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The carriage of Goods by Sea
Conventions – A comparative
study of Seaworthiness and the
list of exclusions

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Summary

In September 2009, the new convention concerning carriage of goods by sea opened for signing in Rotterdam. If the convention succeeds in what it sets out to do, harmonising the carriage of goods by sea regulations throughout the world, the almost a century old regime of the Hague Rules will be discarded. These conventions, together with the Hague-Visby Rules and the Hamburg Rules, regulate the liability in case of cargo damage, and what the carrier and the shipper respectively will be paying for. This thesis looks at the liability regime for the carrier under the present conventions, which are The Hague, The Hague-Visby Rules and The Hamburg Rules to some extent, and what would change if the new Rotterdam Rules will enter into force and be ratified by the majority of maritime nations. The focus is on the list of exceptions that was introduced in the Hague Rules, but actually comes from the American Harter Act. The compromise that leads up to first the Harter act, and then the Hague Rules has two basic components. The carrier was relieved of an absolute obligation of seaworthiness, that was the long-standing practice and this was instead replaced with a duty of exercising due diligence to make the ship seaworthy. The shippers on the other hand got the advantage of a restriction for the carrier to use exculpatory clauses in the bill of lading. With The Hague Rules came a minimum liability for the carrier that could not be contracted out of. The Hague Rules were amended and became the Hague-Visby Rules, but on the liability side, there were no greater changes. In 1992, the Hamburg Rules entered into force. However, they are today regarded as a failure due to the lack of ratifications by the traditional maritime states, and are rarely used. The Hamburg Rules was drafted in a very different way than The Hague and Hague-Visby when it comes to the basis of the carrier's liability and the concepts of seaworthiness and due diligence was not used at all. The new Rotterdam Rules have now gone back to the wording used in The Hague and Hague-Visby with some changes made. There is a general obligation to care for the cargo. The article concerning exercising due diligence to make the vessel seaworthy is kept the same apart from the new convention will require this obligation to be carried out during the voyage as well, instead of before and at the commencement of it. The exception of error in navigation or management it also removed from the new convention and the burden of proof has been modified. It is now clearly stated in the articles which party needs to prove what. The Vallescura rule has been abolished in favour of giving the courts the right to divide the loss between the parties in case of concurrent causes of the loss, damage or delay. Under the Rotterdam Rules the carrier will be liable more frequently, but the changes in the burden of proof will increase the amount of cases where the carrier is only partly liable, as the burden of proving the extent of the loss due to a concurrent cause is no longer on the carrier.

Sammanfattning

I September 2009 öppnade den nya konventionen om godsbefordran till sjöss för signering i Rotterdam. Om den nya konventionen lyckas i det den har intention att göra, vilket är att harmonisera reglerna om godsbefordran till sjöss, kommer den nästan hundra år gammal regimen Haag reglerna att försvinna. Dessa konventioner reglerar tillsammans med Haag-Visby och Hamburg reglerna ansvaret för skada på lasten och vad transportören respektive avlastare kommer att betala för. Denna avhandling undersöker ansvarsreglerna för transportören under de nuvarande konventionerna som är Haag, Haag-Visby reglerna, även Hamburg reglerna till viss utsträckning, och vad som kommer att förändras om de nya Rotterdam reglerna träder i kraft och blir ratificerade av en majoritet av de traditionella sjöfartsnationerna. Fokus ligger på listan av undantag som var introducerad in Haag reglerna men som faktiskt har sitt ursprung i den amerikanska Harter Act. Kompromissen som ledde fram till först Harter Act och sedan även Haag reglerna har två grundläggande element. Transportören blev befriad från ett strikt ansvar för ett sjövärdigt fartyg som var ett vedertaget krav för branschen, och istället skulle han visa tillbörlig omsorg för att göra fartyget sjövärdigt. Till avlastarens fördel blev möjligheterna för transportören att avtala bort sitt ansvar genom klausuler i konossementet begränsat. Haag reglerna satte för första gången upp minimikrav och ansvarsregler för transportören som inte kunde begränsas genom avtal. Haagreglerna blev föremål för ändringar och blev då Haag-Visby reglerna, men bestämmelserna angående transportörens ansvar förblev i stort sätt oförändrade. 1992 trädde Hamburg reglerna i kraft, men de blev aldrig ratificerade av några av de större sjöfartsnationerna, och används sällan. Hamburg reglerna blev avfattade på ett sätt som skiljer sig väsentligt från Haag och Haag-Visby, sjövärdighet och tillbörlig omsorg var uttryck som inte användes i denna konvention. De nya Rotterdam reglerna har återgått till den formulering som användes i Haag och Haag-Visby men med några ändringar Det generella ansvaret för att vårda godset finns kvar. Artikelnen som reglerar sjövärdighet och tillbörlig omsorg är formulerad på samma vis som i Haag och Haag-Visby bortsett från att den nya konventionen kräver att denna omsorg utövar under hela resan, och inte bara innan och vid resans påbörjande. Undantaget fel eller försummelse av besättningen i navigering eller handhavande av fartyget finns inte med i den nya konventionen och reglerna angående bevisbördan har blivit justerade. Det är nu klart uttryckt i artiklarna vem om ska bevisa vad och Vallescura regeln har blivit borttagen. Istället får nu domstolen rätten att fördela ansvaret för skada, förlust eller förseningar mellan parterna när det är flera bidragande orsaker varav en eller flera inte är transportörens ansvar. Under de nya Rotterdam reglerna kommer transportören inte att kunna undvika ansvar i samma utsträckning som tidigare, men den justering i bevisbördan som har gjorts kommer öka antalet fall som transportören och avlastaren delar ansvaret eftersom transportören inte längre har bevisbördan för i vilken utsträckning skadan inte orsakades av fel eller försummelse av transportören själv.

1 Introduction

What is hoped to be the new carriage of goods by sea convention was opened for signing in Rotterdam last September. The result of years worth of discussions, compromises and work was presented to the world in its final form, and now all that can be done is wait and see how the world receives it. The obligations and liabilities of the carrier is one of the fundamentals of the Rules and some changes compared to the former conventions have been made.

1.1 Subject and Purpose

This thesis will discuss the international regulations of carriage of goods by sea. The focus will be on carrier liability, and the list of exclusions from this liability that can be found in both The Hague Visby Rules and the new Rotterdam Rules. The aim is to see how the new rules, if entered into force, will affect the industry, and clarify what interest and agendas that motivates the exclusions. To understand the present development, one needs to look at past legislation and what events led up to the new convention. The purpose of this thesis is to answer a number of questions regarding the regulation of carrier liability in the new Rotterdam Rules.

- How did the conventions develop, where are we now, and why?
- How will the new regime, if adopted, effect the balance between shipper and carrier?
- In what way has the burden of proof shifted throughout this development, and to what effect?
- What was the underlying intention and protective interest behind the exclusions to begin with, and have they changed over time?
- How have the courts interpreted the exclusions over the last century?
- Will the jurisprudence from Hague Visby be relevant for the new Rotterdam Rules?
- What motivated the return to the old list of exclusions?

In order to understand the development of the international conventions dealing with carriage of goods by sea one must commence at the end of the 19th century when the first statutory regulations emerged. The Harter Act from 1893 was in many ways the foundation for the basis of liability in the Hague Rules. Therefore, it is necessary to have a brief account of the Harter Act before proceeding to the international conventions, The Hague Rules, Hague-Visby, Hamburg and Rotterdam Rules. There will be a general overview of the conventions before proceeding to the obligations of the carrier, and the exclusions for this liability.

The list of exceptions and the article in the Hamburg Rules replacing this list will be analysed with the help of jurisprudence and business practise. The purpose is to analyse actual application and practice, to be able to draw conclusions on the expected impact of the new regime.

To see the real effect of the regulations one must also look and the burden of proof in addition to the actual exceptions as this can determine the outcome of a claim. Therefore, the burden of proof will be discussed in addition to the basic obligations of the carrier.

1.2 Material and method

The material used for this thesis is primarily books and articles on the subject, as well as several rulings. These decisions are generally from English courts that interpret the convention as found in the English COGSA. A large quantity of the information available is based on common law and often English law in particular. This will be noticeable when reading this essay, English law is historically dominant in the shipping law area, and through contracts this is often the choice of jurisdiction. In addition, there is the factor of language accessibility.

The general interpretations of the conventions are to a large extent the same, and hence an international perspective on the conventions will be central in this thesis. However, national implementations and interpretations are also important aspects of the conventions, and cannot be left out of the picture. The Hague Rules are based on common law, and the Harter Act. This emphasises the common law approach, and also makes jurisprudence available from the end of the 18th and the beginning of the 19th century up until present day. There is a vast amount of case law regarding The Hague and Hague-Visby Rules. The Hamburg Rules lack this, as the number of ratifications among the big shipping nations has been low. At the time when the Hamburg Rules entered into force there were a large number of articles written about them, but since the Rules lack importance, the main focus will not be on this part of the thesis.

An important source of material regarding the Rotterdam Rules has been the discussions and reports from the working group of UNCITRAL, to find out the intention and purpose of the provisions. This has been helpful in clarifying why some Rules have been kept, and some of the compromises that have been made. Since the Rotterdam Rules at this point lack the interpretation from the courts, some of the discussions will be somewhat speculative.

The method is consequently comparative, as the intention is to focus on the evolution of the liability regimes in the conventions, and this way be able to draw some conclusions regarding the future of the Law of the sea conventions, and particularly the new Rotterdam Rules. In order to know where we are going, we need to know where we have been, and where we are at present. The comparative analysis will be of the conventions as such, with less focus on the national implementations.

To simplify the numbers on the articles of the Hague and Hague-Visby Rules will be marked with roman number, for example article IV(2). The Hamburg Rules will be marked with regular numbers, as such; 4.3, while the Rotterdam Rules are labelled by regular numbers but with the paragraph number in parentheses, like so; 4(2).

1.3 Scope

The carriage of goods by sea conventions address a wide range of issue, all of which could be analysed in greater depth. This thesis will however be limited to the carrier's obligations in general, and the liability and exclusions to this in particular. Special Rules on deck cargo and live animals has been mentioned but not discussed in depth, and Rules on limiting liability will not be dealt with either. There are several other aspects to the liability regime of the conventions. The responsibility of the shipper and dangerous cargo are other subjects that will be mentioned in the context of exclusions, but will not be discussed to the extent that they deserve. The basic obligations of due diligence and seaworthiness will be clarified, as these are fundamental concepts in question regarding liability. The analysis will focus on the whether or not there will be a change if the Rotterdam Rules are generally accepted, and if so, what kind of change and to what extent.

2 The carriage of goods by sea conventions – A general overview

The Hague Rules were the first international attempt to unify the national carriage of goods by sea regulations. Before this convention, the national legislations differed greatly and freedom of contract prevailed in many jurisdictions.

In the United States, the practice changed after 1870 and became somewhat different from the English approach. Many of the federal courts refused to enforce clauses in the Bill of Lading that were not found to be reasonable. The exemption clause that excluded liability due to the negligence of the owner and his servants was regarded as such an unreasonable provision and considered to be contrary to public policy. Because of this, they were not given effect, even though the contract contained a jurisdiction clause or other reference to choice of law. As long as the performance was at least partly in the US, the courts would disregard the exemption clause due to its incompatibility with public policy.¹ In the United Kingdom, freedom of contract was upheld by the courts and as a result, the British shipowners would insert clauses in the Bill of lading that exempted them from most, if not all, liability.

The American Harter Act of 1893 was an attempt to balance the power of the dominating British carriers who were the world's largest merchant fleet at the time. The Harter Act set a minimum level of liability as it prohibited the carriers to contract out of their liability for loss due to negligence or failure to exercise due diligence to make the ship seaworthy and declared any clauses with that effect void. This resulted in more discrepancies concerning this type of clause as it was now being upheld in certain jurisdictions and void in others. Great Britain and France continued to have freedom of contract to limit liability, as the shipowners were a dominating force. The British shipowners reacted to the Harter Act and the fines imposed when trying to contract out of minimum liability, by inserting jurisdiction clauses that prescribed British law and forum. In Great Britain, the courts still refused to give the Harter Act full effect.²

In Australia, New Zealand and Canada, the cargo interest had a greater influence and compelled their governments to enact laws similar to the Harter Act. This put some pressure on the British parliament to uniform the legislation throughout the British Empire.³

¹ Carver, *“Carriage by Sea”* 1982, 13th ed, Vol 1, p. 294 f.

² The American Journal of comparative Law (AmJCL) Zamora, S. *“Carrier Liability for damage or loss to cargo in international transport”* p. 401 ff,

³ Texas International Law Journal, (hereafter 44 TXILJ 277) Estrella Faira, J. *“Uniform law for international transport at UNCITRAL: new times, new players and new Rules”* 2009, p. 3

2.1 The Hague and Hague-Visby Rules

What would turn out to be the foundation of The Hague Rules started as a voluntary set of rules to be incorporated in the bill of lading by the carrier. These rules were based on the same principles as the Harter Act and intended to solve some of the difficulties that world trade was experiencing due to lack of uniformity. However, the attempt to make carriers implement the model Rules on a voluntary basis failed, and instead, in 1924, the rules were made into international law under “the International Convention for the Unification of certain Rules Relating to Bills of Lading”. The same year the convention was put into effect in the UK through the COGSA⁴. In the United States, it took twelve more years before the convention was implemented through their national COGSA, and a number of other countries hesitated as well.⁵ The court ruling of *The Isis*⁶ came in 1933, which made the carrier liable if there was a failure to exercise due diligence to make the ship seaworthy, this regardless of if the damage or loss was caused by the unseaworthiness. This made The Hague Rules appeal more to the carriers and hence there was a renewed effort to ratify the Hague Rules. Once the US COGSA was enacted, the ruling of *the Isis* was no longer relevant.⁷

The Visby protocol was an attempt to rectify some of the problems with the Hague Rules. It was agreed upon at the Stockholm conference in 1963, drafted by the CMI⁸ and signed in 1968. It amended the Hague Rules on several points, among others letting the servants and agents of the carrier be entitled to the same defence and limitation as the carrier was entitled to under the convention, making the addition of a Himalaya clause in the contracts superfluous. Monetary limitations were raised and limitation by weight was added as an alternative.⁹

In line with the development in the shipping business, a Container Clause was added which made the limitation acceptable for this method of transport as well.¹⁰ However, the basic provisions were the same and relevant to this thesis article III and the list of exclusions remained unaltered.¹¹ Before the drafting of the protocol there was a discussion and a proposed amendment of the non-delegable duty of due diligence, the so-called “Muncaster Castle Amendment”. It was proposed that the carrier should be relieved of his duty if he showed diligence in the appointment of the independent contractor.¹² In the case this proposal was named after, the *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd*, the shipowner was held responsible for cargo

⁴ Carriage of Goods by Sea Act

⁵ AmJCL Zamora, S. p. 402 ff.

⁶ *May v. Hamburg-Amerikanische Packetfahrt, A.G.*, 290 U.S. 333 (1933)

⁷ 44 TXILJ 277, Estrella Faira, J. 2009, p. 7-8

⁸ Comité Maritime International

⁹ Tulane Law Review, Yancey, B. “*The carriage of goods: Hague, COGSA, Visby and Hamburg*” (hereafter: 57 Tul. L. Rev. 1238), p. 5

¹⁰ Herber, R. 1993 “*Hamburg Rules, Origin and need for the new liability system*” in “*The Hamburg Rules; A choice for the EEC?*” p. 38

¹¹ 57 Tul. L. Rev. 1238, Yancey, B. p. 5

¹² Tetley, W. “*Marine Cargo Claims*” 1988, 3rd ed. p. 7

damage due the negligence of an independent contractor.¹³ However, the proposed amendment was not included in the final draft. The Visby amendments entered into force in 1977 when the required number of ratifications in number and tonnage had been met.

In broad terms, The Hague and Hague-Visby conventions are applicable to all contracts of carriage of goods by sea covered by a bill of lading, with the exceptions being accounted for in Article I(b) and (c). In these provisions, it is stated that:

- “b) "contract of carriage" applies **only to contracts of carriage covered by a bill of lading or any similar document of title**, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;
- (c) "goods" includes goods, wares, merchandise and articles of every kind whatsoever, **except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried**”¹⁴

The conventions are not applicable to charterparties but can be made so by an express statement of this in the contract. The Hague and Hague-Visby Rules are mandatory on a “tackle-to-tackle” basis, but can apply earlier if the parties agree on expanding the timeframe in their contract.¹⁵ Furthermore, Article X on application of the Hague-Visby Rules states that:

The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:

- (a) the bill of lading is issued in a Contracting State, or
- (b) the carriage is from a port in a Contracting State, or
- (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract,

whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

This is an expansion of the application compared to the Hague Rules, where Article X only states *“The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.”* The amendment to article X was partly motivated by the *Vita Food* gap, that in some cases required a clause paramount for the Hague Rules to apply.¹⁶

¹³ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] 1 Lloyd's Rep. 57 p. 37

¹⁴ Emphasis added by author

¹⁵ Tetley, W. 1988, p. 7 ff.

¹⁶ The Maritime Law Association of Australia and New Zealand Journal (hereafter: (1990) MLAANZ Journal 7), p. 22, The *Vita Food* gap will not be dealt with in the thesis, but is thoroughly explained in this article by Francis Reynolds.

The two conventions should in accordance with the Visby protocol be considered as one, and interpreted as such. This is stated in Article 6 of the Visby amendments and reads as follows:

As between the Parties to this Protocol the Convention and the Protocol shall be read and interpreted together as one single instrument.¹⁷

However, the Visby protocol was not ratified by all members to the Hague convention, the US being a good example of this. Consequently, a distinction between the two set of Rules still has to be made.

The basis of liability as such, was not amended under the Visby protocol, the compromise from the Harter Act was kept and in addition to this clause, there were more issues that some states thought necessary to address. Among these was the question of deck cargo that was excluded from liability even though the container trade was growing fast. The compulsory scope of the Hague-Visby Rules was still limited to the transports where a bill of lading or its equivalent was issued, although these were becoming less frequent, and consequently, an increasing number of cases fell outside the scope.¹⁸ Delay was not addressed in The Hague or Hague-Visby Rules at all, and there are different opinions on whether or not the carrier can be liable for the economic loss of a delay under these conventions.¹⁹

2.2 The Hamburg Rules

In 1968, UNCTAD²⁰ formed a working group to address some of the issues that were not brought up for discussion when negotiating the Visby amendments. UNCITRAL²¹ soon did the same and formed a working group with representatives from 21 different states, regions and jurisdictions as well as relevant organizations. In 1978, there was an international conference held in Hamburg where 76 states participated and the convention was adopted. It entered into force 1992; one year after 20 states had ratified it.²²

While shipowners and their insurers were opposed to the way the Hamburg Rules divide the risk, the cargo owners were generally in favour of the new regime. However, it is clear that the leading maritime states of the world did not favour it, and today the Hamburg Rules are only in force in 34 countries²³, none of which considered to be among the most important shipping nations. The UK has chosen not to ratify it, and so has the US, France, Germany, Greece, Malta, Spain, Russia, China and many others.

¹⁷ The Visby protocol can be found here:

<http://www.admiraltylawguide.com/conven/visbyRules1968.html> 100507

¹⁸ Herber, R. 1993 p. 38 ff.

¹⁹ Gaskell, N, Asariotis, R. Baatz, Y. “*Bills of lading: law and contract*”, 2000, p 342

²⁰ United Nations Conference on Trade and Development.

²¹ The United Nations Commission on International Trade Law

²² Journal of Maritime Law and Commerce (JMLC) Honnold, J. “*Ocean Carriers and Cargo; Clarity and Fairness-Hague or Hamburg*” [1993] Vol 24, No. 1 p. 75 ff.

²³ They can be found on <http://www.uncitral.org/>

The Scandinavian countries have not ratified the Hamburg Rules, but have incorporated parts of it that do not conflict with the Hague-Visby Rules.²⁴

While the Hague Rules were drafted at a time when the shipper delivered the goods just prior to loading at the docks, modern times required a more extensive timeframe as the common practice has changed from delivery at the docks, to delivery to the carriers warehouse. Instead of the “tackle-to-tackle” approach we find in The Hague and Hague-Visby Rules, the Hamburg Rules widens the period of responsibility. It is stated in Article 4:

1. The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.

The scope of the Hamburg Rules has been widened as well. Instead of only covering transport where a bill of lading is issued, the Hamburg Rules cover all contracts of carriage between two different states, provided that:

- (a) **the port of loading** as provided for in the contract of carriage by sea is located in a Contracting State, or
- (b) **the port of discharge** as provided for in the contract of carriage by sea is located in a Contracting State, or
- (c) one **of the optional ports of discharge** provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State, or
- (d) **the bill of lading** or other document evidencing the contract of carriage by sea **is issued in a Contracting State**, or
- (e) **the bill of lading** or other document evidencing the contract of carriage by sea **provides that the provisions of this Convention** or the legislation of any State giving effect to them are **to govern the contract**.²⁵

Charterparties are still not included under the mandatory application, but the Rules can be incorporated by contract. The coverage that is not only of outbound, but also inbound, transports is similar to how the US has made its COGSA applicable. Another novelty in the Hamburg convention is the coverage of living animals and deck cargo. These are both excluded under The Hague and Hague-Visby Rules. However, regulations still differentiate with regards to the types of cargo that are being transported. Explicit regulations regarding deck cargo and live animals are included under the 1978 convention.²⁶

The Hamburg Rules introduced a new approach in drafting the Rules of the carrier liability. Seaworthiness and due diligence was entirely left out of the convention and so was the list of exclusions. The article regulating liability imposed an obligation on the carrier, his servants and agents, to

²⁴ Herber, R. 1993 p. 38 p. 35

²⁵ United Nations Convention on the Carriage of Goods by Sea (hereafter “the Hamburg Rules”.) Article 2.1, Emphasis added by author.

²⁶ 70 Tul. L. Rev. 2051 Force. R “A comparison of the Hague, Hague-Visby and Hamburg Rules: Much ado about (?)” p. 4,

take “all measures that could reasonably be required to avoid the occurrence and its consequences”.²⁷ The liability is based on presumed fault or neglect as stated in the Annex to the Hamburg Rules. The exemption made is that of fire, unless the claimant can prove that “the fire arose from fault or neglect on the part of the carrier, his servants or agents”. Under The Hague and Hague-Visby Rules it is stated that; “unless caused by the actual fault or privity of the carrier” he is not liable in case of fire.²⁸

Article 5.6 under the Hamburg Rules exclude the “damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.”²⁹. The corresponding articles in The Hague and Hague-Visby Rules make a similar exception, but do not include the wording “reasonable” in regards to property. Concerning deviation in general, there is a requirement of reasonableness, but other than this, The Hague and Hague-Visby Rules give the carrier the same possibility to avoid liability for loss or damage when saving or attempting to save property, as when attempting to save lives.³⁰

Liability due to delay of delivery was added in the Hamburg Rules, and a defining article of what is considered to be a delay. The liability is the same as for loss or damage, however the limits for liability are different. Furthermore, it is restricted to economic loss.³¹ Article 5.2 addresses this and states:

Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.

Similar to the Hague-Visby, the Hamburg Rules set the limits of liability in both weight and number of units. It also states what is to be considered a unit and in particular when it comes to container transport. As amended in the Visby protocol servants and agents of the carrier are entitled to the same defence as the carrier himself, the same protection that was included under the Himalaya clause. The phrasing is slightly modified in the Hamburg Rules, and requires that in order to be entitled to the carrier's defence, the servant or agent must prove that he have “acted within the scope of his employment”. The Hamburg Rules also provides for a differentiating

27 JMLC, Bauer, G. [1993] Vol 24, No. 1 “Conflicting liability regimes: Hague-Visby v. Hamburg Rules – A case-by-case analysis”, 54 ff.

28 70 Tul. L. Rev. 2051, Force. R, p. 10

29 The Hamburg Rules Art. 5

30 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (hereafter "the Hague Rules") and Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hereafter "the Hague-Visby Rules") Art. IV(2)(1)

31 Berlingieri, F. “The period of responsibility and the basis of liability of the carrier” in “The Hamburg Rules; A choice for the EEC?” 1994, p. 94

definition of “carrier” and “actual carrier”³² as well as special provisions regarding “through carriage” in articles 10 and 11.³³

2.3 The Rotterdam Rules

In May 1994, the CMI decided to set up a working group to evaluate the lack of uniformity in carriage by sea regulations. This due to the threat of regional agreements taking over where the existing conventions were found to be insufficient. This would result in an even bigger diversity in carriage of goods by sea regulations. Several international organisations, CMI and UNCITRAL among them, was getting concerned with the increasing number of states that chose to amend the Hague and Hague-Visby Rules in their national legislation, moving away from the unification that was the purpose of the convention. After the lack of ratification by the larger shipping nations of the Hamburg Rules and other transport conventions like the Tokyo Rules and the Multimodal convention, all of which never achieved what they were designed to, there was a pressing need for revising The Hague and Hague-Visby Rules in order to keep the unification that was once reached.³⁴

The UNCITRAL considered leaving carrier liability outside the scope of the new convention, as there was still hope that the Hamburg Rules would be widely accepted. However, the CMI took the view that the carrier liability regime is the core of transport law and could not be left out.³⁵

The draft was finalized by the CMI and handed over to the UNCITRAL secretariat in the end of 2001. The draft was extensively amended by the UNCITRAL working group and finalised in 2008, after which it was presented to the UN general assembly for approval. It was adopted by the UN in the end of 2008 and the signing was to take place in Rotterdam in September 2009. The convention is set to enter into force when 20 states have ratified it.³⁶ Reservations to the Rules are not permitted, and the states that ratify the Rotterdam Rules must denounce earlier conventions. The only sections of the convention that are voluntary are the chapters on jurisdiction and arbitration, which the states needs to expressly declare themselves party to, in order to apply.³⁷ EU members will most likely not be doing this, as the Commission and Council of Europe has this jurisdiction and therefore individual member states cannot decide to be parties to these chapters.³⁸

³² The Hamburg Rules, Art. 1.1 and 1.2

³³ 70 Tul. L. Rev. 2051, Force. R, p. 10

³⁴ Lloyd's Maritime and Commercial Law Quarterly (LMCLQ) [2002] Beare, S. part 3, Aug, “*Liability regimes: where we are, how we got here, and where we are going*”. 313

³⁵ LMCLQ [2002] Berlingieri, F. part 3, Aug, “*Basis of liability and exclusions of liability*” p. 336 ff.

³⁶ LMCLQ [2008] 135 Diamond, A. “*The Rotterdam Rules*” p. 446 ff.

³⁷ Hosking, R. 2009, “*The Rotterdam Rules: A New shipping Order?*” p. 4 ff.

³⁸ Berlingieri, F. 2009, “*A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules.*” p. 46

The period of application of the convention and the timeframe for the carrier liability is from pick-up until delivery³⁹ as the Rotterdam Rules apply for “door-to-door transport”. This is stated in article 12 of the convention. To make this possible it deals with carriage not only by sea, but may apply for other modes of transport as well.⁴⁰ The full name of the convention is “United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea”. As the name implies, it requires that at least one leg of the transport be by sea.⁴¹ Similar to what the previous conventions require, the transport needs to be international and linked to a contracting state. The Rotterdam Rules apply to any transport by sea if:⁴²

(...) according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.⁴³

This approach is similar to the one in the Hamburg Rules, and aims to give the new convention effect on both inward and outward transport, and the Rotterdam Rules article 5(2) specifically states, “*This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.*”⁴⁴

The convention does not apply to charterparties and “*Other contracts for the use of a ship or of any space thereon*”⁴⁵. Neither did the old regimes but they have refrained from defining “charterparty” any further.⁴⁶ Furthermore, Rotterdam Rules exclude “non-liner transportation”⁴⁷ except when there is no charterparty and a transport document is issued. The reason for the exclusions, both regarding the earlier conventions and the Rotterdam Rules, are based on the fact and tradition that charterparties are individually negotiated, and there is no weaker party to protect. Instead, the freedom of contract is upheld.⁴⁸

However, in contrast to the earlier conventions, article 7 states that even if the contract is excluded from the scope of the Rules, it applies in respect to third parties that are described as “*not an original party to the charter party or other contract of carriage excluded from the application of this*

³⁹ With the exception of when the goods need to be handed over to an authority in the place of receipt.

⁴⁰ LMCLQ [2008] 135 Diamond, A. p. 446 ff.

⁴¹ Baatz, Y. Debattista., C. Lorenzon, F. Serdy, A. Staniland, H. Tsimplis, M. (hereafter Baatz and others) “*The Rotterdam Rules, a practical annotation*”, 2009, p.15

⁴² Berlingieri, F. 2009, p. 3

⁴³ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Hereafter; “Rotterdam Rules”) Art. 5

⁴⁴ LMCLQ [2008] 135 Diamond, A. p. 458

⁴⁵ Rotterdam Rules Art. 6(1)(b)

⁴⁶ Baatz and others, 2009, p.20

⁴⁷ Rotterdam Rules Art. 6(2), defined in Art. 1(4)

⁴⁸ LMCLQ [2008] 135 Diamond, A. p.457

convention". Consequently, the Rules apply between the carrier and the third party.⁴⁹

Several issues, in addition to multimodal transport, which are addressed in the new convention, have not been dealt with before. Electronic transport documents are one example of this. Volume contracts are another of the new provisions and here derogation from the convention is allowed, but these kinds of contracts are still subject to some of the Rules according to article 80. As an example one of the conditions are that the contracts are individually negotiated. Furthermore, they cannot rid the carrier of the obligation of seaworthiness.⁵⁰

Deck cargo is regulated in the Rotterdam Rules, as in the Hamburg. It is permitted according to article 25 to carry goods on deck:

- When required by law
- When carried in containers or vehicles
- When it is agreed with shipper or in accordance with customs of trade.

The addition to the new convention, in comparison with the Hamburg Rules, is the second scenario and the fact that the Rotterdam Rules regulate the consequence when there is a loss, damage or delay of the deck cargo. A new approach is found in article 81 where the freedom of contract is granted for transport of live animals.⁵¹

The Rotterdam Rules introduce the "performing party"⁵² and the "maritime performing party"⁵³ where the Hamburg Rules used the "actual carrier" and incorporate the principles of the Himalaya clause in the new convention. However, to be entitled to the same defence as the carrier, the defendant needs to be a maritime performing party.⁵⁴

The new convention expands the circle of persons for whom the carrier is liable. They include performing parties (both maritime and other), master and crew of the ship as well as other employees of the carrier and performing parties. This is found in article 18 which states;⁵⁵

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or
- (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

⁴⁹ Berlingieri, F. 2009, p. 4

⁵⁰ *Ibid* p. 39

⁵¹ Berlingieri, F. 2009, p. 43

⁵² Rotterdam Rules Art. 1(6)

⁵³ Rotterdam Rules Art. 1(7)

⁵⁴ Berlingieri, F. 2009, p. 45 ff.

⁵⁵ *Ibid* p. 13

As to carrier liability, it is based on fault and arises from loss, damage or delay. It resembles The Hague and Hague-Visby approach in many ways. Seaworthiness of the ship is required, but has been extended and the obligation to exercise due diligence to make the ship seaworthy will now be a responsibility throughout the voyage. Once again, there is a list of excluded perils relieving the carrier of his liability, although the fault in navigation and management is not included in the new convention. Furthermore, the exceptions are based on there being no fault or negligence on the side of the carrier or those for whom he is responsible. The exceptions are not exonerations from liability, but presumptions of lack of fault.⁵⁶ The Hague-Visby did not cover delay as a basis for liability, the Hamburg Rules on the other hand, did.⁵⁷ Delay is in the Rotterdam Rules defined in article 21 that states;

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

Unlike the Hamburg Rules, the new convention requires the time for delivery to be in the contract of carriage in order for damages to be awarded. It is pure economic loss that is concerned, since damages to cargo would be covered under loss or damages to goods.⁵⁸ This was a difficult paragraph for the working group to decide upon, and it refused to comment on the interpretation of it to upset the compromise reached, leaving this to the courts. Therefore, it is hard to conclude if the agreement of needs to be express in the bill of lading, or if this can be a verbal agreement, or even inferred from the communication between the parties.⁵⁹

Limitation of liability has in the new convention expanded in scope and increased in value. Now the carrier can limit liability *“for breaches of its obligations under this Convention”*. The obligation must however relate to the goods that are the subject of the claim. The limits in the new convention are *“875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher”*. Article 59 goes on defining shipping unit and unit of account that is the Special Drawing Right (SDR). A limit for liability due to economic loss caused by delay is set out in article 60 and article 61 regulates the loss of the right to limit liability, which is similarly construed to earlier conventions.

Unlike preceding conventions, the actual delivery after the goods arrive at their destination is regulated in the Rotterdam Rules, and so are the rights of the controlling party, and the transfer of these rights.⁶⁰

⁵⁶ LMCLQ [2008] 135 Diamond, A. p.470 ff.

⁵⁷ Berlingieri, F. 2009, p.8

⁵⁸ UNCITRAL Working group III, 19th session A/CN.9/621p. 41-43

⁵⁹ UNCITRAL Working group III, 21st session A/CN.9/645 p. 18-19

⁶⁰ Berlingieri, F. 2009, p.33

3 The Carriers' obligation of Seaworthiness and Due Diligence

3.1 The History of Seaworthiness

The concept of seaworthiness has changed over the last century with the development of technology and higher standards in general. However, the basics are still the same. A vessel is considered seaworthy when it is fit to encounter the perils of the contemplated voyage in regards to design, structure, condition, sufficient equipment, competent and sufficient crew and master.⁶¹

A seaworthy vessel needs not to be perfect, but must achieve a degree of fitness that a prudent owner would require in regards to the probabilities of the voyage.⁶² Seaworthiness was defined by Mr Justice McNair in *M.D.C. Ltd. v. N.V. Zeevaart Maatschappij* as “not an absolute concept; it is relative to the nature of the ship, to the particular voyage and even to the particular stage of the voyage on which the ship is engaged.”⁶³

3.1.1 The implied warranty of seaworthiness

To provide a seaworthy vessel before and at the beginning of the voyage started out as an absolute obligation for the carrier, and could not be discarded by show of due diligence. The implied warranty was stated in *Steel v. State Line Steamship Company* by Lord Blackburn as an obligation “not merely that they should do their best to make the ship fit, but the ship should really be fit”⁶⁴.

Regarding the scope of the warranty, it is stated in *Kopitoff v. Wilson* that it “extends to everything except latent defects, which could not by any reasonable diligence or skill be discovered”⁶⁵. If not agreed in the contract of carriage, seaworthiness was an implied warranty, which in some jurisdictions could be excluded but only if explicitly stated in the contract.⁶⁶ In the UK for example, if the carrier by a clear and express statement excluded this implied warranty of seaworthiness, the courts accepted this. In the US however, this was regarded as contrary to public policy and these kind of exculpatory clauses were deemed invalid. When the American Harter Act was introduced in 1883 the carriers was allowed to reduce their

⁶¹ Carver, 1982, p. 114 f.

⁶² *Ibid*

⁶³ *M.D.C. Ltd. v. N.V. Zeevaart Maatschappij*, [1962] 1 Lloyd's Rep. 180 at p. 186

⁶⁴ *Steel v. State Line Steamship Company*, 3 App.Cas. 72

⁶⁵ *Kopitoff v. Wilson and Others*, 1 Q.B.D. 377, at p. 383.

⁶⁶ Tetley, W. “*Marine Cargo claims*” 2008, 4th ed. p. 875

liability and the absolute warranty was replaced by the duty to show due diligence in making the vessel seaworthy.⁶⁷ The Hague Rules does not mention the implied warranty at all, but when enacting the Rules in the UK, it was nevertheless expressly abolished, as was it when Canada legislated the convention in their national law. The Hague Rules themselves were however quite clear when stating:

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

(a) Make the ship seaworthy⁶⁸

The phrasing in The Hague Rules originate from the Harter Act, which was the first statute to limit the carrier's right to in the bill of lading insert clauses that would exculpate the carrier of liability on account of his own negligence or that of his servants. This provided that the shipowner was allowed to merely exercise due diligence to make the vessel seaworthy, instead of having an absolute duty to provide a seaworthy ship.⁶⁹

The Harter Act did not get rid of the implied warranty of strict liability concerning making the ship seaworthy, but made it possible for the shipowner to contract out of the absolute warranty for reduced obligation of due diligence⁷⁰. In *McFadden v. Blue Star Line*, the court ruled that to lessen the obligation of care from absolute warranty to exercising due diligence required an express stipulation in the bill of lading, and a mere incorporation of the Harter Act was not enough.⁷¹ The Hague Rules, on account of their wide spread ratification, generally ended the use of the implied warranty of seaworthiness in the bill of lading.⁷² However, it still exists within common law countries and this applies to the bills of lading that fall outside the scope of the conventions. A recent ruling by the Court of Appeal in Singapore on this reaffirmed the position of the warranty and the possibility to contract out of it requires an explicit clause to that effect.⁷³

3.2 The Hague and Hague-Visby Rules

3.2.1 The obligation of exercising due diligence in making the ship seaworthy

The compromise from the Harter Act was kept in the Hague, and Hague-Visby Rules, prohibiting the carrier from contracting out of the duty of due diligence.⁷⁴ This is stated in article III(8) that reads:

⁶⁷ Knauth, A. "Ocean Bills of Lading" 1953, p. 192 ff.

⁶⁸ The Hague Rules, Article 3(1)

⁶⁹ Knauth, A. 1953, p. 192 ff.

⁷⁰ Poor, W. "Poor on charter parties and Ocean bills of lading" 1968, 5th ed. p. 155 ff.

⁷¹ *McFadden v. Blue Star Line*, [1905] 1 K.B. 697

⁷² Aikens, R. Lord, R. Bools, M. "Bills of Lading" 2006, para 10.84

⁷³ *Sunlight Mercantile Pte Ltd and Another v Ever Lucky Shipping Co Ltd* [2004] 2 Lloyd's Rep. 174

⁷⁴ Gaskell, N, Asariotis, R. Baatz, Y., 2000, p 273

Any clause, covenant or agreement in a contract of carriage **relieving the carrier or the ship from liability** for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or **lessening such liability** otherwise than as provided in these Rules, shall be **null and void and of no effect.**⁷⁵

As previously mentioned the Hague Rules introduced the concept of exercising due diligence in providing a seaworthy vessel in international conventions. The seaworthiness in itself should however be determined on the same basis as it was before the Hague Rules. In *The Fjord Wind*, Lord Justice Clarke stated:

that seaworthiness is concerned with the state of the vessel rather than with whether the owners acted prudently or with due diligence. The only relevance of the standard of the reasonably prudent owner is to ask whether, **if he had known of the defect** (my emphasis), he would have taken steps to rectify it.⁷⁶

According to Tetley, the obligation in The Hague Rules is not one of seaworthiness. It is one of exercising due diligence in making the ship seaworthy. The ship needs not to be seaworthy for this obligation to be met.⁷⁷ What constitutes due diligence will be up to the ruling of the court based on the facts at hand. Since The Hague Rules came in force, there have been a number of cases and the jurisprudence on the subject is now quite extensive.⁷⁸ Due diligence has been interpreted as something close to the common law duty of care by the courts, however with the exception of the fact that the duty cannot be delegated.⁷⁹ The standard of due diligence will be decided by the courts on a case-to-case basis. Some general outlines can be drawn though. The obligation would become too strict if the decision is based on seeing in hindsight, what should have been done. On the other hand, it would be asking to little if it was only based on the carrier's subjective point of view. It follows that an old ship will increase the level of care required from the carrier, compared to that from a new ship.⁸⁰ The obligation of due diligence has been interpreted by the courts of the different states that have ratified the Rules. Unfortunately, the conclusions that have been drawn are not always the same. Due diligence under English law has been considered to constitute a mere "reasonable care". In *The Kapitan Sakharov*⁸¹ due diligence amounted to;

whether it had shown that it, its servants, agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage

⁷⁵ Emphasis added by author

⁷⁶ *Eridania SpA (formerly Cereol Italia Srl) v. Oetker* [2000] 2 Lloyd's Rep. 191 p. 199

⁷⁷ Tetley, 2008, 4th ed. p. 880

⁷⁸ *Ibid* p. 925 ff.

⁷⁹ Wilson, J. "Carriage of Goods by sea" 2008 6th ed, p. 187 f.

⁸⁰ Björkelund, C-G, "Sjövårdighet och ansvar" 1970, p. 148-156

⁸¹ *Northern Shipping Company v Deutsche Seereederei GmbH* [2000] 2 Lloyd's Rep. 255

Due diligence has been described in a Canadian ruling as;

the highest degree of diligence, or extraordinary diligence, or that which a very prudent person would exercise in the care of his own property, or in the management of his own affairs⁸²

Seaworthiness is not merely the physical state, but a relative obligation that should be judged with reference to the cargo that will be carried, and what type of voyage that is contracted, taking into account where and when and the probable weather conditions for that type of transport.⁸³ The old jurisprudence from before the conventions on what constitutes seaworthiness was still of relevance for the Hague Rules.⁸⁴ The ever-quoted definition from Carvers “Carriage by Sea”, here from *F.C. Bradley & Sons v. Federal Steam Navigation Co*⁸⁵, by Lord Justice Scrutton;

The ship must have that degree of fitness that an ordinary owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. Would a prudent owner have required that it (sc the defect) be made good before sending his ship to sea, had he known of it?

In the “*Eurasian Dream*”⁸⁶ Justice Cresswell defined seaworthiness and said on the matter in relation to the business practice;

Seaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable.

This means that even if great advancements in technology has been made, and the standard of seaworthiness rises with this advancement, old ships should not necessarily have to live up to the same requirements as newly built ships to be considered seaworthy.⁸⁷ Justice Cresswell continued to divide seaworthiness into in three components;

- Physical condition of the vessel and its equipment
- The competence and efficiency of the crew and master
- The adequacy of stores and documentation

3.2.1.1 Master and Crew

Considering that around 80% of marine accidents occur due to the human factor, this component of seaworthiness is by no means a trivial one. Unseaworthiness as a result of incompetent by a crewmember or the master

⁸² Sze Ping-fat, “*Carrier's liability under the Hague, Hague-Visby and Hamburg Rules*” 2002, chap. 3.2.b

⁸³ Aikens, R. Lord, R. Bools, M. 2006, para 10.91

⁸⁴ Tetley, 2008, 4th ed. p. 880

⁸⁵ *F.C. Bradley & Sons v. Federal Steam Navigation Co* (1926) 24 Ll.L.Rep. 446,

⁸⁶ *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd* [2002] 1 Lloyd's Rep. 719

⁸⁷ Tetley, 2008, 4th ed. p. 930

will depend on the nature of the shortcoming. Negligence in relation to the vessel fall under the exclusion in 4(2)(a), and can be applicable when the crewmember has the knowledge and skill that is necessary to perform the task, but fails to do so on a particular occasion. If the negligence is in relation to the cargo, it will still be subject to the list of exclusion. The obligation will however fall under article 3(2) and will not render the ship unseaworthy or impose an obligation of due diligence.⁸⁸ Incompetence or lack of skill to perform the job in relation to the vessel will be considered a breach against the carrier obligation of due diligence under article 3(1)(b) that declare:

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to
(...)
(b) properly man, equip and supply the ship;

In *The Eurasian Dream*, the distinction between negligence and incompetence was discussed. Mere negligence will not necessarily make the ship unseaworthy. However, a disabling want of skill or knowledge in the master can be proved by one single incident and is described as incompetence beyond negligence.⁸⁹ Lack of ability, training, or information on the specific vessel, lack of will to perform in accordance with what is required, and disabilities on account of mental or physical incapacity caused by drugs or alcohol for example, may all result in unseaworthiness.⁹⁰ In the *Makedonia*⁹¹, Justice Hewson held that:

I can see no real difference between those two, that is, drunkenness or physical unfitness on the one hand and a disabling lack of will to use the skill and knowledge on the other.

From this judgement, Mr White has in his article on the matter made a division of incompetence into five subgroups. They consist of the following;

- Lack of ability or training.
- Lack of knowledge in relation to a particular vessel.
- Lack of will or inclination
- Habits or characteristics that will render a seaman not suitable for his role onboard the vessel.
- Temporary incapacity, like illness or fatigue.

Just as one individual can render the ship unseaworthy, the crew as a group, or unit can be deemed incompetent due to for example the lack of language skills, or an insufficient number of people on the ship. When the incompetence of the master or crew makes the unseaworthy, the carrier must show that in relation to the appointment, he exercised due diligence. This

⁸⁸ LMCLQ [1995] 221 White, R. “*The Human Factor in Unseaworthiness Claims*” p. 223 ff.

⁸⁹ *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd* [2002] 1 Lloyd's Rep. 719

⁹⁰ Aikens, R. Lord, R. Bools, M. 2006, para 10.111 ff.

⁹¹ *The Makedonia* [1962] 1 Lloyd's Rep. 316

effectively means that when hiring, documents should be inspected, and references from former employers should be checked. Certificates should not be taken as conclusive evidence of competence. The carrier must also provide the master with sufficient information, supervise and monitor on an ongoing basis.⁹² The diligence must be exercised by agents or manning agencies if the recruiting is done by them on behalf of the carrier.⁹³

3.2.1.2 Cargoworthiness

The last point in article III(1) is sometimes referred to as cargoworthiness and states that the carrier is under the obligation to exercise due diligence to:

(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.

Cargoworthiness is included under the concept of seaworthiness, and can be defined as the ability to carry the cargo without damage or loss. The vessel must be fit to carry any permitted cargo, apart from extraordinary or unusual one, according to the ruling of *The Benlawers*⁹⁴. Lack of cargoworthiness has been stated when the cargo itself is not damaged, but it is impossible to discharge it at the discharging port due to some defect in it.

Faulty stowage that endangers the cargo will render the vessel unseaworthy only if it threatens the integrity of the vessel.⁹⁵ This is clearly shown in the case of *Kopitoff v. Wilson* where the bad stowage of the cargo, steel plates that came loose and made a hole in the hull, subsequently made the ship sink.⁹⁶ A cargoworthy vessel can be unseaworthy, but an uncargoworthy vessel can never be seaworthy, as this is part of the requirement and one of the fundamentals in the concept of seaworthiness. What is required to fulfil this obligation is, as with seaworthiness as a whole, dependant on type of cargo, type of voyage and characteristics of the vessel.⁹⁷

3.2.2 Seaworthiness as an overriding obligation

In *Maxine footwear*⁹⁸ Lord Somervell found that seaworthiness was overriding in the sense that if that obligation had not been fulfilled, the list of exclusions was not applicable. In the ruling, he stated:

Art. III, Rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art. IV cannot be relied on. This is the natural construction apart from the opening words of Art.

⁹² *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd* [2002] 1 Lloyd's Rep. 719

⁹³ LMCLQ [1995] 221 White, R. P. 229 ff.

⁹⁴ *Ben Line Steamers Ltd. v Pacific Steam Navigation Co.* [1989] 2 Lloyd's Rep. 51

⁹⁵ Aikens, R. Lord, R. Bools, M. 2006, para 10.99 ff.

⁹⁶ *Kopitoff v. Wilson and Others*, 1 Q.B.D. 377,

⁹⁷ Richardson, J. "The Hague and Hague-Visby Rules" 1998, 4th ed. p. 23

⁹⁸ *Maxine Footwear Company, Ltd. and Morin v. Canadian Government Merchant Marine, Ltd* [1959] 2 Lloyd's Rep. 105

IV, Rule 2. The fact that that Rule is made subject to the provision of Art. IV and Rule 1 is not so conditioned makes the point clear beyond argument.

Following this reasoning, when the cause of the damage or loss is in part due to a failure in due diligence to make the ship seaworthy, and in part caused by a excepted peril, the carrier will be liable for the whole loss. The overriding obligation has no affect on the right to limit liability. Under the Hague Rules, even if the carrier fails to fulfil his duty of due diligence, it will not prevent him from limiting his liability under IV(5). Hague-Visby is slightly different in regards to this matter, as article IV(5)(e) states;⁹⁹

Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or **recklessly and with knowledge** that damage would probably result.¹⁰⁰

3.2.3 Causation

Lord Wright said about unseaworthiness as one of concurring causes:

In truth, unseaworthiness, which may assume according to the circumstances an almost infinite variety, can never be the sole cause of the loss. At least I have not thought of a case where it can be the sole cause. It must, I think, always be only one of several co-operating causes. (...)The question is the same in either case. It is: **Would the disaster not have happened if the ship had fulfilled the obligation of seaworthiness**, even though the disaster could not have happened if there had not also been the specific peril or action?¹⁰¹

Under the Hague and Hague-Visby Rules the liability of the carrier is dependent on if the actual damage or loss was attributed to the failure to exercise due diligence. It was stated in the case of the *Yamatogawa*¹⁰² that if the due diligence would not have prevented the casualty there is no causative effect and the carrier is not liable.¹⁰³ The shipowner must only prove due diligence in respect of the unseaworthiness that contributed to the loss, not in all other aspects.¹⁰⁴ As mentioned earlier, this was not the case under the Harter Act as described in the ruling of the *Isis*¹⁰⁵, where causation between the lack of due diligence and the damage or loss, was not necessary.¹⁰⁶

⁹⁹ Tetley, 2008, 4th ed. p. 902

¹⁰⁰ Emphasis added by author

¹⁰¹ *Smith Hogg & Co Ltd v Black Sea & Baltic General Insurance Co Ltd* (1940) 67 Ll. L. Rep. 253

¹⁰² *Kuo International Oil Ltd. v. Daisy Shipping Co. Ltd.* [1990] 2 Lloyd's Rep. 39

¹⁰³ Aikens, R. Lord, R. Bools, M. 2006, para 10.127

¹⁰⁴ Tetley, 2008, 4th ed. p. 898

¹⁰⁵ *May v. Hamburg-Amerikanische Packetfahrt, A.G.*, 290 U.S. 333 (1933)

¹⁰⁶ 44 TXILJ 277, *Estrella Faira*, J. 2009, , p. 7-8

3.2.4 Duration of the obligation

The Hague and Hague-Visby Rules states that due diligence to make the ship seaworthy shall be exercised “*before and at the beginning of the voyage*”. In *Muncaster Castle* this timeframe was set out to be before the loading of the cargo, until the vessel weighs anchor. The voyage is held to be the contractual voyage, meaning from the port of loading to the port of discharge according to the bill of lading. If the cargo has the same discharge port but several different loading ports, the obligation of due diligence will proceed until the vessel leaves the last loading port. When, as in the liner trade, several contracts of carriage exist and concerns different ports, the cargo will have different voyages, as opposed to the single voyage of the vessel. Due diligence must be exercised with regard to the different contracted voyages, and thus at every loading port.¹⁰⁷ The owners duty of due diligence will begin when the vessel comes into his "orbit", an expression first used by Lord Radcliffe in *Muncaster castle*¹⁰⁸. This should be the point when the owner comes into possession or control of the vessel. When a new vessel is built, normally the shipowner is not liable for the faults of the shipbuilders, but can be if he failed to show due diligence in appointing skilled inspectors to supervise the building, and show reasonable care in choosing a building firm of repute. If the vessel is bought the owner must take steps, surveys and inspections, to satisfy that the vessel is fit for the service intended.¹⁰⁹ Lord Keith of Avonholm held in the case of *Muncaster Castle* that there should be no distinction between when a shipowner buys a vessel or when he orders one to be built. Only if he takes part in the project in reference to the design or supervision, where this is required, should he be liable for defect that should have been found through due diligence during the building.¹¹⁰

If an act that will make the ship seaworthy is of such nature that it can wait until the ship is at sea, the ship will not be unseaworthy due to the choice of taking this action after the commencement of the voyage.¹¹¹ There is a balance between the exception stated in IV(2)(a) that concerns faults in navigation or management. If a task that is ordinarily performed after the ship has commenced its voyage is forgotten or neglected, causes the loss or damage, this will fall under the excepted peril in IV(2)(a). However, if the task would ordinarily be performed before the start of the voyage, is assumed to have been so and not intended to be carried out once at sea, there will be a lack of due diligence in making the ship seaworthy, and the excepted perils will not apply.¹¹²

¹⁰⁷ Tetley, 2008, 4th ed. p. 894

¹⁰⁸ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] 1 Lloyd's Rep. 57

¹⁰⁹ Carver, 1982, 13th ed, p. 354

¹¹⁰ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] 1 Lloyd's Rep. 57

¹¹¹ Tetley, 2008, 4th ed. p. 894

¹¹² Carver, 1982, 13th ed, p. 505 ff.

3.2.5 Delegation and due diligence

According to English law, if the carrier chooses to delegate parts or all of his responsibilities under Article III(1) of the Hague-Visby Rules, he will still be liable for the lack of due diligence in the work performed. This is regardless of to whom he gives the responsibility. It is therefore not sufficient to delegate to a competent or certified person, it is rather the work in itself that needs to be performed in a reasonably diligent manner. The diligence that the delegate must exercise is the same degree of due diligence as the shipper is obligated to show.¹¹³ In *the Muncaster Castle*, which is the leading case of this matter, Lord Keith of Avonholm said:

The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship-repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure. The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory obligation. Perform it as you please.¹¹⁴

The approach is similar in German law, where a shipyard or classification society if found at fault, or negligent, would not be included as someone who the carrier is liable for, unless the work that has been done is in reference to the particular voyage taking place. In that case they could be considered agents for the carrier and as such included in the carrier liability.¹¹⁵ In Scandinavia the situation is not quite as clear. There are case law pointing in both directions, and no recent rulings to confirm either way. There is a distinction to be made between delegation to a classification society, and a shipyard that does the repairs. While the lack of due diligence in a repair usually will make the carrier liable, the outcome when a classification society fails to show due diligence is not necessarily the same and no general rule as to the carrier's liability in these situations can be made out.¹¹⁶

3.3 Hamburg Rules

As previously mentioned, seaworthiness and due diligence are completely left out of the Hamburg Rules, which are drafted in a way that is more similar to the other transport conventions, as opposed to the ones on sea carriage. The Warsaw convention contains a similar liability provision as the Hamburg Rules, stating that the carrier shall take all reasonably necessary measures to avoid damage.¹¹⁷ Seaworthiness is covered under

¹¹³ Tetley, 2008, 4th ed. p. 926 ff.

¹¹⁴ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] 1 Lloyd's Rep. 57

¹¹⁵ Herber, R. 1997, "German law on the carriage of goods by sea" in "New carriage of Goods by Sea", p. 352

¹¹⁶ Björkelund, C-G, 1970, p. 180 - 190

¹¹⁷ JMLC Nicoll C.C. [1993] Vol 24, No 1 "Do the Hamburg Rules suit a shipper-dominated economy?" p. 158 f.f

article 5.1 that sets down the basic liability of the carrier and replaces article III as well as article IV in the Hague and Hague-Visby Rules. It stipulates:

The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took **all measures that could reasonably be required to avoid the occurrence and its consequences.**¹¹⁸

Nicoll explains the width of the article by saying:

The element of reasonable foreseeability probably marks the boundary. Under the Convention the carrier is liable if, **with the benefit of hindsight**, it would appear to have been reasonable to take a step which would have had a significant causative bearing on the loss suffered.¹¹⁹

Analyses have been made on a handful of cases from the US and the UK of when the liability arises from unseaworthiness before or at the commencement of the voyage. Arguably, the outcome of applying the Hague, Hague-Visby or the Hamburg Rules will be similar, if not the same. Therefore “all measures that could reasonably be required” is a duty not far from exercising due diligence.¹²⁰ The obligation under the Hamburg Rules is unlike the duty of due diligence in the Hague and Hague-Visby, an ongoing duty and does not seize by the commencement of the voyage.¹²¹

3.4 The Rotterdam Rules

3.4.1 Seaworthiness and due diligence

The new regime took two of the main obligations from the Hague and Hague-Visby Rules, those of seaworthiness and due diligence. Discussions were held whether or not to make the obligation of seaworthiness an ongoing one. When the Hague Rules was drafted in the beginning of the 19th century it was deemed unreasonable to put an obligation upon the carrier to keep the ship seaworthy, as once the ship was at the high sea it was hard for the carrier to have any control over it. Today however, the situation is a different one. Technological advancements that have been made during the last hundred years have made it possible for the owner to keep in contact and exercise control over the vessel throughout the voyage. Thus the obligation to keep the vessel seaworthy is not unreasonable anymore, and the new convention imposes such an obligation of due diligence.¹²² The Rotterdam Rules article 14, follows the wording of the

¹¹⁸ Emphasised by the author

¹¹⁹ JMLC Nicoll C.C. [1993] Vol 24, No 1 p. 160

¹²⁰ JMLC Bauer, G. [1993] Vol 24, No 1 p. 54 ff.

¹²¹ Tetley, 2008, 4th ed. p. 936

¹²² LMCLQ [2002] Berlingieri, F. part 3, Aug, p. 337

Hague and Hague-Visby Rules, imposing explicit duties on the carrier. It states:

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

The obligation is still one of exercising due diligence. Therefore should jurisprudence from Hague and Hague-Visby still be useful, at least regarding the obligation before and at the beginning of the voyage. The reason for keeping a similar wording and construction as in the Hague Rules is to uphold the certainty and some of the predictability from the old regime. The working group of UNCITRAL was when drafting aware of the fate of the Hamburg Rules, and tried to avoid the new convention having the same lack of support among the traditional maritime nations.¹²³ The standard of seaworthiness is still relative and depending upon several factors, most of which are already mentioned, like the nature of the vessel as of the voyage. The same components of the concept of seaworthiness and due diligence in the Hague and Hague-Visby Rules are still valid. It will be judged by the physical state of the vessel, the crew and master's competence and the cargoworthiness of the ship. There are some additions to the article, such as the on-going duty of due diligence, and the specific reference to container supplied by the carrier.¹²⁴

3.4.2 The continuous duty of seaworthiness

The duty of seaworthiness is, as previously mentioned, not an absolute one. It is one of due diligence to ensure that the vessel is seaworthy. The continuous nature of the duty in the Rotterdam Rules as discussed in the working group of UNCITRAL should be depend on the context, and as such will be different depending on if the ship is in port or at sea. Standards to be taken into account should be such of the ISM code, which would better be in accordance with an on-going obligation of due diligence. However, concerns were expressed that the extended obligation would impose costs that would end up as an increase in freight rates.¹²⁵ In the working group, questions were raised regarding if the vessel experiences problems while at sea. Will it be possible to make it seaworthy again before the port of call? It was reminded that the obligation is one of due diligence, and the carrier is

¹²³ JIML Girvin, S. 2008 Vol 14 “*Exclusions and limitation of liability*” p. 525

¹²⁴ JIML Dr Nikaki, T. 2008 Vol 14 “*The fundamental duties of the carrier under the Rotterdam Rules*” p. 519 f

¹²⁵ UNCITRAL Working group III, 9th session A/CN.9/510 p.14 ff.

obliged to take reasonable steps, not live up to an absolute duty of seaworthiness.¹²⁶ The duration of the duty is not clarified in the convention. As to "before, at the beginning of," in article 14, the case law from the Hague and Hague-Visby Rules apply, and the obligation begins when the vessel comes within the carriers "orbit". However, when the obligation ends is not explained further than "during the voyage by sea". One interpretation of this is that the duty will end when the ship arrives.¹²⁷ Another is that since the loading of the cargo is included there is no reason for discharge to be outside the scope of this article. Furthermore the extended obligation is supposed to cover the entire voyage at sea, and excluding discharge from this liability would deprive article 14 much of its force.¹²⁸

3.4.3 Delegation of the obligation of Due diligence

The Rotterdam Rules have kept the basic obligation of due diligence and seaworthiness from the Hague-Visby Rules, this with the intention to preserve existing case law. Therefore the cases of *the Muncaster Castle*¹²⁹ and *the Amstelslot*¹³⁰ should still be applicable, making the duty of due diligence a non-delegable one, excluding only latent defects. Furthermore, the wording of article 18 that sets out for whom the carrier is liable clearly makes the carrier liable for persons that undertake any of the carrier's obligations under the contract of carriage "to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control."¹³¹

3.4.4 Seaworthiness as an overriding obligation under the Rotterdam Rules

Under the discussions in the working group of UNCITRAL it was decided to amend the seaworthiness concept as to its overriding nature in the Hague and Hague-Visby Rules.¹³² With the changes in the burden of proof, it would not be considered until the carrier has invoked an excepted peril. As explained in chapter 4.3 below, the seaworthiness is not considered an overriding obligation in the Rotterdam Rules. The carrier will instead be liable for the part of the loss that is attributed to the unseaworthiness, and it is up to the courts to decide on the apportionment of the liability in relation to the causation.¹³³

¹²⁶ UNCITRAL Working group III, 12th session A/CN.9/544 p.46 f

¹²⁷ LMCLQ [2002] Berlingieri, F. part 3, Aug, p. 339

¹²⁸ JIML Dr Nikaki, T. 2008 Vol 14 p. 522

¹²⁹ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* [1961] 1 Lloyd's Rep. 57

¹³⁰ *Union of India v. N.V. Reederij Amsterdam*, [1963] 2 Lloyd's Rep. 223

¹³¹ The Rotterdam Rules Art. 18(d)

¹³² UNCITRAL Working group III, 12th session A/CN.9/544 p.38

¹³³ UNCITRAL Working group III, 14st session A/CN.9/572 p. 18 -19

Care of the cargo

3.5 Hague-Visby - Art 3(2)

Under article III(2) of the Hague-Visby Rules the carrier has an obligation to care for the cargo. The article 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.

There is not much discussion on this particular paragraph as it is often included under a general discussion of cargoworthiness. This obligation is however different in the way that it focus on the actual carriage, as opposed to the preparations for the voyage. It does not contain the obligation of due diligence as article III(1) and IV(1) but the carrier can be relieved of his liability if he shows that one of the exemptions in article IV is applicable. The duty in III(2) does not necessarily render the ship unseaworthy, as would the lack of cargoworthiness.¹³⁴

From the obligation in III(2) it follows that the goods should be carried according to a sound system and this is related to what information the carrier has or should have, about the goods. This was made clear in the case of *Albacora S.R.L. v. Westcott & Laurance Line*, where the carrier was not informed that the cargo needed to be refrigerated, and was only given the information to keep it away from engines and boilers. When the cargo was subsequently destroyed, the carrier was not held liable.¹³⁵ The degree of care and skill that is required is one higher than the normal negligence cases. When the damage can arise on account of a normal condition on that type of voyage, the carrier should take additional steps to prevent such damage.¹³⁶

Under the Hague and Hague-Visby Rules there has been some uncertainty whether or not FIO¹³⁷ or FIOS¹³⁸ clauses are a breach of article III(8) which make any clauses lessening the carriers' responsibility under the Rules null and void. Under English law these types of clauses are generally held valid, as confirmed in the *Jordan II*¹³⁹ case. However, the matter of how these terms are incorporated in the contract will be crucial.¹⁴⁰ There is no international consensus on this matter and in the US and South Africa for example, the outcome would most likely be the opposite.¹⁴¹

¹³⁴ Sze Ping-fat, 2002 chp 3.2

¹³⁵ *Albacora S.R.L. v. Westcott & Laurance Line, Ltd.* [1966] Vol. 2 Lloyd's Rep. 54

¹³⁶ Sze Ping-fat, 2002 chp 3.2 ff.

¹³⁷ "free in and out"

¹³⁸ "free in and out, stowed"

¹³⁹ *Jindal Iron and Steel Co Ltd and others v. Islamic Solidarity Shipping Co Jordan Inc* [2004] UKHL 49.

¹⁴⁰ Cooke, J. Young, T. Taylor, A. Kimball, J. Martowski, D. Lambert, L (hereafter: Cooke and others), 2007, 3rd ed. "Voyage Charters", p. 975

¹⁴¹ LMCLQ [2005] 153, Baughen, S. "Defining the limits of the carrier's responsibilities"

3.6 Hamburg Rules

This convention does not have a provision regarding the care of the cargo, as it was held that it would be sufficient with article 5.1. This article sets out that the carrier is liable unless he proves that he and the people he is liable for, took all reasonable measures to avoid the occurrence that caused the loss, damage or delay.¹⁴²

3.7 Rotterdam Rules – Art. 13

When the Rotterdam Rules were drafted, it was decided to base the first part of this article on the provision in the Hague and Hague-Visby Rules. However, some points that have been troublesome under English law have been clarified in the new convention and it has been extended to the scope of the new convention that applies door-to-door.¹⁴³ The article in the Rotterdam Rules states:

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.
2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

As the convention applies door-to-door the new obligations of receiving and delivering the goods are introduced. Consequently, the carrier will now become liable for misdelivery, this has not been the case under previous conventions, for obvious reasons.¹⁴⁴

The provision is unlike Hague and Hague-Visby not explicitly made subject to the exonerations in article 17.2-3 but they are still available if there is no fault on the side of the carrier.¹⁴⁵

The obligation under article 13 is a continuous one, similar to the requirement in Hague and Hague-Visby, and this is made clear by the wording “*during the period of its responsibility*” whereas in the Hague and Hague-Visby conventions the continuous nature of the corresponding articles were only implied. This duty is not exclusive to transport by sea, but will apply to other modes of transport as well. However, the carrier will only be liable for the duties imposed by the contract of carriage. This is

¹⁴² Berlingieri, F. 2009, p. 6 f

¹⁴³ Baatz and others, 2009, p.36

¹⁴⁴ JIML Dr Nikaki, T. 2008 Vol 14 p. 514 ff.

¹⁴⁵ Baatz and others, 2009, p. 38

made clear by the second paragraph of article 13, which gives the option to contract out of some of the responsibility of “loading, handling, stowing or unloading”, given this is stated in the “contract particulars”.¹⁴⁶ This term is defined in 1(23) of the convention and implies that the reference should be in writing.¹⁴⁷ When discussed in the working group of UNCITRAL it was pointed out that shippers often agree to take on some of the carriers’ responsibility through FIO or FIOS clauses. Even though there was a fear that the provision would open up for abusive use, it is common practice in the bulk and tramp trade where the CIF seller uses FIOS terms. As there was a demand from the shippers to have the option of these kinds of clauses, it was considered unnecessary to restrict the freedom of contract by imposing a mandatory obligation on the carrier.¹⁴⁸

The article is not meant to reduce the carrier’s period of responsibility for the goods. If the shipper, documentary shipper, or consignee takes on the loading, stowing and discharge, the liability for damage or loss due to a fault in fulfilling these obligations will be on the that party. However, the carrier would still be responsible for care of the goods and other matters during the loading and discharge.¹⁴⁹

The degree of care that is required for the obligation under article 13(1) is to “properly and carefully” perform the undertakings set out. The same wording was used in the Hague and Hague-Visby Rules, which makes the case law on the interpretation of this term still valid and a help in the understanding of the duties under this clause in the Rotterdam Rules. The carrier must adopt a system that is “sound” in relation to the particular cargo, vessel, and voyage based on the knowledge the carrier ought to have. The duty of care is personal as in the previous conventions, and the carrier will be liable for any performing party according to article 18.¹⁵⁰

Separate Rules apply to a maritime performing party, and if the party qualify under the requirements in 19(1), the liability will be joint and several with the carrier.¹⁵¹

¹⁴⁶ JIML Dr Nikaki, T. 2008 Vol 14 p. 514 ff.

¹⁴⁷ Baatz and others, 2009, p. 36

¹⁴⁸ 44 TXILJ 329, Von Ziegler, A. “The liability if the contracting carrier“ p. 6-7

¹⁴⁹ UNCITRAL Working group III, 21st session A/CN.9/645 p.15

¹⁵⁰ JIML Dr Nikaki, T. 2008 Vol 14 p. 516 ff.

¹⁵¹ JIML Dr Nikaki, T. 2008 Vol 14 p. 516 ff.

4 The List of exclusions

4.1 Hague and Hague/Visby

The list of exclusions still contains the main traditional exceptions that used to be inserted in the bill of lading before the Harter Act, and that were included in this act in addition to the Hague and Hague-Visby Rules, this as a compromise to accept the Article III obligations. The exceptions can be divided into three main groups;

- Fault of the carrier
- Fault of the shipper
- No fault¹⁵²

4.1.1 Error in navigation or management

The first exoneration in article IV(2) is one of the heavily debated ones. It is a compromise kept since the Harter act and the wording is similar. The Hague and Hague-Visby states:

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from
 - (a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

The defence of error in navigation or in the management of the ship was incorporated in bills of lading long before the exception was put into a convention. However, if the carrier was found to be negligent, the exception was no longer applicable. The defence first appeared in statutory form in the US and the Harter Act from 1893. In this legislation it took its modern form and was dependent on due diligence from the shipowner to make the vessel seaworthy. If this was fulfilled, the shipowner was not liable since the provision states;

neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel...¹⁵³.

The purpose of these regulations in the Harter act was to prevent the carrier to limit liability by using exculpatory clauses in the bill of lading. In the making of the Act, the carrier defences of nautical fault and negligent management was added by congress, as a compromise between carrier and

¹⁵² Aikens, R. Lord, R. Bools, M. 2006, para 10.199

¹⁵³ Harter Act 1893 Act of February 13, 1893, Chap.105, 27 Stat. 445-46, 46 U.S. Code Appendix 192

shipper interests.¹⁵⁴ The carriers was relieved of the strict warranty of seaworthiness in favour for due diligence, and the two new defences were added. For the benefit of the shippers, broad exculpatory clauses in the bill of lading were now prohibited. The discussions that lead up to this compromise are however officially unreported, and therefore unknown.¹⁵⁵

There have been several arguments for this exoneration of liability. The one that was of importance when the Harter Act and the Hague Rules were made, is the lack of control of the carrier once the ship has commenced its voyage. It was also claimed that the ship itself is enough incentive for the carrier to take due care when appointing the master and crew. In comparison with other carriage conventions, ocean carriage was said to be particularly hazardous and therefore the exoneration was needed. This too has changed over time and with new technology. However, it is still a reason used when arguing against the abolition of the exception.

One of the arguments frequently used in present time is that regarding the risk that will be placed on the carrier if the exception was deleted. When a big casualty or collision occurs, this exception has often been used, and the cost therefore spreads among the cargo owners and their insurers. If the risk were solely on the carrier, it would be both difficult and expensive for him to get that kind of insurance. Arguably, that cost would increase the freight rates in the end.¹⁵⁶ Whether or not this is true is hard to determine.¹⁵⁷

One of the big P&I Clubs analysed their claims between 1987 and 1997 that exceeded 100,000 USD. Out of all of those claims, 40% were cargo claims. The main cause in 25% was “deck officer error” which usually falls under error in navigation or management.¹⁵⁸

The nautical fault has been central in the allocation of risk between the carrier and the cargo owner. “Navigation” as such has been deemed to include the actual planning of the voyage and the decisions taken in connection with this. It includes issues of security and safety of the ship. The decision to sail from a port would be included, while a decision to stay in port would not. However, not “Everything which involves the vessel proceeding through water” is included. This was held by the Court of Appeal in the case of *Hill Harmony*¹⁵⁹.

The second part of paragraph IV(2)(a), that refers to “*management of the ship*” has a far wider scope and is applicable on most scenarios causing loss or damage. A common problem for the courts had been to draw the line between the management of the cargo, that is an obligation under article III(2) and is not mentioned as to be part of the exclusion, and the management of the ship that would fall within the scope of this

¹⁵⁴ JMLC Vol 30, 1999 (30 J. Mar. L. & Com. 543), Sweeney, J. “*The prism of COGSA*” p. 6

¹⁵⁵ JMLC Vol 24:1 1993 Sweeney, J. “*Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary*” p. 9

¹⁵⁶ AmJCL [1975] Vol. 23, Zamora, S p. 409 f.

¹⁵⁷ The insurance cost issue is discussed by Sturley, M. in JMLC, vol 24, no 1, 1993, “*Changing liability Rules and marine insurance...*” p. 119

¹⁵⁸ Tetley, 2008, 4th ed. p. 954

¹⁵⁹ *Whistler International Ltd -v- Kawasaki Kisen Kaisha Ltd* [1999] 2 Lloyd’s Rep. 209

paragraph.¹⁶⁰ Arguably, it is the primary nature and purpose of the acts that cause the loss that is relevant.¹⁶¹ The courts have in several cases distinguished between want of care of cargo, and lacking in care of the vessel that indirectly affects the cargo. The distinction is hard to make and must be decided on a case-to-case basis. In general, it can be said that if both the ship and the cargo is affected by one error, the carrier could avoid liability. When two causes contribute, one that is due to fault in management and one due to fault in care of the cargo, the carrier must prove the extent to which the damage was caused by error in management, or be liable for the whole loss. This was established in the case of *Schnell v. Vallescura*¹⁶² and is therefore called the Vallescura rule.

Concerning for whom the exception applies this is set out in the article. The errors of the carrier himself will not be exempted from liability under this paragraph. It is only the acts of “*master, mariner, pilot or the servants of the carrier*” that mentioned in the exclusion.¹⁶³ This applies to an officer acting as the carrier as well, and therefore when the officer acts in this role the carrier would be held liable, a distinction that is not easily made.¹⁶⁴ Furthermore, stevedores do not fall under the scope of this exclusion. Neither does the situations when there is a joint fault of several persons and one or more is not included in the exception.¹⁶⁵

4.1.2 The fire exception

(a) fire, unless caused by the actual fault or privity of the carrier;

Justifying this exception, it is said that one of the greatest dangers to a ship is fire, and it has been responsible for great losses. Another reason for the fire exception is the limited means that the crew has to put out the fire.¹⁶⁶ The exclusion itself can be traced back to the English Merchant shipping act of 1894, so the exception was no novelty for the shippers when implemented in the Hague Rules.

“Fire” is narrowly interpreted and for the exception to apply there needs to be an actual flame. Merely heat or smoke will not suffice. The damage done by heat before the fire breaks out and causes more extensive damage, will however be included. The question of whether or not explosions fall within the exception has been dealt with in different ways by the courts. While some claim that an explosion resulting from combustion is included, it has also been argued that fire has to be of some appreciable duration as opposed to momentary ignition.¹⁶⁷

Water damage sustained in the work of putting a fire out is covered (typically under general average), however the indiscriminative use of it can

¹⁶⁰ Gaskell, N, Asariotis, R. Baatz, Y., 2000, p. 273 ff.

¹⁶¹ Sze Ping-fat, 2002 chp 4.4

¹⁶² *Schnell v. The Vallescura*, (1934) 293 US 296; 55 S. Ct. 194; 1934 AMC 1573.

¹⁶³ Richardson, J. 1998, 4th ed, p. 33

¹⁶⁴ Tetley, 2008, 4th ed. p. 973

¹⁶⁵ Cooke, J and others, 2009, 3rd ed. p. 1021

¹⁶⁶ AmJCL [1975] Vol. 23, Zamora, S. p. 410

¹⁶⁷ Aikens, R. Lord, R. Bools, M. 2006, para 10.206 ff.

border on lack of care of the cargo, the obligation in III(2).¹⁶⁸ For the carrier to be able to invoke this exoneration, the fire cannot be caused by a lack of exercising due diligence in making the ship seaworthy. Neither can it be on account of the fault of privity of the carrier.¹⁶⁹ Fault constitutes reckless acts or omissions, and privity can be described as knowledge, actual or "blind eye knowledge". To prove privity, it needs to be shown that the carrier or other relevant person on purpose failed to inquire of something was being, or not being done, to avoid knowing a fact. Lord Denning, M.R. stated in *The Eurysthenes*,¹⁷⁰ which was a marine insurance case, that blind-eye knowledge can be defined as;

If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry - so that he should not know it for certain - then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.

In the same case Lord Justice Roskill discussed the point at p. 184; p. 76

... he cannot escape from being held privy to that unseaworthiness by blindly or blandly ignoring those facts or by refraining from asking relevant questions regarding them in the hope that by his lack of inquiry he will not know for certain that which any inquiry must have made plain beyond possibility of doubt.

In the *Star Sea*¹⁷¹ Lord Hobhouse of Woodborough held in the discussion of privity that;

The illuminating question therefore becomes "why did he not inquire?". If the Judge is satisfied that it was because he did not want to know for certain, then a finding of privity should be made. If, on the other hand, he did not enquire because he was too lazy or he was grossly negligent or believed that there was nothing wrong, then privity has not been made out.

The wording of "*actual fault or privity*" derives from the British limitation of liability act, and is found elsewhere in British legislation as well. It means that if the carrier is a corporation, the fault must be that of someone who is "*the directing mind and will of the corporation*".¹⁷² The question arises which individuals are included or can be identified as the carrier. The paragraph only mentions the carrier himself, but it also includes persons that can be considered his "alter-ego". It does not include all employees or agents. Normally it means a senior officer or employee, whose actions can be considered actions of the company itself. The development in the

¹⁶⁸ Richardson, J. 1998, 4th ed, p. 34

¹⁶⁹ Aikens, R. Lord, R. Bools, M. 2006, para 10.206 ff.

¹⁷⁰ *Compania Maritima San Basilio S.A. v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd.*, [1976] 2 Lloyd's Rep. 171 at p. 179; [1977] Q.B. 49 at p. 68

¹⁷¹ *Manifest Shipping Co. Ltd. v. Uni-Polaris Insurance Co. Ltd. and la Réunion Européene* [2001] 1 Lloyd's Rep. 389

¹⁷² Poor, W. 5th ed. 1974, p. 212-213

decisions as to whom this will include has been that lower level employees can be deemed to represent the carrier if there has been a lack in supervision of such employees by senior staff.¹⁷³

Arguably, the burden of proving fault or privity according to the Hague and Hague-Visby Rules is on the claimant as the one asserting it. This is concluded in the *Apostolis*¹⁷⁴ by Justice Tuckey. He held that;

The fault and privity provision is an exception to an express exemption and therefore, following general principles of construction, it is for the party alleging that the exception applies to establish it.

In contrast to this stands the Merchant shipping act where the burden was upon the shipowner to disprove fault or privity.

4.1.3 Perils of the sea

- (a) perils, dangers and accidents of the sea or other navigable waters;

This is the most commonly used exception, even though it can be hard to plead it with success, as it can be hard to prove. It can be traced back to the Roles of Oléron, where damage to cargo caused by a storm would not be the responsibility of the master.¹⁷⁵

Perils of the sea will include the vessel in actual transit, but not before the ship has left the port. It does not include ordinary wear and tear, only weather that is unforeseeable and unpredictable will qualify.¹⁷⁶ Therefore it will, just as seaworthiness, depend on what kind of weather can be expected in a certain area, that time of the year. The exception has been interpreted differently in different countries. While the US and Canada seldom allows the defence to succeed, the UK and Australia has not interpreted to be as narrow. It is closely linked with seaworthiness as many of the factors in this will be taken into account when determining if a peril of the sea has caused the damage or loss.¹⁷⁷

4.1.4 Act of God, war or public enemies

The three following exception are;

- (c) act of God;
- (d) act of war;
- (e) act of public enemies;

¹⁷³ Tetley, 2008, 4th ed. p. 1004 ff.

¹⁷⁴ *A. Meredith Jones & Co. Ltd. v. Vangemar Shipping Co. Ltd.*, [1996] 1 Lloyd's Rep. 475 at p. 483, The decision was later overturned on other grounds.

¹⁷⁵ Tetley, 2008, 4th ed. p. 1037 ff.

¹⁷⁶ Aikens, R. Lord, R. Bools, M. 2006, para 10.206 ff.

¹⁷⁷ Richardson, J. 1998, 4th ed , p. 34 ff.

Act of God covers accidents solely caused by natural factors, could not have been foreseen or guarded against, and occurred without human intervention. No reasonable precautions could have prevented the loss or damage. It is similar with the civil law concept of *force majeure*.¹⁷⁸

Act of war is quite self-explanatory, and therefore very little case law and doctrine exists on the subject.¹⁷⁹ The interpretation of “war” should be the ordinary business meaning of the word.¹⁸⁰ The American courts have ruled the exclusion only to apply in armed conflicts between sovereign states or the equivalent of that, and consequently terrorism is not included under this exception.¹⁸¹

Act of public enemies has been used to exclude piracy on the High Seas from the carrier’s liability, as well as rebels acting against their own governments. However, it does not include thieves, rioters and robbers. Arguably, robbery if in combination with extreme violence, can fall within the scope of the exception. As with many other exceptions, the carrier can only benefit from it if the loss or damage could not have been prevented by showing reasonable skill or care.¹⁸²

4.1.5 Arrest or seizure

- (f) arrest or restraint of princes, rulers or people, or seizure under legal process;

Damages to the cargo owner due to an arrest by creditors the carrier is generally liable for. For it to be excluded under this paragraph as “*under legal process*” it needs to be unforeseeable.

Restraint of princes can be constituted of any forcible interference with the voyage of a government or ruling power of any country. This can for example be damage done by authorities searching for illegal drugs, unlawful confiscation by customs or restrictions in offloading cargo.¹⁸³ The seizure can be lawful or not, but must be done by people claiming to act legally, and the shipowner must do what is reasonable to challenge the lawfulness of the action.¹⁸⁴

- (g) quarantine restrictions;

This exception could easily fit under (f) as government authorities generally are the ones to impose quarantines. There might be a slight difference in the amount of threat of executive actions needed compared to the exception in (g) where there must be a potential for use of force, or threat thereof, whether implied or explicit.¹⁸⁵

¹⁷⁸ Cooke, J and others, 2009, 3rd ed. p. 1031-1032

¹⁷⁹ Richardson, J. 1998, 4th ed, p. 36

¹⁸⁰ Cooke, J and others, 2009, 3rd ed. p. 1032

¹⁸¹ Tetley, 2008, 4th ed. p. 1089

¹⁸² Richardson, J. 1998, 4th ed, p. 36

¹⁸³ Tetley, 2008, 4th ed. p. 1087 f.

¹⁸⁴ Cooke, J and others, 2009, 3rd ed. p. 1033-1037

¹⁸⁵ *Ibid*

4.1.6 Fault of the shipper

- (h) act or omission of the shipper or owner of the goods, his agent or representative;

This exception reinforces article III(5) which states;

The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars...

This exception is frequently used when, under the bill of lading, the cargo owner has assumed responsibility and not fulfilled the undertaken obligation. Faults by stevedores employed by the shipper or owner for loading or discharging have also proven to be a situation where this exception has been invoked. It will however be up to the carrier to prove that the stevedores were acting as agents for the shipper or owner.¹⁸⁶

4.1.7 Strikes and riots

- (i) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;

The strikes exclusion is broad in its scope and includes “*whatever cause, whether partial or general*”. There is no limitation on who is included under the exception, and why there is a refusal to work. Consequently, a bomb threat or fear of disease will be covered under this exception. A following congestion and delay in port due to a previous strike will fall within this exception as well. However, it can only be used by the carrier if he has acted in a reasonable way and does not act negligently. Therefore, the carrier will not be able to rely on this exception if he knowingly enters an already strike-bound port.¹⁸⁷

- (j) riots and civil commotions;

This paragraph had caused little discussion, as it is generally accepted that the carrier should not be held liable for violent acts of third parties.¹⁸⁸ In English law “riot” has been interpreted as defined in the criminal law, which requires at least 3 persons with a common purpose and intention to give mutual assistance against anyone opposing them in the execution of that purpose which is done with the use of force or violence in such a manner to alarm others.¹⁸⁹ Civil commotion also requires violence or an intention to

¹⁸⁶ Tetley, 2008, 4th ed. p. 1098 ff.

¹⁸⁷ Cooke, J and others, 2009, 3rd ed. p. 1038-1039

¹⁸⁸ Richardson, J. 1998, 4th ed. p. 37

¹⁸⁹ Cooke, J and others, 2009, 3rd ed. p. 1040

commit violence that results in an actual disturbance of the peace and it has been defined as a stage between riot and civil war.¹⁹⁰

4.1.8 Saving lives or property

(k) saving or attempting to save life or property at sea;

This exception, in combination with the provision in IV(4) enables the master of a ship to respond to any emergency situations without being liable for the deviation or loss or damage to cargo. As it can be difficult to distinguish between saving lives or property at sea, both are included to prevent the master from having to take this into consideration before assisting someone in a case of emergency.¹⁹¹ Article IV(2)(l) covers the loss or damage to cargo while article IV(4) covers the deviation from being a breach of contract. It states;

Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

4.1.9 Inherent vice

(l) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;

Inherent vice relates to the goods, and their ability to withstand ordinary perils of the contracted voyage. It includes not only the perils that the vessel will encounter, but also the ones that it *may*.¹⁹² This is in relation to the extent of the carrier's knowledge of the goods, or what he ought to have known under the circumstances at hand. The carrier has to handle the goods with the appropriate care in relation to the type of goods that is being carried in order to rely on the exception.

If the shipper fails to disclose or mislead the carrier in the nature of the goods, the carrier will only be expected to take the degree of care that is reasonable in relation to what he has known and can have known.¹⁹³ If the loss or damage is aggravated due to the carrier's breach of contract, the exception will not apply. Inherent vice is defined as a natural quality of the goods, ordinary processes going on in the things themselves, for example metal rusting or fruit deteriorating.¹⁹⁴

(m) insufficiency of packing;

¹⁹⁰ Carver, 1982, 13th ed, p. 380

¹⁹¹ Richardson, J. 1998, 4th ed. p. 37 f.

¹⁹² Cooke, J and others, 2009, 3rd ed. p. 1041-1042

¹⁹³ Carver, 1982, 13th ed, p. 15

¹⁹⁴ *Ibid*

If the carrier has issued a clean bill of lading and therefore recognised that the goods was received in apparent good order, he must overcome this prima facie evidence by showing that the insufficiency was not obvious at the time of loading.¹⁹⁵ What qualifies as sufficient packing is set by the standards of normal or customary packaging of the trade. It should prevent all but minor damages under normal circumstances for the contracted voyage. If the shipper has packed a container, the carrier has no duty to inspect the cargo if it is not apparent that it is insufficiently packed or he is given specific instructions as to how the cargo should be handled.¹⁹⁶

(n) insufficiency or inadequacy of marks;

This exception refers to the marks on the goods that will identify them when unloading. If there is a loss or damage due to this, the carrier will not be liable if he can prove the inadequacy of the marking and that this shortcoming caused the loss or damage. The exception relates to the carrier's duty to issue a bill of lading under III(3)(a) that states that the leading marks should be set out on the bill of lading as well as the above mentioned article III(5) that sets out the shipper's responsibility for marking the goods accurately.

Arguably, the situations that fall under this paragraph can fit into the exception in (i).¹⁹⁷ It is used, not so much for inadequate marking, but when the markings wear off and complicate the identification at destination.¹⁹⁸ It does not however cover the situations where the marks are incorrect relating to the bill of lading, or inaccurate.¹⁹⁹

4.1.10 Latent defects

(o) latent defects not discoverable by due diligence;

Distinguishing this exclusion from inherent vice is the fact that latent defects refers to the ship, while inherent vice relates to the cargo. This provision refers back to article III(2) that imposes the obligation of due diligence in making the ship seaworthy on the carrier.²⁰⁰ Arguably this is an exclusion that is consumed by III(1) and as such, redundant. However it has been interpreted as covering handling gear and equipment that is shore-based or otherwise not part of the vessel.²⁰¹

Carver has defined latent defect as a defect that "cannot be discovered by a person of competent skill using ordinary care. A defect is not latent if it is discoverable by reasonable methods." The test is the same as it is for due

¹⁹⁵ Richardson, J. 1998, 4th ed, p. 38

¹⁹⁶ Tetley, 2008, 4th ed. p. 1177 ff.

¹⁹⁷ *Ibid.* 1082 f.

¹⁹⁸ Richardson, J. 1998, 4th ed, p. 39

¹⁹⁹ Carver 1982, 13th ed, p. 381

²⁰⁰ Tetley, 2008, 4th ed. p. 1207 ff.

²⁰¹ Cooke, J and others, 2009, 3rd ed. p. 1045

diligence. If a defect cannot be discovered by due diligence, it does not matter if it was exercised or not, as the loss or damage would have incurred anyway, this lies in the nature of a latent defect. Defects like corrosion are seldom considered to be latent defects. These appear over a period of time and should be discovered by due diligence.²⁰²

4.1.11 The “catch-all” exception

- (p) any other cause arising without the actual fault and 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.

Despite the fact that this is a broad exception, it has not been successfully invoked many times. The burden of proof is clearly on the carrier, who must show the cause of the loss or damage, and that there was no negligence on the part of the carrier or anyone for whom he is responsible.²⁰³ It has been held that the paragraph must be read as the “or” in “*or without the fault*” is to be read as “and”.²⁰⁴

The exception has been used in cases of pilferage or theft, but as soon as the carrier, or the agent or servant of him have assisted and thereby contributed to the loss, the exception cannot be invoked.²⁰⁵

4.2 Hamburg

The list of exception as such is not used in the Hamburg Rules, which are drafted using a different technique than the previous conventions. Instead, there are two exceptions from the general rule of liability, and the requirement that the carrier take all reasonable measures to avoid the loss, damage or delay. This is when the loss, damage or delay is due to attempts to save lives or reasonable measures to save property at sea. This exception is found in article 5.6;

The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.

4.2.1 Fire

The fire exception from the Hague and Hague-Visby Rules is kept, with a few modifications to clarify the application. Unlike the Hague and Hague-Visby Rules, under this convention the carrier will be liable for fire even if

²⁰² Carver 1982, 13th ed, p. 382, the first par cited by Lord Atkin in “*The Demitrios*”

²⁰³ Richardson, J. 1998, 4th ed, p. 39

²⁰⁴ Carver 1982, 13th ed, p. 383 f.

²⁰⁵ Tetley, 2008, 4th ed. p. 1234

it is caused by the fault of the servants or agents.²⁰⁶ As with previous conventions the burden of proof is reversed and the claimant must prove fault or neglect on the part of the carrier or his servants or agents.²⁰⁷ This is all clearly set out in article 5.4(a) that states;

The carrier is liable

- (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;

The convention then goes on by making the carrier liable for the loss damage or delay on account of failure to prevent or minimise the loss.

- (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents, in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.

4.3 Rotterdam

It is Article 17 in the new convention that sets out the basis for the liability of the carrier. It begins with two paragraphs aiming to clarify the burden of proof, which will be further explained in the next chapter, and makes the Rotterdam Rules a fault-based regime with a reversed burden of proof.²⁰⁸

The list of exclusions from Hague and Hague-Visby was kept in the Rotterdam Rules, however with some modifications. The reasoning behind this was as mentioned, to preserve the case law developed under the Hague and Hague-Visby regimes. Even though many countries considered the list of exclusions superfluous, it was agreed to keep it to accommodate the needs of both civil and common-law jurisdictions.²⁰⁹ The exclusions are contained in article 17(3) that begins with;

3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

The list can be divided into three kinds of exceptions;

- No fault (a-g)
- Fault on the side of the shipper (h-k)
- Exceptions on account of emergencies (l-o)

²⁰⁶ Tetley, 2008, 4th ed. p. 1030

²⁰⁷ Berlingieri, F. 1994, p. 91 ff.

²⁰⁸ Baatz and others, 2009, p.47

²⁰⁹ UNCITRAL Working group III, 12th session A/CN.9/544 p.38

While some of the exclusions have been kept unaltered, others have been merged, extended or made more narrow. Furthermore, there have also been added a few new paragraphs.

4.3.1 Exclusions kept unaltered

a) Act of God;

This exception is kept in its original form. The deletion of it was discussed in the working group of UNCITRAL, as it was considered unnecessary by many states due to the general liability rule in what was to become article 17.2. It was however kept, as there was a fear that speculation regarding the abolition would result in a wrongful judicial interpretation.²¹⁰ Another argument for deleting this exception was to modernise transport law and have consistency in the logic of the article.²¹¹

The meaning of the article is the same as in previous conventions, for a carrier to avoid liability he and his agents cannot contribute to the loss, damage or delay, and must have been unable to prevent it by any amount of foresight that can reasonably be expected.²¹²

b) Perils, dangers, and accidents of the sea or other navigable waters;

Case law on this exception is still valid, however some of the unclear issues have been solved by the new convention, as the Rotterdam Rules prescribe that where there is a fault by the carrier, or by anyone for whom he is responsible, the exceptions will not apply. In contrast, when using this exception under the Hague and Hague-Visby Rules fault was irrelevant in deciding what constitutes a peril of the sea. The paragraph sets out that the peril must be of the sea, that is, the peril must be a characteristic of the maritime adventure.²¹³ It should also occur after the ship has left the port. It has been defined in English law as an unforeseeable event unavoidable by reasonable persons. From case law it can be seen that this exception covers for example, a collision without negligence of the carrying ship. It has been held to cover pirates, but not unlawful acts of stevedores or crew.²¹⁴

g) Latent defects not discoverable by due diligence;

This article, although kept unaltered, has been considered to have a much wider scope under the new convention. It has been argued that the exception under the Rotterdam Rules will cover not only latent defects in the ship, but other modes of transport within the carrier's period of responsibility as well as containers before shipping and after discharge.²¹⁵ Contradicting this, during the drafting there was a discussion regarding changes to the

²¹⁰ UNCITRAL Working group III, 12th session A/CN.9/544 p.39

²¹¹ UNCITRAL Working group III, 14th session A/CN.9/572 p.13

²¹² Baatz and others, 2009, p.50

²¹³ Cooke, J and others, 2009, 3rd ed. p. 1027

²¹⁴ Baatz and others, 2009, p.50 f.

²¹⁵ *Ibid* p.55 - 56

exception and the suggestions in the draft was either the wording “*Latent defects in the ship...*” alternatively “*Latent defects in the means of transport...*”. The first option was discarded as it was considered being too narrow and not include cranes for example, as the Hague-Visby does. The second option was decided against due to it being too broad, even though the convention was construed to be a “maritime plus” convention.²¹⁶ The decision to keep the exception exactly as it is in the former convention must be interpreted as it should keep its former application and scope.

The deletion of the exclusion was discussed up until the 21st session of the working group on the basis that it would not be fair to put the risk of latent defect of the ship on the cargo owner. On the other hand there was a concern that the deletion of it would impose a substantial increase in the carrier’s liability, and as there was not enough consensus to open it up for another discussion, the exclusion was kept.²¹⁷ The exception can still be considered redundant relating to the duty of due diligence as a latent defect by definition will not be discovered and therefore the carrier is without fault.²¹⁸

- j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

The inherent vice exception was kept unaltered with the motivation that it reflects “*established commercial practice*”.²¹⁹ The exception takes aim at the cargo, as its predecessor, and defence is justified on the same grounds as before. It is the shipper who should know about any inherent characteristics of the goods, and therefore the risk should be on him.²²⁰

Since the new convention has an on-going duty of due diligence, it has been suggested that the nature of this obligation might change as to when there an inherent vice that becomes apparent during the voyage. The carrier can then be obliged to seek advice or take all reasonable measures to limit the damage.²²¹ This should however already be a duty under article 13(1) that concerns care of the cargo and therefore not change the carrier’s duties to a large extent.

4.3.2 Exclusions modified

- c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

This is a merger of articles (e), (k) and (f) in the Hague-Visby Rules as well as an addition of “*armed conflict, piracy, terrorism*”. While discussing the new additions in the working group the question of a precise definition of

²¹⁶ UNCITRAL Working group III, 19th session A/CN.9/621 p. 18

²¹⁷ UNCITRAL Working group III, 21th session A/CN.9/645 p. 16-17

²¹⁸ LMCLQ [2002] Berlingieri, F. part 3, Aug, p. 347

²¹⁹ UNCITRAL Working group III, 14th session A/CN.9/572 p.14

²²⁰ JIML Girvin, S. 2008 Vol 14 p. 527

²²¹ Baatz and others, 2009, p.58

”terrorism” was raised. However, it was decided to be unnecessary as it had been defined in a number of states, and it expressed certain intent.²²²

The merging of the three exceptions from Hague-Visby, and the widening of the scope with the new additions will arguably ensure that it is no longer necessary to clearly categorize an activity and classify it under national law for the exception to apply. The English definition of “riot” is three or more people with a common purpose. With the inclusion of terrorism, this should no longer be the case, even under English law. The new wording will most likely include any criminal act of violence that is not solely for private gain.²²³ However, piracy is an exception to this as it is an act of private gain. It is defined in the Law of the Sea convention as;

... any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;²²⁴

The difference would be that it takes place on the High Seas where or other places where there is no state jurisdiction. Piracy as such defined does not take place on the territorial sea or economic zone of a state. This should however still be included under the exception in article 17(3)(c). Arguably the interpretation of “piracy” in the Rotterdam Rules will be wider than the cited definition in UNCLOS.²²⁵

- d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;

This paragraph is based on two of the exceptions in Hague-Visby, (g) and (h). There is a new wording, and the slightly old-fashioned “*restraint of princes*” has been replaced with “*interference by or impediments created by governments, public authorities*”. Generally, the working group of UNCITRAL agreed on the basic principles of this exception that was that the carrier should not be held liable for an arrest that was not caused by him, his servants or agents. This is clarified in the last part that explicitly states that the event must not be attributable to the carrier or any of the persons in article 18.²²⁶

²²² UNCITRAL Working group III, 12th session A/CN.9/544 p.39

²²³ Baatz and others, 2009, p.51

²²⁴ United Nations Convention on the Law of the Sea, Art.101, emphasis added by author

²²⁵ JIML Girvin, S. 2008 Vol 14 p. 528

²²⁶ Baatz and others, 2009, p.52 - 53

- e) Strikes, lockouts, stoppages, or restraints of labour;

This exception has considered to have been made more narrow than the construction in Hague-Visby, which adds the words “*from whatever cause, whether partial or general;*”. When discussing the possibility to add “for any cause whatsoever”, the working group found this to be too broad, as it did not intend to include situations when the carrier caused or contributed to the strike, by not giving the crew fair working conditions for example.²²⁷ The new wording in this exception does give rise to some uncertainties. Arguably, “whatever cause” would have conflicted with article 17(4) and as the intent was to make the carrier liable when he has caused or contributed to the strike, the new wording was chosen to clarify this. While the corresponding exception in Hague and Hague-Visby would include strikes by crew or stevedores,²²⁸ the new clause does not. The people included under article 18 will contribute to the fault of the carrier, and therefore the carrier will not be able to rely on this exception.²²⁹ The events listed can take place on both sea and land, as before. If the removal of “partial or general” will narrow the application of the exception, or if the wording was redundant and therefore deleted, is hard to say.²³⁰

- f) Fire on the ship;

The new simplified fire exception will not be dependent on fault or privity as in the Hague-Visby Rules. The new wording was a compromise between deleting the exception all together, and keeping it exactly as it was in the Hague and Hague-Visby.²³¹ It will, as all the other exceptions, not be applicable if there is a fault on the side of the carrier or any of those for whom he is responsible according to article 18. The definition of “fire” should however be the same. Therefore, there is still a requirement of an actual flame, heat damage without ignition will not suffice.²³² Since the clause specifically refers to the ship, damages before loading and after discharge appear not to be covered. If this implies that fire in loaded cargo is not fire “on the ship” as such is another question that has been raised.²³³

- h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;

This provision is similar to the wording in Hague-Visby, but has specified categories of people that are defined in this convention. The provision covers incidents where the goods are damaged, lost or delayed because they

²²⁷ UNCITRAL Working group III, 12th session A/CN.9/544 p.39

²²⁸ Cooke, J and others, 2009, 3rd ed. p. 1039

²²⁹ Baatz and others, 2009, p.54

²³⁰ JIML Girvin, S. 2008 Vol 14 p. 528

²³¹ UNCITRAL Working group III, 14th session A/CN.9/572 p.17

²³² JIML Girvin, S. 2008 Vol 14 p. 528

²³³ Baatz and others, 2009, p.55

do not receive the correct treatment due to instructions on this are not received.²³⁴ The provision has not been used successfully under the Hague and Hague-Visby Rules very often, but the new wording will include a wider circle of people and therefore might be used more frequently in the future.²³⁵

- k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;

This is another merge of two exceptions in Hague-Visby, the first one being insufficient packing and the other one insufficient marking. The working group raised the question if this paragraph would not be redundant, as these situations will be covered as an act or omission of the shipper. It was kept as it was considered to clarify that the shipper has the duty of making the goods ready for shipping, this including sufficient packing and marking.²³⁶ The exception covers defective as well as inadequate packaging. If the deficiency is clear and obvious upon inspection this should be noted in the bill of lading and the carrier is obliged to take the best possible care of the goods. Only damage, loss or delay to the goods that is not packed or marked will be covered by the exclusion. Damage to other cargo will not.²³⁷

- l) Saving or attempting to save life at sea;

In the new convention, saving life at sea and saving property has been divided and is now dealt with in two separate provisions. Saving life at sea is an exception that is generally acknowledged. There is no requirement of the acts being reasonable or justified, as the master should not have to make that assessment when time is pressing.²³⁸

Saving life does not only include situations when someone is in mortal danger. Someone seriously injured or ill would suffice for the exception to be applicable.²³⁹ The Salvage Convention²⁴⁰ stipulates a duty to save people in danger, this is however not extended to saving property.

- m) Reasonable measures to save or attempt to save property at sea;

The more debated part of the exception in Hague-Visby is this part regarding saving property. While this used to be under the same conditions as saving life, there has now been added a requirement of reasonableness. As there is a monetary incentive of salvage, the consideration of the risk for cargo damage should be taken into account.²⁴¹ It has been argued that there in the Hague-Visby is underlying requirement of proportionality. There

²³⁴ Baatz and others, 2009, p.55

²³⁵ JIML Girvin, S. 2008 Vol 14 p. 529

²³⁶ UNCITRAL Working group III, 14th session A/CN.9/572 p.14

²³⁷ Baatz and others, 2009, p.58

²³⁸ *Ibid* p.59

²³⁹ Aikens, R. Lord, R. Bools, M. 2006, para 10.243-244

²⁴⁰ International Convention on Salvage, 1989

²⁴¹ Baatz and others, 2009, p.59

would not be justification for saving property of small value when running the risk of large damage to the cargo.²⁴² However, the working group chose to clarify this in the new convention and balance the fact that the carrier might be entitled remuneration on account of the salvage of property, while any damage, loss or delay to the cargo will be excluded from the liability of the carrier.²⁴³ Even though there is a general wish to encourage salvage and assisting vessels in need, this should not be done when it is unlikely that the salvage can be made, and a high risk of damage to cargo. What will constitute reasonable measures will be up to the courts to decide, however it is argued that there should be a higher acceptance when there is a risk of environmental damage.²⁴⁴

4.3.3 New exceptions

- o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.

The articles referred to deals with situations when the carrier exercises his rights to take reasonable actions against cargo if either the goods are a potential danger to life, property or environment, or if there is a general average situation. Under article 15 the carrier can refuse to receive or load the goods, as well as unload, destroy or render the goods harmless as long as the measures taken are reasonable. If the danger needs to be of a physical nature, or if it is enough with a legal danger of confiscation or destruction of other cargo is unclear. The current situation under English law gives the carrier the same right for legally dangerous goods, even though this is not clearly stated in the Hague or Hague-Visby Rules.

The wording in article 15 refers to cargo that "reasonably appear likely to become" an actual danger to persons, property or the environment. Whether or not this will be the subjective opinion or it is necessary that there is an objective actual risk is a question that has not been answered by the convention.²⁴⁵

Article 16 considers general average sacrifices that are made "reasonably made for common safety". This article only gives these rights to protect life or property, however there is no express right in reference to the environment.²⁴⁶

- i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

²⁴² Aikens, R. Lord, R. Bools, M. 2006, para 10.243-244

²⁴³ UNCITRAL Working group III, 13th session A/CN.9/552 p.23, and LMCLQ [2002] Berlingieri, F. part 3, Aug, p. 346

²⁴⁴ Baatz and others, 2009, p.59

²⁴⁵ *Ibid* p. 40-42, 61-62

²⁴⁶ *Ibid* p. 42-43

Article 13.2 gives the carrier and the shipper a possibility to agree that the loading and discharging will be done by the shipper, often through a FIO or FIOS clause. The exception frees the carrier from liability if this type of agreement has been made, provided that it is in fact the shipper, documentary shipper or consignee who performs the task. If the crew, paid by the shipper, is loading, handling or stowing, the carrier cannot avoid liability, as this would be in conflict with article 18.²⁴⁷

- n) Reasonable measures to avoid or attempt to avoid damage to the environment;

This is a new addition, which extends the salvage exceptions. There are several parts of this exception that will need to be interpreted by the courts. What will be defined as "environment" for instance. As there is no limitation in the exception to marine environment, there is a possibility that this will include both land and atmosphere in addition. Furthermore, it should apply before loading and after discharge as there is no timeframe set out in the article.

Under the Salvage Convention, the reward is enhanced if the salvage reduces damages to the environment, although salvage usually needs to be successful for the carrier to collect the remuneration. With environmental damages however, there is compensation to be had even without the attempt having to be effective. There is a requirement of reasonableness, just as there is in regards to saving property. Since the carrier is entitled to remuneration or other compensation under the Salvage Convention article 14 there must be a realistic chance of preventing or limiting the damage to the environment to avoid liability for the cargo damage that can follow.

²⁴⁷ Baatz and others, 2009, p.57

5 The Burden of Proof

The burden of proof varies with to some extent with the jurisdiction to which the case is subject. The focus here is English law, and to the extent it is possible, the differences in other jurisdictions. The reason being that a large number of cases are today subject to English law, and the conventions are drafted with a clear influence from common law countries. The Hague Rules are based on the Harter act, and the Rotterdam Rules are based on the Hague-Visby. As the burden of proof is far from clear, and have been debated ever since the discussions leading up to the Hague Rules, the case law and doctrine on the subject not conclusive. However, the main points of discussion will be presented below.

5.1 The Hague and Hague-Visby Rules

The predominant English view is that the claimant establishes a case by proving loss, damage or delay when the goods were within the carrier's period of responsibility. The carrier must then prove that the loss or damage was due to a cause for which he is not responsible. These are found in article IV(2), IV(4) and IV(6). If the carrier fails in doing so, he will be liable for the loss or damage. Arguably, the carrier needs only to prove the absence of negligence in two scenarios. The first one is when one of the causes is unseaworthiness of the vessel, this lies in the duty of due diligence. The second one is when the carrier invokes the exception in article 4(2)q, the "catch-all" defence that expressly states "... *the burden of proof shall be on the person claiming the benefit of this exception ...*"²⁴⁸ The claimant will have to prove negligence on the part of the carrier or the people for whom he is responsible for to contradict all the other defences used by the carrier. That is the carrier contributed to the exempted peril.²⁴⁹

Article IV(1) of the Hague and Hague-Visby Rules set out the exemption of liability for the carrier if he can prove that he showed due diligence in making the ship seaworthy and refers back to article III(1) and the obligations stated there. It then goes on to the burden of proof and states:

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.²⁵⁰

The burden is upon the claimant to prove that in addition to the fact that the vessel was unseaworthy, that unseaworthiness caused the damage. If the claimant succeeds with this, the carrier then must show that he exercised due diligence, as did the people that he is responsible for. Only if he

²⁴⁸ Gaskell, N, Asariotis, R. Baatz, Y. 2000, p. 281

²⁴⁹ LMCLQ, [2002] Asariotis, R. "Allocation of liability and burden of proof in the Draft Instrument on Transport Law" p. 388

²⁵⁰ Gaskell, N, Asariotis, R. Baatz, Y. 2000, p. 274

manages to do this, he can rely on the exceptions in article IV.²⁵¹ In *The Antigoni* Lord Justice Staughton said about the relation between due diligence and latent defect that:

There is not imposed on the shipowner in law any burden to establish a latent defect if he seeks to rely on art. IV, r. 1. But he will find it much easier to establish due diligence if he can point to the likelihood of a latent defect, and much more difficult if he can suggest none, or only one which is wholly implausible.²⁵²

If the defect is an obvious one, it will be impossible for the shipowner to prove that due diligence was exercised.²⁵³ There have been some differences of opinion as to the burden of proof. While Tetley argues that the burden should be on the party that has access to the fact, usually the carrier, the common view is that the claimant must prove unseaworthiness, and that the loss was attributed to that unseaworthiness.²⁵⁴ This is in line with the ruling in *the Farrandoc*²⁵⁵ where the proper order of proof was according to Mr Justice Noel that;

- The claimant proves loss or damage during the period of responsibility of the carrier
- The carrier proves the cause of the loss
- The carrier proves that the loss falls under one of the exonerations in IV(2)
- The claimant proves unseaworthiness
- The carrier proves that he fulfilled his duty of due diligence before and at the beginning of the voyage.

In *Maxine Footwear*²⁵⁶ and *the Fiona*²⁵⁷ the order of proof is tied to the overriding obligation of due diligence to make the ship seaworthy. Therefore the carrier must show due diligence before invoking any of the exonerations. This is the general standpoint in the commonwealth countries.²⁵⁸ Tetley's order of proof on the other hand, goes;

- The claimant proves loss or damage during the period of responsibility of the carrier
- The carrier proves the cause of the loss
- The carrier proves due diligence to make the ship seaworthy before and at the beginning of the voyage in connection with the loss
- The carrier proves that the loss falls under one of the exonerations to exculpate himself
- The claimant proves, if possible, lack of care of the cargo.

²⁵¹ *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd* [2002] 1 Lloyd's Rep. 719

²⁵² *The Antigoni* [1991] 1 Lloyd's Rep. 209

²⁵³ Carver, 1982, 13th ed, p. 356

²⁵⁴ Wilson, J. 2008 6th ed, p. 187 ff.

²⁵⁵ *Robin Hood Flour Mills Ltd. v. N.M. Paterson & Sons* Lloyd's Law Reports , [1967] 2 Lloyd's Rep. 276

²⁵⁶ *Maxine Footwear v. Can. Gov't Merchant Marine* [1959] 2 Lloyd's Rep. 105

²⁵⁷ *Mediterranean Freight Services Ltd. v. B.P. Oil International Ltd* [1994] 2 Lloyd's Rep. 506

²⁵⁸ Tetley, 2008, 4th ed. p. 882 ff.

The Nordic countries have taken the approach of liability for negligence with a reversed burden of proof. This means that the carrier is presumed to be liable for the damage if he cannot prove that he was not negligent. In practice that is done in the following order;

- The cargo owner needs to prove loss or damage while the goods were in the possession of the carrier. This is done by showing a clean bill of lading, and damaged goods on delivery.
- The carrier has to exculpate himself. In practice, this is done by showing how the damage or loss occurred, and thus showing the court that there was no fault on account of him, or anyone for whom he is responsible.

This approach is motivated by the same arguments that Tetley use. The carrier should prove the circumstances as he was in possession of the goods and is the one with access to the evidence as well as the information. There are exceptions in Norwegian law that are made clear in the preparatory works of the law that incorporated the Hague Rules. When the ship has completely vanished, and the carrier has shown seaworthiness at the commencement of the voyage, the carrier should not be made liable. It is worth mentioning that the Nordic countries have ratified Hague, and Hague-Visby and incorporated the Hamburg Rules to the extent they do not conflict with the previous conventions.²⁵⁹

5.1.1 Concurring causes

When there are several causes of the damage or loss, one of which is a breach to article III(2), the burden to prove what can be attributed to an excepted peril is upon the carrier, and if this fails, he will be liable for all of it. If the cargo owner is claiming negligence on the side of the carrier, it is up to the cargo owner to show how much damage was caused by that negligence.²⁶⁰

If the damage is partially due to an excepted peril, and partially on account of a breach against III(2), according to the Vallescura rule the carrier must prove the part attributed to the excepted peril, otherwise be liable for the whole loss. This was, as previously mentioned, held by the US Supreme court in the case of *Schnell v. Vallescura* the year of 1934.²⁶¹ This does however not apply to the carrier liability under III(1) as due diligence in making the vessel seaworthy is an overriding obligation and will prevent the carrier from claiming the exclusions under IV(2).²⁶² In cases where the loss is impossible to explain, the carrier will generally be liable for the whole loss.²⁶³

²⁵⁹ Falkanger, T. Bull, H. J. 2010, 7th ed. "*Sjørett*" p. 263 ff.

²⁶⁰ Aikens, R. Lord, R. Bools, M. 2006, para 10.157

²⁶¹ Rotterdam colloquium, Hai Li, H. Yuzhou, S. "*The New Structure of the Basis of Liability for the Carrier*" p. 12

²⁶² Tetley, 2008, 4th ed. p. 315 ff.

²⁶³ LMCLQ, [2002] Asariotis, R. p. 387

5.2 The Hamburg Rules

Under the Hamburg Rules the claimant must prove, like in the Hague and Hague-Visby Rules, that the damage or loss was incurred while the cargo was in the custody of the carrier. If the damage should be visible upon inspection, a clean bill of lading and the show of damage upon delivery will be enough to establish a *prima facie* case. Once this is achieved, the carrier then must show that on the balance of probability the proximate cause of the loss was such that the carrier is exempted from liability under Article 5.1. Some differences in relation to fire and live animals are made.²⁶⁴ It follows that for the carrier to prove that all measures reasonably required to avoid the occurrence, needs to prove what the actual occurrence was. When that fact is unknown, it is difficult for the carrier to discharge the burden of proof and avoid liability.²⁶⁵

The burden of proof is addressed not in the convention itself but as a “*Common understanding adopted by the United Nations Conference on the Carriage of Goods by Sea*”. This is located after the text of the convention with the intent to clarify the carrier obligation. It states;

It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

Modification as described above has been done in the fire exception. The claimant has the burden of proving that the fire arose from fault or neglect of the carrier or for those whom he is responsible.²⁶⁶

5.3 Concurring causes

The Hamburg Rules, unlike previously mentioned conventions, explicitly regulate concurring causes. The Vallescura rule is codified in article 5.7, which states:

Where fault or neglect on the part of the carrier, his servants or agents combines with another cause to produce loss, damage or delay in delivery the carrier is liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of the loss, damage or delay in delivery not attributable thereto.

The article assigns the carrier the burden of proving that he, or any of the persons he is responsible, has not caused the loss or damage through their

²⁶⁴ JMLC Nicoll C.C. [1993] Vol 24, No 1 p. 167 f.f

²⁶⁵ Berlingieri, F. 1994, p. 92

²⁶⁶ JMLC Goldie, C. W. H. “*Effect of the Hamburg Rules on shipowners’ liability insurance*” [1993] Vol 24, No 1 p. 114

negligence. If the negligence was casual, or if the evidence presented to exonerate the carrier from liability are not sufficient, the carrier will be liable for the whole loss.²⁶⁷

5.4 The Rotterdam Rules

When discussing the allocation of liability in the working group the burden of proof was proposed to be amended to make sure that the abolition of the exception of error in navigation and management and the extended obligation of seaworthiness would not shift and become a too great of a burden for the carrier. The burden of proof was to be looked at as a whole, in the context of the carriers extended liability in mind.²⁶⁸

The Rotterdam Rules have, unlike the Hague, Hague-Visby and Hamburg Rules, explicitly set out the burden of proof and how it shifts. It is said to not have changed significantly in comparison to the Hague-Visby Rules, it merely codifies what has been established through case law and doctrine. The shifting of the burden of proof is largely a codification of how it works under the US COGSA.²⁶⁹ The Australian government was of a different opinion and when commenting the new Rotterdam Rules they predicted that since they are so different from the international law at present, the cost of litigation to clarify the regime will be costly and the risk is that there will be national discrepancies.²⁷⁰

In the new regime, the burden of proof is divided into different stages.²⁷¹

- As an initial step the claimant must firstly prove a loss, damage or delay, and secondly that this loss, damage or delay occurred while the goods were within the carrier's period of responsibility. This is found in article 17(1) that states;

...if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility...

This can be done by showing a clean bill of lading that will give *prima facie* evidence that the goods were in apparent good order at delivery.²⁷² The claimant has the option of proving that a causative event took place during the carrier's period of responsibility. For instance, that the cargo became wet while in the carrier's time, and subsequently got rust damage.²⁷³

²⁶⁷ LMCLQ, [2002] Asariotis, R. p. 387 ff.

²⁶⁸ UNCITRAL Working group III, 12th session A/CN.9/544 p. 28 f.

²⁶⁹ 44 TXILJ 427, Sturley, M. "Modernizing and reforming U.S Maritime law: The impact of the Rotterdam Rules in the United States", 2009, p. 9

²⁷⁰ Rares, S., "The onus of proof in a cargo claim – articles III and IV of the Hague-Visby Rules and the UNCITRAL Draft Convention" 2008, p. 23

²⁷¹ CMI website, Berlingieri, F. and others "The Rotterdam Rules, an attempt to clarify certain concerns that have emerged" Aug, 2009, p. 8

²⁷² CMI Yearbook 2007-2008 Berlingieri, F. "Carrier's obligations and liabilities" p. 282

²⁷³ Baatz and others, 2009, p. 47

This proof would entail a presumption of liability that in a general principal in contract law. It is codified in the Hamburg Rules article 5(1) and to a large extent interpreted into the Hague, and Hague-Visby Rules.²⁷⁴

- When the claimant has proven the above, to defeat the presumption of fault the carrier must prove one of two things. The first option being that there was no fault on account of him or any of the persons for whom he is responsible according to article 18. This is found in 17(2) that reads;

The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault

How this article will be interpreted by the courts it not completely clear. Some doubts have been expressed in reference to the wording of "*the cause or one of the causes*". It has been argued that the carrier will not have to prove that the fault of him or the persons he is responsible for did not cause or contribute to the loss, only that "*the cause or one of the causes*" was not due to the fault of the carrier or the people he is responsible for.²⁷⁵ The issue was addressed in the working group were concerns where that the carrier would be relieved of all or part of the liability by proving that incidental or irrelevant cause was not due to the fault of him or those for whom he is responsible. The response in the working group was that the courts was entrusted to be interpreting this paragraph, and it was up to them to decide what causes was legally significant.²⁷⁶

- Alternatively, the carrier can be relived of liability if he proves that one of the excepted perils caused or contributed to the loss, damage or delay. However, these excepted perils are not exonerations, but situations that presume absence of fault.²⁷⁷

The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay

The wording implies that the cause needs not to be dominant, only substantial. Furthermore, it does not specify when the carrier will be relived of only part of the liability.²⁷⁸ In a case of contributing causes this could be argued to have the effect that the carrier will be relieved of part of his

²⁷⁴ CMI website, Berlingieri, F. and others Aug, 2009, p. 8

²⁷⁵ LMCLQ [2008] 135 Diamond, A. p. 471 ff.

²⁷⁶ UNCITRAL Working group III, 21st session A/CN.9/572 p.11

²⁷⁷ CMI Yearbook 2007/08 Berlingieri, F. p. 282 ff.

²⁷⁸ LMCLQ [2008] 135 Diamond, A. p. 471 ff.

liability even though he cannot prove the extent of the cause that was not due to his or his servants' fault.²⁷⁹

The burden of proof then shifts over to the claimant again. This time the claimant has three different approaches to impose liability on the carrier.

- As a first option, the claimant can prove that "... *the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies*". This is set out in article 17(4)(a) and would effectively reverse the presumption of absence of fault in the excepted peril. If the claimant is successful in proving this, the carrier has no further defence and will be liable for all or part of the loss, damage or delay.²⁸⁰
- The second option would be to defeat the presumption by proving that an event that is not an excepted peril caused or contributed. This is stated in article 17(4)(b) that says;

Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay: (...)

b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay.

- The last option is found in 17(5)(a) and makes the carrier liable for all or part of the loss if the claimant makes it probable that the loss, damage or delay was caused or contributed by the unseaworthiness of the vessel. The article refers to the three specific obligations in article 14(a – c). The wording in 17(5)(a) is; "*claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by...*". The purpose of including the word "probably" was to mitigate the burden of proof for the claimant, and emphasise that it is on the balance of probabilities that the claimant needs to prove unseaworthiness.²⁸¹ This is however the normal burden for a civil process in common law countries.²⁸²

While The Hague and Hague-Visby rules set out the obligation of seaworthiness in a negative definition, so that the carrier was not liable unless want of due diligence, the new regime inverts this. Under the Rotterdam Rules, the carrier is liable if the claimant makes it probable that the loss, damage or delay was caused or contributed by the unseaworthiness.²⁸³ Arguments that the claimant should not be the one to prove unseaworthiness when the carrier is the party that have access to the relevant information has been heard several times. The words "make probable" were inserted in the article to make sure that the burden on the shipper was not too heavy. Furthermore, Berlingieri and others replied to this

²⁷⁹ JIML Asariotis, R. "*Burden of proof and allocation of liability for loss*" 2008 Vol 14, p. 543 ff.

²⁸⁰ CMI Yearbook 2007/08 Berlingieri, F. p. 282 ff.

²⁸¹ CMI website, Berlingieri, F. and others Aug, 2009, p. 8

²⁸² LMCLQ [2008] 135 Diamond, A. p. 476-477

²⁸³ Rares, S. 2008, p. 25 ff.

argument by pointing out that the carrier must first prove absence of fault, after which the shipper must rebut this absence of fault by making unseaworthiness probable.²⁸⁴

When the claimant can prove one of the two last options above, the burden shift over to the carrier again.

- As a response to the second option, the carrier can respond by proving that the additional event that caused or contributed to the loss, damage or delay was not a result of the fault of the carrier or any person for whom he is responsible. This can be found in the last part of article 17(4)(b) that ends "*and the carrier cannot prove that this event or circumstance is not attributable to its fault*".²⁸⁵
- The carrier can respond to the third option by proving that the ship was seaworthy, or at least that he has showed due diligence in making it so. This is clearly stated in 17(5)(b) that imposes liability on the carrier if he cannot prove that "*none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay*" or that the carrier "*complied with its obligation to exercise due diligence pursuant to article 14.*"²⁸⁶

5.4.1 Concurring causes

There is nothing in article 17(4) and 17(6) that suggests that the carrier needs to prove the extent of the loss, damage or delay that is attributed to the exempted event or that due to his or his servants' fault to only be partially liable for.²⁸⁷ Article 17(6) deals with concurring causes and states;

When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

The article does not clarify how the division of liability should be made, and when discussed in the working group, it was agreed that this should be left up to the courts to decide based upon causation. The intent of the paragraph was to apply where an event that the carrier was not responsible for combines with an event, for example unseaworthiness, or any other cause for which the carrier is responsible.²⁸⁸

In the Hague-Visby Rules the carrier would be liable if the unseaworthiness was a necessary contributory factor, and can only be exculpated from part of the liability if he can show that an excepted peril

²⁸⁴ Berlingieri, F. Delebecque, P. Fujita, T. Illescas, R. Sturley, M. van der Ziel, G. von Ziegler, A. and Zunarelli, S. CMI website, *The Rotterdam Rules – An attempt to clarify certain concerns that have emerged*

²⁸⁵ JIML Asariotis, R. 2008 Vol 14, p. 545

²⁸⁶ *Ibid* p. 546

²⁸⁷ JIML Asariotis, R. 2008 Vol 14, p. 543 ff.

²⁸⁸ UNCITRAL Working group III, 21st session A/CN.9/572 p.19

caused part of the loss or damage, and to what extent. In reality it is hard to find proof of this and usually the carrier will be liable in full.²⁸⁹

One theory of the application of article 17(5) is that when unseaworthiness was the sole cause of the loss, damage or delay, the carrier will be liable in full. When it is only part of the cause, and thus only contributed to the loss, the carrier will only be partly liable. It is the claimant who needs to prove unseaworthiness as A cause, or THE cause, and the proportion of the liability will be up to the court to decide. If this is so, the carrier will only partly liable for a claim to a much higher degree than before.²⁹⁰

The Vallescura rule that was adopted during the Hague Rules, and subsequently incorporated under the Hamburg Rules article 5.7, was considered when discussing the Rotterdam Rules within the UNCITRAL. It was acknowledged that by making the due diligence obligation an ongoing one, the allocation of risk had been affected and the burden on the carrier had been increased. Therefore, the final form of article 17(6) in the new convention provides that the carrier is only liable for the part of the loss, damage or delay that is attributable to the event. The burden of proving the extent of the loss, damage or delay caused by that event is no longer solely on the carrier, thus relieving him from a burden of proof that historically been hard to discharge.²⁹¹

In his article about the new regime, Mr Diamond raised the question whether the courts should decide causation and allocation of partial liability based on national law or convention principles. The former option being supported by the working group of UNCITRAL by referring to national law in their discussion during the 19th session.²⁹²

²⁸⁹ JIML Asariotis, R. 2008 Vol 14, p. 543 ff.

²⁹⁰ *Ibid* p. 546 - 547

²⁹¹ Rotterdam colloquium, Hai Li, H. Yuzhou, S." p. 13

²⁹² LMCLQ [2008] 135 Diamond, A. p. 478

6 Analysis – What will change?

6.1 Care of the cargo

The obligation to care for the cargo will in many ways be the same under the Rotterdam Rules as in the Hague and Hague-Visby. The new obligations of receiving and delivering the goods will broaden the scope of the duty in line with the fact that the whole convention has been made wider due to the new door-to-door scope. On the other hand, the possibility to contract out of some of the duties has been clarified by the second part of article 13, which gives the carrier the possibility to avoid liability if the shipper is in fact handling the cargo when they are damaged. This is reinforced by an exception in article 17(3)(i)²⁹³. The obligation is still to “properly and carefully” care for the goods and with the new ongoing duty to keep the vessel seaworthy and therefore cargoworthy, a distinction between care for the cargo and care for the vessel need not be made anymore.

6.2 Seaworthiness and due diligence

Care of the cargo is an obligation to “properly and carefully” perform what the relevant article²⁹⁴ sets out, while the seaworthiness obligation is one of due diligence. It has been held that these two obligations under the Hague and Hague-Visby Rules amount to the same obligation.²⁹⁵ The difference lies in the overriding nature of due diligence to make the ship seaworthy, which will not be kept in the new convention. With the changes in the Rotterdam Rules these two obligations will be parallel to a larger extent. This in the sense that they will coexist throughout the voyage, even though due diligence still begins when the vessel comes within the carriers orbit, and the care of cargo only begins when the goods are received by the carrier, if nothing else is agreed by contract. The new convention extends the obligation of due diligence to make and keep the ship seaworthy to apply not only before and at the beginning of the voyage, but to be a continuing duty throughout the voyage. As previously mentioned, many of the arguments for a time-restricted duty are not valid anymore. The most “popular” argument was that the increased obligation would raise the carrier’s costs and this would have an effect on the freight rates.²⁹⁶ As pointed out during the discussions in UNCITRAL, there are other international regulations that impose requirements on the carrier to keep the ship in an acceptable state during the whole voyage. In addition, the care of

²⁹³ *Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;*

²⁹⁴ Hague-Visby Art. III(2), Rotterdam Rules Art. 13

²⁹⁵ Cooke, J and others, 2009, 3rd ed. p. 975

²⁹⁶ UNCITRAL Working group III, 9th session A/CN.9/510

the cargo is an ongoing obligation under the former conventions as well as in the Rotterdam Rules. Therefore, the carrier have an obligation to care for the cargo throughout the voyage under present regimes, as well as duties under the ISM code²⁹⁷ which is mandatory for all states that are parties to SOLAS; that is 98% of the world's merchant tonnage.²⁹⁸ The ISM code together with the other IMO conventions already influences what is considered to be seaworthiness and due diligence. The ISM code will not be decisive in the matter of if the vessel will be considered seaworthy or not, and it does not directly address the matter of seaworthiness and due diligence. However, the ISM code sets a standard for the operations of a vessel, and is aimed at those responsible for these operations, like the owners, ship managers and bareboat charterers. If there is a lack of compliance with the ISM code, this can have an effect on the matter of due diligence and if it is considered seaworthy.²⁹⁹ Furthermore, the obligations under the ISM code are delegable, while due diligence is not.

The changes imposed by the new regime will be in relation to the current national interpretation of the applicable convention. In the Nordic countries, the on-going duty of due diligence to keep the ship seaworthy is not very different to the current applications of the Hague-Visby Rules. In a case where the ship becomes unseaworthy during transit e.g. due to engine failure, the carrier must take reasonable measures to get it repaired, or risk being liable for damage, loss or delay due to fault or negligence under the main rule.³⁰⁰ There is a new element that is left up to the courts to decide, and that is what will be required by the carrier if the ship becomes unseaworthy during transit, and what will be considered diligent behaviour in these situations. It has previously been examined what is required from the carrier at present, in terms of due diligence before and at the beginning of the voyage. It is the standards of a prudent shipowner that is the point of reference. The same should be applicable when it is due diligence in keeping the ship seaworthy. How would a prudent shipowner act if the vessel becomes unseaworthy under the voyage? The national interpretations by the courts will be decisive in how much greater the burden will be for the carrier. In this evaluation, there should be room for commercial considerations to decide what a reasonable action is in the specific case. Especially since the carrier must balance this duty with the obligation to deliver the cargo without delay. The on-going obligation of due diligence will however become more noticeable when combined with the abolition of the exemption "fault in navigation or management". The extended time for due diligence will be combined with the deletion of one of the commonly used exonerations of liability. One of the few that actually excuses the carrier for fault and neglect of the people for whom he is responsible. The new obligation of due diligence in keeping the vessel seaworthy will in the end be another task for the crew. The monitoring and maintenance during the voyage, not only to keep the cargo in a good condition, but the vessel itself, will be all the more important. The main reason why due diligence

²⁹⁷ International Safety Management Code

²⁹⁸ Tetley, 2008, 4th ed. p. 938-939

²⁹⁹ *Ibid* p. 238 ff.

³⁰⁰ Bull, H. J. and Falkanger, T. "*Innføring i Sjørett*", 2004, 4th ed, p. 249-254

and seaworthiness should not be extended to the whole voyage, was the increase in freight rates, caused by a higher insurance premium for the P&I cover due to the extended nature of the carrier's liability. One way of reasoning would be that if the P&I insurance for the carrier becomes more expensive, and therefore the freight rates are increased, the insurance for the cargo owner should be lowered due to the relative decrease in risk that is being transferred to the carrier. Therefore, the money cargo owner would spend on insurance, now will be included in the increased freight rate. In the end, the change will be which insurance company will benefit from the change in liability. Since the P&I clubs work on a mutual basis, while regular insurance have a profit interest, the logical conclusion would be that the overall cost would actually be lowered. Naturally, the cargo insurers will be the ones losing business and therefore some resistance against the new regime can be expected. Furthermore, this is all depending on the state of the market and the question if it can hold the increased rates from the carrier. If it can, the cost will end up on the cargo owner where it will be evened out, as the cargo owner should just have a redistribution of the same costs. However, if the market cannot hold the increase in freight rates, the cost will stay with the carrier who will be lose on the redistribution, while the cargo owner then would benefit.

6.3 The list of exclusions

The list of exclusions has, as previously mentioned, been kept as it was in Hague and Hague-Visby, but in a modernised form. Whether or not this is reasonable is up for discussion. According to Aikens the list of exclusions “*owes nothing to logic or underlying legal principle and everything to historical precedent*”.³⁰¹ There have been the same discussions regarding the Hague and Hague-Visby and the list of exclusions in those conventions has also been held to be unnecessary as the “catch-all” exception in (q) would actually suffice to exclude all the scenarios when the carrier, his servants or agents are not at fault.³⁰² Arguably, the attempt to simplify the approach in the Hamburg Rules failed, and it was with this failure fresh in mind that the negotiations of the new convention took place. While some countries argued it was redundant, some of the common law countries that are among the traditional maritime nations held the list to be necessary to keep their base of jurisprudence. It is clear that the focus with the conventions is to harmonise and unify, not necessarily to simplify. In addition, if countries like the US chose not to ratify, the success-rate of the convention is seriously diminished. Therefore, the list was kept and rightfully so, for even though the Hamburg Rules might have been a fine drafted piece of convention, it will not be doing any good if not applicable in more states than it is at the moment. By no means was the list of exclusions decisive in the failure of the Hamburg Rules, but arguably the working group will take all precautions to improve the odds of ratification by the traditional maritime nations.

³⁰¹ Aikens, R. Lord, R. Bools, M. 2006, para 10.199

³⁰² Gaskell, N and others, 2000, p. 280

Error in navigation and management

The abolishment of error in navigation or management was discussed when drafting the Hamburg Rules, as it was when drafting the new Rotterdam Rules. In neither there was found enough reasons to keep the provision. When deleting the exclusion of error in navigation or management, the carrier will be liable for all faults made by those mentioned in article 18 of the Rotterdam Rules. Collisions and grounding are scenarios usually caused by human error, and excluded under this exception. This will be a noticeable change for the carrier. In combination with ongoing due diligence to make the ship seaworthy, it will open up for liability for all cases of fault or negligence by the crew. Arguably, the consequences of the changes in the new convention will therefore be that the standard of the crew and the routines on-board the vessel should be higher. In combination with the ongoing duty to keep the ship seaworthy, which in practice will be performed by the crew, the deletion of this exception will increase the importance of getting well-educated, competent people to work on the vessels. The tools are already in place by the IMO and ILO conventions and guidelines. One can only hope that the pressure and incentive to follow them will rise and the benefit to invest in the crew will become clearer. Accidents caused by tired or drunken crewmembers will no longer be excepted from the carrier's liability, and a positive effect might be prohibiting alcohol and making sure that people are well rested might have a higher ranking on the carriers list of priorities.

The deletion of the error in navigation and management is a change most likely noticeable when discussing settlements, as an argument on the side of the carrier is lost. However, the impact should not be such as it will have a great effect on insurance premiums.

Other changes in the list of exclusions

The most important change when it comes to the list of exclusions is not something in the list itself. It is the fact that the exemptions are no longer subject to an overriding obligation of due diligence, and that it is all dependant on the fact that there was no fault on the side of the carrier or the people he is responsible for. The basis of liability is largely the same as the provision in the Hamburg Rules³⁰³, but drafted in a way that the case law and established interpretations of the Hague and Hague-Visby conventions can be kept.

Piracy and terrorism are both exceptions of our time, in a way that they are very much on the agenda at the moment, both by the number of incidents regarding piracy, and the counter acts made, like the ISPS code³⁰⁴ as a reaction to terrorism. However, both have been interpreted into the exclusions of the Hague and Hague-Visby Rules, and will most likely not have a noticeable effect in application compared to the old regimes.

³⁰³ Hamburg Rules Art 5.1

³⁰⁴ The International Ship and Port Facility Security Code

Fire has been made into an exception that, like the others, is dependent on absence of fault. While before, as long as due diligence was exercised, fire was excepted if not for the “fault or privity” of the carrier, now it is extended to the fault of all of whom the carrier is responsible. A slight expansion in line with the rest of the convention. Now, instead of proving the fault or privity of the carrier, the claimant only has to prove that the fault of the carrier or persons referred to in article 18, caused or contributed to the loss. This is a burden less heavy than the in the former conventions. The extended scope of the exception is something that might have an effect in the settlement discussions, but not something that will tip the scale enough for an change in the insurance premiums.

The expanded version of “**Act or omissions of the shipper...**” will make the exception apply according to article 34 to “*any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations...*”. The changes to the exception will most likely work as a clarification more than anything, and even though the situation when this can be used should fall within the main rule of absence of fault, the exception as kept will make old case law useful since the wording is close to the corresponding paragraph in Hague and Hague-Visby. This should be the main reason for the next exception kept as well, which is **fault in marking and packing**. It is obvious that this could be included under acts or omissions of the shipper, but the aim was to keep the predictability of the conventions and therefore many of the exceptions and clarifications seem redundant.

The new separation of **saving life at sea**, and **saving property** if this can be considered reasonable, makes the considerations that should be taken into account by the court more clear. Even though there has been a reasonableness element interpreted into the provision under the Hague and Hague-Visby Rules, this is now codified as it was in the Hamburg Rules, but even further enhanced by the separation of the exceptions. The corresponding provision for **avoiding damage to the environment** shows the modernisation that was the aim when drafting the new convention. Although this element has been taken into account by the courts under the Hague and Hague-Visby Rules, it will now be an exception of its own and serve as a complement to the relevant provision in the Salvage Convention. In many situations, it can be hard to distinguish between saving property and avoiding damage to the environment. By having the same reasonableness standard and making the exceptions overlap, there is less need for making the distinction between the two exceptions. However, saving property appears to be a reaction to a situation, avoiding damage to the environment can be interpreted as a reference to an earlier stage of the process. This is a new exception and apart from defining what will be included under “environment” the courts will have to decide at what stage of the damage this exception can be used. Whether “avoiding” can be actions taken long before the actual damage would have occurred, or if it only applies in salvage situations when the damage is imminent. There is room for quite considerable variations in how this provision can be applied, and some litigation will be necessary to clarify it. The Salvage Convention and

the considerations taken to the environment in other IMO conventions should however be useful as guidelines for the interests taken into consideration when defining the word “environment”. The exception has given way for the existing regulatory conventions be taken into consideration as well as the private law issues under the contract.

The exception in 17(3)(i) for when **the shipper has agreed to take on some of the carriers obligations** according to **article 13.2** refers to FIO and FIOS clauses, and just reinforces the fact that the carrier should not be liable when the shipper is the one who performs the obligations. This is yet again an exception that can be considered superfluous, as it is not the fault of the carrier and the right to make this kind of contracts are stipulated in article 13.2. Since there is no historical reason for keeping this exception either, as it is new, one can assume it is due to the manner in how the convention is drafted, and to keep the consistency as well as the clarity, there is a specific exclusion. However, since the presumption will be that there is no fault, the carrier only has to prove that there is a clause according to 13.2, instead of proving the absence of fault, which might be harder to do.

6.4 The burden of proof

The codification of the burden of proof in the new convention follows the current general practice in many states. In the US for example, the COGSA is to a large extent the same as the new Rotterdam Rules, with the exception that the Vallescura rule³⁰⁵ was left out of the new convention.³⁰⁶ How big the change will be depends on how the courts have interpreted the Rules in the old conventions. One can only assume that this is why the new convention explicitly states who needs to prove what, and when. There have been arguments from Australia among other states, that the new burden of proof is complicated and imposes a significant change compared to current international law. Many others believe that the new convention simply codifies current practice.

The discussion around seaworthiness and due diligence will be taken into account as one of the last thing. This enhances the fact that seaworthiness is no longer an overriding obligation. If the vessel is or becomes unseaworthy, and the carrier does not do what is reasonable to prevent or correct the lack of seaworthiness, the carrier will be liable but only to the extent that the seaworthiness actually caused the loss, damage or delay. Deciding on the proportions of the loss due to the unseaworthiness will be left up to the courts to decide. The wording throughout these provisions refer to “all or part” of the liability, “one or more” of the event that “caused or contributed”. The working group made it clear that deciding on how to evaluate the concurring causes and partial liability will be up to the national courts. This will open up for national discrepancies in this area, but it will give the carrier the possibility to only make it probable that at least part of the loss, damage or delay was not due to something that is within his

³⁰⁵ For an explanation of the Vallescura rule, see p. 51

³⁰⁶ 44 TXILJ 427, Sturley, M, “*Modernizing and reforming U.S Maritime law: The impact of the Rotterdam Rules in the United States*” p. 9

liability. As this area has been made a great deal wider by the new convention, one can only assume that something to balance the new extended obligations was needed.

Burden of proof and concurring causes

This is one of the major changes to the carrier liability and the possible effects this can have to the overall balance between shipper and carrier should not be underestimated. Especially at the negotiating stage before arbitration or court proceedings, there should be an increased interest in settling from both parties. If there is a greater number of cases where legal responsibility ends up on both parties, together with the costs, this will make parties more prone to settle the matter as there will be less to gain by starting an expensive litigation. The defence of error in navigation or management was broad enough to encourage the cargo owner to settle as this exception was applicable in many situations. As it is now deleted, the burden of proof for concurrent causes has been adjusted to work the same way and encourage both parties to settle. At the moment, when the burden of proving how much of the loss was due to the concurring causes or being liable for all of it, the burden on the carrier is almost impossible to discharge. The new convention will change this and the carrier should be the one who benefits from the new Rules as the courts now decide to what extent the causes contributed and how big the part of the loss this corresponds to is.

6.5 What has been left up to the courts?

The courts will have to interpret the convention in regards to several issues. As mentioned the reasonable actions the carrier will have to take to keep the ship seaworthy during the voyage will be left up to the courts to decide. However, these should reasonably follow the standards set for due diligence to make the ship seaworthy before the voyage, and like this obligation be decided on a case-to-case basis in the light of reasonableness. A bigger issue will be that of apportionment of the fault when the loss, damage or delay is caused by several different factors. With the Vallescura rule out of the picture, extensive litigation will be needed on this area to create some sort of predictability and outlines of how the courts should divide this burden. How will concurring causes be divided between the parties, and how what level of proof will be needed to show that it was more than one cause. How proximate must the cause be to be considered relevant? These are all questions that need to be answered by the courts. Consequently, the courts are receiving clearer directives when it comes to the burden of proof but they are getting more freedom in deciding how to apportion partial liability. While the new convention restricts the national interpretations on one side, it opens up for national interpretations of new areas on the other. Some of the new exception will also need to be clarified by the courts, like the new exception of reasonable acts to avoid damage to environment. When words like “reasonable” are used in a new context, there will always be a need for some clarifications by the courts to set the standard of what is reasonable.

Unfortunately, the standard can then be set on different levels depending on the state. However, with other regulations and guidelines from international organisations like the IMO, the minimum standards are already set in many areas, and therefore harmonised application of the new Rules is easier to achieve. During the negotiations where the error in navigation or management was decided to be deleted, and due diligence was made ongoing, the working group agreed to make sure the overall balance did not shift too much to the side of the carrier. The widened time the vessel needs to be seaworthy, and the loss of one of the commonly used exceptions will tip the scale on the side of the shipper. The loss of the Vallescura rule together with the new burden of proof that allows the courts to decide on the division of the fault will weigh the scale on the side of the carrier. One can argue that the shift is that to the benefit of the cargo owner, but that it should not be big enough to be noticeable on insurance premiums. However, the overall effect is not possible to evaluate without looking at all the other provisions in the new convention, which is not manageable within the scope of this thesis.

7 Conclusions

The working group of UNCITRAL pointed out in their discussions leading up to the Rotterdam Rules that the balance between the carrier and the shipper cannot be seen in the specific obligations or paragraphs included, excluded or modified in the new convention. One must look to the bigger picture to see how the changes made the balance shift back and forth. The ongoing duty of due diligence must be seen in the light of the modified burden of proof and that the seaworthiness obligation which is no longer an overriding one. When deleting the nautical fault exemption, which many thought was long overdue, one must look at the reason for which it existed to begin with and consider if this is still an exoneration that is justified. What can be seen from the lack of ratifications of the Hamburg Rules, is that changes need to be made gradually and it is crucial to keep as much predictability as possible. Even if the Hamburg Rules would have been accepted by the majority of the shipping nations and the outcome of many cases would be the same under Hague, Hague-Visby and Hamburg, the uncertainty would cost a lot of money in litigation expenses to establish this fact.

With the new obligation, the distinction what is the commencement of the voyage needs not to be done. The care of the cargo and the cargoworthiness will not need to be separated, and due to the exception of fault in navigation or management is deleted, the care of the vessel and the care of the cargo will not need to be further defined. These two new circumstances in combination, the deletion of fault in navigation or management and the ongoing due diligence, will give the impression that the carrier's liability will be greatly expanded. It is however important to keep in mind where it started. The Harter Act and the Hague Rules are from a time when the carrier had the upper hand in the negotiation, and these regulations cannot be seen as the point of balance, they must be seen as a reflection of what was the middle ground at that time. They can hardly be considered equal terms. When the balance of power shifts, so does the compromises made. What is reasonable now is not what was reasonable when the Hague Rules were negotiated. There is a good reason for keeping many of the articles and the general wording of the old convention, especially for the common law countries where the case law is vital. To build up the same amount of jurisprudence as there currently is under the Hague and Hague-Visby Rules would be both time-consuming and expensive. It would create an uncertainty that no one would benefit from. With that said, it is still not sufficient reason to keep provisions and apportionments of liability that clearly cannot be justified in present time.

There has been a focus on human error in maritime accidents the last decade or so, and this will reinforce this standpoint made by the IMO and the ILO. Several new codes and conventions are in place since the Hague Rules entered into force, and reasonably, the increased liability is a natural

step. The STCW³⁰⁷, ISM code, ISPS, SOLAS³⁰⁸, the Load lines convention and MARPOL³⁰⁹ have all developed in this direction, and there is no reason why the carrier should not be liable for what he is responsible. The responsibilities have been increasing all the time, and to some extent the evaluation of seaworthiness with them, but the liability has in many ways stayed the same. While no other international convention have limited the seaworthiness to the time before the actual departure, this is the case in the Hague and Hague-Visby. Admittedly for historical reasons, but all the more incentive to modernize it when chance is given.

In the new convention, the liability of the carrier will be a clearly defined liability based on fault and what is reasonable, without the exonerations and exceptions that exculpate the carrier for faults that are within his control. Even though some changes have been made compared to the widely accepted Hague and Hague-Visby Rules, they should not be of the kind that creates uncertainty to the degree that it disrupts the trade. Uncertainty costs the business a lot of money in litigation, something that will be particularly noticeable in common law countries.

The aim was to keep as much of the old liability regime as possible, but modernise it to make it suitable for current practice. It has been called a pragmatic approach, and to unify and reach consensus among all the different states, one must agree that this should be the approach taken. Of course, changes are not always welcome by all. Some people have and will oppose the new regime, often due to the fear that it will have a negative impact on their own interest. However, it is worth keeping in mind that there needs to be a balance, and what is reasonable for most should be more important than what is best for some.

If the Rotterdam Rules will be ratified or not is still an open question. The European parliament has recently given the members of the EU the advice to “speedily to sign, ratify and implement” the Rotterdam Rules. Positive reactions to this advice have been received from many of the international shipping organisations. The fact that there is no single ratification so far is said to be normal, and that a national ratifications process is expected to take around 2 years.

With the failure of the Hamburg Rules fresh in mind, the importance of having the traditional shipping nations to agree is made clear. The focus right now is on the US, and many believe that the success of the convention depends on whether or not they chose to ratify the convention. If and when this happens, others will surely follow, but right now, the faith of the Rotterdam Rules is yet to be decided.

³⁰⁷ International Convention on Standard of Training, Certification and Watchkeeping

³⁰⁸ International Convention for the Safety of Life at Sea

³⁰⁹ International Convention for the Prevention of Pollution from Ships

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