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NAUTICAL FAULT EXEMPTION: NO COUNTRY FOR OLD MEN

Abstract

The present article contains the historical background and concept of nautical fault exemption. The reasons behind the exemption have also been differentiated and how it was incorporated into legislative acts, as well as international conventions in article. The comparative analysis of the regulation of nautical fault exemption within international conventions was conducted. Further, the Article laid down the conceptual basis of the nautical fault exception and the relationship among the seaworthiness, care for cargo and nautical fault exemption by referring case law. Finally, burden of proof was explained and arguments against and for the abolishment of the nautical fault exemption was discussed.

Annotasiya

Bu məqalə dəniz daşıyıcılarının məsuliyyətini istisna edən hallardan biri olan naviqasiya səhvinin tarixi inkişafını və nəzəriyyəsini özündə ehtiva edir. Həmçinin məqalədə bu istisnanı zəruri edən hallar fərqləndirilmiş və qanunvericilik aktlarına, habelə beynəlxalq konvensiyalara hansı formada daxil edildiyi müəyyənləşdirilmişdir. Bu azadetmənin beynəlxaq konvensiyalar çərçivəsində tənziminin müqayisəli analizi aparılmışdır. Daha sonra, presedent hüququna istinad edilməklə naviqasiya səhvi istisnasının konseptual əsası diqqətə çatdırılmış, üzgüçülüyə yararlılıq, yükə qayğı və naviqasiya səhvi arasındakı münasibətlər aydınlaşdırılmışdır. Son olaraq sübutetmə yükü izah olunmuş və naviqasiya səhvi istisnasının ləğv edilməsi ilə əlaqədar arqumentlər müzakirə edilmişdir.

Contents

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Introduction

Balancing the interests of the carriers and the cargo owners in cargo claims is one of the most disputatious issues in maritime law. Some are of the view that there is an imbalance in favor of the carriers. The reason behind these thoughts is mainly related to the immunities allowing the carriers to escape liability under the various carriage of goods regimes. One of the immunities that resulted in controversies in carriage litigation for over a hundred years is the concept of nautical fault rule, also described as the nautical fault exception or error in navigation.

Unlike many fundamental concepts in maritime law that have taken roots in antiquity, nautical fault has recently been conceptualized. As the financial position of the carriers was considerably improved both by technological development in shipping and by the growth of world trade, the bargaining power of the carriers increased. Accordingly, carriers began to insert various exculpatory clauses besides common law exceptions[1] into the bills of lading by the 19th century. The nautical fault has emerged as the result of the strength of the 19th century carriers to contractually narrow the scope of their liability before the cargo interest. Eventually, this exemption had been established through national legislation and subsequently international uniform law.

Though the exemption only provided a basis for "errors in navigation" originally, it was expanded over time to include errors in management and incorporated into uniform law. The Hague Rules and the Hague-Visby Rules maintained this exception in the same way.[2] Contrary to this, in order to meet the requirements of the modern international maritime trade, the Hamburg Rules and the Rotterdam Rules abolished it. The decision of abolishment is sound and progressive as the existence of the nautical fault exemption causes unfair advantage in favor of the carriers. However, taking into account that the countries with a big portion in international maritime trade are generally shipper countries, therefore it is not in their best interest to ratify either the Hamburg Rules or the Rotterdam Rules. Consequently, it was resulted in massive fragmentation in the applicable law to the carriage of goods by sea which led to the development of the contrasting jurisprudence.

[1] Acts of God, acts of public enemy and inherent vice. Lachmi Singh, The Law of the Carriage of Goods by Sea, 227 (2015).

[2] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Article IV(2) (1924).

I. Historical Development of the Nautical Fault Exemption

A. Nautical Fault Exemption prior to the Hague Rules. The Harter Act

The development of nautical fault exemption is closely related to the allocation of the responsibility between cargo owning interests (seller/shipper, buyer/consignee, and cargo insurers) and the ship owning interests (operators, charterers, the P&I Clubs and the Hull insurers).[3] In the beginning, when business relationships had not grown to the level of sophistication as we know it today, cargo owners usually bought or hired a vessel and sailed with their products onboard to destinations relatively close to the departure ports. Therefore, the owners suffered from the loss or damage in transit. In the 11th century, as a result of the expansion of the Roman Empire and its ports, an increase in overseas trade led to the establishment of early contracts of carriage (locatio mercium vehendarum).[4] By the 14th century, such documents became the precursor of the modern bill of lading.[5]

Regarding liability for the cargo, a Roman vessel was not obliged to accept the cargo, however, once it agreed to carry the cargo, the shipowner and crew became responsible for its safekeeping.[6] The sea carrier was viewed as preserving good faith, ensuring the safety of the goods delivered, and preventing fraud and robbery. In time, however, "exceptions" to carrier's liability for loss were admitted for shipwreck and piracy. [7]

By the 16th century, in European countries the owner and the master of a ship can only be excused for non-delivery or damage to cargo because of perils of the sea, pirates, and unusually bad weather, otherwise, he/she will be liable for the loss or damage occurred.[8] In contrast, the common law courts held the carrier of goods by sea absolutely liable for cargo loss or damage, regardless of whether or not the carrier was negligent, and regardless of the cause of the loss. There, the carrier could only be

[3] Joseph C. Sweeney, *UNCITRAL and the Hamburg Rules - The Risk Allocation Problem in Maritime Transport of Goods*, 22 J. Mar. L. & Com. 511, 512 (1991).
[4] Hakan Karan, The Carrier's Liability Under International Maritime Conventions: The Hague, Hague-Visby and Hamburg Rules, 7-9 (2005).
[5] Yin Yang, *The Abolition Of The Nautical Fault Exemption: to be or not to be*, Faculty Of Law Lund University, Master´s Programme in Maritime Law, 8 (2011), http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1969992&fileOId=1975378 (last visited Nov. 30, 2019).
[6] Edgar Gold, Maritime Transport: The Evolution of International Marine Policy and Shipping Law, 14 (1981).
[7] Samuel Robert Mandelbaum, *International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules*, 5 J. Transnat'l L. & Pol'y 1, 7-8 (1995).
[8] Yin Yang, *supra* note 5, 8.

exonerated from liability if the loss or damage was caused by 1) an act of God, 2) a public enemy, 3) inherent vice of the goods, 4) fault of the shipper.[9] Until the latter part of the 19th century, both common law and civil law countries recognized a strict liability and accepted that the carrier was absolutely liable as an "insurer" of the cargo.[10] Strict liability upon carriers made the carrier liable for loss or damage to the cargo, even when the carrier was not negligent.

However, carriers have protected themselves by using exemption clauses, referring to the principle of freedom of contract since the 18h century.[11] By 1890 bills of lading commonly contained exceptions exonerating the carrier from liability for almost every cause or type of cargo damage, even where loss or damage was caused by the negligence of the carrier.[12] Though the

[9] *Id.*, *9.*
[10] *Id.*, 10.
[11] *Ibid.*
[12] Robert Hellawell, *Allocation of Risk between Cargo Owner and Carrier*, 27 Am. J. Comp. L. 357 (1979).
The lack of responsibility on the part of carriers has been judicially noticed in a rather amusing fashion by the 9th Circuit in Tessler Bros v. Italpacific Line 1974 AMC 937; 494 F.2d 438 (9 Cir 1974):
Vanessa Rochester, *Nautical Fault, A Historical and Multi-jurisdictional Study of the Exemption for Errors Relating to Navigation and Management of the Vessel in Modern Carriage Law*, Thesis Presented for the Degree of Doctor of Philosophy in the Department of Commercial Law Unıversıty of Cape Town, 19 (2008),. "The plight of cargo owners was aptly expressed in Them Damaged Cargo Blues, by James A. Quinby:
It is much to be regretted,
That your goods are slightly wetted,
But our lack of liability is plain.
For our latest Bill of Lading,
Which is proof against evading,
Bears exceptions for sea water, rust and rain.
Also sweat, contamination,
Fire and all depreciation,
That we've ever seen or heard of on a ship.
And our due examination,
Which we made at destination,
Shows your cargo much improved by the trip.
It really is a crime,
That you're wasting all your time,
For our Bill of Lading clauses make it plain,
That from ullage, rust or seepage,
Water, sweat or just plain leakage,
Act of God, restraint of princess, theft or war,
Loss, damage or detention,
Lock out, strike or circumvention,
Blockade, interdict or loss twixt ship and shore,
Quarantine or heavy weather,
Fog and rain or both together,
We're protected from all these and many more.
And it's very plain to see,
That our liability,
As regards your claim is absolutely nil.
So try your underwriter,
He's a friendly sort of blighter,

nautical fault exemption in its basic form, was designed merely to provide protection for "errors of navigation" in which cases there is not any negligence by the carrier, it is more commonly drafted to cover situations in which negligence is involved.[13] British courts recognized the validity of the bills of lading embodies exculpatory clauses included errors in navigation, viewing the carrier's strict liability as a "default rule" that could have been set aside by contract by the parties.[14] Most European and Commonwealth countries eventually followed the British example.[15] Nonetheless, these exoneration clauses are regarded with disfavor in several countries, particularly by the United States.

In the United States, as freedom of contract was more restricted, the carriers could not exonerate themselves from the consequences of their own negligence or their failure to provide a seaworthy ship even if the federal courts permitted carriers to limit their liability in many circumstances.[16] 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 depending upon the chosen forum.[17] The dissatisfaction of cargo-owning countries has resulted in the enactment of legislation aiming to eliminate unreasonable exclusion clauses The United States took the initiative by adopting the "Harter Act" of 1893.[18]

While the international community was accomplishing little toward the unification of the law, several countries unilaterally enacted domestic legislation governing exoneration clauses in bills of lading.[19] With the clear break-down of the International Law Association's endeavors to gain an agreement, cargo interests became increasingly frustrated.[20]

The congressman Michael Harter of Ohio introduced legislation to protect the interests of the United States as a cargo owning, rather than a shipowning, to the nation in the fall of 1892, which was passed by the House of Representatives on December 15, 1892.[21] It was heavily amended in the Senate where the famous "compromise" was added.[22] Harter Act was the first national statute that established a compromise between carriers' and shippers' interests by mitigating the strict nature of the common law,

And is pretty sure to grin and foot the bill."
[13] John F. Wilson, Carriage of Goods by Sea, 273 (7th ed. 2010).
[14] Mandelbaum, *supra* note 7, 9.
[15] Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. Mar. L. & Com. 1, 5 (1991).
[16] *Id.*, 5-6.
[17] Stenphen Zamora, *Carrier Liability For Damage or Loss to Cargo In International Transport*, 23 AM. J. COMPo L. 391, 404 (1975).
[18] The Harter Act of 1893, 46 U.S.C. § 190-96.
[19] Sturley, *supra* note 15, 10.
[20] *Id.*, 10.
[21] Sweeney, *supra* note 3, 515.
[22] *Id.*, 515.

limiting the long list of exemption clauses, and nullifying unreasonable clauses in the list.[23]

The Act voided any bill of lading clause seeking to relieve the carrier from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge.[24] It also voided any clause lessening, weakening, or avoiding obligations of the owner the vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same.[25] Under the Harter Act compromise, if the owner used due diligence to make the vessel "in all respects" seaworthy, neither the vessel, nor her owners, shall become or be held responsible for damage or loss resulting from "faults or errors[26] in the navigation or management of vessel".[27]

It was the first time that the nautical fault exemption was stipulated in a legislative act. The Harter Act has had a significant impact on the laws of other maritime countries, as well as international conventions. The Harter Act, though being an important step in the development of the law of maritime carriage, ultimately was a disappointment.[28]

B. Hague Rules and Hague-Visby Rules

Since the major maritime countries followed the United States and adopted national legislation based on the Harter Act, it became clear that uniform and harmonious international law on carriage of goods by sea was essential to smooth international trade. In 1912, the Maritime Law Association of the United States recommended that the Comite Maritime International (CMI) should consider the whole subject.[29] Nonetheless, First World War (1914-1918) suspended the harmonization process and resulted in significant loss to international trade. Initiative to activate the process again was taken by the United Kingdom as a consequence of the pressure of overseas Dominions.

A draft based on the Harter Act was prepared by the CMI in 1921 and was adopted at the ILA's Conference at the Hague in September which became known as "the Hague Rules of 1921.[30] After further amendments, the Hague

[23] Karan, *supra* note 4, 19.
[24] The Harter Act, *supra* note 18, § 190.
[25] *Id*., § 191.
[26] The word " fault" imports negligence; "error " covers a mistake of judgment that does not amount to negligence. Frederick Green, *The Harter Act*, 16 Harvard Law Review 157, 162 (1903).
[27] The Harter Act, *supra* note 18, § 192.
[28] Benjamin W. Yancey, *Carriage of Goods: Hague, Cogsa, Visby, and Hamburg*, 57 Tul. L. Rev. 1238, 1241 (1982-1983).
[29] *Id.*, 1242.
[30] Sturley, *supra* note 15, 12.

Rules were submitted to the International Diplomatic Conference on Maritime Law, at Brussels, leading quickly to the signing, on August 25, 1924, of the "International Convention for the Unification of Certain Rules Relating to Bills of Lading", also known as Hague Rules.[31] After the United Kingdom (1930) and United States (1937) ratified the Convention, the worlds' leading maritime states joined within a few years.

Under the Hague Rules, the carrier is "bound before and at the beginning of the voyage to exercise due diligence to provide a seaworthy vessel"[32] and "to properly load, stow, carry, keep care for, and discharge the goods carried."[33] Any provision in the bill of lading that relieving the carrier or the ship from liability for loss or damage "arising from negligence, fault, or failure in the duties and obligations" or "lessening such liability" is void.[34] The bill of lading may, however, enlarge the duties of the carrier as the Hague Rules "establish minimum standards, not maximum ones."[35] Still, it establishes the maximum standards of the carriers' immunities.

The Hague Rules of 1921 were initially written in the form of a model bill of lading and were later transferred, without relevant adaptation, as an International Convention in Brussels in 1924 (the Hague Rules 1924). This historical particularity may explain why article IV rule 2 of the Hague Rules had listed a "catalog" of different exceptions, which had been traditionally listed as exclusions in the terms of bills of lading in the late 19th century.[36] One of the exceptions which was resulted in heated debates is the exoneration of the carrier from liability to cargo arising from:

Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or the management of the ship.[37]

After a few decades, as a reaction to the development of containerization in sea transportation and general disappointment in the per-package limitation, in 1968, the Belgian Government convened a diplomatic conference in Brussels in order to amend the Hague Rules.[38] The Brussels Protocol of Amendments to the Hague Rules was signed later that year.[39] In 1979, the Belgian Government called another diplomatic conference to add a protocol to the 1968 Protocol to express the amount of unit limitation of

[31] Yancey, *supra* note 28, 1242.
[32] International Convention for the Unification of Certain Rules Relating to Bills of Lading, Article III(1) (1924) (hereinafter Hague Rules).
[33] *Id.*, art. III(2)
[34] *Id.*, art. III(8)
[35] John D. Kimball, *Shipowner's Liability and the Proposed Revision of the Hague Rules*, 7 J. Mar. L. & Com. 217, 223 (1975).
[36] Alexander von Ziegler, *The Liability of the Contracting Carrier*, 44 Tex. Int'l L. J. 329, 340 (2009).
[37] Hague Rules, *supra* note 32, art. IV(2)(a).
[38] Sweeney, *supra* note 3, 519.
[39] Protocol to Amend The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (1968) (hereinafter Hague-Visby Rules).

carrier liability in terms of the artificial unit of the International Monetary Fund, the "Special Drawing Right" ("SDR").[40]

Under Visby Protocols, most of the provisions of Hague Rules remained as it is, and notably, both maintained the same carrier regime, requiring the carrier to exercise due diligence to make the ship seaworthy. Otherwise, if it is proved that the carrier had not exercised due diligence to provide a seaworthy vessel, then the carrier would not enjoy the exemption from liability for damage or loss resulting from "act, neglect, or default".

C. Hamburg Rules and Rotterdam Rules

There were political, legal, and economic reasons circumstanced the revision of the Hague and the Visby Rules. The most important incentive was a political shortcoming of the existing conventions: The majority of the developing States which formed part of the community of Member States were tied to the Convention by force of ratification by their former colonial mother country.[41] On the other hand, the main legal reason was that the outdated provisions of the Hague Rules and the Hague Visby Rules had not been compatible with the recent developments of the maritime trade. The error in the navigation and management exception of the carriers under these regimes was also in dispute, notwithstanding the compromise established in the previous Rules. Eventually, it became apparent that this compromise satisfied the interests of neither traditional maritime states, nor the newly independent developing states.

The United Nations, through UNCTAD and later UNCITRAL, became the vehicle for this re-examination of the appropriate rules to regulate the carriage of goods by sea.[42] Ultimately, The United Nations Convention on the Carriage of Goods by Sea, 1978 (The Hamburg Rules), was adopted in Hamburg, the Federal Republic of Germany, in March 1978 with the participation of 78 States, including many developing countries and updated the Hague Rules and its two protocols.[43] The object of the Hamburg Rules was to strike a fairer balance between carriers and shippers in the allocation of risks, rights, and obligations with the regard to liability by improving the limit of liability, solving the question of the unit limitation value of packages stowed in containers, developing the concept of arbitration, strengthening the carrier's fire exemption and removing the nautical fault defense.[44]

[40] Sweeney, *supra* note 3, 520.
[41] Ignacio Arroyo, Yearbook Maritime Law, Volume I, 85 (1984), Rolf Herber, The UN Convention on the Carriage of Goods by Sea, 1978, Hamburg Rules, Its Future and The Demands of Developing Countries.
[42] Robert Force, *Comparison of the Hague, Hague-Visby, and Hamburg Rules: Much Ado About (?)*, 70 Tul. L. Rev. 2051, 2052-2053 (1995-1996).
[43] The United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) (1978) [hereinafter Hamburg Rules].
[44] UNCTAD, The Economic and Commercial Implications of the Entry Into Force of the Hamburg Rules and The Multimodal Transport Convention, 2 (1991).

Unlike the liability regime under the Hague Rules, the Hamburg Rules concluded a more balanced allocation of risks between carriers and shippers by slightly shifting liability towards carriers. Liability is based on the principle of presumed fault or neglect. The carrier is liable for loss, if the occurrence which caused the loss, damage, or delay took place while the goods were in his charge 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.[45]

The Hamburg Rules finally entered into force in 1992. Only 34 countries deposited their instrument of ratification or accession.[46] Nevertheless, altogether they only represent a small portion of world trade.

Subsequently, it turned out, neither the Hague/Hague-Visby Rules, nor the Hamburg Rules are fully satisfactory. In order to counteract further fragmentation, by the request of the UNCTIRAL, another global initiative was taken by CMI which submitted 'Draft Instrument on Transport Law' to the UNCITRAL Secretariat in 2001. The detailed examination of this draft was delegated to a UNCITRAL Working Group which, after extensive scrutiny and discussions with UN members, the draft was adopted by consensus by the UNCITRAL Commission in New York in July 2008. [47] In December 2008, the General Assembly of the United Nations formally adopted the new carriage convention, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[48]

In respect of the period of responsibility, unlike former conventions which adopted tackle-to-tackle and port-to-port coverages, UNCITRAL decided to increase the period without stopping at the (artificial) boundaries of the pier or the harbor fences, but instead allowing the application of the new Convention to cover the entire period of actual custody by the contractual carrier, by itself or through its performing contractors, door-to-door from the inland point of taking delivery to the inland point of destination.[49]

Besides the general obligation of the carrier to carry the goods to the place of destination and deliver them to the consignee,[50] the Rotterdam Rules also impose a specific obligation of properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods on the carrier.[51]

[45] Hamburg Rules, art. 5.
[46] Status of Signatures, Ratifications, Acceptances, Approvals, Accessions, Reservations and Notifications of Succession of Hamburg Rules (1978), https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280042179 (last visited Nov. 30, 2019).
[47] John F. Wilson, *supra* note 13, 230.
[48] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2009) [hereinafter Rotterdam Rules].
[49] Ziegler, *supra* note 36, 332.
[50] Rotterdam Rules, art. 11.
[51] *Id.*, art. 13.

Compared to the both Hague Rules and Hamburg Rules, the latter obligation exists throughout the entire custody period.

Regarding the obligation of the carrier to make the ship seaworthy, the Rotterdam Rules take a different path than the Hague Rules, Hague-Visby Rules, and Hamburg Rules. As discussed above, in the Hague Rules the carrier is bound before and at the beginning of the voyage to exercise due diligence to provide a seaworthy vessel. The Hamburg Rules avoided setting this obligation. However, in Rotterdam Rules, it has received the same scope as in the Hague Rules. Moreover, the Rotterdam Rules designate a continuous obligation of due diligence relating to the seaworthiness of the ship. Unlike Hague Rules, the carrier's obligation to exercise due diligence is extended to the duration of the entire voyage.[52]

Most importantly, despite the Rotterdam Rules reintroduce the "catalog of exceptions", the carrier's nautical fault immunity has been abolished once again. The Rotterdam Rules did not incorporate the exception in navigation or management of the vessel nor did it incorporate the 'catch-all' exception found in Art-IV(2)(q) of the Hague-Visby Rules.[53]

II. Concept of Nautical Fault Exemption

Exceptions covering errors in navigation or the management of a ship have a long history dating back to the nineteenth century and were frequently incorporated into bills of lading long before the advent of the Hague and Hague/Visby Rules.[54] The original justifications for this liability scheme, and in particular the nautical fault exception, were the inability of the shipowner to communicate with and exercise effective control over his vessel and crew during long voyages at sea, and the traditional concept of an ocean voyage as a joint adventure of the carrier and the owner of the goods.[55] However, "the invention of radar and other similar equipment, and the preparation of modern charts have minimized the possibility of shipwreck and iceberg collisions, and groundings. Carriers can now keep in contact with their vessels wherever they are, through computerized radios and satellite control and instruct their servants and agents."[56]

A. The Interrelation between Nautical Fault Exemption and Seaworthiness

The obligation of seaworthiness has taken roots in Rhodian Sea Law. In the beginning, seaworthiness was a moral obligation of the carriers which evolved to a contractual obligation and later to an absolute legal obligation

[52] *Id.*, art. 14.
[53] Singh, *supra* note 1, 47.
[54] Wilson, *supra* note 13, 273.
[55] Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Carriage of Goods by Sea, 24 (1978).
[56] Karan, *supra* note 4, 89.

which means in the event of a breach, he will be liable regardless of fault. The classic definition of seaworthiness is contained in the judgment of Channell J. in McFadden v Blue Star Line referring to the warranty of seaworthiness that existed at common law as one of "the ship being fit to encounter the perils of the voyage" subsequently expounded the well-known "prudent owner" test, as set out in the Carver on Carriage of Goods by Sea as follows:

"The ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. Would a prudent owner have required that it (the defect) be made good before sending his ship to sea, had he known of it?"[57]

Unlike the common law approach on seaworthiness, the carrier is not under an absolute duty under international Conventions. The Hague Rules, in Article III, prescribe certain duties of the carrier:

(1) 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 other parts of the ship in which goods are carried, fit, and safe for their reception, carriage, and preservation.

Article IV(1) prescribes, neither the carrier, nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless it was proved that the carrier has done due diligence[58] in accordance with the provisions of paragraph 1 of Article III. In other words, Article III(1) is an overriding obligation. If it is not fulfilled and the nonfulfilment causes damage, the immunities of Article 4 cannot be relied on.[59] If the loss or damage can be shown to have arisen or resulted from an error in navigation or management and provided that the carrier has complied with Article III(1) and Article III(2), it may disclaim responsibility for such loss or damage.[60] In such cases, the carrier must prove that fault contributing to loss or damage is that of his employees or servants and he must show that he exercised due care in the choice of his servants and employees and also that he exercised the same degree of care for the purposes of training, instructing and controlling them sufficiently in relation to the requirements of

[57] Richard Aikens, Richard Lord And Michael Bools, Bills of Lading, § 10.99 (2nd Edition, 2016).

[58] Due diligence can be defined as: the efforts of the prudent carrier to take all reasonable measures that can be possibly taken, in the light of available knowledge and means at the relevant time, to fulfil his obligation to provide a seaworthy vessel, Mitisha Naidu, *A Comparative Analysis Of The Carrier's Liability Under The Hague Visby And Rotterdam Rules*, 24 (2016). https://researchspace.ukzn.ac.za/xmlui/handle/10413/15024 (last visited Nov. 30, 2019).

[59] *Maxine Footwear Co Ltd v. Canadian Government Merchant Marine Ltd* (1959) AC 589 (PC).

[60] Yin Yang, *supra* note 5, 23.

seaworthiness, and the navigation or management of the vessel.[61] They must show that a member of the crew was sufficiently negligent to justify the defense but not so negligent as to have made the vessel unseaworthy.[62] When the carrier failed to prove that before and at the beginning of the voyage it exercised due diligence to eliminate unseaworthy conditions, then the responsibility will be rest with the carrier.

In contrast to due diligence, there is not the same requirement for the error in navigation or management that it has to be before or beginning of the voyage. In *the Louis Dreyfus,* case the Court cited *International Navigation Co. v. Farr & Bailey Mfg. Co.,* 181 U.S. 218, 226, 21 S. Ct. 591, 593, 45 L. Ed. 830 (1901), and determined that "the word "management" is not used without limitation, and is not, therefore applicable in a general sense as well before as after sailing."[63] Based on this principle, the Louis Dreyfus court held that because the critical error of the engineer occurred before the commencement of the voyage, the shipowner cannot be exonerated from liability.[64] There is a fine line between the actions that constitute errors in management and the inaction constituting a lack of due diligence and the Louis Dreyfus court found that the timing of the engineer's action best qualified it as a lack of due diligence.[65]

An example of immediate damage from navigational error was used in *the Mississippi Shipping* case.[66] If the damage from the navigational error is immediate and there is no time for discovery, the actions or inactions cannot be deemed as a failure to detect the damage but the navigational error.

In the *Jalavihar* case[67] the Court determined that the exception for navigational or managemental error was not restricted to navigational errors occurring after the commencement of a voyage. The Court agreed with *Isbrandtsen*[68] and *Mississippi Shipping*[69] that navigational error that occurs prior to the commencement of a voyage is excepted under 46 U.S.C. § 1304(2)(a).[70]

[61] *Ibid.*
[62] Michael F. Sturley, An Overview of the Considerations Involved in Handling the Cargo Case, 21 Tul. Mar. L.J. 263, 308 (1997).
[63] *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321 (5th Cir. 1987).
[64] Vanessa Rochester, *supra* note 12, 127.
[65] *Usinas Siderugicas De Minas Geras, Sa-usiminas; Usiminasimportacao E Exportacao, Sa-usimplex, Plaintiffs-appellants, v. Scindia Steam Navigation Company, Ltd.*, in Personam;jalavihar M/v, in Rem, Defendants-appellees, 118 F.3d 328 (5th Cir. 1997), https://law.justia.com/cases/federal/appellate-courts/F3/118/328/587024/#fn3 (last visited Nov. 30, 2019).
[66] *Mississippi Shipping Co. v. Zander*, 270 F.2d 345 (5th Cir. 1959).
[67] *Supra* note 65.
[68] *Isbrandtsen Co. v. Federal Ins. Co.*, 113 F. Supp. 357 (S.D.N.Y. 1952), affd. per curiam, 205 F.2d 679 (2d Cir. 1953), cert. denied, 346 U.S. 866, 74 S. Ct. 106, 98 L. Ed. 377 (1953).
[69] *Supra* note 65.
[70] *Id*.

In view of the difficulties in establishing negligence in the navigation or management of the ship, and the courts' hostility toward the defense, it is not surprising that the defense rarely succeeds, particularly in recent years.[71]

However, in Rotterdam Rules overriding obligation has been amended. "The structural arrangement of the Rotterdam Rules suggests that the exemptions are no longer subject to the seaworthiness obligation, and as a result, the issue of the seaworthiness of the ship would become relevant only in an actual claim for cargo damage, i.e. when the cargo claimant could prove unseaworthiness a cause of damage to rebut the carrier's invocation of one of the 'excepted perils."[72]

B. Error in the Navigation or Management of the Ship and Care for Cargo

Another main obligation of the carrier besides making the ship seaworthy is to care for cargo. The duty for the care for cargo encompass generally the obligations to receive, load, handle, stow, carry, keep, care for, discharge, and deliver the cargo. Under international maritime conventions, this duty embraces nearly the same scope.

According to Article III rule 2 of the Hague Rules, subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried. The expression of "subject to Article IV" proofs that this obligation is not absolute, meaning that if the carrier proves the damage derives from one of the exceptions determined in Article IV rule 2, the carrier will not be held accountable for non-fulfillment of this duty. From the catalog, only error in navigation or management of the ship and fire exception is subject to carriers' fault and, therefore carrier can be exculpated from liability for dissatisfaction of the duty for the care for cargo only in specified instances.

The difficulties arise regarding distinguishing the actions and inactions constitutes an error in navigation or management of the ship and negligence in care for the cargo. The most puzzling issues emerge in cases of the causes of the loss or damage overlap or there are two distinct causes: one of them is excepted peril and another is an infringement of Article IV rule 2.

The courts started to classify the acts by the purposes in order to counteract these issues: "The difficulty in drawing the line arises from the fact that, read naturally, the two clauses overlap, for many actions which might be spoken of as faults or errors in management or even in navigation might equally well be viewed as failures in the duty to use due care with

[71] Sturley, *supra* note 62, 308.
[72] Si Yuzhou & Henry Hai Li, *The New Structure of the Basis of the Carrier's Liability under the Rotterdam Rules*, 14 Unif. L. Rev. 931, 938 (2009).

respect to the cargo. Few clearcut concepts have appeared for dealing with the problem; the feel of it can only be acquired by reading cases."[73]

In the *Germanic*[74], a case decided under the Harter Act in 1906, the Supreme Court enunciated a test that focused upon the primary purpose of the act directly causing the damage. A foreign vessel called the Germanic from Liverpool arrived at its destination, New York, and made fast to the wharf. Owing to unusual gales and weather, she was heavily weighted with snow and ice and made top-heavy.[75] While the cargo was being unloaded, she suddenly rolled over and sank, damaging the cargo remaining in her, some of which had been shipped from points east of Liverpool on bills of lading to Liverpool, thence to be forwarded to New York, and containing certain exemptions of the carrier from liability.[76] The court found that "careless and premature removal of cargo," made the vessel "top-heavy," and "instability brought about by the improper unloading, care, and custody of the cargo, is not Vessel Management Default.[77] "The Court added, "if the primary purpose is to affect the ballast of the ship, the change in the management of the vessel, but if ... the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not [control] .... [T]he question ... must be determined by the primary nature and object of the acts which cause the loss."[78]

The Court held that damage to the cargo has been caused by the negligent discharge of cargo rather than negligent management of the vessel.

In the United Kingdom, *Gosse Millard Ltd. v. Canadian Government Merchant Marine Ltd*[79] case shed light on this matter. The vessel on which the tinplates, the subject matter of the action, were being carried was undergoing repairs to the tail shaft. For this purpose, one of the hatches was left open in order to allow the workmen to pass to and fro, and proper precautions were not taken to- screen it against bad weather. Rainwater thus entered the hold and caused the tinplates to rust. Justice Greer, in a Court of Appeal's case dissentients, "if the cause of the damage is solely, or even primarily, neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for if the negligence is not negligence towards the ship, but only negligent

[73] Frank F. Arness, *Error in Navigation or Management of Vessels: A Definitional Dilemma*, 13 Wm. & Mary L. Rev. 638, *641*-642 (1972), https://scholarship.law.wm.edu/wmlr/vol13/iss3/6 (last visited 30 November 2019).
[74] The Germanic, 196 U.S. 589 (1905), https://supreme.justia.com/cases/federal/us/196/589/ (last visited Nov. 30, 2019).
[75] *Id.*
[76] *Id.*
[77] Eun Sup Lee; Seon Ok Kim, *A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel*, 27 Transp. L.J. 205, 214. (2000).
[78] Arness, *supra* note 73, 642.
[79] *Gosse Millard v. Canadian Gov't Merchant Marine*, All E.R. Rep. 97 (H.L. 1928).

failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved."[80] Leaving one of the hatches open is a failure to use the apparatus of the ship for the protection of the cargo and the carrier cannot be exculpated from liability under nautical fault exemption. The House of Lords upheld the dissent of Justice Greer.

In *Compania Sud American Vapores v. MS ER Hamburg Schiffahrtsgesellschaft* (2006), the English Commercial Court relied on Lord Justice Greer's opinion that the shipowner could be exonerated from liability on the basis that "[t]he heating of the bunker tank was to facilitate the transfer of oil from it to the engines. It was a single act which did not relate in any way to the care of the cargo; albeit it may have indirectly adversely affected the cargo."[81]

As such, in order to distinguish whether it is negligence towards the management of the ship or cargo, several tests have been established by case law. First of all, it has to be unrevealed either the negligent act affect the navigation of the ship or the cargo. If both are affected, then the purpose or nature of an act has to be determined by applying the terms, such as "primary" or "sole" purpose. Was the primary or sole purpose of the act concerned with the cargo or the vessel?[82]

C. The Burden of Proof

The burden of proof is a legal concept that signifies which disputing party has the obligation to furnish the proof in order to take the burden off. It is needed to make a distinction between the burden of proof and order of proof. The first term defines the duty of a party to adduce evidence for proving or disproving a fact (the evidentiary burden), whereas the second one denotes the sequence of the facts and allegations to be proved or disproved by either party (the evidentiary sequence).[83] However, in respect of the marine cargo claims the former comprises both the evidentiary burden and evidentiary sequence.

The allocation of the burden of proof has been codified precisely neither by the Hague Rules and Hague-Visby Rules nor the Hamburg Rules, nonetheless, through case law, the standard has been set.

Obligations under Hague-Visby Rules for seaworthiness, the care for goods, and the exemptions are expressed as "the three balls".[84] The burden of proof is like a ping-pong game that is being played with these balls and the starting point of the game is the presentation of the *prima facie* case. Article III rule 4 implied that the basis of the allegations is a clean bill of lading which is the *prima facie* evidence of the receipt of the goods per Article

[80] Eun Sup Lee; Seon Ok Kim, *supra* note 77, 216.
[81] Rochester, *supra* note 12, 65.
[82] *Id.*, 219.
[83] Ilian Djadjev, The Obligations of the Carrier Regarding the Cargo. The Hague-Visby Rules, 43 (2017).
[84] Yuzhou & Li, *supra* note 72, 938.

III rule 3. If the shipper proves both that the carrier received the goods undamaged and in full which was reflected on the "clean bill of lading" stating that the goods were shipped clean on board and that the goods were subsequently damaged en route, the carrier's liability, in the other words, *prima facie* liability is presumed.[85] Though the identity of the starter of the game is not definite under Hague-Visby Rules, undoubtedly, it is the shipper that bringing the case. At this point, the shipper is not obliged to state the causes of the damage. Once the carrier's fault is established, he has two choices – either proves there is no breach of the obligations under Article III rule 2 by showing that cause of the loss or damage is not subject to his fault or negligence; or refers one of the immunities of the carriers provided in Article IV. In recent *Volcafe Ltd & Ors v Compania Sud Americana De Vapores SA*[86] case which was heard by UK Supreme Court, Lord Sumption asserted:

> *[T]his proposition has sometimes been expressed by saying that once it is shown that the cargo was loaded in good condition and discharged in bad, the carrier bears the burden of proving that this was caused by one of the excepted perils in Article IV. … The true rule is that the carrier must show either that the damage occurred without fault in the various respects covered by Article III(2), or that it was caused by an excepted peril. If the carrier can show that the loss or damage to the cargo occurred without a breach of the carrier's duty of care under Article III(2), he will not need to rely on an exception.*[87]

If the carrier opts former and proves no breach of Article III rule 2, the burden shifts to the claimant who should disprove the defense by referring to the unseaworthiness of the ship. In the end, the carrier's liability presumed in case he cannot show want of due diligence. On the other hand, if the carrier chooses to rely on an exception, he still has to show that obligation of the care for cargo is fulfilled. There are arguments on whether the cargo owner or the carrier bears the legal burden of proving the negligence of the carrier. Some are of the view that if the carrier does *prima facie* bring himself within an exception then the claimant must refute this by showing negligence.[88] In contrast, Lord Sumption made a comparison and reached below conclusion:

[85] Ziegler, *supra* note 36, 339.
[86] *Volcafe Ltd & Ors v Compania Sud Americana De Vapores SA*. 1 Lloyd's Rep 21, [2019], https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2018/61.html&query=(volcafe) (last visited Nov. 30, 2019).
[87] *Id*, § 25.
[88] Aikens, Lord and Bools, *supra* note 57, §10.169.

> *[I]t is common ground, and well established, that the carrier has the burden of proving facts which bring him within an exception in article IV, and in the case of articles IV(1) and IV(2)(q) this is expressly provided. It would be incoherent for the law to impose the burden of proving the same fact on the carrier for the purposes of Article IV but on the cargo owner for the purposes of article III(2)*[89]

The divergence of these views is related to the varied fault regimes of the exceptions which require making decisions on a case-by-case basis. Summing up, if it is an exception that cannot be relied on without disproving negligence (e.g., inherent vice), then the burden of proof is on the carrier, otherwise, the burden shifts to the cargo owner.

Nautical fault exemption has a unique nature. Considering it is subject to the carrier's fault, the above-discussed allocation of the burden of proof cannot be referred to in that case. Proving act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship is sufficient for the exemption from liability. Hereupon, cargo owner's sole option is claiming unseaworthiness.

Allocation of burden of proof under Rotterdam Rules is more precise and definite and consisting of several phases. Once the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility, the carrier's liability establishes. Thereafter, the carrier has two option: 1. to prove that the loss, damage, or delay is not attributable to the fault of the carrier or the fault of any person for whom he is liable; 2. to prove one or more of the listed events or circumstances caused or contributed to the loss, damage, or delay. If the carrier invokes one or more of the excepted perils, the claimant will have three alternatives. Either he will demonstrate that the fault of the carrier caused or contributed to the event or circumstance on which the carrier relies, or an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay. In the latter scenario, the carrier can take the burden off if he disproves his fault or negligence. The third alternative of the claimant has three aspects: 1. Relying on the unseaworthiness of the ship; 2. Referring to the improper crewing, equipping, and supplying of the ship; 3. Cargoworthiness of the ship. The carrier still can be exonerated from liability if it is proved that these events or circumstances caused the loss, damage, or delay, or obligation to exercise due diligence has been complied. During any phase of this game, any party that cannot furnish the evidence will be held liable.

[89] *Supra* note 87, § 18.

Conclusion

The nautical fault exemption emerged as the result of the increased bargaining power of the shipowners. From the 19th century, shipowners started to include such exemption into the Bill of Ladings by using their strong financial position. Though Hague-Rules and Hague-Visby Rules grant this right to the shipowners, Hamburg Rules and Rotterdam Rules preferred to abolish.

Cargo owners argued that it might have been reasonable to have such immunity in the early stages of maritime trade considering shipowners had limited control over the ships once the sail started. Therefore, it was acceptable to exonerate shipowners from liability for the actions of those who were actually engaged in the carriage.

However, as a result of advanced ship construction techniques, sophisticated navigation systems including GPS, radar, and telecommunication tools, shipowners continue constant verbal and visual contact with their ships for the entire voyage. Additionally, shipowners are the least cost avoiders taking into account they have the control and access over the ship and are in a better position to avoid the loss or damage while considering cargo owners can do nothing to eliminate the risk during the voyage.

Furthermore, the development of globalization and world trade requires uniformity of multimodal transport regimes. As no match of the nautical fault exemption is stipulated in other treaties regulates carriage by road, rail, and air, it creates a barrier to the integration and development of international transport.

In contrast, shipowners contend nautical fault exemption is vital in cases of collisions which result in great losses. Otherwise, the disbalance of the risk allocation between shipowners and cargo owners would be likely altered negatively the entire maritime trade practice.

Due to the lack of the general standard in order to apply the exception, the existence of the nautical fault exemption makes also difficulties for the judicial bodies. Likewise, the difficulty of determining the real cause of the accident and proving the due diligence is one of the main obstacles in the allocation of the liability between arguing parties.

Even though the Hamburg Rules and Rotterdam Rules completely abolished the nautical fault exemption, only 34 and 5 countries deposited its instrument of ratification or accession respectively. The states with a huge portion at maritime trade still apply Hague Rules and Hague-Visby Rules or national laws that embody nautical fault exemption.

The abolishment of this exemption probably will make the shipowners bear additional economic costs. However, taking into account that cargo owners are in a more vulnerable position than shipowners, it is fair and

adequate to hold the shipowners responsible for their actions while they have control over the ship during the transit. Like as Sheriff Ed Tom Bell retired when he felt "over-matched", it is time for the nautical fault exemption to retire, as there is no place left for the old notion to be applied.