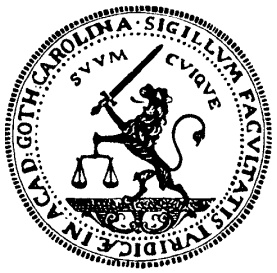

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THE ABOLITION OF THE NAUTICAL FAULT EXEMPTION: TO BE OR NOT TO BE

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CONTENTS

SUMMARY

Historically, the nautical fault exception was justified on the basis that shipowners lacked the ways to control their ships by communication on long voyages and so masters had to act in their own judgement. Modern communications have defeated this underlying rationale but shipowners still want to claim the benefit of the exception. As a matter of statutory regulation, the exception traces back to the United States Hart Act 1893 and adopted by the international law known as the Hague Rules. However, the issue is now in the front burner of debate and is attracting considerable attention because in the new Rotterdam Rules it has been abolished. Thus, notwithstanding its long existence, the exemption is still controversial because of the imbalance in bargaining power between carrier and shipper or cargo-owner interests.

The purpose of this research is to delve into the NFE issue in the context of carrier liability and attempt to demystify some of its attributes. It is necessary to review the history of carriage of goods by sea at first, following with the concept of NFE discussed in contextual detail. The important issue in this research is the analysis of the argument for and against the abolition of the NFE and what impact such abolition may have on carrier liability. The discussion invariably extends to a consideration of the economics of abolition of the NFE. In addition the implications for the Chinese shipping industry, if the NFE is abolished, are discussed. As well, existing positions adopted within China in relation to the acceptance or rejection of the Rotterdam Rules is examined in light of the present situation of China.

Hopefully this paper will make the reader have a clear understanding of the NFE and the present situation related to this issue.

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ABBREVIATIONS

NFE	Nautical Fault Exception
ILA	International Law Association
CMI	Comite Maritime International
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	United Nations Commission on International Trade Law
ECSA	European Community Shipowners' Association
ICS	International Chamber of Shipping
BIMCO	Baltic and International Maritime Council
WSC	World Shipping Council
COSCO Group	China Ocean Shipping (Group) Company

1 INTRODUCTION

In the long history of the evolution of carrier liability in the law of sea carriage of goods, there has, arguably, always been an imbalance in favour of the carrier. Some are of the view that much of that imbalance will be rectified when the newly emerging Rotterdam Rules come into effect worldwide. In the opinion of others that is simply wishful thinking. Indeed the prevailing views within the global shipping industry seem to be still highly polarized. Both carriers as well as shippers fear that any change in the *status quo* will benefit the other camp and will spell detriment to their own interests. Be that as it may, change is inevitable because trade and commerce is largely technology and finance driven. The central issue is the direction in which the change should take place.

Any inquiry into the evolution of the international regime of carrier liability shows that the law both in national as well as global terms has undergone the so-called “pendulum syndrome”. It all started with the English law practice of holding the carrier strictly liable for any damage to cargo during the voyage. The liability law was premised on and rationalized by the principle that the party in custody and possession of the goods must bear legal responsibility for the welfare of the cargo because only that party could exercise control over it during the period of transportation. The pendulum swung in the other direction through application of the doctrine of freedom of contract germane to the law of contract in virtually all legal systems when carriers inserted clauses in their carriage contracts which completely exonerated them from liability. At various times in the history of this evolution of the law, middle positions have been attempted, but nothing seems to be satisfactory depending on one’s viewpoint as a carrier or a shipper. Thus, strict liability can be characterized as “complete fault”

liability and liability accompanied by certain exceptions as "incomplete fault" liability provided the exception is related to fault.[1]

At the very centre of exceptions to or exemptions from liability on the part of the carrier lies the concept of the "nautical fault rule" otherwise variously described as the nautical fault exception (NFE) or exception relating to the navigation and management of the ship. This rule has existed in the law of carrier liability for over a hundred years. The issue is now in the front burner of debate and is attracting considerable attention because in the new Rotterdam Rules it has been abolished. As mentioned above, the imbalance in bargaining power between carrier and shipper or cargo-owner interests has been a bone of contention for a very long time. Abolition of the NFE in the Rotterdam Rules is arguably, a serious attempt to rectify that imbalance and provide more respite to cargo-owners. To what extent that will in fact be the case remains to be seen. Much will depend on whether and when, if ever, the Rotterdam Rules enter into force. Regardless of the eventuality, it is incumbent upon the interests involved in international trade and shipping including practitioners in related fields and scholars alike to focus attention on this controversial issue.

The purpose of this research leading to a dissertation is to probe into the NFE issue in the context of carrier liability and attempt to demystify some of its attributes which have strongly influenced the positions taken by those who are for and those who are against the proposition that it should be abolished. Needless to say, no serious study of the subject, or for that matter, a study on any aspect of sea carriage of goods law can be carried out without probing into its historical evolution. This study is no exception. Thus, in the following chapter, the history of carriage of goods by sea is traced from ancient Roman law to the relatively modern English law on the subject dating back to the 19th century and then beyond into the more contemporary era down to our times at present.

[1] This characterization is to be found in the Chinese legislation on Carriage of Goods by Sea which is the Maritime Code of the People's Republic of China.

In the third chapter, the concept of NFE is discussed in contextual detail. The correlation between the NFE and seaworthiness is explored within the overall context of carrier of liability for damage to cargo. The notion of error in navigation compared with fault in management on the ship is addressed and the distinctions between the management fault and failure to exercise duty to care of cargo are explained under the case law.

The fourth chapter focuses on the argument for and against the abolition of the NFE. The opposite opinions from different parties are stated in this section. What impact such abolition may have on carrier liability is investigated by particular reference to the Rotterdam Rules and Hamburg Rules. Also in what ways shipper interest has been affected by the NFE in practice are also considered in this chapter. The discussion invariably extends to a consideration of the economics of abolition of the NFE, in particular, from an insurance perspective. The political views of abolition of the NFE are examined in the end of this chapter.

Given the fact that the writer hails from the Chinese jurisdiction, it is felt important and necessary to put forward the Chinese Law and national position taken on the question of the NFE. In this chapter the implications for the Chinese Shipping industry, if the NFE is abolished, are discussed. As well, existing positions adopted within China in relation to the acceptance or rejection of the Rotterdam Rules is examined in light of the present situation of China.

A summary together with conclusions and possible proposals and recommendations for legislative action will be presented in the final chapter.

2 BACKGROUND TO SEA CARRIAGE CONVENTIONS: THE NFE IN PERSPECTIVE

As a synoptic preface to this chapter it is important to note that with the enactment of the Harter Act which introduced the concept of NFE, the carrier was subjected to incomplete fault liability. As mentioned in the introductory chapter, the NFE is closely related to the evolution of the carrier's liability system in the law of sea carriage of goods. This clause was subsequently adopted by the international conventions known as the Hague Rules, which defined on the one hand the responsibilities and liabilities of the carrier and on the other, also set out the carrier's rights and immunities. At the time in 1924 the Hague Rules were accepted widely by carriers and shippers alike because it was thought that a reasonable balance had been reached between carriers and shippers interests. But as technology advanced with regard to ships and seamanship, the NFE clause put shippers back into a weak position. The Hamburg Rules of 1978 removed this immunity and adopted a complete fault liability regime, but these rules were not widely accepted. Thus, although carriers and shippers both accepted the risk allocation principle, its application was different at different times. It can be seen that the present rules relating to the carrier's liability and the situation on the NFE did not appear suddenly. The liability rules kept changing with the developments in economics, technology, shipping and international trade. An historical review of these developments will certainly provide a better and clearer appreciation of the NFE rule.

2.1 The carrier's liability prior to the 19th century

In the beginning, as commercial relationships had not yet developed to the extent of maturity as we know it today, cargo owners usually purchased or hired a vessel and traveled with their goods on board to destinations

relatively close to the ports of departure.[2] Thus, any loss or damage in transit was borne by the owners.[3] In the 11th century, as a result of the expansion of the Roman Empire and its ports, overseas trade increased, which led to the early contracts of carriage (location *mercium vehendarum*).[4] According to such a contract, the carrier would undertake to carry the goods, and the master would issue a bill to the shipper as a custody receipt[5]. While the merchant travelled with his cargo he obviously did not require the custody receipt; cargo particulars were simply entered in a register which became part of the ship's documentation. When the merchant ceased to travel with the goods, an arrangement had to be made through documentation between the merchant and the carrier for the dividing the expenses and the profits of the venture. This came to be referred to as the contract of carriage.[6] By the 14th century, this document became the precursor of the modern bill of lading. When the register book was transformed into "bill" and extracts from it were delivered to the shipper.[7]

Under the Roman Law, strict liability was imposed on the carrier for loss of or damage to goods notwithstanding his own *dolus* or *culpa* except for *force majeure* and the cargo owners could bring a *praetorian action* (*action de recepto*) against him.[8] Moreover, the carrier was also made liable by *praetorian delictal actions* for the acts of his servants or agents if it was shown that the carrier at fault in choosing his servants or agents.[9] By the 16th century, the adoption of the fault principle led to a change from liability in contract of the carrier in the civil law system to strict liability which in turn became liability based on presumed fault.[10] The only exceptions were sea perils and the carrier had the vicarious liability for the faults of the

[2] Hakan Karan, The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby and Hamburg Rules, Publisher: Edwin Mellen Press Ltd (Mar 2005), at p.7.
[3] *Ibid.*, at p.8.
[4] *Ibid.*, at p.9.
[5] W.E. Astle, The Hamburg Rules, Fairplay Publications (1981), at p.3.
[6] *Ibid.*
[7] *Ibid.*
[8] See Karan, *supra* note 2, at p.9
[9] *Ibid.*
[10] The carrier was presumed in fault unless he can prove there had been no fault on his part.

carrier's servants or agents.[11] During the 17th century, as trade between Northern Europe and the Mediterranean countries developed further, the bill issued by the master gained its second function, namely, it also became evidence of the contract of carriage. The third function of the bill was established when it served as a document of title by virtue of it representing the goods. At this point in time the bill was not a negotiable instrument despite this character it came to be referred to as a "master's bill" in some countries.[12]

By the late seventeenth century, common law became the predominant legal system for maritime commerce because of the phenomenal growth of maritime transport by spearheaded of English shipowners.[13] The common law courts held the carrier of goods by sea absolutely liable for cargo loss or damage, whether or not the carrier was negligent, and regardless of the cause of the loss. The carrier could only be absolved from liability if the loss or damage was caused by 1) an act of god, 2) a public enemy, 3) inherent vice of the goods, 4) fault of the shipper or if the goods were properly subjected to a general average sacrifice. These were known as the common law exception. Even so, the carrier would be liable if he was negligent or at fault otherwise.[14] There were also a number of implied terms which the courts would uphold unless there were expressed stipulations to the contrary in the bill of lading. These were the carrier's undertaking that the ship was seaworthy and that it would start and excused the contract voyage with reasonable diligence and without unjustifiable deviation.[15] The expression stipulations did not specify anything beyond such vague phrases as "the accidents of navigation excepted".[16] As the principal evidence of the claim for loss or damage, the bills of lading specifying the condition of the goods, became increasingly important and came to be the basis for any claim advanced by the shipper. By the 18th century, the practice of transferring

[11] See Karan, *supra* note 2, at p.9.
[12] *Ibid.*, at p.10.
[13] See Astle, *supra* note 5, at p.2.
[14] *Ibid.*
[15] *Ibid.*, at p.3.
[16] *Ibid.*, at p.5.

title to the goods by endorsement of bills of lading gave to the document its "negotiable" character to satisfy the spread of commerce and the increasing complexity of international business.[17]

2.2 The carrier's liability under the "freedom of contract" principle

By and large, at least until the latter part of the 19th century, the general maritime law principle, which both common law and civil law countries recognized and accepted was that the carrier was absolutely liable as an insurer of the cargo unless one of the exceptions mentioned above could be proved by the cargo owner as the cause of the loss or damage.[18] The carrier did not seem to have much complaint regarding the strict liability and did not mind being the guarantor of the safe arrival, as the only available vessels were small sailing ships, and cargoes were not usually of a perishable nature.[19] But with the growth of steam power, the shipowner's financial position improved and began generally to reduce the scope of his liability as the carrier.[20]

Following a number of judicial decisions of the English courts in the 18th century, carriers started to insert clauses in their bills of lading not only to exempt themselves from liability relating to the common law exceptions but also liability arising from all perils of the sea and navigation of any kind whatsoever.[21] These came to be known as the "exoneration clauses" through carriers used the doctrine of freedom of contract to absolve themselves from the strict liability imposed by the *lex maritima*.[22] Thus, on the one hand the carrier was subject to a regime of strict liability which had emanated from the Roman Law or the customary maritime law, and on the other hand, it

[17] See Astle, *supra* note 5, at p.5.
[18] See *Coggs* v. *Bernard* (1703) 2 Ld Raym 909, 918; 92 ER 107, 112; the Holt CJ says "the law charges this person, thus entrusted, to carry goods against all events, but acts of God, and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable."
[19] See Astle, *supra* note 5, at p.2.
[20] See Karan, *supra* note 2, at p.13.
[21] See Astle, *supra* note 5, at p.5.
[22] *Ibid.*

could exonerate itself from liability by invoking the principle of freedom of contract which was recognized by both the common law as well as the civil law system.[23]

However, these exoneration clauses were treated very differently in different jurisdictions. In many shipowning countries, especially England, which had the world's largest fleet at the time, such clauses were enforceable. Even if the carrier was negligent, it was virtually immune for any liability.[24] However, in shipper and consignee countries, particularly the United States, such exoneration clauses were viewed with disfavour. The court took the position that the carrier could not exonerate itself from liability if loss or damage to cargo resulted from the consequences of its own negligence or its failure to provide a seaworthy vessel.[25]

In the face of increasing complaints[26] from shippers, insurers and others who were put at this situation because of carriers being able escape liability through exoneration clauses, the shipowning countries made a compromise to meet some of the requirements of the cargo interests by using model bills of lading of different types.[27] But with the advancement of the international shipping and global trade, the need for international uniformity was perceived in respect of bills of lading. Accordingly, the International Law Association (ILA) made the first international model bills of lading, known as the Common Form of Bill of Lading 1882, which were followed by model rules in 1885.[28] The General Clause made the carrier liable for negligence in all matters relating to the ordinary course of the voyage on the condition that no damage fell within the several

[23] See Astle, *supra* note 5, at p.5.
[24] Michael F. Sturley, *Transport Law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules*, the Chapter 1 in D.R. 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", Witney : Lawtext, 2009, at p.4.
[25] *Ibid.*, p.5.
[26] One of the main criticisms leveled by shippers related to the insertion of clauses exempting shipowners from negligence caused by their servants and agents.-Stephen Girvin, Carriage of Goods by Sea, Oxford University Press 2007, at p.170 14.03.
[27] See Astle, *supra* note 5, at p.6.
[28] See Karan, *supra* note 2, p.15; see also Sturley, *supra* note 24, p.5.

exemptions[29]. However, most maritime countries of that time declined acceptance of this modal.[30] At this time, the notion of "due diligence" in relation to the carrier's obligation to make the ship seaworthy was introduced and its liability was limited to 100 pounds sterling per package.[31]

2.3 The US Harter Act 1893

Towards the end of the 19th century, the development of American shipping technology faced a decline as a result of the Civil War in the United States. This led to United Kingdom carriers assuming monopoly over the United States shipping industry. American shippers suffered a major disadvantage as United Kingdom carriers were able to exempt themselves from liability by inserting exonerations clauses and choice of English law and English forum clauses.[32] In response to pressure from American shippers and carriers, the Harter Act was enacted by the United States Congress in 1893. It was the first national statute which established a compromise between carriers' and shippers' interests by modified the strictures of the common law, and eliminating unreasonable exemption clauses in the existing long list.[33] The Act introduced the incomplete fault liability system, which provided the carrier was not to be held liable in respect of unseaworthiness if it had exercised due diligence to make the ship seaworthy[34], and if the damage caused to the cargo resulted from faults and errors in the navigation or management of the vessel[35]. It was the first time that NFE was stipulated in legislation as an exemption to the carrier's liability. The Harter Act exerted a profound influence on the legislation of other maritime states as well as be international convention law that was

[29] The exception included: act of god, sea perils, fire, barratry of the master and crew, enemies, pirates, and thieves, arrest and restraint of princes, rulers and people, collisions, stranding and other navigational accidents even when caused by the negligence, default, or error in judgement of the pilot, master, mariners, or other servants of the carrier.- See Karan, *supra* note 2, at p.15.
[30] See Sturley, *supra* note 24, at p.5.
[31] See Astle, *supra* note 5, at p.7.
[32] See Karan, *supra* note 2, at pp.18-19.
[33] *Ibid.*, at p.19.
[34] The Harter Act 1983, Sec.191
[35] The Harter Act 1983, Sec.192

soon to gone. The model of the Harter Act was adopted by Australia[36], New Zealand[37] and Morocco[38] among others. Some provisions of the Harter Act were incorporated into the agreements for the regional shipping trading.[39]

As a cargo-oriented country, Canada also passed a legislation following in the steps of the Harter Act.[40] However, in the national legislation subsequent to the Harter Act the exemption list has being expanded to cover fire, reasonable deviation, strikes and losses arising without the carrier's actual fault or privity or without the fault or neglect of his agents, servants or employees.[41] Such national legislation also had a downside; conflicts of law and interpretations of the general maritime law became a serious issue in the short run, but in the long run, carriers being subjected to conflicting laws in different jurisdictions increased their incentive to support an international resolution of the problem.[42]

2.4 The carriers' liability under international conventions

As more and more countries followed the Harter Act, the major maritime countries realized that it would be to their advantage to have national legislation based on an international instrument in the interest of harmonious global trade and commerce.

2.4.1 The Hague Rules

In response to an initiative taken by the United Kingdom, the ILA through its Maritime Law Committee prepared a model set of rules between May and June 1921 which was based on the Canadian Harter-style statute.[43] After considerable discussion among leading shipowners, underwriters,

[36] Sea-Carriage of Goods Act 1904
[37] Shipping and Seaman Act 1903 and 1911
[38] Maritime Commercial Code 1919
[39] See Karan, *supra* note 2, at p.21.
[40] Canadian Water Carriage of Goods Act 1910
[41] See Karan, *supra* note 2, at p.21.
[42] Michael F. Sturley, The Legislative History of the Carriage of goods by Sea Act, Publisher: Fred B. Rothman & Co. (1990), Volume one, at p.5.
[43] See Karan, *supra* note 2, at p.23.

shippers and bankers of the major maritime countries, a final set of rules was adopted by the ILA at the Hague conference in 1921 which came to be known as the pre-Hague Rules.[44] However, these were not binding on any states as they were only in the nature of a recommendation to carriers to be voluntarily inserted into bills of lading.[45] As it happened they were ignored by most carriers. It was generally felt that the style of the rules should be changed; and with the modifications taking place in the following years, the rules were successfully transformed from "model rules" to a draft international convention.[46] Finally, it was signed at Brussels as the "International Convention for the Unification of Certain Rules of Law relating to Bills of Lading" on August 25, 1924. The convention, commonly known as the "Hague Rules", came into force on June 2, 1931.[47] The United Kingdom ratified this convention in 1930 and United States also adopted it in 1937.[48] After ratification by the United States, all of the world's major maritime nations of that era joined the new regime within couple of years.

The Hague Rules established world wide minimum obligations of the carrier's liability and the maximum immunities to the carrier. The limit of the carrier's liability was fixed at £100 sterling per package. Under the convention, the carrier was not to be held responsible for unseaworthiness of the ship, provided the carrier could prove that the unseaworthiness, if any, was not caused by lack of due diligence on his part before and at the commencement of the voyage, or as a consequence of any exception listed in Article IV (2) commonly referred to as the "catalogue of exceptions".[49] All but two of the exceptions listed involve no fault on the part of the carrier or his servants or agents. The two anomalous cases are the exceptions covering navigational or management error (NFE), and the liability of the carrier for damage caused by fire (fire exception).[50] It is by reason of these two exceptions that the liability regime of Hague Rules can be described an

[44] See Astle, *supra* note 5, at p.8.
[45] See Karan, *supra* note 2, at p.23.
[46] See Sturley, *supra* note 24, at p.5.
[47] CMI Year Book 2009, at pp.441-443.
[48] *Ibid.*
[49] See Astle, *supra* note 5, p.8
[50] John F. Wilson, Carriage of goods by sea 7ed, Harlow: Longman, 2010, at p.194.

incomplete fault liability system. It is not surprising that both these exceptions have been strongly criticized by cargo interests over the years since the very inception of the Rules.

In a short, the Hague Rules is the first set of mandatory rules creating a uniform international carrier liability regime, standardizing the rights and obligations of contracting parties. Considering its wide-spread acceptance, the Rules unquestionably played a key role in protecting the future of bills of lading and ocean trade by attempting to create a reasonable balance between cargo and carrier interests and the risks borne by each side in the sea transportation of cargo. The NFE as the first exception in the long list is probably the most important one in terms of creating a balance. The inclusion of NFE in the catalogue of exception is strong indication of the proposition that in the Hague Rules, and subsequently in the Hague-Visby Rules, the carrier's liability has been based on the principle of incomplete fault liability. Furthermore, it can be said that the list of responsibilities and liabilities laid down in Article III of the Hague Rules brought to end the era of full exoneration of liability exemplified by resort to freedom of contract principles by carriers.

2.4.2 The Hague-Visby Rules

With the invention of the containers and new steel ships, the Hague Rules were rendered inadequate in several respects. [51] Divergent interpretations of the Rules given by national courts especially those of the former colonies of Great Britain which were now independent made the situation even worse.[52] It was widely recognized that the Hague Rules could not keep in step with developments in shipping and commerce. On the basis of the investigation and suggestions made by the sub-committee of Comite Maritime International (CMI), a draft protocol was prepared which addressed involved two principal problems of the Rules, namely, the scope-of-application and the unit for limitation. Following the diplomatic conference, the amendments to the Hague Rules were adopted at Brussels

[51] See Sturley, *supra* note 24, at p.6.
[52] *Ibid.*

on February 23, 1968. The instrument known as the Visby Protocol represents a revision of the Hague Rules and is subject to separate ratifications by the state parties to the Hague Rules. The Hague Rules read together with the Visby Protocol are known as the Hague-Visby Rules. These Rules entered into force on June 23, 1977 and are now in effect in states the totality of which represents approximately two-thirds of world trade.[53] Notably, the Hague-Visby Rules have retained the provisions concerning the carrier liability including the whole of the exception clauses. It appears that the sub-committee was not afforded sufficient time to carry out an in-depth study of the issue. It is also said that the delegations tried to avoid or lessen the intensification of contradictions on the carrier's liability regime under the Hague Rules.

2.4.3 The Hamburg Rules

After the Second World War, the political landscape of the pattern of world trade has changed considerably. Many newly independent developing countries mostly representing cargo interests in Asia and Africa entered into the new international trade arena. However see carriers were still mainly in the hands of developed states.[54] Numerous complaints from the developing countries regarding the unfair liability system and unduly heavy burden of proof in the Hague Rules drove the United Nations to seriously review the Hague/Hague-Visby regime.[55] In December 1969, a Working Group which was established by the United Nations Conference on Trade and Development (UNCTAD) held its first session to review the economic and commercial aspects of international law and practice in the field of bills of lading from the standpoint of their conformity to the needs of economic development, in particular, that of the developing countries.[56] Thereafter, a Working Group of the United Nations Commission on International Trade Law (UNCITRAL) met in Geneva in March 1971 following the meeting of the second session of the UNCTAD Working Group in February 1971 to

[53] CMI Year Book 2009, at pp. 447-448.
[54] See Karan, *supra* note 2, at p.31.
[55] *Ibid.*
[56] *Ibid.*, at p.33.

give consideration to its recommendations.[57] Five years were spent by UNCITRAL in preparing a draft convention, which was approved by the Commission in 1976.[58] Finally, after four weeks of further negotiations, a diplomatic conference in Hamburg, Germany, overwhelmingly approved the final text of International Convention on the Carriage of Goods by Sea, otherwise known as the Hamburg Rules, in March 1978.[59]

The most remarkable innovation of the Hamburg Rules is the change in the basis of carrier liability, from incomplete fault liability to complete fault liability. In framing a uniform and comprehensive test of carrier liability rules, the draftsmen have adopted the argument long advanced by cargo interests that carrier liability should be based exclusively on fault and that a carrier should be responsible without exception for all loss of, and damage to, cargo that results from his own fault or the fault of his servants or agents.[60] Thus, a simple liability test based on the principle of presumed fault has been introduced and the catalogue of exceptions contained in Article IV (2) of the Hague/Hague-Visby Rules has been abolished together with a reversal of the burden of proof.[61] The carrier must prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences; otherwise, he is liable for the loss of or damage to goods.[62]

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[57] See Karan, *supra* note 2, at p.33.
[58] See Sturley, *supra* note 24, at p.9.
[59] *Ibid.*
[60] See Wilson, *supra* note 50, p.216.
[61] Despite the other clause except (a) and (b) under Article IV (2) of Hague Rules are not expressed in the Hamburg Rules, it is fair to conclude that the failure to specifically enumerate those immunities listed in (c)-(q) and the substitution of liability based on the carrier's presumed fault does not preclude the carrier from asserting as a defense under the Hamburg Rules the circumstances that under the Hague Rules would have been offered to establish an immunity defense. Each of the grounds specified in Article IV (2) (d)-(q) is predicated on the fact that the damage to cargo was caused under circumstances in which the carrier was not at fault.- Robert Force, A Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?),Tulane Law Review June, 1996, at 2066.
[62] The Hamburg Rules, Article 5 (1)

The Hamburg Rules finally entered into force in 1992 with over 30 countries subscribing to them.[63] It is unfortunate however, that in the aggregate they only represent a fraction of world trade.

2.4.4 The Rotterdam Rules

Many are of the view that neither the Hague/Hague-Visby Rules nor the Hamburg Rules are entirely satisfactory. Both these sets of Rules are deficient in several albeit in different ways. The Hague/Hague-Visby Rules are out-dated in many respects, particularly in light of technological advancement, including information technology and also economic implications that were not envisaged during a good part of the 20th century. The Hamburg Rules on the other hand have not had much influence on world trade and carriage of goods by sea due to the lack of wide-spread acceptance.[64] In consequence, UNCITRAL again started working on seeking an acceptable solution with a view to achieving greater international uniformity of carriage law. As in the past, the CMI also took the first initiative and deliberated within its designated committee and remained in cooperation with UNCITRAL. After more than ten years of preparation of work on the draft convention, on 11 December 2008 The UN General Assembly adopted the "Convention of Contracts for the International Carrying of Goods Wholly or Partly by Sea" and authorized a signing ceremony for the Convention to be held in Rotterdam on September 23, 2009, recommending the new Convention to be known as the "Rotterdam Rules".[65] While the requisite number of signatures has been met, so far only one country, namely, Spain has ratified it. The entry into force of this Convention is thus still some time away.

The most interesting and controversial development is the formula adopted to deal with the basic question of carrier liability.[66] The proposed solution is an amalgam of the respective approaches adopted by the

[63] See CMI Year Book 2009, p.546.
[64] See Sturley, *supra* note 24, at p.11.
[65] *Ibid.*, at pp.11-24.
[66] See Wilson, *supra* note 50, at p.232.

Hague/Hague-Visby and the Hamburg regimes.[67] The draftsmen of the Rotterdam Rules adopted the definition of "carrier's liability" contained in Article 5 (1) of the Hamburg Rules, which is based on fault with a reversed burden of proof.[68] Accordingly, if the claimant can prove that the loss or damage in question occurred during the carrier's period of responsibility, the carrier will be liable unless he can prove that the loss or damage resulted from neither its fault nor the fault of any other parties[69]. In seeking to discharge this burden of proof, the carrier can prove that the loss or damage resulted from one of a list of events which act as presumptions of the absence of fault on its part.[70] This list mostly follows the general pattern of the exceptions set out in Article IV (2) of the Hague Rules, with the omission of the controversial NFE.[71] Under the Rotterdam Rules, however, the "exceptions" merely act as rebuttable presumptions of the absence of fault rather than, as previously, exonerations from liability.[72] It is important to note the Rotterdam Rules establish the principle of vicarious liability and express it in Article 18 and Article 19 (3).

The liability rules extracted from different previous Rules are the consequence of a compromise between the principles of public policy and between carriers' and cargo interests' bargaining positions. For that reason, the legal nature of liability has swung to and fro along a line from severe to excepted liability throughout history. Whether the NFE remains or is abolished is to a large degree the key to the bargaining process under which the future of sea carriage is bound to rest.

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[67] *Ibid.*
[68] Article 17 (1) (2). However in the Rotterdam Rules, the carrier is specifically required to prove the absence of "fault" rather than that "he took all measures that could reasonably be required to avoid the occurrence and its consequences" in the Hamburg Rules
[69] The Rotterdam Rules, Article 18: The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of: (a) Any performing party; (b) The master or crew of the ship; (c) Employees of the carrier or a performing party; or (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.
[70] See Wilson, *supra* note 50, at p.232.
[71] *Ibid.*
[72] *Ibid.*

3 THE CONCEPT OF THE NFE

After several centuries of development, the classic concept of NFE is now well entrenched in Article IV (2) (a) of the Hague/Hague-Visby Rules. Flowing from the chapeau "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from", paragraph (a) reads-

"Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

The rationale for this exception is summarized by Sellers L.J. in *The Lady Gwendolen*[73] as follows:

> 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 establish no actual fault or privity in respect of navigation itself is exceptional and striking.[74]

Indeed, as Dixon J. put it in *James Patrick & Co Pty Ltd* v. *Union SS Co of New Zealand*[75]:

> such a matter of ordinary everyday, that it did not present itself to {the owner} as a thing upon which there was any need for him to lay down rules, to give instructions or to institute inquiries.[76]… the master of a ship is no ordinary servant. Both in responsibility and in authority his position is special. … 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. But the responsibility and authority of the master is vested in him by the law and is not derivative. …{I}t 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

[73] *Arthur Guinness, Son & Co. (Dublin) Ltd.* v. *MV Freshfield (Owners)* [1965] 1 Lloyd's Rep 335.
[74] *Ibid.*, at pp.337-338.
[75] (1938) 60 CLR 650.
[76] *Ibid.*, at p.671.

> 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.[77]

The above passages explain with remarkable clarity the justification for absolving the carrier from liability for any loss or damage arising from the cause laid down in Art IV (2) (a). Moreover, as the carrier's major exception, it is primarily the provision and possibly the most important balancing factor in the Hague/Hague-Visby Rules. While the Rules impose on the carrier the obligations in Art III (1); in return the carrier may rely on the provisions of the exceptions. A striking attribute of this rule is that it has been in existence for a very long time which was recognized and acknowledged as reflecting customary law and practice at the discussions leading up to the adoption of the Hague/Hague-Visby Rules. As Sir Norman Hill remarked in a 1923 Report submitted to the English House of Lords - "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".[78]

3.1 Co-relation between NFE and seaworthiness

It is important to note that before the carrier can invoke the NFE, it must prove that it has been in compliance with Article III (1) which requires the carrier to exercise due diligence to provide a seaworthy vessel first. This is a prerequisite for invoking any of the items in the catalogue of exceptions set out in Article IV (2). The prerequisite itself is stated in Article IV (1) which provides as follows:

> 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

[77] *Ibid.*, at p.672.
[78] Report from the Joint Committee on the Carriage of Goods by Sea Bill (HL) (16 July 1923), at p.133.

> 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 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.

The above paragraph is the first provision in Art IV which deals with rights and immunities of the carrier. This paragraph serves to introduce the rights and responsibilities by emphasizing the importance of the carrier's duty pertaining to seaworthiness set out in Article III (1). The carrier must first discharge his seaworthiness obligation before he can claim the benefits of Article IV.[79] Before the advent of the Hague/Hague-Visby Rules, there was a similar principle in the common law which was explained by Lord Sumner in *Atlantic Shipping and Trading Co Ltd* v. *Louis Dreyfus & Co. (The Quantock)* as follows:

> Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability – namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case.[80]

The principle was again re-emphasized in the case of *Paterson S.S. Ltd.* v. *Canadian Co-operative Wheat Producers Ltd.*[81], in which it was held that-

> his [the carrier's] overriding obligation might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure

[79] A Guide to the Hague and Hague-Visby Rules, An LLP Special Report, Lloyd's of London Press Ltd. 1985, at p.28.
[80] [1922] 2 AC 250, at 260.
[81] [1934] AC 538 (PC).

> at its inception. Those have been described as fundamental undertakings, or implied obligations.[82]

Thus, it is clearly from the above passages that there has always been an implied requirement that there must be no interference with the obligation of seaworthiness on the part of the carrier and that it must be retained without impediment.[83]

Article IV (1) also places the burden of proof on the carrier to show that it has exercised due diligence to make the ship seaworthy. It is should be noted that in this provision there is no reference to the duty of care pertaining to cargo[84] laid down in Article III (2). However, given that there is no mention of any contradictory rule in Art IV, this duty of the carrier remains intact and serves as an obligation which must be fulfilled before the carrier can claim a defense under the NFE clause.[85] In other words, if the loss or damage can be shown to have arisen or resulted from Article IV (2) (a) and provided that the carrier has complied with Article III (1) and Article III (2), it may disclaim responsibility for such loss or damage.[86] In such cases, the carrier must prove that fault contributing to loss or damage is that of his employees or servants. In addition he must show that he exercised due care in the choice of his servants and employees and also that he exercised the same degree of care for the purposes of training, instructing and controlling them sufficiently in relation to the requirements of seaworthiness, and the navigation or management of the vessel.[87] In this interaction between right and responsibility, regardless of the cause of loss of damage to cargo, the cargo owner invariably bases his claim for damage on unseaworthiness of the vessel and the corresponding failure of the carrier

[82] *Ibid.*, at 544.
[83] See *Maxine Footwear Co Ltd* v. *Canadian Government Merchant Marine Ltd* [1959] AC 589 (PC), at 602-603, the Lord Somervell held "Art.III.1 is an overriding obligation. If it is not fulfilled and the nonfulfilment causes the damage the immunities of Art.IV cannot be relied on."
[84] The difference between "management" and "care of cargo" will be discussed below.
[85] See *supra* note 79, at p.29.
[86] *Ibid.*
[87] See Karan, *supra* note 2, at p.286.

to discharge is duty of due diligence, whereas the carrier almost attribute the loss or damage to nautical fault or error in management.[88]

3.2 Master, mariner, pilot or the servants of the carrier

This provision in sub-paragraph(a) is of utmost importance because its scope of application is limited to three points. First the exclusion operates in respect of error; and second the error must be in the navigation of the ship or in the management of the ship. It must be noted that error is a species of fault. In other words, not all faults are errors but all errors can constitute a fault. It is submitted, however, that in practical terms an error in navigation is no different from faulty navigation which is why the term "nautical fault" is used in describing this all-important exclusion. Second, the question then arises as to whether management of the ship includes navigational management and also whether care of cargo falls within the ambit of that expression. One commentator has opined that-

> act, neglect or default in the care of the cargo does not come within this exclusion. This means that the error has to be one primarily affecting the ship. A simple definition might be that it is an erroneous act or omission, the original purpose of which was primarily directed towards the ship, her safety and well being and towards the venture generally. (i.e. both ship and cargo)[89]

Thirdly, with regard to persons for whom the carrier is not responsible, it is to be noted that he is only protected against the error of his employees or servants and the pilot in respect of faulty navigation or management. If he is personally negligent, however, he is denied the protection of the Rules.[90] Such negligence could in any case lead to a finding of unseaworthiness, as

[88] Song Zhengping, Abolishing the Nautical Fault Defence---the Trend of the Modern Liability Regime of Carriage of Goods by Sea, LLM Research Paper (2002), Law Faculty of Victoria University of Wellington, http://article.chinalawinfo.com/ArticleHtml/Article_2364.shtml, at p.3.
[89] See *supra* note 79, at p.29.
[90] See *The Satya Kailash* [1984] 1 Lloyd's Rep 588.

where the crew is inadequate or poorly trained.[91] Although in the situation the carrier is not exonerated from liability altogether, he can nevertheless enjoy the right to limit liability under the 1976 Convention on Limitation of Liability for Maritime Claims (Protocol of 1996).

It must be noted that a stevedore would not fall under the caption "master, mariner, pilot or the servants of the carrier", as a stevedore is usually an independent contractor and not a servant of the carrier.[92] It is notable that in Art.VI bis of Hague-Visby Rules, the drafters added the "agent" and explained that "servant or agent" does not include independent contractors.[93] Furthermore, a stevedore's task is to carry out cargo work in port. Obviously, nothing he does involves "navigation or management of the ship". If the master is owner or part-owner of the ship, the Rules will protect him in respect of negligence in any of his duties as master, but not as owner.[94] In such a situation, however, it would not always be easy to separate the two roles, namely, that of master and owner. In several instances these two duties would be vested in one and the same person.[95] Furthermore, if a loss is caused by the combined negligence of someone within the list and someone outside, for example the duty officer on ship watch and a stevedore, the exemption will not apply.[96]

For the determination of fault for which the carrier is not liable, there are two types of faults without any general standard to separate them under the Hague/Hague-Visby Rules. These are discussed in detailed below.

3.3 Fault in the navigation of the ship

The interpretation of the phrase "faults of navigation" presents little difficulty. Generally, "navigation" refers to a ship in motion or the state of

[91] Sir Guenter Treitel & F.M.B. Reynolds, Carver on Bills of Lading 2ed., Sweet & Maxwell 2005, at p.606 9-210; see also *The Eurasian Dream* [2002] 1 Lloyd's Rep 719
[92] *Ibid.*, at p.606 9-210.
[93] *Ibid.*, at p.607 9-210
[94] See *supra* note 79, at p.29.
[95] *Ibid.*, at p.30.
[96] See Girvin, *supra* note 26, at p.365 28.08.

the ship after the mooring lines are cast off.[97] The meaning of "navigation" was explained in *Whistler International Ltd.* v. *Kawasaki Kisen Kaisha Ltd. (The Hill Harmony)*[98], a time charterparty case. In that case their Lordships held that as a matter of construction, the exception would not apply to a decision by the master to follow different routing instructions from those given by the charterer.[99] As per the facts of the case, on two occasions the master ignored the charterer's orders (based on the advice of a weather routing service) to perform two trans-Pacific voyages from Vancouver to Japan by a northerly Great Circle route. Instead, he opted to perform the voyages by a longer southerly rhumbline route. The master's apparent justification was that on the Great Circle route, the vessel might encounter adverse weather conditions. To a time charterer, time is money. The subsequent dispute over who should bear the costs of the longer voyage led to arbitration. The House of Lords held that any error which the master made was not an error in the navigation or management of the vessel as it did not concern seamanship.[100] Accordingly, the carrier was denied the protection of Article IV (2) (a) of the Hague-Visby Rules. Thus, it would seem that "navigation" in the context of that provision would not be construed in terms of the commercial, economic, or legal aspects of the operation of the ship.[101]

Examples of faults relating to the navigation of the ship largely accruing to the benefit of the shipowner or carrier are many. Some of these are – faulty berthing, maneuvering and anchoring, erroneous interpretation and assessment of meteorological information[102], incorrect speed adjustments, abandonment of the vessel[103], taking refuge in a port, non-compliance with local or international navigational rules, forcing a ship

[97] See *Lord (SS)* v. *Newsum* [1920] 1 KB 846
[98] [2001] 1 AC 638. [2000] 1 QB 241 (CA) : the High Court and the Court of Appeal thought it was a navigational decision but the arbitrators, who were ultimately upheld by the House of Lords, conclude that it was a commercial one.
[99] *Ibid.*, at 658.
[100] See Girvin, *supra* note 26, at p.365 28.09.
[101] *Ibid.*, at p.365 28.09.
[102] See [1976] ETL 674 827 Gerechtshof Te's - Gravenhage, January 12, 1966
[103] See *Bulgaris* v. *Bunge* (1993) 38 Com. Cas. 103, at 114.

through a storm[104]; and ascertaining the time to proceed or not to proceed in a risky situation and setting a particular course over a bar.[105] The provision has been held to cover cargo damage where, due to the negligence of the master or crew, the vessel struck a reef[106] hit a quay[107], ran aground[108] or had a collision.[109]

Problems have arisen in cases of collision. In the past, if the cargo interests could establish that the operative cause of the collision was fault on the part of the carrying vessel, the shipowner could not escape liability.[110] Alternatively, the cargo interests could obtain a remedy in tort to recover the full loss if the owner of the other vessel involved was solely responsible for the collision.[111] In situations where both vessels are to blame, which is frequently the case each party may recover from the other, damages in proportion to their respective degrees of fault. If it is impossible to determine the degree of fault of the ship, the "divided damages" rule applies.[112]

However, this position is further complicated by the exception in this situation that the carrier is not liable for loss resulting from his servants' fault in navigation if he can prove that he exercised due diligence to provide a seaworthy ship. Consequently, the cargo owner will not be able to recover compensation from a carrier whether he is totally or only partially to blame for the collision, but only against the owner of the other vessel involved in the collision.[113]

The United States courts have adopted a way to deal with collision cases with the exception covering navigational fault. Where both ships are

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[104] See *Yawata Iron & Steel* v. *Anthony Shipping* 1975 A.M.C. 1602 (SD NY 1975)
[105] See Karan, *supra* note 2, pp.291-292.
[106] See *The Portland Trader* [1964] 2 Lloyd's Rep 443
[107] See *The Aliakomon Progress* [1978] 2 Lloyd's Rep. 499 (CA)
[108] See *Complaint of Grace Line* [1974] A.M.C. 1253
[109] See Wilson, *supra* note 50 5ed., at p.266.
[110] *Ibid.*, at p.259.
[111] *Ibid.*
[112] International Convention for the Unification of Certain Rules of Law Related to Collision between Vessels 1910, Art.4; see also *ibid.*
[113] See Wilson, *supra* note 50 5ed., at p.259.

to blame in a collision cargo interests may recover their entire loss from the non-carrying ship,[114] then the latter may then reclaim half of this sum from the owner of the carrying vessel under the "divided damages" rule.[115] In this situation, the carrier becomes directly liable to the non-carrying shipowner and indirectly to cargo interests.[116] The overall result is that the navigational error exception is circumvented by the use of this procedure, but only where both parties are to blame for the collision.[117] If the carrier's servants are fully at fault in the collision, then the cargo interests will not receive any compensation as the carrier is under no liability. It is considered an anomaly that a carrier can be exempted from all liability if he alone is at fault for negligent navigation but he is held liable for half the loss if he is only partly at fault for the collision.[118]

To avoid this anomaly, carriers usually include "both-to-blame collision clauses"[119] in their bills of lading and charterparties which stipulate that cargo interests will indemnify the carrier to the extent that he is indirectly required to pay any compensation for cargo damage under the "divided damages" rule.[120] The clause is designed to preserve the protection afforded by the Hague/Hague-Visby Rules by providing a contractual indemnity against the cargo interests.

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[114] See Karan, *supra* note 2, at p.292.
[115] See Girvin, *supra* note 26, at p.365 28.09.
[116] See Karan, *supra* note 2, pp.291-292.
[117] *Ibid.*
[118] See Girvin, *supra* note 26, at p.365 28.09.
[119] The standard form of a both-to-blame clause: If the vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the cargo carried hereunder will indemnify the carrier 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 or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying vessel or her owners to the owners of the said goods and set off, recouped or recovered by the other or non-carrying vessel or her owners as part of their claim against the carrying vessel or carrier. The foregoing provisions shall also apply where the owners, operators, or those in charge of any vessel or vessels or objects other than, or in addition to, the colliding vessels or objects are at fault in respect to a collision or contact. From Skuld website, http://www.skuld.com/Publications/Clauses/Clause-Library/Clause-Library/Both-To-Blame-Collision-Clause/
[120] See Girvin, *supra* note 26, at p.365 28.09.

However, the "both-to-blame collision clauses" were rejected by the United States courts. In construing the purport of these clauses, the courts held that they were in conflict with a general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence.[121] It was held by the Supreme Court that-

> It would be equally anomalous to hold that a cargo owner, who has an unquestioned right under the law to recover full damages from a non-carrying vessel, can be compelled to give up a portion of that recovery to his carrier because of a stipulation exacted in a bill of lading. Moreover there is no indication that either the Harter Act or the Carriage of Goods by Sea Act was designed to alter the long-established rule that the full burden of the losses sustained by both ships in a both-to-blame collision is to be shared equally.[122]

In the court's view, the purpose of these clauses is to enable one ship to escape its equal share of losses by shifting a part of its burden to its cargo owners. However, despite the attitude of the United States courts, the "both-to-blame collision clauses" are still widely used as binding provisions within carriage contracts. Although it seems unfair to cargo interests, it is an indirect way in which carriers to apply the NFE to protect themselves.

3.4 Fault in the management of the ship

Fault in management can be described as fault in handling of the vessel other than for navigational purpose. Sir Francis Jeune in the case of *The Ferro*[123] says:

> It is not difficult to understand why the word 'management' was introduced, because, inasmuch as navigation is defined as something affecting the safe sailing of the ship … it is easy to see that there might be things which it would be impossible to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation, for

[121] Words of Black J. in *USA* v. *Atlantic Mutual Ins Co* [1952] AMC 659, at p.661.
[122] *Ibid.*, at pp.663-664.
[123] *The Ferro*, [1893] P 38.

> example, might be management of the ship, but would have nothing to do with the navigation.[124]

Since Art III (1) of the Hague/Hague-Visby Rules which provides that the carrier must "exercise due diligence to make the ship seaworthy before and at the beginning of the voyage"[125], is an overriding obligation, the carrier must comply with it if he wishes to invoke the NFE protection. The carrier thus cannot benefit from the exception of fault in the management of the ship if the fault has been committed during the "seaworthiness period" because the act of management during that period will be regarded as the one contributing to unseaworthiness. If any fault occurs that results in loss or damage, the carrier will be liable for unseaworthiness.

In the case of *Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.*[126], under a contract of carriage made subject to the Canadian Water Carriage of Goods Act 1936 which incorporated the Hague Rules, goods were to be shipped from Halifax, Nova Scotia, to Kingston, Jamaica. After the goods had been loaded, a fire broke out in the ship attributable to the negligence of a ship's officer. The ship had to be scuttled which resulted in the loss of the cargo. The shippers claimed damages from the carriers for non-delivery of the goods. Their Lordships held-

> the obligation of the carriers under the Hague Rules Art.III, r.1(a), to exercise due diligence to make the ship seaworthy continued over the whole period from the beginning of the loading until the ship sank; as the carriers had not fulfilled that obligation they were not entitled to immunity under the Hague Rules Art.IV."[127]

Additionally, in *The Muncaster Castle* case[128], Viscount Simonds cited the words of Kay L.J. to express the view that-

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[124] Martin Dockray, Cases & Materials on the Carriage of Goods by Sea, 3ed. Publisher: Routledge-Cavendish 2004, at p.186.
[125] "before and the beginning of the voyage" was explained in *the Maxine Footwear Co. Ltd.* v. *Canadian Government Merchant Marine Ltd.* [1959] 2 All ER 740 as meaning "the period from at least the beginning of the loading until the vessel starts on her voyage."
[126] [1959] AC 589.
[127] *Ibid.*
[128] *Riverstone Meat Co Pty Ltd.* v. *Lancashire Shipping Co Ltd.* [1961] AC 807.

> the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent." [129]

Thus "the exercise of due diligence involves not merely that the shipowner personally shall exercise due diligence, but that all his servants and agents shall exercise due diligence"[130]. In consequence, any negligence or omission of the servants or agents will be regarded as fault resulting in the unseaworthiness during the "seaworthiness period". However, it does not mean that the carrier can only rely on the "fault in management" exception when the ship is off shore.[131] It can be applied after the ship has commenced her voyage until goods are discharged, even if she stays at the port of call for any reason. It has been held that the operation of the exception as to "management" is not limited to the period when the ship is at sea but extends to the period during which the cargo is being discharged.[132]

Many problems have arisen in seeking to distinguish fault in management from the care of cargo under Article III (2) which is the prerequisite for the application of the exception. In practice the distinction between the two acts, while superficially simple enough, is difficult to make, as an error or omission frequently affects both the ship and the cargo. Many cases over the past century or so have attempted to provide a general standard to solve this problem.

In *The Glenochil*[133], servants of the carrier pumped water into the ballast tanks in order to stiffen the ship but they did not know that the inlet pipe was broken. Water thus entered the cargo. Gorell Barnes J. expressed his views in the following words:

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[129] *Ibid.*
[130] See *Smith, Hogg & Co. Ltd.* v. *Black Aea & Baltic General Insurance Company, Ltd.* (1939) 64 Ll L Rep 87, at 89. words of Mackinnon LJ.
[131] See *Lord (SS)* v. *Newsum* [1920] 1 KB 846, at 849.
[132] See *The Glenochil*, [1896] P 10.
[133] *Ibid.*

> I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel'.[134]

Sir Francis Jeune also had a similar opinion when he held - "… the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo."[135] Thus they both held that the shipowner was exempt from liability, as the damage resulted from a fault in the management of the vessel.

In the case of *Hourani* v. *Harrison*[136], cargo was lost as a result of pilfering by stevedores while cargo was being discharged. The court cited the principle in *The Glenochil* and held it did not fall within the expression 'management of the ship'. Atkin L.J. held that -

> there is a clear distinction drawn between goods and ships; and when they talk of the word 'ship', they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea.

The leading opinion on the matter is the dissenting judgment of Greer L.J. in the Court of Appeal judgement of *Gosse Millerd* v. *Canadian Government Merchant Marine*[137]. In this case, the carrier shipped boxes of tinplates on the ship *Canadian Highlander* at Swansea destined for Vancouver. When the ship docked to discharge some cargo at Liverpool there was heavy rain. The ship collided with a pier and damaged her stern. The repairmen who repaired the tail shaft took off the tarpaulins used to cover the cargo and neglected to close the hatch. The rain entered the hold and damaged the cargo. Greer L.J. had the following to say about the exception vis-à-vis the carrier's duty of care of cargo:

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[134] [1896] P 10, at p.18.
[135] *Ibid.*, at p.19.
[136] [1927] 28 Ll LR 120 (CA).
[137] [1927] 29 Ll LR 190, [1928] 1 KB 717 (CA), [1929] AC 223.

> In my judgment, the reasonable interpretation to put on the Articles is that there 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.[138]

The dictum in *The Glenochil* was amplified by Greer L.J. when he held later in his decision as follows:

> If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.[139]

Thus, although each case must be decided on its own facts, there is a general rule to guide the judges. Firstly, finding the cause of the damage; secondly, deciding the purpose of the act. If it is primarily directed towards the safety of the ship, the carrier can bring himself within the ambit of the defence; otherwise the carrier will be liable for breach of Art III (2). Thus in the above/noted case, the carrier had no right to apply the exception of 'fault in management'. As held by Greer L.J., failure to replace the tarpaulins and cover the hatch is conduct relating to the care of cargo rather than management of the ship which view was ultimately upheld by the House of Lords.

Another example is the case of *Chubu Asahi Cotton Spinning Co Ltd.* v. *The Ship Tenos*[140]. In this case, the cargo of wool stowed in the hold was

[138] [1928] 1 KB 717 (CA), at p.744.
[139] *Ibid.*, at p.749.
[140] [1968] 12 FLR 291.

damaged by water which escaped, due to the negligence of the carrier's servants who were testing for leakages in the tanks used for the carriage of vegetable oil. It was obvious that the cause of the damage was the negligence of the crew in testing the leakages. The purpose of the act as the court held "was to undertake activities which were in relation to a part of the ship which was solely used for the purpose of carrying cargo."[141] The exception was thus not applicable.

If the primary objective is the safety of the vessel, it will be immaterial that the negligent conduct also affects the cargo.[142] In the Canadian case of *Kalamazoo Paper Co.* v. *CPR Co.*[143], the ship *SS Nootka* was seriously damaged after hitting a rock on its way to Vancouver and was beached at Quatsino to prevent her from sinking. The cargo interests claimed damages for the alleged negligence of the master and crew in failing to use all available pumping facilities to keep the water level down after the vessel had grounded. The Supreme Court of Canada held that the use of the pumping machinery affected the general safety of the ship and consequently the actions of the crew fell within the 'management of ship' exception. The court held as follows:

> The further question is whether an act or omission in management is within the exception when at the same time and in the same mode it is an act or omission in relation to the care of cargo. It may be that duty to a ship as a whole takes precedence over duty to a portion of the cargo; It may be that duty to a ship as a whole takes precedence over duty to a portion of the cargo; but, without examining that question, the necessary effect of the language of art III.2 'subject to the provisions of Art IV' seems to me to be that once it is shown that the omission is in the course of management, the exception applies, notwithstanding that it may also be an omission in relation to cargo. To construe it otherwise would be to add to the language of clause (a) the words 'and not being a neglect in the care of the goods'.[144]

[141] *Ibid.*, at p.301.
[142] See Girvin, *supra* note 26, at p.366 28.12.
[143] [1950] 2 DLR 369.
[144] *Ibid.*, at p.378.

Thus if both ship and cargo are affected by the same error, the carrier can usually avoid responsibility as the safety of the vessel is the paramount objective. But each case is decided on the individual facts of the case. Generally negligence in stowage, failure to properly secure the cargo during discharge and default in machinery causing loss or damage relating only to the cargo (e.g. the use of refrigeration equipment[145]), would be regarded as the conduct primarily or solely directed towards cargo care and therefore are outside the scope of the exception.

[145] See *Foreman & Ellams* v. *Federal SN Co* (1928) 30 LlLR 52

4 ARGUMENTS FOR AND AGAINST THE ABOLITION OF THE NFE

Although in the early of 20th century, the Hague/Hague-Visby Rules with the NFE clause was accepted by almost every maritime nation as being a fair distribution of the rights and obligations for both carriers and cargo interests, the NFE has been the target of considerable criticism from cargo interests and is regarded as somewhat of an anachronism in many parts of the world[146]. Those opposed to the NFE frequently cite advancements in navigational science and information technology over the past decades as the main reasons.

4.1 Argument by the supporters of the NFE

Except for the rationale of the NFE mentioned in Chapter Three, the supporters consider that the investment by the carrier in sea transport was higher compared to other branches of trade including other modes of transportation and compared to the value of goods carried in the ship.[147] Thus a minor neglect which may lead to collision, grounding or sinking on the voyage will result in the carrier suffering a great loss such as the whole of his maritime asset if he is a one-ship owner. Such loss will often be much higher than that suffered by cargo interests.[148]

In the current milieu, carriers need even larger investments in maritime transport to run their business. Supporters of retention of the NFE argue that the apportionment of risk is necessary to avoid the carrier bearing too great a proportion.[149] Otherwise a fatal case of negligence such as in a collision

[146] See Wilson, *supra* note 50 5ed., at p.266.
[147] See Karan, *supra* note 2, at p.88.
[148] *Ibid.*
[149] Brian Makins, Uniformity of the law of the carriage of goods by sea in the 1990s: The Hamburg Rules - a casualty, at p.45.
http://www.austlii.edu.au/au/journals/ANZMLJ/1991/4.pdf

could raise the carrier to such a level of liability for loss and damages to the ship, cargo and even the crew; he could end up in a state of bankruptcy.[150] On top of that, if he had to bear vicarious liability for the fault of his servants, it would be an added disaster for him financially.

Supporters of the NFE view it as an important device for risk distribution among insurers in major casualties. It works to spread loss among numerous underwriters, with little effect on the world's cargo premiums.[151] In any event, carriers maintain that the nautical fault defense is unimportant in the vast, routine majority of claims, but potentially important in major casualties such as collisions, strandings or fires.[152]

Furthermore, as the incomplete fault liability system has developed over the past decades in the courts and arbitrations and involved a high degree of international uniformity with a resulting reduction in costs, abandoning the NFE will lead to wildly divergent results among different maritime jurisdictions.[153]

Finally, abolishment of the NFE will not necessarily make the carrier take more care of the cargo, because it is the carrier's duty to pay full attention to the cargo. Otherwise he will not be employed by the cargo interests and will not be able to run his business gainfully. Thus, there is an economic incentive for the carrier to take sufficient care of the cargo.[154] The goodwill of their business, which is among their most valuable assets, is based entirely on the care with which their cargoes are carried and the satisfaction they give to the merchants.[155] Further deletion of the NFE will not reduce losses due to collisions as it will not exert any particular

[150] See Karan, *supra* note 2, at p.89.
[151] 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, *Journal of Transnational Law & Policy* (1995), at p.28.
[152] *Ibid.*
[153] See Makins, supra note 149, at p.41.
[154] S. Peck David, Economic Analysis of the Allocation of Liability for Cargo Damage: The Case for the carrier, or Is It?, *26 Transp. L. J.* 73(1998), at p.96.
[155] *Ibid.*, at p.96.

influence on the conduct of masters and officers.[156] They are already keen to avoid being held liable for collisions since this would affect their records and could result in criminal consequences.[157] The practical effect of removal of the nautical fault defense would be substantially less than might be expected because of the relatively low number of cases that are litigated purely on the basis of NFE.[158]

In short, these reasons imply that cargo interests have sufficient protection against the special risks inherent in the navigation or in the management of the ship.[159] The responsibility of the carrier for the choice and adequacy of servants and agents, the possibility that the servants may be liable in tort and crime on their fault and the cargo insurance protection are enough to protect the cargo interests.

4.2 Criticism by the opponents against the NFE

The most important argument from the side of the cargo interests is the significant development of various forms of technology in the shipping filed. They argue that it might have been reasonable to apply NFE in the early of twenties when the Hague and subsequently the Hague-Visby Rules were introduced, as the carrier could well have lost its control over the ship once she commenced her because of the lower standard of technology in those times. Nowadays modern ship construction and new material, such as steel-built ships with sophisticated engines and state-of-the-art navigation systems, make ships much more durable and safer than ever before. The application of GPS makes navigation much easier and less risky.[160] Further, significant improvements in the discipline make ships avoid as much

[156] Francesco Berlingieri, the period of responsibility and the basis of liability of the carrier, *95 II Diritto Marittimo* 925, 933-34 (1993), at 942.
[157] *Ibid.*
[158] Leslie Tomasello Weitz, The Nautical Fault Debate (The Hamburg Rules, The U.S. COGSA 95, The STCW 95 And The ISM Code), *22 Tul. Mar. L.J.* (1997-1998), at p.588.
[159] Secretary- General, Report: Analysis Of Comments By Goverments And International Organizations On The Draft Convention On The Carriage Of Goods By Sea, General Assembly (1976), Doc. A/CN9/110, 7 Yearbook of the UNCITRAL 263 (1976), at p.271.
[160] See Song, *supra* note 88, at p.6.

adverse weather as possible. Most importantly, in these contemporary times of advanced information technology and telecommunications, where shipowners can maintain constant verbal and visual contact with their masters, the historic rationale for the shipowner's inability to control his vessel at sea no longer exists.[161]

Cargo interests also argue that the unfairness engendered by the NFE being rooted in maritime transport, is inconsistent and incompatible with other modes of transport. Pursuant to the principle of *respondeat superior*, the carrier should at least have vicarious liability for the loss or damage resulting from the negligence of his servants, agents or any person employed by him.[162] With the development of modern equipment, which puts the carrier of today in reasonable control of his servants and agents, even if it is just partial, there is no difference between carriage of goods by sea and carriage by other modes. There is no absolute control exercisable by carriers in other modes over their crew and operators or agents. The position of the sea carrier is therefore no different from carriers in other modes. Moreover, the NFE is considered to be at odds with the traditional principle of tort law which holds the principal liable for the torts of his agents so long as the tort is committed within the scope of the authority of the principal.[163]

Additionally, the risk of loss or damage should be borne by the party who is in a better position to prevent or avoid it.[164] Therefore, the party who controls, or has access to, the evidence as to how the loss or damage occurred should be required to prove that it did not result from his fault.[165]

Furthermore, retention of the NFE would discourage the carrier from incurring further expenses in order to control and train the master and crew for the navigation and the management of the ship, to equip the ship with

[161] See Mandelbaum, *supra* note 151, at pp.28-29.
[162] See Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention) 1929, Art. 18 (1); Uniform Rules Concerning the Contract for International Carriage of goods by Rail (CMI) 1980, Art.36(1), Art.50; Convention on the Contract for the International Carriage of Goods by Road Art.3, Art.17
[163] See Song, *supra* note 88, at p.5.
[164] See Weitz, *supra* note 158, at p.588
[165] *Ibid.*

modern navigation and communication devices and to maintain her seaworthiness after the voyage starts.[166] That would normally reduce the degree of care expected from the carrier and would increase the amount of loss of or damage to goods and of harm to the public.[167]

Finally, in the view of UNCTAD the NFE is considered to be an anachronism which causes uncertainty and considerable confusion in attempting to form any conclusions to guide carriers and cargo owners as to where exactly the line is drawn between what does and what does not constitute an error of navigation and management of the ship within the meaning of the exception.[168]

At any rate, in the view of the opponents of the NFE it is an embarrassment to exonerate a carrier based upon a showing of negligence and unfair to make the shipper pay for established nautical or managerial negligence on the part of the carrier and/or its management and agents.[169]

4.3 The impact of NFE on the carrier and cargo interests in practice

Actual commercial practice must always be considered no matter how conceptually sound any proposal for change might be.[170] Therefore, it is necessary to assess what percentage of cases is claimed by the NFE, and in these cases, what percentage of judgments is in favour of the carrier. The UNCTAD has attempted to collect information to provide a quantitative perspective to the discussion. However, the Secretariat of UNCTAD has failed to calculate the desired magnitudes.[171] There are only fragmentary statistics; e.g. in 1969, 1,624 vessels of 500 gross tons and upwards were involved in collisions, while 854 were stranded.[172] The exception in respect

[166] See Karan, *supra* note 2, at 90.
[167] *Ibid.*
[168] UNCTAD, Report On Bills Of Lading, TD/B/C.4/ISL/6/Rev.1, at p.39 227.
[169] See Mandelbaum, *supra* note 151, at p.29.
[170] See Weitz, *supra* note 158, at p.587.
[171] See UNCTAD, *supra* note 169, at p.27 149-152.
[172] See UNCTAD, *supra* note 169, at p.39 footnote 195

of negligence in the navigation of the ship would have been open to carriers in most of these incidents in refuting cargo claims.[173]

Moreover, some courts have given too wide and liberal an interpretation of the NFE. For example, carriers can escape liability even for defective stowage of goods resulting from a technical fault of the master which impaired the ship's stability.[174] The carrier is frequently exempted if both ship and cargo have been affected by the same error, even when bad seamanship has been equated with errors in navigation and management.[175] It should be noted that seamanship can be quite different from navigation in many instances even though a single function on board the ship on many occasions can involve both. It would also appear that carriers have escaped liability for damage to cargo resulting from many ordinary acts of seamanship, such as the berthing of ships, also, damage or delay caused by bunkering may in some circumstances be brought within the exception under the heading of defective "management of the ship".[176]

4.4 The international liability regime without the NFE

Until now, there are two international liability regimes – the Hamburg Rules and the Rotterdam Rules which have abolished the NFE. If maritime nations consider abandoning the NFE, they will obviously subscribe to one of these two conventions. Thus it's important to analyze the details of these two liability regimes to assess the nature of their impact on the carrier and cargo interests.

4.4.1 The liability regime under the Hamburg Rules

Article 5 (1) of the Hamburg Rules provides for the basic liability of the carrier as follows:

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[173] *Ibid.*
[174] *Ibid.*, at p.39 223.
[175] *Ibid.*, at p.39 226.
[176] *Ibid.*

> 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.

The first point which needs to be noted is that the liability 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.[177] It may be argued that the Hamburg Rules thus increase the liability of the carrier. But it should be remembered that under Article III (2) of the Hague/Hague-Visby Rules, the carrier is under a continuous duty "to properly and carefully . . . carry, keep, [and] care for . . . the goods carried."[178] If the carrier fails to perform the duty after the commencement of voyage, he will be liable as well. Thus the carrier carries the same liability as in the Hague/Hague-Visby Rules.

Secondly, this liability regime is completely based on fault in all cases of loss or damage to cargo, where the basic principle of the liability regime is “presumed fault”. This is made clear by an Annex which was added at the conclusion of the Hamburg Rules. The Annex states:

> It is the common understanding that 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.[179]

Provisions are made in the Hague/Hague-Visby Rules regarding the obligations of the carrier to make the ship seaworthy and to care for the cargo. No such reference is made in the Hamburg Rules, since it has been deemed sufficient to provide in Article 5 (1) that the carrier is liable unless

[177] The Hamburg Rules, Article 4 (1), compared with the Hague/Hague-Visby Rules period “before and at the beginning of the voyage” in Article III (1)
[178] See Force, *supra* note 61, at 2064
[179] United Nations Convention on the Carriage of Goods by Sea, Hamburg, Mar. 31, 1978, U.N. Doc. A/Conf. 89/5, 17 I.L.M. 806 (1978), reprinted in 6 Benedict on Admiralty.

he proves that he and his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[180]

Undoubtedly, the Hamburg Rules' regime is more in favour of the cargo interests. Cargo owners need only show that the loss of or damage to cargo took place while the goods were in the carrier's charge. After that, the burden shifts to the carrier to prove that either he was not at fault or that he had taken all reasonable measures to avoid the loss or damage from occurring. This provision is justified on the desirability of placing the burden of proof on the party most likely to have knowledge of the fact.[181]

However, an important issue remaining to be resolved is the construction to be placed by national courts on the carrier's duty to take "reasonable measures". [182] It has been said that all the different interpretations of the expression "all measures that could reasonably be required" aim towards the same: reasonable and diligent behavior of the carrier that is usually known by terms such as "due diligence", "reasonable diligence", or "reasonable measures". [183] In general, taking reasonable measures requires the carrier to prove more than that they were not negligent. [184] The "reasonableness" has been understood to be the "convenient balance', that is to say, what can be expected from the carrier or his agent, bearing in mind all the circumstances of the specific case.[185] Thus the carrier needs to take significant steps to avoid the loss to qualify for the requirement of reasonableness.[186] But how that can be proved and what degree of reasonableness is acceptable by court is uncertain. The Hamburg Rules provide no detailed explanation or guidance regarding this matter. Given that this is a subject matter that is highly dependent on case law

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[180] Francesco Berlingieri, A Comparative Analysis Of The Hague-Visby Rules, The Hamburg Rules And The Rotterdam Rules, at p.6 http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf
[181] See Wilson, *supra* note 50 6ed., at p.217.
[182] *Ibid.*, at p.216
[183] See Berlingieri, *supra* note 156, at 934.
[184] C.C.Nicoll, Do The Hamburg Rules Suit A Shipper-Dominated Economy, *24 J. MAR. L. & COM.* 151 (1993), at p.159.
[185] See Weitz, *supra* note 158, at p.582.
[186] See Nicoll, *supra* note 185, at p.160.

jurisprudence emanating from common law courts, for a general standard to be established with any degree of certainty, numerous decisions will have to be handed down. In any event any case will have its own, sometimes unique, set of facts, which may provide more loopholes than before for lawyers representing both carrier as well as cargo interests. As Lord Diplock stated, the Hamburg Rules provide a wonderful scope for variation of application and he could decide almost every case exactly as he liked.[187] Thus the carrier's situation may be not as bad as expected depending on the construction placed by a court on the term "reasonable measures".

4.4.2 The liability regime under the Rotterdam Rules

The basis of liability is laid down in Article 17 of Rotterdam Rules as follow:

> 1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, 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 as defined in chapter 4.
>
> 2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article 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 of any person referred to in article 18.
>
> 3. 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……[188]

The provision is an amalgam of the respective approaches adopted by the Hague/Hague-Visby and Hamburg regimes.[189] The obligation imposed upon carriers by the fault based liability regime in the strand of the Hamburg Rules which has the presumed fault regime, and also has the

[187] Brian Makins, Sea Carriage of Goods Liability which Route for Australia (Fourteenth International Trade Law Conference, Canberra, 16 October 1987), at p.10.
[188] See the list event in Article 17 (3) in Rotterdam Rules
[189] See Wilson, *supra* note 50 7ed., at p.232.

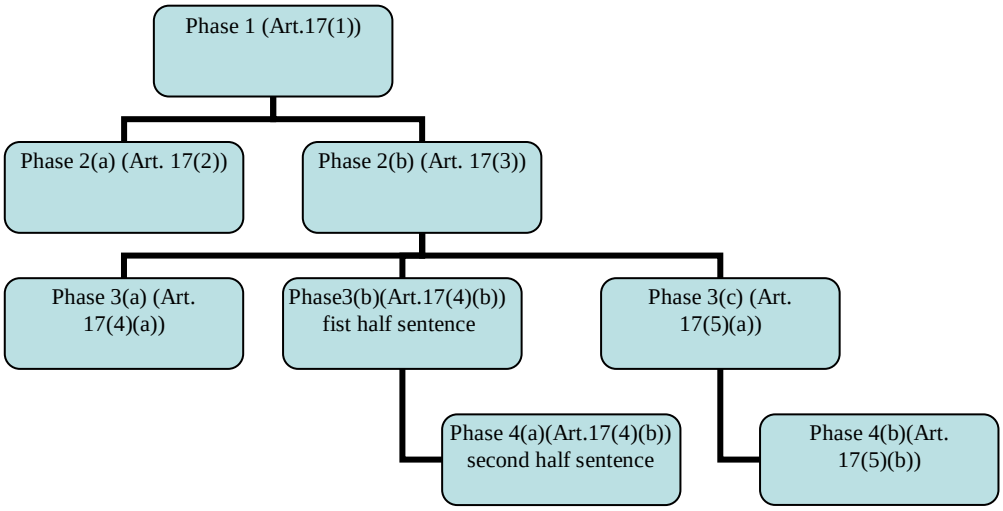
similar pattern of the exception list established by the Hague Rules,[190] with the omission of the controversial NFE. On this occasion, however, the intention is the provisions should act merely as rebuttable presumptions of the absence of fault rather than, as previously, exonerations from liability.[191]

Unlike the Hamburg Rules, the traditional obligations of the carrier to exercise due diligence to make the ship seaworthy and to care for the goods have been preserved in the Rotterdam Rules as positive duties.[192] The first of such obligations has been made to run continuously throughout the duration of the voyage.

According to Article 17 (1), the burden of proof of cargo interests is light. He only has to prove the goods were damaged during the period of the carrier's responsibility. Then a presumption of liability is imposed on the carrier unless he can prove the fault is neither his nor that of the performing parties'[193], or he can prove that the damage was caused by one of the enumerated exceptions. The subsequent burden of proof laying on the claimant is then regulated in a more detailed manner in the Rotterdam Rules, pursuant to which the claimant may prove either that the excepted peril was caused by the fault of the carrier or of a person for whom he is liable or that an event other than an excepted peril contributed to the loss, damage or delay.[194] The Rotterdam Rules then provide for a further alternative in favour of the claimant, consisting of the proof that the loss, damage or delay was probably caused or contributed to by unseaworthiness of the vessel, in which event the carrier may prove that he had exercised due diligence in making and keeping the vessel seaworthy.[195] The following

[190] D.R. Thomas, *An Analysis Of The Liability Regime Of Carriers And Maritime Performing Parties*, the Chapter 3 in D.R. 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", at p.53.
[191] See Wilson, *supra* note 50 7ed, at p.232.
[192] See Rotterdam Rules Art.13 and Art.14.
[193] See Rotterdam Rules Art.1(6) (a).
[194] See Berlingieri, *supra* note 181, at p.9.
[195] *Ibid.*

diagram illustrates clearly the various phases of shifting of the burden of proof[196]:



Compared with the Hamburg Rules, the Rotterdam Rules not only sets out the duties of carriers again, but also details the burden of proof by the cargo interests and carrier. One commentator has opined that the overall effect of these changes is to radically shift the balance of risk from cargo to ship.[197] However, the same commentator has also pointed out that the absence of uniform rules defining causality will lead to courts adopting a variety of different tests of causation which again may give rise to problems.[198] It would appear, for example, if the carrier raises the defence of due diligence to rebut the initial presumption of fault the burden of proof is on the carrier to establish, on a balance of probabilities, both the fact of causal unseaworthiness and due diligence. Whereas, if the claimant pleads unseaworthiness to undermine an exonerating event or circumstance, the burden of proof is shared, with the carrier obliged to prove due diligence or the absence of causal loss only after the claimant has established the probability of causal unseaworthiness. Thus, although from the perspective of the Rotterdam Rules, the liability regime is in favour of the cargo interest, it is difficult to say whether the carrier will be a very bad position in practice, or if so, to what extent.

[196] *Ibid.* and see also D.R. Thomas, *supra* note 191, pp.61-66.
[197] Anthony Diamond Q.C., The Next Sea Carriage Convention, [2008] *LMCLQ* 135, p.150
[198] See D.R. Thomas, *supra* note 191, at p.65.

It can be expected that because the Rotterdam Rules have updated the Hague/Hague-Visby Rules provisions, the case law on those Rules will continue to provide a solid base on which the interpretation of a wide range of issues arising out of the Rotterdam Rules' provisions on the carrier's liability can rest, although the case law on the existing carriage of goods by sea regimes would not cover every aspect of the Rotterdam Rules.[199] It is perhaps fair to conclude that in interpreting the Hague/ Hague-Visby Rules the courts have, by and large, ruled in favour of carriers.

4.5 The economic implication of abolition of NFE

Economic efficiency is always an important issue for discussion and consideration in the wake of the adoption of a new convention or liability regime as this is a matter of vital interest to all parties involved in shipping and international trade. Before the discussion on the economic aspects of abolishment of NFE, it is essential to review the cost effectiveness under the present regime with the NFE.

The economic cost is usually directly reflected in the case when the cargo is lost or damaged and the cargo interests claim damages against the carrier. The claim is either rejected or settled partially or fully on the basis of the distribution of risks and the limitation of liability provided by the existing law.[200] If the cargo owner does not accept the carrier's position, he has to proceed to arbitration or litigation to pursue his claim. The amount of loss suffered by the cargo interests and uncompensated by the carrier represents the initial economic impact which may be said to be "sanctioned" or permitted by the operation and interpretation of the existing law.[201] The Committee of UNCTAD has commented that a significant amount of uncompensated loss arises from an excessive number of exceptions, *inter alia* the NFE, for the carrier to legally avoid liability for loss of cargo and

[199] Theodora Nikaki, The Carrier's Duties Under The Rotterdam Rules: Better The Devil You Know?, *55 Tulane Maritime Law Journal* 1-44 (2010), at p.8.
[200] See UNCTAD, *supra* note 169, at 79
[201] *Ibid.*

reject the claim made by the cargo interests.[202] Furthermore, arbitration and litigation also impose costs, including the indirect or unpaid element of the time which carriers and cargo owners spend in preparing for and attending proceedings.[203] It is normally the cargo interests who pay for travel cost incurred for attending the proceedings. They also bear the costs associated with procuring and submitting evidence including the testimony of witnesses. If there is a delay in the settlement, another economic cost will arise which normally the cargo interests will have to pay.

In practice, with the rapid development of international transport insurance, for the sake of simplification, most loss or damage relating to cargo is actually in the first place indemnified by the cargo insurer. The role of the liability rules is therefore mainly to determine the right of recourse which the insurer has against the carrier and its P&I Club which is the entity that provides third party liability insurance to the shipowner. However, a minor proportion of the claims paid by cargo insurers is ultimately transferred to the carrier by way of recourse, as the insurers usually do not pursue recourse action considering the high costs involved and the relatively low rate of success compared with the insurance profit they can gain.

Moreover, from the insurance perspective, the carrier's insurance overlaps with the insurance borne by the cargo interests under the present regime. Due to the existence of NFE together with its uncertainty and ambiguity, especially on the question of fault in management, the allocation of risks between the parties concerned is uncertain because they are not specified.[204] The cargo interests cannot decide whether the cargo damage can be compensated in such circumstances. Ideally cargo owners should not need to insure against the risk of loss or damage to their goods which is covered by the liabilities falling upon the carrier under the contract of carriage, with particular reference to the Hague/Hague-Visby Rules.[205] However, the incomplete fault regime from the NFE does not clearly

[202] *Ibid.*, at 80 see also 265-284.
[203] *Ibid.*, at 167.
[204] See Astle, *supra* note 5, at p.30.
[205] See UNCTAD, *supra* note 169, at 154.

demarcate the apportionment and definition of risks and liabilities and leads to the cargo interests having no alternative but to over-insure, lest they be exposed to the incident of risk for which carriers might not compensate them, even though the carrier might be legally liable to do so under the provisions of the liability rules.[206] What is even worse is that the additional insurance by the cargo owner includes insurance against risks for which the carrier is already responsible. In this way insurance policies overlap, or it may be more correct to speak of a "dual system of insurance", since both carrier and cargo interests are insuring against the same risks.[207] However, it is pointed out that this overlap is limited since negotiated insurance rates take full account of the liabilities of both the carrier as well as others.[208]

The great merit of the present liability regime is its pragmatism, that is to say that they focus on relatively few essential subjects and achieve their objective with economy of effort and in traditional language which is well known to maritime law.[209]

Then the question that arises following the above discussion is whether abolition of the NFE will affect the economics of international maritime trade, and if so, what kind of economic effectiveness it will bring.

The first point that needs to be noted is that due to the lack of even approximate estimates of the size and relative importance of the cost elements under both the present system and the new system, the discussion will become mainly an exchange of points of view based on assumptions and beliefs.

The issue of whether the number of claims will change will therefore lead to the question of whether there will be an increase in the overall cost. This will be discussed first. The change in the balance of liability and

[206] *Ibid.*, at 155.
[207] See Astle, *supra* note 5, at p.30.
[208] R. Porter, "A Committee of Experts", Is It Time For A Change?, Proceedings of a symposium on cargo insurance and transporter's liability, 18-19th Sep. 1973, United States Department of Commerce/ Maritime Administration, Washington D.C., Sep. 1973, at p.74.
[209] Anthony Diamond Q.C., Part one of a legal analysis of the Hamburg Rules, the Hamburg Rules- a one day seminar organized by Lloyd's of London Press Ltd. London, 28th Sep. 1978, at p.2 of the paper by Diamond.

reverse of burden of proof will bring more claims against the carriers than before, as the cargo interests or their insurers have the belief that it is easier for courts to uphold payment of compensation for cargo loss or damage. However, on the other hand, the introduction of the new liability regime might actually result in less damage since shipowners might be disposed to take better care of cargoes owing to the increase in their liability. Consequently, the total number of claims may either remain unchanged or decrease with the lower amount of damage.

There is another point that needs to be noted; the new liability regime is totally changed regarding the basis and burden of proof, so much so that the case law jurisprudence that has evolved over the years will not be available for consultation if questions arise regarding the new regime. In this situation, each new phrase or word may need to be retested by more cases at great expense. There are differences of opinion among P&I managers about whether the cost of this litigation will be a relatively small item in the overall total of costs and claims or whether it will have a considerable impact on overall costs.[210] But in a long term, a new standard emerging with clarity and certainty may result in the decline of the number of cases and lead to a decrease of the overall cost.

Furthermore both shippers or cargo insurers as well as shipowners and their P&I Clubs have come to realize that in the present very competitive economic climate, where profit margins are sparse, everyone concerned would want to avoid lengthy and costly litigation.[211] For this reason there has been a growing tendency to settle out of court, even when, for example, shipowners felt that they had a very good case for claiming non-liability.[212] This practice is likely to continue after the adoption of the new liability regime.

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[210] C.W.H. Goldie, Effect of the Hamburg Rules on Shipowners' Liability Insurance, CMI Report 1979, "Colloquium of the Hamburg Rules", Vienna 1979, at pp.26-27.
[211] UNCTAD, the Economic and Commercial Implications of the Entry Into Force of the Hamburg Rules and the Multimodal Transport Convention (1991), TD/B/C.4/315/Rev.1, at 64.
[212] *Ibid.*, at 64. See also A. Nichols, Conciliation the key word in Chinese arbitration Fairplay, London, Vol. 306, Issue 5467, 21th July 1988, pp.19-20

In the final analysis, it is submitted that the entry into force of the new liability regime will neither change the total risk, nor result in more loss of or damage to cargo. In the worst case scenario, the total number and amount of cargo claims, expressed in percentage of volume and value respectively, may be expected to remain at the same level as today.[213]

The debate therefore focuses not so much on the amount but on who will pay for it. In practice the real debate over the economic consequences of the new liability regime may be reduced to the question of who in future is going to pay for cargo claims, *i.e.* the cargo insurers or the P&I Clubs, and what influence it will bring to bear on their premiums and other expenses. The P&I Clubs fear that because of the new allocation of risks, they will have to bear a greater share of this expense; the cargo insurers fear that it will be true and that they consequently will be faced with a reduction in premiums. The new liability regime will bring a situation that while the P&I costs will go up; cargo insurance premiums will not go down. As a consequence increase there will be a net increase in the total cost of transport.

From the shipowner or P&I Club's perspective, the strict liability and new rules of burden of proof may increase the carriers' claim-handling costs. If so, then the result will be not only higher costs for the shipowners' claims departments but also possibly higher liability insurance costs. If the cargo interests and cargo insurers receive support from judicial decisions, the P&I Clubs, may have to pay for such claims and may then need to increase their shipowners' calls.

Be that as it may, three points need to be considered in this assumption. First if the cost goes up, the management of both shipping companies and P&I Clubs will probably pay more attention to the cause and try to force the costs down again through improved loss prevention measures and better

[213] K. Schelling, The Practical And Economic Effects Of The Hamburg Rules From The View Of A Cargo Underwriter, CMI Report 1979, "Colloquium of the Hamburg Rules", Vienna 1979, at p.23

standards of cargo care.[214] In such case, cost increase is likely to be temporary. It has, for example, been shown that increased liability for American truckers, voluntarily adopted at the suggestion of one of the largest shippers in the world, *E.I. DuPont de Nemours & Co.*, "gave the truckers the incentive they needed to improve their operations and tighten their safety standards. This in turn had the result that productively increased and insurance premiums went down."[215] Secondly, in reference to the administrative expenses of the P&I Clubs, it has been said these will "remain remarkably steady when analyzed as percentages of total claims paid in each policy year, and it is unlikely that the advent of the new liability regime will so increase the volume of claims as to affect the figures significantly."[216] Thirdly, it is to be noted that of the risks covered by P&I Clubs[217], the payment towards cargo claims amount to about 30% of the total.[218] Since cargo risks play such a relatively limited role in the total risks assumed by the P&I Clubs their implications for liability insurance are limited. If it is assumed that the new liability regime, for example, would increase cargo claims by 20% to 30%, the total claims reimbursement will be increased overall by 6% to 9%.[219] Such slight increase may not result in a dramatic higher premium for the shipowners.

The next related issue is the freight rate charged by the shipowner/carrier. If there is an increase in liability insurance premiums, how will it affect freight rates? It must be noted that the freight rate usually depends on a number of factors and insurance cost is only a small part of the overall consideration. A United States Department of Transport study estimated that the net cost of the United States Ocean carriers' insurance system was only 0.15% of their freight revenue, and the total cost (claims

[214] G.N. Yannopoulos, The Economics of 'Flagging Out', *Journal of Transport Economics and Policy*, London School of Economics and Polictical Science and the University of Bath. May 1988. at p.198.
[215] R. Knee, General Average Outmoded?, *American Shipper* April 1990, at p.16.
[216] See Goldie, *supra* note 211, at p.26.
[217] Liability for loss of life and personal injury, liability for loss of or damage to cargo, one-quarter collision liability, Wreck removal, damage to fixed objects, oil pollution.etc
[218] See UNCTAD, *supra* note 212, at 69.
[219] *Ibid.*

and premiums) came to only 2.05% of the freight revenue.[220] Thus if this set of statistics is followed, an increase in liability insurance costs of 6% to 9% assumed above will influence only 6% x 0.15% to 9% x 0.15% of the total freight rate, which is a virtually negligible change.

From the viewpoint of the cargo interests or cargo insurers, since the new liability regime does not require the carrier to be liable for all cases resulting in the loss of or damage to cargo, it is most likely that cargo interests will continue to insure with their cargo insurers and the overlapping insurance will not be eliminated. In other words, there would seem to be no reason to expect any dramatic reduction in the amount of insurance underwritten by the cargo insurers, because the cargo interests cannot forecast the risk, for example, of stranding, or adverse weather conditions or the fault of servants or agents, but in any event resulting in the loss of or damage to cargo in the end. The cargo interests therefore prefer to pay a small part of the premium to insure any possible risk to ensure the safety of their cargo.

There is another reason why cargo insurance will not be reduced. In practice the relationship between cargo interests and their insurers is a good one. Cargo insurance is one of the few industries where a claimant's claim is paid with admirable efficiency.[221] Shipowners and their P&I Clubs, on the other hand, are notoriously slow in accepting liability and it would be surprising if cargo interests would be bothered with directly confronting shipowners anymore in the future than they have in past.[222] Instead they would leave it to their cargo insurers to seek recourse against the shipowner.

It has been shown above that the new liability regime also puts cargo insurers in a better position in terms of recourse against carriers and their

[220] Cargo Liability Study, Final Report, prepared by office of Facilitation, Office of the Assistant Secretary for Environment, Safety, and Consumer Affairs, United States Department of Transportation, Washington. D.C. June 1975, at p.78.
[221] See UNCTAD, *supra* note 212, at 66.
[222] J. Honour & M. Newbery, the west of England Shipowners Mutual Insurance Association; "Rights of recourse against shipowners – a P&I Club Manager's view", Marine Insurance '79, Conference organized by Lloyd's of London Press Ltd., Sponsored by Lloyd's Underwriters' Association and the Institute of London Underwriters, Cargo Conference, London Press Centre, Nov. 29/30th, 1979, at pp.6-7.

P&I Clubs. In such cases, if successful recourse actions increase, such actions may result in the return of some additional money to the cargo insurers who can then use this income either to improve profitability or to reduce the actual premiums without reducing existing profit margins.[223] However, on the other hand, recourse will lead to increased cost of contesting such actions. But one view is that both the return of money and the claim-handling fee will be low, which could not dramatically influence the rate of premiums.[224] The rate actually mostly depends on international competition.[225]

Finally for the total insurance costs, it must be borne in mind that P&I Clubs in general are more cost effective, as in essence they are owned by the shipowners. They are mutual and non-profit-making compared with cargo insurers. The P&I Clubs use 85% to 90% of their premiums for the payment of compensation.[226] A United States report indicates that little more than half of cargo insurance companies' premiums go to payment of compensation, one third covers cost of administration and the rest is profit.[227] European cargo insurance companies appear to operate with corresponding proportions of 75-25-5 percentage.[228] Thus from a purely economic point of view, it may be more relatively cheap if the risks can be covered more under P&I insurance than under cargo insurance and the risk reallocation of the new liability regime may therefore result in either no change or a reduction in total insurance costs.

In reference to the relationship between these two kinds of insurance, when there is negotiation in private, cargo insurers will be able to extract somewhat better settlements from the P&I Clubs due to the changes in the

[223] See UNCTAD, *supra* note 212, at 76.
[224] N. Kihlbom, The Cargo Owner'S View and His Insurance Requirements, Alx Seminar, at p.5.
[225] J.A. Hickey, Pollution Act Vexes Industry, *Journal of Commerce*, New York, 11th Sep. 1990, at p.7A.
[226] Erling Selvig, The Hamburg Rules, the Hague Rules and Marine Insurance Practice, *12 J. Mar. L. & Com.* 299 (1980-1981), at p.308.
[227] *Supra* note 221, at p.65
[228] N. Kihlborn, The Hague Rules and the UNCITRAL Draft, *Scandinavian Insurance Quarterly*, 1977, 31, at pp.32-34.

liability system. This may result in an increase in cost to the latter but a decrease in cost of the former.

Most commentators are of the opinion that it is highly doubtful whether the new liability regime will result in any increase in the total insurance and transport costs.[229] There is a possibility of increase of P&I Clubs' premiums to guard against the increased liability because of the elimination of the NFE, but it may be very little as can be gleaned from the discussion above. There is also a possibility of decrease in cargo insurance premiums because of the prospect of greater recourse recoveries; again that is also considered to be a very small part. Thus it seems the implementation of the new liability regime will not have a strong impact in terms of the economic aspect. There is no need for all the parties involved to be unduly concerned but it is a natural reaction of any business to any matter which may affect costs, and hence profits.

4.6 The political seascape regarding the abolition of NFE

The attitude of maritime nations to the NFE is actually the question of what liability regime they have chosen i.e. which international convention they have ratified. Up to 2009, the Hague Rules or the Hague-Visby Rules have been adopted or incorporated within national law by more than 100 states, representing a large proportion of maritime states.[230] However, the Hamburg Rules have been adopted only by 33 countries and have taken some 15 years to enter into force.[231] It is interesting to note that several states have adopted hybrid national regimes incorporating certain elements of the Hague/Hague-Visby as well as provisions from the Hamburg Rules.

4.6.1 The Scandinavian Maritime Codes

In the most radical departure to date, the Scandinavian countries have incorporated into their Hague-Visby Rules many parts of the Hamburg

[229] See Selvig, *supra* note 227, at p.316; see also Goldie, supra note 211, at p.27.
[230] CMI Year Book 2009, at pp.441 447.
[231] *Ibid.*, at p.546.

Rules which are not incompatible with the text and underlying policies of the Hague-Visby Rules. But the Scandinavian Maritime Codes stipulate the carrier must prove that its servants and agents took all measures that could reasonably be required to avoid the damage in order for the carrier to avoid liability for damage to the goods while they were in its charge.[232] In so doing, however, the Nordic countries have retained the nautical fault immunities.[233]

4.6.2 Canadian Carriage of Goods by Water Act

The government of Canada enacted its Carriage of Goods by Water Act, implementing the 1968 Visby Amendments in 1993.[234] The law also includes provisions for future adoption of the 1978 Hamburg Rules.[235] The Act requires the Minister of Transport to, on or before January 1, 2005, and thereafter every five years consider whether the Hague-Visby Rules should be replaced by the Hamburg Rules.[236] Consequently, it is the common understanding that the liability of the carrier in Canada is still based on the principle of incomplete fault with the NFE in favour of the carrier.

4.6.3 Australian Carriage of Goods by Sea Act (1991)

The Carriage of Goods by Sea Act incorporated both with the Hague Rules and Hamburg Rules came into force on October 31, 1991 and was due to become effective after October 31 1994. However, this has been deferred for three years. And in 1997, Australia enacted the Carriage of Goods by Sea Amendment Act 1997, amending the Carriage of Goods by Sea Act 1991. the Act 1977 states if, within 10 years of the commencement of this section, the Minister has not tabled a statement in accordance with subsection 2A(4) setting out a decision that the amended Hague Rules should be replaced by the Hamburg Rules, Part 3 and Schedule 2, and

[232] See Scandinavian Maritime Codes, Ch. 13, On Carriage of General Cargo.
[233] *Ibid.*
[234] Carriage of Goods by Water 1993 (this Act was repealed and replaced by Part 5 of the Marine Liability Act), Schedule 3.
[235] *Ibid.*, Schedule 4
[236] *Ibid.*, Part 5, Section 44.

section 2A(the Hamburg Rules part in Act 1991), are repealed on the first day after the end of that 10 years.[237] Now more than ten years passed, the Act 1991 was laid on the table for some complicated reasons. Thus it seems Australia in fact preserved the liability regime under Hague Rules until now.

4.6.4 United States Carriage of Goods by Sea Act (COGSA)

Although the United States government has signed both the Hague-Visby Amendments and the Hamburg Rules, neither has been ratified by the United States. Presently, the Hague Rules are in effect in the United States through the Carriage of Goods by Sea Act.[238] Despite that, most interests believe that some changes in the original Hague Rules is desirable. The political situation is such that neither the carrier interests, who advocate the adoption of the Visby Amendments, nor the shipper interests, who favour the Hamburg Rules, have enough support to make their views prevail.[239] In response to this controversy the United States has suggested a potentially acceptable compromise, known as the "trigger approach". It was created by the government with the hope that a package arrangement could be transmitted to the Senate, requesting the Senate's advice and consent for the ratification of both Visby and Hamburg.[240] To date, the trigger approach has been unacceptable to the majority of commercial interests.[241] Carrier interests including the P&I Club and cargo insurers firmly support the Hague-Visby system, but the cargo interests adamantly oppose the Hague-Visby Rules unless it leads to Hamburg Rules. It is evident from the political views that such a situation creates a classic stalemate causing governmental inaction until the maritime industry can solve its own problems by a compromise. Thus it is generally believed that the United States also will keep the liability regime under the Hague Rules.

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[237] Carriage of Goods by Sea Amendment Act 1997, Schedule 1.1.
[238] Title 46 U.S.C. Appendix Ch.28 CARRIAGE OF GOODS BY SEA 1300-1315.
[239] See Force, supra note61, at p.3.
[240] See Mandelbaum, *supra* note 151, at p.17.
[241] *Ibid.*

Although the incomplete fault regime is still applied by most maritime powers, the new international convention (Rotterdam Rules) is expected to change that situation. It is difficult to gauge the political perspectives on the new convention as it was only recently adopted by the United Nations in 2009, but it is noteworthy that 22 countries have signed the Convention, including Denmark, Greece, Madagascar, the Netherlands, Norway, Spain, Switzerland and the United States of America, all together representing 25% of the world's trade.[242] Also the European Community Shipowners' Association (ECSA), the International Chamber of Shipping (ICS), Baltic and International Maritime Council (BIMCO) and the World Shipping Council (WSC) have greatly welcomed the clear recommendation by the European Parliament that EU Member States should move "speedily to sign, ratify and implement the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the 'Rotterdam Rules', establishing the new maritime liability system".[243] As the President of the Union of Greek Shipowners, Mr. Nicos said: although the new Convention cannot be considered to be ideal for carriers' interests, it may be the last chance to have an international uniform legal framework for modern commercial practices of carriage by sea, to replace the existing patchwork of legal regimes.[244]

[242] See http://www.rotterdamrules.com/en/
[243] *Ibid.*
[244] Speech delivered by the President of the Union of Greek Shipowners, Nicos d. Efthymiou, CMI Year Book 2009, at p.293

5 THE CHINESE PERSPECTIVE

Although China is not a party to any of the international conventions mentioned above[245], the main legislation governing maritime trade which is the Maritime Code of the People's Republic of China (hereinafter "Maritime Code") is drafted based on the Hague Rules. The legislation entered into force on July 1, 1993. The provisions on carrier liability are laid down in chapter IV section 2 of Maritime Code. They are virtually a complete reflection of the Hague Rules and the NFE, of course, is the same as the corresponding clause in the Hague Rules.

In China, it is generally considered that the NFE should not be abolished, at least in the present circumstances, and overall it is in the national interest to retain the existing liability regime. Most shipping enterprises, such as the COSCO Group[246] and China Shipping Group, are of the opinion that the abolition of the NFE will create a negative impact on the Chinese shipping industry.

China is still a developing country where the national interests extend both to being identified as a carrier as well as a cargo-oriented state. Nevertheless on balance the shipping interests predominate. Until 1997, China's commercial vessels represented about 40% of total world tonnage and about 30% of the total world trade.[247]

Most shipping-oriented states, especially the developed countries have not abolished the NFE, and there is no reason why China should be the first one to embrace such a major change without serious and detailed consideration of the possible consequences economically or otherwise. As a leading shipping country, if China advances faster than other maritime states, the balance between carrier and cargo interests which has been

[245] However, Hong Kong has ratified the Hague-Visby Rules in 1980 and Macao has ratified the Hague Rules in 1952, see CMI Year Book 2009, p.441 447
[246] China Ocean Shipping (Group) Company
[247] Zhao Yuelin & Hu Zhengliang, Study on Whether the Nautical Fault Exemption Should be Eliminated in CMC, *Journal of Dalian Maritime University (Social Sciences Edition)*, Vol. 2, No. 1, Mar. 2003, at p.10.

reached under the present system will likely be destroyed. In the circumstances prevailing at present, Chinese policy has imposed on the carrier complete fault liability which is not the case in any other state. Thus, if the NFE abolished under Chinese law both carrier and cargo interests in China will suffer a great loss. This is because in the case of imported goods, the foreign carrier will enjoy the benefit of the NFE if application of foreign law is made a term of the bills of lading. And Chinese cargo interests will not derive benefit from its abolition in the Maritime code. Conversely, in the case of exported goods, if there is any loss or damage suffered by the cargo it will be easier for the foreign cargo interests to obtain the compensation from the Chinese carrier by virtue of the Maritime Code being modified.

The abolition of NFE will surely go against the development of the Chinese shipping industry. As mentioned above, although China is a shipping state, vessels owned by Chinese interests and operating under the Chinese flag are not adequately equipped in terms of technology and technical developments. Frequently the equipment used on board commercial Chinese ships are out dated compared with those used on board the ships of developed maritime countries. It is well known that China is also a major crew supply country and numerous Chinese seafarers serve not only on board Chinese ships but also ships of foreign flags. Maritime education and training in China is quite advanced, but even so, the performance of Chinese crew in terms of technical know-how and standard of seamanship from the view point of maritime safety and protection of marine environment needs to be vastly improved. Normally, the period of service of the average vessel far exceeds her quality guarantee. Experience shows that the loss of or damage to cargo arising from the NFE is of more common occurrence on Chinese ships than ships flagged in other maritime states. As a consequence, the carrier has to expend considerable sums of money to support the new liability system. This will undoubtedly lead to a significant increase in the cost of ship operations and seriously decrease Chinese maritime capital strength and impair the international competitiveness of the Chinese shipping industry.

In China the P&I insurance business is relatively underdeveloped. Many shipping companies choose foreign P&I Clubs to obtain third party liability protection. Even if some Chinese shipping companies or others purchase insurance with the China P&I Club, it represents only a very small share of the P&I insurance market. The China P&I Club normally reinsures a percentage amount of the insurance arrangements with the foreign P&I Clubs. Thus, abolition of the NFE will be a major challenge for the China P&I Club to deal with a new situation. Whether the China P&I Club is ready to face that challenge is doubtful at best. Consequently, the application of a new liability regime seems not to be favourable to the development of the Chinese marine insurance business.

As one commentator stated, the original intention to abolish the NFE was for the exalted purpose of fairness, but this fairness is hardly discernible in the Chinese maritime context.[248] Thus it is commonly considered by both Chinese scholars and maritime traders that China needs to keep the present liability regime intact with the NFE under the current Chinese shipping scenario. Neither the Hamburg Rules nor the new Rotterdam Rules are suited for the development of the Chinese shipping industry.

At any rate, adoption of the fault-based liability regime without the NFE may, in the long term, become the prevailing international trend. Such a change would undoubtedly pose a formidable challenge to Chinese legislators, maritime trade and the shipping industry. In the short term, in a bid to meet the challenges of higher competitiveness, the most important concern would be to improve the standards of technology and equipment on board Chinese ships to achieve international norms.

Apart from the above-mentioned observations, there is also a need to establish a more coherent, fully developed seafarer education and training system. Shipping entities should be encouraged to learn modern navigation and management techniques from the experiences of their foreign

[248] Zhang Renqing, Study on the Issues Concerning Reservation or Abolition of Nautical Fault Exemption, LLM Master thesis of Wu Han University, at p.31.

counterparts. Meanwhile legislators need to pay close attention to what is happening with the Rotterdam Rules, deliberate on all aspects of the Rules, both the favourable and unfavourable ones alike to determine and consider what, if any, advantages can be derived from them for adoption in the Maritime Code. It is suggested that the government make and promulgate regulations in this field designed to support the development of the domestic insurance business and for the benefit of national shipping as a whole. In other words, China should be prepared to abolish the NFE if that becomes necessary in the near future. By embracing a policy of preparedness as proposed above, when most major maritime states, especially those who are the principal trading partners of China abolish the NFE in their maritime legal systems, China will be able to follow suit without hesitation.

6 SUMMARY AND CONCLUSION

It is undeniable that the NFE has occupied a firm and stable position in present liability regimes concerned with carriage of goods by sea. The convention regimes in this area of maritime law and commercial practice have evolved over many decades crossing over from the past to the present century evolution. The regimes have been judicially tried and tested over an extended period of time and in most jurisdictions the law as it stands is thus well-entrenched. However, beginning with the Hamburg Rules of 1978 and now with the recent adoption of the Rotterdam Rules, it is possible that a new phase in carriage law is about to emerge and abolition of the NFE is an essential and germane component of this formidable law reform exercise. The changeover or crossover, in whatever way the phenomenon may be described is all the more important because the NFE is commonly regarded as the primary immunity held by carrier to escape liability from cargo claims.

Removal of the NFE has been a long-standing target of cargo interests since the adoption of the Hague Rules in 1924 and its subsequent entry into force. So far in discussions involving a compromise on the removal of the NFE, largely the *status quo* has been maintained as the two opposing sides have not been able to convince each other. Accordingly, governments have had little choice other than to maintain the extant regimes. Even the emergence of the Hamburg Rules did not succeed in breaking this stalemate. The question confronting the international shipping community and the international trade sector is whether the new convention – the Rotterdam Rules can accomplish this object.

It is submitted that in any debate regarding the retention or removal of the NFE three aspects should be considered; namely, the balance of allocation of risks up to date, the principle of uniformity and the practical effects under both situations.

Vagaries of nature will continue to exist, storms and other fortuitous circumstances will remain a regular feature of every maritime adventure, but whether that is sufficient justification to allow a carrier to escape liability for cargo loss or damage under the NFE is today an issue that demands close scrutiny.

In recent years, many organizations have been dedicated to the research of maritime accidents caused by human error. According to the research of the Bremen Maritime Institute of Maritime Economics, among the 330 maritime accidents which occurred during the period from 1987 to 1991, 75% were caused by human-induced factors. The report of Australian Department of Transportation pointed out that 75% of the accidents investigated in 1998 resulted from seafarer faults. The United Kingdom Advisory Committee on Maritime Pollution blamed 66% of the 182 oil-related accidents in British waters in 1990 on faulty act or omission of crew. The United Kingdom P&I Club report revealed that from 1987 to 1991 there were 1,444 claims of which 66% were attributable to nautical fault and the total amount of the claims was up to USD 77.8 billion. From the statistics above[249], it is abundantly clear that the vast majority of maritime accidents and cargo damage claims are caused by human error.

The statistical data begs the question as to why so many accidents are attributed to human error when there are such modern state-of-the-art modern navigational devices such as GPS and ARPA. Supporters of the NFE abolition rest their contentions on the premise that high technology should reduce casualties caused by human error. No doubt, these navigational devices have indeed reduced a great proportion of the risks that have traditionally plagued the nautical profession but occurrences of casualties will never be completely eliminated. It is submitted that the existence of the NFE is used a safety net; a last resort of protection for carriers which they are unwilling to surrender. The continued protection afforded by the NFE, it is submitted, discourages the servants of the carrier,

[249] See Zhao Yuelin & Hu Zhengliang, *supra* note 249, at p.2.

namely, the ships' officers to pay close attention to navigation and take due care in the management of ships.

Initially, in order to circumvent the strict liability imposed by the law on carriers, they inserted exoneration clauses to exempt themselves from virtually all forms of liability whatsoever. Eventually the untrammeled dominance of carriers was tempered first by the Harter Act in the United States followed by legislation cast in a similar in various jurisdictions. The resulting chaotic situation and lack of uniformity led to the adoption of the Hague Rules in 1924 which was modified by the Visby Protocol in 1968. An attempt to turn the tide was made through the adoption of the Hamburg Rules 1978 but it failed. With few exceptions[250], carriers have retained their predominance in the carrier-shipper relationship. Therefore, in the interests of fairness and the rightful balancing of clout in this relationship, it is perhaps quite reasonable that the risk of loss or damage should be borne by the party who is in a better position, *i.e.* the carrier. This is what the Rotterdam Rules aims to accomplish.

The unfairness of the NFE is particular noticeable in collision liability cases. Abolition of the NFE can remove the anomalous compensation system and the more anomalous "both-to-blame collision" clauses and thus bring more clarity and certainty in practice. In the context of collision liability, apart from its effect *vis a vis* cargo claims, a potential point of contention is that no such exception as the NFE is available. If nautical fault was made an exception in collision liability law, no shipowner would ever be liable for anything since virtually all collisions and most groundings, are attributable to error in navigation. If no such exception is available in a tort action, why should it be available in contractual relationship between carrier and shipper?

[250] A number of shippers, particularly ones operating in the United States have emerged as fairly powerful forces to reckon with, in the carrier-shipper contractual relationships. These pose as Non-Vessel Operating Common Carriers (NVOCCs), consolidators and the likes. These "big" shippers are able to take advantage of the volume contract provisions of the Rotterdam Rules. But small shippers are still at a relative disadvantage. For further details see Proshanto K. Mukherjee and Abhinayan Basu Bal, "The Impact of the Volume contract concept on the global community of shippers: the Rotterdam Rules in perspective", (2010) 16 *JIML*, p. 352

The development of the global economy and the effect of globalization will inevitably lead to the multimodal transport of goods involving different types of transportation. It is imperative that a uniform liability regime be adopted to regulate this huge and growing field. Such uniformity will not only facilitate international trade, but also reduce the costs of sea transport. However, it must be noted that complete uniformity of application is but probably not unachievable, as national judicial attitudes vary from one jurisdiction to another. Thus the objective should be to reduce the scope of variations in substantive law to the minimum. The NFE is absolutely a major obstacle to achieving such uniformity as it gives the sea carrier a special kind of protection which is not available in any other transport convention.

Although shipping is no longer an adventure in the way it was in the past, the characteristics of risks inherent in the sea still make maritime transport more dangerous than other modes. However, such uncontrollable risks are never proposed to be borne by the carrier. The Rotterdam Rules lists specifically the perils as for the immunity of the carrier. So it seems the Rotterdam Rules is relatively fair for both the carrier and cargo interests, although theoretically they favour cargo interests.

Moreover the meaning of the NFE is not explained clearly, especially the fault in management. Even if through several court decisions a general standard has been established, they are not all consistent. It is submitted that abolition of the NFE will at least remove the ambiguity between the "care of cargo" and "management of the ship".

In practice, the defences available to the carrier have become increasingly restricted. In many jurisdictions it is difficult for the carrier to prove that it exercised due diligence to make the ship seaworthy.[251] Since application of the NFE seems to be posing difficulties, its abolition from the liability regime is probably the best course of action.

[251] C.W.H. Goldie, the Effect of the Hamburg Rules on Shipowners' Liability Insurance, *Journal of Maritime Law and Commerce*, Vol. 24, No.1, Jan. 1993, at p.112.

In reference to the economic implication of removal of the NFE, as discussed above, while conclusion is somewhat speculative in the absence of concrete quantitative data, resort to whatever information is available can be useful in a limited way. Most commentators believe the economic effect of changing the liability regime will simply have a moderate impact on all stakeholders involved in the carriage of goods by sea. Even if there is an increase or decrease, for example, in freight rates, it will be temporary. Rates will be adjusted by the adoption of suitable management methodologies based on the adage that “a slight move in one part may affect the whole situation”.

In the final analysis it must be noted that there is a worldwide trend towards imposing higher liabilities on shipowners for cargo loss or damage which in turn points to the need for abolition of the NFE, as it is inconsistent with the principles of vicarious liability as embodied in the law of most countries. The shipping industry has traditionally adopted a conservative posture when it comes to regime change. It is therefore not surprising that widespread support for the Rotterdam Rules has not yet become evident in terms of ratification of the Convention although the minimum number of signatures required was met not long after the signing ceremony held in Rotterdam in October 2009. Most maritime states, especially the emerging economies are adopting a “wait and see” attitude. Thus the expectation is that it may be some time before the Rotterdam Rules enter into force.

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