, at p. 4.

found in order to prevent misunderstandings.¹⁴¹⁷ In addition, the Nordic countries felt that with respect to third parties, mandatory protection must prevail.¹⁴¹⁸ Although only addressing one of the expressed concerns, the United States updated their original proposal prior to the fourteenth session.¹⁴¹⁹ In response to concerns with respect to NVOCCs, the definition of OLSA was amended and expanded in order to include NVOCCs.¹⁴²⁰

At the fourteenth session, in order to begin to properly tackle the issue of freedom of contract, the Working Group divided it into three main topics and highlighted the key issues to be considered.¹⁴²¹ With respect to the first topic, the scope of application, the Working Group considered the alternative approaches to defining what situations and contracts would in fact be governed by the Draft Convention.¹⁴²² It was concluded that an informal drafting group should be requested to draft a provision on the scope.¹⁴²³ For the second topic, the Working Group considered third parties, where it was decided that third parties must be protected in the Draft Convention.¹⁴²⁴ The draft OLSA provisions were the third topic considered and the delegates raised similar concerns to those expressed

¹⁴¹⁷ *Ibid.*

¹⁴¹⁸ *Ibid.*, at p. 5.

¹⁴¹⁹ UNCITRAL, "Proposal by the United States of America", 8 November 2004, UN Doc. A/CN.9/WG.III/WP.42.

¹⁴²⁰ *Ibid.*, a pp. 2-3. The definition of OLSA now provided "An Ocean Liner Service Agreement means a contract that is mutually negotiated and agreed to in writing or electronically between one or more carriers and one or more shippers and that provides for the liner carriage of goods by sea in a series of shipments over a specified period of time. Such contract shall obligate the carrier(s) to perform a service not otherwise mandatorily required by this instrument and shall obligate the shipper(s) to tender a minimum volume of cargo and to pay the rate(s) set forth in the contract. The carrier(s) service obligation shall include ocean carriage and may also include carriage by other modes of transport, warehousing, or logistics services, as required..." (*Ibid.*, at p. 2). This would now ensure that companies such as FedEx and UPS, would be able to contract out of any or all of the terms of the draft convention. (Chatman, T. "The Ultimate Cargo Regime?" (2005) *The Shipper Advocate* 11, at p. 13).

¹⁴²¹ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)" 21 December 2004, UN Doc. A/CN.9/572.

¹⁴²² *Ibid.*, at pp.22-24.

¹⁴²³ As was requested by the Working Group, an informal drafting group composed of several delegations met and prepared a redraft of the provisions governing the scope of application of the draft convention. The redraft is included in the Report of the Working Group from the fourteenth session (*ibid.*, at pp. 28-30).

¹⁴²⁴ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)" 21 December 2004, UN Doc. A/CN.9/572, at pp. 24-26.

during the eleventh session.¹⁴²⁵ The Working Group concluded that “particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA.”¹⁴²⁶ The fourteenth session therefore provided a roadmap of the issues in need of attention and clarification. During the following session, the Working Group devoted considerable attention to continuing the work of the fourteenth session with respect to freedom of contract.¹⁴²⁷ The volume contract provisions became more concrete as several key issues were decided. Importantly, it was decided that the broader and more universal concept of ‘volume contracts’ would be used in the Draft Convention rather than OLSAs.¹⁴²⁸ This negated the thorny issue of finding an acceptable definition for OLSAs, yet still included them in the Draft Convention on the basis that they were subsumed under the broader notion of a volume contract.¹⁴²⁹ The Working Group also put forward draft criteria concerning what conditions must be present in order to derogate from the Draft Convention,¹⁴³⁰ along with suggestions on mandatory provisions from which derogation would not be permitted, in particular, the obligation of

¹⁴²⁵ *Ibid*, at pp. 26-28; For concerns expressed during the eleventh session see UNCITRAL, “Report of Working Group III (Transport Law) on the work of its eleventh session (New York, 24 March – 14 April 2003)”, 9 May 2003, UN Doc. A/CN.9/526.

¹⁴²⁶ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)” 21 December 2004, UN Doc. A/CN.9/572, at p. 28.

¹⁴²⁷ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)” 13 May 2005, UN Doc. A/CN.9/576, at pp. 5-29.

¹⁴²⁸ *Ibid*, at p. 6.

¹⁴²⁹ There was support for this prior to the session. After the fourteenth session, the Finnish delegation distributed a questionnaire in order to canvass the views on the provisions during that session. At the fifteenth session, the Finnish delegation circulated their report, authored by Professor Honka. The report considered, among other things, the definition of OLSA. It was noted that there are views that OLSAs are truly volume contracts, and as such should therefore be regulated as part of the general provisions on the scope of application. (UNCITRAL, “Scope of application and freedom of contract: information presented by the Finnish delegation at the fifteenth session”, 22 June 2005, UN Doc. A/CN.9/WG.III/WP.51, at p. 8).

¹⁴³⁰ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)” 13 May 2005, UN Doc. A/CN.9/576, at p. 6-7, where the Working Group considered four conditions that were suggested as a precondition for derogating from the provisions of the draft convention: “The contract should be [mutually negotiated and] agreed to in writing or electronically; The contract should obligate the carrier to perform a specified transportation service; A provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities should be set forth in the contract and may not be incorporated by reference from another document; and The contract should not be [a carrier’s public schedule of prices and services,] a bill of lading, transport documents, electronic record, or cargo receipt or similar documents but the contract may incorporate such documents by reference as elements of the contract.”

seaworthiness.¹⁴³¹ In addition to other topics, the notion that the derogation from the Draft Convention could cover third parties, where they had expressly consented, was addressed.¹⁴³² The issue of freedom of contract in relation to volume contracts was far from non-contentious during the fifteenth session. Certain delegates expressed the view that no derogation under any circumstances should be allowed.¹⁴³³ Moreover, concern continued to be expressed that provisions and conditions were unclear.¹⁴³⁴ Criticism of the freedom of contract initiatives was not restricted to Working Group members. UNCTAD submitted comments on freedom of contract to the Secretariat prior to the fifteenth session, expressing concern that service or volume contracts would be used to circumvent otherwise mandatory liability rules disadvantaging small shippers.¹⁴³⁵ Despite

¹⁴³¹ *Ibid*, at p. 7-8. Along with providing that a carrier may not derogate from either his obligation to furnish a seaworthy vessel or liability arising from unseaworthiness, there were other suggestions as to mandatory provisions, including obligations relating to maritime safety, and the shipper's obligations to provide information to the carrier. Professor Honka's report, distributed during the fifteenth session, considered the above mentioned provisions as those "provisions in the Instrument [that] are of such fundamental importance that they cannot be derogated from even when article 88a [freedom of contract] as such is applicable." (UNCITRAL, "Scope of application and freedom of contract: information presented by the Finnish delegation at the fifteenth session", 22 June 2005, UN Doc. A/CN.9/WG.III/WP.51, at p. 14).

¹⁴³² UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)" 13 May 2005, UN Doc. A/CN.9/576, at p. 8-10.

¹⁴³³ *Ibid*, at p. 7.

¹⁴³⁴ *Ibid*, at p. 7.

¹⁴³⁵ UNCTAD, "Comments from the UNCTAD Secretariat on Freedom of Contract under the draft instrument" 18 February 2005, Document A/CN.9/WG.III/WP.46, at p. 4. UNCTAD also remarked that "all existing international regimes [for land, sea and air] establish minimum levels of carrier liability, which apply mandatorily... thus a central feature of existing international liability regimes is a restriction of freedom of contract with the legislative intent to ensure the protection of small parties against unfair standard terms. A central question arises for consideration of the Working Group is whether and to which extent the draft instrument should follow the same approach as existing international liability regimes." (UNCTAD, *ibid*, at p. 2) The Working Group at the fifteenth session was cognisant of this noting that in certain jurisdictions, "small shippers were virtually economically compelled to conclude volume contract, and often on standard terms. Given the danger that these standard terms could pose in terms of hiding derogations from the obligations in the draft instrument, it was thought that paragraph (b) [specifying that there must be a prominent identifying the sections of the volume contract containing the derogations] provided practical and indispensable protection for small shippers faced with such standard terms." (UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its fifteenth session (New York, 18-28 April 2005)" 13 May 2005, UN Doc. A/CN.9/576, at p. 25). The CMI however, have responded to the concerns about volume contracts and small shippers as follows: "The concern has therefore been expressed that service contracts covering a small number of shipments of relatively small quantities of goods, which derogate from the mandatory regime, could disadvantage small or unsophisticated shippers with unequal bargaining power to that of the carrier, possibly by sub-service contracts made under an overarching framework contract. It should be noted, however, be noted that no shipper can be forced to accept a volume contract. A shipper is always entitled to obtain from the carrier an appropriate negotiable transport document or electronic transport record..." (Comité Maritime International, "Volume Contracts: Document presented for the information of the Working Group by the Comité Maritime International" 17 February 2006, UN Doc A/CN.9/WG.III/WP.66, at p. 5).

concerns, support for freedom of contract for volume contracts persisted after the fifteenth session, and when an updated version of the Draft Convention was released in September 2005, it contained an article entitled “Special rules for volume contracts”.¹⁴³⁶ It was acknowledged that the drafting of acceptable provisions was a work in progress, and as such, Finland submitted a proposal prior to the seventeenth session that suggested drafting changes in order to simplify and clarify the existing articles.¹⁴³⁷ During the seventeenth session, the Working Group considered the proposals submitted by Finland along with the text of the articles contained in the September 2005 version of the draft convention.¹⁴³⁸ Again, “concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention.”¹⁴³⁹ Nonetheless, after debate, the Working Group concluded by accepting the improvements in the drafting to ‘Special rules for volume contracts’ suggested by Finland, almost without modification.¹⁴⁴⁰

Since the seventeenth session, freedom of contract with respect to volume contracts appears to be cast in stone. Found in article 83 in the most recent version of the Draft Convention,¹⁴⁴¹ it has remained virtually unchanged over the past two years, despite numerous requests to do so. France and Australia have been vocal with respect to their opposition of freedom of contract as currently drafted, in particular noting that a volume contract could potentially cover almost all carriage by shipping lines, thus creating “a loophole in the convention that would enable parties to release themselves from the binding provisions of the instrument.”¹⁴⁴² To attempt to limit the expansive nature of the

¹⁴³⁶ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 8 September 2005, UN Doc. A/CN.9/WG.III/WP.56, at p. 146.

¹⁴³⁷ UNCITRAL, “Proposal by Finland on scope of application, freedom of contract and related provisions” 27 January 2006, UN Doc. A/CN.9/WG.III/WP.61, and in particular see pp. 4 and 11-13 for a discussion on volume contracts.

¹⁴³⁸ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its seventeenth session (New York, 3-13 April 2006)” 24 April 2006, UN Doc. A/CN.9/594, pp. 32-43.

¹⁴³⁹ *Ibid*, p. 39.

¹⁴⁴⁰ *Ibid*, at p. 39-43. The Working Group concluded that although the policies underlying article 95(5)(b), which addressed the binding of third parties, were acceptable, they felt that it should be redrafted. (*Ibid*, at p. 42).

¹⁴⁴¹ UNCITRAL, “Draft convention on the carriage of goods [wholly or partly] [by sea]”, 14 November 2007, UN Doc. A/CN.9/WG.III/WP.101, at p. 53-54.

¹⁴⁴² UNCITRAL, “Joint proposal by Australia and France on freedom of contract under volume contracts”, 22 May 2006, UN Doc. A/CN.9/612, at p. 3. Aside from concerns over the expansive nature of the

freedom to derogate from the Draft Convention, France and Australia submitted a joint proposal to the Secretariat calling for a more restricted freedom of contract.¹⁴⁴³ Specifically, the proposal suggested that neither the shipper nor the carrier should be permitted to derogate from either their basis of liability or their obligations.¹⁴⁴⁴ Furthermore, the proposal increased the necessary conditions to be met in order for parties to derogate from the Draft Convention.¹⁴⁴⁵ Finally, the proposal sought to restrict the scope of the definition of a volume contract.¹⁴⁴⁶ During the nineteenth session, the Working Group considered Australia and France's proposal.¹⁴⁴⁷ The proposal did garner a measure of support, particularly with respect to narrowing the scope of volume contracts in light of the large share of international carriage that would fall within the definition as drafted.¹⁴⁴⁸ The Working Group concluded that "the text that appeared in draft article 89 [currently 83], therefore, was said to be the result of a carefully crafted compromise...[T]he prevailing view within the Working Group was that the current text of draft article 89 reflected the best possible consensus solution to address those concerns in a manner that preserved a practical and commercially meaningful role for party autonomy in volume contracts."¹⁴⁴⁹ Moreover, the Working Group noted that it would be highly unlikely that an equally satisfactory consensus could be achieved, and it was

derogative provisions, France and Australia have argued that this may also harm the draft convention's chances of adoption: "The shift, through the mechanism of volume contracts, from a fundamentally mandatory regime to a largely derogative regime represents a major change. The risk is that in some States obstacles may arise to ratification of a convention whose provisions, which differ sharply from national legislation in the field, appear to be incompatible with fundamental principles of domestic law." (*Ibid*, at p. 2).

¹⁴⁴³ *Ibid*.

¹⁴⁴⁴ *Ibid*, at p. 4. In essence, any derogation from the liability regime would not be allowed.

¹⁴⁴⁵ *Ibid*, at p. 4: "The parties to a volume contract may derogate from the provisions of this convention only if: (a) the volume contract is individually negotiated; (b) the derogation is agreed in writing between the parties; and (c) the derogation is set forth in highly visible type in the volume contract in a manner that identifies the clauses of the volume contract containing derogations."

¹⁴⁴⁶ *Ibid*, at p. 3-4. The wording of the definition was amended slightly by UNCITRAL, "Joint proposal by Australia and France concerning volume contracts" 14 March 2007, UN Doc. A/CN.9/WG.III/WP.88, at p 2, and now reads: "Volume contract means a contract of carriage negotiated by the parties by which a carrier agrees to special terms for the carriage of a substantial quantity of cargo, in a series of shipments during a set period of time of no less than one year. The quantity may be specified as a minimum, a maximum or a certain range."

¹⁴⁴⁷ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its nineteenth session (New York, 16-27 April 2007)" 17 May 2007, UN Doc. A/CN.9/621.

¹⁴⁴⁸ *Ibid*, at p. 37. With respect to restricting the scope of the definition of volume contract, the comment was made that "[f]ailure to do so...might mean that the draft convention would be devoid of practical significance." (*Ibid*).

¹⁴⁴⁹ *Ibid*, at p. 40.

strongly urged not to attempt to do so at this late stage in the drafting process.¹⁴⁵⁰ Given such as position, it is therefore unsurprising that submissions to the Secretariat by the European Shipper's Council have proven to be unsuccessful with respect to freedom of contract. In January 2006, the European Shipper's Council urged the Working Group to reconsider the extent of freedom of contract, stressing that "under no circumstances should the parties be authorized to derogate from the material elements of the contract of carriage, particularly through provisions that result in the liability of the carrier being reduced or even eliminated."¹⁴⁵¹ The Council cautioned the Working Group that only a small number of very large shippers could actually bargain with carriers on equal terms, and as such there were no grounds to derogate from the protection given to shippers under the previous carriage conventions.¹⁴⁵² In February 2007, the Council reminded the Working Group of its extreme reservations surrounding freedom of contract, and its assertions that it would be harmful to small and medium-sized shippers.¹⁴⁵³ Nevertheless, the Working Group remained highly resistant to alterations with respect to freedom of contract during the nineteenth session, a trend that continued into the twentieth session in October 2007.¹⁴⁵⁴ Even though alterations to the provisions were not considered during the twentieth session, it was by no means fully accepted within the Working Group. One delegation made an express reservation with respect to the provisions on volume

¹⁴⁵⁰ *Ibid.*

¹⁴⁵¹ UNCITRAL, "Comments of the European Shipper's Council regarding the draft convention on the carriage of goods [wholly or partly] [by sea]", 27 January 2006, UN Doc. A/CN.9/WG.III/WP.64, at p. 6.

¹⁴⁵² *Ibid.*, at p. 6-7. The Council argued that the drafted articles would allow, for example, "a carrier to be released from liability during loading or discharging simply because it had secured the shipper's signature or a 'contract' on the basis of a 'low freight rate'." Moreover, with respect to requiring consent from the consignee to derogate from the draft convention, the Council thought that in practice this offered no protection: "To what extent can a consignee that is urgently awaiting goods (which it has probably already paid for) really refuse to apply substandard clauses, assuming it is sufficiently well informed to understand those clauses and their significance? Contrary to what the members of the Working Group may think, shippers generally have only a poor knowledge of maritime law and by no means have the legal analysis skills ascribed to them." (*Ibid.*, at p. 7).

¹⁴⁵³ UNCITRAL, "Position of the European Shippers' Council submitted to UNCITRAL Working Group III (Transport Law)", 14 February 2007, UN Doc. A/CN.9/WG.III/WP.83, at p. 5. As in its previous position paper, the Council advocated maintaining the protections offers under the current carriage regimes: "It should be noted that the Hague and Hamburg Rules allow very broad freedom of contract while protecting small and medium sized shippers. By simply reproducing their well-known provisions and excluding derogations in favour of the carrier alone, it would be possible to dispense with the entire, poorly constructed volume contract mechanism." (*Ibid.*).

¹⁴⁵⁴ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)" 2 November 2007, UN Doc. A/CN.9/642, at p. 62.

contracts, and informed the Working Group that further consideration is needed, as the matter is not the subject of a consensus.¹⁴⁵⁵

Such consideration was given during the twenty-first session held during January 2008. Although the issue was debated, and efforts were made to re-define and narrow the scope of volume contracts in order to protect small shippers, sufficient support for change did not exist within the Working Group.¹⁴⁵⁶ The issue, therefore, appears to be settled from a drafting standpoint. Whether the issue of volume contracts will be raised when the Draft Convention is presented during the forty-first session of the Commission in June 2008 is debatable. Generally, substantive issues are not re-opened during the Commission's sessions unless there is overwhelming support to do so, however, the issue is the subject of intense debate with many delegations who oppose the current definition of volume contract.¹⁴⁵⁷ One delegation in particular had previously indicated to the Commission, during a past session, that their position with respect to the adoption of the draft convention would in the end be determined on the basis of the treatment of the issue of freedom of contract in volume contracts.¹⁴⁵⁸ To what extent this continues to be a determinative issue of the ratification and adoption of the Draft Convention remains to be seen.

Interestingly, despite being a contentious issue for the delegates, the volume contract issue has received little attention from commentators.¹⁴⁵⁹ At first blush, the provisions concerning volume contracts appear to have far reaching implications.

¹⁴⁵⁵ *Ibid.*

¹⁴⁵⁶ "Short Summary of Decisions Taken by the Working Group During the 21st session (January 16 to 25, 2008)", Informal summary circulated to interested parties by email from Tracy Chatman, Transport Canada Policy Advisor (International Marine Policy) Member of the Canadian Delegation for the UNCITRAL Working Group III, on February 21, 2008.

¹⁴⁵⁷ UNCITRAL, "Report of the Working Group III (Transport Law) on the work of its twentieth session (Vienna, 15-25 October 2007)" 2 November 2007, UN Doc. A/CN.9/642, at p. 62.

¹⁴⁵⁸ UNCITRAL, "Annotated Provisional Agenda: Working Group III (Transport Law), Twenty-first session (Vienna, 14-25 January 2008)" 7 November 2007, UN Doc. A/CN.9/WG.III/WP.100, at p. 11.

¹⁴⁵⁹ Certain industry groups however have been quite vocal with respect to their opposition to the provisions concerning volume contracts. In particular, both the European Shippers' Council (www.europeanshippers.com) and the Canadian International Freight Forwarders Association (www.ciffa.com) have posted multiple opinion papers on their respective websites advocating the problematic nature of freedom of contract. Both the ESC and the CIFFA believe that allowing carriers to contract out of portions of the convention will be detrimental to shippers and freight forwarders.

Carriers, provided the contractual arrangement falls within the definition of a volume contract, may now exempt themselves from the vast majority of the provisions of the Draft Convention. This is particularly significant when one considers that the definition of a volume contract requires only a “specified quantity of goods in a series of shipments during an agreed period of time.” One has the tendency to conceptualise the shipments in terms of containers, however this does not reflect the reality of the definition.¹⁴⁶⁰ Any specified quantity will suffice, for example if FedEx were to ship two 1kg boxes during a time frame of six months, this would fall within the definition of a volume contract. It therefore becomes difficult to imagine the few instances that cannot be characterized as falling within the definition of a volume contract. The most immediate and pressing issue for the purposes of this thesis is that with freedom of contract comes the nautical fault exemption. Arguably, should the Draft Convention come into force, the closest analogous situation for carrier liability would be that of pre-Harter Act liability, where freedom of contract abounded and from which nautical fault was born. What the provisions on volume contracts have done, among other things, is to render the elimination of the nautical fault exemption from the Draft Convention almost theoretical.

10.8 IS THIS HAMBURG REVISITED?

One commentator has noted that “substantive uniformity...[is] only attainable when the various participants in the transactions arrive at a consensus with respect to the fairness of their rights and duties. This was the lesson of the success of the Harter Act and of the Hague Rules and of the failure of the Hamburg Rules.”¹⁴⁶¹ The Hague Rules were a commercial compromise, of which the nautical fault exemption was an integral part. The absence of the nautical fault exemption in the Hamburg Rules proved to be fairly central to their downfall. Many of the criticisms aimed at the Hamburg Rules, have resurfaced with regard to the Draft Convention.¹⁴⁶² It has been noted that “[a]ny new

¹⁴⁶⁰ Interview with Tracy Chatman, Transport Canada Policy Advisor (International Marine Policy) Member of the Canadian Delegation for the UNCITRAL Working Group III, (6 February 2008), who noted the tendency of delegates to conceive of the problem in relation to the shipments of containers, when in reality any quantity will suffice.

¹⁴⁶¹ Kozolchyk, B. “Evolution and Present State of the Ocean Bills of Lading from a Banking Law Perspective” (1992) 23 JMLC 161, at p. 245.

¹⁴⁶² Prof. Tetley, in reviewing the 2001 Draft Instrument, repeated almost verbatim an argument made by him 23 years earlier when commenting on the Hamburg Rules. In relation to the Draft Instrument, Tetley

instrument must meet the reasonable requirements of the major international liner companies, some twenty of whom probably account for more than three quarters of all bill of lading general cargo movements. This includes the issues relating to Hague Rules ‘exceptions’ and particularly ‘fault in navigation’.¹⁴⁶³ The final Draft Convention contains a liability provision similar to Hamburg’s single basis of liability along with an extensive list of exempted perils. The Hamburg liability regime is therefore not exactly reproduced in the Draft Convention, although the formula is in some instances similar, and the politicised process by which the instrument was drafted is more akin to Hamburg than Hague. Arguably, the drafters in this respect are cognisant of the importance of the list of exempted perils as a feature that would render the Draft Convention less objectionable to certain sectors of the industry. It was noted by the Working Group that “maintaining the list of excepted perils, particularly in language close to that of the Hague-Visby language, was valuable for the purposes of legal certainty, even if it could be argued that it was logically unnecessary...[as the] events [are] already covered pursuant to the general liability rule in draft paragraph 14.”¹⁴⁶⁴ It is evident that the Working Group recognized the need to cater to carrier interests as well as cargo interests thus not repeating the error of Hamburg’s ‘what about us?’ response. Despite the early elimination of the nautical fault exemption, and the wholesale refusal to resurrect it with regard to pilotage, initial fears that a package negotiation at a later stage would prove to be inadequate are unjustified in the light of the provisions concerning volume contracts. The ‘what about us’ response of carriers to Hamburg, was answered by the Working Group with freedom of contract. Were it not for the volume contract provisions, one would be justified in their concern that the existing carrier liability provisions would be repeating mistakes made in Hamburg decades ago. Although criticisms made in relation

noted that: “The drafting and language is so new and so different from Hague and Hague/Visby and Hamburg, that all preceding jurisprudence will not be understood or of value. The new principles and the language, clauses and phrases will not be clear or familiar to judges, even after considerable study, let alone to merchants.” (Tetley, W. “Report of William Tetley RE: Provisional Final Draft Outline Instrument on Issues of Transport Law” November 5, 2001. <http://tetley.law.mcgill.ca/cmissues.htm>.)

¹⁴⁶³ Institute of Chartered Shipbrokers, replies to the UNCITRAL questionnaire on the draft instrument, found in UNCITRAL, “Preparation of a draft instrument on the carriage of goods [by sea]: Compilation of replies”, 31 January 2003, UN Doc. A/CN.9/WG.III/WP.28, at p. 7.

¹⁴⁶⁴ UNCITRAL, “Report of the Working Group III (Transport Law) on the work of its fourteenth session (Vienna, 29 November-10 December 2004)” 21 December 2004, UN Doc. A/CN.9/572, at p. 12.

to the Hamburg Rules have resurfaced with respect to the Draft Convention,¹⁴⁶⁵ the elimination of nautical fault is not longer among them. Carrier interests who campaigned against the Hamburg Rules have so far been silent. Nevertheless, what is likely to become the lightning rod of controversy is the freedom of contract issue, as many delegates remain unsatisfied. Moreover, industry groups representing shippers and forwarders have also voiced their opposition. Has the pendulum of liability swung too far to the other side this time? Has the Draft Convention repeated the mistake of favouring one group over another? Unfortunately, only time will provide an answer as to whether the Draft Convention is another failed attempt at the modernization of carriage law.

10.9. CONCLUSION

Arguably, what will determine the success or failure of the Draft Convention will be how closely the political compromises obtained mirrors the commercial compromises that the shipping industry will accept. The danger that arises with the Draft Convention is that during protracted negotiations along political lines, sufficient consideration was not given to whether the resulting convention will prove palatable to commercial interests. What must not be forgotten is that to date, successful uniform law for the carriage of goods by sea has been born of commercial compromise. In this regard, the words of Lord Hobhouse are instructive: “What should no longer be tolerated is the unthinking acceptance of a goal of uniformity and its doctrinaire imposition on the commercial community. Only conventions which demonstrably satisfy the well proven needs of the commercial community should be ratified and legislation should only be agreed to if it is demonstrably fit to be enacted as part of the municipal law of this country.”¹⁴⁶⁶ If commercial interests on both side of the debate can be satisfied, the majority of nations, particularly the major trading nations, will likely fall in line.

At first blush, the hasty removal of nautical fault from the Draft Convention called into question whether the errors of the Hamburg Rules were being repeated. The

¹⁴⁶⁵ Such criticisms of the Draft Convention reminiscent of the Hamburg Rules include increased friction costs; increased insurance costs and freight rates; lengthy and complex drafting; conflict with existing conventions; and differing interpretations between civil law and common law countries.

¹⁴⁶⁶ As quoted in Griggs, P. “Obstacles to Uniformity of Maritime Law” (2003) 34 JMLC 191, at p. 199.

exemption was eliminated early on in the process, precluding the possibility of including it in a compromise package at a later date. Several Working Group sessions later, freedom of contract was introduced, thereby providing a backdoor reintroduction of nautical fault. One wonders whether freedom of contract would have been a necessity, or a “deal breaker”, had nautical fault not been eliminated earlier. Nevertheless, only time will tell whether the political interests at the bargaining table have truly brokered a commercially acceptable compromise. If the Draft Convention is successful, the prevalence of the nautical fault exemption will be dependent on market forces and the respective bargaining powers of carriers, cargo interests, and their intermediaries. Freedom of contract will in essence create market-based carriage terms. It is nevertheless difficult, if not impossible, to judge or foresee the potential market evolutions, and thus any conclusions on the fate of nautical fault under the Draft Convention are purely speculative.

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Chapter 11

Is A Change Justified?

Many commentators have adamantly adopted the position that the nautical fault exemption must go.¹⁴⁶⁷ One cannot contest that it is out of step with other transport regimes,¹⁴⁶⁸ nor can one refute that from a policy perspective exempting a party from liability, for loss stemming from the negligence of his employees, is in stark contrast to modern legal principles. What one cannot ignore however is that the nautical fault exemption was, and still is under most carriage today, part and parcel of a compromise between cargo interests and carriers on duties and liabilities that has in many ways shaped the basis of their modern relationship. One cannot underestimate the effects of the elimination of nautical fault. As demonstrated by the foregoing, the nautical fault exemption plays an important role, not only in regulating the relationship between a shipper of goods and the carrier under a bill of lading, but also with regard to other maritime contracts. Moreover, by virtue of Himalaya clauses, the effects of the nautical fault exemption reach far beyond the shipowner. Nautical fault has become integral to both the recovery of general average contributions and the barring of recovery from the carrying vessel in both-to-blame collision situations. It is undeniable that the elimination of the nautical fault would profoundly impact such situations.

Provided that the practical effects of the elimination of the nautical fault are not as profound as one would imagine, the absence of the exemption nevertheless provides a

¹⁴⁶⁷ See for example, Berlingieri, F. "Basis of liability and exclusions of liability." [2002] LMCLQ 336; Tetley, W. "The Hamburg Rules – A Commentary" [1979] LMLCQ 1; Karan, H. *The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (2004) Edwin Mellen Press, Lewiston, NY; Ping-fat, S. *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague.

¹⁴⁶⁸ Road, rail and air conventions, despite containing exempted perils, do not contain any exemptions from loss resulting from the fault or negligence of the carrier's servants or agents. For a concise review of carrier liability under rail, road and air regimes see Crowley, M. "The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem" (2005) 79 Tul. L. Rev. 1461, at pp. 1462-1467; See also Moreno, C. *Legal Nature and Functions of the Multimodal Transport Document* (2002) Helbing & Lichtenhahn, Genève, at pp. 23-39; See also Berlingieri, F. "The UNCITRAL Draft Instrument on the Carriage of Goods by Sea and other transport Conventions: Comparative Tables", 30 December 2002, UN Doc. A/CN.9/WG.III/WP.27, who provides an excellent comparative table of the UNCITRAL Draft Convention with eight other transport conventions.

significant disincentive for carrier and insurance interests in relation to the potential adoption of a new convention on the carriage of goods by their State party. Cargo interests, and their political representatives, must therefore seriously examine whether the benefit derived from the removal of nautical fault justifies the resulting difficulties of convincing carriers and other parties to support a new instrument, the cost incurred by cargo in a resulting compromise, and the potential upheaval the exemption's removal would create in the shipping industry. One commentator advises, "there are historical reasons for the [nautical fault] defence which should not be swept aside without a careful examination of the costs that will result if it is abolished."¹⁴⁶⁹ The costs of eliminating nautical fault from the Hamburg Rules were evident. Its absence in the Rules significantly contributed to their failure. The costs of eliminating nautical fault from the Draft Convention may very well have been the imposition of freedom of contract. Beyond a simply cost-benefit analysis, one must still enquire as to whether a change is justified. Has nautical fault truly become an anachronism, whose existence is only justified by the fact that it has become completely entrenched in modern carriage law?

Prior to addressing the above query, a preliminary question must be addressed. If nautical fault is justified only by the fact that it has permeated the law of carriage, is this sufficient? Does the entrenchment of a concept in a legal system constitute justification for its continued existence? The foregoing chapters have demonstrated the extent to which nautical fault has become an integral part of the law of carriage, both under domestic and international carriage regimes, and by virtue of voluntary incorporation. To begin to answer to question, one must revive the Hamburg Rules debate. Litigation costs, transaction costs, and primarily, insurance and freight, are factors that impact whether the existence of nautical fault is justified on the basis of its integration into the law of carriage. Interestingly, those same arguments resurfaced with respect to the Draft Convention.¹⁴⁷⁰ Despite the fact that the same insurance and freight arguments were

¹⁴⁶⁹ Kimball, J. "Shipowner's Liability and the Proposed Revision of the Hague Rules" (1975) 7 JMLC 217, at p. 249.

¹⁴⁷⁰ For example, with respect to the elimination of the nautical fault defence in the Draft Convention, Berlingieri commented on the often used 'increase in freight' aspect of the argument: "If, as alleged by those who want to keep the exoneration in existence, its abolition were to increase freight rates, the consequence would be born by shippers and, therefore, one can hardly understand the opposition of the

resurrected in commentary, in the CMI International Sub-Committee and the Working Group III, the issues remain unresolved. The discussions and arguments with respect to the Draft Convention could easily have been extracted verbatim from the discussion with regard to the Hamburg Rules. Further, there remains to this day a lack of reliable empirical evidence. We know that the elimination of nautical fault will affect recovery for general average, recovery in collision situations, and liabilities incurred by the carriers, but we do not know to what extent this will impact freight, insurance, and litigation. In essence, we cannot predict whether the cost of the elimination of nautical fault to all parties in the shipping industry will outweigh any benefit derived. One may argue that unless there is an evident, tangible and discernable benefit to a significant sector of the shipping industry, disturbing the status quo is not justified. As such, the nautical fault exemption can in fact be justified on the basis of its integration into the law of carriage of goods by sea.

In the past, the exemption for nautical fault has been justified on the basis that it forms part of a legislative bargain or commercial compromise. Error in navigation and management therefore forms part and parcel of “a negotiated compromise between ship and cargo interests brought about by commercial circles directly involved in the international shipping business.”¹⁴⁷¹ The detractors of nautical fault have at times argued that the exemption is unjust. In reality, the decision as to whether the exemption is justified or not, should not be a decision based on equity or justice, rather it should be a decision based on bargaining between the major stakeholders in the shipping industry.

carriers and their P&I insurers.” (Berlingieri, F. “Basis of liability and exclusions of liability.” [2002] LMCLQ 336, at p. 342.) As well, in a report commissioned by New Zealand’s Ministry of Transport on the extent of the country’s legal and economic interest in the Draft Convention, the implications of the location of the insurance market was discussed: “[L]iability issues as between carriers and cargo owners...have become largely the domain of the parties’s insurers. From a New Zealand perspective, cargo owners are able to obtain insurance on the New Zealand market and pay premiums in New Zealand currency. The liabilities of carriers for damage to cargo (and many other risks) is almost universally covered by a small group of mutual insurers based primarily in England. Carrier’s insurance costs are therefore recovered as an element of the freight, generally remitted to a foreign shipowner and therefore a foreign exchange debit so far as New Zealand is concerned.” (Broadmore, T. “International Convention on Transport Law” (2002) Report to the Ministry of Transport of New Zealand, at p. 5. Available at: www.transport.govt.nz/downloads/MaritimeLiabilityReport.pdf); See also Chapter 10: UNCITRAL Draft Convention on the Carriage of Goods.

¹⁴⁷¹ Japikse, R.E. “Deck Cargo Exclusion, Nautical Fault Exemption, Fire Exception” in *The Hamburg Rules: A Choice for the EEC?* (1994) European Institute of Maritime and Transport Law, Maklu, Antwerpen, at p. 186.

Commentators have been apt to point out that “in the context of risk and the nautical fault defence, perceptions of ‘equity’ and ‘fairness’ are irrelevant.”¹⁴⁷² Moreover, it has been argued that “[m]ost disputes are between two insurers, with no widows or orphans in sight. Misguided attempts to achieve what a court believes is a ‘fair’ or ‘equitable’ solution on the facts of a particular case are more likely to undermine the certainty and predictability that thousands of future parties require to order their business affairs.”¹⁴⁷³ It has been noted with regard to the Draft Convention that “[f]or this project to succeed, the Working Group must produce a final instrument that represents a fair balance among the affected commercial interests, and this can be accomplished only by recognizing the need for compromise and identifying the provisions that need to be included in a compromise package.”¹⁴⁷⁴ To date, the commercial compromise of the Harter Act and the Hague Rules remains in effect for the vast majority of nations. As such, it is this compromise that governs the vast majority of the relationships between parties to the carriage of goods. Until such time as a new commercial compromise is brokered, which may or may not be the case with the UNCITRAL Draft Convention, the nautical fault exemption remains justified.

Where a legal concept or rule is unjustified and offensive to the fundamental principles of modern law, in certain cases it will be judicially reformed.¹⁴⁷⁵ In recent years, there have been allegations of the courts of various jurisdictions becoming increasingly hostile to the exemption for nautical fault or judicially narrowing the scope of the exemption. Nowhere is this more evident than France.¹⁴⁷⁶ The French judiciary have openly demonstrated their disregard for the notion that a carrier may be exempted from liability for losses resulting from the faults of his servants. As nautical fault is

¹⁴⁷² Ping-fat, S. *Carrier’s Liability under the Hague, Hague-Visby and Hamburg Rules* (2002) Kluwer Law International, The Hague, at p. 212.

¹⁴⁷³ Sturley, M. “Carriage of Goods by Sea” (2000) 31 JMLC 241, at p. 250.

¹⁴⁷⁴ Sturley, M. “The United Nations Commissions on International Trade Law’s Transport Law Project: An Interim View of a Work in Progress” (2003) 39 Tex. Int’l L.J. 65, at p. 75. Sturley served as the rapporteur for the CMI International Sub-Committee on Issues of Transport Law, and as the senior advisor on the United States Delegation to Working Group III (Transport Law) of UNCITRAL.

¹⁴⁷⁵ For an example in Canadian law see the Supreme Court of Canada decision in *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.* [1997] 3 S.C.R. 1210 at pp. 1256-1268, where the Supreme Court discarded the contributory negligence bar of the common law in favour of a proportionate fault rule for division of damages for one-ship maritime torts.

¹⁴⁷⁶ See Chapter 7: Restricting the Availability of the Nautical Fault Exemption.

provided for explicitly by law, the French courts cannot judicially overrule it, as one could with a rule of common law, or *droit commun*. Nevertheless, the French courts have made evident and significant inroads into the effectiveness of the nautical fault exemption in practice. This is not, however, a worldwide trend. If it were to be the case that the judiciaries of major trading nations were to repeatedly and openly demonstrate overt hostility towards the application of the exemption, such that in practice it became ineffective as a defence, this would indicate that nautical fault cannot be justified within the context of modern legal principles. Admittedly, reliance on the exemption for nautical fault has become increasingly difficult in recent years, owing to numerous factors that include the decline in cargo claims litigation, increased regulatory requirements for shipowners, and the rise in alternative dispute resolution. Nevertheless, the lack of widespread judicial revolt indicates at the very least that, with the exception of France, nautical fault has not become repugnant to modern legal principles.

At the time of its incorporation into statute and then into uniform law, nautical fault was justified on the basis of several rationales.¹⁴⁷⁷ Most notably, or notoriously, was the historic rationale, which may be summarized as the recognition that communications were often difficult, sea carriage was inherently dangerous, and little control could be exercised over the crew after the departure of the vessel. This rationale, is the source of much mischaracterization by opponents of nautical fault: “Error [in the navigation or management of the vessel] was an ancient right given to carriers in the days of sailing ships and in the days when there was no telegraph, little science of the sea, and there were no steel ships. Error as a defence should now be removed from carriage of goods.”¹⁴⁷⁸ As poetic as this statement is, it is wholly inaccurate. A history of carrier liability demonstrates that nautical fault arose during the time of steam and steel, half a century after Morse patented the telegraph, and was incorporated into statute three years shy of the advent of wireless technology.¹⁴⁷⁹ Certainly, communication has improved immeasurably, and as such, shipowners are able to exercise increased control over their

¹⁴⁷⁷ See Chapter 3: Rationale for the Nautical Fault Exemption.

¹⁴⁷⁸ Gold, E. et al. “New Hague Rules” in *New Directions in Maritime Law* (1978) Gold, E. (Ed.) Dalhousie University, Halifax, Nova Scotia, at p. 112.

¹⁴⁷⁹ In 1896, Guglielmo Marconi sent his first radio signal, thus ushering in the wireless age.

servants and agents. There nevertheless remains a grain of truth to the historical rationale. The aspect of this rationale that retains both its relevance and its truth is the recognition of the perils of shipping. Despite advances in technology, carriers remain exposed to dangers unique to sea carriage, unparalleled in other forms of transport. Even in the jurisdiction that is arguably the most hostile to nautical fault, France, a court recently remarked that maritime activities remain perilous, involve high risk, and sailors must grapple with a myriad of elements, and accordingly denied the claim for a container lost overboard.¹⁴⁸⁰ This sentiment has also been echoed by a Canadian court, in noting that “sea traffic involves a constant struggle with incalculable and unusual possibilities of peril.”¹⁴⁸¹ This notion ties in with the rationale that imposing liability for decisions made in the heat of the moment, that with the benefit of hindsight were unwise or erroneous, would negatively impact the decision making process at sea. On this basis, despite being rooted in the 19th century, these justifications still hold true today. Sea carriage remains inherently dangerous and perilous, and despite improved communications, spur of the moment navigational and managerial decisions when faced with perilous situations, will still need to be made. One could therefore argue that the exemption for nautical fault retains both its relevance and its justification.

As with any contentious issue, proponents on either side of the nautical fault debate will undoubtedly find justifications for their position. Nevertheless, the above arguments do demonstrate that nautical fault is not a completely unjustified concept. What are most persuasive, however, as justifications of nautical fault are the arguments relating to commercial compromise and the implications of change. The lessons of the Hague and Hamburg Rules have taught us that where a mutually beneficial commercial compromise is reached, uniformity in shipping is fostered. Indeed, during the push for reform of the U.S. carriage law in the 1990s it was argued; “If we succeed in changing COGSA through truly commercial compromise, then we will have restored the path blazed by the Harter Act a century ago. There is no better way to celebrate the Harter Act’s centenary than by reinforcing the example of commercial compromise as a superior

¹⁴⁸⁰ Tribunal de Commerce de Marseille, 12 décembre 2003, (Ville de Tanya), DMF 2004, 630, at p. 633.

¹⁴⁸¹ *Seaway Distributors v. Newfoundland Container Lines* (1982) 52 N.S.R. (2d) 566 (N.S. Dist. 1), at p. 573.

model to political compromise. If we succeed, then perhaps, once again, it will be the spark for a comprehensive international solution.”¹⁴⁸² Moreover, where sweeping changes in carrier liability are made without taking into account their interplay with other fundamental concepts in carriage, key commercial interests will be resistant to such efforts aimed at unifying the law of carriage. In the past, eliminating nautical fault from uniform law has contributed to the disunity present in carriage law today.¹⁴⁸³ Arguably, what is paramount in the international carriage of goods by sea is uniformity. In 1860, the jurist Mancini said: “The sea with its winds, its storms and its dangers never changes and this demands a necessary uniformity of juridical regime.”¹⁴⁸⁴ Uncertainty has long been seen to be generally harmful to both shipping and commerce.¹⁴⁸⁵ The Supreme Court of the United States has commented on the importance of uniformity in shipping; “...conflicts in the interpretation of the Hague Rules not only destroy aesthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern.”¹⁴⁸⁶ It is not surprising thus that one commentator has acknowledged that “on one point all are agreed: ocean carriers, whose ships are subject to seizure for outstanding claims as they move from port to port, desperately need uniform rules.”¹⁴⁸⁷ The words of the chairman of the Bill of Lading Committee of the International Chamber of Commerce in 1927 hold equally true today: “uniformity of the most important thing. It does not matter so much precisely where you draw the line dividing the responsibilities of the

¹⁴⁸² Chandler, G. “After Reaching a Century of the Harter Act: Where Should We Go From Here?” (1993) 24 JMLC 43, at p. 47.

¹⁴⁸³ “The piecemeal adoption of the Hamburg rules is responsible for much of the current lack of uniformity and also leads to jurisdiction shopping. (e.g. when a Hague or Hague-Visby country is exporting to a Hamburg country).” (Institute of Chartered Shipbrokers, replies to the UNCITRAL questionnaire on the draft instrument, found in UNCITRAL, “Preparation of e draft instrument on the carriage of goods [by sea]: Compilation of replies”, 31 January 2003, UN Doc. A/CN.9/WG.III/WP.28, at p. 7.)

¹⁴⁸⁴ Quoted in Griggs, P. “Obstacles to Uniformity of Maritime Law” (2003) 34 JMLC 191, at p. 192.

¹⁴⁸⁵ Karan, H. “The Carrier’s Liability for Breach of The Contract of Carriage of Goods by Sea Under Turkish Law” (2002) 33 JMLC 91, at p. 91: “Commerce abhors a mystery. Any doubt with regard to the law applicable to commerce impairs merchants in their computation of potential risks and expenses, and deters them from trading.”

¹⁴⁸⁶ *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 1995 AMC 1817 (S.C. 1995), at p. 1824.

¹⁴⁸⁷ Honnold, J. “Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?” (1993) 24 JMLC 75, at p. 81. As well, Collins, D. “International Uniformity and the Carriage of Goods by Sea” (1985) 60 Tul. L. Rev. 165, at p. 165 notes that “[m]an has long recognized that the conduct of maritime commerce is enhanced by the existence of a stable and uniform legal frame of reference.” The importance of uniformity is also recognized by the judiciary. For example, a Belgian court has underscored the primacy of uniformity by holding that the Hague-Visby Rules were intended to create uniform rules of law and as such transcend national law and must be interpreted in an autonomous manner in light of the Convention (Rechtbank van Koophandel te Antwerpen, January 11, 1993 (The M.S. OOCL Europa V032) [1993] ETL 251).

shipper and his underwriter from the responsibility of the carrier and his underwriter. The all important question is that you draw the line somewhere and that that line be drawn in the same place for all countries and for all importers.”¹⁴⁸⁸ At present, there are three international regimes in force, and a whole host of domestic enactments.¹⁴⁸⁹ Currently, the commercial compromise, including nautical fault, continues to govern relationships between the parties to the carriage of goods by sea. What one hopes was considered with every amendment and decision made with respect to the Draft Convention, is whether a regime was being created that has a very real chance of success. It is in this respect that the impacts of the removal of nautical fault were possibly not sufficiently considered, or perhaps were overcompensated for with the provisions concerning volume contracts. As uniform carriage law is the end goal, if commercial interests cannot be brought on board, then we are embarking on a futile exercise. Simply adding a fourth regime truly provides no benefit for anyone. One association has already expressed concern; “[t]he instrument is too broad in its scope, and contains too many new concepts, terms and provisions (some of them controversial), arranged in an unfamiliar structure and sequence, to have any chance of garnering the degree of multilateral adherence required in the next few years if we are to stem the tide of legislative disunity, let alone convince States which have already “gone it alone” to return to an international regime.”¹⁴⁹⁰ In the context of the Draft Convention therefore, the presence or absence of nautical fault can only be justified in so far as it serves to broker a commercial compromise that will usher in a successful, modern, and international regime on the carriage of goods by sea.

¹⁴⁸⁸ Statement of Charles S. Haight before a Subcommittee of the US Senate Committee on Foreign Relations, cited by Sturley, M. “Uniformity in the Law Governing the Carriage of Goods by Sea” (1995) 26 JMLC 553, at p. 557.

¹⁴⁸⁹ It has been noted that by the late 1990s there was eight different regimes in force: (1) countries where the Hague Rules apply amended by the Visby Protocol and the SDR Protocol; (2) Countries bound by the Hague-Visby Rules; (3) Countries where the Hague Rules are observed; (4) Countries having incorporated the Hague Rules into their national legislation without having ratified the Rules; (5) Countries having adopted the Hague-Visby Rules or SDR Protocol without ratifying it; (6) Countries with their own unique domestic legislation; (7) Countries who observe the Hamburg Rules; and (8) national legislations combining one of the above systems with their own rules. (Pavliha, M. “The Impact of International Transport Law on the Slovenian Legislation” [2000] ETL 465, at p. 472-473).

¹⁴⁹⁰ Weale, J. “Re: CMI International Sub-Committee on Issues of Transport Law Proposed Instrument on Carriage of Goods by Sea” (2000), position paper from the Association of Maritime Arbitrators of Canada. Available on line at: www.amac.ca

What is disconcerting with respect to the Draft Convention is despite the pressing need of uniformity in carriage of goods by sea, the provisions on volume contracts create the potential for differential liability and disunity on a scale unseen since the years prior to the Harter Act. Should the Draft Convention be successful, with approximately 80-95% of the world's shipping currently falling within the definition of volume contract, freedom of contract will be revived. Lord Sumner has noted with respect to the Hague Rules, that "the intention of this legislation in dealing with the ability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship."¹⁴⁹¹ If the absence of nautical fault does not aid in fostering uniformity in shipping, and a return to the conventional contract is the way forward for the law of carriage of goods by sea, can the existence of nautical fault be justified? Only time will tell. Whether nautical fault will remain justified in modern carriage, should the Draft Convention be successful, will be truly dependent on whether the parties to the contract of affreightment and other contractual arrangements retain the exemption. The presence and relevance of nautical fault will therefore become subject to market-based forces.

¹⁴⁹¹ *Gross Millerd v. Canadian Government Merchant Marine* [1929] A.C. 223 (H.L.), at p. 236. See also Wolfson, R. "The English and French Carriage of Goods by Sea Enactments" (1955) 4 Int'l & Comp. L.Q. 508, at p. 508, describing the demand for legislative action to remove the chaos and abuse that had resulted from the existence of an unlimited freedom of contract.

Chapter 12

Conclusion

This thesis has challenged the misconceptions surrounding the nautical fault exemption, and sought to demonstrate that the exemption is not simply an anachronistic holdover that can be removed from carriage law without consequence. Rather, nautical fault has formed an integral part of the law of sea carriage for well over a century. Born out of 19th century market forces favourable to shipowners, incorporated into uniform law, and subsequently expanding into essentially all major areas of carriage law, the key role played by nautical fault in relation to liability amongst the parties to the common adventure is undeniable. Nautical fault remains to this day, part and parcel of the allocation of risk between the parties involved in carriage in the context of bills of lading, charterparties, general average, towage, lighterage, pilotage, and insurance.

Nautical fault has been eliminated from the Draft Convention. To argue that it should not have been or to propose re-evaluating its removal at this point in time would be akin to tilting at windmills. Regardless, the death toll for the nautical fault exemption has yet to ring. With the exception of State parties to the Hamburg Rules, and certain countries such as Korea who have opted for domestic carriage regimes based on Hamburg, nautical fault is present in the law of the vast majority of the nations with unilaterally adopted domestic regimes, along with those who are parties to the Hague and Hague-Visby Rules. Experience has shown that it is standard practice to incorporate nautical fault, either by virtue of a clause paramount or by express provision, into charterparties and other contractual arrangements not governed by the Hague or Hague-Visby Rules. Moreover, recent uniform law has, as of yet, done little to restrict the availability of the exemption in practice. Furthermore, the P&I Clubs have ensured that their members will not incur any liabilities other than those of Hague or Hague-Visby, unless obligated to do so by a State party to the Hamburg Rules. Finally, certain continental European courts have been averse to applying the Hamburg Rules, opting instead for the Hague or Hague-Visby Rules. Currently, nautical fault is in no immediate danger of either being eliminated or marginalized as an exemption from liability.

The question must be asked, what does the future hold for nautical fault? The answer is threefold. Firstly, in the short to medium term, very little will change. The shipping industry is a deeply conservative industry that can in many ways be highly resistant to change. Indeed, even if the Draft Convention is palatable to all involved, implementation may take years, if not decades. Given the importance of nautical fault to carrier interests, and its current status as an integral part of carriage, change will likely not come unless it is legislatively imposed.

Secondly, the Draft Convention will be presented to the Commission in June of 2008, and if it proves successful, then we sail into uncharted waters. Acceptance of the Draft Convention by the major trading nations will result in widespread freedom of contract in shipping. For the first time in the history of carriage, carriers will be subject to both a mandatory regime and the freedom to contract out of it. The removal of nautical fault from the Draft Convention is thus rendered academic. The prevalence of the exemption under the new regime will therefore depend on market forces and the relative bargaining power between carrier and cargo interests. Much like the mid-19th century, any superiority in bargaining power could very well lead to abuse. At the moment, the liner trade is highly competitive, however small shippers or non-sophisticated parties could still find themselves entering contracts of affreightment with little or no liability on the part of the carrier. One may speculate that it will take a significant increase in the bargaining power of cargo interests before the carriers will agree to relinquish the time-honoured list of exempted perils, including nautical fault.

Thirdly, should the Draft Convention follow in the infamous footsteps of the Hamburg Rules, the result in practice will likely be similar to the current situation. Uniformity in carriage of goods by sea will continue to be undermined by the adoption of domestic carriage regimes. Despite the divergent nature of certain domestic regimes, there are many similarities, which serve as examples for future reform. These domestic solutions are reflective of modern bargains made with the commercial interests of those nations. They exemplify acceptable compromises on pressing issues, amongst the various

interests in the shipping community. Provisions dealing with delay, higher limitation, jurisdiction, arbitration, period of responsibility or port-to-port, and waybills/EDIs, appear to be the key issues in need of reform.¹⁴⁹² What is instructive is the prevalence of nautical fault in the domestic regimes, thus indicating that it remains part and parcel of commercial compromises made over a century after the Harter Act.

What can be concluded is that regardless of whether the Draft Convention is widely successful or not, nautical fault will not disappear in the foreseeable future. It has become too ingrained in the international carriage of goods by sea to be legislatively removed overnight or “judicially nibbled to death.”¹⁴⁹³ By no means does this thesis propose that nautical fault will remain in the law of carriage in perpetuity, nor that it would be justified in doing so. Nevertheless, as long as nautical fault is present in the international carriage of goods by sea, the debate surrounding the exemption will continue to exist. As with any contentious issue, the ensuing debate needs to be an informed debate. Political decisions that are made in haste and based on misconceptions, impact negatively on shipping and commerce. This thesis therefore proposes a careful and complete examination of the potential consequences of any decision made with regard to nautical fault. In the future, should a decision be made to eliminate nautical fault from either statutory or uniform law, a measured, cautious and informed approach to its removal is advocated.

¹⁴⁹² See Chapter 9 addressing the domestic amendments to carriage regimes.

¹⁴⁹³ To borrow Gilmore & Black’s wonderful turn of phrase concerning limitation of liability (Gilmore, G. & Black, C. *The Law of Admiralty* 2nd Ed. (1975) Foundation, Minneola, N.Y., at p. 846: “The developments of the past twenty years suggest that, although the Limitation Act may never come in for a ‘general overhaul’, its most likely fate, if it is not repealed outright, is that it will be judicially nibbled to death.”)

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