Université de Montréal

The Carrier's Exemption from Liability in the Hague, Hamburg and Rotterdam Rules

An Examination from the Perspectives of Fairness and Clarity

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Thèse présentée en vue de l'obtention

du grade de doctorat en droit

avril 2016

Université de Montréal
Faculté des études supérieures et postdoctorales

Cette thèse intitulée:

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Résumé

Le commerce international est souvent relié au transport maritime. La poursuite des règles uniformes se rapportant à ce dernier avait débuté à la fin du XIXe siècle et a abouti à l'émergence des Règles de La Haye, des Règles de Hambourg et des Règles de Rotterdam.

L'exonération du transporteur maritime, qui suscitait des controverses favorisant le développement des règles maritimes internationales, a été réglementée de trois façons différentes dans les trois Règles précitées. La question principale abordée dans la thèse présente est si elles sont suffisamment satisfaisantes. Une autre question, qui se pose s'il est prouvé qu'aucune d'entre elles ne l'est, est quelle serait une meilleure façon.

Pour y répondre, deux critères, soit la justice et la clarté, ont été choisis. Les recherches effectuées dans le cadre de la thèse présente visent à donner une évaluation profonde des régimes existants en matière de réglementation de l'exonération du transporteur maritime ainsi que des suggestions d'amélioration à cet égard.

Mots-clés: l'exonération du transporteur, les Règles de La Haye, les Règles de Hambourg, les Règles de Rotterdam, justice, clarté

Abstract

The international trade is usually connected with the carriage of goods by sea. The campaign in pursuit of uniform rules governing such carriage was launched in the late nineteenth century and has led to the emergence of the Hague Rules, the Hamburg Rules and the Rotterdam Rules.

The carrier's entitlement to exemption from liability, which triggered much controversy contributing to the development of the international shipping rules, has been regulated in three different ways in the aforementioned three Rules. The principal question addressed in the present thesis is whether they are sufficiently satisfactory. Another question, which is to be dealt with if none of them proves to be the case, is what a better way could be like.

Two criteria, namely fairness and clarity, have been chosen in answer to the aforesaid questions. The research contained in the present thesis aims to give a thorough evaluation of the existing regimes regarding the carrier's exemption from liability and some improvement suggestions in this respect.

Keywords: carrier's exemption from liability, the Hague Rules, the Hamburg Rules, the Rotterdam Rules, fairness, clarity

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List of Abbreviations

A	Atlantic Reporter
ABA J	American Bar Association Journal
AC	Law Reports, Appeal Cases
ACSR	Australian Corporations and Securities Reports
All ER	All England Reports
ALR	Australian Law Reports
Alta L Q	Alberta Law Quarterly
Alta L Rev	Alberta Law Review
Am J Comp L	American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Am J Legal Hist	American Journal of Legal History
AMC	American Maritime Cases
App Cas	Appeal Cases
Appx	appendix
Ariz L Rev	Arizona Law Review
Ark	Arkansas
art	article
arts	articles

ATS	Australian Treaty Series
Austl	Australia
Austl Bus L Rev	Australian Business Law Review
B & S	Best & Smith's Reports
BC	British Columbia
Beav	Beavan's Reports
Berkeley J Int'l L	Berkeley Journal of International Law
Bing	Bingham's Reports
Brook J Int'l L	Brooklyn Journal of International Law
c	chapter
C de D	Cahiers de droit
CA	Court of Appeal
Cal	California
Cal L Rev	California Law Review
Cal WL Rev	California Western Law Review
Cambridge LJ	Cambridge Law Journal
Campbell L Rev	Campbell Law Review
Can	Canada
Can Bar J	Canada Bar Journal

Cardozo Stud L & Lit	Cardozo Studies in Law and Literature
Ch	Chancery Court
Chicago-Kent L Rev	Chicago-Kent Law Review
Cir	Court of Appeals (United States Federal)
CJ	Chief Justice/Chief Judge
Cl & F	Clark & Finnelly's Reports
Clev-Marshall L Rev	Cleveland-Marshall Law Review
CLR	Commonwealth Law Reports
CMI	Comité maritime international
Colum J Transnat'l L	Columbia Journal of Transnational Law
Colum L Rev	Columbia Law Review
Com Cas	Reports of Commercial Cases
Comm Ct	Commerce Court
Comp & Int'l LJS Afr	Comparative and International Law Journal of Southern Africa
CPD	Law Reports, Common Pleas Division
CQ	Court of Quebec
Ct App	Court of Appeal[s] (United States state)
Ct Com Pl	Court of Common Pleas

Ct Err & App	Court of Errors and Appeals
Ct Ex	Court of Exchequer
Cth	Commonwealth
Cumb L Rev	Cumberland Law Review
Curr Legal Probs	Current Legal Problems
Currents	Currents: International Trade Law Journal
Dal LJ	Dalhousie Law Journal
Denv J Int'l L & Pol'y	Denver Journal of International Law & Policy
Dick L Rev	Dickinson Law Review
Dist Ct	District Court (United States state)
Div Ct	Divisional Court
DLR	Dominion Law Reports
DLR (2d)	Dominion Law Reports (Second Series)
DLR (4th)	Dominion Law Reports (Fourth Series)
Doc	document
Drake L Rev	Drake Law Review
ed	edition/editor
eds	editors
ER	English Reports

ERPL	European Review of Private Law
Eur Transp L	European Transport Law
Ex Ch	Exchequer Chamber
Ex CR	Canada Law Reports: Exchequer Court
F	Federal Reporter
F (2d)	Federal Reporter (Second Series)
F (3d)	Federal Reporter (Third Series)
F Supp	Federal Supplement
FCA	Federal Court of Australia/Federal Court of Appeal
FCR	Federal Court Reports
FCTD	Federal Court (Trial Division)
FLR	Federal Law Reports
Fordham L Rev	Fordham Law Review
Ga	Georgia
GA	General Assembly
Ga L Rev	Georgia Law Review
Global L Rev	Global Law Review
Gonz L Rev	Gonzaga Law Review
Harv Int'l LJ	Harvard International Law Journal

Harv JL & Pub Pol'y	Harvard Journal of Law and Public Policy
Harv L Rev	Harvard Law Review
Hastings LJ	Hastings Law Journal
HC Adm	High Court of Admiralty
HCA	High Court of Australia
HL(Eng)	House of Lords (England)
Hous J Int'l L	Houston Journal of International Law
ICLQ	Intellectual and Comparative Law Quarterly
Ill	Illinois
ILM	International Legal Materials
ILSA J Int'l & Comp L	ILSA Journal of International & Comparative Law
IML	International Maritime Law
Ind LJ	Indiana Law Journal
Int'l Law	International Lawyer
Int'l Rev L & Econ	International Review of Law & Economics
J	Justice/Judge
J Air L	Journal of Air Law
J Air L & Com	Journal of Air Law and Commerce
J Bus L	Journal of Business Law

J Legal Stud	Journal of Legal Studies
J Legis	Journal of Legislation
J Mar L & Com	Journal of Maritime Law & Commerce
J Transnat'l L & Pol'y	Journal of Transnational Law & Policy
JILI	Journal of the Indian Law Institute
JL & Com	Journal of Law & Commerce
JL Econ & Org	Journal of Law, Economics & Organization
LS	Legal Studies
KB	Law Reports, King's Bench
KBD	King's Bench Division
L & Env Ct	Land and Environment Court
La	Louisiana
La L Rev	Louisiana Law Review
Law & Contemp Probs	Law & Contemporary Problems
Law & Soc'y Rev	Law & Society Review
Law Q Rev	Law Quarterly Review
Leiden J Int'l L	Leiden Journal of International Law
LJ	Lord Justice
Ll LR	Lloyd's List Law Reports

Lloyd's Rep	Lloyd's Law Reports/Lloyd's List Law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
LR CP	Law Reports, Common Pleas
LR Ex	Law Reports, Exchequer
LR QB	Law Reports, Queen's Bench
M & W	Meeson & Welsby's Reports
Mal L Rev	Malaya Law Review
Marq L Rev	Marquette Law Review
Mass	Massachussetts
McGill LJ	McGill Law Journal
Md	Maryland
Md L Rev	Maryland Law Review
Me	Maine
Melbourne UL Rev	Melbourne University Law Review
Mercer L Rev	Mercer Law Review
Mich	Michigan
Mich L Rev	Michigan Law Review
Minn L Rev	Minnesota Law Review

MLAANZ	Maritime Law Association of Australia and New Zealand
Mo	Missouri
Mod L Rev	Modern Law Review
Monash UL Rev	Monash University Law Review
MPR	Maritime Provinces Reports
n	footnote
N Mex	New Mexico
NCL Rev	North Carolina Law Review
NE	Northeastern Reporter
NJ	New Jersey
NL	Newfoundland and Labrador
NR	National Reporter
NS	Nova Scotia
NSW	New South Wales
NSWLR	New South Wales Law Reports
NW	Northwestern Reporter
Nw UL Rev	Northwestern University Law Review
NY	New York/New York Reports
NYS	New York Supplement

NYS (2d)	New York Supplement (Second Series)
NZ	New Zealand
NZHC	New Zealand High Court
NZLR	New Zealand Law Reports
NZUL Rev	New Zealand Universities Law Review
Ocean Devel & Int'l L	Ocean Development & International Law
Ohio St LJ	Ohio State Law Journal
Or	Oregon
OR	Official Records
Or L Rev	Oregon Law Review
Ottawa L Rev	Ottawa Law Review
Oxford J Legal Stud	Oxford Journal of Legal Studies
P	Pacific Reporter/Law Reports, Probate, Divorce, and Admiralty Division
P (2d)	Pacific Reporter (Second Series)
para	paragraph
paras	paragraphs
PC	Privy Council
PR	Puerto Rico

QB	Queen's Bench Reports
QBD	Queen's Bench Division
Qld	Queensland
QR	Queensland Reports
Res	Resolution
Rev trim dr com	Revue trimestrielle de droit commercial et de droit économique
RGD	Revue générale de droit
RJQ	Recueils de jurisprudence du Québec
RJT	Revue juridique Thémis
RSC	Revised Statutes Canada
RSQ	Revised Statutes Quebec
s	section
S Cal L Rev	Southern California Law Review
S Ct	Supreme Court Reporter
S Tex L Rev	South Texas Law Review
Saint Louis ULJ	Saint Louis University Law Journal
SAIS Review	School of Advanced International Studies Review
Salk	Salkeld's Reports

Sask L Rev	Saskatchewan Law Review
SC	Supreme Court
Scand Stud L	Scandinavian Studies in Law
SCR	Canada Law Reports: Supreme Court of Canada/Canada Supreme Court Reports
SE	South Eastern Reporter
Sess	Session
SLR	Singapore Law Reports
ss	sections
St John's L Rev	Saint John's Law Review
St Mary's LJ	Saint Mary's Law Journal
Stan L Rev	Stanford Law Review
Stat	Statutes at Large
Sup Ct	Superior Court
Sup Jud Ct	Supreme Judicial Court
Supp	supplement
SW	South Western Reporter
SW (2d)	South Western Reporter (Second Series)
Sw UL Rev	Southwestern University Law Review

Sydney L Rev	Sydney Law Review
t	tome
Tex	Texas
Tex Int'l LJ	Texas International Law Journal
Tex L Rev	Texas Law Review
Thomas Jefferson L Rev	Thomas Jefferson Law Review
TLR	Times Law Reports
Transnat'l Law	Transnational Lawyer
Transp LJ	Transportation Law Journal
Tul J Int'l & Comp L	Tulane Journal of International & Comparative Law
Tul L Rev	Tulane Law Review
Tul Mar LJ	Tulane Maritime Law Journal
U Chicago L Rev	University of Chicago Law Review
U Cin L Rev	University of Cincinnati Law Review
U Fla L Rev	University of Florida Law Review
U Mich JL Ref	University of Michigan Journal of Law Reform
U Pa L Rev	University of Pennsylvania Law Review
UBC L Rev	University of British Columbia
UK	United Kingdom

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
Unif L Rev	Uniform Law Review
UNSWLJ	University of New South Wales Law Journal
UNTS	United Nations Treaty Series
US	United States/ United States Reports
USC	United States Code
USF Mar LJ	University of San Francisco Maritime Law Journal
UST	United States Treaties and Other International Agreements
Va	Virginia
Va J Int'l L	Virginia Journal of International Law
Va L Rev	Virginia Law Review
Vand J Transnat'l L	Vanderbilt Journal of Transnational Law
Vand L Rev	Vanderbilt Law Review
Vict	Victoria
VLR	Victorian Law Reports
vol	volume
VUWLR	Victoria University of Wellington Law Review
WA	Western Australia

Wash	Washington
West Ont L Rev	Western Ontario Law Rev
WLR	Weekly Law Reports
Wm & Mary L Rev	William & Mary Law Review
Yale LJ	Yale Law Journal

For my parents, who nourish me with their love.

Acknowledgements

Firstly, I would like to express my sincere gratitude to my supervisor Professor Guy Lefebvre for his academic advice, support and encouragement. He helped me a lot to complete this thesis. His guidance on my research and career is priceless.

Besides, I want to thank all the lecturers I have met at the University of Montreal for their contribution to the accumulation of my professional knowledge, our lovely secretaries for their hard work, and our adorable librarians for their affability.

I am also grateful to my colleagues and friends for their generosity and kindness that helped me to overcome difficulties and made me feel beloved. I treasure every happy moment we have had together.

Last but not the least, I feel like expressing my thanks to my parents who have supported me emotionally and financially in the last four years. Their selfless love has illuminated my past life and will give me courage to embrace my future path.

Introduction

The carriage of goods by sea plays an irreplaceable role in the international trade. Despite the existence and prosperity of other modes of transport, it is still often deemed as the most financially viable option for merchants.[1]

The campaign for uniformity of shipping rules was launched in the late nineteenth century. Its first typical achievement was the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, also known as the Hague Rules, which was updated in the 1960s by the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, better known as the Visby Protocol.[2] Both of them were successful in their days and are still exerting influence on current shipping practices, but broad uniformity has never been accomplished as expected.[3] The United Nations Convention on the Carriage of Goods by Sea, normally called the Hamburg Rules, was adopted in 1978 to supersede the Hague/Visby Rules, but it turned out to be a failure due to insufficient support from major shipping nations.[4]

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[1] Lachmi Singh, *The Law of Carriage of Goods by Sea* (Totton: Bloomsbury Professional, 2011) at 3.
[2] See Michael F Sturley, "Carriage of Goods by Sea" (2000) 31 J Mar L & Com 241 at 245-246; Arthur M Geary, "Carriage of Goods by Sea" (1927) 7 Or L Rev 320 at 320-321.
[3] See Benjamin W Yancey, "The Carriage of Goods: Hague, COGSA, Visby, and Hamburg" (1983) 57 Tul L Rev 1238 at 1242.
[4] Rand R Pixa, "The Hamburg Rules Fault Concept and Common Carrier Liability under U.S. Law" (1979) 19: 2 Va J Int'l L 433 at 440.

In 2008, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the Rotterdam Rules, was approved by the General Assembly of the United Nations with a view to creating a modern regime governing the carriage of goods by sea, meeting some emerging commercial needs and, more importantly, reattempting to establish desirable uniformity of shipping rules that its predecessors had failed to realize.[5] The new convention has been widely appreciated for its pragmatic goals,[6] but it has also suffered a flood of criticism since it came into being.[7] Its fate is still hanging in the balance as there seems to be a long journey to its entry into force.[8]

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[5] It has been noted that:

> Au niveau international, la responsabilité du transporteur de marchandises par mer est loin d'être soumise à un corps de règles unique. L'entreprise d'uniformisation commencée en 1924 a abouti à trois principaux textes: les Règles de La Haye, les Règles de La Haye-Visby et les Règles de Hambourg. En conséquence, le montant de la réparation à laquelle sera condamné le transporteur et les circonstances de son exonération varient selon que l'un ou l'autre des trois régimes en lice est appliqué. Cette situation est pleinement exploitée par le transporteur qui se livre librement et allègrement au *forum shopping*. Paradoxalement, c'est un phénomène que l'uniformisation des droits a pour objet de juguler.

Innocent Fetze Kamdem, "La responsabilité du transporteur maritime au niveau international: un échec d'uniformisation juridique" (2000) 41 C de D 685 at 739. In addition, the previous regimes governing the carriage of goods by sea have been for a long time the subject of criticism for being out of date, fragmented, uncoordinated with other related transport regimes, likely to lead to unpredictable results, and harmful to the development of modern contract practices. Jernej Sekolec, "Foreword" in Alexander von Ziegler, Johan Schelin & Stefano Zunarelli, eds, *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Alphen aan den Rijn: Kluwer Law International, 2010) xxi at xxi.

[6] See Michael F Sturley, Tomotaka Fujita & Gertjan van der Ziel, *The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (London: Sweet & Maxwell, 2010) at paras 1.015-1.031; D Rhidian Thomas, ed, *A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Dawlish: Lawtext Publishing, 2009) at 24-30 [Thomas, *Analysis*].

[7] See e.g. William Tetley, "Some General Criticisms of the Rotterdam Rules" (2008) 14 Journal of International Maritime Law 625 [Tetley, "Criticisms"]. See also Roberto Bergami, "Rotterdam Rules: Volume Contracts, Delivery Terms, Transport Documents and Letters of Credit" (2010) 14 Vindobona Journal of International Commercial Law & Arbitration 9 at 31.

[8] See Si Yuzhuo, "Evaluation and Prospects of the Rotterdam Rules" (2009) 20 Annual of China Maritime Law 3 at 3-5 [Si, "Prospects"]. See also He Zhipeng, "Rotterdam Rules: The Stand of China" (2011) 22 Annual of China Maritime Law 25 at 35-36.

The present thesis focuses on the carrier's exemption from liability in the aforementioned conventions.[9] Different legislative strategies were adopted to cope with that issue.[10] The principal question addressed in this thesis is whether they are sufficiently satisfactory. Another question, which is to be dealt with if none of them proves to be the case, is what could be a better strategy. The research contained in the thesis aims to give a thorough evaluation of the existing regimes regarding the carrier's exemption from liability and some improvement suggestions in this respect. In contrast to those previous studies, its originality consists in not only its wider coverage including the latest Rotterdam Rules and the scattered exoneration-related provisions in those conventions that prior researchers tended to overlook but also its critical quality that distinguishes itself from those descriptive researches.

As indicated in the subtitle of this thesis, two criteria, namely fairness and clarity, have been chosen to actualize the projected evaluation. Fairness is an economic concept as well as a jurisprudential one. It is employed, in the realm of economics, to cope with such problems as redistribution of social welfare,[11] surveillance of profit-seeking

[9] In the present thesis, there are several synonyms for "exemption from liability", such as exoneration, immunity, exception, exculpatory right, defense, exclusion of liability, etc. They are used in two dimensions. They either refer to in general the right enjoyed by carriers to free themselves from liability or mean those specific circumstances where carriers may be absolved from liability. In the latter dimension, the term "exemption from liability" or its synonyms may denote any circumstance to that effect, including those contained in the "laundry list" and those dispersing in other parts of the conventions.

[10] See generally Francesco Berlingieri, "A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules" (Paper delivered at the General Assembly of the AMD, 5-6 November 2009), [unpublished] [Berlingieri, "Comparative"]; Marel Katsivela, "Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague/Visby Rules" (2010) 40 RGD 413 [Katsivela, "Overview"].

[11] See generally Alberto Alesina & George-Marios Angeletos, "Fairness and Redistribution" (2005) 95 American Economic Review 960.

activities[12], etc. Within the field of law, it usually acts as a normative criterion.[13] Fairness is such a broad concept that jurists can hardly give an exact definition. In the theory advanced by Professor Brad Hooker, formal fairness that precludes bias or inconsistency in the application of rules is distinguished from substantive fairness that normally relates to reciprocity and equality.[14] However, he admits that fairness is not always associated with reciprocity and may take the form of justifiable inequality.[15] The inherent abstractness of the concept leads to the diversity of its manifestations in different subdivisions of law. For instance, in the context of antitrust law, fairness finds expression in the protection of consumers and small firms from monopoly;[16] when it comes to international environmental law, fairness is embodied in "common but differentiated responsibilities";[17] under criminal law, fairness generally refers to the enforcement of a sanction that is in proportion to the gravity of the act committed,[18] etc. Some scholars have mentioned fairness in their writings on shipping rules, such as Professor William Tetley who argued that the future uniform law governing the carriage of goods by sea

[12] See generally Daniel Kahneman, Jack L Knetsch & Richard H Thaler, "Fairness as a Constraint on Profit Seeking: Entitlements in the Market" (1986) 76 American Economic Review 728.
[13] Lee Anne Fennell & Richard H McAdams, "Introduction" in Lee Anne Fennell & Richard H McAdams, eds, *Fairness in Law and Economics* (Cheltenham: Edward Elgar, 2013) xiii at xiii.
[14] Ted Honderich, *The Oxford Companion to Philosophy*, 2d ed (New York: Oxford University Press, 2005) at 126.
[15] *Ibid* at 126-127.
[16] Adi Ayal, *Fairness in Antitrust: Protecting the Strong from the Weak* (Portland: Hart Publishing, 2014) at 27.
[17] Kirsten Bishop, *Fairness in International Environmental Law: Accommodation of the Concerns of Developing Countries in the Climate Change Regime* (LL.M. Dissertation, McGill University Faculty of Law, 1999) [unpublished] at 73.
[18] A Mitchell Polinsky & Steven Shavell, "The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy" (2000) 2 American Law and Economics Review 223 at 223-224.

would be a system based on fairness,[19] Professor Boris Kozolchyk who contended that the substantive uniformity of shipping rules "is only attainable when the various participants in the transactions arrive at a consensus with respect to the fairness of their rights and duties",[20] Professor Erling Selvig who reckoned that the Hamburg Rules were superior to the Hague-Visby Rules on the basis of fairness,[21] and Professor John O. Honnold who carried out a comparison between the Hague Rules and the Hamburg Rules in terms of fairness.[22] Although none of them clearly stated what fairness signified in their studies, it still can be inferred from their propositions that fairness pertains to the allocation of risks between competing interests.[23] The carrier's exemption from liability has a close connection with the equilibrium of interests between the shipowning and cargo-owning sides.[24] The carrier's entitlement to excessive immunities would put cargo interests at a serious disadvantage. Conversely, a liability regime requiring carriers to be answerable for all kinds of loss or damage would impose heavy burdens on them.[25] Within the framework of the present thesis, fairness denotes justifiable allocation of risks between carriers and cargo interests. Exoneration-related provisions embrace

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[19] William Tetley, "Uniformity of International Private Maritime Law – The Pros, Cons, and Alternatives to International Conventions – How to Adopt an International Convention" (2000) 24 Tul Mar LJ 775 at 797 [Tetley, "Uniformity"].

[20] Boris Kozolchyk, "Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective" (1992) 23 J Mar L & Com 161 at 245.

[21] Erling Selvig, "The Hamburg Rules, the Hague Rules and Marine Insurance Practice" (1981) 12 J Mar L & Com 299 at 304-305 [Selvig, "Insurance"]. See also Yancey, *supra* note 3 at 1250.

[22] John O Honnold, "Ocean Carriers and Cargo; Clarity and Fairness – Hague or Hamburg?" (1993) 24 J Mar L & Com 75 at 75 [Honnold, "Clarity"].

[23] See generally *ibid* at 75, 108.

[24] See Joseph H Beale, Jr., "The Carrier's Liability: Its History" (1987) 11 Harv L Rev 158 at 158-160; Stephen Zamora, "Carrier Liability for Damage or Loss to Cargo in International Transport" (1975) 23 Am J Comp L 391 at 395-397.

[25] See Dewey R Villareal, Jr., "Carrier's Responsibility to Cargo and Cargo's to Carrier" (1971) 45 Tul L Rev 770 at 772-776. See also Martin T Farris, "The Role of the Common Carrier" (1967) 6 Transportation Journal 28 at 30-32.

arrangements indicating under what circumstances which side, the shipowning one or the cargo-owning one, shall bear the loss of or damage to the goods in transit. The examination from the perspective of fairness aims to check if the bases on which those arrangements have been prescribed are tenable.

The other criterion is also a complex concept that seems to be no less abstract than the first one. Clarity, if interpreted in the plainest language, means that the object of observation is clear.[26] It normally represents the relationship between law and language when used in the domain of jurisprudence.[27] It has become an umbrella term with regard to intelligibility and readability of norms.[28] It is basically interpreted by means of its synonyms or antonyms.[29] However, there are seldom discourses on what elements make a clear norm.[30] Several authors have mentioned clarity in their writings on the major maritime conventions, such as Professor Eun Sup Lee who stated that clarity embodied in the Hamburg Rules would reduce litigation and expenses of settlement of claims,[31] Mr. James J. Donovan who thought that clarity had been inappropriately sacrificed for

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[26] See Ryan J Owens & Justin P Wedeking, "Justices and Legal Clarity: Analyzing the Complexity of US Supreme Court Opinions" (2011) 45 Law & Soc'y Rev 1027 at 1032.

[27] See David Mellinkoff, *The Language of the Law* (Eugene: Resource Publications, 2004) at 3-4. See also James Boyd White, "Law as Language: Reading Law and Reading Literature" (1981) 60 Tex L Rev 415 at 420.

[28] Sophie Cacciaguidi-Fahy & Anne Wagner, "Introduction: The Chiaroscuro of Legal Language" in Anne Wagner & Sophie Cacciaguidi-Fahy, eds, *Obscurity and Clarity in the Law: Prospects and Challenges* (Aldershot: Ashgate, 2008) 1 at 1 [Wagner & Cacciaguidi-Fahy, *Obscurity*].

[29] Obscurity, generally referred to as the antonym of clarity, covers fuzziness, vagueness, ambiguity, and indeterminacy of norms. Sophie Cacciaguidi-Fahy & Anne Wagner, "Searching for Clarity" in Anne Wagner & Sophie Cacciaguidi-Fahy, eds, *Legal Language and the Search for Clarity: Practice and Tools* (Bern: Peter Lang, 2006) 19 at 19 [Wagner & Cacciaguidi-Fahy, *Language*].

[30] Véronique Champeil-Desplats, "Les clairs-obscurs de la clarté juridique" in Wagner & Cacciaguidi-Fahy, *Language*, *supra* note 28, 35 at 39.

[31] Eun Sup Lee, "Analysis of the Hamburg Rules on Marine Cargo Insurance and Liability Insurance" (1997) 4 ILSA J Int'l & Comp L 153 at 154 [Lee, "Cargo"].

reaching compromises under the Hague Rules,[32] Professor Hakan Karan who criticized the Hague-Visby Rules for lack of clarity,[33] Professor D. Rhidian Thomas who argued that the drafters had failed to bring clarity to the Rotterdam Rules,[34] and Professor John O. Honnold who conducted a general analysis of the Hague and Hamburg Rules from the perspective of clarity.[35] Nevertheless, they were all silent on the definition of clarity except for implying that it related to certainty and uniformity.[36] In contrast, general jurisprudential theories may give more useful clues in this respect. Professor Véronique Champeil-Desplats has stated that legal clarity is made up of three elements.[37] The first one is absence of equivocation which means that a legal statement can only have one unique meaning or that only one norm or several consistent norms can be extracted from several correlated legal statements; the second is intelligibility which has the same meaning as readability and accessibility; and the third is normativity which suggests that a clear legal statement should define rights, obligations or liabilities rather than just narrate, observe or advise.[38] In the theory advanced by Professor Alexandre Flükiger, clarity of law comprises two facets, namely linguistic facet (readability) and legal facet (applicability).[39] The former suggests that a clear law has to be intelligible, readable and

[32] James J Donovan, "The Hamburg Rules: Why A New Convention on Carriage of Goods by Sea" (1979) 4 Maritime Lawyer 1 at 3 [Donovan, "Convention"].
[33] Hakan Karan, "Any Need for a New International Instrument on the Carriage of Goods by Sea: The Rotterdam Rules?" (2011) 42 J Mar L & Com 441 at 450 [Karan, "Need"].
[34] D Rhidian Thomas, "And Then There Were the Rotterdam Rules" (2008) 14 Journal of International Maritime Law 189 at 189-190.
[35] See generally Honnold, "Clarity", *supra* note 22 at 81-103.
[36] *Ibid* at 81.
[37] Champeil-Desplats, *supra* note 30 at 39.
[38] *Ibid* at 39-48.
[39] Alexandre Flükiger, "The Ambiguous Principle of the Clarity of Law" in Wagner & Cacciaguidi-Fahy, *Obscurity*, *supra* note 28, 9 at 15.

concise without archaism or over-decorated expressions, while the latter denotes that a clear law must have the quality of being readily applied to concrete cases.[40] In the present thesis, clarity consists of three dimensions, namely coherence, completeness and readability, which are actually extracted from the previous theories with modest adjustments. The first dimension relates to whether there are logical conflicts, the second relates to whether there are serious lacunae, and the third relates to whether there are unwanted circumlocutions. It should be noted that absolute clarity is unachievable in law partly due to the intrinsic vagueness of language and partly due to the fact that law is supposed to have generality to cover homogeneous realities and apply to diverse and ever-changing social phenomena.[41] Such incurable or essential ambiguity is excluded from the scope of the present thesis to prevent it from being trapped in endless and fruitless debates.

The accomplishment of the thesis is dependent on legal positivism analysis, semantic analysis and comparative analysis. Legal positivism analysis suggests that the researches embraced in the thesis tend to estrange themselves from the natural law theory. Naturalists seek to erect a filter for official directives to determine their consistency with

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[40] *Ibid* at 15-23.

[41] For more explanations of the intrinsic vagueness of language, see Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (New York: Routledge, 2011) at 4; Jeremy Waldron, "Vagueness in Law and Language: Some Philosophical Issues" (1994) 82 Cal L Rev 509 at 509-511. For more explanations of the necessary generality of law, see Walter Wheeler Cook, "'Immovables' and the 'Law' of the 'Situs': A Study in the Ambiguity of Legal Terminology" (1939) 52 Harv L Rev 1246 at 1247; Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 at 20-21; Michael Pantazakos, "The Form of Ambiguity: Law, Literature, and the Meaning of Meaning" (1998) 10 Cardozo Stud L & Lit 199 at 203; Arthur S Miller, "Statutory Language and the Purposive Use of Ambiguity" (1956) 42 Va L Rev 23 at 23-24; Sanford Schane, "Ambiguity and Misunderstanding in the Law" (2002) 25 Thomas Jefferson L Rev 167 at 168-169.

fundamental fairness or minimum justice before concluding that such directives are valid laws.[42] Although fairness and clarity have been selected to serve as the criteria for the evaluations in the thesis, the whole research is not designed to challenge the validity of the norms examined by virtue of certain standards that are believed to be superior to them. Semantic analysis is essential to the extraction of the meaning of a provision from the natural language through which it is conveyed.[43] Sometimes, it may be easy when the meaning of a provision can be grasped through its textual structure and the ordinary implications of the words used therein.[44] However, partly due to the limitations of the legislative techniques and partly due to the intrinsic vagueness of language, it is normally necessary to resort to other sources outside the provision being examined, like doctrines and precedents, to figure out what it does imply.[45] Comparative analysis is usually carried out in two directions, that is, search for differences and search for commonness.[46] The former leads towards the discovery of the distinctive features of each object observed,

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[42] See Ronald A Dworkin, "'Natural' Law Revisited" (1982) 34 U Fla L Rev 165 at 165.

[43] See Giulia Venturi, "Legal Language and Legal Knowledge Management Applications" in Enrico Francesconi et al, eds, *Semantic Processing of Legal Texts: Where the Language of Law Meets the Law of Language* (Berlin: Springer, 2010) 3 at 4; Paulo Quaresma & Teresa Gonçalves, "Using Linguistic Information and Machine Learning Techniques to Identify Entities from Juridical Documents" in Enrico Francesconi et al, eds, *Semantic Processing of Legal Texts: Where the Language of Law Meets the Law of Language* (Berlin: Springer, 2010) 44 at 44.

[44] See Yon Maley, "The Language of the Law" in John Gibbons, ed, *Language and the Law* (New York: Routledge, 2013) 11 at 22.

[45] See Timothy Endicott, "The Value of Vagueness" in Vijay K Bhatia et al, eds, *Vagueness in Normative Texts* (Bern: Peter Lang, 2005) 27 at 28; Leslie Scarman, "Law Reform by Legislative Techniques" (1967) 32 Sask L Rev 217 at 220; Max Radin, "Statutory Interpretation" (1930) 43 Harv L Rev 863 at 864.

[46] Gerhard Dannemann, "Comparative Law: Study of Similarities or Differences?" in Mathias Reimann & Reinhard Zimmermann, eds, *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) 383 at 401. See also Pierre Legrand, "How to Compare Law" (1996) 16 LS 232 at 242; Alan Watson, "Comparative Law and Legal Change" (1978) 37 Cambridge LJ 313 at 316; Pierre Legrand, "The Same and the Different" in Pierre Legrand & Roderick Munday, eds, *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 240 at 245, 271-272.

while the latter heads for the exploration of their commonalities.[47] They are both indispensable to the research in the present thesis because the former reveals the similarities and even the historical relationships between the norms examined and the latter results in the acquaintance with the peculiarities of each regime observed that paves the way for the evaluations.

The present thesis is comprised of four parts. The first one is contributed to a historical review of the carrier's exculpatory rights prior to the emergence of the international rules governing the carriage of goods by sea. The carrier's immunities in the Hague, Hamburg and Rotterdam Rules are respectively examined from the perspectives of fairness and clarity in the other three parts.

[47] John C Reitz, "How to Do Comparative Law" (1998) 46 Am J Comp L 617 at 624.

Part I – The marine carrier's exemption from liability in the pre-Hague era

Ocean voyage was undertaken even before land travel.[48] Humankind has voyaged upon oceans for the purpose of trading since time immemorial.[49] Up to now, the carriage of goods by sea is still often deemed as the most financially viable option for merchants, despite the existence and prosperity of other modes of transport.[50]

In the long course of development, ships have evolved from primitive crafts to modern vehicles, and seafarers have evolved from simple laborers to skilled technicians and professional mariners.[51] Briefly speaking, the shipping industry has become complex and highly specialized in operational, managerial and legal terms.[52]

The carrier is the party who assumes the obligation to carry goods from one place to another in the ocean transport.[53] The debate over his liability is regularly put under the spotlight due to his prominent role in the carriage of goods by sea. His entitlement to exemption from liability for loss of or damage to the goods in his custody or for delay in delivery, which constitutes an important facet of the liability regime, has always been a real eye-catcher for both scholars and practitioners.

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[48] Proshanto K Mukherjee & Mark Brownrigg, *Farthing on International Shipping*, 4th ed (Berlin: Springer, 2013) at 1. See also Carl E McDowell & Helen M Gibbs, *Ocean Transportation* (Washington D.C.: BeardBooks, 1999) at 12-13.
[49] Mukherjee & Brownrigg, *supra* note 48 at 1.
[50] Singh, *supra* note 1 at 3.
[51] Edgar Gold, Aldo Chircop & Hugh Kindered, *Maritime Law* (Toronto: Irwin Law, 2003) at 18.
[52] *Ibid*. See also Christopher Hill, *An Introduction to the Law of Carriage of Goods by Sea* (London: Stanford Maritime Ltd, 1974) at 33-35.
[53] Stephen Girvin, *Carriage of Goods by Sea* (New York: Oxford University Press, 2007) at para 1.26 [Girvin, *Carriage*].

Part I is contributed to a historical review of the carrier's exculpatory rights prior to the emergence of the Hague Rules. It displays the radical change in the carrier's immunities by the late nineteenth century and reactions of domestic legislators thereto.

Chapter I – Strict liability prior to the late nineteenth century

Liability is an ancient legal term that in general refers to the duty to respond in the presence of another individual for the violation of any established or presumed behavioral norm and to suffer pre-established sanctions.[54] Strict liability, as a subdivision of the concept of liability, is founded on *causa* instead of *culpa*, which means that liability accompanies the occurrence of damage at the defendant's hand, regardless of whether his behavior is faulty.[55]

Generally speaking, the carrier's exculpatory rights were stringently circumscribed from the early shipping age to the late nineteenth century. An apparent inclination towards strict liability could be detected in the Roman law,[56] civil law and common law systems.

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[54] Francisco Bonet Ramón, "Strict Liability" (1982) 42 La L Rev 1679 at 1680. See also Peter W Huber, *Liability: the Legal Revolution and Its Consequences* (New York: Basic Books, 1988) at 10-12.

[55] Ernest J Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 171. See also Andrew P Simester, *Appraising Strict Liability* (Oxford: Oxford University Press, 2005) at 96-97; Warren Freedman, *Strict Liability* (Columbia, MD: Hanrow Press, 1986) at 111-112.

[56] The renowned Rhodian Law had a considerable influence on Roman law in respect of marine rules. See H Edwin Anderson, III, "Risk, Shipping, and Roman Law" (2009) 34 Tul Mar LJ 183 at 195; Robert D Benedict, "The Historical Position of the Rhodian Law" (1909) 18 Yale LJ 223 at 223. Professor Marel Katsivela has pointed out in one of her articles that the Rhodian Law provided for the exemption of masters under certain circumstances. Marel Katsivela, "The Treatment of the Sea Peril Exception of the Hague-Visby Rules in Common Law and Civil Law Jurisdiction" (2016) WMU Journal of Maritime Affairs 1 at 1 [Katsivela, "Treatment"].

Section 1 – Roman law

As commercial relationships were still in their infancy, cargo owners performed on their own the carriage of goods by sea.[57] Any loss of or damage to the goods in transit was consequently endured by themselves.[58] The prosperity of commerce necessitated the involvement of carriers who undertook to transport goods by assigning to cargo owners the use of all or part of their vessels.[59] Carriers usually issued bills, on which were entered shipments and cargo owners' names, to shippers as a kind of custody receipt.[60]

Until the emergence of the Praetor's Edict that dates back to around 246 BC, carriers of goods were not put under any obligations peculiar to them as a class.[61] The contract of carriage belonged either to the class of contract known as "*depositum*" or to the class known as "*locatio operis*", the division of which depended on whether goods were carried gratuitously or for remuneration.[62] Should the carrier be in breach of contract, the remedy for the consignor was, where no freight was paid, the *actio depositi*, and, where

[57] Samir Mankabady, "Comments on the Hamburg Rules" in Samir Mankabady, ed, *The Hamburg Rules on the Carriage of Goods by Sea* (Leyden: A. W. Sijthoff, 1978) 27 at 28 [Mankabady, *Hamburg*].
[58] JA Thomas, *Textbook of Roman Law* (Amsterdam: North-Holland, 1976) at 293, 299. See also Martin Stopford, *Maritime Economics*, 3d ed (London: Routledge, 2010) at 112-115.
[59] RW Lee, *An Introduction to Roman-Dutch Law*, 5th ed (Oxford: Clarendon Press, 1961) at 320; Barry Nicholas & Ernest Metzger, *An Introduction to Roman Law* (Oxford: Oxford University Press, 2010) at 183.
[60] WE Astle, *Legal Developments in Maritime Commerce* (London: Fairplay, 1983) at 61 [Astle, *Developments*]; WP Benneth, *The History and Present Position of the Bill of Lading as a Document of Title to Goods* (Cambridge: Cambridge University Press, 1914) at 7.
[61] TE Dönges, *The Liability for Safe Carriage of Goods in Roman-Dutch Law* (Cape Town: Juta, 1928) at 20.
[62] *Ibid*.

freight was paid, either the *actio ex locato* or the *actio ex conducto*, depending on whether he merely consigned specific goods or chartered a whole ship.[63]

In the Edict, the carrier was treated as an insurer of the goods he carried whose duty was to preserve good faith, guarantee the safety of the goods and prevent fraud and robbery.[64] The carrier's liability of that time was summarized by Dr. Dönges as follows: (a) it was an absolute obligation for the carrier to restore safely the goods carried; (b) in certain specified cases, however, viz., where loss or damage was due to *vis major* or *damnum fatale*, the carrier would be allowed an "*exceptio*"; (c) the carrier could not have the benefit of this "*exceptio*" where it was his "*culpa*" that triggered the risk of *vis major* or *damnum fatale*; and (d) apart from this particular case, the absence of "*culpa*" of the carrier was irrelevant in actions pursuant to the Edict.[65] The rationale underlying such strict liability was that it was the carrier whose vocation was to look after the goods well in the course of conveyance that ought to be responsible for any loss of or damage to the goods occurring at sea, as the shipper had little control over his cargoes once they had been loaded on board.[66]

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[63] Astle, *Developments*, *supra* note 60 at 63.

[64] Samuel Robert Mandelbaum, "Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Convention" (1996) 23 Transp LJ 471 at 473 [Mandelbaum, "Standards"].

[65] Dönges, *supra* note 61 at 32-33. See also Hakan Karan, *The Carrier's Liability under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (Lewiston: Edwin Mellen Press, 2004) at 8 [Karan, *Liability*].

[66] Mandelbaum, "Standards", *supra* note 64 at 473.

Section 2 – Civil law

The tradition of Roman law exerted on the civil law system considerable influences that could be seen in many aspects including the rules governing the carriage of goods by sea. The Great Ordinance of Marine of August 1681 (l'Ordonnance de la marine du mois d'août 1681), a remarkable achievement of the continental legal system in the enactment of shipping norms, was the first codification of maritime law that was drafted under the reign of Louis XIV and established under the administration of Colbert.[67] It had an extensive scope covering public maritime law as well as private maritime law.[68] The Ordinance earned its reputation worldwide and was imitated by numerous countries intending to codify their own maritime laws, such as the Netherlands, Spain, Sweden, etc.[69] Although the exoneration-related provisions dispersed in the Ordinance, it still could be inferred from its text that the carrier's liability therein was essentially strict liability.[70] Only a very limited number of exceptions were accessible to carriers, such as *force majeure*,[71] shipper's fault,[72] and inherent vice of goods.[73]

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[67] Jean Chadelat, *L'élaboration de l'Ordonnance de la marine d'août 1681* (Paris: Recueil Sirey, 1954) at 74.

[68] René Rodière & Emmanuel du Pontavice, *Droit maritime*, 11th ed (Paris: Dalloz, 1991) at 11.

[69] *Ibid*.

[70] Hind Adil, *Le régime juridique international de la responsabilité du transporteur maritime de marchandises sous connaissement :un échec?* (LL.D. Thèse, Université de Montréal Faculté de droit, 2009) [unpublished] at 14.

[71] *L'Ordonnance de la marine du mois d'août 1681*, Livre III, Titre I, Article VIII [*Ordonnance*]. It provided that:

> Si les ports sont seulement fermés, ou les vaisseaux arrêtés pour un temps par force majeure, la Charte-partie subsistera aussi en son entier; & le maître & le marchand seront réciproquement tenus d'attendre l'ouverture des ports & la liberté des vaisseaux, sans dommages & intérêts de part ni d'autre.

See also René-Josué Valin, *Nouveau commentaire sur l'Ordonnance de la marine, du mois d'août 1681*, t 1 (La Rochelle: Légier, 1766) at 593.

[72] *Ordonnance*, *supra* note 71, Livre III, Titre IV, Article VII. It provided that:

> [S]i la rupture, le retardement, ou la prolongation arrive par le fait des marchands chargeurs, ils auront part aux dommages & intérêts qui seront adjugés au maître; lequel, aussi bien que les propriétaires, seront tenus de ceux des matelots, si l'empêchement arrive par leur fait.

The carrier's strict liability under civil law was initially embodied in the rigid obligation imposed on him to make his vessel seaworthy.[74] Book III, Title III, Article XII of the Ordinance stated that "[s]i … le Marchand [prouve] que lorsque le Vaisseau a fait voile, il était incapable de naviger, le Maître perdra son Fret, & répondra des dommages & intérêts du Marchand."[75] Such obligation originated from the plain and simple idea that when something was offered for hire, the primary duty of its owner was to make it fit for the purpose contemplated, so a horse should be sound for normal riding and a ship should be sound for navigation at sea.[76] As time went on, merchants were gradually no longer content with seaworthiness of the ship where their goods were carried and their attention shifted to the requirement of intact state and prompt delivery of their goods at destination.[77] It was then established under civil law that the carrier should be answerable for his failure to deliver goods safely or punctually.[78] Such liability was also strict in nature because the carrier acted as a "garant de toutes pertes, avaries ou

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See also Valin, *supra* note 71 at 666.

[73] *Ordonnance*, *supra* note 71, Livre III, Titre III, Article XXV. It provided that:

> Ne pourront les marchands obliger le maître de prendre pour son fret, les marchandises diminuées de prix, gâtées ou empirées par leur vice propre ou par cas fortuit.

It has been pointed out in a well-accepted annotation on this article that the master was not liable, in the form of waiver of partial freight, for the diminished price, spoilage, or deterioration of the goods arising from their inherent vice, as such damage had nothing to do with the master's act or his ship. Valin, *supra* note 71 at 635.

[74] Malcolm A Clarke, *Aspects of the Hague Rules: A Comparative Study in English and French Law* (The Hague: Martinus Nijhoff, 1976) at 114 [Clarke, *Aspects*].

[75] See Rodière & du Pontavice, *supra* note 68 at 309-310.

[76] Clarke, *Aspects*, *supra* note 74 at 114.

[77] See Georges Ripert & René Rodière, *Droit maritime* (Paris: Dalloz, 1963) at 106.

[78] See Clarke, *Aspects*, *supra* note 74 at 116-117.

dommages subis par la marchandise" and "une présomption de responsabilité existe à l'encontre de l'armateur qui est tenu à une obligation de résultat."[79]

By the sixteenth century, there appeared, however, in the civil law system presumed fault liability which denoted that carriers should be liable for loss of or damage to the goods in their charge unless they could prove that they were not at fault.[80] The carrier's burden under that kind of liability was greatly mitigated in comparison with that he had to bear under Roman law, though it was still quite severe.[81] At that time, there was a growing feeling within the European commercial community that shipowners shall be excused for non-delivery of or damage to goods caused by sea perils, pirates, bad weather, etc.[82] Those defenses were gradually accepted by the 1570s.[83]

Section 3 – Common law

In common law,[84] carriers were subject to strict liability as they were obliged to deliver goods in the same state as that in which they had been received.[85] In *Riley v Horne*, Best J stated that:

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[79] *Ibid* at 116.

[80] William Holdsworth, *A History of English Law*, vol 5, 3d ed (London: Sweet & Maxwell, 1982) at 100. See also Jamie Glister & Pauline Ridge, *Fault Lines in Equity* (London: Bloomsbury Publishing, 2012) at 68.

[81] Karan, *Liability*, *supra* note 65 at 9.

[82] Mandelbaum, "Standards", *supra* note 64 at 474; Eric GM Fletcher, *The Carrier's Liability* (London: Stevens & Sons, 1932) at 51, 88.

[83] *Ibid* at 51.

[84] The Laws of Oleron had a remarkable impact on common law of the Atlantic ports. They were introduced into England in about 1190 by Richard I and codified in 1336 in the Black Book of the Admiralty that contained a list of the ancient customs and usages of the sea. In the Laws of Oleron, there had been a number of provisions on the obligations, liabilities and immunities of masters. See generally Timothy J Runyan, "The Rolls of Oleron and the Admiralty Court in Fourteenth Century England" (1975) 19 Am J Legal Hist 95 at 95-102.

> When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their master and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer.[86]

In the beginning, only common carriers had to put up with strict liability.[87] A common carrier "holds himself out as being prepared to carry for reward for all and sundry without reserving the right to refuse the goods tendered."[88] Although it is still a moot point whether a common carrier has to ply regularly between fixed places and carry habitually for the public,[89] it has been widely acknowledged that what really matters is whether he has the discretion to accept or reject transportation offers.[90] Later, there appeared the theory calling for the abolition of discriminatory policies on liability of common carriers and that of private carriers who reserved the right to turn down shippers'

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85 Karan, *Liability*, *supra* note 65 at 11.

86 *Riley v Horne*, (1828) 5 Bing 217 at 220 (Ct Com Pl UK) Best J [*Riley*]. See also *Paterson Steamships Ltd v Canadian Cooperative Wheat Producers Ltd*, [1934] AC 538 at 544 (PCUK) [*Paterson*]; Beale, *supra* note 24 at 158, 168; Thomas G Carver & Raoul Colinvaux, *Carver's Carriage by Sea*, vol 1, 13th ed (London: Stevens & Sons, 1982) at 3, 20.

87 See *ibid* at 178. See also Edwin C Goddard, "The Liability of the Common Carrier as Determined by Recent Decisions of the United States Supreme Court" (1915) 15 Colum L Rev 399 at 401-402; William Payne, *An Outline of the Law Relating to Carriage of Goods by Sea* (London: Butterworth, 1914) at 127.

88 David A Glass & Chris Cashmore, *Introduction to the Law of Carriage of Goods* (London: Sweet & Maxwell, 1989) at 12. See also *Nugent v Smith*, (1876) 1 CPD 423 at 430 (CAUK) [*Nugent*].

89 See *Liver Alkali Co v Johnson*, (1872) LR 9 Ex 338 at 341 (UK) [*Johnson*]; *Belfast Ropework Co Ltd v Bushell*, [1918] 1 KB 210 at 212 (UK).

90 See *Nugent*, *supra* note 88 at 430; *E J Webster Ltd v F Dickson Transport Ltd*, [1969] 1 Lloyd's Rep 89 at 94 (QBDUK); *James v Commonwealth*, (1939) 62 CLR 339 at 367-369 (HCA).

offers.[91] It was suggested that all carriers should be brought under strict liability unless their responsibilities were stipulated otherwise in special contracts.[92]

The principle of *Receptum Nautarum* in Roman law, which made carriers answerable for the safety of the goods in their charge,[93] was implicitly followed,[94] but the carrier's liability under common law stemmed from a breach of bailment relation depending on his actual possession of goods rather than that of contractual relation as stated in the Roman law theory.[95] A carrier, even though subject to strict liability under common law,[96] still might release himself from liability where the loss of or damage to the goods in transit resulted from act of God, King's enemies, inherent vice of the goods or negligence of cargo interests, unless the claimant was able to prove that the carrier's fault, unjustifiable deviation or unseaworthiness of the vessel at the beginning of the voyage contributed to such loss or damage.[97]

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91 Lars Gorton, *The Concept of the Common Carrier in Anglo-American Law* (Gothenburg: Läromedelaförl, 1971) at 92.

92 See *Bloomer Chocolate Co v Nosira Sharon Ltd*, 776 F Supp 760 at 765 (NY Dist Ct 1991); *Baxter's Leather Co v Royal Mail Steam Packet Co*, [1908] 2 KB 626 at 630 (CAUK); *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad (The Bunga Seroja)*, [1999] 1 Lloyd's Rep 512 at 525 (HCA) [*Bunga Seroja*]; *Johnson*, *supra* note 89 at 344.

93 George Mousourakis, *Fundamentals of Roman Private Law* (Berlin: Springer, 2012) at 246.

94 *Nugent*, *supra* note 88 at 433; Thomas Edward Scrutton et al, *Scrutton on Charterparties and Bills of Lading*, 20th ed (London: Sweet & Maxwell, 1996) at 203.

95 CHS Fifoot, *History and Sources of the Common Law: Tort and Contract* (London: Stevens, 1949) at 24; Norman E Palmer, *Bailment*, 2d ed (London: Sweet & Maxwell, 1991) at 31. See also Sang Hyun Song, *A Comparative Study on Maritime Cargo Carrier's Liability in Anglo-American and French Laws* (JSD Thesis, Cornell University, 1970) [unpublished] at 32-33.

96 Karan, *Liability*, *supra* note 65 at 12.

97 See *James Morrison & Co Ltd v Shaw, Savill & Albion Co Ltd*, [1916] 2 KB 783 at 788 (CAUK). See also M Kathleen Miller, "Cargo Legal Liabilities: A Comparison of the Liabilities of Carriers, Stevedores, Terminal Operators and Others for Cargo Damage" (1987) 17 Cumb L Rev 763 at 767; Kenneth Smith & Denis J Keenan, *Essentials of Mercantile Law*, 2d ed (London: Pitman, 1969) at 283.

Chapter II – Chaos in the late nineteenth century

Prior to the late nineteenth century, cargo owners were well shielded because of strict liability imposed on carriers who had to serve as insurers of the goods in their charge and could merely avail themselves of few defenses.[98] Nonetheless, the evolution path of the carrier's exemption from liability reached a crucial turning point in the late nineteenth century when carriers inserted in bills of lading exculpatory clauses in an intolerably arbitrary manner.[99]

Section 1 – Causation

The British shipping industry grew so rapidly that British shipowners took an absolute majority of share in the ocean carriage market by the late seventeenth century.[100] British common law accordingly gained unprecedented importance in the settlement of maritime litigations.[101] Although strict liability was imposed on carriers under British law, they were allowed to free themselves from liability by relying on exemption clauses concluded pursuant to the principle of freedom of contract.[102] Shipowners were given latitude to contract out of their liability for loss or damage arising from negligence or

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[98] Arnold W Knauth, *The American Law of Ocean Bills of Lading*, 4th ed (Baltimore: American Maritime Cases, 1953) at 116.

[99] Michael F Sturley, "Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence" (1993) 24 J Mar L & Com 119 at 119 [Sturley, "Vacuum"]. See also Carol Proctor, *The Legal Role of the Bill of Lading, Sea Waybill and Multimodal Transport Document* (Pretoria: Interlegal, 1997) at 126-127.

[100] Karan, *Liability*, *supra* note 65 at 11.

[101] Gorton, *supra* note 91 at 94; Holdsworth, *supra* note 80 at 102.

[102] Carver, *supra* note 86 at 630; Paul Todd, *Cases and Materials on Bills of Lading* (Oxford: BSP Professional Books, 1987) at 287 [Todd, *Cases*].

unseaworthiness, only if such contract terms were made in a clear, unambiguous and unequivocal way.[103] Even those clauses exonerating carriers from liability for loss or damage resulting from negligence on the part of their servants or agents were also enforceable.[104] British courts even recognized the validity of those most far-reaching exculpatory clauses in bills of lading, as they believed that strict liability imposed on carriers was a default rule that shall be applied only in the absence of an agreement to the contrary.[105]

British law offered carriers a theoretical possibility of getting rid of strict liability, while the practical support behind their fight against strict liability was the leap in their bargaining power.[106] As the relative shortage of shipping space became obvious and the driving force of ships developed from sail to steam by the end of the nineteenth century,[107] carriers got an overwhelming advantage over cargo interests in determining terms of contract of carriage.[108] Carriers, with superior bargaining power, no longer had to endure strict liability because they got the chance, under the aegis of the principle of

[103] Yancey, *supra* note 3 at 1239.
[104] Carver, *supra* note 86 at 124-131.
[105] *Ibid* at 126.
[106] Robert Hellawell, "Allocation of Risk Between Cargo Owner and Carrier" (1979) 27 Am J Comp L 357 at 357 [Hellawell, "Allocation"].
[107] See Norman Friedman, *British Carrier Aviation: The Evolution of the Ships and Their Aircraft* (London: Conway Maritime Press Limited, 1988) at 96-98.
[108] Eun Sup Lee & Seon Ok Kim, "A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel" (2000) 27 Transp LJ 205 at 209.

freedom of contract, to arbitrarily insert in bills of lading clauses apparently in favor of themselves by exerting pressure on cargo interests at the negotiation table.[109]

Section 2 – Symptom

The chaos in the shipping industry during the late nineteenth century found expression in the uncontrolled insertion of exculpatory clauses by carriers in bills of lading. After the long-time suppression by strict liability, carriers stepped into a new stage where their disadvantageous situation could be reversed.[110] Unfortunately, the balance of interests was severely damaged due to their immoderation.[111]

In deference to freedom of contract, a shipper and a carrier were able to reach an agreement in which the latter virtually assumed no liability.[112] The substantial negotiating strength of shipping companies compelled cargo interests to accept nealy any contract terms dictated by the opposing side.[113] The so-called "freedom of contract" degenerated into a privilege exclusively enjoyed by carriers.[114]

In the late nineteenth century, bills of lading commonly contained so many exculpatory clauses that there seemed to be no other obligations on a shipowner than to

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[109] Michael F Sturley, "The History of COGSA and the Hague Rules" (1991) 22 J Mar L & Com 1 at 4-5 [Sturley, "COGSA"].
[110] *Ibid* at 5.
[111] See M Bayard Crutcher, "The Ocean Bill of Lading – A Study in Fossilization" (1971) 45 Tul L Rev 697 at 670-672.
[112] Michael F Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux préparatoires of the Hague Rules*, vol 1 (Littleton: F. B. Rothman, 1990) at 3 [Sturley, *History 1*].
[113] *Forward v Pittard*, (1785) 99 ER 953 at 956 (KBD); *Australasian United Steam Navigation Co v Hiskens*, (1914) 18 CLR 646 at 671 (HCA) [*Hiskens*].
[114] Girvin, *Carriage*, *supra* note 53 at para 14.03.

receive the freight.[115] Those oppressive clauses were applicable to cargo loss or damage resulting from theft, heat, leakage, breakage, contact with other goods, sea perils, jettison, frost, decay, collision, strike, deviation, sweat, rain, rust, prolongation of voyage, etc.[116] The Glasgow Corn Trade Association complained in 1890 that those exculpatory clauses had "surpassed all bounds of reason and fairness" and that bills of lading were "so unreasonable and unjust in their terms as to exempt [carriers] from almost every conceivable risk and responsibility."[117]

[115] Hellawell, "Allocation", *supra* note 106 at 357.

[116] Yancey, *supra* note 3 at 1240.

[117] Knauth, *supra* note 98 at 120; Michael F Sturley, "The Development of Cargo Liability Regimes" in Hugo Tiberg, ed, *Cargo Liability in Future Maritime Carriage* (Stockholm: Swedish Maritime Law Association, 1998) 10 at 16-17 [Sturley, "Regimes"]. See also *The Delaware*, 161 US 459 at 472 (SC 1896) [*Delaware*].

Chapter III – Reactions of domestic legislators

Notwithstanding strong complaints from merchants about all-embracing exemption clauses inserted by carriers in bills of lading,[118] the international community moved slowly towards a global solution,[119] while the United States took action to afford shippers and consignees vital protection by enacting a domestic law restricting the carrier's exculpatory rights.[120] Following the lead of the U.S., some other countries promulgated their own statutes in the early twentieth century to deal with the abuse of exemption clauses.[121]

Section 1 – Emergence of the U.S. Harter Act

Speaking of the development of international shipping rules, it is almost impossible to overlook the contribution of the U.S. Harter Act, which has been widely recognized as the foundation of the Hague Rules as well as the prelude to the international movement for uniformity of shipping rules.[122]

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118 Lee & Kim, *supra* note 108 at 209.
119 Sturley, *History 1*, *supra* note 112 at 5.
120 Girvin, *Carriage*, *supra* note 53 at para 14.07.
121 *Ibid* at paras 14.11-14.13.
122 *Ibid* at para 14.08; Joseph C Sweeney, "Happy Birthday, Harter: A Reappraisal of the Harter Act on Its 100th Anniversary" (1993) 24 J Mar L & Com 1 at 29-30 [Sweeney, "Anniversary"]. See also John Boyer Surr, *Carriage of Goods under the Harter Act (with Particular Reference to Commencement and Termination of Its Exemptions)* (JD Thesis, University of California, 1928) [unpublished] at 16-19.

Paragraph 1 - Motivation

American courts and British courts differed in their views on the enforceability of broad exemption clauses in bills of lading. The former recognized the carrier's entitlement to exemption from liability under certain circumstances, though such entitlement was strictly restrained. In general, a carrier was regarded as an insurer who, even though no fault was imputable to him, had to be liable, in the absence of any special contracts or statutes limiting his liability, for any loss of or damage to the goods entrusted to his care, unless the loss or damage was occasioned by act of God, public enemy, public authority, shipper's fault or inherent nature of the goods shipped.[123] Carriers might be exempt from liability by special agreements or stipulations in bills of lading,[124] but they were forbidden to contract against their own negligence, because any agreement to that effect was thought to contradict public policy.[125]

Aside from American courts' hostility towards undue exculpatory clauses in bills of lading, there were other factors contributing to the birth of the Harter Act. In the late nineteenth century, the U.S. shipping industry was at a low ebb due to the devastation of American flag merchant fleets during the Civil War of 1861-1865 and the failure of American shipowners to invest in modern steam-driven iron ships.[126] As a result, the U.S.

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123 *Clark v Barnwell*, 53 US 272 at 279 (SC 1851).
124 *The Jason*, 225 US 32 at 49 (SC 1912).
125 Yancey, *supra* note 3 at 1239. See also Peter L Hupe & Michael J Hill, *Public Policy* (Los Angeles: SAGE, 2012) at 56; Thomas R Dye, *Understanding Public Policy*, 14th ed (Harlow: Pearson, 2014) at 35-36.
126 Joseph C Sweeney, "The Prism of COGSA" (1999) 30 J Mar L & Com 543 at 551.

import and export trade was largely in the hands of British liner companies that had a virtual monopoly on the worldwide sea carriage.[127] Unfair exemption clauses dictated by British carriers brought about the general dissatisfaction of the cargo-owning side.[128] Unlike cargo interests in most other places who kept silent and tolerant, American shippers and consignees were sufficiently powerful to get the notice of leading congressmen and strive for legislation that could protect their interests.[129] In *Charles Pfizer & Co v Convoy SS Co Ltd*, it was stated that:

> To meet the ever increasing attempts further to limit the liability of the vessel and her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, negligence, and other causes of liability by which the common-law responsibility of carriers by sea was being frittered away, the Harter Act … was passed. It was designed to fix the relations between the cargo and the vessel and to prohibit contracts restricting the liability of the vessel in certain particulars.[130]

Paragraph 2 – Restriction on exculpatory clauses

The Harter Act began with a bill proposed in 1892 by Congressman Michael Harter, a Democrat from Ohio,[131] whose principal argument was that:

> [The Bill] is a measure which deprives nobody of any right, but which will by its operation deprive some foreign steamship companies of certain privileges

[127] Knauth, *supra* note 98 at 120. See also RH Thornton, *British Shipping*, 2d ed (Cambridge: Cambridge University Press, 1959) at 23.
[128] Yancey, *supra* note 3 at 1240-1241; Lee & Kim, *supra* note 108 at 209.
[129] Girvin, *Carriage*, *supra* note 53 at para 14.05.
[130] *Charles Pfizer & Co v Convoy SS Co Ltd*, 300 F 5 at 9-10 (3d Cir US 1924). See also *Delaware*, *supra* note 117 at 465.
[131] Sweeney, "Anniversary", *supra* note 122 at 9.

> which for many years they have exercised, to the great disadvantage of American commerce.[132]

After some extensive amendments in the Senate Commerce Committee, the Bill was passed in the Senate and the House of Representatives without dissent, and then was signed by the President on February 13, 1893 and took effect on July 1, 1893.[133]

The Harter Act comprises seven sections.[134] Three of them, namely Sections One to Three, have been designed to place restriction on the carrier's exculpatory rights.[135] Section One forbids clauses in bills of lading relieving carriers from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of lawful merchandise or property committed to their charge.[136] Section Two nullifies clauses that lessen, weaken or avoid the carrier's obligations to exercise due diligence to properly equip, man, provision and outfit the vessel, and to make the vessel seaworthy and capable of performing her intended voyage, or the

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[132] Sturley, "Regimes", *supra* note 117 at 18.

[133] See Knauth, *supra* note 98 at 120; Sweeney, "Anniversary", *supra* note 122 at 9-14. See also Sturley, "Regimes", *supra* note 117 at 17-20.

[134] See generally Frederick Green, "The Harter Act" (1903) 16 Harv L Rev 157 at 157-159; Knauth, *supra* note 98 at 163.

[135] The fourth section of the Act provides for the carrier's obligation to issue a bill of lading or shipping document, the mandatory contents thereof, and the legal consequence of the issuing act; Section Five stipulates a penalty for violation of the provisions of the Act and creates a statutory maritime lien on the vessel; Section Six excludes the carriage of live animals from the prohibition of clauses exonerating the carrier from negligence liability and from the obligation to issue a bill of lading with mandatory contents; and the last section states that the Act shall be applied without any substantial impact on the 1851 Fire Statute and any other statute defining the liability of vessels, their owners or representatives. *Harter Act*, 46 USC Appx §§ 193-196 (1988).

[136] *Ibid* § 190. This section provides that:

> It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

obligations of the master, officers, agents or servants to carefully handle, stow, care for and properly deliver the goods.[137] Section Three states that, if the shipowner has exercised due diligence to make his vessel in all respects seaworthy and properly manned, equipped and supplied, he is permitted to invoke some defenses to escape liability, such as nautical fault, sea perils, acts of God, public enemies, insufficiency of package, seizure under legal process, etc.[138]

The Harter Act represented a compromise between shipowning and cargo-owning interests which was achieved by, on the one hand, dissolving strict liability imposed on carriers and, on the other, shortening the list of exemption clauses available to them.[139] The first section of the Act was meant to protect American shippers from unscrupulous British carriers.[140] Nonetheless, lest Section One should lead to a serious imbalance of interests in favor of shippers and the inability of American carriers to compete with their

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[137] *Ibid* § 191. This section provides that:

> It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

[138] *Ibid* § 192. This section provides that:

> If the owner of any 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 nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representatives, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

[139] Bryan F Williams, "Cargo Damage at Sea: The Ship's Liability" (1949) 27 Tex L Rev 525 at 526.

[140] Green, *supra* note 134 at 159; Wharton Poor, *American Law of Charter Parties and Ocean Bills of Lading*, 5th ed (New York: Bender, 1968) at 152 [Poor, *Charter*].

British rivals, the obligation to exercise due diligence to provide seaworthy ships rather than an absolute duty of seaworthiness was imposed on carriers in Section Two and carriers were granted the entitlement to some statutory defenses in Section Three.[141]

Section 2 – Legislation in other countries

In the early twentieth century, several statutes modelled on the Harter Act were promulgated by some British dominions that were large exporters of raw materials.[142] The first one was the New Zealand Shipping & Seamen Act of 1903, which was followed by the Australia Sea-Carriage of Goods Act of 1904 and the Canada Water-Carriage of Goods Act of 1910.[143]

Paragraph 1 – New Zealand

New Zealand was the first commonwealth country promulgating a Harter-style statute.[144] Its Shipping & Seamen Act was passed in 1903 and repealed and re-enacted, in virtually identical terms, in 1908.[145] The exoneration-related provisions in the Act and its successor of 1908 were similar to those in the Harter Act.[146] Section 293 thereof, which was akin to Section Three of the Harter Act, provided that:

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141 Karan, *Liability*, *supra* note 65 at 20.
142 Sweeney, "Anniversary", *supra* note 122 at 30.
143 Girvin, *Carriage*, *supra* note 53 at paras 14.11-14.13.
144 Sturley, "Regimes", *supra* note 117 at 20.
145 Thomas Edward Scrutton & FD MacKinnon, *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* (London: Sweet & Maxwell, 1917) at 472.
146 Girvin, *Carriage*, *supra* note 53 at para 14.11.

> If the owner of any ship transporting merchandise or property to or from any port in New Zealand exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped, and supplied, neither the ship, her owners, charterers, or agent shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the ship, nor shall the ship, her owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.[147]

Section 300 of the Act, which was practically a reproduction of Sections One, Two and Six of the Harter Act, read as follows:

> (1) Where any bill of lading or shipping document contains –
>
> (a) Any clause, covenant, or agreement whereby the manager, agent, master, or owner of any ship, or the ship itself, shall be relieved from liability for loss or damage arising from the harmful of improper condition of the ship's hold, negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge; or
>
> (b) Any covenant or agreement whereby the obligations of the owners of the ship to exercise due diligence to properly equip, man, provision, and outfit the ship, to make the hold of the ship fit and safe for the reception of cargo, and to make her seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver the same, are in any wise lessened or avoided, –
>
> Such clause, covenant, or agreement shall be null and void and of no effect, unless the Court before which any question relating thereto is tried adjudges the same to be just and reasonable.

[147] *Shipping & Seamen Act 1903* (NZ) 1903/96 [*Act 1903*], s 293; *Shipping & Seamen Act 1908* (NZ) 1908/178, s 293 [*Act 1908*].

(2) This section shall not apply to the transportation of live animals.[148]

In addition, the limitation of the shipowner's liability was addressed in Sections 294, 295 and 301 of the Act.[149]

Paragraph 2 – Australia

Australia kept up with the pace of New Zealand with regard to the enactment of legislation in line with the Harter Act.[150] In 1904, the Commonwealth of Australia

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[148] *Act 1903*, *supra* note 147, s 300; *Act 1908*, *supra* note 147, s 300. It is worthwhile to note that the Shipping & Seamen Act permits a court to uphold an exemption clause if it adjudges the clause to be just and reasonable. See Girvin, *Carriage*, *supra* note 53 at para 14.11.

[149] *Act 1903*, *supra* note 147, ss 294, 295, 301; *Act 1908*, *supra* note 147, ss 294, 295, 301. Section 294 provides that:

> The owner of a British ship, or of any share therein, shall not be liable to make good to any extent any loss or damage happening without his actual fault or privity in the following cases, namely: –
> (a) Where any goods taken in or put on board his ship are lost or damaged by reason of fire on board the ship; or
> (b) Where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which were not at the time of shipment declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.

Section 295 provides that:

> (1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity, that is to say: –
> (a) Where any loss of life or personal injury is caused to any person being carried in their ship;
> (b) Where any damage or loss is caused to any goods on board their ship;
> (c) Where any loss of life or personal injury is caused to any person carried in any other ship by reason of the improper navigation of their ship;
> (d) Where any loss or damage is caused to any other ship, or to any goods on board any other ship, by reason of the improper navigation of their ship, –
> be liable to damages beyond the following amounts: –
> (e) In respect of loss of life or personal injury, either alone or together with loss of or damage to ships or goods, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and
> (f) In respect of loss of or damage to ships or goods, whether there is in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.
> (2) The owner of every sea-going ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to ships or goods arising on distinct occasions, to the same extent as if no other loss, injury, or damage had arisen.

Section 301 provides that:

> (1) When any person takes or puts, or causes to be taken or put, on board any ship any gold, silver, diamonds, watches, jewels, precious stones, or passengers' luggage, he shall furnish to the owner or agent of the ship a list of such articles, with their value, and in the event of their being lost or destroyed the owner of the ship shall not be liable to pay a greater amount than such declared value.
> (2) If the value of the articles is not declared at or before the time of shipment, the owner of the ship shall not, in the event of their loss or destruction, be liable to pay more than fifty pounds.
> (3) The owner of the ship may charge a special rate of freight for the carriage of such articles, whether they are put or taken on aboard as cargo or passengers' luggage.

Parliament passed its first Sea-Carriage of Goods Act primarily in response to the pressure from Tasmanian fruit growers and other shippers of perishable products.[151] The Act applied "in relation to ships carrying goods from any place in Australia to any place outside Australia, or from one State to another State, and in relation to goods so carried, or received to be so carried, in those ships."[152] It explicitly prohibited choice-of-law clauses excluding the application of Australian law with respect to outward shipments from Australia and choice-of-forum clauses ousting or lessening the jurisdiction of Australian courts.[153]

The Sea-Carriage of Goods Act 1904 was largely based on the Harter Act,[154] though the former was considered to be friendlier to cargo interests.[155] Section 5 of the Act, basically reproducing Sections 1 and 2 of the Harter Act, provided that:

> Where any bill of lading or document contains any clause, covenant, or agreement whereby –
>
> (a) the owner, charterer, master, or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from the harmful or improper condition of the ship's hold, or any other part of the ship in which

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[150] The Commonwealth of Australia, comprising the British colonies of New South Wales, Tasmania, Victoria, Western Australia, South Australia, and Queensland, came into existence on January 1, 1901. Sweeney, "Anniversary", *supra* note 122 at 30, n 141. See also Girvin, *Carriage*, *supra* note 53 at para 14.12.

[151] The Act was subsequently superseded by the Sea-Carriage of Goods Act 1924. See Sturley, "COGSA", *supra* note 109 at 15. See also Sturley, "Regimes", *supra* note 117 at 20.

[152] *Sea-Carriage of Goods Act 1904* (Cth), s 4(1) [*Sea Act 1904*].

[153] *Ibid*, s 6. Section 6 provides that:

> All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

[154] Sturley, "COGSA", *supra* note 109 at 15, n 113.

[155] *Ibid* at 15.

goods are carried, or arising from negligence, fault, or failure in the proper loading, stowage, custody, care, or delivery of goods received by them or any of them to be carried in or by the ship; or

(b) any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation, are in any wise lessened, weakened, or avoided; or

(c) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened, or avoided,

that clause, covenant, or agreement shall be illegal, null and void, and of no effect.[156]

Section 8 thereof, following the example of Section 3 of the Harter Act, provided that:

(1) In every bill of lading with respect to goods a warranty shall be implied that the ship shall be, at the beginning of the voyage, seaworthy in all respects and properly manned, equipped, and supplied.

(2) In every bill of lading with respect to goods, unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped, and supplied, neither the ship nor her owner, master, agent, or charterer shall be responsible for damage to or loss of the goods resulting from –

(a) faults or errors in navigation, or
(b) perils of the sea or navigable waters, or
(c) acts of God or the King's enemies, or
(d) the inherent defect, quality, or vice of the goods, or
(e) the insufficiency of package of the goods, or
(f) the seizure of the goods under legal process, or

[156] *Sea Act 1904*, *supra* note 152, s 5.

(g) any act or omission of the shipper or owner of the goods, his agent or representative, or
(h) saving or attempting to save life or property at sea, or
(i) any deviation in saving or attempting to save life or property at sea.[157]

In addition, the Act provided for a penalty to prevent the owner, charterer, master or agent of a ship from inserting in any bill of lading or document any clause, covenant or agreement prohibited by the Act, and from making, signing or executing any bill of lading or document containing any clause, covenant or agreement of that kind.[158]

Paragraph 3 – Canada

Canada promulgated in 1910 its Water-Carriage of Goods Act,[159] which was slightly amended in the following year by another act consisting of only two provisions.[160] The Act applied "to ships carrying goods from any port in Canada to any other port in Canada, or from any port in Canada to any port outside of Canada, and to goods carried by such ships, or received to be carried by such ships."[161] Its enforcement

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[157] *Ibid*, s 8.

[158] *Ibid*, s 7. Section 7 provides that:
The owner, charterer, master, or agent of a ship shall not –
(a) insert in any bill of lading or document any clause, covenant, or agreement declared by this Act to be illegal, or
(b) make, sign, or execute any bill of lading or document containing any clause, covenant, or agreement declared by this Act to be illegal.
Penalty: One hundred pounds.

[159] See Sanford D Cole, *The Carriage of Goods by Sea Act, 1924: With An Explanation of the Hague Rules and Full Notes*, 4th ed (London: Pitman, 1937) at 131; Sturley, "Regimes", *supra* note 117 at 21.

[160] *An Act to Amend the Water-Carriage of Goods Act*, SC 1911, No 212. The following is the full text.
His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: –
1. Paragraph (a) of section 2 of The Water-Carriage of Goods Act, chapter 61 of the statutes of 1910, is repealed and the following is substituted therefor: –
"(a) 'goods' includes goods, wares, merchandise and articles of any kind whatsoever, except live animals and lumber, deals and other articles usually described as 'wood-goods'."
2. Section 10 of the said Act is repealed.

[161] *Water-Carriage of Goods Act*, SC 1910, c 61, s 3 [*Water Act 1910*].

in respect of outward shipments from Canada was ensured and the jurisdiction of Canadian courts was strengthened under Section 5 thereof.[162]

The Act resembled the Harter Act.[163] Section 4 thereof, inspired by Sections 1 and 2 of the Harter Act, read as follows:

> Where any bill of lading or similar document of title to goods contains any clause, covenant or agreement whereby
>
> (a) the owner, charterer, master or agent of any ship, or the ship itself, is relieved from liability for loss or damage to goods arising from negligence, fault, or failure in the proper loading, stowage, custody, care or delivery of goods received by them or any of them to be carried in or by the ship;
>
> (b) any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip, and supply the ship, and make and keep the ship seaworthy, and make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation, are in any wise lessened, weakened or avoided; or
>
> (c) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened or avoided;
>
> such clause, covenant or agreement shall be illegal, null and void, and of no effect, unless such clause, covenant or agreement is in accordance with the other provisions of this Act.[164]

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[162] *Ibid*, s 5. Section 5 provides that:

> Every bill of lading, or similar document of title to goods, relating to the carriage of goods from any place in Canada to any place outside of Canada shall contain a clause to the effect that the shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in, this Act; and 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.

[163] Heiko A Giermann, *The Evidentiary Value of Bills of Lading and Estoppel* (Münster: LIT, 2004) at 33, n 166.

[164] *Water Act 1910*, *supra* note 161, s 4.

Section 6 of the Act, designed to exonerate shipowners having appropriately performed their duty of seaworthiness from liability for cargo loss or damage caused by the nautical fault or latent defects, provided that:

> If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.[165]

Section 7 of the Act enumerating the defenses shipowning interests were able to plead provided that:

> The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, dangers of the sea or other navigable waters, acts of God or public enemies, or inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants or employees.[166]

The Act imposed a fine on those inserting in any bill of lading or equivalent document any clause, covenant or agreement prohibited by the Act, and those making, signing or executing any bill of lading or equivalent document containing any clause, covenant or agreement prohibited by the Act.[167]

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[165] *Ibid*, s 6.
[166] *Ibid*, s 7.
[167] *Ibid*, s 11(1). Section 11(1) provides that:

The Act had a large influence over the British maritime law. The Great Britain Dominions Royal Commission recommended in its report of March 1917 that a similar law should be enacted along the lines of the Canada Water-Carriage of Goods Act 1910.[168] The Imperial Shipping Committee was appointed in 1920 to inquire into and report on all matters in connection with ocean freight and facilities, and it proposed the same recommendation.[169] The Act also provided a template for the Hague Rules. It was even more similar to the Rules, in terms of form, style and contents, than the Harter Act.[170]

> Every one who, being the owner, charterer, master or agent of a ship,
> (a) inserts in any bill of lading or similar document of title to goods any clause, covenant or agreement declared by this Act to be illegal; or makes, signs, or executes any bill of lading or similar document of title to goods containing any clause, covenant or agreement declared by this Act to be illegal …
> is liable to a fine not exceeding one thousand dollars, with cost of prosecution, and the ship may be libelled therefor in any Admiralty District in Canada within which the ship is found.

[168] Giermann, *supra* note 163 at 33.

[169] The work of the Committee and its report paved the way for the 1921 Conference at The Hague convened by the Maritime Law Committee of the International Law Association. See *ibid*; Carver, *supra* note 86 at 6.

[170] Girvin, *Carriage*, *supra* note 53 at para 14.13.

Conclusion of Part I

Prior to the late nineteenth century, the law concerning the carrier's exemption from liability went through a relatively peaceful development phase when carriers were forced to be liable for nearly any loss of or damage to the goods in their charge, even if they were not negligent.[171] The idea that carriers shall put up with strict liability was accepted by both civil law and common law states, though their theories were not identical.[172] At that time, carriers acted as "insurers" of the goods entrusted to them.[173] That label, albeit technically inaccurate, well described their unfavourable position.[174]

The late nineteenth century was a turning point to carriers when they got the chance to throw off the shackles of strict liability by virtue of the principle of freedom of contract and their skyrocketing bargaining power.[175] However, carriers misused their ascendancy and pushed the allocation of risks to the other extreme by arbitrarily inserting in bills of lading unfair clauses relieving themselves from nearly all kinds of cargo loss or

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171 Carver, *supra* note 86 at 3-20; Hellawell, "Allocation", *supra* note 106 at 357; Grant Gilmore & Charles Lund Black, *The Law of Admiralty*, 2d ed (Spring Valley: Foundation Press, 1975) at 139-140; Thomas J Schoenbaum, *Admiralty and Maritime Law*, 4th ed (Saint Paul: Thomson/West, 2004) at 293.

172 Eun Sup Lee, "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 242 [Lee, "System"]. See also Colin Howard, *Strict Responsibility* (London: Sweet & Maxwell, 1963) at 51.

173 Zamora, *supra* note 24 at 397; Otto Kahn-Freund & Henry W Disney, *The Law of Carriage by Inland Transport*, 4th ed (London: Stevens, 1965) at 195-196.

174 Sturley, "COGSA", *supra* note 109 at 3.

175 Sturley, "Vacuum", *supra* note 99 at 119.

damage.[176] At that time, carriers having occupied the position of monopolists were capable of adding in bills of lading any terms they wanted.[177]

National legislation aiming to curtail the carrier's exemption privileges preceded an effective international solution.[178] The United States, due to its particular economic and political background, became the first country enacting a domestic law to afford cargo interests necessary protection.[179] Its Harter Act voided any clause in bills of lading exonerating carriers "from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of" goods,[180] and any clause derogating from the shipowner's obligation in relation to seaworthiness or the shipowning interests' duties in relation to care of goods.[181] Shipowning interests were entitled, pursuant to the Act, to some defenses, provided that shipowners had exercised due diligence to make their vessels "in all respects seaworthy and properly manned, equipped, and supplied."[182]

The Harter Act was a great attempt to allocate risks relating to the carriage of goods by sea between the shipowning and cargo-owning sides.[183] It was highly appreciated for

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176 Hercules Booysen, "The Liability of the International Carrier of Goods in International Law" (1992) 25 Comp & Int'l LJS Afr 293 at 297.
177 Robert Temperley & Francis Martin Vaughan, *Carriage of Goods by Sea Act, 1924: Including the Rules Relating to Bills of Lading (the Hague Rules)*, 4th ed (London: Stevens & Sons, 1932) at 2; *Hiskens*, *supra* note 113 at 671.
178 See F Sieveking, "The Harter Act and Bills of Lading Legislation" (1906) 16 Yale LJ 25 at 26-27.
179 Sturley, "Vacuum", *supra* note 99 at 119.
180 *Harter Act*, *supra* note 135 § 190.
181 *Ibid* § 191.
182 *Ibid* § 192.
183 Sturley, "Vacuum", *supra* note 99 at 119.

its contribution to the rectification of the carrier's unbridled exculpatory privileges,[184] but the "compromise" achieved therein failed to smooth all the complaints from cargo-owning interests.[185] The Act did not alter the validity of clauses containing rather low liability limitations, did not address the problem of very short periods for filing suits, did not clarify burden of proof where cargo loss or damage could be attributed to one or more excepted perils, etc.[186] Therefore, the Act was, at best, a partial, and, at worst, an unsatisfactory solution.[187]

Some other countries enacted in the early twentieth century their own statutes basically modeled on the U.S. Harter Act.[188] These legislative achievements were quite praiseworthy because they represented the domestic legislators' aroused consciousness that a balance of interests between the shipowning and cargo-owning sides was essential to the healthy operation of shipping business.[189]

Those countries tended to enlarge the scopes of application of their statutes to the extent that ships involved in trade contacts with them would fall within their jurisdiction. For instance, the Harter Act was designed to apply to "any vessel transporting merchandise or property from or between ports of the United States of America and

184 See Sweeney, "Anniversary", *supra* note 122 at 41; Yancey, *supra* note 3 at 1241.
185 See IL Evans, "The Harter Act and Its Limitations" (1910) 8 Mich L Rev 637 at 653-655.
186 See Girvin, *Carriage*, *supra* note 53 at para 14.18; Yancey, *supra* note 3 at 1241.
187 *Ibid*.
188 Theodora Nikaki & Bariş Soyer, "A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just Another One for the Shelves?" (2012) 30 Berkeley J Int'l L 303 at 303.
189 See Jürgen Erdmenger & Dinos Stasinopoulos, "The Shipping Policy of the European Community" (1988) 22 Journal of Transport Economics and Policy 355 at 355-356; Johan Horn, "Nationalism versus Internationalism in Shipping" (1969) 3 Journal of Transport Economics and Policy 245 at 246; Edgar Gold, "International Shipping and the New Law of the Sea: New Directions for a Traditional Use?" (1989) 20 Ocean Devel & Int'l L 433 at 436.

foreign ports";[190] the New Zealand Shipping & Seamen Act applied to "all British ships registered at, trading with, or being at any place within the jurisdiction of New Zealand";[191] the Australia Sea-Carriage of Goods Act applied to "ships carrying goods from any place in Australia to any place outside Australia"; [192] the Canada Water-Carriage of Goods Act was applicable to "ships carrying goods … from any port in Canada to any port outside of Canada".[193] Nonetheless, the extensive jurisdiction anticipated by one state was difficult to be recognized by another. Additionally, there was disharmony between statutes of different states. In a nutshell, the inherent internationalism in the carriage of goods by sea inevitably exposed the inadequacy of domestic legislation related thereto and called for a set of uniform rules applicable worldwide.[194]

[190] *Harter Act*, *supra* note 135 § 191.
[191] *Act 1903*, *supra* note 147, s 2(1); *Act 1908*, *supra* note 147, s 2(1).
[192] *Sea Act 1904*, *supra* note 152, s 4(1).
[193] *Water Act 1910*, *supra* note 161, s 3.
[194] See Zamora, *supra* note 24 at 402-403. See also William McFee, *The Law of the Sea* (London: Faber and Faber, 1951) at 29; Alan W Cafruny, *Ruling the Waves: the Political Economy of International Shipping* (Berkeley: University of California, 1987) at 15-18.

Part II – The first well-accepted international solution to the marine carrier's exoneration: the Hague Rules

By the end of the nineteenth century, carriers were already powerful enough to manipulate the insertion of exculpatory clauses in bills of lading.[195] In some countries, those clauses were enforceable, even if they might relieve carriers from nearly all their responsibilities, but in others, the enforcement of such clauses was severely circumscribed.[196] The International Law Association, earlier known as the Association for the Reform and Codification of the Law of Nations,[197] drew up a model bill of lading in 1882,[198] and then a set of model rules in 1885,[199] with a view to unifying rules governing the carriage of goods by sea. However, neither of them was a remarkable success.[200] The absence of an authoritative international legislative instrument stimulated the growth of domestic laws. With an increasing number of countries having adopted or intending to enact Harter-style statutes, the International Law Association returned to the subject in 1921.[201] The joint effort of the Association and another organization, the CMI, led to the birth of the Hague Rules in 1924.

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195 See Everett Pepperrell Wheeler, *The Modern Law of Carriers; or, the Limitation of the Common-Law Liability of Common Carriers under the Merchant, Statute and Special Contracts* (New York: Baker, Voorhis & Co, 1890) at 11-13.
196 See Sweeney, "Anniversary", *supra* note 122 at 39-40.
197 Girvin, *Carriage*, *supra* note 53 at para 15.02.
198 See Sturley, "COGSA", *supra* note 109 at 6-7.
199 See *ibid* at 8.
200 Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.034.
201 Girvin, *Carriage*, *supra* note 53 at para 14.17.

The Rules were strongly influenced by the philosophy of the Harter Act.[202] They inherited from the latter the famous "compromise" in which carriers undertook to exercise due diligence to make their vessels seaworthy in exchange for their entitlement to the defense of negligent navigation and management.[203] Compared with the Act, the Rules contain a more comprehensive normative system covering a wide range of issues,[204] such as period of coverage,[205] time for suit,[206] limitation of liability,[207] etc.

The United Kingdom was a pioneer in the implementation of the Hague Rules. In 1923, prior to the diplomatic conference in Brussels convened by the Belgian government for the consideration of the Rules, the U.K. Carriage of Goods by Sea Bill was proposed in the House of Lords.[208] Its Carriage of Goods by Sea Act giving effect to the Rules had received royal assent on August 1, 1924, approximately three weeks before they were formally opened for signature.[209] The enthusiasm of the U.K. for the Rules inspired other

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202 Yancey, *supra* note 3 at 1239. See also Henry N Longley, *Common Carriage of Cargo* (Albany: M. Bender, 1967) at 32-33.

203 Sweeney, "Anniversary", *supra* note 122 at 32.

204 See Singh, *supra* note 1 at 13-36.

205 *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 25 August 1924, 120 LNTS 187, [1956] ATS 2, art 1(e) [*Hague Rules*]. Article 1(e) of the Hague Rules provides that:

> "Carriage of goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship.

206 *Ibid*, art 3.6. Article 3.6 of the Hague Rules provides that:

> … [i]n any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered …

207 *Ibid*, art 4.5. Article 4.5 of the Hague Rules provides that:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading …

208 Girvin, *Carriage*, *supra* note 53 at para 15.09.

209 Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.035A.

states, including Australia,[210] India,[211] Singapore,[212] Canada,[213] New Zealand,[214] South Africa,[215] the United States,[216] etc. The enforcement of the Rules was carried out at a much slower pace among civil law states which did not take any substantial actions until the passage of the U.S. Carriage of Goods by Sea Act in 1936.[217]

Part II is devoted to an examination of the exoneration-related provisions in the Rules. This part consists of three chapters respectively dealing with the emergence of the Rules, fairness and clarity of the provisions therein associated with the carrier's exemption from liability.

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[210] Australia enacted its Sea-Carriage of Goods Act in 1924. See generally *Sea-Carriage of Goods Act 1924* (Cth).

[211] See generally *Indian Carriage of Goods by Sea Act 1925*. See also Temperley & Vaughan, *supra* note 177 at 113.

[212] See generally *Carriage of Goods by Sea Ordinance 1927* (Ordinance No 4 of 1927).

[213] See generally *Carriage of Goods by Water Act 1936*, RSC 1985, c C-27. See also Gold, Chircop & Kindred, *supra* note 51 at 433.

[214] See generally *Sea Carriage of Goods Act 1940* (NZ) 1940/31.

[215] See generally *Merchant Shipping Act, 1951*, No 57 of 1951.

[216] See generally *Carriage of Goods by Sea Act 1936*, 46 USC Appx §§ 1300-1315 (1988) [*COGSA 1936*].

[217] For example, France did not formally ratify the Hague Rules until 1937, largely due to the intransigence of shippers who were eager to see stronger controls over shipowners. Clarke, *Aspects*, *supra* note 74 at 5. See also HC Gutteridge, "The Unification of the Law of the Sea" (1934) 16 Journal of Comparative Legislation and International Law 246 at 248.

Chapter I – Birth of the Hague Rules

The naissance of the Hague Rules was the result of persistent and painstaking efforts of the international community.[218] This chapter, as the opening of Part II, aims to reveal why and how the Rules came into being.

Section 1 – Catalysts

The Hague Rules were not the first international instrument designed to regulate the carrier's exemption from liability. Confronted with the unreasonable growth of exculpatory clauses in bills of lading, the International Law Association made in 1882 a model bill of lading known as the Common Form of Bill of Lading.[219] Pursuant to the Common Form, carriers shall be liable for loss or damage resulting from negligence in all matters relating to the ordinary course of voyage, unless the loss or damage was occasioned by acts of God, sea perils, fire, barratry of the master or crew, enemies, pirates or thieves, arrest or restraint of princes, rulers or people, collisions, stranding, or other navigational accidents even if they were attributable to negligence, default or error

[218] See Andrew Eric Jackson, *How the Hague Rules Affect Merchants: Being the Hague Rules, 1921, Explained and Discussed from the Merchants' Side* (London: Wilson, 1921) at 11.

[219] The Association, founded in 1873, was initially called the Association for the Reform and Codification of the Law of Nations. It adopted its current name in 1895. *Report of the Seventeenth Conference of the International Law Association, Held at Brussels, October 1st – 4th, 1895* (London: William Clowes and Sons, 1896) at 282-285. See also James Crawford, "The International Law Association from 1873 to the Present" (1997) 2 Unif L Rev 68 at 69-70; *Report of the Tenth Annual Conference of the Association for the Reform and Codification of the Law of Nations, Held at Liverpool, August 8th – 11th, 1882* (London: William Clowes and Sons, 1883) at 78.

of pilots, masters, mariners or other servants of carriers.[220] The Common Form was not as successful and popular as expected.[221]

At the Association's conference in 1885, a new set of rules, called the Hamburg Rules of Affreightment, were created to make up for the failure of the Common Form.[222] Rule I and Rule II thereof provided for the duty of seaworthiness imposed on carriers and the defenses they were able to invoke to exclude themselves from liability.[223] The Rules encountered strong resistance from the shipowning side as they were thought to lean in favor of cargo interests. The Rules were rescinded by the Association in 1887.[224]

The Association was not frustrated by the failure of the Common Form and the Hamburg Rules of Affreightment. It appointed a committee to formulate new model rules.

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[220] *Ibid* at 104; *Report of the Thirteenth Conference of the Association for the Reform and Codification of the Law of Nations, Held in London, July 25th – 29th, 1887* (London: William Clowes and Sons, 1887) at 113. Carriers were also obliged to exercise due diligence to provide seaworthy ships under the Common Form. See Karan, *Liability*, *supra* note 65 at 15.

[221] CW O'Hare, "Allocating Shipment Risks and the UNCITRAL Convention" (1977) 4 Monash UL Rev 117 at 120 [O'Hare, "Risks"].

[222] See *Report of the Twelfth Conference of the Association for the Reform and Codification of the Law of Nations, Held at Hamburg, August 18th – 21st, 1885* (London: William Clowes and Sons, 1886) at 165-168.

[223] Rule I provided that:

> The shipowner shall be responsible, that his vessel is properly equipped, manned, provisioned, and fitted out, and in all respects seaworthy and capable of performing her intended voyage, and for the stowage and right delivery of the goods. He shall also be responsible for the barratry, faults, and negligence, but not for errors in judgment, of the master, officers and crew.

Rule II provided that:

> The shipowner shall not be responsible for loss or damages arising from vis major, public enemies, civil commotions, pirates, robbers, fire, explosion, bursting of boilers, breakage of shafts or screws, nor for any latent defect in hull or machinery (not resulting from want of due diligence by the owner, husband, or manager of the ship), nor for the cargo's decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, or any damage arising from the nature of the goods shipped, or such defective packing as could not be noticed externally, nor for the obliteration of marks, numbers, addresses, or descriptions of goods shipped, nor for any damage or loss caused by accidental prolongation of the voyage, nor for other accidents of the seas, unless it is proved that such exception comes under Rule I.

See *ibid* at 165.

[224] Karan, *Liability*, *supra* note 65 at 17.

The committee presented in 1893 the London Conference Rules of Affreightment,[225] which were basically based on the previous two instruments. What were added in the London Rules were the carrier's liability for loss or damage arising from any want of reasonable care and skill in loading, stowage or discharge of goods as well as the carrier's liberty to deviate for the purpose of saving life or property.[226] The London Rules, like their predecessors, did not get sufficient support from shipowners.[227]

The consecutive unsuccessful attempts of the International Law Association prompted domestic legislators to seek solutions in the dimension of national law.[228] By the early 1920s, the worldwide shipping industry was governed by various non-uniform norms which were the result of the boom in national laws concerning the carriage of goods by sea from the late nineteenth century to the early twentieth century.[229] However, it was the confusion and inconvenience caused by those conflicting regulations that reinforced the enthusiasm of the international community for a set of uniform rules.[230]

In fact, the immediate impetus for the Hague Rules came from the British Empire.[231] Cargo interests in its overseas Dominions, like New Zealand, Australia and Canada, were

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[225] *Report of the Sixteenth Conference of the Association for the Reform and Codification of the Law of Nations, Held at the Guildhall, London, October 10th – 12th, 1893* (London: William Clowes and Sons, 1894) at 113.
[226] Karan, *Liability*, *supra* note 65 at 17.
[227] *Ibid*.
[228] See Sturley, "COGSA", *supra* note 109 at 10-18. See also Peter H Pfund, "International Unification of Private Law: A Report on United States Participation, 1985-96" (1986) 20 Int'l Law 623 at 623-624.
[229] Sturley, "COGSA", *supra* note 109 at 18.
[230] See Jay Lawrence Westbrook, "Extraterritoriality, Conflict of Laws, and the Regulation of Transnational Business" (1990) 25 Tex Int'l LJ 71 at 85. See also Thomas K Chenal, "Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules" (1978) 20 Ariz L Rev 953 at 953.
[231] Sturley, "COGSA", *supra* note 109 at 18.

politically powerful enough to persuade their governments into enacting Harter-style statutes.[232] However, importers in those countries were excluded from the protection of their local laws which applied only to domestic or outbound shipments and left inbound shipments governed by the English law favoring the shipowning side.[233] In response to complaints of their merchants, the overseas Dominions urged the imperial government to coordinate the Harter-style laws within the British Empire.[234] In 1920, the British Prime Minister, in consultation with the colonial authorities and the Dominion governments, appointed a committee to consider the matter.[235] In February 1921, the committee issued a report in which it was stated 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."[236] In the summer of 1921, the report was accepted by the Imperial Conference and all the governments involved agreed to introduce such legislation in their territories.[237] Soon afterwards, the British government realized that carriers of the empire might be at a disadvantage in the global competition,[238] so it asked the International Law Association to resolve such

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[232] See Michael F Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux préparatoires of the Hague Rules*, vol 2 (Littleton: F. B. Rothman, 1990) at 201 [Sturley, *History 2*].

[233] *Sea Act 1904*, *supra* note 152, s 4(1); *Water Act 1910*, *supra* note 161, s 3; *Shipping & Seamen Amendment Act 1911* (NZ) 1911/37, s 9. See also Girvin, *Carriage*, *supra* note 53 at para 15.05.

[234] Carver, *supra* note 86 at 299; CW O'Hare, "The Hague Rules Revised: Operational Aspects" (1976) 10 Melbourne UL Rev 527 at 531 [O'Hare, "Aspects"].

[235] Sturley, "COGSA", *supra* note 109 at 19.

[236] Sturley, *History 2*, *supra* note 232 at 138.

[237] Sturley, "COGSA", *supra* note 109 at 19.

[238] Anthony Diamond, "The Hague-Visby Rules" (1978) 5 LMCLQ 226 at 226 [Diamond, "Rules"]; David C Frederick, "Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules" (1991) 22 J Mar L & Com 81 at 87.

concern through an international conference.[239] The process of unification of shipping rules accelerated as the British government, whose opposition had been one of the principal impediments to the unification campaign,[240] began to advocate the resurrection of the work of the International Law Association.[241] British shipowning interests were severely crippled during the First World War.[242] Norman Hill, the representative of the Liverpool Steamship Owners Association, explained at the Hague Conference of 1921 the volte-face of the shipper's and carrier's positions:

> It may be argued that bills of lading are not contracts that are entered into freely and voluntarily – that they are forced by the all-powerful shipowners upon the helpless cargo owners, bankers, and underwriters … But what is the position at the moment: the all-powerful shipowners are at their wits end to 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.[243]

It was the diminution of the superiority of shipowners that paved the way for an equality-based dialogue among representatives of carriers, underwriters, shippers, consignees and banks.[244]

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[239] Raoul P Colinvaux, *The Carriage of Goods by Sea Act 1924* (London: Stevens, 1954) at 6; Stephane Dor, *Bill of Lading Clauses & the International Convention of Brussels, 1924 (Hague Rules): Study in Comparative Law*, 2d ed (London: Witherby, 1960) at 17.

[240] *Ibid* at 19.

[241] *Ibid* at 17; Colinvaux, *supra* note 239 at 6.

[242] See Miwao Matsumoto, *Technology Gatekeepers for War and Peace: the British Ship Revolution and Japanese Industrialization* (Basingstoke: Palgrave Macmillan, 2006) at 76-77.

[243] Sturley, *History 1*, *supra* note 112 at 144. See also Frederick, *supra* note 238 at 86.

[244] Girvin, *Carriage*, *supra* note 53 at para 15.04.

Section 2 – Crystallization

In May 1921, the Maritime Law Committee of the International Law Association met in London. Notwithstanding the insistence of British shipowners that "freedom of contract" should be the appropriate regime,[245] the Committee decided to formulate a set of model rules based on the Canadian Act to govern ocean bills of lading.[246] A month later, the draft was completed.[247] The draft rules incorporated the famous compromise in the Harter Act. Carriers were required to exercise due diligence to make their ships seaworthy,[248] and, in return, they were not liable for their fault or errors in the navigation or management of their ships.[249] Almost all the defenses in Section 7 of the Canadian Act were reproduced verbatim in Article 4.2 of the draft.[250] The draft rules were first discussed at the inaugural meeting of the International Chamber of Commerce in London at the end of June 1921.[251] The Chamber appointed a committee under the chairmanship of Charles S. Haight, who spent the rest of the summer travelling around Europe to solicit comments and raise support for the draft.[252]

During the conference held at The Hague from August 30 to September 3, 1921, the members of the International Law Association agreed on the text of what became known

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245 Sturley, *History 1*, *supra* note 112 at 144.
246 *Ibid* at 100.
247 Dor, *supra* note 239 at 20.
248 Sturley, *History 1*, *supra* note 112 at 102.
249 *Ibid* at 102.
250 *Ibid* at 103.
251 Michael F Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux préparatoires of the Hague Rules*, vol 3 (Littleton: F. B. Rothman, 1990) at 519 [Sturley, *History 3*]; Knauth, *supra* note 98 at 125.
252 Sturley, *History 1*, *supra* note 112 at 91.

as "the Hague Rules of 1921".[253] The non-mandatory application of the Rules, through voluntary incorporation by reference into bills of lading,[254] was greeted with a storm of protest from cargo interests.[255] In determining the substance of the Rules, the Maritime Law Committee reviewed each clause of the proposed draft and made a number of changes, but most of them were minor.[256]

The most significant topic at the Hague Conference was the package limitation. After a long debate, it was agreed that carriers could limit their liability to £100 per package or unit in the absence of a declaration of higher value.[257] In view of the much lower limitation of liability previously upheld by courts or permitted under Harter-style legislation,[258] the new limitation counted as an improvement for cargo interests.[259] The second victory of the cargo-owning side was the time-for-suit provision. Cargo interests had been required to file suits for loss or damage within sixty days after the delivery of goods.[260] One of the new provisions added during the Hague Conference extended the time for suit to twelve months after delivery,[261] and another one prohibited carriers from

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253 Sturley, "COGSA", *supra* note 109 at 22.
254 Knauth, *supra* note 98 at 126; Joseph C Sweeney, "UNCITRAL and the Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods" (1991) 22 J Mar L & Com 511 at 517 [Sweeney, "Allocation"]. See also Zamora, *supra* note 24 at 405.
255 Knauth, *supra* note 98 at 126.
256 Sturley, "COGSA", *supra* note 109 at 23.
257 Sturley, *History 1*, *supra* note 112 at 263-271, 279-307.
258 See e.g. *Reid v Fargo*, 241 US 544 at 551 (SC 1916); *Hugetz v Compania Transatlantica*, 270 F 90 at 91 (2d Cir 1920); *Water Act 1910*, *supra* note 161, s 8. See also William Tetley, "Acceptance of Higher Visby Liability Limits by U.S. Courts" (1992) 23 J Mar L & Com 55 at 55-56.
259 See Sturley, *History 3*, *supra* note 251 at 664-666; F Cyril James, "Carriage of Goods by Sea – The Hague Rules" (1926) 74 U Pa L Rev 672 at 688. See also James J Donovan, "Origins and Development of Limitation of Shipowners' Liability" (1979) 53 Tul L Rev 999 at 1000-1002.
260 Sturley, "COGSA", *supra* note 109 at 23-24.
261 Sturley, *History 1*, *supra* note 112 at 214-220.

shortening the period.[262] Claimants were therefore guaranteed a much looser prescription of action.[263] The new notice-of-claim provision was also in favor of cargo interests. Previous laws had recognized the validity of notice-of-claim provisions in bills of lading barring all claims for cargo loss or damage in the absence of a notice written to carriers before removal of goods from their custody.[264] Consignees were still required under the Rules to give carriers a written notice of claim before removing their goods, but removal without such a notice would simply be the *prima facie* evidence of proper delivery rather than deprive cargo interests of their entitlement to indemnity.[265] On the other hand, in order to appease the shipowning side, some amendments to the draft were made in favor of carriers, the most important of which was the expansion of the list of defenses.[266] Apart from the defenses previously recognized, carriers would assume no liability for loss or damage arising from act of war, quarantine restrictions, riots and civil commotions, insufficiency or inadequacy of marks, or latent defects not discoverable by due diligence.[267]

At the World Shipping Conference held in London less than three months after the Hague Conference, the Rules went through another review. Shipowners still insisted that

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[262] *Ibid* at 246-248.
[263] Sturley, *History 3*, *supra* note 251 at 664-666; James, *supra* note 259 at 684.
[264] See e.g. *The Persiana*, 185 F 396 (2d Cir US 1925); *The Westminster*, 127 F 680 (3d Cir US 1904); *The St Hubert*, 107 F 727 (3d Cir US 1901). See also Thomas R Skulina, "Liability of a Carrier for Loss and Damage to Interstate Shipments" (1968) 17 Clev-Marshall L Rev 251 at 253.
[265] Sturley, *History 1*, *supra* note 112 at 214-222; Gilmore & Black, *supra* note 171 at 183-185.
[266] Sturley, "COGSA", *supra* note 109 at 24.
[267] Sturley, *History 1*, *supra* note 112 at 262-263, 322-324.

the Rules should apply in a non-mandatory fashion.[268] Reactions from cargo interests, on the other hand, were diverse.[269] The Rules got general support from cargo-owning representatives but still failed to satisfy each of them.[270] For instance, the National Federation of Corn Trade Associations in England made a pamphlet listing over two dozen objections,[271] and the Institute of American Meat Packers published a similar pamphlet recording its objections to almost every provision in the Rules.[272]

At a conference arranged by the British Board of Trade in May 1922, Norman Hill, the leading spokesman on behalf of carriers, met with Andrew Marvel Jackson, a significant representative of cargo interests, to further discuss the prospect of the Rules.[273] It was during this meeting that cargo interests secured the shipowners' agreement to extend time for suit to two years and assume burden of proof in cases where their due diligence or lack of fault was at issue.[274] The agreed changes proved to be important in shaping the final text of the Hague Rules.

The CMI was another organization that made great contributions to the approval of the Hague Rules. The Committee, founded by the eminent Belgian lawyer, Louis Franck,

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[268] Sturley, *History 2*, *supra* note 232 at 175-186.
[269] However, the principal criticism from the cargo-owning side targeted the voluntary nature of the Rules. See *ibid* at 295; Knauth, *supra* note 98 at 126.
[270] Sturley, *History 2*, *supra* note 232 at 292-294.
[271] Sturley, "COGSA", *supra* note 109 at 26.
[272] *Ibid*.
[273] Sturley, *History 2*, *supra* note 232 at 303-304.
[274] Sturley, "COGSA", *supra* note 109 at 27. See also Anthony N Zock, "Charter Parties in Relation to Cargo" (1971) 45 Tul L Rev 733 at 735.

in 1897,[275] held its first post-war conference in Antwerp at the end of July 1921 to resume its work after the hiatus caused by the First World War.[276] When the Committee held its next conference in London in October 1922, the draft Hill and Jackson had prepared a few months before served as the basis for discussion.[277] By the end of the London Conference, the draft was already prepared for diplomatic consideration. The text formed in this conference was known as the CMI or London draft of the Hague Rules or the Hague Rules of 1922.[278]

The fifth session of the Diplomatic Conference on Maritime Law was held in Brussels six days after the conclusion of the London Conference.[279] The Brussels Conference had been scheduled to discuss another two proposed conventions respectively relating to limitation of liability and maritime liens and mortgages.[280] The Hague Rules were not added to the agenda until shortly before the conference began.[281] Two subcommissions were appointed to respectively review the Hague Rules and the drafts regarding limitation and mortgages.[282] The subcommission in charge of the Hague Rules looked into the draft that had been approved at the CMI London Conference but did not

[275] Girvin, *Carriage*, *supra* note 53 at para 15.03.
[276] Sturley, "COGSA", *supra* note 109 at 22.
[277] Sturley, *History 2*, *supra* note 232 at 323-324.
[278] Sturley, "COGSA", *supra* note 109 at 28.
[279] Albert Lilar & Carlo van den Bosch, *Le Comité maritime international 1897-1972* (Antwerp: Comité maritime international, 1972) at 10-12.
[280] Sturley, "COGSA", *supra* note 109 at 28. See also Edward F Ryan, "Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective" (1968) 7 West Ont L Rev 173 at 173-175.
[281] Sturley, "COGSA", *supra* note 109 at 28.
[282] Sturley, *History 1*, *supra* note 112 at 347; Sturley, *History 2*, *supra* note 232 at 564.

propose any substantial changes.[283] At a subsequent plenary session, the draft went through another section-by-section review.[284] There were no remarkable amendments to the draft except for two concerning notice of claim and time for suit.[285] Nonetheless, the last-minute change in the agenda of the Brussels Conference led to the failure of delegates to receive instructions from their governments and hence to their lack of authority to vote for the draft on behalf of their states.[286] As a result, the Conference had to leave "the exact terms … to be decided by a future meeting of the conference, or through the usual diplomatic channels."[287]

In October 1923, a subcommission was appointed to reexamine the draft of 1922.[288] Most of the discussions were merely meant for clarification of the existing text.[289] There was no significant revision except for one regarding package limitation.[290] Moreover, the delegates sought to reconcile the French and English versions of the text.[291] After the subcommission's meeting in 1923, all that remained to be done was a formal approval. Those changes proposed during the meeting were incorporated into the Rules and some

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283 *Ibid* at 566-567.
284 John Richardson, *The Hague and Hague-Visby Rules*, 4th ed (London: Lloyd's of London Press, 1998) at 33.
285 Sturley, *History 2*, *supra* note 232 at 469-471. See also James, *supra* note 259 at 675.
286 Sturley, *History 1*, *supra* note 112 at 362; Sturley, *History 2*, *supra* note 232 at 564.
287 *Ibid* at 563.
288 Wu Huanning et al, *Interpretation of the Three Maritime Conventions: The Hague, Visby, and Hamburg Rules* (Beijing: China Commerce and Trade Press, 2007) at 36.
289 See Sturley, *History 1*, *supra* note 112 at 438, 460-462. See also Richardson, *supra* note 284 at 35.
290 See Sturley, "COGSA", *supra* note 109 at 31-32. See also J Hoke Peacock III, "Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts" (1990) 68 Tex L Rev 977 at 980.
291 See Sturley, *History 1*, *supra* note 112 at 432-437, 482, 511.

technical provisions relating to ratification, denunciation and amendment of the convention were also added thereto.[292]

The Hague Rules were eventually considered at the diplomatic conference convened by the Belgian government in August 1924 and were signed as the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading.

[292] Sturley, "COGSA", *supra* note 109 at 32.

Chapter II – A review of the carrier's immunities in the Hague Rules under the standard of fairness

Carriers are required in the Hague Rules to exercise due diligence, before and at the beginning of voyage, to make their ships seaworthy, properly man, equip and supply their ships, and ensure the locations where goods are carried are fit and safe for reception, carriage and preservation.[293] They are also under obligation to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."[294] On demand of shippers, carriers have the duty to issue bills of lading carrying certain key information in relation to shipments.[295] In return, carriers are entitled to some immunities to exonerate themselves from liability for cargo loss or damage under certain circumstances.[296]

The catalogue of exceptions embraced in Article 4.2 of the Hague Rules, also known as the "laundry list", is one of the most important features of the Rules.[297] Norman Hill maintained that:

> It 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

[293] *Hague Rules*, *supra* note 205, art 3.1. See also Czeslaw A Marchaj, *Seaworthiness: the Forgotten Factor* (London: Adlard Coles Nautical, 2007) at 25; Thomas Bertrand Abell, *Stability and Seaworthiness of Ships* (London: Hodder and Stoughton, 1926) at 51.
[294] *Hague Rules*, *supra* note 205, art 3.2.
[295] *Ibid*, art 3.3.
[296] Lee, "System", *supra* note 172 at 244.
[297] Girvin, *Carriage*, *supra* note 53 at para 28.02.

assurance that the Law Courts would construe any form of general words as covering those, and only those, exceptions.[298]

Article 4.2, the core provision regarding the carrier's exemption from liability in the Hague Rules, enumerates seventeen defenses enjoyed by carriers, including sixteen specifically-defined exceptions and one all-embracing rule. Carriers are able to surrender all or part of his immunities,[299] but they are forbidden to add any other items into the "laundry list".[300] In addition to the defenses on the list, carriers also have entitlement to some immunities applicable in certain particular circumstances which can be found in Articles 4.4, 4.6, and 6 of the Rules.

This chapter is devoted to a fairness-oriented review of the carrier's exemption from liability in the Hague Rules. Much attention is paid to analyzing whether the allocations of risks between carriers and cargo interests embodied in those defenses can be well justified.

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298 *Ibid*.

299 *Hague Rules*, *supra* note 205, art 5. Article 5 of the Hague Rules provides that:

> A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this Convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper …

300 *Ibid*, art 3.8. Article 3.8 of the Hague Rules provides that:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Section 1 – Immunities wholly or partly irrespective of fault on the part of shipowning interests

The basis of the carrier's liability in the Hague Rules cannot be simply described as fault liability due to the existence of the nautical fault exception in Article 4.2(a) and the fire exception in Article 4.2(b), both of which may free carriers from liability even if shipowning interests are at fault. Therefore, carriers are merely subject to semi-fault liability under the Hague Rules.[301]

Paragraph 1 – Nautical fault exception

Article 4.2(a) of the Hague Rules provides that "[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from … [a]ct, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."[302] This provision, better known as the nautical fault exception, can be traced to Section Three of the Harter Act exonerating shipowners from liability for "damage or loss resulting from faults or errors in navigation or in the management of said vessel" or even to earlier bills of lading containing a ridiculous

[301] Wu et al, *supra* note 288 at 52. See also Selvig, "Insurance", *supra* note 21 at 301-304.
[302] *Hague Rules*, *supra* note 205, art 4.2(a).

number of exculpatory clauses.[303] The exception has been rather controversial since it was discussed during the drafting of the Rules.[304]

As opposed to nautical fault, there is another type of fault in connection with care of goods, generally referred to as "commercial fault".[305] It is basically related to the carrier's performance of the duty to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.[306] It is vital to differentiate between them, because carriers may plead nautical fault as a defense but still have to be liable for loss or damage resulting from commercial fault.[307] The Hague Rules did not give any clue as to how to define the two sorts of fault.[308] As demonstrated in some precedents,[309] Anglo-American courts tended to distinguish them by looking into the primary purpose of a measure failed by fault.[310] In a well-accepted definition, nautical fault is described as "an erroneous act or omission, the original purpose of which [is] primarily directed towards the ship, her safety and well-being",[311] while commercial fault is associated with

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303 *Harter Act*, *supra* note 135 § 192; Knauth, *supra* note 98 at 120; David W Robertson, Steven F Friedell & Michael F Sturley, *Admiralty and Maritime Law in the United States: Cases and Materials*, 2d ed (Durham: Carolina Academic Press, 2008) at 98.

304 See *The Travaux Préparatoires of the Hague Rules and of the Hague-Visby Rules* at 391-397, online: Comité Maritime International <http://www.comitemaritime.org>.

305 Karan, *Liability*, *supra* note 65 at 288.

306 *Hague Rules*, *supra* note 205, art 3.2.

307 Lee & Kim, *supra* note 108 at 213.

308 See Robert S Rendell, "Report on the Hague Rules Relating to Bills of Lading" (1988) 22 Int'l Law 246 at 247-248.

309 See e.g. *The Ferro*, [1893] P 38 at 42 (Div Ct UK); *The Glenochil*, [1896] P 10 at 17 (Div Ct UK); *The Rodney*, [1900] P 112 at 116-117 (Div Ct UK); *Foreman & Ellams Ltd v Federal Steam Navigation Co Ltd*, (1928) 30 Ll LR 52 at 61 (KBDUK); *The Washington*, [1976] 2 Lloyd's Rep 453 at 459 (FCTD Can); *The Frances Salman*, 2 Lloyd's Rep 355 at 363-364 (NY Dist Ct 1975). See also WE Astle, *International Cargo Carrier's Liabilities: The Determination of Some Current Contractual Problems Arising from the International Carriage of Goods* (London: Fairplay, 1983) at 134; Carver, *supra* note 86 at 335; Poor, *Charter*, *supra* note 140 at 174.

310 Frank F Arness, "Error in Navigation or Management of Vessels: A Definitional Dilemma" (1972) 13 Wm & Mary L Rev 638 at 641; Gilmore & Black, *supra* note 171 at 155.

311 William Tetley, *Marine Cargo Claims*, vol 1, 4th ed (Montréal: Éditions Yvon Blais, 2008) at 400 [Tetley, *Claims*].

measures primarily directed towards goods, such as loading, handling, stowing, carrying, keeping, caring and discharging.[312]

Nautical fault can be subdivided into fault in the navigation of ships and fault in the management of ships. The emergence of the carrier's navigational fault defense had a close connection with the early shipping practices.[313] In *Union Steamship Co of New Zealand Ltd v James Patrick & Co Ltd*, Dixon J stated that:

> An owner not only may, but must, place his ship under the complete control and authority while at sea of a master duly qualified to navigate and command her … it does not follow that it is wise or prudent for every shipowner to take into his own hands the systematic control of the performance of any of the multifarious duties of seamanship and navigation which are at sea the responsibility of the master. Still less does it follow that it is blameworthy in an owner to rely completely upon a master for the proper navigation of his ship and due observance of the precautions for safety.[314]

In *Arthur Guinness, Son & Co (Dublin) Ltd v Owners of the Motor Vessel Freshfield (The Lady Gwendolen)*, Sellers LJ added that:

> Navigation of a ship at sea is so much in the hands of the master, officers and crew and so much out of the control of the owners that failure of an owner to

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[312] For instance, ventilating holds for the goods carried therein, protecting hatches by tarpaulins against rain, closing hatches during voyage, keeping down temperature of holds, and taking measures to prevent goods from sliding on barges have been considered as cargo-oriented moves in some precedents. See generally *California Packing Corp v The P & T Voyager*, 1960 AMC 1475 (Cal Dist Ct 1960); *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)*, [1927] 2 KB 432 (UK) [*Canadian Highlander*]; *Foreman & Ellams Ltd v Blackburn*, (1928) 30 Ll LR 63 (KBDUK); *Falconbridge Nickel Mines Ltd v Chimo Shipping Ltd*, [1974] SCR 933. However, the borderline between nautical fault and commercial fault is not always clear in practice. See Lee & Kim, *supra* note 108 at 218.

[313] See George F Chandler III, "The Measure of Liability for Cargo Damage Under Charter Parties" (1989) 20 J Mar L & Com 395 at 396-397.

[314] *Union Steamship Co of New Zealand Ltd v James Patrick & Co Ltd*, (1938) 60 CLR 650 at 672, Dixon J (HCA) [*James Patrick*].

establish no actual fault or privity in respect of navigation itself is exceptional and striking.[315]

Navigational fault is always related to matters of seamanship.[316] Such fault may occur in determining routes,[317] berthing, signaling or anchoring,[318] evaluating meteorological news,[319] adjusting speed,[320] deciding to abandon ships,[321] etc. It normally leads to stranding,[322] tilt,[323] or collision of ships.[324]

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[315] *Arthur Guinness, Son & Co (Dublin) Ltd v Owners of the Motor Vessel Freshfield (The Lady Gwendolen)*, [1965] 1 Lloyd's Rep 335 at 337-338, Sellers LJ (CAUK) [*Lady Gwendolen*].

[316] In *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)*, it was argued that the word "navigation" excluded the commercial, economic and legal aspects of the operation of a ship. *Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony),* [1999] QB 72 at 76 (UK).

[317] See *Kalamazoo Paper Co v Canadian Pacific Railway Co*, [1950] SCR 356 at 365.

[318] See *Glenochil*, *supra* note 309 at 19.

[319] See *Yawata Iron & Steel Co Ltd v Anthony Shipping Co Ltd*, 1975 AMC 1602 at 1613 (NY Dist Ct 1975); William Tetley, "Error in Navigation or Management" (1964) 7 Can Bar J 244 at 246.

[320] See *Bulgaris v Bunge*, (1933) 45 Ll LR 74 at 85 (KBDUK).

[321] See *ibid*.

[322] See *President of India v West Coast Steamship Co (The Portland Trader)*, 2 Lloyd's Rep 278 at 281 (Or Dist Ct 1963).

[323] See *The Frances Hammer*, 1 Lloyd's Rep 305 at 311 (NY Dist Ct 1975).

[324] See *Seven Seas Transportation Ltd v Pacifico Union Marina Corp (The Oceanic Amity & Satya Kailash)*, [1984] 1 Lloyd's Rep 586 at 592 (CAUK); *Aliakmon Maritime Corp v Trans Ocean Continental Shipping Ltd & Frank Truman Export Ltd (The Aliakmon Progress)*, [1978] 2 Lloyd's Rep 499 at 507 (CAUK). In the case of collision due to joint navigational fault, the exception may deprive cargo interests of the right to claim damages from the carrier to whom their goods are entrusted, but it may not free the carrier of the other side involved in the collision from tortious liability to cargo interests in proportion to the fault of the master, mariner, pilot or servants employed by him to accomplish the carriage. Under American law, in the event that both sides are to blame for a collision, cargo interests may recover their entire loss from the non-carrying ship which, after the payment of the compensation, would obtain the right of recourse against the carrying shipowner for half of the sum. Therefore, there is indeed a risk that the latter may have to be liable to the non-carrying shipowner in the collision and hence indirectly to cargo interests. In order not to assume such ultimate liability, carriers have begun to insert in bills of lading a special clause requiring cargo interests to reimburse them for the indemnity they have paid to non-carrying shipowners. For example, Clause 22 of the ANL Tranztas Bill of Lading provides that:

> If the carrying ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default in the navigation or the management of the carrying ship, the Merchant undertakes to pay the Carrier, or, where the carrier is not the owner and/or demise possession of the carrying ship, to pay to the carrier as trustee for the owner and/or demise charterer of the carrying ship a sum sufficient to indemnify the carrier and/or the owner and/or demise charterer of the carrying ship against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of or damage to his Goods or any claim whatsoever of the Merchant, paid or payable by the other or non-carrying ship or her owners to the Merchant and set-off, recouped or recovered by the other or non-carrying ship or her owner or demise charterer of the Carrier.

See Gilmore & Black, *supra* note 171 at 173; Karan, *Liability*, *supra* note 65 at 292. See also Francis Emmett, "Collision Liability – Some Considerations and Consequences" (1960) 35 Tul L Rev 75 at 78; Mark O Kasanin, "Cargo Rights and Responsibilities in Collision Cases" (1977) 51 Tul L Rev 880 at 885; Richard H Brown, Jr., "Collision Liabilities between Shipowners" (1983) 8 Maritime Lawyer 69 at 72.

As distinguished from navigational fault, fault in the management of ships is basically committed in the maintenance of seaworthiness of ships.[325] It may occur at any time between the commencement of a voyage and the unloading of goods at the port of discharge.[326] Carriers have entitlement to exemption from liability for loss or damage caused by fault in the management of ships, but fault in the management of goods, which is easily confused with the former, is never a legitimate defense they may invoke to escape liability. The prevailing theory on how to make a distinction between the two kinds of fault was stated in *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)* where Greer LJ explained that:[327]

> 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 protection of the cargo, the ship is not so relieved.[328]

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[325] Poor, *Charter*, *supra* note 140 at 174. The carrier's liability for loss or damage arising from unseaworthiness before or at the beginning of a voyage should be determined in accordance with Articles 3.1 and 4.1 of the Hague Rules. See *Hague Rules*, *supra* note 205, arts 3.1, 4.1.

[326] See *Glenochil*, *supra* note 309 at 13; Carver, *supra* note 86 at 150; *Vistar SA v Sea Land Express*, 1986 AMC 2382 at 2384 (5th Cir 1986).

[327] In this case, boxes of tin plates were shipped from Swansea to Vancouver. The vessel stopped at Liverpool to discharge some cargoes. During the discharge, it started to rain heavily, the vessel collided with a pier, and her stern was damaged. The repairmen who entered to fix the tail shaft took off the tarpaulins used to cover cargoes, and the rain consequently wetted those unprotected goods. See generally *Canadian Highlander*, *supra* note 312.

[328] He added that:

> [T]here is a paramount duty imposed to safely carry and take care of the cargo, and that the 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.

Ibid at 459, Greer LJ.

Another noteworthy attempt to delimit fault in the management of ships could be found in *Hourani v T & J Harrison* where Atkin LJ argued that "management" in this context shall refer to the handling of ships, though it might probably affect the safety of goods,[329] and Bankes LJ added that an act "relating to the ship herself and only incidentally damaging the cargo" shall be distinguished from "an act dealing … solely with the goods and not directly or indirectly with the ship herself."[330] However, it has to be admitted that those theoretical explanations do not always make it an easy job to tell one sort of fault from the other in reality.[331]

Commercial conflicts between cargo interests and shipowners were not acute until the middle of the nineteenth century when the age of steam propulsion and iron ships started.[332] What disappeared along with wooden ships were town-based or family-based business operations in which the division of labor between shipowners and merchants was quite fuzzy.[333] B. K. Williams pointed out that:

> Until the early part of the 19th century shipowners frequently had some direct interests in the cargo itself, with the merchants and shipowners sharing in the same joint venture which [involved] the shipowner and the ship's captain (sometimes the same person) in the sale and disposition of the goods at

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329 *Hourani v T & J Harrison*, (1927) 28 Ll LR 120 at 125, Atkin LJ (CAUK) [*Hourani*].
330 *Ibid* at 123, Bankes LJ.
331 *Ibid* at 126; Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules* (The Hague: Kluwer Law International, 2002) at 93.
332 Sweeney, "Allocation", *supra* note 254 at 512. See also Richard Woodman, *The History of the Ship: the Comprehensive Story of Seafaring from the Earliest Times to the Present Day* (London: Conway Maritime Press, 2005) at 16.
333 See Alfred D Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge: Belknap, 1977) at 15; Robert Greenhalgh Albion & Jennie Barnes Pope, *The Rise of New York Port: 1815 – 1860* (New York: C. Scribner's Sons, 1939) at 67-69.

destination. There was therefore an in-built self-interest for the shipowner to take the utmost care of the cargo on the sea voyage.[334]

The specialization of the shipping industry not only separated carriers from cargo interests but also necessitated the involvement in ocean transport of other individuals with expertise, such as masters, mariners, pilots and servants, who worked for carriers but might not be under their direct supervision. Dixon J said in *Union Steamship Co of New Zealand Ltd v James Patrick & Co Ltd* that "ordinary everyday seamanship did not present itself to [the carrier] as a thing upon which there was any need for him to lay down rules, to give instructions, or to institute inquiries."[335]

The autonomy of employees of carriers also resulted from the poor telecommunication technologies in those days when carriers could hardly communicate with their vessels once they had departed from ports. The inability of carriers to have any substantial controls over their vessels at sea served as an excuse for their entitlement to exemption from liability for loss or damage caused by fault on the part of their employees in the navigation or in the management of their ships. Such immunity was also justified by the reality in that era that there were few reliable marine charts and navigational aids.[336] The carriage of goods by sea was at that time a dangerous joint venture between

[334] BK Williams, "The Consequences of the Hamburg Rules on Insurance" in Mankabady, *Hamburg*, *supra* note 57, 251 at 251.
[335] *James Patrick*, *supra* note 314 at 671, Dixon J.
[336] Sweeney, "Allocation", *supra* note 254 at 511-513; Leslie Tomasello Weitz, "The Nautical Fault Debate (the Hamburg Rules, the U.S. COGSA 95, the STCW 95, and the ISM Code)" (1998) 22 Tul Mar LJ 581 at 587-588.

the shipowning and cargo-owning sides in which the former risked ships while the latter risked goods.[337]

The nautical fault exception used to well protect the underdeveloped shipping industry and vulnerable carriers, but its reasonableness may no longer bear scrutiny nowadays as navigational technologies and communication devices have been considerably improved.[338] Its survival in modern ocean transportation would lead to a manifest imbalance of interests leaning in favor of carriers.[339] From the perspective of economics, carriers are the "cheapest cost avoider".[340] It has been argued that:

> [L]e transporteur … est responsable de la perte survenue depuis la prise en charge jusqu'à la délivrance. Compte tenu du contrôle que peut exercer le transporteur, cela devrait normalement coûter moins cher que si le chargeur devait lui-même s'assurer contre cette perte. Bien entendu, le chargeur paie le coût des précautions du transporteur dans le fret.[341]

The nautical fault exception has been challenged in terms of fairness as it may provide excuses for those awful performers of their duties and place cargo interests in a disadvantageous position where they are compelled to bear unnecessarily high risks.[342]

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337 Honnold, "Clarity", *supra* note 22 at 104.
338 See Yancey, *supra* note 3 at 1241-1242.
339 Douglas A Werth, "The Hamburg Rules Revisited – A Look at U.S. Options" (1991) 22 J Mar L & Com 59 at 72. See also Weitz, *supra* note 336 at 587.
340 See generally Stephen G Gilles, "Negligence, Strict Liability, and the Cheapest Cost-Avoider" (1992) 78 Va L Rev 1291 at 1291-1292; John Prather Brown, "Toward an Economic Theory of Liability" (1973) 2 J Legal Stud 323 at 326; Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089 at 1091-1093.
341 Ejan Mackaay & Stéphane Rousseau, *Analyse économique du droit*, 2d ed (Paris: Dalloz, 2008) at 395.
342 Weitz, *supra* note 336 at 587.

In addition, there is supposed to be a harmonious relationship between the liability regime governing the carriage of goods by sea and those governing other modes of transport, as multimodal transportation is booming.[343] The fact is that none of those conventions relating to the carriage of goods by air, road or rail provides for the carrier's exemption from liability for loss or damage resulting from negligence.[344] The particularity of sea carriers, if any, is in no case sufficient, especially in the context of modern transportation, to justify their exoneration privileges that are inaccessible to

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[343] See Selvig, "Insurance", *supra* note 21 at 303; Honnold, "Clarity", *supra* note 22 at 98. See also Slim Hammadi & Mekki Ksouri, *Multimodal Transport Systems* (London: ISTE, 2014) at 16; David A Glass, *Freight Forwarding and Multimodal Transport Contracts* (London: LLP, 2004) at 57.

[344] Articles 18.1 and 20.1 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air provide that:

> [T]he carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air [unless he] proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

Articles 17.1 and 17.2 of the Convention on the Contract for the International Carriage of Goods by Road provide that:

> [T]he carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery [unless] the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

Articles 23.1 and 23.2 of the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail provide that:

> The carrier shall be liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of taking over of the goods and the time of delivery and for the loss or damage resulting from the transit period being exceeded … [t]he carrier shall be relieved of this liability to the extent that the loss or damage or the exceeding of the transit period was caused by the fault of the person entitled, by an order given by the person entitled other than as a result of the fault of the carrier, by an inherent defect in the goods (decay, wastage, etc.) or by circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

Convention for the Unification of Certain Rules Relating to International Carriage by Air, 12 October 1929, 137 LNTS 11, 4 UST 5250, arts 18.1, 20.1 [*Warsaw Convention*]; *Convention on the Contract for the International Carriage of Goods by Road*, 19 May 1956, 399 UNTS 189, arts 17.1, 17.2 [*CMR*]; *Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM) – Appendix B to the Convention concerning International Carriage by Rail (COTIF) of 9 June 1999*, arts 23.1, 23.2, online: International Rail Transport Committee <http://www.cit-rail.org> [*CIM*].

carriers involved in other modes of transport, since the prime mission of all carriers is to deliver goods or passengers from one place to another safely and punctually.[345]

Paragraph 2 – Fire exception

Fire has always been one of the biggest hazards to goods at sea.[346] In *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)*, Cresswell J stated that "[f]ire is one of the greatest threats to ships at sea … [t]he ship's fire fighting ability and, therefore, its seaworthiness is crucially dependent upon the competence of its crew as the fire-fighters and, in particular, the master as their leader." [347] Unseaworthiness of ships might lead to fire and vice versa. It is necessary to untangle the causal relationship between them, as fire resulting from failure of carriers to perform their duty of seaworthiness before and at the beginning of voyage is not covered by the fire exception of the Hague Rules.[348]

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[345] See Booysen, *supra* note 176 at 294. See also Baris Soyer & Andrew Tettenborn, *Carriage of Goods by Sea, Land and Air: Unimodal and Multimodal Transport in the 21st Century* (Abingdon: Informa Law, 2014) at 35-37; Hugh M Kindred & Mary R Brooks, *Multimodal Transport Rules* (The Hague: Kluwer Law International, 1997) at 13; Marian Hoeks, *Multimodal Transport Law: the Law Applicable to the Multimodal Contract for the Carriage of Goods* (Alphen aan den Rijn: Kluwer Law International, 2010) at 69.

[346] Richardson, *supra* note 284 at 30. Given the frequent occurrence and harmfulness of fire at sea, some states have enacted particular fire statutes. For instance, the U.S. Fire Statute was enacted as Section One of the Limitation of Liability Act of 1851. In the Statute, a shipowner is freed from liability for loss or damage resulting from fire unless such fire is caused by his "design or neglect". *Fire Statute*, 46 USC § 182 (1976). Although the fire exception in the Hague Rules and that in the Statute are essentially similar, they have some remarkable differences. For example, the exception in the Statute benefits owners of vessels rather than carriers as provided for in Article 4.2(b) of the Hague Rules; it is invalid if fire is caused by "design or neglect" of shipowners rather than by "actual fault or privity" of carriers as provided for in Article 4.2(b) of the Hague Rules, etc. Therefore, there is reason to worry about the possible conflicts when a fire-related case is governed by the two competing norms. See Joseph A Calamari, "The Eternal Conflict between Cargo and Hull: the Fire Statute – a Shifting Scene" (1981) 55 St John's L Rev 417 at 417-418.

[347] *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)*, [2002] 1 Lloyd's Rep 719 at 739, Cresswell J (QBDUK) [*Eurasian Dream*].

[348] See *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd*, [1957] SCR 801 at 812 [*Footwear*]; Girvin, *Carriage*, *supra* note 53 at para 28.14. In *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The*

Flame is a prerequisite for fire.[349] Mere heat and smoke, notwithstanding the fact that they may bring damage to goods, do not constitute fire. The fire exception only applies to actual fire that may destroy ships as well as goods carried therein.[350] Carriers are not liable for loss or damage arising from water used to put out fire,[351] but failure to promptly extinguish fire,[352] indiscriminate use of water in dousing fire,[353] and failure to separate without delay undamaged goods from those on fire are not excusable.[354]

It is worthwhile to note that Article 4.2(b) of the Rules is unable to exonerate carriers from liability for loss or damage resulting from fire caused by their actual fault or privity.[355] In other words, the exception is inapplicable if there is "something personal to the [carrier], something blameworthy in him as distinguished from constructive fault or

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Apostolis), a fire, the cause of which was the welding carried out to a pulley underneath the winch platform on the masthouse between holds 4 and 5 of the ship, seriously damaged the goods carried therein. Leggatt LJ said that:

> [I]t was not unseaworthiness [that] caused the fire, but the fire [that] rendered the vessel unseaworthy. Nothing about the state of the ship rendered her unseaworthy. The owners were not in breach of art III, r 1 merely because welding exposed the cargo to an ephemeral risk of ignition. The holds themselves were not intrinsically unsafe. Here the ship only became [unseaworthy] on account of the fire in the cargo.

A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The Apostolis), [2000] 2 Lloyd's Rep 337 at 340-341, Leggatt LJ (CAUK).

349 Karan, *Liability*, *supra* note 65 at 295.

350 *Tempus Shipping Co Ltd v Louis Dreyfus & Co*, [1930] 1 KB 699 at 708 (UK) [*Louis Dreyfus*]. See also *The Buckeye State*, 1941 AMC 1238 (NY Dist Ct 1941); *Cargo Carriers v Brown SS Co*, 1950 AMC 2046 (NY Dist Ct 1950); Poor, *Charter*, *supra* note 140 at 182; Walter L Williams, "The American Maritime Law of Fire Damage to Cargo: An Auto-da-fé for a Few Heresies" (1985) 26 Wm & Mary L Rev 569 at 584.

351 See *The Diamond*, [1906] P 282 at 287 (UK) [*Diamond*]. See also Sandra A Larkin, "The Allocation of the Burden of Proof under the Fire Statute and the Fire Exemption Clause of the Carriage of Goods by Sea Act" (1995) 20 Tul Mar LJ 403 at 405-406.

352 See *Asbestos Corp Ltd v Compagnie de Navigation Fraissinet et Cyprien Fabre*, 1973 AMC 1683 at 1686 (2d Cir 1973). See also *American Mail Line, Limited v Tokyo Marine & Fire Ins Co*, 1959 AMC 2220 at 2227 (9th Cir 1959) [*American Mail Line*]; Joel M Bassoff, "Fire Losses and the Statutory Fire Exceptions" (1981) 12 J Mar L & Com 507 at 511.

353 See *La Territorial de Seguros v Shepard Steamship Co*, 1954 AMC 935 at 938 (NY Dist Ct 1954).

354 See *Ibid.*

355 *Hague Rules*, *supra* note 205, art 4.2(b).

privity of his servants or agents" contributing to fire,[356] but, on the other hand, carriers still have entitlement to exemption from liability for loss or damage arising from fire caused by negligence on the part of their servants or agents.[357]

It has been argued that the main objective of the exception is to afford carriers protection in fire-related cases where casualty normally falls outside their controls,[358] but such argument may not bear close scrutiny. According to the doctrine of vicarious liability that has been acknowledged in modern law, A may have to be liable to C for the loss he has sustained as a result of B's negligence, even though A appears free from direct fault.[359] Oliver Wendell Holmes believes that vicarious liability dates from Roman law where a *pater familias* had to be responsible for the acts of his family members and slaves and an innkeeper or shipowner had to be responsible for the torts of his free servants.[360]

The modern doctrine of vicarious liability suggests that A shall be vicariously liable to C insofar as B has entailed damages to C while acting within the extent of competence granted by A.[361] The most important precondition for A's vicarious liability is the bond

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356 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*, [1915] AC 705 at 718 (HL(Eng)) [*Asiatic Petroleum*]. See also Thomas Edward Scrutton, *The Merchant Shipping Act 1894*, 2d ed (London: W Clowes, 1895) at 503; Glanville Williams, "Recklessness Redefined" (1981) 40 Cambridge LJ 252 at 254 [Williams, "Recklessness"].

357 Sze, *supra* note 331 at 89.

358 *Ibid*.

359 Fleming James, Jr., "Vicarious Liability" (1954) 28 Tul L Rev 161 at 161 [James, "Vicarious Liability"]. See also JB Hodge, *Vicarious Liability or Liability for the Acts of Others* (London: Witherby, 1986) at 25.

360 OW Holmes, Jr., "Agency" (1891) 4 Harv L Rev 345 at 350. *Contra* John H Wigmore, "Responsibility for Tortious Acts: Its History" (1894) 7 Harv L Rev 315 [Wigmore, "Tortious Acts"].

361 James, "Vicarious Liability", *supra* note 359 at 161.

between A and B whereby A has control or the general right of control over B.[362] Where A misuses his control or fails to exercise appropriate control in giving instructions or preventing loss,[363] his liability stems from his own fault and has nothing to do with such doctrine.[364] As a matter of fact, courts do not bother to hear whether A has exercised his right of control prudently or consider whether loss could have been averted if he had exercised his right of control in a proper manner.[365] A's vicarious liability is based on his failure to prevent an accident that he is expected to avert by exercising his right of control.[366] A is placed in an important strategic position to prevent accidents by being furnished with the right of control over B.[367]

A's vicarious liability may also derive from his incompetence in selecting, administrating or discharging his servants.[368] Similarly, A's liability in this context has no direct connection with his fault but is attributable to his failure to effectively prevent an accident by managing manpower.[369] A's power in the personnel management is often

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362 See Gerald M Stevens, "The Test of the Employment Relation" (1939) 38 Mich L Rev 188 at 189.
363 See Roscoe T Steffen, "Independent Contractor and the Good Life" (1935) 2 U Chicago L Rev 501 at 506-507; Talbot Smith, "Scope of the Business: The Borrowed Servant Problem" (1940) 38 Mich L Rev 1222 at 1233.
364 See Harold J Laski, "The Basis of Vicarious Liability" (1916) 26 Yale LJ 105 at 108-109.
365 Joseph Weintraub, "The Joint Enterprise Doctrine in Automobile Law" (1931) 16 Cornell Law Quarterly 320 at 335. See also Oliver Wendell Holmes, Jr., *The Common Law* (Hamburg: Tredition GmbH, 2013) at 6 [Holmes, *Common Law*].
366 James, "Vicarious Liability", *supra* note 359 at 168.
367 See Fleming James, Jr. & John J Dickinson, "Accident Proneness and Accident Law" (1950) 63 Harv L Rev 769 at 771. See also Fleming James, Jr., "Accident Liability Reconsidered: The Impact of Liability Insurance" (1948) 57 Yale LJ 549 at 561.
368 See e.g. *Kelly v Mayor, etc., of City of New York*, 11 NY 432 at 436 (SC 1854). See also Thomas Baty, *Vicarious Liability: A Short History of the Liability of Employers, Principals, Partners, Associations and Trade-Union Members, with a Chapter on the Laws of Scotland and Foreign States* (Oxford: Clarendon Press, 1916) at 15, 28.
369 James, "Vicarious Liability", *supra* note 359 at 169.

deemed as an adjunct to his general right of control.[370] A's act of employing a servant suggests his trust and confidence in him and gives others a hint to do likewise.[371]

In the carriage of goods by sea, masters, mariners, pilots and servants perform their tasks under the control of carriers, though such control may not be strong or direct.[372] There seems to be no acceptable reason why carriers may relieve themselves from liability for loss or damage resulting from fire caused by fault on the part of their masters, mariners, pilots or servants. In *Duncan v Findlater*, Lord Brougham stated that:

> I am liable for what is done for me and under my orders by the man I employ … the reason [why] I am liable is … that by employing him I set the whole thing in motion, and what he does [is] for my benefit and under my direction … I am responsible for the consequences of doing it.[373]

The fire exception represents an absurd allocation of risks in which carriers benefit from profit-creating activities performed by their masters, mariners, pilots or servants but do not have to bear any negative consequences of such activities.[374] The absurdity also resides in burden of proof relating to the exception that impliedly requires claimants, who

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370 *Ibid*.

371 See *Hern v Nichols*, [1700] 1 Salk 289 at 301 (KBDUK). See also Alan O Sykes, "The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines" (1988) 101 Harv L Rev 563 at 565-566.

372 See generally Alan E Branch, *Elements of Shipping*, 8th ed (London: Routledge, 2010) at 55-61; Edward F Stevens & CSJ Butterfield, *Shipping Practice: with a Consideration of the Relevant Law*, 11th ed (London: Pitman, 1981) at 121-127.

373 *Duncan v Findlater*, [1839] 6 Cl & F 894 at 910, Lord Brougham (HL(Eng)).

374 See generally William O Douglas, "Vicarious Liability and Administration of Risk I" (1929) 38 Yale LJ 584 at 586-588.

have little knowledge of what happened to their goods during voyage, to prove actual fault or privity of carriers.[375]

Section 2 – Immunities in the absence of fault on the part of shipowning interests

As distinguished from the nautical fault exception and the fire exception exonerating carriers from liability wholly or partly irrespective of fault on the part of shipowning interests, the majority of the carrier's immunities in the Hague Rules are based on the grounds that cargo loss or damage is attributable to other factors than fault on the part of shipowning interests, such as intervention of natural forces or third parties, fault on the part of cargo interests, insurmountable defects of ships or goods, and unseaworthiness irreparable by due diligence.

Paragraph 1 – Exemption from liability for loss or damage resulting from intervention of natural forces or third parties

Carriers may be exonerated from liability in the Hague Rules if loss or damage results from intervention of natural forces or third parties, such as perils of the sea (Article 4.2(c)), act of God (Article 4.2(d)), act of war (Article 4.2(e)), act of public enemies (Article 4.2(f)), arrest or restraint of princes, rulers or people, or seizure under legal process (Article 4.2(g)), quarantine restrictions (Article 4.2(h)), strikes or lockouts

[375] Pursuant to Article 4.2(b) of the Hague Rules, carriers shall not be responsible for loss or damage resulting from fire, unless caused by their actual fault or privity. The burden of proving actual fault or privity on the part of carriers is actually put on claimants who allege the existence of such fault to refute the fire defense pleaded by carriers. See Bassoff, *supra* note 352 at 509.

or stoppage or restraint of labour (Article 4.2(j)), or riots and civil commotions (Article 4.2(k)).

Subparagraph 1 – Perils of the sea

The embryo idea of the carrier's exemption from liability for loss or damage arising from perils of the sea dates back to 800 – 600 BC when a master was not held liable under the Rhodian Law if his vessel was unable to navigate owing to such perils.[376] Before the exception of perils of the sea was contained in Article 4.2(c) of the Hague Rules,[377] a similar one had appeared in the Common Form of Bill of Lading proposed in 1882 by the Association for the Reform and Codification of the Law of Nations.[378]

In a few classic English cases decided prior to the emergence of the Hague Rules, there had been the view that carriers should be absolved from liability for loss or damage caused by seawater, storm, collision, stranding, or other perils peculiar to the sea, and unable to be foreseen or guarded against by them and their servants.[379] As time went on,

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[376] Katsivela, "Treatment", *supra* note 56 at 1.

[377] Article 4.2(c) of the Hague Rules provides that:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from … [p]erils, dangers and accidents of the sea or other navigable waters.

Hague Rules, *supra* note 205, art 4.2(c). See also George B Freehill, "Mutually Excepted Perils" (1975) 49 Tul L Rev 899 at 901-902.

[378] Sturley, *History 2*, *supra* note 232 at 62.

[379] See *Thames & Mersey Marine Insurance Co Ltd v Hamilton Fraser & Co*, (1887) 12 App Cas 484 at 502 (HL(Eng)) [*Hamilton Fraser*]; *Thomas Wilson Sons & Co v Owners of Cargo of the Xantho (The Xantho)*, (1887) 12 App Cas 503 at 509 (HL(Eng)) [*Xantho*]. See also *Canada Rice Mills Ltd v Union Marine & General Insurance Co Ltd*, [1941] AC 55 at 68 (PCUK) [*Rice Mills*]; *Skandia Insurance Co Ltd v Skoljarev*, (1979) 142 CLR 375 at 384 (HCA) [*Skoljarev*]; Scrutton, *supra* note 94 at 225; Tetley, *Claims*, *supra* note 311 at 435.

more theories were advanced to delimit the exception.[380] Nonetheless, there has been no uniform interpretation of the exception universally acceptable in different jurisdictions.[381]

In spite of such disharmony, there has been, at least, the consensus that the perils covered by the exception must have something to do with the sea.[382] However, it should be noted that the exception is not applicable to all causes of loss in relation to sea.[383] In *Thomas Wilson Sons & Co v Owners of Cargo of the Xantho (The Xantho)*, Lord Herschell said that the term "perils of the sea" would not cover every accident or casualty, of which the sea was the immediate cause.[384] It was stated in *Cullen v Butler* that excepted perils must be those "of the sea" rather than those simply "on the sea",[385] but it is usually hard to differentiate between the two sorts of perils.[386] Lord Macnaghten contended in *Thames & Mersey Insurance Co v Hamilton* that:

> [I]t is not possible to frame a definition which would include every case proper to be included … [E]ach case must be considered with reference to its own circumstances, and … the circumstances of each case must be looked at in a

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[380] In some later cases relating to the exception, it was argued that the exception shall apply to loss or damage arising from irresistible force or overwhelming power and unpreventable by the ordinary exertion of human skills and prudence, and that the perils covered by the exception normally took the form of something so catastrophic that it triumphed over routine safeguards whereby skillful and vigilant seamen usually brought vessels and goods to destination in safety. See *The Giulia*, 218 F 744 at 746 (2d Cir US 1914); *The Rosalia*, 264 F 285 at 288 (2d Cir US 1920); *Charles Goodfellow Lumber Sales Ltd v Verreault, Hovington & Verreault Navigation Inc*, [1968] 2 Lloyd's Rep 383 at 387 (Ct Ex Can) [*Verreault*]; *Kruger Inc v Baltic Shipping Co*, (1989) 57 DLR (4th) 498 at 514-515 (CA Can).

[381] For the differences in the interpretations of the exception prevailing in different jurisdictions, see generally Katsivela, "Treatment", *supra* note 56 at 5-13.

[382] See *ibid* at 13.

[383] Girvin, *Carriage*, *supra* note 53 at para 28.19.

[384] *Xantho*, *supra* note 379 at 509, Lord Herschell.

[385] See *ibid*; *Rice Mills*, *supra* note 379 at 64; *Cullen v Butler*, (1815) 171 ER 426 at 428 (Assizes); *P Samuel & Co Ltd v Dumas*, [1924] AC 431 at 457 (HL(Eng)).

[386] See Harry Apostolakopoulos, "Navigating in Perilous Waters: Examining the 'Peril of the Sea' Exception to Carrier's Liability under COGSA for Cargo Loss Resulting from Severe Weather Conditions" (2000) 41 S Tex L Rev 1439 at 1442-1445.

> broad common sense view and not by the light of strained analogies and fanciful resemblances.[387]

So far, there have been some classic cases relating to the exception, such as *Buller v Fisher* where the damage was caused by a collision at sea without fault on the part of the master,[388] *The Thrunscoe* where the goods were damaged owing to bad ventilation stemming from the necessity of turning off ventilators during a storm of exceptional severity and duration,[389] *Fletcher v Inglis* where the ship grounded because of a heavy swell,[390] *Hagedorn v Whitmore* where the ship took in water while being towed to the heavy sea,[391] *Hamilton Fraser & Co v Pandorf & Co* where the damage arose from water entering into the ship through a pipe hole gnawed by rats,[392] etc.[393]

Subparagraph 2 – Act of God

Actus dei nemini facit injuriam is an ancient Latin legal maxim which means that an act of God does no injury to anyone.[394] In other words, no one ought to be responsible for an act of God.[395] In the context of law governing the carriage of goods by sea,[396] the

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387 *Hamilton Fraser*, *supra* note 379 at 503, Lord Macnaghten. See also *Shipping Corp of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd*, (1980) 147 CLR 142 at 165 (HCA) [*Gamlen*].

388 See generally *Buller v Fisher*, (1799) 170 ER 239 (Assizes). See also *Martin v Crokatt*, (1811) 104 ER 679 at 684 (KBD); *Xantho*, *supra* note 379 at 508.

389 See generally *The Thrunscoe*, [1897] P 301 (Div Ct UK). See also *Rice Mills*, *supra* note 379 at 62.

390 See generally *Fletcher v Inglis*, (1819) 106 ER 382 (KBD).

391 See generally *Hagedorn v Whitmore*, (1816) 171 ER 432 (Assizes).

392 See generally *Hamilton Fraser & Co v Pandorf & Co*, [1887] 12 App Cas 527 (CAUK) [*Pandorf*].

393 Sea perils are, to some extent, similar to acts of God, but it is necessary to differentiate between them. Acts of God refer to natural causes of damage or loss that are not necessarily associated with the sea, while sea perils denote natural or man-made events peculiar to the sea or navigations at sea. Katsivela, "Treatment", *supra* note 56 at 17.

394 Joel Eagle, "Divine Intervention: Re-Examining the 'Act of God' Defense in a Post-Katrina World" (2007) 82 Chicago-Kent L Rev 459 at 463.

395 CG Hall, "An Unsearchable Providence: The Lawyer's Concept of Act of God" (1993) 13 Oxford J Legal Stud 227 at 229.

396 Act of God has also been included as a defense in property law, contract law, etc. See *ibid* at 229-232.

carrier's exemption from liability for loss or damage resulting from act of God has existed for quite a long time and even survived in the strict liability regime that left carriers very little chance to escape liability.[397] Act of God is always linked to natural incidents beyond the control of human beings, such as lightning, earthquake, storm, volcanic eruption, etc.[398] In *Nugent v Smith*, James LJ said that:

> Act of God is a mere short way of expressing this proposition: a common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him.[399]

Subparagraph 3 – Act of war

This exception was invoked so rarely that it did not trigger much controversy or any substantial problems of application.[400] Act of war may be defined as any conflicts between two or more organized groups.[401] A limited number of cases relating to the exception have revealed that "act of war" does not require any formal declaration of war

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[397] See ER Hardy Ivamy & William Payne, *Payne and Ivamy's Carriage of Goods by Sea*, 13th ed (London: Butterworths, 1989) at 179. See also *Johnson*, *supra* note 89 at 270; *Riley*, *supra* note 86 at 219; *Dale v Hall,* (1765) 167 ER 592 at 595 (HC Adm).

[398] Girvin, *Carriage*, *supra* note 53 at para 28.23. See also *Turgel Fur Co Ltd v Northumberland Ferries Ltd*, (1966) 59 DLR (2d) 1 at 6 (NSSC); Kenneth T Kristil, "Diminishing the Divine: Climate Change and the Act of God Defense" (2009) 15 Widener Law Review 235 at 328-329.

[399] *Nugent*, *supra* note 88 at 444, James LJ. In *Siordet v Hall*, the ship's boiler was filled as usual on the night before the date of departure, but the goods were damaged as a pipe connected with the boiler burst owing to frost. The court held that although frost was an act of God, negligence in keeping the boiler filled overnight at a low temperature invalidated the exception. *Siordet v Hall*, (1828) 130 ER 902 at 913 (Ct Com Pl) [*Siordet*].

[400] The infrequent use of this exception was even underlined to prove that the "laundry list" of the Hague Rules was out of date and unsuitable for the current shipping practice. See Mathilde Benmoha, *The Carriers Responsibilities and Immunities under the Hague and Hamburg Rules* (LL.M. Mémoire, Université de Montréal Faculté de droit, 2001) [unpublished] at 72-73.

[401] Richardson, *supra* note 284 at 51. See also Keith Michel, *War, Terror, and Carriage by Sea* (London: LLP, 2004) at 19.

or rupture of diplomatic relations between governments,[402] that it ought to be interpreted in the light of its "ordinary business meaning",[403] and that it includes civil wars as it does in the insurance context.[404] The exception is valid only if shipowning interests are not blameworthy for the occurrence of loss or damage. It has been argued that:

> L'exonération de responsabilité pour faits de guerre ne joue qu'à la condition que ces faits n'aient pas pu raisonablement être prévus et évités. Si, au contraire, le transporteur, dans le but de gagner un fret élevé, expose volontairement une cargaison qui devait être tenue en dehors du conflit, il perd le bénéfice de ce cas excepté.[405]

Subparagraph 4 – Act of public enemies

In English law, this exception used to be called "Queen's enemies" or "King's enemies".[406] It has existed for a long time, but its meaning is still ambiguous. It has been stated that "[i]l n'est pas facile de donner une définition juridique de ce terme … [l]es auteurs de la Convention ne paraissent pas en la circonstance avoir eu des notions très nettes à cet égard."[407] As a result, whether an act falls within the scope of the exception

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[402] See *Kawasaki Kisen Kabushiki Kaisha v Belships Co Ltd Skibs A/S*, (1939) 63 Ll LR 175 at 181 (KBDUK); *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Co Ltd*, [1939] 2 KB 544 at 547 (CAUK). See also William Gerald Downey, Jr., "The Law of War and Military Necessity" (1953) 47 Am J Int'l L 251 at 255-256.

[403] See *National Oil Co of Zimbabwe Ltd v Sturge*, [1991] 2 Lloyd's Rep 281 at 288 (QBDUK). See also Quincy Wright, "When does War Exist?" (1932) 26 Am J Int'l L 362 at 364.

[404] See *Pesquerias y Secaderos de Bacalao de Espana SA v Beer*, [1949] 1 All ER 845 at 849 (HL(Eng)).

[405] Georges Marais, *Les transports internationaux de marchandises par mer et la jurisprudence en droit comparé* (Paris: Librairie générale de droit et de jurisprudence, 1949) at 154. See also Scrutton, *supra* note 94 at 219; Rodière & du Pontavice, *supra* note 68 at 348-350; Michel Pourcelet, *Le transport maritime sous connaissement: droit canadien, américain et anglais* (Montréal: Presses de l'Université de Montréal, 1972) at 131.

[406] Girvin, *Carriage*, *supra* note 53 at para 28.26.

[407] Marais, *supra* note 405 at 156. See also Scrutton, *supra* note 94 at 220-221; Pourcelet, *supra* note 405 at 132.

has to be determined on a case-by-case basis. In general, acts of public enemies include any acts threatening public interests and committed against public authorities.[408]

Subparagraph 5 – Arrest or restraint of princes, rulers or people, or seizure under legal process

The exception comprises two parts. One is "arrest or restraint of princes, rulers or people" which was often included in bills of lading in the nineteenth century, and the other is "seizure under legal process" which expands the exception to cover forcible confiscation of ships or goods in legal process.[409] The exception may exonerate carriers from liability for loss or damage caused by interference from a state or a government, such as blockade,[410] embargo,[411] prohibition on import and export,[412] etc. Any interference or threat of force having the governmental or quasi-governmental quality would suffice.[413] Acts of mobs, rebels or guerrillas without any involvement of the authorities shall be excluded from the scope of the exception.[414]

Carriers wishing to plead this exception do not need to prove the existence of an actual interference. Proof of existence of an imminent threat is sufficient for that

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[408] Karan, *Liability*, *supra* note 65 at 303. See also Jörg Friedrichs, "Defining the International Public Enemy: the Political Struggle behind the Legal Debate on International Terrorism" (2006) 19 Leiden J Int'l L 69 at 72-73.
[409] Girvin, *Carriage*, *supra* note 53 at para 28.27.
[410] See *Geipel v Smith*, (1872) LR 7 QB 704 at 711 (UK).
[411] See *Aubert v Gray*, (1861) 3 B & S 163 at 167 (KBDUK); *Seabridge Shipping Ltd v Antco Shipping Ltd (The Furness Bridge)*, [1977] 2 Lloyd's Rep 367 at 377 (QBDUK).
[412] See *ibid* at 378.
[413] See *British & Foreign Marine Insurance Co v Samuel Sanday & Co*, [1916] 1 AC 650 at 655 (HL(Eng)).
[414] See *Nesbitt v Lushington*, (1792) 100 ER 1300 at 1307 (KBD).

purpose.[415] In *Rickards v Forestal Land Timber & Railways Co Ltd (The Minden)*, the owner of a German ship complied, at the outbreak of the Second World War, with an order from the German government requiring him to scuttle his ship off the Faroe Islands so as to avoid capture by a British warship.[416] Lord Wright upheld the shipowner's entitlement to the exception by stating that:

> [T]here may be a restraint, though the physical force of the state concerned is not immediately present. It is enough, I think, that there is an order of the state, addressed to a subject of that state, acting with compelling force on him, decisively exacting his obedience and requiring him to do the act which effectively restraints the goods …[417]

However, carriers may not rely on the exception if their failure to perform their obligations merely stems from their apprehension of restraints that have not yet formed. In *Watts Watts & Co Ltd v Mitsui & Co Ltd*, the shipowners, who, in accordance with the contract of carriage, should have shipped the goods from the port of Mariupol in the Sea of Azov to Japan, refused to appoint a vessel for the voyage because they feared that the Turkish authorities were about to close the Dardanelles and that their vessel would consequently be trapped in the Black Sea.[418] The House of Lords held the opinion that the shipowners should not be exonerated from liability, though their apprehension was reasonable.[419] Earl Loreburn J explained that:

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[415] Karan, *Liability*, *supra* note 65 at 304. See also *Nobel's Explosives Co v Jenkins & Co*, [1896] 2 QB 326 at 333 (UK).
[416] See generally *Rickards v Forestal Land Timber & Railways Co Ltd (The Minden)*, [1942] AC 50 (HL(Eng)).
[417] *Ibid* at 81-82, Lord Wright.
[418] See generally *Watts Watts & Co Ltd v Mitsui & Co Ltd*, [1917] AC 227 (HL(Eng)).
[419] See *ibid* at 235.

> In my opinion there was no restraint of princes on 1 September when the shipowners declared their intention of not carrying out their contract. There was an available force at hand in the Dardanelles, and if the situation had been so menacing that a man of sound judgment would think it foolhardiness to proceed with the voyage I should have regarded that as in fact a restraint of princes. It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship must continue her voyage till physical force is actually exercised.[420]

It is also worthwhile to note that carriers' knowledge of risks of state intervention at the time of contracting would result in their failure to benefit from the defense.[421] In *Ciampa v British Steam Navigation Co Ltd*, some lemons were carried from Naples to London in a vessel that had previously been on a voyage from Mombasa. The vessel, when arriving in Marseilles, was subjected to deratization measures in which sulphur was pumped into her holds and caused damage to those lemons.[422] The shipowners, who had known at the time of contracting that the French authorities would subject their vessel to such cleansing process in accordance with a recent decree in which Mombasa had been recognized as a plague-contaminated port, intended to invoke the exception to shirk their liability.[423] Rowlatt J argued that:

> I am not deciding that the application of the ordinary law of a country may not in some circumstances constitute a "restraint of princes", but I think the facts which bring that law into operation must be facts which have supervened after the ship has started on the voyage in question. When facts exist which show conclusively that the ship was inevitably doomed before the commencement of

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[420] *Ibid* at 236, Earl Loreburn J.

[421] Girvin, *Carriage*, *supra* note 53 at para 28.30. See also ME DeOrhis, "Restraint of Princes: The Carrier's Dilemma When Trouble Brews at Foreign Ports" (1980) 15 Eur Transp L 3 at 5-6; Harold J Berman, "Excuse for Nonperformance in the Light of Contract Practices in International Trade" (1963) 63 Colum L Rev 1413 at 1425-1428.

[422] See generally *Ciampa v British Steam Navigation Co Ltd*, [1915] 2 KB 774 (UK) [*Ciampa*].

[423] See *ibid* at 780.

> the voyage to become subject to restraint, I do not think that there is a restraint of princes.[424]

Subparagraph 6 – Quarantine restrictions

"Quarantine" means that a ship has to be sequestered for a period of time because the crew and/or the goods therein carry or may carry a contagious disease.[425] This exception has barely been controversial since the drafting of the Hague Rules,[426] partly because the wording used therein is fairly self-explanatory.[427] As a matter of fact, it is akin to the exception regarding "arrest or restraint of princes, rulers or people", as they sometimes involve similar elements.[428] It should be noted that the defense may not be successfully invoked, if carriers or their servants carelessly or deliberately expose their vessels or the goods carried therein to risks that may lead to quarantine restraints.[429]

Subparagraph 7 – Strikes, lockouts and stoppage or restraint of labour

Article 4.2(j) of the Hague Rules has been widely framed to include strikes, lockouts, stoppages and restraints of labour "from whatever cause, whether partial or general".[430]

So far, there have been several typical strike-related cases in which the judges gave some roughly similar definitions of the word "strike". In *Tramp Shipping Corp v*

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424 *ibid* at 779, Rowlatt J.
425 Katsivela, "Overview", *supra* note 10 at 440, n 86. See also Leonard C Meeker, "Defensive Quarantine and the Law" (1963) 57 Am J Int'l L 515 at 516-518.
426 See *Travaux*, *supra* note 304 at 410-411.
427 Girvin, *Carriage*, *supra* note 53 at para 28.32.
428 Benmoha, *supra* note 400 at 75.
429 See *Dunn v Bucknall Bros*, [1902] 2 KB 614 at 627 (CAUK).
430 *Hague Rules*, *supra* note 205, art 4.2(j).

Greenwich Marine Inc (The New Horizon), Lord Denning deemed strike as "a concerted stoppage of work by men done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or supporting or sympathizing with other workmen in such endeavour." [431] In *J Vermaas' Scheepvaartbedrijff NV v Association Technique de L'Importation Charbonnière*, McNair J said that "the word strike is a perfectly good and appropriate word to use to cover a sympathetic strike and a general strike and there is no need today to have an ingredient of grievance between those who are refusing to work and their employers."[432]

Although there have been few cases relating to lockout, stoppage or restraint of labour, it does not follow that there is no clue as to their meanings. As opposed to strike that is normally initiated by employees, lockout is a measure characterized by closure of a working place by an employer to prevent his workers from entering it until they accept his proposal on pay or working conditions.[433] Stoppage is normally brought about by external events, such as fear of disease, bomb scare, war, etc.[434] "Restraint of labour", though never clearly interpreted in precedents, is considered to refer to restrictions of the

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[431] *Tramp Shipping Corp v Greenwich Marine Inc (The New Horizon)*, [1975] 2 Lloyd's Rep 314 at 317, Lord Denning (CAUK) [*New Horizon*]. See also *Cero Navigation Corp v Jean Lion & Cie (The Solon)*, [2000] 1 Lloyd's Rep 292 at 299 (QBDUK); *Frontier International Shipping Corp v Swissmarine Corp Inc (The Cape Equinox)*, [2005] 1 Lloyd's Rep 390 at 398 (QBDUK).

[432] *J Vermaas' Scheepvaartbedrijf NV v Association Technique de L'Importation Charbonnière*, [1966] 1 Lloyd's Rep 582 at 591, McNair (QBDUK).

[433] In the Labour Code of Quebec, "lockout" is defined as "the refusal by an employer to give work to a group of his employees in order to compel them, or the employees of another employer, to accept certain conditions of employment." *Labour Code of Quebec*, RSQ c C-27 s 1(h).

[434] *New Horizon*, *supra* note 431 at 317; Karan, *Liability*, *supra* note 65 at 306.

authorities on certain working conditions that affect the performance of obligations in contracts of carriage.[435]

The words "from whatever cause" broaden the ambit of the defense to the extent that the impediment of work in question may have nothing to do with labour disputes.[436] What really matters is that such impediment, regardless of its causation,[437] must endanger the fulfillment of obligations in relation to carriage.[438] The identity of persons involved is of little importance to the application of the exception.[439] Any suspension of work launched by mariners, stevedores, lightermen, tug operators, custom officers, sanitary officers, or even those who, at the first thought, are almost irrelevant to carriage may be covered in the exception.[440]

Subparagraph 8 – Riots and civil commotions

This exception is normally viewed as a complement to the exception of act of war.[441] In *Field v Metropolitan Police Receiver*, Phillimore LJ defined "riot" in the following terms:

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435 See *W Young & Son (Wholesale Fish Merchants) v British Transport Commission*, [1955] 2 QB 177 at 181 (UK). See also Maximos Aligisakis, "Labour Disputes in Western Europe: Typology and Tendencies" (1997) 136 International Labour Review 73 at 77.

436 See *Beaumont-Thomas v Blue Star Line*, (1939) 64 Ll LR 159 at 165 (CAUK).

437 Karan, *Liability*, *supra* note 65 at 306.

438 See *USA v Lykes Bros SS Co Inc*, 1975 AMC 2244 at 2252 (5th Cir 1975).

439 Girvin, *Carriage*, *supra* note 53 at para 28.35.

440 See e.g. *The Alne Holme*, [1893] P 173 (Div Ct UK). In this case, a strike by timber workers at Gloucester docks was thought to be covered by an equivalent bill of lading exception.

441 See *Bolivia v Indemnity Mutual Marine Assurance Co Ltd*, [1909] 1 KB 785 at 801 (UK).

> We deduce that there are five necessary elements of a riot – (1) number of persons, three at least; (2) common purpose; (3) execution or inception of the common purpose; (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) force or violence not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.[442]

This definition was adopted in some subsequent cases relating to marine insurance and has been thought to be equally applicable in the context of the Hague Rules.[443] In *Levy v Assicurazione Generali*, Luxmoore LJ gave a definition of civil commotion. He said that:

> This phrase is used to indicate a stage between a riot and civil war. It has been defined to mean an insurrection of the people for general purposes, though not amounting to rebellion; but it is probably not capable of any very precise definition. The element of turbulence or tumult is essential; an organized conspiracy to commit criminal acts, where there is no tumult or disturbance until after the acts, does not amount to civil commotion.[444]

Mustill J added in another case that "I find nothing in the authorities compelling the Court to hold that a civil commotion must involve a revolt against the government, although the disturbances must have sufficient cohesion to prevent them from being the work of a mindless mob."[445]

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[442] *Field v Metropolitan Police Receiver*, [1907] 2 KB 853 at 860, Phillimore LJ (UK).

[443] See e.g. *London & Lancashire Fire Insurance Co Ltd v Bolands Ltd*, [1924] AC 836 (HL(Eng)). See also Henry E Cabaud, Jr., "Cargo Insurance" (1971) 45 Tul L Rev 988 at 992; Girvin, *Carriage*, *supra* note 53 at para 28.36.

[444] *Levy v Assicurazione Generali*, [1940] AC 791 at 795, Luxmoore LJ (PCUK).

[445] *Spinneys (1948) Ltd v Royal Insurance Co Ltd*, [1980] 1 Lloyd's Rep 406 at 438, Mustill J (QBDUK).

Subparagraph 9 – Summary

The common feature of the immunities discussed in the present paragraph is the intervention of natural forces or third parties that interrupts the normal performance of obligations under a contract of carriage.[446] It is, however, worthwhile to note that the occurrence of such intervention alone does not guarantee the carrier's exemption from liability.[447] Whether carriers are at fault must be taken into account in determining their exculpatory rights, even if the immediate cause of loss or damage is the intervention of natural forces or third parties.[448] Those defenses are valid only if such intervention is truly unavoidable to carriers having exercised prudence that can be reasonably required.[449]

In the text of the Hague Rules, there is no clear requirement that carriers have to be free from fault if they seek to plead those defenses. However, such requirement has been established in a number of judicial precedents. In *The Friso*, the vessel developed a list of 40 to 45 degrees in heavy weather and some deck goods had to be jettisoned so as to reduce the list.[450] Sheen J held that the carrier was unable to rely on the immunity in Article 4.2(c) of the Hague Rules, because it was found that there had been a breach of the carrier's obligation to exercise due diligence in making his vessel seaworthy at the

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[446] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.005.
[447] See Francesco Berlingieri, "Basis of Liability and Exclusions of Liability" (2002) 29 LMCLQ 336 at 343-344 [Berlingieri, "Basis"].
[448] See J Offerhaus, *Carriers Liability under Uniform Hague Rules Law* (Göteborg: Gumperts Förlag, 1955) at 102-104.
[449] See Hellawell, "Allocation", *supra* note 106 at 365-366. See also R Glenn Bauer, "Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules – A Case by Case Analysis" (1993) 24 J Mar L & Com 53 at 65.
[450] See generally *The Friso*, [1980] 1 Lloyd's Rep 469 (QBDUK).

beginning of the voyage.[451] In *The Tilia Gorthon*, some deck goods were washed overboard in a storm.[452] Sheen J negated the carrier's entitlement to exemption from liability based on the defense of perils of the sea. He contended that:

> It seems highly probable that none of the deck cargo would have been lost but for the evidence of the storm. But the evidence as to the weather has not satisfied me that the conditions encountered were such as could not and should not have been contemplated by the shipowners. Fortunately for the mariners, winds of 48-55 knots (Beaufort Force 10) are encountered infrequently. But they are by no means so exceptional in the North Atlantic in the autumn and winter that the possibility of encountering them can be ignored. A ship embarking on a voyage across the Atlantic Ocean at that time of the year ought to be in a condition to weather such a storm.[453]

In *Siordet v Hall*, some goods were damaged because frost made burst a pipe connected with the boiler of the ship which had been filled up on the night prior to the date of departure.[454] The court held that frost was an "act of God", but negligence in keeping the boiler filled overnight invalidated the defense.[455] In *Ciampa v British Steam Navigation Co Ltd*, some lemons on the ship spoiled because of a deratization process at the port of Marseilles, the occurrence of which had already been foreseen by the shipowner at the time of contracting.[456] Rowlatt J disapproved of the applicability of the defense of restraint of princes in this case. He argued that "[w]hen facts exist which show conclusively that the ship was inevitably doomed before the commencement of the

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[451] See *ibid* at 475, Sheen J. See also *The Bulknes*, [1979] 2 Lloyd's Rep 39 at 52 (QBDUK); *The Torenia*, [1983] 2 Lloyd's Rep 210 at 221 (QBDUK) [*Torenia*].

[452] See generally *The Tilia Gorthon*, [1985] 1 Lloyd's Rep 552 (QBDUK).

[453] *Ibid* at 555, Sheen J.

[454] See generally *Siordet*, *supra* note 399.

[455] See *ibid* at 913. See also Marsha Ternus Rundall, "Act of God as a Defense in Negligence Cases" (1975) 25 Drake L Rev 754 at 760.

[456] See generally *Ciampa*, *supra* note 422.

voyage to become subject to restraint, I do not think that there is a restraint of princes."[457] Briefly speaking, carriers may be relieved from liability for loss or damage arising from intervention of natural forces or third parties that is normally presumed to be beyond their control, but such immunity may be forfeited once there is evidence establishing the contribution of their fault to the occurrence of loss or damage.[458]

"*Pacta sunt servanda*" is a famous Latin maxim as well as a basic principle of contract law which suggests that one party, should he fail to perform his contractual obligations, shall be liable to compensate the other party for the loss the latter has sustained due to such nonperformance.[459] However, there is another Latin maxim – *rebus sic stantibus* – which may counteract the effect of the former. The maxim means "assuming things remain the same" and implies that a contracting party may disengage himself from his promise if an unforeseeable supervening event impedes the normal performance of the contract.[460] The relativity of sanctity of contracts was no longer foreign to civil law and common law states long ago.[461] They both have realized for a

[457] *ibid* at 779, Rowlatt J.

[458] See Karan, *Liability*, *supra* note 65 at 275-276; Richardson, *supra* note 284 at 32; Richard Aikens, Richard Lord & Michael Bools, *Bills of Lading* (London: Informa, 2006) at para 10.234.

[459] Berman, *supra* note 421 at 1413. See also W Paul Gormley, "The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith" (1970) 14 Saint Louis ULJ 367 at 373; Richard Hyland, "Pacta Sunt Servanda: A Meditation" (1994) 34 Va J Int'l L 405 at 415-416, 421-422.

[460] See Peter J Mazzacano, "Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG" (2011) 2 Nordic Journal of Commercial Law 1 at 4, 12; GH Treitel, *Frustration and Force Majeure* (London: Sweet & Maxwell, 1994) at 1.

[461] See Robert Taschereau, *Théorie de cas fortuit et de la force majeure dans les obligations* (Montréal: Théoret, 1901) at 2. See also GR Driver & John C Miles, eds, *The Babylonian Laws* (Oxford: The Clarendon Press, 1952) at 438-440.

long time that courts are not supposed to compel a person to do what is impossible, even if that has been promised in a contract.[462]

As far back as the era of Roman law, there appeared some excuses for nonperformance caused by unforeseeable and irresistible events.[463] They developed into the concept of *force majeure* in civil law, which acted as an important defense that debtors might make use of to shirk their liability.[464] Traditionally, there are three elements for an event to qualify as *force majeure*, namely externality, unforeseeability and irresistibility.[465] Externality suggests that the occurrence of a *force majeure* event is beyond the debtors' sphere of activities or control.[466] As a matter of fact, externality, as

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[462] At first, common law judges tended to hold parties liable, even if the performance of a contract became impossible. Hannes Rosler remarked that "English law has never known the medieval *clausa* [*rebus sic stantibus*] doctrine." However, in later cases, they were aware that the sanctity of contracts was not absolute. See Hyland, *supra* note 459 at 422; Hannes Rosler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law" (2007) 15 ERPL 483 at 497. See also *Forrer v Nash*, (1865) 35 Beav 167 at 171 (Ch UK).

[463] Marel Katsivela, "Contracts: Force Majeure Concept or Force Majeure Clauses?" (2007) 12 Unif L Rev 101 at 101-102 [Katsivela, "Force Majeure"]. See also Paul-Henri Antonmattei, *Contribution à l'étude de la force majeure* (Paris: Librairie générale de droit et jurisprudence, 1992) at 56; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Alphen aan den Rijn: Kluwer Law International, 2009) at 102.

[464] For example, Article 1148 of the French Civil Code provides that "[i]l n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit." In the Code, there are other provisions relating to *force majeure*, such as Articles 1348, 1631, 1730, 1733, 1754, 1755, 1784, 1929, 1934 and 1954. The terms "cas fortuit" and "*force majeure*" both appear in the Code. Theoretically, the former refers to a cause of damage within the debtor's sphere of control which is relatively insurmountable; while the latter refers to an event outside his sphere of control which is absolutely insurmountable. However, French judges tend to use them interchangeably, with a higher frequency of "*force majeure*". See Caslav Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32 VUWLR 817 at 824-825; Philippe Le Tourneau et al, *Droit de la responsabilité et des contrats*, 6th ed (Paris: Dalloz, 2006) at 482-483; François Terré, Philippe Simler & Yves Lequette, *Droit civil – les obligations*, 9th ed (Paris: Dalloz, 2005) at 568-569; Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les obligations*, 6th ed (Cowansville: Éditions Yvon Blais, 2005) at 938; J Denson Smith, "Impossibility of Performance as an Excuse in French Law: the Doctrine of Force Majeure" (1936) 45 Yale LJ 452 at 458.

[465] See Christian Larroumet, *Droit civil*, 5th ed (Paris: Economica, 2003) at 830.

[466] Terré, Simler & Lequette, *supra* note 464 at 568-569. See also Baudouin & Jobin, *supra* note 464 at 941; Jean Pineau, *Le contrat de transport terrestre, maritime et aérien* (Montréal: Éditions Thémis, 1986) at 53-54; *Montréal (Communauté urbaine) c Crédit Commercial de France*, [2001] RJQ 1187 at 1198 (CQ).

distinguished from unforeseeability and irresistibility,[467] is not always regarded as an indispensable element of *force majeure* in doctrines and cases of civil law,[468] though it is quite difficult for debtors to convince courts that an event without such characteristic is still unforeseeable and irresistible.[469] The second element suggests that a *force majeure* event must be unpredictable at the time of contracting.[470] In early cases, debtors could hardly benefit from the *force majeure* immunity, because judges tended to require absolute unforeseeability.[471] Nowadays, courts have abandoned the infeasible strategy and turned to focus on abnormality and rarity of an event, as they have realized that any event is not absolutely unforeseeable.[472] The third element suggests that an event may qualify as *force majeure* only if it cannot be resisted or prevented even though debtors have taken measures that could reasonably be required to guard against its occurrence.[473] The modern theory of *force majeure* was accepted by common law states in the nineteenth century when the term was treated as a synonym of legal impossibility.[474] A roughly equivalent doctrine then developed in common law, that is, frustration.[475] A contract is deemed frustrated when a supervening event has rendered its performance

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[467] See Larroumet, *supra* note 465 at 830; Baudouin & Jobin, *supra* note 464 at 938.
[468] Maurice Tancelin, *Des obligations: actes et responsabilités*, 6th ed (Montréal: Wilson & Lafleur Ltée, 1997) at 408.
[469] Baudouin & Jobin, *supra* note 464 at 942.
[470] Terré, Simler & Lequette, *supra* note 464 at 569-572. See also Joseph M Perillo, "Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts" (1997) 5 Tul J Int'l & Comp L 5 at 14-18.
[471] Terré, Simler & Lequette, *supra* note 464 at 769.
[472] Katsivela, "Force Majeure", *supra* note 463 at 105.
[473] French courts required the debtor to act like "un bon père de famille" or "un homme diligent"; Quebec courts adopted the criterion of "an average person"; Greek courts required the debtor to act with "utter diligence and prudence." *Ibid* at 106.
[474] PJM Declercq, "Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability" (1995) 15 JL & Com 213 at 214. See also Pourcelet, *supra* note 405 at 131.
[475] See Katsivela, "Force Majeure", *supra* note 463 at 108-109.

impossible or so difficult that it would no longer be reasonable to hold the parties bound by the contract.[476] The doctrines of *force majeure* and frustration are not exactly the same. The former only applies to circumstances where the performance of a contract has become impossible, while the latter also covers those where what was initially contemplated by the parties has undergone noticeable changes.[477]

It is not surprising to see that the doctrine of *force majeure* is likewise applicable to contracts of carriage, a specific genre of contract. In civil law, carriers were entitled to exemption from liability for loss or damage resulting from *force majeure* since the era of Roman law.[478] In common law, carriers were granted the exceptions of act of God and Queen's enemies as early as the primitive stage of shipping law when they had to put up with strict liability.[479] The carrier's exemption from liability for loss or damage arising from intervention of natural forces or third parties in the Hague Rules is not an innovation but a continuation of the well-established defense of *force majeure* in contract law, the underpinning of which has been validated over a long time through a multitude of cases and statements. The defense does not represent partiality for carriers who are

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[476] See Ewan McKendrick, ed, *Force Majeure and Frustration of Contract*, 2d ed (London: Lloyd's of London Press, 1995) at 37. See also Hans Smit, "Frustration of Contract: A Comparative Attempt at Consolidation" (1958) 58 Colum L Rev 287 at 292.

[477] See Pejovic, *supra* note 464 at 824-825; Treitel, *supra* note 460 at 433. See also Andrew Kull, "Mistake, Frustration, and the Windfall Principle of Contract Remedies" (1991) 43 Hastings LJ 1 at 6-7.

[478] In Roman law, carriers were not held liable for loss or damage arising from *casus fortuitus*, *vis major* or *damnum fatale*. *Casus fortuitus* was a generic term. *Damnum fatale* represented one sort of *casus fortuitus* that was caused solely by forces of nature, while *vis major* represented the other sort of *casus fortuitus* that, to some extent, was caused by the interposition of human agency. Dönges, *supra* note 61 at 44-45. Under the Great Ordinance of Marine of August 1681, masters and merchants were reciprocally exempt from compensation when ports were closed or ships had to stop due to *force majeure*. *Ordonnance*, *supra* note 71, Livre III, Titre I, Article VIII; Valin, *supra* note 71 at 593. More recently, Article 2702 of the Civil Code of Quebec provides that carriers are not liable for any loss or damage resulting from *force majeure*. *Code civil du Québec*, RSQ c C-1991 s 2072.

[479] Clarke, *Aspects*, *supra* note 74 at 118-119.

truly blameless for loss or damage caused by *force majeure* events beyond their sphere of control; nor does it induce injustice to cargo interests who are supposed to swallow loss or damage attributable to neither their fault nor fault on the part of shipowning interests, as there is an initial liability rule that loss shall lie on victims unless some compelling reason exists for shifting it to someone else.[480]

Paragraph 2 – Exemption from liability for loss or damage resulting from fault on the part of cargo interests

There is another category of immunities in the Hague Rules freeing carriers from liability for loss or damage caused by fault on the part of cargo interests. The exceptions contained in Articles 4.2(i), 4.2(n) and 4.2(o) of the Rules belong to this category.[481]

Subparagraph 1 – Act or omission of cargo interests

This exception aims to relieve carriers from liability that should be assumed by those negligent cargo interests.[482] It may be pleaded by carriers if loss or damage stems from inappropriate instructions of cargo interests with regard to stowage, carriage or discharge of goods,[483] their misrepresentations as for the quantity, weight, nature or

[480] Jules L Coleman, *Risks and Wrongs* (New York: Cambridge University Press, 1992) at 212. See also Susan Hodges, *Law of Marine Insurance* (London: Cavendish Publishing Limited, 1996) at 173-220; Raymond P Hayden & Sanford E Balick, "Marine Insurance: Varieties, Combinations, and Coverages" (1991) 66 Tul L Rev 311 at 320-322.
[481] Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.005.
[482] See Pineau, *supra* note 466 at 106.
[483] *Ismail v Polish Ocean Lines (The Ciechocinek)*, [1976] 1 QB 893 at 903 (CAUK) [*Ismail*].

value of the goods consigned for shipment,[484] their defective operations of loading, stowing or discharging,[485] their failure to provide sufficient documents,[486] etc.

Subparagraph 2 – Insufficiency of packing

In fact, insufficiency of packing is a specific example of acts or omissions of cargo interests, as goods are normally packed by shippers, unless otherwise agreed by the parties in a contract of carriage.[487] Packing ought to be done in the light of the nature of goods and foreseeable ordinary hazards they may encounter during an intended voyage.[488] Shippers are not obliged to see to it that the methods of packing employed by them are able to protect their goods from unusual risks.[489] As to the criterion of sufficiency of packing, customary methods of packing habitually adopted for a particular type of goods or a particular type of voyage are basically presumed to be sufficient.[490] Insufficiency of packing may be either invisible or visible to carriers when they receive goods for shipment. In the former case, a carrier wishing to rely on the defense must prove that a clean bill of lading is issued because insufficiency of packing is not

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484 See *Silver v Ocean Steamship Co*, [1930] 1 KB 416 at 427 (CAUK) [*Silver*]; Karan, *Liability*, *supra* note 65 at 310.
485 *Ibid*.
486 Max R Ganado & Hugh M Kindred, *Marine Cargo Delays: The Law of Delay in the Carriage of General Cargoes by Sea* (London: Lloyd's of London Press, 1990) at 101.
487 Karan, *Liability*, *supra* note 65 at 308.
488 See Michael Wilford, Terence Coghlin & John D Kimball, *Time Charters*, 3d ed (London: Lloyd's of London Press, 1989) at 46. See also *The Lucky Wave*, [1985] 1 Lloyd's Rep 80 at 97 (QBDUK) [*Lucky Wave*]; *The Ponce*, 1946 AMC 1124 at 1136 (NJ Dist Ct 1946); David L Maloof & James P Krauzlis, "Shipper's Potential Liabilities in Transit" (1980) 5 Maritime Lawyer 175 at 178-179; Mark D Booker, *Containers: Conditions, Law and Practice of Carriage and Use* (London: Derek Beattie, 1987) at 47.
489 Karan, *Liability*, *supra* note 65 at 308. See also *AE Potts & Co Ltd v Union SS Co of New Zealand Ltd*, [1946] NZLR 276 at 279 (SC); Michael E Crowley, "The Limited Scope of the Cargo Liability Regime Covering Carriage of Goods by Sea: The Multimodal Problem" (2004) 79 Tul L Rev 1461 at 1470-1472.
490 See *Lucky Wave*, *supra* note 488 at 86; *Continex, Inc v The Flying Independent*, 1952 AMC 1499 at 1503 (NY Dist Ct 1952). See also *Bunga Seroja*, *supra* note 92 at 513.

detectable by an external inspection.[491] In the latter case, a carrier who is aware of insufficiency of packing but still issues a clean bill of lading shall be banned from pleading this immunity.[492]

Subparagraph 3 – Insufficiency or inadequacy of marks

Insufficiency or inadequacy of marks is another specific example of acts or omissions of cargo interests. Shippers are supposed to mark their goods in an appropriate way with a view to preventing them from being mixed up with others and facilitating operations of unloading at destination.[493] Shippers have the duty to furnish in writing leading marks necessary for the identification of goods and ensure that those marks remain legible until the end of voyage.[494] This exception may be invoked if non-delivery or misdelivery of goods is caused by inadequate marks about their destinations or ownership,[495] failure to distinguish them from others due to poor marking,[496] difficulty in identifying them because of abrasion of their marks,[497] etc. However, the defense does not apply to cases in which marks are incorrect, inaccurate or unlawful.[498]

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[491] Richardson, *supra* note 284 at 33. The author gave an example in this book. Some reels of cellophane, which would be used on high-speed cigarette-packing machines, were shipped in heavy wooden cases, but, upon unpacking at the factory, were found squashed so badly that they became useless for their intended purpose. Those cases were received and delivered in apparent good order and condition. The damage was in fact caused by the absence of internal bracings preventing the springing of the boards of the cases, which was not visible to an external inspection. The carrier in this case should be allowed to rely on the exception of insufficiency of packing.

[492] Girvin, *Carriage*, *supra* note 53 at para 28.40. See also *Silver*, *supra* note 484 at 440-441.

[493] Karan, *Liability*, *supra* note 65 at 309.

[494] *Hague Rules*, *supra* note 205, art 3.3.

[495] Girvin, *Carriage*, *supra* note 53 at para 28.41.

[496] See *ibid* at para 30.41.

[497] Richardson, *supra* note 284 at 33.

[498] Karan, *Liability*, *supra* note 65 at 309.

Subparagraph 4 – Summary

There is almost no doubt that, except in rare cases, one shall be responsible for what he does and the outcome of what he does.[499] It is this plain idea of justice that lends important theoretical support to the justification for the carrier's exemption from liability for loss or damage caused by fault on the part of cargo interests.

The determination of a debtor's liability when the opposing party's conduct contributes to the occurrence of loss or damage is not a novel topic.[500] As early as the

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[499] See Tony Honoré, *Responsibility and Fault* (Oxford: Hart, 1999) at 7, 122. See also Carol Harlow, "Fault Liability in French and English Public Law" (1976) 39 Mod L Rev 516 at 522.

[500] There are already a number of domestic civil laws containing provisions related to this issue. For example, Section 254 of the German Civil Code provides that:

> (1) Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party.
>
> (2) This also applies if the fault of the injured person is limited to failing to draw the attention of the obligor to the danger of unusually extensive damage, where the obligor neither was nor ought to have been aware of the danger, or to failing to avert or reduce the damage.

Article 1227 of the Italian Civil Code provides that:

> If the creditor has with fault contributed to cause the damage, the compensation of damages is diminished taking account of the gravity of the fault and of the extent of the consequences deriving therefrom. No compensation may be awarded in relation to those damages that the creditor could have avoided by exercising ordinary diligence.

Article 6.101 of the Dutch Civil Code provides that:

> (1) When the damage is caused as well by circumstances which are attributable to the injured person himself, then the obligation to compensate damages is reduced by imputing the total damage to the injured person and to the liable person in proportion to the degree in which the circumstances which have contributed to the damage can be attributed to them individually, on the understanding that another imputation occurs or the obligation to compensate damages extinguishes or stays in force totally, if this is required by fairness in view of the significance of the various faults or of other circumstances in the prevailing situation.
>
> (2) If the obligation to compensate damages concerns damage which is caused by a thing (object) that a third party kept in his physical power on behalf of the injured party, then, with regard to the application of the previous paragraph, circumstances that are attributable to this third party are imputed to the injured person.

Article 44 of the Swiss Code of Obligations provides that:

> (1) Where the injured party consented to the action which caused the loss or damage or circumstances attributable to him helped give rise to or compound the loss or damage or otherwise exacerbated the position of the party liable for it, the court may reduce the compensation due or even dispense with it entirely.
>
> (2) The court may also reduce the compensation award in cases in which the loss or damage was caused neither willfully nor by gross negligence and where payment of such compensation would leave the liable party in financial hardship.

1940s, British judges began to investigate victims' fault in tort cases.[501] Thirty years later, prevailed in the United States the "comparative fault defense",[502] which represented a more reasonable allocation of damages between injurers and contributorily negligent victims.[503] As time went on, the notion of such defense was implanted from tort law to contract law. In the context of the latter, the defense aims to shield promisors from those promisees whose fault contributes to their own losses.[504] A promisee's fault normally resides in his failure to prevent potential losses by cooperating with the promisor or avoiding overreliance.[505] Its specific manifestations include failure to assist in performance, failure to clarify misunderstandings, failure to provide information necessary for performance, failure to warn of extra risks, etc.[506] A promisee, should his fault render the performance of a contract difficult or impossible, shall, depending on the degree of such fault, be partly or even wholly responsible for the loss sustained by him.[507] Taking into account promisees' fault in determining liability for breach of contract has been appreciated for its positive effect in encouraging promisees, whose early function

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See also Fabrizio Cafaggi, "Creditor's Fault: In Search of a Comparative Frame" in Omri Ben-Shahar & Ariel Porat, eds, *Fault in American Contract Law* (New York: Cambridge University Press, 2010) 237 at 241.

501 Percy Henry Winfield, JA Jolowicz & WVH Rogers, *Winfield & Jolowicz on Tort*, 16th ed (London: Sweet & Maxwell, 2002) at paras 6.38-6.41.

502 Dan B Dobbs, *The Law of Torts* (St Paul: West Group, 2001) at para 201. See also John W Wade, "Comparative Negligence – Its Development in the United States and Its Present Status in Louisiane" (1979) 40 La L Rev 299 at 302-303.

503 Ariel Porat, "A Comparative Fault Defense in Contract Law" (2009) 107 Mich L Rev 1397 at 1397 [Porat, "Comparative Fault"]. See also Carol A Mutter, "Rethinking Assumption of Risk After the Adoption of Comparative Fault" (1992) 23 Memphis State University Law Review 85 at 87.

504 Porat, "Comparative Fault", *supra* note 503 at 1398.

505 Ariel Porat, "Contributory Negligence in Contract Law: Toward a Principled Approach" (1994) 28 UBC L Rev 141 at 145.

506 Porat, "Comparative Fault", *supra* note 503 at 1398-1410. See also Cafaggi, *supra* note 500 at 241.

507 See Ann Spowart Taylor, "Contributory Negligence: A Defense to Breach of Contract?" (1986) 49 Mod L Rev 102 at 108.

was merely "sitting and waiting", to provide promisors with necessary help in the performance of contractual obligations.[508]

The accomplishment of ocean transport is dependent on not only the commitment of carriers but also the cooperation of cargo interests.[509] Merchants are normally obliged, either by express contract clauses or in an implicit way,[510] to undertake actions that fall within their exclusive sphere of influence or demand their particular knowledge.[511] The carrier's exemption from liability for loss or damage arising from fault on the part of cargo interests is not an innovation of the Hague Rules.[512] It derives from a long-standing and universally-accepted idea of fairness that one has to be responsible for his own conducts.[513]

Paragraph 3 – Exemption from liability for loss or damage resulting from insurmountable defects of goods or ships

In the Hague Rules, there is another category of immunities absolving carriers from liability for loss or damage caused by insurmountable defects of goods or ships.

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[508] Porat, "Comparative Fault", *supra* note 503 at 1403. See also Ariel Porat, "The Contributory Negligence Defense and the Ability to Rely on the Contract" (1995) 111 Law Q Rev 228 at 230.

[509] See Girvin, *Carriage*, *supra* note 53 at para 20.03. See also Abraham Berglund, *Ocean Transportation* (New York: Longmans, 1931) at 24.

[510] See *Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SPA (The Nizeti)*, [1960] 1 Lloyd's Rep 132 at 138 (CAUK).

[511] It is quite common that cargo interests are required to mark and describe the goods consigned to carriers, warrant the accuracy of such markings and descriptions, and undertake to indemnify carriers against loss or damage arising from inaccurate markings or descriptions. See Nicholas Gaskell, Regina Asariotis & Yvonne Baatz, *Bills of Lading: Law and Contracts* (London: LLP, 2000) at paras 15.1-15.2.

[512] See Dor, *supra* note 239 at 83-95, 124-130, 145-146; Clarke, *Aspects*, *supra* note 74 at 119.

[513] See Richard W Wright, "The Logic and Fairness of Joint and Several Liability" (1992) 23 Memphis State University Law Review 45 at 49-50. See also John Scott Hickman, "Efficiency, Fairness, and Common Sense: The Case for One Action as to Percentage of Fault in Comparative Negligence Jurisdictions That Have Abolished or Modified Joint and Several Liability" (1995) 48 Vand L Rev 739 at 746.

Subparagraph 1 – Inherent defect, quality or vice of goods

Article 4.2(m) of the Hague Rules provides that "[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from … [w]astage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods."[514] "Wastage in bulk or weight" refers to normal shrinkage or evaporation of goods over time,[515] which may be deemed as an "inherent quality" of goods.[516] "Inherent defect" covers those hidden flaws of goods that cannot be detected externally by a reasonably prudent carrier,[517] such as faulty assembly in automobiles,[518] excess moisture in poorly-seasoned timber,[519] tiny larvae in contaminated flour,[520] etc. "Inherent quality or vice" ought to be understood as internal unfitness of goods for an intended voyage.[521] In *Blower v Great Western Railway*, Willes J explained that "[b]y the expression 'vice', I … mean … that sort of vice which by its internal development tends to the destruction or the injury of the animal or thing to be carried, and which is likely to lead to such a result."[522] In a more recent case, Lord Diplock said that "inherent quality or vice" is "the risk of deterioration of the goods shipped as a result of their natural ordinary behaviour in the ordinary course of the contemplated voyage without the

514 *Hague Rules*, *supra* note 205, art 4.2(m).
515 Aikens, Lord & Bools, *supra* note 458 at para 10.246. See also Tetley, *Claims*, *supra* note 311 at 485.
516 See *ibid*.
517 See generally Huibert Drion, "Exemption Clauses Governing Loss or Damage Resulting from the Inherent Defect, Quality or Vice of the Cargo" (1961) 28 J Air L & Com 329 at 332-333.
518 See *Lister v Lancs & Yorks Ry Co*, [1903] 1 KB 878 at 892 (UK) [*Lister*].
519 See *Wm Fergus Harris & Son Ltd v China Mutual SN Co*, [1959] 2 Lloyd's Rep 500 at 509 (QBDUK).
520 See Karan, *Liability*, *supra* note 65 at 314.
521 See *Lister*, *supra* note 518 at 879.
522 *Blower v Great Western Railway*, (1872) LR 7 CP 655 at 662-663, Willes J (UK) [*Blower*].

intervention of any fortuitous external accident or casualty."[523] Goods with such "inherent quality or vice" include fresh fruits that tend to rot or over-ripen;[524] rubber that may be distorted or dented;[525] steel bars that are likely to be bent or nicked;[526] iron that is apt to get rusty,[527] etc.

Subparagraph 2 – Latent defects of ships not discoverable by due diligence

Article 4.2(p) of the Hague Rules provides for the carrier's entitlement to exemption from liability for loss or damage resulting from latent defects of ships not discoverable by due diligence.[528] Latent defect was defined in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* as "flaw which cannot be discovered by known and customary tests."[529] In *Charles Brown & Co Ltd v Nitrate Producers' Steamship Co Ltd*, a more detailed definition was given by Porter J who stated that:

> [L]atent defect does not mean latent to the eye. It means latent to the senses, that is, it may be hammer-tested, or there may be any other test. The only question is whether by "latent" it means that you have to use every possible method to discover whether it exists, or whether you must use reasonable methods. I cannot myself believe that in every case it is obligatory upon a ship's officer on the commencement of a voyage to go and tap every rivet to find if it has a defect or not. If that were so, ships would be held up in port for a

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523 *Soya GmbH Mainz KG v White*, [1983] 1 Lloyd's Rep 122 at 125, Lord Diplock (HL(Eng)) [*White*].
524 See *Eastwest Produce Co v SS Nordness*, [1956] Ex CR 328 at 340 [*Eastwest Produce*].
525 See *The Silversandal*, 1938 AMC 1489 at 1499 (NY Dist Ct 1938) [*Silversandal*].
526 See *Copco Steel & Engineering Co v S/S Alwaki*, 1955 AMC 2001 at 2018 (NY Dist Ct 1955).
527 See *Tokio M&F Ins Co v Retla SS Co*, 1970 AMC 1611 at 1620 (9th Cir 1970).
528 Although there is no specific reference to "latent defects of ships" in Article 4.2(p), it has been widely accepted that the exception shall not apply to "defects of goods", which are already covered by Article 4.2(m) of the Rules. Girvin, *Carriage*, *supra* note 53 at para 28.42.
529 *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)*, [1961] AC 807 at 872 (HL(Eng)) [*Muncaster Castle*].

very long time while the rivets were being tapped and eyes used to determine whether a defect existed or not.[530]

The prerequisite for pleading the exception is that proper tests have been undertaken, but there is no need to use every possible method to detect potential defects.[531] Carriers wishing to rely on the exception must prove that it is a latent defect described in Article 4.2(p) of the Rules that has brought about loss or damage,[532] though it is usually difficult for them to fulfill such onus of proof.[533] Whether a defect may be deemed as a "latent defect not discoverable by due diligence" has to be determined with reference to facts of each case.[534]

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[530] *Charles Brown & Co Ltd v Nitrate Producers' Steamship Co Ltd*, (1937) 58 Ll LR 188 at 191-192, Porter J (CAUK). See also Harney B Stover, Jr., "Longshoreman-Shipowner-Stevedore: The Circle of Liability" (1963) 61 Mich L Rev 539 at 542-543.

[531] Aikens, Lord & Bools, *supra* note 458 at para 10.256.

[532] *Ibid*. See also *The Antigoni*, [1991] 1 Lloyd's Rep 209 at 212 (CAUK) [*Antigoni*].

[533] The *Antigoni* was built by a German firm in 1977 and was powered by an engine manufactured by Alpha Diesel A/S. The crankshaft of the engine had ten counterweights attached to it whose function was to balance the crankshaft and prevent or counteract vibration. It was necessary as a matter of routine maintenance to inspect the bolts holding the counterweights in place. Alpha Diesel recommended that they should be checked and tightened every 5,000 engine hours. During a voyage, the engine sustained a major breakdown and the vessel was immobilized. It was later discovered that the cause of the engine seizure was one of the counterweights which had struck the connecting rod of the crankshaft. The cargo owners contended that the shipowner's employees had negligently failed to carry out the recommended steps for maintenance and that the shipowner had thus failed to exercise due diligence to make the vessel seaworthy as required by Article 3.1 of the Hague Rules. At first instance, Diamond J found the shipowner liable. The latter appealed by contending that the unseaworthiness of the vessel was caused by a latent defect not discoverable by due diligence. Staughton LJ held that what could be seen from the evidence was that there indeed existed a theoretical possibility that the bolts holding the counterweights might get loose after less than 5,000 running hours, and hence that the shipowner failed to demonstrate that the cause of the loss was a latent defect. See generally *ibid* at 210-215.

[534] See Karan, *Liability*, *supra* note 65 at 316. In some precedents, the following defects were treated as latent defect: a fracture of the web of a crankshaft, a poor design in a suction valve and a vice in the locking device of a rudderpost. See *The Toledo*, 1939 AMC 1300 at 1302 (NY Dist Ct 1939); *National Sugar Refining Co v M/S Las Villas*, 1964 AMC 1445 at 1448 (La Dist Ct 1964); *Tata Inc v Farrell Lines Inc*, 1987 AMC 1764 at 1770 (NY Dist Ct 1987). However, corrosion normally is not deemed as a latent defect because it develops so slowly that it may be detected in time, nor is tear and wear of hull or strike plate for the same reason. See *Itoh & Co Ltd v Atlantska Plovidba (The Gundulic)*, [1981] 2 Lloyd's Rep 418 at 421, 425 (QBDUK); *The Otho*, 1944 AMC 43 at 47 (2d Cir 1944); *The Walter Raleigh*, 1952 AMC 618 at 637 (NY Dist Ct 1952). See also Tetley, *Claims*, *supra* note 311 at 512.

Subparagraph 3 – Summary

The carrier's exemption from liability for loss or damage resulting from insurmountable defects of goods has long since been adopted in both civil law and common law. As early as the seventeenth century, the Great Ordinance of Marine granted carriers the entitlement to exoneration from liability for diminished price, spoilage or deterioration of goods arising from their inherent vices.[535] In common law, carriers habitually are not held liable for loss or damage caused by inherent vices of goods, even during the period when they were treated as "insurers" of goods in transit.[536] The adjective "insurmountable" has been used in the present paragraph to modify the defects falling within the scope of Article 4.2(m) of the Rules, but, strictly speaking, it shall be understood as "relatively insurmountable" because no loss or damage seems to be absolutely unavoidable as long as all kinds of preventive measures are exhausted.[537] There is no doubt that carriers are supposed to be sufficiently diligent and vigilant in taking care of goods in their custody, but it is apparently unfair to compel them to be responsible for loss or damage unpreventable by ordinary measures that may reasonably be required.[538] The ultimate objective of the immunity is to protect dutiful carriers from extra risks that should be borne by shippers or cargo owners who are aware of the

[535] Valin, *supra* note 71 at 635.
[536] Clarke, *Aspects*, *supra* note 74 at 119; Smith & Keenan, *supra* note 97 at 283.
[537] See David M Sassoon, "Damage Resulting from Natural Decay under Insurance, Carriage and Sale of Goods Contracts" (1965) 28 Mod L Rev 180 at 180.
[538] See Claude Chaïban, *Causes légales d'exonération du transporteur maritime dans le transport de marchandises: études en droit libanais, français et anglo-saxon* (Paris: Librairie générale de droit et de jurisprudence, 1965) at 235; Mackaay & Rousseau, *supra* note 341 at 385.

characters of their goods and still willing to subject them to ocean transportation.[539] In a nutshell, fairness is preserved in this exception.

The carrier's exemption from liability for loss or damage caused by latent defects of ships was, to a large degree, the result of the modernization of watercrafts. In the early age when the structures of ships were rather simple, a carrier was normally responsible for fixing all vices of his ship prepared for an intended voyage.[540] However, as the era of steamships came, it was realized that such responsibility imposed on carriers became quite heavy considering the ever-increasing complexity of ships.[541] As a result, by the end of the nineteenth century, there appeared in bills of lading clauses exonerating carriers from liability for loss or damage arising from latent defects of their ships.[542] In the context of Article 4.2(p) of the Hague Rules, the excusable defects of ships have been confined to those not discoverable by due diligence.[543] The concept of "due diligence" came into notice since the promulgation of the Harter Act in 1893.[544] At first, it denoted a very high standard of care that required carriers to do what was possible rather than

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539 See Lee A Hanford, "Erosion of the Carrier's Duty to Inspect and Care for Insufficiently Packed Cargo: Tenneco Resins, Inc. v. Davy International, AG." (1990) 15 Tul Mar LJ 141 at 145-146. See also Aref Fakhry, "Freezing Damage to Northern Sea Route Cargo: Liability and Insurance Consideration" (1998) 29 J Mar L & Com 123 at 128.

540 Chaïban, *supra* note 538 at 97.

541 *Ibid*.

542 Tetley, *Claims*, *supra* note 311 at 512.

543 It was argued that "latent" and "not discoverable by due diligence" had the same meaning. Thomas G Carver stated that the final words of Article 4.2(p) added nothing to what was already understood by the concept of "latent defects". See Carver, *supra* note 86 at 290. Diplock LJ said in *The Amstelslot* that the adjective "latent" was pleonastic as it had no other meanings than "not discoverable by due diligence". See *The Amstelslot*, [1963] 2 Lloyd's Rep 223 at 232, Diplock LJ (HL(Eng)) [*Amstelslot*].

544 See *Harter Act*, *supra* note 135 § 191. In fact, the concept appeared for the first time in the Liverpool Conference Form of 1882 that contained a reference to the "want of due diligence by the owners of the ship". See Sturley, *History 2*, *supra* note 232 at 62.

what was reasonable to prevent accidents.[545] In *Scottish Metropolitan Assurance Co v Canada Steamship Lines Ltd*, Greenshield J stated that "due diligence" might be construed as "the highest degree of diligence, or extraordinary diligence, or that which a very prudent person would exercise in the care of his own property, or in the management of his own affairs."[546] Nevertheless, judges have been increasingly apt to treat "due diligence" as nothing more than an ordinary duty of care.[547] In *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)*, Cresswell J said that "the exercise of due diligence is equivalent to the exercise of reasonable care and skill."[548] The concept of "due diligence" provides carriers with a basic and feasible code of conduct and, on the other hand, protection from burdensome liability for loss or damage caused by those defects of ships which are so hidden that an ordinarily prudent carrier is unable to detect them by devoting care and precautions that may reasonably be required of him.[549] The removal of the exception would impel carriers to employ more rigorous measures of inspectation and maintenance,[550] but it would not necessarily be of benefit to cargo interests as the increase in freight they would have to pay for safer transportation

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[545] See *Scottish Metropolitan Assurance Co v Canada Steamship Lines Ltd*, [1930] 1 DLR 201 at 214 (SC Can) [*Canada Steamship*]. See also William David Duncan & Samantha J Traves, *Due Diligence* (Sydney: LBC Information Services, 1995) at 5, 11, 16; *SPCC v Kelly*, (1991) 5 ACSR 607 at 620 (NSW L & Env Ct).

[546] *Canada Steamship*, *supra* note 545 at 214-215, Greenshield J. See also Linda S Spedding, *Due Diligence Handbook: Corporate Governance, Risk Management and Business Planning* (Amsterdam: CIMA, 2009) at 23-25.

[547] See *Footwear*, *supra* note 348 at 808; Sze, *supra* note 331 at 53. See also Martin Davies & Anthony Dickey, *Shipping Law*, 2d ed (Sydney: LBC Information Services, 1995) at 270; DA Butler & WD Duncan, *Maritime Law in Australia* (Sydney: Legal Books, 1992) at 83; MWD White, ed, *Australian Maritime Law* (Leichhardt: Federation Press, 1991) at 66; JF Wilson, "Basic Carrier Liability and the Right of Limitation" in Mankabady, *Hamburg*, *supra* note 57, 137 at 140.

[548] *Eurasian Dream*, *supra* note 347 at 723, Cresswell J. See also *Amstelslot*, *supra* note 543 at 230; *The Fjord Wind*, [2000] 2 Lloyd's Rep 191 at 200 (CAUK) [*Fjord Wind*]; *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakharov)*, [2000] 2 Lloyd's Rep 255 at 266 (CAUK) [*Kapitan Sakharov*].

[549] See Clarke, *Aspects*, *supra* note 74 at 206-207.

[550] See Tetley, *Claims*, *supra* note 311 at 372.

services would probably exceed the reduction in losses due to such improvement.[551] To make matters worse, both the shipowning and cargo-owning sides would have to endure inefficiency of transactions as a great deal of time would be consumed in precautions.[552] Therefore, the exception contained in Article 4.2(p) of the Hague Rules is justifiable in terms of jurisprudence and economics.

Paragraph 4 – Exemption from liability for loss or damage resulting from unseaworthiness irreparable by due diligence

There is a complementary relationship between Article 3.1 and Article 4.1 of the Hague Rules.[553] The former obliges carriers to exercise due diligence before and at the beginning of voyage to make their vessels seaworthy,[554] while the latter provides for the carrier's exoneration from liability for loss or damage arising from unseaworthiness irreparable by due diligence.[555]

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[551] From an economic perspective, precautions should be taken to the point that the avoidance costs paid for a precaution are less than the reduction in damage due to such precaution. Otherwise, the precaution should be viewed economically inappropriate. See Hans-Bernd Schäfer & Claus Ott, *The Economic Analysis of Civil Law* (Cheltenham: Edward Elgar, 2004) at 114-115.

[552] See generally Robert Cooter, "Unity in Tort, Contract, and Property: The Model of Precaution" (1985) 73 Cal L Rev 1 at 16-18; Peter Diamond, "Integrating Punishment and Efficiency Concerns in Punitive Damages for Reckless Disregard of Risks to Others" (2002) 18 JL Econ & Org 117 at 125.

[553] See Aikens, Lord & Bools, *supra* note 458 at para 10.196.

[554] *Hague Rules*, *supra* note 205, art 3.1. Article 3.1 provides that:

> 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 carried, fit and safe for their reception, carriage and preservation.

[555] *Ibid*, art 4.1. Article 4.1 provides that:

> Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of

Providing a seaworthy ship is a basic obligation for a carrier undertaking to transport goods from one place to another.[556] As to the meaning of seaworthiness, Erle J said in *Gibson v Small* that:

> Seaworthiness … expresses a relation between the state of the ship and the perils it has to meet in the situation it is in; so that a ship, before setting out on voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage.[557]

In *Kopitoff v Wilson*, Field J gave a similar opinion suggesting that a seaworthy ship should be "fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage."[558] In a more recent case, Staughton J added that:

> [T]he word "seaworthy" in the Hague Rules is used in its ordinary meaning, and not in any extended or unnatural meaning. It means that the vessel – with her master and crew – is herself fit to encounter the perils of the voyage and also that she is fit to carry the cargo safely on that voyage.[559]

Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.

[556] See *Lyon v Mells*, (1804) 102 ER 1134 at 1137 (KBD) [*Lyon*]; *Gibson v Small*, (1853) 10 ER 499 at 506-507 (HL(Eng)) [*Gibson*]. See also *Muncaster Castle*, *supra* note 529 at 866-867; *Henry Kendall & Sons v William Lillico & Sons Ltd*, [1966] 1 WLR 287 at 340 (CAUK); *McFadden v Blue Star Line*, [1905] 1 KB 697 at 703 (UK) [*McFadden*]; Ridgway K Foley, Jr., "A Survey of the Maritime Doctrine of Seaworthiness" (1967) 46 Or L Rev 369 at 371-372.

[557] *Gibson*, *supra* note 556 at 512, Erle J. See also *Dixon v Sadler*, (1839) 5 M & W 405 at 408 (KBDUK); *Elder Dempster & Co Ltd v Paterson Zochonis & Co Ltd*, [1924] AC 522 at 539 (HL(Eng)); *Texas & Gulf SS Co v Parker*, 263 F 864 at 870 (5th Cir US 1920).

[558] *Kopitoff v Wilson*, (1876) 1 QBD 377 at 380, Field J (UK) [*Kopitoff*].

[559] *Empresa Cubana Importada de Alimentos Alimport v Iasmos Shipping Co SA (The Good Friend)*, [1984] 2 Lloyd's Rep 586 at 592, Staughton J (QBDUK). See also *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)*, [1982] 1 WLR 119 at 123 (CAUK); *Bunga Seroja*, *supra* note 92 at 515.

Whether a ship is seaworthy or not has to be determined on a case-by-case basis and in the light of various factors,[560] such as the nature of the adventure,[561] the type of the goods on board,[562] the time of the voyage,[563] the physical state of the ship,[564] the route to be followed,[565] etc. It was in order to compensate for the failure to prescribe in a legal instrument any specific technical requirements for the performance of the duty of seaworthiness that the concept of "due diligence" was created.[566] The understanding on the degree of care suggested by this concept has undergone dramatic changes, from the very outset when carriers were required to exercise far more than reasonable care to the latest phase when "due diligence" has been thought to signify nothing more than an ordinary duty of care.[567]

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[560] Professor Guy Lefebvre remarked that:

> La notion de navigabilité comprend deux conceptions. D'abord, nous trouvons une conception nautique impliquant que le bâtiment doit non seulement pouvoir naviguer dans des conditions climatiques hostiles, sans qu'elles engendrent une voie d'eau dans la coque, mais aussi être équipé de moyens de propulsion et d'apparaux appropriés. De plus, il faut que l'on retrouve à bord un équipage suffisant et compétent. Par ailleurs, le chargeur ne se satisfait guère de ces qualités relatives à la sécurité et à l'achèvement du voyage. Il est également intéressé par la capacité du navire à transporter les marchandises: la conception commerciale de la navigabilité. En conséquence, l'armateur doit veiller au bon état des cales, des chambres froides et frigorifiques et des autres parties du navire où des marchandises sont chargées.

It is usually not easy to make a judgement on seaworthiness of a ship as both the nautical aspect and the commercial aspect have to be taken into account. See Guy Lefebvre, "L'obligation de navigabilité et le transport maritime sous connaissement" (1990) 31 C de D 81 at 85-99. See also Dewey R Villareal, Jr., "The Concept of Due Diligence in Maritime Law" (1971) 2 J Mar L & Com 763 at 768; Williams, *supra* note 139 at 526; Abell, *supra* note 293 at 126; *Kopitoff*, *supra* note 558 at 380-381; *Bunga Seroja*, *supra* note 92 at 517; *Hedley v Pinkney & Sons Steamship Co Ltd*, [1892] 1 QB 58 at 63 (UK); *Burges v Wickham*, (1863) 3 B & S 669 at 674, 677 (KBDUK).

[561] *Ibid* at 674.

[562] *Ibid*.

[563] *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd*, [1940] AC 997 at 1405 (HL(Eng)).

[564] Scrutton, *supra* note 94 at 51. See also Butler & Duncan, *supra* note 547 at 66; White, *supra* note 547 at 73.

[565] *Artemis Maritime Co v Southwestern Sugar & Molasses Co*, 1951 AMC 1833 at 1845 (4th Cir 1951).

[566] See *Steel v State Line Steamship Co*, (1877) 3 App Cas 72 at 77 (CAUK) [*Steel*].

[567] The traditional concept of "*culpa levis*" in civil law suggested that a carrier for rewards had to exercise "*exacta diligentia*" instead of mere "reasonable care" or care ordinarily shown by a person in the management of his own affairs. See William L Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (Holmes Beach: Wm W Gaunt & Sons, 1989) at 415; WW Buckland & Peter Stein, *A Text-book of Roman Law from Augustus to Justinian*, 3d ed (Cambridge: Cambridge University Press, 1963) at 556. More recent theories suggested that due diligence "ne

According to Article 4.1 of the Hague Rules, the exercise of due diligence by carriers may release themselves from liability for loss or damage caused by unseaworthiness. Professor René Rodière commented that:

> L'innavigabilité s'efface derrière la preuve que le transporteur a fait diligence. … La solution procède de ce qui est pour nous une confusion des genres car elle introduit une obligation de moyens dans ce qui nous paraît une obligation de résultat. Notre dogmatisme est en échec; cela ne signifie pas que la solution soit mauvaise. C'est une règle de transaction. L'innavigabilité établie qui devrait accabler le transporteur paraît le libérer. Ainsi énoncée, la règle semble absurde, mais ce qui le libère en réalité c'est la preuve complémentaire qu'il a fait diligence. L'innavigabilité autorise cette preuve et la rend pertinente.[568]

This article is similar in nature to Article 4.2(p) entitling carriers to exemption from liability for loss or damage arising from latent defects of their ships not discoverable by due diligence,[569] though they are not exactly the same.[570] As has been discussed in the preceding paragraph, it would be harsh and unprofitable to impose upon carriers the duty to employ every possible precaution to make their ships seaworthy.[571] The concept of "due diligence" serves as a reasonable boundary between blameworthy carriers and

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s'agit pas d'une diligence méticuleuse et extraordinaire", that it "ne s'agit que d'une diligence normale moyenne exigible de tout transporteur soigneux", and that it should signify "une diligence raisonnable, moyenne, à la portée de toute personne normalement douée, zélée et diligente." After a few minor adjustments, a maturer definition has been put forward and prevails. It states that due diligence "n'est pas une diligence méticuleuse et extraordinaire mais une diligence convenable, normale, appropriée, requise, voulue, raisonnablement nécessaire, un ensemble de soins et de précautions qu'on peut logiquement demander à un transporteur normalement soigneux et sérieux." See Clarke, *Aspects*, *supra* note 74 at 205-206.

[568] Rodière & du Pontavice, *supra* note 68 at 254-255.

[569] See Clarke, *Aspects*, *supra* note 74 at 153. See also MD Prodromidès, *Des restrictions légales à la responsabilité des propriétaires de navires à raison des actes et des faits du capitaine et des gens de l'équipage* (Paris: Jouve, 1919) at 136.

[570] For example, it has been argued that there is a difference between Article 4.2(p) and Article 4.1 with regard to burden of proof. Carriers intending to rely on Article 4.2(p) are not bound to prove that they have exercised due diligence to examine defects but have to prove that those defects in question cannot be discovered by a prudent carrier. Karan, *Liability*, *supra* note 65 at 316.

[571] See Clarke, *Aspects*, *supra* note 74 at 206-207.

forgivable ones.[572] On the one hand, it provides carriers with a code of conduct to follow and, on the other, it liberates them from excessively heavy responsibilities. It is not absurd that a carrier is absolved from liability if he has done what could reasonably be required of him.[573] Furthermore, Article 4.1 of the Rules provides that the burden of proving that due diligence has been exercised is placed on carriers pleading unseaworthiness as a defense.[574] Such arrangement poses no problem of fairness because it is in line with a general principle of evidence law that burden of proof shall lie on the party asserting a state of affairs,[575] and carriers are mostly in an overwhelmingly better position to produce evidence relating to the exercise of due diligence.[576]

Paragraph 5 – Catch-all exception

The final provision of Article 4.2 of the Hague Rules is better known as the catch-all exception, which was described in a less favorable way by John Richardson as "the last resort of the rogue".[577] It provides carriers with a backup option in defending cargo claims when they are unable to rely on other specific immunities.[578] It may be successfully invoked only if the person claiming the benefit of this exception can prove

[572] See Sarah C Derrington, "Due Diligence, Causation and Article 4(2) of the Hague-Visby Rules" (1997) 3 International Trade and Business Law Annual 175 at 177-178.
[573] See *Fjord Wind*, *supra* note 548 at 197, 199.
[574] Girvin, *Carriage*, *supra* note 53 at para 26.29.
[575] See e.g. *Lindsay v Klein*, [1911] AC 194 at 203 (HL(Eng)) [*Lindsay*].
[576] See O'Hare, "Risks", *supra* note 221 at 138.
[577] Richardson, *supra* note 284 at 39.
[578] Girvin, *Carriage*, *supra* note 53 at para 28.46.

that the cause of loss or damage, though not covered by those named exceptions, is neither the carrier's fault nor the fault on the part of his servants or agents.[579]

"Actual fault or privity" on the part of carriers has been roughly mentioned in the part of the fire exception. These words represent a direct nexus between carriers and the acts or omissions giving rise to cargo loss or damage.[580] Theoretically, fault can be divided, in terms of its seriousness, into intention and negligence,[581] but such classification is of no importance, within the context of the Hague Rules, in determining whether a carrier shall be held liable.[582] There are two theories used to test whether a carrier is at fault in his performance of contract, namely the subjective theory and the objective theory. The former claims that a carrier is blameworthy, should he fail to prevent loss or damage that could have been foreseen and avoided by him in the light of

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[579] *Hague Rules*, *supra* note 205, art 4.2(q).

[580] See Williams, "Recklessness", *supra* note 356 at 254. However, the fault or privity does not have to be the direct or physical cause of the loss or damage as long as some casual relation is established. See *Frank Hammond Pty Ltd v Huddart Parker Ltd & the Australian Shipping Board*, [1956] VLR 496 at 503-504 (Sup Ct).

[581] See PJ Cooke & David W Oughton, *The Common Law of Obligations*, 2d ed (London: Butterworths, 1993) at 171-173. See also Thomas R Shultz & Kevin Wright, "Concepts of Negligence and Intention in the Assignment of Moral Responsibility" (1985) 17 Canadian Journal of Behavioural Science 97 at 101-103; Frederick Henry Lawson, ed, *Negligence in the Civil Law: Introduction and Select Texts* (Oxford: Clarendon Press, 1968) at 56.

[582] The classification is important under the Visby Protocol in determining whether the carrier is able to enjoy the limitation of liability. See *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, 23 February 1968, 1412 UNTS 127, arts 2(a), 2(e) [*Visby Protocol*]. Article 2(a) of the Protocol provides that:

> Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

Article 2(e) of the Protocol provides that:

> Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

his state;[583] while the latter declares that the fault of a carrier shall be affirmed if his act veers from that of a hypothetical prudent third party.[584] The substantial difference between them is that the subjective theory focuses on carriers per se, while the objective theory sets as standard an imaginary reasonable carrier conducting the management and control of his vessel in similar circumstances.[585] At present, the objective theory prevails largely because it is quite difficult to take into account all personal features of a carrier required by the subjective theory in an investigation into his fault.[586] In *Arthur Guinness, Son & Co (Dublin) Ltd v Owners of the Motor Vessel Freshfield (The Lady Gwendolen)*, Willmer LJ stated that "the test to be applied in judging whether shipowners have been guilty of actual fault must be an objective test."[587] However, the subjective theory should not be totally disregarded especially in cases relating to "privity" where the knowledge and consent of a carrier must be examined.[588] "Privity" is not equivalent to "willful misconduct",[589] as it rather contains the meaning of "turning of a blind eye".[590] The implication of "actual fault or privity" was expounded in *Union Steamship Co of New Zealand Ltd v James Patrick & Co Ltd* by Dixon J who contended that:

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583 See R Martin, "Categories of Negligence and Duties of Care: Caparo in the House of Lords" (1990) 53 Mod L Rev 824 at 824.

584 Karan, *Liability*, *supra* note 65 at 278.

585 See *Lady Gwendolen*, *supra* note 315 at 346; *Northern Fishing Co (Hull) Ltd v Eddom (The Norman)*, [1960] 1 Lloyd's Rep 1 at 11 (HL(Eng)) [*Norman*].

586 Karan, *Liability*, *supra* note 65 at 278-279.

587 *Lady Gwendolen*, *supra* note 315 at 346, Willmer LJ.

588 See *Wood v Associated National Insurance Co Ltd (The Isothel)*, [1984] 1 QR 507 at 530 (SC) [*Wood*]; *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes)*, [1976] 2 Lloyd's Rep 171 at 179 (CAUK).

589 See *ibid*.

590 See *Wood*, *supra* note 588 at 530. See also Patrick Griggs, "Limitation of Liability for Maritime Claims: the Search for International Uniformity" (1997) 24 LMCLQ 369 at 372; Arthur M Boal, "Efforts to Achieve International Uniformity of Law Relating to the Limitation of Shipowners' Liability" (1978) 53 Tul L Rev 1277 at 1281.

> Actual fault or privity implies some culpability on the part of the [shipowner]. It may consist in being privy to the neglect, unskillfulness, 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 in respect of an act or omission on his own part or of his privity to the act or omission of someone else. A failure to make himself aware of what he ought to know is or may be an actual fault. To limit his liability he must show that he himself has not in any such manner been blameworthy in respect of a cause of the loss or damage …[591]

Article 4.2(q) of the Hague Rules literally provides that the carrier shall be excluded from liability for loss or damage resulting from any other cause arising without the actual fault or privity of the carrier OR without the actual fault or neglect of his agents or servants, but the "OR" should be construed as "and".[592] Therefore, the exception is valid only if not just the carrier himself but also his servants or agents are not at fault in the occurrence of loss or damage.[593] Fault on the part of a carrier's servants or agents may deprive the carrier of his entitlement to such immunity, as he is presumed to be responsible for their acts or omissions insofar as they assist him in performing his contractual obligations.[594] In *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd (The Chyebassa)*, the brass cover plate of a storm valve was stolen at an intermediate port by a stevedore and sea water consequently entered the vessel and

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591 *James Patrick*, *supra* note 314 at 670, Dixon J.

592 See *Hourani*, *supra* note 329 at 125-126; *Paterson*, *supra* note 86 at 550; *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd (The Chyebassa)*, [1966] 1 Lloyd's Rep 450 at 460-461 (QBDUK) [*Chyebassa*].

593 Aikens, Lord & Bools, *supra* note 458 at para 10.259.

594 Karan, *Liability*, *supra* note 65 at 283.

damaged some goods.[595] The shipowners were exonerated from liability by pleading Article 4.2(p).[596] Sellers LJ explained that:

> [I]n the present case the act of the thief ought, I think, to be regarded as the act of a stranger. The thief in interfering with the ship and making her, as a consequence, unseaworthy, was performing no duty for the shipowner at all, neither negligently, nor deliberately, nor dishonestly. He was not in fact their servant … The [shipowners] were only liable for his acts when he, as a servant of the stevedores, was acting on behalf of the [shipowners] in the fulfillment of the work for which the stevedores had been engaged.[597]

The exception is regarded as the last resort of carriers seeking to be excused from liability when none of the other immunities may apply, but it was rarely invoked with success for the reason that few carriers were able to discharge the burden of proof placed upon them.[598] According to Article 4.2(q) of the Rules, the exception only benefits those carriers who can prove that loss or damage is attributable to neither their actual fault or privity nor fault or neglect on the part of their servants or agents, and it is neutralized even if there is merely a slight degree of such fault.[599] In *Pendle & Rivet v Ellerman Lines* where the goods in a case were found missing at the time of unloading, the court held that the carrier was unable to plead the catch-all exception, because he failed to refute the evidence adduced by the claimant showing that those goods had truly been

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595 See generally *Chyebassa*, *supra* note 592.

596 See *ibid* at 470.

597 *Chyebassa*, *supra* note 592 at 472, Sellers LJ. The catch-all exception was thought to be inapplicable in other theft-related cases where pilferage was committed by the carrier's servants, by a confederate of the carrier's servants, or by some employees of the firm of stevedores engaged by the carrier to discharge the goods. See generally *Hourani*, *supra* note 329 at 135; *Heyn v Ocean Steamship Co Ltd*, (1927) 27 Ll LR 334 at 345 (KBDUK) [*Heyn*].

598 Richardson, *supra* note 284 at 33; Aikens, Lord & Bools, *supra* note 458 at para 10.257.

599 Marel Katsivela, "Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague/Visby Rules" (2010) 40 RGD 413 at 428-429.

consigned to him for shipment.[600] Nevertheless, there have been some classic cases in which Article 4.2(q) did help carriers to escape liability. For instance, in *Goodwin, Ferreira & Co Ltd v Lamport & Holt Ltd*, some bales of cotton yarn were damaged by sea water in the lighter where they were carried, because another cargo had fallen out of its packing case and holed the lighter.[601] The shipowners were eventually freed from liability after having convinced the court that the damage was caused by another cargo that had been insecurely nailed prior to the voyage and not attributable to their own fault or fault on the part of their servants or agents.[602]

The preceding paragraphs have dealt with the carrier's exemption from liability for loss or damage resulting from intervention of natural forces or third parties, fault on the part of cargo interests, insurmountable defects of goods or ships, and unseaworthiness irreparable by due diligence. The essential similarity of those immunities consists in the absence of fault on the part of shipowning interests in the occurrence of loss or damage. Article 4.2(q) acts as a necessary complement to those specific defenses approached in the present section and, more importantly, perfectly summarizes and highlights the notion of fault liability that is embodied in most provisions of Article 4.2 of the Hague Rules. The catch-all exception may appear somewhat superfluous, as it repeats the essence of

[600] See *Pendle & Rivet v Ellerman Lines*, (1928) 33 Com Cas 305 at 311-312 (HL(Eng)).
[601] See generally *Goodwin, Ferreira & Co Ltd v Lamport & Holt Ltd*, (1929) 34 Ll LR 192 (KBDUK).
[602] See *ibid* at 196.

most specific immunities in the Rules,[603] but its real significance lies in the restatement of the general basis on which the carrier's liability regime of the Rules has been built.[604]

Fault liability is quite different from strict liability that prevailed for a long time prior to the late nineteenth century in the field of the carriage of goods by sea.[605] In general terms, liability is deemed strict when it attaches to us by virtue of our conduct and its outcome alone, irrespective of fault.[606] It is typically imposed on those pursuing permissible but dangerous activities, such as storing explosives, running nuclear power stations, keeping wild animals, marketing drugs or other dangerous products, driving cars, etc.[607] The biggest difference between the two regimes is that fault liability depends on subjective blameworthiness while strict liability does not.[608]

Traditionally, contractual liability is classified as strict liability.[609] The famous maxim "*pacta sunt servanda*" has led to the stereotype that contracts must be kept and that obligors are liable for any damage caused by breach of contract even if they are not

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603 Sze, *supra* note 331 at 88.
604 *Ibid*.
605 See Clarke, *Aspects*, *supra* note 74 at 113-117; Gilmore & Black, *supra* note 171 at 139-140; Hellawell, "Allocation", *supra* note 106 at 357.
606 Honoré, *supra* note 499 at 23.
607 *Ibid*. See also Frank J Vandall, *Strict Liability: Legal and Economic Analysis* (New York: Quorum Books, 1989) at 36. For instance, in German law, strict liability principally applies to issues in connection with road, rail and air traffic, energy plants, medical products, gene technology, environmental damage, etc. Strict liability in German law has four structural characteristics: (a) liability is attached in general to named domains of activities that are related to particular constructions, facilities, plant, or work; (b) liability is attached in general to injury to life or personal property; (c) compensation is generally limited or capped; and (d) liability is generally excluded for some particular causes of damage. See Schäfer & Ott, *supra* note 551 at 164-165. See also Richard A Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability* (Chicago: American Bar Foundation, 1974) at 57-60.
608 See Coleman, *supra* note 480 at 212.
609 See Curtis Bridgeman, "Reconciling Strict Liability with Corrective Justice in Contract Law" (2006) 75 Fordham L Rev 3013 at 3016.

at fault.[610] Professor E. Allan Farnsworth stated that "contract law is, in its essential design, a law of strict liability, and the accompanying system of remedies operates without regard to fault."[611] Nevertheless, his statement and many similar ones now appear quite arguable because the concept of fault has penetrated contract law in a remarkable manner.[612] Here follow two examples respectively extracted from the civil law system and the common law system. In the new German Civil Code that underwent a fundamental reform in 2002, the breaching party is responsible, absent a provision to the contrary, for any nonconformity with the contract unless he is able to prove that no fault can be imputed to him;[613] according to the U.S. Restatement (Second) of Contracts, the adversely affected party is barred from resorting to the unexpected-circumstance excuse if his fault has contributed to the occurrence of the event impeding the performance of the contract.[614] The concept of fault has reshaped, to some extent, the language and

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[610] Melvin Aron Eisenberg, "The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance" in Ben-Shahar & Porat, *supra* note 500, 82 at 82. See also Saul Levmore, "Stipulated Damages, Super-Strict Liability, and Mitigation in Contract Law" (2009) 107 Mich L Rev 1365 at 1368.

[611] E Allan Farnsworth, *Farnsworth on Contracts*, 3d ed (New York: Aspen Publishers, 2004) at 195-196 [Farnsworth, *Contracts*].

[612] Eisenberg, *supra* note 610 at 82.

[613] Stefan Grundmann, "The Fault Principle as the Chameleon of Contract Law: A Market Function Approach" in Ben-Shahar & Porat, *supra* note 500, 35 at 38. See also Hugh G Beale et al, eds, *Cases, Materials and Text on Contract Law* (Oxford: Hart Publishing, 2002) at 659-663; Basil Markesinis, Hannes Unberath & Angus Charles Johnston, *The German Law of Contract: A Comparative Treatise*, 2d ed (Oxford: Hart Publishing, 2006) at 444-451; *German Civil Code*, 2002, ss 276, 280.1. Section 276 of the Code provides that:

> (1) The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation … (2) A person acts negligently if he fails to exercise reasonable care …

Section 280.1 of the Code provides that:

> If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.

[614] See e.g. *Restatement (Second) of Contracts* §§ 261, 265, 266.1 (1981). §261 (Discharge by Supervening Impracticability) provides that:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was

architecture of modern contract law. Accordingly, the traditional position of strict liability in this field has been noticeably shaken.[615]

The softening of contractual liability has been projected in the domain of contract of carriage. Carriers used to be subject to strict liability, the justification for which was well explained in *Riley v Horne*:

> When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their master and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer.[616]

However, strict liability imposed on carriers had been on the decline since the sixteenth century when fault liability was budding and collapsed in the nineteenth century

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made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

§ 265 (Discharge by Supervening Frustration) provides that:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

§ 266.1 (Existing Impracticability or Frustration) provides that:

> Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.

[615] George M Cohen, "How Fault Shapes Contract Law" in Ben-Shahar & Porat, *supra* note 500, 53 at 61. See also Eric A Posner, "Fault in Contract Law" in Ben-Shahar & Porat, *supra* note 500, 69 at 69-70. Barry Nicholas argued that "[f]ault is … absent from the conventional common law conception of liability for breach of contract only because it is in substance incorporated in the meaning of 'contract'". Barry Nicholas, "Fault and Breach of Contract" in Jack Beatson & Daniel Friedmann, eds, *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) 337 at 345.

[616] *Riley*, *supra* note 86 at 220.

when carriers began to insert in bills of lading all kinds of exculpatory clauses.[617] In the renowned Harter Act promulgated by the U.S. in the early twentieth century to redress the heavily impaired balance of interests between the shipowning and cargo-owning sides, the carrier's liability was connected to fault, though in a less obvious way.[618] The Act had an enlightening impact on the Hague Rules in which the connection was made much clearer. As the Rules have been accepted and adopted by a number of countries, the spirit of fault liability has spread.[619]

At times, strict liability penalizes not wrongful acts but sheer bad luck.[620] It worked well in early times,[621] but it now becomes questionable as it places carriers at an evident disadvantage. In contrast, fault liability is more reasonable as it is touched off only if someone is truly blameworthy.[622]

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[617] See Holdsworth, *supra* note 80 at 100. See also Miquel Martín-Casals, *The Development of Liability in Relation to Technological Change* (Cambridge: Cambridge University Press, 2010) at 12.

[618] The Harter Act did not provide that the carrier should be strictly liable for cargo loss or damage, nor did it provide in a quite explicit fashion that the carrier should be liable for cargo loss or damage resulting from his fault. Nonetheless, Section One of the Act forbade clauses in bills of lading relieving the carrier from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of lawful merchandise or property committed to his charge, with the implication that the carrier had to be responsible for his negligence, fault, or failure in dealing with these matters. See *Harter Act*, *supra* note 135 § 190.

[619] See Sweeney, "Anniversary", *supra* note 122 at 29-30. Fault liability has been established in numerous national statutes relating to carriage of goods by sea, such as the U.S. Carriage of Goods by Sea Act, the Marine Liability Act of Canada, the Maritime Code of China, etc. See *Carriage of Goods by Sea Act*, 46 USC Appx c 28 (2006) [*COGSA 2006*]; *Marine Liability Act*, SC 2001, c 6, s 43; *Maritime Code of the People's Republic of China*, 1993, art 51.

[620] Honoré, *supra* note 499 at 23-24.

[621] See Clarke, *Aspects*, *supra* note 74 at 117-118; Marais, *supra* note 405 at 130.

[622] See Coleman, *supra* note 480 at 217-219. Compare RW Baker, "An Eclipse of Fault Liability" (1954) 40 Va L Rev 273 at 279-281.

Section 3 – Particular immunities

Aside from the immunities already examined in the first two sections, there are some other provisions dispensing in the Hague Rules and entitling carriers to exemption from liability under certain circumstances. They are classified as "particular immunities" instead of being included in the preceding categories because the rationales for them may not be fully explained within the ambit of the doctrine of fault liability.

Paragraph 1 – Exceptions relating to salvage and reasonable deviation

The salvage exception and the reasonable deviation exception are respectively stipulated in Article 4.2(l) and Article 4.4 of the Hague Rules. Although the former is part of the "laundry list", it is inappropriate to include it in either of the two preceding sections and it has a close connection with the latter, so they are discussed together in the present paragraph.

According to Article 4.2(l), carriers are not responsible for loss or damage resulting from "[s]aving or attempting to save life or property at sea."[623] The precondition for salvage is that there must have been a hazard threatening life or property at sea.[624] The hazard may be actual or imminent, but it has to be sufficiently severe.[625] In the context of Article 4.2(l), salvage of life and salvage of property are equivalent in relieving carriers

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623 *Hague Rules*, *supra* note 205, art 4.2(l).
624 Karan, *Liability*, *supra* note 65 at 311.
625 *Ibid*. See also Enrico Vincenzini, *International Salvage Law* (London: Lloyd's of London Press, 1992) at 46-47; Steven F Friedell, "Salvage" (2000) 31 J Mar L & Com 311 at 333-335.

from liability.[626] Such equal treatment is meaningful, as it is normally hard to differentiate between acts for saving life and those for saving property during an emergency and any discriminative treatment may bring about the hesitation of potential salvors that may be fatal at times.[627] It is also worthwhile to note that "saving" and "attempting to save" have the same effect as a defense. In other words, carriers are still allowed to invoke Article 4.2(l) even if they try to save life or property but fail.[628]

Except for the overlap of the scopes of Article 4.2(l) and Article 4.4 where the cause of loss or damage is deviation in saving or attempting to save life or property,[629] the boundary between the two exceptions is basically clear. Article 4.2(l) applies to salvage no matter whether deviation is involved, while Article 4.4 applies to deviation on any reasonable grounds including salvage.[630]

In continental law, carriers wishing to establish the legitimacy of a deviation are usually required to prove that it is not voluntary but forced and that its purpose is to avoid

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[626] A literal interpretation of "saving or attempting to save life" suggests that the exception only applies where the persons rescued were in mortal danger, but this approach is unduly restrictive because the salvage can sometimes be directed at subjects who are seriously ill or injured. However, acts taken merely to mitigate the inconvenience of the party "rescued" would not fall within the exception. Some constraints of proportionality should be applied in the case of saving property. Saving or attempting to save property of trivial value should not be the justification for acts causing damage to goods on board of greater value. See Aikens, Lord & Bools, *supra* note 458 at paras 10.243-10.244.

[627] Richardson, *supra* note 284 at 32.

[628] See Karan, *Liability*, *supra* note 65 at 312.

[629] Richardson, *supra* note 284 at 32; *Hague Rules*, *supra* note 205, art 4.4. Article 4.4 provides that:

> 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.

[630] See *Scaramanga v Stamp*, (1880) 5 CPD 295 at 307 (CAUK); Smith & Keenan, *supra* note 97 at 288; Todd, *Cases*, *supra* note 102 at 147.

a danger, such as a blockade, a storm, etc.[631] In Anglo-Saxon customary law, carriers are entitled to exemption from liability for loss or damage arising from deviation for saving human life, avoiding a danger, or even curing the bad navigability of a vessel.[632] The diversity of excusable deviations has been remarkably expanded in Article 4.4 of the Rules. Atkin LJ stated in *Stag Line Ltd v Foscolo Mango & Co Ltd* that:[633]

> A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what … a prudent person controlling the voyage at the time [might do], having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive.[634]

Reasonable deviations may include those for preventing ships and goods from being seized in wartime,[635] avoiding storms, quarantine restrictions or strike-bound ports,[636]

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631 Chaïban, *supra* note 538 at 140.

632 *Ibid* at 142-144. See also Eberhard P Deutsch, "Deviation under the Carriage of Goods by Sea Act" (1941) 21 Or L Rev 365 at 368; HS Morgan, Jr., "Unreasonable Deviation under COGSA" (1977) 9 J Mar L & Com 481 at 485.

633 In this case, a cargo of coal was carried from Swansea to Constantinople. The ship was equipped with a heating apparatus designed to make use of the heat otherwise wasted as steam. As the apparatus was not working well, the shipowners arranged for some engineers to undertake certain tests during the voyage. The tests were not carried out as planned. The ship was obliged to make a detour to St Ives to land the engineers. Then the ship navigated along the coast of Cornwall and ran aground. Both the vessel and the cargoes carried thereon were totally lost. The shipowners argued that the deviation was reasonable and was not an infringement of the contract of carriage. Lord Atkin concluded that after the ship left St Ives, the course set by the master was not the correct course which should ordinarily have been set in those circumstances. The small extra risk to the ship and cargoes caused by the deviation to St Ives was vastly increased by the subsequent course. Therefore, the shipowners were unable to rely on the exception of reasonable deviation to escape their liability. See generally *Stag Line Ltd v Foscolo Mango & Co Ltd*, [1932] AC 328 (HL(Eng)) [*Stag Line*]. See also *Thiess Bros (Queensland) Pty Ltd v Australian Steamships Pty Ltd*, [1955] 1 Lloyd's Rep 459 at 478 (NSWSC).

634 *Stag Line*, *supra* note 633 at 343-344, Atkin LJ.

635 See Karan, *Liability*, *supra* note 65 at 321.

having ships repaired,[637] conveying a patient on board to hospital,[638] taking on bunkers,[639] etc. A deviation may be deemed unreasonable if its purpose is to load or unload goods or passengers,[640] land or take on board people of little importance,[641] take on bunkers for the next voyage,[642] avoid fictitious risks,[643] etc.

The exception of salvage and the exception of deviation for salvage both aim to encourage carriers to save life or property in danger.[644] The circumstances covered by the words "any reasonable deviation" are complex, but it has been established that deviations solely in the interest of shipowners do not constitute a valid defense.[645] In other words, the deviations having the effect of exoneration are basically those made merely in the interest of cargo owners, in the joint interest of shipowners and cargo owners, or in the direct interest of neither.[646] The exception of deviation contained in Article 4.4 encourages carriers, in the first two cases, to take measures to protect cargo owners from sustaining potential or greater damages and, in the last case, to defend

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636 See *ibid*.

637 See *The Daffodil B*, [1983] 1 Lloyd's Rep 498 at 512 (QBDUK).

638 See Theodora Nikaki, "The Quasi-Deviation Doctrine" (2004) 35 J Mar L & Com 45 at 52; David M Sassoon & John C Cunningham, "Unjustifiable Deviation and the Hamburg Rules" in Mankabady, *Hamburg*, *supra* note 57, 167 at 172.

639 See *Lyric Shipping Inc v Intermetals Ltd (The Al Taha)*, [1990] 2 Lloyd's Rep 117 at 130 (QBDUK).

640 See *COGSA 2006*, *supra* note 619, § 1304.4. Section 1304.4 provides that:

> 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 chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom … however … if the deviation is for the purpose of loading or unloading cargo or passengers it shall, *prima facie*, be regarded as unreasonable.

641 See *Stag Line*, *supra* note 633 at 342.

642 See *The Macedon*, [1955] 1 Lloyd's Rep 459 at 470 (QBDUK).

643 See *The Ruth Ann*, 1962 AMC 117 at 137 (PR Dist Ct 1962).

644 See Karan, *Liability*, *supra* note 65 at 310-313.

645 See *International Drilling Co v M/V Doriefs*, 1969 AMC 119 at 127 (Tex Dist Ct 1969); *Dow Chemical Pacific Ltd v Rascator Maritime SA*, 1986 AMC 1445 at 1457 (2d Cir 1986).

646 See *Stag Line*, *supra* note 633 at 343-344.

certain interests of much significance that appear relevant to neither of the two sides. The idea that an interest may be sacrificed for protecting another one of greater value has been introduced into different subdivisions of law. For example, in criminal law, a person is not liable for the damage he has caused while averting in an emergency an immediate danger to the interests of the state or the public;[647] in counter-terrorism law, the authorities are allowed to infringe on citizens' liberties with a view to uncovering and preventing potential terrorist activities;[648] in investment law, a number of countries still retain the power of the authorities to nationalize foreign investors' assets for national benefits,[649] etc. Analogically, the legitimacy of such sacrifice is acknowledged in Article 4.4 of the Hague Rules.[650]

The actions of carriers covered by Articles 4.2(l) and 4.4 of the Rules can be divided into two categories: those taken in the interest of cargo owners and those taken in the interest of outsiders. Carriers shall not be held liable for loss or damage resulting from the first category of actions because it is unfair to permit cargo owners, beneficiaries of such actions, to claim damages from carriers having helped them to avoid sustaining greater losses. The exception associated with the second category has been designed to

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[647] See e.g. *Criminal Law of the People's Republic of China*, 1997, art 21. Article 21 provides that:
> If a person is compelled to commit an act in an emergency to avert an immediate danger to the interests of the State or the public, or his own or another person's rights of the person, property or other rights, thus causing damage, he shall not bear criminal responsibility.

[648] See e.g. Sharon H Rackow, "How the USA Patriot Act Will Permit Governmental Infringement upon the Privacy of Americans in the Name of 'Intelligence' Investigations" (2002) 150 U Pa L Rev 1651 at 1651-1653.

[649] See Nicholas R Doman, "Postwar Nationalization of Foreign Property in Europe" (1948) 48 Colum L Rev 1125 at 1125; James Thuo Gathii, "Commerce, Conquest, and Wartime Confiscation" (2006) 31 Brook J Int'l L 709 at 709-710.

[650] See Aikens, Lord & Bools, *supra* note 458 at paras 10.243-10.244.

encourage carriers to do good to others without unnecessary worries.[651] Considerable worthiness of the preserved interests lends justification to the deeds of carriers done at the cost of interests of cargo owners.[652] There is no reason to impose liability on a carrier who has done something praiseworthy and deserving recommendation.

Paragraph 2 – Exception relating to shipment of dangerous goods

The exception relating to shipment of dangerous goods is prescribed in Article 4.6 of the Hague Rules.[653] This article comprises two paragraphs: the first grants carriers the right to land at any place, destroy or render innocuous dangerous goods whose nature or characters are unknown to them when they consent to carriage; and the second applies when dangerous goods shipped with the knowledge and consent of carriers become a real danger.[654]

There have been debates over the definition of "dangerous" in the context of Article 4.6 of the Rules. It used to be assumed that the exception applied only to goods which were physically dangerous,[655] but such narrow view was practically abandoned

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651 See CP Mills, "The Future of Deviation in the Law of the Carriage of Goods" (1983) 10 LMCLQ 587 at 591.

652 See *Stag Line*, *supra* note 633 at 343-344.

653 *Hague Rules*, *supra* note 205, art 4.6. Article 4.6 provides that:

> Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

654 See Aikens, Lord & Bools, *supra* note 458 at para 10.320.

655 Scrutton, *supra* note 94 at 457; Justin DuClos, "Liability for Losses Caused by Inherently Dangerous Goods Shipped by Sea" (2007) 20 USF Mar LJ 61 at 63.

following the decision in *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)*.[656] Lloyd LJ stated that:

> I can see no reason to confine the word "dangerous" to goods which are liable to cause direct physical damage to other goods. It is true that goods which explode or catch fire would normally cause direct physical damage to other cargo in the vicinity. But there is no need to qualify the word "dangerous" by reading in the word "directly" …[657]

Steyn LJ added that:

> [I]t would be wrong to apply the *ejusdem generis* rule to the words "goods of an inflammable, explosive or dangerous nature." These are disparate categories of goods. Each word must be given its natural meaning, and "dangerous" ought not to be restrictively interpreted by reason of the preceding words. Secondly, it would be wrong to detract from the generality and width of the expression "goods of … [a] dangerous nature" by importing the suggested restriction that the goods must by themselves, or by reason of their inherent properties, pose a danger to the ship or other cargo. For my part I would resist any temptation to substitute for the ordinary and non-technical expression "goods of … [a] dangerous nature" any other formulation.[658]

Article 4.6 of the Rules not only provides for the carrier's exemption in relation to shipment of dangerous goods but also implies the shipper's obligations and responsibilities associated with such shipment. It has been universally accepted that a

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[656] In this case, groundnuts infested with Khapra beetles were shipped aboard the vessel along with other cargoes. After part of those groundnuts had been discharged, the infestation was discovered and the unloading of other cargoes was refused. The carrier had to dump all the remaining cargoes on board at sea and he also suffered delay and expenses while his vessel was being fumigated. See generally *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)*, [1998] AC 605 (HL(Eng)) [*Giannis NK*].

[657] *Ibid* at 613, Lloyd LJ.

[658] *Ibid* at 620, Steyn LJ. At common law goods can be dangerous in the more indirect sense of being "legally" dangerous. Atkin J said in *Mitchell Cotts & Co v Steel Bros & Co Ltd* that "I think there is no question that a shipment of goods upon an illegal voyage – i.e., upon a voyage that cannot be performed without the violation of the law of the land of the place to which the goods are to be carried – a shipment of goods which might involve the ship in danger of forfeiture or delay – is precisely analogous to the shipment of a dangerous cargo which might case the destruction of the ship." *Mitchell Cotts & Co v Steel Bros & Co Ltd*, [1916] 2 KB 610 at 623, Atkin J (UK). See also *Log-O-Mar AG v Craft Enterprises International Ltd*, [2004] All ER 467 at 486 (Comm Ct).

shipper has no unlimited freedom to decide what he can consign for shipment.[659] There is an implied undertaking of shippers that the goods consigned by them for shipment, in the absence of their express notifications to the contrary, must not be dangerous when carried in an ordinary way.[660] Whether they have knowledge of the dangerous characters of their goods is even of no importance in determining their liability.[661] In *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)*, Lloyd LJ said that:

> Article IV, rule 6 is a free standing provision dealing with a specific subject matter. It is neither expressly, nor by implication, subject to Article IV, rule 3. It imposes strict liability on shippers in relation to the shipment of dangerous goods, irrespective of fault or neglect on their part.[662]

Overall, Article 4.6 of the Rules represents an appropriate distribution of responsibilities between cargo-owning interests and shipowning interests with regard to shipment of dangerous goods.[663] Shippers, who normally know well the dangerous

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[659] FD Rose, "Cargo Risks: 'Dangerous' Goods" (1996) 55 Cambridge LJ 601 at 601. See also PE King, "The Carriage of Dangerous and Nuclear Cargoes" (1986) 14 Austl Bus L Rev 86 at 87; Robert Force, "Shipment of Dangerous Cargo by Sea" (2007) 31 Tul Mar LJ 315 at 315-317.

[660] See *Bamfield v Goole & Sheffield Transport Co Ltd*, [1910] 2 KB 94 at 99 (CAUK) [*Bamfield*].

[661] See *ibid* at 101; *The Athanasia Comninos*, [1990] 1 Lloyd's Rep 277 at 282-283 (QBDUK) [*Athanasia Comninos*]; Andrew Homer, "Second Circuit Limits COGSA Strict Liability for Shippers of Dangerous Goods in *Contship Containerlines, Ltd. v. PPG Industries, Inc.*" (2006) 31 Tul Mar LJ 199 at 202; Holly Roark, "Explosion on the High Seas! The Second Circuit Promotes International Uniformity with Strict Liability for the Shipment of Dangerous Goods: *Senator v. Sunway*" (2003) 33 Sw UL Rev 139 at 142.

[662] *Giannis NK*, *supra* note 656 at 615, Lloyd LJ. See also *Hague Rules*, *supra* note 205, art 4.3. Article 4.3 provides that:

> The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

It is argued that only in rather rare instances where neither the shipper nor the carrier knew, or could have known, about the dangers associated with the goods, does the strict nature of the shipper's obligation become relevant. Another example relating to such strict liability is *Industries Perlite Inc v "Marina di Alimuri"* where, on the basis of some ancient English cases and with reference to the judgment in *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)*, the shippers of a cargo of peat moss were held liable in spite of their ignorance as to the potential danger posed by the goods. See generally *Industries Perlite Inc v "Marina di Alimuri"*, [1996] 2 FCR 426 at 426-432 (FCTD Can).

[663] When analyzing Article 4.6 in *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)*, Lord Steyn found it necessary to review the objective of the Hague Rules, namely to place restrictions on unbridled freedom of contract by a pragmatic compromise between shipowning and cargo-owning interests. See *Giannis NK*, *supra* note 656 at

nature and characters of the goods consigned for shipment, are obliged to reveal such information to carriers.[664] If they have failed to perform such obligation, carriers have the right to take any disposal measures anytime prior to unloading without any need to compensate them for their losses; if they have performed such obligation, carriers are still allowed to take any disposal measures without any liability for their losses when the goods become a danger, even though precautions suitable for such shipments or particularly required by them have been taken.[665] In the former case, the carrier's exemption counts as a punishment for shippers failing to perform their notification duty; in the latter case, the carrier's exemption can be justified by his blamelessness in taking disposal measures to protect his vessel and other goods carried therein against risks arising out of the dangerous goods that become hazardous despite the precautions that have been appropriately taken by him.[666]

621-622, Steyn LJ. See also Aldo E Chircop, "The Marine Transportation of Hazardous and Dangerous Goods in the Law of the Sea – An Emerging Regime" (1987) 11 Dal LJ 612 at 615.

[664] See Homer, *supra* note 661 at 203.

[665] See Tetley, *Claims*, *supra* note 311 at 470; *Micada Compania Naviera SA v Texim*, [1968] 2 Lloyd's Rep 57 at 63 (QBDUK) [*Texim*]; *Islamic Investment Co ISA v Transorient Shipping Ltd (The Nour)*, [1999] 1 Lloyd's Rep 1 at 13 (CAUK); *Atlantic Oil Carriers Ltd v British Petroleum Co Ltd (The Atlantic Duchess)*, [1957] 2 Lloyd's Rep 55 at 95-96 (QBDUK).

[666] The carrier's exemption from liability in relation to shipment of dangerous goods may be invalid if he has been at fault in taking reasonable precautions against potential risks. In *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)*, the carrier was forbidden to rely on Article 4.6 as there had been a causative breach of Article 3.1 of the Hague Rules. Diamond J said that "I conclude that it constitutes a defence to a claim made by a carrier under art. IV, r. 6 that the relevant damages and expenses were incurred through a breach by the carrier of his overriding obligation under art. III, r. 1 to exercise due diligence to make the ship seaworthy." *Mediterranean Freight Services Ltd v BP Oil International Ltd (The Fiona)*, [1994] 2 Lloyd's Rep 506 at 516, Diamond J (QBDUK) [*Fiona*]. See also *Kapitan Sakharov*, *supra* note 548 at 286.

Paragraph 3 – Exception relating to shipment of particular goods

Article 6 of the Hague Rules contains no specific exception that carriers may rely on to free themselves from liability, but it recognizes a certain degree of flexibility with respect to their exculpatory rights when the goods carried are special.[667] Freedom of contract is just circumscribed rather than eliminated in the Rules.[668] In *Chandris v Isbrandtsen Moller Co Inc*, Devlin J stated that:

> [The convention] is not meant altogether to supplant the contract of carriage, but only to control on certain topics the freedom of contract which the parties would otherwise have. I see no reason why it should not be silent on such topics as the consequences of shipping cargo with consent of the master, leaving the matter to be regulated by the parties themselves. On the contrary, I see good reason why silence might be thought desirable …[669]

In Article 6 of the Rules, the following constraints are prescribed for special agreements regarding the carrier's immunities in the carriage of particular goods: (a) the agreement is not contrary to public policy or care or diligence of the carrier's servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge

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667 *Hague Rules*, *supra* note 205, art 6. Article 6 provides that:

> Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.
>
> Any agreement so entered into shall have full legal effect.
>
> Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

668 Girvin, *Carriage*, *supra* note 53 at para 15.11.

669 *Chandris v Isbrandtsen Moller Co Inc*, [1951] 1 KB 240 at 247, Devlin J (CAUK).

of the goods carried by sea; (b) no bill of lading has been or shall be issued; (c) the terms agreed shall be embodied in an appropriately marked non-negotiable document; (d) the shipment should be different from ordinary commercial shipments made in the ordinary course of trade; and (e) the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed may justify such agreement.[670] In *Harland & Wolff v Burns & Laird Lines*, Article 6 was interpreted as follows:

> [I]t is to allow a carrier … to limit his responsibilities by agreement with the shipper in any way "not contrary to public policy"; provided that the bill of lading (which would otherwise have been issued at or after shipment with the agreed-on limitations embodied in it) shall not be issued, but that instead thereof a non-negotiable receipt, marked as such and embodying the limitations, shall be used.[671]

The definition of "particular goods" is not given in the Hague Rules, but it has been universally accepted that "particular goods" in this context must be those having such unusual qualities that it would be inappropriate to impose mandatory duties on carriers with regard to their transportation.[672] If shipment of particular goods is still subject to standard contract terms designed for that of ordinary goods, carriers may be overloaded

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[670] See Gaskell, Asariotis & Baatz, *supra* note 511 at para 10.34.

[671] *Harland & Wolff v Burns & Laird Lines*, (1931) 40 Ll LR 286 at 301-302 (QBDUK).

[672] In the New Zealand Shipping & Seamen Act, gold, silver, diamonds, watches, jewels, and precious stones were treated as particular goods. In the "K" Line Bill of Lading, particular goods include platinum, gold, silver, jewelry, precious stones, precious metals, radioisotopes, precious chemicals, bullion, specie, currency, negotiable instruments, securities, writings, documents, pictures, embroideries, works of art, curios, heirlooms, and goods having particular value only for the merchant. *Act 1903*, *supra* note 147, s 294; *Act 1908*, *supra* note 147, s 294; Gaskell, Asariotis & Baatz, *supra* note 511 at para 10.33.

with excessive commitments and risks.[673] Therefore, it it not unacceptable to allow carriers and shippers to enter into special exoneration-related agreements as to shipment of particular goods, insofar as such freedom is carefully circumscribed.

[673] See James, *supra* note 259 at 687. See also In Hyeon Kim, "An Introduction to Korean Law Governing Carriage of Goods by Sea" (2005) 36 J Mar L & Com 447 at 451-452.

Chapter III – A scan of exoneration-related provisions in the Hague Rules under the dimension of clarity

The present chapter is contributed to an examination of exoneration-related provisions in the Hague Rules from the perspective of clarity. It is comprised of two sections. The first focuses on the problems associated with the relationship between the core obligations of carriers and their immunities, and the second deals with the problems stemming from the allocation of burden of proof relating to exemption.

Section 1 – Carrier's core obligations and exculpatory rights

Two core obligations, namely the obligation to provide seaworthy ships and the obligation to care for goods, are imposed on carriers in the Hague Rules.[674] Section 1 aims to reveal whether their exculpatory rights harmonize with their core obligations in the context of the Rules.

Paragraph 1 – Carrier's duty of seaworthiness and immunities

Providing a seaworthy ship is the most basic duty of a carrier. In *Lyon v Mells*, Ellenborough LJ said that:

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[674] See *Hague Rules*, *supra* note 205, arts 3.1, 3.2. Article 3.1 provides that:

> 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 carried, fit and safe for their reception, carriage and preservation.

Article 3.2 provides that:

> Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

> In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public.[675]

In common law, the obligation is unconditional.[676] In *Steel v State Line Steamship Co*, Lord Blackburn described it as a warranty "not merely that [the shipowners] should do their best to make the ship fit, but that the ship should really be fit."[677] In *McFadden v Blue Star Line*, Channell J added that:

> [The] warranty is an absolute warranty; that is to say, if the ship is in fact unfit at the time when the warranty begins, it does not matter that its unfitness is due to some latent defect which the shipowner does not know of, and it is no excuse for the existence of such a defect that he used his best endeavors to make the ship as good as it could be made.[678]

The obligation has even been deemed as an implied term in a contract of carriage in the absence of any express term to the contrary.[679] In *Kopitoff v Wilson*, Field J argued that:

> The shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit

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675 *Lyon*, *supra* note 556 at 1137, Ellenborough LJ. See also *Gibson*, *supra* note 556 at 506-507.

676 Girvin, *Carriage*, *supra* note 53 at para 23.10; George H Chamlee, "The Absolute Warranty of Seaworthiness: A History and Comparative Study" (1973) 24 Mercer L Rev 519 at 523-524; Anthony J Briguglio, "Unseaworthiness and Evidence of Subsequent Repairs" (1982) 19 Cal WL Rev 450 at 450; Mark Ellman, "Instant Unseaworthiness: Mascuilli Revisited" (1969) 1 J Mar L & Com 573 at 573.

677 *Steel*, *supra* note 566 at 86, Blackburn LJ.

678 *McFadden*, *supra* note 556 at 703, Channell J. See also *Virginia Carolina Chemical Co v Norfolk & North American Steam Shipping Co*, [1912] 1 KB 229 at 243 (CAUK).

679 Aikens, Lord & Bools, *supra* note 458 at para 10.83. See also Terence H Benbow, "Seaworthiness and Seamen" (1954) 9 Miami Law Quarterly 418 at 421-422.

to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage.[680]

However, the obligation has been apparently lessened in the Hague Rules. Article 3.1 merely requires carriers to exercise due diligence to make their ships seaworthy, and Article 4.1 entitles carriers to plead unseaworthiness as a defense if they can prove that they have exercised due diligence in performing their obligation to provide seaworthy ships.[681]

As to the relationship between the carrier's duty of seaworthiness and immunities, common law and civil law states developed similar doctrines.[682] In common law, failure to fulfill such duty may deprive carriers of their entitlement to exceptions in bills of lading;[683] in civil law, carriers seeking to be relieved from liability must prove, in seaworthiness-related cases, that they are not negligent in preparing their ships for intended voyages, even if one of the excepted perils in bills of lading is the immediate cause of loss or damage.[684] The obligation contained in Article 3.1 of the Rules has been called "overriding obligation".[685] In *B J Ball (New Zealand) Ltd v Federal Steam Navigation Co Ltd*, Field J said that "Art. III r. 1 … corresponds in meaning with the

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680 *Kopitoff*, *supra* note 558 at 380, Field J.
681 *Hague Rules*, *supra* note 205, arts 3.1, 4.1.
682 Aikens, Lord & Bools, *supra* note 458 at para 10.138; Scrutton, *supra* note 94 at 442.
683 See *Steel*, *supra* note 566 at 89; *Torenia*, *supra* note 451 at 217; *Sleigh v Tyser*, [1900] 2 QB 333 at 337 (UK); *Atlantic Shipping & Trading Co Ltd v Louis Dreyfus & Co (The Quantock)*, [1922] AC 250 at 255 (HL(Eng)); *The Rossetti*, [1972] 2 Lloyd's Rep 116 at 121 (QBDUK); *Sunlight Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd*, [2004] 1 SLR 171 at 178 (CA); *The Imvros*, [1999] 1 Lloyd's Rep 848 at 856 (QBDUK); *Kish v Taylor*, [1912] AC 604 at 617 (HL(Eng)).
684 Clarke, *Aspects*, *supra* note 74 at 142.
685 Girvin, *Carriage*, *supra* note 53 at para 26.34. See also Zhu Zuoxian & Si Yuzhuo, "On the Doctrine of Overriding Obligation under the Hague Rules – And Commentary on the Provision of the Basis of the Liability under the UNCITRAL Draft Instrument on Transport Law" (2002) 13 Annual of China Maritime Law 27 at 32.

provisions of s.3 of the Harter Act … [t]hat section makes the exemption from liability … depend on due diligence having been exercised to make [the vessel] in all respects seaworthy."[686] The most frequently cited dictum in support of its overriding effect was made in *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd*. Somervell LJ stated that:

> Article III, rule 1, is an overriding obligation. If it is not fulfilled and the nonfulfilment causes the damage, the immunities of article IV cannot be relied on. This is the natural construction apart from the opening words of article III, rule 2. The fact that that rule is made subject to the provisions of article IV and rule 1 is not so conditioned makes the point clear beyond argument.[687]

The doctrine of "overriding obligation" implies that proof of exercise of due diligence to provide a seaworthy ship is required in all cases, no matter what exception a carrier intends to rely on and no matter whether seaworthiness is really relevant to loss or damage.[688] Professor William Tetley has contended that, in order to be able to plead one of the exceptions enumerated in Article 4.2, carriers must first prove that their obligation of seaworthiness in Article 3.1 has been appropriately performed.[689] Professor René Rodière holds the same view. He argued that "[a]ucun des 'cas exceptés' énumérés par l'article 4, paragraphe 2, ne saurait être invoqué par le transporteur s'il n'a pas fait au

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[686] *B J Ball (New Zealand) Ltd v Federal Steam Navigation Co Ltd*, [1950] NZLR 954 at 966, Field J (NZHC). See also *Toronto Elevators v Colonial SS*, [1950] Ex CR 371 at 375; *Eastwest Produce*, *supra* note 524 at 340.

[687] *Footwear*, *supra* note 348 at 814-815, Somervell LJ. See also *Bunga Seroja*, *supra* note 92 at 523; *Gamlen*, *supra* note 387 at 152. Following his analysis, has prevailed the theory that the wording and the structure of the Hague Rules have already implied the overriding effect of Article 3.1, since it, unlike Article 3.2, has not been made subject to Article 4. See Girvin, *Carriage*, *supra* note 53 at para 26.34; NJ Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Paris: Zutphen, 2008) at 35. See also *Fiona*, *supra* note 666 at 513-514.

[688] Clarke, *Aspects*, *supra* note 74 at 148. See also Pourcelet, *supra* note 405 at 97.

[689] Tetley, *Claims*, *supra* note 311 at 97. See also Pourcelet, *supra* note 405 at 82.

préalable preuve qu'il a exercé la diligence requise par l'article 3, paragraphe 1."[690] However, such theory has not been well accepted and followed by courts.[691] In a Canadian case, *De Carvalho & Co v Kent Line Ltd*, Walsh CJ emphasized that "the carrier [needs to] give no evidence of his diligence until the claimant has proved [that] the ship [was] unseaworthy at the beginning of the voyage, and that such unseaworthiness caused the loss."[692] English courts have developed a similar theory suggesting that proof of exercise of due diligence to provide a seaworthy ship is not needed unless the claimant has cast doubt on the defense pleaded by the carrier by claiming that the immediate cause of loss is not the excepted peril embodied in such defense but unseaworthiness of the ship provided by the latter.[693] The doctrine of "overriding obligation" has not been adopted by American and French courts either. Both of them tend to take the view that it is only when the state of a ship is pertinent to loss that proof of exercise of due diligence in performing the duty of seaworthiness is meaningful.[694]

The above analysis has demonstrated that the relationship between the carrier's duty of seaworthiness and immunities is not articulated in the Hague Rules and has been inducing debates and confusion.

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690 See Rodière & du Pontavice, *supra* note 68 at 212.

691 See Clarke, *Aspects*, *supra* note 74 at 139-148; Schoenbaum, *supra* note 171 at 110-125.

692 *De Carvalho & Co v Kent Line Ltd*, [1951] 32 MPR 282 at 288, Walsh CJ (NLSC). See also *Western Canada Steamship Co v Canadian Commercial Corp*, [1958] 14 DLR (2d) 487 at 501 (BCSC); *The Farrandoc*, [1967] 2 Lloyd's Rep 276 at 298 (Ct Ex Can) [*Farrandoc*]; *Verreault*, *supra* note 380 at 386.

693 See Clarke, *Aspects*, *supra* note 74 at 138-139; Scrutton, *supra* note 94 at 434-435; Ivamy & Payne, *supra* note 397 at 214; *Minister of Food v Reardon Smith Line Ltd*, [1951] 2 Lloyd's Rep 265 at 271 (KBDUK) [*Minister of Food*].

694 See *Isbrandtsen v Federal Ins*, 113 F Supp 357 at 373 (NY Dist Ct 1952); *The Black Heron*, 1964 AMC 42 at 47-48 (2d Cir 1964) [*Black Heron*]; *California & Hawaiian Sugar Co v Columbia SS Co Inc*, 1973 AMC 676 at 690 (La Dist Ct 1973); *The Glendarroch*, [1894] P 226 at 232-233 (CAUK) [*Glendarroch*].

Paragraph 2 – Carrier's duty of care of goods and immunities

Article 3.2 of the Hague Rules imposes on carriers the obligation to take due care of goods in their custody. The theoretical foundation of such obligation may trace back to common law in which a carrier, who undertakes to carry specified goods in accordance with a particular contract, is compared to a bailee whose basic obligation is to take good care of the subject of bailment.[695] In *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)*, Wright J said that "[t]he bailee is bound to restore the subject of the bailment in the same condition as that in which he received it, and it is for him to explain or to offer valid excuse if he has not done so … [i]t is for him to prove that reasonable care had been exercised."[696]

The duties prescribed in Article 3.2 of the Rules are not absolutely rigid.[697] In other words, they may be reassigned by special agreements.[698] In *Pyrene Co Ltd v Scindia Navigation Co Ltd*, Devlin J argued that "I see no reason why the rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligation is left to the parties

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[695] See *Xantho*, *supra* note 379 at 508; *Pandorf*, *supra* note 392 at 531; *Notara v Henderson*, (1870) LR 5 QB 346 at 360 (UK); *Grill v General Iron Screw Colliery Co Ltd*, (1868) LR 3 CP 476 at 481-482 (Ex Ch UK) [*Grill*]; Scrutton, *supra* note 94 at 205-207. See also Joseph Henry Beale, *A Selection of Cases on Carriers and Other Bailment and Quasi-Bailment Services*, 2d ed (Cambridge: Harvard University Press, 1920) at 56; George Whitecross Paton, *Bailment in the Common Law* (London: Stevens, 1952) at 45.

[696] *Canadian Highlander*, *supra* note 312 at 436, Wright J. See also *Albacora SRL v Westcott & Laurance Line Ltd*, [1966] 2 Lloyd's Rep 53 at 61 (HL(Eng)) [*Albacora*]; *Torenia*, *supra* note 451 at 216-217.

[697] Girvin, *Carriage*, *supra* note 53 at para 26.39. See also Karan, *Liability*, *supra* note 65 at 193-216.

[698] Aikens, Lord & Bools, *supra* note 458 at para 10.142.

themselves to decide."[699] So far, there have emerged some popular contract terms regarding redistribution of obligations in respect of loading, stowing, trimming and discharging of goods.[700] The most recent authoritative judgment confirming the right of carriers to contract out of the obligations enumerated in Article 3.2 of the Rules was made in *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc*,[701] where the judges came to the conclusion that Article 3.2 did not absolutely oblige carriers to perform the functions therein but merely obliged them to do so if they had agreed and that Article 3.8 did not render null and void contract terms relieving carriers of their duties under Article 3.2.[702]

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[699] *Pyrene Co Ltd v Scindia Navigation Co Ltd*, [1954] 2 QB 402 at 417-418, Devlin J (UK) [*Pyrene*]. This construction was approved by the House of Lords in *Renton v Palmyra* and reaffirmed in *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc*. See *Renton v Palmyra*, [1957] AC 149 at 169-170 (HL(Eng)) [*Renton*]; *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc*, [2005] 1 WLR 1363 at 1367 (HL(Eng)) [*Jindal*]. See also *Balli Trading Ltd v Afalona Shipping Co Ltd (The Coral)*, [1993] 1 Lloyd's Rep 1 at 14 (CAUK); *Ismail*, *supra* note 483 at 897.

[700] Such contract terms include FIO (free in and out), FIOS (free in and out, stowed), FIOST (free in and out, stowed and trimmed), etc. See Girvin, *Carriage*, *supra* note 53 at para 26.40. See also Martin Davies, "Two Views of Free In and Out, Stowed Clauses in Bills of Lading" (1994) 22 Austl Bus L Rev 198 at 201; Melis Ozdel, *Incorporation of Charterparty Clauses into Bills of Lading* (Ph.D. Thesis, University of Southampton, 2010) [unpublished] at 89; In Hyeon Kim, "South Korean Maritime Law Update: 2004" (2005) 36 J Mar L & Com 363 at 368; *Renton*, *supra* note 699 at 170; *The Arawa*, [1977] 2 Lloyd's Rep 416 at 424-425 (QBDUK).

[701] In this case, the Jordan II was chartered for the carriage of steel coils from India to Spain. The shipper alleged that the goods were damaged due to defective loading, stowage, lashing, securing, dunnaging, separation and discharge. Clause 3 of the charterparty stated that the freight was payable "FIOST lashed/secured/dunnaged" and Clause 17 provided that "shipper/charterers/receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel." The claimants argued that these clauses relieving the shipowners from their duties in Article 3.2 of the Hague Rules were void and of no effect pursuant to Article 3.8. See generally *Jindal*, *supra* note 699.

[702] *Ibid* at 1370-1371. See also Sarah C Derrington, "The Hague Rules – A Lost Opportunity" (2005) 121 Law Q Rev 209 at 212 [Derrington, "Opportunity"]; *Pyrene*, *supra* note 699 at 411; *Renton*, *supra* note 699 at 169.

Article 3.2 of the Rules requires carriers to perform their duty of care of goods "properly and carefully". In *Albacora SRL v Westcott & Laurance Line Ltd*.[703] Reid LJ explained that:

> "[P]roperly" means in accordance with a sound system and that may mean rather more than carrying the goods carefully … In my opinion the obligation is to adopt a system which is sound in the light of all the knowledge which the carrier has or ought to have about the nature of the goods.[704]

Pearce LJ added that "[t]he word 'properly' presumably adds something to the word 'carefully'" and that "[a] sound system does not mean a system suited to all the weakness and idiosyncrasies of a particular cargo."[705]

As to the relationship between the carrier's duty of care of goods and immunities, a few judges tended to treat the performance of the former as a precondition for the access to the latter. In *Phillips & Co Ltd v Clan Line Steamers Ltd*, Atkinson J contended that the carrier was not allowed to invoke the defense of inherent vice of goods unless he could prove that he had performed the duty in Article 3.2.[706] He drew his conclusion by referring to the views of Roche J in *Borthwick & Sons Ltd v New Zealand Shipping Co*

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[703] In this case, the owners of the Maltasian, an unrefrigerated vessel, were sued for the damage sustained by 1,200 cases of wet salted ling fillets during the voyage from Glasgow to Genoa. The fillets harbored halophilic bacteria that would cause no harm provided that they were kept at temperature below 41 degrees Fahrenheit. However, no special instructions were given by the consignor other than the marks on the cases "keep away from engines and boilers". When the fillets arrived at Genoa, they had substantially spoiled because of the bacteria. The court held that the claim under Article 3.2 of the Hague Rules failed as there was no reason for the carrier to be aware of the requirement of refrigeration and there was no means by which the fillets could have been refrigerated. See generally *Albacora*, *supra* note 696.

[704] *Ibid* at 58, Reid LJ.

[705] *Ibid* at 62, Pearce LJ. The above interpretation was adopted in many subsequent cases. See e.g. *Caltex Refining Co Pty Ltd v BHP Transport Ltd (The Iron Gippsland)*, [1994] 1 Lloyd's Rep 335 at 347 (NSWSC); *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)*, [2006] 1 Lloyd's Rep 649 at 653 (QBDUK); *Bunga Seroja*, *supra* note 92 at 523;

[706] *Phillips & Co Ltd v Clan Line Steamers Ltd*, (1943) 76 Ll LR 58 at 63, Atkinson J (KBDUK).

Ltd and Wright J in *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)*.[707] Both of them insisted on the overriding effect of the duty contained in this article.[708] Nevertheless, such theory did not prevail.[709] Its unpopularity mainly stemmed from the opening words of Article 3.2 stating that the article should be "[s]ubject to the provisions of Article 4".[710] In common law, a carrier is unable to rely on an exception if the excepted peril and its consequences could have been avoided by reasonable care and diligence on his part or on the part of his servants or agents.[711] This principle was articulated in *Thomas Wilson Sons & Co v Owners of Cargo of the Xantho (The Xantho)* by Lord McNaughten, who explained that:

> Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss.[712]

The carrier's exemption from liability in the Hague Rules is mostly based on absence of fault on the part of shipowning interests.[713] In other words, a carrier shall be deprived wholly or partly of his exculpatory rights if his fault or the fault of his servants

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[707] See *ibid* at 67-69.
[708] *Borthwick & Sons Ltd v New Zealand Shipping Co Ltd*, (1934) 49 Ll LR 19 at 24, Roche J (KBDUK); *Canadian Highlander*, *supra* note 312 at 436, Wright J.
[709] See *Silver*, *supra* note 484 at 435; *Silversandal*, *supra* note 525 at 1497; *Albacora*, *supra* note 696 at 64; *Eppens, Smith Co v Silver Line*, 1941 AMC 647 at 652 (La Dist Ct 1941).
[710] Clarke, *Aspects*, *supra* note 74 at 140-142.
[711] Scrutton, *supra* note 94 at 204.
[712] *Xantho*, *supra* note 379 at 515, Lord McNaughten. See also *Grill*, *supra* note 695 at 484; *Glendarroch*, *supra* note 694 at 280; *Torenia*, *supra* note 451 at 217-218.
[713] See Girvin, *Carriage*, *supra* note 53 at para 10.154.

or agents has caused or contributed to loss or damage.[714] The opening words of Article 3.2 appear quite confusing in the context of the Hague Rules. They imply that Article 4 overrides Article 3.2 and hence that a carrier is still able to escape liability by pleading one or more exceptions enumerated in the former even if he has failed to "properly and carefully" perform the obligation prescribed in the latter. However, such literal construction obviously conflicts with the spirit of fault liability that infiltrates the Hague Rules in a remarkable way.[715]

Section 2 – Burden of proof relating to the carrier's exemption

Burden of proof is a duty to persuade or, as is sometimes otherwise stated, a risk of non-persuasion.[716] The predictability of proceedings is to be intolerably undermined if there is much unnecessary vagueness, uncertainty or confusion as to the scope or extent of such burden.[717] There are some provisions in the Hague Rules concerning burden of proof in connexion with the carrier's exemption from liability, but they are, at least literally, not well organized. Professor John O. Honnold said that "[f]or nearly all the

[714] See *Crelinsten Fruit Co v The Mormacsaga*, [1969] 1 Lloyd's Rep 515 at 518 (Ct Ex Can) [*Mormacsaga*].
[715] Aikens, Lord & Bools, *supra* note 458 at para 10.154. See also Scrutton, *supra* note 94 at 205-207; Carver, *supra* note 86 at 205.
[716] The term "burden of proof" can be used in two senses. Primarily it is used to describe the duty of a litigant to persuade the judge or the jury that the facts he asserts exist or have existed. It is also sometimes used to describe the duty of a litigant to produce evidence of an asserted fact. See John Henry Wigmore, *Wigmore's Code of the Rules of Evidence in Trials at Law*, 3d ed (Boston: Little, Brown, 1942) at 112-114. See also Hyun Song Shin, "The Burden of Proof in a Game of Persuasion" (1994) 64 Journal of Economic Theory 253 at 256; Chris William Sanchirico, "The Burden of Proof in Civil Litigation: A Simple Model of Mechanism Design" (1997) 17 Int'l Rev L & Econ 431 at 435-436.
[717] JP McBaine, "Burden of Proof: Degrees of Belief" (1944) 32 Cal L Rev 242 at 242. See also Douglas N Walton, *Burden of Proof, Presumption and Argumentation* (New York: Cambridge University Press, 2014) at 39; Per Olof Bolding, *Aspects of the Burden of Proof* (Göteborg : Almqvist & Wiksell, 1960) at 101; Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (The Hague: Kluwer Law International, 1996) at 97-99.

items in the list of responsibilities and immunities, [the Hague Rules fail] to deal with burden of proof, an issue that is especially vital."[718]

Paragraph 1 – Textual lacunae

There are only two exoneration-related provisions in the Hague Rules explicitly mentioning burden of proof.[719] Article 4.1 imposes the burden of proving exercise of due diligence on carriers or other persons wishing to rely on the exception contained therein, and Article 4.2(q) requires the person claiming the benefit of the catch-all exception to prove that "neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."[720]

Article 4.1 of the Rules merely deals with the proof of exercise of due diligence, but it is silent on other issues of burden of proof generally involved in cases associated with unseaworthiness, such as proof of unseaworthiness and proof of the causal relationship between unseaworthiness and loss,[721] which normally shall be done by claimants prior to the proof prescribed in this article.[722]

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[718] Honnold, "Clarity", *supra* note 22 at 98-99.
[719] See Karan, *Liability*, *supra* note 65 at 128.
[720] *Hague Rules*, *supra* note 205, arts 4.1, 4.2(q).
[721] See Clarke, *Aspects*, *supra* note 74 at 139.
[722] See Aikens, Lord & Bools, *supra* note 458 at para 10.132; Scrutton, *supra* note 94 at 442; *Minister of Food*, *supra* note 693 at 272; *Hiram Walker & Sons Ltd v Dover Navigation Co Ltd*, (1949) 83 Ll LR 84 at 95 (KBDUK) [*Dover Navigation*]. See also *Farrandoc*, *supra* note 692 at 281; *The Hellenic Dolphin*, [1978] 2 Lloyd's Rep 336 at 339 (QBDUK) [*Hellenic Dolphin*]; *The Theodegmon*, [1990] 1 Lloyd's Rep 52 at 54 (QBDUK) [*Theodegmon*].

Similarly, Article 4.2(q) of the Rules only provides for an element extracted from a complete chain of proof commonly required in determining a cargo dispute. Absence of fault is apparently not the first element that needs proving in such cases.[723] For starters, a *prima facie* case against the carrier has to be established by the claimant who basically needs to show his entitlement to claim, the nature and amount of his loss, etc.[724] The carrier is held *prima facie* liable as long as the claimant is able to prove that the goods entrusted to him in good order and condition have not arrived or have arrived damaged.[725] The burden of proof prescribed in Article 4.1 of the Rules is functional only if such *prima facie* case has been appropriately established.

In a word, the rules of burden of proof in the Hague Rules are so fragmentary that they may not provide enough guidance for the proceeding of a cargo claim.

Paragraph 2 – Practical remedies

The general rules of evidence, which have adequately developed over a long time and been repeatedly adopted in countless precedents, have been used to fill some textual loopholes of the Rules with regard to burden of proof.[726] The most basic rule of burden of proof is that a litigant has to take upon himself the onus to establish those facts

[723] See Coleman, *supra* note 480 at 212. See also *Heyn*, *supra* note 597 at 337, MacKinnon J; George F Wood, "Damages in Cargo Cases" (1970) 45 Tul L Rev 932 at 937.

[724] Clarke, *Aspects*, *supra* note 74 at 133. See also *Amstelslot*, *supra* note 543 at 229, McNair J.

[725] See *Farrandoc*, *supra* note 692 at 284, Noel J; *Verreault*, *supra* note 380 at 384. See also *Albacora*, *supra* note 696 at 69; *Brown & Williamson Tobacco Corp v The Anghyra*, 157 F Supp 737 at 752 (Va Dist Ct 1957). While English law requires full proof that the goods arrived damaged or did not arrive at all, it will suffice in French law that a written, timeous and explicit notice of the alleged damage has been given by the claimant to the carrier to have the latter presumed liable. Clarke, *Aspects*, *supra* note 74 at 133.

[726] Gaskell, Asariotis & Baatz, *supra* note 511 at para 8.64; Berlingieri, "Comparative", *supra* note 10 at 3.

essential to his cause of action or defense.[727] In an ordinary cargo claim, it is incumbent upon the claimant to prove every element of his claim against the carrier, the carrier wishing to bring himself within one or more of the given exceptions needs to present evidence in support of his defense,[728] and then the onus of proving that the carrier is not entitled to the benefit of the exception(s) due to his negligence shifts to the claimant so contending.[729] In *The Glendarroch* where the cargo owners sued the carriers for the non-delivery of the goods, Esher LJ stated that:

> The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course, they fail. The defendants' answer is "Yes; but the case was brought within the exception – within its ordinary meaning". That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz, that the damage was brought about by the negligence of the defendants' servants, and it seems … it is for the plaintiffs to make out that second exception.[730]

When loss or damage arises from unseaworthiness, the claimant seeking for compensation has the burden of proving unseaworthiness of the ship provided by the carrier.[731] Such burden may be discharged if the former has presented some facts

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727 See Victor H Lane, "Burden of Proof" (1919) 17 Mich L Rev 264 at 265.

728 Aikens, Lord & Bools, *supra* note 458 at para 10.140; Sze, *supra* note 331 at 192.

729 See *Glendarroch*, *supra* note 694 at 232. See also *Torenia*, *supra* note 451 at 217.

730 *Glendarroch*, *supra* note 694 at 231, Esher LJ. His approach has been followed in a large number of cases decided under the Hague Rules. See e.g. *Antigoni*, *supra* note 532 at 212, Staughton LJ; *Gamlen*, *supra* note 387 at 153, Stephen J; *Bunga Seroja*, *supra* note 92 at 558, Callinan J; *Glebe Island Terminals Pty Ltd v Continental Seagram Pty Ltd (The Antwerpen)*, (1993) 40 NSWLR 206 at 227-228, Sheller JA (CA). Mason J explained the burden of proof in marine insurance in *Skandia Insurance Co Ltd v Skoljarev*. He said that (a) the insurer carries the burden of proving unseaworthiness whereas the insured is not required to establish the ship's seaworthiness; and (b) the insured has to prove that the loss was caused by perils of the sea and not other causes such as the ordinary action of wind and waves or wear and tear. See *Skoljarev*, *supra* note 370 at 387, Mason J.

731 Professor Tetley holds a different opinion. See Tetley, *Claims*, *supra* note 311 at 889-891.

sufficient to lead to an inference of unseaworthiness.[732] The claimant also needs to prove the causal relationship between unseaworthiness and the loss or damage sustained by him. In *The Europa*, Bucknill J argued that:

> [W]henever a cargo-owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo-owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and therefore that he was entitled to recover the loss …[733]

The carrier may rely on the exception contained in Article 4.1 of the Rules by proving exercise of due diligence by him to provide a seaworthy ship.[734] There has been a scheme of burden of proof applicable to cases involving both unseaworthiness and other excepted perils. The scheme consists of four phases: the claimant first needs to establish a *prima facie* case against the carrier; the latter may defend himself by invoking one or more exceptions in the second phase; the claimant may overturn his defense in the following phase by either contesting that the loss or damage arises from other causes than

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[732] A claimant even does not have to directly prove that the poor state of the ship is inadequate for the intended voyage. In *Pickup v Thames & Mersey Insurance Co Ltd*, Cockburn CJ stated that:

> If a vessel very shortly after leaving port founders, or becomes unable to prosecute her voyage, in the absence of any external circumstances to account for such disaster or inability the irresistible inference arises, that her misfortune has been due to inherent defects existing at the time at which the risk attached. But this is not by reason of any legal presumption or shifting of the burden of proof, but simply as matter of reason and common sense brought to bear upon the question as one of fact, inasmuch as in the absence of every other possible cause the only conclusion, which can be arrived at, is that inherent unseaworthiness must have occasioned the result.

Pickup v Thames & Mersey Insurance Co Ltd, (1878) 3 QBD 594 at 607, Cockburn CJ (UK). See also *Lindsay*, *supra* note 563 at 205.

[733] *The Europa*, [1908] P 84 at 97-98, Bucknill J (Div Ct UK). See also *International Packers London Ltd v Ocean Steamship Co Ltd*, [1955] 2 Lloyd's Rep 218 at 229 (QBDUK).

[734] See Aikens, Lord & Bools, *supra* note 458 at para 10.132; Scrutton, *supra* note 94 at 442; *Minister of Food*, *supra* note 693 at 272; *Dover Navigation*, *supra* note 722 at 95. See also *Farrandoc*, *supra* note 692 at 281; *Hellenic Dolphin*, *supra* note 722 at 339; *Theodegmon*, *supra* note 722 at 57.

the excepted peril(s) pleaded by him or claiming that unseaworthiness of the ship provided by him leads to the loss or damage; and in the last phase, the carrier still may release himself from liability by showing that such unseaworthiness indicated by the claimant occurs notwithstanding exercise of due diligence by him in accordance with Article 3.1 of the Rules.[735]

The aforementioned approaches have been widely used by courts to settle cargo disputes, but they are not completely undebatable.[736] The main controversy resides in the position of proof of exercise of due diligence in the whole chain of proof. It arises from the ambiguous relationship between the carrier's duty of seaworthiness and immunities, as has been discussed in the preceding section. The alleged overriding effect of such duty, which implies that proof of exercise of due diligence by a carrier in making his ship seaworthy is indispensable to his access to those exceptions enumerated in Article 4.2 of the Rules, is still followed by some scholars and courts.[737] Conflicting case law and international disharmony have therefore been brought about.[738] It is unnecessary to include in a maritime convention an extremely detailed scheme of burden of proof, as some universally acknowledged rules of proof have already provided enough guidance, and, on the other hand, it is impossible to do so, as some issues are too complex to be

[735] Clarke, *Aspects*, *supra* note 74 at 138-139. See also *Albacora*, *supra* note 696 at 64; *Hellenic Dolphin*, *supra* note 722 at 339; *Antigoni*, *supra* note 532 at 216; *Paterson*, *supra* note 86 at 545; Sze, *supra* note 331 at 93.
[736] See Karan, *Liability*, *supra* note 65 at 122.
[737] See Tetley, *Claims*, *supra* note 311 at 97; Rodière & du Pontavice, *supra* note 68 at 212.
[738] Honnold, "Clarity", *supra* note 22 at 99.

well defined.[739] However, there are indeed some improvements that can be made to render clearer the rules of burden of proof in the Hague Rules.

[739] For example, it is difficult to reach a consensus about the standard of proof with respect to absence of fault on the part of carriers. In *Northern Fishing Co (Hull) Ltd v Eddom (The Norman)*, Viscount Simonds held that the carrier "must prove that the damage did not flow from his fault, at any rate if it is a reasonable hyphothesis that it did so flow." In *Gaggin v Moss* where a collision at night was unexplained, the carrier was required to adduce affirmative evidence to disprove any hypothesis consistent with fault on his part, notwithstanding the possibility of another hypothesis to the contrary. In *Chubu Asahi Cotton Spinning Co Ltd v The Ship Tenos*, Macfarlan J proposed a less exacting standard of proof by stating that "the carrier is not bound to establish the defense by express evidence … so long as the court is satisfied upon the balance of probabilities of the facts necessary to establish the defense and in the light of any inferences that may properly be made from other acceptable evidence. *Norman*, *supra* note 585 at 10, Viscount Simonds; *Gaggin v Moss*, [1984] 72 FLR 222 at 231-232 (Qld SC); *Chubu Asahi Cotton Spinning Co Ltd v The Ship Tenos*, (1968) 12 FLR 291 at 296, Macfarlan J (HCA). See also *James Patrick*, *supra* note 314 at 654; *Antigoni*, *supra* note 532 at 213, Staughton J; *Alstergren v Owners of the Ship "Territory Pearl"*, (1992) 112 ALR 133 at 135, Heerey J (FCA); *BHP Trading Asia Ltd v Oceaname Shipping Ltd*, (1996) 67 FCR 211 at 230, Hill J (FCA); *Sanko Steamship Co Ltd v Sumitomo Australia Ltd (No 2)*, (1996) 63 FCR 227 at 291, Sheppard J (Austl); *Woods v Duncan*, [1946] AC 401 at 439, Simonds LJ (HL(Eng)); *Watts v Rake*, (1960) 108 CLR 158 at 160, Dixon CJ (HCA); *SS Knutsford Ltd v Tillmanns & Co*, [1908] AC 406 at 411 (HL(Eng)); *The Renée Hyaffil*, (1916) 42 TLR 660 at 665 (CAUK); *Suzuki & Co v J Beynon & Co*, (1926) 24 Ll LR 49 at 54 (HL(Eng)).

Conclusion of Part II

In the nineteenth century, freedom of contract was misused by powerful carriers to seek unfair contact terms in favor of themselves.[740] At that time, carriers were protected by a triple mechanism involving "negligence-clause", "clause d'exonération de responsabilité personnelle" and "clause limitative de responsabilité".[741] Freedom of contract may work well in a commercial environment where the parties to a contract have the chance to bargain on equal terms.[742] It is rather compatible with charterparties as they are connected to an active market and charterers are able to strive for terms favorable to themselves.[743] However, it is less suitable for bills of lading, mainly because individual cargo owners usually do not have the same commercial muscle as charterers and also because indorsees of bills of lading in foreign ports of discharge normally have no opportunity to negotiate with carriers.[744] The Hague Rules, which apply only to contracts of carriage covered by bills of lading or any similar documents of title,[745] have been formulated principally to place some restrictions on unbridled freedom of contract.

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740 See Dor, *supra* note 239 at 13-14, 19.

741 Clarke, *Aspects*, *supra* note 74 at 114. See also Cole, *supra* note 159 at 8.

742 Gaskell, Asariotis & Baatz, *supra* note 511 at para 1.5. See also Douglas Owen, *Ocean Trade and Shipping* (Cambridge: Cambridge University Press, 2012) at 56.

743 Gaskell, Asariotis & Baatz, *supra* note 511 at para 1.5. See also D Rhidian Thomas, *The Evolving Law and Practice of Voyage Charterparties* (London: Informa, 2009) at 29.

744 See Otto Charles Giles et al, *Chorley and Giles' Shipping Law*, 8th ed (London: Pitman, 1987) at 87; Poor, *Charter*, *supra* note 140 at 143.

745 *Hague Rules*, *supra* note 205, art 1(b). Article 1(b) provides that:

> "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

The Rules were ratified or adopted, shortly after their emergence, by some leading maritime nations, including the United Kingdom, Finland, Germany, Italy, Sweden, Denmark, Australia, Canada, India and so forth.[746] They have been praised for focusing on essential subjects and setting out practical solutions in the traditional language well accepted in the field of shipping law.[747] They have been generally viewed as the first substantially influential international rules aiming to creat a uniform code of conduct, standardize rights and obligations of contracting parties, establish a balance of interests between stakeholders and protect the future of bills of lading and ocean trade.[748]

However, the Rules also have been confronted with severe criticism and doubt. The compromises, which were inevitably made between the shipowning and cargo-owning sides for the birth of the Rules, have brought about some problems.[749] Mr. Anthony Diamond, a renowned barrister and writer in maritime law, said that:

> Due to the series of trade-offs and compromises involved in producing a multilateral contract between opposing political and commercial interests, it is

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[746] Yancey, *supra* note 3 at 1242.

[747] Anthony Diamond, "Responsibility for Loss of, or Damage to, Cargo on a Sea Transit: The Hague or Hamburg Conventions?" in Peter Koh Soon Kwang, ed, *Carriage of Goods by Sea* (London: Butterworths, 1986) 106 at 110 [Diamond, "Responsibility for Loss"].

[748] Karan, *Liability*, *supra* note 65 at 27. As a result of various and conflicting maritime laws, it was not uncommon that neither the carrier nor cargo interests could foresee which law would be applied to the bill of lading, whether or not exemption clauses would be held valid and what risks would be actually imposed on them. Underwriters and banks were hence reluctant to rely on the impaired credit of bills of lading resulting from such uncertainty. The rehabilitation of bills of lading, which had lost their traditional value, had to depend on a convention with uniform rules standardizing rights and obligations of each stakeholder and imposing mandatory minimum liability on the carrier. Therefore, the primary purpose of the Hague Rules was to safeguard holders and beneficiaries of bills of lading and serve the need for security in international trade by creating a set of uniform rules. See *Muncaster Castle*, *supra* note 529 at 838; *The Strathnewton*, [1983] 1 Lloyd's Rep 219 at 223 (CAUK); *The Asturias*, 1941 AMC 761 at 772 (NY Dist Ct 1941); E Hoppu, "The Carrier's Liability under the Scandinavian Bills of Lading Acts in Case of Concurrent Causes" (1971) 15 Scand Stud L 109 at 123.

[749] Girvin, *Carriage*, *supra* note 53 at para 15.13.

not surprising that clarity and consistency of purpose tend to be sacrificed at times for the sake of producing agreement.[750]

Despite those compromises, the Rules are still not perfectly satisfactory for both sides.[751] The convention has been attacked by carriers asserting that it may excessively affect their exemption clauses in an unfavorable way and by cargo owners complaining that under the convention, a written notice of loss has become a prerequisite for a cargo claim,[752] the carrier's liability has been limited to 100 pounds sterling per package or unit,[753] and the time for suit has been reduced to one year.[754] Several problems surfaced soon after the Rules were approved, such as the carrier's inappropriate limit of liability,[755] lack of provisions concerning container cargoes,[756] narrow documentary coverage,[757] etc.

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[750] Diamond, "Rules", *supra* note 238 at 228.

[751] Honnold, "Clarity", *supra* note 22 at 77-78. See also Derrington, "Opportunity", *supra* note 702 at 210-211.

[752] *Hague Rules*, *supra* note 205, art 3.6. Article 3.6 provides that:

> Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading. …

[753] *Ibid*, art 4.5. Article 4.5 provides that:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. …

[754] Sturley, "COGSA", *supra* note 109 at 25; *Hague Rules*, *supra* note 205, art 3.6. Article 3.6 provides that:

> … In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered. …

[755] Girvin, *Carriage*, *supra* note 53 at paras 15.13, 29.08. See also Leslie J Buglass, "Limitation of Liability from A Marine Insurance Viewpoint" (1978) 53 Tul L Rev 1364 at 1365-1367.

[756] See W David Angus, "Legal Implications of 'The Container Revolution' in International Carriage of Goods" (1968) 14 McGill LJ 395 at 398; Edward Schmeltzer & Robert A Peavy, "Prospects and Problems of the Container Revolution" (1970) 2 Transp LJ 263 at 266; S Mankabady, "Some Legal Aspects of the Carriage of Goods by Container" (1974) 23 ICLQ 317 at 321; John L DeGurse, Jr., "The 'Container Clause' in Article 4(5) of the 1968 Protocol to the Hague Rules" (1970) 2 J Mar L & Com 131 at 131-132.

[757] See Sturley, "COGSA", *supra* note 109 at 25-26. See also Carver, *supra* note 86 at 300.

The Rules were designed to redress the existing imbalance of interests between the cargo-owning and shipowning sides by affording the former necessary protection against unbridled freedom of contract and defining the minimum obligations imposed on each side, in particular on the latter.[758] They have been appreciated for the production of basic rules regarding the carrier's responsibilities for loss of or damage to the goods in his custody.[759] Nevertheless, there also has been considerable scepticism about the merits of such rules. Mr. Erling Selvig, a famous Norwegian legal scholar and judge, insisted that the Hague Rules were exploited more to evade liability than to anchor responsibility.[760]

Among the immunities in the Rules, the nautical fault exception has suffered the most criticism due to its unfairness and obsolescence. Mr. Anthony Diamond contended that:

> It is difficult to see why negligence in navigating a ship should have different legal consequences from any other kind of negligence … The exception of negligent navigation and negligent manangement of the ship is distinctly out of place in a regime based on a duty of care.[761]

It was also argued that the exception actually sheltered those worst performers from liability that they should have assumed.[762] It violently contradicts the principle that the

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[758] See Cole, *supra* note 159 at 22; Temperley & Vaughan, *supra* note 177 at 1; Francis Sauvage & Jean Talandier, *Manuel pratique du transport des marchandises par mer*, 2d ed (Paris: Librairie générale de droit et de jurisprudence, 1965) at 8.

[759] See e.g. Diamond, "Responsibility for Loss", *supra* note 747 at 110.

[760] Selvig, "Insurance", *supra* note 21 at 302.

[761] Diamond, "Responsibility for Loss", *supra* note 747 at 110.

[762] Weitz, *supra* note 336 at 587.

risk of loss should be borne by the party who is in a better position to prevent it.[763] Have gone the old times when carriers easily lost their effective control over their vessels at sea.[764] The exception has become unreasonable and outdated as the shipping industry has been significantly modernized.[765] Article 4.2(b) of the Rules contains another highly controversial exception exonerating carriers from liability for loss or damage resulting from fire caused by negligence on the part of their servants or agents.[766] What is confusing is that a carrier may escape liability by invoking the exception even if fire is caused by an act or omission of a person working for his benefits and under his control.[767] The exception, like the nautical fault exception, is labelled as a product of the underdeveloped shipping age when casualty often fell outside the expectation and control of carriers after the commencement of shipment.[768] As tremendous technical changes have taken place in the carriage of goods by sea, the rationale underlying it has collapsed.

The exceptions contained in Articles 4.1, 4.2(c)-(k) and 4.2(m)-(q) of the Rules are essentially in line with the principle of fault liability. There used to be some comments

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763 *Ibid*.

764 Mandelbaum, "Standards", *supra* note 64 at 473.

765 See Werth, *supra* note 339 at 72.

766 Aikens, Lord & Bools, *supra* note 458 at para 10.206.

767 See Bassoff, *supra* note 352 at 509-511; Robert Force, "A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About" (1996) 70 Tul L Rev 2051 at 2070-2071 [Force, "Much Ado About"]. The provisons releasing carriers from liability for loss or damage caused by fire in the absence of his fault existed prior to the approval of the Hague Rules. See e.g. *Merchant Shipping Act*, 1894 (UK), 57 & 58 Vict, c 60, s 502. Section 502 provides that:

> The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely, –
>
> (i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; …

Limitation of Liability Act of 1851, 46 USC § 30504 (2010). Section 30504 provides that:

> The owner of a vessel is not liable for loss or damage to merchandise on the vessel caused by a fire on the vessel unless the fire resulted from the design or neglect of the owner.

768 Sze, *supra* note 331 at 89.

suggesting that fault on the part of shipowning interests was irrelevant when other exceptions than that in Article 4.2(q) were pleaded.[769] However, they have proven to be erroneous and inconsistent with the drafters' original intention.[770] The current formulation of the exceptions was recommended by the majority of the drafting group, namely those Anglo-American experts who thought it unnecessary to add to each exception the requirement of absence of fault because their courts had well established the tradition that carriers were not allowed to invoke any of the exceptions if they, their servants or agents were at fault.[771] Those specifically-defined immunities merely represent *prima facie* blamelessness that may be overturned by evidence to the contrary.[772] Article 4.2(q) should be viewed as an umbrella provision covering other excusable causes of loss or damage unable to be concretized in the Rules and, more importantly, reaffirming the principle of fault liability underlying most of the immunities therein.[773] It is such principle that largely gives expression to fairness embedded in the carrier's entitlement to exemption from liability under the Rules.[774]

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769 See *Albacora*, *supra* note 696 at 63.

770 See FJJ Cadwallader, "Care of Cargo under the Hague Rules" (1967) 20 Curr Legal Probs 13 at 29; HM Kindred, "From Hague to Hamburg: International Regulation of the Carriage of Goods by Sea" (1983) 7 Dal LJ 585 at 613; NR McGilchrist, "The New Hague Rules" (1974) 3 LMCLQ 255 at 259; O'Hare, "Risks", *supra* note 221 at 143, 152.

771 Karan, *Liability*, *supra* note 65 at 297.

772 See S Brækhus, "The Hague Rules Catalogue" in Kurt Grönfors, ed, *Six Lectures on the Hague Rules* (Göteborg: Akademiförlaget/Gumpert, 1967) 11 at 20; O'Hare, "Risks", *supra* note 221 at 138; Ganado & Kindred, *supra* note 486 at 65; Brian T Naylor, "The Elements of the Burden of Proof under the Carriage of Goods by Sea Act" (1973) 12 Colum J Transnat'l L 289 at 297, 302.

773 See Selvig, "Insurance", *supra* note 21 at 322-323; Sze, *supra* note 331 at 88.

774 See generally Coleman, *supra* note 480 at 217-219. See also Robert L Rabin, "The Historical Development of the Fault Principle: A Reinterpretation" (1980) 15 Ga L Rev 925 at 927-928.

The Rules also contain some particular exceptions, the rationales for which may not be fully explained within the ambit of the doctrine of fault liability. The exceptions relating to salvage and reasonable deviation release carriers from unnecessary worries following good deeds they have done to help cargo owners to avoid greater losses, give a hand to outsiders or preserve interests of considerable value.[775] The exception relating to shipment of dangerous goods grants carriers the right to take necessary disposal measures, without any need for compensation, to shield their ships and other goods carried therein from potential or imminent risks brought by the dangerous goods in their custody.[776] The exception contained in Article 6 of the Rules recognizes the applicability of freedom of contract to shipment of particular goods in which carriers are easily overloaded with duties and liability if subject to ordinary contracts of carriage.

In the last chapter of this part, the relationship between the carrier's duty of seaworthiness and immunities, the relationship between the carrier's duty of care of goods and immunities, and burden of proof relating to the carrier's exemption in the Rules have been examined from the perspective of clarity. There has been an influential theory stating that the carrier's duty of seaworthiness contained in Article 3.1 is the "overriding obligation" in the Rules, the appropriate performance of which must be

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[775] See *Pyrene*, *supra* note 699 at 413; *The Rosa S*, [1989] QB 419 at 425, Hobhouse J (UK); *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co (The Nadezhda Kaubskaya)*, (1989) 15 NSWLR 448 459 (SC). See also William Tetley & Bruce Cleven, "Prosecuting the Voyage" (1970) 45 Tul L Rev 807 at 810-811; J Roger Lee, "The Law of Maritime Deviation" (1972) 47 Tul L Rev 155 at 159; Stanley L Gibson, "The Evolution of Unreasonable Deviation under US COGSA" (1990) 3 USF Mar LJ 197 at 202; Mary Pace Livingstone, "Has the Deviation Doctrine Deviated Unreasonably" (2001) 26 Tul Mar LJ 321 at 326.

[776] See generally Cleopatra Elmira Henry, *The Carriage of Dangerous Goods by Sea: The Role of the International Maritime Organization in International Legislation* (London: Pinter, 1985) at 13-16.

proven before any exception is pleaded.[777] However, the theory has not been universally accepted and conflicting doctrines and judgments persist.[778] The relationship between the carrier's duty of care of goods and immunities is far more confusing.[779] The opening words of Article 3.2 easily lead to the inference that a carrier is still able to escape liability even if he has failed to perform his obligations therein, which contradicts the commonly-accepted view that the entitlement of a carrier to exemption from liability is valid only if he is blameless in caring for goods in his charge.[780] Additionally, the provisions concerning burden of proof in the Rules are rather fragmentary. Though a few textual loopholes have been filled by certain approaches that already have been repeatedly practiced by courts,[781] some issues of importance are still left undetermined.[782]

In conclusion, the Hague Rules, notwithstanding their merits, have some serious defects in terms of both fairness and clarity that have hindered them from being a satisfactory solution to the regulation of the carrier's exculpatory rights.[783]

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[777] Tetley, *Claims*, *supra* note 311 at 97. See also Pourcelet, *supra* note 405 at 82.
[778] See Clarke, *Aspects*, *supra* note 74 at 139-148; Schoenbaum, *supra* note 171 at 110-125.
[779] See Girvin, *Carriage*, *supra* note 53 at para 10.154.
[780] Aikens, Lord & Bools, *supra* note 458 at para 10.154. See also Scrutton, *supra* note 94 at 205-207; Carver, *supra* note 86 at 205.
[781] See Gaskell, Asariotis & Baatz, *supra* note 511 at para 8.64.
[782] See *Anonima Petroli Italiana SpA & Neste OY v Marlucidez Armadora SA (The Filiatra Legacy)*, [1992] 2 Lloyd's Rep 337 at 365-366 (CAUK); *Amoco Oil Co v Parpada Shipping Co Ltd (The George S)*, [1989] 1 Lloyd's Rep 369 at 380 (CAUK); *Fal Oil Co Ltd v Petronas Trading Corp Sdn Bhd (The Devon)*, [2004] 2 Lloyd's Rep 282 at 293 (CAUK); *Torenia*, *supra* note 451 at 217; *Theodegmon*, *supra* note 722 at 60.
[783] See Yancey, *supra* note 3 at 1240-1242; Honnold, "Clarity", *supra* note 22 at 83-86.

Part III – A remarkable endeavor to reform the Hague-style carrier's exemption system: the Hamburg Rules

After the Second World War, the global economic and political situations changed sharply. An increasing number of newly independent countries emerged and were involved in the international trade.[784] The exports from those countries accounted for a majority of the volume of business by sea, whereas the dominance of mercantile vessels was still firmly held by industrialized nations.[785] The Hague Rules, together with the Visby Protocol of 1968, were deemed by developing countries as no more than a tactic to pre-empt fundamental changes to the existing international regime governing the carriage of goods by sea.[786] Their dissatisfaction mostly stemmed from the concern that the existing regime did not ensure an equal treatment between developing nations generally representing cargo interests and developed nations basically representing shipowning interests.[787] It was also complained that the representatives at the meetings leading to the emergence of the Hague Rules were predominantly spokesmen of major industrialized

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[784] Karan, *Liability*, *supra* note 65 at 8.

[785] L Andreani, "Revision of the Hague Rules, Activities of UNCTAD and UNCITRAL and the Developing Countries" in Francesco Berlingieri, ed, *Studies on the Revision of the Brussels Convention on Bills of Lading* (Genoa: Ricerca, 1974) at 11, 21. See also William Schaw Lindsay, *History of Merchant Shipping and Ancient Commerce* (Cambridge: Cambridge University Press, 2014) at 42-43.

[786] See generally Joseph C Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)" (1975) 7 J Mar L & Com 69 [Sweeney, "Draft I"]; Joseph C Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part II)" (1975) 7 J Mar L & Com 327 [Sweeney, "Draft II"]; Joseph C Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part III)" (1975) 7 J Mar L & Com 487; Joseph C Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)" (1975) 7 J Mar L & Com 615; Joseph C Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V)" (1976) 8 J Mar L & Com 167 [Sweeney, "Draft V"].

[787] TK Thommen, "Carriage of Goods by Sea: The Hague Rules and Hamburg Rules" (1990) 32 JILI 285 at 288.

countries and commercially-minded forces who strived to work out compromises reflecting commercial rather than political realities.[788]

Spurred by developing countries, the United Nations Conference on the Carriage of Goods by Sea was held in Hamburg from March 6 to 31, 1978. 78 states were present at the Conference, together with an observer from Guatemala and representatives from non-governmental organizations, specialized agencies and United Nations organs.[789] The negotiations took on a distinctly political hue as many delegates were diplomats rather than experts on ocean transport.[790] The final text of the act of the Conference was signed on March 31, 1978, following a vote of 67 in favor, 0 against and 4 abstentions.[791] The Hamburg Rules came into force on November 1, 1992, after the expiration of one year from the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.[792] There are so far 34 contracting states,[793] but few of them are truly powerful and influential in the domain of the carriage of goods by sea.[794]

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[788] Girvin, *Carriage*, *supra* note 53 at para 16.02. See also George F Chandler, III, "After Reaching a Century of the Harter Act: Where Should We Go from Here" (1993) 24 J Mar L & Com 43 at 45 [Chandler, "Century"]; Frederick, *supra* note 238 at 105.

[789] Those participant organizations included Intergovernmental Maritime Consultative Organization (IMCO), Baltic and International Maritime Conference (BIMCO), International Chamber of Commerce (ICC), International Chamber of Shipping, International Shipowners Association, CMI, International Monetary Fund (IMF), United Nations Conference on Trade and Development (UNCTAD), etc.

[790] Frederick, *supra* note 238 at 105.

[791] Girvin, *Carriage*, *supra* note 53 at para 1.26.

[792] *United Nations Convention on the Carriage of Goods by Sea*, 31 March 1978, 1695 UNTS 3, 17 ILM 608, art 30 [*Hamburg Rules*]. Article 30 provides that:

> 1. This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.
> 2. For each State which becomes a Contracting State to this Convention after the date of deposit of the 20th instrument of ratification, acceptance approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.

Part III consists of three chapters. The first one reveals how the Hamburg Rules were created to supersede the Hague Rules. Chapter II examines the carrier's exclusion of liability in the Hamburg Rules under the criterion of fairness. The last chapter focuses on a clarity-oriented evaluation of exoneration-related provisions therein.

3. Each Contracting State shall apply the provisions of this Convention to contracts of carriage by sea concluded on or after the date of the entry into force of this Convention in respect of that State.

[793] The 34 contracting states include Albania, Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Dominican Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kazakhstan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syrian Arab Republic, Tunisia, Uganda, United Republic of Tanzania and Zambia. Status of the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978), online: United Nations Commission on International Trade Law <http://www.uncitral.org>.

[794] See Pixa, *supra* note 4 at 440.

Chapter I – Path from the Hague Rules to the Hamburg Rules

The compromises embraced in the Hague Rules did not put an end to all problems.[795] Longstanding issues untouched in the Rules, newly-emerging problems and changing international situations called for a new maritime convention.[796]

Section 1 – Mild reform brought by the Visby Protocol

The deficiencies of the Hague Rules began to emerge shortly after they had been approved.[797] As opposed to the demand of developing countries for radical changes to the Rules,[798] some businessmen and lawyers from leading shipping nations advocated modest reforms to prevent the entire scheme that had been built from rupturing.[799]

The biggest stimulus for the revision of the Rules was limitation of liability.[800] The limitation sum of 100 pounds sterling in the Rules was determined after a series of heated discussions.[801] When the Rules were approved, the sum was acceptable given the average value of a package at that time.[802] However, only one year later, sterling lost its

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795 Carver, *supra* note 86 at 7.
796 Donovan, "Convention", *supra* note 32 at 3.
797 Lee, "System", *supra* note 172 at 244.
798 See Sinha Basnayake, "Introduction: Origins of the 1978 Hamburg Rules" (1979) 27 Am J Comp L 353 at 353-355.
799 See Michael F Sturley, "Uniformity in the Law Governing the Carriage of Goods by Sea" (1995) 26 J Mar L & Com 553 at 560-561 [Sturley, "Uniformity"].
800 See Craig H Allen, "Limitation of Liability" (2000) 31 J Mar L & Com 263 at 266; Richardson, *supra* note 284 at 36.
801 See Francesco Berlingieri, *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* (Antwerpen: CMI, 1997) at 263-271, 279-307 [Berlingieri, *Travaux*].
802 Some scholars suggested that the limitation amounts agreed upon represented a major improvement for cargo interests. See e.g. James, *supra* note 259 at 688. Lord Diplock explained that "the economic purpose of the [Hague Rules] limitation was to enable the shipowner, on the basis of knowing that his liability was limited to that figure, to offer standard freight rates for all ordinary cargo without the delay and cost to himself and to the cargo-owner which would be incurred by inquiring into the value of the particular consignment and by adjusting the freight rate

convertibility into gold and contracting states began to adopt the equivalence of 100 pounds sterling in terms of their own currencies.[803] The net effect was that the amount of limitation of liability became so fluctuant that it was almost impossible for shipowners and their insurers to predict with accuracy the total amount of indemnity.[804] As Mr. Diamond remarked, it was regrettable that the provisions in the Rules regarding limitation of liability failed to bring certainty, uniformity, stability and the maximum degree of protection against currency inflation.[805]

Another noteworthy problem, which arose several decades after the enactment of the Rules, was containerization.[806] The movement of goods by means of containers was a revolution in the transportation business.[807] Containerization led to some positive changes, such as increase in the speed of transit, reduction in handling costs, and extra protection against loss or damage.[808] However, as it prospered, the disharmony between the transport of containers and the Rules was exposed.[809]

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accordingly." See L Diplock, "Coventions and Morals – Limitation Clauses in International Maritime Conventions" (1970) 2 J Mar L & Com 525 at 529. See also Patrick Griggs, Richard Williams & Jeremy Farr, *Limitation of Liability for Maritime Claims*, 4th ed (London: LLP, 2005) at 49.

803 Girvin, *Carriage*, *supra* note 53 at para 15.13.

804 See Francesco Berlingieri, "Conversion of the Gold Monetary Unit into Money of Payment" (1991) 18 LMCLQ 97 at 99-100.

805 Diamond, "Rules", *supra* note 238 at 237.

806 See Mandelbaum, "Standards", *supra* note 64 at 473.

807 See Lane C Kendall & James J Buckley, *The Business of Shipping*, 7th ed (Centreville: Cornell Maritime Press, 2001) at 171. See also Lawrence J Rinaldi, *Containerization: The New Method of Intermodal Transport* (New York: Sterling Pub Co, 1974) at 11-12.

808 See Branch, *supra* note 372 at 378; Christof F Lüddeke, *Marine Claims*, 2d ed (London: Lloyd's of London Press, 1996) at 128. See also Marc Levinson, *The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger*, 2d ed (Princeton: Princeton University Press, 2016) at 12-15.

809 Yancey, *supra* note 3 at 1247.

In 1959, the CMI organized a conference in Rijeka where a reform plan directed at the provisions in the Rules regarding limitation of liability was intensively discussed.[810] A sub-committee on bills of lading, formed during the conference, issued in 1962 a report containing seven important recommendations.[811] The next CMI conference was held in Stockholm in 1963. Those recommendations were reviewed at the initial plenary session before being returned to the sub-committee for further consideration.[812] In the ensuing plenary session, a number of other proposals were added.[813] At the conclusion of the conference, a draft protocol was signed in Visby.[814]

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[810] The CMI's International Sub-Committee on Conflicts of Law was also invited to consider whether other changes should be made. See Berlingieri, *Travaux*, *supra* note 801 at 56. See also Sturley, "Regimes", *supra* note 117 at 24.

[811] Those recommendations included: (a) clarifying that the carrier was not liable for negligent loading, stowage or discharge of goods if those activities were carried out by the shipper or consignee; (b) clarifying that the failure to give notice of non-apparent loss or damage during the three-day period in Article 3.6 led to a presumption of proper delivery, but did not otherwise affect relations between the parties; (c) adding a two-year limitation period to govern claims for wrongful delivery to persons not entitled to receive them; (d) replacing the 100 pounds sterling package limitation and the gold clause with a 10,000 Poincaré franc package limitation clause; (e) adding a new provision to the Hague Rules to address the problem of Himalaya clauses; (f) adding a new provision to govern nuclear damage; and (g) urging the United States to adopt the same rules as the rest of the maritime world as to collisions and thus solving the problem of the both-to-blame clause. Girvin, *Carriage*, *supra* note 53 at para 15.15.

[812] In this review, the first and the second recommendations were rejected, the third was substantially modified, the fourth and the fifth were accepted with changes, the six was accepted unaltered, and the seventh was not addressed at all. See Berlingieri, *Travaux*, *supra* note 801 at 60.

[813] Among those proposals, there was one in effect overruling the decision in *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)*. That decision was to the effect that if particular responsibilities were delegated to independent contractors or Lloyd's surveyors, and those persons were negligent, the carrier remained liable. It was not a defense for the carrier to argue that he engaged reliable experts or that he lacked the necessary expertise to check their work. The decision caused consternation in the United Kingdom and many other places, so it was considered by the CMI at its Rijeka Conference and Stockholm Conference. The British delegation was vocal is proposing changes and its proposal was adopted by a majority. However, at the later Diplomatic Conference at Brussels in 1967 and 1968, the amendment was rejected because: (a) it was believed to be contrary to fundamental legal principles in some countries; (b) it disturbed the balance achieved in 1924 between the various interests; and (c) it made it difficult for cargo interests or their insurers to recover against independent contractors at fault. See *Muncaster Castle*, *supra* note 529 at 844, 872; Berlingieri, *Travaux*, *supra* note 801 at 148, 150; Clarke, *Aspects*, *supra* note 74 at 253. See also *Fjord Wind*, *supra* note 548 at 199, Clarke LJ.

[814] See FR Sanborn, *Origins of the Early English Maritime and Commercial Law* (New York: The Century Co, 1930) at 76; Leon E Trakman, "Evolution of the Law Merchant: Our Commercial Heritage – Part I: Ancient and Medieval Law Merchant" (1980) 12 J Mar L & Com 1 at 5; Diamond, "Rules", *supra* note 238 at 226, n 1. See also Richardson, *supra* note 284 at 62-63.

A two-session diplomatic conference, hosted by the Belgian government, was held in Brussels in May 1967 and February 1968. Two proposals relating to the Himalaya clause and nuclear damage were accepted in the first session.[815] When the delegations met in February 1968, they grappled with one vital problem, namely limitation of liability, on which no agreement had been reached in 1967. Several significant innovations were made during the session in 1968, including alternative weight basis for limitation,[816] inclusion of a container clause,[817] and invalidity of limitation resulting from intentional or reckless misconducts.[818] At the end of the second session, the Protocol to Amend the

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[815] *Visby Protocol*, *supra* note 582, arts 3, 4. Article 3 provides that:

> Between Articles 4 and 5 of the Convention shall be inserted the following Article 4bis:
> … If such 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 defenses and limits of liability which the carrier is entitled to invoke under this Convention. …

Article 4 provides that:

> Article 9 of the Convention shall be deleted and replaced by the following:
> "This Convention shall not affect the provisions of any international Convention or national law governing liability for nuclear damage".

See also William Tetley, "The Himalaya Clauses – Revisited" (2003) 9 Journal of International Maritime Law 40 at 43; Norman Palmer, "The Stevedore's Dilemma: Exemption Clauses and Third Parties" (1974) J Bus L 101 at 103; FM Reynolds, "Himalaya Clause Resurgent" (1974) 90 Law Q Rev 301 at 305; F Dawson, "Himalaya Clauses, Consideration and Privity of Contract" (1975) 6 NZUL Rev 161 at 167; William Tetley, "Himalaya Clause – Heresy or Genius" (1977) 9 J Mar L & Com 111 at 112.

[816] *Visby Protocol*, *supra* note 582, art 2. Article 2 provides that:

> Article 4, paragraph 5, shall be deleted and replaced by the following:
> (a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 10,000 francs per package or unit or 30 francs per kilo of gross weight of the goods lost or damaged, whichever is the higher. …

[817] *Ibid*, art 2. Article 2 provides that:

> Article 4, paragraph 5, shall be deleted and replaced by the following:
> … (c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit. …

See also Berlingieri, *Travaux*, *supra* note 801 at 524, 561; Yehuda Hayuth, *Intermodality: Concept and Practice: Structural Changes in the Ocean Freight Transport Industry* (Colchester: Lloyd's of London Press, 1987) at 26; H Edwin Anderson III & Jason P Waguespack, "Assessing the Customary Freight Unit: A COGSA Quagmire" (1996) 9 USF Mar LJ 173 at 188-189.

[818] *Visby Protocol*, *supra* note 582, art 2. Article 2 provides that:

> Article 4, paragraph 5, shall be deleted and replaced by the following:

International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, also known as the Visby Protocol, was adopted. It was signed on February 23, 1968 and came into force on June 23, 1977. The Hague Rules of 1924 and the Visby Protocol of 1968 are usually treated as a single instrument.[819]

Notwithstanding its virtues,[820] the Protocol did not radically alter the layout already built in the Hague Rules.[821] It merely made a few changes to several provisions in the latter that had been widely deemed obsolete and urgently needed revising.[822] It is no wonder that the Protocol was thought to provide no more than a facelift to the Hague Rules since the form, structure and contents of the latter remained substantially unchanged.[823] Such minimalist approach was obviously unable to soothe all dissatisfaction with the Hague Rules.[824]

> … (e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result. …

See also *MSC Mediterranean Shipping Co SA v Delumar BVBA (The MSC Rosa M)*, [2000] 2 Lloyd's Rep 399 at 401, David Steel J (QBDUK).

819 *Visby Protocol*, *supra* note 582, art 6. Article 6 provides that:

> As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument. …

820 The Hague-Visby Rules were given statutory effect in the United Kingdom by the Carriage of Goods by Sea Act 1971 which came into force on June 23, 1977. Australia, Canada, Singapore and South Africa were examples of states which enacted legislation applying the Hague-Visby Rules, though not contracting states to the Protocol. See Hugh M Kindred, "Goodbye to the Hague Rules: Will the New Carriage of Goods by Water Act Make a Difference?" (1994-95) 24 Can Bus LJ 404 at 408; Gold, Chircop & Kindred, *supra* note 51 at 434; Tan Lee Meng, "The Carriage of Goods by Sea Act 1972 and the Hamburg Rules" (1980) 22 Mal L Rev 199 at 202 [Tan, "Act 1972"]; Tan Lee Meng, *The Law in Singapore on Carriage of Goods by Sea*, 2d ed (Singapore: Butterworths Asia, 1994) at 313.

821 Girvin, *Carriage*, *supra* note 53 at para 15.21.

822 Lee, "System", *supra* note 172 at 244-245.

823 Girvin, *Carriage*, *supra* note 53 at para 15.20.

824 Lee, "System", *supra* note 172 at 245.

Section 2 – Ambition of developing countries

The reform brought by the Visby Protocol was evidently too slight to extinguish the longing of developing countries for a brand-new maritime convention. They kept grumbling that they were oppressed by an international cartel of carriers which was similar to the British shipping monopoly dictating to American merchants at the end of the nineteenth century and that they had not effectively participated in the negotiations for the Hague Rules.[825] Their discontent originated primarily from the belief that the traditional maritime law was exploited to ensure their continued poverty and perpetual underdevelopment in the industrial age.[826] Those developing countries tended to criticize the Hague Rules for their confusing language, unduly heavy burden of proof imposed on consignees, lack of compensation for loss resulting from delay, unjustifiable protection in favor of carriers, divorce from needs of modern ocean transport and international trade, etc.[827]

Developing countries distrusted the network controlled by traditional maritime powers but had confidence in the United Nations.[828] Their desire for a new maritime

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[825] See Basnayake, *supra* note 798 at 353-355. See also Okechukwu C Iheduru, *Political Economy of International Shipping in Developing Countries* (Cranbury: University of Delaware, 1996) at 25-26.

[826] Sweeney, "Draft I", *supra* note 786 at 73.

[827] Karan, *Liability*, *supra* note 65 at 32. See also Basnayake, *supra* note 798 at 353-355; John C Moore, "The Hamburg Rules" (1978) 10 J Mar L & Com 1 at 5-6; MJ Shah, "The Revision of the Hague Rules on Bills of Lading within the UN System – Key Issues" in Mankabady, *Hamburg*, *supra* note 57, 1 at 4; John D Kimball, "Shipowner's Liability and the Proposed Revision of the Hague Rules" (1975) 7 J Mar L & Com 217 at 217-220.

[828] Those developing countries were hostile towards the CMI because they believed that radical reforms would not be brought in and the ancient regime would be readopted by the institution. Karan, *Liability*, *supra* note 65 at 32. See also Chandler, "Century", *supra* note 788 at 45; Gunnar K Sletmo, "The End of National Shipping Policy? A Historical Perspective on Shipping Policy in a Global Economy" (2001) 3 International Journal of Maritime Economics 333 at 336-337.

convention was initially transmitted to the United Nations Conference on Trade and Development (UNCTAD), an organ of the United Nations set up in 1964 to formulate policies on international trade and economic development with particular reference to problems and needs of developing countries.[829] At its first conference held in Geneva from March 23 to June 16, 1964, the United Arab Republic raised the issue of international shipping legislation.[830] There was a proposal that this matter should be entrusted to the UNCITRAL, which was being built at that moment, because the UNCTAD might not be technically qualified, but it was rejected by developing countries.[831] A committee on shipping was appointed by the Trade and Development Board of the UNCTAD to consider a range of issues concerning the trade relationship between developed and developing states.[832] During its second conference in New Delhi from February 1 to March 29, 1968, a working group was appointed to cope with legislative matters.[833]

Following the establishment of the UNCITRAL on December 17, 1966, legal problems relating to bills of lading were shifted to the new forum so that the UNCTAD

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[829] See Gabriel M Wilner, "Survey of the Activities of UNCTAD and UNCITRAL in the Field of International Legislation on Shipping" (1971) 3 J Mar L & Com 129 at 129-134. See also Lawrence Juda, "World Shipping, UNCTAD, and the New International Economic Order" (1981) 35 International Organization 493 at 496.

[830] See Christof F Lüddeke & Andrew Johnson, *The Hamburg Rules: From Hague to Hamburg via Visby*, 2d ed (London: Lloyd's of London Press, 1995) at 13-15.

[831] See CC Nicoll, "Do the Hamburg Rules Suit a Shipper-Dominated Economy?" (1993) 24 J Mar L & Com 151 at 151-152.

[832] Girvin, *Carriage*, *supra* note 53 at para 16.03.

[833] "A Survey of the Work in the Field of International Legislation on Shipping Undertaken by Various International Organizations, and Co-ordination of Future Work in This Field: Report of the Secretary-General" (A/CN.9/41) in *Yearbook of the United Nations Commission on International Trade Law 1968-1970*, vol 1, part 3 (New York: UN, 1971) at 233-237 (A/CN.9/SER.A/1970).

could concentrate on economic issues.[834] The UNCITRAL was set up to further the progressive harmonization and unification of international trade law.[835] It had a working group on international shipping legislation that comprised twenty-one states representing different regions and legal systems.[836] The Working Group held six substantive sessions between 1971 and 1975.[837] At that time, there was a consensus that "within the priority topic of international legislation on shipping, the subject for consideration for the time being shall be bills of lading."[838] In 1975, the UNCITRAL prepared a draft convention on the carriage of goods by sea,[839] which aimed to (a) reduce the carrier's immunities; (b) permit cargo interests to pursue legal claims at destination; (c) clarify the carrier's liability in transshipment; (d) prevent carriers from including invalid clauses in bills of lading; and (e) raise the limitation of liability.[840] The Draft Convention was transmitted to all participant governments and some international organizations for their comments.[841] It was approved by the UNCTAD in July 1976 and was thereafter

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834 See Clive Schmitthoff, "The Unification of the Law of International Trade" (1968) J Bus L 105 at 106-107; E Allan Farnsworth, "UNCITRAL – Why? What? How? When?" (1972) 20 Am J Comp L 314 at 314-316 [Farnsworth, "UNCITRAL"]. See also John H Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2d ed (Cambridge: MIT Press, 2002) at 46-47.

835 See Isaak I Dore & James E Defranco, "A Comparison of the Non-substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code" (1982) 23 Harv Int'l LJ 49 at 49-50.

836 Basnayake, *supra* note 798 at 355. See also Wilner, *supra* note 829 at 133.

837 Girvin, *Carriage*, *supra* note 53 at para 16.04.

838 "Report of the Working Group on International Legislation on Shipping on the Work of Its Third Session, Held in Geneva from 31 January to 11 February 1972" (A/CN.9/63 and Add. 1) in *Yearbook of the United Nations Commission on International Trade Law 1972,* vol 3, part 2 (New York: UN, 1973) at 256 (A/CN.9/SER.A/1972).

839 See generally "Draft Convention on the Carriage of Goods by Sea" (A/CN.9/105, annex) in *Yearbook of the United Nations Commission on International Trade Law 1975,* vol 6, part 2 (New York: UN, 1976) at 246-252 (A/CN.9/SER.A/1975).

840 Shah, *supra* note 827 at 11.

841 See generally "Report of the Secretary-General: Analysis of Comments by Governments and International Organizations on the Draft Convention on the Carriage of Goods by Sea" (A/CN.9/110) in *Yearbook of the United Nations Commission on International Trade Law 1976,* vol 7, part 2 (New York: UN, 1977) at 263-298 (A/CN.9/SER.A/1976).

endorsed by the General Assembly of the United Nations that decided to convene a conference of plenipotentiaries to consider it.[842]

The United Nations Conference on the Carriage of Goods by Sea was held in Hamburg from March 6 to March 31, 1978.[843] There was a remarkable tension during the Conference between developed and developing countries roughly representing shipowning and cargo-owning interests respectively.[844] Much attention was paid to controversial issues instead of those that had already been settled in the previous negotiations.[845] In general, developed states sought to preserve the old pattern in favor of themselves, while developing states strived for some radical changes.[846] The Conference featured both antagonism and "horse trading".[847] One of the U.S. delegates commented that "the trading was so hard that when agreement was reached no one dared even touch a comma for the fear that the whole deal would be upset."[848]

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842 Karan, *Liability*, *supra* note 65 at 34.

843 There were three committees that had debated some issues of importance even before the Conference. The First Committee dealing with matters of substance was set up under the chairmanship of Professor Mohsen Chafik. The Second Committee, concerned with the technical provisions regarding entry into force, relationship between the new convention and the Hague-Visby Rules, and future revisions, was chaired by Mr. Dimitar Popov. The Third Committee, the drafting committee, was chaired by Mr. DK Dixit. See Basnayake, *supra* note 798 at 355.

844 At that time, developing countries were at a disadvantage in the shipping industry. They accounted for 64.7%, in terms of weight, of all maritime shipments, but actually owned only 7.6% of the worldwide fleets. Girvin, *Carriage*, *supra* note 53 at para 16.04. See also Sweeney, "Allocation", *supra* note 254 at 526; CWH Goldie, "Effect of the Hamburg Rules on Shipowners' Liability Insurance" (1993) 24 J Mar L & Com 111 at 111-113; Julio Faúndez & Celine Tan, *International Law, Economic Globalization and Developing Countries* (Cheltenham: Edward Elgar Pub, 2010) at 55.

845 For instance, the limitation figures were deliberately left blank in the final draft, and in fact were held from discussion at the Conference until all other issues, e.g., the deletion of the nautical fault exception and the revision of the fire exception, had been resolved. Only then were the limits of liability agreed upon. Donovan, "Convention", *supra* note 32 at 4-5.

846 See Sweeney, "Draft I", *supra* note 786 at 73-74. See also Robert Hellawell, "Less Developed Countries and Developed Countries' Law: Problems from the Law of Admiralty" (1968) 7 Colum J Transnat'l L 203 at 203-205.

847 Donovan, "Convention", *supra* note 32 at 5.

848 *Ibid*.

The Hamburg Rules were adopted on March 31, 1978 and came into force on November 1, 1992 after the expiration of one year from the date of deposit of the twentieth instrument of ratification, acceptance, approval, or accession.[849] There are few powerful shipping nations having officially accepted the Rules,[850] though a number of states have implanted them into their domestic laws.[851] The Rules are often regarded as a counterattack of developing countries with a view to overthrowing the traditional international legal regime governing the international carriage of goods by sea,[852] but they are, as a matter of fact, more like a "compromise settlement" than an outright victory of the camp of developing countries.[853] Anyway, the significance of the Rules should never be underestimated. Mr. James J. Donovan, former president of the Maritime Law Association of the United States, remarked that:

> It is my belief that the mark of a successful settlement is that all parties to the agreement walk away somewhat dissatisfied. No single interest group succeeded in getting every provision which it wanted, but no interest group was unable to obtain some provisions which it believed to be in its interest. The Hamburg Rules represent a significant development in international trade law. The experience in Hamburg has proven that the international commercial community can resolve differences in an international forum.[854]

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849 *Hamburg Rules*, *supra* note 792, art 30.1. Article 30.1 provides that:
> This Convention enters into force on the first day of the month following the expiration of one year from the date of deposit of the 20th instrument of ratification, acceptance, approval or accession.

850 See Pixa, *supra* note 4 at 440.

851 For example, the contents of the Hamburg Rules have been incorporated into the Marine Liability Act of Canada in the form of Schedule 4. See *Marine Liability Act*, *supra* note 619, Schedule 4.

852 See Francis Reynolds, "The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules" (1990) 7 MLAANZ Journal 16 at 22.

853 Donovan, "Convention", *supra* note 32 at 1.

854 *Ibid*.

Chapter II – An investigation into the carrier's exclusion of liability in the Hamburg Rules under the criterion of fairness

After years of negotiation, some important changes to the Hague Rules were made in the Hamburg Rules,[855] such as increased limitation of liability,[856] articulated definition of "per package",[857] newly-added liability for delay in delivery,[858] newly-added provision regarding the carriage of goods on deck,[859] modified time limit for notices of ordinary loss or damage,[860] modified time limit for notices of concealed

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[855] See generally R Cleton, "The Special Features Arising from the Hamburg Diplomatic Conference" (Paper delivered at the Hamburg Rules: A One-Day Seminar, 28 September 1978).

[856] *Hamburg Rules*, *supra* note 792, art 6.1(a). Article 6.1(a) provides that:

> The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.

[857] *Ibid*, art 6.2(a). Article 6.2(a) provides that:

> Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

[858] *Ibid*, art 5.2. Article 5.2 provides that:

> Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

[859] *Ibid*, art 9. Article 9 provides that:

> 1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.
>
> 2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.
>
> 3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.
>
> 4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8.

[860] *Ibid*, art 19.1. Article 19.1 provides that:

loss or damage,[861] extended limitation of action,[862] etc.[863] With respect to the carrier's exemption from liability, the noteworthy changes include removal of the "laundry list",[864] articulated principle of presumed fault,[865] modified fire exception,[866] etc. This chapter is contributed to an investigation into the carrier's exclusion of liability in the Hamburg Rules under the criterion of fairness.

Section 1 – Dominance of fault liability

In the Hamburg Rules, the carrier's liability is generally based on fault.[867] According to Article 5.1 of the Rules, carriers shall be liable for loss, damage or delay in delivey occurring while the goods are in their charge, unless they are able to prove that they, their servants or agents have taken all measures that may reasonably be required to prevent such loss, damage or delay.[868]

Unless notice of loss or damage, specifying the general nature of such loss or damage, is given in writing by the consignee to the carrier not later than the working day after the day when the goods were handed over to the consignee, such handing over is *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

[861] *Ibid*, art 19.2. Article 19.2 provides that:

Where the loss or damage is not apparent, the provisions of paragraph 1 of this article apply correspondingly if notice in writing is not given within 15 consecutive days after the day when the goods were handed over to the consignee.

[862] *Ibid*, art 20.1. Article 20.1 provides that:

Any action relating to carriage of goods under this Convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years.

[863] For more information about other changes, see Mandelbaum, "Standards", *supra* note 64 at 482-483.

[864] See Karan, *Liability*, *supra* note 65 at 35; Sweeney, "Draft I", *supra* note 786 at 102-117.

[865] *Ibid*; Lee, "System", *supra* note 172 at 245-246.

[866] *Ibid* at 246; Force, "Much Ado About", *supra* note 767 at 2071.

[867] See John F Wilson, *Carriage of Goods by Sea*, 7th ed (Harlow: Pearson, 2012) at 216 [Wilson, *Carriage of Goods*]; Selvig, "Insurance", *supra* note 21 at 301-304.

[868] *Hamburg Rules*, *supra* note 792, art 5.1.

Paragraph 1 – Principle of presumed fault

Article 5.1 of the Rules provides that:

> The carrier is liable for loss resulting from 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 article 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.[869]

Its implication has been stated in clear and concise terms in Annex II of the Rules:

> The liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.[870]

The discussions over the basis of liability in the Rules began in February 1972.[871] In spite of other alternatives,[872] shipowning interests and cargo-owning interests both favored the idea that the carrier's liability in the prospective convention should be based on fault.[873] Many delegates contended that the basis of liability in the new convention should harmonize with that in the conventions governing other modes of transport,[874] but

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869 *Ibid*.
870 *Ibid*, Annex II.
871 Sweeney, "Draft I", *supra* note 786 at 102.
872 See generally "Responsibility of Ocean Carriers for Cargo – Bills of Lading: Report of the Secretary-General" (A/CN.9/63/Add.1) in *Yearbook 1972*, *supra* note 838 at 287-302.
873 Sweeney, "Draft I", *supra* note 786 at 102.
874 See e.g. *Warsaw Convention*, *supra* note 344, arts 18.1, 20.1; *CMR*, *supra* note 344, arts 17.1, 17.2; *CIM*, *supra* note 344, arts 23.1, 23.2. See also George W Orr, "Fault as the Basis of Liability" (1954) 21 J Air L & Com 399 at 401; George R Sullivan, "The Codification of Air Carrier Liability by International Convention" (1936) 7 J Air L 1 at 5-6; Carl E McDowell, "Containerization: Comments on Insurance and Liability" (1972) 3 J Mar L & Com 503 at 507; Stuart Beare, "Liability Regimes: Where We Are, How We Got There and Where We Are Going" (2002) 29 LMCLQ 306 at 310.

some of them argued that an indiscriminate imitation might be unwise as the carriage of goods by sea indeed had its particularities.[875]

Article 5.1 of the Rules provides for, on the one hand, the defense that carriers may invoke to relieve themselves from liability and,[876] on the other, the duty imposed upon them to take "all measures that could reasonably be required" to avert loss, damage or delay in delivery.[877] Such duty is believed to denote no more than an ordinary standard of care,[878] because the analogous duties in the Warsaw Convention and the CMR have been construed in that way.[879]

The principle of presumed fault embodied in Article 5.1 of the Rules has a close connection with the Anglo-American doctrine of *res ipsa loquitur*.[880] "*Res ipsa loquitur*"

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875 Sweeney, "Draft I", *supra* note 786 at 102.

876 Sze, *supra* note 331 at 64. See also Erling Selvig, "Report of Group 2 – Articles 5 and 24 Basis of Liability, Including Problems Relating to Salvage and General Average" (Paper delivered at the CMI Colloquium on the Hamburg Rules, 8-10 January 1979) at 46 [Selvig, "Report of Group"]; William Tetley, "The Hamburg Rules – A Commentary" (1979) 6 LMCLQ 1 at 7 [Tetley, "Commentary"]; Wilson, *supra* note 547 at 140.

877 See Finn Hjalsted, "The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law – Part I" (1960) 27 J Air L & Com 1 at 1; L Diplock, "Summing up" (Paper delivered at the CMI Colloquium on the Hamburg Rules, 8-10 January 1979) at 58; Mankabady, *supra* note 57 at 54; Anthony Diamond, "A Legal Analysis of the Hamburg Rules Part I" (Paper delivered at the Hamburg Rules: A One-Day Seminar, 28 September 1978) at 11 [Diamond, "Legal Analysis"]. See also *Heyn*, *supra* note 597 at 338, MacKinnon J.

878 See Hjalsted, *supra* note 877 at 4-5; Malcolm A Clarke, *International Carriage of Goods by Road: CMR* (London: Stevens, 1982) at 119.

879 See Diamond, "Legal Analysis", *supra* note 877 at 11; Selvig, "Report of Group", *supra* note 876 at 46.

880 There is another similar doctrine deriving from France called "présomption de faute". The doctrine of *res ipsa loquitur* raises a presumption of negligence against the defendant which may be rebutted. The defendant is not liable if the evidence shows that he was not at fault. The presumption involved in the doctrine operates to shift the burden of ultimately persuading the judge or the jury on a given issue. The doctrine of *présomption de faute*, on the other hand, has a much more far-reaching effect. Althougth *présomption de faute* may be literally translated into presumption of fault, the expression is quite misleading as such a presumption indeed cannot be refuted even if the absence of fault can be proven. The so-called presumption of fault in the French doctrine is irrebuttable unless there is proof showing that the loss or damage resulted from *force majeure*, unforeseen events or causes not imputable to the person presumed to be liable (i.e. contributory negligence or fault of a third party). In this sense, the doctrine of *présomption de faute* actually amounts to the imposition of liability regardless of fault. See Francis Deak, "Automobile Accidents: A Comparative Study of the Law of Liability in Europe" (1931) 79 U Pa L Rev 271 at 278. See also Francis H Bohlen, "The Effect of Rebuttable Presumptions of Law upon the Burden of Proof" (1920) 68 U Pa L Rev 307 at 309-312.

literally means "the thing speaks for itself."[881] It is a doctrine of law, or rather, a rule of evidence.[882] Its application to negligence-related cases may be traced as far back as 1863 when it was roughly mentioned in *Byrne v Boadle*.[883] Two years later, in *Scott v London & St Katherine Docks Co*, Erle CJ gave a definition of the doctrine that has since been well followed.[884] He said that:

> There must be reasonable evidence of negligence. But where the thing [that caused the injury] is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.[885]

Nowadays, the doctrine has been adopted in cases relating to falling objects, conditions of premises, malfunction of machinery, malpractice, airplane accidents, etc.[886] The carrier's liability is another domain into which it has penetrated. At first, it was used

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[881] Some other implications were also proposed, such as "the thing tells its own tale on its very face", "the very fact speaks", "it stands to reason", etc. John E Hannigan, "Res Ipsa Loquitur" (1931-1932) 6 Temple Law Quarterly 376 at 376.

[882] Mark Shain, "Res Ipsa Loquitur" (1944) 17 S Cal L Rev 187 at 187. See also Charles E Carpenter, "The Doctrine of Res Ipsa Loquitur" (1933) 1 U Chicago L Rev 519 at 521-522; Fleming James, Jr., "Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)" (1951) 37 Va L Rev 179 at 192; Robert A McLarty, "Res Ipsa Loquitur in Airline Passenger Litigation" (1951) 37 Va L Rev 55 at 76.

[883] See generally *Byrne v Boadle*, (1863) 159 ER 299 at 305 (Ct Ex).

[884] See Shain, *supra* note 882 at 188.

[885] *Scott v London & St Katherine Docks Co*, (1865) 159 ER 665 at 667, Erle CJ (Ct Ex). In the United States, the use of the phrase and the application of the doctrine has grown rapidly since the early twentieth century. All U.S. courts have recognized the principle under certain circumstances except those of the States of Michigan and South Carolina. The Michigan Supreme Court has repeatedly stated that it does not recognize the rule as generally defined, but concedes that inferences drawn from the circumstances of a case may be used to make out a *prima facie* case. The most frequently cited authority is the case *Burghardt v Detroit United Railway*, from which the following was taken: "[t]his court has not adopted the rule of *res ipsa loquitur*; we have uniformly held that the happening of the accident alone is not sufficient evidence of negligence; and we have as uniformly held that negligence may be established by circumstantial evidence, and that where the circumstances are such as to take the case out of the realm of conjecture and within the field of legitimate inferences from established facts that at least a *prima facie* case is made." *Burghardt v Detroit United Railway*, 5 ALR 1333 at 1345 (Mich SC 1919).

[886] See generally Shain, *supra* note 882 at 187-192.

to settle disputes between carriers and passengers. In *Budd v United Carriage Co*, the rationale for its application to such cases was expounded in the following terms:

> The liabilities of the carrier arise from the duties which the law imposes … although the duty is not imposed upon him of conveying his passengers in absolute safety, yet his liability goes to the extent of requiring that he shall use all care and diligence. … This is based on the principle that, the means of transportation being under the management of the carrier, and their fitness for such service peculiarly within his knowledge, he is bound to be supplied with every reasonable requisite to insure the safety of his passengers. This being so, when the duty is performed in the ordinary course of things an accident would not be likely to happen … When, therefore, a plaintiff establishes the relation of carrier and passenger, the fact that he received an injury from any defect in the instrumentalities which it was the duty of the carrier to furnish … makes a *prima facie* case of negligence against the carrier.[887]

As a matter of fact, the carrier's duty to exercise reasonable care and diligence in conveying passengers is not essentially different from that in delivering goods. That is why the doctrine has subsequently been transplanted into law governing the carriage of goods by sea.[888]

The inclusion of the principle of presumed fault in the Hamburg Rules was the result of much deliberation. During the lengthy discussions leading to the Rules, there was little

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[887] *Budd v United Carriage Co*, 35 P 660 at 663 (Or SC 1894). See also *Sewell v Detroit United Railway*, 123 NW 2 at 13 (Mich SC 1909); *Price v Metropolitan St Railway Co*, 119 SW 932 at 946 (Mo SC 1909); *Osgood v Los Angeles Traction Co*, 70 P 169 at 175 (Cal SC 1902); *Plumb v Richmond Light & R Co*, 233 NY 285 at 299 (CA 1922); *Doherty v Boston & N St Railway Co*, 92 NE 1026 at 1038-1039 (Mass Sup Jud Ct 1910); *Chicago City Railway Co v Barker*, 70 NE 624 at 642 (Ill SC 1904); *Little Rock & MR Co v Harrell*, 25 SW 117 at 135 (Ark SC 1894); *Stangy v Boston Elevated Railway Co*, 107 NE 933 at 939 (Mass Sup Jud Ct 1915); *Loudoun v Eighth Ave R Co*, 162 NY 380 at 395 (CA 1900); *Falke v Third Ave R R Co*, 55 NYS (2d) 984 at 1001 (SC 1899); *Southern Railway Co v Cunningham*, 50 SE 979 at 991 (Ga SC 1905).

[888] See John Honnold, *Cases and Materials on the Law of Sales and Sales Financing*, 3d ed (Mineola: Foundation Press, 1968) at 281-283; Kahn-Freund & Disney, *supra* note 173 at 111-120. See also *Warsaw Convention*, *supra* note 344, arts 18.1, 20.1; *CMR*, *supra* note 344, arts 17.1, 17.2; *CIM*, *supra* note 344, arts 23.1, 23.2.

support for strict liability.[889] Some delegates admitted that strict liability might induce carriers to try their best to ensure safety of the goods in their custody and result in lower costs of administering claims,[890] but they worried that strict liability would have unidentified influences on freight rates, insurance rates and insurance practices and, more importantly, would place carriers at a disctinctly unfavorable position.[891]

In contrast to strict liability, fault liability represents a better allocation of risks between the shipowning and cargo-owning sides.[892] Dr. Rudolf von Jhering contended that "[f]ault, not damage, makes one liable for compensation."[893] "No liability for compensation without fault" is an important principle of law,[894] which originated in Roman law and has been well accepted by both civil law and common law states.[895] Article 5.1 of the Rules states not only that the carrier's liability is based on fault but also that it shall be determined by means of the principle of presumed fault.[896] Such principle suggests a reversed allocation of burden of proof that is justifiable only if the defendant is in a much better position than the plaintiff to ascertain the facts and circumstances

889 Lüddeke & Johnson, *supra* note 830 at 13-15.
890 "Report", *supra* note 872 at 299.
891 *Ibid*. See also Wharton Poor, "A New Code for the Carriage of Goods by Sea" (1924) 33 Yale LJ 133 at 135.
892 Ferdinand Fairfax Stone, "Tort Doctrine in Louisiana: The Concept of Fault" (1952) 27 Tul L Rev 1 at 1.
893 Kenzo Takayanagi, "Liability without Fault in the Modern Civil and Common Law" (1921) 16 Illinois Law Review 163 at 164.
894 *Ibid* at 163.
895 See Holmes, *Common Law*, *supra* note 365 at 107-108; Wigmore, "Tortious Acts", *supra* note 360 at 324-330; William Markby, *Elements of Law: Considered with Reference to Principles of General Jurisprudence* (Oxford: Clarendon Press, 1871) at 344.
896 The principle of presumed fault is more of a theory of evidence than one of substantive law. Thomas G Shearman & Amasa A Redfield, *A Treatise on the Law of Negligence*, 2d ed (Buffalo: Hein, 1980) at 150. The Supreme Court of Maryland explained its character as follows "[it] is a simple rule of evidence depending on sound sense and reason, and amounts to no more than this, that where the physical facts … are of such a character as to compel an inference that [loss or damage] resulted from negligence, such facts are themselves evidence of negligence." *Goldman & Freiman Bottling Co v Sindell*, 117 A 866 at 881 (Md SC 1922). See also Lewis Klar & Linda D Rainaldi, *Negligence* (Scarborough: Carswell, 1995) at 117-118.

leading to loss or damage.[897] It has been argued that "the facts … must be peculiarly within the knowledge of the defendant and not equally accessible to the plaintiff … [w]here the plaintiff is in a better position to explain the cause … than the defendant, [presumption of fault] certainly does not apply."[898] It should be noted that such presumption does not exempt plaintiffs from general burden of proof.[899] In *Bahr v Lombard*, it was pointed out that "when the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of [loss or damage] … does not raise a presumption of negligence."[900]

To sum up, given the predicament faced by claimants that they know little about what has happened to their goods in transit,[901] it is acceptable and reasonable that the principle of presumed fault is employed to determine the carrier's liability.

Paragraph 2 – Elimination of the nautical fault exception

One of the most remarkable changes in the Hamburg Rules is the abrogation of the nautical fault exception. From the very outset of the preparations for the Rules, the states

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[897] See *Lynch v Ninemire Packing Co*, 115 P 838 at 845-848 (Wash SC 1911) [*Lynch*]; Albert A Ehrenzweig, "Negligence without Fault" (1966) 54 Cal L Rev 1422 at 1425-1426; John McDonough, "Res Ipsa Loquitur" (1949-1950) 1 Hastings LJ 28 at 28-30.

[898] *Pronnecke v Westliche Post Pub Co*, 291 SW 139 at 151 (Mo CA 1927) [*Pronnecke*]. However, such superior knowledge on the part of the defendant is not an indispensable element of the doctrine. The courts have held that, though superior knowledge may be one of the reasons for the rule, it is not the basic cause for its adoption. "The true reason is found in the rule itself, in that the act complained of … speaks for itself. It is therefore not the matter of the defendant's ability to speak, but the fact that the act itself speaks." *Weller v Worstall*, 197 NE 410 at 433 (Ohio CA 1934). Professor William L. Prosser observed that "a substantial number of *res ipsa loquitur* cases involve mysterious occurrences, about which the defendant has in fact no information at all." William L Prosser, "Res Ipsa Loquitur: A Reply to Professor Carpenter" (1937) 10 S Cal L Rev 459 at 463.

[899] See *Losie v Delaware & H Co*, 126 NYS 871 at 878 (SC 1911).

[900] *Bahr v Lombard*, 21 A 190 at 202 (NJ Ct Err & App 1890) [*Bahr*].

[901] See *Riley*, *supra* note 86 at 220.

representing cargo interests insisted that the exception should be removed.[902] Their proposal was resisted by traditional shipping states and triggered intense debates during the lengthy negotiations.[903] The necessity of a "package deal" was emphasized by the United States at an early stage of the Hamburg Conference.[904] The delegations were aware that trade-offs had to be made in order to achieve a logically consistent and economically feasible compromise.[905] The abolition of the nautical fault exception was eventually agreed on in company with the settlement of such issues as limitation of liability,[906] deprivation of the entitlement to limitation of liability,[907] and fire exception.[908]

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[902] See Diamond, "Responsibility for Loss", *supra* note 747 at 111-112.

[903] For example, the United Kingdom opposed any change to the existing Hague Rules because any change would increase costs in view of greater concentration of risks on the carrier. Shipper and shipowner groups in the United Kingdom believed that an increase of 1-2% in freight rate would inevitably follow any change in the liability scheme and such a change would destroy the ancient institutions of salvage and general average because carriers would be less likely to give guarantees for cargo to salvors and the concept of joint venture underlying general average would be nullified if the cargo side did not bear some risks involved in the navigation. The United Kingdom contended that the exception for negligent management might be removed for eliminating friction, but the exception for navigational error must be retained. See generally Sweeney, "Draft I", *supra* note 786 at 102-117.

[904] Sweeney, "Allocation", *supra* note 254 at 527.

[905] *Official Records of the United Nations Conference on the Carriage of Goods by Sea* (New York: UN, 1981) at 166 [*Official Records*].

[906] See *Hamburg Rules*, *supra* note 792, art 6. Article 6 provides that:

> 1. (a) The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article 5 is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher.
>
> (b) The liability of the carrier for delay in delivery according to the provisions of article 5 is limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.
>
> (c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.
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> 2. For the purpose of calculating which amount is the higher in accordance with paragraph 1(a) of this article, the following rules apply:
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> (a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading, if issued, or otherwise in any other document evidencing the contract of carriage by sea, as packed in such article of transport are deemed packages or shipping units. Except as aforesaid the goods in such article of transport are deemed one shipping unit.

In the age when the Hague Rules were made, errors in the navigation or management of ships at sea were beyond control of either shipowners or cargo owners, so the drafters of the Hague Rules decided that any damage to or loss of goods caused by such errors would be borne by cargo interests while any damage to vessels resulting from such errors would be borne by carriers.[909] The exception used to be an important compromise, but it is now out of accord with the times. Professor William Tetley remarked that:

> Error in the navigation and management of the ship [should] no longer be a defense for the carrier … Carriage by sea under the Hague/Visby Rules is virtually the last legal sphere where a carrier is not responsible for its faults. It is felt by many that it is now time to withdraw this exception granted long before the advances of technology. … It has been said that by removing the defense of error, shipowners' insurance costs will rise immeasurably. But, on the other hand, and by the same argument, shippers' insurance costs should fall and the total cost to society would be the same. No figures are available to prove either of the foregoing provisions. Nevertheless, society would probably benefit by the removal of the "error" exception because it is a rule of commerce

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(b) In cases where the article of transport itself has been lost or damaged, that article of transport, if not owned or otherwise supplied by the carrier, is considered one separate shipping unit.

3. Unit of account means the unit of account mentioned in article 26.

4. By agreement between the carrier and the shipper, limits of liability exceeding those provided for in paragraph 1 may be fixed.

See also William Tetley, "Package & Kilo Limitations and The Hague, Hague/Visby and Hamburg Rules & Gold" (1995) 26 J Mar L & Com 133 at 136-137 [Tetley, "Limitations"]; NW Palmieri Egger, "The Unworkable Per-Package Limitation of the Carrier's Liability under the Hague (or Hamburg) Rules" (1978) 24 McGill LJ 459 at 463.

[907] See *Hamburg Rules*, *supra* note 792, art 8. Article 8 provides that:

1. The carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of the carrier done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

2. Notwithstanding the provisions of paragraph 2 of article 7, a servant or agent of the carrier is not entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the loss, damage or delay in delivery resulted from an act or omission of such servant or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

[908] *Official Records*, *supra* note 905 at 173, 349-352.

[909] See Chester D Hooper, "Carriage of Goods and Charter Parties" (1999) 73 Tul L Rev 1697 at 1705-1714.

> that the person responsible for a loss should be held responsible in law; otherwise the negligent practices will be repeated and never corrected.[910]

Mr. Anthony Diamond said that:

> It is difficult to see why negligence in navigating [and managing] a ship should have different legal consequences from any other kind of negligence … The exceptions of negligent navigation and negligent management of the ship are distinctly out of place in a regime based on a duty of care. They were, of course, essentially a trade-off, a concession to shipowners in return for the annulment of other traditional exception clauses … But whatever the historical reasons for the exceptions, it is submitted that they cannot any longer be justified.[911]

The fundamental motive for the elimination of the exception was that it, along with its variations, had placed a disproportionate burden of risks on cargo owners.[912] In the Hague Rules, the entitlement of a carrier to the exception practically offsets his duty to make his vessel seaworthy before and at the beginning of the voyage.[913] Cargo-owning nations were keen on putting an end in the new convention to the absurd exception.[914] Leading shipowning nations responded by suggesting a distinction between the exception for errors in navigating ships and that for errors in managing ships, and they advocated the elimination of the latter owing to the high volume of litigations engendered by the

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[910] William Tetley, "Canadian Comments on the Proposed UNCITRAL Rules: An Analysis of the Proposed UNCITRAL Text" (1978) 9 J Mar L & Com 251 at 255 [Tetley, "Canadian Comments"].

[911] Diamond, "Responsibility for Loss", *supra* note 747 at 111-112.

[912] In the United Kingdom, approximately 20% of cargo losses arose at that time in circumstances covered by the navigational error exception. See *Official Records*, *supra* note 905 at 5. See also *The Irish Spruce*, 431 US 955 (SC 1977) (stranding due to negligence); *Black Heron*, *supra* note 694 (ballasting into cargo-filled spaces); *The Mormacsurf*, 276 F (2d) 722 (2d Cir US 1960) (overfilling ballast tank); *Corsar v JD Spreckels & Bros Co*, 141 F 260 (9th Cir US 1905) (failure to put into port of refuge); *The Flying Trader*, 1970 AMC 432 (NY Dist Ct 1970) (avoidable rolling of vessel); *The Rosedale*, 88 F 324 (NY Dist Ct 1898) (failure to post lookout).

[913] Gustavus H Robinson, *Handbook of Admiralty Law in the United States* (St. Paul: West Publishing, 1939) at para 70. See also Nicholas J Healy & David J Sharpe, *Cases and Materials on Admiralty* (St. Paul: West Publishing, 1974) at 572.

[914] Pixa, *supra* note 4 at 445.

vague boundary between management of ships and care of goods.[915] Their proposal was flatly rejected by cargo-owning nations.[916] Another stimulus to the change was the removal of a similar exception from the Warsaw Convention.[917] The Warsaw Convention contained until 1955 a provision exonerating carriers from liability in piloting or handling aircrafts so as to protect the infant aviation industry.[918] The nautical

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[915] The Dutch government argued that "[i]t should be realized that the deletion of the exceptions of 'error in navigation' and 'fault in the management' constitutes a major change in the allocation of risks between the cargo owner and the carrier under the Hague Rules. The deletion of the exception of fault in the management may be justifiable in view of the many disputes this exception gives rise to. This is not the case as regards exception of error in navigation. Shifting the risk in the case of error in navigation towards the shipowner may bring on an increase in total costs of transportation without an equivalent reduction in cargo insurance costs and will not induce the shipowner to act with more care towards the goods in view of his own interest in this case. For economic reasons preference is given to retaining the exception of error in navigation." The government of the United Kingdom stated that "[t]he one major change effected by the present text of article 5 is the removal of the defense of nautical fault which appeared in article 4(2)(a) of the 1924 Rules. As intimated in earlier general comments, all commercial interests in the United Kingdom, shipowners, shippers and their respective insurers, are united in wanting the retention of the defense of nautical fault. Furthermore, the transfer of risk to the carrier entailed in the deletion of this defense will inevitably change the pattern of insurance in maritime commerce away from cargo insurance and to the disadvantage of developing countries. For these reasons it is recommended that serious consideration be given to reinstating the defense of nautical fault (in the narrow sense, excluding fault in the management of the ship): this could be done in a new paragraph following paragraph 3, on the lines of the text set out in the annex." "Note by the Secretary-General: Comments by Governments and International Organizations on the Draft Convention on the Carriage of Goods by Sea" (A/CN.9/109) in *Yearbook 1976*, *supra* note 841 at 224, 235. See also Sweeney, "Draft I", *supra* note 786 at 104.

[916] Eventually, cargo-owning nations achieved the deletion of the nautical fault exception as well as the imposition on carriers of a continuing period of responsibility. See *Hamburg Rules*, *supra* note 792, art 4. Article 4 provides that:

> 1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.
> 2. For the purpose of paragraph 1 of this article, the carrier is deemed to be in charge of the goods
> (a) from the time he has taken over the goods from:
> (i) the shipper, or a person acting on his behalf; or
> (ii) an authority or other third party to whom, pursuant to law or regulations applicable at the port of loading, the goods must be handed over for shipment;
> (b) until the time he has delivered the goods:
> (i) by handing over the goods to the consignee; or
> (ii) in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with the law or with the usage of the particular trade, applicable at the port of discharge; or
> (iii) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.
> 3. In paragraphs 1 and 2 of this article, reference to the carrier or to the consignee means, in addition to the carrier or the consignee, the servants or agents, respectively of the carrier or the consignee.

See also Pixa, *supra* note 4 at 446.

[917] See *ibid*.

[918] See *Warsaw Convention*, *supra* note 344, art 20.2. Article 20.2 provides that:

> In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

fault exception was abandoned partly because the draftsmen of the Hamburg Rules saw the need for harmonization among the rules governing different modes of transport.[919]

Proponents of retention of the exception contended, as one of their strong arguments, that the removal proposed by cargo-owning interests might not produce any actual changes in favor of them if marine insurance practices were taken into account.[920] The normal operation of the carriage of goods by sea relies, to a large extent, on two kinds of insurance, namely cargo insurance and liability insurance.[921] It is quite common that risks that cargo owners and shipowners may encounter in the course of shipment are ultimately borne respectively by cargo insurers and liability insurers.[922] Expenses of

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In 1955, a protocol was approved to amend the Warsaw Convention of 1929. See *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 28 September 1955, 478 UNTS 371, art 10. Article 10 provides that "Paragraph 2 of Article 20 of the Convention shall be deleted." See also "Report", *supra* note 872 at 296; Lawrence B Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook*, 2d ed (The Hague: Kluwer Law International, 2000) at 57; KM Beaumont, "Need for Revision and Amplification of the Warsaw Convention" (1949) 16 J Air L & Com 395 at 398; René H Mankiewicz, "Hague Protocol to Amend the Warsaw Convention" (1956) 5 Am J Comp L 78 at 83.

[919] The final attempt by Belgium, Japan and Poland to reinstate the defense of negligent navigation failed because the Working Group thought that the economic arguments proposed by them concerning the projected increase in shipping costs following the removal of the exception were unconvincing and speculative. Sweeney, "Draft V", *supra* note 786 at 181.

[920] See Weitz, *supra* note 336 at 588; Brian Makins, "The Hamburg Rules: A Casualty?" (1994) 96 Il Diritto Marittimo 637 at 652 [Makins, "Casualty"].

[921] See Jonathan Gilman, Robert Merkin & Joseph Arnould, *Arnould: Law of Marine Insurance and Average*, 18th ed (London: Sweet & Maxwell, 2013) at paras 7-10; Howard N Bennett, *The Law of Marine Insurance*, 2d ed (New York: Oxford University Press, 2006) at 6-9. See also Alex L Parks, *The Law and Practice of Marine Insurance and Average* (London: Stevens & Sons, 1988) at 32; Frederick Templeman & RJ Lambeth, *Templeman on Marine Insurance: Its Principles and Practice*, 6th ed (London: Pitman, 1986) at 45-47; Victor Dover & Robert Henry Brown, *A Handbook to Marine Insurance: Being a Textbook of the History, Law and Practice of an Integral Part of Commerce for the Business Man and the Student*, 8th ed (London: Witherby, 1982) at 19; D Rhidian Thomas, *The Modern Law of Marine Insurance* (London: Informa, 2009) at 26.

[922] Liability insurers are basically Protection and Indemnity Associations, commonly called P&I Clubs, whose business covers over 90% of the world's merchant fleets. They are actually groups of vessel owners banding together to provide mutual insurance. They, though non-profit, have their own sophisticated systems involving high-tech communication networks, correspondents throughout the world, canny investment counselors, and knowledgeable underwriters and claims adjusters. The largest clubs include Assuranceforeningen GARD, Assuranceforeningen SKULD, The Britannia Steam Ship Insurance Association Limited, Liverpool and London Steamship Protection and Indemnity Association Limited, The London Steam Ship Owners' Mutual Insurance Association Limited, Newcastle Protection and Indemnity Association, The North of England Protecting and Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity Association Limited, The Standard Steamship Owners' Protection and Indemnity

insurance borne by cargo owners are proportionate to expected losses of their goods.[923] The removal of the nautical fault exception saves cargo owners from risks of loss attributable to the nautical fault on the part of shipowning interests. With the decrease in expected losses that cargo owners have to swallow, premiums of cargo insurance may accordingly be lowered.[924] On the other hand, expenses of insurance borne by carriers may increase as risks are transferred from cargo owners to them due to the elimination of the exception.[925] If cargo insurers and liability insurers are equally efficient, the amount of added expenses for carriers shall be equal to that of savings for cargo owners.[926] When a carrier passes his added expenses of insurance on to the cargo owners whose goods are carried on his ship, the total amount that they have to pay for freight and insurance remains unchanged. It seems that risks of loss arising from the nautical fault are shifted from cargo owners to carriers because of the abolition of the exception, but the sole change may be that cargo owners, who pay cargo insurers for insurance against such

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Association (Bermuda) Limited, The Steamship Mutual Underwriting Association (Bermuda) Limited, Sveriges Angfartygs Assurans Forening (The Swedish Club), The United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Limited, The West of England Ship Owners Mutual Insurance Association (Luxembourg), The Japan Ship Owners' Mutual Protection and Indemnity Association, and American Steamship Owners Mutual Protection & Indemnity Association, Inc. Norman J Ronneberg, Jr, "An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide" (1990-1991) 3 USF Mar LJ 1 at 1-2, n 2. See also Stephen Martin, "Marine Protection and Indemnity Insurance: Conduct, Intent, and Punitive Damages" (2003) 28 Tul Mar LJ 45 at 46-48.

923 See J Kenneth Goodacre, *Marine Insurance Claims*, 3d ed (London: Witherby, 1996) at 58. See also William D Winter, *Marine Insurance: Its Principles and Practice*, 3d ed (New York: McGraw-Hill, 1952) at 57; FD Rose, Gerard McMeel & Stephen Watterson, *Marine Insurance: Law and Practice*, 2d ed (London: Informa Law, 2012) at 38.

924 Sturley, "Vacuum", *supra* note 99 at 124. See also *The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Convention*, UN Doc TD/B/C.4/315/Rev.1, (1991) at para 58, online: United Nations Conference on Trade and Development <http://www.unctad.org>.

925 Sturley, "Vacuum", *supra* note 99 at 124. See also Goldie, *supra* note 844 at 114; Jan Ramberg, "The Vanishing Bill of Lading & the 'Hamburg Rules Carrier'" (1979) 27 Am J Comp L 391 at 397; Donald O'May, *Marine Insurance: Law and Policy*, 2d ed (London: Sweet & Maxwell, 2008) at 124.

926 Sturley, "Vacuum", *supra* note 99 at 124.

risks, would need to pay carriers for the same purpose in the form of extra freight.[927] Mr. Brian Makins summarized that "the only effect [of the elimination of the nautical fault exception] on shippers will be that … the [shipper's] rate for cargo insurance is reduced to reflect the cargo insurer's increased rate of recovery, [and] the freight the shipper pays will be increased to reflect the increased charge made by the liability insurer to the shipowner."[928] The position of cargo owners may even deteriorate if they would have to endure higher freight rates and continue to rely on cargo insurance to the same degree as they do currently either due to their worry about other potential losses irrelevant to the nautical fault or due to their habitual trust in insurance companies.[929]

The above-mentioned theory suggesting that the elimination of the nautical fault exception would be fruitless to cargo interests is no more than a conjecture. As a matter of fact, a panic was sparked among cargo insurers who had been assumed to favor the

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[927] The Hamburg Rules have produced a material shift of liability from cargo interests to carriers, or more realistically, from cargo insurers to P&I Clubs. This shift of liability is economically efficient only if the reduction in cargo premiums, as a consequence of the shift, does not match the resulting increase in P&I premiums and, consequently, in freight rates. Weitz, *supra* note 336 at 585. See also Makins, "Casualty", *supra* note 920 at 665-666.

[928] *Ibid* at 652. For cargo owners, the only difference may be the allocation between freight and insurance premiums when their expenses of insurance go down by the same amount that their freight goes up. See Sturley, "Vacuum", *supra* note 99 at 124-125.

[929] It is believed that cargo insurance will still be needed to cover loss or damage arising from excepted perils and indemnities in excess of the limitation of liability in the Hamburg Rules. Makins, "Casualty", *supra* note 920 at 667. In general, cargo owners seem to trust insurance companies more than carriers or P&I clubs to obtain prompt and full compensation for loss or damage they have sustained. Most cargo owners are reluctant to directly contact shipping companies to make claims for the loss or damage of their goods because shipping companies are usually unresponsive in making compensation even if they are clearly liable for the loss or damage. Therefore, cargo owners are willing to resort to insurance companies. A healthy working relationship with an insurance company originating from accumulated transactions brings cargo owners not only trustworthy relief but also fringe benefits (e.g. discounted insurance premiums). Given the fact that cargo owners tend to perceive cargo insurance as a better alternative than compensation plans available at shipping companies, the increase in the carrier's liability under the Hamburg Rules may not significantly alter the current practices of marine cargo insurance. Lee, "Cargo", *supra* note 31 at 168-169.

change as a secure right of subrogation would produce greater returns for them.[930] However, it turned out that cargo insurers opposed any departure from the regime of the Hague Rules for fear that the transfer of risks from cargo owners to carriers would lead to an avalanche of rejection of cargo insurance.[931] Although cargo insurance still might play an important role in protecting cargo owners from other risks associated with limitation of liability, general average or salvage claims,[932] cargo insurers pessimistically predicted that these instances were insufficient to fully sustain the existing structure of cargo insurance and that there would be a tremendous reduction in coverage.[933] On the other hand, there was no solid evidence showing that carriers would definitely charge more as a result of their increased costs of liability insurance.[934] In fact, some carriers expressed their intention, considering the cut-throat competition among them, to absorb those additional costs by employing cost-saving strategies rather than by raising freight.[935] If cargo owners drop insurance against loss or damage arising from fault in the navigation or management of ships and there is no increase in freight, there shall be a

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930 Sweeney, "Allocation", *supra* note 254 at 532.

931 See generally Donovan, "Convention", *supra* note 32 at 4-8; George F Chandler III, "A Comparison of 'COGSA', the Hague/Visby Rules, and the Hamburg Rules" (1984) 15 J Mar L & Com 233 at 282-284 [Chandler, "Comparison"].

932 See Donald T Rave Jr. & Stacey Tranchina, "Marine Cargo Insurance: An Overview" (1991) 66 Tul L Rev 371 at 373; Andrew E Rossmere, "Cargo Insurance and Carriers' Liability: A New Approach" (1974) 6 J Mar L & Com 425 at 428; John Dunt, *Marine Cargo Insurance*, 2d ed (London: Informa, 2015) at 46.

933 Sweeney, "Allocation", *supra* note 254 at 532-533.

934 It should be noted that P&I clubs were not on the side of supporters of the Hamburg Rules even though the imposition of heavier risks on carriers was likely to bring about an increase in premiums of liability insurance. The reason lied in the nature of those clubs which were non-profit societies made up of shipowners. Thus, they shared with shipowners the same views as to the Hamburg Rule. *Ibid* at 532.

935 According to a survey conducted to inquire into the rections of Korean shipping companies to the Hamburg Rules, most of them were discouraged by the intensive competition among them from raising freights to make up for increased costs arising from the need for additional liability insurance. They would rather save in other areas instead. See Lee, "Cargo", *supra* note 31 at 170.

foreseeable decline in transportation costs on their side.[936] Even if there is an increase in freight, cargo owners are not necessarily, in the long run, unable to benefit from the removal of the nautical fault exception, given the fact that cargo claims may be decreased as carriers would be impelled to become more prudent.[937] Therefore, there is a strong possibility that the deletion of the exception may give rise to changes embracing both jurisprudential fairness and economic efficiency, which strikes a powerful counterblow against those opponents.

Section 2 – Particular immunities

The Hamburg Rules contain some particular immunities that are applicable to fire-related cases,[938] shipment of live animals,[939] measures for saving life or property,[940]

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[936] Cargo insurance and liability insurance are different with respect to contracting parties and covered risks. The former covers economic losses incurred by cargo owners due to the carrier's failure to deliver goods in good condition or in time; while the latter covers the carrier's liability for loss of or damage to the goods in his custody. "Overlapping insurance" occurs when both of them deal with the same goods. *Ibid* at 156. There is currently a principle of cargo insurance that the compensation for a loss under the policy is due even if the carrier is liable for it. The practical effect is that cargo owners are in the first place indemnified by their insurers. The role of liability regime is mainly to determine the right of recourse of cargo insurers against carriers. Carriers insure their liability with P&I clubs. Consequently, when "overlapping insurance" exists, the practical effect of liability regime is primarily to determine the extent to which cargo losses shall remain with cargo insurers or shall ultimately, as a result of recourse, be borne by P&I clubs. Selvig, "Insurance", *supra* note 21 at 308. "Overlapping insurance" had existed long before the Hamburg Rules were approved. Hopefully, the Hamburg Rules may put an end to the problem at least with regard to insurance against risks related to the nautical fault exception. See Lee, "System", *supra* note 172 at 248-249.

[937] Once it is recognized that some losses are inevitable, the law must determine how to allocate losses when they arise. The law could assign full responsibility to carriers by making them strictly liable for any loss of or damage to the goods, or the law could assign full responsibility to cargo owners by declaring that all shipments are carried out at their risk. Another solution is that the responsibility is split between carriers and cargo owners. Historically, the last one was mostly adopted. See Sturley, "COGSA", *supra* note 109 at 4-5. One widely-accepted theory declares that an appropriate division should require carriers to bear enough risks so that they have an incentive to exercise due care, but that once this threshold level is achieved, remaining risks should be left to cargo owners. See Sturley, "Vacuum", *supra* note 99 at 127-128. Mr. Anthony Diamond said that "it 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." Diamond, "Legal Analysis", *supra* note 877 at 4.

[938] See *Hamburg Rules*, *supra* note 792, art 5.4(a).

[939] See *ibid*, art 5.5.

[940] See *ibid*, art 5.6.

or shipment of dangerous goods.[941] They either deviate from or complement the general rule concerning the carrier's exoneration in Article 5.1 of the Rules.

Paragraph 1 – Fire exception

According to Article 5.4(a) of the Hamburg Rules,[942] the carrier shall be liable for loss, damage or delay caused by fire if the claimant proves either that the fire arose from fault or neglect on the part of the carrier, his servants or agents, or that the carrier, his servants or agents were at fault in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.[943] The fire exception in the Rules grew out of a "horse-trader's compromise" proposed by Nigeria in which shipowning states agreed to give up the notorious defense of negligent navigation and management of ships in exchange for the retention of the fire exception.[944]

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[941] See *ibid*, art 13.

[942] *Ibid*, art 5.4(a). Article 5.4(a) provides that:

> The carrier is liable
> (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
> (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

[943] See Lüddeke & Johnson, *supra* note 830 at 13-14.

[944] Bauer, *supra* note 449 at 67. Although India, Tanzania, Ghana and Singapore pressed for the complete elimination of the fire exception, the Nigeria's strategy was adopted. A tentative compromise text on the fire exception used for reference an earlier Norwegian proposal where the exception had been framed as follows:

> The carrier shall be liable for loss of or damage to the goods occurring while the goods are in his charge except to the extent that such loss or damage has arisen without fault or neglect on the part of the carrier or his agents or servants.
> The carrier shall have the burden of proving the extent to which the loss or damage has arisen without fault or neglect on his part. However, if loss or damage has been caused by fire, the burden of proving that the fire was due to fault or neglect on the part of the carrier or his agents or servants shall be on the shipper or consignee.

Sweeney, "Draft I", *supra* note 786 at 113, 115.

There are three differences between the fire exception in the Hamburg Rules and its counterpart in the Hague Rules. Firstly, the scope of the parties for whose conducts carriers should be responsible has changed. In the Hague Rules, carriers are not liable, in fire-related cases, for loss or damage resulting from negligent conducts of their servants or agents;[945] while the Hamburg Rules provide for the vicarious liability of carriers for loss or damage arising from fault or neglect on the part of their servants or agents. Secondly, the scope of censurable incidents relating to fire has been better defined in the Hamburg Rules. The fire exception has been laid down under the Hague Rules in the following terms "[n]either the carrier nor the ship shall be responsible for loss or damage arising or resulting from … [f]ire …." There is much confusion about its coverage, though it has been addressed in numerous judicial precedents.[946] In the Hamburg Rules, it has been stipulated that liability may arise from either the contribution of fault on the part of shipowning interests to the occurrence of fire or inadequacy of measures taken by them for extinguishing fire or minimizing its consequences.[947] Thirdly, what needs to be proven for the invalidation of the exception has altered.[948] In the Hague Rules, the fire exception is invalidated if loss or damage proves to be attributable to actual fault or

[945] Wilson, *Carriage of Goods*, *supra* note 867 at 275.

[946] The carrier is not liable for loss or damage arising from smoke or water used to put out a fire on board a ship. Nonetheless, failure to extinguish a fire, to guard against indiscriminate use of water in dousing a fire or to separate undamaged goods from damaged ones does not fall within the exception. See *Diamond*, *supra* note 351 at 286; *American Mail Line*, *supra* note 352 at 2239; *In the Matter of the Complaint of Ta Chi Navigation (Panama) Corp SA as Owner of the SS Eurypylus for Exoneration from or limitation of liability*, 1982 AMC 1710 at 1719 (2d Cir 1982). See also Bassoff, *supra* note 352 at 511.

[947] See Pixa, *supra* note 4 at 447-448.

[948] See Per Olof Ekelöf, "Free Evaluation of Evidence" (1964) 8 Scand Stud L 47 at 48-49, n 4. See also Lirieka Meintjes-Van Der Walt, "Decision-maker's Dilemma: Evaluating Expert Evidence" (2000) 13 South African Journal of Criminal Justice 319 at 323; John Danaher, "Blind Expertise and the Problem of Scientific Evidence" (2011) 15 International Journal of Evidence & Proof 207 at 210.

privity of carriers;[949] while in the Hamburg Rules, the exception is of no effect if it is proven that there is fault or neglect on the part of carriers, their servants or agents in the occurrence of fire leading to loss or damage or in taking measures to put out fire and avoid or mitigate its consequences.[950]

Despite the merits of the changes, the fire exception in the Hamburg Rules was after all a concession that cargo-owning states made in return for the deletion of the nautical fault exception. The biggest problem is that it, like its counterpart in Article 4.2(b) of the Hague Rules, imposes on the claimant the burden of proving fault on the part of shipowning interests in fire-related cases.[951] The burden of proof in both Article 4.2(b) of the Hague Rules and Article 5.4(a) of the Hamburg Rules is unreasonably favorable to carriers in view of the practical difficulty of cargo interests in having access to information regarding the origin of fire on board or what measures have been taken to extinguish fire or minimize its consequences.[952] The fire exception in the Hamburg Rules constitutes a self-contained code where the principle of presumed fault in Article 5.1 is

[949] The presence or the absence of the actual fault or privity of the carrier is primarily a question of fact that needs to be decided by reference to all the circumstances of a particular case. It is particularly difficult to prove that where the party involved is a public company. As such an organization can only act through agents, it is often hard to decide whether a particular negligent act is to be regarded as an act of the company itself or merely an act of its servants or agents. See *Asiatic Petroleum*, *supra* note 356 at 713; *Louis Dreyfus*, *supra* note 350 at 710, Wright J; *Grand Champion Tankers Ltd v Norpipe A/S (The Marion)*, [1984] 2 Lloyd's Rep 1 at 9, Lord Brandon (HL(Eng)); *Tesco Supermarkets Ltd v Nattrass*, [1971] 2 All ER 127 at 132, Lord Reid (HL(Eng)); *Meridian Global Funds Management Asia Ltd v Securities Commission*, [1995] 3 All ER 918 at 922-927, Lord Hoffmann (PC).

[950] See Tetley, "Canadian Comments", *supra* note 910 at 266.

[951] It is a basic rule of burden of proof that the claimant has to take upon himself the onus of proving the facts essential to his allegation against the defendant. See Lane, *supra* note 727 at 265. See also Louis Kaplow, "Burden of Proof" (2012) 121 Yale LJ 738 at 741-743; Edmund M Morgan, "Instructing the Jury upon Presumptions and Burden of Proof" (1933) 47 Harv L Rev 59 at 62-63; Otis H Fisk, "Burden of Proof" (1927) 1 U Cin L Rev 257 at 258-260; McBaine, *supra* note 717 at 245-248; Bohlen, *supra* note 880 at 309-311.

[952] Sze, *supra* note 331 at 90.

subverted to maintain the obsolete exculpatory right of carriers relating to fire.[953] It is a frustrating departure from the general basis of liability in the Rules.[954] What is worse, it virtually provides blameworthy carriers with a chance to evade liability in fire-related cases.[955]

To sum up, the modified fire exception is still ill-designed because it derogates from fairness arising out of Article 5.1 of the Hamburg Rules.[956]

Paragraph 2 – Exception relating to shipment of live animals

The exclusion of live animals from the "goods" covered by the Hague Rules has led to the result that the parties to a contract of carriage are at liberty to negotiate particular terms for shipment of such goods.[957] The draftsmen of the Hamburg Rules realized that there might be some problems in the integration of shipment of live animals into any set formula, but they saw no reason for leaving it ungoverned.[958] They thought of a solution that shipment of live animals might be subject to general rules as well as certain special rules designed for its peculiarities.[959] During the negotiations for the Rules, there appeared divergences on the prospective scheme governing shipment of live animals. Brazil, India and Iraq gave strong backing to the inclusion of such shipment in the

953 See Nicoll, *supra* note 831 at 154-155.
954 Lüddeke & Johnson, *supra* note 830 at 13-14.
955 *Ibid*.
956 See Frederick, *supra* note 238 at 87-88.
957 See *Hague Rules*, *supra* note 205, art 1(c). Article 1(c) provides that:
"Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage in stated as being carried on deck and is so carried.
958 Wilson, *supra* note 547 at 142.
959 *Ibid*.

upcoming convention; France and Austria thought that such shipment should be covered by the convention but it shall be possible that the responsibilities related thereto might be limited by contracts; Japan stated that the issue must be decided after much deliberation as it was a considerable adventure, almost tantamount to gambling, to undertake such shipment given the great difficulty in ensuring life and health of live animals in transit; while Cambodia, Canada, Denmark, Greece, Norway, Philippines, Poland, Saudi Arabia and Sweden categorically opposed the introduction of such shipment into the convention.[960] At first, the participant delegations had failed to come to any agreement on the issue.[961] With reference to Article 23.3 of the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail and Article 17.4 of the Convention on the Contract for the International Carriage of Goods by Road, they eventually agreed on the carrier's liability in relation to shipment of live animals,[962] which has been formulated in the following terms:

> With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. If the carrier proves that he has complied with any special instructions given to

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960 See Sweeney, "Draft I", *supra* note 786 at 75.

961 See *Ibid* at 75-76.

962 See *CIM*, *supra* note 344, art 23.3. Article 23.3 provides that:

> The carrier shall be relieved of this liability to the extent that the loss or damage arises from the special risks inherent in one or more of the following circumstances: …
> f) carriage of live animals; …

CMR, *supra* note 344, art 17.4. Article 17.4 provides that:

> Subject to article 18, paragraphs 2 to 5, the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances: …
> (g) The carriage of livestock.

Egypt noted that the risks associated with the carriage of live animals could be allocated in the following manner: the carrier shall be responsible for normal care of animals while the shipper shall be responsible for special care. It was actually the method of division of risks that had been adopted in the conventions governing the carriage of goods by road and by rail. See Sweeney, "Draft I", *supra* note 786 at 76.

> him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.[963]

Carriers engaged in shipment of live animals are still subject to the general duty of care prescribed in Article 5.1 of the Rules.[964] The peculiarities of their liability relating to such shipment reside in two aspects. The first one is that carriers are "not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage." Live animals are quite different from ordinary goods because they are exposed to injuries, sickness and death that are foreign to shipment of inanimate objects.[965] Even if sufficient sanitary and veterinary measures have been taken, special risks inherent in shipment of live animals may still give rise to unpreventable losses.[966] Article 5.5 of the Rules is evidently superior to those either holding carriers undiscriminatingly responsible for all risks embraced in shipment of live animals or entitling them to an unconditional immunity.[967] It attempts to strike a balance of interests between the shipowning and

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[963] *Hamburg Rules*, *supra* note 792, art 5.5. The term "live animals" covers any living creature capable of self-movement other than humans and live plants. Live animals include not only domestic and tamed animals but also wild animals and sea products such as fish, musesels and oysters. See "Study on Carriage of Live Animals" (A/CN.9/WG.III/WP.11) in *Yearbook of the United Nations Commission on International Trade Law 1974*, vol 5, part 2 (New York: UN, 1975) at 168 (A/CN.9/SER.A/1974) ["Study"].

[964] Wilson, *Carriage of Goods*, *supra* note 867 at 218.

[965] See Sweeney, "Draft I", *supra* note 786 at 78. See also Patrick J O'Keefe, "The Contract of Carriage of Goods by Sea: International Regulation" (1977) 8 Sydney L Rev 68 at 73; Vivion Tarrant & Temple Grandin, "Cattle Transport" in Temple Grandin, ed, *Livestock Handling and Transport* (Wallingford: CABI, 2000) 151 at 160.

[966] Sanitary and veterinary controls play an important role in the transport of live animals. They are employed to identify the animals consigned for shipment, guarantee their fitness for carriage and prevent epizootic diseases. Veterinary officers may be called upon to inspect, prior to the shipment, the fittings of the vessel and its stocks of drinking water and fodder. In old times, shippers usually provided competent attendants to accompany their cargo of live animals. "Study", *supra* note 963 at 167, 171.

[967] In some model bills of lading, the carrier is relieved of liability for any loss or damage related to the carriage of live animals. For example, Article 9 of the Conlinebill stipulates that "the Carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of [live] animals …"; Article 16 of the P &

cargo-owning sides by, on the one hand, keeping carriers fettered by the general duty of care applicable to all kinds of carriage and, on the other, entitling them to exemption from liability for loss or damage arising from special risks inherent in shipment of live animals.

The second peculiarity is the presumed absence of fault on the part of shipowning interests.[968] According to Article 5.5 of the Rules, a carrier is presumed to be free of fault if he can prove that "he has complied with any special instructions given to him by the shipper respecting the animals" and that the loss, damage or delay in delivery could be ascribed to special risks inherent in the carriage.[969] This article is questionable as it muddles up loss or damage resulting from "ordinary risks" and that resulting from "special risks". The proof of the foregoing two aspects by a carrier merely shows his blamelessness in protecting goods from special risks. However, such proof provides no

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O Nedlloyd Bill stipulates that "[t]he Hague Rules shall not apply to the carriage of live animals, which are carried at the sole risk of the Merchant. The Carrier shall be under no liability whatsoever for any injury, illness, death, delay or destruction to such live animals howsoever arising"; Article 18 of the Mitsui OSK Lines Combined Transport Bill 1992 stipulates that "[l]ivestock are carried without responsibility on the part of the Carrier for any accident, injury, illness, death, loss or damage arising at any time whether caused by unseaworthiness or negligence or any other cause whatsoever"; Article 14 of the Mitsui OSK Lines Combined Transport Bill 1993 stipulates that "[l]ive animals are carried without responsibility on the part of the Carrier for any accident, injury, illness, death, loss or damage arising at any time whether caused by unseaworthiness or negligence or any other cause whatsoever. The Merchant shall indemnify the Carrier against any claim, loss, damage or expense arising in consequence of the carriage of live animals"; Article 16 of the "K" Line Bill of Lading stipulates that "[t]he Ocean Carrier shall not be responsible for any accident, disease, mortality, loss of or damage to live animals, birds, reptiles and fish, and plants arising or resulting from any cause whatsoever including the Ocean Carrier's negligence or the Vessel's unseaworthiness …"; Article 14 of the ANL Tranztas Bill of Lading stipulates that "[l]ive animals are carried at the sole risk of the Merchant. The Carrier shall be under no liability whatsoever for any injury, illness, death, delay or destruction howsoever arising even though caused or contributed to by the act, neglect or default of the Carrier or by the unseaworthiness or unfitness of any vessel, craft, conveyance, container or other place existing at any time." See Gaskell, Asariotis & Baatz, *supra* note 511 at paras 10.1-10.10.

968 *Ibid* at para 10.13.

969 It was argued that Article 5.5 of the Hamburg Rules might encourage carriers to ask shippers for instructions on the shipment of live animals. See Wilson, *Carriage of Goods*, *supra* note 867 at 218, n 15.

clues as to whether the carrier has performed the duty of care in Article 5.1 of the Rules to shield the live animals in his custody from ordinary risks that generally exist in shipment of all sorts of goods. In effect, Article 5.5 may liberate carriers from the bondage of Article 5.1 to the extent that the basic duty of care of goods may be disregarded in shipment of live animals as the burden of proving fault on the part of shipowning interests in performing such duty is placed on claimants who normally know little about what has happened to their goods in the course of conveyance.[970]

In a nutshell, Article 5.5 of the Rules deals with not only which part of liability in shipment of live animals can be excluded but also how burden of proof is allocated in such cases. The former triggers no problems in terms of fairness, but the latter is rather unreasonable.

Paragraph 3 – Exception relating to measures for saving life or property

During the negotiations for the Rules, India contended that the carrier's exclusion of liability for loss or damage arising from salvage should be linked to reasonable deviation,[971] and it put forward a proposal based on Section 1304.4 of the U.S. Carriage

[970] It was argued that "[w]hen goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination." *Riley*, *supra* note 86 at 220.

[971] The Indian proposal read as follows:

> 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, 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.

See "Working Group on International Legislation on Shipping: Report on the Work of the First Session, 22-26 March 1971" (A/CN.9/55) in *Yearbook of the United Nations Commission on International Trade Law 1971*, vol 2, part 2 (New York: UN, 1972) at 135 (A/CN.9/SER.A/1971).

of Goods by Sea Act.[972] However, the Norwegian delegation argued that no special provisions on deviation would be necessary, though it was one of the main causes of delay in delivery.[973] Its view was endorsed by the Nigerian delegation which added that it was already sufficient to treat deviation under the general rules governing the carrier's liability.[974] As opposed to the Norwegian and Nigerian delegations, the U.S. delegation advocated the retention of a particular provision on deviation as it believed that it would be unfortunate if all landmarks of the Hague Rules were removed.[975] It also suggested that the prospective provision should be formulated in the following terms:

> Any act in saving or attempting to save life or property at sea or any reasonable departure from the contract of carriage 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 provided, however, that if the departure is for the purpose of loading or unloading cargo or passengers it shall, *prima facie*, be regarded as unreasonable.[976]

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[972] *COGSA 1936*, *supra* note 216, § 1304.4. This section provides that:

> 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 chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom; 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 proposal reflected the desire that the carrier ought not to be permitted to deviate for the sole purpose of increasing his profits. It duplicated the language of Article 4.4 of the Hague Rules and of § 1304.4 of the U.S. Carriage of Goods by Sea Act. See Constantin Katsigeras, *Le déroutement en droit maritime comparé* (Paris: Librairies techniques, 1970) at 47. See also Morgan, *supra* note 632 at 485; Brien D Ward, "Admiralty – Failure to Deliver Cargo Does Not Constitute Unreasonable Deviation under COGSA" (1986) 60 Tul L Rev 849 at 856.

[973] This viewpoint got support from Hungary, Japan and Australia. See Sweeney, "Draft II", *supra* note 786 at 346. See also Hugh Beale & Tony Dugdale, "Contracts between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 British Journal of Law and Society 45 at 51; Ellen A Peters, "Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two" (1963) 73 Yale LJ 199 at 206.

[974] The Nigerian view got support from Tanzania. See Sweeney, "Draft II", *supra* note 786 at 346.

[975] *Ibid* at 346-347.

[976] Reasonable deviation to save life or property at sea was permitted in the Harter Act. Section Three thereof provides that:

> If the owner of any 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

Eventually, the idea of detaching measures for saving life or property from reasonable deviation was adopted.[977] The carrier's exemption from liability for loss or damage resulting from salvage has been contained in Article 5.6 of the Rules which provides that:

> The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.[978]

There are three differences between Article 5.6 of the Hamburg Rules and its counterpart in the Hague Rules.[979] The first one is the omission of the words "attempting to save life or property at sea". The change has narrowed the coverage of the exception and may presumably discourage carriers from engaging in salvage.[980] The second one is the addition of the requirement of reasonableness with respect to measures for saving property at sea. It was designed to break the equivalence between measures for saving life and those for saving property in exonerating carriers from liability, but it may simply bring about some inconspicuous changes because there has always been more consideration of proportionality in cases concerning salvage of property than in those

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> management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from … saving or attempting to save life or property at sea, or from any deviation in rendering such service.

The Carriage of Goods by Sea Act granted carriers additional protection by allowing reasonable deviation not connected with saving life or property at sea. U.S. courts held that unjustifiable deviation would deprive the carrier of protections contained in bills of lading as well as statutory protections. See *St Johns NF Shipping Corp v SA Companhia Geral Commercial do Rio de Janeiro*, 263 US 119 at 138 (SC 1923); *The Willdomino*, 272 US 718 at 734 (SC 1927).

977 Sweeney, "Draft II", *supra* note 786 at 348.

978 *Hamburg Rules*, *supra* note 792, art 5.6.

979 *Hague Rules*, *supra* note 205, art 4.2(l). Article 4.2(l) provides that:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: …
> (l) Saving or attempting to save life or property at sea. …

980 See WE Astle, *The Hamburg Rules: An Appreciation of the Cause and Effect of the Amendments to the Hague Rules and the Hague-Visby Rules* (London: Fairplay Publication, 1981) at 65.

concerning salvage of life.[981] The last one is the declaration of independence of general average from the immunity, which means that Article 5.6 and the regime of general average both apply when a carrier intentionally sacrifices part of the goods in his charge to save his vessel and the remaining goods from an emergency.[982] The reference to "except in general average" in Article 5.6 of the Rules eradicates the possibility that carriers may rely on the exception to evade compensation for cargo owners whose goods have been sacrificed for collective interests.[983]

Overall, Article 5.6 of the Rules provides for more restrictions on the carrier's access to the exception than its counterpart in the Hague Rules, but it basically shares with the latter the spirit of freeing carriers from unnecessary worries about potential

[981] See Aikens, Lord & Bools, *supra* note 458 at para 10.243. Nonetheless, it may be difficult to distinguish between acts for saving life and those for saving property when an emergency occurs and any discriminative treatiment with regard to the two kinds of acts may consequently lead to potential salvors' hesitation that sometimes may be fatal. See Richardson, *supra* note 284 at 32.

[982] General average is an important regime in maritime law according to which all parties in a sea venture proportionally share any losses resulting from a voluntary sacrifice of part of the ship or cargo to save the whole in an emergency. In the exigencies of hazards at sea, crew members often have very little time to determine precisely whose cargo they are going to sacrifice. Thus, to avoid quarrels that could waste valuable time, there arose an equitable practice whereby all the merchants whose cargo landed safely and the shipowner whose vessel was preserved would be called on to contribute a portion, based upon a share or percentage, to the merchant or merchants whose goods had been sacrificed for the collective interests. See John Francis Donaldson, CT Ellis & CS Staughton, *The Law of General Average*, 9th ed (London: Stevens & Sons, 1964) at 2-4; George S Hughes, RR Cornah & John Crump, *A Guide to General Average*, 3d ed (London: Richards Hogg Ltd, 1989) at 5; Richard Lowndes, Edward L De Hart & George Rupert Rudolf, *The Law of General Average: English and Foreign*, 6th ed (London: Stevens & Sons, 1922) at 4-6. See also Richard R Cornah et al, *The Law of General Average and the York-Antwerp Rules*, 14th ed (London: Sweet & Maxwell, 2013) at 16; Laurence R Baily, *General Average: And the Losses and Expenses Resulting from General Average Acts, Practically Considered*, 2d ed (London: Baily Bros, 1856) at 13; Leon S Felde, "General Average and the York-Antwerp Rules" (1952) 27 Tul L Rev 406 at 408.

[983] General average contribution is defined as a contribution by all the parties in a sea adventure to make good the losses sustained by one or more of them on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. See Thomas Barclay, "The Definition of General Average" (1891) 7 Law Q Rev 22 at 22-23; Jonathan Spencer, "Hull Insurance and General Average – Some Current Issues" (2009) 83 Tul L Rev 1227 at 1257-1267.

claims following their good deeds.[984] It poses no problem from the perspective of fairness.

Paragraph 4 – Exception relating to shipment of dangerous goods

During the negotiations for the Hamburg Rules, there was little criticism with regard to Article 4.6 of the Hague Rules,[985] despite its failure to specify the shipper's obligations in relation to shipment of dangerous goods.[986] Poland favored a lengthier provision detailing the carrier's rights in this respect.[987] The United States suggested that a new provision should be based on Article 4.6 of the Hague Rules, include a definition

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[984] See *Stag Line*, *supra* note 633 at 343-344.

[985] *Hague Rules*, *supra* note 205, art 4.6. Article 4.6 provides that:

> Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

[986] Sweeney, "Draft V", *supra* note 786 at 170.

[987] The provision proposed by the Polish delegation read as follows:

> (1) On easily inflammable, explosive or otherwise dangerous goods, the shipper is bound to place a suitable marking indicating such goods as dangerous, and to give the carrier the necessary information on the nature and properties of the goods.
>
> (2) When supplying for carriage the goods which should be handled in a particular manner, the shipper is bound to place a suitable marking thereon and to inform the carrier as to their nature and properties.
>
> (3) The carrier – while retaining his right to the full freight – may at his discretion discharge the cargo from the vessel, destroy or render it innocuous without any obligation to compensate for damage resulting therefrom where the cargo containing easily inflammable, explosive or otherwise dangerous materials has been falsely declared or where the carrier could not, when receiving the cargo, ascertain its dangerous nature or properties on the basis of a common knowledge of such matters and has not been warned about such nature. The shipper is liable for damage resulting from such cargo having been loaded and carried.
>
> (4) Although the nature and properties of the cargo as set out in paragraph 3 have been known to the carrier and the cargo has been loaded with his consent, but subsequently the cargo has imperiled the safety of the vessel, of persons on board or of other cargoes, the carrier may – at his discretion – discharge the dangerous cargo, destroy it or render it innocuous. For damage resulting therefrom the carrier is liable only in general average. The carrier retains his right to the distance freight.

"Dangerous Goods: Proposal by the Representative of Poland" (A/CN.9/WG.III(VIII)/CRP.8) in *Yearbook 1975*, *supra* note 839 at 253.

of dangerous goods, prescribe a discriminatory treatment for special risks inherent in such shipment and clarify burden of proof.[988] Some developing countries were dissatisfied with the carrier's unlimited discretion to dispose of dangerous goods and proposed a provision containing more restrictions on such discretion.[989] It was to appease those developing countries that the words "as the circumstances may require" were added.[990] It was finally decided that the formulation in the Hague Rules was retained as the basis of the new provision and that the Polish and American proposals should also be taken into account.[991] There was a consensus that the shipper's obligations, which had previously been determined by customary practices, had to be specified in the upcoming convention and that their obligations in relation to shipment of dangerous goods were supposed to include informing carriers of dangerous nature of goods consigned for shipment and precautions that should be taken as well as marking goods in an appropriate

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[988] The provision proposed by the U.S. delegation read as follows:

> (1) With respect to goods which are regarded as dangerous goods at the port of loading, or by the law of the vessel's flag or by international agreement, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has conplied with any special instructions given to him by the shipper respecting the goods and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents.
>
> (2) Such dangerous goods may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation where they have been taken in charge by the carrier without knowledge of their nature and character.
>
> (3)Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

"Provisions Respecting Dangerous Goods: Proposal Submitted by the Representative of the United States of America" (A/CN.9/WG.III(VIII)/CRP.13) in *Yearbook 1975*, *supra* note 839 at 253.

[989] Sweeney, "Draft V", *supra* note 786 at 171.

[990] *Ibid*.

[991] *Ibid*.

manner to indicate their dangerous properties.[992] The provision regarding shipment of dangerous goods was eventually fixed in Article 13 of the Hamburg Rules after its original text had been proposed in the eighth session of the Working Group on International Legislation on Shipping and gone through a revision at the UNCITRAL Plenary in 1976.[993]

Notwithstanding the addition of the shipper's obligations, Article 13 of the Hamburg Rules is essentially akin to Article 4.6 of the Hague Rules as both of them cover two

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[992] See Nicoll, *supra* note 831 at 155; John A Maher & Joan D Maher, "Marine Transport, Cargo Risks, and the Hamburg Rules – Rationalization or Imagery?" (1979-1980) 84 Dick L Rev 183 at 212-213.

[993] The text proposed in the eighth session of the Working Group on International Legislation on Shipping read as follows:

> (1) When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous.
> (2) Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without such knowledge, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.
> (3) Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any.

"Report of the Working Group on International Legislation on Shipping on the Work of Its Eighth Session (New York, 10-21 February 1975)" (A/CN.9/105) in *Yearbook 1975*, *supra* note 839 at 226. See also *Hamburg Rules*, *supra* note 792, art 13. Article 13 provides that:

> 1. The shipper must mark or label in a suitable manner dangerous goods as dangerous.
> 2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper must inform him of the dangerous character of the goods and, if necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:
> (a) the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and
> (b) the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.
> 3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.
> 4. If, in cases where the provisions of paragraph 2, subparagraph (b), of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

circumstances. One is that a carrier consents to shipment of dangerous goods without knowledge of their dangerous nature and characters, and the other is that he is acquainted with such nature and characters but still agrees to conduct the carriage.[994] In either case, carriers are allowed to unload, destroy or render innocuous the dangerous goods in their charge without any need for compensation. The difference is that in the former case, they may not only dispose of dangerous goods without liability but also be indemnified by shippers against any loss or expenses resulting from such shipments, while in the latter case they are merely entitled to dispose of dangerous goods that have become an imminent danger but unable to claim indemnities from shippers.[995]

In Article 13 of the Hamburg Rules, a reasonable allocation of risks has been built between carriers and shippers with regard to shipment of dangerous goods. The obligation to inform carriers of dangerous characters of goods and, if necessary, of the precautions that need to be taken is imposed on shippers on the grounds that they have overwhelmingly better access to such information.[996] Should a shipper fail to properly

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994 See Wilson, *Carriage of Goods*, *supra* note 867 at 36.

995 Gaskell, Asariotis & Baatz, *supra* note 511 at paras 15.1-15.2.

996 The shipper's obligation has long since been included in some model bills of lading. For example, Article 19.1 of the Ellerman East Africa/Mauritius Service Bill stipulates that "[n]o goods which are or may become dangerous, inflammable or damaging (including radio-active materials), or which are or may become liable to damage any property whatsoever, shall be tendered the the Carrier for carriage without his express consent in writing, and without the container or other covering in which the goods are to be carried as well as the goods themselves being distinctly marked on the outside so as to indicate the nature and character of any such goods …"; Article 22.1 of the Mitsui OSK Lines Combined Transport Bill 1992 stipulates that "[t]he Merchant undertakes not to tender for transportation any goods which are of a dangerous, inflammable, radio-active, or damaging nature without previously giving written notice of their nature to the Carrier and marking the goods and the container or other covering on the outside …"; Article 14 of the "K" Line Bill of Lading stipulates that "(1) The Ocean Carrier undertakes to carry the goods of an explosive, inflammable, radioactive, corrosive, damaging, noxious, hazardous, poisonous, injurious or dangerous nature only upon the Ocean Carrier's acceptance of a prior written application by the Merchant for the carriage of such goods. Such application must accurately state the nature, name, lable and classification of the goods as well as the method of rendering them innocuous, with the full names and addresses of the shipper and the

perform such obligation, he is reasonably held responsible for all negative consequences of his dishonesty or ignorance,[997] including loss of goods arising from disposal measures of the unwitting carrier and loss sustained by the carrier due to such shipment. Even though a shipper has fulfilled his duty of disclosure, he still has to bear risks inherent in shipment of dangerous goods which cannot be resisted despite the execution by the carrier of all measures of care that could reasonably be required as provided for in Article 5.1 and of all precautions demanded by him.[998] It is rather unacceptable to hold

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consignee. (2) The Merchant shall undertake that the nature of the goods referred to in the preceding paragraph is distinctly and permanently marked and manifested on the outside of the package(s) and container(s) and shall also undertake to submit the documents or certificates required by any applicable statutes or regulations or by the Ocean Carrier. …"; Article 4.1 of the FIATA (FBL) stipulates that "[t]he Merchant shall … in any case inform the Freight Forwarder in writing of the exact nature of the danger before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken."; Article 19 of the Multidoc 95 stipulates that "[t]he Consigonor shall … in any event inform the MTO in writing of the exact nature of the danger before Goods of a dangerous nature are taken into charge by the MTO and indicate to him, if need be, the precautions to be taken." See *ibid* at paras 15.24-15.32. See also Meltem Deniz Güner-Özbek, *The Carriage of Dangerous Goods by Sea* (Berlin: Springer, 2008) at 7-12.

[997] Where goods are shipped without notice of their dangerous qualities the shipper will be liable for any damage resulting therefrom either to the vessel or to any other cargoes on board. See *Great Northern Railway Co v LEP Transport & Depository Ltd*, (1922) 11 Ll LR 133 at 152 (CAUK); *Texim*, *supra* note 665 at 62. The orthodox view is that such liability is strict and in no way dependent on the knowledge available to the shipper as to the nature of the goods. This view stems from the majority decision in *Brass v Maitland* where a consignment of bleaching powder containing chloride of lime was shipped in casks. During the voyage, the chloride of lime corroded the casks and damaged other goods in the hold. The majority of the court took the view that the shipper should be liable even though he was unaware of the dangerous nature of the goods. In the absence of such knowledge on either side, the majority treated the issue purely as a question of allocation of risks. "It seems much more just and expedient that although they were ignorant of the dangerous qualities of the goods or the insufficiency of the packing, the loss occasioned by the dangerous quality of the goods and the insufficient packing should be cast upon the shippers than upon the shipowners." *Brass v Maitland*, (1856) 119 ER 940 at 945, Lord Campbell (KBD). On the other hand, there was a strong dissenting judgment from Crompton J who felt that there was no authority to support an absolute obligation on the part of the shipper. He said that "[i]t seems very difficult that the shipper can be liable for not communicating what he does not know … I entertain great doubt whether either the duty or the warranty extends beyond the cases where the shipper has knowledge, or means of knowledge, of the dangerous nature of the goods when shipped or where he has been guilty of some negligence as shipper, as by shipping without communicating danger, which he had the means of knowing and ought to have communicated." *Ibid* at 948, Crompton J. A similar view was adopted by a U.S. court in *Sucrest Corp v M/V Jennifer*. *Sucrest Corp v M/V Jennifer*, 1978 AMC 2520 at 2529 (Me Dist Ct 1978). However, in *obiter dicta* in *The Athanasia Comninos*, Mustill J supported the strict liability approach. See *Athanasia Comninos*, *supra* note 661 at 282, Mustill J. This approach was confirmed in a later case, *Effort Shipping Co Ltd v Linden Management SA (The Giannis NK)*, where the House of Lords expressed the view that the shipper's common law undertaking in this respect was absolute. See *Giannis NK*, *supra* note 656 at 612-613, Lord Lloyd. *C.f. Bamfield*, *supra* note 660 at 110, Fletcher Moulton LJ.

[998] See generally Grant Purdy, "Risk Analysis of the Transportation of Dangerous Goods by Road and Rail" (1993) 33 Journal of Hazardous Materials 229 at 236; Carsten Helm, "How Liable Should an Exporter Be? The Case of Trade in Hazardous Goods" (2008) 28 Int'l Rev L & Econ 263 at 265.

sufficiently prudent carriers liable for loss of or damage to dangerous goods resulting from disposal measures taken by them after such goods have realistically imperiled other properties or life.[999]

[999] See Wilson, *Carriage of Goods*, *supra* note 867 at 36.

Chapter III – A survey of exoneration-related provisions in the Hamburg Rules out of the consideration of clarity

As distinguished from the preceding chapter focusing on fairness of exoneration-related provisions in the Rules, Chapter III is intended for an examination from the perspective of clarity. It touches upon two issues. One is the substitution of the unitary basis of liability for the "laundry list" in the Hague Rules and the other is the newly-added provision regarding partial exemption.[1000]

Section 1 – From the "laundry list" to the unitary basis of liability

The introduction of a unitary basis of liability in Article 5.1 of the Hamburg Rules has brought about two noteworthy changes, that is, the elimination of the catalogue of exceptions contained in Article 4.2 of the Hague Rules and the presence of a well-defined allocation of burden of proof.

Paragraph 1 – Elimination of the catalogue of exceptions

The Hamburg Rules, unlike the Hague Rules, were drafted in the continental rather than the Anglo-American legislative style.[1001] The elimination of the catalogue of exceptions contained in Article 4.2 of the Hague Rules is an important symbol of such

[1000] See Frederick, *supra* note 238 at 86-88; Basnayake, *supra* note 798 at 353-355.
[1001] Karan, *Liability*, *supra* note 65 at 35. See also Francis Alan Roscoe Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford: Oxford University Press, 2009) at 26.

change.[1002] As a matter of fact, the elimination of the catalogue is not equivalent to the abolition of the exceptions enumerated therein.[1003] The exceptions in Articles 4.2(c)-(q) of the Hague Rules are well covered by Article 5.1 of the Hamburg Rules as their effectiveness ultimately depends on absence of fault on the part of shipowning interests.[1004]

The catalogue of exceptions in the Hague Rules had been subject to criticism long before the Hamburg Conference was held. It was argued that the catalogue reduced the Hague Rules into a model bill of lading, a format that reflected the purpose for which they had been drafted but was hard to be deemed as an appropriate legal instrument.[1005] The scheme of the carrier's exemption from liability in the Hague Rules was even described as the epitome of poor drafting skills of lawyers from the common law system.[1006] Under the Hague Rules, the carrier's liability is basically, though not wholly, dependent on his own fault or fault on the part of his servants or agents.[1007] The spirit of fault liability is reflected in an implicit manner, or rather, in a series of elaborate

[1002] See Joseph C Sweeney, "Review of the Hamburg Conference" (Paper delivered at the Bill of Lading Conventions Conference, 29-30 November 1978) at 1, 8.
[1003] Bauer, *supra* note 449 at 54-55.
[1004] Hugh M Kindred et al, *The Future of Canadian Carriage of Goods by Water Law: A Study of the Hague Rules, the Hague/Visby Rules, and the Hamburg Rules on the Carriage of Goods by Sea* (Halifax: Dalhousie Ocean Studies Programme, 1982) at 171-172.
[1005] See Alexander von Ziegler, "The Liability of the Contracting Carrier" (2009) 44 Tex Int'l LJ 329 at 330 [von Ziegler, "Contracting Carrier"]; Gaskell, Asariotis & Baatz, *supra* note 511 at para 8.64. The scheme of the carrier's exclusion of liability in the Hague Rules was criticized for it was thought to have failed to meet even the most elementary standards of legislative technique and statutory language. "The convention in its entirety has been based on English legal traditions … it is ambiguous, difficult to interpret and consequently [can hardly serve] as a basis for uniform statutory rules … the provisions on the scope of application and [those] on bills of lading and the liability of carriers give rise to doubts and conflicting interpretations. The Convention [was] drafted by lawyers and businessmen without experience in statutory drafting and without knowledge of continental legislative techniques. It is more like a bill of lading than a statute." Selvig, "Insurance", *supra* note 21 at 301-302, n 8.
[1006] Gaskell, Asariotis & Baatz, *supra* note 511 at para 8.64.
[1007] Selvig, "Insurance", *supra* note 21 at 301.

provisions.[1008] Those provisions have much in common with clauses in English bills of lading prevalent at the beginning of the twentieth century.[1009] The Norwegian Ministry of Justice, when submitting in 1937 to the Norwegian parliament a proposal for domestic legislation incorporating the Hague Rules, contended that the Rules should be drawn into national law by general reference because only in such way would the prospective act avoid including the exemption provisions therein which even did not meet the most elementary standard of legislative techniques.[1010] The Ministry commented that the Hague Rules, based, in their entirety, on English legal traditions and designed by lawyers and businessmen without experience in drafting instruments and knowledge of continental legislative techniques, were more like a bill of lading than a statute, which was so ambiguous that it could not serve as a set of shipping rules universally applicable in various countries.[1011]

On the other hand, proponents of the Hague Rules believe that the use of business language and format of bill of lading is a great advantage.[1012] They contend that the Hague Rules have been working well in practice and have provided a considerable degree

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[1008] *Ibid*.

[1009] See Dor, *supra* note 239 at 21-25. See also Michael D Bools, *The Bill of Lading: A Document of Title to Goods; An Anglo-American Comparison* (London: Lloyd's of London Press, 1997) at 119-121; Paul Todd, *Modern Bills of Lading*, 2d ed (Oxford: Blackwell Law, 1990) at 23-27; CF Powers, *A Practical Guide to Bills of Lading* (New York: Oceana Publications, 1966) at 102-105.

[1010] Selvig, "Insurance", *supra* note 21 at 301-302. See also KR Simmonds, "The Interpretation of the Hamburg Convention: A Note on Article 3" in Mankabady, *Hamburg*, *supra* note 57, 117 at 118; Raoul Ruttiens, *La technique législative* (Bruxelles: E. Bruylant, 1945) at 57; Garth C Thornton, *Legislative Drafting*, 4th ed (Haywards Heath: Tottel Publishing, 2005) at 69; James J Morrison, "Legislative Technique and the Problem of Suppletive and Constructive Laws" (1934) 9 Tul L Rev 544 at 547.

[1011] Selvig, "Insurance", *supra* note 21 at 302, n 8.

[1012] *Ibid* at 301, n 7.

of certainty in settlement of cargo claims.[1013] The Hamburg Rules are, in their view, no more than an over-radical and ill-advised product of the "economic warfare" mentality of developing states.[1014] The most furious criticism against the Hamburg Rules is that they have discarded those valuable interpretations with respect to the carrier's exemption made by courts throughout the world over a long time and that the so-called novelties contained therein would merely increase disputes and litigation costs.[1015] It has been argued that:

> The new Rules are not just an amendment of the Hague Rules. They are a totally new cargo convention expressed in novel and unclear language unknown to the maritime law. … The drawback to the adoption of the Hamburg Rules is that the maritime community would be throwing away the work of clarification done by the courts over the years and would be creating uncertainty and ambiguity in areas where none existed before.[1016]

For instance, carriers are not liable in the Hague Rules for loss or damage arising from "saving or attempting to save life or property at sea",[1017] but the defense has been revised in the Hamburg Rules to only cover loss or damage resulting "from measures to save life or from reasonable measures to save property at sea."[1018] The additional requirement of reasonableness is deemed by some as "a radical departure from the time-honored traditions of the sea" and likely to bring about uncertainty and needless

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[1013] Tetley, "Commentary", *supra* note 876 at 7. See also Simmonds, *supra* note 1010 at 118.
[1014] Yancey, *supra* note 3 at 1249, 1253.
[1015] It was argued that "the new Convention (if and when it comes into force) is bound to produce a great deal of litigation and many cases which, if they had fallen to be determined under the Hague Rules, would have been settled, will now go to Court." JP Honour, "The P&I Clubs and the New United Nations Convention on the Carriage of Goods by Sea" in Mankabady, *Hamburg*, *supra* note 57, 239 at 240.
[1016] Diamond, "Responsibility for Loss", *supra* note 747 at 117.
[1017] *Hague Rules*, *supra* note 205, art 4.2(l).
[1018] *Hamburg Rules*, *supra* note 792, art 5.6.

litigation.[1019] Article 5.1 of the Hamburg Rules has been repeatedly criticized for the possibility that it may reduce jurisprudence on the carriage of goods by sea to ground zero and induce recurrence of many issues that have already been well settled under the Hague Rules.[1020] The replacement of the "laundry list" by Article 5.1 of the Hamburg Rules is believed to have the side effect of boosting recourse to litigation.[1021] In short, such replacement has been viewed by opponents as a giant step backward in the development of legal regimes governing the carriage of goods by sea.[1022]

In fact, the evolution from the "laundry list" in the Hague Rules to the unitary basis of liability in the Hamburg Rules ought not to be devalued. The change has not only produced a more equitable distribution of risks between carriers and cargo interests but also brought a new setup regarding the carrier's exemption from liability characterized by greater conciseness.[1023] The arguments from proponents of the retention of the "laundry

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[1019] Yancey, *supra* note 3 at 1253. Article 5.6 of the Hamburg Rules aims to bring the exception for measures to save property at sea under the general umbrella of the carrier's liability. The draftsmen found it undesirable to provide an unqualified immunity with respect to measures to save property at sea in view of possible abuse. See Wilson, *supra* note 547 at 144.

[1020] See Diamond, "Responsibility for Loss", *supra* note 747 at 118. See also Werth, *supra* note 339 at 70-71.

[1021] Haight J said that "[t]he Hamburg Rules might well be subtitled: '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." See R Cleton, "Contractual Liability for Carriage of Goods by Sea (the Hague Rules and Their Revision)" in CCA Voskuil & JA Wade, eds, *Hague-Zagreb Essays 3: Carriage of Goods by Sea, Maritime Collisions, Maritime Oil Pollution, Commercial Arbitration* (The Hague: Sijthoff & Noordhoff, 1980) 3 at 20.

[1022] See Kindred et al, *supra* note 1004 at 171-172.

[1023] The deletion of the "laundry list" directly led to the removal of the notorious nautical fault exception heavily biased in the carrier's favor. It has been observed that "[f]reeing ocean carriers from liability for their fault by contract and law is not an ancient phenomenon but emerged in the last 100 years. This principle permits an ocean carrier to escape liability for his own negligence or that of his servants. No carrier in any other modern mode of carriage (by road, rail or air) is given this right, nor is any othe profession given such relief for the faults of its members (lawyers, doctors, taxi owners, taxi drivers, or even average adjusters). The adoption of Art. 5(1) of the Hamburg Rules would put ocean carriers in step with the rest of the world's carriers and the law of responsibility in general." William Tetley, "Cargo Owners' Obligations in General Average" (1988) 19 J Mar L & Com 90 at 105-106.

list" are not tenable. First of all, the list itself has never been isolated from ambiguity and uncertainty.[1024] The interpretations of those excepted perils contained therein are far from uniform and stable. Instead, they have been under constant review, update and revise.[1025] It is predictable that the list would continuously stir up controversies.[1026] In the Hague Rules, there is a complex layout concerning the liability of carriers where they have the obligations to make their vessels seaworthy and care for goods in their custody but, on the other hand, are entitled to a variety of exceptions to relieve themselves from liability.[1027] In contrast, the Hamburg Rules contain a much simpler scheme in this respect where there is no longer need for provisions on the carrier's duties as they are covered by the unitary basis of liability and the carrier's diverse immunities in the Hague Rules are condensed into one single general exemption based upon absence of fault on the part of shipowning interests.[1028] Such change may probably bring a decrease rather than a rise in unwanted disputes and litigation costs.[1029] Secondly, Article 5.1 of the Hamburg Rules was not created without foundation.[1030] Although the scheme of the carrier's liability in the Hamburg Rules is quite different from that in the Hague Rules, there is still some continuity between them.[1031] The concepts of reasonableness and fault

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[1024] Werth, *supra* note 339 at 73.
[1025] See Selvig, "Insurance", *supra* note 21 at 302; Lee, "System", *supra* note 172 at 253.
[1026] See Frank H Easterbrook, "Legal Interpretation and the Power of the Judiciary" (1984) 7 Harv JL & Pub Pol'y 87 at 89-94; Jason J Czarnezki & William K Ford, "The Phantom Philosophy? An Empirical Investigation of Legal Interpretation" (2006) 65 Md L Rev 841 at 842-844.
[1027] See Pixa, *supra* note 4 at 444.
[1028] See *ibid*. See also Berlingieri, "Comparative", *supra* note 10.
[1029] See O'Hare, "Risks", *supra* note 221 at 117-120. It was believed that the liability regime of the Hague Rules, which exonerated carriers from liability even when they were at fault, might lead to diminished standards of care and uneconomic results. See Hellawell, "Allocation", *supra* note 106 at 363-366.
[1030] Werth, *supra* note 339 at 73.
[1031] *Ibid* at 68.

propping up the configuration of the carrier's liability in the Hamburg Rules also present themselves in the Hague Rules, albeit in a much less prominent fashion.[1032] What the draftsmen of the Hamburg Rules did was merely upgrading the catch-all exception in the Hague Rules into a general provision.[1033] In effect, Article 5.1 of the Hamburg Rules covers nearly all the defenses in the Hague Rules.[1034] Given such continuity, there is no need to worry that the precedents decided on the basis of the Hague Rules would be discarded after the emergence of the Hamburg Rules.[1035] On the contrary, they would probably play an irreplaceable role in fleshing out the plain language of Article 5.1 of the Hamburg Rules.[1036]

Paragraph 2 – Simplified burden of proof

The replacement of the "laundry list" by the unitary basis of liability in the Hamburg Rules has marked a significant improvement in burden of proof.[1037] In Article 5.1 of the Hamburg Rules, the burden of proving absence of fault on the part of shipowning

[1032] See e.g. *Hague Rules*, *supra* note 205, arts 4.1, 4.2(b), 4.2(p), 4.2(q), 4.4.
[1033] Werth, *supra* note 339 at 68.
[1034] *Ibid*; *Hague Rules*, *supra* note 205, arts 4.2(a), 4.2(b).
[1035] The exact extent of the carrier's obligation in the Hamburg Rules has to be clarified by case law. One of the fears expressed by the UNCTAD Secretariat is that Article 5.1 may be interpreted through the use of old cases with the probable result that many of the deleted defenses would reappear. In fact, that fear seems to be unnecessary since nearly all the defenses in the Hague Rules have never vanished due to the emergence of the Hamburg Rules. It has been noted that "due diligence" in the case of seaworthiness has been incorporated by "all measures that could reasonably be required" in Article 5.1 of the Hamburg Rules. It has, nevertheless, been argued that although precedents may help to explain the level of reasonable measures under the Hamburg Rules, the new wording sometimes has to be interpreted with a clean slate. See Kindred et al, *supra* note 1004 at 171-172.
[1036] See Hellawell, "Allocation", *supra* note 106 at 358; DE Murray, "The Hamburg Rules: A Comparative Analysis" (1980) 12 Lawyer of the Americas 59 at 62-65.
[1037] See "Analysis of Comments and Proposals by Governments and International Organizations on the Draft Convention on the Carriage of Goods by Sea, and on the Draft Provisions Concerning Implementation, Reservations and Other Final Clauses Prepared by the Secretary-General" (A/CONF.89/8) in *Official Records*, *supra* note 905 at 40; Letter from Richard D Kearney, Chairman of the Advisory Committee on Private International Law, U.S. Department of State, to Thomas A Fain, President of the American Institute of Marine Underwriters (12 August 1977) at 4; Werth, *supra* note 339 at 73.

interests in the occurrence of loss, damage or delay in delivery is placed upon carriers.[1038] Such burden of proof was highly endorsed by Professor Hellawell who contended that it could be justified, notwithstanding some arbitrary results it might bring about,[1039] on the grounds that the carrier was not only the party more likely to have knowledge of the cause of loss, damage or delay but also the party more capable of exercising optimal care.[1040] Article 5.1 of the Rules has brought two delightful changes in respect of the burden of proof.

The first one is the presence of a unitary formulation of absence of fault. The carrier's immunities in the Hague Rules are mostly based on absence of fault on the part of shipowning interests.[1041] However, there is no unitary formulation as to such absence of fault in the Hague Rules. Instead, several homologous alternatives coexist, such as exercise of due diligence,[1042] "without the actual fault or privity",[1043] and "without the

[1038] Although a unitary basis of liability is laid down in the Hamburg Rules, there are still two exceptions. Firstly, where the loss, damage or delay is related to special risks inherent in the carriage of live animals, the presumption of fault in Article 5.1 of the Hamburg Rules becomes inapplicable and instead the aggrieved party has to prove that the carrier was at fault. Secondly, in fire-involved cases, cargo owners have the burden of showing that the fire arose from fault on the part of the carrier, his servants or agents, or from their fault in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences. *Hamburg Rules*, *supra* note 792, arts 5.4(a), 5.5. See also Sze, *supra* note 331 at 205.

[1039] "Report", *supra* note 872 at 302.

[1040] The first assertion easily proves to be true in most cases because the goods are in the carrier's custody over the period of transport. With respect to the second one, strict liability can presumably bring about an optimum standard of care insofar as the carrier spends up to the exact amount of a possible loss to prevent it, whereas fault liability permits a settlement value lower than the actual loss and a correspondingly smaller investment by the carrier to avoid that loss. Professor Hellawell thinks that the shift of risks toward the carrier via the presumption of fault helps to achieve a more nearly optimal standard of care. See *ibid* at 292-303.

[1041] It was argued that the exceptions contained in Articles 4.2(c)-(p) of the Hague Rules were superfluous because they merely enumerated examples of absence of fault in particular situations. See Sweeney, "Draft I", *supra* note 786 at 112.

[1042] See *Hague Rules*, *supra* note 205, arts 4.1, 4.2(p).

[1043] See *ibid*, arts 4.2(b), 4.2(q).

actual fault or neglect".[1044] The diversity of the expressions concerning "absence of fault" has inevitably led to confusion about whether there is any material difference between them and whether the carrier's burden of proving absence of fault varies depending on the specific defense he intends to plead.[1045] In contrast, Article 5.1 of the Hamburg Rules contains a unified formulation, that is, "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."[1046] Although it was stated in a French proposal, which served as the prototype of Article 5.1, that the carrier seeking the protection of the immunity must show that he could have neither foreseen nor avoided the circumstances causing the loss or damage,[1047] the text was eventually amended in accordance with a later Spanish proposal giving strong backing to the replacement of the harsh requirement of unforeseeability by the concept of reasonableness.[1048] Article 5.1 of the Hamburg Rules has been criticized for leaving

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[1044] *Ibid*, art 4.2(q).

[1045] Tetley, *Claims*, *supra* note 311 at 373-374; Clarke, *Aspects*, *supra* note 74 at 153; *Footwear*, *supra* note 348 at 808.

[1046] *Hamburg Rules*, *supra* note 792, art 5.1.

[1047] The French proposal read as follows: "[t]he carrier shall be liable for all loss or damage to the goods carried occurring from the time when the carrier has taken over the goods until the time when he has delivered them. The carrier shall not be liable if he can prove that the loss or damage resulted through circumstances which the carrier, his agents or servants, could neither foresee nor avoid and the consequences of which he was unable to prevent. The burden of proof shall be on the carrier to show that neither the actual fault or privity or act of the carrier nor the fault or neglect or act of the agents or servants of the carrier contributed to or concurred in the loss or damage." Sweeney, "Draft I", *supra* note 786 at 110.

[1048] The Spanish proposal read as follows: "[t]he carrier shall be liable for loss or damage to the goods while in the charge of the carrier. However, the carrier shall not be liable if he proves that the event which caused the loss or damage could not have been prevented. To this end, the carrier shall be required to prove that he and his servants have taken all measures that could reasonably be required to avoid the loss or damage (in the particular case)." *Ibid* at 113.

undefined "measures that could reasonably be required",[1049] but such vagueness is indeed insuperable given the necessary generality of a statutory provision.

The second change is the simplification of the route of burden of proof. Article 4.2 of the Hague Rules contains sixteen specifically defined exceptions and the catch-all exception. The orthodox view is that the catch-all exception is a complement to the immunities enumerated in Articles 4.2(c)-(p) which are merely some specific examples of the former.[1050] When a cargo dispute occurs, the claimant needs to, for starters, establish a *prima facie* case against the carrier, and then the latter may defend himself by pleading one of those immunities.[1051] The immunity invoked by the carrier cannot, however, ensure that he may ultimately be exonerated from liability. The carrier is merely presumed to be blameless. Such presumption may be rebutted by any evidence to the contrary showing that the carrier's own fault or fault on the part of his servants or agents has contributed to the occurrence of the loss of or damage to the goods in his custody.[1052] If the issue of seaworthiness is involved, the above route shall be prolonged and become more complicated as there are two more stages in which the claimant may argue that the loss or damage is caused by unseaworthiness of the vessel provided by the carrier rather than the excepted peril he has pleaded and then the carrier may preserve his exculpatory

[1049] See Frederick, *supra* note 238 at 113-114; Lee, "System", *supra* note 172 at 250.
[1050] See Sze, *supra* note 331 at 88; Sweeney, "Draft I", *supra* note 786 at 112.
[1051] See Clarke, *Aspects*, *supra* note 74 at 138-139.
[1052] See Karan, *Liability*, *supra* note 65 at 275-276; Richardson, *supra* note 284 at 32; Aikens, Lord & Bools, *supra* note 458 at para 10.234.

right by proving that unseaworthiness has nothing to do with want of due diligence.[1053] It can be seen from the foregoing analysis that the carrier's entitlement to the immunities in Articles 4.1 and 4.2(c)-(p) of the Hague Rules is ultimately dependent on absence of fault on the part of shipowning interests.[1054] Article 5.1 of the Hamburg Rules provides for a clear and concise allocation of burden of proof that is sufficient to supersede the circuitous route of proof in cases governed by the Hague Rules.[1055]

Section 2 – Partial exemption from liability

Article 5.7 of the Hamburg Rules provides for, in an explicit manner, the carrier's entitlement to partial exemption from liability.[1056] Its merits have been applauded, but its poor applicability has been subject to criticism.

Paragraph 1 – Gap-filling merit

Article 5.7 of the Hamburg Rules enables a carrier to assume responsibilities in proportion to his own fault or fault on the part of his servants or agents when multiple causes have led to his failure to deliver goods safely and punctually, provided that he is

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[1053] Clarke, *Aspects*, *supra* note 74 at 138-139.

[1054] Sweeney, "Draft I", *supra* note 786 at 112.

[1055] In fact, there is no essential difference between the formulation of Article 5.1 of the Hamburg Rules and that of the catch-all exception in the Hague Rules. The former was said to be consistent with the modern tort theory recognizing absence of fault as an effective defense to a *prima facie* case of injury. See *ibid*.

[1056] *Hamburg Rules*, *supra* note 792, art 5.7. Article 5.7 provides that:

> Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

able to prove the amount of loss, damage or delay in delivery not attributable to such fault.[1057]

Divisibility of liability was negated in the doctrine of contributory negligence,[1058] which originated from an English case but was then widely adopted by American courts.[1059] The doctrine stated that a plaintiff who was at fault in the occurrence of the injury or damage sustained by himself shall be barred from any recovery regardless of the gravity of his contributory negligence.[1060] The harsh and arbitrary all-or-nothing method espoused by the doctrine grew out of the common law concept of the unity of cause of action which implied that damages could not be apportioned since there was but one wrong.[1061] As a result of the prevalence of the doctrine, it used to be common to see

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[1057] Lüddeke & Johnson, *supra* note 830 at 15; Wilson, *Carriage of Goods*, *supra* note 867 at 219-220.

[1058] See Gregory C Sisk, "Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform" (1992) 16 University of Puget Sound Law Review 1 at 10-16; Gregory C Sisk, "The Constitutional Validity of the Modification of Joint and Several Liability in the Washington Tort Reform Act of 1986" (1990) 13 University of Puget Sound Law Review 433 at 436-439. See also Wex S Malone, "The Formative Era of Contributory Negligence" (1946) 41 Illinois Law Review 151 at 151-153.

[1059] Most scholars attribute the origin of the doctrine to the English case *Butterfield v Forrester*, decided by the Court of King's Bench in 1809. The case involved a defendant who negligently blocked part of a highway with a pole and a plaintiff who rode his horse violently and got injured by the pole. The Court found for the defendant in a very brief opinion where one of the judges, Bayley, stated that the plaintiff appeared to have been injured "entirely from his own fault." *Butterfield v Forrester*, (1809) 103 ER 926 at 940 (KBD). The first American case decided in accordance with the doctrine of contributory negligence was *Smith v Smith*. Another classic case promoting the development of the doctrine in the U.S. was *Brown v Kendall*. See generally *Smith v Smith*, 2 Me 408 at 426 (Sup Jud Ct 1824); *Brown v Kendall*, 60 Mass 292 at 296 (Sup Jud Ct 1850). See also Frank E Maloney, "From Contributory to Comparative Negligence: A Needed Law Reform" (1958) 11 U Fla L Rev 135 at 142, n 35; Gary T Schwartz, "Contributory and Comparative Negligence: A Reappraisal" (1978) 87 Yale LJ 697 at 697, n 3.

[1060] Gregory C Sisk, "Comparative Fault and Common Sense" (1994-1995) 30 Gonz L Rev 29 at 31 [Sisk, "Comparative Fault"]. See also William BL Little, "'It Is Much Easier to Find Fault with Others, Than to be Faultless Ourselves': Contributory Negligence as a Bar to a Claim for Breach of the Implied Warranty of Merchantability" (2007) 30 Campbell L Rev 81 at 82-83; Glanville Llewelyn Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (London: Stevens, 1953) at 18; Fleming James, Jr., "Imputed Contributory Negligence" (1954) 14 La L Rev 340 at 342.

[1061] See *Bartlett v New Mexico Welding Supply, Inc*, 646 P (2d) 579 at 594 (N Mex Ct App 1982); William L Prosser, "Joint Torts and Several Liability" (1937) 25 Cal L Rev 413 at 418; Richard N Pearson, "Apportionment of Losses under Comparative Fault Laws – An Analysis of the Alternatives" (1980) 40 La L Rev 343 at 344. In fact, there were other explanations of the rationale of the doctrine. One writer suggested that the courts applied the medieval concept of causation, sometimes referred to as the last wrongdoer rule, under which the last responsible human being was

judgments in which plaintiffs who had been at fault in part were wholly deprived of their entitlement to compensation.[1062] In other words, there was no room for partial reduction in liability of defendants. The last few decades witnessed, however, the decay of the obsolete doctrine.[1063] It has been realized that the antique all-or-nothing approach cannot be justified either by economic reasoning or in terms of fairness.[1064]

The idea of apportionment of damages dates back to the fourteenth century,[1065] when a provision was included in the Laws of Oleron suggesting equal division of damages where two ships collided but it was impossible to determine which one was to blame for the accident,[1066] and the approach of dividing damages in accordance with the degree of fault of each party was recognized in the *Consulato del Mare*, a compilation of

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regarded as the sole proximate cause of the injury. See Fleming James, Jr, "Contributory Negligence" (1953) 62 Yale LJ 691 at 693, 696. The fact that, in *Butterfield v Forrester* and other very early cases related to contributory negligence, the defendant's negligence came before that of the plaintiff in point of time lent support to this theory. Maloney, *supra* note 1059 at 142. Compare *Raisin v Mitchell* in which the court allowed a division of damages as the plaintiff's negligence had preceded that of the defendant. See generally *Raisin v Mitchell*, (1839) 173 ER 979 at 995-997 (Assizes) [*Raisin*]. Another theory stated that by denying recovery in whole to the victim contributorily negligent in the occurrence of the injury or damage he sustained, the law could well discourage people from engaging in conducts involving unreasonable risks to their own safety. See Richard A Posner, *Economic Analysis of Law*, 2d ed (Boston: Little, Brown and Company, 1977) at 123-124; Harold Demsetz, "When Does the Rule of Liability Matter?" (1972) 1 J Legal Stud 13 at 27; John H Mansfield, "Informed Choice in the Law of Torts" (1961) 22 La L Rev 17 at 53-54, 64, 72. But see James R Chelius, "The Control of Industrial Accidents: Economic Theory and Empirical Evidence" (1974) 38 Law & Contemp Probs 700 at 708-709; Walter Y Oi, "On the Economics of Industrial Safety" (1974) 38 Law & Contemp Probs 669 at 679.

[1062] See Glanville L Williams, "The Law Reform (Contributory Negligence) Act, 1945" (1946) 19 Mod L Rev 105 at 111-112.

[1063] For example, the Washington Legislature adopted in 1973 a statute based on the doctrine of comparative fault to replace the previous rule of contributory negligence. The new scheme involved the evaluation of the relative blameworthiness of the plaintiff and of the contribution made by each defendant to the plaintiff's injury or damage. In 1981, the Washington Legislature enacted another statute recognizing the allocation of responsibility among the tortfeasors according to their relative degree of fault. Five years later, the legislature adopted the Tort Reform Act, which abolished the doctrine of contributory negligence in cases where the plaintiff was partially at fault for his own injury or damage. See Sisk, "Comparative Fault", *supra* note 1060 at 31-33.

[1064] Schwartz, *supra* note 1059 at 727.

[1065] Some writers claim that the idea traces back to early Roman law. H Hillyer, "Comparative Negligence in Louisiana" (1936) 11 Tul L Rev 112 at 120-121. *Contra* Ernest A Turk, "Comparative Negligence on the March" (1950) 28 Chicago-Kent L Rev 189 at 216-218.

[1066] See Sanborn, *supra* note 814 at 66.

Spanish decisions.[1067] So far, such idea has been well acknowledged by numerous jurisdictions,[1068] such as Austria, France, Germany, Portugal, Switzerland, Italy, China, Japan, Poland, Russia, Turkey, Canada, the United Kingdom, the United States, etc.[1069] In addition, it has spread from tort law to other juristic domains. For instance, in contract law,[1070] the comparative fault defense may be invoked by the breaching party against the aggrieved party whose fault has contributed to his own loss;[1071] in criminal law, it has been argued that the victim's conducts should be taken into account in determining the sanctions imposed on the criminal.[1072] The idea has been bound up with marine disputes

[1067] It was prescribed in the compilation that damages should be apportioned according to the conscience of "experienced men, who are well and accurately versed in the art of the sea." See Turk, *supra* note 1065 at 223, n 88. See also Sanborn, *supra* note 814 at 86.

[1068] In fact, even in the era when the doctrine of contributory negligence was overwhelmingly prevalent, divisibility of damages was not fully negated. There was a case in which the plaintiff had negligently anchored his sloop in the channel of the Thames and then the defendant's ship ran into it in a fog. At the trial, the court instructed the jury, apparently on the basis of *Butterfield v Forrester*, that if they found that the injury was "imputable in any degree to any want of care or any improper conduct on the part of the plaintiff", they should find for the defendant. The jury made, however, a verdict for the plaintiff for half of the admitted damages and when asked why, "answered that there were faults on both sides." The court allowed the verdict to stand, in the teeth of the *Butterfield* case. *Raisin*, *supra* note 1061 at 991.

[1069] See Turk, *supra* note 1065 at 238-244.

[1070] The doctrine of comparative fault has spread into contract law, albeit primarily in cases where a party breached a contractual duty of reasonable care or there existed concurrent tort and contract liability. The acceptance of the doctrine in American contract law was relatively slow. The refusal and the willingness to apply the doctrine to contract disputes coexisted for a long time. See *Fortier v Dona Anna Plaza Partners*, 747 F (2d) 1324 at 1337 (10th Cir US 1984); *American Mortage Inv Co v Hardin-Stockton Corp*, 671 SW (2d) 283 at 301 (Mo Ct App 1984). See also James J White & Robert S Summers, *Uniform Commercial Code*, 6th ed (St. Paul: West Group, 2010) at 758-760.

[1071] The aggrieved party should be considered "at fault" and should shoulder part of the loss when he failed to meet a reasonable burden to reduce his potential losses by cooperating with the other parties or avoiding overreliance. Professor Ariel Porat thinks that there are eight categories of cases in which the aggrieved party should be deemed at fault and the comparative fault defense may apply. They are "failure to assist in performance", "failure to clarify misunderstandings", "failure to provide information necessary for performance", "failure to warn of a highly potential loss", "creating apprehensions", "failure to restrain reliance in the face of a concrete risk of breach", "failure to restrain reliance when there is no concrete risk of breach", and "reliance on the mistaken belief that the contract has been adequately performed". See generally Porat, "Comparative Fault", *supra* note 503 at 1398-1403.

[1072] Criminal law was traditionally described as directing its injunctions exclusively to actual or potential criminals. In other words, it was believed that norms of criminal law were intended only for influencing the behavior of criminals or potential criminals, but not that of victims or potential victims. It has, however, been realized that the traditional view may be both normatively unjustified and descriptively misleading. It is normatively unjustified because providing protection in an efficient manner and distributing protection in a fair way require criminal law to project its impact onto criminals as well as victims. It is descriptively misleading because, despite the traditional perception that criminal law solely regulates the behavior of criminals, various doctrines in this field may be interpreted as aimed at affecting the behavior of victims. This argument attempts to restore symmetry between criminal law and other juristic domains.

since it came into being.[1073] The Laws of Oleron and the *Consulato del Mare* where it had been crystallized were integrated into common law of the Atlantic ports and maritime law of the Mediterranean countries respectively.[1074] Its influences have accordingly been extended and reinforced in the field of law governing the carriage of goods by sea.[1075]

It is inaccurate to say that the carrier's entitlement to partial exemption is excluded from the Hague Rules because Article 4.2(q) thereof implies that carriers are not held responsible for loss or damage arising without fault on the part of shipowning interests in multiple-causation cases.[1076] Nonetheless, the problem is that such entitlement is not articulated in the Hague Rules.[1077] It is, therefore, fair enough to say that Article 5.7 of the Hamburg Rules has filled a loophole left by the Hague Rules.[1078]

By denying aggrieved parties the compensation for the loss they could have avoided or mitigated, contract law induces them to reduce negative consequences to the extent that they are within their control. See Farnsworth, *Contracts*, *supra* note 611 at 896-907. Tort law treats both victims and tortfeasors as autonomous agents whose actions or omissions may contribute to the injury or damage at issue. See Daniel Orr, "The Superiority of Comparative Negligence: Another Vote" (1991) 20 J Legal Stud 119 at 122-123. It has been argued that disregarding the victim's conduct in determining the sanctions of criminals is both inefficient and unfair. It is inefficient because there is little incentive for victims to take precautions against crime if their conducts are deemed irrelevant to the concerns of the criminal justice system. It is unfair because judicial resources are mostly used to protect careless people intead of cautious people given the fact that careless people are more likely to become actual victims. See Alon Harel, "Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault" (1994) 82 Cal L Rev 1181 at 1182-1183.

[1073] See Sanborn, *supra* note 814 at 70.

[1074] See *ibid* at 86.

[1075] See Reginald G Marsden, Simon Gault & Kenneth C McGuffie, *Marsden on Collisions at Sea*, 12th ed (London: Sweet & Maxwell, 1998) at 143.

[1076] See Alfred Huger, "Proportional Damage Rule in Collisions at Sea" (1928) 13 Cornell Law Quarterly 531 at 533; Maloney, *supra* note 1059 at 153.

[1077] See Erastus C Benedict & Arnold Whitman Knauth, *The Law of American Admiralty: Its Jurisdiction and Practice with Forms and Directions*, 6th ed (New York: Matthew Bender and Company, 1941) at 32. See also Turk, *supra* note 1065 at 231-238.

[1078] See *ibid*.

Paragraph 2 – Unworkable apportionment method

Article 5.7 of the Hamburg Rules is appreciated for its attempt to clear up the carrier's entitlement to partial exemption from liability, but it has failed to provide for a workable method on how liability shall be apportioned. Thus, it has been described as an example of poor draftsmanship that is really regrettable in view of the potential significance it could have had.[1079]

It has always been difficult to figure out the portion of loss or damage for which the carrier shall not be liable when there are other contributory factors than fault on the part of shipowning interests. Clark J lamented that apportionment of liability "not only invites but demands arbitrary determinations by judges and juries, turning them free to allocate loss as their sympathies direct."[1080] It has no set formula and very little specific guidance may be given in this respect.[1081] The only solution is probably to leave it to jurors acquainted with some general principles.[1082]

Article 5.7 of the Hamburg Rules provides that when multiple causes have produced loss, damage or delay in delivery, the carrier may be relieved from liability for the part thereof not resulting from his own fault or fault on the part of his servants or agents, as

[1079] Lüddeke & Johnson, *supra* note 830 at 15.
[1080] *American Motorcycle Association v Superior Court*, 578 P (2d) 899 at 924, Clark J (Cal SC 1978).
[1081] Pearson, *supra* note 1061 at 348.
[1082] See Wayne Fisher, James Nugent & Craig Lewis, "Comparative Negligence: An Exercise in Applied Justice" (1974) 5 St Mary's LJ 655 at 657-658.

long as he is able to prove the amount of that part.[1083] If fault on the part of shipowning interests and another factor irrelevant to such fault individually cause two mutually distinguishable portions of loss, there seems to be no obstacle to the application of the provision.[1084] However, it has been argued that such circumstance may even not fall within the scope of the provision which underlines, by the word "combine" used therein, the joint contribution of fault on the part of shipowning interests and other factors to loss, damage or delay in delivery. Working out the amount of loss not attributable to fault on the part of shipowning interests is essential to the application of Article 5.7, but it is almost impossible when such fault is tightly entangled with other causes in producing the whole of loss. There has been a theory that the relative contribution of other factors than such fault to the occurrence of loss may be expressed in terms of percentage and the amount for which the carrier shall not be responsible may be calculated by multiplying the total amount of loss and that percentage.[1085] Nevertheless, how to determine such relative contribution is still far from clear. A method has been proposed in which it is necessary to imagine a line, with absence of any significance at one end having a value of zero and full contribution at the other having a value of one hundred, and then to figure

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[1083] *Hamburg Rules*, *supra* note 792, art 5.7.

[1084] See generally Glen O Robinson, "Multiple Causation in Tort Law: Reflections on the DES Cases" (1982) 68 Va L Rev 713 at 726; Robert J Peaslee, "Multiple Causation and Damage" (1933) 47 Harv L Rev 1127 at 1129; HLA Hart & Tony Honoré, *Causation in the Law*, 2d ed (Oxford: Clarendon Press, 2002) at 73; Mario J Rizzo & Frank S Arnold, "Causal Apportionment in the Law of Torts: An Economic Theory" (1980) 80 Colum L Rev 1399 at 1403.

[1085] Section 2(b) of the Uniform Comparative Fault Act suggests that "the extent of the causal relation between the conduct and the damages claimed" should be taken into consideration "in determining the percentages of fault." See Pearson, *supra* note 1061 at 346, n 11. See also Aaron D Twerski, "From Defect to Cause to Comparative Fault – Rethinking Some Product Liability Concepts" (1977) 60 Marq L Rev 297 at 326; William Kruskal, "Terms of Reference: Singular Confusion about Multiple Causation" (1986) 15 J Legal Stud 427 at 430-431; Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts" (1980) 9 J Legal Stud 463 at 486; William M Landes & Richard A Posner, "Joint and Multiple Tortfeasors: An Economic Analysis" (1980) 9 J Legal Stud 517 at 534.

out where each contributory element falls on this line.[1086] The method is at most an annotation but has never fundamentally fixed the impracticability mentioned above.[1087]

All in all, Article 5.7 of the Hamburg Rules should be appreciated for its recognition of the carrier's entitlement to partial exemption from liability, but its practicability has been severely undermined as it contains no workable method on apportionment of liability.

[1086] Pearson, *supra* note 1061 at 348-349.

[1087] See Peaslee, *supra* note 1084 at 1130-1132; Robinson, *supra* note 1084 at 716-717; James Angell McLaughlin, "Proximate Cause" (1925) 39 Harv L Rev 149 at 152-153.

Conclusion of Part III

The Hamburg Rules eventually came into force on November 1, 1992, fourteen years after the Hamburg Conference, following the expiration of one year from the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.[1088] Up to now, there are only 34 countries representing approximately 5 per cent of the global trade volume which have officially accepted the convention.[1089] That outcome is apparently far from satisfactory.[1090] The Hamburg Rules have been the subject of extensive and spirited debates and criticism since they were adopted.[1091] They have been viewed by some opponents as no more than a valueless political compromise.[1092] Professor Joseph Sweeney, one of the U.S. representatives at the Hamburg Conference, commented that:

> I wish I could say that after all the time and money spent on the Hamburg Rules that they are perfect. They are not, but I believe that whenever conflicting economic interests must be compromised, the resulting structure must be inelegant and shaky. I do not see how the results could be noticeably improved in the foreseeable future by another conference. Sometime after the Hamburg Rules shall have come into force, it may be possible to revise some of the more infelicitous provisions in a new spirit of compromise.[1093]

Roskill LJ, former chairman of the British Association of Average Adjusters, complained in a speech shortly after the Hamburg Conference that:

[1088] *Hamburg Rules*, *supra* note 792, art 30.
[1089] See Wilson, *Carriage of Goods*, *supra* note 867 at 227.
[1090] See Pixa, *supra* note 4 at 440.
[1091] See e.g. Kimball, *supra* note 827 at 222; Warren Moseley, "UNCITRAL Attacks the Ocean Carrier Bill of Lading" (1973) 17 Saint Louis ULJ 355; AJ Waldron, "The Hamburg Rules – A Boondoggle for Lawyers" (1991) J Bus L 305.
[1092] Girvin, *Carriage*, *supra* note 53 at para 16.11.
[1093] Sweeney, "Allocation", *supra* note 254 at 529-530.

> Those who propose them do not, with all respect, seem to me to be asking the only relevant question – is this change necessary to a better working result in practice? … One begins to suspect, rightly or wrongly, that other influences were at work and that these proposals emanate from some who have no practical experience in how well the Hague Rules have worked over the last fifty years. Once again I venture to repeat, has anyone counted the cost of these changes if they are made?[1094]

The obstruction of wide acceptance of the Hamburg Rules basically comes from the interest group of carriers which sticks to the Hague Rules for fear that its profits may be impaired due to the transition from the traditional legal system governing the carriage of goods by sea to which it is accustomed towards a new one.[1095] In a sense, the emergence of the Hamburg Rules was the result of the battle between followers of the Hague Rules and innovators.[1096] Mr. John C. Moore, former chairman of the Committee on Bills of Lading of the Maritime Law Association of the United States, noted that:

> At Hamburg, the Hague Spirit was constantly present in the Hall, in the rooms where the committees and working parties met, in the lobbies, the restaurants and even out on the streets. For many, it was a set of principles to be defended in whole and when the whole was lost, in each part. For the majority, however, it was a dragon to be slain with whatever means could be brought to bear. In the end, the majority had its way and many changes were made.[1097]

The Hamburg Rules were intended for the replacement of the Hague Rules, but this goal apparently has not yet been achieved as adherents of the Hague Rules are unwilling

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[1094] Moore, *supra* note 827 at 5.

[1095] There has been also much opposition from P&I Clubs made up of shipowners and cargo insurers which fear that any departure from the Hague regime representing the transfer of risks from shippers to carriers may result in a remarkably diminished need for cargo insurance. See Sweeney, "Allocation", *supra* note 254 at 531-533.

[1096] See Frederick, *supra* note 238 at 87-89; Hellawell, "Allocation", *supra* note 106 at 357-358.

[1097] Moore, *supra* note 827 at 5.

to abandon the regime contained therein that is favorable and familiar to them.[1098] An editor of the Lloyd's Maritime and Commercial Law Quarterly, when commenting on the anxiety of the U.K. government about the acceptance of the Hamburg Rules, said that:

> It is to be hoped that the United Kingdom will not for once find itself dragged willy-nilly into yet another convention which neither meets the needs of our economy nor fits into our common law heritage. Enough problems have arisen over the past decade as we have endeavored to digest the inadequate frame work of CMR, and those of accommodating the Hamburg Rules in the near future appear rather daunting.[1099]

At one time, the hope for wide acceptance of the Hamburg Rules by the international community was pinned on the adoption of the Rules by the U.S.[1100] The dawn of the era of the Rules was seen when the U.S. delegation at the Hamburg Conference, which had contributed a lot to the birth of the Rules, suggested that the U.S. Department of State should immediately sign the Rules and initiate proceedings for the implementation of the Rules shortly after their entry into force.[1101] However, the acceptance of the Rules within the U.S. did not go swimmingly as expected primarily owing to the irreconcilable confrontation between two warring camps, that is, American shipowners and cargo underwriters as opponents of the Rules and American cargo owners as proponents of the Rules.[1102] A host of efforts were made to explore the way of

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[1098] See Werth, *supra* note 339 at 60-62; Selvig, "Insurance", *supra* note 21 at 305.
[1099] Yancey, *supra* note 3 at 1258.
[1100] Girvin, *Carriage*, *supra* note 53 at para 17.03.
[1101] Yancey, *supra* note 3 at 1258.
[1102] For example, the American Institute of Marine Underwriters contended in a letter to the Department of Transportation that "[t]he Hague Rules … represent a fair and time-tested balancing of the risks involved in ocean carriage of cargo. … AIMU strongly urges ratification of the Visby Amendments to the Hague Rules. We oppose replacement of the existing Hague Rules by the new and untested Hamburg Rules." Letter from Walter M Kramer,

adapting the U.S. marine legislation to the Rules.[1103] In 1992, an *ad hoc* committee set up by the U.S. Maritime Law Association prepared a draft bill based on the Rules in attempt to update the Carriage of Goods by Sea Act 1936.[1104] The bill triggered a large number of polarized opinions that were presented through publications both within and outside the U.S.[1105] Regretably, all those efforts ended in vain.[1106]

American Institute of Marine Underwriters, to the Department of Transportation (28 July 1983). See also Werth, *supra* note 339 at 74, n 95.

[1103] In 1988, the U.S. Department of Transportation solicited in a federal register notice comments on the U.S. future legislation on the carriage of goods by sea, Several options were listed: (a) no change to the COGSA; (b) adoption of the Visby Rules and the SDR Protocol; (c) adoption of the Hamburg Rules; (d) adoption of the Visby Rules and the SDR Protocol as a step in the transition to the Hamburg Rules via a trigger approach; (e) sending both instruments to the Congress without a trigger; (f) implementation of the proposal of the American Bar Association to adopt the Visby Rules and the SDR Protocol and, meanwhile, seek international agreements on additional amendments; (g) adoption of domestic legislation implementing the Visby Rules and the SDR Protocol. The trigger approach in the third option contemplated sending both the Visby Rules and the Hamburg Rules to the Senate for concurrent advice and consent, with the Hamburg Rules going into effect only if the U.S. trading partners adopting the Hamburg Rules overnumbered those adhering to the Hague/Visby Rules. The approach was abandoned because it in effect rested the U.S. future legislation in the hands of its major trading partners. See Kurosh Nasseri, "The Multimodal Convention" (1988) 19 J Mar L & Com 231 at 242-243. In order to resolve the deadlock over Visby and Hamburg, the American Bar Association proposed another approach called "incremental improvement" which recommended the ratification of the Visby Rules and the SDR Protocol and urged the U.S. government to consider further changes, such as (a) adopting the limits of liability set forth in the proposed Multimodal Convention of approximately $1160 per package or $3.50 per kilo; (b) eliminating the nautical fault defense; (c) providing for liability in multimodal movements where the leg during which the loss or damage had occurred was unable to be readily identified; (d) clarifying that stevedores were entitled to the same liability limits as carriers. See Werth, *supra* note 339 at 76.

[1104] See Michael F Sturley, "Revising the US Carriage of Goods by Sea Act: The Work of the ad hoc Liability Rules Study Group" (1994) 96 Il Diritto Marittimo 685 at 690-691; Michael F Sturley, "Proposed Amendments to the Carriage of Goods by Sea Act" (1996) 18 Hous J Int'l L 609 at 612-614.

[1105] See e.g. Regina Asariotis & Michael N Tsimplis, "The Proposed US Carriage of Goods by Sea Act" (1999) 26 LMCLQ 126; Michael Sturley, "Proposed Amendments to the US Carriage of Goods by Sea Act: A Response to English Criticisms" (1999) 26 LMCLQ 519; Regina Asariotis & Michael N Tsimplis, "Proposed Amendments to the US Carriage of Goods by Sea Act: A Reply to Professor Sturley's Response" (1999) 26 LMCLQ 530; Howard M McCormack, "Uniformity of Maritime Law, History, and Perspective from the U.S. Point of View" (1999) 73 Tul L Rev 1481; William Tetley, "The Proposed New United States Senate COGSA: The Disintegration of Uniform International Carriage of Goods by Sea" (1999) 30 J Mar L & Com 595.

[1106] The U.S. signed the Hamburg Rules on April 30, 1979, but never officially ratified the Rules. In fact, the U.S. government seemed to be in favor of the Hamburg Rules. The Department of State, in response to a letter from a marine underwriter critical of the Hamburg Rules, explained its position: "[t]he Department does not accept the view expressed in your letter that those disagreeing with you and urging adoption of the Hamburg Rules are misguided and not acting in the best interests of American foreign trade policy. The Department of State and other government departments and shipper interests have for year held the view that the Hamburg Rules represent the best achievable balance between shipper and carrier interests meeting modern requirements and the most realistic opportunity to achieve international uniformity of law in the area of maritime liability. The Department, as you know, welcomed the efforts of various interests involved in maritime transportation to develop what your letter refers to as the 'phased approach', and regretted that the expected consensus for this approach was not forthcoming at the meeting of the Maritime Law Association in May 1983. Unless such a consensus does develop, the Department, with the

Nonetheless, there have been some examples of successful integration of the Rules into domestic laws. The legislative style of the Rules has determined their greater popularity with civil law states.[1107] The Maritime Code of China contains a scheme influenced by both the Hague Rules and the Hamburg Rules.[1108] So does the maritime section of the Commercial Code of Korea.[1109] The Nordic countries having a long tradition of cooperation in the carriage of goods by sea and pursuing harmony in legislation related thereto have adopted their national laws allowing for the implementation of the Hamburg Rules insofar as it is not in conflict with the Hague/Visby Rules.[1110] As a matter of fact, some common law states also made active efforts to put the Hamburg Rules into practice.[1111] The Hague Rules and the Hamburg Rules were both incorporated into the Canadian Carriage of Goods by Water Act and its successor, that is, the Marine Liability Act. The latter states that the Hague Rules have the force of law in Canada and that they may be replaced by the Hamburg Rules once the

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Departments of Commerce and Transportation, will continue to support the ratification of the Hamburg Rules at such time as a significant number of trading partners of the United States have become, or have indicated an intent to become, parties to the Hamburg Rules." Letter from Peter H Pfund, Assistant Legal Advisor for Private International Law, United States Department of State (9 November 1983).

[1107] See Karan, *Liability*, *supra* note 65 at 35.

[1108] The Maritime Code of China came into effect in 1993. Article 51 thereof provides for a catalogue of exceptions which is akin to that contained in Article 4.2 of the Hague Rules. Article 46, like Article 5.1 of the Hamburg Rules, sets the principle of presumed fault as the basis of the carrier's liability. In addition, Article 54 of the Code, inspired by Article 5.7 of the Hamburg Rules, entitles the carrier to partial exemption in multiple-causation cases. See Si Yuzhuo & Li Hai, "The New Structure of the Basis of the Carrier's Liability under the Rotterdam Rules" (2009) 14 Unif L Rev 931 at 940. See also L Li, "The Maritime Code of the People's Republic of China" (1993) 20 LMCLQ 204; Zhu Zengjie, "The Maritime Code of the People's Republic of China" (1993) 95 Il Diritto Marittimo 176; Zhang Lixing, "Recent Maritime Legislation and Practice in the People's Republic of China" (1994) 6 USF Mar LJ 273.

[1109] See generally Rok Sang Yu & Jongkwan Peck, "The Revised Maritime Section of the Korean Commercial Code" (1993) 20 LMCLQ 403.

[1110] See Hugo Tiberg & Anders Beijer, *The Swedish Maritime Code*, 2d ed (Stockholm: Juristförlaget, 2001) at 126; Hugo Tiberg, "The Nordic Maritime Code" (1995) 22 LMCLQ 527 at 528; Hugo Tiberg, "The Nordic Maritime Code Once Again" (1996) 23 LMCLQ 413 at 413-415.

[1111] See Girvin, *Carriage*, *supra* note 53 at paras 17.02-17.05.

time is ripe.[1112] Similarly, the Australian Carriage of Goods by Sea Act 1991 recognized the force of law of the Hague Rules but provided that the Hamburg Rules would come into force automatically at midnight on October 19, 1997, unless both Houses of the Commonwealth Parliament decided before then to repeal the Hamburg Rules or postpone the replacement for another three years.[1113]

In the second chapter of this part, the scheme of the carrier's exemption from liability in the Hamburg Rules has been examined from the perspective of fairness. There follow the positive aspects of the scheme: the inclusion of the principle of presumed fault

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[1112] *Marine Liability Act*, *supra* note 619, ss 43, 44, 45, 142. Section 43 provides that:

> (1) The Hague-Visby Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article X of those Rules.
>
> (2) The Hague-Visby Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless there is no bill of lading and the contract stipulates that those Rules do not apply. …
>
> (4) The Hague-Visby Rules do not apply in respect of contracts entered into after the coming into force of section 45.

Section 44 provides that:

> The Minister shall, before January 1, 2005 and every five years afterwards, consider whether the Hague-Visby Rules should be replaced by the Hamburg Rules and cause a report setting out the results of that consideration to be laid before each House of Parliament.

Section 45 provides that:

> (1) The Hamburg Rules have the force of law in Canada in respect of contracts for the carriage of goods by water between different states as described in Article 2 of those Rules.
>
> (2) The Hamburg Rules also apply in respect of contracts for the carriage of goods by water from one place in Canada to another place in Canada, either directly or by way of a place outside Canada, unless the contract stipulates that those Rules do not apply. …

Section 142 provides that:

> Section 45 comes into force on a day to be fixed by order of the Governor in Council.

[1113] *Carriage of Goods by Sea Act 1991* (Cth), Part 2, Schedule 1. The Hamburg Rules could have come into force on October 31, 1994 in Austrlia, but the Parliament decided to wait for another three years. See Martin Davies, "Australian Maritime Law Decisions 1994" (1995) 22 LMCLQ 384 at 385-386. The Parliament then pre-empted the entry into force of the Hamburg Rules by passing the Carriage of Goods by Sea Amendment Act 1997 on September 15, 1997. Although the act was enacted to forestall any further implementation of the Hamburg Rules in Australia, the Australian Department of Transport and Regional Services had initiated a comprehensive review of the existing cargo liability regime as early as 1995, with the aim of making necessary amendments to the existing Hague/Visby Rules. As a result, the Carriage of Goods by Sea Regulations 1998 were enacted and came into effect on July 1, 1998, in which there appeared some important amendments to the Carriage of Goods by Sea Act 1991. See Davies & Dickey, *supra* note 547 at 171; Ian Davis, "COGSA 98: The Australian Carriage of Goods by Sea Act" (1998) 5 IML 223 at 225; Stuart Hetherington, "Australian Hybrid Cargo Liability Regime" (1999) 26 LMCLQ 12 at 14-15; Kate Lewins, "Are the 1998 Amendments to COGSA Holding Water" (2000) 28 Austl Bus L Rev 422 at 425-426.

in Article 5.1 of the Rules as the general basis of the carrier's liability is quite praiseworthy as it would lead to a reasonable allocation of risks between carriers and cargo interests;[1114] Article 5.6 of the Rules, which provides for the carrier's exclusion of liability for loss, damage or delay in delivery arising from measures to save life or reasonable measures to save property at sea, is justifiable on the grounds that it may liberate carriers from unnecessary troubles following their good deeds;[1115] and there is little controversy over Article 13 of the Rules that has appropriately set out the respective obligations and liability of shippers and carriers with regard to shipment of dangerous goods.[1116] However, the scheme is not faultless. Its unreasonableness resides in Article 5.4(a) of the Rules where the general basis of liability prescribed in Article 5.1 is subverted to afford carriers unjustifiable protection in fire-related cases and in Article 5.5 that may possibly be exploited by carriers to escape liability for loss, damage or delay in delivery resulting from their failure to perform the general duty of care set out in Article 5.1.[1117]

Chapter III contains a clarity-oriented analysis directed at Articles 5.1 and 5.7 of the Hamburg Rules. The former delineates a clear and concise layout of the carrier's exculpatory rights by setting out a unitary basis of liability as the substitute for the

[1114] See *Lynch*, *supra* note 897 at 842-845. See also Jasper Godwin Ridley & Geoffrey Whitehead, *The Law of the Carriage of Goods by Land, Sea, and Air*, 6th ed (London: Shaw, 1982) at 111.
[1115] See *Stag Line*, *supra* note 633 at 343-344.
[1116] See Wilson, *Carriage of Goods*, *supra* note 867 at 36.
[1117] See Nicoll, *supra* note 831 at 154-155; Lüddeke & Johnson, *supra* note 830 at 13-14; Wilson, *Carriage of Goods*, *supra* note 867 at 218, n 15; Gaskell, Asariotis & Baatz, *supra* note 511 at para 10.13.

"laundry list" in the Hague Rules.[1118] The latter prescribes explicitly the carrier's entitlement to partial exemption from liability in multiple-causation cases, but its practicability may be considerably undermined due to the absence of a workable method on apportionment of liability.[1119]

To sum up, the scheme of the carrier's exemption from liability in the Hamburg Rules is superior to that in the Hague Rules in terms of fairness and clarity. However, not all the defects of the Hague Rules relating to the carrier's exculpatory rights have been fixed in the Hamburg Rules and some new issues have emerged. Therefore, it is hard to come to the conclusion that the Hamburg Rules have provided a satisfactory solution in this respect.

[1118] See Honnold, "Clarity", *supra* note 22 at 98-99, 101-103; Werth, *supra* note 339 at 68.
[1119] See Peaslee, *supra* note 1084 at 1130-1132; Pearson, *supra* note 1061 at 348-350.

Part IV – The latest attempt to restructure the marine carrier's exclusion of liability: the Rotterdam Rules

The rapid development of the shipping industry led to the anxiety that the legal regimes governing the carriage of goods by sea, whether based on the Hague Rules or the Hamburg Rules, might not be perfectly compatible with modern trade practices, especially those treating ocean transportation as part of door-to-door commercial network and those relying on electronic commerce.[1120] Additionally, there has been increasing criticism suggesting that both of the Rules are fragmented, uncoordinated with the regimes governing other modes of transport, and likely to bring about unpredictable results.[1121] Despite an urgent need for changes, no realistic plan was put on the agenda for a long time,[1122] mainly because any change might be of concern to a variety of stakeholders,[1123] such as marine carriers, shippers, actual carriers performing the whole or part of sea carriage, diverse parties engaging in specialized services within port areas, inland carriers providing transport services before or after sea leg, merchants, banks, freight forwarders, cargo insurers, liability insurers, etc.[1124] What was badly needed at that time was an international forum where governments could reassemble for a new

[1120] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 21. See also Branch, *supra* note 372 at 76; Niko Wijnolst, Kai Levander & Tor Wergeland, *Shipping Innovation* (Amsterdam: IOS Press, 2009) at 90; Antonis Antapassis, Lia Athanassiou & Erik Rosaeg, *Competition and Regulation in Shipping and Shipping Related Industries* (Leiden: Brill Academic Publishers, 2009) at 46.

[1121] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 21.

[1122] See Stephen Girvin, "The 37th Comité Maritime International Conference: A Report" (2001) 28 LMCLQ 406 at 408-409 [Girvin, "Comité Report"].

[1123] See Karan, "Need", *supra* note 33 at 442-443.

[1124] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 21-22.

convention.[1125] The UNCITRAL, a reputable intergovernmental organization with an excellent track record of producing instruments in important areas of commercial law, was considered to be an ideal choice.[1126] The cooperative atmosphere and balanced working methods of the Commission, which had been honed over a long time to facilitate thorough and inclusive negotiations, helped a lot to satisfy needs of both developing and developed countries and build equilibrium of interests of different industrial sectors.[1127] The long-awaited United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the Rotterdam Rules, was eventually adopted by the U.N. General Assembly on December 11, 2008.[1128] It has been open for signature since September 23, 2009.[1129] There are so far twenty-five signatories to the Rotterdam Rules,[1130] but only three of them have officially deposited their instruments of ratification, acceptance, approval or accession.[1131]

[1125] See Anthony Diamond, "The Rotterdam Rules" (2009) 36 LMCLQ 445 at 446-447 [Diamond, "Rotterdam Rules"].

[1126] See Farnsworth, "UNCITRAL", *supra* note 834 at 314-316. See also Henry Deeb Gabriel, "The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference" (2009) 34 Brook J Int'l L 655 at 655-658.

[1127] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 21-22.

[1128] *Resolution Adopted by the General Assembly on 11 December 2008 [on the Report of the Sixth Committee (A/63/438)]*, GA Res 63/122, UNGAOR, 63d Sess, UN Doc A/RES/63/122, (2008) at paras 1-3 [*Resolution*].

[1129] *Ibid* at para 3.

[1130] The 25 signatories include Armenia, Cameroon, Congo, Democratic Republic of the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Guinea-Bissau, Luxembourg, Madagascar, Mali, Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo and United States of America. Sixteen of them signed the convention at the ceremony for the opening for signature held in Rotterdam. They were Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States. See Michael F Sturley, "Chapter 2 General Principles of Transport Law and the Rotterdam Rules" in Meltem Deniz Güner-Özbek, ed, *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the "Rotterdam Rules"* (Berlin: Springer, 2011) at 65, n 4 [Sturley, "Chapter 2"].

[1131] Congo, Togo and Spain deposited such instruments respectively on January 28, 2014, July 17, 2012 and January 19, 2011.

Like their predecessors, the Rotterdam Rules were motivated largely by the desire to achieve broad uniformity in the legal regime governing the carriage of goods by sea.[1132] The first opening clause of the resolution whereby the Rules were adopted mentions that the UNCITRAL was established to "further the progressive harmonization and unification of the law of international trade", the second clause expresses the concern over the current lack of uniformity, and the fourth and fifth clauses introduce the benefits to be brought by greater uniformity.[1133] Article 2 of the Rules explicitly stipulates that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application …"[1134]

[1132] See Sturley, "Chapter 2", *supra* note 1130 at 66.

[1133] See *Resolution*, *supra* note 1128. Its opening clauses state that:

> The General Assembly,
>
> Recalling its resolution 2205(XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade.
>
> Concerned that the current legal regime governing the international carriage of goods by sea lacks uniformity and fails to adequately take into account modern transport practices, including containerization, door-to-door transport contracts and the use of electronic transport documents. …
>
> Convinced that the adoption of uniform rules to modernize and harmonize the rules that govern the international carriage of goods involving a sea leg would enhance legal certainty, improve efficiency and commercial predictability in the international carriage of goods and reduce legal obstacles to the flow of international trade among all States.
>
> Believing that the adoption of uniform rules to govern international contracts of carriage wholly or partly by sea will promote legal certainty , improve the efficiency of international carriage of goods and facilitate new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally.

[1134] *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 11 December 2008, 48 ILM 659, art 2 [*Rotterdam Rules*]. Many factors led to the breakdown in uniformity under prior conventions. One contributing factor was undoubtedly the tendency of national courts to construe those conventions with less concern with the achievement of international uniformity but more concern with harmonization with other aspects of their national laws. See Michael F Sturley, "International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation" (1987) 27 Va J Int'l L 729 at 730-733 [Sturley, "National Courts"].

The Rules are comprised of eighteen chapters.[1135] They contain a series of designs that are aimed at reshaping the legal relationships between shipowning interests and cargo-owning interests in the international carriage of goods wholly or partly by sea.[1136] The draftsmen intended to produce a set of comprehensive norms that would be able to supersede not only the prior multilateral conventions, like the Hague/Visby Rules and the Hamburg Rules, but also national or regional alternatives prevailing in some parts of the world.[1137] Although there have been numerous positive comments on the Rules,[1138] some scholars and practitioners still have doubts.[1139] In fact, the future of the Rules is still a blur as there seems to be a long journey to their entry into force.[1140]

[1135] The eighteen chapters are "General Provisions", "Scope of Application", "Electronic Transport Records", "Obligations of the Carrier", "Liability of the Carrier for Loss, Damage or Delay", "Additional Provisions Relating to Particular Stages of Carriage", "Obligations of the Shipper to the Carrier", "Transport Documents and Electronic Transport Records", "Delivery of the Goods", "Rights of the Controlling Party", "Transfer of Rights", "Limits of Liability", "Time for Suit", "Jurisdiction", "Arbitration", "Validity of Contractual Terms", "Matters not Governed by This Convention" and "Final Clauses". See generally Francesco Berlingieri, "General Introduction" in von Ziegler, Schelin & Zunarelli, *supra* note 5, 1 at 3-6.

[1136] In the simplest case, the Rotterdam Rules regulate the relationship between carriers and shippers. Other shipowning interests may include performing parties fulfilling some of the carrier's obligations under the contract of carriage. Other cargo interests may include those succeeding to the shipper's rights under the contract of carriage. See Sturley, "Chapter 2", *supra* note 1130 at 65, n 4.

[1137] For example, the Maritime Code of China contains elements extracted from both the Hague/Visby Rules and the Hamburg Rules along with unique solutions to certain problems. China, though a particularly prominent example, is by no means the only nation having made significant modifications to the international rules. See Li, *supra* note 1108 at 209. The four Nordic countries – Denmark, Finland, Norway and Sweden – revised their maritime codes to incorporate major elements from the Hamburg Rules into their pre-existing legal regimes governing the carriage of goods by sea based on the Hague/Visby Rules. See J Ramberg, "New Scandinavian Maritime Codes" (1994) Maritt 1222 at 1222-1224.

[1138] See e.g. Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.019; Chester D Hooper, "Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or the Definition of Fora Conveniens Set Forth in the Rotterdam Rules" (2008) 44 Tex Int'l LJ 44 at 52; Pieter Neels, "The Rotterdam Rules and Modern Transport Practices: A Successful Marriage", *Law & Transport Magazine* (7 April 2011).

[1139] See generally Tetley, "Criticisms", *supra* note 7. See also Bergami, *supra* note 7 at 31; Felix WH Chan, "In Search of a Global Theory of Maritime Electronic Commerce: China's Position on the Rotterdam Rules" (2009) 40 J Mar L & Com 40 at 43.

[1140] See *Rotterdam Rules*, *supra* note 1134, art 94.1. Article 94.1 provides that:

> This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

Part IV deals with the carrier's exemption from liability in the Rotterdam Rules. It is comprised of three chapters that are respectively devoted to a review of the cooperation between the CMI and the UNCITRAL in the production of the Rules, an investigation into the carrier's exculpatory rights therein from the perspective of fairness, and an inspection of exoneration-related provisions therein by the yardstick of clarity.

Chapter I – Advent of the Rotterdam Rules

The deficiencies of the Hague and Hamburg Rules led to their inability to reverse the annoying situation that multiple international and national laws were still competing to govern the carriage of goods by sea in the end of the twentieth century.[1141] In the 1990s, the CMI and the UNCITRAL reached a consensus that they were supposed to work together for a modern regime. It was their joint efforts that gave birth to the Rotterdam Rules. The present chapter consists of three sections that picture the three phases of the growth of the Rules.

Section 1 – Preliminary work executed by the CMI

The Hague Rules were largely formulated by the CMI, while the Hamburg Rules were a product of efforts of the UNCITRAL. At one time, it was assumed that the CMI and the UNCITRAL were rivals in the production of international shipping rules.[1142] When the UNCITRAL reattempted, near the end of the twentieth century, to set up a global legal regime governing the carriage of goods by sea, it attached much importance to cooperation with other international organizations, in particular with the CMI.[1143] The seed of the collaboration between the UNCITRAL and the CMI was planted in the former's Electronic Data Interchange Project. In June 1996, a proposal, as part of the project, was discussed in the UNCITRAL. The proposal suggested a review of existing

[1141] Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.047.
[1142] *Ibid* at para 1.048.
[1143] See Kate Lannan, "Launch of the Rotterdam Rules" (2009) 20 Annual of China Maritime Law 1 at 3.

practices and laws relating to the international carriage of goods by sea "with a view to establishing the need for uniform rules in the areas where no such rules [had] existed and with a view to achieving greater uniformity of laws than [had] so far been achieved."[1144] The Commission noted that:

> [E]xisting national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage.[1145]

Soon afterwards, the Secretariat was authorized to start gathering information on those matters so as to determine "the nature and scope of any future work that might usefully be undertaken by [the Commission]."[1146] The Secretariat was also permitted to consult with other international organizations, such as CMI, International Chamber of Commerce, International Union of Marine Insurance, International Federation of Freight Forwarders Associations, International Chamber of Shipping, and International Association of Ports and Harbours.[1147]

The CMI accepted the UNCITRAL Secretariat's invitation to do some preparatory work for a new maritime convention.[1148] It set up a steering committee that issued in

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[1144] *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-ninth Session*, UNGAOR, 51st Sess, Supp No 17, UN Doc A/51/17, (1996) at para 210.
[1145] *Ibid*.
[1146] *Ibid* at para 215.
[1147] *Ibid*.
[1148] See Lannan, *supra* note 1143 at 3.

April 1998 a report outlining the work to be undertaken.[1149] An international working group was also founded to cope with some premilinary matters,[1150] the most important of which was the preparation and distribution of a questionnaire designed to solicit opinions and suggestions from around the world.[1151] The Executive Council of the CMI made the decision to appoint an international sub-committee on issues of transport law shortly after the Working Group's last preliminary meeting. The Sub-Committee's primary mission was "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."[1152] The Sub-Committee met formally four times in 2000,[1153] participated in the CMI's Thirty-seventh Conference in February 2001,[1154] and organized another two formal meetings in July and November 2001.[1155] In December 2001, the CMI submitted

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[1149] Alexander von Ziegler, "Issues of Transport Law: Report of the CMI Steering Committee" in *CMI Yearbook 1998* (Antwerpen: CMI Headquarter, 1999) 107 at 107.

[1150] The close cooperation between the UNCITRAL and the CMI might be further illustrated by the active participation of Jernej Sekolec, then a senior lawyer with the UNCITRAL Secretariat, as a member of the CMI Working Group. When Mr. Sekolec became the Secretary of the UNCITRAL, he appointed another senior lawyer from the Secretariat to succeed him in the CMI Working Group. Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.051, n 85.

[1151] See "Questionnaire" in *CMI Yearbook 1999* (Antwerpen: CMI Headquarter, 2000) 132 at 132-138.

[1152] Stuart N Beare, "Issues of Transport Law: Introductory Paper" in *CMI Yearbook 1999*, *supra* note 1151, 117 at 117.

[1153] See generally "Report of the First Meeting of the International Sub-Committee on Issues of Transport Law" in *CMI Yearbook 2000* (Antwerpen: CMI Headquarter, 2001) 176; "Report of the Second Meeting of the International Sub-Committee on Issues of Transport Law" in *CMI Yearbook 2000* (Antwerpen: CMI Headquarter, 2001) 202; "Report of the Third Meeting of the International Sub-Committee on Issues of Transport Law" in *CMI Yearbook 2000* (Antwerpen: CMI Headquarter, 2001) 234; "Draft Report of the Fourth Meeting of the International Sub-Committee on Issues of Transport Law" in *CMI Yearbook 2000* (Antwerpen: CMI Headquarter, 2001) 263.

[1154] See generally "Issues of Transport Law: Report of Committee A" in *CMI Yearbook 2001* (Antwerpen: CMI Headquarter, 2002) 182 ["Issues"].

[1155] See generally "Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law" in *CMI Yearbook 2001*, *supra* note 1154, 265; "Draft Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law" in *CMI Yearbook 2001*, *supra* note 1154, 305.

to the UNCITRAL the final Draft Instrument on Transport Law it had already prepared.[1156]

Section 2 – Contribution of the UNCITRAL Working Group

The CMI's Draft Instrument was converted by the UNCITRAL into its own Preliminary Draft Instrument. The latter was published in 2002 and then referred to Working Group III of the UNCITRAL.[1157] This revitalized Working Group met for the first time in April 2002 for a broad exchange of ideas about the Preliminary Draft Instrument.[1158] After some general discussions, it proceeded to carry out three readings of the draft instrument.

The first reading included an article-by-article review of the provisions contained in the draft. That process turned out to be more time-consuming than anticipated but indeed gave the delegates ample opportunities to express their views. Based on those diverse opinions, the UNCITRAL Secretariat prepared a new draft,[1159] which had, in comparison with the prior Preliminary Draft Instrument, few substantive changes but more characters making it look like a U.N. document.[1160] The second week of the 2003 spring session

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[1156] See generally "CMI Draft Instrument on Transport Law" in *CMI Yearbook 2001*, *supra* note 1154, 532.

[1157] See generally *Preliminary Draft Instrument on the Carriage of Goods by Sea*, UNCITRALOR, UN Doc A/CN.9/WG.III/WP.21, (2002), online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Preliminary Draft*].

[1158] The precursor of Working Group III had met in the 1970s to discuss international shipping legislation. Its efforts led to the emergence of the Hamburg Rules. The new Working Group was theorectically a continuation of the old one but it was actually a completely new entity. See Thomas, *Analysis*, *supra* note 6 at 14, n 106.

[1159] See generally *Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]*, UNCITRALOR, 2003, UN Doc A/CN.9/WG.III/WP.32 [*Draft Instrument*].

[1160] It should be noted that the Working Group made the decision to delete the carrier's navigational fault defense during the first reading. See *Report of Working Group III (Transport Law) on the Work of Its Tenth Session*,

was devoted to a discussion about the scope of application of the instrument.[1161] That issue had been repeatedly debated during the previous meetings.[1162] The Working Group found it quite necessary to reach some tentative conclusions is this respect before the drafting work proceeded any further.[1163]

From the 2003 fall session in Vienna, the Working Group began the second reading in which the Secretariat's new draft was used as the basis of discussion. Much attention was paid to some core issues and the interrelationships between various topics.[1164] The second reading took up seven full sessions. As the negotiations progressed, several revised versions of the draft were presented by the Secretariat so that the delegates could see how the text was developing.[1165] During the second reading, it was realized that it

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UNCITRALOR, 36th Sess, UN Doc A/CN.9/525, (2003) at para 36, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Tenth Session*].

[1161] See *Report of Working Group III (Transport Law) on the Work of Its Eleventh Session*, UNCITRALOR, 36th Sess, UN Doc A/CN.9/526, (2003) at paras 219-267, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Eleventh Session*].

[1162] See Michael F Sturley, "Solving the Scope-of-Application Puzzle: Contracts, Trades, and Documents in the UNCITRAL Transport Law Project" (2005) 11 Journal of International Maritime Law 22 at 22-25.

[1163] Thomas, *Analysis*, *supra* note 6 at 15.

[1164] Two topics sometimes had to be discussed together because of their inherent interrelationship. The network principle (Article 26 of the Rotterdam Rules) and the liability of performing parties (Article 19 of the Rotterdam Rules), for instance, must be handled simultaneously. There was another possibility that two topics were discussed in conjunction because they were both elements in a compromise package. One of the Working Group's primary goals was to maintain a fair balance among those affected commercial interests, which could be accomplished only by recognizing the need for compromise and identifying the elements that should be included in a compromise package. See *ibid* at 16, n 119. See also *Report of Working Group III (Transport Law) on the Work of Its Twelfth Session*, UNCITRALOR, 37th Sess, UN Doc A/CN.9/544, (2004) at para 126, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Twelfth Session*].

[1165] See e.g. *Provisional Redraft of the Articles of the Draft Instrument Considered in the Report of Working Group III on the Work of Its Twelfth Session (A/CN.9/544)*, UNCITRALOR, 2004, UN Doc A/CN.9/WG.III/WP.36, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Provisional Redraft of the Articles of the Draft Instrument Considered in the Report of Working Group III on the Work of Its Thirteenth Session (A/CN.9/552)*, UNCITRALOR, 2004, UN Doc A/CN.9/WG.III/WP.39, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Proposed Revised Provisions on Electronic Commerce*, UNCITRALOR, 2005, UN Doc A/CN.9/WG.III/WP.47, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, UNCITRALOR, 2005, UN Doc A/CN.9/WG.III/WP.56, online: United Nations Commission on International Trade Law <http://www.uncitral.org>.

was quite necessary for the delegates to have additional contacts outside the formal Working Group sessions for the sake of a final pact. Sufficient interactions among delegations played an important part in the determination of the text.[1166] In an effort to promote inter-delegation contacts, Professor Francesco Berlingieri invited in February 2004 all the delegates to a two-day round table discussion.[1167] The gathering had no official status but provided the delegates with a valuable forum where ideas could be exchanged, proposals could be refined, and future tasks could be oriented.[1168] Having been aware of the effectiveness of informal meetings between Working Group sessions, Professor Johan Schelin and Professor Francesco Berlingieri organized another two respectively in February 2005 and in January 2006.[1169] As a matter of fact, near the end of the Working Group's 2004 spring session in New York, some informal consultation groups open to all interested delegations had been created to accelerate "the exchange of views, the formulation of proposals and the emergence of consensus."[1170] The Secretariat was invited "to monitor the operation of the informal consultation groups and to facilitate the presentation to the Working Group of proposals that interested Member States or observers might wish to make in respect of the draft instrument as a result of their

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[1166] See generally Johan Kaufmann, *Effective Negotiation: Case Studies in Conference Diplomacy* (Dordrecht: Nijhoff, 1989) at 56-59; Cecilia Albin, *Justice and Fairness in International Negotiation* (Cambridge: Cambridge University Press, 2001) at 29-31.

[1167] Thomas, *Analysis*, *supra* note 6 at 17.

[1168] A Swedish delegate, Professor Johan Schelin, served as the rapporteur at the round table and prepared a report entitled "Freedom of Contract and Carriage of Goods" to summarize the discussions and offer materials for future negotiations. See *ibid* at 17, n 126.

[1169] Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.062.

[1170] See *Report of Working Group III (Transport Law) on the Work of Its Thirteenth Session*, UNCITRALOR, 37th Sess, UN Doc A/CN.9/552, (2004) at para 167, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Thirteenth Session*].

informal consultations."[1171] Professor Johan Schelin worked as the chief coordinator and appointed some delegates as subcoordinators whose duty was to solicit comments from interested delegations and observers and help the Working Group to spot noteworthy issues and identify feasible solutions.[1172]

The second reading was completed in the fall of 2006. A new draft was prepared by the Secretariat to serve as the basis of further discussions in the third reading.[1173] The drafting work speeded up as there had been consensus on most issues of importance by the end of the second reading.[1174] At the 2007 spring meeting in New York, the Working Group reviewed and approved most of the provisions in Chapters 1 through 9 and

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[1171] See *ibid* at para 167.

[1172] Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.063. Most of the subcoordinators' papers were submitted as official papers by the delegations whose members had prepared them. See e.g. *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Limitation of Carrier Liability*, UNCITRALOR, 2006, UN Doc A/CN.9/WG.III/WP.72, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Transport Documents and Electronic Transport Records: Document Presented for Information by the Delegation of the United States of America*, UNCITRALOR, 2006, UN Doc A/CN.9/WG.III/WP.62, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Delivery: Information Presented by the Delegation of the Netherlands*, UNCITRALOR, 2005, UN Doc A/CN.9/WG.III/WP.57, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Shipper's Obligations: Information Presented by the Swedish Delegation*, UNCITRALOR, 2005, UN Doc A/CN.9/WG.III/WP.55, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Transfer of Rights: Information Presented by the Swiss Delegation*, UNCITRALOR, 2005, UN Doc A/CN.9/WG.III/WP.52, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Scope of Application and Freedom of Contract: Information Presented by the Finnish Delegation at the Fifteenth Session*, UNCITRALOR, 2005, UN Doc A/CN.9/WG.III/WP.51, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Right of Control: Information Presented by the Norwegian Delegation*, UNCITRALOR, 2005, UN Doc A/CN.9/WG.III/WP.50/Rev.1, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Transport Law: Preparation of a Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea] – Jurisdiction and Arbitration: Information Presented by the Danish Delegation at the Fifteenth Session*, UNCITRALOR, 2005, UN Doc A/CN.9/WG.III/WP.49, online: United Nations Commission on International Trade Law <http://www.uncitral.org>.

[1173] See generally *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, UNCITRALOR, UN Doc A/CN.9/WG.III/WP.81, (2007), online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Draft Convention*].

[1174] Thomas, *Analysis*, *supra* note 6 at 19, n 134.

Chapter 19.[1175] At the fall meeting of the same year, it finished the remaining review and approval work concerning the provisions in Chapters 10 through 18 and Chapter 20.[1176] The Working Group met for the last time in January 2008 to finalize the Draft Convention. It reviewed the entire draft and approved each provision thereof.[1177] The highlight of the last session was a compromise proposal presented by thirty-three delegations.[1178] As a result of the compromise, the limitation amounts were significantly increased;[1179] the "expedited amendment" procedure was deleted;[1180] the treatment of "non-localized" loss or damage as if it had occurred in the leg with the highest limitation amounts was abandoned;[1181] the inclusion of mandatory national laws in the network provision was rejected again;[1182] and the definition of "volume contract" was eventually confirmed.[1183] The acceptance of the compromise package by the Working Group

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[1175] The Working Group decided to postpone the consideration of some provisions. See *Report of Working Group III (Transport Law) on the Work of Its Nineteenth Session*, UNCITRALOR, 40th Sess, UN Doc A/CN.9/621, (2007) at para 302, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Nineteenth Session*].

[1176] See generally *Report of Working Group III (Transport Law) on the Work of Its Twentieth Session*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/642, (2008) at paras 9-278, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Twentieth Session*].

[1177] To facilitate this review, the Secretariat had prepared another new draft incorporating all the changes agreed during the third reading. See generally *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, UNCITRALOR, 2008, UN Doc A/CN.9/WG.III/WP.101, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Draft Convention 101*].

[1178] See *Report of Working Group III (Transport Law) on the Work of Its Twenty-first Session*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/645, (2008) at para 197, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Twenty-first Session*].

[1179] The limitation amounts were lifted to 875 SDRs per package or 3 SDRs per kilogram. At the 2007 fall session, the Working Group had tentatively accepted the lower limits in the Hamburg Rules. See *Report Twentieth Session*, *supra* note 1176 at para 166. See also Michael F Sturley, "Setting the Limitation Amounts for the UNCITRAL Transport Law Convention: the Fall 2007 Session of Working Group III" (2007) 5 Benedict Mar Bull 147 at 147-150.

[1180] See *Draft Convention 101*, *supra* note 1177, art 99; *Draft Convention*, *supra* note 1173, art 99.

[1181] See *Draft Convention 101*, *supra* note 1177, art 62.2; *Draft Convention*, *supra* note 1173, art 62.2.

[1182] See *Report Nineteenth Session*, *supra* note 1175 at paras 189-190; *Report Twentieth Session*, *supra* note 1176 at paras 163(e), 166.

[1183] See *Report of Working Group III (Transport Law) on the Work of Its Seventeenth Session*, UNCITRALOR, 39th Sess, UN Doc A/CN.9/594, (2006) at paras 154-170, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Seventeenth Session*]; *Report Nineteenth Session*, *supra* note 1175 at paras 161-172.

signified the termination of substantive negotiations for the new convention.[1184] The next step was the preparation of an ultimate draft by the Secretariat for the approval of the UNCITRAL.

Section 3 – Final approval

The Secretariat of the UNCITRAL circulated the final draft among the U.N. Member States to solicit comments. Some states whose delegations had taken an active part in the prior negotiations showed strong support for the draft in their comments,[1185] while others sought to reopen the discussion about certain issues as they felt that they had not effectively participated in the drafting.[1186] The Commission showed much deference to the Working Group's achievement when it met in New York in June 2008 probably

[1184] See *Report Twenty-first Session*, *supra* note 1178 at paras 196-203.

[1185] See e.g. *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658/Add.2, (2008) at paras 15-19, online: United Nations Commission on International Trade Law <http://www.uncitral.org> (comments from the Danish government); *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658/Add.3, (2008), online: United Nations Commission on International Trade Law <http://www.uncitral.org> (comments from the French government); *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658/Add.9, (2008), online: United Nations Commission on International Trade Law <http://www.uncitral.org> (comments from the Dutch government); *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658/Add.12, (2008), online: United Nations Commission on International Trade Law <http://www.uncitral.org> (comments from the U.S. government).

[1186] See e.g. *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658, (2008) at paras 4-68, online: United Nations Commission on International Trade Law <http://www.uncitral.org> (comments from the Australian government); *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658/Add.1, (2008), online: United Nations Commission on International Trade Law <http://www.uncitral.org> (comments from eighteen countries of West and Central Africa) [*Compilation Add.1*]; *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658/Add.8, (2008), online: United Nations Commission on International Trade Law <http://www.uncitral.org> (comments from the Jordanian government); *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658/Add.14, (2008), online: United Nations Commission on International Trade Law <http://www.uncitral.org> (comments from the Egyptian government).

due to the overlap of personnel between the two bodies.[1187] It applauded the time and efforts that the Working Group had devoted to the settlement of various issues and the compromises promoted by the latter.[1188] Being aware of the risk that the project would unravel if major issues were renegotiated, it rejected the proposal to reopen the discussion over such topics as basis of liability, limitation of liability and volume contract.[1189] However, several minor changes were made. The most contentious topic of the meeting was delivery of goods without surrender of a negotiable transport document or a negotiable electronic transport record. After intense debate, a compromise was reached. Delivery of goods without such surrender would be allowed only if the parties chose to "opt in" by including a clause to that effect in the transport document or the electronic transport record.[1190] Other noteworthy changes included the deletion of Article 13 of the Draft Convention entitled "transport beyond the scope of the contract of carriage",[1191] the elimination of Article 36 of the Draft Convention regarding the cessation of the

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[1187] Many countries were represented at the Commission by the same delegates who had represented them in the Working Group. Furthermore, Professor Rafael Illescas, who had ably chaired every session of the Working Group, was elected to chair the Commission's 2008 session. Thomas, *Analysis*, *supra* note 6 at 21-22. See also *Report of the United Nations Commission on International Trade Law*, UNGAOR, 63d Sess, Supp No 17, UN Doc A/63/17, (2008) at para 9, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*UNCITRAL Report*]; Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.068.

[1188] Thomas, *Analysis*, *supra* note 6 at 22.

[1189] See *UNCITRAL Report*, *supra* note 1187 at paras 67-77, 195-200, 243-246.

[1190] See *Rotterdam Rules*, *supra* note 1134, art 47.2; *Draft Convention 101*, *supra* note 1177, art 49; *Compilation of Comments by Governments and Intergovernmental Organizations*, UNCITRALOR, 41st Sess, UN Doc A/CN.9/658/Add.13, (2008) at paras 16-18, online: United Nations Commission on International Trade Law <http://www.uncitral.org>.

[1191] See *UNCITRAL Report*, *supra* note 1187 at paras 45-53; *Draft Convention 101*, *supra* note 1177, art 13. Article 13 provided that:

> On the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport that is not covered by the contract of carriage and in respect of which it is therefore not the carrier. In such event, the period of responsibility of the carrier for the goods is the period of the contract of carriage. If the carrier arranges the transport that is not covered by the contract of carriage as provided in such transport document or electronic transport record, the carrier does so on behalf of the shipper.

shipper's liability,[1192] and the removal of any mention of "performing party" from the definition of "transport document".[1193]

After the acceptance of the final text of the Draft Convention by the Commission, all preparation work was complete. The Commission submitted to the General Assembly a formal report containing the agreed final text and a summary of the discussions at its meetings.[1194] The General Assembly referred this report to its Sixth Committee which devoted a full day, at the former's 2008 fall session, to a review of all the activities the UNCITRAL had carried out in the past year, particularly of its work on the transport law project.[1195] There was no substantive debate during the review. The proposed convention was widely appreciated. Most of the delegations congratulated the UNCITRAL on the completion of the project and many expressed their expectation of the adoption of the

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[1192] See *UNCITRAL Report*, *supra* note 1187 at paras 109-110; *Draft Convention 101*, *supra* note 1177, art 36. Article 36 provided that:

> A term in the contract of carriage according to which the liability of the shipper or the documentary shipper will cease, wholly or partly, upon a certain event or after a certain time is void:
> (a) With respect to any liability pursuant to this chapter of the shipper or a documentary shipper; or
> (b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security for the payment of such amounts.

[1193] See *ibid*, art 1.15. Article 1.15 provided that:

> "Transport document" means a document issued under a contract of carriage by the carrier or a performing party that satisfies one or both of the following conditions:
> (a) Evidences the carrier's or a performing party's receipt of goods under a contract of carriage; or
> (b) Evidences or contains a contract of carriage.

It could be seen from Article 1.15 of the Draft Convention that a transport document could be issued by the carrier or by a performing party, viz., someone acting on the carrier's behalf. The draftsmen had no intention of including matters of agency in the convention despite the universal recognition that most of actions relating to the carriage of goods by sea were typically performed by agents on behalf of the carrier. In order to maintain consistency and, more importantly, avoid any implication that agents could not act on behalf of a carrier when they were not explicitly mentioned, the Commission decided to remove any mention of "performing party" from the defition of transport document. See *UNCITRAL Report*, *supra* note 1187 at paras 133-134.

[1194] See *ibid*.

[1195] Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.070.

convention.[1196] The General Assembly passed on December 11, 2008 a resolution which marked the naissance of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[1197] The Resolution authorized a formal signing ceremony in Rotterdam on September 23, 2009 and suggested that the new convention should therefore be known as the Rotterdam Rules.[1198]

Sixteen countries signed the Convention at the ceremony in Rotterdam.[1199] Another five countries signed soon after the ceremony.[1200] Up to now, there are already twenty-five signatories.[1201] However, it should be noted that signature is not equivalent to ratification.[1202] Given the fact that only three countries have deposited their instruments of ratification, acceptance, approval or accession,[1203] it has to be admitted that the prospect of the Convention is still far from clear.[1204]

[1196] A typical statement was that of the Norwegian representative on behalf of the five Nordic countries. It read as follows: "[d]uring this year's session, the Commission obtained significant results within the field of transport law. The draft Convention on contracts for the international carriage of goods wholly or partly by sea was agreed upon. We are delighted that many years of hard work have been successfully concluded." Thomas, *Analysis*, *supra* note 6 at 23, n 166.

[1197] *Resolution*, *supra* note 1128.

[1198] *Ibid* at para 3.

[1199] The sixteen countries were Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, the Netherlands, Nigeria, Norway, Poland, Senegal, Spain, Switzerland, Togo and the United States. See Sturley, "Chapter 2", *supra* note 1130 at 65, n 4.

[1200] They were Armenia, Cameroon, Madagascar, Mali and Niger. See Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.072.

[1201] The 25 signatories include Armenia, Cameroon, Congo, Democratic Republic of the Congo, Denmark, France, Gabon, Ghana, Greece, Guinea, Guinea-Bissau, Luxembourg, Madagascar, Mali, Netherlands, Niger, Nigeria, Norway, Poland, Senegal, Spain, Sweden, Switzerland, Togo and United States of America.

[1202] See Anthony Aust, *Modern Treaty Law and Practice*, 3d ed (Cambridge: Cambridge University Press, 2013) at 112-115; Monroe Leigh et al, *National Treaty Law and Practice* (Leiden: Martinus Nijhoff Publishers, 2005) at 150. See also Kaye Holloway, *Modern Trends in Treaty Law: Constitutional Law, Reservations and the Three Modes of Legislation* (London: Stevens, 1967) at 62.

[1203] Congo, Togo and Spain deposited such instruments respectively on January 28, 2014, July 17, 2012 and January 19, 2011.

[1204] See *Rotterdam Rules*, *supra* note 1134, art 94.1.

Chapter II – An inquiry into the carrier's exculpatory rights in the Rotterdam Rules from the perspective of fairness

One of the key features of the Hague Rules is the catalogue of exceptions set out in Article 4.2 thereof.[1205] In the Hamburg Rules, the catalogue was omitted and the scheme of the carrier's exemption from liability was evidently simplified.[1206] The stimulus to such volte-face was the strong feeling among developing countries that their cargo interests were at an unfavorable position in the traditional legal regime governing the carriage of goods by sea.[1207] In the Rotterdam Rules, there has been a new mechanism of determination of liabilitiy and exemption of carriers.[1208] The present chapter is devoted to an examination of the mechanism from the perspective of fairness.

Section 1 – Reaffirmation of the fault philosophy

The first section of this chapter deals with the basis of the carrier's liability in the Rotterdam Rules that sets the tone for the scheme of the carrier's exemption therein.

Paragraph 1 – Fault-based liability

The Hague Rules contain a hybrid basis of liability that represents, to a large degree, the spirit of fault liability but leaves carriers opportunities to escape liability for loss or

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[1205] See Force, "Much Ado About", *supra* note 767 at 2066.

[1206] The idea of eliminating the catalogue of exceptions in the Hague Rules was supported by Argentina, Australia, Brazil, Chile, Egypt, France, Ghana, India, Nigeria, Norway, Singapore, Spain, Tanzania and the U.S.; while it was opposed by Belgium, Japan, Poland and the United Kingdom. See Sweeney, "Draft I", *supra* note 786 at 111.

[1207] See Frederick, *supra* note 238 at 98.

[1208] See Yancey, *supra* note 3 at 1252.

damage resulting from fault on the part of shipowning interests in cases relating to negligent navigation of ships, negligent management of ships or fire.[1209] In the Hamburg Rules, the carrier's liability is simply based on fault on the part of shipowning interests.[1210] The same is true in the Rotterdam Rules.[1211]

The nautical fault exception and the fire exception in the Hague Rules have been deleted or revised in the Rotterdam Rules for the establishment of an unadulterated fault liability regime. Whether the nautical fault exception should be retained was intensely discussed in the preliminary preparations for the Rotterdam Rules conducted by the CMI as well as in the later negotiations organized by the UNCITRAL.[1212] The argument eventually prevailed that such immunity shall be excluded from a modern liability regime designed for the carriage of goods by sea,[1213] as the rationale that it was quite easy for shore-based carriers to lose control over ships and goods at sea was no longer convincing due to advanced telecommunication technologies.[1214] In the early discussions coordinated by Working Group III, there appeared three preponderant proposals about the fire exception.[1215] One suggested the removal of the exception from the new

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[1209] *Hague Rules*, *supra* note 205, arts 4.2(a), 4.2(b). See also Sze, *supra* note 331 at 88.
[1210] See *Hamburg Rules*, *supra* note 792, art 5.1.
[1211] See Berlingieri, "Comparative", *supra* note 10 at 8-10.
[1212] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 102.
[1213] *Ibid* at 102-103.
[1214] See von Ziegler, "Contracting Carrier", *supra* note 1005 at 342.
[1215] See *Report of Working Group III (Transport Law) on the Work of Its Fourteenth Session*, UNCITRALOR, 38th Sess, UN Doc A/CN.9/572, (2005) at paras 59-62, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Fourteenth Session*]. See also *Report Tenth Session*, *supra* note 1160 at para 37; *Report Twelfth Session*, *supra* note 1164 at para 126; *Report Thirteenth Session*, *supra* note 1170 at paras 94-95.

convention;[1216] another suggested the retention of the exception;[1217] and the third suggested a compromise plan in which the exception would be retained provided that it would apply to the ocean transportation alone and would not enable carriers to escape liability for loss or damage resulting from fault on the part of their servants or agents.[1218] The last one was eventually adopted in the Working Group's fourteenth session.[1219]

The language used in Article 17 of Rotterdam Rules has revealed that the carrier's liability is ultimately based on fault. It is stated in Article 17.2 of the Rules that "the carrier is relieved of all or part of its liability … if it proves that the cause or one of the causes of the loss, damage or delay is not attributable to its fault or to the fault [on the part of its servants or agents]."[1220] Article 17.4 of the Rules provides that "the carrier is liable for all or part of the loss, damage, or delay … [i]f the claimant proves that the fault of the carrier or [on the part of its servants or agents] caused or contributed to the event or circumstance on which the carrier relies or … that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault [on the part of its servants or agents]."[1221] Article 17.5 of the Rules stipulates that "[t]he carrier

[1216] This proposal was put forward notwithstanding the fact that the Working Group had decided in its thirteenth session to retain the defense. See *ibid* at paras 94, 99.
[1217] Katsivela, "Overview", *supra* note 10 at 443-444.
[1218] *Ibid* at 444.
[1219] See *Report Fourteenth Session*, *supra* note 1215 at para 62.
[1220] *Rotterdam Rules*, *supra* note 1134, art 17.2.
[1221] *Ibid*, art 17.4.

is … liable … for all or part of the loss, damage, or delay if … [t]he carrier is unable to prove … it complied with its obligation to exercise due diligence."[1222]

Although the basis of the carrier's liability is stated in an indirect manner in the Rotterdam Rules, it is still essentially fault liability that rules out the possibility that carriers may be freed from liability for loss, damage or delay arising from fault on the part of shipowning interests. Fairness embodied in such basis of liability has been thoroughly examined in some preceding parts treating of the same topic.

Paragraph 2 – Two sorts of presumptions

According to Article 17.1 of the Rotterdam Rules, a carrier shall be liable for loss of or damage to the goods or for delay in delivery as long as the claimant can prove that "the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility."[1223] However, he may be exempt,

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[1222] *Ibid*, art 17.5.

[1223] *Ibid*, art 17.1. See also *ibid*, art 12. The period of the carrier's responsibility is defined in Article 12 of the Rotterdam Rules, which provides that:

> 1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.
> 2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.
> (b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.
> 3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:
> (a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or
> (b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

wholly or partly, from his liability if he is able to show that the cause or one of the causes of the loss, damage, or delay is not attributable to fault on the part of shipowning interests.[1224] In other words, Article 17.1 of the Rules provides for a rebuttable presumption of fault against carriers.[1225]

It is stated in Article 17.3 of the Rules that a carrier wishing to be relieved of all or part of his liability may invoke one or more defenses as an alternative to the proof of absence of fault on the part of shipowning interests.[1226] During the negotiations for the Rules, there were lots of debates over the nature of those defenses.[1227] Some delegates and industry observers contended that the defenses were substantive exonerations, while

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The period of the carrier's responsibility in the Hague Rules, which is called the "tackle-to-tackle" period, runs "from the time when the goods are loaded on to the time they are discharged from the ship". The period of responsibility has been extended in the Hamburg Rules to cover the whole period "during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge." Such period is called the "port-to-port" period. The period of responsibility in the Rotterdam Rules, namely the so-called "door-to-door" period, is more extensive. It begins when the carrier receives the goods for carriage and ends when the goods are delivered. See *Hague Rules*, *supra* note 205, art 1(e); *Hamburg Rules*, *supra* note 792, art 4.1. See also James, *supra* note 259 at 685; O'Hare, "Aspects", *supra* note 234 at 530-531; Tomotaka Fujita, "The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implications" (2009) 44 Tex Int'l LJ 349 at 350-355.

[1224] *Rotterdam Rules*, *supra* note 1134, art 17.2.

[1225] See *Report Twelfth Session*, *supra* note 1164 at para 88. A claimant usually can fulfill his burden of proof as required in Article 17.1 of the Rotterdam Rules in two ways: (a) if he proves that the goods were not damaged at the beginning of the period (i.e., the carrier received the goods in apparent good order and condition) but that they were lost or damaged at the end of the period (i.e., the carrier failed to deliver the goods or failed to deliver them in the same state as that in which they had been received), it follows that the loss or damage occurred during that period; (b) if he proves that the loss of or damage to the goods must have occurred during the transportation covered by the contract of carriage or during some other time included within the period of the carrier's responsibility, the claimant is also able to establish a *prima facie* case. The latter may be preferable if the claimant has no evidence of the goods' condition when they were received by the carrier, or if the type of damage (e.g., salt-water damage) can be pinpointed to a particular time during the period of responsibility. See Sturley, Fujita & van der Ziel, *supra* note 6 at paras 5.058-5.059.

[1226] *Rotterdam Rules*, *supra* note 1134, art 17.3. Article 17.3 provides that:

> The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay: …

[1227] See *Report of the Working Group on Transport Law on the Work of Its Ninth Session*, UNCITRALOR, 35th Sess, UN Doc A/CN.9/510, (2002) at para 45, online: United Nations Commission on International Trade Law <http://www.uncitral.org> [*Report Ninth Session*]; *Report Tenth Session*, *supra* note 1160 at para 41; *Report Twelfth Session*, *supra* note 1164 at paras 87, 90, 92, 97, 102, 106, 119, 129; *Transport Law: Preparation of a Draft Instrument on the Carriage of Goods [by Sea] – Proposal by the United States of America*, UNCITRALOR, 2003, UN Doc A/CN.9/WG.III/WP.34 at para 13.

others asserted that they were no more than presumptions or simply typical examples of circumstances in which carriers were habitually free of fault.[1228] In fact, those debates had more theoretical values than practical ones.[1229] Those advocating the "exoneration" label admitted that a carrier would be deprived of his entitlement to an excepted peril if the claimant could prove that the occurrence of the peril was attributable to his fault. A conditional exoneration that may be invalidated is effectively the same as a presumption of absence of fault that may be rebutted.[1230] Either of them entitles a carrier to exemption from liability insofar as there is no evidence showing that his fault has contributed to loss, damage or delay.[1231] In the final text of the Rotterdam Rules, there is no description about the nature of the specific exceptions contained therein, but many tend to believe that the exceptions should be labelled as presumptions.[1232]

Another presumption of fault may be found in Article 17.5 of the Rotterdam Rules which provides that the carrier shall be liable if the claimant proves that the loss, damage or delay has been caused by unseaworthiness and he is unable to prove his compliance with the obligation to exercise due diligence to make his ship seaworthy.[1233] In other

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[1228] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.046.

[1229] See *Report Twelfth Session*, *supra* note 1164 at para 87.

[1230] Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.047.

[1231] *Ibid*.

[1232] See *Rotterdam Rules*, *supra* note 1134, art 17.4. Article 17.4 provides that:

> Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:
> (a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; …

See also Si & Li, *supra* note 1108 at 932-933.

[1233] *Rotterdam Rules*, *supra* note 1134, art 17.5. Article 17.5 provides that:

> The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

words, carriers are presumed to be at fault in unseaworthiness-related cases unless they can prove the contrary.

There are two sorts of presumptions in Article 17 of the Rotterdam Rules. One is the presumption of fault against carriers that is contained in Articles 17.1 and 17.5 of the Rules, and the other is the presumption of absence of fault in favor of carriers that is contained in Article 17.3 of the Rules. The rationale for the former resides in the fact that carriers are in an overwhelmingly better position than claimants to ascertain what has caused loss, damage or delay.[1234] The latter is tenable as it basically applies to circumstances where carriers indeed have little control over the events contributing to loss, damage or delay or where loss, damage or delay is an inevitable by-product of an act that carriers are encouraged to do.

(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for receptioin, carriage, and preservation of the goods; and

(b) The carrier is unble to prove either that: (i) none of the events or circumstances referred to in subparagraph 5(a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.

[1234] See *Lynch*, *supra* note 897 at 842-845; Ehrenzweig, *supra* note 897 at 1425-1426; McDonough, *supra* note 897 at 28-30; William L Prosser, "The Procedural Effect of Res Ipsa Loquitur" (1936) 20 Minn L Rev 241 at 243-245 [Prosser, "Procedural Effect"]. See also *Bahr*, *supra* note 900 at 207; *Pronnecke*, *supra* note 898 at 153; *Cass v Sanger*, 71 A 1126 at 1141 (NJSC 1909) [*Cass*]; *Levendusky v Empire Rubber Mfg Co*, 87 A 338 at 348 (NJ Ct Err & App 1913) [*Levendusky*].

Section 2 – Updated catalogue of exceptions

Whether the "laundry list" in Article 4.2 of the Hague Rules should be retained in the Rotterdam Rules went through heated discussions.[1235] Many argued that it was supposed to constitute a vital part of the new convention, while others regarded it as a meaningless repetition of the principle that carriers shall not be liable in the absence of their own fault or fault on the part of their servants or agents.[1236] The debate was actullay between common law states and civil law states. For the former, it was not unusual to enumerate in a legislative instrument specific circumstances governed by a general rule, while for the latter, it was normal to declare a general principle and leave to courts the task of applying it to concrete cases.[1237] Although civil law states far outnumbered their common law counterparts, the "laundry list" was finally retained. Notwithstanding strong opposition from a number of delegations to the revival of the list,[1238] the Working Group insisted that it should be retained so as to preserve certainty and predictability built up by a significant body of precedents.[1239] The resurgence of the "laundry list", though deemed

[1235] Even when the Hague Rules were negotiated, some delegates objected to the inclusion of a catalogue of defenses. See *Travaux*, *supra* note 304 at 249-253. See also Thomas, *Analysis*, *supra* note 6 at 114.
[1236] The general principle has been expressed in Article 4.2(q) of the Hague Rules and Article 5.1 of the Hamburg Rules. See *Hague Rules*, *supra* note 205, art 4.2(q); *Hamburg Rules*, *supra* note 792, art 5.1.
[1237] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.045.
[1238] See *Report Nineteenth Session*, *supra* note 1175 at para 68. Angola, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Ghana, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Nigeria, Senegal and Togo submitted a joint comment on the new convention stating that "after nealy a century without those exceptions, their resurgence seems even less justifiable in that the shipping industry has made tremendous technological strides" and that "if, in spite of everything, the shipowner's liability remains what it was nearly a hundred years ago, this is simply unfair to the user." *Compilation Add.1*, *supra* note 1186 at paras 9-10.
[1239] See Anthony Diamond, "The Next Sea Carriage Convention" (2008) 35 LMCLQ 135 at 150 [Diamond, "Next Convention"].

by some as an unfortunate retrogression,[1240] was virtually a pragmatic response of the Working Group to the real likelihood that the new convention might otherwise suffer the same fate as the Hamburg Rules due to lack of support from traditional maritime nations.[1241] Furtheremore, it was believed that a list of exceptions, no matter how it might appear odd to civil law states, would not do any substantial harm to them.[1242] A new "laundry list" has thus been laid down in Article 17.3 of the Rotterdam Rules.

Paragraph 1 – Deleted exceptions

First of all, the notorious nautical fault exception has been abolished. In a survey conducted by the CMI's International Sub-Committee on Issues of Transport Law, a consensus had been reached in favor of the retention of the exception,[1243] but at the subsequent CMI's Thirty-Seventh Conference, most of the delegations contended that it should be eliminated.[1244] There was such a change mainly because it was noted that a similar defense had been omitted from the Warsaw Convention as early as 1955 and it was widely felt that the removal of the exception would be an important step towards a modern and harmonious legal regime governing the carriage of goods by sea.[1245] The

[1240] See *Report Twelfth Session*, *supra* note 1164 at para 117; *Report Nineteenth Session*, *supra* note 1175 at para 68.
[1241] Thomas, *Analysis*, *supra* note 6 at 114. The removal of the "laundry list" was viewed as "a fatal flaw in the Hamburg Rules." Brian Makins, "Uniformity of the Law of the Carriage of Goods by Sea in the 1990s: The Hamburg Rules – A Casualty" (1991) 8 Australian & New Zealand Maritime Law Journal 34 at 43. See also Francesco Berlingieri, "The Period of Responsibility and the Basis of Liability of the Carrier" in Francesco Berlingieri, ed, *The Hamburg Rules: A Choice for the EEC?* (Antwerp: MAKLU, 1994) 85 at 95.
[1242] Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.045.
[1243] See "Uniformity of the Law of the Carriage of Goods by Sea – Report on the Work of the International Sub-Committee" in *CMI Yearbook 1999*, *supra* note 1151, 105 at 109.
[1244] See "Issues", *supra* note 1154 at 184. See also Girvin, "Comité Report", *supra* note 1122 at 409.
[1245] *Report Tenth Session*, *supra* note 1160 at para 35.

exception was eventually excluded from the new "laundry list" despite the concern that such change might have adverse impacts on insurance and balance of interests.[1246] The orthodox view is that the deletion of the exception is praiseworthy as it would lead to a reasonable allocation of risks between shipowning interests and cargo-owning interests. As Professor Francesco Berlingieri has remarked, "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 faults of the servants of the carrier is lacking in any justification and is contrary to the general rule that exists in most jurisdictions."[1247]

Another two deleted exceptions, which are of minor importance, are "act of public enemies" and the catch-all exception.[1248] The former, originating from "King's (or Queen's) enemies", one of the ancient common law immunities,[1249] has been

[1246] The concern about insurance mainly came from P&I Clubs. See *Preparation of a Draft Instrument on the Carriage of Goods [by Sea] – Compilation of Replies to a Questionnaire on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, UNCITRALOR, 2003, UN Doc A/CN.9/WG.III/WP.28 at 39-40, online: United Nations Commission on International Trade Law <http://www.uncitral.org>. For detailed discussions of the terms on which P&I Clubs insure against cargo risks, see Steven J Hazelwood, *P&I Clubs: Law and Practice*, 3d ed (London: Lloyd's of London Press, 2000) at 163. It seems, however, that the concern has not been supported by empirical evidence. See Sturley, "Vacuum", *supra* note 99 at 119-121; Berlingieri, "Basis", *supra* note 447 at 342. For the concern about balance of interests, see Diamond, "Next Convention", *supra* note 1239 at 150. Lord Sumner explicated in *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)* the rationale for the nautical fault exception. He said that "[t]he intention of this legislation in dealing with the liability 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." *Canadian Highlander*, *supra* note 312 at 445.

[1247] Berlingieri, "Basis", *supra* note 447 at 342.

[1248] See *Hague Rules*, *supra* note 205, arts 4.2(f), 4.2(q).

[1249] See Julian Cooke et al, *Voyage Charters*, 3d ed (London: Informa, 2007) at para 85.302. See also *Russell v Niemann*, (1864) 144 ER 66 at 86 (Ct Com Pl).

reformulated and modernized in Article 17.3(c) of the Rotterdam Rules,[1250] and the latter has been transformed into Article 17.2 of the Rules.[1251]

Paragraph 2 – Unaltered exceptions

Some exceptions in Article 4.2 of the Hague Rules have been transplanted into Article 17.3 of the Rotterdam Rules, unchanged or almost unchanged. One of them is "act of God".[1252] The exception has existed since the era when carriers were subject to strict liability.[1253] Some suggested that it should be removed from the Rotterdam Rules as it had no well-defined meaning and was a mere repetition of Article 17.2 of the Rules,[1254] but the Working Group was finally persuaded to retain it for fear that erroneous judicial interpretations might stem from speculations about the reasons for such removal.[1255]

[1250] See *Rotterdam Rules*, *supra* note 1134, art 17.3(c).

[1251] See *ibid*, art 17.2. The catch-all exception in Article 4.2(q) of the Hague Rules has been upgraded to the general umbrella immunity in Article 17.2 of the Rotterdam Rules. They are quite similar, but a careful examination may reveal that the burden of proof in the former is more stringent than that in the latter. According to Article 4.2(q) of the Hague Rules, carriers wishing to be relieved from liability must prove that no fault on their part or on the part of their servants or agents has contributed to loss or damage, and even the slightest contribution of such fault to loss or damage may render the catch-all exception inapplicable. In comparison, Article 17.2 of the Rotterdam Rules only requires carriers wishing to be exonerated from liability to prove that the cause or one of the causes of loss, damage or delay is not attributable to fault on their part or on the part of their servants or agents, and the cause to be proved does not have to be the dominant one. See von Ziegler, "Contracting Carrier", *supra* note 1005 at 341; Diamond, "Rotterdam Rules", *supra* note 1125 at 473.

[1252] See *Rotterdam Rules*, *supra* note 1134, art 17.3(a).

[1253] See Cooke et al, *supra* note 1249 at para 85.295.

[1254] During the tenth session of the Working Group, there was a discussion on whether or not this excepted peril should be maintained in the new convention. The debate intensified in the twelfth and fourteenth sessions where it was argued that the retention of the "act of God" defense would be unnecessary due to the inclusion of Article 4.2(q) of the Hague Rules in the prospective convention. See *Report Twelfth Session*, *supra* note 1164 at para 120. See also Berlingieri, "Basis", *supra* note 447 at 344.

[1255] An alternative wording – "natural phenomema" – was proposed to describe the defense, but a decision was made in the end to keep the old formulation. See *Report Fourteenth Session*, *supra* note 1215 at paras 36-37.

The exception in Article 4.2(c) of the Hague Rules relating to "perils, dangers and accidents of the sea or other navigable waters" has also been retained in the Rotterdam Rules.[1256] There was no substantial debate over it during the deliberations of the Working Group.[1257]

Another unaltered exception is "latent defects not discoverable by due diligence."[1258] The exception has always been problematic in practice partly owing to difficulties of proof,[1259] but it is still frequently used in the marine insurance.[1260] Even in the last session of the Working Group, there were still some delegates who suggested that the exception should be deleted, but their suggestion was rejected because of the general reluctance among the participants to reopen any discussion about those settled issues.[1261]

The last exception formulated in the same terms as its counterpart in the Hague Rules is contained in Article 17.3(j) of the Rotterdam Rules that entitles carriers to exemption from liability for loss or damage arising from "wastage in bulk or weight" or "inherent defect, quality or vice of the goods."[1262] The rationale for the exception is that shippers know much more than carriers about the nature and characters of the goods consigned for shipment and hence shall bear unavoidable loss or damage resulting

[1256] See *Rotterdam Rules*, *supra* note 1134, art 17.3(b).
[1257] The defense was first mentioned in the Working Group's report on the work of its tenth session and then, during the Working Group's thirteenth session, a general agreement was reached on its substance. See *Report Tenth Session*, *supra* note 1160 at para 29; *Report Thirteenth Session*, *supra* note 1170 at para 98.
[1258] See *Hague Rules*, *supra* note 205, art 4.2(p); *Rotterdam Rules*, *supra* note 1134, art 17.3(g).
[1259] See e.g. *Antigoni*, *supra* note 532.
[1260] See Gilman, Merkin & Arnould, *supra* note 921 at paras 23-57.
[1261] See *Report Twenty-first Session*, *supra* note 1178 at paras 54, 56.
[1262] *Rotterdam Rules*, *supra* note 1134, art 17.3(j). See also *Hague Rules*, *supra* note 205, art 4.2(m).

therefrom.[1263] This exception was referred to very briefly in the Working Group's tenth, eleventh, twelfth and fourteenth sessions.[1264] In the eleventh session, it was suggested that the exception should cover the carriage of live animals in poor health,[1265] but such suggestion was opposed by most of the delegations.[1266] In the fourteenth session, it was decided that the wording of Article 4.2(m) of the Hague Rules would be maintained since it had well reflected established commercial practices.[1267]

The exceptions mentioned in the present paragraph are barely controversial in terms of fairness as the circumstances covered by them indeed involve factors beyond the control of a reasonably prudent carrier. Besides, they are no more than presumptions of absence of fault that may be rebutted by evidence to the contrary.

Paragraph 3 – Modified exceptions

Some exceptions in the new "laundry list" are variants of their counterparts in Article 4.2 of the Hague Rules. The first example is Article 17.3(c) of the Rotterdam Rules that entitles carriers to exemption from liability for loss, damage or delay arising from "war, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions."[1268] This article has not only absorbed from the Hague Rules the exceptions relating to "act of

[1263] It is often believed that this exception has the same meaning in the context of marine insurance. Schoenbaum, *supra* note 171 at 704. See also Howard Bennett, "Fortuity in the Law of Marine Insurance" (2007) 34 LMCLQ 315 at 342; *Blower*, *supra* note 522 at 662-663; *White*, *supra* note 523 at 125, Lord Diplock.
[1264] Katsivela, "Overview", *supra* note 10 at 453, n 128.
[1265] *Report Eleventh Session*, *supra* note 1161 at para 216.
[1266] *Ibid* at para 216. A special regime was created for the carriage of live animals in Article 81 of the Rotterdam Rules. See Indira Carr & Peter Stone, *International Trade Law*, 5th ed (London: Routledge, 2014) at 280.
[1267] See *Report Fourteenth Session*, *supra* note 1215 at para 45.
[1268] *Rotterdam Rules*, *supra* note 1134, art 17.3(c).

war" and "riots and civil commotions" but also been designed to cover other analogous circumstances such as hostilities, armed conflict, piracy and terrorism.[1269] The exception was discussed in the Working Group's tenth, twelfth and fourteenth sessions, but its formulation did not change substantially.[1270] "Hostilities" and "armed conflict" are two accompanying terms that clarify and moderately extend the scope of "war".[1271] "Hostilities" denote hostile acts by persons acting as agents of sovereign powers or by organized forces.[1272] They do not cover acts of an individual acting on his own initiative no matter how hostile his acts may be.[1273] "Armed conflict" does not presuppose the presence of war between countries.[1274] War connotes "more than mere combat or armed conflict but rather a more complete undertaking of hostilities by one state against another."[1275] In the Working Group's twelfth session, there was general support for the inclusion of terrorism in the new "laundry list", but much concern was expressed about the absence of a precise definition of the term "terrorism".[1276] Such concern was, however, thought by most delegations to be unnecessary as the core issue was whether

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[1269] See *Hague Rules*, *supra* note 205, arts 4.2(e), 4.2(k).

[1270] The only change was the removal from this defense of the phrase "act of God" which happened in the Working Group's fourteenth session. See *Report Fourteenth Session*, *supra* note 1215 at paras 36, 75.

[1271] Katsivela, "Overview", *supra* note 10 at 438.

[1272] *Atlantic Mutual Insurance Co v King*, [1919] 1 KB 307 at 311 (UK).

[1273] *Ibid* at 312.

[1274] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3d ed (New York: Cambridge University Press, 2015) at 76; Rain Liivoja & Timothy LH McCormack, *Routledge Handbook of the Law of Armed Conflict* (Abingdon: Routledge, 2016) at 28.

[1275] Robert Gray Bracknell, "Real Facts, 'Magic Language', the Gulf of Tonkin Resolution, and Constitutional Authority to Commit Forces to War" (2007) 13 New England Journal of International and Comparative Law 167 at 172-173.

[1276] See *Report Twelfth Session*, *supra* note 1164 at para 121. So far, there has been no universally accepted definition of the term "terrorism" in international law. See Upendra D Acharya, "War on Terror or Terror Wars: The Problem in Defining Terrorism" (2009) 37 Denv J Int'l L & Pol'y 653 at 657. At the level of domestic law, there are also various definitions. See Nicholas J Perry, "The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails" (2004) 30 J Legis 249 at 251-253.

fault on the part of shipowning interests was contributory.[1277] Moreover, given the ever-increasing number of piracy attacks in certain areas of the world, "piracy" has been included in Article 17.3(c) of the Rotterdam Rules to exonerate carriers from liability for loss, damage or delay resulting from capture of vessels by pirates. "Piracy" is not defined in the Rotterdam Rules, but it has got definitions at the national and international levels.[1278]

Another renovated exception is prescribed in Article 17.3(d) of the Rotterdam Rules that entitles carriers to exemption from liability for loss, damage or delay arising from "[q]uarantine restrictions, interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest or seizure not attributable to the carrier or any person referred to in Article 18."[1279] This provision has combined Articles 4.2(h) and 4.2(g) of the Hague Rules.[1280] The archaic wording in the latter originating from traditional insurance policies has been replaced by a modern formulation.[1281]

[1277] See *Report Twelfth Session*, *supra* note 1164 at para 121. It can be concluded from the deliberations of the Working Group that in order to define the term "terrorism", the parties have to resort to domestic statutes. Domestic courts are invited to play an important role in clarifying this term and promoting uniformity with regard to its interpretation. See Katsivela, "Overview", *supra* note 10 at 437.

[1278] One of the commonly accepted definitions of piracy is included in the United Nations Convention on the Law of the Sea. See *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, 21 ILM 1261, art 101. Article 101 provides that:

> Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

See also Dana Dillon, "Maritime Piracy: Defining the Problem" (2005) 25 SAIS Review 155 at 155-157.

[1279] *Rotterdam Rules*, *supra* note 1134, art 17.3(d).

[1280] See *Hague Rules*, *supra* note 205, arts 4.2(g), 4.2(h). See also Cooke et al, *supra* note 1249 at paras 85.304, 85.413.

[1281] See *Hague Rules*, *supra* note 205, art 4.2(g). See also Thomas, *Analysis*, *supra* note 6 at 123, n 110.

However, such change does not mean any departure from the existing interpretations concerning Article 4.2(g) of the Hague Rules.[1282]

There is no substantial difference between Article 17.3(e) of the Rotterdam Rules and Article 4.2(j) of the Hague Rules though the reference to "from whatever cause, whether partial or general" has been omitted in the former.[1283] During the Working Group's twelfth session, doubts were raised about the rationality of the modifier "from whatever cause" as some strikes might be caused by acts of carriers.[1284] Some delegates worried about the possibility that the adjunct might be wrongly interpreted to exonerate carriers from liability even if they were at fault.[1285] In the same session, it was suggested that a distinction should be made between general strikes and strikes occurring in the business of carriers for which they might need to be responsible.[1286] Another proposal regarding "restraints of labour" was made in the Working Group's fourteenth session where some delegates found it necessary to make it clear that the term would not cover events arising from fault on the part of carriers.[1287] During the Working Group's last session, a radical suggestion was thrown out to delete the entire exception from the "laundry list" on the grounds that Article 17.2 of the Rotterdam Rules had already

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[1282] See *Report Twelfth Session*, *supra* note 1164 at para 122.

[1283] See *Rotterdam Rules*, *supra* note 1134, art 17.3(e); *Hague Rules*, *supra* note 205, art 4.2(j).

[1284] See *Report Twelfth Session*, *supra* note 1164 at para 123.

[1285] However, it should be noted that even under the Hague Rules, the carrier is not allowed to invoke this defense where he is at fault. See *Mormacsaga*, *supra* note 714 at 522-523; Gilmore & Black, *supra* note 171 at 165-166. Under Section 1304.2(j) of the U.S. COGSA, this concern has been eliminated by adding the phrase "nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts." *COGSA 1936*, *supra* note 216, § 1304.2(j).

[1286] See *Report Twelfth Session*, *supra* note 1164 at para 123.

[1287] See *Report Fourteenth Session*, *supra* note 1215 at para 43.

implied the carrier's exemption from liability in such circumstances as strike, lockout, stoppage and restraint of labour.[1288] However, it attracted very little attention.[1289] Finally, the latter part of Article 4.2(j) of the Hague Rules was simply sloughed off.

The next example is Article 17.3(f) of the Rotterdam Rules that has reproduced Article 4.2(b) of the Hague Rules with some changes. In the negotiations for the new "laundry list" in the Rotterdam Rules, there were three proposals on how to treat the fire exception which suggested that it should be removed, follow the pattern of Article 4.2(b) of the Hague Rules, or be retained on the condition that it would apply to the carriage of goods by sea alone and keep carriers from being relieved of liability for loss, damage or delay arising from fault on the part of their servants or agents.[1290] The last one was eventually adopted in the Working Group's fourteenth session.[1291]

Article 17.3(h) of the Rotterdam Rules has absorbed Article 4.2(i) of the Hague Rules and widened its scope of application to the extent that carriers shall not be liable for loss, damage or delay caused by "[a]ct or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the

[1288] See *Report Twenty-first Session*, *supra* note 1178 at para 54.
[1289] There was also concern that the deletion of this defense would lead to a considerable increase of the carrier's liability. See *ibid* at para 56.
[1290] See *Report Fourteenth Session*, *supra* note 1215 at paras 59-62. See also *Report Thirteenth Session*, *supra* note 1170 at paras 94-95; *Report Twelfth Session*, *supra* note 1164 at para 126; *Report Tenth Session*, *supra* note 1160 at para 37.
[1291] See *Report Fourteenth Session*, *supra* note 1215 at para 62.

documentary shipper is liable."[1292] Notwithstanding such change, there is no essential difference between the two provisions.[1293]

Article 17.3(k) of the Rotterdam Rules is a combination of Articles 4.2(n) and 4.2(o) of the Hague Rules.[1294] In the Working Group's fourteenth session, it was noted that the shipper's obligation to consign goods for shipment in a fashion fit for the intended voyage had a close connection with the exception relating to insufficiencies or defective conditions of packing or marking.[1295] Also in that session, a consensus was reached with respect to the addition of the reference to "not performed by or on behalf of the carrier" for the sake of preciseness.[1296] Some delegations suggested that this exception should be deleted as it overlapped with the exception relating to fault on the part of shippers.[1297] However, such suggestion was rejected on the grounds that there was no need to address an issue that had not posed any serious problems in practice.[1298]

[1292] "Documentary shipper" means a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record. "Controlling party" means the person that pursuant to article 51 is entitled to exercise the right of control. See *Rotterdam Rules*, *supra* note 1134, arts 1.9, 1.13.

[1293] See Aikens, Lord & Bools, *supra* note 458 at para 10.235.

[1294] See *Rotterdam Rules*, *supra* note 1134, art 17.3(k); *Hague Rules*, *supra* note 205, arts 4.2(n), 4.2(o).

[1295] *Report Fourteenth Session*, *supra* note 1215 at para 46. See also *Rotterdam Rules*, *supra* note 1134, art 27.1. It provides that:

> Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.

[1296] *Report Fourteenth Session*, *supra* note 1215 at paras 46-48, 75.

[1297] *Ibid* at para 45.

[1298] *Ibid* at para 46.

The last two modified exceptions are contained in Articles 17.3(l) and 17.3(m) of the Rotterdam Rules.[1299] Both of them derive from Article 4.2(l) of the Hague Rules that entitles carriers to exemption from liability for loss, damage or delay arising from "saving or attempting to save life or property at sea."[1300] The justification for such exception is based on public policy.[1301] The discriminatory treatment with regard to salvage of life and salvage of property was determined in the Working Group's thirteenth session.[1302] From the fourteenth session onwards, they were arranged in two provisions.[1303] Also in the thirteenth session, there was broad support for the introduction of a reasonableness test for acts done to save property at sea.[1304] The underpinning of such test is that a carrier should never, in pursuit of a generous remuneration for his rescue acts directed at property at sea, take any unreasonable measures that may imperil the goods in his custody.[1305]

As has been mentioned above, the exceptions enumerated in Article 17.3 of the Rotterdam Rules are presumptions of absence of fault in favor of carriers. Those examined in the present paragraph, except for the fire exception, can be justified as their

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1299 See *Rotterdam Rules*, *supra* note 1134, arts 17.3(l), 17.3(m).
1300 *Hague Rules*, *supra* note 205, art 4.2(l).
1301 Michael Sturley, "An Overview of the Considerations Involved in Handling the Cargo Case" (1997) 21 Tul Mar LJ 263 at 313.
1302 See *Report Thirteenth Session*, *supra* note 1170 at paras 96, 99.
1303 See *Report Fourteenth Session*, *supra* note 1215 at para 75. The new layout was probably inspired by Article 5.6 of the Hamburg Rules relieving the carrier of liability for loss, damage or delay resulting "from measures to save life or from reasonable measures to save property at sea." See Katsivela, "Overview", *supra* note 10 at 456, n 142.
1304 See *Report Thirteenth Session*, *supra* note 1170 at paras 96, 99.
1305 See *ibid* at paras 96, 99.

occurrence is *prima facie* attributable to intervention of natural forces or third parties,[1306] fault on the part of cargo-owning interests,[1307] or goodwill of carriers.[1308] Fire does not have an apparent feature of being beyond the control of shipowning interests nor does it have anything to do with public policy. The fire exception in the Rotterdam Rules, even if it is rebuttable, is nothing less than providing carriers with an easy way of escaping liability for loss, damage or delay in fire-related cases,[1309] so it is supposed to be eliminated.[1310]

Paragraph 4 – New exceptions

There are three exceptions in Article 17.3 of the Rotterdam Rules that did not appear in the "laundry list" of the Hague Rules. The first one is contained in Article 17.3(i) of the Rotterdam Rules that entitles carriers to exemption from liability for loss, damage or delay resulting from "loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee."[1311] It is usually the carrier's duty to load, handle, stow and

[1306] See *Rotterdam Rules*, *supra* note 1134, arts 17.3(c), 17.3(d), 17.3(e).
[1307] See *ibid*, arts 17.3(h), 17.3(k).
[1308] See *ibid*, arts 17.3(l), 17.3(m).
[1309] *Report Fourteenth Session*, *supra* note 1215 at para 59; *Report Thirteenth Session*, *supra* note 1170 at para 94; *Report Twelfth Session*, *supra* note 1164 at para 126; *Report Tenth Session*, *supra* note 1160 at para 37.
[1310] Another reason proposed by proponents of the deletion of the fire exception was that including such exception in a multimodal instrument could produce inequity and was inappropriate because it did not apply to other modes of transport. However, opponents argued that the defense should be retained as it had been well accepted both in jurisprudence and in practice and the proposed deletion might alter the existing balance of interests. See *Report Fourteenth Session*, *supra* note 1215 at para 60. See also *Report Thirteenth Session*, *supra* note 1170 at para 94.
[1311] *Rotterdam Rules*, *supra* note 1134, art 17.3(i). See also *ibid*, art 13. Article 13 provides that:

unload the goods consigned for shipment,[1312] but the carrier and the shipper sometimes opt to insert in the bill of loading an FIO clause, in accordance with which it is the shipper who is responsible for the above-mentioned operations.[1313] In the Hague Rules, there was confusion about who shall be liable for loss or damage occurring during loading, handling, stowing or unloading performed by cargo interests pursuant to an FIO clause.[1314] Such confusion has been dispelled in Article 17.3(i) of the Rotterdam Rules.[1315]

Another new exception pertains to reasonable measures taken to avoid or attempt to avoid damage to the environment.[1316] In the Working Group's thirteenth session, it was suggested that there should be in the Rotterdam Rules a provision addressing the carrier's exculpatory right in cargo claims associated with environmental protection.[1317] Broad

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1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.
2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

[1312] See *Hague Rules*, *supra* note 205, art 3.2. Article 3.2 provides that:

Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

[1313] FIO stands for "free in and out". FIO clauses have several variants, such as FILO (free in liner out), FIOS (free in and out, stowed), FIOST (free in and out, stowed and trimmed), etc. Those clauses are, in effect, used to transfer from the carrier to cargo interests certain duties which are usually supposed to be performed by the former. See *Report Twenty-first Session*, *supra* note 1178 at paras 44, 46-49; *Report Fourteenth Session*, *supra* note 1215 at para 51.

[1314] English courts sanctioned such clauses having the effect of exonerating the carrier. See *Pyrene*, *supra* note 699 at 412; *Renton*, *supra* note 699 at 170; *Jindal*, *supra* note 699 at 1370. See also William Tetley, "Properly Carry, Keep and Care for Cargo – art.3(2) of the Hague/Visby Rules", online: McGill University <http://www.mcgill.ca>. U.S. courts did not have a uniform opinion on whether the carrier's duties of loading, handling, stowing and unloading were delegable. See generally Mark Hegarty, "A COGSA Carrier's Duty to Load and Stow Cargo is Nondelegable, or Is It?: Associated Metals & Minerals Corp. v. M/V Arktis Sky" (1993) 18 Tul Mar LJ 125.

[1315] See generally Diego Esteban Chami, "The Obligations of the Carrier", online: Rotterdam Rules <http://www.rotterdamrules2009.com>.

[1316] *Rotterdam Rules*, *supra* note 1134, art 17.3(n).

[1317] See *Report Thirteenth Session*, *supra* note 1170 at paras 97, 99.

support was expressed for the suggestion.[1318] The exception was finalized in the fourteenth session.[1319] A reasonableness test was embedded in the exception to prevent carriers from pursuing remunerations for acts of environmental protection at the cost of goods in their charge.[1320]

The third new exception is contained in Article 17.3(o) of the Rotterdam Rules which provides that carriers shall not be liable for loss, damage or delay resulting from their acts "in pursuance of the powers conferred by articles 15 and 16."[1321] The exception went through several modifications.[1322] Its final text reveals its connection with shipment of dangerous goods and common adventure.[1323]

As a matter of fact, these new exceptions are not entirely innovative. Article 17.3(i) of the Rotterdam Rules merely restates the carrier's exemption from liability for loss, damage or delay arising from fault on the part of cargo interests that has been prescribed in Article 4.2(i) of the Hague Rules.[1324] The exception for "reasonable measures to avoid

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[1318] Katsivela, "Overview", *supra* note 10 at 458.

[1319] See *Report Fourteenth Session*, *supra* note 1215 at paras 64, 75.

[1320] Katsivela, "Overview", *supra* note 10 at 459.

[1321] *Rotterdam Rules*, *supra* note 1134, art 17.3(o).

[1322] *Report Tenth Session*, *supra* note 1160 at para 29; *Report Twelfth Session*, *supra* note 1164 at para 85; *Report Fourteenth Session*, *supra* note 1215 at para 75.

[1323] *Rotterdam Rules*, *supra* note 1134, arts 15, 16. Article 15 of the Rotterdam Rules provides that:

> Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

Article 16 of the Rotterdam Rules provides that:

> Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

[1324] See *Hague Rules*, *supra* note 205, art 4.2(i).

or attempt to avoid damage to the environment" shares the same underpinning – public policy – with the exceptions for salvage that have been contained in Article 4.2(l) of the Hague Rules and Article 5.6 of the Hamburg Rules.[1325] Article 17.3(o) of the Rotterdam Rules, along with Article 15, reaffirms the exception relating to shipment of dangerous goods that can be found in both Article 4.6 of the Hague Rules and Article 13 of the Hamburg Rules.[1326] Article 17.3(o), when read with Article 16, entitles carriers to exemption from liability for loss, damage or delay resulting from measures taken by them to cope with common adventure.[1327] In this sense, the exception contained therein is essentially akin to those relating to salvage or environmental protection as they all aim to encourage carriers to do what they are, morally or jurisprudentially, expected to do. To sum up, these new exceptions are unquestionable in terms of fairness.

Section 3 – Exemption from liability in certain particular circumstances

Not all the exceptions in the Rotterdam Rules are included in the new "laundry list". The present section is devoted to an examination of those outside the list.

[1325] See *ibid*, art 4.2(l); *Hamburg Rules*, *supra* note 792, art 5.6.
[1326] See *Hague Rules*, *supra* note 205, art 4.6; *Hamburg Rules*, *supra* note 792, art 13.
[1327] *Report Ninth Session*, *supra* note 1227 at paras 137-143; *Report Twelfth Session*, *supra* note 1164 at paras 154-157; *Report Nineteenth Session*, *supra* note 1175 at paras 60-62; *Report Twenty-first Session*, *supra* note 1178 at para 53.

Paragraph 1 – Exemption relating to shipment of deck cargo

In the 1920s, the deck carriage was only employed in certain specialized trades.[1328] As a result, it was safely excluded from the scope of the Hague Rules.[1329] The issue of deck cargo had been put on the agenda at the beginning of the preparations for the Visby Protocol, but it was crossed out at the CMI Stockholm Conference of 1963 because it was not "of sufficient practical importance".[1330] Fifteen years later, the deck carriage was finally addressed in the Hamburg Rules, but the carrier's exemption from liability in relation to such carriage was not prescribed therein, at least not in an explicit manner.[1331]

According to Article 25.1 of the Rotterdam Rules, the deck carriage may be allowed only if (a) it is required by law; (b) it is performed by means of qualified containers, vehicles and decks; or (c) it is in accordance with the contract of carriage, or the customs,

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[1328] See generally Richard Williams, "The Developing Law Relating to Deck Cargo" (2005) 11 Journal of International Maritime Law 100 at 100-103.

[1329] See *Hague Rules*, *supra* note 205, art 1(c).

[1330] See *Travaux*, *supra* note 304 at 844.

[1331] See *Hamburg Rules*, *supra* note 792, art 9. Article 9 provides that:

> 1. The carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.
> 2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.
> 3. Where the goods have been carried on deck contrary to the provisions of paragraph 1 of this article or where the carrier may not under paragraph 2 of this article invoke an agreement for carriage on deck, the carrier, notwithstanding the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as for delay in delivery, resulting solely from the carriage on deck, and the extent of his liability is to be determined in accordance with the provisions of article 6 or article 8 of this Convention, as the case may be.
> 4. Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article 8.

usages or practices of the trade in question.[1332] There is no special rule governing the carrier's liability in the second circumstance, but in the other two, carriers may be exempt from liability for loss, damage or delay caused by special risks in such carriage.[1333] Extra risks arise when goods are carried on deck because they are exposed to influences of weather and the possibility of falling overboard.[1334] Certain events, such as theft and fire, are more likely to occur to deck goods, but they are not special risks covered by the exception as they are not peculiar to the deck carriage.[1335] It should also be noted that carriers are unable to invoke the exceptions provided for in Article 17 of the Rotterdam Rules to relieve themselves from liability for loss, damage or delay exclusively caused by carriage on deck in impermissible cases.[1336]

The carrier's liability in relation to the deck carriage is still governed by Article 17 of the Rotterdam Rules, which may be seen from the first half of Article 25.2 thereof stating that "[t]he provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article."[1337] Its particularity consists in the carrier's exemption from liability for loss, damage or delay resulting from special risks embraced in such

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1332 *Rotterdam Rules*, *supra* note 1134, art 25.1.
1333 *Ibid*, art 25.2.
1334 See Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.136.
1335 See Eberhard P Deutsch, "Deck Cargo" (1939) 27 Cal L Rev 535 at 537-539 [Deutsch, "Deck Cargo"]. See also Lina Wiedenbach, *The Carrier's Liability for Deck Cargo: A Comparative Study on English and Nordic Law with General Remarks for Future Legislation* (Heidelberg: Springer Science and Business Media, 2015) at 72.
1336 The reference to "exclusively" in Article 25.3 of the Rotterdam Rules implies that the exceptions contained in Article 17 of the Rules are still valid for loss, damage or delay arising from a combination of causes. Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.138; *Rotterdam Rules*, *supra* note 1134, art 25.3.
1337 *Ibid*, art 25.2.

carriage. Such exemption has been designed to release carriers from excessive burdens relating to the deck carriage in which goods may encounter more perils than those carried under deck.[1338] Article 25.3 of the Rotterdam Rules provides for another mechanism to maintain a balance of interests between the shipowning and cargo-owning sides, that is, the prohibition of reliance by carriers on the exceptions in Article 17 of the Rules when goods are carried on deck in other cases than those permitted ones.[1339] In a nutshell, the special rules regarding the carrier's exclusion of liability in the deck carriage are acceptable from the perspective of fairness.

Paragraph 2 – Exemption relating to shipment of live animals

The carriage of live animals has been expressly excluded from the scope of application of the Hague Rules,[1340] while a particular rule concerning the carrier's liability in such carriage has been laid down in Article 5.5 of the Hamburg Rules which states that "the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage" and that "if the carrier proves that he has complied with any special instructions given to him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it is presumed that the loss, damage or delay in delivery was so caused, unless there is proof that all or a part of the loss, damage or delay in

[1338] See James B Wooder, "Deck Cargo: Old Vices and New Law" (1991) 22 J Mar L & Com 131 at 134-136.
[1339] *Rotterdam Rules*, *supra* note 1134, art 25.3.
[1340] *Hague Rules*, *supra* note 205, art 1(c). It provides that "'[g]oods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals …"

delivery resulted from fault or neglect on the part of the carrier, his servants or agents."[1341]

In the Rotterdam Rules, the carrier's liability in relation to the carriage of live animals is governed by not only Article 17 but also an additional rule that recognizes the validity of contract terms designed to exclude or limit the carrier's liability in such carriage.[1342] During the negotiations for the Rotterdam Rules, it was argued that the exclusion policy in the Hague Rules was inappropriate and that the approach in the Hamburg Rules might lead to unwanted disputes about how to define "special risks inherent in that kind of carriage",[1343] so the Working Group decided to resort to freedom of contract.[1344] According to Article 81(a) of the Rotterdam Rules, the parties are at liberty to reach a special agreement regarding the carrier's exemption from liability in the carriage of live animals even though it may derogate from the regular liability rules of the Convention.[1345]

[1341] *Hamburg Rules*, *supra* note 792, art 5.5.

[1342] *Rotterdam Rules*, *supra* note 1134, art 81(a). It provides that:

> Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if … [t]he goods are live animals …

[1343] See *Report Eleventh Session*, *supra* note 1161 at paras 216-217; *Report of Working Group III (Transport Law) on the Work of Its Fifteenth Session*, UNCITRALOR, 38th Sess, UN Doc A/CN.9/576, (2005) at para 106, online: United Nations Commission on International Trade Law <http://www.uncitral.org>; *Report Seventeenth Session*, *supra* note 1183 at para 171.

[1344] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 13.032.

[1345] Article 79.1 of the Rotterdam Rules provides that "[u]nless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it: (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Conveniton; (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention …" However, Article 81 thereof indicates that "[n]otwithstanding article 79 … the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if … [t]he goods are live animals …" *Rotterdam Rules*, *supra* note 1134, arts 79.1, 81(a).

The carrier's exemption from liability in relation to the carriage of live animals has been given more flexibility in the Rotterdam Rules.[1346] It is not unacceptable that the carrier's exculpatory rights in such carriage are determined by means of freedom of contract if the agreement reached between the shipper and the carrier indeed represents their wills. What is worrying is the possibility that freedom of contract may be misused if there is a great disparity between the bargaining power of the shipper and that of the carrier, because Article 81(a) of the Rotterdam Rules provides for no procedural restrictions on freedom of contract.[1347]

Paragraph 3 – Exemption relating to special carriage

A particular rule concerning the carrier's exemption from liability for loss, damage or delay in special carriage has been contained in Article 81(b) of the Rotterdam Rules which states that:

[1346] Some restrictions have been placed on the carrier's exemption from liability relating to the carriage of live animals in Article 81(a) of the Rotterdam Rules, which indicates that "… any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result." *Ibid*, art 81(a).

[1347] Freedom of contract has also been embedded in the regime of volume contract. Unlike Article 81(a) of the Rotterdam Rules, Article 80 relating to volume contract contains a series of restrictions on freedom of contract. See *ibid*, art 80.2. Article 80.2 provides that:

> A derogation pursuant to paragraph 1 of this article is binding only when:
> (a) The volume contract contains a prominent statement that it derogates from this Convention;
> (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;
> (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and
> (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.

See also Proshanto K Mukherjee & Abhinayan Basu Bal, "A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective" (2009) 40 J Mar L & Com 579 at 583-585.

> Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if … [t]he character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.[1348]

A similar exception is prescribed in Article 6 of the Hague Rules,[1349] but it has a narrower range than its counterpart in the Rotterdam Rules as the former only applies to shipment of special goods while the latter applies where the goods consigned for shipment have particularity or the carriage itself has particularity.[1350]

Notwithstanding the aforesaid difference, Article 6 of the Hague Rules and Article 81(b) of the Rotterdam Rules are essentially similar as they both provide that the carrier's liability may be determined by means of freedom of contract. A distinction should be made between the rules governing the carrier's liability in the ordinary carriage and those applicable to the carriage with special elements because carriers may be placed at an

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[1348] *Rotterdam Rules*, *supra* note 1134, art 81(b).

[1349] See *Hague Rules*, *supra* note 205, art 6.

[1350] Article 81(b) of the Rotterdam Rules is applicable only if the charater or condition of the goods (the particularity of goods) or the circumstances and terms and conditions under which the carriage is to be performed (the particularity of carriage) can justify a special agreement. There follows an example of the particularity of goods. A containership catches fire off the coast of Brazil but some of the containers are salvaged. The goods in the containers may have been damaged either by the fire or the water used to extinguish the fire, but a proper inspection is impossible. A second carrier undertakes to carry the salvaged containers from the port of refuge to their original destinations in Europe. Due to the uncertain condition of the goods, the carrier is unwilling to take responsibility for the loss or damage that may be discovered at the end of the voyage. In this case, the special "character or condition of the goods" may justify a special agreement for this carriage. The following example is given to illustrate the particularity of carriage. A carrier undertakes to ship some daily necessities for an Antarctic expedition team. Given the risks inherent in a voyage to the Antarctic area, the carrier is unwilling to promise to deliver the goods in good condition at the destination. In this case, the special "circumstances … under which the carriage is to be performed" may justify a special agreement for this carriage. See Sturley, Fujita & van der Ziel, *supra* note 6 at para 13.036. See also Dennis Minichello, "The Coming Sea Change in the Handling of Ocean Cargo Claims for Loss, Damage or Delay" (2009) 36 Transp LJ 229 at 256-258; Yvonne Baatz et al, *The Rotterdam Rules: A Practical Annotation* (London: Informa, 2009) at 252-256.

unfavorable position if the latter kind of carriage is still subject to regular contracts of carriage.[1351] As has been mentioned above, it is theoretically acceptable to leave the carrier's liability in special carriage governed by freedom of contract, but there is a risk that the anticipated balance of interests may be unachievable if one party to the contract of carriage has superior bargaining power.[1352]

[1351] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 347-348.

[1352] See Samuel Williston, "Freedom of Contract" (1921) 6 Cornell Law Quarterly 365 at 367-368; GHL Fridman, "Freedom of Contract" (1967) 2 Ottawa L Rev 1 at 3-5; Michael J Trebilcock, *The Limits of Freedom of Contract* (London: Harvard University Press, 1997) at 125-128.

Chapter III – An inspection of exoneration-related provisions in the Rotterdam Rules by the yardstick of clarity

The emergence of the Rotterdam Rules was motivated in large part by the desire for uniformity of law governing the carriage of goods by sea. Mr. Charles S. Haight, former chairman of the International Chamber of Commerce Bill of Lading Committee, said that:

> [I]n the view of the [ICC], uniformity is the one important thing. It does not matter so much precisely where you draw the line dividing the responsibilities of the 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.[1353]

One of the most significant benefits such uniformity may bring is that it is to be much easier for the parties to be aware of their responsibilities no matter where the carriage is performed and to predict the result of a cargo dispute no matter where it is resolved.[1354] The enjoyment of such benefit has to be dependent on the existence of a set of clear rules. The carrier's exemption from liability in the Rotterdam Rules has been examined from the perspective of fairness in the previous chapter. The present one is contributed to an inspection of some exoneration-related provisions therein by the yardstick of clarity.

[1353] Sturley, *History 2*, *supra* note 232 at 327.
[1354] See Thomas, *Analysis*, *supra* note 6 at 29.

Section 1 – Partial exemption in multiple-causation cases

The carrier's partial exemption from liability is laid down in Article 17.6 of the Rotterdam Rules.[1355] This provision is an improvement on its counterpart in the Hamburg Rules, but it is still enveloped by insuperable vagueness.

Paragraph 1 – Revision of the approach in the Hamburg Rules

The carrier's partial exemption from liability in multiple-causation cases induced some heated discussions during the negotiations for the Rotterdam Rules. Two methods of apportionment were proposed in the Preliminary Draft Instrument. One, similar to that contained in Article 5.7 of the Hamburg Rules,[1356] required a carrier to be fully liable unless he might prove the extent to which he was not responsible for loss, damage or delay,[1357] and the other required a carrier to be liable for the loss, damage or delay that proved to be attributable to one or more events for which he was responsible and relieved him of liability for the loss, damage or delay that proved to be attributable to one or more events for which he was not responsible.[1358] Each method had its proponents and

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[1355] *Rotterdam Rules*, *supra* note 1134, art 17.6. Article 17.6 of the Rotterdam Rules provides that:

> When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstances for which it is liable pursuant to this article.

[1356] According to Article 5.7 of the Hamburg Rules, the carrier may be partially exempt from liability only if he proves the amount of the loss, damage or delay in delivery not attributable to the fault or neglect on the part of shipowning interests. *Hamburg Rules*, *supra* note 792, art 5.7. See also *Report Tenth Session*, *supra* note 1160 at para 49.

[1357] *Preliminary Draft*, *supra* note 1157, art 6.1.4. The first half of this article provides that:

> If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable …

[1358] *Ibid*, art 6.1.4. The second half of this article provides that:

opponents.[1359] The UNCITRAL initially had chosen the first method and relegated the second one to a footnote in the second draft,[1360] but it subsequently reconsidered them.[1361] The variant of the approach in the Hamburg Rules was ultimately rejected due to the possibility that it might impose excessive burdens on carriers.[1362] The other approach mentioned above was not accepted either because there was a concern that it would deprive courts of necessary flexibility and that the "fall-back provision" was likely to unduly compel courts to equally divide liability even if there was adequate evidence in support of a different allocation.[1363]

The draft text of the carrier's partial exemption from liability was actually based on a new proposal that had been put forward during the Working Group's twelfth session.[1364] It read as follows:

> When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss,

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> … If loss, damage. or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is
> (a) liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and
> (b) not liable for the loss, damage, or delay in delivery to the extent that the carrier proves that it is attributable to one or more events for which the carrier is not liable.
> If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one-half of the loss, damage, or delay in delivery.

The last sentence of this article is actually a "fall-back provision" suggesting an equal division of liability between the claimant and the carrier in some rare situations where there is no adequate proof to figure out a specific percentage of liability the latter shall be responsible for. See *ibid*, para 91.

[1359] See *Report Tenth Session*, *supra* note 1160 at paras 48-52; *Report Twelfth Session*, *supra* note 1164 at paras 140-141.

[1360] *Draft Instrument*, *supra* note 1159, art 14(3), n 79.

[1361] See *Report Twelfth Session*, *supra* note 1164 at paras 135-144.

[1362] It was argued that the draft instrument should not place the carrier in a situation where the carrier would be liable for the entire loss where his fault had only contributed to a minor proportion of the loss. See *ibid* at para 140.

[1363] See *ibid* at paras 140-142; *Report Fourteenth Session*, *supra* note 1215 at para 73.

[1364] See *Report Twelfth Session*, *supra* note 1164 at para 137.

> damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability shall be apportioned on the basis established in the previous paragraphs.[1365]

This text got broad support.[1366] The UNCITRAL Secretariat made several minor modifications to it in the third reading of the draft convention to render it succinct.[1367] The modified text was smoothly approved without any further discussions.[1368] At the Working Group's final session, Article 17 went through another review,[1369] but the carrier's partial exemption was unaffected.[1370] It was widely believed that "Paragragh 6 … had been the subject of extensive debate within the Working Group and the current text reflected a compromise that many delegations regarded as an essential piece of the overall balance."[1371]

Paragraph 2 – Insuperable vagueness

In *The Vallescura*, a famous principle, known as the "Vallescura principle", was stated.[1372] According to it, even if a claimant has proven that a carrier is liable, the latter still may limit his liability by proving whether and to what extent the causes for which he shall not be responsible coexist with those for which he shall be responsible.[1373] Since

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[1365] *Report Fourteenth Session*, *supra* note 1215 at para 75.
[1366] See *ibid* at paras 68-69, 72-74, 77.
[1367] Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.107.
[1368] See *Report Nineteenth Session*, *supra* note 1175 at para 74.
[1369] See *Report Twenty-first Session*, *supra* note 1178 at paras 54-58.
[1370] See *ibid* at para 58.
[1371] *UNCITRAL Report*, *supra* note 1187 at para 73.
[1372] See William Tetley, "Loss and Damage under Marine Claims" (1964) 10 McGill LJ 105 at 114 [Tetley, "Marine Claims"].
[1373] *The Vallescura*, 293 US 296 at 303-304 (SC 1934).

that case, the divisibility of the carrier's liability in cargo disputes has been well accepted.[1374] The real controversy has always revolved around how to do such division.

Article 5.7 of the Hamburg Rules and Article 17.6 of the Rotterdam Rules provide for two different methods of apportionment. The former requires a carrier wishing to be partially exempt to prove the amount of the loss, damage or delay in delivery not attributable to his own fault or fault on the part of his servants or agents.[1375] However, it is quite difficult, or rather impossible, for a carrier to figure out the specific amount of the loss irrelevant to such fault when there is more than one contributory factor. Article 17.6 of the Rotterdam Rules reaffirms the carrier's entitlement to partial exemption pursuant to other paragraphs of this article without giving any details about how liability may be apportioned.[1376] Likewise, Articles 17.1 to 17.5 of the Rules merely provide for the circumstances where carriers shall be liable and those where they shall not be without containing any reference to the method of apportionment of liability when two categories of circumstances jointly contribute to loss, damage or delay in delivery.[1377]

At first sight, Article 5.7 of the Hamburg Rules appears clearer as it at least roughly indicates that the carrier's partial exemption depends on the amount of loss not

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[1374] See von Ziegler, "Contracting Carrier", *supra* note 1005 at 347; Tetley, "Marine Claims", *supra* note 1372 at 114; William Tetley, "Reform of Carriage of Goods – The UNCITRAL Draft and Senate COGSA '99" (2003) 28 Tul Mar LJ 1 at 12.

[1375] *Hamburg Rules*, *supra* note 792, art 5.7.

[1376] Thomas, *Analysis*, *supra* note 6 at 156.

[1377] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.108.

attributable to fault on the part of shipowning interests.[1378] However, the method contained in that provision is hardly practicable.[1379] A carrier may prove that an excepted peril has contributed somehow to loss but he is usually unable to prove to what extent it has been contributory. Similarly, a claimant may prove that an event outside the "laundry list" has contributed somehow to loss but he is usually unable to prove to what extent it has been contributory.[1380] The poor applicability of Article 5.7 of the Hamburg Rules led to the desire for a new method of apportionment, but the truth is that it may be impossible to prescribe in a legal instrument any accurate rules on how to apportion liability in multiple-causation cases.[1381] Mr. Anthony Diamond criticized Article 17.6 of the Rotterdam Rules for its silence about how liability shall be divided which might exacerbate the existing confusion in this respect.[1382] However, given the complexity of multiple-causation cases,[1383] it may be a wise choice to refrain from setting a rigid method of apportionment.[1384] The vagueness embodied in the provisions of the Rotterdam Rules relating to the carrier's partial exemption is excusable or even welcome as it is such vagueness that enables those provisions to be applicable to a variety of cases. As Professor Alexander von Ziegler has stated, the method in Article 17.6 of the Rotterdam Rules is more flexible than that in Article 5.7 of the Hamburg Rules, and the

[1378] See Thomas, *Analysis*, *supra* note 6 at 156.
[1379] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 110.
[1380] Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.102.
[1381] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 110.
[1382] Diamond, "Rotterdam Rules", *supra* note 1125 at 477.
[1383] Professor Francesco Berlingieri has claimed that there could be as many as three different types of concurring causes: (a) each event could have caused the entire loss, damage or delay in delivery; (b) each event caused only a portion of the loss; and (c) each event was insufficient independently to cause the loss, damage or delay in delivery. Francesco Berlingieri, "Revisiting the Rotterdam Rules" (2010) 37 LMCLQ 583 at 601 [Berlingieri, "Revisiting"].
[1384] See *Report Fourteenth Session*, *supra* note 1215 at paras 67-80.

former would probably foster adequate judgments and, more importantly, bring about better settlements.[1385]

Section 2 – Intricate burden of proof

Burden of proof is essential to the determination of the carrier's liability.[1386] There is no articulated burden of proof in the Hague Rules. That gap has been filled in Article 17 of the Rotterdam Rules.[1387]

Paragraph 1 – Burden of proof swinging back and forth

Article 17 of the Rotterdam Rules consists of six provisions that respectively deal with claimant's *prima facie* case, carrier's burden of proving absence of fault, new "laundry list", claimant's chance to overturn the carrier's defense, role of unseaworthiness and apportionment of liability in multiple-causation cases.[1388] Burden of proof runs through this article like a "golden thread".[1389]

For starters, the claimant has to establish a *prima facie* case against the carrier pursuant to Article 17.1 of the Rules which requires him to prove (a) that his goods have been lost or damaged, or that their delivery has been delayed; and (b) that the loss,

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[1385] See von Ziegler, "Contracting Carrier", *supra* note 1005 at 347.
[1386] See *ibid*.
[1387] During the negotiations for the convention, the process was thought to involve four steps. However, it should be noted that the availability of different options along the process may render the counting uncertain. In practice, most cases end before the fourth step, whatever method is used for counting, but more steps are still likely to be involved in some complicated cases. See *Report Twelfth Session*, *supra* note 1164 at para 88. See also Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.049, n 128.
[1388] See generally von Ziegler, Schelin & Zunarelli, *supra* note 5 at 98-110.
[1389] See von Ziegler, "Contracting Carrier", *supra* note 1005 at 347-348.

damage or delay, or the event or circumstance that caused or contributed to it took place during the carrier's period of responsibility.[1390]

The carrier may defend himself by proving either that the cause or one of the causes of the loss, damage or delay is not attributable to his fault or fault of any person for whom he is responsible or that one or more excepted perils enumerated in the "laundry list" caused or contributed to the loss, damage or delay.[1391] If the carrier manages to prove either of them, burden of proof is to shift to the claimant.[1392]

If the carrier has proven that the cause or one of the causes of the loss, damage or delay is not attributable to his fault or fault of any person for whom he is responsible, the claimant wishing to be indemnified may discredit the evidence produced by the former.[1393] If the carrier has pleaded one or more exceptions enumerated in Article 17.3 of the Rules, the claimant may refute his defense by proving (a) that the excepted perils invoked by him are actually attributable to his fault or fault of a person for whom he is responsible,[1394] (b) that an event or circumstance outside the "laundry list" contributed to

[1390] Article 17.1 of the Rotterdam Rules explicitly describes the second requirement, and the first is actually also implied in this provision. In any event, the proof that the loss, damage or delay occurred during the carrier's period of responsibility is always on the premise that the goods were really lost or damaged, or that their delivery was really delayed. Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.050, n 129.

[1391] *Rotterdam Rules*, *supra* note 1134, arts 17.2, 17.3.

[1392] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.051.

[1393] See Helen Ford, "Burden of Proof" (1934) 1 Alta L Q 219 at 219-220; Charles T McCormick, "Charges on Presumptions and Burden of Proof" (1926) 5 NCL Rev 291 at 293.

[1394] See *Rotterdam Rules*, *supra* note 1134, art 17.4(a).

the loss, damage or delay,[1395] or (c) that the loss, damage or delay was caused by unseaworthiness.[1396]

Confronted with the claimant's allegation that fault on the part of shipowning interests caused or contributed to the excepted perils on which he relies, the carrier may defend himself by discrediting the evidence produced by the former.[1397] He may also refute the claimant's allegation based on Article 17.4(b) or Article 17.5(a) of the Rules by accordingly proving (a) that the event or circumstance outside the "laundry list" which contributed to the loss, damage or delay is not attributable to his fault or fault of any person for whom he is responsible,[1398] or (b) that it was not unseaworthiness that caused the loss, damage or delay or that he has complied with his obligation to exercise due diligence.[1399]

It is unnecessary for adjudicators to proceed through all those steps in every cargo dispute. The cases, in which loss, damage or delay is entirely attributable to fault on the part of shipowning interests, may be resolved within the first step. Those where loss, damage or delay has nothing to do with such fault may be settled within the first two. The multiple-step process articulated in Article 17 of the Rules is not a script of trials but an analytical framework that adjudicators are expected to employ in determining who shall

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[1395] See *ibid*, art 17.4(b).
[1396] See *ibid*, art 17.5(a).
[1397] See Bruce L Hay, "Allocating Burden of Proof" (1997) 72 Ind LJ 651 at 653.
[1398] See *Rotterdam Rules*, *supra* note 1134, art 17.4(b).
[1399] See *ibid*, art 17.5(b).

be responsible and to what extent he shall be responsible.[1400] A trial progresses along the process as far as a decision can be made.[1401]

Paragraph 2 – Superfluous circumlocution

Article 17 of the Rotterdam Rules has been applauded for providing parties, lawyers and judges with valuable guidelines on allocation of burden of proof,[1402] but it has also been criticized for its unparalleled complexity.[1403]

The multiple-step process contained in Article 17 of the Rules is not an innovation emerging out of the void. As a matter of fact, Articles 17.1 and 17.2 of the Rules are largely based on Article 5.1 of the Hamburg Rules and Article 4.2(q) of the Hague Rules, the "laundry list" in Article 17.3 of the Rules is no more than an updated version of its counterpart in Article 4.2 of the Hague Rules, and Article 17.5 of the Rules derives from Article 4.1 of the Hague Rules. As Professor Francesco Berlingieri has remarked, such process has existed for a long time in practice prior to the emergence of the Rules.[1404] In the 1950s, English courts began to adopt the so-called "long route" when adjudicating on

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[1400] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 5.055.

[1401] See *ibid*.

[1402] See von Ziegler, "Contracting Carrier", *supra* note 1005 at 348; Berlingieri, "Revisiting", *supra* note 1383 at 596.

[1403] Professor Guy Lefebvre contended that Article 17 of the Rotterdam Rules "n'aide pas à clarifier le régime de responsabilité du transporteur en ce qu'il multiplie à la fois les règles relatives à la responsabilité et celles concernant l'administration de la preuve." Guy Lefebvre, "Le projet préliminaire de la CNUDCI et la responsabilité du transporteur de marchandises par mer: périple difficile ou échouement?" (2003) 37 RJT 431 at 471. See also Diamond, "Rotterdam Rules", *supra* note 1125 at 472; Guy Lefebvre, "La responsabilité du transporteur de marchandises par mer dans le cadre des nouvelles règles de Rotterdam: un labyrinthe juridique" in Générosa Bras Miranda & Benoît Moore, eds, *Mélanges Adrian Popovici: les couleurs du droit* (Montreal: Éditions Thémis, 2010) 487 at 526; Jiao Jie & Guy Lefebvre, "The Carrier's Responsibilities and the Rotterdam Rules: A Critical Voice" (2011) 25 Journal of Comparative Law 112 at 125.

[1404] See Berlingieri, "Revisiting", *supra* note 1383 at 596.

cargo claims filed pursuant to the Hague Rules.[1405] The "long route" was comprised of four phases: (a) the claimant needed to establish a *prima facie* case against the carrier in the first phase; (b) the carrier might defend himself in the following phase by invoking one or more exceptions enumerated in the "laundry list";[1406] (c) the claimant then might refute the carrier's defense by proving that other factors than the excepted perils invoked by the carrier, including unseaworthiness of the ship provided by the latter, caused the loss or damage;[1407] and (d) the carrier might shore his defense in the last phase by proving that unseaworthiness alleged by the claimant existed notwithstanding his exercise of due diligence.[1408]

Fault has played an important part in the determination of the carrier's liability since the era of the Hague Rules. The carrier's immunities in the Hague Rules, except for those prescribed in Articles 4.2(a) and 4.2(b) thereof, are essentially based on absence of fault on the part of shipowning interests.[1409] The causal relationship between the carrier's exoneration and absence of fault on the part of shipowning interests is stipulated in a

[1405] See e.g. *Minister of Food*, *supra* note 693 at 271.

[1406] The carrier was able to defend himself by proving, pursuant to Article 4.2(q) of the Hague Rules, that the loss or damage was not attributable to his fault or the fault of his servants or agents, which is quite similar to the burden of proof under Article 17.2 of the Rotterdam Rules. See Baatz et al, *supra* note 1350 at 216. See also Michael F Sturley, "Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States" (2009) 44 Tex Int'l LJ 427 at 435 [Sturley, "Modernizing and Reforming"].

[1407] In the "long route", it was not clearly indicated that the claimant could overturn the carrier's defense by proving that the fault on the part of shipowning interests caused or contributed to the excepted peril pleaded by the latter, but such an alternative was well accepted in judicial precedents. It was widely recognized that the carrier should be deprived wholly or partly of his exculpatory rights if his fault or the fault of his servants or agents caused or contributed to the loss or damage. See Girvin, *Carriage*, *supra* note 53 at para 10.154; *Mormacsaga*, *supra* note 714 at 518.

[1408] Clarke, *Aspects*, *supra* note 74 at 138-139. See also Theodora Nikaki, "The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know?" (2010) 35 Tul Mar LJ 1 at 20-22.

[1409] See David M Sassoon, "Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons" (1972) 3 J Mar L & Com 759 at 764-766; Hashim R Al-Jazairy, *The Maritime Carrier's Liability under the Hague Rules, Visby Rules and Hamburg Rules* (Ph.D. Thesis, University of Glasgow, 1983) [unpublished] at 65-68.

quite explicit fashion in Article 5.1 of the Hamburg Rules which provides that a carrier shall be liable for loss, damage or deley in delivery unless he is able to prove that "he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."[1410]

In the Rotterdam Rules, fault runs through the multiple-step process designed for the determination of the carrier's liability. In a cargo dispute, the carrier is presumed to be at fault if the claimant proves that "the loss, damage or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility";[1411] the carrier may be relieved of liability by either directly proving absence of fault on the part of shipowning interests or resorting to presumption of absence of fault;[1412] the claimant may refute the carrier's defense by proving either that the excepted perils pleaded by the latter are attributable to fault on the part of shipowning interests or that an event or circumstance not covered by such presumption, including unseaworthiness, contributed to the loss, damage or delay in delivery;[1413] and the carrier may still defend himself by proving that the event or circumstance alleged by the

[1410] See Hakan Karan, *The Carrier's Liability under International Maritime Conventions (The Hague, Hague-Visby and Hamburg Rules)* (Ph.D. Thesis, London Guildhall University, 1999) at 123-126; CW O'Hare, "Cargo Dispute Resolution and the Hamburg Rules" (1980) 29 ICLQ 219 at 222-223 [O'Hare, "Dispute Resolution"]; Samuel Robert Mandelbaum, "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 Transnat'l L & Pol'y 1 at 19.

[1411] See *Rotterdam Rules*, *supra* note 1134, art 17.1.

[1412] See *ibid*, arts 17.2, 17.3.

[1413] See *ibid*, arts 17.4, 17.5(a).

claimant as the real cause of loss, damage or delay is not attributable to fault on the part of shipowning interests.[1414]

The question to be posed in the present paragraph is whether it is really necessary to include in the Rotterdam Rules such an intricate process. The answer may be no as such process can be replaced by an initial setting of burden of proof analogous to that contained in Article 5.1 of the Hamburg Rules and some basic principles of evidence law. Article 5.1 of the Hamburg Rules provides in concise terms (a) that it is the claimant's duty to initiate a cargo claim by proving that the loss, damage or delay, or the event or circumstance that caused or contributed to it took place during the carrier's period of responsibility and (b) that the carrier's entitlement to exemption from liability is based on his proof of absence of fault on the part of shipowning interests.[1415] Once the opening proof is fulfilled by the claimant, there follows a "dialogue" between him and the carrier that revolves around the contribution of fault on the part of shipowning interests to the occurrence of loss, damage or delay in delivery.[1416] In the "dialogue", the carrier and the claimant take turns to make moves.[1417] The former tries to release himself from liability

[1414] See *ibid*, arts 17.4(b), 17.5(b).

[1415] See Tan, "Act 1972", *supra* note 820 at 204-205; K Gronfors, "The Hamburg Rules – Failure or Success" (1978) J Bus L 334 at 336; O'Hare, "Dispute Resolution", *supra* note 1410 at 221-222; N Gaskell, "Damages, Delay and Limitation of Liability under the Hamburg Rules 1978" in Berlingieri, *supra* note 1241, 129 at 132-133; R Herber, "The Hamburg Rules: Origin and Need for the New Liability System" in Berlingieri, *supra* note 1241, 33 at 35-37.

[1416] See Douglas N Walton, "Burden of Proof" (1988) 2 Argumentation 233 at 235-236. See also Sanchirico, *supra* note 716 at 435-437.

[1417] Some scholars have noted that burden of proof is not really governed by a fixed pattern in practice. It is usually courts that give claimants and carriers necessary instructions on the production of evidence they have. Professor Emmanuel Du Pontavice argued that:

> […] dans la lutte judiciaire pratiquement, contrairement à la description théorique, chacun apporte ses preuves d'emblée sans se soucier de savoir qui a la charge de la preuve: il serait bien dangereux à un défendeur n'ayant pas la charge de la preuve, par exemple, d'attendre que l'adversaire ait apporté la

by making every effort to establish absence of fault on the part of shipowning interests,[1418] while the latter does his best to disprove what the former has stated.[1419] The "dialogue" ends when one side fails to produce effective and convincing evidence during his round, and the other side wins the case.[1420]

Conciseness has always been a vital quality of legal instruments that distinguishes them from literary works.[1421] It not only represents the pragmatic purpose of a legal instrument but also leaves necessary discretion to adjudicators.[1422] The multiple-step process in Article 17 of the Rotterdam Rules is not irreplaceable. An equivalent but much simpler layout concerning burden of proof could have been adopted to achieve what it was designed for.[1423]

> preuve qui lui incombe. Le procès n'est pas organisé de telle sorte, du reste que le juge ait à l'avertir avant de rendre sa sentence que le demandeur a apporté la preuve qui lui incombait et que c'est maintenant à lui de prouver une exception …

Professor William Tetley said that "[m]ost courts solve the problem by calling on both parties to make what proof is available to them." Emmanuel Du Pontavice, "La loi du 18 juin 1966 sur les contrats d'affrètement et de transport maritime" (1966) 19 Rev trim dr com 675 at 696; Tetley, *Claims*, *supra* note 311 at 382.

[1418] The carrier may produce evidence showing that an event or circumstance having no *prima facie* relevance to the fault on the part of shipowning interests caused the loss, damage or delay in delivery, as an alternative to directly proving absence of fault. There is no fundamental difference between the two options. See James, *supra* note 259 at 688; Charles L Black, Jr., "The Bremen, COGSA and the Problem of Conflicting Interpretation" (1973) 6 Vand J Transnat'l L 365 at 367; Chandler, "Comparison", *supra* note 931 at 283-284.

[1419] Accordingly, the claimant may produce evidence showing that an event or circumstance not having *prima facie* irrelevance to the fault on the part of shipowning interests caused the loss, damage or delay in delivery, as an alternative to directly disproving absence of fault. See Baatz et al, *supra* note 1350 at 223; Guo Ping & Zhang Wenguang, "Commentary on the Rotterdam Rules" (2009) 17 Global L Rev 133 at 136-138.

[1420] See Hyun, *supra* note 716 at 257-258; Fisk, *supra* note 951 at 259-261; Hay, *supra* note 1397 at 653; Ronald J Allen, "Presumptions, Inferences and Burden of Proof in Federal Civil Actions – An Anatomy of Unnecessary Ambiguity and A Proposal for Reform" (1982) 76 Nw UL Rev 892 at 895.

[1421] See Sidney F Parham, Jr., "The Fundamentals of Legal Draftsmanship" (1966) 52 ABA J 831 at 831.

[1422] See Michael Zander, *The Law-making Process*, 7th ed (Oxford: Hart Publishing, 2015) at 79-82; Yves R Simon, Vukan Kuic & Russell Hittinger, *The Tradition of Natural Law: A Philosopher's Reflections*, 7th ed (New York: Fordham University Press, 2006) at 53-56.

[1423] Professor Jiao Jie and Professor Guy Lefebvre argued that the regime of the carrier's responsibilities in the Rotterdam Rules could have been much simpler if it had been based on objective liability of Roman law. The latter entitles carriers to exemption from liability only if loss or damage is caused by act of God, act of public enemies, inherent vice of goods, or fault on the part of cargo interests. Jiao & Lefebvre, *supra* note 1403 at 125. See also Guy

Lefebvre & Jiao Jie, "The New Rotterdam Rules on the Maritime Transport: A Jural Labyrinth", *International Business Daily* (23 April 2011) A3.

Conclusion of Part IV

The Hamburg Rules have been described as a product of politics as they were conceived mainly to achieve political goals rather than meet commercial needs.[1424] In contrast, much attention was paid to the latter for the advent of the Rotterdam Rules.[1425] Pragmatism is the philosophy propping up the whole Rules.[1426] It was to solve practical problems which might be encountered by the parties involved in the carriage of goods by sea that the Rules were created.[1427] Most of the delegations having taken an active part in the negotiations for the Rules either had industry experts as their members or consulted with them on a regular basis between sessions.[1428]

The Rotterdam Rules contain a number of changes to the existing legal regime governing the carriage of goods by sea,[1429] but those changes are not earth-shaking.[1430] One of the most radical changes, the deletion of the nautical fault exception,[1431] even does not count as a real change for those countries that have already adopted the

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[1424] See Frederick, *supra* note 238 at 87.
[1425] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.016.
[1426] See Thomas, *Analysis*, *supra* note 6 at 24.
[1427] See Cecilia Fresnedo de Aguirre, "The Rotterdam Rules from the Perspective of a Country that Is a Consumer of Shipping Services" (2009) 14 Unif L Rev 869 at 872-873.
[1428] The two largest delegations in the Working Group were from China and the United States. Both of them were equipped with enough industry experts to advise the government representatives. Certain smaller delegations also had industry experts who regularly attended meetings. Denmark, for instance, usually sent two delegates to the Working Group. One was a government official and the other was an expert. See Thomas, *Analysis*, *supra* note 6 at 25, n 173.
[1429] See Zhu Zengjie, "Evaluation on the Rotterdam Rules" (2009) 20 Annual of China Maritime Law 9 at 9-10.
[1430] See Sturley, Fujita & van der Ziel, *supra* note 6 at para 1.027.
[1431] One of the Working Group's few substantive decisions during the first reading was the removal of the nautical fault exception. See *Report Tenth Session*, *supra* note 1160 at para 36. See also *Report Eleventh Session*, *supra* note 1161 at para 163.

Hamburg Rules or whose courts rarely, if ever, uphold such defense.[1432] Another conspicuous change is the extension of the carrier's period of responsibility.[1433] Although such a wide coverage is not included in other transport conventions, it is not surprisingly innovative as contract clauses extending the coverage of marine legal regime to inland carriage have been sanctioned by some courts for decades.[1434] The provisions on volume contract derive from the long-standing idea that contracts, the parties to which have equal bargaining power, do not have to be subject to the regime on a mandatory basis.[1435] However, the continuity between the Rotterdam Rules and traditions cannot guarantee that the Rules would be well accepted by the international community.[1436] So far, there are only three states that have already officially approved the Rules.[1437] Complaints have been heard from both the shipowning and cargo-owning sides that the Rules unduly tilt in favor of the opposing side.[1438] Part IV focuses on the carrier's

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[1432] See Sturley, "Uniformity", *supra* note 799 at 577.

[1433] See *Report Ninth Session*, *supra* note 1227 at paras 26-32; *Rotterdam Rules*, *supra* note 1134, art 12.

[1434] See e.g. *Norfolk Southern Railway Co v Kirby*, 543 US 14 (SC 2004). In this case, it was admitted that the U.S. COGSA could be used to govern liability for loss or damage arising from rail derailment on the basis of clauses paramount in a multimodal bill of lading.

[1435] See *Hague Rules*, *supra* note 205, art 5; *Hamburg Rules*, *supra* note 792, art 2.3. Article 5 of the Hague Rules provides that:

> A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and obligations under this Convention, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.
>
> The provisions of this Convention shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of this Convention. Nothing in these rules shall be held to prevent the insertion in a bill of ladig of any lawful provision regarding general average.

Article 2.3 of the Hamburg Rules provides that:

> The provisions of this Convention are not applicable to charter-parties. However, where a bill of lading is issued pursuant to a charter-party, the provisions of the Convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer.

[1436] See Thomas, *Analysis*, *supra* note 6 at 32.

[1437] Congo, Togo and Spain deposited such instruments respectively on January 28, 2014, July 17, 2012 and January 19, 2011.

[1438] See Thomas, *Analysis*, *supra* note 6 at 32. See also Si, "Prospects", *supra* note 8 at 3-5.

exemption from liability in the Rotterdam Rules that may affect, to a large degree, the destiny thereof.[1439]

In the second chapter of this part, the carrier's immunities in the Rotterdam Rules have been under scrutiny from the perspective of fairness. The basis of the carrier's liability under the Rules exhibits the spirit of fault-based liability that gives full expression to fairness,[1440] though it is stated in a roundabout way.[1441] There is a new "laundry list" in Article 17.3 of the Rules that embraces some changes to its counterpart in Article 4.2 of the Hague Rules.[1442] The exceptions contained in the former are basically uncontroversial except for the one relating to fire that may afford carriers undue protection in fire-related cases.[1443] With respect to those exceptions outside the "laundry list" and applicable in certain particular circumstances, there is no fundamental unreasonableness in them.[1444] Nevertheless, there is a risk that freedom of contract, when used to determine exculpatory rights of carriers in shipment of live animals or special carriage, may probably be abused by those having superior bargaining power.[1445]

1439 See Sturley, "Modernizing and Reforming", *supra* note 1406 at 436-437.
1440 See generally Si & Li, *supra* note 1108 at 932-934.
1441 See *ibid* at 932-933.
1442 See generally Berlingieri, "Comparative", *supra* note 10 at 8-13.
1443 See Robert H Thede, "Statutory Limitations (Other than Harter and COGSA) of Carrier's Liability to Cargo – Limitation of Liability and the Fire Statute" (1971) 45 Tul L Rev 959 at 968; *Report Fourteenth Session*, *supra* note 1215 at para 59; *Report Thirteenth Session*, *supra* note 1170 at para 94; *Report Twelfth Session*, *supra* note 1164 at para 126; *Report Tenth Session*, *supra* note 1160 at para 37.
1444 See Si & Li, *supra* note 1108 at 933-934.
1445 See Jiang Yuechuan & Zhu Zuoxian, "Legislative Features and Analysis of Several Issues Concerning Vital Interests of the Rotterdam Rules" (2010) 21 Annual of China Maritime Law 26 at 29-30; Tetley, "Criticisms", *supra* note 7 at 627; Thomas, *Analysis*, *supra* note 6 at 295. See also Tetley, *Claims*, *supra* note 311 at 317.

In the third chapter, Article 17.6 and the allocation of burden of proof running through Article 17 have been examined under the dimension of clarity. The former may be criticized for containing no specific method of apportionment of liability applicable to multiple-causation cases,[1446] but such vagueness is indeed incurable.[1447] The latter involves an unnecessarily complex layout that can be replaced by an equivalent but much simpler one based on an initial setting of burden of proof and some basic rules of evidence law.[1448]

In conclusion, though lots of efforts were made for the establishment in the Rotterdam Rules of a desirable scheme of the carrier's exemption from liability, the outcome is not satisfactory.

[1446] See Thomas, *Analysis*, *supra* note 6 at 293; Diamond, "Next Convention", *supra* note 1239 at 152; Tetley, "Criticisms", *supra* note 7 at 627.

[1447] See generally Si & Li, *supra* note 1108 at 932-934; von Ziegler, Schelin & Zunarelli, *supra* note 5 at 98-101.

[1448] See Sweeney, "Allocation", *supra* note 254 at 515-517; Tetley, "Commentary", *supra* note 876 at 7; Pixa, *supra* note 4 at 440-442; Edwin C Conrad, *Modern Trial Evidence* (St Paul: West Publishing Company, 1956) at 110; Ian H Dennis, *The Law of Evidence*, 5th ed (London: Sweet & Maxwell, 2013) at 96-98.

General conclusion

Up to now, the carriage of goods by sea throughout the world is still governed by competing laws. Such chaos has given rise to a predicament described by some authors as the legal "Tower of Babel".[1449] So far, there have been three well-known maritime conventions, namely the Hague Rules, the Hamburg Rules and the Rotterdam Rules. The Hague Rules purported to unify certain rules of law relating to bills of lading and that purpose was indeed achieved to a large degree by the beginning of the Second World War.[1450] However, the Rules gradually lost their popularity because of changing technological, economic and political factors.[1451] In the late 1950s, the CMI started a renovation project of the Hague Rules that culminated with the emergence of the Visby Protocol in 1968.[1452] Ten years later, the Hamburg Rules were approved.[1453] Some states opted for the Hague Rules or their variants based on the Visby Protocol of 1968 or the

[1449] See Carole Murray, David Holloway & Daren Timson-Hunt, *The Law and Practice of International Trade*, 12th ed (London: Sweet & Maxwell, 2012) at 135. See also Lorena Sales Pallarés, "A Brief Approach to the Rotterdam Rules: Between Hope and Disappointment" (2011) 42 J Mar L & Com 453 at 453-454.

[1450] See Sturley, "COGSA", *supra* note 109 at 55-56; Sturley, "Uniformity", *supra* note 799 at 560.

[1451] See Kendall & Buckley, *supra* note 807 at 171-225; René de la Pedraja Tomán, *A Historical Dictionary of the U.S. Merchant Marine and Shipping Industry: Since the Introduction of Steam* (Westport: Greenwood Press, 1994) at 149-152; Richard W Palmer & Frank P DeGiulio, "Terminal Operations and Multimodal Carriage: History and Prognosis" (1989) 64 Tul L Rev 281 at 285-295; Frederick, *supra* note 238 at 87; Sturley, "National Courts", *supra* note 1134 at 736.

[1452] See Richardson, *supra* note 284 at 30-32.

[1453] See Sweeney, "Draft I", *supra* note 786 at 76.

SDR Protocol of 1979,[1454] while others opted for the Hamburg Rules. There are also some domestic laws modelled on more than one international instrument.[1455]

The carrier's exemption from liability has a longer history than international legislation concerning the carriage of goods by sea.[1456] In the earliest stage, strict liability was imposed on carriers who could hardly be relieved of liability for loss of or damage to the goods in their custody.[1457] They were treated as "insurers" of the goods they carried, but they were essentially different from ordinary insurers taking responsibilities in consideration of premiums in proportion to anticipated risks.[1458] By the end of the nineteenth century, carriers having gained overwhelming bargaining power radically changed the allocation of risks to their disadvantage by arbitrarily inserting in bills of lading all kinds of exculpatory clauses.[1459] In 1893, the Harter Act was enacted in the U.S. to place some restrictions on the carrier's exemption from liability.[1460] Some other countries followed the trend by promulgating their own domestic laws on the carriage of

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[1454] See generally *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968*, 21 December 1979, 1412 UNTS 146, [1993] ATS 23.

[1455] See Sturley, "COGSA", *supra* note 109 at 23, n 177; Tetley, "Limitations", *supra* note 906 at 149-155; Sturley, "Uniformity", *supra* note 799 at 561.

[1456] See Mandelbaum, "Standards", *supra* note 64 at 472-473.

[1457] See Fletcher, *supra* note 82 at 96-97.

[1458] See Beale, *supra* note 24 at 158. See also Robert E Keeton, "Insurance Law Rights at Variance with Policy Provisions" (1970) 83 Harv L Rev 961 at 965-966; Robert H Jerry & Douglas R Richmond, *Understanding Insurance Law*, 5th ed (New Providence: LexisNexis, 2012) at 115-117; Spencer L Kimball, "Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law" (1961) 45 Minn L Rev 471 at 473-475; Roger C Henderson, "Doctrine of Reasonable Expectations in Insurance Law after Two Decades" (1990) 51 Ohio St LJ 823 at 825; ER Hardy Ivamy, *General Principles of Insurance Law*, 6th ed (London: Butterworths, 1993) at 126-128.

[1459] Booysen, *supra* note 176 at 297.

[1460] See Yung F Chiang, "The Applicability of COGSA and the Harter Act to Water Bills of Lading" (1972) 14 Boston College Industrial and Commercial Law Review 267 at 269.

goods by sea.[1461] The international community then stirred itself to find a solution applicable on a larger scale.[1462] It may be stated without exaggeration that the carrier's exemption from liability constituted a strong impetus behind the growth of international shipping rules.[1463]

There has been a long history of the pursuit of a set of uniform rules governing the worldwide carriage of goods by sea.[1464] The strong desire for uniformity stems from the awareness that conflicting laws may "destroy aesthetic symmetry in the international legal order" and "impose real costs on the commercial system."[1465] The eventual achievement of such uniformity must depend on a variety of factors.[1466] A well-designed maritime convention is undoubtedly one of them.[1467] The elaborate review in the present thesis aims to reveal what has been accomplished in the past and what shall be accomplished in the future with respect to the regulation of the carrier's exemption from

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[1461] See generally Girvin, *Carriage*, *supra* note 53 at paras 14.11-14.13. See also FL Wiswall, Jr., "Uniformity in Maritime Law: The Domestic Impact of International Maritime Regulation" (1983) 57 Tul L Rev 1208 at 1209-1212.

[1462] See Sturley, "Uniformity", *supra* note 799 at 553-555; Paul Myburgh, "Uniformity or Unilateralism in the Law of Carriage of Goods by Sea?" (2000) 31 VUWLR 355 at 357-358.

[1463] See Charles S Haight, Jr., "Babel Afloat: Some Reflections on Uniformity in Maritime Law" (1997) 28 J Mar L & Com 189 at 191-193; Gordon W Paulsen, "An Historical Overview of the Development of Uniformity in International Maritime Law" (1983) 57 Tul L Rev 1065 at 1068-1069. See also Tetley, "Uniformity", *supra* note 18 at 778-780.

[1464] See Abdulla Hassan Mohammed, *The Exclusions and Limitations of the Liability of the Carrier by Sea: A Comparison Study of English and U.A.E. Laws* (Ph.D. Thesis, University of Southampton, 1989) [unpublished] at 56-58; Archibald J Wolfe, *Liability of Ocean Carriers for Cargo Damage or Loss: Progress Toward Uniform Legislation* (Washington DC: Government Printing Office, 1924) at 80-82; Gilmore & Black, *supra* note 171 at 191-192; Scrutton, *supra* note 94 at 421-422; Francesco Berlingieri, "Uniformity in Maritime Law and Implementation of International Conventions" (1987) 18 J Mar L & Com 317 at 317, 349. See also Patrick JS Griggs, "Uniformity of Maritime Law – An International Perspective" (1999) 73 Tul L Rev 1551 at 1555-1558; Patrick JS Griggs, "Obstacles to Uniformity of Maritime Law: The Nicholas J Healy Lecture" (2003) 34 J Mar L & Com 191 at 197-198 [Griggs, "Obstacles"].

[1465] *Vimar Seguros y Reaseguros SA v M/V Sky Reefer*, 115 S Ct 2322 at 2328 (US 1995). See also *Robert C Herd & Co v Krawill Machinery Corp*, 359 US 297 at 311 (SC 1959); Sturley, "National Courts", *supra* note 1134 at 736.

[1466] See generally Griggs, "Obstacles", *supra* note 1464 at 198-208.

[1467] See generally Sturley, "Uniformity", *supra* note 799 at 560-564.

liability. Although it is more of a theoretical analysis, it still may shed some light on the road ahead.

It can be seen from the expositions in this thesis that none of the Hague, Hamburg and Rotterdam Rules have contained a sufficiently satisfactory scheme of the carrier's exemption from liability.[1468] The nautical fault exception and the fire exception in the Hague Rules have proven to be obsolete and unreasonable,[1469] though they used to be justifiable when the Rules came into being.[1470] The ambiguous relationship between the carrier's duties and immunities and the fragmentary allocation of burden of proof in the Rules have been subject to criticism as well.[1471] In contrast, the Hamburg Rules were drafted in a more organized manner.[1472] One of the visible changes is the replacement of the "laundry list" by a unitary basis of liability. Such change has resulted in the elimination of the notorious nautical fault exception and the emergence of a clear layout of burden of proof.[1473] Nonetheless, the Hamburg Rules are not perfect as they fail to rectify some problems found in the Hague Rules and have some ill-designed provisions.[1474] The new scheme of the carrier's exemption from liability in the

[1468] See generally Honnold, "Clarity", *supra* note 22; Tetley, "Criticisms", *supra* note 7.
[1469] See Leslie W Taylor, "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 32 at 35-38; Maris Lejnieks, "Diverging Solutions in the Harmonisation of Carriage of Goods by Sea: Which Approach to Choose" (2003) 8 Unif L Rev 303 at 305-306.
[1470] See Yancey, *supra* note 3 at 1240-1242; James, *supra* note 259 at 688; William Tetley, "Selected Problems under the Hague Rules" (1965) 11 McGill LJ 19 at 22-25.
[1471] See Honnold, "Clarity", *supra* note 22 at 83-86; Chandler, "Comparison", *supra* note 931 at 282-285.
[1472] See Karan, *Liability*, *supra* note 65 at 35.
[1473] See Werth, *supra* note 339 at 72-75; Mankabady, *supra* note 57 at 30-32; Lüddeke & Johnson, *supra* note 830 at 13-16.
[1474] See *ibid* at 13-14; Sweeney, "Draft II", *supra* note 786 at 346; Pearson, *supra* note 1061 at 346.

Rotterdam Rules has its merits but is still unsatisfactory in terms of both fairness and clarity.[1475]

Then what would a better scheme be like?[1476] Article 5.1 of the Hamburg Rules may have already divulged some clues.[1477] First of all, it is based on fault liability that is superior to strict liability compelling carriers to be responsible for any loss, damage or delay and incomplete fault liability leaving carriers opportunities to escape liability for loss, damage or delay arising from fault on the part of shipowning interests.[1478] Secondly, it contains a reasonable allocation of burden of proof in which the carrier, who has better knowledge of what happened to the goods in his custody, is required to prove absence of fault on the part of shipowning interests to be relieved of liability after the claimant has established a *prima facie* case against him.[1479] Thirdly, it provides a clear and simple method on the determination of the carrier's liability and entitlement to exemption from

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[1475] See Si, "Prospects", *supra* note 8 at 3-5.

[1476] See Berlingieri, "Revisiting", *supra* note 1383 at 596-601; Yuan Faqiang & Ma Zhiyao, "Balancing or Improving – Analyze the Impact on the Rights and Liabilities of the Parties in Marine Transport Regulated in the Rotterdam Rules" (2009) 20 Annual of China Maritime Law 3 at 6-8.

[1477] See Berlingieri, "Comparative", *supra* note 10 at 8-13; Tetley, "Criticisms", *supra* note 7 at 627.

[1478] See Weinrib, *supra* note 55 at 171; Steven Shavell, "Strict Liability Versus Negligence" (1980) 9 J Legal Stud 1 at 3-6; Richard A Epstein, "A Theory of Strict Liability" (1973) 2 J Legal Stud 151 at 158-160; Richard A Posner, "Strict Liability: A Comment" (1973) 2 J Legal Stud 205 at 209-212; Samuel A Rea, Jr., "Economic Analysis of Fault and No-fault Liability Systems" (1986) 12 Can Bus LJ 444 at 446-448; Nathan Isaacs, "Fault and Liability" (1918) 31 Harv L Rev 954 at 956-960; Weitz, *supra* note 336 at 587-588; Stephen G Wood, "Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues" (1998) 46 Am J Comp L 403 at 406-408.

[1479] See Sweeney, "Allocation", *supra* note 254 at 515-517; Tetley, "Commentary", *supra* note 876 at 7; Pixa, *supra* note 4 at 440-442. See also McDonough, *supra* note 897 at 28-30; Prosser, "Procedural Effect", *supra* note 1234 at 243-245; *Lynch*, *supra* note 897 at 845-846; *Bahr*, *supra* note 900 at 201; *Cass*, *supra* note 1234 at 1239; *Levendusky*, *supra* note 1234 at 350.

liability that may save parties, lawyers and adjudicators from unwanted confusion and arguments.[1480]

Each convention includes some particular immunities, such as those relating to salvage, reasonable deviation, dangerous goods and special goods in the Hague Rules,[1481] those relating to fire, live animals, salvage and dangerous goods in the Hamburg Rules,[1482] and those relating to deck cargo, live animals and special carriage in the Rotterdam Rules.[1483] Their particularity is embodied in some substantive aspects that determine to what circumstances they may apply as well as in some procedural aspects that pertain to special burden of proof or formal requirements. There should be in the projected scheme of the carrier's exemption from liability some particular immunities as an important complement to the general basis of liability modelled on Article 5.1 of the Hamburg Rules. However, it does not mean that all those contained in the previous conventions can be incorporated indiscriminately. A few of the existing ones, like the exceptions relating to fire and live animals in the Hamburg Rules, should be deleted or revised given their unreasonableness.[1484] Some of them, like the exceptions relating to salvage, reasonable deviation and dangerous goods, are supposed to be retained because they are justifiable but somewhat inconsistent with fault liability.[1485] The rest, like the

[1480] See Honnold, "Clarity", *supra* note 22 at 98-99; Hellawell, "Allocation", *supra* note 106 at 361-363. See also R Grime, *Shipping Law* (London: Sweet & Maxwell, 2008) at 102-105.
[1481] See *Hague Rules*, *supra* note 205, arts 4.4, 4.6, 6.
[1482] See *Hamburg Rules*, *supra* note 792, arts 5.4(a), 5.5, 5.6, 13.
[1483] See *Rotterdam Rules*, *supra* note 1134, arts 25, 81.
[1484] See Lüddeke & Johnson, *supra* note 830 at 13-14; Frederick, *supra* note 238 at 87-88.
[1485] Karan, *Liability*, *supra* note 65 at 311; Richardson, *supra* note 284 at 32; DuClos, *supra* note 655 at 63-65.

exceptions relating to deck cargo, live animals and special carriage, are applicable to cases where the carriage itself or the goods consigned for shipment have peculiarities.[1486] The carrier's entitlement to exemption from liability in shipments involving special risks may be determined by means of freedom of contract, as provided for in Article 6 of the Hague Rules and Article 81 of the Rotterdam Rules, insofar as there is necessary concern over the potential abuse of such freedom.[1487]

In addition, it seems to have no adverse effects to stress the carrier's entitlement to partial exemption in multiple-causation cases, though such entitlement can virtually be inferred from the concept of fault liability. It may be impossible to prescribe any specific methods of apportionment of liability, but there had better be a provision stating the general principle that the carrier's liability shall be in proportion to fault on the part of shipowning interests contributing to loss, damage or delay in delivery.[1488]

There may follow concern about the acceptability of such a scheme that is, by and large, akin to its counterpart in the Hamburg Rules since the Rules have not yet been well accepted by numerous traditional shipping nations that have been accustomed to the regime based on the Hague Rules. Their hostility is attributable partly to the fear that their interests may be impaired under the Hamburg Rules and partly to the continental

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[1486] See Deutsch, "Deck Cargo", *supra* note 1335 at 537-539; Wooder, *supra* note 1338 at 134-136; Gaskell, Asariotis & Baatz, *supra* note 511 at para 10.13; von Ziegler, Schelin & Zunarelli, *supra* note 5 at 347-348.

[1487] See *ibid*. See also Girvin, *Carriage*, *supra* note 53 at para 15.11; Gaskell, Asariotis & Baatz, *supra* note 511 at para 10.34; Sturley, Fujita & van der Ziel, *supra* note 6 at para 13.037.

[1488] See von Ziegler, Schelin & Zunarelli, *supra* note 5 at 110.

legislative style foreign to them.[1489] However, the truth is that, at least as far as the carrier's exemption from liability is concerned, there is no obvious partiality for the cargo-owning side in the Rules and the conversion of the "laundry list" into the unitary basis of liability is not equivalent to departure from the theories and jurisprudence developed under the Hague Rules.[1490] It is worthwhile to note that several countries, which are influential in the domain of ocean transportation or have a long tradition of case law, have incorporated or tried to incorporate the Hamburg Rules into their domestic laws though they are not yet official signatories.[1491] That trend has given a mild but hopeful sign that the scheme of the carrier's exemption from liability proposed in this thesis may be included in the eagerly anticipated uniform rules governing the carriage of goods by sea and be accepted by a majority of shipping nations one day.

[1489] See Mankabady, *supra* note 57 at 28-30; Karan, *Liability*, *supra* note 65 at 12.
[1490] See Honnold, "Clarity", *supra* note 22 at 100-103; Sweeney, "Allocation", *supra* note 254 at 517.
[1491] Those countries include Australia, Canada, China, Denmark, Sweden, Norway, Finland, Korea, the United States, etc. See generally Mandelbaum, "Standards", *supra* note 64 at 491-497.

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