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**The Common Law, the Hague-Visby Rules, and the Thai
Carriage of Goods by Sea Act regarding carrier's
obligations and liability: A Comparative Study**

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1. Introduction

The writer has had an opportunity to study the Master of International Financial Law program at the University of Manchester in the year 2007. During which time, the writer has become familiar with the English Common law and had obtained the International Sales of Goods course which inspired the writer to further study the second Master program in Maritime Law at Lund University.

Moreover, while intern at PBS Law limited, a Bangkok law firm, during the summer period of the year 2009, the writer has had an opportunity to conduct a research on Thai Maritime Laws which was eventually published in “*Getting the Deal Through Shipping 2010 Thailand*”, an annual journal of the International Bar Association.

Both of the above experience and familiarity with English and Thai maritime laws combining with the knowledge of Hague-Visby Rules gained from studying the Master of Maritime Laws at Lund University have inspired the writer to carry out this Master thesis.

The purpose of this Master thesis is to examine in complex details, the similarities and differences of the carrier’s duties and liabilities between the Common law, Hague-Visby Rules and the Thai Carriage of Goods by Sea Act B.E. 2534 (1991).

Although Thailand is not a major maritime country, exports play the most crucial role of developing Thai economy, apart from tourism, services and agricultural industries. In fact, fifty percent of Thailand’s gross domestic product, of which 20 millions workers are employed, comes from exports.

Thus many maritime laws, concepts and practices are adopted from Common law rules, and international Conventions to which Thailand is a party and not a party. After those rules were adopted, there have been a number of cases and practices which Thai courts have had opportunities to consider, and subsequently have become common practices in Thailand.

The writer hopes that this Master thesis will assist lawyers, law students and others in the shipping industry to gain information on Thai and international maritime laws and also hopes that the Thai maritime laws and industry will continue to grow and develop to serve the demands of export businesses in Thailand.

2. Methodology

First of all, this Master thesis will start with an overall summary of the Thai Carriage of Goods by Sea Act B.E. 2534 (1991) which is a special law dealing with Maritime-related cases in Thailand. The reason of legislating the act and the summarized features of the act will be provided.

Then, the thesis will come across to the main part which is a comparative study of the carrier's obligation and liabilities under the contract of carriage. The comparison will be made between Common law, Hague-Visby Rules, and Thai Carriage of Goods by Sea Act. For Common law in particular, English and Singaporean law will be mainly considered. The sub topic of this section; namely the carrier's obligations includes:

- a. Seaworthiness**
- b. Reasonable despatch**
- c. Deviation**
- d. Duty of care for the cargo**
- e. Exclusion of Liability**
- f. Limitation of Liability**

After the complex detail, explanation and comparison between each law, the Master thesis shall come to the final part of this paper which is the conclusion.

3. Abbreviation

- 1. COGSA = Carriage of Goods by Sea Act**
- 2. IPIT Court = Intellectual Property and International Trade Court**

4. Overall summary of Thai Carriage of Goods by Sea Act B.E. 2534 (1991)

4.1. History

The Act was drafted by the Law Committee of the Maritime Promotion Office, Ministry of Communications. Its implementation had been pending for more than ten years until 1991, the government of His Excellency Prime Ministry Anan Panyarachun reconsidered the draft Act and subsequently in 1991, the Thai National legislative Assembly passed the Carriage of Goods by Sea Act B.E. 2534. The Act is the first Thai law directly dealing with the matter of carriage of goods by sea.

Before the implementation of the Act, the Thai Courts had applied the provision of the Civil and Commercial code in respect of carriage of goods to the maritime disputes.

Although Thailand is not a signatory to any international conventions relating carriage of goods by sea i.e. Hague Rules, Hague Visby Rules of Hamburg Rules, some principles in those international Conventions were adopted in Thai COGSA, particularly it was mainly influenced by the provisions of Hamburg Rules.

4.2. Carriers

As influenced by Hamburg Rules, there are two kinds of the carrier under Thai COGSA, namely, the “carrier” who enters into the contract of carriage of goods by sea with the shipper and the “actual carrier” who does not enter into the carriage contract with the shipper, but has been entrusted by the carrier the carry the goods even for any part of the carriage under the contract.

4.3. Application

The Act shall compulsorily apply if one of the parties in the dispute is a Thai national of Thai entity. The Act neither applies to the carriage of goods within the Thai waters nor the carriage of goods under a charterparty.

4.4. Carriers' Liability

The carrier (including the “actual carrier”) is presumed by law to be liable for the loss, damage and delay in delivery of the goods, except where he can prove that such loss, damage or delay arose or resulted from the following causes:

1. force majeure;
2. perils, dangers and accidents of the sea or navigable waters;
3. an act of war or a fighting between armed forces;
4. civil war, riots, subversion and civil commotions;

5. detention, arrest, restraint, or any interference made against the ship by the ruler of any State or territory, or under provisions of law, provided that it is not caused by fault of neglect of the carrier;
6. quarantine restrictions;
7. strikes, lockouts, stoppage or intentional slowdown at any port which obstruct the loading and discharge of goods, or berthing or unberthing;
8. act of piracy;
9. fault of the shipper or consignee, particularly on insufficiency of packing or packing unsuitable for the condition of the goods and insufficiency or inadequacy of marks;
10. inherent vice;
11. latent defects of the ship not visible or discoverable by inspection with care and skill which can normally and properly be expected of a person engaged in an occupation of inspector of ships;
12. error in navigation arising from the fault of the pilot in discharging of his duties or from the pilot's instruction;
13. any other cause arising without fault or neglect or privity of the carrier or without fault or neglect of the agents or servants of the carrier.

4.5. Limitation of Liability

In case of damages resulting from loss of or damage to all or part of the goods, the liability of the carrier is limited to an amount of 10,000 baht per package or 30 baht per kilogramme of net weight of the goods, whichever is the greater, As for damager resulting from delay in delivery of the goods, the liability of the carrier is limited to an amount equivalent to two and a half times of the freight payable to the goods delayed, but not exceeding the total freight payable under the contract.

4.6. Loss of Right to Limit Liability

If the loss or damage or delay in delivery occurred as a result of a negligence or a wrongful act of the carrier or his agents or servants, the carrier is not entitled to the benefit of the limitation of liability. The limitations are not applicable in the case where a higher limitation is stipulated in the bill of lading, or where the value of the goods has been declared to the carrier, or where the carrier fails to note in the bill of lading any particulars notified by the shipper, with the intent to deceive the consignee.

4.7. Time Limit

The claim for damages, loss or in delivery of the goods is barred by prescription of no action or arbitration proceedings have been commenced or instituted within one year

from the day of the delivery of the goods to the consignee. However, the right to claim compensation for damages resulting from the delay in delivery of the goods ceases to exist if the consignee fails to give to the carrier a written notice within 60 days from the time of taking of the delivery of the goods. Before the expiration of the one-year time limit, the carrier may grant to the claimant a written time extension.

5. The carrier's obligation under the Common Law, Hague-Visby Rules and Thai COGSA: The Comparative Study

5.1. The obligation to make the ship seaworthy

5.1.1. The Carrier's obligations under Common Law

In principle, in every contract of carriage of goods by sea, there is an implied obligation on the carrier to provide a seaworthy ship 'fit to meet and undergo the perils of the sea and other incidental risks to which the necessity she must be exposed in the course of a voyage'.¹ In comparison with the majority of charter parties, this implied undertaking is reintroduced by an express term to the same effect, e.g. the requirement in the preamble to the NYPE form that the ship is 'tight, staunch, strong, and in every way fitted for the service'.² The duty covers not only the physical state of the ship but also the competence and adequacy of the crew, the sufficiency of fuel and other supplies, and the facilities necessary and suitable for the carriage of the cargo.³

5.1.1.1. Nature of the Obligation

The carrier's obligation to provide a seaworthy vessel is absolute under Common law, and in the event of breach, he will be liable no matter what fault. It equals to an undertaking 'not merely that they should do their best to make the ship fit, but that the ship should really be fit'.⁴ However, the carrier is not under an obligation to provide a perfect vessel but only one which is reasonably fit for the purpose intended.⁵ The standard requirement is not an accident-free vessel, nor a duty to provide vessel or gear which might tolerate all possible dangers. Although the duty is absolute, it means nothing more than the duty to furnish a vessel and equipment reasonably appropriate for the intended use or service.⁶ The test of which would be objective that 'the ship must have the degree of fitness which an ordinary careful and prudent owner would require his ship to have at the beginning of her journey having regard to all conceivable circumstances of it'.⁷ Therefore, the standard requirement will vary depending on the nature of the journey, the type of cargo to be carried and the likely hazards to be faced en route.⁸ Nonetheless, this common law obligation can be excluded by a suitable clause in the contract of carriage of goods by sea, although the

¹ *Kopitoff v Wilson* (1876) 1 QBD 377 at p.380

² **John F Wilson**, *Carriage of Goods by Sea*, 6th edition, 2008, Pearson Education Limited, p.9

³ *ibid*

⁴ *Steel v State Line Steamship Co* (1877) 3 App Cas 72 at p.86

⁵ *supra* n.2, p.9

⁶ *President of India v West Coast Steamship Co* (1963) 2 Lloyd's Rep 278 at p.281

⁷ *McFadden v Blue Star Line* (1905) 1 KB 697 at p.706

⁸ *supra* n2, p.9

courts are reluctant to treat such clauses in the same way as all exceptions but apply a restrictive interpretation to them instead.⁹ An example of which can be found in *Nelson Line v Nelson*¹⁰ in which a clause exempting the ship owner from liability for any damage to goods ‘which is capable of being covered by insurance’ was held not to be effective in excluding liability for damage to cargo resulting from unseaworthiness.¹¹ In order to be effective, however, any such clause must be expressed in clear and unambiguous drafting.¹² A concrete example of such a clause satisfying this test can be found in *The Irbenskiy Proliv*¹³ in which a bill of lading consisted of a provision excluding liability for loss or damage of any kind ‘arising or resulting from: unseaworthiness, whether or not due diligence shall have been exercised by the carrier, his servants or agents or others to make the ship seaworthy.’ In that case, the trial judge, in holding the clause sufficiently widely drafted to exclude all liability for unseaworthiness, rejected the claimant’s argument that it frustrated the main purpose of the contract by reducing the contract to only a declaration of intent.

51.1.2. Degree of Obligation

There are basically twofold requirements for the carrier to provide a seaworthy ship. On one hand, the ship must be appropriately manned and equipped to meet the normal perils likely to be faced while undertaking the services required of it, while at the same time it must be cargoworthy in a such a sense that it is in a fit state to receive the specified cargo.¹⁴

As the first concept of the seaworthiness is concerned, the implied obligation at Common law of the United States is expressed in *The Framlington Court*¹⁵ that seaworthiness is a relative term depending for its application upon the type of the vessel and the character of the voyage. The general rule is that the vessel must be staunch and strong and well equipped for the intended journey, and she must also be provided with a crew, adequate in number and competent for the voyage with reference to its length and other particulars and have a competent and skilled master of sound judgment and discretion. Therefore, a ship will be clearly unseaworthy where it has defective engines¹⁶, or a defective compass¹⁷, or where deck cargo is stowed in such a way as to render the ship unstable.¹⁸ However, the shipowner will equally be in breach where he hires an incompetent engineer or other crew¹⁹, where inadequate bunkers are taken on board for the journey,²⁰ or even where the documentations for the voyage is inadequate.²¹ Nonetheless, under common law, once these legal requirements are fulfilled, there is no further implied obligation to cover

⁹ *ibid* at p.10

¹⁰ *Nelson Line v Nelson* (1908) AC 16

¹¹ *Ingram v Services Maritime* (1914) 1 KB 541; *The Rossetti* (1972) 2 Lloyd’s Rep 116

¹² *supra* n2, p.10

¹³ *The Irbenskiy Proliv* (2005) 1 Lloyd’s Rep 383

¹⁴ *supra* n2, p.11

¹⁵ *The Framlington Court* (1934) AMC 272 at p.277

¹⁶ *Hong Kong Fir Shipping Ltd v Kawasaki* (1962) 2 QB 26

¹⁷ *Peterson Steamships Ltd v Robin Hood Mills* (1937) 58 LILR 33

¹⁸ *The Friso* (1980) 1 Lloyd’s Rep 469

¹⁹ *The Makedonia* (1962) 1 Lloyd’s Rep 316

²⁰ *McIver v Tate Steamers* (1903) 1 KB 362

²¹ *The Madeleine* (1967) 2 Lloyd’s Rep 224

such matters as recommended manning levels and conditions of employment formulated by extra-legal organization such as trade unions.²²

In the case of a voyage charter, the duty to provide a seaworthy ship attaches at the time of sailing on the charter voyage.²³ It is irrespective that defects occur rendering the ship unseaworthy during the preliminary journey to the loading port or even during the loading operation, provided that they can be repaired by the time of sailing.²⁴ In similar, the duty is discharged if the ship is seaworthy at the time of sailing, notwithstanding what happens afterwards either during the journey or at an intermediate port.²⁵ Therefore, such warranty is only a warranty as to the condition of a ship at a specific time, namely, the time of sailing; it is not a continuing warranty in the sense of a warranty that she shall continue fit during the voyage. If anything happens whereby the goods are damaged during the voyage, the shipowner is liable because he is an insurer, except in the event of the damage happening from some cause in respect of which he is protected by the exceptions.²⁶ Moreover, in the case of a consecutive voyage charter, the duty arises at the commencement of each voyage undertaken in performance of the charter.²⁷ Similarly, where a voyage charter is divided into stages by agreement between the parties, there will be an obligation to make the ship seaworthy at the beginning of each stage of the journey.²⁸ Conversely, the position is different in case of the time charter where the duty attaches only at the time of delivery of the vessel under the charterparty.²⁹ In such case, the first seaworthiness undertaking is usually supplemented by some form of maintenance clause under which the shipowner is required to keep the ship in a thoroughly efficient state in hull, machinery and equipment for and during the service.³⁰ Nevertheless, this express undertaking to maintain the vessel throughout the charter is entirely different from any obligation as to seaworthiness.³¹

The second concept of Common law obligation in relation to seaworthiness is tied with cargoworthiness of the ship. The carrier is bound to ensure that his vessel is in a fit state to receive the contractual cargo.³² This requirement would fail in case where the ship's holds needed fumigating or cleaning prior to being in a fit state to receive cargo,³³ where frozen meat was to be shipped and there was a defect in the ship's refrigeration plant,³⁴ or where the pumps were inadequate to drain surplus water from the cargo.³⁵ In each circumstance, the implied obligation is to operate as from the beginning of loading.³⁶ As Channell J³⁷ said that the warranty is that, at the time the goods are put on board, she is fit to receive them and encounter the ordinary perils

²² *The Derby* (1985) 2 Lloyd's Rep 325

²³ supra n2, p.11

²⁴ *Cf. Stanton v Richardson* (1875) LR 9 CP 390

²⁵ supra n2, p.11

²⁶ *McFadden v Blue Star Line*(1905) 1 KB 697 at p.703

²⁷ *Adamastos Shipping v Anglo-Saxon Petroleum* (1958) 1 Lloyd's Rep 73

²⁸ *The Vortigern* (1899) P 140; 80 LT 382; 8 Asp MLC 523

²⁹ supra n2, p.12

³⁰ NYPE 93 form, clause 6

³¹ supra n2, p.12

³² *ibid*

³³ *Tattersall v National Steamship Co* (1884) 12 QBD 297

³⁴ *Cargo per Maori King v Hughes* (1895) 2 QB 550

³⁵ supra n24

³⁶ supra n2, p.12

³⁷ supra n26

that are likely to arise during the loading stage, but ... there is no continuing warranty after the goods are once on board that the ship shall continue fit to hold the goods during that stage and until she is ready to go to sea, irrespective any accident that may happen to her in the meantime. Thus, after cargo had been safely loaded, the ship's engineer opened a sluice door on a water light bulkhead and on closing it, failed to secure it properly with the result that water percolated through and damaged the claimant's cargo. It was held that, since the defective closure of the sluice door happened after the cargo had been loaded, it did not constitute a breach of the cargo worthiness obligation.³⁸

5.1.1.3. Burden of proof

In principle, the burden of proof of unseaworthiness will rest on the party alleging it, even though in many circumstances he may be assisted by inferences drawn by the court.³⁹ Therefore, the presence of seawater in the hold will ordinarily be treated by the courts as *prima facie* evidence of unseaworthiness.⁴⁰ However, having established breach of this obligation, it will then be incumbent on the claimant to establish that the unseaworthiness caused the loss of which he complains.⁴¹ In an example case,⁴² a cargo of tinned meat shipped from Brisbane for Glasgow was damaged by seawater during the voyage as the result of tarpaulins being stripped from the hatch covers during a storm. On hearing that the ship was equipped with locking bars designed to secure the hatches, the trial judge held that the loss was caused not by the unseaworthiness of the ship but by the negligence of the crew in failing to make use of the equipment provided. In similar, the cargo owner will fail to discharge the burden of proof if it is clear that the damage resulted from bad stowage rather than from any unfitness of the ship to receive the contract cargo.⁴³

5.1.1.4. Effect of breach

After having established the breach, the next point is to decide what remedies are available to the charterer. Thus, the vital question is whether the courts are prepared to apply the traditional classification of terms into conditions or warranties and treat the obligation to provide a seaworthy vessel as either a condition, as a result, any breach of which would entitle the charterer to repudiate his obligations under the contract, or as a warranty, sounding only in damages?⁴⁴ In the event the courts have taken the view that neither of these alternatives is appropriate, the shipowner's undertaking to provide a seaworthy ship was classified as an intermediate term by the Court of Appeal.⁴⁵ In rejecting to classify the term once and for all as either a condition or a warranty, Diplock LJ pointed out that such an obligation can be broken by the presence of trivial defects easily and quickly remediable as well as any defects which must inevitably result in a total loss of the ship. As the consequence of a breach could be variable, it would be as unreasonable to allow a party to repudiate a charter

³⁸ supra n26

³⁹ supra n2, p.13

⁴⁰ ibid

⁴¹ *The Europa* (1908) p.84; 98 LT 246; 11 Asp MLC 19

⁴² *International Packers v Ocean Steamship Co* (1955) 2 Lloyd's Rep 218

⁴³ *Elder Dempster v Paterson, Zochonis & Co* (1924) AC 522

⁴⁴ supra n2, p.14

⁴⁵ *Hong Kong Fir Shipping Ltd v Kawasaki* (1962) 2 QB 26

because of a few missing rivets as it would be to prevent him from doing so in the event of the defects in the ship being irremediable.⁴⁶ Therefore, while objectively a compass defect was a serious matter, it would be illogical to allow the rejection of a 24-month charterparty if the defect could be repaired by a compass adjuster within a matter of hours. Whilst damages would always be available for breach of an obligation, a charterer should only be permitted to repudiate his duty under the charterparty where the breach deprived him of substantially the whole benefit which it was intended that he should obtain from the contract.⁴⁷ Thus, everything would depend on the impact of the breach in each individual circumstance, and in the view of Diplock LJ, the test as to whether a party had been deprived of substantially the whole benefit of the contract should be the same whether it consequences from breach of contract by the charterer or from the operation of the doctrine of frustration.⁴⁸

The next question then is what remedies are available to the charterer in the event of a breach of this intermediate undertaking by the shipowner? A difference must be drawn between the situation in which the breach is found prior to the performance of the charterparty has begun and the circumstance where the breach only comes to light after the vessel has sailed.⁴⁹ In the former situation, the charterer will be able to treat his undertaking under the contract as discharged if the breach actually deprives him of substantially the whole benefit of the contract and it is a breach which cannot be rectified within such time as would prevent the object of the contract from being frustrated.⁵⁰ Therefore, where the pumping equipment on the chartered ship was inadequate to deal with the surplus water from a cargo of wet sugar, the charterer was held entitled to repudiate the contract when it was established that new pumps could not be installed within a reasonable time.⁵¹ Conversely, if the effects of the breach are less brutal, the charterer will be restricted to his remedy in damages.⁵² Regarding this issue, it should be noted that the allowable time in which to remedy the defect will vary as between a voyage and a time charter.⁵³ Whilst a quite brief delay may be enough to frustrate the object of the former, the Court of Appeal held that the absence of a ship for five months undergoing repairs was sufficient to frustrate the objects of a 24-month time charter party.⁵⁴

The provisions of the time charter itself might, nonetheless, provide the charterer with a chance to escape if the shipowner cannot repair the defect prior to the cancelling date, although the breach would not otherwise have entitled the charterer to repudiate.⁵⁵ Therefore, under clause 22 of the *Baltimex* form, the charterer is entitled to terminate the charter party unless the ship is delivered to him by a specified date, 'she being in every way fitted for ordinary cargo service.' For example, the charterer in *The Madeline*⁵⁶ was able to take advantage of this by cancelling date. From the *Roskill J*'s point of view, there was here an express warranty of seaworthiness and

⁴⁶ *Bunge Corp v Tradax Export* (1981) 1 WLR 711

⁴⁷ *supra* n45

⁴⁸ *The Hermosa* (1982) 1 Lloyd's Rep 570

⁴⁹ *supra* n2, p.14

⁵⁰ *ibid*

⁵¹ *supra* n35

⁵² *supra* n2, p.14

⁵³ *ibid*

⁵⁴ *supra* n45

⁵⁵ *ibid*

⁵⁶ *supra* n21

unless the vessel was timeously delivered in a seaworthy condition, including the necessary certificate from the port health authority, the charterers had the right to cancel.⁵⁷ Nevertheless, such right to terminate is not dependent on any breach of obligation by the shipowners.

In situation where the unseaworthiness of the vessel is not found until after it has commenced sailing, mere acceptance of the ship does not equal to a waiver of the charterer's rights to damages.⁵⁸ It also does not amount to a waiver of the right to repudiate the charter provided that the breach, when found, is sufficiently fundamental. This is specifically correct for the time charter, however, in the case of the voyage charter, if the breach is not apparent before the ship sails, for all practical purposes the charterer may have little chance to find out it prior to the vessel arriving at its destination and performance of the contract is complete.⁵⁹

5.1.2 The carrier's obligation under the Hague-Visby Rules

Under the Hague-Visby Rules, like the Common law, the carrier is in general obliged both to carry and to care for the goods. These fundamental obligations are legislated in article 2 which states that 'under every contract of carriage of goods by water the carrier, in relation to the loading handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.'⁶⁰ In essence, the first step towards achieving this requirement is the provision of an appropriate carrying vessel. The carrier's obligation to make the ship seaworthy under the Hague-Visby Rules can be found in article 3(1) as follows.

The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

(a) make the ship seaworthy'

(b) properly man, equip and supply the ship

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

While, the implied obligation at Common law to provide a seaworthy vessel is an absolute undertaking, the carrier's undertaking under the Hague-Visby Rules, as can be seen under article 3(1), only limits to exercising due diligence to put up one. In exchange for this reduction in responsibility, the duty can no longer be disclaimed.⁶¹ Moreover, if a claim for loss as a result of unseaworthiness of the vessel should happen, the carrier, not cargo claimant, bears the burden of proving due diligence to render the vessel seaworthy so as to escape liability.⁶²

⁵⁷ *ibid*

⁵⁸ *The Democritos* (1975) Lloyd's Rep 386 at p.397

⁵⁹ *supra* n2, p.15

⁶⁰ Hague-Visby Rules art. 2

⁶¹ Hague-Visby Rules art. 3(8)

⁶² Hague-Visby Rules art. 4(1)

Although it can be seen that article 3(1) describes many of attributes of a seaworthy ship, it does not cover every thing at all.⁶³ In brief, they include the condition of the vessel's hull, the machinery and navigational equipment, the complement and qualification of the crew, the ship's operational procedures, and the suitability of the cargo spaces for the specific cargo, as well as bad stowage that harms the safety of the vessel.⁶⁴ However, the carrier's obligation is limited to exercising due diligence to make the ship ready in all these respects.⁶⁵ The standard of due diligence is tied to the Common law's duty of care.⁶⁶ Keeping in mind this expression was agreed internationally for use in both Common law and Civil law jurisdictions, an exact measure cannot be expected.⁶⁷ Obviously, it amounts to reasonable diligence in light of the known or reasonably anticipated situations of the contemplated voyage.⁶⁸ More significantly, such obligation is not delegable. The carrier must exercise the duty duly by himself and be responsible for the acts and defaults of his employees, such as crew, as well as of independent contractors who may be engaged in place of or in addition to employees. It does not suffice for a carrier to exercise good judgment in choosing and contracting with a competent and respected company: the individuals hired must also exercise due diligence in their tasks.⁶⁹ Nonetheless, the carrier will fulfill the requirement of due diligence, even if the contracted workers fail to discern a flaw in the ship that subsequently results in cargo damage, if they can be shown by the carrier, to have been acting carefully and competently.⁷⁰

Furthermore, the carrier's obligation toward the vessel merely applies from the time it is under his or her control.⁷¹ In essence, the carrier cannot be held liable for defects in vessel's design and construction that are not detectable by due diligence unless the carrier was involved in its building process.⁷² The carrier's responsibility is merely to make sure by careful and skilful inspection of the ship when he receives it that it is in a fit condition.⁷³ The carrier's obligation is to make the ship seaworthy by fixing it, as necessary, and preparing it for the intended voyage.⁷⁴ A surveyor's certificate as to the seaworthiness of a vessel at the time of its acquisition is probably enough but is not adequate to establish the carrier's due diligence towards the ship once it is in his operation.⁷⁵

In accordance with article 3(1) of the Hague-Visby Rules, the carrier is bound to exercise due diligence before and at the beginning of the voyage. In other words, the duty is to prepare the vessel for the contracted journey.⁷⁶ Such obligation ends when the vessel departs upon the voyage. During the journey, the carrier will also have duties of care for the cargo, which may be affected by the maintenance of the

⁶³ **E Gold, A Chircop, H Kindred**, *Essentials of Canadian Law Maritime Law*, 2003, Irwin Law, p.450

⁶⁴ *ibid*

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ *ibid*

⁶⁸ *Grain Growers Export Co. v Canada Steamship Lines Ltd.* (1918), 43 O.L.R. 330

⁶⁹ *Riverstone Meat Co v Lancashire Shipping Co.*, (1961) A.C. 807

⁷⁰ *Union of India v N.V. Reederij Amsterdam* (1963) 2 Lloyd's Rep 223 (H.L.)

⁷¹ *supra* n63, p.450

⁷² *ibid*

⁷³ *W. Angliss v Peninsular & Orient Steam Navigation Co.*, (1927) 2 K.B. 456

⁷⁴ *supra* n63, p.451

⁷⁵ *Charles Goodfellow Lumber Sales Ltd. v Verreault*, (1971) S.C.R. 522 at p.541

⁷⁶ *supra* n63, p.451

condition of the ship, but otherwise there is no continuing obligation in relation to seaworthiness.⁷⁷ When the duty can be said to have commenced has proven more contentious: it has been held to start at least from the beginning of loading and to continue through to the moment the ship sails. Therefore, when fire, resulted from a lack of due diligence, damaged a loaded cargo before the vessel sailed, the ship was found unseaworthy from the time the fire begun.⁷⁸ However, in case where cargo is to be picked up during the journey at an intermediate port, it is still uncertain as to whether the carrier is obliged to exercise due diligence to make the vessel ready in every aspect for all the cargoes to be lifted along the way before leaving the originating port, particularly when the necessary action is simple to undertake and is commonly postponed until the vessel is underway.⁷⁹ Article 3(1) is regarded as an overriding obligation. Thus, the carrier may not rely on any exculpatory exceptions found in article 5(2) until it has demonstrated that the due diligence was exercised to make the vessel seaworthy.⁸⁰ The burden of proof rests on the carrier, thus, the carrier must make the proof after the cargo claimant has established a *prima facie* case of loss owing to unseaworthiness of the ship.⁸¹

5.1.3. The carrier's obligation under Thai COGSA

Under article 8 of the Thai Carriage of Goods by Sea Act B.E. 2534 (COGSA),

it is the carrier's obligation, before loading a ship or beginning a voyage, to make the ship seaworthy; man, equip, and provide the ship with supplies, accessories and necessaries properly; and make the holds and other parts of the ship in which goods are to be carried fit and safe for their reception, carriage and preservation.

The above provision actually follows the concept of the Hague-Visby Rules. Article 3, (1) which stipulates that the carrier shall be bound before and at the beginning of a voyage to exercise due diligence in making the ship seaworthy; manning, equipping and supplying the ship properly; and making the holds, refrigerating machines, cool chambers and other parts of the ship in which goods are to be carried fit and safe for their reception, carriage and preservation.

Although there appears to be no difference in substance between the Thai COGSA and the Hague-Visby Rules, the term “due diligence” in the Rules may indicate a different level of standard for performing the duty. The term “due diligence” first appeared in the American Harter Act 1893 and was later introduced to the world by the draftsmen of the Hague Rules. Before the introduction of the Hague Rules, it was an implied Common law obligation of the carrier under a carriage of goods by sea contract to provide a seaworthy ship fit to meet and undergo the perils of the sea and other incidental risks to which, of necessity, the ship is exposed in the course of a voyage. “To make the ship seaworthy” and “to exercise due diligence in making the ship seaworthy”, the carrier may anticipate different degrees of action necessary to satisfy the requirements. The first term specifically requires the actual seaworthiness

⁷⁷ *Leesh River Tea Co. v British India Steam Navigation Co.* (1966) 2 Lloyd's Rep. 193

⁷⁸ *Maxine Footwear Co. v Canadian Government Merchant Marine Ltd.*, (1959) A.C. 589 (P.C.)

⁷⁹ *supra* n63, p.451

⁸⁰ *supra* n78

⁸¹ Hague-Visby Rules art. 3(1)

of the vessel. Under English law, the carrier should not merely do his best to make the ship fit, but that the ship should really be fit. To illustrate the concept of due diligence in the latter term, the English Admiralty Court deemed that the carrier is liable not only for his own negligence but also for the negligence of any party, even including an independent contractor to whom he has delegated the responsibility for making the ship seaworthy. In these circumstances, the carriers have frequently claimed that their liability under the Hague Rules differ little from that of common law. However, there is a distinction in that under the Hague Rules, the carrier is not liable if neither he nor his delegate has been negligent.

The Hamburg Rules, however, are silent on the issue of seaworthiness. The liability of the carrier under the Hamburg Rules is based upon presumed fault. The carrier is liable for loss or damage to the goods as well as delay in delivery if the occurrence which caused the loss, damage, or delay took place while the goods were in his charge, unless the carrier can prove that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. Thus, under the Hamburg rules, it would seem immaterial to find out whether the carrying ship was seaworthy in the event of loss, damage or delay in delivery, since the carrier is presumed to be at fault. It falls on the carrier to clear himself of the presumption in order to be released from liability for the cargo. In other words, the liability of the carrier rests on the safe and sound condition of the cargo carried, not on the condition of the carrying ship. As far as the relationship between the carrier and the consignee under the Hamburg Rules is concerned, seaworthiness is of no importance.

In substance, the Thai COGSA as a whole reflects a combination of the Hague-Visby Rules and the Hamburg Rules. However, if the provisions of the Act are considered section by section, it is evident that the Act corresponds more with the Hamburg Rules than the Hague-Visby Rules. Although it is not clearly stated, the basis of the carrier's liability under the Act can be considered as presumed fault. Unless the carrier can prove that the loss, damage, or delay in delivery was caused by one of the exclusions, which is along the same lines as the Hague-Visby Rules, he will be liable but only up to specified limitations. Furthermore, the Act goes on to provide that the carrier will not be liable for loss, damage or delay in delivery arising out of any defect in the ship if he can prove that he had done everything normal and reasonable for a person in the occupation of sea carrier to make the ship seaworthy. In such a situation, if the defect occurred after the goods had been loaded on board the ship or after the ship had sailed but the carrier remedied such defect as soon as possible in a manner normally expected of a person in the occupation of sea carrier, it can be assumed that he had fulfilled his obligation and thus exempted from the subsequent loss, damage, or delay in delivery. In effect, the requirement of seaworthiness under Thai law falls short of the common-law obligation and follows more or less the "due diligence" approach.

Assuming that the Thai COGSA has adopted a concept similar to "due diligence," there remains an uncertainty in the Act concerning the issue of seaworthiness. That is, the law does not specify whether the carrier can entrust the performance of the obligation to his servants, agents or independent contractors. If the carrier has delegated such performance but the person entrusted with the obligation has been negligent in his performance, it is questionable whether the carrier can be held as having performed the undertaking of seaworthiness. This loophole appears to be the

outcome of adopting the Hague-Visby Rules while disregarding other supplementary principles which make the whole concept workable.

From the foregoing discussion, it would appear that the liability of the carrier in relation to the obligation of seaworthiness varies depending on the law or rules used. Take, for example, a case where the carrier has made attempts to fulfill his obligation, such as engaging a professional surveyor to examine the ship, but the ship is later discovered to be unseaworthy. In this scenario, after passing the surveyor's examination, the ship embarked on its scheduled voyage. About 10 miles from the port of origin, its main engine broke down and it was found that the main engine had not been fully functional since before or at the beginning of the voyage and such failure was caused by the negligence of the surveyor in examining the ship. From the example, it is indisputable that the carrier had not discharged his Common law obligation. It is also possible to hold that he had not exercised due diligence in making the ship seaworthy under the Hague-Visby Rules. However, as far as the Hamburg Rules are concerned, he would probably be exempted from liability because it can be said that with the engagement of the surveyor, he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. Furthermore, under the Thai COGSA, the carrier could be discharged from liability if he can prove that the engagement of the independent contractor to survey the vessel is a normal and reasonable undertaking for a person in the occupation of sea carrier to do. If evidence is satisfactory, he will be released from liability for the damage caused by the ship's unseaworthiness even though the surveyor appeared to be negligent. Thus, the bags of salt were damaged as a result of a leaking deck and a broken fan coil which led to the seawater coming into the salt cargo. There is no evidence that the ship encountered unexpected storm so that it could be prevented. The defendant carrier has an obligation to make the ship seaworthy, man, equip, and provide the ship with supplies, accessories and make the holds and other parts of the ship in which goods are to be carried fit and safe for their reception, carriage and preservation in accordance with article 8 of the Thai COGSA. Even though the vessel had just been inspected prior to sailing, after the inspection, there might be a defect relating to some part of the vessel. The defendant carrier, therefore, must make good the vessel before loading the goods or commence sailing. However, just a short time after the inspection, the port official discovered the leaking deck and broken fan-coil. Thus the defendant carrier must be liable for the damaged goods while in his charge.⁸²

6. The obligation of reasonable despatch

6.1. The Carrier's obligations under Common Law

The Common law stipulates in every contract of carriage of goods by sea requiring the shipowner or carrier to perform his contractual obligations with reasonable despatch; namely, with out delay. However, in case there is no time specified for a particular duty, there is an implied obligation to complete the obligation within a reasonable time.⁸³ Therefore, in a voyage charter there is an implied obligation that the ship will proceed on the voyage, load and discharge at the time agreed or within a

⁸² Thai Supreme Court decision no. 127/2543

⁸³ supra n2, p.15

reasonable time.⁸⁴ Similarly to a time charter, the master is expected to prosecute each voyage within the 'utmost dispatch'.⁸⁵ Moreover, not only the voyage should be completed without dispatch but also must be commenced within a reasonable time. Thus, in *M' Andrew v Adams*⁸⁶, the Court held that the vessel must proceed on the voyage with reasonable dispatch. The case summary is that, by the terms of a charter party dated on 20 October 1832, a ship was to proceed from Portsmouth where she was then lying to St. Michaels (in the Azores) and there load a cargo of fruits and return to London. However, on 7 November, instead of proceeding direct to St. Michaels, she went on an intermediate voyage to Oporto, and return later to Portsmouth, from where she finally sailed for St. Michaels on 6 December. As a result, the Court of Common pleas held that the shipowner was liable to the charterer for breach of the implied undertaking that the voyage should be commenced within a reasonable time. Undertaking of this duty is judged, not on a strictly objective basis, but with regard to what can reasonably be expected from the shipowner under the actual circumstances existing at the time of performance.⁸⁷

Where the charter party makes it a condition precedent that the vessel must *leave for* or *arrive at* the port of loading by a given date, that deadline must be strictly adhered to.⁸⁸ If it is failed to fulfilled the condition precedent, then the charterer is entitled to damages and may refuse to load his goods onto the vessel. For instance, in *Glaholm v Hays*⁸⁹, the charter party provided that the ship was to sail from England for the port of loading '*on or before 4 February next*'. Nonetheless, she did not leave for that port until 22 February. In consequence, it was held that the charterers were entitled to refuse to load their goods onto her. Moreover, a shipowner whose vessel has met the deadline for arriving at the port of loading may still be in breach if after considering the agreed voyage and the terms of the charter party, it could be seen that his vessel should have arrived at the port of loading at an earlier time. Again, in *M' Andrew v Adams*⁹⁰, the vessel was chartered for a voyage from St. Michaels to London. It was agreed that the charterer was to have the option of refusing to load the goods onto her, if the vessel was not ready to load by 31 January. In fact, the vessel was dispatched on an intermediate voyage but, nonetheless, reached St. Michaels well before the deadline. Despite this arrival before deadline, the shipowner was held to be liable in damages for his delay in dispatching the ship to St. Michaels.

6.1.1. Effect of Breach

Likewise the seaworthiness obligation, the undertaking to exercise reasonable dispatch seems to fall into the category of intermediate terms.⁹¹ As a result, the remedy available in any specific case will depend on the effects of the relevant breach.⁹² Whilst the injured party will always be entitled to recover damages for any

⁸⁴ *ibid*

⁸⁵ see *Baltimor*, clause 9; *NYPE 46*, clause 8

⁸⁶ *M' Andrew v Adams* (1834), 1 Bing. N.C. 29, **E.R. Hardy Ivamy**, *Casebook on Carriage by Sea*, 6th ed., Lloyd's of London Press Ltd, 1985, at p.7

⁸⁷ *supra* n2, p.15

⁸⁸ **Tan Lee Meng**, *The Law in Singapore on Carriage of Goods by Sea*, Malayan Law Journal PTE. LTD. Singapore, 1986, at p.70

⁸⁹ *Glaholm v Hays* (1864) 2 Man. & G. 257

⁹⁰ *supra* n 86

⁹¹ *supra* n2, p.16

⁹² *ibid*

dispatch, he will merely be able to repudiate the contract if the delay is so prolonged as to frustrate its object. For example, in *Freeman v Taylor*⁹³, a ship had been chartered to take her cargo to Cape Town and, after discharging it, to proceed with all convenient speed to Bombay in order to load the charterer's cargo of cotton. After discharging at the Cape, nonetheless, the master for his own account took on board a cargo of mules and cattle some six or seven weeks late in arriving in Bombay and the Court held that the delay sufficiently long to frustrate the purpose of the charter. In cases where the delay is not so prolonged, nonetheless, the injured party will be restricted to a claim for damages.⁹⁴ Even such a claim may be disallowed if that specific delay is covered by an expected peril.⁹⁵

6.2.2 Cancelling clause

Charter party contracts, most of the time, provide that the charterer may cancel the charter party whether the shipowner has been at fault or not, if the ship has not arrived at or has not been delivered by or is not ready to load by a specified date.⁹⁶ For instance, clause 10 of the Gencon form, which may also be relied upon if a ship is not ready to load because she is unseaworthy, stipulates as follows:

“Should the vessel not be ready to load (whether in berth or not) on or before the date indicated in Box 19, Charterers to have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at the port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day she is stated to be expected ready to load, Charterers have the option of cancelling this contract, unless a cancelling date has been agreed upon.”

Unless the contract provides otherwise, a charterer is not entitled or obliged to repudiate the charter party in advance of the cancelling date provided for in the cancelling clause even though it has become obvious that the ship cannot be tendered to him in time.⁹⁷ Nevertheless, the presence of a cancelling clause does not preclude the charterer from exercising his common law right to regard himself as having been discharged from the contract before the deadline in the cancelling clause if the charter party has been frustrated or if the shipowner is guilty of an anticipatory breach.⁹⁸ A charterer would of course prefer to repudiate a charter party under the provisions of a cancelling clause in view of the uncertainties involved in proving frustration or an anticipatory breach.⁹⁹ This was recognized in *The Madeleine*¹⁰⁰ by Lord Roskill who suggested that a charterer who would like to obtain the right to cancel in advance of the cancelling date should ensure that this right was included among the terms of the charterparty.

⁹³ *Freeman v Taylor* (1831) 8 Bing 124

⁹⁴ *MacAndrew v Chapple* (1866) LR 1 CP 643

⁹⁵ *Barker v MacAndrew* (1865) 18 CB (NS) 759

⁹⁶ supra n88, at p.71

⁹⁷ *Uni-Ocean Lines Ltd, v Kamal Sood* (1983) 2 M.L.J. 189

⁹⁸ supra n88, p.72

⁹⁹ *ibid*

¹⁰⁰ *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines (The Madeleine)* (1967) 2 Lloyd's Rep. 224.

6.2 The carrier's obligation under the Hague-Visby Rules

The Hague-Visby Rules does not expressly regulate the rules of not making delay in delivery even though it may constitute a breach of the carriage contract under the Common law.¹⁰¹ Basically, a character of breach by delay is different from other types of breach of contract. Whilst delay may have been triggered by a specific event, there can be no determination of any breach until the end of the voyage.¹⁰² Moreover, the cargo owner is only temporarily, not permanently, deprived of the goods and as a result suffers purely economic and rarely any physical losses.¹⁰³ Nonetheless, from a commercial perspective, particularly under modern systems of just-in-time supply, delays in delivery can be just as financially injurious as deliveries of damaged goods.¹⁰⁴ In general, delay often arises in connection with some other duty of the carrier under the Hague-Visby rules. For example, a deviation on the contracted route frequently causes delay as well. Likewise, a vessel that goes to sea in an unseaworthy condition is also likely to suffer delay on a voyage. In such a case where delay is combined with another breach of contract, the carrier's liability will generally be determined by the rules governing that other default.¹⁰⁵ In consequence, the delay will likely merely affect the outcome of the cargo owner's claim, if at all, in evaluating the damages payable by the carrier.¹⁰⁶

In essence, when the delay is the sole or primary cause of the cargo owner's loss, for instance when the vessel is late in departing or goes slow in the voyage, the carrier's liability will be determined by the standard of care of the cargo imposed by art 3(2) of the Hague-Visby Rules.¹⁰⁷ No specific difficulty has been encountered in subsuming issues of delay under the rules¹⁰⁸ and the carrier's obligation to properly and carefully handle and carry the cargo clearly implies a duty to deliver it with reasonable dispatch. The cargo owner's difficulty is not likely to be establishing the breach of the contract of carriage by an unreasonable delay so much as difficulty in demonstrating that the full extent of damages that he/she claims should reasonably have been foreseen by the carrier as liable to result should the vessel delays.¹⁰⁹ Whilst temporary loss of the use of the goods or decrease in their market value is usually reasonably foreseeable, the carrier is less likely to be expected to anticipate all the cargo owner's loss of business profits and other consequential losses.¹¹⁰

6.3 The carrier's obligation under Thai COGSA

Unlike in countries adopting the Hague or Hague Visby Rules, the Thai COGSA places the liability for delay in delivery on the carrier. The Act adopted the concept of the Hamburg Rules which is in line with the general principles of the Civil and Commercial Code whereby the carrier is liable for loss of or damage to goods and delay in delivery.

¹⁰¹ *supra* n63, p.455

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

¹⁰⁷ Hague-Visby Rules art. 3(2)

¹⁰⁸ *Anglo Saxon Petroleum Co, v Adamastos Shipping Co.* (1957) 2 Q.B. 233 at 253 (C.A.)

¹⁰⁹ *Hadley v Baxendale* (1854), 9 Ex. 341, 156 E.R. 145

¹¹⁰ **Ganado & H. Kindered**, *Marine Cargo Delays*, London: Lloyd's Press, 1990 c.8.

The Act stipulates in Section 41 of the Thai COGSA that a delay in delivery occurs when the carrier has not delivered the goods within the time agreed upon, or, in the absence of such agreement, within a reasonable time for the carrier to deliver the goods, having regard to the circumstances of the case. However, if a period of at least 60 days after the agreed date of delivery or the time within which delivery should have been made has elapsed, the person entitled to claim for compensation may choose to take delivery of the goods and claim for damages as a result of such delay in delivery or claim for compensation as if the goods have been totally lost.

The Act also gives a time condition for claiming damages for delay in delivery. The right to damages resulting from delay in delivery will cease to exist if the consignee has not given to the carrier a notice in writing within 60 days from the date of taking delivery of the goods.

7. Obligation not to deviate

7.1. The carrier's obligation under Common law

7.1.1. Basic Principle

In principle, under Common law, the carrier is impliedly obliged to proceed the vessel on the voyage without unjustifiable deviation. Basically, a deviation is a radical change of the vessel's course in breach of contract.¹¹¹ The essence of deviation lies in the voluntary substitution of the contractual voyage by another voyage just like Hackett J. said in *Verappa Chetty v Ventre*¹¹²:

'...an involuntary departure from the ordinary course of the voyage through the ignorance of the master does not constitute a deviation... to constitute a deviation the departure must be voluntary. And indeed it seems to me that any other doctrine would be attended with absurd results, and it would come to this, that in every case in which a vessel struck on a rock or sand bank through the ignorance and unskillfulness of the master, there would be a deviation inasmuch as such rock or sand bar must necessarily be out of the proper course of the voyage.'

The fact from the above case was that a ship, which was on a voyage from Penang to Singapore, strayed to an area between the Carimons and Pulo Panjang. The master had no intention whatsoever to leave the usual route. Indeed, he did not realize that he was off course until it was too late. In this situation, it was held that the question of an unjustified deviation did not arise.

Similarly, a lack of intention to deviate was also evident in *Rio Tinto Co. Ltd. v Seed Shipping Co.*¹¹³ In such case, the master, 56, who had never navigated in the River Clyde before, set a course for S.S.E. instead of S.S.W. as he had misunderstood the pilot's instructions. The vessel struck a rock and both she and her cargo were totally lost. Roche J. accepted that had the master been more awake in better health he would have been more competent. Nonetheless, as he did not intend to deviate, he had not made an unjustifiable deviation.

¹¹¹ supra n88, p.72

¹¹² *Verappa Chetty v Ventre* (1868) 1 Kyshe 181

¹¹³ *Rio Tinto Co. Ltd. v Seed Shipping Co* (1926) 42 T.L.R. 381

7.1.2. The contractual route

Normally, as deviation arises from a departure from the contractual route, it is necessary to determine the meaning of 'contractual route'.¹¹⁴ For instance, a helpful rule was suggested by Lord Porter in *Reardon Smith Line Ltd. v Black Sea and Baltic General Insurance Co. Ltd.*¹¹⁵, that

'If no evidence is given, the route is presumed to be the direct geographical route but it may be modified in many cases for navigation or other reasons and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charter party or bill of lading.'

In essence, the direct geographical route may in some cases be justifiably modified on the ground of commercial practice.¹¹⁶ For example, if it is a well-known fact that a specific shipping line adopts a route not followed by others, that route may be regarded as a usual route for that line.¹¹⁷ Evidence may also be introduced to establish that it was intended that the contractual route take into account the usage of the trade. Thus, in *Armoogum Chetty v Lee Cheng Tee & Anor*, an unsuccessful attempt was made to establish that for a certain class of ships called 'Straits Traders', which were ships owned, commanded and manned by Chinese, the right to deviate to Malacca was to be implied as far as voyages between Singapore and Penang were concerned. The question of trade took place in this case because the ship, which was lost as a result of a collision, had called at Malacca while on her way to Singapore just before she was lost. As a result, Maxwell C.J. held that the ship had unjustifiably deviated on two grounds. First, the alleged trade usage had not been proven. Even though three or four Chinese owners of such ships had said that it was usual for them to call at Malacca to get to the latest market news or to enable the masters and crew to visit their favorites, the Chinese traders had scrupulously confined their evidence to their own personal practices while the evidence of the non-Chinese witnesses was unhelpful as they had no personal experience whatever in trade. Secondly, although such a trade usage existed, it did not apply to the vessel in question due to the fact that it had been intended that she sail to Rangoon, Achin and Saigon where 'Straits Traders' 'only plied between Singapore and Penang.

As for modification of the contractual patch on the ground of commercial need, a clear example of this can be found in *Reardon Smith Line Ltd. v Black Sea and Baltic General Insurance Co. Ltd.*¹¹⁸. In such case, an oil-burning vessel, which had been chartered for a voyage between the Black Sea and the United States, proceeded to Constanza, a port that was not on the direct geographical route to the United States, so as to bunker as oil was cheaper there. Whilst entering the port, she ran aground and sustained considerable damage. Evidence was given to the effect that the usual path in this case included the trip to Constanza. Lord Wright outlined what may be taken into account to be an acceptable departure from the direct geographical route in the interest of commercial need when he said that the ship owner was entitled to balance the cost to him of extra steaming against the cheapness or convenience of Constanza,

¹¹⁴ supra n88, p.73

¹¹⁵ *Reardon Smith Line Ltd. v Black Sea and Baltic General Insurance Co. Ltd.* (1939) A.C. 562, 564

¹¹⁶ supra n88, p.73

¹¹⁷ *Morrison & Co. v Shaw, Savill and Albion Co. Ltd.*, (1916) 2 K.B. 783, 797

¹¹⁸ *Reardon Smith Line Ltd. v Black Sea and Baltic General Insurance Co. Ltd.* (1939) A.C. 562, 564

as long as to do so is not unreasonable in relation to the interests of the charterer or any other persons who might be concerned.

Likewise, where the usual path agreed upon by the parties is subsequently closed, the ship owner may be obliged to take another path even though the alternative route is much longer and may involve a greater cost unless the carriage contract has been frustrated.¹¹⁹

7.1.3. The liberty to deviate clause

Obviously, a liberty to deviate clause is included among the terms of charter party or a bill of lading. For instance, clause 3 of the Gencon form, which is a liberty to deviate clause, states:

'The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations and also to deviate for the purpose of saving property.'

In essence, such a clause which gives the ship owner liberty to deviate is strictly construed and must be read together with that part of the contract which describes the contractual route.¹²⁰ Several cases give an example of the restricted sense in which such clauses have been interpreted. For instance, in *Leduc v Ward*¹²¹, a cargo was loaded at Fiume for carriage to Dunkirk. The deviation added some 1,000 miles to the voyage. Even though the contract of carriage permitted the ship owners liberty to call at any port in any order, it was held that the deviation to Glasgow was unjustifiable. In such case, Lord Esher M.R. said:

'It was argued that the clause gives liberty to call at any port in the world. Here again, it is the question of the construction of a mercantile document, and I think as such the term can have but one meaning, namely that the ports, liberty to call at which is intended to be given, must be substantially ports which will be passed on the named voyage.'

Furthermore, his Lordship explained that the clause merely stated that the vessel could call at any port, the invariable construction of the clause would have been that the vessel could only call at such ports in geographical order.¹²² Addition of the words 'in any order' merely meant that the requirement of geographical order was removed.¹²³

The next illustrated case in *Glynn v Margetson & Co.*¹²⁴, oranges were loaded at Malaga, which was on the Spanish coast, for shipment to Liverpool. Even though the contract of carriage permitted the vessel to proceed to and stay at any port or ports in any rotation in among other areas, the coasts of Spain, it was held by House of Lords that the deviation to Burriana was unjustifiable because the trip to that port defeated

¹¹⁹ *Ocean Tramp Inc. v Continental Ore Corporation* (1970) 2 Q.B. 226

¹²⁰ supra n88, p.74

¹²¹ *Leduc v Ward* (1888) 20 Q.B.D. 475

¹²² supra n88, p.75

¹²³ *ibid*

¹²⁴ *Glynn v Margetson & Co* (1893) A.C. 351

the manifest object of the contract, which concerned the carriage of oranges from Malaga to Liverpool. Referring to the shipowners' right to sail to Spanish ports in any rotation, Lord Hershell L.C. said:

'... in a business sense it would be perfectly well understood to say that there were certain ports on the way between Malaga and Liverpool and those are the ports at which I think the right to touch and stay is given.

Then it is said that this may be done in 'any rotation'. I do not think that that carriers the matter any further ... It is not necessary to decide what effect should be given to them the fullest possible effect they do not seem to me to enlarge the number of ports at which it would be justifiable for this vessel to touch during the course of her voyage.'

*The outcome of the decisions on Leduc v Ward*¹²⁵ and *Glynn v Margetson & Co*¹²⁶ may be negated by inclusion of apt provisions in the carriage contract which make it absolute clear that the shipowner is not to be restricted to ports within the usual route.¹²⁷ As such, in *Connolly Shaw Ltd v Nordenfieldske S.S. Co*¹²⁸, where the contract for carriage of lemons from Palermo to London provided that the ship had liberty to proceed to... any ports whatsoever (even though... out of or beyond the route...), Branson J. held that a deviation to Hull, which was outside the usual route for the agreed path and which added three days to the voyage, was permitted under the contract. Indeed, his Lordship pointed out that under the terms of the wide liberty to deviate clause in this case, the vessel could be sent anywhere so long as the contract of carriage was not frustrated by the deviation and no measurable harm was caused to the lemons by the delay.¹²⁹

Moreover, as for clauses giving the shipowner 'liberty to tow and assist vessels in all situations', it is unambiguous that they permit the vessel to deviate in order to tow and assist ships even where no life is endangered.¹³⁰ To illustrate, in *Stuart v British and African S.N. Co*¹³¹, a ship and her cargo were lost after she stranded whilst attempting to tow another vessel which had run aground. It was held that the deviation to assist the other ship was excused although no life was in danger. Nonetheless, whilst delay is tolerated, the shipowner has no right to delay the voyage for a greater duration than is necessary to tow or assist another ship and the delay must not be such as to frustrate the voyage charter party.¹³²

7.1.4. Justifiable deviations

At common law, a departure from the contract or proper path is allowed in the following circumstances.

¹²⁵ supra n121

¹²⁶ supra n124

¹²⁷ supra n88, p.76

¹²⁸ *Connolly Shaw Ltd v Nordenfieldske S.S.* (1934) 50 T.L.R. 418

¹²⁹ supra n88, p.76

¹³⁰ *ibid*

¹³¹ *Stuart v British and African S.N. Co* (1875) 32 L.T. 257

¹³² *Porter v Burrell* (1877) 1 Q.B. 97

(A). To save human life or to communicate with a ship in distress in case lives may be in danger. To illustrate, Cockburn C.J. had made a point in *Scaramanga v Stamp*¹³³ that:

'Deviation for the purpose of saving life is protected and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exceptions of perils of the sea. And, as a necessary consequence of the foregoing, deviation for the purposes of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger of life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails the usual consequences of deviation.'

In the situation from which this case is drawn, the ship, having deviated to answer a distress call, could easily have taken off the crew from the stricken vessel, but decided to take the latter in tow so as to earn salvage. Whilst the ship in question was engaged in this operation, it was driven ashore in a gale with the loss of her cargo. The deviation so as to save the vessel was held not to be justified and the shipowners were held liable for loss of cargo despite the fact that such loss was covered by the exception of perils of the sea in the charter party. The position, however, would have been otherwise had the weather been such that it had been necessary to take the disabled vessel in tow so as to save the lives of the crew.¹³⁴

(B) To avoid danger to the ship or cargo

In principle, a master is entitled and obliged to deviate where this is necessary for the safety of the adventure.¹³⁵ Nonetheless, the right to deviate does not permit where the danger is temporary and may be overcome should the vessel wait for a longer.¹³⁶ It is, though, not necessary that the deviation be made to save both ship and cargo.¹³⁷ The master, thus, is obliged to consider the interests of all the parties to the adventure and if danger affects ship or cargo, reasonable steps may be taken to avoid it.¹³⁸ Nonetheless, it is not to be assumed that the master is obliged to deviate only to preserve a part of the cargo. To illustrate, in *Notara v Henderson*,¹³⁹ Cockburn C.J. pointed out that it cannot be that a master is bound to put into the nearest port so as to dry and transship cargo that had become wet and liable to damage during stormy weather if the vessel is in a fit condition to prosecute the voyage. Furthermore, his Lordship added that although the master had been compelled to put into port, it would be unreasonable to hold that he is bound beyond doing all that he reasonably can to improve as possible to wait until the cargo was fit to be carried on even if the voyage might be unduly protracted. These observations are particularly relevant when the interests of other cargo-owners are also involved.¹⁴⁰

¹³³ *Scaramanga v Stamp* (1880) 5 CPD 295 at p.304

¹³⁴ *supra* n2, p.17

¹³⁵ *supra* n88, p.77

¹³⁶ *ibid*

¹³⁷ *ibid*

¹³⁸ *The Teutonia* (1872) L.R. 4 P.C. 171

¹³⁹ *Notara v Henderson* (1870) L.R. 5 Q.B. 354

¹⁴⁰ *supra* n88, p.78

The next principle is that a master whose vessel had been so damaged that repairs are necessary is entitled and obliged to make a reasonable deviation to repair the damage.¹⁴¹ For instance, in *James Phelps & Co. v Hill*,¹⁴² a ship was damaged during severe weather after leaving Swansea. She could have returned to Swansea or proceeded to Queenstown for repairs. Nonetheless, her owners ordered her to Bristol, some sixty miles further away as repairs could be undertaken there at less cost. The jury decided that the shipowners acted reasonably in deviating to Bristol and the application to set aside the verdict was dismissed.

Furthermore, a deviation to port of refuge would be justifiable even where it has been necessitated by the unseaworthiness of the vessel.¹⁴³ The carrier maybe liable for having sent the vessel to the sea in an unseaworthy status; however, that is a different matter altogether. Thus, in *Kish v Taylor*,¹⁴⁴ a vessel needed to deviate to a port of refuge for repairs as she had been so overloaded that she became unseaworthy. It was held by the House of Lords that, irrespective of the unseaworthiness of the vessel, the deviation was justifiable. By deciding so, Lord Atkinson explained that this had to be so because to hold that the law obliged a master of an unseaworthy merchant vessel to choose between continuing on the voyage or seeking safety under the penalty of forfeiting the contract of carriage would be to enlarge the dangers to which life and property are exposed at sea.¹⁴⁵

The next case which gives an example that the master's right to deviate from the proper route may in some cases be coupled with an obligation to do so is *The Mormacsaga*.¹⁴⁶ In this case, the plaintiff's oranges were loaded at a Brazilian port on board an American vessel for delivery at Montreal. The carriage contract contained a 'liberty to deviate' clause and one of the intended ports of call was Jacksonville, Florida. It was known at the time of shipment and when the ship was ordered to Jacksonville that that port was strike bound for all American vessels. Jacksonville remained strikebound for a few weeks; consequently, the plaintiff's oranges were damaged. Arthur I. Smith J. held that the carriers were liable for the loss which had been suffered by the plaintiff as they had failed to act with reasonable care and prudence and with proper in relation to the preservation of the plaintiff's cargo when they entered Jacksonville instead of deviating and proceeding directly to Montreal.

The Court of Appeal had recently considered the question of the carrier's duty to deviate in *The Iran Bohanar*.¹⁴⁷ The fact from this case, the plaintiffs, a US company, sold 6,000 tonnes in bulk of crude soya bean oil to Interice, and Iranian company which also owned the vessel that was used to transport the cargo to Iran. As Interice failed to pay for the oil, the plaintiffs retained possession of the bills of lading. For reasons which were unclear to the Court of Appeal, another Iranian company, a state owned concern, also claimed to be entitled to the goods. As the production of bills of lading by the plaintiffs would not achieve for them the delivery of their cargo to Iran, the plaintiffs applied for an injunction ordering the carriers to deviate to Karachi,

¹⁴¹ *ibid*

¹⁴² *James Phelps & Co. v Hill* (1891) 1 Q.B. 605

¹⁴³ *supra* n88, p.78

¹⁴⁴ *Kish v Taylor* (1912) A.C. 604

¹⁴⁵ *ibid*, 618

¹⁴⁶ *Crelinsten Fruit Co. v The Mormacsaga* (1968) 2 Lloyd's Rep. 184

¹⁴⁷ *The Iran Bohanar* (1983) Lloyd's Rep. 620

which was accepted as a safe port and one to where it would be reasonable for the carriers to deviate should they were entitled or obliged to do so. Thus, it was held by the Court of Appeal, which affirmed the decision of Parker J., that as there was a prima facie case that the delivery of oil to Iran would result in a loss of that bean oil to the plaintiffs, the carriers were entitled, as against the Government Corporation of Ira, to deviate and was bound to, as against the plaintiffs, to deviate to Karachi. As such, the desired injunction was granted.

7.1.5. Effect of deviation

In principle, in case where there has been an unjustifiable deviation, the charterer or cargo owner may either repudiate the contract and treat the contract as discharged, or affirm it after the facts have been known.¹⁴⁸ This is true whether loss or damage to cargo has been caused or not.¹⁴⁹ In case where the carriage contract has been discharged, the shipowner cannot rely on the exceptions in the contract or on any favorable stipulation such as limitation of liability.¹⁵⁰ Moreover, the shipowner might also be liable for loss or damage which is caused by the deviation as would be the case where loss or damage is due to an unwarranted prolongation of the voyage.¹⁵¹ Although this rule seems harsh, it has been justified on the basis that where the vessel has deviated, the cargo owner might be left uninsured¹⁵² due to the fact that there is an implied obligation in marine insurance contracts that there will be no deviation from the voyage stipulated by the insurance policy. For instance, Lord Wilberforce explained in *Photo Production Ltd. v Securicoe Transport Ltd.*¹⁵³ that deviation cases may be considered a body of authority *sui generis* with special rules derived from historical and commercial reasons. Lord Diplock pointed out in the same case that the parties to a contract of carriage may be taken to have agreed by implication of the Common law, that the vessel would not deviate without justification and that notwithstanding the gravity of the event that has in fact caused by the breach, the innocent party is entitled to elect to repudiate the contract.

Whilst a shipowner is not entitled to rely on the exceptions in the charter party should the charterer has made a decision to treat himself as discharged from the carriage contract, he is not precluded by a deviation from relying on the exceptions which might be relied upon by a common carrier, such as inherent vice, Queen's enemy and act of God, as long as he can establish that the loss in question would, in any event, have taken place should the ship had not deviated.¹⁵⁴ To illustrate, in *International Guano v MacAndrew & Co.*¹⁵⁵ a cargo of superphosphates was damaged in consequence of inherent vice, delay and deviation by the vessel. It was held by Pickford J. that whilst the shipowners were not entitled to rely on the exceptions in the charter party because of the deviation, they were; however, entitled, as common carriers after the deviation, to escape from liability for that part of the loss which was

¹⁴⁸ *Hain S.S. Co. Ltd. v Tate and Lyle Ltd.*, (1936) 41 Com. Cas. 350, 354

¹⁴⁹ **Dockray**, *Cases and Materials on the Carriage of Goods by Sea*, 3rd edition, Cavendish Publishing Limited, p.68

¹⁵⁰ *Cunard S.S. Co. Ltd. v Buerger* (1927) A.C. 1

¹⁵¹ supra n88, p.80

¹⁵² supra n148

¹⁵³ *Photo Production Ltd. v Securicoe Transport Ltd* (1980) A.C. 827

¹⁵⁴ **Kwang**, *Carriage of Goods by Sea*, 1986, Singapore, Butterworths, p.96

¹⁵⁵ *International Guano v MacAndrew & Co* (1909) 2 K.B. 360

caused by inherent vice of the cargo. Conversely, in *Morrison & Co. Ltd. v Shaw, Savill and Albion Co. Ltd.*,¹⁵⁶ where a vessel and her cargo were lost as a result of the vessel which was sunk by an enemy submarine, the shipowners were not allowed to rely on the exceptions in relation to King's enemies since they were unable to establish that the cargo would have been lost even if the vessel had not deviated from the contractual path.

As a result, where the charter party has been discharged, the shipowner is not entitled to the freight due under the carriage contract.¹⁵⁷ Nonetheless, he might be entitled to freight on a *quantum meruit* should he have carried the goods to their destination.¹⁵⁸ Moreover, unless the deviation has been waived, the carrier might not claim general average contribution regarding a casualty which occurred after the deviation¹⁵⁹ because he would be unable to prove that the casualty would still have occurred even if the ship had not deviated. On the other hand, as for whether the carrier may rely on exceptions in the contract of carriage where cargo has been lost or damaged before the deviation, Pickford J. pointed out that, in such a case, the carrier cannot rely on the exceptions in the carriage contract.¹⁶⁰ Nonetheless, with respect, his Lordship's view cannot be supported since the cargo owner is only entitled to regard the contract as having been discharged with effect from the date of deviation.¹⁶¹ It is also vital to note that under the Marine Insurance Act 1906, a voyage policy is avoided only as from the time of deviation.¹⁶²

7.1.6. Waiver

As a party to a carriage contract cannot, by his own wrongful act, repudiate the contract against the other party's wish, the charterer or cargo owner might waive the deviation after the facts have become known and reserve his rights to damages.¹⁶³ As a result, a charterer or a cargo owner who acquires the knowledge of deviation should leave uncertainty as to whether he is waiving the shipowner's breach or treating himself as discharged from the contract.¹⁶⁴ In case where there has been an unequivocal act on the part of the charterer or cargo owner recognizing the continuance of the carriage contract, the contract cannot be subsequently treated as if it had come to an end. To illustrate, in *Bank of China v Brusgaard Kiosterud & Co; and The Bank of East Asia Ltd; and Thong Lee Trading Co. Third Parties*,¹⁶⁵ the defendants, when sued for failing to deliver part of a cargo which had been transported from Hong Kong to Singapore, sought to refer to the terms of the bill of lading so as to escape from liability. The plaintiffs argued that the terms of the bill of lading could not be relied upon by the defendants since they had deviated from the contractual route. Nonetheless, no allegation of deviation was made in the statement of claim. On the other hand, the plaintiffs had made clear in their statement of claim

¹⁵⁶ *Morrison & Co. Ltd. v Shaw, Savill and Albion Co. Ltd* (1916) 2 K.B. 783

¹⁵⁷ *supra* n88, p.81

¹⁵⁸ *Societe Franco Tunisienne d'Armement v Sideamr S.p.A.* (1961) 2 Q.B. 278

¹⁵⁹ *supra* n148

¹⁶⁰ *supra* n155

¹⁶¹ *supra* n88, p.82

¹⁶² Marine Insurance Act 1906, Section 46

¹⁶³ *supra* n88, p.82

¹⁶⁴ *ibid*

¹⁶⁵ *Bank of China v Brusgaard Kiosterud & Co; and The Bank of East Asia Ltd; and Thong Lee Trading Co. Third Parties* (1956) M.L.J. 124

that they intended to rely on the terms of the bill of lading at the trial. In this case, Whyatt C.J. held that the defendants were allowed to refer to the terms of the bill of lading so as to escape from liability.

7.1.7. Delay as deviation

On top of an unjustified departure from the contractual voyage, there are other types of serious misconduct by the carrier which might be defined as deviation.¹⁶⁶ The results which follow such other deviations are almost the same as those which follow an unjustified departure from the contractual path.¹⁶⁷ Therefore, it can be construed that there is a deviation in case when cargo has been stowed on deck in breach of carriage contract, or when there has been a severe delay in the undertaking of the agreed voyage.¹⁶⁸

In *Brandt v Liverpool*,¹⁶⁹ Lord Atkin pointed out that delay would constitute a deviation where its effect is to substitute an entirely different voyage for that contemplated by the parties. From the fact of this case, a cargo of zinc bags was to be carried from Buenos Aires to Liverpool. Even though a clean bill of lading had been issued, many of the bags had to be discharged as they had either been wet by rain before shipment or heated in one of the holds. After necessary delay, they were reconditioned and reshipped on another ship which arrived at Liverpool three months later than the first ship. Even though the clean bill of lading consisted of an exception to the effect that the ship owners were not to be liable for delay, loss or damage caused by prolongation of the journey, it was held by the Court of Appeal that the clause was ineffective as the delay had been such as to substitute a different voyage for that contemplated by the bill of lading and to amount to a deviation. By that, Lord Scrutton explained.

'... not only was there a taking out of the vessel through negligence and error of judgment, but after the goods were taken out there was an unreasonable delay in putting them back again, and it appears to me that the result of those two unreasonable acts is that there is sufficient delay to amount to a deviation; and if once a deviation occurs, the ship owner cannot refer to any of the exceptions.'

Furthermore, in *Scaramanga & Co. v Stamp*,¹⁷⁰ the Court of Appeal also considered the relationship between delay and deviation. In such case, a vessel deviated from the contractual path to help a ship in distress. On top of saving the crew, she took other vessel in tow for a fee, and while towing her, she and her cargo were lost when she got ashore. It was held that the towing of other ship was amounted to a deviation. Cockburn C.J. pointed out that this was rightly so, seeing that the effect of taking another ship in tow is necessary to retard the progress of the towing ship, and thereby to prolong the risk of the voyage. As such, the ship owners were not entitled to refer to a charter party exception to avoid liability for the mishap.

7.2. The carrier's obligation under the Hague-Visby Rules

¹⁶⁶ supra n88, p.83

¹⁶⁷ ibid

¹⁶⁸ ibid

¹⁶⁹ *Brandt v Liverpool, Brazil and Steam Plate Navigation Co. Ltd.*, (1924) 1 K.B. 575, 601

¹⁷⁰ *Scaramanga & Co. v Stamp* (1880) 5 C.P.D. 295

The Hague-Visby Rules article IV (4) allows ‘any reasonable deviation’ in the voyage but they do not define what deviation means. Once again, the courts seek to construe the rules in favor of the Common law duty not to deviate.¹⁷¹ Such principles set out that the vessel does not stray during the voyage from its contractual or customary course to destination. In general, no difficulty is encountered under the Hague-Visby Rules when the parties agree a specific route distinct from the customary one between the loading and discharging ports: the rules simply apply to the scope of the contract defined by parties.¹⁷² However, problems can arise when liberty clauses are incorporated in the bill of lading. By constructing such a clause together in the agreed voyage, the courts will seek to give business efficacy to the contract parties, and also to judge whether the way the liberty is exercised is reasonable under the rules.¹⁷³ In effect, a general liberty clause in the bill of lading presents almost nothing, as the carrier has a right to make reasonable deviations but cannot contractually decrease or relieve his or her liability under the rules.¹⁷⁴ The evaluation whether a deviation is reasonable and justifiable; thus, was formulated by Lord Atkin in *Stag Line Ltd. v Foscolo, Mango & Co*¹⁷⁵. as the following question: ‘What departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned? Article IV (4) itself provides two concrete illustrations of reasonable grounds to deviate such as saving life and rescuing property even though it is widely agreed that, in respect of saving property, the carrier may not deviate simply to earn a salvage award. Other normal illustrations are deviating into a port of refuge or overcarrying the cargo since the destination port is strikebound. Moreover, article IV (4) sets out nothing regarding the outcomes of an unjustifiable deviation but the courts have applied the remedies at common law, that is to say, deviation is so serious a breach that the cargo owner may elect to treat the contract of carriage as no longer binding. If that happens, then the Hague-Visby Rules implied in the contract are also set aside and, with them, the right of the carrier to limit his or her liability.¹⁷⁶

7.3. The carrier’s obligation under Thai COGSA

Thai COGSA does not set out the rules about the unjustified deviation; however Thai COGSA follows the concept of Hague-Visby Rules. Art. IV Rule 2(1) of the Hague-Visby Rules provides that the carrier shall not be liable for loss or damage which is caused while saving or attempting to save property at sea. This exception; however, must be read together with Art. IV Rule 4 which states that any reasonable deviation shall not be deemed to be an infringement of the contract of carriage and that the carrier shall not be liable for any loss or damage in consequence of such a deviation. Nonetheless, the carrier still remains responsible for the general average required to be paid on its part.

¹⁷¹ supra n63, p.454

¹⁷² ibid, chapter 8 ‘Deviation’

¹⁷³ *Stag Line Ltd. v Foscolo, Mango & Co.* (1932) A.C. 328 (H.L.)

¹⁷⁴ supra n63, p.454

¹⁷⁵ supra n173

¹⁷⁶ ibid

In fact, the carrier is obliged not to deviate from the contractual route. However, in certain circumstances, the carrier may deviate and can be waived from liability if such deviation is for the purpose of avoiding danger. For instance, pursuant to the warning by the authority that there will be a typhoon passing the contractual route, the master had then decided to deviate from such route, and transited at another port in order to wait for the typhoon to be gone, so that he could recommence sailing. Even though such action caused delay of delivery, the carrier could escape from liability pursuant to Article 52 of Thai COGSA which read

“The carrier is not liable for loss, damage, or delay if he/she can prove that such loss, damage, or delay is caused by

- (1) force majeure
- (2) perils of the sea

Furthermore, the carrier may also escape from liability pursuant to deviation provided that such deviation occurred in order to save life or property at sea. However, the carrier will still be liable for general average, if any, in accordance with Article 55 of Thai COGSA which read

“The carrier is not liable for loss, damage, or delay if he/she can prove that such loss, damage, delay is caused by an attempt to save life or property at sea. However the carrier will still be liable for general average, if any.”

8. The obligation of care for the cargo

8.1 The carrier’s obligation under Common law

Under the English Carriage of Goods by Sea Act 1971, the carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the cargo.¹⁷⁷

However, the carrier is free to determine by the contract with the shipper which part of each has to play in loading.¹⁷⁸ If, nonetheless, the carrier undertakes the loading, then he has to do it properly.¹⁷⁹

However, there is some doubt regarding the meaning of ‘properly’.¹⁸⁰ One opinion¹⁸¹ is that ‘properly’ means ‘in accordance with a sound system’. The carrier’s duty is to adopt a system which is sound in the light of all knowledge which the carrier has or should have about the nature of the goods. To be precise, Lord Reid said:

‘I think that ‘properly’ in this context has a meaning slightly different from ‘carefully’. I agree with Viscount Kilmuir L.C. that here ‘properly’ means in accordance with a sound system (...) and that may mean rather more than carrying the goods carefully. But the question remains by what criteria it is to be judged whether the system was sound.

On the other hand, another view¹⁸² is that ‘property’ presumably adds something to the word ‘carefully’, and means ‘upon a sound system’.

¹⁷⁷ Carriage of Goods by Sea Act 1971, Art III, r 2

¹⁷⁸ **E R Hardy Ivamy**, *Carriage of Goods by Sea*, 13th edition, Butterworths, 1989, p.99

¹⁷⁹ *Pyrene Co Ltd v Scindia Navigation Co Ltd* (1954) 2 QB 402 at 419

¹⁸⁰ *G H Renton Co Ltd v Palmyra Trading Corp of Panama* (1957) AC 149, (1956) 3 All ER 957

¹⁸¹ *Albacora SRL v Westcott and Luarance Line Ltd*, (1966) 2 Lloyd’s Rep. 53

¹⁸² *ibid* (per Lord Pearce)

A sound system does not mean a system suitable for all weaknesses and idiosyncrasies of a specific cargo, but a sound system under all the circumstances regarding the general practice of carriage of goods by sea.

A further view¹⁸³ is that the word ‘properly’ means ‘in an appropriate manner’. The word ‘properly’ adds something to ‘carefully’, if ‘carefully’ has a narrow meaning of merely taking care. The element of skill or sound system is required on top of taking care.¹⁸⁴

Whether the carrier has breached his duty is a question of fact in each case, for example,

- (1) whether a cargo of wet salted fish had been negligently stowed and ventilated;¹⁸⁵
- (2) whether a cargo of bags of cocoa had been negligently stowed, dunnaged and protected;¹⁸⁶
- (3) whether a cargo of coco yams had been negligently stowed and ventilated;¹⁸⁷
- (4) whether a cargo of melons, garlic, and onions had been negligently stowed and badly ventilated because they had been stowed in a bold containing a cargo of fishmeal;¹⁸⁸
- (5) whether an electric shovel had been properly stowed because there were gaps in the stowage;¹⁸⁹
- (6) whether the ship owner by entering a strike-bound port causing delay had damaged a cargo of oranges;¹⁹⁰
- (7) whether a cargo of lumber had been safely stowed;¹⁹¹
- (8) whether boxes of bananas had been properly stowed;¹⁹²
- (9) whether the shipowners were negligent in securing the cargo on a barge to keep it from sliding, and in tethering the barge to the ship;¹⁹³
- (10) whether apple concentrate in containers had been properly stowed since no extra dunnage had been used;¹⁹⁴
- (11) whether melons stowed in crates 17 high without air circulating in the hold had been properly stowed;¹⁹⁵

¹⁸³ *ibid* (per Lord Pearson)

¹⁸⁴ *supra* n178, p.100

¹⁸⁵ *ibid*

¹⁸⁶ *Jahn (Trading as C F Otto Weber) v Turnbull Scott Shipping Co Ltd and Nigerian National Line Ltd, The Flowergate* (1967) 1 Lloyd’s Rep 1.

¹⁸⁷ *Chris Foodstuffs (1963) Ltd v Nigerian National Shipping Line Ltd* (1967) 1 Lloyd’s Rep 294, CA

¹⁸⁸ *David McNair & Co Ltd and David Oppenheimer Ltd and Associates v Santa Malta* (1967) 2 Lloyd’s Rep 391

¹⁸⁹ *Blackwood Hodge (India) Private Ltd v Ellerman Lines Ltd and Ellerman and Bucknall SS Co Ltd* (1963) 1 Lloyd’s Rep 454

¹⁹⁰ *Crelinsten Fruit Co v The Mormacsaga* (1969) 1 Lloyd’s Rep 515, Exchequer Court of Canada

¹⁹¹ *Charles Goodfellow Lumber Sales Ltd v Verreault Hovington and Verreault Navigation Inc* (1968) 2 Lloyd’s Rep 383

¹⁹² *Heinrich C Horn v Cia de Navegacion Fruco SA and J R Atkins* (1970) 1 Lloyd’s Rep 191

¹⁹³ *Falconbridge Nickel Mines Ltd, Janin Construction Ltd and Hewitt Equipment Ltd v Chimo Shipping Ltd, Clarke SS Co Ltd and Munro Jorgensson Shipping Ltd* (1973) 2 Lloyd’s Rep 469, Supreme Court of Canada

¹⁹⁴ *Bruck Mills Ltd v Black Sea SS Co*, (1973) 2 Lloyd’s Rep 531, Federal Court of Canada, trial Division

- (12) whether cars had been stowed too closely together;¹⁹⁶
- (13) whether a cargo of apples and pears had been properly stowed in a refrigerated ship;¹⁹⁷
- (14) whether a cargo of plate glass should have been surrounded by dunnage fixed more securely;¹⁹⁸
- (15) whether a cargo of galvanised steel had been properly stowed;¹⁹⁹
- (16) whether a cargo of crude oil had been heated;²⁰⁰
- (17) whether a cargo of ceramic tiles had been stowed with sufficient care to fill up void spaces.²⁰¹

Therefore, the fact that the goods arrive in damaged condition does not of itself constitute a breach of the carrier's duty although it may well be in many cases enough to raise an inference of a breach of the obligation.²⁰²

8.2. The carrier's obligation under the Hague-Visby Rules

The carrier has an obligation of care for the cargo under the Hague-Visby Rules which is spelled out in more detail than at Common law. As such, art III (2) states: 'Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.' In other words, the carrier's duty of care covers every aspect of handling of the cargo.²⁰³ The standard of care requires the carrier to act properly and carefully. These words have been interpreted by the courts as signifying distinct yet cumulative duties.²⁰⁴ Basically, the word 'carefully' means exercising the degree of skill and care that a reasonably competent person in the trade should to display in the particular circumstances involved in the task required.²⁰⁵ Moreover, the word 'properly' means acting in accordance with a system that, in light of the standards of practice in the shipping industry and the knowledge of the carrier has or should have about the nature of the cargo, is both suitable and adequately maintained.²⁰⁶ In brief, the carrier must take care of the cargo in accordance with a sound system operated with reasonable care.²⁰⁷ Whereas article III (2) refers to every aspect of handling the cargo, including loading and discharging, it is always true that the shipper or consignee some how involves in those operations.²⁰⁸ Where bills of lading are issued for goods laden on a chartered

¹⁹⁵ *William D Branson Ltd and Tomas Alcazar SA v Jadranska Slobodno Plovidba (Adriatic Tramp Shipping)* (1973) 2 Lloyd's Rep 535, Federal Court of Canada, Trial Division

¹⁹⁶ *Nissan Automobile Co (Canada) Ltd v Owners of the Vessel Continental Shipper* (1976) 2 Lloyd's Rep 234, Court of Appeal Canada

¹⁹⁷ *Crelinsten Fruit Co and William D Branson Ltd v Maritime Fruit Carriers Co Ltd* (1975) 2 Lloyd's Rep 249, Federal Court of Canada, Trial Division

¹⁹⁸ *The Washington* (1976) 2 Lloyd's Rep 453, Federal Court of Canada, Trial Division

¹⁹⁹ *The Lucky Wave* (1985) 1 Lloyd's Rep 80, QBD (Admiralty Court)

²⁰⁰ *Gatoil International Inc v Panatlantic Carriers Corp* (1985) 1 Lloyd's Rep 350 (Commercial Court)

²⁰¹ *The Saudi Prince (No 2)* (1988) 1 Lloyd's Rep 1, CA

²⁰² supra n181

²⁰³ supra n63, p.452

²⁰⁴ ibid

²⁰⁵ *Bache v Silver Line Ltd*, 110 F.2d 60 (2d Cir. 1940)

²⁰⁶ supra n180

²⁰⁷ supra n63, p.452

²⁰⁸ ibid

vessel, it is obvious for the parties to contract on the basis of FIOST (free in and out, stowed, and trimmed) or some variation of those terms.²⁰⁹ In practice, English courts have accepted this practice as allowable under the Hague-Visby Rules, construing them to mean the carrier shall act properly and carefully toward the cargo throughout the contract to which he has agreed.²¹⁰ In other words, the contract parties are free to limit the scope of their responsibilities on which the rules the compulsorily fasten the standard of obligations.²¹¹

The outcome of this approach to construing the rules is that the carrier is not obliged to agree to load or discharge cargo or even to accept specific goods; however, if he does so, he cannot escape the responsibilities set out by art III (2).²¹² Likewise, the carrier also cannot delegate such duty. The carrier is liable for the negligent undertaking of these obligations whether committed by himself or by his employees or subcontractors.²¹³ In similar, the carrier will be liable for breach of the duty of care toward one cargo owner when another cargo owner negligently causes the damage whilst loading or stowing his own goods, as agreed with the carrier.²¹⁴

However, the carrier's obligations in art III (2) are clearly expressed in its opening words to be subject to the exceptions from liability enclosed in art IV.²¹⁵ The distinct in wording might suggest that the carrier may break away from the duty of care for the cargo whenever he can prove one of the exceptions in art IV; however, the courts have construed art III (2) more narrowly.²¹⁶ As such, they have worked from the Common law theory that the carrier is strictly responsible for care of the cargo and cannot take advantage of exceptions from liability if his conduct is negligent. Likewise, the courts have held that the exceptions in art IV, or at least those that do not explicitly refer to negligence, such as art IV (2) (a) and (b), are of no benefit to the carrier when he is in breach of art III (2).²¹⁷ This approach also suggests, even though the point seems unsettled, that the burden of proof of negligence and breach of art III (2) falls on the claimant, cargo owner.²¹⁸

8.3. The carrier's obligation under Thai COGSA

The carrier's duty for care of the cargo is similar to that in the Common law, as set out in Article 10 of Thai COGSA which read

“The carrier must properly and carefully load, handle, stow, carry, keep, care for and discharge the cargo”

By complying with this requirement, the carrier must exercise due diligence when loading, handling, stowing, carrying, keeping, and discharging of goods.²¹⁹

²⁰⁹ *ibid*

²¹⁰ *ibid*

²¹¹ *supra* n16

²¹² *supra* n19

²¹³ *International Packers London Ltd v Ocean Steam Ship Co.*, (1955) 2 Lloyd's Rep. 218

²¹⁴ *supra* n52, p.452

²¹⁵ *ibid*

²¹⁶ *ibid*

²¹⁷ *Gamlan Chemical Co. v Shipping Corp. of India* (1978) 2 N.S.W.L.R. 12

²¹⁸ *supra* n63, p.452

²¹⁹ **Pataichit**, *Maritime Law*, 1994, Winyoochon, Bangkok, p. 255

For example, by keeping different goods such as cloths, leather, and olive oils together, the carrier must exercise this duty with care; that is, keeping them separately. Moreover, should any extra equipment is needed to keep goods safe while in transit, the carrier is obliged to arrange for such.²²⁰

However, the carrier is not obliged to perform such duty by himself. He may assign the master, crew or his agent to act on behalf of him. As such, the carrier shall be responsible for such master, crew, or agent's liability.²²¹

In the event the carrier fails to comply with the duty of care requirement, if it leads to the loss of, or damage to the goods while being carried, then the carrier shall be liable for such loss or damage to the consignee in accordance with Article 39 of Thai COGSA which read

“Except in Article 51, 52, 53, 54, 55, 56 and 58, the carrier shall be liable for the loss of, damage to, or delay for delivery of the goods if the cause of such loss, damage, or delay arose from the carrier's action while carrying the goods.

The carrier shall be deemed to carry the goods from the time of receipt of such goods from the shipper, the shipper's agent, or any officer by which the law of that port of loading enforce the shipper to hand over the goods to the officer until the time the carrier deliver the goods at the port of discharge stipulated in Article 40.”

The goods which the defendant carrier received from Marica International Co., Ltd., and then loaded into the vessel were in the apparent good order. Therefore, that the goods were found to be damaged at the port of discharge shall be deemed to be liability of the carrier for failing to exercise due diligence when carrying, loading, and keeping the goods. The carrier's liability, moreover, is not subject to any exclusion of liability by law. Thus, the defendant carrier shall be liable for the damage to the goods pursuant to Article 3, 10, 39 of Thai COGSA.²²²

9. Exclusion of Liability

9.1 Exclusion of Liability under Common law

In the absence of any other applicable provision, a shipowner who is a common carrier must be liable for any loss of or damage to goods which have been caused by an act of God, the Queen's enemies, inherent vice, or a general average act.²²³ Like other rules, carriage of goods by sea contracts do provide for exclusion of carrier's liability for loss of or damage to cargo. In this part, the Singapore Carriage of Goods by Sea Act 1972 will be considered. In general, exclusion of shipowner's liability can be relied upon in the following cases.

²²⁰ IPIT Court decision no. 412/1996

²²¹ supra n219, p. 255

²²² IPIT Court decision no. 138/1998

²²³ Supra n88, p.254

- (a) Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship
- (b) Fire unless caused by the actual fault or privity of the carrier
- (c) Perils, dangers and accidents of the sea or other navigable waters
- (d) Act of God
- (e) Act of war
- (f) Act of Public enemies
- (g) Arrest or restraint of princes, rulers, or people or seizure under legal process
- (h) Quarantine restrictions
- (i) Act or omission of the shipper or owner of the goods, his agent or representative
- (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general
- (k) Riots and civil commotions
- (l) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods
- (m) Insufficiency of packing
- (n) Insufficiency and inadequacy of marks
- (o) Latent defects discoverable by due diligence
- (p) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage

9.1.1. 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

Exceptions in relation to navigation and management of a ship have been relied upon long before the introduction of the Hague Rules. Nonetheless, whilst an exception in relation to ‘errors in navigation’ is, unless provided otherwise, inapplicable in case where there has been negligence,²²⁴ the exception under art IV Rule 2(a) safe guards the carrier against the negligent acts of the master, mariner, pilot or his servants.²²⁵ It might seem bizarre that art IV Rule 2 (a) should place the risk of negligent navigation or management of the vessel on the shoulder of the cargo owner but this sort of liability between carrier and cargo owner formed part of the balance which was struck between the interests of carriers and cargo owners in the United States’ Harter Act

²²⁴ *Seven Seas Transportation Ltd. v Pacifico Union Marina Corporation* (1984) 1 Lloyd’s Rep. 558

²²⁵ supra n88, p.255

1893, a balance which was followed in the Hague Rules and in the Hague-Visby Rules.²²⁶

The problem is that the sphere of the term ‘navigation’²²⁷ incurs less difficulty than of the terms ‘management’.²²⁸ In relation to the U.S. Harter Act, it has been held that faults in navigation included a failure to put into a port or refuge to fix damage caused by perils of the sea,²²⁹ inappropriate selection of an anchorage²³⁰ and negligence in not heeding a light upon a reef.²³¹ No doubt, this exception would be inapplicable where a ship has been negligently navigated due to the fact that she was improperly manned.²³² This is so because the carrier has in such a case breached his duty under art III Rule 3 of the Hague-Visby Rules to exercise due diligence to assure that the vessel was properly manned.²³³

‘Management of the ship’

The term ‘management’ has a wider meaning than ‘navigation’ and consists of acts which do not affect the sailing or moving of the vessel.²³⁴ Nonetheless, it is not a term which is easily defined, moreover, in *Sim Lim Co. (Pte.) Ltd. v Danny Skou, Owners of*,²³⁵ Chua J. accepted that its application depends on the facts of each case as appreciated by persons experienced with vessels. The clear point is that the exception in relation to management of the vessel is not intended to negate the carrier’s duty of care for the cargo.²³⁶ Therefore, a difference is made between loss which caused by want of care of cargo and loss which results from want of care of the vessel, it being clear that this exception is only applicable when loss of or damage to cargo has been incidental to an act, neglect, or default in the management of the vessel.²³⁷

In *Gosse Millard Ltd. v Canadian Government Merchant Marine Ltd*²³⁸, a ship, which had been loaded with a cargo of tin plate, had to proceed to Liverpool for repairs. Whilst the repairs were undertaken, the ship’s hatches were left open for purposes of convenience. As a result, rain water got into the holds and damaged the tin plates. As the damage could have been avoided had tarpaulins been used to cover the hatches, it was held by the House of Lords that the shipowners were unable to rely on the exception regarding management of the vessel. Negligence in the management of the hatches could not be regarded as negligence in the management of the vessel.

In *Sim Lim Co. (Pte.) Ltd. v Danny Skou, Owners of*,²³⁹ a cargo of paper was damaged when water from two deep tanks got into the hold where the paper was stored.

²²⁶ *ibid*

²²⁷ e.g. *The Accomac* (1880) 15 P.D. 208

²²⁸ *supra* n88, p.255

²²⁹ *Carsa v Spreckels* (1905) 141 Fed. Rep. 401

²³⁰ *The Etona* (1896) 64 Fed Rep. 880

²³¹ *The E.A. Shores* (1896) 73 Fed. Rep. 324

²³² *supra* n88, p.255

²³³ Hague-Visby Rules, art III Rule 3

²³⁴ *supra* n88, p.255

²³⁵ *Sim Lim Co. (Pte.) Ltd. v Danny Skou, Owners of* (1982) 1 M.L.J. 49

²³⁶ *supra* n88, p.255

²³⁷ *ibid* at p.256

²³⁸ *Gosse Millard Ltd. v Canadian Government Merchant Marine Ltd.* (1929) A.C. 223

²³⁹ *supra* n235

According to inadequate care, the pump which carried water into the tanks during cleansing operations was not stopped in time to stop excess water seeping the hold. The mishap could also have been avoided had the deep tanks' manholes been shut. The trial judge took the view that the actions of the crew members in the undertaking of their obligations regarding the cleansing of the two deep tanks were acts of negligence whilst performing the obligations to the vessel as a vessel, and, as such, were acts which concerned the management of the ship as a whole. His judgment was affirmed by the Court of Appeal.

Where there has been a failure to manage facilities which are only partly used for the vessel and partly for the cargo, this exception may be relied upon.²⁴⁰ In *Rowson v Atlantic Transport Co*,²⁴¹ refrigerating apparatus, which was used partly to preserve cargo and partly to preserve the food consumed by the crew, was carelessly handled and, as a result, damage to cargo. It was held by the Court of Appeal that the apparatus was part of the vessel and that negligence in failing to keep the refrigeration chambers cooled during the voyage was a fault or error in the management of the ship. Nevertheless, it seems that the approach in *Rowson's* case may only be applicable in which the facilities in questions are primarily intended for the ship's purposes.²⁴²

A difference must be made between the mismanagement of a vessel before the beginning of the voyage and mismanagement of a vessel after the commencement of the voyage for where the Singapore Carriage of Goods by Sea Act 1972 applies, the former circumstance would involve a breach of the carrier's duty under art. III Rule 1 to assure that the vessel is seaworthy at the beginning of the voyage. In such a situation, no reliance can be placed on the exception in relation to management in art. IV Rule 2 (a).²⁴³

9.1.2. Fire unless caused by the actual fault or privity of the carrier

Whilst both art. IV Rule 2 (b) and section 294 of the Merchant Shipping Act state about a carrier's right to avoid liability for loss or damage in consequence of a fire which has not been caused by the actual fault or privity of the carrier, one significant distinction between the two provisions is that only owners of British ships, which also includes Singapore ships, may refer to section 294 of the Merchant Shipping Act while there is no such restraint as far as art. IV Rule 2 (b) is concerned.²⁴⁴

One more vital distinction between art. IV Rule 2 (b) and section 294 of the Merchant shipping Act is that whereas the latter can only relied on where there has been a fire on board a vessel, art. IV Rule 2 (b) is applicable to the stages of loading and discharging of cargo.²⁴⁵ As such, a fire on board a lighter onto which goods from the vessel have been discharged would be within the ambit of art. IV Rule 2 (b).

²⁴⁰ *supra* n88, p.256

²⁴¹ *Rowson v Atlantic Transport Co.* (1903) 2 K.B. 666

²⁴² *Foreman and Elmans Ltd. v Federal S.N. Co.* (1928) 2 K.B. 424

²⁴³ *supra* n26

²⁴⁴ *supra* n88, p.257

²⁴⁵ *ibid*

Art. IV Rule 2 (b) is, in view of art. III Rule 1 and art IV Rule 1, inapplicable in which a fire has been caused by unseaworthiness unless the carrier has exercised due diligence to make sure that the ship was seaworthy at the beginning of the voyage.²⁴⁶

9.1.3. Perils, dangers and accidents of the sea or other navigable waters

The scope of this exception which deals with the famous exception, ‘perils of the sea’ are difficult to establish.²⁴⁷ This exception is normally applicable where loss or damage has caused by marine casualties, for instance, stranding, foundering, and shipwreck. Nonetheless, its application is not confined to such grave catastrophe.²⁴⁸ It may be relied upon in which the event which led to loss of or damage to cargo was not so serious.²⁴⁹ Nevertheless, it is significant to note that this exception relates to *perils of the sea* and not perils on the sea. It is vital that there be proof that the loss or damage was accidental.²⁵⁰

For instance, in *The Freighter Kien Kung*²⁵¹, Buttrose J. stressed:

‘Perils of the sea do not fall within the class of losses, the mere happening of which is proof of the casualty. The mere sinking of a vessel beneath the waves by itself, does not establish a loss by perils of the seas. There must, in my view, be some evidence of a casualty or a fortuitous occurrence...’

In this case, a Panamanian registered ship disappeared under suspicious situations in the Straits of Malacca whilst on a voyage from Singapore to Penang. No evidence of a casualty or fortuitous occurrence was offered. In the situations, the Court refused to accept that a loss by perils of the sea had been established.

Likewise, the defence of perils of the sea was also failed to rely upon in *The M.V. Kantang*,²⁵² which also related to the sinking of a ship in the Straits of Malacca. The defendants, who were sued concerning loss of a cargo of maize, relied on art. IV Rule 2 (c) of the Hague Rules, which were then in force. Chua J. rejected this defence on the basis that the weather encountered by the vessel during its voyage in the Straits had not been of such a disaster nature as to constitute perils of the sea.

Conversely, in *Malayan Motor & General Underwriter (Pte) Ltd. v M.H. Almojl*,²⁵³ evidence of fortuity was not lacking. In this case, a British seaward defence ship, which had been refitted in Singapore for service as a ferry in the Persian Gulf, sailed from Singapore for a Persian gulf at a time when the south west monsoon created very turbulent conditions in the Indian Ocean. She ran aground off the Iranian coast after meeting with stormy winds and finally capsized. It was held that the ship had been lost in consequence of perils of the sea.

²⁴⁶ *Maxine Footwear Co. Ltd. v Canadian Government Merchant Marine Ltd.* (1959) A.C. 589

²⁴⁷ *supra* n88, p.258

²⁴⁸ *ibid*

²⁴⁹ *ibid*

²⁵⁰ *ibid*

²⁵¹ *The Freighter Kien Kung* (1965) 2 M.L.J. 68

²⁵² *Zuellig (Gold Coin Mills) v M.V. Autoly (Owners) The M.V. Kantang* (1971) 1 M.L.J. 13

²⁵³ *Malayan Motor & General Underwriter (Pte) Ltd. v M.H. Almojl* (1982) 2 M.L.J. 2

Another example of the exception ‘perils of the sea’ was also decided by the Malaysian Federal Court in *The Melanie*,²⁵⁴ In such case, a vessel grounded at Kuantan after she hit a submerged sand bar which was not known by the charts to be there. Salleh Abbas C.J. who held that the striking of the sand bar in an area marked in the charts as a sea-lane was an accidental act which could not have been guarded against. As the danger had been created by the sea, the grounding had to be regarded as having been caused by a peril of the sea.

9.1.4. Act of God

The exception ‘act of God’ is one which is given at Common law and it might be referred to even where it has not been included amongst other exceptions is the carriage contract. In *Nugent v Smith*,²⁵⁵ James L.J. provided the following helpful definition of the act of God exception.

‘The ‘act of God’ is a mere short way of expressing this proposition: A common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly, and exclusively, without human interventions, and that it could not have been prevented by any amount of human foresight and pains and care reasonably to be expected of him.’

Natural accidents which are resulted from, *inter alia*, lightning, earthquake and violent storm are obviously concerned with the exception ‘act of God’.²⁵⁶ For instance, in Singapore and Malaysian Courts, the ‘act of God’ exception has been pleaded in some cases involving loss or damage caused by stormy weather. In a Malaysian case,²⁵⁷ an attempt was made to avoid liability for loss of cargo on the basis that a storm was, in fact, an act of God. In this case, the defendant’s vessel, which towed the plaintiff’s logs from Sungei Sugat to Sandakan, left Sungei Sukat with a raft of 82 logs but arrived at Sandakan with only 11 logs. It was clarified that a large number of the logs drifted away after the spikes, rings and chains, which secured them, gave away during the storm which took place during the course of the voyage. Seah J. said that a storm had to be ‘violent enough’ so that ‘act of God’ exception can be relied upon. Nonetheless, in this case, there was no evidence of any violent storm. Evidence had not been put to show that the vessel shipped water or that the crew had to pump out water from vessel and no meteorological report had been provided. In fact, it was clear that the vessel had continued on its voyage to Sandakan without any reduction of speed despite the alleged storm. In such situation, no question of reliance on the exception ‘act of God’ arose.²⁵⁸

Moreover, the defendant cannot invoke the ‘act of God’ exception where the loss or damage in question could have been avoided by the taking of precautions.²⁵⁹ In *K.M.A. Abdul Rahim & Anor. v Owners of Lex Maersk & Ors.*,²⁶⁰ nylon piece goods were damaged by rain water while they lay in lighters after having been discharged

²⁵⁴ *United Oriental Assurance Kuantan Sdn. Bhd. v W.M. Mazzarol (The Melanie)* (1984) 1 M.L.J. 260

²⁵⁵ *Nugent v Smith* (1876) 1 CPD 423 at 434

²⁵⁶ *supra* n88, p.260

²⁵⁷ *Khoo Than Sui v Chan Chiau Hee* (1976) 1 M.L.J. 25

²⁵⁸ *supra* n88, p.260

²⁵⁹ *ibid*

²⁶⁰ *K.M.A. Abdul Rahim & Anor. v Owners of Lex Maersk & Ors* (1974) 2 M.L.J. 121

from the ship which carried them to Singapore. Apparently, the rain and sudden showers had been unprecedented. Nonetheless, Choor Singh J. held that the carrier would not escape from liability since the goods would not have been damaged had there been greater vigilance in having them prevented from the rain. In such situations, the defence of 'act of God' was not approved.

9.1.5. Act of war

The 'act of war' exception is also applicable in which cargo has been lost or damaged in consequence of hostilities between governments whose diplomatic relations have not been severed.²⁶¹ Expectedly, like in the case of insurance law, this exception would work in regard to a civil war.²⁶² Only direct results of acts of wars are covered by this exception and reference should be made to insurance cases on the question of proximate cause of a loss.²⁶³

9.1.6. Act of public enemies

This exception is similar to the exception of 'Queen's enemies', a Common law exception which may be referred to even where it has not been included among other exceptions in the carriage contract. The 'act of public enemies' exception may be relied upon where loss or damage has been caused by 'enemies of the carrier of the Sovereign, whatever title he may enjoy – whether queen, emperor, president, duke, doge or aristocratic assembly'.²⁶⁴ Presumably, it also extends to loss or damage caused by pirates.²⁶⁵

9.1.7. Arrest or restraint of princes, rulers or people or seizure under legal process

At Common law, restraints of princes and rulers are akin to the acts of a state or government and not to the judgment of any judicial court.²⁶⁶ Illustrations of such restraints include blockades, embargoes on vessels, and ban against import or export of goods.²⁶⁷ Also, this exception extends to actions which have been taken to avoid the risk of actual arrest for a master has an obligation to avoid usual danger.²⁶⁸

However, this exception cannot be relied upon by a carrier who has constituted detention by carrying enemy cargo, by doing so, caused loss or damage to cargo-owners who have not been advised on that risk.²⁶⁹ Moreover, a carrier who was aware prior to the beginning of the voyage that the vessel will be restrained or detained during her journey because she lacks a clean bill of health may not be entitled to refer to this exception. For instance, in *Ciampa v British India S.N. Co.*,²⁷⁰ a cargo of lemons, which was shipped from Naples to London, was damaged by sulphurous fumes during the disinfection process in Marseilles, her next port of call. It was held

²⁶¹ *Kawasaki Kisen Kabushiki Kaisha v Bentham S.S. Co. Ltd.* (1939) 2 K.B. 544

²⁶² *Curtis v Mathews* (1919) 1 K.B. 425

²⁶³ *supra* n88, p.261

²⁶⁴ *Russel v Niemann* (1864) 34 L.J.C.P. 10, 14

²⁶⁵ *ibid*

²⁶⁶ *Finlay v Liverpool and Great Western S.S. Co. Ltd.* (1870) 23 L.T. 251, 254

²⁶⁷ *supra* n88, p.261

²⁶⁸ *Nobel's Explosives Co. v Jenkins & Co.* (1896) Q.B. 326

²⁶⁹ *Dunn v Bucknall* (1902) 2 K.B. 614

²⁷⁰ *Ciampa v British India S.N. Co.* (1915) 2 K.B. 774

by Roche J. that the carriers were not able to rely on an exception in relation to ‘restraint of princes’ since they were aware that their ship had to undergo fumigation at Marseilles according to French regulations vessels which had been to plague infested ports since their ship had been to Mombasa. a plague infested port, before her call at Naples.

One significant difference between the exception in art. IV Rule 2 (G) of the Hague-Visby Rules and that regarding the ‘restraint of princess’ is that whereas the latter does not extend to detentions as a result of the arrest of the ship at the instance of a plaintiff who has a claim against the carrier, the exception of the former does extend since it is applicable where there has been a ‘seizure under legal process’.²⁷¹

9.1.8. Quarantine restrictions

This exception is clear and it is important to note that the exception of quarantine restrictions under Singapore Carriage of Goods by Sea Act 1972 also fall under the domain of art. IV Rule 2 (g) of the Hague-Visby Rules.²⁷²

9.1.9. Act or omission of the shipper or owner of the goods, his agent or representative

This exception is basically drafted in general terms such that it could be applied to acts or omission which falls within the sphere of art. IV Rule 2 (n) of the Hague-Visby Rules.²⁷³

Basically, a carrier would be entitled to refer to this exception where loss or damage to cargo resulted from improper stowage if the goods would not have been improperly stowed had their nature not been misdescribed by the shipper.²⁷⁴ Of course, if the nature of the cargo has been knowingly misdescribed in the bill of lading, the carrier is also entitled to rely on art. IV Rule 5 (h) of the Hague-Visby Rules to avoid liability.²⁷⁵

9.1.10. Strikes or lockouts or stoppage or restraints of labor from whatever cause, whether partial or general

The meaning of the term ‘strike’ has been changed significantly since the last century. Before, it was once thought that a strike had to involve a stoppage of work by workers who were demanding higher salaries or refusing to accept a diminution of wages.²⁷⁶ In *Williams v Namlooze*.²⁷⁷ the term ‘strike’ was extended by Sankey J. to include any concerted refusal by workers to work as a result of an alleged grievance against their employers whether the question of wages was involved or not.

²⁷¹ supra n88, p.262

²⁷² ibid

²⁷³ ibid

²⁷⁴ ibid

²⁷⁵ ibid

²⁷⁶ *Stephens v Harris* (1887) 57 L.T. 618

²⁷⁷ *Williams v Namlooze* (1916) 21 Com. Cas. 253

Furthermore, in *The Laga*,²⁷⁸ the establishment of a modern approach towards strikes was laid. In this case, a ship was chartered to carry coal to the French port of Nantes. Whilst the ship was there, port workers rejected to unload her for a while, as part of their policy of supporting striking French miners by rejecting to handle ships which carried coal to Nantes. The charterers contended that the action of the port workers were not strike because they were unloading other ships in the port at that time. Thus, McNair J. held that in determining whether there had been a strike, the fact that the workers unloaded other vessels was irrelevant as one had to determine whether there had been a strike in relation to the ship herself. In this situation, his Lordship considered the action of the port workers to be strike.

Next, in *The New Horizon*²⁷⁹, it was held there was a strike even if the strikers were not in breach of contract. In this case, a ship arrived at the French port of St Nazaire where it was customary for the crane and suction workers to work round the clock in three shifts. Nonetheless, when the ship arrived at the port, the men had limited themselves to day work in an attempt to improve their working conditions. This delayed the discharge of cargo. Even though the port workers were not in breach of their contracts of service which they were obliged to work round the clock, the Court of Appeal held that the actions of the port workers could be construed as strike action and the time of during which there as a refusal to work could not be counted as laytime under the terms of the charter party.

9.1.11. Riots and civil commotions

The term ‘riot’ has the same meaning in insurance law likewise under the criminal law of the land.²⁸⁰ As far as Singapore is concerned, section 146 of the Penal code²⁸¹ clarifies that there is a riot whenever force or violence is used by an unlawful assembly of five or more persons or by any member thereof in the prosecution of a common object of the said assembly.

Moreover, as for the phrase ‘civil commotion’, reference should be made to insurance law which provides that it refers to ‘an insurrection of the people for general purposes, though it may not amount to a rebellion’.²⁸² Thus, of course, it can be clearly seen that a carrier can only rely on this exception where loss or damage has in fact been caused by riots or civil commotions.

9.1.12. Wastages in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods

Basically, this exception relates to inherent vice, a Common law exception which might be referred to even where the Singapore Carriage of Goods by Sea Act 1972 does not apply to the carriage contract or where it has ceased to apply due to the abrogation of the carriage contract in subsequence of a deviation by the carrier.²⁸³

²⁷⁸ *J. Vermaas Scheepvaartbedrijf N.V. v Association Technique de L’Importation Chabonniere (The Laga)* (1966) 1 Lloyd’s Rep. 582

²⁷⁹ *Tramp Shipping Corporation v Greenwich Marine Inc. (The New Horizon)* (1975) 1 W.L.R. 1042

²⁸⁰ *London and Lancashire Fire Insurance Co. v Bolands* (1924) A.C. 836

²⁸¹ Penal Code Cap. 103 of 1970, Rev. Ed.

²⁸² *Langdale v Mason* (1780) 2 Marshall (2nd) 791, 894

²⁸³ supra n88, p.265

In principle, inherent vice includes a ‘want of power of the cargo to bear the ordinary transit in a ship’²⁸⁴ or ‘the natural behavior of the subject matter being what it is, in the circumstances under which it is carried.’²⁸⁵ In *Keck Seng & Co Ltd v Royal Exchange Assurance*,²⁸⁶ for instance, a substantial portion of a sugar cargo, which had been shipped from Dairen, was partly damaged by the time it arrived in Singapore as it had become wet. It was considered that the sugar absorbed moisture when the ship neared Singapore and caked after it had been discharged onto lighters. Because these changes were caused by the special properties of sugar, Ambrose J. held that the damage to the sugar was the result of inherent vice and the carriers were not responsible for the damage.

Likewise, the inherent vice defense was also successfully referred to in *Successors of Moine Compte & Co. Ltd. v East Asiatic Co. Ltd. and Singapore Harbor Board*.²⁸⁷ In this case, coils of galvanized wire, which had been shipped from Antwerp to Singapore, arrived in a rusted condition. Knight J. accepted the defendant’s suggestion that the wire had, at the port of loading, come into contact with salt water whilst being carried by lighters to the ship. His Lordship explained that the rusting of the wire in the humid air as the ship neared the tropics would be a natural consequence of such contact with salt water. As such, the defendants were able to rely on the exception in art. IV Rule 2(m) of the Hague-Visby Rules.

On the other hand, if damage which is due to inherent vice is aggravated by a breach of contract such as an unauthorized deviation on the part of the shipowner, then he would be liable for that part of the damage which is caused by his breach.²⁸⁸

9.1.13. Insufficiency of packing

In principle, goods are insufficiently packed when they have been packed in such a manner that they cannot withstand the handling which they are likely to undergo during the carriage to the port of discharge.²⁸⁹

However, this exception cannot be referred to by a carrier to avoid liability to a third party to whom a clean bill of lading has been transferred in good faith if the insufficiency of packing would have been externally visible to a person who conducts a reasonable examination of the goods before shipment.²⁹⁰ In the above case of *Successors of Moine Compte & Co. Ltd. v East Asiatic Co. Ltd. and Singapore Harbor Board*, it was further held by Knight J. that the defendants were not entitled to complain that the galvanized wire coils, which arrived in Singapore in a rusted condition, were insufficiently packed as they had accepted the cargo in an unwrapped form prior to issuing a clean bill of lading to it.

²⁸⁴ *International Guano v MacAndrew & Co.* (1909) 2 K.B. 360

²⁸⁵ *British and Foreign Marine Insurance Co. Ltd. v Gaunt* (1921) 2 A.C. 41, 57

²⁸⁶ *Keck Seng & Co Ltd v Royal Exchange Assurance* (1964) M.L.J. 256

²⁸⁷ *Successors of Moine Compte & Co. Ltd. v East Asiatic Co. Ltd. and Singapore Harbor Board* (1954) M.L.J. 114

²⁸⁸ supra n 280 above

²⁸⁹ *ibid*

²⁹⁰ *Silver v Ocean S.S. Co. Ltd.* (1930) 1 K.B. 416

9.1.14. Insufficiency and inadequacy of marks

This exception may be referred to by a carrier to avoid liability towards the shipper, or the consignee where goods which he has agreed to carry have become indistinguishably mixed with other goods as they were insufficiently or inadequately marked.²⁹¹

9.1.15. Latent defects discoverable by due diligence

In *Guan Bee & Co. v Palembang Shipping Co. Ltd*,²⁹² Buttrose J. elucidated the meaning of 'latent defect' in the following terms:

'A latent defect is a defect which could not be discovered on such an examination as a reasonably skilled man would make it. It is not latent if it can be discovered by reasonable means.'

In this case, a cargo of copra cake was damaged when it became mixed with water which poured out of the starboard forward main deck scupper pipe. The scupper pipe had become so wasted and weakened by rust that it rendered the vessel unseaworthy. The defendants claimed that the damage had been caused by a latent defect. Nonetheless, it was held that the question of latent defect did not arise as the defect in this case could have been detected by a careful and proper examination by a reasonably careful man. The defendants were therefore liable for the damage that was caused to the copra cake.

Furthermore, in case where loss or damage has been caused by a latent defect when no effort has been made to detect is an interesting question as to whether this exception may be relied upon. In *Corporation Argentina de Productores de Carres v Royal Mail Lines Ltd*,²⁹³ Brandon J. expressed the view that a carrier may, under such situations, still refer to this defense. His Lordship said that if the defect is such that it cannot be discoverable by due diligence, it becomes immaterial to consider whether due diligence was exercised or not because *ex hypothesi* if it had been exercised it would have been useless.

9.1.16. Any other cause taking place without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier; however, the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

In order for this exception to apply, a carrier has to establish that the loss or damage took place without his actual fault or privity and that it happened without the fault or neglect of his agents or servants.²⁹⁴ The carrier's agents or servants involve the servants of an independent contractor.²⁹⁵

²⁹¹ supra n88, p.267

²⁹² *Guan Bee & Co. v Palembang Shipping Co. Ltd* (1969) 1 M.L.J. 90

²⁹³ *Corporation Argentina de Productores de Carres v Royal Mail Lines Ltd* (1939) 64 L.I.L. Rep. 188 at 192

²⁹⁴ supra n88, p.268

²⁹⁵ *Hourani v Harrison* (1927) 32 Com. Cas. 305

To illustrate, this exception was successfully invoked in *Goodwin, Ferreira & Co. Ltd. v Lamport & Holt Ltd.*²⁹⁶ From the fact of this case, goods which were already in a lighter were damaged when a case, which was being lowered into the same lighter, broke open. As the carriers were able to establish that the case which had broken had done so because it had been insecurely nailed before shipment and that there had been no fault or negligence on the part of their servants, they were able to refer to art. IV Rule 2 (q) of the Hague Rules.

Moreover, the carrier need not establish the actual cause of loss or damage.²⁹⁷ Nonetheless, where the cause of loss or damage cannot be examined and the carrier fails to prove the requisite absence of fault, privity or negligence, no reliance may be placed on this exception.²⁹⁸

Furthermore, a carrier is not entitled to rely on this exception in which loss has been caused by a fraudulent act of his agents or servants. This is illustrated in the case of *Heyn v Ocean S.S. Co.*²⁹⁹ In this case, cloth was shipped from Liverpool to Shanghai. At the port of discharge, some of the goods were pilfered and some were damaged even though the shipowners had taken precautions to have the goods guarded against pilferage at night. It was held that the thieves probably involved the workmen of the independent stevedore contractors who were the agents or servants of the carrier. Thus, in such situation, it cannot be said to have taken place without the fault of the carrier's agents or servants.

By contrast, the above case must distinct from *Leash River Tea Co. Ltd. v British S.N. Co. Ltd.*³⁰⁰ which concerned the theft of a storm valve cover plate by a stevedore during unloading and loading of the cargo at an intermediate port. In consequence, part of the vessel's cargo of tea was damaged by sea water. The Court of Appeal accepted that this case was different since that which had been stolen was not cargo but a very small part of the vessel. Sellers L.J. opined that as the removal of the plate was in no way incidental to or a danger of the loading or unloading process, the act of stealing was to be regarded as the act of a stranger and not that of a servant or agent of the shipowners. As such, Danckwerts and Salmon L.J.J. opined that the stevedore was acting in a way which was completely outside the scope of his employment on behalf of the shipowners when he deliberately stole the plate. As the stealing of the plate could not have been avoided by any reasonable diligence on the part of the shipowners' officers and crew, it was held that art. IV Rule 2 (q) of the Hague-Visby Rules could be relied upon to escape liability for the loss.

9.2. Exclusion of Liability under the Hague-Visby Rules

Article IV(2) of the Hague-Visby Rules provides seventeen exclusions of liability. The list of exceptions truly reflects the categories of "excepted perils" that carriers customarily included in the standard trading terms of their bills of lading so as to reduce the heavy obligations of the Common law prior to the Hague Visby Rules were

²⁹⁶ *Goodwin, Ferreira & Co. Ltd. v Lamport & Holt Ltd* (1929) 34 L.I.L.R. 192

²⁹⁷ *City of Baroda (Cargo Owners) v Hall Line* (1926) 42 T.L.R. 717

²⁹⁸ *Heyn v Ocean S.S. Co.*, (1927) 127 LT 158; 27 LILR 334 270

²⁹⁹ *ibid*

³⁰⁰ *Leash River Tea Co. Ltd. v British S.N. Co. Ltd.* (1967) 2 Q.B. 250

concluded.³⁰¹ The exclusions are of three types: some protect the carrier from liability when the cause of loss was an act of the cargo owner; some waive the carrier from liability when the causative incident was unforeseen and beyond his/her control; and others simply excuse the carrier for malfeasance.³⁰²

9.2.1. Errors in Navigation

The carrier is allowed to escape liability for the negligence of employees pursuant to Article IV (2) (a). This provision expressly wipes out responsibility for loss arising from an 'act, neglect or default of the master, mariner, pilot, or the servant of the carrier in the navigation or in the management of the vessel.' Should one ever be required to track the root of this practice, then it must go to history. In history, this exclusion of liability was justified on the basis that the shipowners lacked the tools to communicate with their vessels while on long and distant voyages.³⁰³ Masters had to act on their own judgment, which, it was claimed, should not be attributed to the shipowner.³⁰⁴ Although in the modern era where sophisticated communication tools have substantially defeated this rationale, the shipowners still claim the benefit of the exception. However, the Courts tend to interpret the exception narrowly. It has no application to the carrier's duty to exercise due diligence to make the vessel seaworthy under Article III (1), nor is it a defense to a claim for lack of cargo care under Article III (2) should the negligence be committed by the carrier.³⁰⁵

9.2.2. Fire

Under Article IV (2) (b), the carrier is waived from liability for damage to cargo in consequence of fire, unless caused by the actual fault or privity of the carrier. Therefore, the shipowner cannot escape liability for fire damage if the fire was as a result of the carrier's insufficient due diligence to make the vessel seaworthy, as required by Article III (1).³⁰⁶ Likewise, the carrier may not rely on the fire exception provided that the fire was caused by any other personal negligence.³⁰⁷ For the corporation carrier, it will be considered at fault if the senior officer responsible for the management of the company's vessel is negligent. The test is whether the official is the directing mind of the company,³⁰⁸ at least in respect of its shipping activities.³⁰⁹ By contrast, the carrier may claim the benefit of the exception for damage to the cargo by fire caused by the negligence of any lesser employees.³¹⁰ Such exception only covers damage by actual fire; i.e. there must be ignition or flame involved.³¹¹ Heat alone is insufficient, but damage by heat is included provided that flame is present.³¹²

9.2.3. Perils of the Sea

³⁰¹ supra n63, p.456

³⁰² ibid

³⁰³ ibid, at pp.457

³⁰⁴ ibid

³⁰⁵ ibid

³⁰⁶ *Maxine Footwear Co. v Canadian Government Merchant Marine Ltd.*, [1957] S.C.R. 801

³⁰⁷ supra n63, p.457

³⁰⁸ *Lennard's Carrying Co. v Asiatic Petroleum Co.*, (1915) A.C. 705 (H.L.)

³⁰⁹ *Lady Gwendolen (The)*, (1965) 1 Lloyd's Rep. 335 (C.A.)

³¹⁰ supra n63, p.458

³¹¹ ibid

³¹² *Tempus Shipping Co. v Louis Dreyfus*, (1930) 1 K.B. 699

The carrier is grounded for exempting from liability for the cargo loss caused by Acts of God and Perils of sea provided that he/she first proves due diligence to make the vessel seaworthy.³¹³ The difference between the act of God and perils of the sea is in terms of the degree. While an act of God is some incident from natural causes, although not necessarily of the sea, that could not have been prevented by many amount of foresight and care reasonably to be expected of the carrier.³¹⁴ For example, a special high or freak wave that floods the vessel may be an act of God.³¹⁵ A peril of the sea is a hazard from water, wind, and weather of such a degree that the risk of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.³¹⁶ Nevertheless, the peril does not have to be extraordinary or irresistible, but it must be of such violence that the damage caused cannot be attributed to negligence in protecting the cargo.³¹⁷ In other words, the peril must be an unforeseeable danger of the sea on the particular route of the voyage at the particular time of year.³¹⁸ The carrier must also prove that such peril was the cause of the cargo owner's loss.³¹⁹

9.2.4. Other Dangers and Restraints

Under Article IV (2), there is a list of variety of dangers which a vessel may run into but for the result of which the carrier will be exempted from liability: acts of war, acts of public enemies, arrest or restraint by princes, rulers, or people, or seizure under legal process, quarantine restrictions, riots and civil commotions, and strikes, lockouts, or restraints of labor.³²⁰ All these exemptions are granted because they are beyond the control of the carrier; nonetheless, the carrier has a continuing duty of care for the cargo and, so, should avoid placing the vessel and cargo in the face of anticipated danger where reasonably possible.³²¹ For example, the carrier should not direct the vessel into a strike-bound port, particularly if the cargo is perishable, but should carry the goods to an alternative safe port of discharge.³²²

9.2.5. Saving Life at Sea

Consistent with the carrier's justifiable right to make deviations,³²³ Article IV (2) (1) waives the carrier from liability for attempting to save life or property at sea.

9.2.6. Shipper's Faults and Cargo Defects

In principle, the carrier shall not be held liable for injury to the cargo that arises from some cause within the scope of responsibility of the shipper. Pursuant to Article IV (2) of the Hague-Visby Rules, the carrier is exempted from liability for loss due to the

³¹³ *Charles Goodfellow Lumber Sales Ltd. v Verreault* [1971] S.C.R. 522

³¹⁴ *Nugent v Smith* (1876), 1 C.P.D. 423

³¹⁵ *Turgel Fur Co. v Northumberland Ferries Ltd.* (1966), 59 D.L.R. (2d) 1 (N.S.S.C.)

³¹⁶ *N.M. Paterson & Sons Ltd. v Mannix Ltd.*, (1966) S.C.R. 180 at 188

³¹⁷ *Keystone Transports Ltd. v Dominion Steel & Coal Co.*, (1942) S.C.R. 495

³¹⁸ *G.E. Crippen v Vancouver Tug Boat Co.*, (1971) 2 Lloyd's Rep. 207 (Ex. Ct.)

³¹⁹ *Falconbridge Nickel Mines Ltd. v Chimo Shipping Ltd.*, [1974] S.C.R. 933

³²⁰ Hague-Visby Rules art. IV (2) (e), (f), (g), (h), (k), and (j) respectively

³²¹ *Morrisey v S.S.A. & J. Faith*, 252 F. Supp. 53 (N.D. Ohio 1965)

³²² *Crelinsten Fruit Co. v Mormacsaga (The)*, (1968) 2 Lloyd's Rep. 184 (ex. Ct.)

acts or omissions of the cargo owner and his or her agents, or in consequence of inherent vice or defect, insufficient packing, or inadequate marking of the goods.³²⁴

9.2.7. Latent Defects

The carrier is also exempted from liability for loss and damage caused by latent defects undiscoverable by due diligence, pursuant to Article IV (2) (p). Because the exemption refers to defect in the vessel, not the cargo, it can be seen to overlap with the carrier's obligation to exercise due diligence to make the vessel seaworthy under Article III (1). The carrier will not be then liable for cargo losses caused by the unseaworthiness of the vessel provided he/she proves that he/she exercised due diligence to render the vessel seaworthy, even though a hidden defect was overlooked if it could not be discovered by reasonable diligence.³²⁵ The carrier is only bound to make the vessel seaworthy prior to the voyage. The exception may avail the carrier for defects undiscoverable by due diligence during the voyage, such as in the event of a ship inspections or surveys. The exclusion of liability also confirms that the carrier is not liable for latent defects in the vessel before he/she acquired it, provided they were not discoverable by a diligent inspection of the ship on delivery.³²⁶

9.2.8. Any other cause without fault

The lists of carrier's exemptions from liability with a general excuse for loss from any other cause, provided it arose without the fault or privity of the carrier or the fault or neglect of his or her agents or employees, are provided in Article IV (2) (q). The most typical event when the carrier claims the benefit of this exception is loss by theft of the cargo.³²⁷ However, if such suspicion of the pilferage falls on stevedores contracted to work the vessel by the carrier, or their associates, the carrier cannot escape liability unless he/she proves that the loss took place without any fault on the part of his/her agents and employees.³²⁸

9.3 Exclusion of liability under Thai COGSA

Pursuant to article 52 of the Thai COGSA, the carrier, including the actual carrier, is presumed by law to be liable for the loss, damage and delay in delivery of the goods, except where he can prove that such loss, damage or delay arose or resulted from the following causes.

9.3.1. Force majeure

The Thai COGSA does not define what it means by force majeure, therefore, one can be considered in comparison with article 8 of the Civil and Commercial Code which reads

³²⁴ Hague-Visby Rules art. IV (2) (i), (m), and (o) respectively

³²⁵ *Leesh River Tea Co. v British India Steam Navigation Co. (The Chyebassa)* [1966] 3 All E.R. 593

³²⁶ *supra* n63, p.463

³²⁷ *supra* n.325

³²⁸ *Heyn v Ocean Steamship Co.* (1997), 27 LI. L.R. 158

‘Force majeure is a disastrous incident which is beyond control of any one even if he/she had exercised his/her reasonable measure to prevent such disaster, such as earthquake, thunder storm, volcano, etc.’

Therefore, when the tug boat which carried the cargo beyond its capacity, plus the fact that the tug boat’s steel structure was not sufficiently strong, thus, resulted in the water entering the tug and sank the tug boat. Such incident was not a force majeure, so the plaintiff could not rely on the exclusion of liability.³²⁹

5.3.2 Perils, dangers and accidents of the sea or navigable waters

Regarding this exception, the Thai COGSA follows the concept of the Hague-Visby Rule to grant carrier a right to exclude him/herself from liability. This exception is provided in article 52(2) of the Thai COGSA. The scope of such exception extends also to the river, apart from the sea, due to the fact that the vessels may have to sail along the river in order to approach the port, or to reach the sea.

The IPIT court had an opportunity to define the exception. His honored judge stated that that the vessel encountered the expectedly ordinary peril of the sea, such incident was not so severe that can be claimed as a peril of the sea. Therefore, the carrier could not rely on the exception to exclude his liability.³³⁰

5.3.3 Act of war or fighting between armed forces

If the ship was destroyed during carrying the cargo to the port of destination on the normal and agreed route, then the carrier is excluded from liability if the vessel was destroyed and the cargo was lost or damaged by the act of war or fighting between armed forces. Even though the both acts contain different level of violence, the Thai COGSA prevents the carrier from liability from both acts pursuant to article 52(3) of Thai COGSA.

5.3.4 Civil war, riots, subversion and civil commotions

Article 52(4) of Thai COGSA provide these exceptions to exclude the carrier from liability for loss of, or damage to the goods should they were caused by such incidents.

5.3.5 Detention, arrest, restraint, or any interference made against the ship by the ruler of any State or territory, or under provisions of law, provided that it is not caused by fault or neglect of the carrier

The carrier is exempted from liability for loss of, or damage to cargo if caused by such unpreventable act. Moreover, the carrier is obliged to prove that he, his servant, or his agent is not involved in such act which cause the loss of, or damage to the goods pursuant to article 52(5) of Thai COGSA. For instance, if the vessel was arrested in accordance with the Ship Arrest Act because of the debt and obligation

³²⁹ IPIT Court decision no. 220/2541

³³⁰ IPIT Court decision no. 494/2543

arisen out of the vessel itself, or the service of the ship, then the carrier are unable to rely on this exception.³³¹

5.3.6 Quarantine restrictions

This exception is clear and follows the concept of both English Merchant Shipping Act and Hague-Visby Rules.³³²

5.3.7 Strikes, lockouts, stoppage or intentional slowdown at any port which obstruct the loading and discharge of goods, or berthing or unberthing

For instance, the port workers staged a strike because they got their demand for wage increase rejected by the government, which results in delay in loading and unloading the goods to and out of the vessel. Therefore, the carrier is able to rely on this exception pursuant to article 52(7) of Thai COGSA.

5.2.8. Act of piracy

This exception is clear and follows the concept of both English Merchant Shipping Act and Hague-Visby Rules.³³³ For example, the vessel Siam Chai was robbed and damaged by the act of pirates during its course of voyage in the South China sea. As a result, the carrier is able to rely on the exception to exclude his liability for loss of and damaged to cargos.³³⁴

5.2.9 Fault of the shipper or consignee, particularly on insufficiency of packing or packing unsuitable for the condition of the goods and insufficiency or inadequacy of marks

This exception is clear and follows the concept of both English Merchant Shipping Act and Hague-Visby Rules.³³⁵ For instance, when the defendant received the goods from the shipper in order to put them in the container and then issue a bill of lading to the shipper, the goods in dispute were in apparent good order without any damage. The goods were found to be damaged when the defendant opened the container so as to deliver them to the consignee. Thus, the damages were not caused by the shipper or the consignee, and as a result, the carrier cannot escape liability for damages to the goods to the consignee.³³⁶

5.2.10 Inherent vice

Article 52(10) of Thai COGSA provides exception for carrier provided that loss of or damage to goods was caused by the vice of the goods themselves. However, the carrier still always has to maintain his duty of care of cargo and make the vessel seaworthy.

³³¹ Pataichit, *Thai Carriage of Goods by Sea Act 1991*, 1995, Nititham, Bangkok, p. 114

³³² *ibid*

³³³ *supra* n331, p.114

³³⁴ IPIT Court decision no. 465/2545

³³⁵ *supra* n331, p.115

³³⁶ IPIT Court decision no. 136/2541

5.2.11 Latent defects

This exception can be found in article 52(11) of Thai COGSA. Such latent defects of the vessel must not be visible or discoverable by inspection with care and skill which can normally and properly be expected of a person engaged in an occupation of inspector of ships.

5.2.12 Error in navigation arising from the fault of the master in discharging of his duties or from the master's instruction

Similarly to the Hague-Visby Rules, due to the lack of communication between the shipowner who stays in land and the master who is sailing in the middle of the sea, it can be unfair to put the ship owner into liability which is clearly beyond his control or instructions. Therefore, article 52(12) of Thai COGSA provides the exclusion of liability, resulting from error in navigation arising from the fault of the master in discharging of his duties or from the master's instruction, to the carrier.

5.2.13 Any other cause arising without fault or neglect or privity of the carrier or without fault or neglect of the agents or servants of the carrier.

Apart from those eleven exceptions provided in article 52 of Thai COGSA, the carrier may rely on and prove this exception of article 52(13). The condition is clear in the provision. For instance, the reason why the plaintiff could not deliver the goods to the consignee on time was because he could not approach the berth of Antwerp port due to the busy traffic at the port. Therefore, such delay was not caused by fault or neglect or privity of the plaintiff or without fault or neglect of the agents or servants of the plaintiff. The plaintiff shall not be liable for damages to the defendant in accordance with article 52(13) of Thai COGSA.³³⁷

³³⁷ IPIT Court decision no. 7879/2542

10. Conclusion

Thai Carriage of Goods by Sea Act has come into force for two decades. So far, the Act has functioned smoothly in dealing with maritime dispute in Thailand, of which the Intellectual Property and International Trade Court (IPIT Court) has been established in 1997 as a special Court having jurisdiction over every maritime dispute in Thailand. The cases are heard and determined by a quorum of two professional judges and one associate judge knowledgeable and experienced in maritime matters. Although the IPIT Court can exercise its expertise and specialization to adjudicate some maritime disputes, the enforcement of other maritime claims, including maritime lien, has to be carried out in the Civil Court. So far, thousands of maritime disputes has been adjudicated and settled by the IPIT Court which leads to the fair and professional tribunal specialized for maritime cases.

Thai Carriage of Goods by Sea Act follows many rules, concepts and practices from Common law and Hague-Visby Rules. Those practices have assisted Thai maritime operators to develop their shipping expertise, such as carrying goods by sea, documentary payment, salvage, and others. Most importantly, with the enforcement of those Common law and Hague-Visby Rules through the channel of legislating the Thai Carriage of Goods by Sea Act, many Thai maritime operators have become alerted in improving their vessel conditions, maritime labors issue, marine environmental matters and others in order to comply with international Conventions, rules and regulations because the maritime operators must engage from time to time in sailing in international water pursuant to shipping goods and cargos overseas.

Lastly, it is noticeable that there are similarities between the Common law and Hague-Visby Rules but there are also differences between them. The Thai Carriage of Goods by Sea is indeed a combination of both laws. However, there is still a lot more to learn for the Thai justice and maritime operators should they would like to amend or update the Thai maritime law because maritime law is a unique law in itself which combines of a number of practices and techniques.

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