THE CARRIER'S UNDERTAKING OF SEAWORTHINESS
- A COMPARATIVE STUDY -

Thesis submitted for the degree of

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by

MOHAMMED AMINE HAKIKI

Faculty of Law and Financial Studies

University of Glasgow

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

To my Parents and

my Wife.

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SUMMARY

In the past few decades many sectors of the marine transport industry have been subject to rapid technological and organisational change. The reason for that is that shipping is today a highly competitive and, thus, a constantly changing industry. Innovations in modern shipping practice challenge the Law to respond to these changing circumstances.

A second important feature of the shipping industry is that contracts of carriage by sea are performed in special and often hazardous conditions. This factor was clearly instrumental in the development of the sea carrier's duty to provide a seaworthy ship.[1]

A third noticeable feature is that shipping is essentially an international business; this means that there is a great desire for international uniformity in Maritime Law. This desire has been satisfied in an inter-governmental agreement which resulted in the Hague and the Hague-Visby Rules.[2]

Under these Rules, the fundamental duties of the carrier are duties of due diligence, diligence in caring for cargo and diligence in preparing his ship for sea. It is the latter duty that has been selected for detailed study, and which the writer is concerned with in this thesis.

Also as it is intended that the Hamburg Rules will eventually

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[1] See Dockray, M., Cases and materials on the carriage of goods by sea, Abingdon, Professional Books limited, 1987, p. 1.

[2] Ibid, at p. 1.

replace the Hague Rules, we are bound to look at the changes brought by the new Convention in respect of the shipowner's duty to provide a seaworthy ship.

Thus, in this work, the carrier's undertaking to provide a seaworthy ship, is studied comparatively under the different regimes of Common and conventional Laws.

ABBREVIATIONS

A.C. Law Reports, Appeal Cases.

A.J.C.L. American Journal of Comparative Law.

A.L.J. Australian Law Journal.

A.M.C. American Maritime Cases.

All E.R. All England Law Reports.

Asp.M.L.C. Aspinall's Maritime Cases.

B. & Ad. Barnewall & Adolphus' King's Bench Reports (109-110 ER).

Bing. Bingham's Common Pleas Reports (130-131 ER).

C.P.D. Law Reports, Common Pleas Division.

Calif.Western L.Rev. California Western Law Review.

Can.B.R. Canadian Bar Review.

Den.J.I.L.P. Denver Journal of International Law and Policy.

Dir.maritt. Diritto marittimo (Italy).

East. East's Term Reports, King's Bench (102-104 ER).

Fed.Cas. Federal Cases (USA).

J.B.L. Journal of Business Law.

J.M.L.C. Journal of Maritime Law and Commerce.

K.B. Law Reports, King's Bench.

L.M.C.L.Q. Lloyd's Maritime and Commercial Law Quarterly.

L.R.C.P. Law Reports, Common Pleas.

L.R.P.C. Law Reports, Privy Council.

Ld.Raym. Lord Raymond's King's Bench Reports (91-92 ER).

Ll.L.Rep. Lloyd's List Law Reports.

Lloyd's Rep. Lloyd's Law Reports.

Maine L.Rev. Maine Law Review.

Mass. Massachusetts Supreme Judicial Court Reports.

Mer. Mercer Law Review.

Mood. & M. Moody & Malkin's Nisi Prius Reports (137 ER).

N.Z.L.R. New Zealand Law Reports.

New Rep. New Reports.

P. Law Reports, Probate Division.

Q.B. Law Reports, Queen's Bench.

R.(Ct. of Sess.). Rettie's Session Cases (Scot.).

S.L.R. Scottish Law Reporter.

T.L.R. Times Law Reports.

T.R. Durnford & East's Term Reports (99-101 ER).

Tul.L.Rev. Tulane Law Review.

U.S. United States Supreme Court Reports.

UNCITRAL. United Nations Commission on International Trade Law.

UNCTAD. United Nations Conference on Trade and Development.

Va.J.Int'l.L. Virginia Journal of International Law.

W.L.R. Weekly Law Reports.

INTRODUCTION

During the last ninety years legislatures, courts and international conferences have tried to maintain a balance between the paramount duty to protect cargo-owners and the desire to render justice to shipowners. The protection of the cargo-owner demands ideal standards and an absolute guarantee of safety, while justice to the shipowner is based on the realisation of a number of technical and commercial realities that call for relativity.

A ship is a complex instrument with potentially hidden defects, some of which are undiscoverable by reasonable care. The maintenance, repair and inspection of the ship are delegated to experts and registered surveyors and are largely carried out while the ship is in port or drydock. Yet in the modern world the shipowner is blamed if his ship is found to be unseaworthy. Since bills of lading, charterparties or marine insurance policies refer to seaworthiness and do not particularise further, this perpetually creates a tug-of-war between the shipowner and the cargo-owner.

All this leads us to the question of what constitutes seaworthiness at the present day and how both the cargo-owner and the shipowner can be protected in a complex commercial world?

To answer this question, the history and development of seaworthiness will have to be traced from ancient times to the

present day.

However, it is important here to have a brief look at the background that has shaped the carrier's liability and to recall its evolution. This will help us in our effort to determine the degree of his liability to provide a seaworthy ship under the different regimes of Common and conventional Laws.

Under the general Maritime law, a common carrier of goods by sea was liable to the cargo-owner on an absolute basis for any loss or damage occasioned in the transport of the goods, with the exceptions of loss or damage caused by an act of God or the public enemy, or by the inherent vice of the goods or the default of the shipper. Thus, the common carrier's rule was strict, it may be characterised as an example of liability without fault, for the carrier may be held liable even though he took all reasonable steps to protect against loss. Once the cargo-owner could show that goods left to the carrier had been lost or damaged, the carrier had the burden of proving specifically that one of the four excepted perils caused the loss or damage. Failure to do so would inevitably make him liable.

The severity of this rule of the Common Law is said to have had its origin in the danger of theft by the carrier's servants, or collusion between dishonest carriers and thieves to the prejudice of the shipper, since geographic remoteness of the shipper from the property while it was in transit would make proof of such a collusion difficult if not impossible. To prevent this, the responsibility of an insurer for the safe delivery of the goods, was imposed on the carrier in addition to his liability as a bailee for reward.

Further, the carrier was permitted to exonerate himself from liability for loss caused by the negligence of his employees or agents, including the master and crew of the vessel.

But at the same time Maritime Law added another Common Law doctrine which served as an additional hurdle before the carrier could claim exoneration on account of one of the excepted perils. This was the implied warranty of seaworthiness, which obliged the carrier to provide a seaworthy vessel at the beginning of the voyage.

Despite the apparently strict rules of Common Law, carriers were hardly at the mercy of cargo-owners. In fact taking advantages of the realities of the commercial world largely in their favour and of their traditional freedom of contract, shipowners began to insert clauses in the bill of lading which purported to exonerate them from liability for loss or damage due to numerous causes. Thus the implied condition in the contract of affreightment that the ship is seaworthy has been subjected to any contrary intention appearing in the contract and shipowners have frequently tried to cover themselves so thoroughly as to be virtually impregnable against any form of liability.

If the courts in Britain have allowed the carrier to avoid the implied warranty of seaworthiness by an explicit statement to that effect in the bill of lading, American courts, traditionally more protective of shipper's rights, refused to recognise any abrogation of the implied warranty. As a result shipowning in the United States was at a low point while nineteenth century Britain boasted the world's largest merchant fleet.

Because of that situation American traders, facing a virtual British monopoly over international transport, eventually found sufficient congressional support to pass the first legislative attempt to define the minimum liability of ocean carriers in the Harter Act of 1893. The Harter Act was an important mile stone in the challenge to a system in which ocean carriers could easily shift the risk of loss on to cargo-owners, and thus effecting an important change in the liability of the carrier under the general Maritime Law.

With regards to loss or damage caused by unseaworthiness, the Act, in section III, permitted the inclusion in the bill of lading of provisions eliminating the absolute warranty and substituting in its place the duty to use due diligence to make the vessel seaworthy.

In toto the Harter Act may be viewed as the first formulation of national Law designed to provide a certain uniformity by restricting the power of carriers contractually to limit their liability. Yet unlike the United States in which cargo interests were relatively powerful, shipowning nations such as Britain and France continued to allow carriers full freedom to set their own liability terms. As a result, a negligence clause inserted in an international bill of lading could be valid in one country and invalid in another, the liability of the carrier then depending upon the chosen forum.

These were briefly the events which illustrated the need for an international solution, and in 1924, the compromise represented by the Harter Act was in essence codified on an

international level in the Hague Rules. This Convention has since been given wide effect. Great Britain was the first nation to introduce legislative measures to bring the Rules into legal effect.

The Hague rules retained the carrier's duty to provide a seaworthy vessel at the beginning of a voyage, and imposed an additional duty upon the carrier to care for the goods in his possession.

Unfortunately, with but few exceptions all the countries which have introduced legislation, with the object of giving effect to the Hague Rules, have introduced modifications and variations, additions and deletions, some of a very wide nature, and some of lesser importance, but all to some extent, departing from the desire of the Convention for complete uniformity and rendering necessary a reference to each individual enactment itself in order to determine its full effect upon any particular bill of lading contract.

Furthermore, critics of the Convention argue that the liability regime achieved by the Hague Rules is too favourable to carriers and does not reflect present day realities of international transport, and believe that though often referred to as a compromise between carriers and cargo interests, the Hague Rules in fact preserve the essential and somewhat paradoxical character of Common Law, in which a presumption of liability against the carrier can be defeated by the exercise of numerous exceptions of liability.

Indeed, it was general belief among some elements of the international maritime community, such as particularly cargo interest and the majority of developing countries, that existing

legal rules governing liability for loss of cargo carried under a bill of lading are inequitable and therefore should be changed.

As a result, a new Convention was adopted in 1978, known as the Hamburg Rules, which is still awaiting for international enforcement. The adoption of this Convention, as it will be seen at the end of this study, was directed as a revision of the Hague Rules to restore the carrier to the position he held under the general Maritime Law, by shifting back to him greater liability for the loss of cargo.

Thus, it is the aim of this study to examine the manner in which the courts have dealt with the carrier's undertaking to provide a seaworthy ship. All the details of this problem are, in fact, reflected in a number of decisions dealing with unseaworthiness. In the light of these decisions, we shall attempt to differentiate between the duty to provide a seaworthy ship as it arises at Common Law, under the Hague Rules and the Hamburg Rules.

In this study, the writer endeavours to contribute to the knowledge of the law of seaworthiness by attempting a logical and more systematic approach, by selecting for discussion from the multitude of cases with which the textbooks inundate us, those which are typical and sufficient for the comparison of the provisions of the present Hague Rules, with respect to the carrier's duty of seaworthiness, with those of the new Hamburg Rules, in order to find out to what extent this duty has been modified under the new Rules, and therefore what consequences we shall expect from the application of the Hamburg Rules if and when they come into force.

Thus this study is divided into three main chapters.

The first chapter, which is divided into two sections, examines the double feature of the warranty of seaworthiness, i.e. a warranty being relative and absolute. Section one introduces a detailed study of the meaning of seaworthiness as understood in Law. Having thus established what seaworthiness means, section two deals with the absolute warranty of seaworthiness imposed upon the carrier under the Common Law, and shows how does seaworthiness work in its clash with the excepted perils.

The second chapter discusses the carrier's duty of seaworthiness on a comparative basis under both the Hague Rules and Hamburg Rules. Our comparative discussion will involve the main features of the seaworthiness duty namely, the basis upon which this duty is based, the time during which this duty must be exercised, and finally the standard of care which the carrier must use in order to make his ship seaworthy.

The third and last chapter deals with the carrier's liability for any loss or damage arising from unseaworthiness. In other words, having failed to exercise his duty to maintain the ship in a seaworthy condition, as explained in the previous chapter, the carrier will incur liability for any loss or damage resulting therefrom. The writer is concerned here with two main questions. First, on whom lies the burden of proving or disproving unseaworthiness. Second, what immunities are available to the carrier to exempt himself from liability for any loss or damage caused by unseaworthiness of his ship. The discussion is also here made on a comparative basis.

CHAPTER ONE

The Relative and Absolute Nature of the Warranty of Seaworthiness.

At first sight of this title, one must wonder how can the warranty of seaworthiness be relative and absolute at the same time?

The answer is that the "absolute" feature of the warranty of seaworthiness implied by the Common Law refers to the degree of the shipowner's liability. The relative nature, on the other hand, refers to the standard of fitness or seaworthiness of his ship.

It is essential that this point be appreciated and not confused. In Rio Tinto Co., Ltd. V. The Seed Shipping Co., Ltd.,[1] the Law was clarified by Roche.J as thus:

> "The warranty of seaworthiness is an absolute contract, but at the same time, although it is an absolute contract that the ship in question is reasonably fit for the voyage...it is not a contract that the ship is absolutely fit for the voyage..."

In accordance with this principle, the standard of seaworthiness is not absolute, but the liability of the owner for unseaworthiness is under the Common Law.

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[1] (1926) 24 Ll.L.Rep 316 at p. 320.

Therefore, this chapter will be divided in two main sections:

I) The relativity of the term seaworthiness.

II) The absolute warranty of seaworthiness under the Common Law.

Section one: The Relativity of the Term Seaworthiness.

To the seeker after precision in the Law, seaworthiness is a disconcerting doctrine because, by its very nature, it is not reducible to exactitude. It is a "relative" term; it is a question of fact and like many concepts premised on a question of fact, it does not lend itself to easy application or absolute definition.

Accordingly, the standard of seaworthiness must always be uncertain, for the Law cannot fix in advance those precautions in hull and gear which will be necessary to meet the manifold dangers of the sea.

Therefore, it is clear enough that, there can be no fixed and positive standard of seaworthiness but that it must vary with the varying exigencies of Mercantile enterprise.[2] The ship, said Lord Cairns:

> "should be in a condition to encounter whatever perils of the sea, a ship of that kind and laden in that way, may be fairly expected to encounter on the voyage."[3]

It must be borne in mind that the required standard of

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[2] See Arnould, J., Law of Marine insurance and average, 16th ed. by M.J. Mustill & J.C. Gilman, London, Stevens & Sons, 1981, Vol. 2, p. 569.

[3] Steel V. State Line S.S.Co. [1877] 3 A.C 72 at p. 77.

seaworthiness is not absolute. It is relative among other things, to the nature of the ship, to the particular voyage contracted for and the particular stages of that voyage being different for summer or for winter voyages, for river or for sea navigation, whilst loading in harbour and when sailing, to the state of knowledge and scientific progress at the time of contract,[4] and varies with the particular cargo contracted to be carried. For instance that state of repair and equipment which would constitute seaworthiness for one description of voyage might be wholly inadequate for another. A ship seaworthy for the coasting might be unseaworthy for a voyage to the Greenland seas.

Moreover, a ship may be seaworthy although scientific research subsequently shows that her refrigerating chambers were unfit to receive the cargo if that fact was not known at the time.[5]

It is obvious, then, that seaworthiness is a relative concept which depends upon circumstances. A ship may be seaworthy in one instance but unseaworthy in another.[6] However, seaworthiness does not require that a vessel be of the latest design. Even though a shipowner has not installed the latest appliances, the ship may still be held to be seaworthy.

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[4] See Bradley & Sons V. Federal S.N. Co. (1927) 27 Ll.L.Rep 395 at p. 396 per Viscount Sumner, "relative among other things, to the state of knowledge and the standards prevailing at the material time."

[5] See Carver, T.G., Carriage by sea, 13th ed. by Raoul Colinvaux, London, Stevens & Sons, 1982, Vol. 1, p. 116.

[6] See Briguglio, A.J, "Unseaworthiness and evidence of subsequent repairs", (1983) 19 Calif.Western L.Rev. 450 at p. 453.

Thus, it is the aim of this section to investigate the meaning of seaworthiness and probe into its many ramifications: in respect of the ship; in respect of the captain, officers and crew; in respect of the cargo, and all other relevant factors.

I- Definition of Seaworthiness:

For over a century at least the question of what is a "seaworthy" ship has been a matter that has troubled the courts of the common law world.[7] Yet throughout that period it has been difficult to find any more apposite meaning for the "Seaworthiness" of a ship than the description, as long ago as 1877, by Lord Blackburn in Steel V.State Line Steamship Co.[8] "...the ship should really be fit."

The term seaworthiness and the determination of what makes a vessel unseaworthy, as it has been noted above, is a flexible one which can never be settled by positive rules of law, for the reason that improvements and changes in the means and modes of navigation frequently require new implements or new forms of old ones.

Although, the flexibility of this term, the commonly accepted definition of seaworthiness appears to be as follows.

"Seaworthiness" may be defined as:[9]

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7 See Starke, J.G, "Meaning of Seaworthiness", (1982) 56 A.L.J. 88 at p. 88.

8 [1877] 3 A.C 72 at p. 86.

9 See Tetley, W., Marine cargo claims, 2nd ed., Toronto, Butterworths, 1978, p 157.

> "The state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage."

Another interesting definition of seaworthiness is to be found in Bouvier's Law dictionary, which defines "Seaworthiness" to be in Maritime law:

> "The sufficiency of the vessel in materials, construction, equipment, officers, men and outfit for the trade or service in which it is employed."[10]

From these definitions, it is clear that, the term seaworthiness is applicable to the condition of the vessel, its structure, equipment, fittings, to the stowage of the goods, and to the manning of the ship. Seaworthiness also concerns such matters as the type of the vessel, character of the voyage, foreseeable weather and navigational conditions.

Therefore, in order to keep a ship in a seaworthy condition for the purpose of the voyage, she must, at the time of sailing, be in a fit state as to repairs, equipment and crew, and in all other respects, to encounter the perils of the voyage at the particular season in question. She must, therefore, be tight, staunch and strong, and furnished with all tackle and apparel necessary for the intended voyage, and she must have on board a pilot, when by the law of the country one is required.

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[10] Definition approved in The Southwark (1903) 191 U.S. 1 at 8.

II- General Principles:

To be seaworthy a vessel "must have that degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it".[11] As an instrument of transport a ship is efficient if her hull, tackle and machinery are in a state of good repair, if she is sufficiently provided with fuel, and is manned by an efficient crew. In other words; the ship must be fit in design, structure, condition and equipment to encounter the ordinary perils of the voyage, and the cargo taken must be a safe cargo for such a voyage as may be reasonably expected, and it must be stowed in a way so as not to be a source of danger.

Also, the ship must take in a safe supply of bunkers, including water for boilers. She will be unseaworthy if she bunkers with low grade coal which is liable to spontaneous combustion during the voyage.

Thus, in Fiumana Societa di Navigazione V. Bunge,[12] it was held that an unexplained occurrence of fire in the coal-bunkers afforded a reasonable presumption that this was due to a defect or unfitness of the bunker coal at the time of loading of the cargo which amounted to a breach of the warranty of seaworthiness.

Therefore, it is clear that, seaworthiness encompasses many things, a tight hull and hatches, a proper system of pumps, valves and boilers, and engines, generators and refrigeration equipment in good order. A seaworthy vessel must be equipped

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[11] Mc Fadden V. Blue star line [1905] 1 K.B. 697 at p 706.

[12] [1930] 2 K.B. 47.

with up-to-date charts, notices to mariners and navigating equipment, the crew must be properly trained and instructed in the ship's operation and idiosyncrasies. Equipment must be properly labelled.

However, it is noteworthy that, seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo transported,[13] i.e: fit to carry the particular cargo it takes on board.

It is convenient to mention here that, failure to comply with one or more of these requirements constitutes a case of unseaworthiness. For instance, inadequate design, defective condition, or crew insufficient in either skills or number can render a vessel unseaworthy.[14]

III- The Hull:

The hull is the framework of a vessel, together with all decks, deck houses, the inside and outside plating or planking, but exclusive of masts, yards, riggings and all outfit or equipment.[15]

Seaworthiness originally meant the good order of the hull of the vessel and in particular the condition of the bulkheads, plating and rivets.

To constitute seaworthiness of the hull of a vessel, the hull

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13 See Sorkin, S., Goods in transit, Vol. 1, Chapt. 5 at p. 89.

14 See Langhauser, D.P., "Implied warranties of seaworthiness: applying the knowing neglect standard in time hull insurance policies", (1987) 39 Maine L.Rev. 443 at p. 446.

15 See Webster, F.B., Shipping Cyclopedia, New York London, Simmons-Boardman publishing company, 1920, p. 70.

must be so tight, staunch, and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo under deck.[16] In other words; seaworthiness as far as relates to the condition of the ship, requires that when the ship sails on her voyage she should be well furnished, tight, sound, staunch and strong, competent, that is, in her hull to resist the ordinary attacks of wind and weather on the voyage.

The integrity of the hull is a very important condition for seaworthiness. The wasting of shell plates through the passage of time has often produced leakage and consequent cargo damage.[17] While seaworthiness, with respects to rivets does not require before the start of every voyage, that a test be given to each of the thousands of rivets in a large steel vessel, it does require that the rivets be tested from time to time by hammering or otherwise drydocking.

If a vessel encounters extremely heavy weather, seaworthiness requires that she be carefully examined before she embarks on another voyage to ascertain if the stresses to which she has been subjected have caused damage which should be made good.

Also if a vessel has been subjected to contact with ice, or in collision, careful examination and test of her rivets and seams is required, a superficial examination from a distance is not

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16 See Benedict on Admiralty, Vol. 2.A "Carriage of goods by sea", Chapt. 7 at p. 1.

17 See Dewey.R.Villareal, J.R., "The concept of due diligence in Maritime Law", (1970/71) 2 I.M.L.C. 763 at p. 770.

enough.[18]

In The Cypria,[19] the vessel was held to be unseaworthy as no hammer or drill test of the rivets was done and only a long-range visual examination by surveyors during the vessel's eight-years classification.

It is important to note that, openings in the hull are as important as the general integrity of the shell plating and failure to check the water tightness of ports, by those tests, constitutes unseaworthiness.[20]

Seaworthiness with respects to hull, involves that hatches should be tight, as hatches are a constant source of damage to cargo and as such a constant source of litigation.

Thus, in Sears Roebuck & Co. V. American President Lines Ltd.,[21] a vessel was badly constructed, there being a hole in the coamings of the hatches. Held, the vessel was unseaworthy.

It must be borne in mind that, if in a short period after sailing on the voyage the ship becomes leaky and founders, or is obliged to put back, without encountering any extraordinary peril, or other visible cause to produce such effect, there is a presumption of fact that she was not seaworthy when she sailed. Accordingly, if after her return to port, it is found that the leak arose from the loosening of the timbers of her hull, owing to the decayed state of her bolts and fastenings, or similarly with the rivets in her plates or other like deficiency, this is, generally speaking, a clear case of

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18 See Benedict, op.cit., Vol. 2.A, Chapt. 8 at p. 8.

19 [1943] A.M.C. 947.

20 See Dewey.R.Villareal, J.R., op.cit., at p. 771.

21 [1972] 1 Lloyd's Rep. 385.

unseaworthiness.[22]

IV- Machinery:

Besides being competent in hull to resist the ordinary attacks of the wind and weather on the voyage, the ship should have fit propulsion machinery with sufficient fuel, and refrigeration and ventilation machinery in good order. Also the vessel's engines, boilers and generators must be in good working order in order to constitute seaworthiness.

Thus in Seville Sulphur & Copper Co. V. Colvils Lowden & Co.,[23] the vessel was lost in consequence of the breakdown of her boiler through the presence of muddy water in it, which rendered her unseaworhty.

It is noteworthy, that few cases discuss seaworthiness in connection with the main propulsion machinery, probably because breakdowns of that machinery do not normally produce cargo damage. But refrigeration and ventilating machinery predictably, have figured in cargo damage cases.[24] Therefore if a vessel's refrigerating machinery is defective, she is unseaworthy.

An interesting case concerning this point is that of The Maori King V. Hughes.[25] A cargo of frozen meat was carried from Australia to Europe. At the beginning of the voyage the refrigerating machinery was defective, and owing to that defect broke down during the voyage. Held, the ship was unseaworthy.

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22 See Arnould, op.cit, at p. 572.

23 (1888) 15 R. (Ct of Sess) 616.

24 See Dewey.R.Villareal, J.R., op.cit., at p. 772.

25 [1895] 2 Q.B. 550.

It must be said that, failure to supply the ship with these things constitutes a case of unseaworthiness. For example, failure to supply the propulsion machinery with sufficient fuel to make the projected voyage with a margin of about 25 percent, may amount to unseaworthiness.

An illustrating case that can be cited in connection with the question of machinery, is that of, The Quebec Marine Insurance Co. V. Commercial Bank of Canada.[26] In this case, a vessel sailed with a defective boiler, but the defect did not appear until she had passed into salt water, and then it became necessary to put back and repair the boiler. After sailing again she was lost by perils of the sea. It was held that she was not seaworthy.

It is convenient to mention here that, if a vessel's machinery breaks down shortly after a voyage commences, it is to be presumed prima facie that the machinery was defective at the start of the voyage and therefore the ship was unseaworthy.

Thus in The Southwark,[27] the vessel was to carry a cargo of dressed beef. Shortly after leaving port, the refrigerating machinery broke down, and after being repaired broke down again, and during the voyage did not reduce the temperature sufficiently to preserve the meat. The vessel was therefore presumed to be unseaworthy at the start of the voyage.

V- Complement (Master and Crew):

Seaworthiness involves adequacy of the ship's officers and men. Most of the maritime nations have regulations governing

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[26] (1870) L.R. 3 P.C. 234.

[27] (1903) 191 U.S. 1.

the manning of ships of their flags, and the vessel's certificate sets out the number of officers and men required by Law to man her. So, if a vessel sails with a crew less in number than her certificate or accepted practice requires, she is unseaworthy.[28]

A vessel is also unseaworthy, if the crew are inexperienced and untrained in the operation of the ship. Accordingly, every ship at the time of sailing must be properly manned, with a master of competent nautical skills, a crew sufficient and competent to navigate her on the voyage, and a pilot on board whenever there is an establishment of pilots at the port and the nature of the navigation requires one.[29]

First, of the master, he must be a person sufficiently well acquainted with the usual course of navigation on the voyage, to be able to conduct the vessel in safety through its ordinary perils, and if he is ignorant of that, the ship is not seaworthy. The master must also, even if generally competent, be sufficiently instructed in any peculiarities of the vessel which may require special attention during the voyage. His incompetence may consist in a disabling want of skill or disabling want of knowledge, in other words, ignorance of the master concerning the condition or characteristics of his vessel, her fittings and their use, may make a vessel unseaworthy.

In this connection reference can be made to the case of Standard Oil Co. V Clan line,[30] in which the vessel was of the unusual construction but was quite stable and seaworthy if two

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[28] See Benedict, op.cit., Vol. 2.A, Chapt. 7 at p. 11.

[29] See Carver, op.cit., Vol. 1, p. 114.

[30] [1924] A.C. 100.

of her ballast tanks remained full. Because of the master's ignorance of the necessity for ballast, he ordered that the ballast tanks be pumped out shortly after the vessel sailed on her voyage, and when this had been done the vessel capsized, and therefore, she was considered unseaworthy.

In another case,[31] where the master was of broad experience and had held for many years a master's license issued by the British Board of Trade, the vessel was found unseaworthy because it was established that the master was frequently intoxicated, and that his weakness in this regard was widely known.

Seaworthiness also requires that the master must be in a fit state of health to command the ship when the voyage starts.[32]

Secondly, as to the crew. The crew must be adequate to discharge the usual duties and to meet the usual dangers to which the ship is exposed.[33] If the crew be sufficient when the ship sailed on her voyage, she is then, seaworthy. In other words, the ship is unseaworthy if she sails without a crew that is competent and sufficient for the voyage, regard being had to its length and the circumstances in which it is undertaken.[34]

It is convenient to mention here that, seaworthiness with respect to the crew, involves that the shipowner must satisfy

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31 The Mountoswald (1923) 15 Ll.L.Rep. 155.

32 See Rio Tinto Co., Ltd. V. Seed Shipping Co., Ltd. (1926) 24 Ll.L.Rep. 316 at p. 320.

33 See Arnould, op.cit., at p. 577.

34 See Halsbury, Laws of England, 4th ed. by Lord Hailsham of St. Marylebone, London, Butterworths, 1983, Vol. 43 "Shipping", p. 408.

himself by inspection of the seaman's documents, interviews and inquiries from previous employers that he is reasonably fit to occupy the post to which he is appointed.[35]

An interesting case concerning this point is that of The Makedonia.[36] It was held in this case that the chief engineer and the second engineer were inefficient, and the shipowner had not taken the necessary steps and make the necessary inquiries to ascertain the record and competence of these officers. Consequently the ship was unseaworthy.

It is noteworthy that, unseaworthiness may also be caused by a crew that held all the necessary competence certificates but was nevertheless incompetent, in other words, it will not necessarily be enough to rely on certificates of competence held by the seaman.

This was the case in Adamastos Shipping Co., Ltd. V. Anglo-Saxon Petroleum Co., Ltd.,[37] where the engine-room crew though qualified, was incompetent so that the ship became unseaworthy.

It must be borne in mind that, the question of the competence of the crew may depend upon the nature of the voyage on which they are employed, for instance, if there is no mate on board capable of performing the captain's duties, should the captain be disabled by accident or illness, the ship may be unseaworthy.

Thus in Clifford V. Hunter,[38] the voyage was from Mauritius

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35 See Scrutton, T.E., Charterparties and bills of lading, 19th ed. by A.A. Mocotta, M.J. Mustill & S.C. Boyd, London, Sweet & Maxwell, 1984, p. 435.

36 [1962] 1 Lloyd's Rep. 316 at pp. 334-338.

37 [1959] A.C. 133.

38 (1827) Mood. & M. 103.

to London. The captain on sailing from Mauritius was very ill, and next day feeling himself, from increased illness, incompetent to take charge of the ship, he inquired of his two mates whether they could manage the voyage to England, but finding no one competent to undertake it, he put back towards the Mauritius, and in his way the ship was lost by perils of the sea.

In addition to these cases cited in connection with the incompetence of the crew, some other vital matters has been found to establish unseaworthiness. For example, ignorance of a ship's engineer of the amount of bunker oil on board and his unfamiliarity with the oil-piping system was held to have rendered a vessel unseaworthy.

In the case of The Makedonia,[39] the chief engineer and second engineer were not properly instructed or experienced in the use of the oil and ballast lines in a timber-laden ship. Held that the ship was unseaworthy.

Also vessels have been found unseaworthy because their helmsmen were ignorant of English in which the watch officers gave their orders. This led to the helmsmen turning the wheel in a direction opposite to that ordered by the watch officer and thus the vessel became involved in disaster.[40] Furthermore, an unwillingness on the part of a member of the crew to perform his proper tasks and in carrying out his duties may constitute incompetence and render the ship unseaworthy.[41]

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[39] [1962] 1 Lloyd's Rep. 316.

[40] See Benedict, op.cit., Vol. 2.A, Chapt. 7 at p. 15.

[41] See Scrutton, op.cit., at p. 86, see also The Makedonia [1962] 1 Lloyd's Rep. 316.

Thirdly, as to the pilot. If the nature of the navigation or the law or usage of the place requires that the ship should take a pilot on board, either before leaving or before entering a port, she is, it would seem, not seaworthy without a pilot.

Accordingly, if a ship sails without a pilot from a port where pilotage is compulsory or customary, she is insufficiently manned, and therefore unseaworthy, unless the master himself has adequate local knowledge.[42] It was further stated that:" a vessel coming out of a harbour must have a pilot, because the captain has it in his power always to procure one".[43]

It is noteworthy that, the question which arises in connection with the incompetence of the crew is: whether negligence of the master or the crew may amount to unseaworthiness?

For answering such question, a distinction should be made between unseaworthiness and neglect or default in management.

Unseaworthiness is to be distinguished from neglect or default in management, in that even if on sailing, the ship is not in safe condition to complete the voyage, she is not unseaworthy, if in the course of the voyage, the defect will be remedied.

For instance, on sailing, a port-hole might be left open which might normally be closed in the course of the voyage. Such a defect of a temporary nature or trivial character which in the ordinary course of the voyage could and would be remedied by the crew, cannot reasonably be said to render the ship unfit to encounter the perils of the voyage. She is therefore seaworthy in

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[42] See Carver, op.cit., at p. 114.

[43] Citing Lord Tenterden in Phillips V. Headlam (1831) 2 B. & Ad. 380 at p. 382.

spite of the defect, and it is immaterial that the defect is not in fact put right, there is then negligence on the part of the crew but not unseaworthiness of the ship.[44]

Thus in The Silvia[45] case, the vessel sailed with an iron porthole cover knowingly left open by the ship's officers to afford light in the compartment by way of the porthole. Conditions permitted ready access to the porthole to make fast the cover. After the vessel sailed, the open porthole was forgotten, and when a storm threatened, the cover porthole was not made fast and water entered the vessel and damaged cargo. It was held that, The Silvia was seaworthy when she sailed on her voyage under the circumstances mentioned, and that the damage to cargo resulted from negligence in the ship's management.

On the other hand, although the defect is temporary or trivial, if it is invisible and inaccessible, the ship cannot be considered seaworthy.

An interesting case concerning this point is that of The Schwan.[46] In this case, the damage arose because of a three-way cock which was intended to be used either to open into the bilges or into the sea, was allowed to be in such a position as to leave both openings free at the same time. In consequence of this, water entered the hold and damaged the cargo.

The court of Appeal held that the engineer ought to have understood the construction of the cock, and if he had, could at any time have turned it into the proper position. The loss was

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[44] See Halsbury, op.cit., at p. 407.

[45] 171 U.S. 462, 19 S. ct. 7, 43 L. ed. 241.

[46] [1909] A.C. 450.

therefore due to negligence and not to unseaworthiness.

But this decision was reversed by the House of Lords on the ground that the construction of the cock was admittedly unusual and dangerous, and as the engineer had no notice of the unusual and dangerous character or the need of special care, the ship could not be considered seaworthy although the engineer was in fact negligent.

VI- Cargoworthiness:

Seaworthiness includes "cargoworthiness". In relation to cargo the commonly accepted definition of seaworthiness, is whether the vessel is reasonably fit to carry the cargo which it has undertaken to transport.

Seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo transported. Seaworthiness is that quality of the ship which makes it fit to carry the particular merchandise it takes on board. It is seaworthy or unseaworthy in relation to the particular article or goods carried.[47] Thus it may be seaworthy as to one kind of goods and unseaworthy as to another.

This was the case in Stanton V. Richardson,[48] where the ship was perfectly capable of carrying a cargo of wet sugar, but the ship's pumps were not able to deal with the moisture, though good for any other purpose. Held the ship was not cargo- or seaworthy.

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[47] See Saul Sorkin, op.cit., Chapt. 5 at p. 89.

[48] (1874) L.R. 9 C.P. 390 (Ex ch).

Cargoworthiness means that he ship must be equipped not only to carry the contract cargo but also to prevent its deterioration during the voyage. Accordingly if goods carried require refrigeration or freezing and the refrigerating apparatus is defective, then the ship is unseaworthy as to those goods requiring refrigeration although it may be perfectly seaworthy in relation to other types of goods.

This was well illustrated by the case of The Maori King V. Hughes,[49] where a ship with defective refrigerating machinery was held unseaworthy in the sense of being uncargoworthy for a cargo of frozen meat.

It is convenient to note here that, the cargo taken must be stowed in a way so as not to be a source of danger,[50] as unseaworthiness may be caused not only by the unfitness of the vessel to carry the cargo but also by the manner in which such cargo is stowed.

Therefore, if a ship is so heavily or improperly loaded when she sails on her voyage as to be incapable of encountering the ordinary perils of the sea, that is unseaworthiness. In certain cases of this nature, i.e: bad stowage, it is necessary to distinguish between unseaworthiness and bad stowage not amounting to unseaworthiness.

Bad stowage which endangers the safety of the ship and makes her unfit to encounter the perils of the voyage may amount to unseaworthiness.

An interesting case that can be cited in this connection is that

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[49] [1895] 2 Q.B. 550.

[50] See Carver, op.cit., at p. 115.

of Kopitoff V. Wilson,[51] which concerned iron armour plates stowed in the ship broke loose during bad weather and went through her side so that she sank. the court found that the ship was unseaworthy as regards the manner of stowing because she was not fit to encounter the ordinary perils that might be expected on the voyage.

On the other hand, if the bad stowage is such as only to affect the cargo and not the ship as a ship, she will not be unseaworthy although the effect of the bad stowage may be to make it impossible for the cargo to arrive undamaged.

In this connection reference can be made to the case of Elder Dempster and Co. V. Paterson Zochonics and Co.[52] In this case some casks of palm oil were stowed on board a vessel which had no "tween decks". After they had been stowed, a quantity of palm kernels was stowed on top of them. the casks were damaged and much of the oil was lost.

Held, by the House of Lords, that the vessel was structurally fit to receive the oil and carry it, and that she was therefore seaworthy. The damage to the oil cargo was not due to the unseaworthiness of the ship by reason of the absence of "tween decks" but was due to bad stowage. The observations of Lord Sumner in this case are of particular interest. He said:[53]

> "Bad stowage which endangers the safety of the ship may amount to unseaworthiness, of course, but bad stowage which affects nothing but the

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51 [1876] 1 Q.B. 377.

52 [1924] A.C. 522.

53 [1924] A.C. 522 at p. 561.

> cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure even though the adventure be the carrying of that cargo."

One last point which deserves notice is that the vessel is sometimes loaded so heavily that she cannot safely sail on the voyage contracted for, she is unseaworthy. A measure of the weight of cargo which a vessel may safely carry is provided by her Plimsoll marks, a line or a series of lines on a ship's sides.[54] The Law requires that every vessel bear marks painted on her side delineating to what depths she may properly and safely be loaded.

These lines or marks are painted under the supervision of Lloyd's Register of Shipping, American Bureau of Shipping, or other like organizations, based on their computations of the limits of safe loading for the particular ship, and will include load marks for seawater and for freshwater, for summer, for winter, for winter North Atlantic and for tropical waters. Accordingly if a vessel is so loaded that her load line is submerged in a violation of a binding regulation, she is unseaworthy.

VII- Other Relevant Factors:

Besides the different factors, already mentioned, seaworthiness includes other relevant things such as bunkers, navigational equipment and documents necessary for the performance of the voyage. In other words; to be seaworthy, a vessel must be supplied with a sufficiency of fuel and equipped

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[54] See Benedict, op.cit., Vol. 2.A, Chapt. 7 at p. 11.

with adequate charts and firefighting equipments, etc.

1- Bunkers:

To be seaworthy, a vessel must be adequately supplied with bunkers for the voyage undertaken. It has been held that to be adequate, the bunkers should be 20 to 25 percent greater than the tonnage of bunkers which is estimated to be consumed on the contemplated voyage under normal conditions.

Thus, in Thin V. Richards and Co.,[55] the voyage was from Oran to Garston, with liberty to call at Huelva. The ship left Oran with a supply of coal insufficient for the voyage to Garston, but sufficient to take her to Huelva. And through a mistake of the engineer, who overestimated the quantity still on board at Huelva, sailed thence without taking a fresh supply. As a result, the ship went ashore when the engines failed, and the cargo was lost.

Held by Day. J. that the voyage was an entire voyage from Oran to Garston, and that the ship was unseaworthy when she sailed from Oran. The Court of Appeal did not decide whether the voyage was entire or was divided into stages, but held that in either view of the case the ship was unseaworthy. If the voyage was entire, they said, the ship should on starting have had enough coal to take her to Garston, if it was a voyage in stages, the ship ought to have been properly equipped at Huelva for the later stage.

The quantity of fuel required on board depends on season of

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55 [1892] 2 Q.B. 141 (C.A).

voyage. Thus, a greater supply of bunkers is required for a winter North Atlantic voyage than one in the summer. If it is known that ice may be encountered, the supply of bunkers must relate to the possibility of delay resulting from ice conditions.[56]

Seaworthiness in respect of bunkers, requires that the vessel be supplied with bunkers of quality which will permit her to prosecute her voyage at a reasonable speed.

An interesting case concerning this point is that of, A/B. Karlshams Objefabriker V. Monarch Steamship Co., Ltd.[57] In this case, the ship was supplied with coal which, by reason of its poor quality, prevented her from prosecuting her voyage with reasonable despatch. Held, that the ship was unseaworthy in this regard.

It must be borne in mind that, it is sometimes, impossible for a vessel to take on board, at the start of a long voyage, a sufficient supply of fuel for the whole voyage contracted for. That is the basis for the principle of seaworthiness by stages. This principle means, that when a ship starts on a long voyage with only enough coal or other fuel for part of the voyage, the intention being to take on board a fresh supply at one or more intermediate ports. The voyage is considered as divided into stages for the purpose of coaling or bunkering.[58]

It is convenient to mention here that, the shipowner has the right to decide what the bunkering stages are to be, provided that they are usual and reasonable. But once the stages have

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[56] See Benedict, op.cit., Vol. 2.A, Chapt. 7 at p. 16.

[57] (1946) 79 Ll.L.Rep. 385 (Court of Session).

[58] See Arnould, op.cit., Vol. 2 at p. 566.

been fixed, it is not open to the shipowner to say that the vessel was seaworthy because of the presence of an intermediate bunkering port at which she could, but was not intended to call.

Therefore, to be seaworthy, the ship must at starting, have enough supply of fuel for the first stage to the intermediate port at which it is intended to take further supplies, and she must have enough for her second stage when she sails from that intermediate port.

Thus in The Vortigern,[59] a vessel sailed on her voyage from the Philippines to Liverpool. The voyage was divided into stages. She called at Colombo, but did not take on sufficient coal for the next stage to Suez. When she was near a coaling station, the master did not take on any more fuel owing to the negligence of the engineer in not informing him that the coal was running short. In consequence, some of the cargo had to be burned as fuel to enable her to get to Suez.

Held, by the Court of Appeal, that the ship was unseaworthy when she left Colombo by reason of the insufficiency of coal taken there.

2- Navigational Equipment:

Seaworthiness involves elements independent of the vessel's structure. she must be supplied with means whereby she may be safely navigated. Thus she must have on board a reliable compass or compasses and sextants.

Also, it is clear that a vessel is unseaworthy when she sails on her voyage if she is not equipped with adequate charts, light

[59] [1899] P. 140.

books, pilot books, lists of radio beacons and notices to mariners.

But this does not mean that every chart and publication on board must be corrected up-to-date prior to breaking ground on the voyage provided the means of correcting them before they need to be used are at hand, nor must the ship must have the latest edition of a given chart or publication provided the edition on board contain substantially the same information as the later ones.[60]

It is important to note, that failure to provide plans of the vessel's machinery may amount to unseaworthiness.

Thus in Robin Hood Flour Mills Ltd. V. N.M. Paterson and Sons Ltd.,[61] the absence of a plan of the engine-room piping system made the ship unseaworthy.

Furthermore, to be seaworthy, the ship must be equipped with suitable loading and discharging tackle for the ordinary purposes of loading and discharging.[62]

The ship must also have on board all papers and documents necessary for the protection of the ship and cargo and for due performance of the voyage such as her bill of health.

Thus in Ciampa V. British India Co.[63] A ship sailed from Monbassa which was a plague contaminated port, with a foul bill of health. At Naples lemons were shipped under a bill of lading for London. Marseilles was the next port of call and under French

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60 See Dewey.R.Villareal, J.R., op.cit., at p. 775, see also The Irish Spruce [1976] 1 Lloyd's Rep. 63.

61 [1967] 2 Lloyd's Rep. 276.

62 See Payne, W., and Ivamy, E.R.H., Carriage of goods by sea, 12th ed. by E.R. Hardy Ivamy, London, Butterworths, 1985, p. 15.

63 [1915] 2 K.B. 774.

Law, the ship coming from an Eastern port without a clean bill of health, had to be fumigated. The lemons were damaged by fumigation.

Held that the ship was not reasonably fit at Naples for the carriage of lemons and she was, therefore, unseaworthy.

3- Seaworthiness and Importance of Classification or Certificates:

Many seagoing vessels are built under the supervision of classification societies and most are classified in one or another of the standard classification societies of the world such as Lloyd's Register of Shipping, American Bureau of Shipping and Bureau Veritas. These classification societies have rules concerning the design, construction and fittings of vessels which they respectively classify.[64] These rules are clearly a measure of the vessel's seaworthiness. Accordingly, if a vessel conforms to the requirements of her class, she is prima facie seaworthy.

But the question which arises in this connection is whether the issuance of seaworthiness certificates, by classification societies, is sufficient to establish a vessel's seaworthiness?

As seaworthiness relates to a vessel's actual condition, neither the granting of classification nor the issuance of certificates establish seaworthiness.

This was made clear in the case of Charles Goodfellow Lumber Sales Ltd. V. Verreault Hovington,[65] which came before the Canadian courts. It was held that, the production of a certificate

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[64] See Benedict, op.cit., Vol. 2.A, Chapt. 8 at p. 10.

[65] [1971] 1 Lloyd's Rep. 185.

of seaworthiness signed by a steamship inspector appointed by the Department of Transport was not sufficient to establish the vessel's seaworthiness.

On the other hand, if on sailing, a vessel's structure, fittings or stowage do not comply with measure of proper conditions provided by the rules of classification societies, she is unseaworthy.

Section two: The Absolute Warranty of Seaworthiness Under the Common Law.

I- History of the Absolute Warranty of Seaworthiness:

In The Caledonia[66] case, Mr Justice Gray delivering the opinion of the Circuit court, said:

> "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage..."

It has been said that the warranty of seaworthiness, in the relations between vessel and shipper, is one of the most severe known to the Law. It is that, at the commencement of the voyage, the vessel shall be thoroughly fitted for the same, both as regards structure and equipment. It is not merely that the vessel owner will exercise reasonable care to have her in this condition or that he will repair such things as are discoverable, but it is an

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66 (1895) 157 U.S. 124 at p. 130.

absolute warranty of fitness for the voyage against even such defects as are latent.[67] That means that the most controversial feature of the warranty of seaworthiness is the element of strict liability.

Thus it is this absolute quality of the warranty which we shall focus upon in this section, specifically its origins and development.

The concept of seaworthiness first appears in the customs and regulations dealing with the shipment of cargo by sea and the chartering of vessels to carry cargo (contracts of affreightment) and concurrently in the Law of Marine insurance.[68]

The origins of much of Anglo-American Maritime Law are found in the Law Merchant consisting of the customs and practices of merchants common to most European countries.[69]

The Law Merchant was administered in most seaport towns prior to the seventeenth century by special courts of which a number of "grave and discreet merchants" were necessary members.[70] And as the Law Merchant was considered as custom, cases were rarely reported as laying down any particular rule. As a result little was done towards building up any system of Mercantile Law in England, and it was not until Lord Mansfield

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67 See Dewey.R.Villareal, J.R., op.cit., p. 763.

68 See Chamlee, G.H., "The absolute warranty of seaworthiness: a history and comparative study", (1973) 24 Mercer Law Review 519 at p. 520.

69 See Scrutton, T.E, "General survey of the history of the Law Merchant" In 3 select essays in Anglo-American legal history, edited by a committee of the Association of American Law Schools, Boston, 1909, Vol. 3, p. 7 at p. 12.

70 Ibid, at p. 12.

became chief justice of the King's Bench in 1756 that any real system of Mercantile Law came into being in England.[71]

An important source of the Maritime Law administered in these early merchants' courts, and later in the Common Law courts, was a series of codes of sea laws which became identified with particular seaports.[72] In these famous codes are found some of the most enduring principles of Maritime Law. The absence of references to these codes in early texts which discuss seaworthiness support this conclusion; however, it is probable that an express warranty of a vessel's fitness was commonly incorporated into early charterparties.

Scrutton cites a charterparty dated July 3rd,1531, containing the following passage:

> "And the sayd owner shall warrant the said shypp strong stanche well and sufficiently vitalled and apparellyd,etc."[73]

Variations of this same language are found in charterparties today.[74]

In 1681 a comprehensive body of Marine ordinances was

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71 Ibid, at p. 13.

72 Ibid, see also Gilmore, G. & Black, C., The Law of Admiralty. 2nd ed., New York, The Foundation Press, Inc., 1975, pp. 5-7.

73 See Scrutton, T.E., The contract of affreightment as expressed in charterparties and bills of lading. 15th ed. by W.L. Mc Nair & A.A. Mocatta, London, Sweet & Maxwell, 1948, p. 97.

74 "Vessel on her delivery to be...tight, staunch, and in every way fitted for the service..." (excerpt from New York Produce Exchange Time charter form) in Gilmore & Black, op.cit., Appendix B, p. 1003.

published by Louis XIV[75] under the direction of his celebrated minister of finance Colbert. Although of French origin, the ordinances were based upon the prevailing Maritime principles of Europe. In time the ordinances became quite popular with English Jurists who had no comparable national code available.[76] The ordinances included a provision which very likely formed the foundation of the warranty of seaworthiness:

> "However, if the merchant prove that when the ship put to sea she was unfit for sailing, the master shall lose his freight and pay the other damages and losses."[77]

The significant feature of this ordinance was that it afforded the merchant a right to indemnity solely upon proof of the vessel's unfitness independent of any fault or negligence on the part of owner or master.

R.J. Valin, in his commentary on this article, cites an observation of Weitson:

> "That the punishment of the master in this case ought not to be thought too severe, because the master, by the nature of the contract of affreightment, is necessarily held to warrant that

75 The Marine Ordinances of Louis XIV. [1879] 30 Fed. Cas., pp. 1203-1216, see also Chamlee, op.cit., at p. 521.

76 See Scrutton, "General survey of the history of the Law Merchant", op.cit., at p. 14.

77 The Marine ordinances of Louis XIV. Title third, article 12, (1879) 30 Fed. Cas, 1203 at p. 1208, see also Abbott, C., A treatise of the Law relative to merchant ships and seamen, 4th ed., London, Butterworth, 1812, p. 229.

> the ship is good, and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages, and interest."[78]

And he himself adds that this is so, although before its departure the ship may have been visited according to the practice of France, and reported sufficient; because on the visit the exterior parts only of the vessel are surveyed, so that secret faults cannot be discovered, for which by consequence, says he:

> "The owner or master remains always responsible; and this the more justly because he cannot be ignorant of the bad state of the ship, but even if he be ignorant, he must still answer, being necessarily bound to furnish a ship good and capable of the voyage."[79]

The author of the most popular English admiralty text of the early nineteenth century, Charles Abbott, writing in 1812, seems to credit the Marine ordinances and Valin's interpretation with being the source of the absolute warranty of seaworthiness.[80]

Adding his own stamp of approval to the absolute warranty, Abbott states:

> "In a charterparty the person who lets the ship covenants that it is tight, staunch, and sufficient; if it is not so, the terms of the covenant are not complied with, and the ignorance of a covenator

78 See Abbott, op.cit., pp. 229-230.

79 Ibid, at p 230, quoting Valin.

80 Abbott, op.cit., pp. 229-230.

can never excuse him."[81]

With regards to a general ship, a shipowner who offers to carry the goods of all comers or who runs a line of ships from port to port habitually carrying all goods brought to him is a common carrier.[82] In the absence of express stipulations in the contract of affreightment, and subject to certain statutory exemptions from liability, the common carrier impliedly undertakes to carry the goods at his own absolute risk, except where the loss or damage to them is caused by:

(i) The act of God. In Nugent V. Smith,[83] James. L.J gave the following observation:

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

(ii) The queen's enemies, (iii) the inherent vice of the goods, (iv) default of the shipper, or by (v) a general average sacrifice.[84]

The severity of this rule of the Common Law is said to have

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81 Abbott, op.cit., at p 231.

82 Nugent V. Smith [1875] 3 Asp.M.L.C 87 at p. 89, per Brett. J.

83 (1876) 1 C.P.D. 423 at p. 444.

84 For further discussion on the exceptions, see Carver, op.cit., pp. 11-19.

had its origin in the danger of theft by the carrier's servants, or collusion between dishonest carriers and thieves to the prejudice of the shipper, since geographic remoteness of the shipper from the property while it was in transit would make proof of such a collusion difficult if not impossible.[85] To prevent this, the responsibility of an insurer for the safe delivery of the goods, was imposed on the carrier in addition to his liability as a bailee for reward.[86]

In the case of Riley V. Horne,[87] Best C.J. delivering the judgment of the Common Pleas, said:

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

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[85] Chicago & ILL R.R. Co. V. Collins Produce Co. (1919) 249 U.S. 186 at 192-93.

[86] Per Lord Holt in Coggs V. Bernard (1703) 2 Ld. Raym. 909 at 918.

[87] (1828) 5 Bing 217 at 220.

The same reason was given by Lord Mansfield in Forward V. Pittard,[88] where he stated that:

> "...by the nature of his contract, he is liable for all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the Common Law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the king's enemies."

In addition to these famous cases imposing on the carrier the liability of an insurer, Abbott comments that a common carrier is in any event liable as an insurer of the cargo against all events but "act of God and the king's enemies".[89] Accordingly, there is no doubt that an absolute warranty of seaworthiness implied by Law prevailed in England at the turn of the nineteenth century as to contracts of affreightment.

The case of Lyon V. Mells,[90] arising in the year 1804, is an early and much cited authority. A leaky lighter had wetted bales of yarn. The owner of the lighter relied on a notice whereby he reduced his liability in ambiguous language. In delivering the judgment of the court on this occasion, the learned chief justice Lord Ellenborough said:

> "In every contract for the carriage of goods between a person holding himself forth as the

88 (1785) 1 T.R. 27 at 33.

89 Abbott, op.cit., at p. 231.

90 (1804) 5 East 428.

> owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by Law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate substratum of the contract that it is so: the Law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so."[91]

From this judgment arose the doctrine of an absolute and implied warranty of seaworthiness as a fundamental condition of every contract of affreightment.

Lord Ellenborough's judgment has been followed ever since. Thus, in Steel V. State Line Steamship Co.,[92] Lord Blackburn[93] emphasizes that the "warranty" is "not merely that they (the owners) should do their best to make the ship fit, but that the ship should really be fit."

In United States, the first American case of note in which an absolute warranty of seaworthiness was applied was Putman V. Wood[94] decided in 1807 by the Supreme court of Massachusetts. In a transaction which seems extraordinary today but possibly was not uncommon in the era of sailing ships, the plaintiff

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[91] Ibid, at 437.

[92] [1877] 3 A.C. 72.

[93] Ibid, at p. 86.

[94] (1807)3 Mass 481.

entrusted $ 3.000 to a shipowner to be used to purchase merchandise at Calcutta for delivery to him at Newbury-port. In lieu of freight and a broker's commission the shipowner agreed to accept one half of the net profits from the sale of the merchandise. Upon arrival at Calcutta, after encountering two severe gales, the ship was found to be leaking slightly. Repairs were effected and loading commenced. After receiving two thirds of its cargo, four feet of water were discovered in the cargo hold. Sale of the damaged cargo resulted in a $ 300 loss to the plaintiff who sued to recover.

The evidence at trial disclosed "no want of care and diligence in the officers and crew of the vessel in finding out the leak, and securing the cargo". Rejecting the argument that the vessel's seaworthiness at the commencement of the voyage was sufficient to exonerate the shipowner, the court (citing Abbott as its sole authority) articulated an absolute warranty in the broadest possible terms:

> "It is the duty of the owner of a ship, when he charters her, or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety; and he is to keep her in that condition, unless prevented by perils of the sea or unavoidable accident. If the goods are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter, upon the principle that he tacitly contracts that his vessel shall be fit for the use, for which he thus employs her. This principle governs, not only in charterparties and in policies of insurance, but it is equally applicable in

contracts of affreightment."[95]

With Putman case, the absolute warranty established a firm foothold in the New world. It only remained for the United States Supreme court to place its imprematur upon the doctrine. This it did 71 years later in Work V. Leathers,[96] a charterparty case in which Putman was cited as prime authority for the absolute warranty.

II- The Warranty of Seaworthiness in Charterparties:

Charterparties invariably contain a large number of terms expressly agreed to by the parties, contained both in the standard forms used in the market and in the special riders agreed to between particular owners and charterers. These express terms will deal with such matters as the period of the charter, the rate of freight or hire, etc.[97]

As a general rule of Law, the courts will not imply a particular term in a contract merely because it would have been reasonable for the parties to have inserted such a term, for it is not the function of the court to make a contract for the parties.[98]

However, if certain terms are necessary to give business efficacy to the contract as both parties must have intended,[99] the court will then imply them into the contract. In this way,

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95 Ibid, at p. 484 per Parker.J.

96 (1878) 97 U.S. 379.

97 See Chorley, R.S., & Giles, O.C., Shipping Law , 8th ed. by N.J.J. Gaskell et Al, London, Pitman Publishing, 1987, p. 181.

98 See Scrutton, 1984, op.cit., at p. 81.

99 Ibid, at p. 81.

certain terms have, through judicial policy, become permanent fixtures in charterparty Law. One of the most important of these implied terms is the warranty of seaworthiness.

1- Express and Implied Undertakings as to Seaworthiness in Charterparties:

By entering into a contract to carry goods in his ship, whether under a charterparty or as a common carrier, a shipowner undertakes that his ship is seaworthy.[100]

This implied undertaking of seaworthiness, was well illustrated in Steel V. State Line[101] case, where Lord Blackburn said:[102]

> "...where there is a contract to carry goods in a ship, whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship, or that ship's room, unless something be stipulated which should prevent it, that the ship shall be fit for its purpose. That is generally expressed by saying that it shall be seaworthy..."

Yet charterparties also contain the express term that the ship is "tight, staunch, and strong and in every way fitted for the voyage". This express provision seems to be equivalent to the warranty of seaworthiness and fitness which is implied by Law on the part of the shipowner.

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100 See Chorley & Giles, op.cit., at p. 182.

101 [1877] 3 A.C. 72.

102 Ibid, at p. 86.

Therefore, it may well be asked why, in view of these clear words, the courts should have found it necessary to imply a warranty of seaworthiness?

The answer is that, in charterparties, two different positions of shipowner may be distinguishable:

(i) The usual clause that the ship is "tight, staunch, and strong and in every way fitted for the voyage" apparently refers either to the time at which the contract is made, or to the time of sailing for the loading port.[103] In other words; the "voyage" for which the ship is to be "in every way fitted" can, therefore, only be the preliminary voyage from where the ship happens to be to the port where the cargo is taken on board. The charter is silent on the condition of the ship when it sails with cargo from the loading port.[104]

(ii) Seaworthiness implied by Common Law, on the other hand, refers to the cargo-carrying voyage, actually to the time of sailing from the loading port.

Generally speaking, the warranty of seaworthiness on sailing from the port of loading is, however, implied by Law, although there be an express warranty in the charter which relates only to the time of sailing for that port.

Thus in Seville Sulphur Co. V. Colvils,[105] where the charter provided that the ship "being tight, staunch, and strong and in every way fitted for the voyage" shall proceed to Seville, and there load, it was held that she was bound to be seaworthy on

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103 See Carver, op.cit., at p. 448.

104 See Chorley & Giles, op.cit., at p. 182.

105 (1888) 25 S.L.R. 437.

sailing from Seville. And the charterer recovered on the ground that this warranty was broken, though the defect was not an original one, but lay in the muddy state of the water which had been taken into the boilers just before leaving Seville.

From this case, it is clear enough, that the contractual warranty need not coincide with the Common Law one, so that an exemption from the former in the charterparty does not relieve the owner if the particular unseaworthiness remains until the ship sails from the port of loading.[106]

2- Time of Seaworthiness in Voyage Charterparties:

We must now consider at what time the ship must be seaworthy.

First, the ship is warranted to be fit to receive the cargo, and lie in harbour until ready to sail. A defect arising after the cargo has been shipped is no breach of this undertaking.

Thus in Mc Fadden V. Blue Star Line,[107] a sluice door was imperfectly closed after the plaintiff's goods were shipped, but before the ship sailed. In consequence the goods were damaged.

It was held by Channel.J.[108] that, the state of the sluice door, had it existed before the goods were put on board, would have constituted a breach of the warranty of fitness in respect of cargo, but as it did not exist till after the loading commenced, there was no breach of the warranty in that respect.

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106 See Lorentz, H.A., The Law as to seaworthiness under the contract of affreightment. L.L.M. Dissertation, University of London (1954), p. 7.

107 [1905] 1 K.B. 697.

108 Ibid, at p. 705.

Secondly, the ship is warranted to be fit "to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter".[109] This last and most important warranty is restricted to the commencement of the voyage. "It does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed: it takes effect at the time of sailing, and at the time of sailing alone".[110]

An interesting case that can be cited in this connection, is that of Cohn V. Davidson.[111] A ship was chartered to proceed to a wharf in the port of Sunderland, there take on board a cargo and proceed to Dundee. She was seaworthy when she began to load, but unseaworthy when she put to sea.

Held, that the owner undertakes that the ship shall be seaworthy for the intended voyage at the time of her sailing on it; that what is seaworthiness for loading in harbour may be unseaworthiness for the voyage; that the warranty of seaworthiness implied by Law upon entering into the charterparty had been broken, and that the plaintiff was entitled to recover the value of the cargo shipped by him on board the vessel.

One last point which deserves notice is that, if the ship is reasonably fit to complete the voyage at the moment of sailing, the fact that she becomes unseaworthy during the course of the voyage is no breach of the warranty of seaworthiness as "it is not a continuing warranty, in the sense of a warranty that she

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109 Steel V. State Line S.S. Co. [1877] 3 A.C. 72, per Lord Cairns L.C at p. 77.

110 Mc Fadden V. Blue Star Line [1905] 1 K.B. 697, per Channel.J at p. 704.

111 (1877) 2 Q.B.D. 455.

shall continue fit during the voyage".[112] If unseaworthiness arises in the course of the voyage, the shipowner is bound to remedy it if possible. This special obligation, however, does not arise from the warranty of seaworthiness, but from the duty to take care.[113]

Where the voyage is divided into "stages", the warranty of seaworthiness is interpreted as a warranty that, when the ship sails on each stage of the voyage, she is fit for the duration of that particular stage. There is, then, no breach of the warranty if the ship is not fit for the whole voyage when she sails on one particular stage, provided that she is fit for the whole of this stage.[114]

An extremely important and involved point of seaworthiness is sufficient fuel. For cargo vessels on long voyage it is, from a commercial point of view, impossible to take on board a sufficient supply of fuel for the whole voyage.[115] In such cases, the voyage is deemed to be divided into bunkering stages for the purpose of re-fuelling. And, accordingly, the voyage from one coaling port to another is a "stage", and by commencing this "stage" with an insufficiency of fuel on board, the shipowner is in breach of the undertaking.

Thus in The Vortigern,[116] a vessel sailed on her voyage from the Philippines to Liverpool. The charterparty excluded liability

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112 Mc Fadden V. Blue Star Line [1905] 1 K.B. 697, per Channel.J at p. 703.

113 See Scrutton, 1984, op.cit., at p. 86.

114 See Ridley, J., The Law of the carriage of goods by land, sea, and air, 6th ed. by Geoffrey Whitehead, London, Shaw & Sons Ltd., 1982, p. 89.

115 See Arnould, op.cit., at p. 566.

116 [1899] P. 140.

for the negligence of the master and engineers. The voyage was divided into stages. She called at Colombo, but did not take on sufficient coal for the next stage to Suez. When she was near a coaling station, the master did not take on any more fuel for he was not warned by the engineer that the supplies were running short. The consequence was that some of the cargo had to be used as fuel to enable the ship to reach Suez.

Held, by the Court of Appeal, that the shipowners could not plead the exception clause; that the ship was not seaworthy for the stage from Colombo to Suez, and that the charterer could recover from the shipowner the value of the cargo burned in consequence of the breach of the warranty of seaworthiness.

3- The Effect of Unseaworthiness in Voyage Charter-parties:

If the charterer discovers that the ship is unseaworthy before the voyage begins, and the defect cannot be remedied within a reasonable time, he may throw up the charter.

Thus, in Stanton V. Richardson,[117] a ship was chartered to take a cargo including wet sugar. When the bulk of sugar had been loaded, it was found that the pumps were not of sufficient capacity to remove the drainage from the sugar. Adequate pumping machinery could not be obtained for a considerable time.

Held, the ship was unseaworthy for the cargo agreed on, and as she could not be made fit within a reasonable time, the

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[117] (1874) L.R. 9 C.P. 390.

charterer was justified in throwing up the charter.

Further, although the ship is unseaworthy, the shipowner may still rely on a contractual clause which exempts him from liability for certain perils if the respective loss or damage has not been caused by the unseaworthiness of the ship.[118]

The issue was settled in The Europa[119] case, the facts of which neatly illustrate the point.

The German steamship "Europa" was chartered by British merchants to carry a cargo of sugar in bags from Stettin to Liverpool, and there deliver it. One of the excepted perils mentioned in the charterparty being "collision". When entering the dock at Liverpool the ship struck the dock wall. A water-closet pipe was broken and water got through it into the tween decks and some bags of sugar which were stowed there were damaged by the water. In the tween decks near to the water-closet pipe were two scupper holes. The pipes which had originally been affixed to these two scupper holes for the purpose of carrying off water from the tween decks to the bilges, had been removed, and the scupper holes had been imperfectly plugged. With the result that the water from the broken closet pipe not only got to the tween decks, but also through these scupper holes, into the lower hold, damaging other bags of sugar stowed there.

There was thus, two different aspects of seawater damage to the sugar: one in the tween decks, and one in the lower hold. It was not disputed that the imperfect plugging of the scupper

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118 See Payne & Ivamy, op.cit., at p. 16.

119 [1908] P. 84.

holes existed before the cargo was loaded, and before the vessel sailed from Stettin; and that thereby the vessel was, to that extent, unseaworthy.

While the defendant shipowners admitted liability for the damage to the sugar in the lower hold, as being due to a breach of the seaworthiness duty, they denied liability for the damage in the tween decks, alleging that this damage was not caused at all by unseaworthiness, but was the direct result of the collision with the dock wall, and that liability for collision had been excepted.

Held, that they were not liable for this damage; and that the breach of the undertaking of seaworthiness did not displace the terms of the contract. The damage to the sugar in the tween decks was caused not by unseaworthiness, but by the collision, and so the shipowners were entitled to rely on the exception clause.

On the other hand, "if the unfitness of the ship becomes a real cause of loss or damage to the cargo, the shipowner is responsible, although other causes from whose effect he is excused either at Common Law or by express contract have contributed to cause the loss".[120]

Accordingly, where there is an exception of negligence, but no exception of unseaworthiness, the shipowner is liable for the whole of the damage.

Thus, in The Christel Vinnen,[121] damage to cargo due to

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120 Smith Hogg & Co. V. Black Sea & Baltic General Insurance Co. [1940] A.C. 997, per Lord Wright, at p. 1005.

121 [1924] P. 208.

leakage through a leaky rivet was increased by the negligence of the master in not detecting the water in the hold and pumping it out.

It was held by the Court of Appeal that, notwithstanding an exception of negligence, the shipowners were responsible for the whole of the damage, not merely for such proportion as must have been incurred before the inflow of the water could have been checked. No distinction was drawn between damage due to perils of the sea alone and that due to perils of the sea and to negligence combined.

In this case, Scrutton L.J said:[122]

> "The water which entered and did the damage entered through unseaworthiness; its effects when in the ship might have been partially remedied by due diligence, which the shipowner's servants did not take. But in my view the cause of the resulting damage is still unseaworthiness..."

The test is not was unseaworthiness the dominant cause,[123] but was it a cause, or a real effective or actual cause of the loss?[124] It is immaterial that other causes contributed to occasion it.[125]

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122 Ibid, at p. 214, see also Scrutton, 1984, op.cit., at p. 243.

123 Scrutton L.J's test in The Christel Vinnen [1924] P. 208 at p. 214, whether unseaworthiness was the direct or dominant cause of the loss, now appears to be wrong, see per Lord Wright in the Smith Hogg case [1940] A.C. 997 at p. 1006.

124 Smith Hogg V. Black Sea & General Insurance [1940] A.C. 997, per Lord Wright at p. 1007.

125 Ibid, at p. 1007.

It must be borne in mind, that the choice given to the charterer either to rescind the contract or to claim damages depends upon whether the breach of the seaworthiness undertaking defeats the commercial purpose of the voyage or not.

A breach of this undertaking which defeats the commercial purpose of the voyage will justify the charterer of the ship in repudiating the contract and claiming damages if he suffers any by reason thereof. Another breach which does not defeat the commercial purpose of the voyage will give rise only to an action for damages.[126]

It is noteworthy that, the right to rescind the contract follows from perceiving that the warranty of seaworthiness, is as we saw earlier, a condition lying at the very root of the contract: "The very foundation and immediate substratum of the contract" as Lord Ellenborough C.J put it.[127]

Carver reverses this proposition by stating:[128]

> "...the obligation of seaworthiness is not, generally speaking, a condition breach of which entitles the party aggrieved, on discovering it, to rescind the contract. On principle, therefore, it would seem that it should never so operate, but operate only as a warranty, breach of which would entitle the party aggrieved merely to damages. But there is high authority for the proposition that it may sometimes operate as a condition."

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126 See Scrutton, 1984, op.cit., pp. 81-82.

127 In Lyon V. Mells (1804) 5 East 428 at 437.

128 Carver, op.cit., at p. 106.

The right of the charterer to treat the contract as discharged in consequence of a breach of the undertaking depends on whether the breach goes to the root of the contract.[129]

4- Excluding Liability for Unseaworthiness:

In Lyon V. Mells,[130] Lord Ellenborough C.J. said[131] that the Law "presumes" a promise of seaworthiness on the part of the carrier without any actual proof.

What is presumed may be rebutted. In all cases where the carriage of goods by sea Act does not apply, the Common Law warranty of absolute seaworthiness asserts itself. The shipowner is, under English Law, perfectly free either to modify it by contract or to contract himself out of it altogether. He may, in the drastic words of Lord Blackburn,[132] say:

> "We will take the goods on board, but we shall not be responsible at all, though our ship is ever so unseaworthy; look out for yourselves; if we put them on board a rotten ship, that is your look-out."

If the shipowner wishes to exempt himself from liability for unseaworthiness, he must use clear and unambiguous language. The respective clause in the charterparty must be "in the

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129 See Scrutton, 1984, op.cit., at p. 82, see also Hong Kong Fir Shipping Co. Ltd. V. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26, per Upjohn L.J., at p. 63.

130 (1804) 5 East 428.

131 Ibid, at 437.

132 Steel V. State Line S.S. Co. Ltd. [1877] 3 A.C. 72 at p. 89.

plainest possible language".[133]

In Marine Craft Constructors Ltd. V. Earland Blomqvist (Engineers) Ltd.,[134] Mr Justice Lynskey[135] said that:

> "It requires very clear words to get rid of that particular warranty implied by Law in any contract of carriage or charterparty."

In The Petrofina[136] case, Lord Wright laid down the Law:

> "We are dealing with a contract of affreightment, and it is necessary to bear in mind the well-established view which has been so often stated, that if it is sought to effect a reduction of the overriding obligation to provide a seaworthy ship, whether that is express or implied for this purpose does not matter, by other express terms of the charterparty or contract of affreightment, that result can only be achieved if perfectly clear, effective, and precise words are used expressly stating that limitation."

According to first principles, any exceptional term in a contract is to be strictly construed and any ambiguous expression will be construed against the shipowner. A term in the contract excluding the liability of the shipowner in general terms, or excluding his liability for negligence, will be interpreted as not

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133 Waikato V. New Zealand Shipping Co., Ltd. [1898] 1 Q.B. 645 at p. 647 per Bigham.J.

134 [1953] 1 Lloyd's Rep. 514.

135 Ibid, at p. 519.

136 Petrofina S.A of Brussels V. Compagnia Italiana Trasporto Olii Minerali (1937) 53 T.L.R. 650 (C.A) at p. 653.

affecting his liability for unseaworthiness.[137]

A good example of ambiguity is the case of Nelson Line (Liverpool) Ltd. V. James Nelson & Sons Ltd.,[138] where frozen meat had been shipped under an agreement which stated that the shipowner would not be liable for any damage "which is capable of being covered by insurance". The meat arrived in a damaged condition on account of the unseaworthiness of the vessel. Held, by the House of Lords, that the clause was not sufficiently clear to exempt the shipowner from being liable to supply a seaworthy ship.

In some cases, the shipowner exempts himself from liability for unseaworthiness only where the loss or damage is caused by personal want of due diligence on his part or that of his employees to make the vessel in all respects seaworthy.[139]

Thus, clause (2) of the "Gencon" charterparty[140] provides:

> "Owners are to be responsible for loss or damage to goods...only in case the loss, damage has been caused...by personal want of due diligence on the part of the owners or their manager to make the vessel in all respects seaworthy..."

In Itoh & Co. Ltd. V. Atlantska Plovidba (The Gundulic).[141] The

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137 See Ridley, op.cit., p. 90, see also the case of Lyon V. Mells (1804) 5 East 428.

138 [1908] A.C. 16.

139 See Payne & Ivamy, op.cit., at p. 18.

140 Ibid, Appendix B at p. 276.

141 [1981] 2 Lloyd's Rep. 418, Q.B.D (Commercial court), for other examples, see Elderslie S.S Co. V. Borthwick [1905] A.C. 93.

vessel "Gundulic" was chartered for a voyage under a charterparty containing the above clause. The cargo was damaged by the entry of seawater through the hatch covers. The charterers claimed damages from the shipowners.

Held, by the Queen's Bench Division (Commercial Court) that there would be judgment for the charterers. The condition of the hatch covers was such that any prudent surveyor ought to have seen a real risk that seawater would enter the holds through them and would have called for repairs. The shipowners had failed to discharge the burden of showing that the damage had occurred without any personal want of due diligence on the part of a junior engineer superintendent employed by them.

One last point which deserves notice here is, that a mere right given to the charterer and his inspector to inspect the ship before loading and to satisfy himself as to her being fit for the cargo in question does not free the shipowner from his obligation to provide a cargoworthy ship.[142]

This, was well illustrated in Petrofina S.A of Brussels V. Compagnia Italiana Trasporto Olii Minerali,[143] where the charterparty of a steamer which was to carry a cargo of oil provided in clause (1) that the ship was to be "in every way fitted for the voyage and to be maintained in such condition during the voyage". By clause (16) the master was bound to keep tanks, pipes and pumps clean. Finally a clause (27) was inserted according to which the steamer should be clean for the cargo in question to the satisfaction of the charterer's inspector. On

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142 See Chorley & Giles, op.cit., at p. 191.

143 (1937) 53 T.L.R. 650 (C.A).

discharge the benzene was discoloured, and on the evidence this was found to be the fault of the steamer. The shipowner, however, pleaded clause (27), and contended that he was only bound to keep the tanks clean to the satisfaction of the charterer's inspector, and the latter had in fact expressed his satisfaction.

Held, that clauses (1) and (16) contained an express warranty of seaworthiness that the ship was fit for the particular cargo, and that clause (27) far from excluding the warranty of seaworthiness, only gave an additional right of inspection to the charterers. Without express words to this effect, the satisfaction of the inspector could not be relied on as a discharge of the shipowner's obligation to provide a seaworthy ship; and that the shipowners were accordingly liable to the charterers.

Carver, after citing a number of effective and ineffective clauses, comes to the conclusion that:

> "No general rules can be laid down as to the language which is sufficient to exclude the warranty of seaworthiness. Each contract must be construed as a whole."[144]

III- The Interaction Between the Warranty of Seaworthiness and the Excepted Perils:

Under the Common Law, the shipowner was exempted from liability for losses or damages resulting from a few perils only: acts of God, the King's enemies, the inherent vice of the goods, default of the shipper,and general average sacrifice.

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[144] See Carver, op.cit., at p. 127.

The Merchant Shipping Act 1894, section 502 (i) added fire. Finally the charterparty or the bill of lading, as the case may be, will almost always name yet further exceptions. We thus have exceptions under Common Law, exceptions under statute, exception under contract, all of which sail under the flag of the "excepted perils".

The question is: how does unseaworthiness fare with these excepted perils? Must it recoil before them, or does it override them? What does prevail? The liability for unseaworthiness, or the exception from liability for fire, negligence, etc?

To answer this question we have to distinguish. Those exceptions which prevail even if the ship is unseaworthy, from those which are swept away by the liability for unseaworthiness.

We come first to consider how far the responsibility of a carrier by sea for the goods which he carries has been affected by the Merchant Shipping Act which affords carriers a special protection in the case of fire.

The Merchant Shipping Act 1894, section 502 provides:[145]

> "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:
> (i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the

[145] Section 502 of the Merchant Shipping Act 1894 has been replaced by section 18 of the Merchant Shipping Act 1979 on December 1, 1986.

ship;..."

Accordingly the shipowner is not deprived of the exemption from liability for fire given by this section merely because the fire was due to unseaworthiness.[146]

The point arose in Louis Dreyfus & Co., Ltd. V. Tempus Shipping Co., Ltd.,[147] where a steamship was chartered to carry a cargo of grain from the River Plate to the United Kingdom. The vessel was sent to sea with bad bunker coal aboard. In this respect the vessel was unseaworthy. The coal caught fire, and part of the cargo was damaged. The captain put into a port of refuge and incurred expense for the benefit of ship and cargo.

In an action by the shipowners against cargo-owners for contribution towards a general average expenditure, the defendants counterclaimed for damages for injury to their cargo owing to the fire.

Held, by the House of Lords, that the shipowners were not deprived of the protection afforded by section 502 of the Merchant Shipping Act 1894 by reason of the fact that the fire was due to the unseaworthy condition of the ship; and that in the absence of proof of an actionable wrong on their part, the shipowners, in view of the provisions of section 502, were entitled to recover from the cargo-owners the contribution claimed.

It must be borne in mind that the benefit of section 502 (i) is subject to the proviso of the Act: "Any loss or damage happening

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146 See Payne & Ivamy, op.cit., at p. 180.

147 [1931] A.C. 726.

without his actual fault or privity". This deprives the shipowner of the protection of section 502 in cases of negligence. Where absence of actual fault or privity of the owner can be proved, he may rely on section 502 though his ship was ever so unseaworthy.

It is convenient to mention here that, the benefit of section 502 (i) may be waived by contract. Whether the shipowner has, by his contract waived the benefit of section 502, is a question of construction of that contract. The statute can be excluded only by express contract. Thus, the implied warranty of seaworthiness has not been construed to cut down the benefit of section 502 (i) where fire is caused by unseaworthiness; but the shipowner would not appear to be able to rely on the section where the fire has been caused by breach of an express provision of the contract imposing upon him an obligation relating to seaworthiness.[148]

Thus, in Virginia Carolina Chemical Co. V. Norfolk & North American Steam Shipping Co.[149] Goods on board a British ship were destroyed by fire on board.

The bill of lading contained a clause providing that the shipowner was not responsible for any loss or damage to the goods occasioned by (inter-alia) fire or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness.

Held, by Bray.J and by the Court of Appeal, that a shipowner is not deprived of the protection of section 502 merely by reason

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148 See Carver, op.cit., at p. 286.

149 [1912] 1 K.B 229.

of the fact that the fire is caused by the unseaworthiness of the ship in breach of the warranty implied by Law, but that the effect of a bill of lading containing the above clause is to preclude the shipowner from setting up the section as an answer to a claim for the loss of goods by reason of fire on board the ship caused by the unseaworthiness of the ship.

From these cases[150] concerning unseaworthiness and fire, it is, therefore, clear enough that unseaworthiness if not due to the actual fault or privity of the owner, does not deprive him of the statutory exception of section 502 Merchant Shipping Act from liability for fire; but that a contractual exception from this liability for fire is, in principle, still subject to the condition that he has not only done his best to make the ship seaworthy but that she is actually seaworthy.

The same rule _ that the exception does not come into play unless the primary obligation to provide a seaworthy ship has been complied with _ applies to all other excepted perils, whether excepted by contract, or by Common Law. Thus, no shipowner may rely on any of his exceptions if his vessel was not in a seaworthy condition when she commenced her voyage, and if that contributed to the loss or damage.[151] As Lord Sumner put it:

> "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability _ namely that

[150] See Louis Dreyfus & Co., Ltd. V. Tempus Shipping Co., Ltd. [1931] A.C. 726, Virginia Carolina Chemical Co. V. Norfolk & North American Steam Shipping Co. [1912] 1 K.B. 229.

[151] See Carver, op.cit., at p. 20.

> the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."[152]

To understand this relation between the warranty of seaworthiness and the excepted perils, it is important to cite here the case of Steel V. State Line Steamship Co.,[153] in which Lord Blackburn laid down the Law:

> "It is settled that in any contract...to carry the goods except the perils of the sea, and except breakage, and except leakage,...there still remains a duty upon the shipowner, not merely to carry the goods if not prevented by the excepted perils, but also that he and his servants shall use due care and skill about carrying the goods and shall not be negligent...Now, if even that is excepted, there still remains a duty to provide a seaworthy ship."

In tackling any case with "excepted perils" it is all important to keep in mind this distinctive rank of the exceptions; to perceive that, logically, they are not on the same level. There is an order of preference amongst them:

(i) seaworthiness, (ii) negligence, (iii) fire under section 502 Merchant Shipping Act, (iv) all other exceptions.

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[152] Atlantic Shipping & Trading Co., Ltd. V. Louis Dreyfus & Co. [1922] 2 A.C 250, at p. 260.

[153] [1877] 3 A.C. 72, at p. 87.

If, therefore, unseaworthiness cannot be proved, the next strongest weapon with which to fight the case against the shipowner is that, apart from, his implied warranty of seaworthiness there is further an implied engagement on his part to use due care and skill in navigating the vessel and carrying the goods.[154] In other words; that he and his servants shall not be negligent in navigation or carriage. The only possible defence against the proof of negligence is that negligence was excluded.

From the above duties impliedly cast upon every shipowner, it follows as a necessary consequence, as Lord Macnaghten put it in The Xantho case:[155] "that even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected", if (i) the vessel is not seaworthy, or (ii) if any default or negligence on his part has contributed to the loss. The only possible defence of the owner is his plain and precise exception from (i) seaworthiness and (ii) default or negligence. His exception from negligence alone does not exempt him from liability for negligence at the commencement of the voyage amounting to unseaworthiness.

If the open port-hole, on which Steel V. State Line case[156] turned, had been fastened at starting; then, the exception from negligence would have protected the owner; but being unfastened at the commencement of the voyage, it came squarely within the four corners of the definition of unseaworthiness and excepted

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154 See The Xantho (1887) 12 A.C. 503, per Lord Macnaghten, at p. 515.

155 (1887) 12 A.C. 503 at p. 515.

156 [1877] 3 A.C. 72.

negligence was no answer to that.

CHAPTER TWO

The Carrier's Duty of Seaworthiness Under the Hague Rules and Hamburg Rules.

Historical Introduction:

It is not possible to interpret the Hamburg Rules or to understand their objectives without citing the main historical factors which led to the new Rules being conceived.

At the same time, it may be appropriate to remind ourselves briefly of the development of carriers' liability towards cargo up to the present day.

Until the early part of the nineteenth century shipowners frequently had some direct interest in the cargo itself, which the merchants and the shipowners sharing in a joint venture which included the shipowner and the ship's captain (sometimes the same person) in the sale and disposal of the cargo at the destination. There was, therefore, an in-built self-interest for the shipowner to take the utmost care of the cargo on the sea voyage.

However, with the introduction of steamships and the subsequent increasing size of the vessels, shipowners tended to become solely the carriers of cargo, and having no direct financial interest in the goods themselves. The terms on which cargo was carried become largely dictated by shipowners with

little or no legislative restrictions or guidelines, and it is, therefore, not surprising that carriers tended to protect themselves by absolving themselves from virtually all liability towards the cargo in their care, under the terms of the contract of carriage.

This was generally the position up to about sixty years ago and was considered unsatisfactory because it removed any incentive to take care of the goods and omitted any penalty as a result of not doing so.

The lengthy struggle between ship owning and cargo interests which resulted, eventually culminated in the adoption of the Hague Rules in 1924 with the aim of achieving a fairer allocation of the risks of loss or damage to goods in transit between the parties.[1]

The situation was then changed by the Hague Rules which introduced certain requirements for the care required from the shipowner in providing a seaworthy ship and in caring for the cargo whilst in his control;[2] but at the same time it gave the shipowner some valuable exemptions[3] from liability in certain circumstances provided he had fulfilled the basic requirements laid on him under the Rules.

It was hoped that, by establishing just solutions in the interests of the shippers and carriers, the Rules would standardise the liabilities of the carriers at an international

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1 See Wilson, J.F., "Basic carrier liability and the right of limitation", published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, p. 137.

2 See Article III, rule 1 & 2 of the Hague Rules.

3 See Article IV, rule 1 & 2 of the Hague Rules.

level. Unfortunately, the optimism which prevailed at the time the Rules were signed proved largely illusory and conflicting interpretations of some parts of the Rules are not infrequent.[4]

In a legal analysis of the Hamburg Rules, Diamond[5] mentioned two main historical factors leading to the formulation of the Hamburg Rules.

The first one is that the years which had intervened since 1924 had thrown up both technical defects in the Hague Rules and also a number of new commercial problems to which those Rules provided either no answer at all or no satisfactory answer.[6] In these circumstances the Comité Maritime International (C.M.I) took the lead in revising the Rules, as it found itself compelled to recommend an amendment designed to bring the Hague Rules up to date, and to cure what may be called the conflict of law problems inherent in most Hague Rules' legislation.

As a result, a diplomatic conference held in two stages in 1967 and 1968, formulated a protocol[7] containing the Visby amendments to the Hague Visby Rules.

Thus, the first historical factor which led to a demand for a totally new convention was the disappointment experienced by

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[4] See Mankabady, S., "Comments on the Hamburg Rules", Published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, 27 at p. 30.

[5] See Diamond, A., "A legal analysis of the Hamburg Rules" (part I), published in the Hamburg Rules, A one-day seminar organised by Lloyd's of London Press Ltd., September 28, 1978, p. 1.

[6] Ibid, at p. 1.

[7] The protocol was signed on 23rd February, 1968.

many people at the outcome of the conferences held for the purpose of bringing the Hague Rules up to date, since the modifications effected by the protocol of the amendment in 1968 did not gain universal approval. They were regarded by many cargo-owning countries as constituting merely a temporary expedient and there was a growing demand for a thorough reappraisal of carrier liability designed to produce a comprehensive code covering all aspect of the contract of carriage.[8]

As to the second factor leading to the formulation of the Hamburg Rules is that, both the Rules and the 1968 protocol came under severe criticism from most of the developing countries as they felt that their interests were not taken into account.

Already by 1968 it had become clear that the Hague Rules were unpopular among the developing countries partly because they were thought to have been drafted in the interests of the so-called colonialist or shipowning notions, and, even more, because they had been imposed on their colonies before those colonies had gained their independence.[9]

The developing countries argued that as shippers they were being exploited by an international cartel of carriers similar to the British shipping monopoly which had dictated terms to American merchants at the end of the nineteenth century, and that they had not participated in the formulation of the Hague Rules governing the allocation of risks between carriers and

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[8] See Wilson, op.cit., at p. 138.

[9] See Diamond, op.cit., at p. 2.

shippers,[10] and that they were, therefore, entitled to a share in the formulation of those Laws which should govern their maritime affairs.

Therefore, and for the main reasons already cited, the United Nations Conference on Trade and Development (UNCTAD) published in 1970 a detailed study containing a number of proposals for the revision of the Rules.

In this UNCTAD study[11] the main grounds of concern were identified as follows:

a) Uncertainties arising from vague and ambiguous wording in certain areas of the Rules, which lead to conflicting interpretations (and which complicate such matters as the allocation of responsibility for loss or damage to cargo; and the burden of proof, this being a subject of complaints by both carrier and cargo interests);

b) Exemptions in the Hague Rules which are peculiar to ocean carriage, in cases where the liability should be logically be born by the ocean carrier, such as those which excuse him from liability in respect of the negligence of his servants and agents in the navigation and management of the vessel, and in respect of perils of the sea, etc;

c) The uncertainties caused by the interpretation of terms used in the Hague Rules, such as "reasonable deviation", "due

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[10] U.N. Conference on the carriage of goods by sea, comments and proposal by Governments and International Organizations on the Draft Convention on the carriage of goods by sea, at 36 (General Observation of the Government of Qatar, para 7) U.N. Doc. A/CONF. 89/7 (1977).

[11] See UNCTAD report dated 14 December, 1970, TD/B/C. 4/ISL/6.

diligence", "properly and carefully", "in any event", "load on", "discharge";

d) The ambiguities surrounding the seaworthiness of vessels for the carriage of goods;

e) The insufficient legal protection for cargoes with special characteristics that require special stowage, adequate ventilation, etc, and cargoes requiring deck shipment.

After the adoption of this study, UNCTAD invited the United Nations Commission On International Trade Law (UNCITRAL) to examine the defects and the amendments to the Rules.

Therefore, the UNCITRAL Rules were prepared according to the resolution adopted by the working group on International Shipping Legislation at its second session,[12] with the following purposes in mind:

"...the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others should be considered for revision and amplification:

a) Responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;

b) The scheme of responsibilities and liabilities, and rights and immunities, incorporated in Articles III and IV of The Convention as amended by the protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;

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12 TD/B/C.4/86; TD/B/C. 5/ISL/8. Annex1, See also Mankabady, op.cit., at p. 31.

c) Burden of proof;

d) Jurisdiction;

e) Responsibility for deck cargoes, live animals, and transshipments;

f) Extension of the period of limitation;

g) Definition under Article I of the Convention;

h) Elimination of invalid clauses in bills of lading;

i) Deviation, seaworthiness and unit limitation of, liability."

In the years between 1971 and 1975 negotiations took place under the auspices of UNCITRAL for the purpose of producing a text which could be submitted to the Diplomatic Conference. It was not until 1976 that UNCITRAL published a final draft of the proposed new cargo Convention.[13]

The next and last stage in the process was of course the Diplomatic Conference which was held at Hamburg from 6 to 31 March, 1978. Some 200 amendments were discussed and on 30 March, 1978, the Convention on the carriage of goods by sea (known as the Hamburg Rules) was adopted.[14]

It is convenient to note that, the compromise reached by the UNCITRAL working group, removes the more notorious "exceptions" from liability, in exchange for a rule of general liability subject to a standard of reasonable care, and the excision of the statement of the positive duties placed on the carriers by the Hague Rules:

a) To "properly and carefully load, handle, stow, carry, keep,

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13 See Diamond, op.cit., at p. 3.

14 The Hamburg Conference also adopted a "Common Understanding".

care for and discharge the goods...";

b) To exercise due diligence to make the ship seaworthy before and the beginning of the voyage.

As this chapter is mainly based on the study of the latter duty (i.e: duty of seaworthiness) it is important here to mention the arguments which were raised in UNICITRAL in this respect.

At the fourth session[15] of the working group on International Shipping Legislation, the arguments raised that the carrier's positive duties should be restated, and that his duty to provide a seaworthy ship, should continue throughout the voyage, were opposed by counter arguments that these two separate sets of duties would be subsumed under the general liability rule and would not, for this reason, require restatement, since the carrier under the general rule of liability "based on presumption of fault", would have to perform all his obligations under the contract of carriage with care.

This chapter will therefore, compare the provisions of the existing Hague Rules (found in Article III) imposing on the carrier certain duties with respect to seaworthiness, with those of the new Hamburg Rules relating to the basis of the carrier's liability (found in Article 5).

Decisions of the courts concerning cases of seaworthiness under the present Hague Rules will be considered as a background for the comparative discussion, which has to cover a wide range of problems in this respect (i.e: duty of seaworthiness) in order to find out to what extent this important

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15 See report of the working group on International Shipping Legislation on its fourth (special) session, A/CN.9/74, para. 30.

duty will be modified under the new Hamburg Rules.

Section one: Basis of Liability.

I- Under the Hague Rules:

The Hague Rules placed upon the carrier's shoulders some important obligations, of which breach of any will give rise to the liability of the carrier unless he brings himself within one of the exemption clauses.[16]

The formulation of the basic liability is to be found in Article III rule 1 and 2 of the Hague Rules. On the one hand, the responsibility of the carrier to provide a seaworthy ship is limited by Article III, rule 1 to a duty to exercise due diligence before and beginning of the voyage to make the ship seaworthy. The cargo owner must first establish that the cargo loss has resulted from the unseaworthiness of the ship before the carrier assumes the burden of proving the exercise of such due diligence.

On the other hand Article III, rule 2 requires the carrier to deal "properly and carefully" with the cargo which it is under his control from the time of loading to the time of discharge. This latter obligation is made expressly subject to the catalogue of exceptions contained in Article IV, rule 2 which can be claimed by the carrier.

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16 See AL. Jazairy, Hashim.R., "The maritime carrier's liability under the Hague Rules, Visby Rules and Hamburg Rules", thesis submitted for PhD degree, University of Glasgow, 1983, p. 58.

1- Origin of the Phrase "Due Diligence to Make the Ship Seaworthy":

It can be seen that the first of the carrier's major obligation under the Hague Rules, is to "exercise due diligence to make the ship seaworthy". However, this famous phrase did not spring into existence in 1924 but it was borrowed from the language which had been conventionally used by the carriers in their bills of lading, and from earlier legislation.[17]

In Riverstone Meat Company, Pty, Ltd. V. Lancashire Shipping Company Ltd. (The Muncaster Castle),[18] it was held that:

> "The framers of the Rules had among other precedents the American Harter Act, 1893, the Australian sea carriage of goods Act, 1904, the Canadian water carriage of goods Act, 1910, and though they had no British Act as a model, they had decisions of the English courts in which the language of the Harter Act had fallen to be construed by virtue of its provisions being embodied in bills of lading. In all these Acts the relevant words "exercise due diligence to make the ship seaworthy" are to be found. It was in these circumstances that these words were adopted in the Hague Rules."

The Harter Act made use of the notion "Due diligence" as an overriding condition: A carrier had to prove that he had exercised due diligence to make the ship seaworthy "in all

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17 See Diamond, A., "The division of liability as between ship and cargo under the new rules proposed by UNICITRAL", (1977) L.M.C.L.Q. 39 at p. 46.

18 [1961] 1 Lloyds Rep. 57, per Viscount Simonds at p. 67.

respects" before he would be allowed to rely on any excepted perils. Article III, rule 1, read with Article IV, rule 1 of the Hague Rules, make it clear that the requirement of due diligence is a condition for exemption of liability for unseaworthiness.

The Privy Council in the Maxime Footwear case[19] has construed Article III, rule 1 as a general overriding condition, functioning in the same manner as section 3 of the Harter Act, 1893. As a general overriding obligation, it has to be complied with regardless of causal connection between unseaworthiness and the damage or loss.

2- Due Diligence and Delegation:

The concept of "Due diligence" baffled the trial court and the Court of Appeal in the case of The Muncaster Castle.[20] Both tribunals thought that so long as the shipowner himself had exercised due diligence in the selection of his agents he had successfully discharged his responsibility under Article III, rule 1 of the Hague Rules. A delegation of the repair work to a firm of reputable repairers was considered sufficient fulfilment of the obligation to exercise due diligence to make the ship seaworthy.

It was conceded that the carrier himself had exercised due diligence. The issue was whether he was to be held responsible for the negligence of the fitter employed by the independent contractors_ a firm of ship repairers.

The House of Lords, in a unanimous decision, put forth in a most poignant and forceful manner, their views of the notion of

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19 [1959] 2 Lloyd's Rep. 105.

20 [1958] 2 Lloyd's Rep. 255, [1959] 2 Lloyd's Rep. 553.

"Due Diligence" and the extent of the carrier's responsibility under Article III, rule 1. They overturned the decisions of the lower courts and held the carriers liable for the loss caused by unseaworthiness which resulted from the negligent conduct of the ship repairer's fitter. Their Lordships had no doubt whatsoever as to the degree of the carrier's liability under Article III, rule 1.

The House of Lords has settled this issue definitively, and therefore it is needless to refer to the earlier authorities which the House has cited with approval.

Viscount Simonds held the opinion that:[21]

> "...no other solution is possible than to say that the shipowners' obligation of due diligence demands due diligence in the work of repair by whosoever it may be done."

He emphasised that:

> "The obligation imposed by the Act is not...to "exercise due diligence...to provide a seaworthy ship" but "to make the ship seaworthy."[22]

Lord Keith using different expressions pointed out that Article III, rule 1 is "an inescapable personal obligation". He then continued:[23]

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21 [1961] 1 Lloyd's Rep. 57 at p. 71.

22 Ibid at p. 72.

23 Ibid at p. 87.

> "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...Perform it as you please. The performance is the carrier's performance. As was said in a corresponding case under the Harter Act: "The act requires due diligence in the work itself."

The above speeches have made it patently clear that a carrier is responsible for the negligence of the delegate, whether he is the carrier's servant, agent or independent contractor.

Members of the House, by way of obiter dictum, qualified their "Non-delegability" doctrine with an exception. A distinction was drawn between building and repairing a ship. Viscount Simonds considered that:[24]

> "It is a reasonable construction of the words..."to exercise due diligence to make the ship seaworthy" to say that in the case of a ship built for the carrier, or newly come into his hands by purchase, the carrier fulfils his obligation if he takes the precautions...Until the ship is his, he can have no further responsibility...But it is far otherwise where the shipowner puts his ship in the hands of third parties for repair."

Lord Keith comments on this subject were of the same opinion. He rationalised that a carrier cannot be liable for:

> "unseaworthiness in a ship which results from lack

[24] Ibid at p. 70.

> of due diligence at a time when the ship was not his to possess and control and which could not be detected by due diligence after the ship came into his possession."[25]

He then cautiously proceeded to insert a reservation to this broad exception. He added that a prospective owner could well be made liable for:

> "unseaworthiness in the case where he had taken some part in the project of the building of the ship, either in the matter of design, or by supervision in the course of building, or otherwise..."[26]

The rule of "no liability for anterior failure of diligence by a previous owner or by someone with whom the carrier had no previous concern"[27] was the brain-child of Wright.J (as he then was).

His judgement in Angliss & Co. (Australia) Pty. Ltd. V. Peninsular & Oriental Steam Navigation Co.,[28] was enthusiastically accepted by the House of Lords as stating the correct rule of Law.

The distinction made by Lord Hodson was the most subtle of all. He remarked:

> "It could be argued that the Angliss case, in so far

25 [1961] 1 Lloyd's Rep. 57 at p. 86.

26 Ibid at pp. 86-87.

27 Ibid at p. 86 per Lord Keith.

28 [1927] 2 K.B. 456, (1927) 28 Ll.L.Rep. 202, Hereafter reffered to as The Angliss case.

> as it deals with shipbuilders, was dealing with something outside the scope of Article III, for to make a ship seaworthy is not the same as to make a seaworthy ship, but the expression "to make a ship seaworthy" is in my opinion wide enough to cover the work of repair however extensive those repairs may be."[29]

A slight movement in the placement of one word in a phrase completely changes the sense of a sentence.[30] Fine and delicate it may be, the distinction was offered as the basis of an exception to the "inescapable personal obligation" of the carrier.

The concept of due diligence was apparently adopted in the Hague Rules to alleviate the carrier from the severity and harshness which emerge from the strict liability of the Common Law. The primary and obvious objective of Article III, rule 1, was to relieve the shipowner from this onerous burden cast upon him by the absolute feature of the Common Law warranty of seaworthiness and to fill in its place a lower standard of responsibility. The question is: Has Article III, rule 1 achieved this aim ?

In Smith Hogg & Co., Ltd. V. Black Sea & Baltic General Insurance Co., Ltd., Lord Wright[31] declared that the qualified exception of unseaworthiness will "only excuse against latent defects."

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[29] [1961] 1 Lloyd's Rep. 57 at p. 90.

[30] Lord Keith obviously had the same idea in mind when he said: "...a carrier cannot, in general, make a ship seaworthy unless he has first a ship to make seaworthy." [1961] 1 Lloyd's Rep. 57 at p. 87.

[31] [1940] A.C. 997 at p. 1001.

Mackinnon L.J, who in the Court of Appeal of the same case, stated that:[32]

> "The limitation and qualification of the implied warranty of seaworthiness, by cutting it down to use "due diligence on the part of the shipowner to make the ship seaworthy",...is more apparent that real, because the exercise of due diligence involves not merely that the shipowner personally shall exercise due diligence, but that all his servants and agents shall exercise due diligence..."

Scrutton[33] expressed doubts of the practical value of the variation as latent defects causing unseaworthiness are "not likely to occur often."

Another writer[34] has expressed that there is "in fact little difference between absolute warranty and the standard of due diligence."

The two instances in which a carrier will not be legally responsible for a loss caused by unseaworthiness under the Hague Rules were summarised by Lord Keith in The Muncaster Castle[35] as follows:

> "He will be protected against latent defects, in the

[32] (1939) 64 Ll.L.Rep. 87 at p. 89.

[33] See Scrutton, T.E., The contract of affreightment as expressed in charterparties and bills of lading, 14th ed. by W.L. Mc Nair & A.A. Mocatta, London, Sweet & Maxwell, 1939, p. 110.

[34] See Greenwood, E.C.V, "Problems of negligence in loading, stowage, custody, care and delivery of cargo; Errors in management and navigation; Due diligence to make seaworthy", (1971) 45 Tul.L.Rev. 790 at p. 792.

[35] [1961] 1 Lloyd's Rep. 57.

> strict sense, in work done on his ship, that is to say, defects not due to any neglect workmanship of repairers or others employed by the repairers and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence."[36]

From the above statement one can, therefore conclude that, Article III, rule 1 is not as generous as the carrier had imagined and hoped it would be.

The carriers were surprised and sadly disappointed when the House of Lords decided against them in The Muncaster Castle[37] with an interpretation of the concept of "Due diligence" which they did not anticipate. They had expected more of the provision that it being just a mere exception of liability for unseaworthiness by reason of latent defects. Article III, rule 1 has lifted only one aspect of the absolute character of the Common Law warranty from the shoulders of the carrier. Its only concession is exception of liability for unseaworthiness caused by latent defects.

Judicial attitudes, such as that voiced by Lord Keith, have made it plain that the carriers should count their blessings. He stated that:[38]

> "The carrier will have some relief which, weighed

[36] Ibid at p. 87.

[37] [1961] 1 Lloyd's Rep. 57.

[38] Ibid at p. 87.

> in the scales, is not inconsiderable when contrasted with his previous Common Law position."

The Act after all, according to Lord Hodson:[39]

> "was not passed for the relief of shipowners, but to standardise within certain limits the rights of the holder of every bill of lading against the shipowner."

II- Under the Hamburg Rules:

The Working Group on International Shipping Legislation of UNCITRAL had devoted the session, held in February 1972 to a preliminary consideration of the basic rules governing responsibility of the carrier. Alternative schemes of liability to replace the existing Articles III and IV of the Hague Rules were considered.

Both carrier nations and shipper nations supported the principle of carrier liability based on fault, and it was believed to be desirable, at the outset, that the basic principle of fault be simply stated while the rules for the burden of proof be separately elaborated together with a separate consideration of the exceptions to liability.[40]

The basis for discussion in the Drafting Group was paragraph 269 of the Secretariat Report (A/CN. 9/63/ Add 1 of December 3rd, 1971) which was redrafted as paragraph 42 of the working paper prepared by the secretariat for the september meeting

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[39] Ibid at p. 91.

[40] See Sweeney, J.C., "The UNCITRAL Draft Convention on carriage of goods by sea", (part I), (1975-76) 7 J.M.L.C. 69 at p. 102.

(A/CN 9/W.G III/WP 6 of 31 August, 1972).[41]

After lengthy and heated discussions, the majority of the members working group reached on agreement at the fourth session[42]on the principles that should be incorporated in a set of rules[43] that would govern the responsibility of the carrier for damage or loss of cargo and which would replace Articles III and IV of the Hague Rules.

The draftsmen of the Hamburg Rules have accordingly chosen to state an affirmative rule of responsibility based on presumed fault and to abolish the catalogue of exceptions contained in Article IV, rule 2 of the Hague Rules.

Almost all that is to be found in the Hamburg Rules relating to the basis of liability (the most important and most central topic of all) is to be found in Article 5, rule 1, which states as follows:

> "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."

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41 See the Report of the third session U.N. Doc series A/CN. G No. 63.

42 It was held in Geneva from 25 September to 6 october 1972. See UNICTRAL Y.B, Vol. IV (1973) p. 138/139.

43 See Cleton, R., "The special features arising from the Hamburg Diplomatic Conference", Published in The Hamburg Rules, a one-day Seminar organised by Lloyds of London Press Ltd, september 28, 1978, p. 5.

It is convenient to mention here that Article 5, rule 1 of the Hamburg Rules is patterned broadly, on Article 18 (1) of the Warsaw Convention for the unification of certain Rules relating to International carriage by Air of 1929 as amended by the Hague Protocol 1955.[44]

It is obvious that the basis of liability under the Hamburg Rules is affirmative in nature, and based on fault or negligence.

The test proposed by Article 5, rule 1 is that if goods are short delivered or are delivered damaged, then you first look to see whether the loss or damage was caused by an occurrence which took place while the goods were in the carrier's custody. If it did, you then ask whether the "occurrence" was due to the fault of the shipowner or his servants or agents. If there is fault, there is liability. Conversely if there is no fault, there is no liability.[45]

It is noteworthy that this test replaces all the provisions of the Hague Rules with regard to seaworthiness, as well as all the provisions setting out the carrier's duty "properly and carefully" to look after the goods in other respects, together with so-called "catalogue of exceptions" which qualify the latter duty.

Since the system of liability proposed by the new Convention is based exclusively on fault, this is generally true of the Hague Rules as well. The fundamental difference between the two systems lies in the varying ways in which the "fault" principle is

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44 See Shah, M.J., "The revision of the Hague Rules on Bills of lading within the U.N system, Key issues", published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, p. 17.

45 See Diamond, "The division of liability as between ship and cargo under the new rules proposed by UNICITRAL". op.cit., at p. 45.

applied in each.[46]

1- Nature of Liability:

In comparing the provisions of the Hague Rules with those of the Hamburg Rules with respect to the carrier's duty of seaworthiness, the resulting situation can be described as follows:

The basic duty of the carrier set forth in the present Article III, rule 1 of the Hague Rules is that the carrier is under an obligation to exercise due diligence before and at beginning of the voyage to make the ship seaworthy. This Rule has not returned into the new Convention, but since there is a general obligation to take all measures to avoid any occurrence which could cause loss or damage and to avoid the consequences of such occurrence. This duty is obviously subsumed under this general obligation of Article 5, rule 1 of the Hamburg Rules and would remain in effect under this Article as part of the carrier's overall responsibility to perform all of his obligations under the contract of carriage with due care.

The only issue remaining to be resolved will be the construction to be placed by national courts on the carrier's duty to take "all measures that could reasonably be required to avoid the occurrence and its consequences". Will British courts construe this as negligence liability or will they still hold the carrier liable for the negligence of independent contractors as in The Muncaster Castle?

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46 See Williams, B.K., "The consequences of the Hamburg Rules on Insurance", published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, p. 252.

This is, in fact, one of the great areas of uncertainty that seem to be inherent in the new Convention since there is a great deal of room for controversy in Article 5, rule 1, as to precisely who are to be regarded as the shipowner's agents and who are not.

Under Article 5, rule 1 of the Hamburg Rules the carrier assumes liability for the negligence of the master and the crew as part of his overall responsibility to exercise due care to avoid loss or damage to the cargo,[47] namely, the carrier is liable for damage caused by fault of his servants or agents. Unfortunately there is no Article in the Hamburg Rules attempted to define the meaning of "servant" and "agent".

There is no difficulty to define the word "servant". It refers to a person, usually employed on a regular basis and subject to the command of his employer as to the manner in which he shall do his work.[48]

But the difficulty seems to appear in trying to define the concept "agent", because it is not always easy to determine the exact role of the intermediaries and whether they are acting as servants, agents or independent contractors.[49] For example, a freight forwarder may act as an independent contractor,[50] or as

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47 See Kimball, J.D., "Shipowner's liability and the proposed revision of the Hague Rules", (1975/76) 7 J.M.L.C. 217 at p. 236.

48 See Diamond, A., "A legal analysis of the Hamburg Rules" (part I), op.cit., at p. 13.

49 See Mankabady, "Comments on the Hamburg Rules", op.cit., at p. 69.

50 In J.Evans & Sons (Portsmouth) Ltd. V. Andrea Merzario Ltd. [1976] 2 Lloyd's Rep. 165, Roskill L.J. said at p. 168: "The defendants are not carriers...they are forwarding contractors who arranged for the transport of goods...The work which they do is performed by them through many sub-contractors."

an agent acting on behalf of the shipper, the consignee or the carrier.

Perhaps, stevedores are the most important category in this respect. But the position of the stevedores is not obvious in most countries, and the courts adopted different solutions in this matter.[51] However, two points are to be considered in deciding whether the stevedore is a servant, an agent or an independent contractor:

1) The degree of control and supervision of his work by the principal.

2) The work to be done and whether it is part of the original contract.[52]

It is important to mention here that, if the meaning of the word "servant" or "agent" is left to be decided according to the concepts established under each local legal system, different interpretations would prevail, because every contracting state will apply its own rules of vicarious liability when applying Article 5, rule 1 of the Hamburg Rules and that widely differing results are to be expected in different countries.[53]

2- Carrier and "Actual Carrier":

Finally, it should be noted that, sometimes whole or part of

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[51] In England in the case of Heyn V. Ocean S.S. Co. (1927) 47 T.L.R 358. It was held that "the stevedores are the ship's servants, and the shipowner or charterer, as the case may be, is vicariously liable for damage done by stevedores."

[52] See Mankabady, "Comments on the Hamburg Rules", op.cit., at p. 70.

[53] See Diamond, "A legal analysis of the Hamburg Rules" (part I), op.cit., at p. 13.

the carriage is sub-contracted by the contracting carrier to another carrier termed the "actual carrier",[54] who may or may not be named in the bill of lading.

Moreover, the bill of lading may provide that the contracting carrier shall not be liable in respect of sub-contracted carriage, or as regards such carriage, shall be deemed to be an agent only.[55]

The position of the actual carrier is governed by Article 10, rule 2 of the Hamburg Rules, which provides that all the provisions of the Rules governing the responsibility of the carrier shall also apply to the responsibility of the actual carrier. This means, of course, that the carrier is responsible for the acts or omissions of the actual carrier and for the acts or omissions of his servants and agents acting within the scope of their employment.[56] Moreover, Article 10, rule 2 gives the shipper the right to bring his claim against the actual carrier if the loss, damage or delay of the goods occurred while they were in his charge.[57]

However, it is to be noted that, in most cases it is very difficult to prove that the occurrence which damaged the goods or

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54 See Article 10 of the Hamburg Rules.

55 See Pollock, G., "A legal analysis of the Hamburg Rules" (part II), published in the Hamburg Rules, a one-day seminar organised by Lloyd's of London Press Ltd, September 28, 1978, p. 8.

56 See Diamond, "A legal analysis of the Hamburg Rules" (part I), op.cit., at p. 15, see also Tetley, W., "Articles 9 to 13 of the Hamburg Rules", published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, p. 197 at p. 199.

57 See Mankabady, S., "Comments on the Hamburg Rules", op.cit., at p. 77.

delayed their delivery occurred whilst they were in his charge. In most cases, it will be easier to sue the carrier as well as the actual carrier.[58]

In dealing with the question of the carrier's liability for the acts of his sub-contractors in making the ship seaworthy, one would expect that, in these cases (i.e: seaworthiness), Article 5, rule 1 of the Hamburg Rules will in practice cast a somewhat less onerous duty on shipowners than did the Hague Rules. This is because The Muncaster Castle decision tended to impose a somewhat inflexible approach in deciding that the carrier's duty to exercise due diligence was a personal one which could not be delegated in any circumstances. By contrast, it will always be necessary under the Hamburg Rules to ask whether the relevant act of negligence was actually committed by an "agent" of the carrier.

This approach is, undoubtedly, a far more flexible one since there must be some limit to the class of persons who can be called "agents" of the carrier in whatever sense.

Section two: The Period Covered by the Obligation of Seaworthiness.

I- Under the Hague Rules:

The issues of seaworthiness and due diligence under the Hague Rules, as under the Common Law, are only relevant at a specified point of time. The pertinent moment under the Common

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58 See Thomas, R.J.L., "A legal analysis of the Hamburg Rules", (part III), published in The Hamburg Rules, A one-day seminar organised by Lloyd's of London Press Ltd, September 28, 1978, p. 7.

Law for the warranty of cargoworthiness is as the commencement of loading, and for seaworthiness in its strict sense, at the beginning of the voyage. With regard to Article III, rule 1 of the Hague Rules, one has to bear in mind that it encompasses both seaworthiness and cargoworthiness within it: rule 1 (a) and (b) refer to the former and (c) to the latter. Both aspects of seaworthiness are governed by a common time stipulation.

According to Article III, rule 1 of the Hague Rules, the carrier is bound to exercise due diligence to make the ship seaworthy "before and at the beginning of the voyage". It is, then, important to bear in mind that the question of due diligence can only arise when the ship is actually unseaworthy at the relevant time. In fact according to this Article[59] the ship must not be unseaworthy when she starts on her voyage. And whatever the carrier and his agents do afterwards may amount to negligence in the care and custody of the cargo, but it is irrelevant, on principle, from the point of view of Article III, rule 1.

1- Interpretation of the Words "Before and at the Beginning of the Voyage":

The attitude of writers on the significance of the words "before and at beginning of the voyage" is a varied one.

Zaphiriou[60] in search of greater precision of these words asserts that:

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59 Article III, rule 1 of the Hague Rules.

60 See Zaphiriou, G.A., "Seaworthiness", (1963) J.B.L. 221 at p. 225.

> "The use of the verb "make" as well as the nature of the operations of manning, equipping and supplying the ship, indicate that the duty is performed by making in one exhaustive operation the ship seaworthy, in a wide sense, before she receives the cargo and before she is about to sail."

Götz[61] appears to reach a different conclusion when he said:

> "I believe that "before and at the beginning of the voyage" in Article III, rule 1, does not refer to any moment or period of time before the beginning of loading."

The Judicial Committee of the Privy Council in Maxime Footwear Co., Ltd. V. Canadian Government Merchant Marine Ltd.,[62] had to determine the issue as to when a ship must be seaworthy, and consequently when must the carrier exercise due diligence to make her so.

In this case the loading of Nº.3 hold of a ship at Halifax, began on Tuesday, 3 February, 1942, and finished on Friday, 6 February. The loading of all cargo was completed at 8.15 p.m on that evening. The intention was to sail on saturday.

On the Friday morning three scupper pipes passing through the Nº.3 hold were found to be frozen, and were thawed out by an acetylene torch used by an employee of a firm who had arranged to do this work for the shipowners. This work was done

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61 See Götz, H.N., "Comments on the Maxime Footwear case", (1960) 38 Can.B.Rev. 96 at p. 98.

62 [1959] 2. Lloyd's Rep. 105.

> loading until the vessel starts on her voyage. The word "before" cannot, in their opinion, be read as meaning "at the commencement of the loading". If this had been intended, it would have been said."

The Judicial Committee was certain that the obligation to exercise due diligence to make the ship seaworthy continued over the whole period from at least the beginning of loading until the ship sank. And as the cargo was damaged after loading but before sailing, the cargo-owners were, therefore, entitled to succeed. By using the word "at least", the Judicial Committee has conveniently evaded the troublesome task of having to nominate a starting pin-point exactly when the period commences. How far back from "the beginning of the loading" must one go to make the ship seaworthy is not known; the Judicial Committee had deliberately refrained from answering this question as it was not necessary, under the circumstances of the case, for it to do so. By the ingenious choice of the words "at least" they had securely caught the carriers; whether the fire began before or after the loading of the cargo (but before sailing) would have made no difference to the outcome of the case.

With regard to the warranty of cargoworthiness, the carrier has under Article III, rule 1, a continuing duty to exercise due diligence to make the ship "fit and safe" for each and every parcel of merchandise loaded. In other words, a fresh warranty of cargoworthiness arises as soon as each parcel is accepted on board. According to the opinion of the Judicial Committee:

> "The commencement of the loading means the

> commencement of the loading of each shippers' parcel and not the commencement of loading any cargo."[64]

It is convenient to mention here that the rights and immunities set out in the Hague Rules, are confined only to a "contract of carriage of goods by sea". Article I (e) defines "carriage of goods" to cover the "period from the time when the goods are loaded on to the time they are discharged from the ship." If Article III, rule 1, were to apply from a moment prior to the beginning of loading it would conflict with Article I (e) which defines the scope of the Hague Rules. This would subject the carrier with responsibilities which may not be intended by the Rules.

If the phrase "at the beginning of the voyage" were to stand on its own, it would not be adequate to cover the case of cargoworthiness under Article III, rule 1 (c) which if any sense were to be made of the provision has to refer to the condition of the ship at the commencement of loading. The use of the word "before", in addition to the "beginning of the voyage" was, therefore, necessary to provide for rule 1 (c) of Article III.

It is important to note that the continued obligation of seaworthiness, which the Privy Council[65] has accorded to Article III, rule 1, places the cargo-owner in a very favourable position. Under Article III, rule 2, the carrier has a continuing duty, whilst the cargo is in his custody, to "properly and carefully" care for the goods "carried".

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[64] [1959] 2 Lloyd's Rep 105 at p. 112.

[65] In the Maxime Footwear Case [1959] 2 Lloyd's Rep. 105.

Goods, according to the House of Lords in Renton and Co., Ltd. V. Palmyra Trading corporation of Panama,[66] are being "carried" from the moment they are put on board. The house was clear that the word "carry" did not mean transport from one place to another; it has no geographical significance.

Lord Morton[67] even went to the extent of saying that the word "does not place any obligation on the carrier to transport at all". He was inclined to the view that "a ship does "carry" goods within the meaning of Article III, rule 2 from the moment when they are loaded on board".

The cargo owner now has in fact two provisions, Article III, rule 1 and rule 2, on which he could rely on in a claim for loss or damage sustained by cargo after loading but before sailing. The duty to take care of cargo under Article III, rule 2, would naturally include the duty to secure and maintain the seaworthiness of the ship.[68] Article III, rule 2, is of course wider in scope than rule 1 as it embraces any act or omission to take care of the goods carried. A clear example of this is the case where the carrier is held responsible, not for causing the unseaworthiness, but for loading the cargo into or sending it to sea on an unseaworthy vessel.

2- The Doctrine of Stages:

It is to be observed that the Maxime Footwear case did not deal with the question of the effect of the Hague Rules on the

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66 [1957] A.C. 149.

67 [1957] A.C. 149 at p. 171.

68 See Götz, op.cit., at p. 101.

doctrine of stages after the vessel had sailed, though it seems implicit in the speech of Lord Somervell that this doctrine has ceased to exist in the case of the bill of lading to which the rules apply. Accordingly he stated:[69]

> "The doctrine of stages had its anomalies, and some important matters were never elucidated by authority. When the warranty was absolute, it seems at any rate intelligible to restrict it to certain points of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began only to reappear later shortly before the beginning of the voyage."

In this respect Cadwallader observed that:[70]

> "The obligation to make the ship seaworthy in respect of loading will continue over the entire of the loading period, at which point the obligation will be to make the ship seaworthy for the voyage she is to undertake. It is at this point that the rule appears to curtail the general Common Law approach, for if the carrier's duty terminates at the beginning of the voyage the doctrine of stages would appear to be irrelevant."

Indeed when this particular problem arose in the case of The Makedonia,[71] the court made it clear that the doctrine of stages at least in the bunkering sense, has no application in cases where

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69 [1959] 2 Lloyd's Rep. 105 at p. 113.

70 See Cadwallader, F.J.J., "Due diligence at sea", (1972) 74 Dirrito Marittimo (Italy) 3 at p. 13.

71 [1962] 1 Lloyd's Rep. 316.

the terms of Article III, rule 1 apply. But when it was argued[72] in this case that the importation of the words "before and at the beginning of the voyage" has changed nothing in the previous Law, Mr Justice Hewson did not agree saying:[73]

> "I see no obligation to read into the word "voyage" a doctrine of stages, but a necessity to define the word itself..."voyage" in this context means what it has always meant: the contractual voyage from the port of loading to the port of discharge as declared in the appropriate bill of lading. The rule says "voyage" without any qualification such as any declared stage thereof."

Accordingly Hewson.J. affirmed:[74]

> "In my view, the obligation on the shipowner was to exercise due diligence before and at the beginning of sailing from the loading port to have the vessel adequately bunkered for the first stage...and to arrange for adequate bunkers...at other selected intermediate ports on the voyage so that the contractual voyage might be performed. Provided he did that, in my view, he fulfilled his obligation in that respect."

Thus, in the case of Leesh River Tea Co. Ltd. V. British India Steam Navigation Co.,[75] a storm valve cover plate was stolen

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72 [1962] 1 Lloyd's Rep. 316, per. Mr Brandon, at p. 329.

73 [1962] 1 Lloyd's Rep. 316 at p. 329.

74 [1962] 1 Lloyd's Rep. 316 at p. 330.

75 [1966] 2 Lloyd's Rep. 193.

while the vessel was calling at an intermediate port and consequently the cargo was damaged. The Court of Appeal held that the vessel was seaworthy at "the beginning of the voyage" within the meaning of Article III, rule 1 of the Hague Rules.

It is important to note here that this interpretation of the words "before and at the beginning of the voyage" may cause little difficulty in relation to bunkering stages but it does present problems in so far as there may be various other stages of the voyage requiring different factors to be attended to at each stage.

The best example of this can be found in the ship which sailing from an inland port is perfectly seaworthy for river voyage, but will require certain alterations or repairs to be attended to before she proceeds into the open sea. In this case, is the carrier relieved of this further liability because the ship is seaworthy at the "beginning of the voyage" (in the restricted sense), or must he carry out those alterations or repairs at the river port before they are required?

The solution which has been offered is that in these cases the word "beginning" should be given its ordinary meaning of the process of entering upon action, and not limiting it to one point of time, and that therefore the carrier might postpone part of his duty to exercise due diligence to properly man, equip and make the ship seaworthy until the requisite moment which, when performed, would mark the "beginning of the voyage".[76] That is to say, that the end of the "beginning of the voyage" is regarded

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[76] See Carver, T.G., Carriage by sea, 13th ed. by Raoul Colinvaux, London, Stevens & Sons, 1982, Vol. 1, p. 359, See also Cadwallader, op.cit., at p. 14.

as not yet reached before that duty has been performed; meanwhile he remains under a continuing duty of due diligence to keep the vessel seaworthy in other respects by virtue of the Maxime Footwear case.

Rightly it is suggested that this interpretation should be used only where commercial practice shows it to be necessary.[77]

II- Under the Hamburg Rules:

It has been seen earlier that under Article III, rule 1 of the Hague Rules, the obligation of the carrier to provide a seaworthy ship was limited to a duty to exercise due diligence "before and at the beginning of the voyage". This was construed as meaning that the carrier would commit no breach of this obligation by allowing the ship to become unseaworthy during the voyage, while any negligence in this respect would be covered by the exception regarding fault in the management of the ship.

On the other hand, he was required to look "properly and carefully" after the cargo throughout the period of carriage.

In interpreting these two provisions,[78] the courts have found that some incongruities and inconsistencies had arisen from the ambiguous wording used in these provisions.

The aim of the Hamburg Rules was, therefore, to remove these inconsistencies. The introduction of a uniform test of liability based on fault was designed to obviate these problems.[79] Under this new Convention the carrier's duty to provide a seaworthy

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77 See Cadwallader, op.cit., at p. 14.

78 Article III, rule 1 & 2 of the Hague Rules.

79 See Wilson, op.cit., at p. 141.

ship is to be judged on the same basis as his duty towards the cargo, and both obligations are to run throughout the period of carriage.[80] The undertaking of "due diligence" to make the ship seaworthy, which exists under Article III, rule 1 of the Hague Rules, is covered by the term "reasonable measures" that appears in Article 5, rule 1 of the Hamburg Rules, and it should be exercised not merely "before and at the beginning of the voyage" but all times.[81] This term also covers the undertaking of care for the cargo.

The view is, therefore, tenable that the duty to ensure seaworthiness will persist for the duration of the voyage, thus introducing the significant change that the carrier being under a general duty, will be liable for his specific failure to reestablish seaworthiness in the event of any incident during the voyage.

It is noteworthy that, the unitary concept of fault liability under the Hamburg Rules, has been reinforced by the removal of the exception to liability for negligent navigation and management of the ship[82] and the elimination of the limit on the carrier's duty to ensure seaworthiness only at the beginning of the voyage.[83]

From this latter observation one can argue that, if the

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80 See Wilson, J.F., Carriage of goods by sea, London, Pitman Publishing, 1988, p. 204.

81 See Tetley, W., "The Hamburg Rules; A commentary", (1979) L.M.C.L.Q. 1 at p. 7.

82 See Article IV, rule 2 (a) of the Hague Rules.

83 See Report of the Working Group on International Shipping Legislation on its fourth (special) session, Annex 1 U.N. Doc. A/CN. 9/74 (1972), reprinted in (1973) 4.Y.B UNCITRAL 146, 149 U.N. Doc. A/CN. 9 SER. A/1973.

navigation and management exception has not been abolished under the Hamburg Rules, the imposition of a continuing duty of seaworthiness will have no significance and the carrier's position under the new Rules will be the same as it is under the present Hague Rules. In order to understand this situation it is necessary to leave the Hamburg Rules and go back to the Hague Rules.

There is a distinction to be drawn in the Hague Rules between a loss caused by unseaworthiness and one caused by neglect or default "in the navigation or in the management of the ship" within the meaning of Article IV, rule 2 (a). In the former case the shipowner is liable, in the latter he is not.

In this connection, one first has to find out whether the relevant act occurred before or after the voyage began. If it occurred before the voyage, then it constitutes a failure in making the ship seaworthy and the owner is liable. If it occurred after the voyage began, it is considered as a fault in "the navigation or in the management" of the ship.

For example, if a ship sails in a condition as to be fit to start but not fit to continue through the voyage unless something is done, such as the closing and fastening of a port, which can and would ordinarily be done during the voyage. In this case the ship is not considered to be unseaworthy at starting; and an omission to do the thing required for safety, at the proper time, is treated as a fault in "navigation or management".

Thus, in International packers London, Ltd. V. Ocean steamship Co., Ltd.[84] a cargo of tinned meat shipped from Brisbone for Glasgow was damaged by seawater during the voyage as the

[84] [1955] 2 Lloyd's Rep. 218, See also The Silvia (1898) 171 U.S. 462.

result of tarpaulins being stripped from the hatch covers during a storm. On hearing that the vessel was equipped with locking bars designed to secure the hatches, the trial judge held that the loss was caused not by the unseaworthiness of the vessel but by the negligence of the crew in failing to make use of the equipment provided.

On the other hand, if a port is not designedly left open, but is understood to be closed, and is not intended to receive attention at sea, the case will be treated as one in which due diligence has not been exercised to make the ship seaworthy, by the owner and his subordinates, and not as a fault of "navigation or management".

In this connection reference can be made to the case of International Navigation Co. V. Farr and Bailey Mfg. Co.[85] In this case the ship sailed with ports open near cargo, the hold where the parts were located was used exclusively for cargo, the hatches were battened down over the hold, and no one had any plans for inspecting or otherwise dealing with these ports. When the vessel reached its destination, the cargo was found wet with sea water, which had obviously come in through the ports. This damage was held to be attributable to the unseaworthiness of the vessel.

Having established a clear distinction between what might be considered to be a fault in the management or in the navigation of the vessel and a failure to exercise due diligence to make the ship seaworthy, one must ask the following question: If these

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85 (1901) 181 U.S. 218, See also The Schwan [1909] A.C. 450, The Elkton (1931) 40 Ll.L.Rep. 263.

cases[86] will arise under the Hamburg Rules, what will be the carrier's position and what defences, if any, will be available to him under the new Convention?

The answer is that, the carrier will be held liable in both situations because:

1) He cannot invoke the "navigation or management" exception, since after the removal of this exception, the distinction between seaworthiness and operational negligence would no longer be legally significant.

2) By the imposition of a continuing duty of seaworthiness, the carrier cannot pretend that the ship was seaworthy at the beginning of the voyage, as any fault of the carrier during the period he is in charge of the goods as defined in Article 4 of the Hamburg Rules, rendering the ship unseaworthy and affecting the cargo either directly or indirectly through navigational error or management would result in carrier liability; courts could assess damages without assuming the difficult task of pinpointing the exact cause of loss.

It must be borne in mind that, the drafters of the Convention sought to eliminate the Hague Rules navigation and management exception because its many variations alone place a disproportionate burden of risks and losses on cargo owners.[87] Under the Hague Rules, the carrier's opportunity to avoid liability for navigational error, although inconsistent with fault liability,

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[86] See cases dealing with the distinction between unseaworthiness and fault in navigation or managementof the ship.

[87] See Pixa, R.R., "The Hamburg Rules fault concept and common carrier liability under U.S. Law", (1979) 19 Va.J. Int'l.L. 433 at p. 445.

offsets the duty to ensure seaworthiness at the beginning of the voyage.

Therefore, the effect of the absence of the exception of negligent navigation is to some extent mitigated by the fact that in some major stranding cases, the carrier is unable even under the Hague Rules to escape liability because the court may decide that the loss os damage was caused as a result of unseaworthiness rather than fault in navigation.

Indeed in many countries the courts are already reluctant to give effect to the exception of negligent navigation and have shown a tendency in recent years to find as a fact that there has been unseaworthiness and not just negligence in navigating the ship.[88]

But the final draft of the Hamburg Rules sought the related advantages of both the elimination of the navigation exception and the end of the time limitation on seaworthiness.

It is clear enough, then, that the imposition of a continuing duty of seaworthiness is contingent upon the total removal of the navigation and management exception.

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88 See Honour, J.P. "The P & I clubs and the New United Nations Convention on the carriage of goods by sea 1978", published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, p. 244, see also Diamond, A., "The division of liability as between ship and cargo under the new Rules proposed by UNCITRAL", op.cit., at p. 48.

Section three: Standard of Care Required by the Obligation of Seaworthiness.

I- Under the Hague Rules:

It has been seen that at Common Law a warranty that the ship is seaworthy is implied in all contracts for the carriage of goods by sea. But at the same time the shipowner is at liberty to contract out or limit the effect of this warranty by expressly stating in the contract of carriage that he is not to be responsible for loss or damage arising out of unseaworthiness of his ship. In fact it has been established that provided the clause in the contract making such provision was set out in clear and express words, without ambiguity, the implied undertaking at Common Law that the ship is seaworthy could be avoided.

But when the Hague Rules were given legal effect in the United Kingdom by the passing of the Carriage of Goods by Sea Act 1924, the implied undertaking that the ship is seaworthy was abrogated. Section 2 of the Act provides that:

> "There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship."

Thus, with the introduction of the Hague Rules this implied warranty of seaworthiness no longer obtained but in its place it is provided in Article III, rule 1 of the Rules that:

> "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
> a) Make the ship seaworthy;
> b) Properly man, equip, and supply the ship;
> c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

1- The Standard of "Due Diligence":

In the search for the meaning of the words "exercise due diligence to make the ship seaworthy", the courts have been faced with an extremely difficult task which consist of determining the kind of obligation imported by this expression.

The standard imposed by the obligation to exercise due diligence has been interpreted by the courts as being roughly equivalent to that of the Common Law duty of care,[89] but with the important difference that it is a personal obligation that cannot be delegated.

It is important to note here that what has been said about the equivalence of the duty "to exercise due diligence" to that of the Common Law "duty of care" cannot be true. The standard of Common Law duty of care to provide a seaworthy ship, which would not require express mention in the contract, is in fact embodied in the absolute liability which arises by virtue of the undertaking implied at Common Law. The promise to use due diligence is an express reduction of that duty of care.

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[89] See Cadwallader, op.cit., at p. 5, See also Scrutton, T.E., Charterparties and bills of lading, 19th ed. by A.A. Mocotta, M.J. Mustill & S.C. Boyd, London, Sweet & Maxwell, 1984, p. 435.

In establishing the standard imposed by the obligation to exercise due diligence, Lord Justice Willmer in The Muncaster Castle case, attempted a judicial definition of the term and stated:[90]

> "An obligation to exercise due diligence is to my mind indistinguishable from an obligation to exercise reasonable care."

Now, if one can use the substitution made by Cadwallader[91] of the words "diligence" for "care", then we are left with the obligation to use "due diligence" being indistinguishable from the use of "reasonable diligence", of which Dr. Lushington[92] gave the following definition over a hundred years ago:

> "Reasonable diligence (means) not the doing of everything possible, but the doing of that which under the ordinary circumstances, and having regard to the expense and difficulty can be reasonably required."

In the case of The Amstelslot, Lord Reid stated that:[93]

> "The question always is whether a reasonable man in the shoes of the defendant, with the skill and

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[90] Riverstone Meat Co. Pty. Ltd. V. Lancashire Shipping Co., Ltd. [1960] 1 All. E.R. 193 at p. 219.

[91] See Cadwallader, op.cit., at p. 6.

[92] The Europa (1863) 2 New Rep. 194 at p. 196.

[93] Union of India V. N.V Reederij Amsterdam [1963] 2 Lloyd's Rep. 223 at p. 230.

> knowledge which the defendant had or ought to have had, would have taken those extra precautions."

The answer to this question is that the standard of due diligence requires not merely what shipowners usually do, but what a reasonably prudent one would do and not what he might do in another vessel but in this vessel under the particular circumstances here present.[94]

Thus, if an inspection of the vessel's machinery by or on behalf of the shipowner fails to reveal a defect , the question whether the failure amounts to want of due diligence must be answered by considering:

(1) Whether the examination was, in the circumstances, of a character such as a skilled and prudent shipowner should reasonably have made, and (2) If so, whether the examination was carried out with reasonable skill, care and competence.[95] Accordingly, there is no failure of due diligence merely because precautions are not taken which subsequent experience shows to be necessary.

It must be borne in mind that the French version of the Hague Rules uses the words "diligence raisonnable". This illustrates the standard of diligence.

In order to determine the standard imposed by the obligation of due diligence, it is necessary to consider it from the financial point of view.

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[94] See Sorkin, S., Goods in transit. Vol. 1, Chapt. 5 at p. 98.

[95] Union of India V. N.V.Reederij Amsterdam [1962] 2 Lloyd's Rep. 336, per Diplock L.J., at p. 345.

The amount that carriers spend on safety measures, training, equipment, ship construction and the like will be reflected in the amount of loss or damage to cargo that takes place. If the carrier spends too little, failing even to put in some relatively inexpensive safety items, that will be uneconomic from the standpoint of minimizing the total costs of world shipping. It will be uneconomic because the amount spent for the safety item would, by assumption, save more in cargo damage than it costs.

Thus, a higher standard of care may be equated to a greater expenditure of funds, because each higher level of care will cost more and save less damage than the preceding one.[96]

It has been said that the threat of liability is not the sole cause of carriers taking precautions against loss or damage to cargo. Clearly a carrier has an interest in protecting cargo to keep the shipper as a customer. But it is highly doubtful that this consideration by itself will lead to an optimum standard of care.[97]

It is convenient to mention here that under the Hague Rules where the carrier is wholly or partially relieved of liability in two major instances namely (for fault in navigation and management of the ship and fire) he has an additional incentive to act with due diligence quite apart from any threat of liability to the shipper, that is, to prevent damage to the ship. However, that incentive may not be sufficient to promote an optimum standard of care. For example, the carrier would presumably spend £ 99 to prevent £ 100 damage to his ship. But ideally he

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96 See Kimball, J.D., op.cit., at p. 244.

97 See Hellawell, R., "Allocation of risk between cargo owner and carrier", (1979) 27 A.J.C.L. 357 at p. 365.

should spend up to £ 199 to prevent a combination of £ 100 damage to the ship and £ 100 damage to the cargo. Yet without liability to the cargo he may be unwilling to do so.

It is also theoretically possible that a shipper would be willing to pay an extra 99 p. freight to save £ 1 of damage to cargo and, by agreeing to pay this to carrier, would theoretically buy an optimum standard of care.[98]

Having established a financial point of view on the standard imposed by the obligation of due diligence, it is now important to note that the analogy between the duty to take reasonable care and the duty to exercise due diligence, that the British Courts have assumed has served to determine the standard of liability under the Hague Rules. But it should be mentioned that the correctness of this analogy has been in doubt since the decision of the House of Lords in The Muncaster Castle.[99]

In fact their Lordships have expressed a lot of concern about the way the shipowner's duty to exercise due diligence is apprehended by the courts. In this respect Lord Merriman observed that:[100]

> "Much depends...on the context in which the duty is postulated. I am not convinced that cases of tort based on the relationship of master and servant, invitor and invitee, and the like, afford a sufficient basis for construing words embodied by statute in a bill of lading, the interpretation of which has been the subject of a long series of decisions".

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98 Ibid, at p. 365.

99 [1961] A.C. 807.

100 [1961] A.C. 807 at p. 849.

Despite a severe criticism of the House of Lords formulated in this case, against the analogy established between the duty to exercise due diligence and that of taking reasonable care, however, later cases have continued to assert that the carrier's duty is one of reasonable care and that lack of due diligence is negligence.

In this respect Mc Nair J. observed in the case of The Amstelslot:[101]

> "As regards the standard of care involved in the exercise of due diligence, I was usefully referred to the observations of Lord Wright[102]...Where he equiparated the exercise of due diligence with taking reasonable care, and to the statement of Mr. Justice Porter[103]...in (a case dealing with failure to detect leaky rivets), in which the learned judge defines the examination required as "such an examination as a reasonably careful man skilled in that matter would make". To this statement I would only add that the standard must be judged in the light of the facts known, or which ought to have been known at the time."

As a result of the reluctance of the courts to offer a determined standard which is imposed by the obligation of due diligence, some writers have attempted to be more precise on this

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101 [1962] 1 Lloyd's Rep. 539 at p 553.

102 Wilsons and Clyde coal company Ltd. V. English [1938] A.C. 57 at pp. 80-81.

103 Charles brown and Co., Ltd. and others V. Nitrate producers steamship company Ltd. (1937) 58 LI.L.Rep. 188 at p. 191.

subject. Cadwallader declared that:[104]

> "The most simple way to interpret the term would appear to be to ask just what the particular words used mean. "due" means "all that which is proper" whilst "diligence" can be interpreted as "attention to duties" put together this means that a carrier relying on this form promises that "he will pay all that attention to his duties to provide a seaworthy ship as is properly to be expected of a carrier of goods by sea."

Consequently, he affirmed:[105]

> "Framed in the above manner the test of due diligence in fact reverts to that of the actions of the prudent carrier as utilised in the implied undertaking of the Common Law, but...the test is shorn of the retrospective implanting of the knowledge of the later discovered defect."

In fact it is submitted that the carrier's diligence is sufficient only if the loss or damage has been caused by a defect of latent nature. Latent defect seemed the more pertinent subject of definition.

2- Due Diligence and Latent Defect:

The effect of the abolition by Section 3 of the Carriage of Goods by Sea Act 1971 (COGSA), in relation to any contract to which the Act applies by operation of Law of the absolute

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104 See Cadwallader, op.cit., at p. 6.

105 Ibid, at pp. 6-7.

undertaking at Common Law to provide a seaworthy ship and the substitution of the lesser obligation under the Rules to exercise due diligence to make the ship seaworthy has thus been summarised:

> "The carrier will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers, and as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence."[106]

As a result it has become apparent under the Hague Rules that unseaworthiness caused by latent, undiscoverable defect is not cause of action against the shipowner.

Article IV, rule 2 (p) of the Rules provides that:

> "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from latent defects not discoverable by due diligence."

The problem of the interpretation of this immunity from liability conferred upon the carrier by this exception of latent defect not discoverable by due diligence, involves two particular considerations. What is a latent defect, and what constitutes due diligence within the meaning of the exception?

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[106] Riverstone Meat Co., Pty. Ltd. V. Lancashire Shipping Co. Ltd. [1961] A.C. 807, per Lord Keith of Avonholm, at p. 872.

In considering the effect of the exception covering loss or damage arising or resulting from latent defects not discoverable by the exercise of due diligence, one can notice that the matter is inextricably bound up with unseaworthiness and the duty of the carrier to exercise due diligence to make the ship seaworthy, because even before the substitution of due diligence for the Common Law undertaking, carriers had experimented with terms whereby they sought to exclude liability for latent defects. Some attempts at exclusion failed because they did not link the exclusion of liability for latent defects with the undertaking as to seaworthiness, and thus the exception served only in respect of the common carrier liabilities.

With the introduction of the obligation to use due diligence the need to mention latent defects in respect of seaworthiness became superfluous, since "a defect is said to be latent when it cannot be discovered by a person of competent skill using ordinary care."[107]

It is important now to find out to what extent a shipowner must use due diligence as to enable him to secure the benefit of the exception, that is the immunity from liability in respect of cargo loss or damage arising or resulting from latent defects not discoverable by the exercise of due diligence.

The answer can be found in the case of Union of India V. N.V. Reederij Amsterdam,[108] which in fact deals in detail with the extent to which a classification surveyor should probe in order to discover defects that may be of a latent nature.

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[107] See Carver, op.cit., p. 382.

[108] [1962] 1 Lloyd's Rep. 539.

In this case the motor vessel "Amstelslot" proceeded on a voyage from Portland (Oregon) with a cargo of wheat for delivery at Bombay. Having reached a position some 900 miles from Honolulu, she sustained an engine breakdown due to the failure of her reduction gear. In consequence of this breakdown, she was unable to proceed further under her own power and had to be towed to Honolulu. On arrival at Honolulu and after examination of her reduction gear, the damage was found to be severe as to require extensive replacement, and it was estimated that repairs in Honolulu would take eight or nine months.

As a result of negotiations between the interested parties, it was agreed that the vessel should be towed from Honolulu to Kobe (Japan), and that at Kobe the cargo should be delivered to the Union of India into a vessel chartered by them for on-carriage to Bombay. In pursuance of this agreement the vessel was so towed to Kobe, where the cargo was discharged into the on-carrying vessel.

The Union of India claimed damages from the charterers of the Amstelslot (N.V. Reederij Amsterdam), for breach of contract alleging the failure on the part of the charterers to exercise due diligence.

The grounds for this claim were that the breakdown was due to the improper fixing of a helix tyre on the drum, or an undiscovered fatigue crack in the tyre. The claimants accepted that if the original breakdown was not due to an actionable fault on the part of the charterers e.g. due to "a latent defect not discoverable by the exercise of due diligence" the voyage was

properly abandoned and that the expense to which they had been put, which they now sought to recover from the shippers in providing for the on-carriage of the cargo to Bombay, was for their account, and that they would be liable for their proportion of the general average for which, on that hypothesis, their cargo would be liable.

The vessel was admittedly unseaworthy on sailing from Portland because there must have been at that time a crack in the helix tyre of the drum in the reduction gear which broke during the voyage. If they were to escape liability under the above exception, the charterers would need to prove the exercise of due diligence on the part of the classification surveyors who surveyed the gear but failed to discover the crack. The crack is a fatigue crack, which began in the metal and gradually got larger. In the opinion of the court, the crack had probably reached the surface at the time of the examination of the surveyors, and was possibly visible on a careful inspection of a more thorough kind than that made by the surveyors.

It was submitted by the claimants that, in addition to the inspection made by the surveyors through the inspection cover, the upper housing should have been removed, permitting closer examination; oil should have been wiped from the teeth of the gear wheels, and one helix should have been examined at a time.

The question for the court was whether reasonable surveyors, exercising proper care and skill, would have taken those measures. There was no lack of care or skilled knowledge in this case and the surveyors were familiar with the three methods of examination which it was suggested that they should have

adopted, and they could easily have followed them if they had chosen to do so. They decided not to do so, and the court said that the issue in this case is whether there was an error of judgment that amounted to professional negligence.

The court reached the conclusion that, in conducting the survey as they did, the surveyors were not guilty of negligence and that they had exercised due diligence, there being no duty on them to adopt these additional measures or to probe further than they did. The fault was, in fact, a "latent defect not discoverable by the exercise of due diligence".

The standard of due diligence necessarily to use which the court is refering to here, has been clearly established earlier in the case of The Dimitrios.N. Rallias[109] in which cargo-owners sued for damage to their cargo of cotton-seed shipped under a bill of lading by the terms of which the shipowner's warranty of seaworthiness was not to extend to damage caused by "latent defect in hull provided such latent defect do not result from want of due diligence of the owners or any of them, or of the ship's husband or manager".

In this case the damage was caused by sea-water entering the hold through the fracture of certain rivets by which the plates were attached to the ship's frames. Rust had been allowed to accumulate between the plates and the frames, thus subjecting the rivets to undue stress, which ultimately caused them to break.

The damage occurred during a voyage in August 1921. In 1920 the vessel had passed Lloyd's special survey, and in July

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[109] (1922) 13 Ll.L.Rep. 363.

1921, she had been surveyed for fire damage, when the condition of the rivets was reported to be satisfactory, but certain cleaning and coating of steel work in the holds which was recommended in the report had not been carried out at the time the cargo was damaged. The damage was augmented by the failure of the master who was a part owner, to have the bilges properly pumped.

The judge gave judgment for the shipowners on the ground that although a careful examination would have disclosed the existence of the rust which caused the defect, the surveyors' reports indicated no lack of due diligence on the part of the owner or his advisors. The damage was therefore caused by a latent defect in respect of which the owner was protected by the bill of lading.

But in delivering judgment, Lord Justice Atkin[110] referred to the definition propounded by Carver[111] that latent defect is "a defect which could not be discovered by a person of competent skill and using ordinary care".

And as a result the court ruled that, by the exercise of ordinary care by a competent person, the existence of the rust in the rivets would have been found, and it was common ground that something should have been done to remedy it; and then if the ship sailed without anything being done, there was a breach of the warranty of seaworthiness. In other words, the court held that the defect was such that it would have been discovered by a reasonably careful and diligent examination, and extraordinary

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110 (1922) 13 Ll.L.Rep. 363 at p. 366.

111 Carver, op.cit., at p. 382.

care was not necessarily to make it apparent.

The question whether a defect was or was not latent is in fact treated as being the same as whether the person charged with the care of the vessel was or was not negligent.

In this connection it is important to refer to the observation made by Cadwallader:[112]

> "In looking at the effects of Article III, rule 1, it is relevant to inquire whether a failure to exercise due diligence in respect of a defect not discoverable by due diligence which subsequently causes loss or damage is likely to affect the position of the carrier. The answer to this, at least on the basis of Article IV, rule 1, must be that it is not, since it can hardly be said that the incident complained of was caused by a want of due diligence on the part of the carrier."

Faced with a similar problem in Corporacion Argentina de Productors de Carnes V. Royal Mail Lines Ltd.,[113] which concerned the question of liability for damage to a cargo of frozen meat on the voyage from Buenos Aires to London, Mr. Justice Branson stated that:[114]

> "If the defect is such that it cannot be discoverable by due diligence it becomes immaterial to consider whether due diligence was exercised or not, because *ex hypothesi* if it had been exercised it would have been useless." [original emphasis].

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112 See Cadwallader, op.cit., at p. 17.

113 (1939) 64 Ll.L.Rep. 188.

114 Ibid, at p. 192.

In this connection, Cadwallader affirmed that:[115]

> "If it is accepted that a latent defect is one "which could not be discovered by a person of competent skill and using ordinary care", it is difficult to see what is gained by the inclusion of the words "not discoverable by due diligence."

Finally one can sympathise with Mr. Justice Porter who, faced with the problem of the exercise of due diligence in respect of seaworthiness and latent defects not discoverable by due diligence, said:

> "I am bound to say that in dealing with these cases I always found a certain amount of difficulty in distinguishing between a particular latent defect and a particular due diligence to get rid of that latent defect."[116]

II- Under the Hamburg Rules:

Under Article 5, rule 1 of the Hamburg Rules:

> "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 Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to

115 Cadwallader, op.cit., at p. 17.

116 Charles Brown & Co., Ltd. V. Nitrate Producers' steamship Co., Ltd. (1937) 58 Ll.L.Rep. 188 at p. 192.

avoid the occurrence and its consequences."

The form of this new provision is heavily influenced by the language used in conventions concerning the international transport of cargo by Air,[117] Rail,[118] and Road[119] carriage.

The first part of this rule is in the form of a strict liability provision while its final clause exonerates the carrier if he "took all measures that could reasonably be required". It is essentially a liability for fault provision.

It is noteworthy that this second part of Article 5, rule 1 is closely modeled in accordance with the other International cargo conventions.

The Warsaw Convention of 1929 states that the carrier is not liable if "he and his agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures".[120] The CIM Convention (Rail) states that the carrier is not liable if the loss or damage resulted "through circumstances which the...(carrier)...could not avoid and the consequences of which he was unable to prevent".[121] The wording of the CMR Convention[122] is almost identical to that of

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117 Convention for the unification of certain rules relating to International carriage by Air (The Warsaw Convention) signed at Warsaw on 12 Oct, 1929.

118 International Convention concerning the carriage of goods by Rail (CIM) signed at Berne on 25 oct, 1952.

119 Convention on the contract for the International carriage of goods by Road (CMR) signed at Geneva on 19 May, 1956.

120 The Warsaw Convention, Article 20 para. 2.

121 CIM Convention, Article 27 para. 2.

122 CMR Convention, Article 17 para. 2.

the CIM Convention.

It is important to observe in this connection that the drafters of the new Convention (Hamburg Rules) could have used traditional carriage of goods by sea language and still fashioned a general liability for fault provision. This would in essence have entailed provisions requiring the carrier to exercise due diligence to make the ship seaworthy, to care for the cargo and to properly and carefully navigate and manage the ship. But they rejected this traditional language in order to conform more closely to the language used in other International transport conventions. This may be an advantage in facilitating the multimodal transportation of cargo.[123]

But this latter observation has been criticized on the ground that the Hamburg Rules by changing the language of the standard from "due diligence" in the Hague Rules to that which is used in the other transport conventions "liable for loss ...unless (he)...proves that he took all measures which could be reasonably required..." clarity and predictability is being sacrificed. It is argued that had the "due diligence" language of the Hague Rules been retained, the benefit of existing case law construing the standard and clarifying its application could have been retained[124]. As the Rules presently stand the meaning of the standard is vague and ambiguous.

In this connection, one can argue that this criticism can, on one hand, be true because what the new Convention has not resolved is the standard of care imposed upon the shipowner. Is

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[123] See Zamora, S., "Carrier liability for damage or loss to cargo in International Transport", (1975) 23 A.J.C.L. p. 391.

[124] See Hellawell, op.cit., at p. 359.

the obligation in Article 5, rule 1 of the Hamburg Rules, the same as "due diligence" in Article III, rule 1 of the Hague Rules?

In fact, it is uncertain how the new general rule under Article 5, rule 1, of the new Convention will work out in practice since there is very little guidance in the Convention as to the standard of care to be applied by the courts.

One can imagine that the adoption of a general rule of negligence expressed in terms of "reasonable" conduct exposes undoubtedly the carrier to considerable uncertainty as to the consequences of his action. What are "all measures that could reasonably be required? Only years of case Law under the new Rule would provide increased certainty.

On the other hand, this criticism fails to consider that due to the similarity between the standard in the Hamburg Rules and the other transport conventions, the courts might analogize and apply decisions clarifying and construing the standards of the other transport conventions to the Hamburg Rules. Specific duties might be slightly different owing to the peculiarities of the different modes of transportation, But the general nature of the duty of care owed could easily be analogized.

Furthermore, a standard based on that of other comparable conventions was adopted because of the potential for facilitating multimodal contracts and because of the anticipation of a multimodal transport convention in the future.

1- The Standard of "Reasonable Measures":

The issue that remains to be resolved will be the construction

to be placed by the courts on the carrier's duty to take "all measures that could reasonably be required to avoid the occurrence and its consequences".[125]

In this connection, reference must be made to the statement of Mr. Richardson,[126] where he described the wording of Article 5, rule 1 of the Hamburg Rules as:

"It is perhaps one of the vaguest phrases I have ever heard".

Accordingly he affirmed:[127]

> "Can you imagine the field day which lawyers would have in determining what measures could and what measures could not reasonably be required in a myriad of circumstances? Furthermore, if the courts were to place the same sort of interpretation on these words as they placed on "due diligence" in The Muncaster Castle[128] case, the carrier would be issuing, what would amount to strict liability bills of lading and cargo insurance would become superfluous."

One of the most important questions which arises in connection with this point is: what is it that the carrier has to prove in order to escape liability? Does he have to show merely that the reasonable shipowner in his position would not have done more to safeguard the cargo than he did? or is it necessary

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125 See Wilson, (1988 edition), op.cit., at p. 204.

126 Richardson, J.W., "The Hague-Visby Rules; a carrier's view". Published in The Hague Visby Rules and the carriage of goods by sea Act 1971. A one-day seminar organised by Lloyd's of London press Ltd, December 8, 1977, p. 5.

127 Ibid at p. 5.

128 [1961] 1 Lloyd's Rep. 57.

for him to go further and prove that it would have been totally impracticable to take further steps in this respect?

If all one had to go on were the words "could reasonably be required" one might have had some doubt as to whether the Rule (Article 5, rule 1) did not impose a higher duty on the shipowner than that of ordinary reasonable care.

It should be mentioned that the term "reasonable measures" is an unlimited term. However, it seems plain that the standard of these measures is an objective one, or, as it is commonly said of the "prudent owner" which corresponds to that of the "bon pere de famille" in French Law.[129]

Accordingly, in determining the reasonable measures, regard must be given to the course which would be pursued by a prudent carrier in the circumstances of the case.[130]

It is believed that paragraph 1 of Article 5 did not impose a higher duty on the shipowner than that of ordinary reasonable care.

The Common Understanding[131] makes it clear that all the shipowner needs to do is to show that he took reasonable care of the goods[132].

It is convenient to mention here an important observation made by Judge Haight. As to the term of "reasonably" he said:

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129 See Mankabady, S., "Comments on the Hamburg Rules", op.cit., at p. 56.

130 Ibid at p. 56.

131 See Annex II of the Hamburg Rules.

132 See Diamond, A., "A legal analysis of the Hamburg Rules" (part I), op.cit., at p. 11.

> "I am stuck, however, by the dramatic appearance of that hero of the Maritime Law. The Hamburg Rules might well be subtitled: "The reasonable man puts to sea". The vision of the future is that, in an infinitive variety of situations, the carrier's liability for cargo damage or loss will be determined by the question of whether or not the shipowner, master, officers, crew or agents, acted "reasonably". while I constantly instruct Juries to emulate him, I have never met the reasonable man...My prediction is that the application of this particular principle will substantially increase litigation."[133]

Whereas, the Hague Rules used terms well known to the Maritime Law such as "seaworthiness", "perils of the sea" and "deviation". These terms have disappeared under the Hamburg Rules.[134]

The carrier's liability under the Hamburg Rules "is based on the principle of presumed fault or neglect"[135] to induce the carriers to keep their standard of care at the optimum level.

It must be borne in mind that during the formulation of the Hamburg Rules, the drafters have taken into account the technological advances of shipping and navigation and communication. Shipping by sea is not as perilous as it was at the time of the passage of the Hague Rules, and therefore, a higher

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133 See Haight, C.Jr., in: The Speakers' Papers for the Bill of Lading Conventions Conference, New York, November 29/30, 1978, organised by Lloyd's of London Press, p. 4.

134 See Diamond, A., "A legal analysis of the Hamburg Rules" (part I), op.cit., at p. 7.

135 See Annex II of the Hamburg Rules.

standard of care should be expected of carriers.[136]

But, as it has been noted earlier, the form of the new provision (Article 5, rule 1 of the Hamburg Rules) is heavily influenced by the language used in the other three international cargo conventions which impose a standard of reasonable care rather than absolute liability, then one might argue that no higher standard should be applicable under the Hamburg Rules.

A system of liability for fault may tend to produce a standard of care near the optimum. Carrier will presumably spend 99 p. to avoid a fault causing £ 1 in cargo damage. A system of liability for fault is complicated; fault may be difficult to prove and cases may be settled for less than the amount of the damage. If, with certain types of errors or claims, carriers could reasonably expect to settle each loss for 75 p, presumably they would be unwilling to spend more than 75 p to avoid the £ 1 loss.

Perhaps more important, fault, negligence or due diligence do not exist in nature as constants. They are legal constructs which both change over time and are dependent to some considerable extent on normal industry practice. As technology changes, fault does also. The navigational equipment which would serve to satisfy the requirement of due diligence to make the ship seaworthy in 1910 would not suffice today.

Despite these weaknesses, a liability for fault system does give carrier a considerable incentive for adopting a standard of care somewhere near optimum. With regard to standard of care, therefore, the new Convention seems a considerable

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136 See Shollenberger, D.K., "Risk of loss in shipping under the Hamburg Rules", (1981) 10 Den.J.I.L.P. 568 at p. 575.

improvement over its predecessor.

Finally, in the words of Hellawell:[137]

> "The stringent standard of a strict liability would not be generally acceptable today. The 1978 Convention is therefore about the best compromise one could reasonably expect. It is a substantial improvement over the Brussels Convention in that it simplifies and almost unifies the rules on burden of proof and eliminates the multiple exceptions of the Brussels Convention, especially the exception for navigation and management of the ship."

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[137] See Hellawell, op.cit., at p. 367.

CHAPTER THREE

The Carrier's Liability for Unseaworthiness Under the Hague Rules and Hamburg Rules.

Generally for the holder of the bill of lading to make his case, he has only to prove the loss, shortage or damage of the cargo.

On the other hand, when the bill of lading came into use as a receipt for cargo and as a document of title, carriers began to use the bill's exceptions clauses, stipulating that they should not be liable to the holders of the bill of lading for damage or loss of goods suffered in certain ways or from certain causes.

Under the Hague Rules the carrier is entitled to rely upon the defences set out in Article IV provided that he has exercised due diligence to make the ship seaworthy and has properly cared for the cargo during its carriage. In particular the carrier is not responsible for loss or damage arising from fault in the navigation or management of the ship. This means, of course, that in the majority of cases the cargo-owner has no claim against the shipowner, since the latter is protected by the terms of his bill of lading which incorporates the provisions of the Hague Rules.

Whereas the Hamburg Rules adopt a different basis of liability. Article 5 provides that the carrier is liable for cargo damage unless he proves that he, his servants or agents took all

measures that could reasonably be required to avoid the occurrence and its consequences. The omission of the defence of fault in the management and navigation of the ship, particularly the latter, clearly imposes an additional heavy burden on the shipowner.

Therefore, this chapter will be divided in two sections:

I) The burden of proof.

II) The carrier's immunities from unseaworthiness.

Section one: The Burden of Proof.

It does not admit of doubt that the position of the burden of proof is a basic element in the fixing of rights with respect to any legal claim.

The Hague Rules set out in clear language the burdens of cargo-owner and carrier with respect to proving or disproving the carrier's liability for loss or damage suffered by the cargo-owner.

Where these Rules are not clear enough, judicial interpretation has filled some of the gaps as to who bears the burden of proof at a given point in the litigation of a claim for loss or damage.

The Working Group on International Shipping Legislation of UNCITRAL[1] has proposed that these burden of proof rules be changed and that the carrier bears the burden of disproving his liability under almost all circumstances.

I- Under the Hague Rules:

It should be noticed that, the onus of proof is not set out in the

[1] United Nations Commission on International Trade Law.

Hague Rules. Yet certain references are to be found in particular articles where the burden of proof is prescribed, but these articles do not constitute a general theory for the burden of proof.[2]

In countries using the Hague Rules, the burden of proof is in some situations placed on the carrier and in others on the shipper. Exactly how the burden is allocated is often a matter of some uncertainty, and may vary among countries.[3]

However, it is a general rule of Law that whoever relies on a certain fact must prove its existence. Accordingly, when the goods do not arrive, or arrive in a damaged condition, the cargo-owner must make a prima facie case against the carrier by showing that the goods were not turned out in as good condition as when shipped. This done, the burden passes to the carrier, who must show that it falls within an Article IV exception of the Hague Rules. If he manages to do so, the burden may shift back to the cargo-owner, who must prove that the carrier's fault or negligence caused the exempted act or concurred with it in producing loss or damage.

With respect to unseaworthiness, it should be noted that some difference of opinion exists as to the incidence of the burden of proof relating to the exercise of due diligence.

Article IV, rule 1 provides that the carrier shall not be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on his part to make the

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2 See Tetley, W., Marine cargo claims, 2nd ed., Toronto, Butterworths, 1978, p. 47.

3 Approaches to basic policy decisions concerning allocation of risks between the cargo-owner and carrier. [1972] UNCITRAL Y.B at 289.

ship seaworthy, as defined in Article III, rule 1.

The section then continues:

> "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 exeption under this Article."

The phraseology of this Article has led to the general assumption that no onus is cast on the carrier in relation to proof of due diligence until the other party has first established that:

1) The vessel was unseaworthy and;

2) that the loss or damage complained of resulted from unseaworthiness.[4]

1- Proof of Unseaworthiness:

The burden of proving unseaworthiness as a fact rests upon the party who asserts it, that is to say the shipper, and he must plead it with sufficient particularity. There is no presumption of Law that a ship is unseaworthy because she breaks down or even sinks from an unexplained cause, unless such occurrence can be accounted for by sufficient evidence of unseaworthiness.

Moreover a proof of non-delivery and damaged goods, do not raise a presumption of unseaworthiness or a failure to exercise due diligence to make the vessel seaworthy. And if unseaworthiness is not specially pleaded and proved, there is nothing for the carrier to refute, and hence there should be no

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[4] See Scrutton, T.E., Charterparties and bills of lading, 19th ed. by A.A. Mocotta, M.J. Mustill & S.C. Boyd, London, Sweet & Maxwell, 1984, p. 446.

need for him to show that he had exercised due diligence to make the ship seaworthy.

But once unseaworthiness is proved by the cargo-owner, it is then, for the shipowner to rebut it by either proving that the vessel was seaworthy in fact, or failing that, that he had exercised due diligence to make it so, as required by Article III, rule 1 of the Hague Rules.

The principle that a ship is not presumed to be unseaworthy is no doubt sound but this principle does not preclude certain presumptions of fact, i.e: presumptions arising from age, low classing or non-survey of the ship or machinery. The mere fact that the damage has occurred raises a prima-facie case that the ship was unseaworthy at the commencement of the voyage.

Thus in Fiumana Societa di Navigazione V. Bunge & Co., Ltd.,[5] their Lordships decided that an unexplained fire in the coal bunkers at the port of loading afforded a reasonable presumption that it was due to defect or unfitness of the bunker coal which in turn amounted to unseaworthiness.

It is therefore clear that the last sentence of Article IV, rule 1 of the Hague Rules imposes upon the carrier the burden of proving that the unseaworthiness of the vessel was not caused by want of due diligence on his part. In other words, he must prove that he had exercised due diligence to make the ship seaworthy.

This, however, still leaves the prior problem of proof of unseaworthiness, a problem which is harder on the shipper who has to prove also that the unseaworthiness was caused by the

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5 [1930] 2 K.B. 47.

carrier's want of due diligence.

An alternative view is provided by Tetley who argues that on policy grounds the burden of proof in both cases should rest with the carrier who has all the facts available to him to prove seaworthiness and due diligence while the cargo-owner has few, if any.[6]

As was pointed out by Chief Justice Beste, in the nineteenth century decision of Riley V. Horne,[7] the events relevant to the liability of the carrier occur for the most part out of the presence of the shipper, under circumstances making it exceedingly difficult for the shipper to ascertain or approve the cause of loss or damage.

In Tetley's opinion the construction of Article IV, rule 1, is contrary to the spirit of the Rules and to the express wording of Article III, rule 1 and 2.[8] He holds the view that, due diligence to make the vessel seaworthy in respect to the loss must be proven by the carrier before he may exculpate himself under Article IV of the Hague Rules.[9]

This was clearly pointed out by the Privy Council in Maxime Footwear Co., Ltd. V. Canadian Government Merchant Marine, Ltd.[10] where Lord Somervell said:[11]

> "Article III, rule 1 is an overriding obligation. If it

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6 See Tetley, op.cit., at p. 155.

7 (1828)Bing 217.

8 See Tetley, op.cit., at p. 155.

9 Ibid, at p. 153.

10 [1959] 2 Lloyd's Rep. 105.

11 Ibid, at p. 113.

> is not fulfilled and the non-fulfilment causes the damage, the immunities of Article IV cannot be relied on..."

The above statement made by Lord Somervell in the Maxime Footwear, seemingly simple and innocuous, had engendered much controversies and confusion in the Law regarding seaworthiness under the Hague Rules.

In this case, a consignment of leather was loaded into a burning hold, it caught fire and became a total loss. The fire rendered the vessel uncargoworthy as it made her holds unfit and unsafe for the reception, carriage and preservation of the goods. The unseaworthy condition arose as a consequence of the negligent supervision of the ship's officers in thawing out, with an acetylene torch, some waste pipes. This caused the surrounding cork insulation to catch fire.

The cargo-owners pleaded that the shipowners had not exercised due diligence to make the ship seaworthy under Article III, rule 1, and that the unseaworthiness so resulting caused the damage.

The shipowners' defences were that they had performed their obligations under Article III, rule 1, and that they were exempted from liability by Article IV, rule 1 and rule 2 (a) and (b).

The shipowners proceeded directly to Article IV, rule 2 (a) and (b) to defend their case by passing and ignoring Article III, rule 1. They argued that Article III, rule 1 never came into operation even though the fire caused the vessel to be unseaworthy.

In making a direct approach to Article IV, rule 2 (a) and (b), the shipowners were indirectly challenging the cargo-owners' allegation that unseaworthiness caused the loss. In pleading Article IV, rule 2 (b), the shipowners were in effect attributing fire as the cause of loss and not unseaworthiness. The question is: Can a shipowner make such a direct short-cut access to Article IV, rule 2 ?

The outcome of the proceedings (and in particular the speech of Lord Somervell cited above) seems to suggest that the shipowners had to prove compliance with the provisions of Article III, rule 1 before they would be allowed to rely on any of the immunities spelt out in Article IV.

Described as an "overriding obligation", a shipowner has to show that he had exercised due diligence to make the ship seaworthy. Article III, rule 1 has been considered the "gateway" to Article IV.

One has to bear in mind that in the Maxime Footwear[12] case, the cargo-owners pleaded not only a breach of Article III, rule 1, but also that unseaworthiness caused the loss. An issue was made of unseaworthiness as the cause of loss. The shipowners, therefore, had no alternative but to show that they had exercised due diligence to make the ship seaworthy in order to qualify for exemption of liability under Article IV, rule 1. Further, the court had to satisfy itself that the allegations made by the plaintiffs were met and satisfactorily rebutted. A failure to refute the claims would leave the plea of unseaworthiness hanging. Simply by showing that fire (Article IV, rule 2 (b)) was the cause

[12] [1959] 2 Lloyd's Rep. 105.

of loss does not by itself automatically disprove that unseaworthiness could not also be a concurrent cause.

The shipowners could not rely on Article IV for two reasons. Firstly, they could not show that they had exercised due diligence to make the ship seaworthy, and secondly, they could not disqualify unseaworthiness as a cause of loss. A breach of Article III, rule 1 would be inconsequential if unseaworthiness did not cause the loss. Judgement was awarded to the cargo-owners on both grounds.

To defend an allegation of unseaworthiness, the shipowner has three defences at his disposal:

1) He could prove that the defect or matter complained of did not fall within the definition of "unseaworthiness" i.e: that the vessel was not unseaworthy.

2) Failing (1), he could prove that unseaworthiness did not cause the loss.

3) And if (1) and (2) were decided against him, he could still escape liability if he showed that he had exercised due diligence to make the ship seaworthy, and in spite of that the loss still occurred, he relies on Article IV, rule 1.

The shipowners in the Maxime Footwear[13] could not prove any of the three defences outlined above.

The procedures at the trial, the shuttling back and forth of the burdens of proof, together with Lord Somervell's comments have led many judges and writers to conclude that Article III, rule 1 is in all cases, regardless of whether unseaworthiness is or is not pleaded, raised or proved, a general condition precedent for

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13 Ibid.

exoneration of liability under Article III, rule 1 and rule 2.

Before a carrier could think of giving evidence to establish a case of immunity from liability under Article IV, he has first, to prove that he had exercised due diligence to make the ship seaworthy.[14]

As it was pointed out earlier, Tetley,[15] drawing support from Canadian authorities and the above remarks made by Lord Somervell, holds this view: the exercise of due diligence is a prerequisite to proving the exceptions under Article IV. This view-point is identical to the scheme under the Harter Act, the forerunner of the Hague Rules, where the exercise of due diligence was clearly expressed as the basis of exemption. But unseaworthiness as a subject or basis of a suit stands on a different plane from unseaworthiness as a condition of exculpation. A causal connection between the loss and effect has to be traced in the former, but not in the latter. The wording of section 3 of the Harter Act does sanction such a prerequisite, but not the wording of Article III, rule 1 of the Hague Rules.

However, it must be said that the judges are free to draw their own inferences from a relatively skeletal framework of facts brought forward by the cargo-owner. The position was clarified in The Hellenic Dolphin[16] case, which tends to favour the majority view.

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[14] See The Jervis Bay (1940) 66 Ll.L.Rep. 184 at p. 193, per Wrottesley.J: "...the defendants must...prove, firstly, that they had exercised due diligence laid down in Article III...in the matter of the ship, and, secondly, one of the exceptions contained in Article IV, rule 2..."

[15] See Tetley, op.cit., at pp. 153-170.

[16] [1978] 2 Lloyd's Rep. 336.

The judgement of Lloyd.J in this case is of particular interest. He said:[17]

> "The cargo-owner can raise a prima facie case against the shipowner by showing that cargo which had been shipped in good order and condition was damaged on arrival. The shipowner can meet that prima facie case by relying on an exception, for example, perils at sea. The position in that respect is exactly the same whether the Hague Rules are incorporated or not. The cargo-owner can then seek to displace the exception by proving that the vessel was unseaworthy at the commencement of the voyage and that the unseaworthiness was the cause of the loss. The burden in relation to seaworthiness does not shift. Naturally, the court can draw inferences: in Lindsay V. Klein the inference of unseaworthiness at commencement of the voyage was overwhelming. But if at the end of the day, having heard all the evidence and drawn all the proper inferences, the court is left on the razor's edge, the cargo-owner fails on unseaworthiness and the shipowners are left with their defence of perils of the sea. If, on the other hand, the court comes down in favour of the cargo-owners on unseaworthiness, the shipowners can still escape by proving that the relevant unseaworthiness was not due to any want of due diligence on their part or on the part of their servants or agents."

In practice, however, most courts solve the problem by calling on both parties to make what proof is available to them. Moreover, the problem is frequently solved by the readiness of

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[17] Ibid, at p. 339.

the court to treat the presence of seawater in a vessel's hold as prima facie evidence of unseaworthiness.

2- Unseaworthiness Must be the Cause of the Loss:

In the course of making out his prima facie case, the claimant has to show that his loss or damage complained of resulted from the unseaworthiness. In other words, the fact that due diligence was not exercised to make the vessel seaworthy is not sufficient to find the carrier responsible. The unseaworthiness must be the cause of the loss. That is not to say that the courts have required that unseaworthiness be the proximate cause of the loss nor even the dominant cause as long as it be "a" cause in the sense of a real or effective cause.[18]

This requirement that unseaworthiness results in the loss or damage complained of is, particularly, important in the light of the distinction between the Harter Act and the Hague Rules, with respect to the carrier's duty to exercise due diligence to make the ship seaworthy.

Under the Harter Act, the wording of section 3 made the exercise of due diligence by the shipowner to make the ship seaworthy a condition precedent to his right to rely on certain specified defences,[19] an effect requiring no causal connection whatever between the exercise of the duty and the incident

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[18] See Smith Hogg V. Black Sea and Baltic [1940] A.C. 997.

[19] Section 3 of the Harter Act commenced: "If the owner of any vessel transporting merchandise or property...shall exercise due diligence to make the said vessel in all respects seaworthy" then he may rely on the defences provided in that section.

resulting in the loss or damage.

Whereas under the Hague Rules, and according to the wording of Article IV, rule 1, no question of due diligence arises unless the cargo-owner proves unseaworthiness.[20]

Therefore, the essential difference between the Harter Act and the Hague Rules is that the negligence or exception clause in the Harter Act (section 3) is conditional: it never operates to exonerate the carrier unless due diligence has been used to make the ship seaworthy in all respects regardless of causal connection. In other words, if unseaworthiness is found, the carrier cannot invoke the Harter Act exoneration clause, even if no connection exists between the event causing the loss and the unseaworthiness.

The Hague Rules, however, calls for such causal relation as a prerequisite to a finding of liability.[21] The exception clause of the Hague Rules (Article IV) is positive: it always operates to exonerate the carrier unless the actual want of due diligence caused the particular unseaworthiness.

It should be pointed out that if the carrier has failed to exercise due diligence to make the ship seaworthy and unseaworthiness was the sole cause of loss, there is no problem. He cannot rely on Article IV, rule 1 as he has failed to comply with its terms. Article IV, rule 2 is irrelevant as unseaworthiness is not an excepted cause of loss under it.

Unseaworthiness, however, rarely operates as a cause on its own. To quote Lord Wright: "...unseaworthiness as a cause cannot

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20 See Carver, T.G., Carriage by sea, 13th ed. by Raoul Colinvaux, London, Stevens & Sons, 1982, Vol. 1, p. 336.

21 See Tetley, op.cit., at p. 156.

from its very nature operate by itself...".[22] It is invariably accompanied by another peril which it relies upon to evince itself, to show up the inferior qualities of the ship. As there will always be a combination of causes, one of which is unseaworthiness and the other/s, possibly, an excepted peril, difficulties in the selection of the decisive cause of loss arise. The carrier would naturally plead one of the causes under Article IV, rule 2 as his defence. The question is: Can he do so when unseaworthiness is also responsible for the loss?

The Common Law has resolved this dilemma by means of Lord Wright's "a" cause theory of causation.[23]

It is important to cite here the Canadian Supreme Court decision of Charles Goodfellow Lumber Sales Ltd. V. Verreault Navigation Inc.,[24] to illustrate the same principle as applied under the Hague Rules. In a case of multiple causes, Ritchie.J would determine the issue as follows:[25]

> "It thus appears to me that even if the loss is occasioned by perils of the sea, the shipowner is nevertheless liable if he failed to exercise due diligence to make the ship seaworthy at the beginning of the voyage and that unseaworthiness was a decisive cause of the loss."

The English authorities on causation declaring the same rule

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22 Smith Hogg V. Black Sea and Baltic [1940] A.C. 997.

23 In the Smith Hogg [1940] A.C. 997.

24 [1971] 1 Lloyd's Rep. 185.

25 Ibid, at p. 188.

were approved by the judge.[26] The "a" cause theory is simpler to apply under the Common Law as the warranty of seaworthiness is absolute; once unseaworthiness is established as a cause of loss, the shipowner is liable. But as under the Hague Rules the warranty is reduced to the exercise of due diligence, Lord Wright's conception has to be adjusted accordingly; the carrier has to be given the right to prove that he had exercised due diligence to make the ship seaworthy.

One has little doubts that Lord Somervell's overriding obligation[27] was intended to prevent the carrier from using Article IV, rule 2 as a means of escaping from liability in the circumstance where unseaworthiness is only a cause of loss operating together with an excepted cause which falls within Article IV, rule 2.

In the Maxime Footwear[28] itself, fire and unseaworthiness were the concurrent causes of loss, with the former acting as the immediate cause. Lord Somervell's rule would not have been so severely criticised and so gravely misunderstood if he had added to it a note on causation, one similar to Lord Wright's "a" cause theory[29] on the significance of unseaworthiness as a cause of loss. Such an elaboration would surely clarify his intention which basically was to prevent a carrier from seeking refuge in Article IV, rule 2 where unseaworthiness is evident as one of the two or more causes of loss. And it would bring home more clearly the

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[26] See for example the Smith Hogg [1940] A.C. 997, and Grill V. The General Iron Screw Collier Co. (1866) L.R 1 C.P 600.

[27] In the Maxime Footwear [1959] 2 Lloyd's Rep. 105.

[28] [1959] 2 Lloyd's Rep 105.

[29] In the Smith Hogg [1940] A.C 997.

point that if Article III, rule 1 is not fulfilled and unseaworthiness acts as a cause of loss, none of the immunities in Article IV can be sought. If unseaworthiness was the sole cause of loss, there would have been no need for him to comment the way he did as none of the causes under Article IV, rule 2 (a) to (q) would be applicable.

In an earlier Privy Council decision of Corporation of the Royal Exchange Assurance & others V. Kingsley Navigation Co., Ltd.,[30] with facts similar to the Maxime Footwear,[31] the same approach was adopted by the Board. The carrier was not given the protection of Article IV, rule 2 (b) even though the cargo of lime was burnt as a result of a water leakage which came into contact with it and generated heat. Both parties concurred that the vessel was unseaworthy. The cargo-owners pleaded unseaworthiness and the carriers, fire as the cause of loss.

The Board arrived at the firm conclusion that the loss:[32]

> "...is a loss naturally and directly attributable to the unseaworthiness of the ship, and is not a loss arising from fire within the protection of S.7."

As the carriers could not show that they had exercised due diligence to make the holds safe for the carriage of lime, they were held responsible for the loss.

In a dictum, the Board intimated that the onus was on the carriers to show that the loss did arise from the fire. Though the

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[30] [1923] A.C. 235.

[31] [1959] 2 Lloyd's Rep. 105.

[32] [1923] A.C. 235 at p. 244.

cargo was in fact damaged by fire, unseaworthiness was held by the Board to be the proximate cause of loss and this deprived the carrier of the immunity under Article IV, rule 2 (b).

Unseaworthiness operating side by side with a cause which falls within the protection of Article IV, rule 2 (a) to (q) has often occasioned embarrassment to judges. On one hand, the carrier is exempted from liability by one of the provisions of Article IV, rule 2, and on the other, he is not, on account of his failure to exercise due diligence to make the ship seaworthy under Article III, rule 1 read with Article IV, rule 1. To prevent a carrier from escaping scot-free in such a situation, the English Courts have utilised Lord Wright's "a" cause theory of causation.

In the United States, the District judge in Lockett Co. V. Cunard S.S. Co.,[33] applied a similar rule to the "a" cause doctrine of causation. It was held that:

> "...such unseaworthiness was, at least, a contributing cause, and therefore the exception did not exonerate the respondents from one of the perils to which their negligence, or that of their servants, contributed."[34]

In the Maxime Footwear,[35] as it has been pointed out earlier, it was reasonable and proper to make the shipowner prove that he had complied with Article III, rule 1 as unseaworthiness as a cause of loss was in dispute. In cases where unseaworthiness is not specifically pleaded or proved, it would seem totally pointless

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33 (1927) 28 Ll.L.Rep. 181.

34 Ibid, at p. 183.

35 [1959] 2 Lloyd's Rep. 105.

to compel the carrier to take the first step in adducing evidence on seaworthiness. Unseaworthiness may not exist, and even if it did, it may have nothing to do with the loss.

In Minister of Food V. Reardon Smith Line, Ltd.,[36] the vessel was found to be unseaworthy as cement was used to seal the scupper pipes instead of burlap, the standard material. The carriers were also found to have failed to exercise due diligence to make the ship seaworthy in this regard. The Umpire, however, found that the damage would have occurred in any case even if the pipes were covered with burlap. He made an express finding of negligence, one amounting to an "act, neglect or default" within the meaning of Article IV, rule 2 (a), as the cause of loss.

As there was no evidence whether unseaworthiness had anything to do with the damage at all, the court exempted the carrier from responsibility by reason of Article IV, rule 2 (a). In this case Mc Nair.J stated that:[37]

> "...the second sentence in Article IV, rule 1, strongly supports the submission made...that no onus as to seaworthiness is cast on the shipowner, except after proof has been given by the other party that the damage has resulted from unseaworthiness."

The case of Walker V. Dover Navigation[38] falls within the same groove. The vessel was overloaded at the commencement of the voyage. But by reason of consumption of bunkers and stores

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[36] [1951] 2 Lloyd's Rep. 265.

[37] Ibid, at p. 272.

[38] (1950) 83 Ll.L.Rep. 84.

during the course of her voyage, she regained her stability and at the time of loss was not below her marks. The cargo-owners pleaded that the vessel founded by reason of her unseaworthiness in that she was overloaded when she left port. The defendants denied this with the submission that at the time of loss she was no longer unseaworthy and unseaworthiness could not possibly be responsible for the damage.

Lynskey.J. awarded judgment in favour of the carriers who were not even asked to prove the exercise of due diligence. He declared that:[39]

> "Even if it (unseaworthiness) amounted to a breach of contract, it was not one of those matters which was a cause of this particular loss, or such as to prevent the exception of perils of the sea applying in favour of the carrier."

The above authorities do illustrate the importance of causation in a contract of carriage. As under the Common Law unseaworthiness, as a basis of liability, has to be shown to have caused the loss. This requirement of a causal connection between unseaworthiness and the damage, stems from the character of the undertaking of seaworthiness as a contractual term. In a contract of affreightment, the warranty is not a condition precedent a breach of which would attract legal responsibility. Its counter-part in Marine insurance, in contrast, is a condition precedent a breach of it alone is sufficient to discharge the insurer from liability.

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[39] Ibid at p. 90.

II- Under the Hamburg Rules:

We have already seen that the Hague Rules dealt specifically with the question of the burden of proof in only a few limited situations, with the result that the courts have frequently reached conflicting conclusions in interpreting their provisions on this issue. Depending on the situation, the burden of proof is sometimes placed on the carrier, sometimes on the shipper and sometimes on a combination of the two. Thus, the allocation of the burden is subject to considerable uncertainty.

However, the general rule appears to be that, the shipper must first make out a prima facie case by proving delivery of the cargo to the carrier in good condition and receipt in bad order, or non-receipt. This done, the burden passes to the carrier. Now suppose the carrier proves that the damage resulted from an exception under Article IV, rule 2. In that event the burden shifts back to the shipper to prove, for example, that fault of the carrier contributed to, or was the real cause of the loss.[40]

It should be noted that the above rule has been criticized on the following grounds:[41]

First, the cited rule is common but it is not universal. Some cases and jurisdictions take a different approach or the matter is unsettled, and the result may vary depending on the particular exception relied on. For example, if the carrier seeks the protection of the latent defects exception he must first establish

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40 See Wilson, J.F., "Basic carrier liability and the right of limitation", published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, p. 137 at p. 141.

41 See Hellawell, R., "Allocation of risk between cargo owner and carrier", (1979) 27 A.J.C.L. 357 at p. 361.

that such defects were not discoverable by due diligence.[42]

Second, the burden is very likely to fall on the shipper to prove something that is peculiarly within the knowledge of the carrier, i.e: what did the carrier do, or fail to do, while at sea or at a distant port. In most of the cases, shippers have a difficult time securing evidence to meet the burden of proof.

Therefore, it was suggested that, it will be reasonable to place the burden on the party most likely to be able to produce evidence on the matter.[43]

The Hamburg Rules seek to remove this confusion by presuming fault in all cases of loss or damage to cargo and so imposing a uniform burden of proof on the carrier.

The Hamburg Rules' formulation, therefore, places upon the carrier the initial burden of proving his freedom from fault for any loss.[44] As it has been noted earlier, this provision is justified on the ground of the desirability of placing the burden of proof on the party most likely to have knowledge of the facts. The basic provision is in Article 5, rule 1:

> "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."

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[42] See Wilson, op.cit., at p. 141.

[43] See Hellawell, op.cit., at p. 362.

[44] See Annex II of the Hamburg Rules.

It is important here to make it clear that rule 1 of Article 5 contains two stages for the carrier's liability. The first stage is to prove that the "occurrence" which caused the damage took place while the goods were in the carrier's hand. If it did, then the second stage will come into play. In this stage it is allowed for the carrier to prove that he took all measures that could reasonably be required to avoid the occurrence and its consequences.[45]

As to the first stage, two main questions are to be discussed. First, what is an "occurrence"? Second, on whom lies the burden of proof?

What is an "occurrence"? It is to be noted that this is something other than the fact that the goods have sustained damage or that they have become lost while in the carrier's charge. The occurrence is whatever caused this. Moreover, the occurrence need not be of an extraordinary nature or arise from irresistible force. All that is required is that it happens while the carrier is in charge of the goods.[46]

To illustrate this point, we can take the example where the shipowner is due to carry a liquid cargo and in preparation for this he causes the tanks of his vessel to be cleaned. However, the cleaning is badly or insufficiently done. He then takes delivery. The cargo is put into the dirty tank and as a result it become

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[45] See Diamond, A., "A legal analysis of the Hamburg Rules" (part I), published in the Hamburg Rules, A one-day seminar organised by Lloyd's of London Press Ltd, September 28, 1978, p. 9.

[46] See Mankabady, S., "Comments on the Hamburg Rules", published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, p. 27 at p. 55.

contaminated. Now the question to be asked in this situation is: What was the occurrence which caused the loss?

The immediate answer will certainly be: "Failing properly to clean the tank". But it should be noted that, in this example, the occurrence which is "the failure to clean the tank", took place before the goods came into the shipowner's charge, and if this answer were to be given, then the shipowner would escape all liability. One can therefore expect that a court will be forced to give a strained interpretation to Article 5, rule 1 in such a case and to say that the occurrence was not the failure to clean the tank but the putting of the cargo into a dirty one.

The second question on this part of the rule is: Is it for the shipowner to prove that the relevant "occurrence" did not occur while the goods were in his charge or must cargo-owner prove that it did?

The answer to this question does not seem to be a matter of first importance. To illustrate this, reference can be made to the words of Lord Reid in Mc Williams V. Arol,[47] where he stated that:

> "...in the end, when all the evidence has been brought out, it rarely matters were the onus originally lay, the question is which way the balance of probability has come to rest."

However, in some cases where goods have arrived in a damaged condition and the cause of the damage is either

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[47] [1962] 1 W.L.R. 295 at p. 307.

unknown or is a matter of hot debate between parties, it is not easy for the carrier, particularly in the latter situation, to prove that the relevant "occurrence" did not occur while the goods were in his charge. For example, were fresh fruit or vegetable have arrived in a mouldy condition. The consignee says that the occurrence which caused this was that the goods were badly stowed or improperly ventilated, that is to say that the ship was unseaworthy in the sense of uncargoworthy for the reception, carriage and preservation of the goods. The shipowner retorts that the only relevant occurrence was the inherent vice of the goods. Is it for cargo to prove improper stowage or for the shipowner to prove inherent vice?

Annex II of the Hamburg Rules which contains the "Common Understanding" makes this point very clear. 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..."

But though this Annex points in favour of the solution that the burden usually rests on the carrier, it does not really answer the question "what is to give rise to the presumption of fault or neglect".[48]

Undoubtedly, the intent of the draftsmen of the Convention is that the cargo-owner would make out a prima facie case against the carrier by showing that the goods were not turned out in as good condition as when they were delivered to the custody of the carrier. Accordingly, the courts would probably decide that

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[48] See Diamond, op.cit., at p. 10.

where a clean bill of lading has been issued, then delivery in a damaged condition is sufficient, in itself, to raise a presumption that the relevant occurrence occurred while the goods were in the carrier's charge. Once the cargo-owner had made out a prima facie case, it would, then be the shipowner's task to rebut this presumption.

We come, then, to the second stage of Article 5, rule 1 where the carrier is required to prove that the cause of the loss or damage was not an act of negligence for which he is responsible. Accordingly, the burden of proof which is against the carrier, shall be reversed if the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences. In other words, the carrier can escape liability if he proves that neither he nor his servants or agents caused the loss or damage by their fault or neglect.[49]

As under the Hamburg Rules there is no basic requirement of due diligence to provide a seaworthy vessel, the situation seems to be more complicated. If the ship is unseaworthy and cargo loss or damage results, the carrier would presumably be liable as he would not be able to prove that "he...took all measures that could reasonably be required to avoid the occurrence."

Assuming, however, that seaworthiness is not an issue, but there is a loss following negligent navigation. Initially, the carrier will be liable unless he discharges his burden of proof to show

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[49] See Cleton, R., "The special features arising from the Hamburg Diplomatic Conference", published in the Hamburg Rules, A one-day seminar organised by Lloyd's of London Press Ltd, September 28, 1978, p. 5.

that he took all reasonable measures to avoid the occurrence. To discharge his burden of proof, the carrier, of course, will have many arguments at his disposal, technical details of weather conditions, navigational problems from other ships, and other aspects relative to sea perils which prevented the effectiveness of his "reasonable measures" being successful.

It is noteworthy that, in respect of the burden of proof, the drafters of the Hamburg Rules chose a method of exoneration similar to the catchall exception under the Hague Rules,[50] Article IV, rule 2 (q).[51] The carrier, therefore carries the initial burden of proving non-fault rather than affirmatively proving the circumstances of an exception; under the liability presumption of the new Rules the shipper need adduce no actual evidence of carrier negligence.

With respect to seaworthiness, it is well established that under the Hague Rules, the carrier could respond to the shipper's prima facie case either by proving an excepted cause under Article IV, rule 2 or by demonstrating due diligence in attempting to avoid the loss or damage. If the carrier, successfully, could make out an exception, the burden of proof then shifted to the plaintiff shipper to establish unseaworthiness or the supervening negligence of the carrier. But under the Hamburg Rules, the carrier must meet the shipper's prima facie case without the benefit of the shipper's narrowing of the issues. Thus the incorporation of the Hague Rules "q" clause defence not only constricts the opportunities for exemption but also modifies the

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[50] See Report of the Working Group on International Legislation on Shipping (fourth session), (1973) 4 Y.B UNCITRAL, at 153.

[51] See Article IV, rule 2 (q) of the Hague Rules.

adduction of evidence.

It is convenient to note here that the Hamburg Rules' modification of the burden of proof does not change the ultimate burden of proof, as the delegates of one country suggested,[52] but rather shifts the burden of explaining the cause of the loss.

Accordingly, under the Hague Rules, the shipper will lose his case if he cannot show the specific negligence of a carrier who has drawn himself within an exception. Whereas, under the Hamburg Rules, the carrier bears the risk of loss following from his own negligence, and in cases where he will not be able to meet the burden of proof, such as in unexplained losses, he will be liable even without fault.[53] The Hamburg Rules clearly intend to place financial responsibility for an unexplained loss upon the carrier.

The burden of proof requiring the carrier to come forward with an explanation of the loss was designed by Professor Hellawell. He recommended this scheme for two policy reasons.[54] First, he suggested that the carrier is the party more likely to have knowledge of the circumstances of the loss, and second, that the carrier is the party more capable of achieving

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[52] The comments of the United Kingdom suggest that the Hamburg Rules effect a general reversal of the burden of proof from shipper to carrier. See Comments and proposals by Governments and International organizations on the draft Convention on the carriage of gooods by sea, (comments of the United Kingdom, para 9) U.N. Doc A/conf. 89/7. Add 1. (1977).

[53] See Hellawell, op.cit., at p. 363, see also Schollenberger, D.K., "Risk of loss in shipping under the Hamburg Rules." 10 Den.J.I.L.P. 568 at p. 575.

[54] See Hellawell, op.cit., at pp. 362-364, see also (1972) 3 Y.B. UNCITRAL at 302.

an optimal standard of care.

Under Hellawell's reasoning, and according to the "Common Understanding", one can therefore conclude that, the drafters of the Convention intended that the carrier explain the loss and prove his freedom from fault.[55]

But when we refer to the language of Article 5, rule 1, it may allow some dilution of that result, because the Rules may require the shipper to contribute to the adduction of causation. He may have to prove that the incident causing the loss or damage occurred while the goods were in the charge of the carrier. In order to prove the time of the incident, the shipper may have to attempt to identify the cause of the loss itself. This requirement surpasses the prima facie test contemplated by the rule which requires only delivery in good condition and return in damaged condition as the shipper's sole burden of proof.[56]

1- Burden of Proof in the Case of Loss or Damage Caused by Fire:

Generally, as it has been seen, it is for the carrier to prove that he took all reasonable care of the goods. This seems undoubtedly correct if the relevant "occurrence" occurred while the goods were in his charge. For all the relevant evidence is likely to be in the carrier's control.

However, Article 5, rule 4, enunciates an exceptional case where the burden of proof has been modified so as to produce a

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55 See Annex II of the Hamburg Rules.

56 See Report of the Working Group on International Legislation on Shipping (fourth session), (1973) 4 Y.B. UNCITRAL, at 150-151.

different result. Article 5, rule 4, which deals with loss caused by fire, provides:

> "(a) The carrier is liable
> (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents;
> (ii) for such loss, damage or delay in delivery which 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."

Reading these two sections together, it appears that if a fire arose without the fault of the carrier, he would not be liable unless he failed to take all measures that could reasonably be required to put out the fire. Conversely, if the fire arose from the fault or neglect of the carrier, his servants or agents, liability would follow.

From the wording of Article 5, rule 4, it is therefore clear that, in the case of loss or damage caused by fire, the burden of proof is shifted away from the carrier, presumably for the reason that it is difficult to establish the precise origin of a fire at sea.[57] This provision, which is in favour of the carrier, is supported on the ground that most fires on ships are caused by spontaneous combustion originating in the cargo,[58] and thus it will be

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[57] See Wilson, op.cit., at p. 142.

[58] See Hellawell, op.cit., at p. 363, see also Wilson, J.F., Carriage of goods by sea, London, Pitman Publishing, 1988, p. 205.

reasonable to place the burden of proving fault or neglect of the carrier, his servants or agents, on the claimant.

Accordingly, under Article 5, rule 4 of the Hamburg Rules,[59] the carrier is liable for loss or damage caused by fire, if the cargo-owner proves either that the fire arose from fault or neglect on the part of the carrier, his servants or agents, or from their fault or neglect in not taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.[60] In other words, carrier's liability may arise both from the actual causation of the fire and from the inadequacy of the measures used to extinguish it.[61]

From the latter provision, one can therefore conclude that, by imposing liability upon the carrier for measures used to put out the fire, the drafters of the Convention hoped to avoid the possibility that carriers merely could comply mechanically with materials requirements, such as fire fighting equipment, and thus fail to select and train the crew properly, a responsibility singularly under the control of the carrier.

However, it is noteworthy that the fire clause in the Hamburg Rules has been a source of criticism since it places the burden on the shipper to prove the fault of the carrier. This burden would be difficult for a shipper to sustain since he normally would not

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59 With regard to rule 4 of Article 5 the Developing Countries argued that it was unjust to put the entire burden of proof on the claimant. See Cleton, op.cit., at p. 6.

60 See Wilson. "Basic carrier liability and the right of limitation", op.cit., at p. 142.

61 It must be noted that damage through fire includes damage by fire and also by water used to put out the fire.

be in a position to witness the negligence at the time of its occurrence, and servants of the carrier would be adversarial and probably of little help in determining the cause of the loss.

Accordingly, it seems to be unjust to make the shipowner win the action simply because the cargo-owner might be unable to present the necessary evidence of negligence, in spite of the carrier's failure to give detailed evidence as to the cause of the outbreak of the fire.

But it can be said that, this change of the burden of proof from carrier to shipper, was offered to shipowners as a concession in exchange for their non-exemption from liability for negligent navigation.[62] In this connection Hellawell stated:[63]

> "...basically this provision is part of a political compromise between carrier and cargo interests. It was prepared in the final days of hard bargaining..."

2- Partial Liability of the Carrier:

Finally, it must be mentioned that some problems could arise where fault of the carrier combined with another cause to produce loss or damage.

The question which must be asked in this connection is: How is liability to be dealt with if there are two causes of the loss or damage, negligence by the carrier and another cause beyond the carrier's control?

It has already been mentioned that, under the Hague Rules, if the fault of the carrier combined with an Article IV, rule 2

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62 See Diamond, op.cit., at p. 12.

63 See Hellawell, op.cit., at p. 363.

exception to cause damage to the cargo, for example, one constituting initial unseaworthiness caused by a failure to exercise due diligence, and the other consisting of negligent navigation, the carrier is 100 per cent liable for the loss or damage for breach of his duty to exercise due diligence, and the exception will not exonerate the carrier.[64]

However, there is a different situation where there are not two co-operating causes of the whole loss or damage, but some cargo is damaged by e.g. unseaworthiness for which the shipowner is liable under the Hague Rules, and other damage caused by an excepted peril e.g. a latent defect in the ship. Here the carrier will be liable for that proportion of the loss which is attributable to his fault, provided that the amount of this loss can be identified.[65]

Therefore, the question which arises here is, whether the new Hamburg Rules make any difference to either of these concepts? Article 5. rule 7 of the Hamburg Rules provides:

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64 Per Lord Wright in Smith Hogg & Co., Ltd. V. Black Sea & Baltic General Insurance Co., Ltd. [1940] A.C. 997 at p. 1005. "...if her unfitness becomes a real cause of loss or damage to the cargo, the shipowner is responsible, although other causes from whose effect he is excused either at Common Law or express contract have contributed to cause the loss."

65 Per Viscount Sumner in Gosse Millard Ltd. V. Canadian Government Merchant Marine Ltd. [1929] A.C. 223 at p. 241. "...it is incumbent on the shipowner, on whom the whole burden of proving this defence falls, to show how much damage was done in the subsequent operations, because it is only in respect of them that he can claim protection. This he has failed to do, and in consequence he has failed to show to what extent in money his prima facie liability for the whole damage ought to be reduced."

> "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."

From this provision, it is clear that, where the carrier's fault or negligence concurs with another cause to produce loss or damage, the carrier is liable only for that portion of the loss or damage attributable to his fault or negligence, provided he can establish the proportion of the loss attributable to other factors.[66] In other words, the onus being placed upon him to prove the extent which is not attributable to his fault. Accordingly, the carrier will be liable for the entire loss if he failed to establish that proportion.

Perhaps the effects of this provision can be seen most clearly in the case of a collision between the carrier's ship and another ship where both are equally to blame. Assuming, here that, if the carrying ship is held 20 per cent to blame, the carrier will presumably be liable for only 20 per cent of any resultant cargo damage, and will expect the cargo-owner to recover the remaining 80 per cent from the other vessel.

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66 See Williams, B.K., "The consequences of the Hamburg Rules on insurance", published in the Hamburg Rules on the carriage of the goods by sea, edited by S. Mankabady, Leyden, A.W. Sijthoff, 1978, p. 251 at p. 256.

Section two: The Carrier's Immunities from Unseaworthiness.

I- Under the Hague Rules:

Article IV of the Hague Rules set forth certain defences upon which the carrier is entitled to rely provided that he has exercised due diligence to make the ship seaworthy and has properly cared for the cargo during its carriage. It is outside the scope of this work to examine in detail these exceptions.

As our study is mainly based on the seaworthiness duty, it is sufficient here to deal with the most important exceptions which are related to this duty (i.e: seaworthiness). These immunities are:

1) Exception of unseaworthiness contained in Article IV, rule 1.

2) Exception of latent defects contained in Article IV, rule 2 (p).

3) The catch-all exception contained in Article IV, rule 2 (q).

However, the important question which is likely to appear here is: Can a carrier still rely on these defences if he has failed to exercise due diligence to provide a seaworthy ship?

This point was clarified in the Maxime Footwear[67] case where Article III, rule 1 was described as an "overriding obligation".

Therefore, in order to comprehend the application of these immunities in favour of the carrier, it would be appropriate to analyse first the controversial issue of whether Article III, rule 1

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[67] [1959] 2 Lloyd's Rep. 105.

is an overriding obligation before the above cited exceptions are discussed.

1- Is Article III, rule 1 an Overriding Obligation?

In Maxime Footwear Co., Ltd. V. Canadian Government Merchant Marine, Ltd.,[68] Lord Somervell said:[69]

> "Article III, rule 1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Article IV cannot be relied on..."

In analysing Lord Somervell's statement, one can notice that it contains two limbs:

1) If the carrier did not exercise due diligence to make the ship seaworthy, and

2) That want of due diligence to make the ship seaworthy has caused the loss or damage,

the carrier is liable. He cannot rely on:

a) Article IV, rule 1 as he has failed to comply with the condition for exemption under it, nor

b) Article IV, rule 2 because the loss or damage did not arise or result from any of the causes under (a) to (q).

This is the only circumstance in which Article III, rule 1 is an "overriding obligation" and when the immunities under Article IV cannot be relied on by the carrier.

To illustrate this point, reference can be made to the case of

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[68] [1959] 2 Lloyd's Rep. 105.

[69] Ibid at p. 113.

Ball (New Zealand), Ltd. V. Federal Steam Navigation Co., Ltd.[70] In this case pipes were allowed to freeze whilst they were filled with water when the vessel was at the port of loading. After the ship set sail, the ice melted causing the pipes to burst and flood the hold in which the plaintiff's cargo was stowed. The act of leaving the pipes to freeze was an act of "Neglect...in the management of the ship" under Article IV, rule 2 (a). It was also the act which rendered the vessel unseaworthy; the presence of frozen pipes liable to fracture made the hold unfit for the reception and carriage of the plaintiff's cargo. The court, therefore, had two causes to wrestle with.

The Supreme Court of Wellington showed a protective instinct towards the interests of the cargo-owners. Fair.J had to explain why he held the carriers liable when their defence fell literally within the wording of Article IV, rule 2 (a). To justify his preference for Article III, rule 1 (read with Article IV, rule 1) instead of Article IV, rule 2 (a) as the basis of his judgement, Fair.J resorted to the following reasoning: Article III, rule 1 was construed to be an overriding obligation, breach of which prevented the carrier from relying on Article IV, rule 2 (a).

To substantiate this point, Fair.J drew an analogy with the provisions of the Harter Act. He declared that:[71]

> "To hold Article III not so qualified by Article IV, rule 2 (a) means that it corresponds in meaning with the provision of section 3 of the Harter Act (1893)...that section makes the exemption from liability for faults or errors in navigation or in the

[70] [1950] N.Z.L.R 954.

[71] Ibid at p. 964.

> management of the vessel depend on due diligence having been exercised to make it in all respects seaworthy..."

In this connection one can argue that, the difference in wording between the Harter Act and the Hague Rules makes this proposition difficult to support. As a condition of exemption, section 3 of the Harter Act requires that the owner shall exercise due diligence to make the vessel seaworthy "in all respects". A strict and literal interpretation was given to these three words by the American Court in The Isis.[72] It was there held that:

> "the condition had to be met before the immunity could be availed of, whether or not the actual loss or damage was causally connected in any way with the unseaworthiness defect left uncorrected through a failure to use due diligence."[73]

The words "in all respects" do not appear in Article III, rule 1 of the Hague Rules.

According to a strict and literal interpretation of Lord Somervell's comment, both the non-fulfilment of Article III, rule 1 and unseaworthiness as a cause of loss would have to be proved before Article III, rule 1 can be considered as an overriding obligation. In the absence of one or the other, it is not an overriding obligation and the immunities of Article IV can still be invoked.

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[72] (1933) 290 U.S. 333.

[73] Quoted from Gilmore, G. & Black, C., The Law of Admiralty, 2nd ed., New York, The Foundation Press, Inc., 1975, p. 155.

In the following variations, Article III, rule 1 is not an overriding obligation for one of the requirements is not met:

a) Article III, rule 1 is not fulfilled and unseaworthiness did not cause the loss.

b)Article III, rule 1 has been fulufilled and unseaworthiness did not cause the loss.

In both these circumstances, Article III, rule 1 is irrelevant as the loss or damage did not arise or result from unseaworthiness. The carrier can, therefore, plead Article IV, rule 2 if he can show that the cause of loss falls within one of the exceptions from (a) to (q).

c) Article III, rule 1 has been fulfilled and unseaworthiness has caused the loss.

The carrier in this case would have to rely on Article IV, rule 1 to exonerate himself from liability as it is specially enacted to protect him from liability in this situation. It is unnecessary for the carrier to rely on Article IV, rule 2[74] as rule 1 itself "affords a complete defence".[75]

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74 See Cranfield Brothers Ltd. V. Tatem Steam Navigation Co., Ltd. (1939) 64 Ll.L.Rep. 264, where leaky rivets allowed the entry of sea water into the hold and caused damage to the cargo of wheat. Inspection indicated that the vessel must have been unseaworthy at the commencement of the voyage. The carriers were held not liable for the loss as they had exercised due diligence. Hilbery.J. at p. 271 stated that: "...this unseaworthiness is shown not to have been caused by the want of due diligence on the part of the carrier to make the ship seaworthy, that really answers the claim. I need not deal with the question raised that the ingoing of the sea water into that hold was due to a latent defect within the words of Article IV, rule 2 (p)...or whether it was due to perils of the sea..."

75 Per Branson.J in Corporacion Argentina de Productores de Carnes V. Royal Mail Lines, Ltd. (1939) 64 Ll.L.Rep. 188 at p. 192.

The above study on the statement of Lord Somervell, is sufficient in itself to lead one to the conclusion that Article III, rule 1 is not a general overriding obligation to be complied in all situations before a carrier can plead Article IV.

It is convenient to note here that, if Article III, rule 1 was intended by Lord Somervell to be a general "overriding obligation" to be applied in all cases as suggested by Tetley,[76] it would have been adequate for the judge merely to state that "if it is not fulfilled, the immunities of Article IV cannot be relied on". The insertion of the magical words "and the non-fulfilment causes the damage" clearly delimit the ambit of this rule.

It is therefore only in the case where a breach of Article III, rule 1 is proved to have caused the loss or damage is the shipowner debarred from relying on Article IV. Article III, rule 1 merely spells out the carrier's obligation and the standard of conduct expected of him to make the ship seaworthy, i.e, the extent he has to go to make the vessel seaworthy. It does not concern itself with the legal consequences and effects of a breach. The legal consequence regarding seaworthiness is only made apparent when Article III, rule 1 is read with Article IV, rule 1.

2- Article IV, rule 1 as a Defence to Article III, rule 1:

In the case of Leesh River Tea Co., Ltd. V. British India Steam Navigation Co., Ltd. (The Chyebassa),[77] Article IV, rule 1 was

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[76] See Tetley, W., Marine cargo claims, 2nd ed., Toronto, Butterworths, 1978, pp. 153-170.

[77] [1967] 2 Q.B. 250 C.A, hereafter reffered to as The Chyebassa.

pleaded by the carriers as an ordinary exception of liability for unseaworthiness which arose during the course of a voyage. A storm cover plate was stolen whilst the vessel was loading and discharging at an intermediate port. The removal of the cover plate rendered the vessel unseaworthy as it left the vessel in a condition in which water could enter the hold with the rolling of the vessel. The absence of the cover plate could not reasonably have been detected by the ship's officers and crew.

At the trial, the carriers were found not to have failed to exercise due diligence to make the ship seaworthy at the beginning of the voyage at Port Sudan where the incident occurred. The carriers claimed that they were entitled to rely, inter alia, on the immunity in Article IV, rule 1. The legal issue was whether Article IV, rule 1 exempted them from liability for unseaworthiness which arose during the course of a voyage.

The Court of Appeal was not impressed with this ground of the carrier's appeal, and it did not consider it in any detail. The plea was rejected on the ground that the exception in Article IV, rule 1 was confined to unseaworthiness arising before or at the beginning of the voyage. Salmon.L.J,[78] held the view that the meaning which the carrier had attributed to Article IV, rule 1 was strained and an altogether impossible interpretation to put to the Article. The judges did not however go to the language of the rule to determine its applicability.

Prima facie, Article IV, rule 1 does appear to contain a general exception of liability for unseaworthiness as it makes no specific mention of unseaworthiness existing before and at the

[78] Ibid, at p. 275.

commencement of the voyage. Further its opening words[79] are almost identical to those found in Article IV, rule 2 which without doubt contain general exceptions from liability for specified causes. This seems to be the American construction of Article IV, rule 1[80] and of Carver[81] who in a footnote stated:

> "For unlike Article III, rule 1, the due diligence to make the ship seaworthy is not here limited to due diligence "before and at the beginning of the voyage". The carrier might otherwise be liable for such loss under Article III, rule 2, but Article IV, rule 2 (a) or (q), would appear to exempt him in such a case, and no purpose is served, therefore, in omitting these words from Article IV, rule 1."

According to this interpretation a carrier can exempt himself from liability for loss or damage resulting from unseaworthiness (arising during the course of a voyage) if he can prove that he had exercised due diligence before and at the beginning of the voyage to make the ship seaworthy. This implies that Article III, rule 1 is a general overriding obligation for exoneration from liability for loss or damage caused by unseaworthiness which arises during the course of a voyage. The terms of Article III, rule 1 would have to be satisfied before the carrier could rely on

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79 Article IV, rule 1 provides: "Neither the carrier nor the ship shall be liable for the loss or damage arising or resulting from unseaworthiness unless..."

80 See Lockett Co. V. Cunard Steamship Co. (1927) 28 Ll.L.Rep. 181 (U.S.A).

81 See Carver, T.G., Carriage by sea, 13th ed. by Raoul Colinvaux, London, Stevens & Sons, 1982, Vol. 1, p. 377.

Article IV, rule 1.

Such a scheme would be very similar to the American Harter Act. The words "unless caused by the want of due diligence..." presumably have been interpreted as a condition for exemption of liability for loss or damage caused by intervening unseaworthiness, rather than as a condition for exemption of liability for loss or damage caused by unseaworthiness evident "before and at the beginning of the voyage".

The question which arises in this connection is: If Article IV, rule 1 is an exception to the carrier's liability for loss or damage caused by unseaworthiness, which arises during the course of a voyage, which Article is then the provision for exemption for loss or damage caused by a breach of Article III, rule 1?

Article IV, rule 1 may be capable of the above construction, but it is also capable of another construction which seems to be more reasonable. Article III, rule 1 is the only positive enactment in respect of seaworthiness contained in the Hague Rules. This obligation is applicable only "before and at the beginning of the voyage". Unseaworthiness existing at any other time is irrelevant, and of which the Rules are not concerned with.

The wording of Article III, rule 1 matches up with that of Article IV, rule 1. The latter in fact makes a special reference to Article III, rule 1 with the words "...in accordance with the provisions of paragraph 1 of Article III". This seems to be sufficient to complement the two Articles. A vessel need only be seaworthy "before and at the beginning of the voyage" to be "in accordance with the provisions of paragraph 1 of Article III". The omission of the words "before and at the beginning of the

voyage" in Article IV, rule 1 is, therefore, well compensated by the words "...in accordance with the provisions of paragraph 1 of Article III".

Seaworthiness is a concept which is relevant at the inception of a voyage; this is the only moment at which the word has any legal effect or significance under the Common Law whether the contract is one of insurance or carriage of goods. The word "seaworthy" appearing in Article IV, rule 1 has to be read with this time association in mind so that it is consistently understood in the same sense under the Hague Rules as it is under the Common Law. There is nothing in the Rules which says that it is to be understood in another way.

On this issue one can agree with the decisions of the trial judge and of the Court of Appeal in The Chyebassa.[82]

Scrutton[83] stated that the legitimate construction of Article IV, rule 1 would be to read into it the words "before and at the beginning of the voyage". This would "harmonise the protection given by this rule with the obligation imposed by Article III, rule 1...". This is a sensible construction as it leads to a reasonable result and does not cause, unnecessarily, a rift of the notion of seaworthiness between the Hague Rules and the Common Law.

3- The Exception of Latent Defects:

A latent defect in a vessel could, but need not necessarily,

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82 [1967] 2 Q.B. 250 C.A. The Court of Appeal did not reverse Mc Nair.J's ruling on this point.

83 See Scrutton, T.E., Charterparties and bills of lading, 19th ed. by A.A. Mocotta, M.J. Mustill & S.C. Boyd, London, Sweet & Maxwell, 1984, p. 446.

cause a vessel to become unseaworthy. Such a defect would only present a condition of unseaworthiness when it affects the ship's ability to encounter the ordinary perils of the seas, and when it exists at the beginning of the voyage.

We are here only interested in the situation where a vessel is rendered unseaworthy by a latent defect, and that unseaworthiness has caused a loss or damage. The familiar feature of concurrent causes arise, and the tussle for supremacy is between unseaworthiness and latent defect, which is an excepted peril under Article IV, rule 2 (p).

Where a claimant has not averred unseaworthiness or breach of Article III, rule 1 as the cause of loss, there is nothing to prevent the carrier from heading directly to Article IV, rule 2 and plead (p) as his defence. This is the "short-route" which Clarke[84] has recommended that the Englishman should adopt. A pursuit of this path, the said writer reckons, would lead the court to the issue of seaworthiness as "an integral aspect of the exception itself" involves proof by the carrier that due diligence had been exercised to make the ship seaworthy.

This preposition presupposes that the latent defect exists at the inception of the voyage and also that it render the vessel unseaworthy, which may not be the case. A demonstration that the loss or damage was caused by a latent defect is likely, but need not necessarily in the majority of cases, to upheave the issue of seaworthiness and provide the proof that due diligence had been exercised to make the ship seaworthy. But this need

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[84] The "short-route" is the Frenchman's approach, see Clarke, M.A., "Aspects of the Hague Rules, a Comparative study in English and French Law", The Hague, Martinus Nijhoff, 1976, p. 174.

not always be the case as the character of a latent defect is one that could not be discovered by the exercise of due diligence and not one that has not been discovered by the exercise of due diligence.

The exercise of due diligence in (p) refers strictly to the character of the defect, rather than the conduct or behaviour of the carrier. The carrier in fact does not really have to show that he had actually exercised due diligence to prove a case of latent defect under Article IV, rule 2 (p). The defect itself, e.g, a hair-line fracture, metal fatigue, could sometimes tell of its character and that even if due diligence was exercised, it would not have disclosed its existence. Where unseaworthiness is not specifically pleaded, the carrier could take this "short-route" and rely on Article IV, rule 2 (p) alone.

Where the issue of unseaworthiness (by reason of latent defects) as a cause of loss is initiated by the plaintiff when he opens his case or is tendered as rebuttal evidence to contest the right of the carrier's reliance on (p) to exempt himself from liability, the carrier may have to refer to Article IV, rule 1 to exonerate himself from legal responsibility. The carrier may be able to prove that the loss was caused by a latent defect[85] within the terms of Article IV, rule 2 (p), but can he also satisfy the court that the loss was not caused by his "want of due diligence to make the ship seaworthy" under Article IV, rule 1?

If the carrier can show that he did exercise due diligence, by way of usual inspections and attention, to make the ship

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85 By showing the characteristics of the defect, i.e, one that could not be discovered by the exercise of due diligence.

seaworthy and inspite of that exercise the loss still came about, he has succeeded.

The court would have no choice, in such a case, but to draw the inference that the defect was of a latent nature. If it was patent it would have showed itself during the examination; as the exercise of due diligence did not expose it, the defect has to be latent. The carrier, under this circumstance, is in effect relying on Article IV, rule 1, and possibly Article IV, rule 2 (p) to free himself from liability.

This was precisely the reason why Lord Wright in the Smith Hogg[86] case has declared that a qualified form of exception of liability for unseaworthiness, one like Article IV, rule 1, bears a built-in exception of liability for latent defects. He held that an exception of liability for unseaworthiness, which is subject to the exercise of due diligence as a condition, could only excuse latent defects.[87] The proof of the exercise of due diligence furnished would itself establish the nature of the defect. This is the only forgiveable form of unseaworthiness which Article IV, rule 1 contemplates. It was intended by the Hague Rules when they reduced the absolute Common Law obligation to the exercise of due diligence.[88]

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86 [1940] A.C. 997.

87 [1940] A.C. 997 at p. 1001.

88 See per Lord Keith in The Muncaster Castle [1961] 1 Lloyd's Rep. 57 at p. 87, "He will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any neglect workmanship of repairers or others employed by the repairers and, as I see it, against defects making for unseaworthiness in the ship, however caused, before it became his ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence."

Article IV, rule 1 alone affords a complete defence to the carrier for a loss caused by unseaworthiness by reason of latent defects. It would not be necessary for him to resort to Article IV, rule 2 (p). This approach was adopted by Hilbery.J in Cranfield Brothers Ltd. V. Tatem Steam Navigation Co., Ltd.,[89] who on arriving at the conclusion that the unseaworthiness (caused by a correded rivet) was not caused by the want of due diligence on the part of the carrier to make the ship seaworthy, said that this was sufficient to answer the claim.

In Union of India V. Reederij Amsterdam (The Amstelslot),[90] McNair.J., the trial judge and the House of Lords both discharged the carriers from liability on the ground that the shipowners had established that they had exercised due diligence to make the ship seaworthy. The tribunals paid little attention to the carrier's plea, that the breakdown of the vessel's reduction gear was caused by a fatigue crack which was unknown to them and was not detectable by visual inspection, and their reliance on Article IV, rule 2 (p).

This approach irritates Clarke,[91] who would rather the courts to adopt Article IV, rule 2 (p) as the basis of their decision to arrive at the same conclusion.

As the vessel was admitted to be unseaworthy and that was specifically pleaded by the cargo-owners as the cause of loss, the court took pains to go through the process of examining the

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89 (1939) 64 Ll.L.Rep. 264.

90 [1962] 1 Lloyd's Rep. 539, [1963] 2 Lloyd's Rep. 223, hereafter reffered to as The Amstelslot.

91 See Clarke, op.cit, at p. 212.

conduct of the carriers. They felt that they had to be satisfied that the loss was not caused by the "want of due diligence" on the part of the carriers to make the ship seaworthy, in accordance with the terms of Article IV, rule 1. They realised that once this issue was cleared up the question of liability would sort itself out. The court perhaps took a longer and more tedious route than Clarke would have done to arrive at the same destination. But there are reasons for this.

Firstly, the judges' reluctance to gallop straight to Article IV, rule 2 (p) was largely attributable to their Common Law training and background.

Secondly, Lord Wright's "a" cause theory of causation could have cautioned and deterred them from invoking Article IV, rule 2 (p) straightaway as the basis of their judgements. unseaworthiness being shown to exist as a cause of loss could dilute or negate the operation of latent defect as a cause of loss, even though it was excepted by Article IV, rule 2 (p), assuming that it is capable of freeing the carrier from liability for all types of latent defects, including those (existing at the commencement of the voyage) which render the vessel unseaworthy.

Scrutton L.J's comment, on the application of an exception of liability for latent defects, in The Christel Vinnen[92] is particularly relevant here.

The judge sitting in the Court of Appeal declared that a simple and unqualified exception of liability for latent defects is only adequate to protect the carrier from liability for loss caused by latent defects which comes into life during the course of a

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92 [1924] P. 208.

voyage.[93] If this was the reason for taking the longer route, the court ought to have made this clear in its judgement. And Clarke's "short-route" would have to be reconsidered for he has assumed that Article IV, rule 2 (p) shields the carrier from liability for all latent defects, regardless of the time of their formation.

The outcome of The Amstelslot[94] has implicitly acknowledged the fact that there is an exception of liability for a latent defect of a kind which causes a vessel to become unseaworthy, inherent in Article IV, rule 1. If this is the case, then Article IV, rule 2 (p) may, to prevent duplicity of exemptions, have to be confined merely to latent defects which come into existence after the commencement of a voyage and which do not render a vessel unseaworthy. A direct plunge into Article IV, rule 2 (p) would, therefore, be short-sighted as well as unwise.

The question which must be asked in this connection is: What if the carrier has little or nothing on record to show that he had in fact exercised due diligence to make the ship seaworthy as expected of him by Article III, rule 1 and Article IV, rule 1, but is able to prove, by means of extraneous expert evidence that the defect which caused the loss is of a latent character, can he still avoid liability when he has not in fact exercised any diligence?

If Article III, rule 1 is a general overriding obligation, the

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[93] Article IV, rule 2 (p) states: "Latent defects not discoverable by due diligence". It is not qualified by any time element. According to Scrutton L.J's point of view, it would not be exact enough to protect the carrier from the case of loss or damage caused by a latent defect, which exists at the inception of the voyage, rendering the vessel unseaworthy.

[94] [1963] 2 Lloyd's Rep. 223.

carrier would have first to prove that he had exercised due diligence to make the ship seaworthy before he would be allowed to go straight to Article IV, rule 2 (p) to show that the loss was caused by a latent defect or any other excepted peril. As he is unable to comply with this prerequisite he would be held liable for the loss as there are no immunities upon which he could lean on.

We have earlier[95] commented that an overriding obligation in this broad sense is untenable, and have suggested a limited version of it, one based on a literal interpretation of Lord Somervell's statement. The carrier is only prohibited from relying on Article IV when he has failed to exercise due diligence to make the ship seaworthy, and that want of due diligence has caused the loss. Now, how does an exception of latent defects fit within such a scheme?

Prima facie, it would appear as though the carrier is liable if he is unable to show that he had exercised due diligence to make the ship seaworthy, and that unseaworthiness has caused the loss. After taking a harder look at the problem, one could be persuaded that this may not be the case. The carrier on providing the non-discoverable nature of the defect would also be bringing home the point that even if due diligence was in fact exercised, it would have made no difference, the loss would have occurred in any case.

The observation of Branson.J in the case of Corporacion Argentina de Productores de Carnes V. Royal Mail Lines, Ltd.[96] is

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[95] See pp. 165, 167.

[96] (1939) 64 Ll.L.Rep. 188.

of particular interest. He stated:[97]

> "Supposing that one had a tail-shaft which had a flaw in it which nobody could possibly discover by an examination short of destroying the thing, and that tail-shaft broke, it would be no answer to the shipowner's defence that there was a latent defect not discoverable by due diligence, to say that it might be he had not exercised any diligence to look at the tail-shaft at all. If the defect is such that it cannot be discoverable by due diligence it becomes immaterial to consider whether due diligence was exercised or not, because *ex hypothesi* if it had been exercised it would have been useless." [original emphasis].

According to Branson.J, it would be futile in such a case to enquire whether the shipowner had exercised due diligence to discover the defect when no amount of care or diligence would have brought it to light.

On this issue, one can agree with the obiter dictum of Branson.J, but it is also possible, in this connection, to rely on the actual wording of Article IV, rule 1. The carrier, under this rule, is only liable for "loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence" on his part to make the ship seaworthy.

Admittedly, this is a loss caused by unseaworthiness. But can one effectively say that the unseaworthiness (by reason of latent defect) is caused by the "want of due diligence" when no amount of due diligence, even if exercised, would have revealed the

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[97] Ibid, at p. 192.

presence of the defect which rendered her unseaworthy. According to this construction of Article IV, rule 1, the loss is not caused by "the want of the exercise of due diligence", and therefore the carrier is not liable.

The special quality of a latent defect, being one not discoverable by the exercise of due diligence and care, harmonises conveniently with the scheme of a reduced warranty of seaworthiness based on the exercise of due diligence to make the vessel seaworthy contained in Article III, rule 1.

If the defect, which rendered the vessel unseaworthy, was not a latent defect within the strict meaning of the term, there is no way the carrier could rely on Article IV, rule 1 or Article IV, rule 2 (p). The defect, if not latent, has to be patent and therefore discoverable by the exercise of due diligence. The carrier would have breached the warranty to exercise due diligence to make the ship seaworthy; the nature of the defect being one discoverable by the exercise of due diligence, the defect ought not to have passed unnoticed or undetected. If the patent defect was not detected, the carrier could not have exercised the due diligence and care expected of him by Article III, rule 1 and Article IV, rule 1.

If the cause of loss was attributable to a latent defect not discoverable by the exercise of due diligence, Article IV, rule 1 would apply; the carrier need not rely on Article IV, rule 2 (p) to extricate himself from liability. It is no answer to say that the carrier did not exercise due diligence for even if he did, he would not have learnt anything regarding the defect, its inherent quality being one that "could" not be discovered by the exercise

of due diligence.

Accordingly, one can conclude that, the regime of a reduced or limited warranty of seaworthiness does incorporate within its framework an exception of liability for latent defects which render a vessel unseaworthy. The exercise of due diligence or reasonable care, which is the standard of conduct set by Article III, rule 1 of the Hague Rules for the responsibility as regards seaworthiness, coincides snugly with the intrinsic attribute of a latent defect, one not discoverable by the exercise of due diligence.

4- The Catch-all Exception:

Having listed sixteen specific instances in which the carrier's liability for loss or damage will be excluded, the Hague Rules conclude the catalogue in Article IV, rule 2 with the following general exculpatory provision:

> "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."[98]

It is noteworthy that the words "actual fault or privity" in Article IV, rule 2 (q) appears also in Article IV, rule 2 (b) which is the exception from liability for loss or damage caused by

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[98] Article IV, rule 2 (q) of the Hague Rules.

fire,[99] and in section 502 of the Merchant Shipping Act 1894 which has been replaced by section 18 of the Merchant Shipping Act 1979 on December 1, 1986. Section 502 provides:

> "The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely:
> (i) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship;..."[100]

Under Article IV, rule 2 (q) of the Hague Rules, the carrier can therefore avoid liability for any loss or damage providing that he can establish that it occurred without his own fault or privity and it did not result from any fault or neglect on the part of his servants or agents.

However, it is important to mention here that the use of the words "fault or privity" in Article IV, rule 2 (q) have been held to mean "fault and privity".[101] "Actual fault or privity" is difficult to apply now that nearly all ships are owned by companies rather

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[99] Article IV, rule 2 (b) of the Hague Rules provides: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from fire, unless caused by the actual fault or privity of the carrier."

[100] For a discussion on the concept of "fault or privity" within the context of the Merchant Shipping Act, see chapter one at pp. 60-63.

[101] Hourani V. Harrison (1927) 28 Ll.L.Rep. 120, see also per Lord Wright in Paterson Steamships, Ltd. V. Canadian Co-operative Wheat Producers, Ltd. [1934] A.C. 538 at p. 549.

than individuals or partnerships. In such a case the courts examine the fault or privity of the person actually in control of the company.[102]

It must be noted that problems have arisen with regard the applicability of the this exception to cases of pilferage and theft. Such actions are hardly committed "without the fault or neglect of the agents or servants of the carrier".

A questionable distinction was, however, drawn in Leesh River Tea Co. V. British India Steam Navigation Co.[103] where damage to cargo resulted from the theft of a storm valve cover by stevedores employed by the carrier to discharge a cargo of tea at Port Sudan. The carrier satisfied the court that the theft had involved no negligence on the part of the ship's officers and crew, but the question still remained as to whether he has to take responsibility for the acts of the stevedores who, admittedly, were independent contractors.

The Court of Appeal drew a distinction between thefts committed in the course of employment, i.e. thefts of cargo, and thefts which had no connection with the work the independent contractors were engaged to perform. As the theft of the storm valve cover formed no part of the discharging operation, the carrier was not required to take responsibility for it and could accordingly invoke Article IV, rule 2 (q) exception to defeat the cargo-owners' claim.

Sellers L.J. justified the decision in the following way:

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102 See Lennard Carrying Company V. Asiatic Petroleum [1915] A.C. 705.

103 [1966] 2 Lloyd's Rep. 193.

> "In the present case the act of the thief ought, I think, to be regarded as the act of a stranger. The thief in interfering with the ship and making her, as a consequence, unseaworthy, was performing no duty for the shipowner at all, neither negligently, nor deliberately, nor dishonestly. He was not in fact their servant...The appellants were only liable for his acts when he, as a servant of the stevedores, was acting on behalf of the appellants in the fulfilment of the work for which the stevedores had been engaged."[104]

In this connection Tetley[105] argued that the distinction drawn by the Court of Appeal is a trifle one. He declared that Article IV, rule 2 (q) makes no mention as to whether the servants or agents must be acting within the scope of their employment in order that the carrier be responsible for them. It is submitted that to add such a meaning to the text would be to assume something that is not there.

Accordingly, he stated:[106]

> "To say that a servant or agent is outside his employment when he performs a tortuous or delictual act, because that is not the act he was employed to do, seems to strain the Law particularly as Article IV, rule 2 (q) makes no mention that the fault must be within the scope of the servants' or agents' employment."

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104 Ibid, at p. 200.

105 See Tetley, op.cit at p. 249.

106 Ibid, at p. 250.

In the said case, Mc Nair.J. in the first instance held:[107]

> "...it was argued in the present case that it could not be said that the act of the stevedore's men in removing the cover plate was an act done by him in the course or scope of his employment, primarily, as I understood the argument (but not wholly) on the ground that the stevedores were not engaged to perform any function in relation to the plaintiff's goods in the lower hold. In my judgement, that argument is not well founded. Firstly because the statutory provision in sub-para.(q) does not contain the words "in the course of or in the scope of his authority", and there is no necessity to imply them; and, secondly, because the Common Law background against which the exceptions in Article IV, rule 2, have to be construed is not the background of an ordinary bailee or ordinary principal."

The Court of Appeal[108] failed to consider the Hague Rules as a statute which specifically calls on carriers to carefully and properly care for the cargo under Article III, rule 2 and only exculpates carriers if they, their servants and agents do not contribute to the loss.

It is submitted that the opinion of Mc Nair.J. in the first instance in Leesh River Tea Co. V. British India Steam Navigation Co.[109] is a better interpretation of the Law.

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[107] [1966] 1 Lloyd's Rep. 450 at p. 460.

[108] [1966] 2 Lloyd's Rep. 193.

[109] [1966] 1 Lloyd's Rep. 450.

II- Under the Hamburg Rules:

It has already been mentioned that the Hague Rules set forth a list of causes for which the carrier shall not be responsible.

In framing a uniform and comprehensive test of carrier liability the draftsmen of the Hamburg Rules have chosen to state an affirmative rule of responsibility based on presumed fault and to abolish the catalogue of exceptions contained in Article IV, rule 2 of the Hague Rules as well as the concepts of "due diligence" and "unseaworthiness".

Accordingly, Article 5 of the Hamburg Rules announces a single rule controlling carrier exoneration[110] in lieu of the catalogue of exceptions available under the Hague Rules.

The most significant change that would result from the adoption of the Hamburg Rules can be summarised in three main points.

First, the Hamburg Rules eliminate the Hague Rules' catalogue of exceptions and in its place is the concept that the carrier is liable unless he proves that he took all measures that could reasonably be required to avoid the occurrence and its consequences. Second, the exception to liability for negligence in the navigation and management of the ship as it existed under the Hague Rules has been abolished. Third, the new Convention narrowed the fire exception to hold the carrier liable for the negligent acts of the crew in starting or fighting a fire.

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110 Article 5, rule 1 of the Hamburg Rules provides in pertinent part: "The carrier is liable...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."

1- The Elimination of the Hague Rules' Catalogue of Exceptions:

It is convenient to observe here that the whole list of the exceptions in the Hague Rules can be said to be causes for loss or damage to cargo for which the carrier cannot be blamed, or to borrow the term used in The Marine Sulphur Queen,[111] the "uncontrollable causes". In other words, this catalogue of exceptions set forth circumstances in which the carrier would not be considered at fault, and thus had no independent significance outside the general rule that the carrier would be held responsible only where he is at fault.[112]

In so far as the majority of the exceptions listed in the Hague Rules did not in fact involve fault on the part of the carrier,[113] the effect of the abolition of the catalogue on carrier liability should be minimal.

The Working Group concluded that these exceptions were not satisfactory, as they did not describe all the circumstances that might arise in which the carrier would be at fault, and therefore, had produced uncertainty and unnecessary litigation.[114]

Accordingly, it should be beneficial from a legal standpoint in removing unnecessary uncertainty surrounding the definition and extent of such exceptions, which are merely examples of circumstances in which fault cannot be attributed to the

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111 [1970] 2 Lloyd's Rep. 285.

112 See Kimball, J.D, "Shipowner's Liability and the Proposed Revision of the Hague Rules", (1975/76) 7 J.M.L.C. 217 at p. 237.

113 See Article IV, rule 2 (c) - (p) of the Hague Rules.

114 See Report of the Working Group on International Legislation on Shipping on the work of its fourth (special) session held in Geneva from 25 September to 6 October 1972, U.N. Doc A/CN. 9/74, at 9-11.

carrier.[115] In this connection, the Egyptian delegate, during the conference, stated that the list of exceptions were merely illustrative and not mandatory.[116]

However, it is noteworthy that writers are not of the same opinion on the question of the elimination of the Hague Rules' list of exceptions. On this issue, Carey[117] stated:

> "I do not share the view of some that the enumerated defenses set forth in the exculpatory provisions of the Hague Rules would not be available to the carrier under the Hamburg Rules. Indeed, it seems to me that under that portion of Article 5 (1), which provides that the carrier will be liable "unless", we must presuppose that the various defenses which would have been available to the carrier, absent, of course, error in management and navigation survive. Thus, if the carrier can prove (and surely it is his burden to do so) that he took all measures that could reasonably be required, he will not be liable."

This latter view is supported by an important observation made by the Maritime Law Association of the United States, which in referring to the exoneration language contained in

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115 See Wilson, "Basic carrier liability and the right of limitation", op.cit., at p. 140.

116 See Sweeney, J.C, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)", (1975/76) 7 J.M.L.C. 69 at p. 105.

117 See Carey, J.E, "Will the Hamburg Rules Prove to be a Lawyer's Bonanza From the Cargo Plaintiff's Point of View", published in The Speakers' Papers for the Bill of Lading Conventions Conference, New york, November 29/30, 1978, organised by Lloyd's of London Press, p. 4.

Article 5, rule 1 of the Hamburg Rules, stated that:[118]

> "This language would seem to abolish the traditional defenses provided by the Hague Rules, with the exception of Article IV, rule 2 (q)...the fire defense is retained in a modified form. In reality, however, the only traditional defenses that would be effectively abolished are the error in navigation or management defenses. All other Hague Rules defenses, such as perils of the sea, act of God, act of war, strikes, insufficiency of packing, etc, would appear still to be available. They are causes over which the carrier may not have control, and which, therefore, would not likely be caused by his negligence."

From the above cited observations, one can therefore conclude that, the historical exceptions to the carrier's liability, including inherent vice of the goods, act of God, fault of the shipper or his agents, and all other causes beyond the control of the carrier and his agents and servants, if shown by the carrier to be the cause of the loss, would still exonerate the shipowner from liability under the Hamburg Rules.

2- The Abolition of the Exception for Negligence in the Navigation or Management of the Ship:

It is well established that under the Hague Rules, there is an exceptional situation where the shipowner is protected from liability for loss or damage caused by the negligence of his own

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118 Maritime Law Association of the United States, Special Report of the Committee on Bills of Lading Regarding the UNCITRAL Draft of New Rules for the Carriage of Goods by Sea, (1977), at 6.

servants "in the navigation or in the management of the ship".[119]

Undoubtedly, this is the most important exception from the carrier's point of view since it either effectively exempts the carrier from liability in large number of cases involving loss or damage to cargo, or at least it enables him in the majority of these cases to obtain a favourably compromising settlement. But it is also the exception which provides the most difficult problems of interpretation.[120] As Giles said:[121]

> "The difficulty of this clause lies in the fact that so many things are done on a ship in the course of its voyage that it is sometimes not easy to say whether any one act was done in the course of the management of the ship."

Cargo interests had long contended that it was invidious that a carrier, in complete control of vessel and cargo, should exclude such liability which was basic to the contract of carriage.[122] But the carriers alleged that such a change would substantially alter the present balance of risk allocation, and the result would be the imposition of higher freights to account for higher liability insurance costs.[123]

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119 See Article IV, rule 2 (a) of the Hague Rules.

120 See Tetley, op.cit., at p. 171.

121 See Chorley, R.S., & Giles, O.C., Shipping Law , 8th ed. by N.J.J. Gaskell et Al, London, Pitman Publishing, 1987, p. 204.

122 See Wilson. "Basic carrier liability and the right of limitation", op.cit., at p. 140.

123 See Report of the UNCITRAL Working Group on the work of its fourth session (A/CN.9/74), para. 22.

However, in the course of the UNCTAD and UNCITRAL's debates, there has been a great deal of controversy as to whether the exception of the negligence in navigation or management of the ship should be retained.

It is believed by UNCTAD and UNCITRAL that the exceptions of negligent navigation and negligent management of the ship are something of an anachronism. And the historical justification for these odd defences has been explained as follows:

> "In the nineteenth century, the era in which the principles behind the 1924 Rules were maturing, shipowner and vessel were often out of contact for long periods. In such circumstances, and with navigation dependent on fine judgement rather than technology, a sea voyage was a common venture and risks were shared between ship and cargo. The special defences to protect the carrier from liability in a catastrophic situation were therefore not necessarily to be regarded as unreasonable."[124]

It is noteworthy that the abolition of the exception for negligent navigation and management of the ship was also justified on the ground that, the drafters of the Hamburg Convention sought to harmonize the rules for different modes of transport.

The key argument for harmonization lay in the removal of a similar navigational exception from the Warsaw Convention on

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124 Quoted from McGilchrist, N.R., "The New Hague Rules", (1974) L.M.C.L.Q. 255 at p. 259.

air carriage.[125]

Until 1955,[126] the Warsaw Convention had contained a clause exonerating the carrier from liability in handling or piloting aircraft.[127] The Hamburg Rules Conference assumed that the exception was no more necessary for marine transport than it was for air transport.[128]

On the other hand, it is generally recognised that under the Hague Rules, the conflict between the exception covering fault in the management of the ship and the carrier's duty of care in relation to the cargo (set out in Article III, rule 2) had resulted in considerable uncertainty and litigation.[129]

The Working group on International Shipping Legislation concluded that an unnecessary source of litigation can be avoided, by eliminating the carrier's exoneration for the

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125 Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Warsaw Convention) signed at Warsaw on 12 Oct, 1929.

126 Hague Protocol to the Warsaw Convention, September 28, 1955.

127 Warsaw Convention, supra note 125, Article 20 (2) provides:

"In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in the navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the loss."

128 A final attempt by Belgium, Japan, Poland and the U.S.S.R to reintroduce the defense of negligent navigation alone failed because the Working Group viewed the economic data concerning projected shipping cost increases based on the removal of the exception as speculative. See Sweeney, J.C., "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V)" (1977) 8 J.M.L.C. 167 at p. 181.

129 See Diamond, A., "The division of liability as between ship and cargo under the new Rules proposed by UNCITRAL", (1977) L.M.C.L.Q. 39 at p. 48, see also Gilmore & Black, op.cit., at p. 156.

negligence of the master or crew.[130]

Finally, the carrier's exception from liability for loss caused by an error in navigation or management of the ship was eliminated, and this represents a definite shift in risk from cargo to ship.

The removal of the navigation and management exception, however, represented one side of a compromise between shipper and carrier nations achieved by the Working Group at the suggestion of Nigeria.[131] The carrier nations agreed to this provision in exchange for the retention of the fire exception which has been modified so as to produce a different result.

3- The Modification of the Fire Exception:

Under the Hague Rules, the carrier is protected from liability arising from fire unless caused by his actual fault or privity.[132] This exception is amended by the Hamburg Rules. The carrier under the Hamburg Rules is liable for loss or damage 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.[133]

The Hamburg Rules' objective in effecting this change was the elimination of the liability-free position that a carrier can achieve under the Hague Rules by proving that a fire was the proximate cause of a loss. Proof of this fact shifts the burden of

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130 See Sweeney, J.C., "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)" (1975/76) 7 J.M.L.C. 69 at p 111.

131 Ibid, at p. 112.

132 See Article IV, rule 2 (b) of the Hague Rules.

133 See Article 5, rule 4.a (i) of the Hamburg Rules.

proof back to the cargo claimant, requiring him to demonstrate that the carrier's actual privity rather than the acts of his agents proximately caused the fire.

The Hague Rules hold the carrier liable for loss or damage resulting from fire only if it is caused by by his actual fault or privity. The prominent feature of this exception is that it is necessary to distinguish between the negligence of the shipowner and that of his employees. The negligence of the carrier's employees will not necessarily result in carrier liability; the fault must be that of the carrier himself.

Therefore, it can be said that, the application of the fire exception under the Hague Rules provides a useful analytical tool under the Hamburg Rules because its interpretation under the Hague Rules foreshadowed the Hamburg Rules' imposition of responsibility for subordinates in the context of deficient manning and material conditions. Although the Hague Rules hold the carrier liable only for fire-related loss involving his "actual fault or privity", courts have applied the rule more broadly, finding carriers liable for unseaworthy conditions causing fires,[134] such as failure to maintain proper fire fighting equipement, or in some cases where the negligence of crew members in fighting a fire has been ascribed to their lack of training and thus to the carrier's failure to fulfill his duty of seaworthiness.

Although the Hamburg Rules intend to hold the carrier vicariously liable for the actions of his agents in fighting a fire, the Hague Rules achieved the same result through the device of

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[134] See, e.g., The Galileo (1932) 287 U.S. 420.

seaworthiness.

Accordingly, one can conclude that the change which resulted from the amendment of the fire exception by the Hamburg Rules is not an important one for two reasons:

First, the fire on board the ship is very often found to have been caused by initial unseaworthiness. If this is so, then the carrier is not protected under the Hague Rules unless he exercised due diligence to make the ship seaworthy. Secondly, under the Hamburg Rules, the onus of proof is put upon the claimant, namely the defence of fire ceases to be a defence if the cargo-owner can establish negligence of carrier, his servants or agents not only in respect of the outbreak of the fire, but also in respect of "measures that could reasonably be required to put out the fire and avoid or mitigate its consequences."[135] But in practice, many claimants will be unable to adduce the necessary evidence of negligence.[136]

Having established the different situations in which the carrier can exempt himself from liability for loss or damage caused by unseaworthiness under both the Hague Rules and Hamburg Rules, we can conclude that the rules controlling carrier exoneration under the Hamburg Rules are substantially different from those under the Hague Rules. Under the new Hamburg Rules, carriers attempting exoneration within the unified fault concept must explain loss or damage to cargo without the Hague Rules' advantageous order of proofs and without the Hague Rules' exemptions for negligence.

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135 See Chorley & Giles, op.cit., at p. 322.

136 See Diamond. "A legal analysis of the Hamburg Rules" (part I), op.cit., at p. 12.

CONCLUSION

We are now in position to look in perspective at the different changes to which the carrier's undertaking of seaworthiness has been subjected to under the different regimes of Common and conventional Laws.

We have seen throughout our study that the shipowner's liability in respect of unseaworthiness under the Hague Rules differs in several aspects from that at Common Law. The position of the shipowner in relation to seaworthiness at Common Law is under an absolute obligation to provide a seaworthy vessel. This is an implied term in all contracts for the carriage of goods by sea, and unless he has expressly and decisively excluded the term in his contract, the shipowner is liable for its breach whether he has been negligent or not.

Faced with such a heavy responsibility, carriers by sea entered into a frenzy of activity aimed at developing a clause acceptable to the courts which would lessen their obligations.

Out of the many attempts at limiting their obligations, carriers' claims succeeded at the Hague in 1924, where by international agreement the former absolute warranty was abandoned in favour of a reduced requirement to exercise due diligence to provide a seaworthy vessel.

That is, in fact, the purpose of the Hague Rules in attempting a fair distribution of liabilities between the parties (carrier and cargo-owner) and consequently releasing the former from the

strict obligation implied at Common Law.

However, if legislatures, courts and international conferences have tried to maintain a balance between the paramount duty to protect cargo-owners and the desire to render justice to shipowners, it is submitted that the pendulum has swung in favour of cargo-owners by the decision of the House of Lords in Riverstone Meat Co. Pty. Ltd. V. Lancashire Shipping Co. Ltd., (The Muncaster Castle).[1]

The reason for that is the severity shown by the British courts in the interpretation of the shipowner's duty to exercise due diligence to make the ship seaworthy in the said case. The result is that the exercise of due diligence is a duty of a non-delegable nature. Accordingly, the carrier would remain liable if any negligence on the part of those who may be employed by him to ensure the seaworthiness of the vessel does result in an unseaworthy condition causing loss or damage to cargo. This is because the courts regard negligence on the part of those parties as negligence on the part of the carrier himself, in other words, their failure to exercise due diligence to make the ship seaworthy is his failure.

Since then, the outcome of The Muncaster Castle[2] became a great concern for the shipping industry, it caused quite a stir and considerable unrest among the carriers. The complaint was that the decision had nullified and defeated the object of Article III, rule 1 of the Hague Rules. Attempts were made to revise Article III, rule 1 to exclude the result arrived in the said case.

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[1] [1961] 1 Lloyd's Rep. 57.

[2] Ibid.

At the Stockholm conference in 1963 a proposal to negate the undesired effect of The Muncaster Castle[3] was tabled. The British proposal did not receive unanimous approval and was therefore not included in the protocol. Nothing on this materialised out of this meeting. A duty which comes very close to the absolute warranty of the Common Law still reigns in Article III, rule 1 of the Hague Rules.

It has already been mentioned that the Hague Rules were the result of a compromise between the interests of the carriers and the shippers. But the balance created by that compromise is substantially changed in favour of the shipper under the Hamburg Rules.

It is worthy of note that under the Hamburg Rules the undertaking of due diligence to provide a seaworthy ship has been replaced by the term "reasonable measures" and it should be exercised at all times.

The Hamburg Rules, 1978, if and when ratified by the great maritime nations, are unlikely to improve the position of the carrier. The carrier, under the new basis of liability of Article 5 has to prove that "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

According to a literal construction of this provision, he could be in a worse off position under the new regime. He has to take the initiative to prove that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences, whereas under the present

[3] [1961] 1 Lloyd's Rep. 57.

Hague Rules, his liability for the acts of his servants and agents is premised simply on the doctrine of vicarious liability. It is highly improbable that a court would interpret the said provision in any way which is inconsistent with the result reached in The Muncaster Castle.[4]

[4] Ibid.

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