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Preface

This issue of MarIus contains a wide selection of papers by extinguished European maritime law scholars who gave presentations during the 7th European Colloquium on Maritime Law Research (ECMLR) which took place in Palermo 27-28 September 2012. The colloquium – hosted by the University of Palermo and the University of Messina – was entitled: Contracts in shipping: flexibility, foreseeability, reasonableness.

Publication is made with the consent of the law journals Diritto Maritimo, International Maritime Law Journal and Revista de Derecho del Transporte, where several of the papers are, or will be, co-published.

Trond Solvang and Donato Di Bona (co-editors)

Overview of content

Reasonableness, foreseeability and flexibility in the principles of European contract law

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Innhold

1 The Principles of European Contract Law (PECL)

Constant doctrine and jurisprudence agree that charter parties or contracts for sale of goods on CIF/FOB[1] terms, or other shipping contracts (such as all contracts), must be interpreted, firstly, according to the common intention of the parties and – as subsidiary criterion – applying the reasonableness test[2].

But neither the CISG (*Convention on Contracts for the International Sale of Goods*) nor the Hague-Visby Rules[3] or other international legal instruments for the international carriage of goods by sea contain a definition for 'reasonableness'. In fact, the term reasonableness refers to a general principle of Contract Law (originally derived from the common law system) that requires a general definition.

In fact, the general definition for reasonableness is contained in the text of the Principles of European Contract Law (PECL)[4], in particular

1 CIF (*Cost, Insurance and Freight*) Clause; FOB (Free On Board) Clause. See D. M. Sassoon, *CIF and FOB contracts*, London, 1995; R. Bradgate, *Commercial Law*, London, 2000; P. Todd, *Cases and Materials on International Trade*, London, 2002; R. Goode, *Commercial Law*, London, 2004; I. Carr (et al), *International Trade Law*, London, 2005; P.S. Atiyah (et al), *Sale of Goods*, London, 2005; S. Schnitzer, *Understanding International Trade Law*, London, 2006; M. Bridge, *The International sale of Goods Law and Practice*, Oxford, 2007.

2 *See* Article 2:101 PECL (*Principle of European Contract Law)* and Article 8 of the United Nations Convention on Contracts for the International Sale of Goods (CISG, Vienna 1980). P. Schlechtriem, *Uniform Sales Law – The UN-Convention on Contracts for the International Sale of Goods*, 1986, 99; J. Ziegel, *The Future of the International Sales Convention from a Common Law Perspective,* in *New Zealand Business Law Quarterly* 2000, 6, 336, 338; C. Gillette - R. Scott, *The Political Economy of International Sales Law*, in *International Review of Law and Economics* 2005, 25, 446.

3 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules) (Brussels, 25 August 1924), as amended by the Protocol to amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Rules) (Brussels, 23 February **1968**). *See* M.A. Clarke, *Aspects of the Hague Rules: A Comparative Study in English and French Law*, The Hague, 1976, 11-17; J. Richardson, *A guide to the Hague and Hague-Visby Rules*, London, 1994

4 In French PDEC (*Principes du Droit Européen du Contrat*). See C. Castronovo, *Contract and the idea of codification in the Principles of European Contract Law*, in

in Article 1:302, inspired by the CISG and the *Principles of International Commercial Contracts* of UNIDROIT (*Unidroit Principles* or PICC)[5]: a text prepared by top-class jurists (judges, law professors, lawyers etc.), first published in 1994.

Instead, the PECL do not contain the definition of foreseeability and flexibility.

The Principles of European Contract Law are a set of basic rules of contract law (and more generally the law of obligations) which most legal systems of the Member States of the European Union hold in common.

In fact, according to Article 1:101 of the PECL, these Principles are intended to be applied '*as general rules of contract law in the European Union*'.

Initially, the creation of European private law was conceptually difficult for jurists who traditionally understand private law as those provisions enshrined in continental civil codes to regulate contract.

Since the early 1990s things *have changed radically*. The Treaty of Maastricht[6] gave the Community the power to harmonize national legislations where necessary to ensure the establishment and the functioning of the internal market (Article 95). Under this provision

Festskrift til Ole Lando, 1997, 109-124-

5 The new edition of the UNIDROIT Principles of International Commercial Contracts ('UNIDROIT Principles 2010') was adopted by the Governing Council of UNIDROIT at its 90*th* session. See A. Hartkamp, *The UNIDROIT Principles for International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods*, in Boele-Woelki, F.W. Grosheide, E.H. Hondius, G.J.W. Steenhoff (eds.), *Comparability and Evaluation*, Dordrecht, Boston, London, 1994, at 85 et seq.; F. Marrella, *La nuova lex mercatoria. Principi Unidroit ed usi del commercio internazionale*, in *Trattato di diritto commerciale dell'economia diretto da Francesco Galgano*, Vol. XXX, Padova, 2003; M. Nabati, *Les règles d'interpretation des contrats dans les principes d'Unidroit et la CVIM: entre unité structurelle et diversité fonctionnelle*, in *Unif. Law Rev.* 2007, 247-263; O. Toth, *The Unidroit Principles of International Commercial Contracts as the Governing Law: Reflections in Light of the Reform of the Rome Convention*, in E. Cashin-Ritaine/E. Lein, (ed.), *The UNIDROIT Principles 2004*, 2007, 201-213; P. Ratti, *Il richiamo ai principi Unidroit nella giurisprudenza interna e arbitrale*, in *Riv. dir. int. priv. proc.* 2009, 915-928.

6 It was signed on 7 February 1992 and came into force on 1 November 1993. See especially: *Droit international privé et procédure internationale après le Traité de Maastricht*, in *Die Direktwirkung europäischer Richtlinien*, Heidelberg, 1994, 103-113.

the European Community enjoys a relatively broad power to issue directives to harmonize specific private law rules: for instance, the Directive on Product Liability (1985, 85/374)[7], the Directive on Contracts Negotiated Away from Business Premises (1985, 85/577)[8], the Directive on Self-Employed Commercial Agents (1986, 86/653)[9], the Directive on Consumer Credit (1987, 87/103), the Directive on Package Tours (1990, 90/314)[10] and the Directive on Unfair terms in Consumer Contracts (1993, 93/13)[11]. In particular, harmonization was considered a legal instrument for the *development* of the *EU transportation system*.

The European Court of Justice (ECJ) undertook the interpretation of European directives on contract law, thus creating a quasi-federal common law for Europe. Many commentators have stressed that the application by the ECJ of the principles of the Supremacy (sometimes referred to as primacy) of *EU law* and Direct Effect[12] allowed the Court

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7 Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products *(OJ L 210, 07.08.1985, p. 29-33).*

8 Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (*OJ L 372, 31.12.1985, 31- 33).*

9 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (*OJ L 189, 20.7.1988, 28-28).*

10 Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours *(OJ L 158, 23.6.1990, p. 59-64). See* T. Hartley, *Holiday Homes and Package Holidays*, in *European Law Review*, 1992, 550; F. Mosconi, *Quando la vacanza finisce in tribunale*, in *Rivista di diritto internazionale privato e processuale,* 1993, 5; A. Palmieri, *In tema di pacchetti turistici*, in Foro italiano, 2012, 5, 260-261.

11 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (*OJ L 095, 21.04.1993 p. 29-34).*

12 The principles of supremacy and direct effect were crystallised in ECJ case law in several progressive stages. In the 'Van Gend en Loos v Nederlandse Administratie der Belastingen' (Case 26/62), in *European Court Reports*, 1963, 1 the ECJ affirmed the following guiding principle: where there is a conflict between national law and EU law, EU law should prevail. In 'Costa v ENEL' (Case 6/64) [1964], in *European Court Reports*, 1964, 585, which constituted a second step to defining the principle of supremacy of the EU law, the Court affirmed the following principle: earlier EU law prevails where there is a conflict between EU law and later national law. In 'Internationale Handelsgesellschaft mbH v Einfuhr - und Vorratsstelle fur Getreide und Futtermittel' (Case 11/70), in *European Court Reports,* 1970, 1125 the ECJ stated

to be a very powerful engine for European market integration.

But only specific, *short* segments and certain sectors of European private law have been harmonized by these directives.

Two European Parliament resolutions of 1989 and 1994[13], aimed at establishing a European Civil Code and bringing into line the Private Law of all Member States[14], gave impetus to start working on the Principles of European Contract Law.

The PECL were created by the Commission on European Contract Law (the so-called Lando Commission)[15], a group of comparative lawyers consisted of 22 members from all Member States of the European Union.

Therefore, the PECL only constitute the first step of a project for a European Civil Code. The work performed by this Lando Commission was continued by the Study Group on a European Civil Code[16].

According to the EU Commission's Action Plan[17] that proposed the

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that the EU law prevails where there is a conflict between EU law and national law even if the conflict is with a Member State's constitution. *See* especially S. Enchelmaier, *Supremacy and Direct Effect of European Community Law Reconsidered, or the Use and Abuse of Political Science for Jurisprudence*, in *Oxford Journal of Legal Studies*, 2003, Vol. 23, Issue 2, 281-299; J.H.H. Weiler, M. Kocjan, *The Law of the European Union. Principles of Constitutional Law: the Relationship between the Community Legal Order and the National Legal Orders: Supremacy*, New York, 2004/05, 15-20.

13 Dated 26 May 1989 *(OJ C 158, 28.6.1989, p. 400)* and 6 May 1994 *(OJ C 205, 25.7.1994, p. 518* on the harmonisation of certain sectors of the private law of the Member States) in which Parliament asked that a start be made on the necessary preparatory work for the drawing up of a Common European Code of Private Law.

14 R. Schulze, J. Stuyck, *Towards a European Contract Law,* in *Zeitschrift für Europäisches Privatrecht*, 2012, 221-222.

15 The so-**called** "Lando Commission", a group of comparative lawyers representing many European jurisdictions, headed by Professor Ole Lando (University of Copenhagen)**.** It started work in 1982; in the year 1995 the first part of the PECL was published; since 1999 the second part has been available and the third part was completed in 2002.

16 A group founded in 1997 and managed by Christian von Bar, a German Law Professor. *See* K. Kerameus, *Problems of Drafting a European Civil Code,* in *European Review of Private Law*, 1997, 5, 475, 478-479; T. Koopmans, *Towards a European Civil Code?,* in *European Review of Private Law*, 1997, 541; W. Tilmann, *The Legal Basis for a European Civil Code,* in *European Review of Private Law* , 1997, 5, 471; W. Van Gerven, *Coherence of Community and National Laws. Is There a Legal Basis for a European Civil Code?,* in *European Review of Private Law*, 1997, 5, 465, 467-469.

17 COM (2003) 68 final.

implementation of the Common Principles of European Contract Law (CoPECL), this Group published in 2008 the *Draft Common Frame of Reference* (DCFR), a draft for the codification of the whole European contract law[18], in which the *acquis communautaire*[19] and the PECL are integrated.

So, nowadays, European private law comprises a variety of legal rules, which derive from legislative, judicial and scholarly sources (such as the PECL) operating at different levels[20].

In particular, the PECL created a mixed legal system of common and civil law.

Because there is often a considerable difference with respect to certain *laws,* regulations and provisions, the differing national laws in question were merged to form a common core[21]. This approach is intended to eliminate such obstacles to cross-border contracts created by differing national rules of contract law and complete the common market without frontiers.

Although the PECL provide assistance to judges in national and european courts and arbitrators in arbitration proceedings deciding cross-border issues, they do not represent a legally enforceable regulation. In fact, they are an instrument of so-called *soft law*[22]. *Soft law* instruments

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18 See especially H. Kotz, *European Contract Law: Formation, Validity, and Content of Contracts; Contract and Third Parties,* Oxford, 1997.

19 *Acquis Principles* (ACQP) prepared by the Acquis Group, coordinated by Professors Gianmaria Ajani (University of Torino) and Hans Schulte-Nölke (University of Osnabrück, Germany). See G. Ajani, *Acquis comunitario*, in *Digesto IV ed. suppl.*, Torino, 2010, 90.

20 Today, the legal decisions are the result of complex cooperation between institutions operating at different levels (so-called *Hart and Sacks' principle*). H.M. Hart, A.M. Sacks, *The Legal Process: Basic Problems In the Making and Application of Law*, Foundation Press 1958; Sacco, *Legal Formants: a Dynamic Approach to Comparative Law*, in *Am. Journ. Comp. Law*, 1991, 39, 1, part 1: 1-34; part 2: 343-401.

21 In this vein, see W. Wurmnest, Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze-Ansätze internationaler Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa, in *Zeitschrift für Europäisches Privatrecht*, 4/2003, 714-744.

22 As it is well known "*The term 'soft law' is a blanket term for all sorts of rules, which are not enforced on behalf of the state, but are seen, for example, as goals to be achieved".* See R. Dworkin, *Is Law a System of Rules?,* in *University of Chicago Law Review,* 1967,

are usually considered as non-binding agreements. The difference between *soft law* and *hard law* based on the legally binding force vanishes when the parties of a contract expressly refer to the rules contained in the PECL (or PICC). In that case, *these* uniform rules *are considered* not just as mere contractual clauses*, but as* the applicable law of the *contract*.

But it is not sure if the PECL may also be considered part of the *lex mercatoria* (so-called Law Merchant) or the new *lex mercatoria*[23], an autonomous body of rules and customs, from different origin, laid down by merchants to regulate their dealings and dedicated to serving the needs for international trade. Unlike the *lex mercatoria*, the PECL also contain specific rules for consumers.

In particular with regards to the scope of application, according to Article 1:101, the Principles *must* be applied – as general rules of contract law – when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them. Instead, these Principles *may* be applied in two different cases: (a) when the parties have agreed that their contract is to be governed by 'general principles of law' or the *lex mercatoria* and (b) when they have not chosen any system or rules of law to govern their contract.

2 General principles and legal rules in the PECL

As regards the content, the PECL contain both general principles[24] and legal rules. In fact, the European Union's (EU) internal market requires

35, no. 14, 14-46.

[23] See, among others, F. Galgano, *Lex Mercatoria*, Bologna, 1993, new ed. 2003; F. Marrella, *La nuova lex mercatoria. Principi Unidroit ed usi del commercio internazionale*, in *Trattato di diritto commerciale dell'economia* (diretto da F. Galgano), Vol. XXX, Padova, 2003; K. P. Berger, *The Creeping Codification of the New Lex Mercatoria*, 2 ed., The Hague, 2010.

[24] K. Boele Woelki, *Principles and Private International Law*, in *Uniform Law Review*, 1996, 652.

not just general and abstract principles (such as the freedom of establishment and the freedom to provide services)[25], but also legal rules in the field of contract law.

Therefore, a logical distinction should be made between principles and rules. Under the Dworkinian approach[26], we can recognize the difference between legal rules and principles. In addition to the legal rules (*i.e.* standards or specific, technical requirements), the principles set forth general and vague rules, related to meta-juridical values.

In addition, the principles justify (or should justify) the rules: for example, the rule that states that one party to the contract cannot break the agreement without a valid legal reason (*i.e.* just cause) is justified by the **principle** of **equity** and good faith[27].

Consequently, the rules must always be congruent with the principle that justifies them.

When two principles conflict with each other, it must balance both. For example, freedom of contracts is a fundamental principle of contract law. According to Article 1:102 of the PECL (Freedom of Contract) '*Parties are free to enter into a contract and to determine its contents*' but "*subject to the requirements of good faith and fair dealing, and the mandatory rules*[28]

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[25] Article 56 TFEU. See especially J. Aussant, *Freedom to provide services in shipping in the European Communities*, in *Diritto Marittimo,* 1989, 59; P.J. Slot, *Freedom to provide shipping services*, in *Diritto Marittimo*, 1989, 51; M. Nesterowicz, *Freedom to provide maritime transport services in European Community Law,* in *Journal Mar. Law Comm*., 2003, 629.

[26] R. Dworkin, *Is Law a System of Rules?, supra,* 14-54.

[27] R. Zimmermann, S. Whittaker (eds.), *Good Faith in European Contract Law,* Cambridge, 2000*;* E. Hondius, *Good Faith in European Contract Law - A First Publication of the Trento Common Core Project,* in *European Review of Private Law*, 3, 2002, 471-474; G. Robin, *Le principe de bonne foi dans les contrats internationaux*, in *Revue de droit des affaires internationales - International Business Law Journal* (RDAI) 2005, n. 6, 695-727.

[28] See Article 1:103 (Mandatory Law) '*(1) Where the law otherwise applicable so allows, the parties may choose to have their contract governed by the Principles, with the effect that national mandatory rules are not applicable. (2) Effect should nevertheless be given to those mandatory rules of national, supranational and international law which, according to the relevant rules of private international law, are applicable irrespective of the law governing the contract'.*

established by these Principles'[29]. So, good faith, fair dealing and mandatory rules are three limits of the principle of freedom of contract, intended to ensure a balance[30] **between** the interests of the contracting **parties**[31].

To this end, the European Court of Justice said[32] '*according to the general rules of international law there must be a bona fide performance of every agreement'*.

Good faith and fair dealing are also the most influential principles within the PECL. In fact, Article 1:201 (Good Faith and Fair Dealing) says that *'Each party must act in accordance with good faith and fair dealing. The parties may not exclude or limit this duty*'. It imposes upon each party a duty to observe reasonable standards of fair dealing (and to show due regard for the interests of the other party).

In other words, the PECL refer to good faith and fair dealing:

(a) as a general rule of interpretation of law. Article 1:106 says: *'These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application*'. In the same way, Article 7 CISG provides: '*in the interpretation of this Convention, regard is to be had to its international character and the need to promote uniformity in its application and the*

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[29] On the contrary, Article 6 CISG does not contain a similar limitation to the freedom of contract.

[30] In the case of contractual unbalance and of a party's conduct in contrast with the principle of good faith, Article 4:109 PECL applies as legal remedy 'of new generation'. Article 4:109: *'A party may avoid a contract if, at the time of the conclusion of the contract, the other states party knew or ought to have known of this and, given the circumstances and purpose of the contract, took advantage of the first party's situation in a way which was grossly unfair or took an excessive benefit*'.

[31] Article 7.1.6 PICC states that '*a clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract'*. See D.F. Vagts, Arbitration and the UNIDROIT Principles, in *Contratación Internacional. Comentarios a los Principios sobre los Contratos Comerciales Internacionales del Unidroit*, Universidad Nacional Aut\onoma de México - Universidad Panamericana, México, 1998, 265-277.

[32] See, among others, the case 104/81 ('Hauptzollamt Mainz v Kupferberg & Cie KG a.A), in *Racc*., 1982, 3641).

observance of good faith in international trade';

(b) as a rule of behaviour. In fact Article 1:201 says: *'Each party must act in accordance with good faith and fair dealing*'. Good faith in contract is defined as just and honest conduct, which should be expected by both parties in their dealings, one with another and with third parties.

But the real function of good faith and fair dealing in the PECL can only be understood when one sees the interplay with the other rules and principles.

O'Connor[33] defines good faith as: '*a fundamental principle derived from the rule pacta sunt servanda, and other legal rules, distinctively and directly related to honesty, fairness and reasonableness, the application of which is determined at a particular time by the standards of honesty, fairness and reasonableness prevailing in the community which are considered appropriate for formulation in new or revised legal rules*'.

Therefore, the concept of good faith necessarily involves the concept of reasonableness.

3 The reasonableness test

In a large number of provisions, the PECL make reference to the criterion of reasonableness. Under Article 1:302, *'reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable'*.

According to the first part of the above written definition, reasonableness must be judged by what persons acting in good faith (*i.e.* reasonable persons) and in the same or similar situation as the parties would consider to be reasonable.

But what does the legal term 'reasonable person' mean? Who is a reasonable person? The so-called reasonable person standard is a legal fiction. Its origin must be found in Roman Law[34] where the standard of reasonable

[33] See J.F. O'Connor, *Good Faith In English Law,* Brookfield USA, 1990,102.

[34] See M.T. Cicero, *De officis*, 1, 4, 10-12, 33.

care was that of the *pater familias* or the *bonus pater familias* (*good father of a family*).

A reasonable person would likely be defined as someone who acts reasonably, *i.e.* who exercises a reasonable care. But, to make an objective and impartial determination of the issue, it should be emphasized that the criterion of a reasonable person must be assessed with regard to the conduct of a person of the same kind as the parties, engaged in the same trade or business.

So, the PECL refer to the principle of reasonableness not just as a rule of behaviour, but also as a general rule of interpretation and as the element that characterizes an event.

In the context of contract interpretation, Article 2:102 PECL[35] refers to the conduct of one party, reasonably understood by the other party, but this provision make reference to the above mentioned definition of reasonableness outlined in Article 1:302 PECL.

The same definition of reasonableness can also be used for the application of CISG Article 75 on avoided contract ("*If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74*"). In fact, this Convention does not contain a definition of reasonableness for the application of the criteria above-quoted of *reasonable manner*[36] and *reasonable time*. In this case, reasonableness is the element that characterizes an event.

Moreover, the application of the above definition contained in the PECL is expressly allowed by CISG Article 7(2): '*In the absence of general*

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[35] Article 2:101 PECL (Intention): '*The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party*'.

[36] Examining the '*reasonable manner*', it must be said that the reasonable person's behaviour should be to perform the substitute transaction at the most favorable conditions, *i.e.*, the resale to be made at the highest price reasonably possible in the circumstances, or the cover purchase to be made at the lowest price reasonably possible.

principles on which the CISG is based, such matters are to be settled in conformity with the law applicable by virtue of the rules of private international law'.

The above mentioned Article 1:101 PECL also clarifies that '*these Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so'.*

In this case, a *soft law* document can fill a gap left by a binding *hard law* instrument, but it is not uncommon that international pactional provisions may be supplemented by (or interpreted in the light of) other documents such as the PICC or the PECL.

As previously mentioned, the second part of Article 1:302 contains the definition of reasonableness and also clarifies: '*In particular, in assessing what is reasonable, the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account'.* Similarly, under Article 2:101, all relevant circumstances should be taken into consideration when deciding who and what is reasonable. Primarily, the nature and purpose of the contract should be taken into account. Secondly, the circumstances of the case should be taken into consideration. Thirdly, customs and practices of the professions involved are relevant. These practices generally reflect the reasonable behaviour of the parties.

Well, for the purpose of Article 6:104 PECL[37], in determining whether a price or any other contractual term is fixed in a reasonable manner, comparable contracts made in analogous situations should be considered.

Furthermore, the nature and purpose of the contract, the status of the parties, the usages and practices in the trade or profession concerned should be taken into account. For **determining** the **price,** reasonableness requirements of the PECL can be applied to the interpretation of Article 55 CISG[38]**.**

[37] Art. 6:104 PECL (Determination of Price) '*Where the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price'.*

[38] Art. 55 CISG: *'Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in*

Any reference to circumstances for the reasonableness test can be also found in Article 9:101 PECL[39], that says '*Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance* […] *unless: (a) it could have made a reasonable substitute transaction without significant effort or expense; or (b) performance would be unreasonable in the circumstances'*. Anyway, the injured party is not obliged, under the circumstances, to take unreasonable or excessive measures, those which entail unreasonable high expenses and risks. In other words, performance should not cause the debtor unreasonable effort or expense[40].

The wording of these Articles has probably been influenced by the so-called 'Alaskan Trader' shipping case[41]. The question is simply whether continued performance by one of the contracting parties against the wishes of the other party was reasonable in the circumstances.

On October 19, 1979, the ship 'Alaskan Trader' was chartered for a period of two years. She was delivered under the charter on December 20, 1979, and then performed services on short Mediterranean voyages carrying gas oil. In 1980 the vessel suffered a serious engine breakdown and it was clear that the repairs would take many months. After all repairs were completed (April 1981) the owners informed the charterers that the vessel was again at their disposal. But the charterers declined to give the master of the vessel any orders because they regarded the charterparty as having come to an end. The owners refused to treat the charterers'

the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned'.

39 Art. 9:101 (Monetary Obligations) *'(1) The creditor is entitled to recover money which is due. (2) Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless: (a) it could have made a reasonable substitute transaction without significant effort or expense; or (b) performance would be unreasonable in the circumstances'*.

40 See Article 9:101, § 2, lett. *a)* and *b)* PECL, abovementioned.

41 *Clea Shipping Corp v Bulk Oil International Ltd*(The 'Alaskan Trader'), in *All England Law Reports,* 1984, 1, 129 and in *Lloyd's Rep*., 1983, 2, 646. See especially J. W. Carter, G. Marston, *Repudiation of Contract - Whether Election Fettered*, in *Cambridge Law Journal*, 1985, 44, 18-21.

conduct as a repudiation of the charterparty. They anchored the 'Alaskan Trader' off Piraeus, where she remained with a full crew on board, ready to sail, until the time charter expired.

The Court[42] stated that ownership behaviour intended to complete performance of his side of the contract, without the assent or co-operation of the party in breach was not only merely unlawful but wholly unreasonable in the circumstances, having regard to the usages and practices of the trades or professions involved. In fact, a time charterparty[43] is a shipping contract that – in consideration of its nature and purpose – calls for a close co-operation between both contracting parties (owner and charterer). The Court said that the owners had not the right to elect to disregard the repudiation in the circumstances concerned. They had no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages.

In a similar, recent case-law (*Isabella Shipowners)*[44] the vessel 'Aquafaith' was chartered for a minimum period of sixty months on an amended NYPE[45] form in 2006. In an admitted anticipatory breach of the time charter, the charterers decided to redeliver the vessel. They clarified to the owners that they would have no further use for the vessel during the remaining days of the contract. In July 2011, prior to the vessel being redelivered, the owners began arbitration proceedings aimed at declaring that they were entitled to refuse early redelivery and affirm the charterparty.

The Court concluded that it would be impossible, under these circumstances, to characterise the owners' position in wishing to maintain the contract as 'unreasonable', 'wholly unreasonable', 'extremely unreasonable' or 'perverse'[46] because charterers were in financial difficulty

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42 The *Queen's Bench Division*, UK.

43 See especially L. Tullio, *I contratti di charter party*, Milano, 1981, 59; P.R. Weems, *Time charter parties in the LNG Trade*, in *LNG Journal,* January-February 2001.

44 '*Isabella Shipowners SA v Shagang Shipping Co Ltd'* (The 'Aquafaith'), High Court of England and Wales, judgment handed down on 27 April 2012, in *EWHC*, 2012, 1077.

45 NYPE (*New York Produce Exchange Time Charter*) adopted by the Baltic and International Maritime Council (BIMCO).

46 The judge considered applicable the principle affirmed in another famous case-law:

and might become insolvent. In fact, in this case the contract was governed in different circumstances than the 'Alaska Trader' case-law. In the circumstances concerned, the Court abandoned the idea that a time charterparty is a type of contract involving a high degree of co-operation between the parties (such that the owners could not choose to maintain the contract despite the charterer's repudiation).

In addition, with due regard to circumstances, the PECL also refer to the observance of good faith (and fair dealing) in international trade and in commercial transactions.

Anglo-Saxon doctrine created the new expressions 'commercial reasonableness' and 'commercially reasonable efforts'**.** 'Commercially reasonable', in particular, might include the concepts of proper or best price, true market or fair market value etc. as a central consideration of what is considered reasonable or 'commercially reasonable' from a commercial standpoint. However, the entire phrase has had a little judicial consideration. In particular, according to the 'majority of the majority' Italian doctrine[47], the meaning of this idiom is **unknown** under our legal system.

4 The interplay of reasonableness and foreseeability

This question remains to be answered: **'**Is there an interplay between the principle of reasonableness and the principle of foreseeability?'

'White and Carter (Councils) Limited v. McGregor', in *Appeal Cases*, 1962, 413, in which the Court said: '*if one party to a contract repudiates it, the innocent party has the option of either accepting that repudiation and suing for damages for breach of contract, or refusing to accept the repudiation and affirming the continuation of the contract. If the innocent party can then complete the contract himself, without the need for any action on the part of the contract breaker, he will be in a position to sue for the agreed price. An absence of legitimate interest could, in appropriate circumstances, operate as an exception to the general rule*'.

47 See, among others, A.V. Guccione., *I contratti di garanzia finanziaria*, Milano, 2008, 48.

Article 9:503 PECL[48] says: '*The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent*". The above text (similar wording is found in Article 74 CISG[49]) ties the principle of reasonableness to the principle of foreseeability. More precisely, it refers to 'reasonable foreseeability' in contract law and, in particular, in the field of contract remedies.

The PECL contain a general definition of reasonableness, but do not contain a definition of foreseeability. In fact, although Article 9:503 is entitled 'Foreseeability', it only refers to 'foreseeable loss' or to 'reasonably foreseeable loss'. In this case, foreseeability is referred to the legal classification of an event (*e.g.* foreseeability of the impediment, classification of events as force majeure, *vis maior*, act of God, etc.).

Another reference to foreseeability is contained in Article 9:103[50] *'A non-performance of an obligation is fundamental to the contract if: (a)* [….] *(b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result'.*

So, although letter *b)* is expressly referred to a 'foreseeable result', as a classification of a particular situation, in this special case foreseeability

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48 Art. 9:503 PECL (Foreseeability) '*The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of its non-performance, unless the non-performance was intentional or grossly negligent'.*

49 Art. 74 CISG: '*Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.*'

50 Art. 8:103 PECL (Fundamental Non-Performance). *'A non-performance of an obligation is fundamental to the contract if: (a) strict compliance with the obligation is of the essence of the contract; or (b) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or (c) the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance*'.

refers to foreseeable substantial deprivation of contractual expectations of the aggrieved party.

In spite of the lack of a general definition of foreseeability, it is possible to think that also '*the foreseeability test is confined to cases of negligence, where a party fails to exercise a reasonable degree of care and prudence,* but *in situations where a change of circumstances*[51] *is evident*'[52]. In other words, where a duty of care is imposed, reasonable care should be taken to avoid acts or omission which can reasonably be foreseen to be likely to cause harm to persons or property.

The principle of foreseeability has been applied in many cases. I would like to call attention to a well-known English tort law case, *'Heaven v. Pender'* (1883)[53] which foreshadowed the birth of the modern law of

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[51] Article 6:111 PECL (Change of Circumstances): *'(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract, (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear. (3) If the parties fail to reach agreement within a reasonable period, the court may: (a) end the contract at a date and on terms to be determined by the court ; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing'.* See D.-M. Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle*, Bruxelles, 1986.

[52] So, K. Keilhack, *The Hardship Approach in the Unidroit Principles of International Commercial Contracts and its equivalent in German Law of Obligations – A Comparison*, Munich, 2003, 3.

[53] *Trading As West India Graving Dock Company* ('Heaven v Pender'), in *Queen's Bench Division* (QBD), 1883, 11, 503, Court of Appeal. Similarly, see 'Donoghue v Stevenson' (or so-called "*snail in the bottle*" on the 'neminem non laedere principle'), in *Appeal Cases*, 1932, 562. The facts involved Mrs Donoghue drinking a bottle of ginger beer in a cafe. A snail was in the bottle. She fell ill, and she sued the ginger beer manufacturer, Mr Stevenson. The House of Lords held that the manufacturer owed a duty of care to her, which was breached, because it was reasonably foreseeable that failure to ensure the product's safety would lead to harm of consumers. See, F. Pollock, *The Snail in the Bottle, and Thereafter*, in *Law Quarterly Review.*, 1933, 49, 22.

negligence and the notion of foreseeability.

An owner of a dry dock supplied ropes that supported a stage slung over the side of a ship. The stage failed because they had been previously burned. The failure of the stage injured an employee of an indipendent painting contractor working in the dry dock. The painting contractor had been engaged by the shipowner. Despite the fact that there was no contractual relationship between the dry dock owner that erected the staging and the painting contractor, the dry dock owner was found liable because he had failed in his duty of care to give reasonably careful attention to the condition of the ropes, prior to employing them to hold up the stage.

In particular, the British Court of Appeal stated as follows: '*Whenever one person is by circumstances placed in such a position with regard to another* [...] *that if he did not use ordinary care and skill in his own conduct* [...] *he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger*' (*i.e.* 'foreseeable danger'). In other words, the Court affirmed that the 'ordinary care and skill' was not exercised.

Another leading case in English tort law[54]: *Home Office v. Dorset Yacht Co Ltd* (1970)[55].

On 21 September 1962, some young offenders (borstal trainees)[56] were doing some supervised work in the harbour of Brown Sea Island, under the control of three officers employed by the Home Office[57]. Seven boys escaped one night, at the time the officers had retired to bed, leaving them unsupervised. The trainees who escaped boarded a yacht and collided with another yacht owned by the claimant.

According to the House of Lords' opinion, the Home Office owed a

[54] See G. Williams, *The Aims of the Law of Tort*, in *Current Legal Problems,* 1951, 137; C. Castronovo*, Liability between Contract and Tort*, in T. Wilhelmsson (ed.), *Perspectives of critical contract law*, 1993, 273; S. Deakin, A. Johnston and B. Markesinis, *Tort Law,* Oxford, 2003, 5th ed.

[55] 'Home Office v Dorset Yacht Co Ltd', in *All England Law Reports*, 1970, 2, 294, United Kingdom House of Lords (UKHL).

[56] Borstal is type of youth detention centre in the United Kingdom.

[57] The Home Office is a ministerial department of the Government of the United Kingdom, responsible for immigration, security, and law and order.

'duty of care' to take reasonable care to ensure that their acts or omissions did not cause reasonably foreseeable injury to other people. The competent Ministerial Department was in a position of control over the third party who caused the damage and it was foreseeable that harm would result from the inaction of its officers.

The above mentioned cases share the following common elements: duty of care, position of control and foreseeability of legal consequences.

5 Flexibility: a cross-cutting principle

The last question is: 'What does the term flexibility mean in this context?'.

Actually, very few words are enough for this purpose because the principle of flexibility is a cross-cutting principle that has inspired many provisions of PECL. In fact, these Principles have been defined by Professor Ole Lando as '*a set of general rules which are designed to provide maximum flexibility and thus accommodate future development in legal thinking in the field of contract law*'[58]**.**

So, flexibility represents the fundamental character and intrinsic nature of a rule or principle (so-called 'flexible rule'). **T**he very concept of 'reasonableness' **or '**reasonable foreseeability', taking into considerations the circumstances and usages, should be understood – in contractual interpretation – as a flexible test, according to judicial discretion.

In conclusion, it is demonstrated that reasonableness combines the other two concepts: foreseeability and flexibility. Reasonableness is the core of the PECL. It is not just a principle for interpreting contracts, but also '*a norm integrating additional obligations and terms into the contract and restricting the exercise of contractual rights*'[59]. In fact, while reasonableness is recognised as one of the general principles of contract law and a basic concept (indeed, the PECL contain just the definition

[58] See O. Lando, H. Beale (eds.), *Principles of European Contract Law*, Parts I and II (prepared by the Commission on European Contract Law), The Hague, 2000, XXVII.

[59] So M. E. Storme, *Good Faith and the contents in European Contract Law*, in *Electronic Journal of Comparative Law (EJCL)*, vol. 7.1, March 2003.

of reasonableness), foreseeability is not an autonomous concept, but it depends on reasonableness. In effect, the purpose of the reasonableness test is to determine whether a reasonable person would have foreseen and expected these consequences. But the degree of probability and foreseeability varies – in a flexible manner – depending on the nature of the contract, the liability, the damage etc. Therefore the reasonable test should concentrate on those factors – interpreted in a flexible and dynamic manner – that make reasonable (or unreasonable) the behaviour of the contracting parties.

Flexibility, foreseeability, reasonableness in shipping contracts : the civil law approach

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1. Shipping contracts are various and diverse

We know carriage of goods by sea, marine insurances, stevedore contracts, agencies contracts and so on. Some of them have a name under civil law. It is the case of : contract of sale of goods (FOB, CIF, …) ; shipbuilding contracts ; classification contracts ; management contracts affreightments (C/P) ; carriage of goods (B/L)[1] ; insurance contracts ; agency contracts ; deposit contracts … Other are "sui generis" and do not have a name, like management agreements, financial agreements or forward freight agreements. But, all of them are binding, if they are legally concluded.

2. What are precisely the rules governing such contracts ?

Some are mandatory and therefore foreseeable. Some are optional or additional.

Under international conventions, most of the time, the provisions are mandatory[2].

Under Civil code, it is not always easy to identify whether the provisions are optional or not. When the provision is silent, it is up to case law to decide. For instance, case law decides that non warranty clauses[3] are null or void in all contracts, except if the parties are professional in the same field.

We must add that both contracts, named or unnamed, are submitted to the test of reasonableness. Under civil code, agreements lawfully entered into are equivalent to laws and the must be performed in good

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1 Contract of goods is a type of « locatio operis », i.e. a hiring of work, namely a contract by which one of the parties binds himself to do something for the other, at a charge of a price agreed between them.

2 See HVR, art. 3.8 : "any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage … shall be null and void and of no effect" ; comp. Salvage convention 1989 applying to any salvage operations save to the extent that a contract otherwise provides expressly or by implication ; Vienna Sale convention, art. 6 : "the parties may exclude the application of this Convention or, subject to art. 12, derogate from or vary the effect o any of its provision".

3 In French law : « Clauses de non garantie ou limitatives de garantie ».

faith (art. 1134, al. 1 and 3). Precisely, the rule on the which the contract must be performed in good faith leads to the present consequence: the judge can therefore set aside a clause which be used in an unfaithful way. Indeed, duplicity is the opposite of good faith. Good faith leads to have an honest behavior, i.e. to have a loyal and honest attitude, but does not extend to a duty of cooperation.

3. Is it different under common law ?

In my opinion both systems set forward two different points.

Common law : flexibility first.

Civil law : foreseeability first.

But in fact, as we will understand, it is not black or white, good or bad. Both systems make room for the other point, which means that both systems are not that different and converge. Under civil law, freedom of contract is favored and highlighted, especially in international contracts: hardship clauses, jurisdiction clauses, arbitration clauses, exemption clauses are quite valid and binding. While under common law or English law, we have an increasing number of mandatory rules due to EU regulation.

4. Of course, it is not possible to speak about all the contracts.

I have to exclude from this discussion consumer contracts, namely now carriage of passengers because the new European regulation states that this kind of contract is very specific.

To exclude also salvage contract, because civil law does not apply to this kind of contract: I have never seen a salvage contract governed by French law.

To exclude equally insurance contract, because this kind of contract is too specialized.

But I will consider domestic contracts and international contracts, given that international contracts are more open to freedom of contract than domestic contracts. After having said that, I would underline two points. On one hand, flexibility is, at first glance, seminal in certain

contracts. Yet mandatory rules are increasing. On the other hand, in other maritime contracts, foreseeability is influencial and one cannot underestimate the importance of freedom of contract.

I. Flexibility, but …

5. This observation seems true for two main contracts : affreightments or charter parties and sui generis maritime contracts.

A. Charter parties

6. As for charter parties, charter parties are documents and not contracts.

Affreightment is a contract, at least, under French law, where we distinguish between voyage charter-party, time charter and bare-boat charter. Under common law, affreightment is a volume contract. Anyway, we can distinguish between "voyage charter", a kind of carriage of goods, a hire of work, a *locatio operis;* and "time charter", a kind of hire of thing, a simple hire. In these contracts, freedom of contract is a principle. Arbitration clauses are valid, like force majeure clauses, ice clauses, war clauses, deviation clauses … These clauses are sometimes strictly construed because of the rule of "contra proferentem". Besides, they are submitted to the test of reasonableness. But I have to add that some clauses are not always as valid or efficient as one might think. Freedom of contract – the principle in charter parties – has some limits. For example, a hardship clause is valid, but its implementation raises three questions.

First, which event triggers the hardship clause ? Three conditions must be fulfilled in relation with this event. It has to be external, unexpected and frustrating. In award 1172 (Chambre Arbitrale Maritime de Paris, feb. 3 rd 2010), the arbitrators decided that any increase of freight rates on the market, as extensive as they might have been, could not

justify the reference to a hardship situation. Freight had been freely negotiated and agreed. Equally extensive increase of owner expenses (port costs and overheads) could not be considered as a hardship situation, because they were predictable at the time of entering into the contract.

In award 1170 (CAMP, dec. 3rd 2010), the same situation has been ruled by a panel of arbitrators. In this case, the charterers considered that their default in the performance of the contract was due to an unforeseen overthrow of the iron market during the last quarterly of 2008. As for the charterers, there has been a gap between the financial events linked to the worldwide economic situation and the demand for iron, notably in China. For the arbitrators, the conditions of the hardship clause were not met. At the time of the contract, there already appeared some signs of uncertainty concerning the short term perspectives of the worldwide production of iron and that the charterer had taken a risk by concluding the contract three months earlier than the beginning of its execution.

Second, what do the parties have to do? The aim is to restore the balance of the agreement. The parties have to discuss with bona fide. The concept of bona fide refers, under French law, to loyalty. It is the opposite of duplicity.

Third, what happens if the parties cannot reach a new agreement ? Is it a cause of termination ? Does the contract have to be performed as it is ? If the parties fail to reach an agreement within a reasonable period of time, two solutions are prima facie conceivable :

- end the contract at a date and according to the terms determined by the parties ;
- adapt the contract in order to distribute between the parties, in a just and equitable manner, the losses and gains resulting from the change of circumstances.

But, if the parties cannot reach an agreement, and if the hardship clause does not grant to judges or arbitrators any ability to adjust their contract, this contract is always binding and continues to take the place of the law for the parties.

7. As we have seen and to summarise, the hardship clauses are valid, but they compel the parties to adjust their contract, to modify their contract only if the conditions foreseen by the parties are met.

8. Exemption clauses are also valid, but their regime is nevertheless different.

The principle is clear: It is the validity of the clauses (see Code civil, art. 1134). Under French law, where a party seeks to avoid liability on a clause exempting him from liability which is contained in the contract and accepted by the other party, that clause is inapplicable only if there has been intentional fault or gross negligence on the part of the party invoking it.

According to French law, an exclusion of liability arising from the law in torts is void.

Besides, any clause in a consumer contract shall be regarded as unfair if its object or its effect is to create, to the detriment of that consumer, a significant imbalance in the rights and obligations of the parties to the contract. On the other hand, when the parties are professionals, as in charter parties, the exemptions are valid, but only in the terms of general law.

B. Sui generis maritime contracts

9. As for sui generis contracts, we can make the same observation:

Flexibility but … In the first glance, the main issue was that of validity or nullity of exemption clauses. Now, case law, especially in classification contracts, does not accept exclusion clauses. Case law accepts only limitation liability clauses. Consequently, the practice only provides for clauses which limit liability and not which exclude liability.

10. Yet, one has to stress that these clauses have no effect against third parties.

Indeed in classification contracts, the solution is now well improved

and especially since the Wellborn case[4]. Near Madagascar, there was a strong hurricane and the Welborn sunk. All of the goods carried by the ship were destroyed. The ship was a very old ship, but she had all her certificates. Those certificates were too optimistic. The cargo interests sued the classification society to obtain damages and not the company of carriage. The Cour de cassation, said yes : it is possible to sue the classification society under article 1382 of Code civil. The reasoning is this one : the society has committed a contractual fault vis-à-vis ship owner. This fault is at the same time an extra contractual fault vis-à-vis third parties and especially vis-à-vis shipper or consignee. So, this kind of fault is a source of liability for the classification society.

11. I think it will be the same for management contracts where we find many exemption clauses.

I am not sure that they are always fully valid. In fact, the clauses are less severe and they do not seek to exclude liability, but only to limit this liability.

So, we could accept this kind of clause : "The managers shall be under no liability whatsoever to the owners for any loss, damage, delay or expenses of whatsoever nature, where direct or indirect (including but not limited to loss or profit arising out of or in connection with detention of or delay to the vessel) and howsoever arising in the course of performance of the management services, unless same is proved to have resulted solely from the negligence, gross negligence or willful default of the managers or their employees or agents or sub-contractors employed by them in connection with the vessel, in which case . The managers' liability for each incident or series of incidents giving rise to a claim or claims shall never exceed a total off ten times the annual management fee payable hereunder".

[4] Cass. com. 27 mars 2007, DMF 2007, 750, obs. Bonassies.

II. Foreseeability, but …

12. This remark is true in many contracts, in carriage of goods, shipbuilding contracts and, perhaps, in agency contracts.

A. Carriage of goods.

13. For a long time, carriage of goods was the best example of a strict contract governed by mandatory rules.

It is not always the case now. *FI0* clauses are today considered as valid: In this case, the carrier's responsibility is among other things loading, handling, stowing and unloading the goods. The ability of the shipper to assume some or all these responsibilities can vary. The parties may agree to such an arrangement. This reference is achieved by some variation of a *FI0* clause. Is this kind of clause valid ? Under HVR, this becomes up for discussion. Under English law, the carrier may lawfully transfer to shipper, consignees and charterers both the responsibility for paying for and the liability for performance of loading, stowing and discharging cargo. Clauses to this effect are compatible with art. 3.2 of the HVR and therefore they are not void under art. 3.8 (*The Jordan* II 2005, 1, Lloyds Rep. 57 2005 AMC 1 HL). Under French law, case law is quite severe. Loading and unloading are considered as mandatory obligations. In those conditions, *FI0* clauses are void (Cass. com. 30 nov. 2010, Khairpur, DMF 2011, 261).

14. De lege ferenda, to morrow, when the Rotterdam Rules will be ratified, under volume contracts, the principle will be freedom of contract.

Freedom of contract is duly admitted, but with some guidance.

According to art. 80, a volume contract to which the RR apply may provide for greater or lesser rights, obligations and liabilities than those

imposed by the Convention. But a derogation is binding only if the volume contract contains a prominent statement that it derogates from the Convention, if the volume contract is individually negotiated or prominently specifies the sections of volume contract containing the derogations, if the shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with the Convention without any derogation, and the derogation is neither incorporated by reference from another document nor included in a contract of adhesion that is not subject to negotiation.

Besides, a volume contract cannot derogate to fundamental obligations of the carrier (specified by art. 14 a. and b.) or of the shipper (specified by art. 29 and 32).

B. Other contracts.

15. First, in shipbuilding contracts, non warranty clauses are considered for 30 years as null by consideration of public policy.

Case law was very severe against these kinds of clauses. Is it always the case? I am not sure of that. In arbitration under French law, we admit clauses that limit the warranty of the shipbuilder. We recognize and give force to clauses that frame the warranty within a period of time.

16. Second observation: in agency contracts, we find special clauses organizing the termination of the contract.

For example, a clause which includes in the remuneration / reimbursement the amount of the indemnity eventually provided. Under French domestic law, this kind of clause is void (C. com. art. L. 134-16)[5]. Why ? Because the agent and especially the ship agent is protected. If his contract is terminated, he may obtain indemnities calculated in consideration of fees obtained during the two last year exercises. This solution is the consequence of a European directive (1986). Under English law, the

[5] See Cass. com. 17 juin 2003, Bull. civ. IV, n° 99.

solution is different, because the European directive has not been implemented as under French law. The English commercial agent act 1993 does not apply to ship agents. So, the clauses that I have quoted is valid. Therefore, most of the time ship agency contracts are governed by English law. I wonder if – when this kind of contract is international – it would not be necessary to change and to admit the clause I have discussed. My answer is yes.

17. To conclude, one cannot be too simplistic.

As you may guess and you probably will be surprised to learn, civil law is more flexible than it appears prima facie. Old Europe has always something good to offer.

Flexibility, foreseeability and reasonableness in relation to the Nordic Marine Insurance Plan 2013

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Innhold

1 Introduction

The topic for this paper is flexibility, foreseeability and reasonableness in regard to the Nordic Marine Insurance Plan 2013. The Nordic Marine Insurance Plan 2013 is a new marine insurance contract for the Nordic marine insurance market, based mainly on the Norwegian Marine Insurance Plan 1996, Version 2010.

Considerations concerning flexibility, foreseeability and reasonableness are important in any contractual context. Often, such considerations are secured by the use of international or national mandatory regimes like an international convention or national legislation. Even if there have been attempts of international harmonization for marine insurance, none of these attempts have succeeded in creating an internationally harmonized regulation. Further, in the Nordic countries, there is limited mandatory insurance regulation that applies to marine insurance. Instead, marine insurance has for more than a century been regulated in the form of agreed documents through a method that is very similar to law making.[1]

The purpose of this paper is to demonstrate that the method that is used for making this contract has secured that considerations concerning flexibility, foreseeability and reasonableness have been properly evaluated and balanced. The three mentioned concepts will therefore be analyzed in the light of the method of drafting and maintaining the Marine Insurance Plan, the method for construction of the contract and some of the material solutions that are chosen. To the extent the findings in relation to the Plan departs from systems in other countries, in particular the UK market, this will be remarked upon. Before this analysis, a short overview of the legal sources of this paper is presented, and also an overview of some main elements of a marine insurance contract is provided.

[1] Hans Jacob Bull, "Avtalte standardvilkår som privat lovgivning", *Lov, dom og bok*, Festskrift til Sjur Brækhus, red. Thor Falkanger, Oslo 1988, p. 99–114.

2 The legal sources

2.1 Legislation

The four Scandinavian countries previously had a common Insurance Contract Act (ICA), dating from around 1930. This act was discretionary unless there was a provision to the contrary, but contained several mandatory rules that also applied to marine insurance. This act still applies in Denmark, although it was amended in 2003.[2] The other three Scandinavian countries have new ICAs.[3] The approach in Norway, Sweden and Finland, is that the insurance regulation is generally mandatory, but marine insurance is excluded.[4] Accordingly, in Norway, Sweden and Finland there is full contractual freedom in relation to hull insurance.

The Danish ICA contains general provisions that apply to all kinds of insurance as well as separate provisions applicable to marine insurance. The latter provisions are not mandatory and have been in little use as these rules are contained in the more specific Danish Marine Insurance Convention. From 2013, these rules will be found in the Nordic Plan.

The Scandinavian legislation also contains a common rule concerning unfair contracts, stating that contracts that provide for unfair results may be set aside partly or in full. [5] This rule is mandatory and applies also to professional contracts.

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2 Danish Insurance Contracts Act dated 15 April 1930 (Danish ICA), as amended by Act no. 434 10 June 2003 and Act. no. 451 9 June 2004.

3 Norwegian Insurance Contracts Act (Norwegian ICA) dated 16 June 1989, Swedish Insurance Contracts Act 2005:104 (Swedish ICA), Finnish Insurance Contracts Act 28 June 1994 (Finnish ICA).

4 Norwegian ICA section 1-3 second sub paragraph letter (c), excluding insurance in relation to ships that have to be registered according to the Maritime Code of 24 June 1994, Swedish ICA chapter 1 § 6 cf, § 7 excluding commercial marine insurance, and Finnish ICA § 3 third subparagraph, excluding commercial marine insurance.

5 Norsk avtalelov av 31. mai 1918 nr. 4 § 36, dansk Lov om aftaler og andre retshandler på formuerettens område, Lovbog nr. 600 af 8. september 1986 § 36, svensk Lag om avtal och andra rättshandlingar på förmögenhetsrättens område (1915:218) § 36, finsk Lag om rättshandlinger på förmögenhetsrättens område (1982/956) § 36.

2.2 The Plan and the Commentaries

The Nordic countries will from January 2013 have a common Nordic Marine Insurance Plan 2013 (NP). This Plan is based on the Norwegian Marine Insurance Plan 1996 Version 2010 (NMIP). The Plan contains general insurance conditions for hull and machinery,[6] and also special insurance conditions for total loss insurance, [7] war risk insurance,[8] loss of hire insurance,[9] and insurance conditions for fishing boats and freighters, mobile offshore units and builders risk.[10] Part I of the Plan contains general provisions that apply to all the different types of cover.

The Norwegian Plan is an agreed document with a very long history. The first Plan was published in 1871. It was amended in 1881, 1907, 1930, 1964 and 1996. When the 1996 Plan was made, a Standing Revision Committee was established to make a continuous maintenance of the Plan possible. The 1996 Plan therefore is published in several different versions: the versions of 1997, 1999, 2000, 2002, 2003, 2007 and 2010.

The Plan has traditionally been accompanied with a comprehensive set of Commentaries. All versions of the Commentaries until 2007 except for the 2003 version are published. The 1997 and 1999 versions are published as books.[11] The 2002, 2007 and 2010 versions of the Commentaries are published on Cefor's web site.[12] The Commentary contains a written synopsis of the negotiations in the drafting committee and provides a lot of information in regard to the interpretation of the provisions. This information consist of defining the concepts and expressions that are used in the clauses, explanation of the purpose of the different clauses and the policy considerations that the Committee has considered relevant, and the reason for any amendments in the provisions.

6 Chapters 10-13.

7 Chapter 14.

8 Chapter 15.

9 Chapter 16.

10 Chapters 17-19.

11 Commentary to Norwegian Marine Insurance Plan 1996, Version 1999, Det Norske Veritas, Oslo 1999.

12 http://www.norwegianplan.no/eng/index.htm To simplify references, I will here refer to Commentary 1999 unless the presentation concerns later amendments.

The Plan contains no explicit reference to the Commentary, but the Commentary states that:

> "The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. This is in keeping with the approach of the 1964 Plan. Nevertheless the Commentary shall still carry more interpretative weight than is normally the case with preparatory works of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Revision Committee, and it must therefore be regarded as a part of the standard contract which the Plan constitutes."[13]

This attitude of the Committee is accepted in Norwegian court practice, where it is stated that the Commentary to standard contracts in general, and in particular for the marine insurance conditions, constitutes a preparatory document which is given significant weight for the interpretation of the conditions.[14] Of particular importance here is the following statement in an arbitration case from 2000 made by three distinguished Norwegian professors:[15]

> "It is generally accepted that preparatory documents to standard contracts can be of significance when interpreting the contract. This is in particular true for the marine insurance plans where the method of drafting implies that the text must be read in conjunction with the Commentary" (my translation).

2.3 Some international sources used for comparison

The main international marine insurance market is the UK market. It is

[13] Commentary Version 1999 p. 17.

[14] The status of preparatory documents to contractual regulation is discussed in ND 2000.442 NA *Sitakathrine,* ND 1998.216 NSC *Ocean Blessing*, ND 1991.204, NSC *Hardhaus,* ND 1978.139 NA *Stolt Condor, cf.* also Trine-Lise Wilhelmsen and Hans Jacob Bull, *Handbook in hull insurance*, Oslo 2007 (Wilhelmsen/Bull), pp. 29–30, and Hans Jacob Bull, "Avtalte standardvilkår som privat lovgivning", *Lov, dom og bok*, Festskrift til Sjur Brækhus, ed. Thor Falkanger, Oslo 1988, pp. 99–114, at pp. 110–111.

[15] ND 2000.442 NA (Falkanger, Brækhus, Bull) *Sitakathrine* pp. 449–450.

therefore convenient to make some comparisons with the UK regulation to highlight the considerations in the Plan. In the UK, marine insurance is regulated partly by the Marine Insurance Act of 1906 (MIA) and partly by insurance conditions.

The UK marine insurance market is divided between Lloyd's and the London Companies Market, which effect insurance on identical conditions developed by the insurers. The main set of insurance clauses covering hull insurance for ocean-going ships is the "Institute Times Clauses - Hulls" (ITCH). The newest set of ITCH is from 1995, but apparently 75 % of the market is still using the previous ITCH 1983. The main reason for this seems to be considerations of foreseeability as these clauses are well known in the market and tested in the court system.[16]

As a result of international criticism of both the MIA and the ITCH, the UK market put forward a new set of International Hull Clauses in 2002, which were amended in 2003.[17] Comparison is here made with the ITCH 1983 as the most used and the IHC 2003 as the most modern clauses.

Another major player in the international marine insurance market is France. France has similar to the Nordic countries a general insurance contract act.[18] This act contains a chapter on marine insurance. The main regulation is however the French Hull Conditions. These were completely revised in 2010. The new set of clauses is named "The Marine Hull and Machinery Insurance Package", and is an agreed document. It provides for hull insurance, war insurance, loss of hire insurance and "additional clauses". It is supplemented with "Commentaries", which "makes a general presentation and sheds light of one or another of its provisions". [19]

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16 Wilhelmsen/Bull p. 36, cf. also Arnould's *Law of Marine Insurance and Average*, 7 ed., Lnd. 2008, p. 815 (19-32).

17 John Hare," Report of the CMI Standing Committee", *CMI Yearbook 2005/2006* (Hare 2005/2006) p 391.

18 Loi no 67-522 du 3 juillet 1967 Title VIII sur les assurances maritime. The relevant provisions are translated by the Association Francaise du Droit Maritime and included in an annex to Commentaries to The Marine Hull and Machinery Insurance Package 1 July 2010.

19 Commentaries The Marine Hull and Machinery Insurance Package (French Form dated July 1, 2010).

However, the significance and weight of these commentaries are not clear.

3 Some main elements of the marine insurance contract

Insurance means that the person buying insurance transfers unwanted risk to the insurer against a premium to cover this risk and the administration of the insurance. For the person effecting the insurance it is therefore important that the cover of the risk is suitable to his need, whereas the insurer needs information about the risk in order to calculate a sufficient premium to cover his costs, and also that the assured acts as a prudent owner to take care of the insured object.

In a marine insurance contract for hull and machinery, these issues are dealt with through the regulation of scope of cover, valuation of the object insured, and provisions concerning duty of disclosure and due care. Considerations concerning flexibility, foreseeability and reasonableness will therefore in this paper be tied to these issues.

The scope of cover is a heading for several different problems: The first issue is the definition of the perils that are insured. The second issue is the definition of the insured event, i.e. the event that the perils insured against must materialize through in order to trigger the insurer's liability. The third issue is the definition of the losses covered. And the last issue is the question of causation, which applies both to the chain of events from the peril insured to the casualty, and from the casualty to the loss.

Valuation of the object insured is defined as the objective value of the insured interest and will decide the maximum of the insurer's liability in case of a casualty.

The regulation of the duties of disclosure and due care defines two main issues. The first is the duty of disclosure of the person effecting the insurance at the point in time the contract is entered into. The second is the duties of the assured during the contractual period. In the Nordic

system, these duties are divided into several rules: The first set of rules concern alteration of risk. The second set of rules concern safety regulation. And the last set of rules is rules on the assured's causation of the casualty. Here, focus will be on alteration of risk and safety regulation, as these are the most practical in insurance for ocean going ships.

4 Flexibility

4.1 Concept and overview

"Flexibility" means elasticity as opposed to stiff or rigid. In relation to legal contracts it means that the contract should be able to bend to withstand pressure, or is adjustable to a change in the circumstances. For a marine insurance contract a change in the circumstances may relate to the need for insurance protection on the part of the assured, or the ability to offer such protection on the part of the insurer. These kinds of changes can be on a general or an individual level.

In a general perspective, flexibility is needed in relation to the insurance contract as such so that it is adjusted to changes in the shipping community and the general need for insurance protection. The Nordic Plan secures this requirement through two different aspects. The first aspect is the continuous development of the conditions in the Plan through the Standing Revision Committee, cf. 4.2. The second aspect is the use of the concept of safety regulations, which means that the Plan automatically follows the developments in the rules concerning safety at sea, see 4.3.

The individual aspect of flexibility is the requirement that the marine insurance contract should be adjusted to the need of the individual customers and to changes in the assureds needs during the insurance period. The first requirement for flexibility is solved through the negotiation process and dealt with below in 4.4. The changes in the need for protection will mainly concern changes in the risks that are covered (4.5)

and changes in the valuation of the insured object (4.6). A general issue here is also the possibility to cancel the contract before the contractual period is ended, see 4.7.

4.2 Adjusting to changes in the shipping industry

Similar to legislation, amendments of agreed documents normally take a lot of time. The time and resources needed to negotiate amendments will prohibit frequent changes. In the Nordic system this is illustrated by the time span between the three latest Plan revisions, which took place in 1930, 1964 and 1996. However, when the 1996 Plan was made, a Standing Revision Committee was established to make a continuous maintenance of the Plan possible. Therefore the 1996 Plan came in 8 different versions during 14 years. In 2007, it was decided that a 3 year time span for each version normally would be convenient. The next Plan, which is the Nordic Plan, will therefore be dated 2013.

In the Nordic Plan Agreement, it is decided that the system with a Standing Revision Committee shall be continued. [20] The Agreement further outlines the proceedings and time frame for proposing amendments, and states that the revisions following the entering into force of the 2013 Plan shall be every third year.[21] This system is to my knowledge quite unique in marine insurance contracts, and secures flexibility in relation to changes in the shipping industry that requires adjustment of the insurance conditions.

The significance of this flexibility is demonstrated through the development of some important clauses. Firstly, the Plan of 1996 inserted very strict rules concerning loss of class and change of classification society. This was in conformity with the international approach to these issues after serious problems with sub standard ships. However, in 2007 it was agreed that a less strict regime was sufficient for change of class, and this rule was therefore amended.[22] At the same time, the rules on

[20] Agreement clause 2.

[21] Agreement clause 4 first paragraph.

[22] According to NMIP 1996 § 3-14 second sub paragraph change of classification Society resulted in termination of the contract. In the 2007 Version this was changed

safety regulation and seaworthiness were simplified and modernized to adjust to the new Norwegian legislation on Ship Safety.[23] The problems with the millennium date was solved by a separate safety regulation in 1999, which was deleted when the problem no longer existed in 2002. [24] A similar development is lacking in UK, where the regulation of these issues still follows the approach mapped out in the MIA 1906 as developed in the ITCH 1983.[25]

The 1996 Plan also simplified the coverage for lack of maintenance and wear and tear, and error in material and design.[26] The regulation was further simplified and the cover extended in 2007. Again the English system is lagging behind: The regulation of lack of maintenance and error in material and design in the English clauses conforms to the regulation the Norwegian Plan of 1964.[27]

Further, the Plan was adjusted to deal with problems connected to terrorism in 2002[28] and 2007,[29] and with piracy in 2010.[30]

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to alteration of risk, cf. 2007 Version § 3-8 second sub paragraph, and further below in 6.3.

23 Commentary Version 2007, Introduction to chapter 3 part 3, cf. further below in 6.3.

24 NMIP 1996 Version 1999 § 3-24A Failure to recognize the millennium change date, deleted in Version 2002.

25 MIA sec. 33, cf. further Wilhelmsen "Issues of marine insurance. Duty of disclosure, duty of good faith, alteration of risk and warranties", in *SIMPLY Scandinavian Institute Yearbook of maritime and petroleum law* 2001, (Wilhelmsen 2001), ch. 6, ITCH clause 4.1 and IHC clause 13.1.1 and 13.1.2 ref. 13.2. The same is partly true for the FHC, cf. FHC 2.1.

26 Cf. Wilhemsen, "Hull insurance of "Latent Defects" – i.e. Error in Design, Material or Workmanship", *Scandinavian Studies in Law* Volume 46, pp. 257-285 (Wilhelmsen 2004), Wilhelmsen/Bull p. 259 ff and Sjur Brækhus and Alex Rein, *Håndbok i kaskoforsikring*, Oslo 1993, pp. 86 ff.

27 Cf. IHC 2.2.1 og 2.2.2, ITCH Inchmaree Clause, and NMIP 1964 § 174, cf. Wilhelmsen 2004 s. 271-282.

28 The words "acts of terrorism" was included in NMIP Clause 2-9 sub clause 1 letter c in the 2002 Version, cf. also the Commentary 2002 to this letter.

29 The RACE II clause was inserted in NMIP Clauses 2-8 letter d and Clause 2-9 sub-clause 2 letter b in Version 2007, cf. also the Commentary 2007 to these provisions.

30 Piracy is covered as a war peril according to NMIP Clause 2-9 sub-clause 1 letter d from 1996. The wording was not amended in 2010, but the definition of the concept of "piracy" was extended in the 2010 Version of the Commentary to adher to the assureds need for better protection under the war risk insurance.

4.3 Flexibility in relation to safety rules

Marine insurance is dealing with casualties. Rules on safety at sea are very important to reduce the risk for casualties and liability for the insurers. It is therefore important that the insurance contract adapt to changes in these rules. The three year maintenance program explained above makes it possible to consider any changes in the safety regulation. However, the Nordic insurance legislation has traditionally solved this particular issue through the concept of safety regulation as part of the assured's duty of care according to the contract. The concept of safety regulation is included in the Nordic ICAs[31], and has also always been a part of the marine insurance conditions.

The Nordic Plan follows this tradition. A safety regulation is defined as a "rule concerning measures for the prevention of loss, issued by public authorities, stipulated in the insurance contract, or issued by the classification society."[32] The expression "public authorities" includes all public authorities that have jurisdiction over the ship. This will first and foremost be the ship's flag state authorities, but also rules provided by port state authorities or coast state authorities will be relevant if these rules are legally binding for the ship owner in question.[33] Further, all such rules made by the ship's classification society will be included in this concept. This means that all changes made in such rules will automatically and immediately be included in the marine insurance contract without any activity by the parties involved. The assured has to comply with these rules. If a negligent breach of the rules results in a casualty, the insurer will be freed from liability.[34]

The UK and French regulation contain a similar flexibility through requirements of seaworthiness. [35] This regulation is however from a Nordic perspective less convenient in regard to foreseeability and reasonableness, cf. further below in 6.3.

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31 Cf. today Norwegian ICA § 4-8, Danish ICA § 51.

32 NMIP clause 3-22 sub-clause 1.

33 Commentary 1999 p. 107, Ingrid Solum, "Sikkerhetsregulering og kaskoforsikring av skip", *MarIus* no. 399, pp. 65-67.

34 NMIP Clause 3-25 sub-clause 1.

35 FHC 2.1.1 A/b), 2.1.2 and 2.1.3, IHC 13.1.3, 13.1.4 and 13.1.5.

4.4 Individual flexibility as to the content of the contract

The Plan is an agreed document, and thus not mandatory between the parties, who are free to agree to other conditions. As there is no mandatory regulation in the Nordic countries except for Denmark, there is mostly full contractual freedom. However, the normal situation is that the Plan is used as a basis for the contract without individual adjustments. As the Plan system has survived for almost 150 years, it may be presumed that the need for individual flexibility in relation to the main content of the contract is so limited that agreed clauses constitute a more cost efficient contractual tool than individual negotiations over each contract. This may partly be explained by the maintenance program that secures continuous adjustments, but the use of extensive standard contracts is a general feature in the international marine insurance market.

The sharing of risk in relation to the scope of cover and duty of disclosure and due care thus is as a main rule standardized. There is however, one exception: there are several alternative rules in regard to losses covered, allowing the assured to choose between "full conditions", and more limited cover against "total loss only" or "on stranding terms".[36]

There is more flexibility in relation to the rules concerning the sharing of risk of the values involved. The rules define the insurable value of the interest insured, but it is the assured who chooses which method of valuation that he wants to use and to what extent he wants to be self insured. The concept of insurable value is defined as the full value of the ship at the inception of the insurance period,[37] but the value can be open, i.e. it will be calculated when the damage occur, or assessed, i.e. fixed to a certain amount between the parties when the insurance is entered into.[38] The approach most commonly used is to assess the value to avoid any uncertainty.

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[36] NMIP Clause 10-4 to 10-8. Apparently, insurance on limited conditions is however not common, and mostly used when the ship is being towed for scrapping, cf. Wilhelmsen/Bull pp. 106 and 107.

[37] NMIP Clause 2-2.

[38] NMIP Clause 2-3 sub-clause 1.

Self-insurance can be obtained either through so-called underinsurance, or through the use of deductibles. Underinsurance occurs when the sum insured, which is the sum the assured decides to insure his interest for, is set lower than the assessed insurable value. In this case, the insurer shall only compensate a portion of the loss corresponding to the proportion that the sum insured bears to the insurable value.[39] This approach means that the assured carries a proportion of any loss himself.

A more normal approach to self insurance is the use of deductibles. The Plan provides for a general deductible tied to each separate casualty.[40] The provision regulates what constitute a casualty in certain circumstances, but it is up to the assured to decide the amount that shall be deducted. This will then depend on his risk management and attitude to risk. The Plan also contains special deductibles for ice damage and machinery damage.[41] These have traditionally been calculated as 25 % of the damage, but in the Nordic Plan all deductibles are to be decided by the assured.

4.5 Alteration of risk

When a marine insurance contract is effected, the insurer will calculate the premium to be paid based on certain presumptions. It is important for the insurer that these presumptions do not change during the insurance period. Such presumptions are normally regulated through clauses termed "alteration of risk" or "warranties".[42] The Plan uses the "alteration of risk" concept, and contains several clauses defining risk factors that are not supposed to be changed. This is true for the State of registration, management, ownership, classification society and class of the ship.[43] Further, it is presumed that the ship's activity is legal and performed

39 NMIP/NP Clause 2-4.

40 NMIP/NP Clause 12-18 for hull casualties, Clause 13-4 for collision liability, Clause 16-7 for loss of hire. This kind of risk sharing is also provided for in ITCH 12, IHC 15 and FHC 4.1.3.

41 NMIP/NP Clauses 12-15 and 12-16.

42 Cf. further Wilhelmsen (2001) ch. 5 and 6.

43 NMIP/NP Clause 3-8 sub-clause 2, Clause 3-14, Clause 3-21.

within a defined trading area.[44]

The Plan also contain a general provision stating that an

> "alteration of risk occurs when there is a change in the circumstances, which according to the contract, are to form the basis of the insurance, and the risk is thereby altered contrary to the implied conditions of the contract".[45]

Some of the defined risk factors are considered to be of such importance that the insurer will not accept any changes, and the insurance will terminate if the risk is changed. This is the case for loss of class, change of ownership, if the ship is primarily used for the furtherance of illegal purposes, and if the ship sails in excluded trading areas.[46] This is in conformity with the UK and French regulation.[47]

In relation to the other risk factors defined, however, the assured is allowed to alter the risk. The same is true in regard to risks that are deemed to "form the basis of the insurance", but do not fall into any of the particular categories mentioned. However, a certain procedure must be followed in order to be covered when there is an alteration of the risk. The assured must, in order to be covered, notify the insurer about the change of risk without undue delay.[48] The insurer may then decide to accept the alteration with no extra payment. But the insurer is allowed to cancel the insurance by giving 14 days notice.[49] This also means that he can continue the coverage, but claim a higher premium to compensate for the added risk. If the insurer is not notified, an alteration of the mentioned risks will on certain conditions result in freedom of liability

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44 NMIP/NP Clause 3-15 and Clause 3-16.

45 NMIP/NP Clause 3-8 sub-clause 1.

46 NMIP/NP Clause 3-14 sub-clause 2, Clause 3-21, Clause 3-16 sub-clause 3, Clause 3-15 sub-clause 3.

47 Cf. for instance FHC 2.1.1, ITCH clause 4.1 and IHC clause 13.1.1 and 13.1.2 cf. 13.2, Wilhelmsen/Bull p. 156 and pp. 159-160 concerning change of class, MIA sec 5 and FICA L 171-3 concerning illegal interests and FHC 2.6 D/ and IHC 14.1 cf. 14.2 for change of ownership.

48 NMIP/NP Clause 3-11.

49 NMIP/NP Clause 3-10.

for any resulting casualty.[50] The NP here contains more flexibility than the UK and French conditions, where change of classification society, flag and management result in automatic termination of the contract. [51]

4.6 Amendments of the assessed insurable value

As mentioned above the insurable value in marine insurance contracts according to the NP will normally be assessed. The sum insured will also normally be set equal to the assessed insurable value in order to avoid under insurance. If the market fluctuates, the market value of the ship when a casualty occurs may depart from the assessed value and sum insured. In such cases both parties may want to require that the insurable value is changed. Where the market value goes up, the assured may want to raise the assessed value and sum insured in order for the interest to be fully insured, particularly if this is a condition in the loan agreement for the ship. On the other hand, as the premium is calculated based on the sum insured, the assured may want to reduce the assessed value and sum insured in order to reduce premium costs in cases where the market value goes down.

The Plan therefore provides both parties with a right to require "that the assessed insurable value be changed by giving fourteen days notice" if the "value of the interest insured has changed significantly after the insurance contract was entered into".[52] In practise, the assureds will continually review the assessed valuations and make adjustments when necessary. The insurers will normally accept a request for adjustment, but will on the other hand seldom require such adjustment themselves.[53]

The provision does not define what constitutes a "significant" change,

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50 NMIP/NP Clause 3-9, cf. further Wilhelmsen/Bull p.157. In case of sailing in conditional trading areas without notification, the sanction is limited to an extra deductible in addition to he extra premium that would have been charged, cf. Clause 3-15 sub-clause 2.

51 IHC 13.1.2, ITCH 4.1, FHC 2.1.1 A/, a) second paragraph and 2.6 E/.

52 NMIP/NP Clause 2-3 sub-clause 2.

53 Commentary to NMIP/NP Clause 2-3 sub-clause 2, Wilhelmsen/Bull p. 69.

but if the parties disagree concerning the adjustment, the question shall be submitted to a Nordic Average Adjuster.[54] A similar system is not found in the UK or French conditions.

4.7 Cancellation

Traditionally, a marine insurance contract is effected for an insurance period lasting 1 year. The insurance terminates on expiry of the agreed insurance period unless the parties agree to renew it.[55] The insurer is given the right to cancel the insurance in certain cases where the assured breaches his duties under the contract,[56] but has no general basis to get out of the contract before the period is over. Neither is there any cancellation clause that gives the assured a right to cancel the contract during the insurance period. This is true also if the insurance period is agreed to attach for more than one year.[57]

This means that the assured is not given a right to cancel the contract in cases where his need for insurance protection alters during the period or if he can get cheaper insurance arrangements in another company. The Norwegian ICA gives the assured a general right to cancel the insurance contract in such circumstances,[58] but in the Plan foreseeability for the insurer is here given higher priority than flexibility for the assured. This conforms to the UK and French regulation.

54 NMIP/NP Clause 2-3 sub-clause 3, Wilhelmsen/Bull p. 69.

55 NMIP/NP Clause 1-5 sub-clause 3.

56 NMIP/NP Clause 3-3 sub clause 3 and Clause 3-4 for breach of the duty of disclosure, 3-11 for change of risk, 3-27 for breach of safety regulation, and 6-2 for failure to pay premium.

57 This is possible, cf. Clause 1-5 sub clause 4.

58 Norwegian ICA § 3-6.

5 Foreseeability

5.1 Concept and overview

Foreseeability in a contractual context means the facility to perceive, know in advance, or reasonably anticipate your position according to the contract. In relation to marine insurance, foreseeability can refer to the facility to perceive or anticipate coverage for casualties that may occur, the content of the duties of disclosure or due care, and the consequences of a breach of these duties.

Foreseeability may be seen as a counter argument to flexibility in relation to changes in the contract as flexibility creates uncertainty in regard to the amendments that may be made. Therefore, the flexibility established in the clauses presented in ch. 4 above means that flexibility is given priority over foreseeability in the sense that the risk, the assessed insurable value and the premium may change during the contract. On the other hand, the limitations in the permission to change the contract will secure foreseeability.

Foreseeability as a consideration can be a general argument tied to how easy it is to predict the content of the marine insurance contract. This is addressed in 5.2.

Foreseeability can also be an individual consideration relevant for the choice of regulation. Some examples where foreseeability is given priority in this relation will be provided in 5.4. However, particularly in regard to duty of disclosure and due care, considerations of foreseeability is often weighed against considerations of reasonableness. This will be discussed under 6 below.

5.2 Foreseeability through easy access and interpretation

Two features of the Plan facilitate foreseeability on a general level. The first is the way the Plan is organized. As mentioned the Plan constitute

a comprehensive regulation of insurance conditions. The Plan contains all types of marine insurance except for P&I insurance and cargo insurance. The normal approach in marine insurance will be to have separate contracts for the different types of insurance. This approach is upheld in the UK market, whereas the French Package contains a selection of insurance contracts. It is still more limited than the Plan. Further, even if the Nordic ICAs function as background law for the Plan, there is no need to consult with these Acts to define the position of the parties. Part I of the Plan, which contains general provisions that applies to all the different types of cover, includes all the provisions in the ICA that may be relevant for the marine insurance contracts. This is partly necessary because particularly the Norwegian ICA was deemed to be less suitable for the marine insurance market, and the regulation in the ICA is therefore to a large degree departed from. But this approach was used also in the previous Plans where the regulation in the Plan was more in conformity with the regulation in the ICA. The point here is to publish the Plan as a comprehensive set of conditions providing all the relevant clauses in one document.

This means that the Plan operates with only one layer of conditions. This is very unique in the marine insurance regulation, where it is normal to operate with several layers of rules, either in the form of a combination of a contract and legislation, or where you have a combination of an individual contract, model clauses and legislation.[59] Even the new and modern FHC does not include the rules in the French ICA. And the interpretation of the UK regulation depends to a great extent on court decisions, which makes the total regulation more impenetrable.

The second feature is the use of extensive Commentaries to the Plan. As mentioned all the versions of the Plan is accompanied by extensive Commentaries that are published and therefore accessible for all users. Through these Commentaries one can follow the history of all the clauses, see how they were meant by the drafters and the purpose of any change. The conclusion on disputed issues will therefore often be easier to predict than when you have the wording only. The new French Commentaries

[59] Cf. Wilhelmsen (2001) pp. 41-169, ch. 2.

are far less extensive, and in UK similar preparatory documents are not published.

5.3 Foreseeability as a policy consideration

Foreseeability is also an important policy consideration in relation to individual clauses. This can be highlighted through two important issues in the marine insurance contract: the approach to defining the perils insured against, and the use of the concept of safety regulation.

The perils insured against define what perils are covered by an insurance contract. One may here distinguish between so called all risks insurance, where the insurance covers all risks the insured interest is exposed to unless the peril is explicitly excluded, and the named peril approach, where the insurance covers the perils that are listed, but not perils outside this list. The approach in the civil law countries has traditionally been the all risks approach, and this approach is used also in the Plan.[60] The approach in the UK conditions is on the other hand the named perils approach.[61] An analysis of the two sets of rules demonstrates that the difference between them as they stand is maybe not substantial.[62] However, the all risks principle creates more foreseeability for the assured – and less for the insurer. This is partly because the insurer will have the risk for any peril that is not excluded, and partly because the assured, once a casualty is established, will have fulfilled his burden to prove liability for the insurer.[63]

Foreseeability has also played an important role in the development of the regulation on safety. Until 2007, this regulation was divided between a requirement of seaworthiness[64] and rules on safety regulation. In the 1996 Plan Version 2007 the concept of seaworthiness was deleted.

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60 NMIP/NP Clause 2-8 sub-clause 1: "An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of ..."

61 ITCH Clause 6, IHC Clause 2.

62 Wilhelmsen/Bull p. 80 ff.

63 NMIP/NP Clause 2-12 sub-clause 1, cf. further Wilhelmsen/Bull p. 135, Bull, *Forsikringsrett*, Oslo 2008 (Bull 2008), p. 213.

64 NMIP 1996 Cl. 3-22 until version 2007.

The reason for this was the entry into force of the Norwegian Ship Safety Act of 2006 on 1 January 2007. This Act does not use the concept of seaworthiness, but instead sets out – in a more concrete, explicit manner – the requirements that must at all times be satisfied by the management on shore and the master and officers on board the ship.[65] It was presumed that if the assured followed these rules and therefore complied with the safety regulation system in the Plan, the ship would also be seaworthy according to the traditional interpretation of this concept in marine insurance. Thus, special rules on seaworthiness were superfluous.

But it was also emphasized that the concept of seaworthiness could, in principle, impose more stringent requirements on the assured than the requirements laid down by the provision regarding breaches of safety regulations if the ship had defects which were relevant to the ship's safety, but which might not have been covered by the safety regulations in force. One aim of doing away with the concept of seaworthiness in the 2007 version was thus to make it clear that the duties of the assured in this respect were limited to complying with safety regulations as they are now defined in § 3-22. In this way, insurers were deprived of the possibility of asserting that even though the ship satisfied the relevant safety regulations, it was nevertheless unseaworthy on account of a defect. This also creates a greater degree of predictability for the assured because the concept of unseaworthiness is not a clearly defined term, but a legal standard that creates uncertainty as regards the content of the concept.[66]

As already mentioned, both the UK conditions and the FHC still use

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[65] These requirements relate to four specific matters, each of which is covered in a separate chapter of the Act: Technical and operational safety (chap. 3), Personal safety (chap. 4), Environmental safety (chap. 5) and Safety and Terrorism Preparedness (chap. 6). Furthermore, the Act lays down a general principle of safety management (chap. 2), whereby the shipowner must ensure that a safety management system, which can be documented and verified, is established, implemented and maintained in his organisation and on each ship. The safety management system must be used to identify and control risks, and ensure compliance with requirements laid down in or pursuant to statutes or set out in the safety management system itself. The latter also entails compliance with all provisions of the other chapters of the Ship Safety and Security Act and appurtenant regulations.

[66] Cf. Commentary to NMIP/NP Chapter 3 Section 3 Safety Regulation, explaining the history on this point.

the concept of "seaworthiness", and in the IHC and the FHC non-compliance with rules relevant for seaworthiness results in no liability for the insurer from the date of the breach.[67] This conforms to a warranty approach and appears inflexible and unreasonable from a Nordic perspective.

6 Reasonableness

6.1 Concept and overview

Reasonableness means that the contract shall be fair or balanced. A requirement of fairness may apply to the contract itself, and to individual clauses. Reasonableness in regard to the contract itself means that the rights and duties are balanced between the parties to the contract. In the Plan, this is achieved through the drafting method and discussed in 6.2.

Reasonableness in regard to individual clauses means that there should be a balance between the purpose of the clause and how this purpose shall be obtained. Therefore, the insurer's need to control the risk should be properly balanced against the assured's need for financial protection. Further, there should be a proper balance between the severity of the breach of the assured's duties of disclosure and due care and the sanctions that may be invoked against the assured. Reasonableness or fairness in regard to the individual clause can either be part of the reasoning of the drafters of the clause or used as a policy consideration when the clause is interpreted. Reasonableness as part of the interpretation process must be seen in conjunction with the method of drafting, and is therefore discussed in 6.3.

When different contractual clauses are assessed, reasonableness may support flexibility because a change in the circumstances relevant for the contract may make a shift in the original balance between the parties

[67] FHC 2.1.1 A/ b), IHC 13.1.3. The approach in MIA sec 39 (5) is more in conformity with the Norwegian regulation.

and make it necessary to adjust the contract to re-establish the original balance. Reasonableness may also support foreseeability because it is reasonable that the parties shall be able to predict their contractual position and be able to plan accordingly. As foreseeability may contradict flexibility, reasonability may be the decisive argument to how far flexibility shall be protected.

More often, however, there is a conflict between foreseeability and reasonableness. This is the case for the development of the regulation of duty of disclosure and due care in the Plan, cf. 6.4 below.

6.2 Reasonableness as a requirement for a balanced contract

The Nordic Plan is an agreed document which is drafted by a Committee consisting of participants from the insurance companies, the shipowners, the average adjusters and with the Scandinavian Institute of Maritime Law acting as secretariat. As a starting point it may be presumed that the agreed status of the contract secures a fair balance of the duties and rights between the parties. No amendments will be made unless the parties agree to them. If changes in the shipping industry make amendments necessary, these will be accepted if both parties agree that they are reasonable according to the circumstances.

However, this does not mean that all parties agree that all the rules are reasonable at all times. One side may agree to amendments that they do not deem reasonable if they can obtain better conditions in regard to other issues. The agreed status therefore implies that the Plan as a total contractual product is balanced, but not necessarily that each individual clause is.

This agreed status is in contrast to the UK clauses. This may be one of the reasons why the NP in several aspects appears more adjusted to the needs of the assured than the UK conditions. This is true both for the rules on duty of disclosure and due care, and in relation to the coverage for lack of maintenance and error in design and material. However, the FHC demonstrates that the agreed approach alone is not sufficient

to make these adjustments. It may therefore be that it is a combination of the agreed approach, the long history and the maintenance program that secure continuous discussions on important issues that are decisive.

6.3 Reasonableness as a policy consideration in the interpretation

Reasonableness is an important policy consideration in Nordic legal method. This implies that if the wording is unclear, the interpretation that is most reasonable should be chosen, but it may also mean that considerations of reasonableness results in an interpretation contrary to a natural understanding of the wording. If so, reasonableness will be contrary to considerations of foreseeability, which would favor an interpretation according to the wording. However, the trend in Norwegian Supreme Court practice for professional contracts in the latter years is to give greater weight to the wording and less to considerations of reasonableness.[68] This implies that foreseeability will normally be given priority over reasonableness in the interpretation process.

Further, the fact that the Plan is an agreed document that presumably is balanced on a general level, is a reason to demonstrate caution to go outside the wording to achieve a reasonable result. The parties have presumably agreed on the clauses as they stand, and if the wording is not followed because the result seems unreasonable, this will provide an unwarranted benefit for one of the parties at the cost of the other. Thus, the goal to achieve a reasonable result must be weighed against the unreasonableness of such unwarranted profit.

6.4 Reasonableness versus foreseeability in the regulation of the duties of the assured.

Considerations concerning reasonableness have been a main issue in discussions concerning the system for duty of disclosure and due care

[68] Rt 2002.1155, Rt 2000.806, Rt 2003.1132 and Rt 2010.1345.

in the Plan. Before the 1930 Plan these duties were rather strict. The Nordic ICA 1930, which is still in force in Denmark, contains however several rules concerning theses duties that are mandatory. The mandatory application of the act includes inter alia the duty of disclosure,[69] increase of risk,[70] safety regulation,[71] and negligence of the assured.[72] These rules, which were more favourable for the assured, were therefore incorporated in the Norwegian Plan in the 1930 revision.

A main feature in these rules is that the insurer may not invoke a breach of the rules if there is no causation between the breach and the concluding of the contract or the casualty, and also that no breach may be invoked if the assured is not to be blamed for the breach. These requirements were supposed to create a proper balance between the need for risk control and the purpose of insurance.

Norway got a new ICA in 1989. This Act establishes a more favourable duty and sanction system for the assured. As a general starting point, the required degree of fault in case of breach of a duty was raised from ordinary negligence to fault defined as "being more than a little to blame".[73] Further, instead of freedom of liability in case of a breach, a system with deductions from 0 % to 100 % depending on the degree of fault, the chain of events and other circumstances was established.[74] The main argumentation behind these rules was that it was reasonable to provide better protection in consumer insurance. However, the regulation is not mandatory for marine insurance of ocean going ships. The reason was that the ship owners were professional actors in insurance matters and could handle a more strict system. In addition, it was pointed out that the extended protection is costly, and a mandatory and expensive system would create a competition disadvantage for the Norwegian shipping industry that operated world wide and competed with shipow-

69 Norwegian ICA 1930 and Danish ICA § 10 cf. § 5, 7, 8 and 9.

70 Norwegian ICA 1930 and Danish ICA § 50 cf. §§ 45-49.

71 Norwegian ICA 1930 and Danish ICA § 51.

72 Norwegian ICA 1930 and Danish ICA § 20.

73 Norwegian ICA § 4-2 (duty of disclosure) and § 4-8 (safety regulation).

74 Norwegian ICA § 4-2 (duty of disclosure), § 4-8 (safety regulation), § 4-9 (negligence in regard to the casualty.

ners under less strict and cheaper insurance regimes.[75]

The entering into force of the Norwegian ICA 1989 was one of the reasons for revision of the Norwegian Plan in 1996.[76] The Committee discussed i.a. the new and more favourable sanctioning system, and concluded as follows:[77]

> "The general approach during the revision has been that the Plan should follow the provisions of ICA as far as possible. This is, however, not very practical as regards the duty of disclosure and the duty of care. Even though they apply generally, the ICA provisions are aimed primarily at protecting consumers. In marine insurance, on the other hand, the person effecting the insurance is often a business concern; additionally, Norwegian shipowners have considerable expertise in insurance matters at their disposal. This means that the extensive protection provided by ICA is unnecessary. Nor are the sanctions in ICA, with their considerable emphasis on discretionary decision-making, entirely appropriate for a field like marine insurance. Given the considerable sums involved in marine insurance, allowing discretion to play such a large part could easily lead to significant growth in the number of lawsuits".

Therefore, the regulation from the 1930 ICA was continued. One may therefore conclude that reasonableness has its price both in terms of higher premium, lack of foreseeability and growth in the number of disputes. Too much protection may be too costly to be worth it.

On the other hand, the use of a more strict system, and in particular the use of warranties, has also been discussed by the Norwegian legislators and the Revision Committee. Even if the ICA was made non-mandatory for marine insurance, the legislators pointed out that they were very skeptical to the use of warranties, and that such clauses according to the individual circumstances might be set aside according to the Contract Act section 36.[78] The Revision Committee followed this advice except

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75 NOU 1987:24 Lov om avtaler om skadeforsikring p. 40.

76 Cf. Preface to the 1996 Plan.

77 Cf. Commentary to the NMIP chapter 3, General Remarks.

78 Ot prp no 49 (1988-1989) Om lov om forsikringsavtaler p. 32, Wilhelmsen (2001) ch.

for the presumption of classification, which in all marine insurance conditions is expressed as a warranty.[79] The warranty in relation to classification in the 1996 Plan applied both to the fact that the ship should be classified, and that there should be no change of classification society without acceptance from the insurer. The latter provision was widely discussed,[80] and in the 2007 amendment this requirement was moved from the warranty of classification clause to the alteration of risk regulation in the Plan Clause 3-8.

In the common law market, warranties are explained as a technique to reduce uncertainty and subjective evaluations, which strengthens foreseeability.[81] The UK conditions therefore continue the tradition from MIA and use warranties and automatic termination instead of alteration of risk and safety regulation.[82] The FHC uses the concept of alteration of risk, but uses the warranty/termination approach for several important issues[83]. In the Nordic regulation, foreseeability is not given this high priority as compared to reasonability. The Nordic system is therefore much more reasonable in relation to the duties of the assured than other systems, in particular that of UK.

7 Summary and some conclusions

The aim of this article has been to demonstrate that the Plan is an unique product where the balance between flexibility, foreseeability and reasonableness has been evaluated over a long period and continually assessed in recent years. The agreed approach secures a generally fair contract,

6.1.

79 NP Clause 3-14, Wilhelmsen (2001) ch. 7.

80 Cf. Commentary to NMIP 1996 § 3-14 until Version 2007.

81 Staring, "Harmonization of Warranties and Conditions: Study and Proposals", *CMI Yearbook 2003 VANCOUVER I*, p. 522 ff, p. 525, Staring "The CMI Looks at Marine Insurance Law", *Benedict's Maritime Bulletin*, Vol. 2, No. 3, 3rd Quarter 2004 pp. 6 and 11.

82 ITCH 1983 Clause 4, IHC 2003 Clause 13 and 14.

83 FHC 2.1.1 and 2.6 E/.

but also protects foreseeability by reducing the need for using reasonableness as a policy consideration in the individual case.

The rules on scope of cover provide foreseeability for the assured rather than for the insurer, whereas the rules on duty of disclosure and due care are more aimed at reasonableness for the assured than at foreseeability for the insurer. This appears to be in contrast with the UK conditions, where foreseeability for the insurer is given priority before foreseeability for the assured and in particular considerations of reasonableness in regard to breach of duties during the insurance period. But many of the solutions in the Plan are also more in favour of the assured than the new FHC.

A balanced and continually maintained contract also appears to reduce the need for individual flexibility, but flexibility through the insurance period is secured through mechanisms for alteration of risk and the assessed insurable value.

Flexibility, foreseeability, reasonableness in maritime conventions and other relevant instruments

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Content

Introduction

There is a fundamental difference between the character of the above three terms. Reasonableness connotes inter alia a manner of behaviour (a person may act reasonably or unreasonably, be reasonable or unreasonable) or describe the character of an event (the time by which an action must be performed must be reasonable). From the Shorter Oxford Dictionary it appears that the word "reasonable" can have various meanings, including "having a sound judgment, sensible, sane", "moderate in price, inexpensive", "of such an amount, size, number, etc., as is judged to be appropriate or suitable to the circumstances or purpose".

Foreseeability may be either the qualification of an event (such event being foreseeable or not) or the effect of the manner in which an action may be performed or the time by which it must take place. Flexibility is not a term used in any instrument but rather the character of a of rule: for example, a rule whereby an action must be performed within a reasonable time is flexible, a rule whereby an action must be performed within a specified period of time is not. Reasonableness may affect foreseeability and may create uncertainty. Where certain behaviours of the contracting parties are to be judged on the basis of their reasonableness, that accords a flexibility otherwise impossible, but adversely affects foreseeability. The more flexibility is allowed the less an action may be foreseeable. If in the performance of his obligation one of the contracting parties must behave reasonably, he should know which his behaviour should be and the other party should be able to assess the reasonableness of such behaviour without necessarily seeking the (costly) opinion of a court. If an action must be performed within a reasonable time it should be found out in advance which the expiry date will be. On the other hand in commercial contracts the more rigid is the conduct the parties must observe, the more difficult will be to adapt their behaviour to changing circumstances. And the need for a "reasonable" degree of flexibility greatly increases where the rules applicable to any given contract are not specific for a particular contract, but are generally laid down for all contracts of

the same kind: they are, in other words, rules adopted in international or national instruments or even in standard contract forms.

The conclusion seems to be that reasonableness is the basic concept, whereas flexibility and (un)foreseeability are respectively the positive and negative effect of reasonableness.

The speed with which the technique of communications is changing is reflected, for example, in the increasing adoption in international instruments of flexible time limits by which certain actions of the parties must take place and the relative vagueness of the description of their behaviour. Suffice it to mention that in the U.N. Convention on Contracts for the International Sale of Goods, 1980 the terms "reasonable" and "unreasonable" have been used not less than 25 times and in the Unidroit Principles of International Commercial Contracts, 2010 they (together with the adverbs "reasonably" and "unreasonably") have been used not less than 65 times.

The analysis that follow will consider in which manner and with which consequences the criterion of reasonableness, has been used in the conventions and other instruments enumerated below:

- International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules) as amended by the Protocol of 1968 (Hague-Visby Rules)
- United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)
- United Nations Convention on the International Carriage of Goods Wholly or Partly by Sea, 2008 (Rotterdam Rules)
- United Nations Convention on the Liability of Operators of Transport Terminals in International Trade, 1991 (Convention on Transport Terminals Operators)
- Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, as amended by its 2002 Protocol (Athens Convention)
  International Convention on Salvage, 1989 (Salvage Convention)
- Convention on the Protection of the Underwater Cultural Heri-

tage 2001 (UNESCO Convention)
- International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC 1992)
- International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances, 1996 (HNS Convention)
- International Convention on the Establishment of an International Fund of Compensation for Oil Pollution Damage, 1992 (Fund Convention)
- International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (Bunker Oil Convention)
- International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (OPRC Convention)
- International Convention on Maritime Liens and Mortgages, 1993 (MLM Convention)
- International Convention on Arrest of Ships, 1999 (Arrest 1999)
- International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties,1969 (Intervention Convention)
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA Convention 1988)
- United Nations Convention on Contracts for the International Sale of Goods, 1980 (Vienna Convention 1980)

It will also cover the following instruments:
- York Antwerp Rules 1994 (YAR 1994)
- CMI Rules for the Assessment of Damages in Maritime Collision,1988 (Lisbon Rules)
- Unidroit Principles of International Commercial Contracts, 2010 (Unidroit Principles)

Such analysis will be conducted under the following headings:

1) llegality

2) Interpretation of contracts

3) Performance of obligations

4) Action to be taken

5) Conditions for and limits to the exercise of rights

6) Foreseeability of result or event

7) Rules relating to the event from which time must count

8) Interpretation of statements and conduct

9) Time by which or after which an action must be performed

10) Time by which a notice must be given or received

11) Reasonableness of costs or expenses

12) Terms similar to "reasonable".

The analysis of each provision is divided in two parts: a description of the rule followed, in italics, by a comment.

1 Illegality

Unidroit Principles

Art. 3.3.1. Where the effects of the infringement of a mandatory rule upon a contract are not expressly stated, the parties have the right to exercise such remedies under the contract "as in the circumstances are reasonable".

Guidelines for the assessment of the reasonability of the remedies are in this case provided first by the reference to what is reasonable "in the circumstances" and secondly, in much greater details in the subsequent paragraph 31.

[1] Paragraph 3 of rule 3.3.1 so provides: (3) In determining what is reasonable regard is to be had in particular to:

2 Interpretation of Contracts

Unidroit Principles

Art. 4.1. Where the common intention of the parties cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

Guidelines for the interpretation of the contract by reasonable persons are given first by the reference to persons "of the same kind" and secondly by the following clarifications contained in the comment on this rule: "The text is not a general and abstract criterion of reasonableness, but rather the understanding which could reasonably be expected of persons with, for example, the same linguistic knowledge, technical skill, or business experience as the parties". Doubts as to the actual common intention of the parties and its identification on the basis of reasonability may adversely affect foreseeability. However flexibility in this case is definitely required.

Art. 4.2. Where the common intention of the parties cannot be established for the interpretation of statements and other conduct, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

In this case guidelines are provided in the rule itself, wherein reference is made to a person "of the same kind as the other party" and are supplemented by an ad hoc rule, rule 4.3[2]*. The other comments made in respect of art.4.1 hold also here.*

(a) the purpose of the rule which has been infringed;
(b) the category of persons for whose protection the rule exists;
(c) any sanction that may be imposed under the rule infringed;
(d) the seriousness of the infringement;
(e) whether one or both parties knew or ought to have known of the infringement;
(f) whether the performance of the contract necessitates the infringement; and
(g) the parties' reasonable expectations.

2 Rule 4.3. so provides: 4.3 - (Relevant circumstances) In applying Articles 4.1 and 4.2, regard shall be had to all the circumstances, including
(a) preliminary negotiations between the parties;

3 Performance of obligations

3.1 Carriage of goods by sea

3.1.1 Obligations of the carrier

The term "*due diligence*", used first in s. 2 of the Harter Act of 1893, then in Australian Sea-Carriage of Goods Act of 19043 , in the Canadian Water-Carriage of Goods Act of 19104 and in the Hague Rules 1921, was translated into French in the Hague Rules by "diligence raisonnable".

Although that translation has been criticized[5]*, on the ground that it might indicate the diligence of the average man, rather than the diligence of a competent person, it appears to be settled that the level of diligence required of the carrier is that of a person that performs professionally the activity of carriage of goods by sea with updated knowledge of technical developments and operating experience. The equivalence between "due" and "reasonable" has been repeatedly affirmed by the jurisprudence. In* The Silvia[6] *it was stated that "a ship must be reasonably fit to carry the cargo which she has undertaken to transport". In* Corrie v. Coultyard *Cockburn J.*[7] *made the following remarks*[8]*: "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into. It is enough if he exercises a reasonably sound judgment under all circumstances". In* Union of India v. N.V. Rederij Amster-

(b) practice which the parties have established between themselves;
(c) the conduct of the parties subsequent to the conclusion of the contract;
(d) the nature and purpose of the contract;
(e) the meaning commonly given to terms and expressions in the trade concerned;
(f) usages.

3 Section 5(b).

4 Section 4(b).

5 By Bonassies and Scapel, *Droit Maritime*, 2nd edition, p. 678.

6 (1898) 171 U.S.462, 464.

7 The judgment of the Court of Appeal in *Corrie v. Coultyard* is published in 3 Asp. M.L.C 546, footnote (a).

8 At p. 547.

dam[9] *it was questioned*[10] *whether the owners did establish that the examination of the reduction gear was "carried out with reasonable skill, care and competence" and it was stated*[11] *that "lack of diligence is negligence". Subsequently, in* The "Kapitan Sakharov"[12] *it was stated*[13]*, with reference to the proof of exercise of due diligence to make the vessel seaworthy, that the Judge had correctly taken as the test whether the owner "had shown that it, its servants, agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy".*

Reference to the concept of reasonableness was subsequently made in the Hamburg Rules in respect of the basis of liability, rather than in respect of the obligations of the carrier: pursuant to art. 5.1 the carrier is liable for loss of or damage to the goods and delay in their delivery unless he proves that he took all measures "that could reasonably be required" to avoid the occurrence and its consequences. A more qualified behaviour is instead specified in respect of delay: art. 5.2 in fact provides that delay in delivery occurs when the goods have not been delivered "within the time it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case".

It is thought that the provision in art. 5.1 should be read as if there had been the same qualifications.

The equivalence between "*due diligence*" and "*diligence raisonnable*" is confirmed in article 14 of the Rotterdam Rules in connection, as in the Hague Rules, with the obligation to make (and now keep) the ship seaworthy.

In connection with the obligation to receive, safely carry and deliver the goods, the test of reasonableness is used, this time both in the French and English text, in articles 15 and 16 of the Rotterdam Rules that set out the situations in which the carrier may respectively refuse to receive or sacrifice the goods. In the first case it is related to the fact that the

9 [1963] 2 Lloyd's Rep.223 (H.L.).
10 By Lord Evershed, at p. 231.
11 By Lord Devlin, at p. 235.
12 [2000] 2 Lloyd's Rep. 255 (C.A.).
13 By Auld, L.J., at p. 266.

goods "reasonably appear likely to become dangerous during the carrier's period of responsibility".

The test of reasonabless is therefore applied to the likelihood of an event, viz. of the goods becoming dangerous. It is suggested that in this case the likelihood of an event being reasonable cannot be assessed in abstract, but with reference to the nature of the event: in connection with the likelihood of the goods becoming dangerous even a 20% likelihood may be considered sufficient to trigger the application of this rule.

In the second case the subject matter of the decision is the sacrifice of the goods that is permitted if it is reasonably made "for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure".

Since this wording is the same as that of Rule A of the York-Antwerp Rules 1994, the analysis of this provision will be made later, when the YAR will be considered[14].

The test of reasonableness is then used, in connection with the implied term of not deviating from the course, in art. 4.4 of the Hague-Visby Rules in respect of deviations other than that to save life or property, in art. 5.6 of the Hamburg Rules in respect of deviations to save property and in art. 17.3(m) and (n) of the Rotterdam Rules in respect of deviations to save property and to avoid damage to the environment.

Since pursuant to art. 4.4. of the Hague-Visby Rules the deviation exonerates the carrier from liability, the notion of "reasonable deviation" must necessarily be restricted to deviations that are not the consequence of a breach by the carrier of his obligations, such as, for example, that to exercise due diligence to make the ship seaworthy at the beginning of the voyage[15]*. While no comment may be made in respect of the provision in the Hague-Visby Rules, for no indication is given in respect of the possible purpose of deviations other than that for saving life or property and, therefore, unforeseeability of the subsequent assessment on its reasonably is high, the parameters for assessing the reasonableness of deviations to*

[14] Infra, paragraph 11.1.

[15] F. Berlingieri, *Le convenzioni internazionali di diritto marittimo*, 2011, p. 109, paragraph 14.3.

save life or property may be easily guessed: they include the length of the deviation, the degree of danger and the possible intervention of other ships closer to the position of the ship in danger.

The test of reasonableness is used also in respect of the obligation to issue a bill lading showing the particulars of the goods in art. 3.3 of the Hague-Visby Rules, wherein it is provided that the carrier shall not be bound to state in the bills of lading particulars "dont il a une raison sérieuse de soupçonner" (reasonable grounds for suspecting) not accurately to represent the goods or which he has not had "des moyens raisonnables" (reasonable means) of checking.

Curiously, whereas in the French version of the Hague Rules 1921 "due diligence" was translated with "diligence raisonnable", "reasonable grounds" was translated with "raison serieuse"(of course that was due to the fact that the word "grounds" was translated with the word "raison" and it would have looked rather odd to say "raison raisonnable"). While the second of the above alternatives has been considered many times by the courts, that have for example found clauses in respect of weight effective, in particular for bulk cargoes, albeit without qualifying them as "reasonable" but merely stating that they were valid, there are very few judgements that considered situations where the carrier had justified a reservation on the ground that he suspected that the information provided by the shipper was not correct and none that considered the reason why such suspicion had arisen. On the assumption that there must be grounds for suspecting that the particulars furnished by the shipper do not accurately represent the goods, on which basis can it be established that such grounds are reasonable? This seems a question the answer to which cannot but be based on the facts of the particular case and of the discretional judgment of the court. Therefore it is very difficult to predict in advance whether the reservation, if challenged by the consignee, will be held to be effective or not.

The same wording may be found in art. 16.1 of the Hamburg Rules, but it is linked, rather than to the refusal of mentioning the description of the goods, to the right of the carrier to qualify such description. It may also be found in art 40.1 and 3 of the Rotterdam Rules and in art. 4.1(2)

of the Convention on Transport Terminals Operators.

In the Rotterdam Rules it is also used in art. 36.4 for the purposes of the definition of "apparent order and conditions" and then in art. 40.4(b)(ii) in respect of the possibility for the carrier of checking the weight of the container.

In this connection there is not only an alternative test, viz. either physical practicability or reasonableness, but reasonableness is qualified: there should not be a possibility of checking "commercially reasonable" and that implies that in order to be commercially reasonable its cost should not be out of proportion in respect of the transportation cost and should not entail a significant reduction of the net earnings of the carrier. The degree of foreseeability appears, therefore, to be substantial.

Finally the test of reasonableness is applied by the Rotterdam Rules in respect of matters that are not governed by the other transport conventions. That is the case:

a) For delivery of the goods, in respect of which the persons to whom delivery must be effected are listed in articles 45-47 in a certain order that the carrier must observe by making each time "reasonable effort" to locate the person that comes first (the consignee), then second in the order listed (the controlling party) and finally the third (the shipper).

It is suggested that in assessing the reasonableness of the efforts attention should be paid to the fact that the enquiry should be conducted quickly, for the longer the goods remain undelivered the greater would be the storage cost. But it appears that the level of discretion is high and consequently the degree of foreseeability low.

b) For the request of security by the carrier where, in case a negotiable transport document has been issued, delivery is requested without surrender of the document, although in such a case there are two conditions, namely the security must be adequate and the request must be reasonable.

Since the security must be adequate, the test of reasonableness does not apply to the amount, but probably to the actual need for a security, in consideration, for example, of the financial situation of the person from

whom security may be required. The level of foreseeability of the assessment of reasonableness appears, therefore, to be significant.

c) For the choice by the carrier of the action he may take (under art. 48) when the goods remain undelivered. In this case the action must be such as "circumstances may reasonably require".

Therefore the test of reasonableness depends on the specific circumstances of the case and that means, for example, that an immediate sale would be reasonable if the goods are perishable or longer storage would be impossible. The assessment of reasonableness seems consequently to be predictable.

d) For the rights and obligations of the controlling party and the carrier's execution of his instructions; pursuant to art. 52 the carrier must execute the instructions provided they can "reasonably be executed" and the controlling party must reimburse the carrier for any "reasonable additional expense" and provide security for the amount of additional expense, loss or damage the carrier "reasonably expects will arise".

In the first case reasonableness relates to the circumstances of the particular case and the nature of the instructions: for example discharge at a scheduled port of call may not reasonably be executed if the ship would be required to shift at another berth at that time occupied by another ship or if it would require shifting or even unloading of other cargo; *in the second case there may be more difficulties in establishing what should be the ceiling of the additional expense in order not to trespass the limit of reasonableness: should it be related to the freight and not to exceed a percentage of it? Probably a wise carrier would seek the agreement of the controlling party in advance, but what would happen if the controlling party would object that the amount requested is unreasonable and insist for discharge being made at a "reasonable additional expense"? However generally the level of foreseeability of the judgment on whether or not the action to be adopted is reasonable is high. The third case is very likely linked with the second one.*

e) For the obligation of the controlling party, pursuant to art. 55, to provide information, instructions and documents the carrier may "reasonably need", to perform its obligations.

The test of reasonableness applies only if it is not certain that the information, instructions and documents will actually be required and, therefore, it may coincide with one of probability.

f) For the existence of a special agreement that permits the exclusions or limitation of the obligations of the carrier; pursuant to art. 81 (b) that is the case where the character or conditions of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as "reasonably to justify" a special agreement.

Although there is a condition precedent that reduces the scope of application of this exception and thus the possible excessive flexibility of this rule, namely that the carriage be not related to ordinary commercial shipment made in the ordinary course of trade, in this case it appears rather difficult to establish on which basis reasonableness must be assessed: would it be, for example, the likelihood of damage to the cargo, in consideration of its nature? Foreseeability appears, therefore, to be minimal.

3.1.2 Obligations of the shipper

The test of reasonableness is not applied to the obligations of the shipper in the Hague-Visby Rules and in the Hamburg Rules. It is instead applied in the Rotterdam Rules in respect of the obligation to provide information, instructions and documents, that, pursuant to art. 29.1, must be complied with only where such information, instructions and documents "are not otherwise reasonably available to the carrier and that are reasonably necessary".

It is thought that "reasonably available" means availability without difficulties, while it is not easy to establish how the test of reasonableness may apply in respect of something (the information) that is necessary.

It is also applied in respect of dangerous goods where, although not such when delivered to the carrier, they "reasonably appear likely to become dangerous".

The test of reasonableness is, therefore, applied to the likelihood of the goods becoming dangerous and must be applied to an ordinary carrier with the knowledge and experience that a carrier should have at the time when the goods are handed over to him. Reference is made, therefore to the comments in paragraph 3.1.1.

3.1.3 Joint obligations of the carrier and the shipper

An obligation that must be performed reasonably is in all such Conventions that of both the carrier and the consignee providing to each other all "reasonable facilities" for inspecting and tallying the goods (art. 3.6 of the Hague-Visby Rules, art. 19.4 of the Hamburg Rules and art. 23.6 of the Rotterdam Rules).

In this connection the test of reasonableness applies to the facilities the parties must provide to each other and that seems to mean that the facilities should be such as to enable each party to carry out the inspection without difficulties. Those that in the particular case would be the reasonable facilities appears normally to be foreseeable.

3.2 Salvage and protection of the underwater cultural heritage

3.2.1 Salvage Convention 1989

Art. 8(1)(a) and (b) of the Salvage Convention 1989 provides that the salvor owes a duty to the owner of the vessel in danger to carry out the operation with "due care" and to exercise "due care"(the corresponding words in the French text being *soin voulu*) to prevent or minimize damage to the environment.

While in the Hague-Visby Rules the word used in connection with "diligence" is "raisonnable" and that used in the Hague Rules 1921 is "due", in the Salvage Convention the word used in the English text to qualify "care" is still "due", while in the French text the word used to qualify "soin" is "voulu". Amongst the meanings of this word indicated in the Petit Larousse, that appropriate is "éxigé par les circonstances" (required by the circumstances), and that appears to be the meaning also of "due". It may be the appropriate meaning of "raisonnable" if that term is not related generally to the diligence of the average man, but rather to the diligence of a person performing that particular kind of activity[16]*.The degree of care or*

[16] *Supra*, paragraph 3.1.1. Art.1176 of the Italian Civil Code still refers to the diligence of the *bonus pater familias,* but then provides that in respect of compliance with

reasonableness appears therefore to be foreseeable.

Art. 8(1) provides in (c) and (d) that the salvor owes a duty to the owner of the vessel in danger whenever circumstances "*reasonably require*" (*l'exigent raisonnablement*) to seek assistance from other salvors and to accept the intervention of other savors "when reasonably requested to do so"(*lorsqu'il est raisonnablement prié de le faire*) by the owner or master of the vessel in danger, provided his reward shall not be prejudiced should it be found "that such a request was unreasonable"(*que cette demande n'était pas raisonnable).*

It is thought that an experienced salvor may judge when he should seek or accept assistance from other salvors and, therefore reasonableness in this case does not affect foreseeability.

Art. 8(2)(c) provides that the owner or master of the vessel in danger must, when the vessel has been brought to a place of safety, accept redelivery "when reasonably requested by the salvor to do so".

In this case it is necessary to establish what is meant by "place of safety"[17]*. If it is merely referred to the nature of the place, without considering whether the vessel is in safe conditions, then the reasonableness of the request must be assessed on the basis of the conditions of the vessel. If for example the vessel stays afloat only if the pumps provided by the salvor continue to operate, then the request by the salvor to the owner of the vessel to accept delivery would not be reasonable. The notion of reasonableness in this connection must be related to the additional wording proposed by the International Salvage Union*[18] *and foreseeability is not affected.*

Art. 14(3) provides the definition of the expenses mentioned in the

obligations inherent to the exercise of a professional activity the diligence must be assessed with reference to the nature of the activity performed by the debtor.

17 On the notion of "place of safety" in English law see Brice *On Maritime Salvage*[4], London 2003, p.114.

18 The following additional wording had been proposed by the International Salvage Union during the 54th Session of the IMO Legal Committee (The Travaux Préparatoires of the Convention on Salvage 1989, edited by F. Berlingieri, p. 226): "Such request shall not be made by the salvor until the vessel or property has been preserved from danger from which it was required to be salved and has been brought to a place where a prudent owner would reasonably be expected to be able to preserve such vessel or property on a non-salvage basis".

previous two paragraphs as the "out-of-pocket expenses reasonably incurred by the salvor in the salvage operations".

The test of reasonableness should be based in this case on the character of the salvage services, the time used and the nature and degree of danger run by the salved vessel and cargo on board and an experienced salvor should know with a high degree of approximation, whether the expenses he is going to incur will be considered reasonable.

Art. 17 provides that where services are rendered under an existing contract no payment is due under the Convention "unless the services exceed what can reasonably be considered as due performance of a contract entered into before the danger arose". In the French version the words corresponding to "due performance" are "exécution normale".

It is thought that the word "reasonably" was added because, owing to the general restatement of the principle adopted in article 4 of the 1910 Salvage Convention, pursuant to which the tug has no right to salvage remuneration except where it has rendered exceptional services, it was necessary to allow some flexibility to this rule, for due performance is by itself a vague concept. Foreseeability in this case does not come into play, for either the services provided would have been due under the contract or, if not, would entitle the person rendering them to a salvage award.

Art. 19 provides that "services rendered notwithstanding the *express and reasonable prohibition* of the owner or master of the vessel in danger shall not give rise to payment under the Convention".

Reference to the express and reasonable prohibition was already made in article 3 of the 1910 Convention and the assessment of the reasonableness of the prohibition must be made probably on the basis of the vessel overcoming the situation of distress with its own means or the expected arrival of another salvor.

3.2.2 UNESCO Convention

Art. 18.2 of the UNESCO Convention provides that each State Party "shall record, protect and take "all reasonable measures to stabilize underwater cultural heritage".

It is thought that in this case there was an absolute need for flexibility,

since the nature of the measures in question could vary so much that no guidance could be provided. The only limit is that of the purpose of the measures in question, namely that of stabilizing underwater cultural heritage. The impact on the conduct of the interested parties of the lack of foreseeability of whether the measures taken are reasonable or of whether the measures that would have been reasonable have not been taken does not seem to be significant

4 Action to be taken

4.1 Arrest 1999

Art. 5.1 enumerates the situations where re-arrest of a ship or multiple arrest is permitted and amongst them under (c) indicates those (i) where the ship arrested was released upon application or with the consent of the claimant "acting on reasonable grounds" and (ii) those where the claimant could not by taking reasonable steps prevent the release.

In both cases the situation is similar to that mentioned in respect of the UNESCO Convention: it would be almost impossible to indicate the circumstances in which the consent of the arrestor would be reasonable or which steps the arrestor might take in order to prevent the release and therefore, once accepted that such situations may occur, the only solution was to have recourse to a wording that could ensure flexibility. Perhaps some guidance might be given by the examples made in the course of the travaux préparatoires[19]*: they were in the first case that where the owner of the arrested ship would be unable to provide security in time in order to meet a cancelling date in respect of a profitable time charter party and in the second case that of the injunction of the port authority of the port in which a ship was arrested to remove the ship for safety reasons. In any event it does not appear to be any need for the effect of the action being foreseeable.*

[19] F. Berlingieri, *Arrest of Ships*[5], London 2011, p. 715.

4.2 OPRC Convention

Art. 1.3 after providing that the Convention shall not apply to warships, states that each Party shall ensure that such ships "act in a manner consistent, *so far as reasonable and practicable*", with the Convention.

In this case there is a double test: reasonableness and practicability and clearly the purpose was to grant States the widest possible freedom of action, and to resort merely to something that is nothing more than a vague expression of good will. Flexibility was in this case required much more than in other situations and, therefore, foreseeability, albeit not very likely affecting a decision on the action to be taken, must yield to it.

4.3 SUA 1988

Art. 8.1 provides that the master of a ship "may deliver to the authorities of any other State Party any person who "he has reasonable grounds to believe has committed one of the offences set forth in art. 3".

The master has the burden a) of proving that that person has committed one of the offences set forth in article 3, and b) of indicating the basis of his belief, whereupon the assessment as to whether the "reasonable grounds"[20] *exist or not will be made by the competent authorities of the State Party to whom the master wants to deliver that person. It appears, therefore, that such authorities have a considerable flexibility. The issue of foreseeability in this case does not arise.*

4.4 Intervention Convention

Reference to reasonableness is made three times in this Convention.

Art. I.1 provides that States may take measures to mitigate or eliminate grave or imminent danger to their coastline or related interest of pollution or threat of pollution following upon a maritime casualty "which may reasonably be expected to result in major harmful consequences".

In this case reasonableness is linked to foreseeability of the consequences

[20] Also in this case, as for article 3.3 of the Hague-Visby Rules, the words in the French text corresponding to "reasonable grounds" are "raisons serieuses".

and their seriousness. The assessment of the compliance with this provision must be made by the State involved prior to the measures been taken (it must not be forgotten that this Convention originates from the bombing of the "Torrey Canyon" by the British Air Force) and subsequently by the persons affected by them or in case of litigation by the competent court. In any event, as in most other cases, it was necessary here to resort to the notion of reasonableness.

Art. III(b) provides that the Coastal State shall notify the proposed measures to any person known to have interests "which can reasonably be expected to be affected by those measures".

In this case the test of reasonableness does not seem to create problems, since the subject matter of the measures would almost exclusively be a ship (the measures are taken on the high sea) and, therefore, the persons who may be affected are those having an interest in the ship. There would be, therefore, also a significant degree of foreseeability.

Art. VI provides that any Party who has taken measures in contravention of the provisions of the Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures "which exceed those reasonably necessary to achieve the end mentioned in art. I", namely to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil following a maritime casualty.

In this case the test is the same as that in respect of art. I.1 previously considered.

4.5 Vienna Convention

Art. 85 provides that if the buyer is in delay in taking delivery of the goods the seller, if he is in possession of the goods or otherwise able to control them, must take such steps "as are reasonable in the circumstances to preserve them".

Art. 86 in turn provides that if the buyer has received the goods and intends to reject them, he "must take such steps to preserve them as are reasonable in the circumstances".

The assessment of reasonableness is in both cases based on the circumstances in which the steps are taken, such as the nature of the goods and the possibility and cost of their storage and preservation. Foreseeability of which the reasonable measures may be seems therefore to be possible.

4.6 Unidroit Principles

Art. 7.4.8 provides that the non-performing party is not liable for the harm suffered by the aggrieved party to the extent that the harm could have been reduced by the aggrieved party taking reasonable steps.

This is the duty of mitigation of damages and, being a general rule, its flexibility is obvious, while foreseeability of which such steps may be judged reasonable is impossible.

5 Conditions for and limits to the exercise of rights

5.1 CLC 1992

Art. I.6 in the definition of "pollution damage" states that compensation for the impairment of the environment other than loss of profit from such impairment "shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken" and art. 1.7 in the definition of "Preventive measures" states that such are "any reasonable measures taken…to prevent or minimize pollution damage".

Art. V.8 provides that "claims in respect of expenses reasonably incurred or sacrifices reasonably made by the owner voluntarily to prevent pollution damage shall rank equally with other claims against the fund".

These rules cannot but to be flexible and reasonableness is, therefore, the general test for measures and disbursements, the nature and amount of which is hardly foreseeable.

5.2 Fund Convention 1992

Art. 4.1 provides that the Fund shall pay compensation to any person suffering pollution damage if such person is unable to obtain full and adequate compensation for the damage because the owner is financially incapable of meeting his obligation in full and any financial security that may be provided does not cover or is insufficient to satisfy the claim. Such conditions materialize if that person "has been unable to obtain full satisfaction of the amount of compensation due under the 1992 Liability Convention after having taken reasonable steps to pursue the legal remedies available to him".

This provision has an obvious high degree of flexibility and this is due to the fact that what such steps might be is hardly foreseeable.

5.3 Bunker Oil Convention

Art. 1.9 in the definition of "pollution damage" provides that compensation for impairment of the environment other than loss of profit from such impairment "shall be limited to cost of reasonable measures of reinstatement actually undertaken or to be undertaken".

The comment is the same as that on art. 5.2 of the Fund Convention.

5.4 HNS Convention

Art. 1.6 in the definition of "damage" similarly provides that compensation for impairment of the environment other than loss of profit from such impairment "shall be limited to cost of reasonable measures of reinstatement actually undertaken or to be undertaken" and art. 14.3 provides that the Fund shall incur no obligation if (b) the claimant cannot prove that there is "a reasonable probability" that the damage resulted from an incident involving one or more ships".

In art. 14.1 there is a provision identical to that in art. 4.1. of the Fund Convention and therefore reference is made to the comments thereunder in para. 5.2 above.

5.5 Unidroit principles

Art. 7.4.13 provides that the amount of liquidated damages "may be reduced to a reasonable amount where it is grossly excessive".

This is an application of the rule of reductio ad aequitatem *(see art. 1384 of the Italian Civil Code) and, therefore, reasonableness is in this case tantamount to equity. The rule is obviously flexible and correspondingly the effect of its application is not foreseeable.*

6 Foreseeability of result or event

6.1 Vienna Convention

Art. 79 provides that a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not "reasonably be expected to have taken the impediment into account" at the time of the conclusion of the contract or to have avoided or to have overcome it, or its consequences.

In this case flexibility is necessary, for the rule applies to any kind of impediment and reasonableness must be established with reference to a person such as that who has failed to perform an obligation arising out of a contract of sale. Foreseeability is hardly conceivable.

7 Rules relating to the event from which time must count.

7.1 HNS Convention

Art. 37.1 provides that rights to compensation shall be extinguished unless action is brought thereunder within three years "from the date

when the person suffering the damage knew or ought reasonably to have known of the damage and of the identity of the owner".

In this case the reasonableness does not create flexibility, but rather objective foreseeability of the date from which the period should commence to run and, consequently, the date when it would terminate. However the criterion of assessment of the reasonableness is subjective, for it is necessary to establish when the person suffering damage should have become aware of the damage and (circumstance probably more difficult to establish) of the identity of the owner of the ship.

8 Interpretation of statements and conduct

8.1 Vienna Convention

Art. 25 provides that a breach committed by one of the parties is fundamental if it results in such a detriment to the other party to deprive him of what he is entitled to expect under the contract unless the party in breach "did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such result".

Of course a rule such as this could not be otherwise than flexible, but as in all the cases considered in the previous paragraph, foreseeability would to a certain degree exist when the breach will have been committed. In any event guidelines are provided in order to assess the behaviour of a reasonable person, since reference is made to a "person of the same kind acting in the same circumstances".

8.2 Unidroit Principles

Art. 9.1.12, provides that if notice of assignment is given by the assignee, the obligor may request the assignee "to provide within a reasonable time adequate proof that the assignment has been made".

The assessment of the length of time is therefore left to the obligor and the issue of foreseeability does not arise, because what matters is that the

assignee knows by which date he must comply with the request. Flexibility was necessary, for the time depends on the subject matter of the assignment, and of its form.

9 Time by which or after which an action must be performed

9.1 Athens Convention

Art. 1.7 in its definition of "loss of or damage to luggage" provides that that expression includes pecuniary loss resulting from the luggage not having been re-delivered "within a reasonable time" after the arrival of the ship.

In this case flexibility does not appear to be justified and affects foreseeability.

9.2 MLM Convention 1993

Art. 3.1 provides that where deregistration is obligatory the holders of registered charges shall be notified of the pending deregistration, that "shall not be implemented earlier than after the lapse of a reasonable period of time which shall not be less than three months after the relevant notification to such holders".

Here the issue of foreseeability does not arise, for the interested persons know that they have not less than three months from the date of notification to take action in protection of their interest and because almost certainly the period allowed will be indicated in the notice. It may be added that that period should normally be deemed to be reasonable, because it has been deemed to be normally sufficient to protect the interest of the holders of registered charges.

9.3 Arrest 1999

Art. 7.5 provides that where the court of the State where arrest has been effected has no jurisdiction on the merits, a final decision of a competent court "shall be recognized and given effect with respect of the arrested ship or the security provided in order to obtain its release on condition that (a) the defendant has been given reasonable notice of such proceedings and a reasonable opportunity to present the case for the defence, and b) such recognition is not against public policy (*ordre public*)".

This wording is similar to that contained in conventions on the recognition and enforcement of judgments and, specifically, to that adopted in art. 34.2 of Council Regulation (EC) No.44/2001 of 22 December 2000, except that the term used is "sufficient time" instead than "reasonable time" and the phrase "reasonable opportunity to present the case for a defence" follows the phrase "and in such a way as to enable him to arrange for his defence". The flexibility of the phrase "reasonable time" is limited by the condition that that time must be such as to enable the defendant to present his case. The foreseeability of the time required for the defendant being able to present his case, will materialize when it will be known in which court proceedings on the merits have been brought.

9.4 Vienna Convention

Art. 64.2 provides that where the buyer has paid the price the seller loses the right to declare the contract avoided unless he does so "(a) in respect of any breach other than late performance by the buyer within a reasonable time (i) after the seller knew or ought to have known of the breach or (ii) after the expiration of any additional period fixed by the seller ... or after the seller has declared that he will not perform his obligation within such additional period".

Reasonableness and flexibility in this case affect foreseeability, because neither the seller nor the buyer would know in advance what the relevant period is.

Art. 73 provides that if one party's failure to perform any of his obligations in respect of any instalment gives the other party good

grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, that party may declare the contract avoided for the future, "provided he does so within a reasonable time"

Art. 75 provides that in case of breach of contract the party that is not in breach can claim the difference between the contract price and the price actually paid for goods purchased or sold if such purchase or sale is made "in a reasonable manner and within a reasonable time".

The comments made in respect of article 64.2 hold also in respect of both art. 73 and art. 75.

9.5 Unidroit Principles

Art. 7.4.5 provides that where the aggrieved party has terminated the contract and has made a replacement transaction "within a reasonable time and in a reasonable manner" it may recover the difference between the contract price and the replacement price as well as damages.

Also in respect of this rule reasonableness and flexibility affect foreseeability, because none of the parties would know in advance what the reasonable period and the reasonable manner should be.

10 Time by which a notice must be given or received

Whereas in all maritime conventions on carriage of goods notice of loss or damage must be given within a specified number of days, in the Vienna Convention 1980, as well as in the Unidroit Principles this is not the case, the assessment of the length of time being left to the appreciation of the parties and of the judicial or arbitral tribunal.

10.1 Vienna Convention

Art. 39 provides that the buyer "loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the

nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it".

Art. 43 provides that the buyer loses the right to rely on the provisions of art. 41 or art. 42, that regulate the delivery obligations "if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim".

Art. 73.2 provides that where a party may have good grounds to conclude that a fundamental breach of the contract will occur with respect to future instalments, "he may declare the contract avoided for the future, provided he does so within a reasonable time".

Finally art. 79.4 provides that the party who fails to perform must give notice to the other party of the impediment an its effect on his ability to perform and that if the notice "is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt".

In all the above provisions, the flexibility resulting from the reasonableness of the period of time prevents foreseeability and creates uncertainty.

10.2 Unidroit Principles

Art. 2.1.7 provides that an offer must be accepted within the time the offeror has fixed or, if no time is fixed, "within a reasonable time having regards to the circumstances, including the rapidity of the means of communications employed by the offeror".

Art. 2.1.12 provides that if "a writing which is sent within a reasonable time after the conclusion of the contract and which purports to be a confirmation of the contract contains additional or different terms, such terms become part of the contract unless they materially alter the contracts or the recipient, without undue delay, objects to the discrepancy"."

Art. 2.2.7 provides that where the agent that concludes a contract is

in conflict of interest with the principal on behalf of whom he has concluded the contract, has disclosed such conflict to the principal, the principal may not avoid the contract if he "had not objected within a reasonable time".

Art. 2.2.9 provides that where an agent acts without authority, the third party "may by notice to the principal specify a reasonable period of time for ratification".

Art. 3.2.12 provides that where the conditions for avoidance of a contract materialize the notice must be given "within a reasonable time, having regard to the circumstances after the avoiding party knew or could not have been unaware of the relevant facts or became capable of acting freely".

Art. 5.1.8 provides that a contract for an indefinite period of time "may be ended by either party by giving notice a reasonable time in advance".

Art. 6.1.1 provides that where time is not fixed or determinable from the contract a party must perform its obligations "within a reasonable time after the conclusion of the contract".

Art. 6.1.12 provides that if the obligor owing several monetary obligations to the same obligee does not specify, when paying, to which obligation he intends the payment to be applied, the obligee may, "within a reasonable time after payment, declare to the obligor the obligation to which it imputes the payment, provided that the obligation is due and undisputed".

Art. 6.1.16 provides that where the law of a State requires a public permission affecting the validity of the contract or its performance and the permission "is neither granted or refused within the agreed time, or where no period has been agreed, within a reasonable time from the conclusion of the contract, either party is entitled to terminate the contract".

Art. 6.2.3 provides that in case of hardship the party affected may request "without undue delay" renegotiations and "upon failure to reach an agreement within a reasonable time either party may resort to the court".

Art. 7.1.7(3) provides that the party who fails to perform must give notice to the other party of the impediment and if the notice "is not

received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt".

Art. 7.2.2(e) provides that where the party who owes a non-monetary obligation does not perform, the other party may require performance unless, inter alia, it fails to do so "within a reasonable time after it has, or ought to have, become aware of the non-performance".

Art. 7.3.2. provides that if performance has been offered late or otherwise does not conform to the contract "the aggrieved party will lose its right to terminate the contract unless it gives notice to the other party within a reasonable time after it has or ought to have become aware of the offer or of the non-conforming performance".

In view of the fact that the Unidroit Principles, as stated in the Preamble, set forth general rules for international commercial contracts, it was unavoidable to resort to flexibility in all the articles that have been previously considered. There is no doubt that flexibility affects foreseeability, but when the parties agree to apply the Unidroit Principles to their contract, they may well consider the articles in which certain actions are required to be performed within a "reasonable" time and specify which such time should be, in consideration of the specific nature of their contract. It may be added that in some of the articles that have been considered indications are provided in respect of the manner in which the reasonableness of the time limit ought to be assessed. This is the case for art 2.1.7, in which it is provided that regard should be had "to the circumstances, including the rapidity of the means of communications employed by the offeror" and for art. 2.1.12, in which a distinction is clearly made between the time by which the writing that contains additional terms become part of the contract and the time by which the recipient must object in order to prevent that result: the first being "reasonable" and second, that must necessarily be shorter, being qualified by the words " without undue delay". It is also the case for art. 3.2.12, wherein it is stated that the reasonable time must be assessed "having regard to the circumstances".

11 Reasonableness of costs or expenses

11.1 York-Antwerp Rules 1994

The Rule Paramount provides that in no case there may be any allowance for sacrifice or expenditure "unless reasonably made or incurred".

Rule A provides that there is a general average act when, and only when, an extraordinary sacrifice or expenditure "is intentionally reasonably made or incurred".

As pointed out in Lowndes and Rudolf[21]*, this rule is modelled very closely on rule 66(2) of the Marine Insurance Act 1906 and therefore the judgments in which that provision has been considered may be of assistance*[22].

Rule I.6 provides that if repairs were necessary for the safe prosecution of the voyage, "the wages and maintenance of the master, officers and crew reasonably incurred…shall be admitted in general average".

The question whether the wages and maintenance would be considered as having been reasonably incurred or not does not arise when the expense is incurred and consequently the uncertainty does not exert any influence on the expense.

Rule XVIII provides that the amount to be allowed as general average for damage or loss when repaired or replaced shall be "the actual reasonable cost of repairing etc:" and when not repaired or replaced, it shall be "the reasonable depreciation arising from such damage or loss".

In this case reasonableness could only be judged ex post facto.

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21 *The Law of general Average and the York-Antwerp Rules*, XIII edition, London 2008, p. 81.

22 Reference is made in Lowndes and Rudolf (at p. 120 and 121) to the remarks of Cockburn C.J.in *Corrie v. Coultyard* (supra paragraph 3.1.1)and of Hobhouse J. in *The Alpha* [1991] 2 Lloyd's Rep. 515. The remarks of Cockburn J. (the judgment of the Court of Appeal is published in 3 Asp. M.L.C 546, footnote (a)) are of particular interest. He stated (at p. 547): "It is not necessary that the judgment of the master should be borne out by the facts when they come to be examined into. It is enough if he exercises a reasonably sound judgment under all circumstances".

11.2 CMI Rules for the Assessment of Damages in Maritime Collision (Lisbon Rules)

Rule I(2)(a) provides that damages recoverable include reimbursement of salvage, general average and other charges and expenses "reasonably incurred" as a result of the collision; that rule under (d) provides that damages include compensation for loss of use of the vessel "for a period reasonably necessary to find a replacement" whether the vessel is actually replaced or not.

Rule II(1) provides that in the event of the vessel being damaged the claimant shall be entitled to recover as damages, inter alia, (a) the cost of repairs "reasonably effected and the reasonable cost of permanent repairs" and (b) reimbursement of salvage, general average and other charges and expenses "reasonably incurred" as a result of the collision.

Rule III(3))b) provides that in the case of property other than property having a commercial value being damaged and in the case it can be repaired the claimant shall be entitled to recover "the reasonable cost" of repairs, but not exceeding "the reasonable cost" of its replacement.

In all such cases, reasonableness of the expense may only be a guidance to the person who is incurring the expense, but no alternative test would be conceivable.

12 Terms similar to "reasonable"

12.1 Due

The expression "due diligence" was used first in the Harter Act of 1893[23],

[23] Section 2 of the Harter Act so provides in its relevant part:
"It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly to equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage …"

then in the Australian Sea Carriage of Goods Act 1904[24] and in the Canadian Water-Carriage of Goods Act 1910[25].

For this reason it would actually be more appropriate to qualify "reasonable" a term similar to "due". It would appear that the term "reasonable" was used for the first time in article 7 of the Canadian Act, in connection with deviations other that deviations to save life or property.

12.2 Properly and carefully

These terms were used separately in section 4 (c) of the Harter Act[26], then in section 5(c) of the Australian Act[27] and in section 4(c) of the Australian

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24 Section 5 of the Australian Act so provides in its relevant part:
"Where any bill of lading or document contains any clause covenant or agreement whereby:
(a) …
(b) any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold 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, are in any wise lessened, weakened, or avoided; or …"

25 Section 4 of the Canadian Act so provides in its relevant part:
"Where any bill of lading or similar document of title to goods contains any clause, covenant or agreement whereby:
(a) …
(b) any obligations of the owner or charterer of any ship to exercise due diligence to properly man, equip, and supply the ship, and make and keep the ship seaworthy, and make and keep the ship's hold, 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, are in any wise lessened, weakened or avoided; or …
(c) … such clause, covenant or agreement shall be illegal, null and void, and of no effect, unless such clause, covenant or agreement is in accordance with the other provisions of this Act."

26 Section 2 of the Harter Act so provides in its relevant part:
"It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement (…) 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, shall in any wise be lessened, weakened, or avoided."

27 Section 5 of the Australian Act so provides in its relevant part:
"Where any bill of lading or document contains any clause covenant or agreement whereby: (…)

Act. They were subsequently employed in the Hague Rules 1921 on which are based the Hague Rules 1924 and have now been employed also in article 13.1 of the Rotterdam Rules, the equivalent terms in the French text being "de façon appropriée et soigneuse".

These are, similarly to "reasonably", flexible terms that must be applied to the facts occurring at a given time, with reference to the knowledge and experience normally possessed by a master at that time. In this connection the warning of Roskill, J, as he then was, in The "Flowergate"[28] *is illuminating*[29].

12.3 Practicable measures

SUA 1988 provides in art. 13.1 that States Parties shall co-operate in the prevention of the offences set forth in art. 3 inter alia by "taking all

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(c) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened, or avoided."
Section 4 of the Canadian Act so provides in its relevant part:
"Where any bill of lading or similar document of title to goods contains any clause, covenant or agreement whereby: …)

(c) the obligations of the master, officers, agents, or servants of any ship to carefully handle and stow goods, and to care for, preserve, and properly deliver them, are in any wise lessened, weakened, or avoided."

28 *Jahn (Trading as C.F. Otto Weber) v. Turnbull Scott Shipping Company, Ltd. and Nigerian National Line, Ltd.* [1967] 1 Lloyd's Rep. 1.

29 He so held (at p. 46):
"But I wish to make it clear that my decision in favour of the defendants on the facts of this case does not, and must not, be understood to involve that shipowners can in future safely and without financial risk to themselves continue to accept cocoa for shipment in West Africa for delivery in North-West Europe whatever its moisture content may be and then, if and when damage occurs, successfully set up the same defence as that which has succeeded in this case. This case has revealed much regarding the shipment and carriage by sea of cocoa which seems not to have been hitherto generally known among shipowners and their masters and officers and others immediately concerned with the day-to-day practical side of the problem. If in the future, and in the light of what is now known, shipowners continue to accept cocoa for shipment merely on the strength of its apparent condition, and heedless of the implications of what its true condition may in fact be by reason of its moisture content, they may find it said against them hereafter that they have engaged themselves to carry that cocoa safely to destination, whatever that moisture content may ultimately prove to be."

practicable measures to prevent preparations for the commission of the offences set forth in art. 3, the words corresponding to "all practicable measures" in the French text being "toutes les mesures possibles".

The flexibility is related to the question of which the practicable measures are and, therefore there is a significant degree of foreseeability.

12.4 Without delay

SUA 1988 provides in art. 7.3(a) that if a State Party takes the alleged offender person into custody, such person shall be entitled "to communicate without delay" with the nearest appropriate representative of the State of which he is a national.

In this case there is no flexibility, for "without delay" is tantamount to "immediately", such latter word being instead used in article7.2.

13 Conclusive remarks

From the preceding analysis it appears that recourse to the criterion of reasonableness is a remedy that is justified when flexibility is necessary. And flexibility is necessary both where the behaviour of the parties depends on the facts of the specific case and where the period by which an action must accomplished depends on the speed of communications and on the development of technologies. The longer the time during which an instrument is meant to regulate commercial relationships the greater is the necessity to make recourse to flexible criteria, even though that may adversely affect foreseeability.

There are, however, some guidelines that may assist the parties and the courts in their assessment of what is reasonable in a specific case, such as the reference to:

- what is reasonable in the specific circumstances,
- what is commercially reasonable (art. 40.4 (b)(ii) of the Rotterdam Rules),
- what is reasonable to require of a person that commercially per-

forms a specific activity (art. 5.2. of the Hamburg Rules, art. 1176 of the Italian Civil Code and comments on art. 4.1 of the Unidroit Principles), and

- the purpose of the rule that has been infringed (art. 3.3.1 of the Unidroit Principles).

Reasonableness, Foreseeability and Flexibility: Construction of terms in maritime contracts and remedies for their breach

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Introduction

This paper will consider the important role of reasonableness, foreseeability and flexibility in two contexts: first construction of terms in maritime contracts and secondly the remedies for breach of those terms. As to the first it is important to explore the role of the notional reasonable man in establishing what the terms of a commercial contract mean. A commercial contract may contain express terms which are very clear, but the role of the notional reasonable man may become very important where the contract has not been drafted as carefully as it might have been and the parties disagree as to the construction of the express terms that it contains. Alternatively the parties may have omitted to make any provision in the contract as to what is to happen in certain circumstances and again the notional reasonable man will step in should one party seek to argue that there is an implied term in the contract.[1]

The second area in which the role of reasonableness, foreseeability and flexibility will be explored is that of remedies. Whether a term of the contract can be construed as a condition, an innominate term or a warranty will dictate what the remedies for breach are. What those remedies are and how and why they differ depending on the nature of the term broken will be analysed, showing how the line between certainty and flexibility is negotiated. Thus although there is a right to elect to terminate for breach of a condition, this remedy is available for breaches of an innominate term only where the consequences of the breach are very serious and merit such a drastic end to the parties' obligations. Alternatively the innocent party may elect to affirm the contract, save in extreme cases where it would have no "legitimate interest" in doing so if damages would be an adequate remedy and insisting on maintaining

[1] Compare frustration where an event occurs which the parties have not "foreseen" in the sense that there is no provision in the contract to deal with it. Is frustration a question of construction of the contract? Frustration leads to termination of the contract on the occurrence of an event outside the control of either party. In *Lloyd's TSB Foundation for Scotland v Lloyd's Banking Group plc* [2013] UKSC; [2013] 1 W.L.R. 366 the contract was not frustrated although the contract did not provide for what was to occur upon certain changes of circumstances.

the contract would be "wholly unreasonable." Where damages are claimed the innocent party must take reasonable steps to mitigate their loss. The relevance of whether there is an available market or not has been considered in the recent case law arising out of the market crash in the autumn of 2008. Foreseeability plays an important role in assessing whether damages are too remote to be recoverable.[2]

I. Construction of Terms

A. Express Terms

In some cases commercial contracts may not be as carefully drafted as they should be and may not make clear what the parties intended. The court then has to construe or interpret the parties' intentions.[3] Those intentions have to be ascertained from the language the parties have used interpreted in accordance with the principles set out in *Investors' Compensation Scheme v West Bromwich Building Society*[4] which are quoted below. The English court adopts an objective rather than a subjective approach and it is here that the "reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract" makes an entrance. As always with contract it is necessary to go back to the formation stage of the contract. Where the parties have used unambiguous language in their contract, the court must apply it, unless this

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2 See page 136.

3 See K. Lewison, *The Interpretation of Contracts*, 5th ed. 2011, Sweet & Maxwell and for interpretation of charterparty terms J. Cooke et al, *Voyage Charters*, Third ed., 2007, Informa, paras. 1.95 to 1.126; T. Coghlin et al, *Time Charters*, Sixth ed., 2008, Informa, para. G9.

4 [1998] 1 W.L.R. 896 followed in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL8; [2002] 1 AC 251; *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101; *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900 discussed below; and *Enviroco Ltd v. Farstad Supply A/S* [2011] UKSC 16; [2011] 1 W.L.R. 921.

leads "to a conclusion that flouts business commonsense".

In *Investors' Compensation Scheme* the House of Lords had to consider the meaning of a contractual agreement, the drafting of which was described by Lord Lloyd as "slovenly."[5] Lord Hoffmann summarised the correct approach in his judgment with which three other members of the House of Lords concurred, Lord Lloyd of Berwick dissenting, as follows,

> "I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384-1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

[5] At pp. 899B and 903H.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd.* v. *Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""[6]

[6] At pp. 912F – 913E.

The Supreme Court has recently revisited the principles that the English court will apply to interpret a contract where there are two possible constructions in *Rainy Sky SA v. Kookmin Bank*.[7] In that case a ship builder had entered into six contracts with six buyers for six ships at a cost of US$33,300,000 payable in five instalments of US$6,660,000 each. The contracts provided that it was a condition precedent to payment of the first instalment that the builder would deliver refund guarantees to the buyers relating to the first and subsequent instalments. Kookmin Bank issued those guarantees. The buyers each paid the first instalment and one of them also paid the second instalment. The builder experienced financial difficulties and entered into a debt workout procedure under Korean law. The buyers demanded an immediate refund of all the instalments paid. The bank refused to pay arguing that on the true construction of the guarantee the buyers were not entitled to a refund as the guarantees did not cover the insolvency of the shipbuilder. Paragraphs 2 and 3 of the guarantee provided,

> "[2] Pursuant to the terms of the contract, you are entitled, upon your rejection of the vessel in accordance with the terms of the contract, your termination, cancellation or rescission of the contract or upon a total loss of the vessel, to repayment of the pre-delivery instalments of the contract price paid by you prior to such termination or a total loss of the vessel …..
>
> [3]….we hereby , as primary obligor, irrevocably and unconditionally undertake to pay to you, your successors and assigns, on your first written demand, all such sums due to you under the contract (or such sums as would have been due to you but for any irregularity, illegality or unenforceability in whole or in part of the contract)…"

The building contract provided that if the builder became insolvent or

[7] [2011] UKSC 50; [2011] 1 W.L.R. 2900. See also *Lloyd's TSB Foundation for Scotland v. Lloyd's Banking Group plc* [2013] UKSC 3; [2013] 1 W.L.R. 366 at [23], [45] and [54] and *Griffon Shipping LLC v Firodi Shipping Ltd (The Griffon)* [2013] EWHC 593 (Comm) construction of the Norwegian Sale form.

any action was taken by it which was similar in effect the buyer could give a notice requiring the builder to refund to the buyer the full amount of any sum paid to the builder on account of the vessel. The builder could then choose to terminate the contract. The bank argued that the words "all such sums" in paragraph three of the guarantee were limited by paragraph two which referred to termination by the buyer, and did not cover insolvency, as it was the builder who could chose to terminate the contract on insolvency, and not the buyer.

Lord Clarke delivering the judgment of the Supreme Court stated that,

> "the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the *Investors Compensation Scheme*[8] case at page 912H, the relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

The court is not entitled to consider evidence of pre contractual negotiations. It is irrelevant to consider the parties' subjective intentions and the mere fact that a term in the contract appears to be particularly unfavourable to one party or the other is also irrelevant.

Lord Clarke held that it is not necessary to conclude that unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court must give effect to that meaning. Where the language used by the parties has more than one potential meaning the court can prefer the construction which is most consistent with business common sense and reject the other. [9] It is relevant to

[8] *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 quoted above.

[9] Lord Clarke quoted from the journal article of Lord Steyn "Contract Law: Fulfilling the reasonable expectations of honest men" 113 LQR 433, 441 where he said, "in the

consider the consequences of a particular construction as this may constitute a reason to reject a possible but unbusinesslike meaning.

Applying these principles to the facts of the case Lord Clarke concluded that the bank's construction had the surprising and uncommercial result that the buyers would not be able to call upon the guarantees in the situation where security was most likely to be needed ie. the insolvency of the builder. Therefore of the two possible constructions of paragraph three of the guarantee the buyers' construction was to be preferred as it was consistent with the commercial purpose of the guarantee in a way in which the bank's construction was not.

B. Implied Terms

Sometimes the parties have made no provision as to how a matter should be dealt with and then the question arises as to whether a term can be implied in the contract. The implication of a term has recently been considered by the Privy Council in *Attorney General of Belize v Belize Telecom Limited*.[10] Telecommunications had been a state monopoly in Belize and Belize Telecommunications Limited was formed as part of a scheme of privatisation to enable the Government of Belize to sell all or part of its financial interest to private investors while retaining a degree of control. That control was achieved by a special share issued to the Government which could only be transferred to a Minister of the Government or a person acting on the written authority of the Government. The special shareholder could appoint and remove two directors and another two "C" directors if it held "C" ordinary shares amounting to 37.5% or more of the issued share capital of the company. Such latter two directors could only be removed by a special shareholder holding C shares amounting to 37.5% of the issued share capital. There was no express provision dealing with the position of a special C director when the special shareholder who appointed him no longer held enough C ordinary

event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties."

[10] [2009] UKPC 10; [2009] 1 W.L.R. 1988.

shares or the position of the Government Appointed Directors when the special share had been redeemed and no longer existed.

The respondents argued that the directors were irremovable until they chose to resign, did not comply with the articles or died. The Government argued that this was an absurd result and that the articles should be construed as providing by implication that a director appointed by virtue of a specified shareholding vacated his office if there were no longer any holder of such a shareholding. The Privy Council held that the implication was necessary.

Lord Hoffmann delivered the judgment of the Privy Council. He stated,

> "[16]…The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to who the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.
>
> [17] The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> [18]In some cases, however, the reasonable addressee would

> understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means."

Lord Hoffmann went on to comment on the two tests which have been used previously to determine whether a term could be implied: whether an officious bystander would say such a term would "go without saying" and whether it is "necessary to give business efficacy to the contract." He stated that these were not "different or additional tests".

> " [21] … There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?

Lord Hoffmann made two important points about the business efficacy test. The first is that the notional reader will take into account the practical consequences of deciding that a contract means one thing or another. The second is the word "necessary." It is not enough that the court considers that the implied term expresses what it would have been reasonable for the parties to agree to. The court must be satisfied that it is what the contract actually means.

He continued,

> "[22] There are dangers in treating these alternative formulations of the question as if they had a life of their own. Take, for example, the question of whether the implied term is "necessary to give business efficacy" to the contract. That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the

> practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which *Equitable Life Assurance Society v Hyman* … was decided. The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.
>
> [23] The danger lies, however, in detaching the phrase "necessary to give business efficacy" from the basic process of construction of the instrument. It is frequently the case that a contract may work perfectly well in the sense that both parties can perform their express obligations, but the consequences would contradict what a reasonable person would understand the contract to mean. Lord Steyn made this point in the *Equitable Life* case (at p 459) when he said that in that case an implication was necessary "to give effect to the reasonable expectations of the parties."
>
> [24] The same point had been made many years earlier by Bowen LJ in his well known formulation in *The Moorcock* (1889) 14 PD 64 , 68:
>
> "In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men"
>
> [25] Likewise, the requirement that the implied term must "go without saying" is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean. …"

The question that has arisen as a result of the Opinion of the Judicial Committee of the Privy Council in *Belize* is whether Lord Hoffmann's single test of what a reasonable man with the relevant commercial

background would have understood the contract to mean is a "significant reformulation of, and departure from the officious bystander test." John McCaughran argues that it is, that the officious bystander test is too strict and that it is apt, occasionally to produce the wrong result. He therefore prefers the test of the reasonable man which is ultimately the court.[11] Lord Grabiner, on the other hand, advocates a stricter approach to the implication of terms.[12] He approves the judgment of Sir Thomas Bingham M.R. in *Philips Electronique Grand Public v British Sky Broadcasting Ltd13* where the latter states that the implication of contract terms involves "a different and altogether more ambitious undertaking"[14] than the courts' usual role in contractual interpretation. "It is because the implication of terms is so intrusive that the law imposes strict constraints on the exercise of this extraordinary power."[15]

The Court of Appeal applied *Belize* in *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn).*[16] That case involved a voyage charterparty of the vessel *Reborn* from "1BERTH CHEKKA – 27 FT SW PERMISSIBLE DRAFT". The vessel allegedly sustained hull damage from a hidden underwater projection at the loading berth nominated by the charterers at Chekka in the Lebanon. The issue was whether if a specific load port is named in a voyage charterparty and there are several possible berths within that port to which a vessel could be directed to load by the charterers and there is no express warranty in the charterparty of the safety of either the port or the berth to which the vessel is to be directed by the charterers, is the charterparty subject to an implied term that the charterers must nominate a "safe" berth at the load port? It was assumed that there were two loading berths which the

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11 J. McCaughran, "Implied Terms: The Journey of the man on the Clapham Omnibus" [2011] CLJ 607, 614-622.

12 Lord Grabiner, "The iterative process of contractual interpretation" [2012] L.Q.R. 41.

13 [1995] EMLR 472.

14 *Ibid* 481.

15 *Ibid* 481.

16 [2009] EWCA Civ 531; [2009] 1 C.L.C. 909. See also *Wuhan Ocan Economic and Technical Cooperation Company Limited v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co. KG* [2012] EWHC 3104 [32] to [39].

charterers could have nominated at Chekka.

Clause 1 of the standard form Gencon charterparty provided,

> The said Vessel shall…proceed to the loading port(s) or place(s) stated in Box 10 or so near thereto as she may get and lie always afloat… and being so loaded the Vessel shall proceed to the discharging port(s) or place(s) stated in Box 11… or so near thereto as she may safely get and lie always afloat, and there deliver the cargo.

Clause 20 provided,

> "Owners guarantee and warrant that upon arrival of the vessel to and/or prior its departure from, loading or discharging ports (either in ballast condition prior to loading or laden prior discharging) the vessel including, inter alia the vessel's draft, shall fully comply with all restrictions whatsoever of the said ports (as applicable at relevant time) including their anchorages, berths and approaches and that they have satisfied themselves to their full satisfaction with and about the ports specifications and restrictions prior to entering into this Charter Party."

Sir Anthony Clarke MR, as he then was, with whom Rix and Carnwarth LJJ agreed, quoted extensively from the judgment of Lord Hoffmann in the *Belize* case. He stressed that the most usual inference where a contract does not provide for what is to happen when some event occurs and one party suffers loss as a result, is that the loss lies where it falls. Thus if no term were to be implied the owners would have to bear their own loss. He also stressed the importance of the test of necessity and stated,

> "Moreover, as I read Lord Hoffmann's analysis, although he is emphasising that the process of implication is part of the process of construction of the contract, he is not in any way resiling from the often stated proposition that it must be necessary to imply the proposed term. It is never sufficient that it should be reasonable. This point is clear, for example, from the well-known speech of

> Lord Wilberforce in Liverpool City Council v Irwin [1977] AC 239, where he rejected at page 253H to 254A the approach of Lord Denning, which was to permit the implication of reasonable terms."[17]

Clarke M.R. held that it was not necessary to imply such a term and furthermore any such implication was negated by the express terms of the contract.

As regards the authorities on charterparties, standard form time charterparties commonly contain a safe port provision. If there is no such provision it has been suggested by Donaldson J. in *The Evvagelos Th*[18] that such a term would probably be implied in a time charterparty. The reason for this is that the charterer may have a wide choice as to where the vessel may be ordered,

> "For my part, if I were faced with a simple charter which provided that the vessel was only to go to such port or place within a specified range as might be nominated by the charterer and there load a cargo, I should have no hesitation in implying a qualification that the port or place had to be safe. I should make this implication because common sense and business efficacy require it in cases in which the shipowner surrenders to the charterer the right to choose where his ship shall go, and because I think that this is in accordance with the weight of authority."

However, there is no decision in relation to voyage charters where some standard form charterparties do contain a safe port obligation but others do not. Thus much will depend on the terms of the charterparty. Sir Anthony Clarke MR cited Voyage Charters with approval where the editors state,

> "In principle, the more extensive that liberty, the greater the necessity to imply a warranty: conversely, the more specific the

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17 [15].

18 *Vardinoyannis v The Egyptian General Petroleum Corporation (The Evvagelos Th)* [1971] 2 Lloyd's Rep. 200.

> information given in the charter to the owner about the intended port or place, the more reasonable it is to conclude that he has satisfied himself as to its safety, or that he is prepared to take the risk that it is unsafe."[19]

Thus, for example, if the voyage charterparty provides for a named load port but there is no express safe port obligation, no implied obligation as to safety will be implied. If, however, there is a named port and an express safe port obligation the safe port requirement will apply to the named port.[20] Nor will there be such an obligation if the charterers can choose from a range of ports eg. Amsterdam/Rotterdam/Antwerp.[21] However, the position may well be different where the charterer has a choice eg. where the voyage charterparty provides for one load port from a range of ports eg. Bordeaux/Hamburg range.

Where there is a safe port provision the berth must also be safe as the vessel must be able to use the port safely as provided for in the classic statement of what constitutes a safe port by Sellers J. in *The Eastern City.*[22]

In *The Reborn* as there was no safe port provision Sir Anthony Clarke MR considered the scope of any possible implied safe berth provision. He referred to the judgment of Bingham LJ in *The APJ Priti*[23] where the latter referred to Sellers LJ's description of a safe port and stated that the same principle should apply to safe berths, subject to two qualifications. The first qualification was that, since the charterers had not promised that the port would be safe, the vessel's passage to and from the berth would not include the passage to and from the port. The second qualification was that the charterers' promise should be understood as limited

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19 J. Cooke et al, *Voyage Charters*, Third ed., 2007, para. 5.32.

20 *AIC Ltd V. Marine Pilot Ltd (The Archimidis)* [2008] EWCA Civ 175; [2008] 1 Lloyd's Rep. 597; *STX Pan Ocean Co Ltd v. Ugland Bulk Transport AS (The Livanita)* [2007] EWHC 1317 (Comm); [2008] 1 Lloyd's Rep. 86.

21 See eg. *Atkins International HA v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep. 37.

22 *Leeds Shipping Co Ltd v Societe Francaise Bunge (The Eastern City)* [1958] 2 Lloyd's Rep. 127 at 133.

23 *Atkins International HA v Islamic Republic of Iran Shipping Lines (The APJ Priti)* [1987] 2 Lloyd's Rep. 37.

to a promise that the berth or berths nominated would be prospectively safe from risks not affecting the port as a whole or all the berths at it. He accepted the charterers' contention that the relevant safety (or unsafety) must be particular to the berth nominated and not general to the port as a whole or all the berths in it.

The word "safely" had been deleted from clause 1 which was "a pointer", but "no more than a pointer" to the fact that the parties did not intend there to be any express term as to the safety of the port or the berth.[24] Furthermore an implied term would be inconsistent with the express terms of the charterparty.[25]

Sir Anthony Clarke MR concluded that it was not necessary to imply a term into the contract as to safety but added,

> "Moreover, if one asks the question identified by Lord Hoffmann at [21] of the *Belize* case as the only question to be asked, namely whether the charterparty could reasonably be understood to mean, when read against the relevant background, that the charterers warranted the safety of the berth at Chekka from risks not affecting the port as a whole or all the berths in it or arising from the specifications and restrictions of the berth, the answer is in my opinion no. The question is simply whether the charterers agreed to take the risk of unsafety at the berth from hidden dangers and the answer is no."

Rix LJ agreeing with Sir Anthony Clarke's judgment stated,

> "After all, the charterers did not expressly warrant the safety of the port or berth; the port was a named, accepted and agreed port; it is hard to think that it does not follow that the (two assumed) berths in the port are also to be regarded as berths of which the owners had agreed to accept the risk; and for good measure the ownershad, by the special clause 20, expressly agreed to familiarise themselves with all aspects of the port, including its berths, as well as relevant restrictions and specifications. To cap this, there is no single case

[24] [38].

[25] [40].

> which Mr Bailey has been able to refer to us, for all his industry, in which the safety of a berth at a named port, whose safety has not itself been expressly warranted, has been implicitly warranted. Whether or not the, albeit limited, implied warranty of safety for which Mr Bailey now contends is actually inconsistent with clause 20, or whether, as I am inclined to think, in Sir Thomas Bingham's insightful phrase in *The APJ Priti* at 42, "such an implied term would at best lie uneasily beside the express terms of the charter", I would reject the owners' submission. Moreover, I would do so whether or not an essential requirement of the implication of a term is that it is necessary, and whether or not Lord Hoffmann's new formulation of the implied term test, that the term contended for is what the instrument "must mean" to the "reasonable addressee" (para 18 of *Attorney-General of Belize*), is the ultimate test. In all this, I agree with the judgment of Sir Anthony Clarke MR, which I gratefully adopt in full."[26]

As far as safe ports are concerned Rix L.J. stated,

> "In sum, there is no authority which extends any implied warranty of safety to a voyage charterer's choice of berth in a port which is not itself warranted safe. It appears to be accepted that a warranty of safety as to a port will encompass a warranty of safety as to its berths (*Voyage Charters* at para 5.42, *Time Charters*, 6th ed, 2008, at para 10.33). It seems to me that the corollary also applies: where there is no warranty of safety as to the port, there is unlikely to be any warranty of safety as to its berths, in the absence of an express warranty. Whether that is always the case, as for instance in a vast port such as Rotterdam, it is not necessary to decide. But in the present case, it seems to me to be impossible to imply the residual term for which the owners contend."

The decision in *The Reborn* is limited to its particular facts and the specific provisions of the charterparty.[27] Its importance lies in the fact that the Court of Appeal stresses the continuing requirement of necessity for the implication of a contractual term, a requirement which is not inconsistent

[26] [48].

[27] C. Ward, "Unsafe berths and implied terms reborn." [20??] LMCLQ 489.

with the judgment of Lord Hoffmann in *Belize*. *The Reborn* has been followed in subsequent decisions.[28]

II. Remedies for breach

A. The Right to Elect to Terminate. Conditions, innominate terms and warranties

Another area in which the courts have to construe contracts is to determine whether a contractual term is a condition, an innominate term or a warranty. The reason this is so significant is that it will dictate what remedy is available for breach of the term. Although the breach of all terms will give rise to a claim for damages, provided it can be shown that a loss has been suffered as a result of the breach, that such loss is not too remote,[29] and is not excluded or limited by the terms of the contract, only some terms will give rise to the precious right to elect to terminate the contract. Here English law seeks to balance certainty and flexibility. As regards conditions there is certainty in that breach of a condition gives a right to elect to terminate the contract as soon as the breach occurs. However, breach of an innominate term may do so, but only if the consequences of the breach are so serious as to deprive the innocent party

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[28] See also *Yam Seng Pte Ltd v International Trade Corporation Limited* [2013] EWHC 111 (QB) [119] – [154] where Leggatt J. held that there was an implied duty of good faith in a long term commercial contract. He considered *Belize* and concluded that the implied term would have satisfied all the old tests eg of necessity. *Wuhan Ocean Economic and Technical Cooperation Company Limited v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co. KG* [2012] EWHC 3104 where Cooke J. held where the sellers under a ship building contract had an obligation to extend a Refund Guarantee, there was an implied term that the obligation would be performed within a reasonable time – [30]. The arbitrators' finding that a reasonable time would expire fourteen days before the expiry of the Refund Gurantee, was unchallengeable as a fact found by the Tribunal - [31]. *SNCB Holding v UBS AG* [2012] EWHC 2044 (Comm). *Swallowfalls Ltd v Monaco Yachting & Technologies S.A.M.* [2013] EWHC 236(Comm) at [108].

[29] See fn 58.

of substantially the whole performance it was entitled to under the contract (another way of putting this is that the breach goes to the root of the contract or is fundamental). There is therefore greater flexibility as to the remedy for breach of an innominate term according to the gravity of the consequences of the breach.

It may be possible to classify a term as a condition, innominate term or a warranty because it is stated in a statute what that term is[30] or there may be clear authority. Thus the time for performance in commercial contracts is frequently a condition.[31] The parties may themselves make clear in their contract that the term is a condition by expressly stating so or spelling out that if the term is broken the other party will have the right to terminate the contract. However, the use of the word "condition" is neither necessary nor sufficient to make the term a condition. It will be a strong indication but not conclusive.[32] Alternatively the parties may provide that time is of the essence.[33] Even if the parties have provided for an express right to terminate and a remedy, exercise of that right may not exclude the common law right to elect to terminate and claim damages.[34]

Even if the parties have not used the word "condition" or spelled out the remedy for breach the court will seek the intention of the parties. Thus in *B.S. & N. Ltd (BVI) v. Micado Shipping Ltd (Malta) (The*

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30 Eg. sections 12 – 15 of the Sale of Goods Act 1979.

31 *Maredelanto Compania Naviera S.A. v. Bergbau-Handel G.m.b.H. (The Mihalis Angelos)* [1970] 2 Lloyd's Rep 43; *Bunge Corporation v. Tradax* [1981] 1 WLR 711. Late payment may not constitute a repudiatory breach unless a party refuses to pay or is unable to pay and that is why an express withdrawal clause is invariably inserted in a time charterparty. However, in *Kuwait Rocks Co v AMN Bulk Carriers Inc (The Astra)* [2013] EWHC 865 (Comm) Flaux J. held that the obligation to make punctual payment of the hire under a time charter was a condition. *Dalkia Utilities Services plc v. Celtech International Ltd* [2006] EWHC 63; [2006] 1 Lloyd's Rep. 599 C had not renounced or repudiated the agreement by its failure to pay three consecutive instalments and its indications as to whether it could and would perform.

32 *Schuler v. Wickman* [1974] AC 235.

33 *Lombard North Central plc v Butterworth* [1987] 1 Q.B. 527; [1987] 1 All E.R. 267.

34 *Stocznia Gdanska SA v Latvian Shipping Company (No 2)* [2002] EWCA Civ 889; [2002] 2 All E.R. (Comm) 768; [2002] 2 Lloyd's Rep. 436; *Stocznia Gdanska SA v Gearbulk Holdings Ltd* [2009] EWCA Civ 75; [2010] QB.

"Seaflower")[35] a time charterparty for a period of 11 months, maximum 12 months at the charterers' option, contained the following clause 46,

> "Vessel is presently MOBIL (expiring 27/1/98) CONOCO (expiring 3/2/98) and SHELL (expiring 14/1/98) acceptable. Owners guarantee to obtain within 60 days (sixty) days EXXON approval in addition to present approvals. On delivery date hire rate will be discounted USD 250…for each approval missing…If for any reason, Owners would lose even one of such acceptances they must advise charterers at once and they must reinstate same within 30 (thirty) days from such occurrence failing which Charterers will be at liberty to cancel charterparty…Hire rates will be reinstated once Owner will show written evidence of approvals from Major Oil Companies."

On delivery Exxon approval had not been obtained. The charterers claimed that they were entitled to terminate the charterparty for breach of condition if Exxon approval was not obtained within 60 days of the charter. One of the charterers' problems was that the clause did not spell out whether the charterer had the right to cancel the charterparty if the Exxon approval was not obtained within 60 days. It only expressly provided for such a right if an acceptance were lost and not reinstated within thirty days. That right clearly applied to the loss of Exxon approval once such approval was obtained. Thus the charterer treated the oil majors' approval as important and the clause treated a failure to reinstate a lost approval as a breach of condition. The parties should be assumed to have intended to be consistent about the importance of obtaining and maintaining oil majors' approvals. Thus there should be no inconsistency between the loss of some oil majors' approvals and that of Exxon or between having the approval at the outset of the charterparty and losing the approval after the commencement of the charter period. It did not matter that the charterparty did not expressly state that the requirement

[35] [2001] 1 Lloyd's Rep. 341. See also *Dolphin Tanker Srl v Westport Petroleum Inc (The Savina Caylyn)* [2010] EWHC 2617 (Comm); [2011] 1 Lloyd's Rep. 550. Compare *Transpetrol Maritime Services Ltd v SJB (Marine Energy) BV (The Rowan)* [2012] EWCA Civ 198; [2012] 1 Lloyd's Rep. 564.

was a condition. The Court of Appeal unanimously held that the requirement to obtain approval from Exxon within sixty days was a condition, breach of which entitled the charterers to elect to terminate the charterparty. As held by the House of Lords in *Bunge Corporation v Tradax Export S.A.,* [36] a provision for performance of an obligation within a certain time limit in a mercantile contract,[37] particularly if the other party's performance of the contract is dependent on performance of that obligation by a certain time, is presumed to be a condition. The word "guarantee" used in this provision served to emphasise the importance of the provision although it would not on its own justify the conclusion that the provision was a condition.[38]

There are many contractual obligations which are complex and cannot be categorised as either conditions or warranties. The consequences of breach could be very varied. The important obligation of seaworthiness was considered by the Court of Appeal in *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd*.[39] The *Hong Kong Fir* was chartered for twenty four months. The owners were in breach of their obligation of seaworthiness and the vessel was offhire for a total of five months while repairs were carried out to her engines. The Court of Appeal held that the obligation as to seaworthiness is an innominate term and breach of that term would only give rise to a right to elect to terminate if the consequences of the breach are so serious that they deprive the innocent party of substantially the whole benefit that it was intended to obtain under the contract. The reason for the classification of a term as to seaworthiness as an innominate term is the huge range of consequences that can flow from breach of such a term. At one end of the spectrum

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36 [1981] 1 W.L.R. 711; [1981] 2 Lloyd's Rep. 1.

37 See fn. 32

38 Per Jonathan Parker L.J. at para. 102.

39 [1962] 2 Q.B. 26; [1961] 2 Lloyd's Rep. 478 followed in *Star Reefers Pool Inc v JFC Group Co Ltd* [2011] EWHC 2204 (Comm). See also *Sports Connection Pte Ltd v Deuter Sports GMBH*[2009] SGCA 22; [2009] 5 SLR 883, a decision of the Singapore Court of Appeal; *Wuhan Ocean Economic and Technical Cooperation Company Limited v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co. KG* [2012] EWHC 3104 [32] to [39] where Cooke J. held that the obligation of a seller under a ship building contract to extend the Refund Guarantee was an innominate term.

the consequences of breach may be very trivial. For example, the radar of the ship may break down. Nevertheless the ship is navigated safely into port without any difficulty. On arrival in port an electrical engineer is requested to fix the radar which is repaired within a matter of hours and no delay is caused to the ship's operations as cargo operations are performed throughout the repairs. At the other end of the spectrum, the ship's steering gear fails in heavy seas and the ship becomes a total loss on a rocky shoreline. The Court of Appeal held that the breach by the Owners of the seaworthiness provision did not entitle the charterers to elect to terminate the charterparty as the latter had not been deprived of substantially the whole benefit they had contracted for.[40] They had lost the use of the ship for five months out of twenty four.[41]

Another common provision in a time charterparty relates to the vessel's speed and performance. Although breach of such a provision will commonly only give rise to damages for the time lost by the charterers or overconsumption of fuel, in *Dolphin Hellas Shipping S.A v. Itemslot Ltd (The Aegean Dolphin)*[42] Hobhouse J. upheld the arbitrators' award that breach of the speed provision gave rise to a right to elect to terminate. In that case the *Aegean Dolphin* was chartered for three years "for a series of cruises" from the east coast of Australia. The charterparty provided that "Timetables for all itineraries …shall be based on the speed of 18 knots in good weather conditions." Subsequently the parties agreed that the charterer would inspect the vessel prior to June 1988 and declare to the owner that the vessel was satisfactory in its entirety for the performance of its obligations under the charterparty. In May 1988 the

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40 There was also no right to elect to terminate in eg. *Star Reefers Pool Inc v JFC Group Co Ltd* [2011] EWHC 2204 (Comm); *Sports Connection Pte Ltd v Deuter Sports GMBH*[2009] SGCA 22; [2009] 5 SLR 883, a decision of the Singapore Court of Appeal. ; and *Wuhan Ocean Economic and Technical Cooperation Company Limited v Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co. KG* [2012] EWHC 3104.

41 Some charterparties may provide that the charterer can add on any offhire periods at the end of the charterparty so that it has indeed had the use of the vessel for the actual amount of time agreed. There was such a clause in *The Hong Kong Fir*. See also *Petroleo Brasileiro S.A. v. Kriti Akti Shipping Co. S.A. (The Kriti Akti)* [2004] EWCA Civ 116; [2004] 1 Lloyd's Rep. 712.

42 [1992] 2 Lloyd's Rep. 178.

charterers made such a declaration but they noted that they had owners' "assurance that the ship will cruise at 18 knots in good weather." Both parties subsequently argued that they were entitled to elect to terminate the charterparty. The arbitrators found that the charterparty had a clear and contemplated underlying commercial objective which was appreciated by both parties which included as an essential ingredient the capacity of the vessel to perform the contemplated cruises, including seven night three stop cruises. The vessel could not maintain a speed of 18 knots and owners' breach of the speed obligation deprived the charter of substantially the whole benefit intended to be conferred by the contract or went to the root of the contract. They concluded that the charterers were deprived of what they had bargained for and were entitled to terminate the contract. Hobhouse J. held that based on the arbitrators' findings of fact and their assessment of the essential commercial basis of the contract, the owners' appeal on this point failed. However, the charterers had lost their right to reject the vessel as a result of their declaration in May, as on its construction it was an acceptance of the vessel in its entirety. They were not precluded from claiming damages for later breaches when the vessel, having been delivered, subsequently failed to perform fully in accordance with its terms. Having accepted the vessel in May, the charterers sought to reject the vessel and terminate the charterparty in August. There had not been any change of circumstances between May and August. The charterers had no right to do this because of their earlier acceptance. They were therefore in wrongful repudiation of the charterparty.

There is a right to elect to terminate the contract the moment a condition is breached. It is not necessary for the innocent party to wait to see what the consequences of the breach are and this certainty is very important. It may lead, however, to a draconian result if the consequences of the breach are not very serious. The position with breach of an innominate term may be contrasted as there the innocent party does have to wait and see what the consequences of the breach are, or be able to predict that those consequences will be very severe, before it knows whether it can elect to terminate the contract. This greater flexibility allows for a

more appropriate remedy depending on the severity of the consequences of the breach. However, this may result in uncertainty and may be commercially very inconvenient as is illustrated by the situation in *The Hong Kong Fir* case itself. When the breach occurs the charterer may be in a very difficult position if it does not have the use of the vessel for a period of time. This will be exacerbated by the fact that it may not initially be clear how long it will take to remedy the breach and make the ship seaworthy. This may play havoc with the charterer's planning. The charterer may well have decisions such as whether to charter in a substitute ship to perform its contractual commitments to third parties and may not know how long to charter such substitute for, so that it has to make spot fixtures. Furthermore until it becomes clear how long the difficulties will last, or it becomes clear that the difficulties will cause a significant delay, the charterer cannot elect to terminate the charterparty even if the market is falling and it would much prefer to charter in a reliable and cheaper substitute ship. It is for this reason that many of the more sophisticated time charterparties, and particularly those with the oil majors, contain express cancellation clauses entitling the charterer to cancel the charterparty if the owner does not rectify a problem within a specified time[43] and provide for an indemnity.

B. Affirmation of the contract

Where one party is in fundamental breach of contract the innocent party has the right to elect to terminate the contract or to affirm the contract. If the innocent party wishes to elect to terminate it must communicate its election to the party in breach.[44] If it is aware of such right but does not make any such election it will be taken to have affirmed the contract

[43] e.g. cl. 3(iii) of the Shelltime 4 form and additional typed clauses as in *The Seaflower,* discussed above. See also *Dolphin Tanker Srl v Westport Petroleum Inc (The Savina Caylyn)* [2010] EWHC 2617 (Comm) on the construction of an oil majors' approval and vetting clause in an amended Shelltime 4 charterparty and *Transpetrol Maritime Services Ltd v SJB (Marine Energy) BV (The Rowan)* [2012] EWCA Civ 198; [2012] 1 Lloyd's Rep. 564).

[44] Rarely conduct may amount to communication of such election - *Vitol v. Norelf (The Santa Clara)* [1996] AC 800.

which will continue and both parties will be obliged to perform their obligations under the contract.

Frequently the innocent party will wish to elect to terminate the contract. For example, if a charterer states that it is unable to perform the contract the shipowner may wish to take control of the situation, to elect to terminate the contract and to mitigate its damages by going into the market to find a substitute charterer. This will often be the case if the market is rising and the owner can find a substitute charterer at a better market rate than the charter rate. However, if the market is falling, as it did dramatically in the market crash in the autumn of 2008,[45] the question may arise as to whether the shipowner is obliged to elect to terminate or whether it can affirm the contract and demand payment of the charter hire for the full period of the charterparty.

In many contracts it may not be possible for the innocent party to continue to perform the contract and earn the contract price without the assent or cooperation of the other party. This issue was considered by the House of Lords in *White and Carter (Councils) Ltd v. McGregor*.[46] There an advertiser entered into a contract to provide advertising for the owner of a garage for three years. A term of the contract provided that if payment of an instalment was not paid for four weeks, the whole amount due for the three year contract became immediately due and payable. As the advertiser was able to perform the contract without the cooperation of the garage owner the House of Lords held that it could perform the contract and claim payment for the whole three years. Lord Reid stated,

> "It might be, but it never has been, the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a court will not support an attempt to enforce them in an unreasonable way. One reason why that is not the law is, no doubt, because it was thought that it would create too much uncertainty to require the court to decide whether it is reasonable or equitable to

[45] See the UNCTAD Review of Maritime Transport 2012 Chapter 3 Freight Rates and Maritime Transport Costs.

[46] [1962] A.C. 413.

> allow a party to enforce his full rights under a contract."[47]

Lord Hodson agreed with Lord Reid also on the grounds of introducing uncertainty and stated,

> It is trite that equity will not rewrite an improvident contract where there is no disability on either side. There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract. To hold otherwise would be to introduce a novel equitable doctrine that a party was not to be held to his contract unless the court in a given instance thought it reasonable to do so."[48]

Lord Reid, *obiter*, did go on to admit of one possible exception,

> "It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself."[49]

That exception did not apply in that case as it could not be said that the advertisers "should be deprived of their right to claim the contract price merely because the benefit to them, as against claiming damages and re-letting their advertising space, might be small in comparison with the loss to [the garage owner]."[50]

In *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafaith)*[51] Cooke J. considered whether owners were entitled to refuse early redelivery of the *Aquafaith* and affirm the time charter or whether they were bound to accept early delivery and merely entitled to sue for damages.

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47 *Ibid*, page 430.

48 *Ibid*, page 445.

49 *Ibid*, page 431.

50 *Ibid*, page 431.

51 [2012] EWHC 1077 (Comm); [2012] 2 All E.R. (Comm) 461. See also *Barclays Bank plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm) (guarantees) and *Geys v Societe Generale* [2012] UKSC 63; [2013] 2 W.L.R. 50 (employment contract).

The *Aquafaith* was chartered on an amended NYPE form for a duration of 59-61 months and expressly provided that "the vessel will not be re-delivered before the minimum period of 59 months." The vessel was redelivered 94 days before the earliest permissible redelivery date. Owners sought an arbitration award declaring that they were entitled to refuse such redelivery and to affirm the charterparty, holding the charterers liable for hire for the balance of the minimum period.

On the first issue as to whether the rule in *White and Carter* applied to a time charter or whether the owners could not complete the contract themselves without the cooperation of the charterers, Cooke J. held that a shipowner could perform a time charterparty by keeping the ship at the disposal of the charterer, without the need for the charterer to do anything. He agreed with the view of Kerr J. in *The Odenfeld*[52] and of Simon J in *The Dynamic*[53] that the principle in *White and Carter* applied to a time charter. He distinguished a demise charter, where the charterer takes possession of the vessel, provides the crew and typically pays all outgoings on the vessel. Therefore the *obiter dicta* of Orr and Brown L.J.J. in *The Puerto Buitrago*[54] that the demise charter could not be fulfilled without the cooperation of the charterers did not apply to a time charter.

The second issue was whether this was an extreme case where the general rule that the innocent party can elect to affirm or terminate the contract could not apply, because the owners had no legitimate interest in maintaining the charter for the balance of 94 days and claiming hire, as opposed to accepting the repudiatory breach of the charterers as bringing the charter to an end, trading on the spot market in mitigation of loss and claiming damages for the difference. Cooke J. held that,

> "the effect of the authorities is that an innocent party will have no legitimate interest in maintaining the contract if damages are an adequate remedy and his insistence on maintaining the contract

[52] *Gator Shipping Corp v Trans-Asiatic Oil S.A. (The Odenfeld)* [1978] 2 Lloyd's Rep. 357.

[53] *Ocean Marine Navigation Ltd v. Koch Carbon Inc (The Dynamic)* [2003] EWHC 1936 (Comm);[2003] 2 Lloyd's Rep. 693.

[54] *Attica Sea Carriers Corporation v Ferrostaal Poseidon Bulk Reederei GmbH (The Puerto Buitrago)* [1976] 1 Lloyd's Rep. 250.

> can be described as "wholly unreasonable",[55] "extremely unreasonable" or, perhaps, in my words, "perverse".[56]

Damages were not an adequate remedy for the reasons set out by the judge,

> "the owners had submitted that damages were an inadequate remedy because the charterers were in financial difficulty. The owners were therefore at risk of the charterers directing their limited funds to meet obligations to other parties, whilst delaying payment of any sums owing to the owners until the end of the charterparty and the assessment of what was due in damages. Instead of paying hire up front, semi-monthly in advance, with all the cashflow implications of that, the charterers wished to compel the owners to trade the vessel in mitigation of loss and leave themselves liberty to argue about the quantum of damages at the end of the relevant period and pay whatever they could at that stage. The existence of expert reports as recorded in the Reasons, showed that the views of the parties about the state of the market were not identical, giving rise to the possibility of significant argument as to proper mitigation of loss and the extent of damages recoverable. Should the charterers choose to do so, payment of any liability could be postponed until the conclusion of an arbitration, months away, by which time the charterers could conceivably have become insolvent or arguments used to secure a settlement discount on any loss claimed. The owners wished to guard against that by maintaining the charter with the ability to claim hire and sue/proceed in arbitration for it on any default, without the propensity for argument as to failure to mitigate damages. The arbitrator never appears to have grappled with this point at all.
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> 48. Nor did he grapple with the argument that the contract breaker was seeking to foist upon the innocent party the burden of seeking to trade in a difficult spot market, where a substitute time charter was impossible, with all the management issues involved. The

[55] Kerr J in *Gator Shipping Corp v Trans-Asiatic Oil S.A. (The Odenfeld)* [1978] 2 Lloyd's Rep. 357. Lloyd J. in *Clea Shipping Corp v Bulk Oil (The Alaskan Trader)* [1984] 1 A.E.R. 129.

[56] [44].

> ability to sub-let the charter was, contrary to the arbitrator's view, a matter of relevance in this context. As pointed out by Kerr J in *The Odenfeld* at page 374, it was equally open to the owners or the charterers to employ the vessel, there, as here, on the market in what had become very difficult market conditions following the large drop in rates. The Reasons give no information as to the previous course of employment of the vessel, nor whether the charterers' prior use the vessel was for their own cargoes or for the cargoes of others, but the ability to sub-let plainly provided an additional facility to the charterers to make use of the ship. The charterers had the same opportunities, therefore, to use the vessel as the owners, subject only to their relative abilities to trade the vessel in the market in question, about which the arbitrator made no finding. The contract breaker was therefore seeking to be shot of the difficulties in trading the vessel by imposing that burden on the innocent party, as well as depriving him of the assured income of advance hire."

C. Calculation of Damages

The purpose of contractual damages is to compensate the innocent party and to put it in the position that it would have been in had the contract been performed.[57] Sometimes a party is entitled to reliance damages. Such damages must not be too remote and must have been in the reasonable contemplation of both parties at the time the contract was entered into.[58]

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[57] *Golden Strait Corporation v. Nippon Yusen Kubishka Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 AC 353 [29].

[58] Whether losses suffered under another contract can be recovered in the shipping context was considered in eg. *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215 (breach of the owners' obligation to use reasonable dispatch); *Transfield Shipping Inc of Panama v. Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48; [2008] 2 Lloyd's Rep. 275 (breach of the charterers' obligation to redeliver by the final terminal date); and *Sylvia Shipping Co. Limited v. Progress Bulk Carriers Limited (The Sylvia)* [2010] EWHC 542 (Comm); [2010] 2 Lloyd's Rep. 81(owners' breach of their obligation to exercise due diligence and maintenance. As a result the time charterers' sub charterers cancelled the subcharterparty. The time charterers were entitled to recover the profits they would have made under the subcharter). As to whether the innocent party can recover its hedging losses see *Addax v Arcadia Petroleum Ltd* [2000] 1 Lloyd's Rep. 493; *Trafigura Beheer BV v Mediterranean*

Where, for example, a ship is redelivered prior to the redelivery date specified in the charterparty, the charterer is in breach and is liable for damages.[59] The innocent party must take reasonable steps to mitigate its loss.[60]

Available Market

Where there is an available market the damages are calculated by reference to the difference between the contract rate that would have been earned for the balance of the charter period and the market rate which would have been available to the owners had they entered the market on termination to find a substitute fixture of similar length to the balance of the charter period[61] and for similar routes.[62] Robert Goff J. stated in *The Elena D'Amico*

> "…there is, I consider, a normal measure of recovery in case of premature wrongful repudiation of a time charter by the owners,

Shipping Co SA (The MSC Amsterdam) [2007] 1 CLC (the case went to the Court of Appeal but not on this point; *Glencore Energy UK Ltd v Transworld Oil Ltd (The Narmada Spirit)* [2010] EWHC 141 (Comm); [2010] 1 CLC 284; *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm). See paper given by Chirag Karia "Owners' Damages for Repudiation by Charterers: The Effect of Hedging" to the London Shipping law Centre on 23.11.2011.

59 *Ibid*. *Miranos International Trading Inc v. Voc Steel Services BV* [2005] EWHC 1812 (Comm) Cooke J. The charterers may be able to rely on a cancellation clause to reduce its damages for repudiatory breach of charterparty. See *Ferco Metal Sarl v MSC Mediterranean Shipping Co SA (The Simona)* [1989] AC 788 and *Golden Strait Corporation v. Nippon Yusen Kubishka Kaisha (The Golden Victory)* [2007] UKHL 12; [2007] 2 Lloyd's Rep. 164.

60 Whether the duty to mitigate required a party to hedge its position was considered in *Transpetrol Maritime Services Ltd v SJB (Marine Energy) BV (The Rowan*) [2011] EWHC 3374 (Comm); [2011] 2 Lloyd's Rep 331 (The Court of Appeal reversed this decision and found that there was no breach – [2012] EWCA Civ 198; [2012] 1 Lloyd's Rep. 564). See also *Choil Trading SA v Sahara Energy Resources Ltd* [2010] EWHC 374 (Comm). See paper given by Chirag Karia "Owners' Damages for Repudiation by Charterers: The Effect of Hedging" to the London Shipping law Centre on 23.11.2011 pages 8 and 9.

61 *Koch Marine Inc v d'Amica Societa di Navigazione arl (Elena D'Amico)* [1980] 1 Lloyd's Rep. 85 at 89.

62 *Zodiac Maritime Agencies Limited v Fortescue Metals Group Limited (The Kildare)* [2010] EWHC 903 (Comm) discussed below.

> and that normal measure is that, if there is at the time of the termination of the charter-party an available market for the chartering in of a substitute vessel, the damages will generally be assessed on the basis of the difference between the contract rate for the balance of the charter-party period and the market rate for the chartering in of a substitute vessel for that period."

The market price on an available market at the date of termination is deemed by the law to represent reasonable mitigation.[63] In *Star Reefers Pool Inc v JFC Group Co Ltd*[64] there was an available market and the owners did not have to bring into account the fact that since repudiation the vessel had been traded on the spot market at a better rate of hire.

No Available Market

In the autumn of 2008 the shipping market collapsed.[65] As a result the issue of damages where a charterer repudiates a time charter has been considered in a number of recent cases where there was no available market, or no available market and then a recovering market.

In *Zodiac Maritime Agencies Limited v Fortescue Metals Group Limited (The Kildare)*[66] Steel J. held that a Consecutive Voyage charterparty dated 5 December 2007 for five years to carry iron ore from Australia to China had been repudiated by charterers on 9 January 2009 with some four and a half years to run. Expert shipbrokers gave evidence on quantum. Steel J. regarded as realistic the charterers' concession that the evidence of the owners' expert that the non-trading period of the vessel during the balance of the charterparty was 10 days per annum to allow for heavy weather, dry docking, breakdown and port delays.[67] The parties disputed whether there was an available market at or shortly after the contract

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63 *Glory Wealth Shipping Pte Ltd v. Korea Line Corporation (The Wren)* [2011] EWHC 1819 (Comm); [2012] 1 All E.R. (Comm) 402; [2011] 2 Lloyd's Rep. 370 discussed below and *Star Reefers Pool Inc v JFC Group Co Ltd* [2011] EWHC 2204 (Comm).

64 [2011] EWHC 2204 (Comm) [184] – [189].

65 See fn. 40.

66 [2010] EWHC 903 (Comm); [2011] 2 Lloyd's Rep. 360.

67 See also *Star Reefers Pool Inc v JFC Group Co Ltd* [2011] EWHC 2204 (Comm).

was terminated. Steel J. stated,

> "If it existed the relevant market must have been for a 4 ½ year consecutive voyage/time charter on equivalent terms (other than freight/hire) for the carriage of bulk cargo including iron ore and coal. One question that arises is whether the requirement for equivalent terms includes broadly the same trading limits (ie. Western Australia/China) or whether fixtures for the Brazil/China route would be material. In my judgment, in order to categorise the replacement fixture as a market substitute, the trading limits should broadly correspond with the existing fixture: see *The Golden Victory* [2007] 2 AC 353. Of course, if seeking to mitigate his loss, an owner might seek to charter his vessel for service on different routes, but such would not be by way of replacement on any relevant available market."

The judge held that there was no available market as there were no reported fixtures in the time/consecutive voyage charter for the balance of the charter category as from September 2009. Neither expert was aware of any unreported fixtures. When the vessel was marketed in January 2009 there were no approaches for long term business. There was no match of supply and demand for charters of this length. The market had been at record levels in August 2008 at US$160,000 per day. After the crash a rate of US$24,000 or so might have been acceptable for a one or even two year charter, but for any longer period a far higher rate would be demanded. The judge accepted the evidence of the charterers' expert that charterers would only have been willing to contract for the relevant period at a rate which no owner would accept and therefore there was no available market and rejected the evidence of owners' expert that there were available fixtures for the balance of the charter period of US$23,500 per day.

It was common ground that an available market later emerged in February 2010 for a 3 to 3 ½ year charter. The owners argued that where such an available market emerged at a later date, damages for the remaining period should be assessed by reference to the available market. That argument was rejected and Steel J. stated,

> "It is simply a matter of chance when the vessel completes any spot voyages after the termination date. Indeed they may overrun the emergence of an available market. In short I see no basis for requiring the owner to go back into the term market at the end of every spot voyage or for that matter to disregard short time charters in case the market for longer charters emerges in the meantime."[68]

Where the charterparty is wrongfully terminated by charterers and there is no available market then the court must assess the owners' actual loss by reference to the difference between what the owner would have earned had the charter been performed and the actual position resulting from breach. In *The Kildare* the owners were able to nominate the vessel under a different charter to Guofeng which had been concluded before the *Kildare* charterparty. The judge concluded that it was probable that the *Kildare* would continue to perform under the Guofeng charter until after the expiry date of the *Kildare* charter.[69] The issue was whether the earnings from the Guofeng charter should be taken into account in assessing the owners' loss or whether the relevant earnings would be those available on the market. He found that the cause of the renegotiation of the Guofeng charter was the termination of the *Kildare* charter and therefore it should be taken into account. Finally an allowance of 1.5% was given for accelerated receipt of income reflecting the three year yield in US Treasury bonds. As stated above an allowance had already been made for downtime. A further discount of 1.5% was made to reflect "more catastrophic contingencies such as total loss, bankruptcy and so on."[70] Applying these findings the owners' damages were likely to be in the region of US$80-85 million.

Although Blair J agreed with the decision in *The Kildare* in *Glory Wealth Shipping Pte Ltd v. Korea Line Corporation (The Wren)*,[71] he considered that the reviving market was relevant to mitigation. In that

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68 [66].

69 [69].

70 [73].

71 [2011] EWHC 1819 (Comm); [2012] 1 All E.R. (Comm) 402; [2011] 2 Lloyd's Rep. 370k.

case a charterparty was concluded on 22 February 2008 of a new build for minimum 36 months to maximum 38 months at a daily rate of US$39,800. The vessel was delivered on 21 June 2008 but charterers redelivered her in November 2008 and owners accepted charterers' repudiatory breach as entitling them to terminate the charterparty. At the date of termination there was no available market. Owners claimed damages on a "hybrid basis" by reference first to losses on substitute fixtures in the spot market up to July 2009 and then by reference to market rates for the balance of the charter period from that time, when owners argued the market for the equivalent of the unexpired period of the charter had revived. The charterers argued that the market had not revived. The owners did not in fact fix the vessel on a long term charter at that time but continued to fix her on the spot market. The arbitrators found that there was an available market for a two year charter at US$15,200 per day, although the market was fragile, and used this rate from July onwards. The charterers argued that "to ask when the market for period charters has revived and then to deem the owners to have entered that market, is almost bound to generate a windfall. Such an approach locks in an artificially low rate, in other words the rate at which the market begins to recover, thereby ensuring maximum damages for the Owners."[72] Owners, however, argued that ignoring the market rate when it revived would postpone the calculation of owners' damages until the end of the repudiated charter period. Blair J. agreed with the views of Steel J. in *The Kildare* and held that the damages where there was no market at the date of termination and it only later revived, were to be assessed by reference to the actual loss of the owner.[73] The rules as to mitigation would apply and the revival of the market would be relevant to mitigation. The revival of the market might also be a factor in calculating future loss if damages fall to be assessed before the end of the contractual period, even though it does not in itself provide the correct measure of damages.[74]

72 [13].
73 [31].
74 [31].

Usually where a charterparty is wrongfully terminated by charterers the owners' loss is measured by calculating what the owners would have received under the charterparty for the remaining days of that charterparty and deducting what the owners in fact earned during that period. Where the owner has obtained a substitute charterparty the earnings under that charterparty will usually be taken into account up to the date when the original charterparty would have ended had it not been wrongfully terminated. Frequently the substitute charterparty lasts longer than this date and the question then arises whether those earnings should also be taken into account. The general position is that they would not be, unless the owners have obtained a benefit as a result of the longer duration of the substitute voyage. This was the position in *The Concordia C*[75] where Bingham J. held that where a voyage charterparty had been repudiated by the charterers the correct measure of loss was the net revenue that the owners would have earned under the original charterparty less the net earnings under the substitute charter for the period from 13 to 16 February which was the date when the original charter would have come to an end, even though the substitute charterparty did not come to an end until 10 March. The position would have been different had the substitute charterparty conferred a benefit on the owners which they would not have obtained had the original charterparty been performed.[76] Staughton LJ also referred to the difficulty where the substitute charterparty runs for longer than the original charterparty in *The Noel Bay*[77] but referred to the "solution commonly adopted" of using the original voyage as the cut off point. "Otherwise one would be involved in calculations to the end of the ship's working life."[78]

In *Dalwood Marine Co. v Nordana Line A/S (The Elbrus)*[79] it was found that a benefit was conferred on the owners by the substitute charterparty and that the latter did have to account for such benefit. On 4 April 2005

[75] [1985] 2 Lloyd's Rep. 55.

[76] P.58.

[77] [1989] 1 Lloyd's Rep. 361.

[78] P. 363.

[79] [2009] EWHC 3394 (Comm). See also *Zodiac Maritime Agencies Limited v Fortescue Metals Group Limited (The Kildare)* [2010] EWHC 903 (Comm).

the charterers wrongfully terminated the time charterparty of the *Elbrus* while the vessel was at Lobito, Angola. But for that repudiation the vessel would have been employed under the charterparty for some 39 days until redelivery at Houston on 13 May 2005. The owners had already fixed the vessel to Navimed before the charterers' wrongful repudiation at a "good hire rate" of US$18,100 per day (as opposed to US$10,800 per day under her repudiated charter) with a laycan of 1-20 May 2005. She had to be drydocked before she could be delivered to Navimed. Had the charterparty not been repudiated the vessel would have drydocked in Portugal and would have missed her laycan under the Navimed fixture. There was a possibility that Navimed would not have agreed to an extension of the cancelling date because market rates in the Mediterranean had softened. When the charterers wrongfully terminated the charterparty there was no available market for the *Elbrus* off the West coast of Africa. Therefore the owners drydocked the vessel early thus ensuring that they could meet the Navimed laycan. The arbitrators found that the owners acted reasonably and went on to find that the owners did not lose as a result of the early termination but made a gain. They found that the owners would not have been able to deliver the vessel to Navimed, had the charter not been prematurely terminated, until 13 June or 10 July 2005. As a result of the premature termination the owners were able to earn the higher rate under the Navimed charter earlier from 6 May than they would have done had the charterparty been contractually terminated. The arbitrators did not compare the notional and actual earnings of the vessel from 4 April until 13 May 2005, the date when the original charterparty would have ended, but compared the notional and actual earnings of the vessel from 4 April until the date when the vessel would have been delivered to Navimed, either 13 June or 10 July 2005. The owners appealed from that decision. The normal measure of damages for early redelivery under a time charter is the hire which would have been earned under the contract and the hire which was in fact earned during that period from such alternative employment as the Owners were able to secure. That prima facie measure reflects at least two matters. First the duty of the owner to mitigate its loss by finding alternative employment for its vessel.

Second by assessing the value of the benefit obtained from mitigation by reference to the hire received during the period ending with the date on which the original charterparty would have ended, it recognises the difficulty of assessing that benefit over any longer period which, if there were to be a complete assessment of that benefit, would entail a calculation over the whole of the vessel's working life.[80] Teare J. held that the arbitration award should be read as a finding that the owners had secured a benefit from their action to mitigate their loss in addition to the earning of hire from 6 to 13 May 2005, as they were able to earn under the Navimed fixture earlier and they ensured that they did not lose the Navimed fixture. Depending on the nature of the benefit and the approach taken to valuation it may be necessary to take into account earnings after the notional date of redelivery. Whether a particular benefit has been established on the evidence and the assessment of the value of that benefit is a matter for the tribunal to determine as a fact. The arbitration tribunal had found that the benefit was established on the evidence before it and the court had to accept the facts as found by the tribunal.

In *Glory Wealth Shipping Pte Limited v North China Shipping Limited (The North Prince)*[81] subcharterers wrongfully redelivered a ship early to the time charterers on 16 November 2007 when the charterparty provided for "minimum 27 June 2009." The arbitration tribunal awarded damages representing the difference between the contract rate until the 27 June 2009 and the actual earning potential on the market as from 5 January, the date on which the subcharterers' repudiation had been accepted and 27 June 2009. In fact the time charterers redelivered the vessel to the owners on 5 June 2009 and therefore the subcharterers on appeal argued that this should be taken into account. Steel J. dismissed the appeal.

Another problem is where the vessel may have been better or worse placed for future employment at the end of the substitute voyage rather than at the end of the original charter had it been performed. [82]

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80 [32].

81 [2010] EWHC 1692 (Comm).

82 See Staughton LJ in *The Noel Bay* at p.363.

Conclusion

Reasonableness, foreseeability and flexibility are extremely important in English contract law in seeking to achieve a commercially sensible result both in relation to ascertaining what the terms of the contract mean and also what the remedies for breach of those terms are. However, they need to be balanced with the requirements of certainty and predictability.

Damage, destruction and consequential loss - should carriers be different from everyone else?

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If you break an ordinary commercial contract, or damage someone else's goods, you expect in most legal systems [1] to have to make the other party whole. In particular, this means you have as a matter of course to make good not only his direct damage but also any further losses consequential on that damage, at least if these latter are neither freakish nor unforeseeable. One of the exceptions, however, is marine cargo claims. Not only is there, by international agreement, an overall cap on the size of such demands (or at least on some of them): there is also a belief that even within these limits sea carriers ought to have a further artificial protection against potential exposure to anything but the most basic measure of recovery. This is curious, and deserves a closer look.

The provision in issue here is the little-cited Art.IV r.5(b) of the Hague-Visby Rules [2], stating as follows:

> "The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged. The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality."

The issue is whether this merely provides vague guidance as to the assessment of damages, or whether it goes further, modifying the law of damages and positively preventing a shipper[3] from claiming more than the value of the goods even if his loss is greater.

A brief bit of background is necessary. The original 1924 Hague

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1 Though admittedly not quite all. Austria, oddly, retains a rule that claims for consequential losses on damage to property are barred for conduct falling short of gross negligence: ABGB, Art.1324.

2 Compare the dry comment in S.Girvin, *Carriage of Goods by Sea* (2nd ed), Para.30.24: "There is little authority on the meaning of these words and there exists some uncertainty as to the reasons for inserting the provision." The rule gets one short and uninformative footnote in *Scrutton on Charterparties* (22nd ed): see Para.20-091.

3 We will refer to a shipper for convenience: but everything said below refers equally to a consignee or other cargo owner.

convention and the 1921 Rules that preceded it contained no equivalent to r.5(b), and indeed did not address the issue of the basic measure of recovery at all. This was no doubt because no-one thought that it could cause any difficulty, coupled perhaps with the fact that in any case uncomfortably large awards were barred by the overall £100 (later £200 [4]) package limit in what was then Art.IV r.5. Thus, while the 1924 Convention dealt with issues of *liability* in painstaking detail, the measure of recovery against a carrier in breach was left up to the common sense of individual legal systems. And there it generally followed the pattern of damages elsewhere. When it came to compensation for loss or damage to goods being carried, in the nature of things the starting point was necessarily the goods' sound arrived value (or, in the case of damage short of a total loss, the depreciation in that figure resulting from the casualty) [5]. But this was not regarded as an absolute rule. In those jurisdictions where damages were at large [6], this figure could be augmented by other consequential losses [7], or for that matter reduced to the extent

[4] Raised from £100 in 1950 as a result of unofficial arrangements put in place by the British Maritime Law Association. There was a further rise to £400 in 1977, but by then the matter was becoming largely academic because of the advent of the Hague-Visby Rules.

[5] See W.Tetley, *Marine Cargo Claims* (4th ed), Vol I, 761 ff and authorities there cited. For representative English cases see *Rodocanachi v Milburn* (1886) 18 QBD 87; *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473, 479 (Lord Goff); *The Athenian Harmony* [1998] 2 Lloyd's Rep 410, 416 (Colman J).

[6] Which was not a universal feature. Germany was a clear and important counter-example: see below.

[7] "It is proper to award the plaintiff anticipated profits where it has been satisfactorily shown that this amount was in fact lost and was not realizable by substitution of other goods" – *Pacol (Canada) Ltd v M/V Minerva*, 523 F.Supp. 579, 582 (1981, DCNY). For cases where this was done, see *The Mormacsaga*, 1969 AMC 202, [1968] 2 Lloyd's Rep. 184 (appeal dismissed, [1969] 2 Ex. C.R. 215); *Valerina Fashions, Inc v Hellman International Forwarders, Inc*., 897 F.Supp. 138 (1995 SDNY), 1996 AMC 1201 (loss of profits on stolen clothing). Also incidentals, such as the costs of an inspection: e.g. *Standard Brands, Inc*. v *The Radja*, 114 F.Supp. 456 (1953). See generally T.Schoenbaum, *Admiralty and Maritime Law*, Para.9-32.

that loss had been [8], or could have been [9], avoided [10].

The problem arose while the Hague Rules were being renegotiated in 1968, when there was understandable pressure from shippers for a weight limitation to complement the arbitrary and by then very niggardly [11] Hague package limit. As a number of delegations pointed out, giving the shipper the alternative of invoking a weight limit *tout court* arguably went too far the other way and favoured him too much, for example by allowing very substantial awards in the case of heavy and delicate machinery. It thus might emasculate the entire right to limit. A number of extra restrictions were proposed to deal with this awkwardness [12]. One was an absolute cap on the weight limitation [13]. Another, this time from the UK, was an explicit further limit on recovery, capping compensation at the value of the goods lost or damaged, such value to be measured on

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8 *Stein v. United States Lines Co,* 1957 AMC 272 (1956) (soiled goods sold on at full price); *Texport Oil Co v. M/V Amolyntos*, 11 F.3d 361 (1994), 1994 A.M.C. 815 (salvaged oil). See too *Shonac Corp. v. Maersk, Inc*., 159 F.Supp.2d 1020 (2001); *Dessert Service, Inc. v. M/V MSC Jamie/Rafaela*, 219 F. Supp.2d 504, 507; 2002 AMC 2358, 2361 (SDNY 2002).

9 "Unquestionably, the owner or consignee of the property has a duty to mitigate damages, but the burden of establishing that the cargo interests failed to act reasonably to mitigate damages falls on the carrier, which has caused the situation that requires the mitigation of damages in the first place." – Lynch J in *Fortis Corporate Ins., SA v M/V Cielo del Canada*, 320 F.Supp.2d 95, 105 (2004). See too e.g. *M. Golodetz Export Corp. v. S/S Lake Anja,* 751 F.2d 1103 (1985) (leaving damaged cargo to deteriorate further); *Kentucky Fried Chicken Intern. Corp. v. S/S Ponce*, 1988 WL 35057 (E.D.La.,1988) (failure to take proper steps to realise salvage value).

10 See W.Tetley, *Marine Cargo Claims* (4th ed), Vol I, 839 ff.

11 Save where the "Gold Clause" in the old Art.IX of the Hague Rules applied, in which case the sum could be disconcertingly large: see the later decisions in *The Rosa S* [1988] 2 Lloyd's Rep 574 and *The Tasman Discoverer* [2004] UKPC 22, [2005] 1 W.L.R. 215, and also C.Proctor, *Mann on the Legal Aspect of Money* (6th ed), Paras.11.24 – 11.26.

12 The process is described at length in *The Travaux Préparatoires of the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 25 August 1924 (the Hague Rules) and of 23 February 1968 and 21 December 1979 (the Protocols of the Hague-Visby Rules)* (pub CMI), 531 ff. Henceforth this will be referred to as *Travaux*.

13 Notably by the German delegation (*Travaux,* 541). There were other more outré proposals too, such as an overall limit based on cubic meterage. They all, perhaps thankfully, came to nothing.

their sound arrived market price [14]. This was premised on the ideas that this "is in the majority of cases the true measure of the cargo owner's loss"; that a maximum sum based on weight bore "no relation to the value of cargo transported by sea"; and that the lack of such a cap would "permit courts to award damages in excess of the value of the goods in many cases" [15]. Such arguments were, if one may say so, something of a series of *non sequiturs*, since no-one had been suggesting that cargo should always be able to claim the limitation sum come what might, or indeed anything more than the actual loss it had suffered. In any case, the idea that there should be any further cap on recovery beside the package and weight limitations was roundly rejected. And with it, of course, fell the British proposal. Oddly enough, however, rather than abandon their suggested provision as the veritable Cinderella it had become – all dressed up but with nowhere to go – the UK delegation brought it back, now recast in substantially the form in which Art.IV r.5(b) appears today, namely:

> "The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged in accordance with the contract or should have been so discharged.
>
> The value of the goods shall be fixed according to the commodity exchange price or, if there be no such price, according to the current market price or, if there is neither, by reference to the normal value of goods of the same kind and quality." [16]

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[14] The proposed provision would have read: "When, under the provisions of this Convention the carrier and/or the ship is liable for any loss or damage to or in connection with goods, the extent of such liability shall not exceed the value of such goods at the place and time at which the goods are discharged or should have been discharged from the ship, and no further damages shall be payable. The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality". See *Travaux,* 546.

[15] See *Travaux,* 545.

[16] See *Travaux,* 554-555.

This new addition was in due course adopted, with a few immaterial drafting changes, and became r.5(b). The delegates present were assured that it now said nothing important at all, but just gave a rule of thumb for computation of damages: it was, they were told in honeyed tones, "simply the expression of custom and practice, or rules usually followed, but it is useful that they be codified to avoid any uncertainties in the future" [17]. Happy, doubtless, to save the face of the UK by agreeing a provision both obscure and seemingly innocuous, they went home.

So much for the history. In fact, of course, as we now know, anyone fondly hoping that inserting r.5(b) into Hague-Visby would somehow avoid future uncertainty on the measure of damages for lost or damaged goods was in for a rude shock.

If one simply looks at the Hague and Hague-Visby Rules in isolation, the answer to the question whether r.5(b) limits recovery to the sound arrived value is a no-brainer. It must be No [18]. There was no suggestion that the unamended Hague Rules provided such a limit before 1968. Indeed, as pointed out above, there was abundant authority, particularly from the US (whose Carriage of Goods by Sea Act 1936, modelled on those Rules, spawned more jurisprudence than any other jurisdiction), that they did no such thing; and that on the contrary damages could be had beyond the value of the goods [19]. And as regards the provision that became r.5(b), one simply notes that this (a) had been specifically changed so as *not* to limit recovery to the value of the goods; (b) was presented against the background of a decision not add further caps to the weight and package limitations already agreed; and (c) was specifically described in the Visby *travaux* as introducing no substantial change at all. Furthermore, a look at the actual wording tends to confirm this view. A requirement that damages "shall be calculated *by reference to* [20] the value of

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17 *Travaux,* 555 (comment of M van Ryn).

18 The argument below, it should be noted, is not entirely original. Many of the points in it appear in N.Gaskell, "Damages, Delay and Limitation of Liability under the Hague, Hague-Visby and Hamburg Rules" in *The Hamburg Rules: A Choice for the EEC*, European Institute of Maritime Law, pp. 135-139.

19 See Note 6 above.

20 Italics supplied. The French, and equally authentic, version, uses the same word: " …

such goods" at the time and place of discharge is not the same thing as a statement that they are limited to that amount. On the contrary, it reads absolutely plausibly as what the delegates in 1968 thought it was: first, a requirement to measure the value of goods, where relevant, by reference to sound arrived value [21], and secondly and more importantly, a prima facie quantification of cargo claims on this basis, but subject to adjustment according to the facts of the case.

In accordance with this reasoning, a number of jurisdictions have taken just this view. In 1994, for example, transatlantic carriers inadvertently dropped a drum of very noxious chemicals at the docks in Le Havre. Despite r.5(b) [22], the French *Cour de Cassation* had no hesitation in upholding a judgment against them for the shippers' whole loss, including decontamination expenses, rather than merely the modest value of the drum itself, and moreover in ignoring a term in the bill of lading affecting to exclude liability for the overplus [23]. So too in Norway, where consignees of bunker oil for fishing vessels recovered for sizeable consequential losses when the oil was contaminated en route [24], and also in England, as witness the unfortunately unreported 1989 decision in *Laiterie Dupont Morin Flechard v Anangel Endeavour Compañía* [25]. There,

sera calculée par référence *à la valeur des marchandises ...*" (emphasis supplied).

21 As the Australian Federal Court seems to have held in *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296, [2004] 2 Lloyd's Rep 537 at [312]-[316] (cargo damaged en route from Australia to Greece; claim admittedly based on value of cargo; judge wrong to extrapolate value from worth in Australia rather than seeking to fix price in Greece). A similar case is *Mayhew Foods Ltd v Overseas Containers Ltd* [1984] 1 Lloyd's Rep. 317, 321-322 (cif invoice price basis of value claim: no right to increase based on value to claimant).

22 In the guise there of Art.28 of the *Loi* of 18.6.1966.

23 Cass comm, 15.2.1994, No 92-13.707. This type of reasoning is approved in R.Rodière & E.du Pontavice, *Droit Maritime* (2nd ed), § 377, where it is simply stated that "*ce montant* [i.e. compensation for loss or damage] *sera déterminé suivant les dispositions des art.1150 et 1151 CC* [i.e. the general rules on damages]".

24 See *Nils Blakstad & Sønner A/S v A/S Dolsøy*, Norges Høyesterett, 21.11.1987, referred to in T.Falkanger et al, *Scandinavian Maritime Law,* 288-289 (in reference to what is now Art.279 of the Maritime Code 1994, itself a direct translation of Art.5(b)). I am most grateful to Prof Erik Røsæg for providing me with a translation of this decision.

25 High Court, Evans J, 17.3.1989 (detailed facts at J.Cooke, T.Young & A.Taylor, *Voyage*

carriers short-delivered EU surplus butter, with the result that the owners lost not only the butter but the munificent payment that they would otherwise have pocketed from the EEC for exporting it to Tanzania. Evans J repelled a hopeful argument by the carriers that a clause paramount applying the Hague-Visby Rules, including Art.IV r.5(b), had the effect of barring a claim for anything more than the relatively low intrinsic value of the butter. Other English decisions have also proceeded implicitly on the basis of the lack of any such limitation, as where consignees of peas recovered salvage expenses and also the loss of an EU subsidy payment due to the casualty [26]; and this view has a good deal of support from the commentators [27]. Indeed, a case some four years ago might have settled the matter once and for all, in which owners of cargo a small proportion of which had suffered wetting claimed large sums due to the depreciation of the cargo as a whole, *including the undamaged part*. But this was eventually decided in the carrier's favour on a minor point of general limitation, leaving the question of the possible scope of r.5(b) unanswered [28].

On the other hand, despite everything we have just said, there is a large body of opinion supporting the use of the article as a genuine limitation. These include writers from Spain [29] and Italy [30], as well as at least some from the common-law world [31]. Now, why should this be? The

Charters (3rd ed), Para.85-382).

26 *The Subro Valour* [1995] 1 Lloyd's Rep. 509.

27 See e.g. A.Diamond, "The Hague-Visby Rules" [1978] L.M. & C.L.Q. 225, 247-248; R.Aikens, R.Lord & M.Bools, *Bills of Lading*, Para.10.137; N.Gaskell, "Damages, Delay and Limitation of Liability under the Hague, Hague-Visby and Hamburg Rules" in *The Hamburg Rules: A Choice for the EEC*, European Institute of Maritime Law, pp. 135-139. Less certain is S.Baughen, *Shipping Law* (5th ed), p.252.

28 See *The Limnos* [2008] 2 Lloyd's Rep. 166: and S.Lamont-Black, "Claiming damages in multimodal transport: a need for harmonisation", 36 Tul. Mar. L.J. 707, 717-718 (2012).

29 See F.Sanz, M.Lavall, A.Pütz & L.Sales Pallarés, *Aspectos jurídicos y económicos del transporte: hacia un transporte más seguro, sostenible y eficiente*, Vol 1, 625 ("*Y este carácter tasado de supuestos exceptuados sería compensado por la limitación del importe máximo de la responsabilidad 'al valor de las mercancías' (artículo 4.5 (b))*.").

30 S.Carbone, *Contratto di trasporto marittimo di cose*, 412-414.

31 See in particular F.Reynolds, "Package or Unit Limitation and the Visby Rules"

answer is not clear, but at least two explanations present themselves.

One reason is a parallel with the CMR, dating from 1956 (i.e. considerably later than the Hague Rules, but well before the Visby amendments), whose Art.23.1 contains wording similar to Art.IV r.5, and which it is universally accepted *does* on principle exclude any claim by cargo for consequential loss. We shall return to this. But much more suggestive as a reason for civil lawyers to support the idea of r.5(b) as a limitation is a background German tradition (extending also to a number of other German-inspired jurisdictions [32]) going back 150 years. Although the normal rule of damages in German law has always been to allow both direct and consequential loss [33], carriage has always been an exception. Not only the Commercial Code (HGB) as drafted in 1900, but also its predecessor of 1861, the General German Commercial Code (ADHGB) [34], specifically limited the liability of carriers (including sea carriers) to the value of the goods, before proceeding to the time-honoured valuation method in Art.IV r.5(b) [35]. Thus the 1861 Code:

> "If damages are due under [the article covering the liability of sea carriers] for the loss of goods, the only sum to be made good is the value of the lost goods. This value is reckoned by reference to the market price of goods of that type and condition at the stipulated

[2005] L.M. & C.L.Q. 1, 5; W.Tetley, *Marine Cargo Claims* (4th ed), Vol I, 809; S.Lamont-Black, "Claiming damages in multimodal transport: a need for harmonisation", 36 Tul. Mar. L.J. 707, 716 (2012).

32 E.g., in terms of sea carrier liability, Switzerland (SSG, sr-747.30, §105.1) and Austria (Commercial Code (UGB), §658).

33 See now BGB, Arts.249-252, especially the last of these (*Der zu ersetzende Schaden umfasst auch den entgangenen Gewinn*).

34 *Allgemeines Deutsches Handelsgesetzbuch* . Despite its name, this was strictly state legislation by the members of the then German Confederation, later enacted on the federal level in 1869 by the Bundestag of the North German Confederation. Germany itself, although it adopted the ADHGB, only came into existence as a country in its own right in 1871.

35 The relevant provisions were Arts.396 and 612 of the ADHGB, referring to land and sea carriage respectively, and Arts.430 and 611-613 of the HGB. (Note: in the HGB this refers to the original Arts.430 and 611-613, and not the current version introduced in the reforms of 1937 (as regards 611-613) or 1998 (as regards Art.430)).

destination at the time of commencement of discharge ..." [36]

Originally inserted as a quid pro quo for a carrier's strict liability, this limitation has ever since been consistently and strictly construed as excluding any claim, however dressed up, for consequential loss [37]. And indeed the point is rammed home by a further provision that the right to limit liability to the goods' value is, like the right to limit generally, lost in the case of deliberate wrongdoing [38]. With a tradition such as this, it is not surprising that some civilians welcome the opportunity to read Art.IV r.5(b) of Hague-Visby as a genuine limitation provision.

What are we to make of all this? The point is clearly one that matters, if only because a claim for the value of goods is very often well below the global Hague-Visby limit in Art IV r 5(a) [39] and thus there is a good deal to play for as regards consequential loss. And besides it is clearly disconcerting that, a good 40 years after the terms of the Visby amendments were hammered out, we still have a situation where English and French lawyers take one view on what is meant to be a unifying convention and

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[36] Art.612 ("*Wenn auf Grund des Artikels 607 für den Verlust von Gütern Ersatz geleistet werden muß, so ist nur der Werth der verlorenen Güter zu vergüten. Dieser Werth wird durch den Marktpreis bestimmt, welchen Güter derselben Art und Beschaffenheit am Bestimmungsorte der verlorenen Güter bei Beginn der Löschung des Schiffs ... haben*"). Art.614 made parallel provision for damage. These are now contained in Art.658 (in updated form).

[37] As the German Supreme Court put it, "*Danach hat der Verfrachter bei Verlust der Güter nur den gemeinen Handelswert derartiger Güter (§ 658 HGB) und bei Beschädigung der Güter allein den Unterschied zwischen deren Verkaufswert und deren gemeinen Handelswert im Falle ihrer Unversehrtheit (§659 HGB) - jeweils am Bestimmungsort - zu ersetzen*" (BGH 25.09.1986, II ZR 26/86). See too OLG Hamburg 16.07.2009, 6 U 173/08 (claim for contaminated yarn: no claim for storage or investigation costs). Also BGHZ 169, 187 (2006) (no claim by shipper for damages paid to buyer when apple juice concentrate contaminated with cocoa residues); also BGH 11.9.2008, TranspR 2008, 432, 435 (costs of administering claim). These latter cases concerned the analogous rules relating to land transport: but the principle remains the same.

[38] HGB, § 660.

[39] I.e. 6662/3 SDRs per package or 2 SDRs per kg. It is easy for academic lawyers to forget that even in these times of dearth the market value of a tonne of most basic commodities – for example, maize, wheat, soya beans or rubber – is way below 2,000 SDRs (which in September 2012 translated into about €2,400 or $3,000).

German, Italian and Spanish ones another. The real issue, however, is simply who is right. Put bluntly, do the arguments advanced in favour of limiting a carrier's liability for loss or damage to the value of the goods or their depreciation, as the case may be, stack up? The answer, it is suggested, is fairly clear. They do not.

The first argument for the value limitation is familiar from discussions of limitation generally. Shipowners and others need to be able to keep their potential liabilities within tight and controllable bounds in order to be able to plan their business and obtain P & I cover at a reasonable price. But the difficulty with this contention is fairly obvious: protection of that kind is already available. Carriers as it is have a clear right to limit for precisely this purpose, in the shape of the ordinary (and, it should be added, now satisfactorily unbreakable) package and weight limitations [40]. True it is that the addition of a further cap on liability in the shape of a value limit (or, if you prefer, an exclusion of consequential loss – they are two sides of the same coin) is more advantageous for the carrier. True also that it also makes life easier for his lawyers – a glance at Bloomberg's index of commodity prices, or even, in the case of more complicated cargo, at the cif invoice, may yield without much effort a plausible amount to offer in settlement. But this is hardly a sufficient reason for arguing that this is a necessary protection for the carrier, or that for this reason the way in which the carrier's damages are computed within the overall limit should be different from the way other damages for breach of contract are calculated.

The second, already hinted at, refers to Art.23.1 of the CMR, and the fact that this does limit a land-based cargo claimant to a claim bottomed on the value of the goods (albeit their value on departure and not arrival) [41]. It reads as follows:

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[40] Limitations, moreover, which apply across the board – to "any loss or damage to or in connection with the goods" – rather then merely to goods which disappear en route or arrive in a worse state than on shipment, which is the limit of Art.IV r 5(b).

[41] M.Clarke & D.Yates, *Contracts of Carriage by Land and Air* (2nd ed), Para.1.144; also cases such as the leading *James Buchanan & Co Ltd v Babco Forwarding & Shipping Ltd* [1978] AC 141, which are inexplicable except on the basis of this assumption. Nor is this very surprising, given the explicit terms of 23.4: "In addition, the carriage

> "When, under the provisions of this Convention, a carrier is liable for compensation in respect of total or partial loss of goods, such compensation shall be calculated by reference to the value of the goods at the place and time at which they were accepted for carriage."

On the basis that Art.IV r.5(b) of Hague-Visby bears a striking similarity to this provision [42], it is easy to conclude that it should be read in a similarly restrictive way [43]. On the other hand, this is not necessarily the knock-out point that it seems to be. For one thing, although the correspondence is word-for-word in English (" ...compensation shall be calculated by reference to the value of ..."), it is not so in the French versions [44], a matter that makes it less plausible to assume an intent simply to carry over a provision from one convention to another. But rather more importantly, it has to be recognised that even if Art.IV r 5(b) were taken as an attempted cloning of Art.23.1, the position under Hague-Visby and CMR would not be approximated. This is because, while r 5(b) of Visby is *ex facie* absolute and subject to no exceptions, the CMR rule is carefully qualified, and actually *does* allow in quite a lot of consequential loss. This is because under Art.23.4 the shipper is permitted to claim in addition to be made good in respect of carriage charges, customs duties and (significantly) "other charges incurred in respect of the carriage of the goods". True, this latter phrase is not a blank cheque for shippers seeking

charges, Customs duties and other charges incurred in respect of the carriage of the goods shall be refunded in full in case of total loss and in proportion to the loss sustained in case of partial loss, *but no further damage shall be payable*". (Emphasis supplied).

42 "The second paragraph of Art.IV r 5(b) appears to be derived from Article 23.2 of the CMR Convention" (N.Gaskell in "Damages, Delay and Limitation of Liability under the Hague, Hague-Visby and Hamburg Rules" in *The Hamburg Rules: A Choice for the EEC*, European Institute of Maritime Law, p. 140). See too J.Cooke, T.Young & A.Taylor, *Voyage Charters* (3rd ed), Para.85-382, n.654.

43 W.Tetley, *Marine Cargo Claims* (4th ed), Vol I, 809

44 Where Art.21.3 reads "*... est calculée d'après la valeur des marchandises* ..." and Art. IV. R 5(b) "*... sera calculée par référence à la valeur des marchandises* …" . In both the CMR and the 1968 Visby protocol, the French text enjoys equal status with the English.

to have any consequential losses whatever made good [45]. Nevertheless it still covers a multitude of sins, and allows in particular things such as claims for the return carriage [46] or reconsignment to someone else [47] of damaged goods, not to mention excise surcharges [48], at least where not entirely unforeseeable [49]. In short, the result of reading r.5(b) as an import from the CMR would not so much treat marine and non-marine shippers equally, but make the latter a great deal worse off than the former. Why this should be regarded as either desirable or sensible is hard to fathom.

Thirdly, it is sometimes said that the object of a value limitation is to inject a measure of objectivity into cargo claims, and avoid claims in respect of lost or damaged property for what are referred to in civil law jurisdictions as "subjective values." [50] But this objection, it is suggested, looks overplayed. To begin with, talking in terms of "subjective values" suggests a distaste for claims such as would-be profits not taken care of by an award of sound arrived value – for example sales over the odds, or lost chances of doing further business. But even if these are problematical (itself a big if, since in the nature of things most such claims will fail anyway, on the basis of lack of direct causation or sufficient foreseeability),

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45 So loss of profits pure and simple are regularly refused: e.g. OLG Düsseldorf 18.11.1971, (1973) 8 ETL 510, or App Paris 30.5.1984, (1985) Bull Tr 85. But note that on occasion courts can allow in claims for consequential loss on the basis that they fall outside the scope of the CMR altogether. An example is *Shell Chemical UK Ltd v P & O Roadtanks Ltd* [1993] 1 Lloyd's Rep. 114 (cleaning-out of tank into which wrong oil delivered).

46 *Thermo Engineers Ltd v Ferrymasters Ltd* [1981] 1 Lloyd's Rep. 200, 207 (Browne J), clearly repudiating earlier contrary suggestions in *Tatton & Co Ltd v Ferrymasters Ltd* [1974] 1 Lloyd's Rep. 203.

47 So held in France: App Rennes, 19.3.1987, (1988) Bull Tr 105.

48 *James Buchanan & Co Ltd v Babco Forwarding & Shipping Ltd* [1978] AC 141.

49 *Sandeman Coprimar SA v Transitos y Transportes Integrales SL* [2003] EWCA Civ 113, [2003] Q.B. 1270.

50 Compare *YB 2001 CMI: Draft Report of the Sixth Meeting of the International Sub-committee on Issues of Transport Law, Madrid, 12-13 November 2001*. Discussing an early draft of the Rotterdam Rules which aimed at eliminating claims for consequential loss, Prof Berlingieri said, illuminatingly, at pp. 328-9: "The carrier should be protected from subjective values." Subjective value in this sense is a civilian concept particularly associated with German thought (where it appears as *subjektiver Wert*, denoting in the case of a thing the actual loss suffered by the owner as a result of being deprived of it, as opposed to *gemeine Wert,* its value in the market as a whole).

not all consequential claims are like that. It seems hard to see, for instance, why as a matter of policy the carrier referred to above [51] who dropped a container of harmful chemicals should escape liability for cleanup costs within the weight limitation figure, merely on the basis that the value of the cargo was relatively low. Furthermore, in the context of carriers' liability it is not entirely clear what is wrong with "subjective values". Outside simple loss and damage, for instance in cases of delay, they are available as of course: indeed, nearly all such claims represent "subjective values" in that the shipper recovers such consequential and foreseeable financial losses as he can prove that he himself has suffered [52]. One is tempted to ask: if subjective values are acceptable for delay, why not for loss?

Not only do the arguments in favour of r.5(b) not stack up: those against it are also formidable. As observed above, the idea of a hard-and-fast limit to recovery based on the value of the goods seems to have originated in Germany. But even there, commentators have correctly pointed out that the original justification – a quid pro quo for a strict liability in the carrier [53] – no longer applies [54], and that the only effect of a value limitation is to give the carrier a peculiar privilege denied to almost anyone else [55]. Furthermore, r 5(b) as a limitation also gives rise to serious problems of interpretation. It comes after the general package or weight limitation rules, which refer expansively to "loss or damage to or in

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[51] Note 21, above.

[52] If authority is needed, see cases such as *Monarch Steamship Co Ltd v Karlshamns Oljefabriker A/B* [1949] A.C. 196. Nor is any change suggested in the Rotterdam Rules: although Art.60 takes a leaf from the Hamburg Rules and subjects delay claims to a dual limitation of sound arrived value and 2½ times the freight, whichever is the less, there is no change in the actual method of computation.

[53] The original ADHGB of 1861 exonerated the carrier only for force majeure (*höhere Gewalt*), inherent vice and unseaworthiness not discoverable by due diligence: see § 607.

[54] See, on the original land-based Art.430 HGB (since changed), the *HGB Münchener Kommentar* (1 ed), §430, ss.1-2. Indeed, as long as the navigational fault exception in Art.IV r 2(a) of Hague-Visby continues to apply, the boot is now on the other foot: the liability of the sea carrier is now *less* strict than that of almost any other handler of others' goods.

[55] Ibid.

connection with the goods" [56], a term apt to cover almost all claims arising out of carriage problems, and specifically embracing economic loss as well as physical damage [57]; but should it be construed in the same way? Despite the reference to "the total amount recoverable," it seems doubtful: however plausible it may be to sound arrived value to claims for goods lost or damaged, it is hard to see any sensible reason to do the same thing for claims for (say) transhipment expenses [58]. But even if this construction is right, we still end up with more anomaly. Suppose a bulker loaded with soya beans, unseaworthy at departure, begins taking on water and runs for a port of refuge. If when her cargo is removed the water has damaged it to the tune of $250,000, then presumably r 5(b) kicks in and gives the carrier the benefit of an extra limitation of liability to that sum: if the shipper incurs additional administrative, warehousing and forwarding expenses of $200,000 over and above it, that is his (or his insurer's) bad luck. But now suppose that the cargo is undamaged because the shipper makes swift arrangements to unload, store and forward it at a cost of $450,000. In such a case, it seems he recovers in full.

In addition, if we take r 5(b) as allowing claims for depreciation but not consequential loss, such an interpretation may have bizarre results. Take, for instance, the facts of an English case four years ago [59]. Unseaworthiness in a bulk carrier caused a very small proportion (about 0.5%) of a cargo of maize to suffer water damage: the rest of the cargo, reputed "distressed," predictably proved difficult to sell, and dropped nearly 10% of its value as a result. Assuming that the the goods whose value limits

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56 French: "*pertes ou dommages des marchandises ou concernant celles-ci* ".

57 For example, depreciation of undamaged cargo because of buyers' perceptions (*The Limnos* [2008] 2 Lloyd's Rep. 166), or transhipment expenses (*GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149). For discussion of the ambit of the provision see generally *Renton*'s case at pp.166, 169, 173, and 175; also *The Strathnewton* [1982] 2 Lloyd's Rep. 296, 303 (Goff J).

58 A point acknowledged, at least tacitly, in the Rotterdam Rules, where under Art.22.1 the sound arrived value limit is placed on "compensation payable by the carrier for loss of or damage to the goods", whereas under Art.59.1 the general weight / package limitation is global, affecting all claims invoking "the carrier's liability for breaches of its obligations under this Convention."

59 *The Limnos* [2008] 2 Lloyd's Rep. 166.

the claim under r 5(b) are the damaged ones [60], the shipper in such a case will recover virtually nothing. But now assume that no maize has been damaged at all, but instead the whole cargo is distressed [61]. In such a case it is difficult to see anything for r.5(b) to bite on, and if so the carrier will be liable in full [62]. Nor is it difficult to think of other examples. Suppose a reefer carrying fruit deviates and arrives a week late. If the fruit deteriorates physically in the intervening period, necessitating inspection and bureaucratic expenses, the shipper will nevertheless be limited to the amount of the depreciation [63]; if on the other hand the result is (for example) that the fruit bears a higher rate of customs duty [64] and the market has fallen [65], then again recovery is available in full.

In short, presenting Art.IV r.5(b) of Hague-Visby as a provision for "extra" limitation is, it is suggested, indefensible, whether as a matter of interpretation, law or policy. But of course it might be said that even if this is so, it is a bit late in the day to raise the point. We are, after all, talking about a fairly obscure provision in a treaty signed nearly forty-five years ago, in respect of which, since the appearance of the Rotterdam Rules in 2009 the talk is more of replacement than fine-tuning. And whatever the position under Hague-Visby, there is no doubt that, whether we like it or not, Rotterdam does embrace the sound arrived value limitation. Its Art.22, headed "Calculation of Compensation", says this:

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60 Which was held in *The Limnos* itself to be the case with the general limitation in r 5(a). It would be most odd if r.5(b), assuming (contrary to the argument proposed here) that it did limit liability, limited it on the basis of different goods from r.5(a).

61 Not as implausible as it sounds: the vessel might have been carrying two cargoes and all the damage might have been to the other one. For another way in which undamaged cargo can nevertheless create liability, see *The Good Friend* [1984] 2 Lloyd's Rep. 586 (insect infestation leaves cargo unaffected but causes ship to be turned away from arrival port).

62 And apparently under Hague-Visby in an unlimited amount: *The Limnos* [2008] 2 Lloyd's Rep. 166 at [32]-[33]. To give credit where it is due, Rotterdam sensibly applies the global limit here: see Art.59.1.

63 A point specifically spelt out in the Rotterdam Rules: see Art.60 ("compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 [i.e. the value limitation]").

64 Cf *The Ardennes* [1951] 1 K.B. 55.

65 Cf *Koufos v C Czarnikow Ltd* [1969] 1 A.C. 350.

> 1. Subject to article 59 [the weight and package limitation], the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery … .
>
> 2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.
>
> 3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article … .

Arts.22.1 and 22.2 are effectively clones of Hague-Visby, Art.IV r 5(b), but the object of Art.22.3 is clear: as confirmed by the Rotterdam *travaux préparatoires* [66], it is to enshrine permanently the sound arrived value limit of liability.

Nevertheless, two comments are worth making. For one thing, there is no guarantee that Rotterdam will come to anything. The catch of signatures thus far, though it does include the US, is a good deal less than its promoters hoped [67], and that of ratifications, dismal [68]. And if it does not then the arguments in this chapter will remain rather significant. But more importantly, even if Rotterdam does attract support, this is a matter that should weigh in the balance when asking whether a particular jurisdiction, such as the UK, or a multinational body like the EU, should ratify it. Although, as observed above, Rotterdam embraces the limitation view, it seems to have done so with almost no discussion. It is certainly interesting to see how little reference there is to it in the *travaux préparatoires*. The effective decision seems to have been that of UNCITRAL's Working Group III (which did most of the donkey-work) in May 2004

[66] See A/CN.9/552, Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004).

[67] Twenty-four as of September 2012.

[68] Namely, two (Spain and Togo). Twenty are needed.

[69], where the proposal was adopted on the basis of a brief and bland statement that its object was merely to clear up what was seen as a tiresome ambiguity in Hague-Visby [70]. It seems remarkably queer that a matter of this importance, effectively turning a "package / weight" limitation into a "package / weight / value" limitation, seems to have gone through almost on the nod, despite having been regarded as highly controversial in 1968 and notwithstanding the existence of powerful reasons against it. If this is the way forward for important international conventions, then there is all the more need for states – like well-informed shippers and carriers faced with unfamiliar documents – to read the small print carefully before signing up.

[69] See A/CN.9/552, Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004), referred to above.

[70] See ibid, Para.36 ("It was explained that this paragraph was intended to clarify the Hague-Visby Rules, which were unclear as to whether or not claimants were entitled to consequential damages.").

Flexibility in contracts for the carriage of goods by sea: A historical perspective

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Content

Introduction

The purpose of this article is to consider the concept of flexibility in contracts for the carriage of goods by sea from a historical perspective. It is not a statement of the modern law. It is a historical analysis which considers the position in English law between the late seventeenth century and the introduction of the Hague Rules into English law by the Carriage of Goods by Sea Act 1924. Almost a century has elapsed since the Carriage of Goods by Sea Act 1924 was passed, during which time considerable changes have occurred in this area of law, including the repeal of the 1924 Act, and its replacement by the Carriage of Goods by Sea Act 1971.[1] However, this article does not consider these later changes, nor does it set out the present legal position.

The intention of this article is not to define flexibility, but to provide a historical analysis of flexibility from the point of view of the parties to contracts of carriage of goods by sea, judicial perspectives and the perspectives of the international community during the period under consideration.

The article will consider flexibility from a number of aspects. First, it will consider the strict liability relating to common carriers which was imposed by the common law. Secondly, it will consider the implied undertakings in contracts for the carriage of goods by sea implied by the common law. It will then assess the extent to which the common law regime incorporated, or failed to incorporate, flexibility. Thirdly, the article will consider the introduction of statutory exclusions and limits of liability, and also the flexibility provided by the introduction of contractual clauses which were designed to vary or exclude liability in relation to the common law responsibilities. Fourthly, it will consider the methods used by the courts to interpret these contractual clauses, and will assess the extent to which the methods of interpretation used by the courts

[1] The United Kingdom is now a party to the Hague - Visby Rules, as amended by the Brussels Protocol of December 1979. See the Carriage of Goods by Sea Act 1971 (as amended). The Carriage of Goods by Sea Act 1971 in its original form came into force on 23 June 1977.

reduced the contractual flexibility provided by exclusion clauses. Fifthly, the article will consider the divergence which occurred between the law regulating bills of lading and the law regulating other contracts of carriage of goods by sea, including charterparties, as a result of the introduction of the Hague Rules. Finally, the article will discuss the flexibility of the law in this historical context. It will also consider whether it is arguable that the imposition of onerous and inflexible responsibilities by the common law, and the flexibility introduced by exclusion clauses, led in turn to regulation which reduced flexibility in relation to contracts for the carriage of goods by sea.

Common Carriers

(a) The General Rule

Carver, in the first edition of his book *A Treatise on the Law Relating to the Carriage of Goods by Sea,*[2] published in 1885, posed a preliminary question to his discussion of contracts of carriage of goods by sea, namely:

> What are the obligations which a shipowner impliedly undertakes, apart from any express contract, when he receives goods, to carry them for a reward?[3]

He went on to point out the severity of the obligations imposed on public carriers by the common law, and the reasons for this. He explained:

> The common law, with regard to the liability of a public carrier of goods, is strict. Apart from express contract he is, with certain exceptions, absolutely responsible for the safety of the goods while

[2] Carver, T. G., *A Treatise on the Law Relating to the Carriage of Goods by Sea*, 1885, London, Stevens and Sons, (hereafter 'Carver').

[3] Ibid. at p.1.

they remain in his hands as carrier.[4]

Carver then considered the case law, and the reasons underlying the imposition of such a high level of responsibility by the common law.[5] In this context he discussed three cases, namely *Coggs v Bernard*[6], decided in 1703, *Forward v Pittard*[7], decided in 1785, and *Riley v Horne*[8], decided in 1828.

In *Coggs v Bernard*[9] Lord Holt discussed the position when goods were delivered for carriage to a bailee for reward who offered their services to the public.[10] He took the view that common carriers, common hoymen[11] and the masters of ships[12] had to 'answer for the goods at all events' and the only exceptions on which they could rely at common law were acts of God and King's enemies[13]. Lord Holt explained that the underlying reason for this was a policy reason, namely that persons using the services of carriers[14] and ships' masters were obliged to trust them. If such a high level of responsibility was not imposed on such persons, they might secretly collude with thieves and criminals, and the goods entrusted to them could

4 Ibid. at p.2. On this point see also Scrutton, T.E., *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading,* 2nd edn., 1890, London, William Clowes and Sons, Limited, (hereafter 'Scrutton'), at p. 155.

5 Carver, op. cit. at pp. 2-3.

6 (1703) 2 Ld. Raym. 909; 92 E.R. 107.

7 (1785) 1 Term Rep. 27; 99 E.R. 953.

8 (1828) 5 Bing. 217; 130 E.R. 1044.

9 (1703) 2 Ld. Raym. 909; 92 E.R.107.

10 The analysis is *obiter,* and constituted part of an analysis of the various types of bailment.

11 A common hoyman carried goods by water for hire.

12 Citing *Morse v Slue* (1671) 1 Vent. 190, (1672) 1 Vent. 238; 86 E.R.129, 159.

13 (1703) 2 Ld. Raym. 909 at pp.917- 918; 92 ER 107 at p.112. There were some other exceptions at common law, which are not mentioned in the three cases under discussion, namely inherent vice or defective packaging of the goods and fault of the consignor. See *Blower v The Great Western Railway Company* (1872) L.R. 7 C.P. 655 at pp.663- 664, in which Willes J. approved Story on Bailment (9th Edn, 1878) §492a; *Nugent v Smith* (1876) 1 C.P.D. 423. These further exceptions were also not referred to in *Liver Alkali v Johnson* (post). In addition, the carrier was not liable for the damage if it was due to a general average sacrifice: Carver, op cit. at p.23.

14 The rule as to strict liability applied to common carriers by land as well as by sea, and included public carriers on inland waters. Carver, op. cit. at pp.3-4

be clandestinely disposed of without the carriers incurring responsibility.[15] Lord Mansfield took a similar view in *Forward v Pittard*[16] where he considered that the underlying reason for the rule was

> …. to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shews it was done by the King's enemies or by such act as could not happen by the intervention of man, as storms, lightening, and tempests.[17]

On the issue of theft of the cargo he stated:

> The true reason is, for fear it may give room for collusion, that the master may contrive to be robbed on purpose, and share the spoil.[18]

As Best C.J. pointed out in *Riley v Horne*[19], since the owner of the goods did not travel with them, he was at the mercy of the carrier and his servants in relation to the fate of his goods. Consequently, if the goods were destroyed or damaged by gross negligence of the carrier or his servants, or stolen by them, or by thieves with whom they had colluded, the owner of the goods would not be able to prove the reason for the loss of his goods because the only evidence on which he could rely would be that given by the carrier's servants,

> and they, knowing they could not be contradicted, would excuse their masters and themselves.[20]

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15 "And this is a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered." (1703) 2 Ld. Raym. 909 at p.918; 92 E.R. 107 at p.112.

16 (1785) 1 Term Rep. 27; 99 E.R. 953.

17 (1785) 1 Term Rep. 27 at p.33; 99 E.R. 953 at pp.956-957

18 (1785) 1 Term Rep. 27 at p.34; 99 E.R. 953 at p.957.

19 (1828) 5 Bing. 217; 130 E.R. 1044.

20 (1828) 5 Bing. 217 at p.220; 130 E.R. 1044 at p.1045.

Consequently, a high level of responsibility was imposed on the carrier:

> 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. From his liability as an insurer, the carrier is only to be relieved by two things …… namely, the act of God and the King's enemies.[21]

(b) Application of the General Rule

It is important to identify the categories of carriers of goods by sea to whom this strict common law rule relating to responsibility for the goods applied.

First, the rule applied to ships which carried goods for the public generally, and applied to both the coastal trade and also to foreign voyages,[22] as well as to carriers on inland waterways and other domestic carriage by water.[23]

In order to be a common carrier the shipowner had to carry for the public generally. In *Nugent v Smith* [24] Brett J. defined a common carrier

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[21] Ibid.

[22] *Morse v Slue* (1671) 1 Vent. 190, (1672) 1 Vent. 238; 86 E.R.129, 159. Goods were delivered on board a ship in London for carriage to Cadiz in Spain. The goods were stolen from the ship whilst the ship was still in London. Although the defendant, who was master of the ship, was not negligent, he was held liable for the loss. The court took the view that the case was not to be judged by admiralty law because the 'ship was infra corpus comitatus' (i.e. within the body of a county), when the theft occurred, and thus the master was judged by the same rules as a hoyman, common carrier or innholder. Also, although the goods were received on land for transportation, as there was one entire contract, the goods could not be subject to one law in port and another at sea. Carver, op. cit . at p.4.
See also Chitty, T., and Temple, L., *A Practical Treatise on the Law of Carriers of Goods and Passengers by Land, Inland Navigation, and in Ships,* 1856, London, W.G Benning and Co., Law Booksellers, (hereafter 'Chitty and Temple'), at p.148. "The owners and masters of ships or steamboats are common carriers when they hold forth to the public that they will carry their goods on a particular voyage to the ship's destination, whether the vessel trade from one part of this country to another, or to a place *beyond the seas* and *out* of this realm.'

[23] Carver, op. cit. at p.4.

[24] (1875) 1 C.P.D. 19.

as someone who holds out

> that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried.[25]

Carver offered a similar definition:

> A common carrier is one who is engaged in the trade of carrying goods as a regular business, and who holds himself out as ready to carry for any who may wish to employ him.[26]

Scrutton defined shipowners who constituted common carriers as those

> who offer their ships as general ships for the transit of the goods of any shipper.[27]

Some authorities considered that a common carrier needed to ply between certain termini or on a specified route,[28] although it was also doubted by other authorities that these additional criteria were necessary elements of the definition.[29] Consequently, shipowners who offered their ships as general ships and carried goods under bills of lading for various cargo owners were within the definition of common carriers, whether the goods were carried on internal or overseas voyages, if the carrier plied between fixed points or on regular routes. Shipowners operating general ships in this way arguably also fell within the definition even if they did not ply between fixed points or on regular routes.[30]

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25 Ibid at p.27

26 Carver, op. cit. at p.5.

27 Scrutton, op. cit. at p.155. See also Chitty and Temple, supra fn. 22.

28 See the judgment of Cockburn C.J. in *Nugent v Smith* (1876) 1 C.P.D. 423 at pp.427 – 428.

29 See Brett J in *Nugent v Smith* (1875) 1 C.P.D. 19 at p.27. See also Carver, op. cit. at p.5.

30 Charles, Lord Tenterden, *A Treatise of the Law Relative To Merchant Ships and Seamen*, 14th edn, by Aspinall, B., and Moore H.S., 1901, London, Shaw and Sons, (generally known as 'Abbott's Law of Merchant Ships and Seamen', hereafter referred to as 'Abbott') at p. 484. See also Maclachlan, D., *A Treatise on the Law of Merchant Shipping*, 7th edn. by St Clair Pilcher, G., and Bateson, O.L., 1932, Sweet and Maxwell

It also seems clear from cases such as *Morse v Slue*[31] and *Coggs v Bernard*[32] that at common law masters of ships were subject to strict liability in relation to the goods carried, with the limited exceptions permitted at common law. However, this was not because the masters of ships were common carriers as such, but because they offered their services to the public [33] and their case was indistinguishable from that of common carriers.[34] It should also be remembered in this context that many masters of ships at this stage in history were part-owners of their ships,[35] and in some cases owned the entire ship. The master was personally liable on any contract he entered into, e.g. by signing the bill of lading, and the merchant could choose to sue either the master or the owner on the contract. As the matter was explained in *Abbott's Law of Merchant Ships and Seamen,*

> It is true that the master also is answerable for his own contract; for in favour of commerce the law will not *compel* the merchant to seek after the owners and sue them, although it gives him the power to do so: but leaves him a two-fold remedy against the one or the other. [36]

There is some discussion in the older cases as to whether a shipowner who carried goods for hire in his ship but was not a common carrier *per se* was subject to the same strict rules of liability as a common carrier.[37] This affected lightermen, and shipowners who chartered their vessels

Limited, London (hereafter 'Maclachlan') at p. 88, where the author argued that any shipowner who put his ship up as a general ship incurred the liability of a common carrier, whether he fell within the definition in the strict sense of the term or not.

31 (1671) 1 Vent. 190, (1672) 1 Vent. 238; 86 E.R.129, 159.

32 (1703) 2 Ld. Raym. 909; 92 ER 107.

33 Coggs v Bernard (1703) 2 Ld. Raym. 909 at pp 917-918; 92 ER 107 at p.112 per Lord Holt.

34 Carver, op.cit.at p.5.

35 Chitty and Temple, op. cit. at p.150.

36 Abbott, op. cit. at p.156. See also Chitty and Temple, op. cit. at p.151. The reason for this was that the master normally signed bills of lading in his own name as master, in which case he made himself personally liable on the contract: Carver, op cit. at p.47.

37 Carver, op. cit. at pp. 5-8.

under time and voyage charterparties. The case law on the subject is complex, and the authors of the era interpreted the case law in different ways.

In *Liver Alkali Co. v Johnson*[38] the defendant was a lighterman who let out his barges, under the care of his own servants, for the carriage of goods to and from places on the River Mersey to any customer who applied for them. On each occasion a separate contract was made, but each barge only carried the goods of one customer, and no specific barge was allocated to a particular customer at the time of the contract. The defendant did not ply between fixed points, but the points of arrival and departure were fixed for each customer. The plaintiff's goods were damaged when the barge grounded, although there was no negligence on the part of the defendant. In the Court of Exchequer the defendant was held to be a common carrier, and liable as such.[39] On appeal,[40] in the Exchequer Chamber, Blackburn J. delivered the majority judgment in the case. The majority considered that it was unnecessary to decide whether the defendant was a common carrier, but held that he incurred the liability of a common carrier. Brett J.[41], in a separate judgment, specifically concluded that the defendant was not a common carrier because he did not undertake to carry goods indifferently for anyone who wished to employ him. However, he took the following view:

> I think that by a recognised custom of England, - a custom adopted and recognised by the Courts in precisely the same manner as the custom of England with regard to common carriers has been adopted and recognised by them - *every shipowner who carries goods for hire in his ship*,[42] whether by inland navigation, or coast-ways, or abroad, undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a

[38] (1871-72) L.R. 7 Ex. 267; (1873-74) L.R. 9 Ex. 338.

[39] (1871-72) L.R. 7 Ex. 267.

[40] (1873-74) L.R. 9 Ex. 338.

[41] Brett J. subsequently became Lord Esher and is referred to by this title in a number of texts.

[42] Italics added.

> particular voyage, or on particular voyages, he limits his liability by further exceptions.[43]

In the first edition of his book in 1885 Carver pointed out [44] that Brett J had repeated this view, *obiter*, when delivering the judgment of the court in the case of *Nugent v Smith,*[45] and that it had been subsequently severely criticised, also *obiter,* in the Court of Appeal by Cockburn, C.J. in the same case.[46] Cockburn, C.J. was unwilling to concur in the view that shipowners who were not common carriers were subject to the strict liability imposed on common carriers by the common law in relation to loss or damage to cargo.[47] However, Carver considered that Cockburn C.J.'s opinion did not destroy the decision in *Liver Alkali Co. v Johnson.* [48] Carver also argued that the same rules of strict responsibility should apply whether a ship was used to carry goods for one person or for multiple cargo owners, and the rules should apply equally to charterparties, with the exception of charterparties by demise, which were in a different category as the shipowner no longer had control of the ship.[49] He added:

> Whether the rule of law is wise or not it appears to apply as properly to one class of cases as to the other[50]

In relation to the latter point Carver was following the view expressed

43 (1873 -74) L.R. 9 Ex. 338 at p.344 per Brett J.

44 Carver, op. cit. at p.7.

45 (1875) 1 C.P.D. 19 at p.33 per Brett, delivering the judgment of the court (Brett and Denman JJ.): "We are, therefore, of opinion that the true rule is, that every ship-owner or master who carries goods on board his vessel for hire, is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God, or the Queen's enemies. It is not only such ship-owners as have made themselves in all senses common carriers who are so liable, but all shipowners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward."

46 (1876) 1 C.P.D. 423.

47 Ibid at p.434.

48 Carver op. cit. at p.7.

49 Carver, op. cit. at p.8.

50 Ibid.

by Blackburn J. in *Liver Alkali Co. v Johnson* where he said:

> ….. it is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries the lading in different parcels for different people.[51]

Carver's analysis therefore took the view that the rule of strict responsibility applied to all shipowners who carried goods for reward, on the basis that they were either common carriers, or their liability for loss or damage to the goods was indistinguishable from that of common carriers, unless the ship had been chartered by demise.

The authors of Abbott concurred in this view. They stated, citing *Liver Alkali v Johnson,*

> It seems, however to make little difference whether a shipowner is a common carrier or not. If he is, he is liable to an action for improperly refusing to take goods tendered to him for carriage. If he is not, he is subject to every other responsibility of a common carrier, that it is to say, he must carry the goods entrusted to him safe against all events but acts of God and the enemies of the Queen, unless excused by the terms of his contract.[52]

Later in the text the authors stated that

> ….the exact ground of the shipowner's liability in this respect is not clearly settled.[53]

However, after a careful consideration of the authorities they concluded that *Liver Alkali v Johnson* 'may be regarded as indisputable law'.[54]

Maclachlan also took a similar view. After considering the authorities[55]

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51 (1873-74) 9 Ex. 338 at p.341.

52 Abbott, op. cit. at p.484.

53 Ibid, at p. 580.

54 Ibid, at p.582.

55 Maclachlan, op. cit. at pp. 88-90.

he said:

> However, the weight of modern authority supports the conclusion that at common law all shipowners incur the same liability for goods carried by them as common carriers.[56]

Scrutton, on the other hand, when dealing with the authorities on this matter, took a more restrictive view. He analysed the problem from two points of view. First, he considered the issue of whether, in the absence of express agreement, the owner of a ship or barge which had been hired to carry a particular cargo on a particular voyage constituted a common carrier, and was therefore strictly liable for loss or damage to the goods. After considering the cases of *Liver Alkali v Johnson* and *Nugent v Smith* he concluded that the decision in the case of *Liver Alkali v Johnson* could not apply if there was a charterparty involved.[57] Moreover, he took the view that since, on appeal, the court in *Liver Alkali v Johnson* did not decide that the defendant lighterman in the case was a common carrier, but that he had the same liability as a common carrier, the decision should be restricted to the employment of lightermen.[58] Secondly, Scrutton considered the larger question of whether every shipowner or master who carried goods for hire was, in the absence of express provisions, subject to the same liability for loss or damage to the goods as a common carrier, even if he was not a common carrier. Scrutton doubted Brett J's view that such a high level of responsibility should be imposed on the carrier. He concluded that in the light of cases such as *The Xantho* [59],

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[56] Ibid at p.90.

[57] Chitty and Temple, writing in 1856, drew a clear distinction between general ships and chartered ships. They took the view that whilst the master and owners could be held liable as common carriers even if the goods were carried for one merchant only, this only applied if they held themselves out as carrying for the public generally. In their view, the rule could not apply to charterparties, as the rights of the owners and charterers were governed by the terms of the charter. Chitty and Temple, op. cit. at pp.149, 150. It is, however, important to note that this was written in 1856 before the cases of *Liver Alkali v Johnson* and *Nugent v Smith* were decided.

[58] Scrutton, op. cit. at pp.156-157.

[59] (1887) 12 A.C. 503.

Hamilton v Pandorf[60] and *Laurie v Douglas,*[61] it would be unsafe to assume that such a high level of responsibility applied, and that the latter case law was consistent with a standard of reasonable care.[62]

Even today the issue of the level of liability of a shipowner who is not a common carrier for the loss or damage to goods at common law remains undecided. As the matter is put in Halsbury's Law of England:

> It is uncertain whether a shipowner who is not a common carrier of goods has the same liability or owes only the obligations of a bailee for the exercise of reasonable care.[63]

(c) The Severity of the General Rule

In the quotation set out above[64] Carver suggested that the rule imposing strict liability might be unwise.[65] It was certainly harsh in its application, a matter recognised by Grose J. in *Hyde v Trent Navigation Co.*[66] when he said:

> The law, which makes carriers answerable as insurers, is indeed a hard law: but it is founded on wisdom, and was established to prevent fraud.[67]

The severity of the rule was illustrated in the following authorities. In *Coggs v Bernard* Lord Holt took the view that the carrier was strictly liable even if

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60 (1887) 12 A.C. 518.

61 (1846) 15 M. & W. 746; 153 E.R. 1052.

62 Scrutton, op.cit. at pp. 157-159.

63 Halsbury's Laws of England, Carriage and Carriers, Vol. 7, 5th Edition, 2008, para.1.2.4. fn.10.

64 Text to fn.50.

65 See also *Liver Alkali v Johnson* (1873-74) L.R. 9 Ex. 338 per Lord Blackburn at p.340: "It is too late now to speculate on the propriety of this rule, we must treat it as firmly established that, in the absence of some contract, express or implied, introducing further exceptions, those who exercise a public employment of carrying goods do incur this liability".

66 (1793) 5 Term. Rep. 389; 101 E.R. 218.

67 (1793) 5 Term. Rep. 389 at p.399. 101 E.R. 218 at p.223.

> the force be never so great, as if an irresistible multitude of people should rob him.[68]

Similarly, in *Forward v Pittard* Lord Mansfield stated:

> If an armed force come to rob the carrier of the goods, he is liable: and a reason is given in the books, which is a bad one, viz. that he ought to have a sufficient force to repel it: but that would be impossible in some cases, as for instance in the riots in the year 1780.[69]

In *Morse v Slue*[70] the master of a vessel was held liable for the loss of cargo in circumstances where he had left the usual number of men, namely four or five, to guard the ship whilst it was in port. These seamen were overpowered by eleven men purporting to be from the press gang, who took three trunks of cargo containing silk and silk stockings. The court took the view that:

> ….. if a carrier be robbed by an hundred men, he is never the more excused.[71]

Maclachlan put the matter thus:

> Upon the principles of the common law [the master and owners] are responsible for goods stolen or embezzled on board the ship by the crew or other persons, or taken by pirates, or destroyed by fire……or striking an unbouyed obstruction[72]

The draconian nature of the responsibilities imposed on the carrier at common law was further increased by the fact that the carrier was unable to rely on the exceptions of act of God, Queen's enemies and inherent

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68 (1703) 2 Ld. Raym. 909 at p.918; 92 ER 107 at p.112.
69 (1785) 1 Term Rep. 27 at p.34; 99 E.R. 953 at p.957..
70 (1671) 1 Vent. 190, (1672) 1 Vent. 238; 86 E.R.129, 159.
71 (1672) 1 Vent 238 at p.239: 86 ER 159 at p.160.
72 Maclachlan, op. cit. at p.455.

vice[73] in the goods if he had been negligent and failed to take reasonable steps to avoid them.[74] Also, if the carrier had deviated from the voyage, he could not rely on these exceptions if the occurrence which caused the loss would not have operated in the absence of the deviation.[75] Thus, even the sparse protection accorded by the exceptions granted by the common law could be lost by negligence or deviation on the part of the carrier.

The Implied Undertakings of the Carrier

In addition to the heavy responsibilities imposed by the common law on carriers in relation to the care of the cargo, further heavy responsibilities were imposed on carriers by virtue of the implied undertakings.

1. Seaworthiness

There was an obligation imposed on the shipowner at common law to provide a seaworthy ship at the commencement of the voyage.[76] If he failed in this duty and the goods were lost or damaged as a result of the unseaworthiness, the shipowner was responsible for the loss.[77] The obligation of seaworthiness imposed was a very high level, namely an absolute undertaking that the ship would be fit to encounter whatever perils a ship of that kind and laden in that way might fairly expect to encounter on that voyage at that time of year.[78] The definition approved in *Daniels v Harris*[79] a marine insurance case in 1874, was whether the ship

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73 See ante fn.13.

74 Carver, op. cit. at p.18.

75 Ibid. at pp.18-19.

76 Steel v State Line SS Co. (1877) 3 App. Cas. 72 at p.76.

77 Carver, op. cit. at p.19.

78 Ibid. Steel v State Line SS Co. (1877) 3 App. Cas. 72 at p.77.

79 (1874-75) L.R. 10 C.P. 1.

> loaded as she was with the cargo which she had on board stowed in the way it was, the ship was fit to undergo all the ordinary risks of the voyage upon which she was to sail, at the time of year at which she was to sail.[80]

In 1876, in *Kopitoff v Wilson* [81] seaworthiness was defined as follows:

> fit to meet and undergo the perils of the sea and other incidental risks to which she must, of necessity, be exposed in the course of the voyage[82]

Moreover, it was not an undertaking that the carrier would

> do their best to make the ship fit, but that the ship should really be fit. [83]

It was irrelevant that the defect could not be discovered by due diligence.[84] In *The Glenfruin* [85] the owners of the ship were held liable for the cost of salvaging the cargo because the ship commenced her voyage in an unseaworthy condition. This was the case even though it was impossible for the shipowners or manufacturers to discover a latent defect in the screw shaft on the ship.

Seaworthiness was also an extensive obligation in that it applied not just to the design, structure, condition and equipment of the ship, but also to the manning of the vessel in that she was required to have a competent master and a competent and sufficient crew.[86]

The obligation also extended to cargoworthiness in that the ship had to be fit to receive the cargo at the time it was put on board, and be fit to

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80 Ibid at p.2.

81 (1876) 1 Q.B.D. 377.

82 Ibid at p. 380.

83 Lord Blackburn in *Steel v State Line* (1877) 3 App. Cas. 72 at p.86.

84 Carver op. cit. at p.20.

85 (1885) 10 P.D. 103.

86 Carver op. cit. at p.20. Abbott, op. cit. at p.491. *Clifford v Hunter* (1827) Mood. & M. 103; 173 E.R. 1096.

carry it on the voyage.[87] Also, the ship was required to be supplied with the necessary papers.[88]

However, the duty was not to provide a perfect ship, but a ship which met the standard which an

> ordinary careful and prudent shipowner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it.[89]

Interestingly, in *Abbott's Law of Merchant Ships and Seamen* the obligation to provide a seaworthy ship is linked, in the case of a carrier of goods in public employment, with the strict liability imposed on common carriers. The authors cited Holt C.J's statement in *Coggs v Bernard*[90] to the effect that

> The law charges the person (viz., common carrier, hoyman, master of a ship) thus entrusted to carry goods against all events but acts of God and of the King's enemies.[91]

and concluded that a common carrier was treated as an insurer, and was liable for all losses not within the exceptions available at common law to such carriers.[92] Logically, therefore, they were liable for losses due to unseaworthiness. However, it was subsequently decided that the implied obligation extended beyond common carriers. In *Kopitoff v Wilson* [93], in dealing with the argument that earlier authorities had not intended that the implied obligation of seaworthiness should apply to all contracts for carriage by water, the court took the following view:

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87 Carver, op. cit. at p.22. *Stanton v Richardson* (1871-72) L.R. 7 C.P. 421, (1873-74) L.R. 9 C.P. 390 (Ex. Ch.), (1875) 3 Asp. M.C. 23 (H.L.).

88 Abbott, op. cit. at p.502.

89 Carver, op. cit., at p.21.

90 (1703) 2 Ld. Raym. 909.

91 This is a paraphrase of the wording in the judgment.

92 Abbott, op.cit. at p.490.

93 (1876) 1 Q.B.D. 377

> We hold that, in whatever way a contract for the conveyance of merchandise be made, where there is no agreement to the contrary, the shipowner is, by the nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or in ordinary language, is seaworthy.[94]

In *Steel v State Line SS. Co.*[95] Lord Blackburn made it clear that this obligation applied to all contracts for the carriage of goods by sea,[96] and was thus applicable to both charterparties and bills of lading.

2. Deviation

There was an implied condition that the ship would proceed on her voyage without any unjustified delay, or departure from her proper course, and unless there was a custom to the contrary, the ship was required to take the most direct, safe course to her destination.[97] However, the shipowner was not liable if the delay or deviation occurred without fault on his part.[98] Also, there were a number of exceptions whereby a delay or deviation was permitted, for example to repair the ship after an accident or storm damage, to avoid pirates or enemies, or to obtain water and provisions at the customary places on long voyages. [99] The carrier was also excused if he deviated to save life.[100]

The implied undertaking applied to all contracts of affreightment [101],

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94 Ibid at p.380.

95 (1877) L.R. 3 App. Cas. 72.

96 Ibid at p.86. Cited in Carver op. cit. at p.19. See also Abbott, op. cit. at p.488: "In whatever way the contract for the conveyance of merchandise be made, the master and owners are thereby bound to the performance of various duties of a general nature."

97 Carver op. cit. at p.285. Abbott op .cit. at p.522.

98 Carver op. cit. at p.285

99 Abbott op. cit. at p.522.

100 *Scaramanga v Stamp* (1880) 5 C.P.D. 295. The permitted deviations are fully discussed in Abbott, op. cit. at pp. 522 – 527 and Carver op. cit. at pp. 285-292.

101 Maclachlan op. cit. at p.340.

and therefore applied to both bills of lading [102] and charterparties. The consequences of a breach were serious for a shipowner. As Maclachlan explained:

> the effect of a breach of this condition is that the contract is displaced, and the shipowner cannot, in the event of a loss set up any of the exceptions in the charter-party in answer to the charterer's claim.[103]

Similarly, the shipowner was not permitted to rely on contractual exceptions in the bill of lading to protect himself from losses following an unjustified deviation.[104] Moreover, the carrier in such circumstances was treated as a common carrier, and was subject to the liabilities of a common carrier.[105] The reason for this harsh rule was that an unjustified deviation had the effect of vitiating any insurance policy on the cargo,[106] and since the action of the shipowner had abrogated the insurance, the shipowner was required to assume the risk.[107]

3. Care of the Cargo

The shipowner, through his master was bound during the voyage to take all reasonable care of the cargo, and if he failed in this duty the shipowner was liable even if the loss was caused by an excepted peril. [108] As Lord Macnaghten put the matter in *The Xantho:*

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102 See e.g. *Leduc v Ward* (1888) 20 Q.B.D. 475.

103 Maclachlan op. cit. at p.301. See also Carver, op .cit. at p 286: "When a vessel has deviated from her proper course, the shipowner is not only liable for the delay, but he becomes absolutely responsible for any loss or damage to the goods which may occur during the deviation, and which can be attributed to it. He is not protected by the exception of perils in the contract." Carver also argued at p. 288 that the shipowner remained liable for damage which occurred after a deviation even though the ship had reverted to its normal course: Carver op. cit. at p.288.

104 Maclachlan op. cit. at p.342.

105 *Internationale Guano v Macandrew & Co.* [1909] 2 K.B. 360.

106 Abbott op. cit. at p.525. Carver op. cit. at p.288.

107 Parsons, *Law of Shipping*, Vol. i at p. 172n, quoted in Abbott op. cit. at p.525.

108 Maclachlan, op. cit. at p.348. Carver, op. cit. at p.292.

> Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss.[109]

The rule was equally applicable to charterparties and bills of lading.[110]

The Obligations of the Freighter and Reciprocal Obligations

Although the carriers were subject to heavy obligations imposed by the common law, some implied obligations were imposed on the freighters. These were less stringent than those imposed on the carriers. Also, in some cases there were reciprocal obligations. However, it is clear from the case law during the period that the obligations imposed by the common law on the freighters were not as fully developed as those imposed on the carriers.

a. Time

Obligations in relation to time were undertaken at common law by both parties. In relation to charterparties, if the charterparty was silent on the matter, there was an implied stipulation that there would be no

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[109] [1887] 12 App. Cas. 503 at p.515. See also *Grill v General Iron Screw Colliery Co.* (1865-66) L.R. 1 C.P. 600 at p.612 *per* Willes J. "In the case of a bill of lading it is different, because there the contract is to carry with reasonable care unless prevented by the excepted perils. If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner he is liable for this breach of his covenant."

[110] Maclachlan, op. cit. at p.348

unreasonable or unusual delay by the shipowner in commencing the voyage.[111] Thus, in *M'Andrew v Adams*[112] the shipowners were held to be in breach when they undertook an intermediate voyage before commencing the charter voyage. Although the matter is not entirely clear, it is possible that the rule applied not only to charterparties, but also if goods were shipped under a bill of lading. Carver made the following general statement:

> If there has been an improper loss of time after the goods have been delivered by the shippers for shipment, and damage or loss results, the shipowner is answerable.[113]

However, he supported this assertion with a case relating to a charterparty.

The charterer also undertook reciprocal obligations in relation to time. If the charterparty did not specifically deal with the matter of timing, and the charterer had agreed to name the port of discharge at the port of loading or at an intermediate port, it had to be done within a reasonable time.[114]

b. Safe Port

The charterer was under an obligation to nominate a safe port for the discharge of the cargo.[115] This extended beyond the natural safety of the port to dangers such as capture and confiscation.[116] Thus the port was required to be physically safe[117] and also politically safe.[118] A breach of this obligation by the charterer constituted a breach of contract which entitled the shipowner to rescind the contract if he so wished. If the port

111 Maclachlan, op. cit. at p.295. Carver, op. cit. at pp.217, 220.
112 (1834) 1 Bing. N.C. 29; 131 E.R. 1028. Maclachlan op. cit. p.295.
113 Carver, op. cit. at p.285.
114 Carver op. cit. at p.427. See also Maclachlan op. cit. at p.296.
115 Carver, op. cit. at p.427.
116 Maclachlan op. cit. p.301-302.
117 Carver op.cit at p. 429.
118 *Ogden v Graham* (1861) 1 B. & S. 773; 121 E.R. 901; Carver op. cit. p.431.

became unsafe after nomination, the charterer was required to name another port.[119]

c. Not to ship dangerous goods

At common law a common carrier had no right to be informed of the contents of any parcel of goods he agreed to carry, nor did he have the right to open it to see what the contents consisted of.[120] However, freighters were under a general duty not to ship

> prohibited or uncustomed goods by which the ship may be subjected to detention or forfieture[121]

In *Brass v Maitland* [122] the question of shipment of dangerous goods was discussed in relation to a general ship. The court was agreed on two aspects of the case. Firstly, if the shipper knew that the goods were dangerous, he was obliged to warn the carrier of the danger. Secondly, if the carrier knew, or ought reasonably to have known the dangerous nature of the goods, but chose to accept them, the shipper was not liable for loss or damage caused by the goods. However, the court disagreed as to whether the shipper was liable if he was unaware of the dangerous nature of the goods. Lord Campbell took the view that in such a case the loss should fall upon the shipper. Wightman J. concurred in this judgment. However, Crompton J. took the view that if the shipper did not know, and had no means of knowing the dangerous quality of the goods, he should not be held liable for loss and damage caused by them.[123] If Crompton J.'s view is taken to its logical conclusion, it follows that if both parties were ignorant of the dangerous nature of the goods, the

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119 Maclachlan op. cit. p.301-302.

120 Maclachlan, op. cit. at p.358. *Crouch v L.&N.W. Rly. Co.* (1854) 14 C.B. 255; 139 E.R. 105, in which the court disapproved a dictum Best C.J. in *Riley v Horne.*

121 Abbott, op. cit. p.644.

122 (1856) 6 El. & Bl. 470; 119 E.R. 940.

123 For a discussion of the case, see Carver op. cit. pp.274 – 277 and Abbott op. cit. pp.644 – 650.

carrier should bear the loss.

Since Campbell and Wightman were in the majority, the correct view was that if dangerous goods were delivered to a common carrier without notice of their dangerous character, then the shipper impliedly undertook that they were not dangerous, unless the carrier knew or should have known of their dangerous qualities. However, it was unclear whether this rule extended beyond common carriers to other carriers.[124]

In their consideration of the issue, whilst accepting that the issue was unclear, the authors of Abbott concluded that the view taken by Crompton J. in *Brass v Maitland* was 'more in accordance with later authorities',[125] a view which was shared by Carver.[126] It therefore seems that there was some judicial willingness to consider placing the loss on the carrier if the shipper was unaware of the dangerous nature of the goods.

Assessment of the Flexibility or Inflexibility of the Common Law Regime

In relation to shipowners who were common carriers and who carried goods under bills of lading, the common law had clearly established a position prior to 1900 whereby they were strictly liable for loss or damage to the goods, subject only to the common law exceptions of act of God, King's or Queen's enemies and inherent vice[127] of the goods. A similar responsibility had been imposed on the masters of ships. Moreover, although the point had not been definitively decided, there was authority to suggest that all shipowners, including those carrying goods under a charterparty, were subject to the same liability, unless the charterparty was a charter by demise.

Furthermore, heavy and inflexible implied obligations were imposed

[124] Maclachlan, op. cit. at p.358. n.3.

[125] Abbott op. cit. at p.647.

[126] Carver, op. cit. at p.275.

[127] See ante fn.13.

on shipowners. The implied undertaking as to seaworthiness, which extended beyond the ship itself to the crew, cargoworthiness of the vessel and the ship's papers, was applied to both common carriers and all other carriers by sea. It applied regardless of the type of contract concerned, and thus applied to shipowners who let their vessels under charterparties and those who carried goods under bills of lading. In relation to deviation the shipowner was required not to deviate from the proper course. A breach deprived him of the contractual exemption clauses, and rendered him a common carrier. Similarly, a breach of the duty in relation to care of the cargo rendered the shipowner unable to rely on the contractual exemption clauses. Negligence and deviation could also, in some circumstances, abrogate the common law exceptions available to common carriers.

Although there were some duties imposed on freighters by the common law, these were not as well developed as the duties imposed on carriers. Moreover, in relation to dangerous goods, there appears to have been some judicial willingness to consider casting greater responsibilities on the carriers than the shippers in the event that neither party was aware of the dangerous nature of the goods.

In the light of this, it is clearly arguable that the responsibilities under the basic common law regime imposed inflexible and unreasonable burdens on carriers by sea at that stage in history. However, as will be discussed in the following sections, there were also elements of flexibility in the system.

The Introduction of Flexibility

It was clear that the harsh and inflexible system imposed by the common law required modification. This occurred in two ways, namely by the introduction of statutory provisions, and the use of contractual exemption clauses.

i. Statutory Provisions

The *Responsibility of Shipowners Act 1733* was introduced to deal with the problem of the shipowners' liability for theft of the cargo by the master and crew. Section 1 provided that if the master or mariners made away with gold, silver, diamonds, jewels, precious stones (hereafter 'valuables'), or other goods without the privity and knowledge of the shipowners, the shipowner's liability was limited to the value of the ship and freight. The *Merchant Shipping Act 1786* section 1 extended this limitation to theft of valuables and goods by persons other than the master and crew if the shipowners were not privy to the occurrence. Section 2 introduced a statutory exemption from liability for shipowners in respect of losses of goods occurring due to fire on board the ship. Section 3 introduced an exemption for masters and owners in relation to the theft of valuables, including watches, if the value had not been declared on shipment.

The Merchant Shipping Act 1854 section 503 modified the exemptions relating to loss or damage to goods by reason of fire occurring on board the ship, or the theft of valuables, including watches, if the value had not been declared on shipment, stating that the loss must occur without the shipowner's actual fault or privity. The provision was subsequently consolidated in similar terms in section 502 of the Merchant Shipping Act 1894, which provided:

> 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; or
>
> (ii) Where any gold, silver, diamonds, watches, jewels, or precious stones taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship

> in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with, or secreting thereof.

Other statutory provisions were introduced which enabled shipowners to limit their liability in various circumstances. Under s.1 of The *Responsibility of Shipowners Act 1813,* the liability of shipowners in respect of loss or damage to goods arising on board their ship or any other ship, or damage to any other ship, without their fault or privity was limited to the value of the ship and freight. The same limit was subsequently preserved by sections 504 of the *Merchant Shipping Act 1854.* This was subsequently changed in the *Merchant Shipping Act Amendment Act 1862, section 54,* to a limitation based on the ship's tonnage. The latter provision was consolidated in section 503 of the *Merchant Shipping Act 1894.* In relation to the parts of the section which related to goods,[128] section 503 provided:

> (1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say,)
>
> ……..
>
> (*b*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship;
>
> ……..
>
> (*d*) Where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship;
>
> be liable to damages beyond the following amounts; (that is to say,)
>
> ……

[128] The section also dealt with loss of life and personal injury.

> (ii.) In respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

Statutory provisions also dealt with the problem of dangerous goods. For example, the *Merchant Shipping Act 1873* imposed fines for shipping dangerous goods without marking them appropriately and declaring their nature to the master or shipowner ;[129] moreover the goods became liable to forfeiture.[130] The master could also require packages he suspected of containing dangerous goods to be opened, and he could refuse to carry them.[131] If the goods had not been appropriately marked, or notice of their nature had not been given, the owner or master was entitled to have them thrown overboard without liability.[132] The provisions relating to dangerous goods were subsequently consolidated in the *Merchant Shipping Act 1894*.[133]

ii. Exemption Clauses in Charterparties and Bills of Lading

While these statutory provisions went some way towards reducing the shipowners onerous common law responsibilities, the carriers clearly wished to reduce their liabilities still further. Consequently, contractual exemption clauses were introduced into charterparties. It is for this reason that Scrutton regarded the issue of whether shipowners or masters who were not common carriers were subject to the same liability as common carriers for loss of or damage to cargo as of little practical importance. As he explained, ships chartered to one shipper without any express stipulations in the charterparty were 'an unusual case'.[134]

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129 Section 23.

130 Section 27.

131 Section 25.

132 Section 26.

133 Sections 446 – 450.

134 Scrutton, op. cit. at p.156.

Exclusion clauses were also introduced into bills of lading. Early bills of lading did not contain exemption clauses.[135] The first exceptions used were act of God, the King's enemies, fire, and dangers of the seas. These were subsequently expanded after 1795 to 'act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted.'[136] However, as Scrutton explained in the Preface to the First Edition of his book *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* in 1886:

> Shipowners ….. have gradually protected themselves by exceptions in their bill of lading against every risk of liability for damage to the goods they carry until the bill of lading contains fifty or sixty lines of closely printed conditions and exceptions, and there appears to be no duty imposed on the fortunate shipowner but that of receiving the freight.

Similarly, Maclachlan remarks in relation to bills of lading issued in relation to cargoes on general ships:

> Elaborate forms, containing a large number of complicated clauses, are now commonly used by the owners of general ships.[137]

The excepted perils varied according to the particular trade and the particular shipowner, with some companies offering different levels of liability and adjusting the freight accordingly.[138]

Thus, by the extensive use of exclusion clauses, the carriers sought to contractually reduce their level of responsibility in relation to loss of or damage to cargo carried under both charterparties and bills of lading.

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135 Scrutton, T.E., *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading,* 4th edn., 1899, London, William Clowes and Sons, Limited, (hereafter 'Scrutton 4th edn'), at p.171.

136 Ibid.

137 Maclachlan, op. cit. at p.315, n.2.

138 Scrutton 4th edn. at p.172.

The Interpretation of Exemption Clauses in Charterparties and Bills of Lading

Maclachlan commenting on the construction of charterparties, said:

> The general rule, which our courts of law have adopted in the construction of charter-parties as well as other mercantile instruments, is that the construction should be liberal, agreeable to the real intention of the parties, and conformable to the usage of trade in general, or of the particular trade to which the contract relates.[139]

However, this was not the principle applied by the courts in relation to the interpretation of exemption clauses in charterparties and bills of lading. It was pointed out in Abbott,

> Judges, generally, have disliked, what appear to them, the excessive claims by shipowners for irresponsibility .[140]

If there was any ambiguity in the exemption clause, the court applied the *contra proferentem* rule. This meant that if there was any doubt as to the meaning of the clause, the clause was construed against the person for whose benefit it had been introduced and who was seeking to rely on it.[141] Thus, general words excluding liability for loss from a particular cause would not exempt the shipowner if the loss occurred as a result of negligence, unless negligence was specifically excepted.[142] Similarly, if a shipowner wished to exclude responsibility for unseaworthiness, he had to do so by a clear stipulation to that effect; an exemption for negligence would not exempt him from liability.[143] Also, if unseaworthiness was

[139] Maclachlan op. cit. at p.306.

[140] Abbott, op.cit. at p.587.

[141] The application of the *contra proferentem* rule was not restricted to shipping contracts. It was applied to contracts generally. Halsbury's Laws of England, Contract, Vol. 22, 5th Edition, 2012, para. 5.4.390.

[142] Carver, op. cit. at p.87.

[143] Ibid at pp.89, 109.

the primary cause of the loss, the shipowner was liable for the loss or damage even if there were contributory causes which were covered by exclusion clauses.[144] 'Liberty clauses' which permitted deviations were also construed restrictively. For example, in *Glynn v Margetson* [145] a liberty to call at any ports in any rotation in the Mediterranean, Levant, Black Sea or Adriatic was held to be restricted to ports in the course of the named voyage from Malaga to Liverpool.

Although the majority of the cases from this period dealt with exemption clauses in bills of lading, the same principles applied to all contracts of affreightment. Abbott made the following comment on the subject:

> The long series of decisions on the effect of exceptions qualifying the ordinary clauses in bills of lading and charter-parties, shows how continuously shipowners have attempted to diminish their liability at common law and how often they have failed.[146]

Thus, although the use of exclusion clauses enabled shipowners to reduce the severity of the obligations imposed on them by the common law and introduce flexibility into their contracts, the exemption clauses were strictly construed by the courts. Consequently, the flexibility provided by the clauses was reduced by the strict interpretation applied.

144 Ibid at p.19.

145 [1893] A.C. 351.

146 Abbott, op .cit. at p.527.

The Introduction of the Hague Rules

Many bills of lading contained complex exemption clauses which made it difficult for shippers to understand their rights and liabilities. The clauses also created problems for subsequent holders of the bills of lading, and made it difficult for insurers and bankers to assess the security offered by the documents.[147] In addition, many exception clauses were sufficiently well drafted that they protected the shipowners from the results of their own negligence. These problems affected not only the United Kingdom, but other countries as well,[148] and ultimately led to the drafting of the Hague Rules. The Hague Rules applied to bills of lading. They provided a minimum degree of protection for cargo owners, set out the basic obligations of the carrier, specified the exemption clauses on which the carrier could rely and provided a minimum limit for the carrier's liability.[149] The Hague Rules were initially drawn up as a voluntary international code. However, it became apparent that shipowners would not universally adopt them on a voluntary basis, and the rules were subsequently embodied in an international convention.[150]

The United Kingdom gave statutory effect to the Hague Rules in the Carriage of Goods by Sea Act 1924. It could therefore be argued that, as a result of reducing their liabilities in relation to bills of lading by the use of extensive and complex exclusion clauses, the carriers had brought about a situation in relation to bills of lading in which freedom of contract was replaced by statutory regulation, although some flexibility remained in that the parties could agree their own terms in respect of matters not covered by the Hague

147 Maclachlan, op.cit. at p.363.

148 See e.g. The Harter Act 1893, enacted by the USA, which basically sought to preclude carriers from excluding liability for loss resulting from negligence in the care of the cargo. Wilson, J.F., *Carriage of Goods by Sea*, 7th edn. 2010, Pearson Longman, (hereafter 'Wilson') at p. 116.

149 Wilson, op. cit. at p. 116.

150 Machlachlan, op. cit. at pp.364-365.

Rules.[151] In essence, contractual flexibility was replaced by statutory control.

However, it must be remembered that the Hague Rules only applied to bills of lading and similar documents of title. Therefore, in relation to charterparties the parties were free to contract as they wished. In relation to charterparties, freedom of contract and flexibility remained.

Conclusion

It is clear that the common law imposed extremely stringent obligations on carriers of goods by sea. This situation was ameliorated to an extent in the eighteenth and nineteenth centuries by the introduction of statutory provisions which exempted the carriers from liability, or limited their liability, in certain circumstances. Statute also improved the carriers' position in relation to the shipment of dangerous goods. However, the shipowners sought to reduce their responsibilities and liabilities still further by introducing exclusion clauses into both charterparties and bills of lading. Although these clauses were construed restrictively, it was possible to overcome the strictures by careful drafting. The widespread introduction of exclusion clauses resulted in the devaluation of the bill of lading, requiring action by the international community, which resulted in the introduction of the Hague Rules. As far as English law was concerned, this led to statutory regulation of the rights and liabilities in relation to bills of lading and similar documents of title which were governed by the Carriage of Goods by Sea Act 1924. However, charterparties and other contracts for the carriage of goods by sea which did not fall within the ambit of the Act were left to develop flexibly on the basis of freedom of contract.

[151] For example, the Rules did not apply to live animals, deck cargo and shipments which were not made in the ordinary course of trade where a non-negotiable document was issued.

On foreseeability in construction of contracts in laytime matters – a comparison between English and Scandinavian law

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Content

1 Introduction

Under most legal systems it is generally recognized that adherence to the contract wording has the effect of promoting foreseeability in contract. This may be particularly true in the area of charterparty law where the industry uses standard forms, intended for use across national borders and under various legal system. Admittedly, this notion of 'adherence to the wording' is no formula which yields the answer to the question of construction in a given case. The wording must normally be construed within a context, and the extent to which the context shall be allowed to influence a mere literal understanding, is a discussion well known under any legal system.

This paper does not deal with foreseeability in contract within that traditional dichotomy: context oriented vs. literal construction. Rather it deals – in a tentative manner – with what may be called "background law structures" to construction of contracts. By this is meant the, so to speak, starting point taken when construing contracts which do not contain specific or elaborate wording on the question at hand.

Examples are taken from earlier times when contracts were less specific than we normally find today. A selection of case law concerning commencement of laytime will be compared under English and Scandinavian law. The selection is based on the same contract wording and essentially the same set of facts; the ship being delayed in berthing.

One aspect of such comparison is that in Scandinavian law the structural thinking is to a large extent laid down in the non-mandatory Maritime Code, intended as aid to charterparty construction. English law has no similar legislation, hence the structural thinking is taken from other sources such as basic principles of sale of goods law.

A general observation will be that there is a complexity in English law, more so than in Scandinavian law, which may have a bearing on the notion of foreseeability in construction of contracts. Moreover, some observations will be made on the interplay between the development of charterparty forms and some key English law decisions. This is of interest

since the direction taken by the industry, whether or not to adopt such key rulings, may serve to illustrate foreseeability in contract from a pragmatic perspective.

2 The structure of port/berth charters

a) English law

We shall start with some general constituents of the port/berth charter thinking in English and Scandinavian law. We first look at English law, somewhat simplified.

The essence is that the formulation of the contract destination constitutes the point of performance by the shipowner; where the ship must be "arrived"[1] for the sea voyage stage to be transformed into the loading stage.[2]

Historically, if the berth was named in the charter, such berth constituted the destination – the place of "arrival". If the berth was not named a right of nomination was implied in favour of the charterer and the ship became "arrived" when placed at such waiting area of the port where she was at the charterer's immediate disposal – a port charter solution.[3]

It is important to note that under English law the ship must have so "arrived" for laytime to commence. Laytime is the contractual effect of the shipowner's prior performance. This has been called the principle of "mutual interdependent promises"[4] and is adopted from sale of goods law. Performance by the one party must be fully completed before a duty

[1] The adjectival form (the ship being arrived/an arrived ship) rather than the verbal form (the ship having arrived) is here used since the term "arrival" has the technical legal meaning of the shipowner's contractual performance having been completed.

[2] See e.g. the analysis in the Johanna Oldendorff [1973] 2 Lloyd's Rep. 285 HL (pp. 304-305). For simplicity reasons the term "loading stage" is used throughout this paper rather than the (depending on the circumstances) more complete phrase "loading and discharging stages".

[3] Ibid.

[4] See e.g. the Court of Appeal in the Aello [1958] 2 Lloyd's Rep. 65 CA (p. 78).

to perform by the other is triggered. A seller must have completed delivery of the goods for property to pass and the sales price to become earned.[5]

This principle of "mutual interdependent promises" makes good sense in the majority of cases but complications arise if the ship is prevented from being "arrived" by hindrances on the charterer's part. Here English law resorts to the structural thinking of implied obligations imposed on the charterer not to prevent the shipowner from performing.[6] But the nature of such implied obligation is far from clear. In some areas, like the charterer's duty to procure cargo to enable "arrival" of the ship, the law seems to be settled.[7] In other areas not.[8]

Moreover, if the charterer is in breach of such implied obligation the shipowner's remedy is damages for detention, not laytime proper.[9] This kind of splitting-up of remedies causes complications since the contract often contains exceptions to the running of laytime. If for example Sundays and holidays are excluded from laytime – shall such days be excluded also during a period of detention, prior to laytime? If the answer is 'no', for example on the footing that damages for detention is outside the scope of the charterparty terms, the slight paradox may ensue that the shipowner benefits from the charterer preventing the shipowner from

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5 See the sale of goods case Mackay v. Dick 1881 LR 6 App. Cas. 251 as discussed in the context of laytime by the Court of Appeal in the Aello, supra, p. 80.

6 The principle was laid down in the Vergottis v. William Cory 1926 2 K.B. 344 (p. 355) and later applied e.g. in the Aello, supra, p. 78.

7 See the House of Lords in the Aello [1960] 1 Lloyd's Rep. 623 HL (p. 643).

8 In the Atlantic Sunbeam [1973] 1 Lloyd's Rep. QB 482 the ship's "arrival" depended on a prior *jetty challan* (berthing allowance) from the port authorities. The court expressed doubt as to whether the shipowner or the charterer was responsible for procuring the *challan* but if the responsibility of the charterer, the implied obligation to be imposed consisted in the mere exercising of due diligence, and on the evidence no want of diligence was found. See also the World Navigator [1991] 2 Lloyd's Rep. 23 CA which was decided on different grounds but where comments are made (p. 31) on the apparent discrepancy between the Aello and the Atlantic Sunbeam.

9 A remedy sounding in laytime proper rather than damages was discussed but dismissed by the Court of Appeal in the Aello, supra, p. 80. Likewise it was discussed but dismissed in earlier cases, see Förnyade Rederi Aktiebolaget Commercial v. Blake & Co. [1931] 39 Lloyd's Rep. 205 CA (p. 211) and Samuel Crawford v. Cory Brothers [1926] 25 Lloyd's Rep. 464 Privy Councel. In the latter case (p. 468) the point was merely raised by the court as one not having been addressed by the parties.

performing.[10]

Another structural aspect relates to port charters in particular. When the contract destination is held to be a proper waiting place in the relevant port this means that the loading stage begins upon the ship's arrival there. This in turn means that the subsequent sailing time to berth is for the charterer's time as part of the loading stage. And this in turn means that there is a limit as to how far from the relevant berth the waiting place can be located; the ship must be at the charterer's immediate disposal.[11]

This criterion of the ship having to be at the charterer's immediate disposal has generated a fair amount of litigation. The courts have seen it as an important task to establish workable criteria for what constitutes "arrival" in a port charter, through a line of cases in the Leonis v. Rank,[12] the Aello,[13] the Johanna Oldendorff[14] and the Maratha Envoy.[15] The so-called Reid test of the Johanna Oldendorff from 1973 governs still today, essentially stating that the ship must lie at a usual waiting area within the limits of the destination port.[16]

These criteria are intended to promote foreseeability in contract but they are also capable of creating inflexibility and unreasonable results.[17] Due to configurations at various ports the ship may be left waiting a few hundred meters outside those within-port-criteria, thus not being "arrived". Generally, this kind of arbitrary effects has a propensity for

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10 See e.g. the Radnor, infra, addressing a similar paradox under Gencon 'time lost' clause.

11 See e.g. Lord Reid's statement in the Johanna Oldendorff, supra, p. 291, to the effect that sailing time to berth, in that case, of about three hours "is wholly immaterial because there will be at least this much notice before the berth becomes free …". See discussions to the same effect at p. 307.

12 (1907) 13 CC 136 (CA).

13 The decision by the House of Lords, supra.

14 Supra.

15 [1977] 2 Lloyd's Rep. 301 HL.

16 See Lord Reid's speech in Johanna Oldendorff, supra, p. 291. See however the somewhat differently formulated criteria in Viscount Dilhorne's speech, p. 299.

17 See the quite differing approaches to this point in the Maratha Envoy, by Lord Denning in the Court of Appeal decision, [1977] 1 Lloyd's Rep. 217 (at p. 222) and Lord Diplock in the House of Lords, supra (at p. 308).

generating further litigation.[18] Moreover, it should be recalled that those port charter criteria are not really derived from the contract wording. They are derived from policy considerations which again are linked to the mentioned structural approach of English law – the principle of "mutual interdependent promises".

b) Scandinavian law

Having been through these structural aspects of English law we turn to Scandinavian law and the Maritime Code.

The Code takes as a starting point that laytime commences when the ship has reached the end destination of the sea voyage; the berth where cargo operations will occur.[19] However, if the ship is prevented from arriving there by hindrances on the charterers' side, the system is (and has been so from 1860) that laytime is advanced in time to the place where the ship has to wait.[20] This approach of advancing laytime means that Scandinavian law does not adopt the English structure of "mutual interdependent promises". Rather the principle of *mora accipiendi* is adopted, derived from the sale of goods law in the civil law tradition: if the buyer does not co-operate so as to enable delivery by the seller, the legal effect of delivery occurs by reason of contractual tender for delivery by the seller.[21]

In the context of laytime this has various implications.

Firstly, there is no split-up between laytime proper and a separate

[18] See to this effect Davies, Commencement of laytime, 4th ed., London, Informa, 2006 pp. 13-14: "Lord Reid's test in the *Oldendorff* decision does not appear to be of easy application to many ports and, in addition, can often lead to considerable time consuming and costly research in attempting the establishment of the limits of the various powers exercised by port authorities. The views expressed above [that waiting areas should be expanded to 'off port'] are prompted simply by a desire to see the 'arrived ship' concept made easier and more certain of application, also in the hope that, one day, the English law will be in step with so many other maritime nations."

[19] Section 332 first sentence of the Norwegian Code. In the following the Norwegian Code will be used as reference; the numbering of the Swedish and Finnish provisions differs from that of the Norwegian and Danish.

[20] Section 333 first sentence.

[21] For further analyses see Solvang, Forsinkelse i havn – risikofordeling ved reisebefraktning (Delay in port – risk allocation in voyage chartering), Oslo, Gyldendal, 2009, pp. 264-272 and 439 flw.

regime of damages for detention as under English law. This also means that there is no need to venture into the nature of a charterer's implied obligations as under English. The criteria are objective: is the cause of the delay to the ship attributable to the charterer? If 'yes', laytime commences from where the ship has to wait. Admittedly it must be asked: What is the nature of such hindrances attributable to the charterer? But the answer to this seems to be less complex than the English equivalent of asking whether the charterer is subject to implied obligations and, in turn, the nature of those obligations.[22]

Secondly, since there is no split-up between laytime proper and damages for detention there is also no complicating aspect of the application of charterparty laytime exceptions to a separate regime of damages for detention, as under English law.

Thirdly, based on this structure of *mora accipiendi* laytime will only count during the time the vessel is delayed by reason of a charterer-related hindrance. This means that when such hindrance ceases, performance by the shipowner resumes during the sailing time to berth. Moreover, the fact that this sailing time will be for the shipowner's time makes redundant much of the need of the English law criteria as to exactly where the vessel must wait to become "arrived". It is not in the same way a question of the ship having to be at the charterer's immediate disposal during the waiting time. The decisive point is the nature of the hindrance, not exactly where the ship has to wait.

3 Comparison of English and Scandinavian case law

a) Berth charters and the effect of 'order clauses'

We now turn to some examples from case law under the respective

[22] See further Solvang, supra, pp. 667-672.

systems to see how one and the same charterparty wording has been treated differently. We shall also see how the development of charterparty forms has been affected by some of the English law solutions.

We start with the berth charter concept and so called order clauses. These were clauses giving the charterer an express right to nominate the berth, however, with no clear stipulation as to where the vessel must have arrived for laytime to commence. Disputes arose when charterers nominated berths which were occupied. Could the charterer in this way put the risk of delay on the shipowner?

English courts took the view that such order clauses constituted a berth charter solution. The reasoning was that a subsequent nomination by the charterer was in principle no different from the nominated berth having initially been written into the charter. Moreover, such right to nominate was seen as a true option: the charterer had no duty to consult the convenience of the shipowner since no such restriction was contained in the contract wording.[23]

The same question was put before the Norwegian and the Swedish supreme courts which reached a different outcome from the English. According to the Scandinavian courts there must be an implied requirement that the nominated berth be available, otherwise the shipowner would be too much at the charterer's mercy.[24] Laytime therefore counted from where the ship was left waiting.

Following these differences in outcome some observations may be made on how the industry reacted to the English law solution.[25] Express

[23] Tharsis Sulphur v. Morel Brothers, 1353 [1891] 2 QB 647 (p. 652).

[24] Nordiske Domme (ND) 1907.225 and 1923.126 (Norwegian Supreme Court), ND 1901.539, 1905.241 and 1932.125 (Swedish Supreme Court). Some of the cases contain discussions on the relationship between express order clauses and the system of the Code contemplating implied rights of ordering by the charterer. Those discussions are however immaterial to the question at hand, see Solvang, supra, pp. 510-523.

[25] These observations are not based on any empirical research on cause and effect in this context; there may for example have existed 'wibon' provisions relating to berth charters before authoritative English law decisions were rendered on the meaning of order clauses. It seems, however, that the main tendency of the observations is appropriate, as also confirmed by the House of Lords in the Kyzikos, infra. See to the same effect Davies, supra, pp. 76 flw.; Tiberg, The law of demurrage, 4th ed., London, Sweet&Maxwell, pp. 259 flw.; Schofield, Laytime and demurrage, 5th ed., London,

order clauses were obviously retained but added wording was adopted placing the risk of occupied berth on the charterer through the acronym 'wibon'[26] (whether in berth or not) or, as in Gencon 1946, 'time lost waiting for berth to count as loading or discharging time'.

Also these phrases became subject to litigation under English law. By 'wibon' it was recognized that the intention was to depart from the earlier English order-clause decisions.[27] 'Wibon' was therefore construed in line with the English port charter solution.[28] From a Scandinavian perspective 'wibon' merely adopted the solution already given to order clauses by the courts.

The Gencon 'time lost' clause became more complex under English law. Since the clause was phrased 'time lost shall count as loading or discharging time', this was believed to mean something other than laytime proper.[29] Thus, time waiting for berth counted as a separate regime unaffected by the charterparty laytime exceptions.[30]

LLP, pp. 159 flw.

26 See e.g. Iron Ore clause 6 and Baltimore Grain clause 14. Other standard forms contained qualifications obliging charterers only to nominate berths which were 'available', 'accessible', 'reachable' etc. No doubt the intended effect was essentially the same as 'wibon' or 'time lost' but these qualifying terms became entangled in the English split-up system of charterers' breach and the remedy of damages for detention, separate from laytime proper. An account of that topic would exceed the scope of this paper, see further discussion in Solvang, supra, pp. 605-649 and 719-727.

27 See e.g. the House of Lords in the Kyzikos [1989] 1 Lloyd's Rep. 1 (p. 7).

28 It is however not obvious from the wording of 'wibon' that the vessel would have to wait at the "within-port" criteria as developed in the English port charter concept, while the 'time lost' clause would not be so restricted, see footnotes, infra.

29 See e.g. the Radnor [1955] 2 Lloyd's Rep. 668 CA (p. 675). From a Scandinavian perspective it is worth noticing Davies' critical remarks to such a finding, supra (p. 77): "It is also strange that the court should think that the words loading and discharging time meant something different to laytime; to commercial men the terms are synonymous."

30 Moreover, time lost waiting for (an available) berth counted as a separate regime unrelated to the otherwise applicable port charter criteria; the vessel would not have to wait "within-port". That can be contrasted with 'wibon' despite the obvious similarity in meaning; 'wibon' was, according to the House of Lords in the Kyzikos, supra (p. 7), shorthand for "'whether in berth (a berth being available) or not in berth (a berth not being available)'".

In a series of cases[31] this had the somewhat absurd effect of the shipowner benefitting from having to wait for a berth.[32] Eventually, in the Darrah from 1976[33] the House of Lords put an end to this line of cases. It is worth quoting part of the reasoning:

> "In recommending your Lordships to overrule the construction of a standard clause in a much used form of charterparty …, I am not unaware of the importance of not disturbing an accepted meaning of a clause commonly used in commercial contracts upon which the parties to such contracts have relied in regulating their business affairs. But this is a consideration which in my view carries little weight in the case of the "time lost" clauses in the Gencon form of voyage charters. In the first place, results of ascribing to the clauses the meaning accepted since 1966 do not make commercial sense; it gives the shipowner the chance of receiving a bonus dependent upon whether a) his ship is lucky enough to be kept waiting for a berth and b) is so kept waiting during a period which includes time which would not have counted against permitted laytime if the ship had been in berth."34

Hence the earlier understanding of splitting-up into separate regimes was set aside essentially on the footing that it led to results which did not make commercial sense. From a Scandinavian perspective this development is of particular interest.

Firstly, the Gencon phrase 'loading or discharging time' does not within the context of the Code mean anything separate from laytime. The Code uses this very term 'loading and discharging time' as a common denominator for laytime and time on demurrage.[35]

Secondly, the phrase 'time lost waiting for berth' fully accords with

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31 The Radnor, supra; the Vastric [1966] 2 Lloyd's Rep. 219 QB; the Loucas N [1970] 2 Lloyd's Rep. 482 QB.

32 That was so not only when waiting for berth prevented the ship from being "arrived" according to the English port charter criteria but also when being so "arrived", see footnotes supra.

33 [1976] 1 Lloyd's Rep. 359 HL.

34 Ibid, p. 366.

35 Section 330.

the structure of the Code: laytime starts from where the ship has to wait in case of charterer-related hindrances, including occupied berth.[36] Thus, in a case from 1969[37] the Danish Commercial Court gave the Gencon 'time lost' clause the same meaning as the laytime provisions of the Code. The ship was left waiting some 30 nm at a nearby port from the port of destination. Such waiting time was held to count as laytime proper under the Gencon[38] and it was stated to have so counted also under the provisions of the Code. This also illustrates how the Code was not aligned with the English law port charter "arrival" criteria.

b) Port charters and 'at or off port', 'wipon'

A further illustration of charterparty development relates to the English "arrival" criteria in a port charter context. It would be conceivable that the industry adopted the English law thinking by inserting clauses, something like:

"*Laytime only to count from arrival at a waiting place within the limits of the port. However, the charterers are under an obligation to facilitate such arrival, and if in breach of such obligation, they shall compensate the shipowner by paying damages for detention separate from the regime of laytime/demurrage proper.*"

However, modern standard charter forms do not say so. Rather they take the simpler approach of expanding the area from where laytime can commence. For example the Gencon 1994 states:

"*If the loading … berth is not available on the vessel's arrival at or off the port of loading …, the vessel shall be entitled to give notice of readiness … on arrival there.*"

Other forms may add the acronym 'wipon' (whether in port or not) intended to achieve the same result.

From a Norwegian perspective such expansion of the waiting area is unproblematic. It is in line with the existing structure of the Code as

[36] Section 333 first sentence.

[37] ND 1969.70 SøHa.

[38] To that effect see also ND 1976.105 SøHa.

sanctioned by case law.[39] The decisive point is not the exact location of the waiting place but the nature of the hindrance.

From an English perspective such clauses may however be problematic. No doubt English law would give effect to the wording but the nature of the structural thinking might still influence the extent of such giving effect to the wording. For example, the notion of port charters that the loading stage is extended to the waiting place[40] may well put restrictions on how far 'off the port' such clauses can reach. In the Oldendorff the distance from the waiting place to berth was 17 nm, in the Aello - a ship held not to be "arrived" – the distance was 22 nm. Would a ship be considered 'at the charterer's immediate disposal' (thus "arrived") from a waiting place, say, 200 nm from the destination port under an 'at or off port' clause?[41]

An integral part of this is that modern charterparty forms – including Gencon 1994 – invariably deduct from laytime the vessel's sailing time from the waiting place to berth.[42] Hence, the loading stage does not – in that sense – extend to the waiting place as contemplated in the Oldendorff analysis of port charters.[43] Moreover, the adoption of such terms further indicates that the industry does not follow the structural thinking of English law. Rather it points in the direction of the Scandinavian model of merely having the waiting time count whereafter the sea voyage resumes for the shipowner's time; the shipowner should not benefit from the ship being initially prevented from berthing by letting the subsequent sailing time to berth form part of the laytime.[44]

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39 ND 1969.70 SøHa, supra.

40 Para 2 a) supra.

41 In the Adolf Leonhardt [1986] 2 Lloyd's Rep. 395 QB such a distance of 200 nm was, obiter, held to be sufficiently close under 'wipon', however, significant doubt was expressed as to how the Oldendorff-criteria should be applied, and the case was decided on a different basis: that laytime exceptions would in any event have prevented time from counting.

42 Gencon 1994 clause 6 lines 115-116, see also e.g. Asbatankvoy clause 7 in fine, and Shellvoy clause 14 (a).

43 This may clearly affect the application of the English law criterion of the vessel having to be 'at the charterer's immediate disposal'. See footnote 11, supra,

44 This somewhat illogical result follows from the Oldendorff analysis whereby laytime

4 Concluding remarks

The purpose of this paper has been to raise awareness of what is called structural thinking in construction of contracts. For example the English starting point of "mutual interdependent promises" may have a different impact on construction than the Scandinavian equivalent of *mora accipiendi*.

A selection of examples has been made to illustrate this point and there could be others.[45] The examples are not intended to suggest that Scandinavian legal thinking is any "better" than the English – perhaps rather the opposite: English law analysis seems in many ways more sophisticated and richer on nuances. But such sophistication may come at the cost of complexity and self-generated legal questions in need of being resolved, something which entails aspects of foreseeability in contract in a structural sense.

Moreover, when looking at the development of charterparty forms the examples show a tendency being closer to the Scandinavian than to the English approach. And also this may entail aspects of foreseeability in contract: If the industry tends to revise and simplify the earlier solutions of construction produced by the English courts, this may in itself indicate that English legal thinking is not fully aligned with the pragmatic aims of the industry.

commences upon berthing if the ship can sail directly to berth, while the loading stage is extended to the waiting place if the ship is prevented from berthing, see the Oldendorff, supra, p. 305.

45 As in the area of invalid Notices of Readiness (NORs): If a ship is left waiting in port for, say, 10 days due to occupied berth and a defect in loadreadiness is subsequently discovered upon inspection at berth, the NOR would under English law be considered invalid, see e.g. the Mexico I [1990] Lloyd's Rep. 507 CA. This makes good sense under the structural thinking of English port charters where performance by the shipowner, including the requirement of physical loadreadiness, must be completed at such waiting time in port. It may not make the same sense under the structure of *mora accipiendi* where such a result may entail elements of enrichment in favour of the charterer, insofar as the waiting time is occasioned by hindrance on the charterer's side. See further Solvang, supra, pp. 687.

Some reflections on charterparties and their flexibility and reasonableness

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Content

Introduction

The existence of various forms of contracts concerning the use of ships for the purpose of carrying goods by sea through different terms which distinguish - even considerably -the positions of the parties, has since long time taken to a considerable number of questions relating particularly to the fundamental contents of the main obligations undertaken by the parties and the underlying responsibilities imposed on the same as well as their allocations between the contracting parties, with particular reference to time and voyage charters, for the purpose of ascertaining their real ability to meet all the parties' requirements.

In this respect, a quite debated aspect is - as it is well known - that concerning the demarcation line between the obligation concerning the disposal of the ship and the obligation to carry the goods and the consequent allocation of the said obligations and of the related responsibilities between the contracting parties; having regard to the numerous models of charter parties, it must be pointed out that not only these items do not appear uniformly outlined in the various legal systems but they also appear to be subject to different doctrinal theories, which, by arguing from the just mentioned obligations, have come to support opposite thesis on the legal classification of these contracts.

The regulatory impulses, as well as the outcomes of doctrinal interventions, have certainly allowed to investigate carefully and to obtain interesting responses which have sometimes acknowledged even by the case law. However, in some circumstances these legal trends have ended up to lead to a "crystallization" of those characteristics which are to be considered typical in time and voyage charters, i.e. those forms of contracts in which the changing needs of maritime operators (together with other elements, such as, for example, the evolution of the operational techniques and the development of various commercial markets) have traditionally required quick actions and constant amendments, just for the purpose of safeguarding these changing needs.

In this context, the answers given by the present forms of time and

voyage charters are well known and appreciated; actually - through timely revised editions of many forms adopted in respect both to carriages of dry and liquid cargoes – those contracts have confirmed their ability to adapt effectively the contractual rules to the real and ever changing needs of the shipping market, showing great flexibility and reasonableness.

And just by analyzing the forms primarily in use today, it is possible to find very interesting indications particularly in respect to the relationships between the obligation of making available the ship and the obligation to carry the goods, by virtue of solutions that can be really considered reasonable and, at the same time, flexible, since they not only guarantee a serene approach of the contracting parties through the introduction of various provisions that clarify, in relation to various kinds of contracts, the correct distribution of rights, obligations and responsibilities between shipowners and charterers, but also allow, on a more theoretical hand, to better define the contractual forms of time charter and voyage charter.

For these reasons the present report will be directed to consider primarily and exclusively the above mentioned aspects arising out from time and voyage charters.

The structural characteristics of time charters and voyage charters

As it is known, among the contracts for the use of commercial ships, time charters and voyage charters are characterized by some distinctive features and, at the same time, well-differentiated peculiarities.

Time charters provide for the delivery of a ship for a specified period of time in return for payment of the hire agreed upon, to be paid in time, i.e. usually in advanced installments.

In respect to this contract it is possible to trace also other distinctive profiles that relate principally to the degree of control that shipowners and charterers have on the ship, as well as the risks and costs weighing on the contracting parties.

Particularly, and generally speaking, in time charters the degree of control on the vessel by the owners is limited to the technical management of the ship, since orders relating to the commercial management of the vessel are given directly by the charterers to the master. Consequently, all the risks that relate to the seaworthiness of the vessel, or the risks associated with the operation of the same, as well as the fixed costs are allocated on the shipowners; on the contrary, the risks associated with commercial profiles, namely those relating to the management of the goods, as well as all the variable costs, are burdened by the charterers.

On its turn, contracts of voyage charter provide for the use of the ship to make a particular journey (but sometimes some voyages, provided they are consecutive) against payment of a freight due in respect to the agreed performance and frequently paid at the end of the voyage.

Even the shape of the voyage charter is characterized by several aspects which relate principally to the degree of control that shipowners have the ship, as well as the risks and costs born by the contracting parties.

Particularly, in voyage charters, it is possible to notice that the degree of control that charterers have on the ship is not as direct as in time charter parties, since it is normally the shipowner who gives orders to the ship (after, of course, having received from the charterer the necessary and sufficient instructions for the completion of the voyage). Conversely, the shipowners' risks increase; in fact, they have to bear some risks concerning the commercial use of the vessel and, in any case, those involving navigation; as regards costs, it is generally stated that not only fixed costs but also some variable costs are largely borne by the shipowners. It must also be recalled the peculiar discipline of loading and unloading times, tied to an institute typical and exclusive in the voyage charter, i.e. the institute of laytime and demurrage.

Considering the above mentioned characteristics, the voyage charter seems therefore to be a contractual phenomenon which imposes major obligations, costs and risks on the shipowners and correspondingly, albeit partially, relieves the position of charterers who in some respects seem to be less involved in the fulfillment of the voyage than it turns out to be the charterer's position in time charter parties.

The possible classifications of time charters and voyage charters

As it was previously remarked, the different structure of time charters and voyage charters – which is already sufficiently clear from the above-mentioned brief description of the most important contents of these contracts - formed the basis on which a wide-ranging debate has developed with the aim to proceeding to their classification, taking into particularly consideration the areas of both parties' duties and responsibilities.

This debate, indeed, has not produced uniform results, since still now it is possible to observe contrasting trends resulting from a non-unique perception of the essence of these contracts.

In the face of their characteristics that show undeniably differences, it must in fact be pointed out that in contractual practice (which normally conforms with the legal systems of common law) both time charters and voyage charters are included into the category of the so-called "*charter parties*" of which they clearly represent the most significant expressions: *inter alia*, their appurtenance to the same category must to be considered a significant evidence of a common matrix that links both models of contract.

The unity that appears to arise out from the fact that both time charters and voyage charters belong to the same category, i.e. the category of "*charter parties*", seems, however, to find some limits when considering the trends shown by some legal systems, different from those of the *common law,* as well as some doctrinal theories suggested by some authors, since they have expressed different views on the essence of these two contracts, which are sometimes considered to have different souls and substances by virtue of some aspects that have been appropriately enhanced.

In this respect, it is sufficient to point out, as a striking example, the well distinguished position adopted by Italian Navigation Code in which, after a quite general definition of "noleggio" contained in Article 384

(according to which it seems that time charters as well as voyage charters should be included within the same category), in fact only time charters are actually governed by the charter parties' regime, where voyage charters are deeply governed by the carriage of goods by sea rules under the name of "carriage of full or partial cargo".

In Italian legal system, this different framework - shared by authoritative doctrine - was justified by observing that in time charters, the main obligation of shipowners resides in delivering a seaworthy vessel and making it available to the charterer for the purpose of allowing the same to make the number of ordered voyages; therefore, in consideration of the fact that in this contract generally shipowners do not seem to expressly assume any obligation concerning the carriage of the goods, according this view, the said contract could not be considered as a "carriage" but as a "noleggio" (charterparty).

As regards the voyage charter, noting that the said contract would mostly contain an express provision relating to the obligation – imposed on shipowners - of carrying the goods, which has to be added to the obligation to put at charterers' disposal a named and seaworthy ship, it has been considered fit to regulate this contract as a mere "carriage" and not as a charter party.

Under Italian Law, therefore, time charters and voyage charters are not governed by the same rules but are governed by articles belonging to two different sections of Italian Code; the operation carried out in Italian legal system if, on the one hand, is understandable - and perhaps justifiable - having regard to the considerable links which connect voyages charters to carriages of goods and which suggest to treat them as "carriages", on another aspects, however, can undoubtedly be considered cause for some concern, even mostly on a purely conceptual level.

In fact, given that the voyage charter is to be considered a contract belonging to the "charter party" category (as it is evidenced by the use in the practice of forms of voyage charters, i.e. of charter parties), it is clear that the fact of having inserted voyage charters contracts into the category of the so-called carriages of goods (which it is differently considered and regulated by Italian Code of Navigation) has lead, on the one

hand, to fragment the unitary category of "*charter parties*" and, secondly, to make more hybrid the category of carriage contracts in which it appears to be included contracts represented by charter parties as well as contracts represented by very different documents (such as bills of lading or, more recently, seawaybills).

It is therefore evident that the trend shown by Italian Law – trend even supported by some distinguished authors - has greatly helped to lay the foundations for a wide discussion that is generated about the boundaries between the activities concerning the ship's disposal and those concerning the carriage of the goods on board and, subsequently, the allocation of the relevant obligations and responsibilities on the contracting parties.

Actually, the focal point of controversy seems to be found out precisely with regard to the identification of those obligations and responsibilities which fall respectively on shipowners and charterers and, in this respect, it must be noticed that the correct establishment of those terms which concern the allocation of obligations and responsibilities between the parties with particular reference to the two basic aspects that form the pillars of these contracts, i.e. the delivery of the ship and the carriage of goods, appears to be also fundamental in the determination of the nature and the essence both of time charters and voyage charters.

In this respect, it is self evident that charter parties forms can give a valid support, providing with reasonable and flexible rules that – in their variety and diversity - are able to meet all the parties' requirements.

The obligations concerning the delivery of the ship and the carriage of cargo: the solutions offered by charter parties forms

Actually, the above mentioned problems have surely found a wide resonance and deep attention in the forms both of time charters and voyage charters in which the relationships between the provisions concerning

the disposal of the vessel and those concerning the carriage of the goods appear to have been the subject of numerous clauses which are certainly worthy of special attention in consideration of the legal significance of the topics involved and their practical implications.

This search - needless to say – represents an explanatory moment of extreme interest also for the fact that the peculiar, and sometimes differently articulated, contractual solutions show different and flexible contents. At least at a first sight, it must be even pointed out that some clauses offered today in various charter parties forms, seem to contain features so singular as to appear even antithetical to the contract category to which they belong.

For the purpose of clarifying the said flexible contents and evaluate their reasonableness in respect to the needs of the maritime field, it appears to be necessary, as well as extremely interesting, a brief examination of some of the main forms of time and voyage charters in use today, which - in their varied and flexible solutions – are, as a matter of fact, proving to be capable of considering all the possible needs of the parties involved with great reasonableness and, sometimes, even amazing attention.

The time charters forms

As it was previously reported, among the variegated range of obligations incumbent on the parties, as a matter of principle in time charters forms it is given to find a balanced distribution of obligations on both parties: in fact, normally all the navigational aspects are allocated on shipowners while the aspects related to cargo and its management are passed on to charterers.

The above distribution, in principle, should allow to confirm the essence of the time charter as a contract concerning mainly the vessel, of which charterers may dispose commercially, ordering all the voyages they consider necessary (complying, of course, with the rules concerning her technical characteristics and the contractual agreements) and taking upon themselves all the risks and costs arising out from her commercial use.

The time charter - as outlined above - seems therefore to constitute the contract that provides for the use of the vessel for a fixed period of time; the aim of carrying goods – which is obviously the basic reason of the contract itself - would seem to form only the background of a dynamic contract which is organized into a set of provisions basically intended to regulate the use of the named vessel.

Examining some contractual clauses present in the time charters forms currently most in use, however, it does not seem to be possible to extrapolate always elements which in any case allow to confirm the distribution of obligations as above outlined: in some forms, in fact, varied, and not always uniform, provisions are inserted and their different expressions undoubtedly deserve some clarification since they reveal very particular contents that need to be explored in order to fully perceive their value.

Actually, in some cases, time charters contracts reveal the presence of provisions that not only require that charterers load only legal and non-dangerous or hazardous goods but also impose on them liabilities in respect of possible damages or losses arising out from any activity concerning the cargo management, such as for instance the signing of bills of lading (and except for damage to goods caused by unseaworthiness of the ship). In this respect it may be recalled, just as an example, the provision adopted by Baltime (rev. 2001), a classical form used in respect to ships carrying general dry cargoes, which, after establishing at cl. 12 that owners are liable for loss or damage to goods

> "caused by want of due diligence on the part of the Owners or their Manager in making the vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager"

at cl. to cl. 9 clearly states that:

> " the Charteres shall indemnify the Owners against all consequences or liabilities arising from the Master, officers or agents signing bills of lading or other documents or otherwise complying with such orders"

These provisions, indeed, would seem to confirm the assumption that frames a time charter contract into a contract for the use of a vessel to be delivered by the shipowners in seaworthy conditions, for the purpose of carrying goods which are at charterers' risks.

In other cases, however, some time charters forms – which usually do not include a clause containing an express obligation of care, custody and carriage of the goods imposed on the shipowner - contains provisions imposing on the owners a liability for cargo damage caused by negligence in its care or custody as well as for failure to exercise due diligence to make the ship seaworthy. In this context, it may be recalled, for example, the Gentime form, identically used in respect to vessels carrying dry cargoes, whose cl.18 (a) Section III *inter alia* provides that:

> "The Owners shall be liable for any Cargo Claim arising or resulting from:
>
> 1) Failure of the Owners or their servants to exercise due diligence before or at the beginning of each voyage to make the Vessel seaworthy;
>
> 2) Failure of the Owners or their servants properly and carefully to carry, keep and care for the cargo while on board;
>
> 3) ……"

The above mentioned provisions should lead to the conclusion that time charters forms may provide for an obligation of the shipowners in respect to carriage and care of the cargo loaded on board by the charterers, as well as, indeed, they may also provide special allocations of liability for certain damages or shortages of goods; this latter aspect, actually, transpires from cl.18 point V of Gentime form which, when sharing the *"cargo claims"* between shipowners and charterers, states that:

> "All Cargo Claims arising from other causes than those enumerated under sub-clauses III and IV, shall be shared equally between the Owners and the Charterers unless there is clear and irrefutable

> evidence that the claim arose out of pilferage or the act or neglect of one or other party or their servants or sub-contractors, in which case that party shall bear the full claim."

The contents of those provisions seem therefore to confirm the legitimacy of the question whether in time charters contracts shipowners are simply required to provide a seaworthy ship or if they also may, and to what extent, perform the carrier's functions.

Although having to draw the attention on the fact that - in accordance with BIMCO's notes in his commentary on Gentime form - "time charter party is not a contract of carriage in the same way as is a voyage charter or a bill of lading", it is however possible to point out that really the above mentioned provisions, included in some time charters forms, may admit, more or less explicitly, that shipowners can fulfill carriage obligations and take on the related responsibilities.

The above assumption, indeed, seems to be based not only on the further account that some time charters forms make express reference to the Hague-Visby Rules – i.e. the Rules which gave rise to the 1924 International Brussels Convention on bills of lading governing the international carriage of goods by sea - but also on the further fact that some forms do not appear to provide an unconditioned charterers'guarantee in favour of shipowners in respect to whatever adverse effect resulting from the signing of the bill of lading by the master (or the vessel's agent) on charterers' orders, but simply limit it to the possible "inconsistencies" between the bill of lading issued by the charterers (or by the master on their behalf) and the charter party. In this sense see, for example, the NYPE 93 form which at cl.30 (b) states that:

> "All bills of lading or waybills shall be without prejudice to this Charter Party and the Charterers shall indemnify the Owners against all consequences or liabilities which may arise from any inconsistency between this Charter Party and any bills of lading or waybills signed by the Charterers or by the Master at their request."

Clauses such as those listed above would therefore seem to confirm that

in time charters forms shipowners may be sometimes treated as carriers.

That finding - for its obvious importance - however, requires some further consideration in order to clarify the precise scope of said provisions and, thus, to identify the real characteristics of this model of contract.

In fact, since – generally speaking – time charters forms usually provide for the shipowners' obligation to make the ship seaworthy and do not contain normally an express clause that places uniquely on charterers the obligations to care, custody and carry the goods, and since it is also stated that charterers are entitled to give orders to the master in respect of the management of cargoes which are carried on board, including the signature of the bill of lading in respect of the goods which are loaded, it would seem to be logically necessary to pose some questions on the real scope of those different expressions - although present in some time charters forms - which are not limited to establish a shipowners' liability for damages to cargo caused by unseaworthiness of the ship (which is perfectly understandable and justifiable since it belongs to the shipowner's responsibility to deliver a ship in a seaworthy condition) but appear to reduce the charterers' guarantee to indemnify the shipowners for the possible adverse effects associated with some commercial use of the vessel, only to some cases which - as it was mentioned above - are in some time charters forms identified in those damages due to "inconsistencies" between the provisions contained in the bill of lading and those contained in the adopted charter party.

In order to give an answer to this question, first of all it is to be observed that in general – and given the significant number of forms today available on the shipping market and their intended purpose of allowing carriages of very different types of cargoes – the various wordings adopted by charter parties in respect both to configuration and allocation of the obligations concerning the goods may adequately be justified by observing that each charter party form is intended to cover not only the needs of any specific sector (for both dry and liquid cargoes) and but also more specific needs typical of particular areas which necessitate different

formulations of the obligations concerning care, custody and transportation of goods.

More specifically, it should be noted that all the charter parties in use - institutionally born for the purpose of covering all the possible situations, typical of international maritime transports - are particularly flexible in order to create an adequate basis for the developing parties' negotiations which are normally addressed to cover specific and very different needs. As it is well known, it is conceivable that a vessel may be time chartered for several reasons, among which – for instance - particular attention has to be drawn to the case of use of the ship for carriages of goods belonging to third parties or belonging to charterers: it is consequently evident that the charter parties forms have to be shaped so as to take into serious account these circumstances concerning the charterers' position in connection with the cargo, well having to consider also the circumstances wherein charterers intend to assume the carriage of goods belonging to third parties.

In this perspective, it is therefore possible to conclude by observing that, in relation to the contractual contents arising out from time charters, the main object of the contract appears to be the ship which has to be delivered to charterers; the rich provisions that deal with the conditions and terms of delivery and use of the vessel actually show evidence of this assumption. However, at the same time, there is - and indeed it is always inherent to this kind of contract – the purpose of carrying goods that might assume different features depending on the circumstances that the cargo belongs to charterers or to third parties.

Summing up, it is therefore possible to affirm that time charters represent a contractual form that, by providing the use of a ship, makes possible various carriages of full cargoes.

In this respect, it is typical, for example, the case of the carriage of liquid cargoes in relation to which the most part of charter parties forms (normally issued by the same oil companies/charterers) essentially provide that the shipowner acts as a carrier in connection with the products belonging to the oil company/time charterer; in this context it can be recalled, the BPTime 3 form that, at cl.35, clearly states that:

> " … this charter shall be deemed to be a contract for the carriage of goods".

As far as carriage of dry cargoes is concerned, on the contrary, the contractual provisions appear to be more faded since, even if in some contracts they do not seem exclude the quality of carriers resting on the shipowners, in others forms they clear burden the charterers with obligations and liabilities concerning the carriage of the goods loaded on board, which mostly belong to third parties, as stated in Boxtime form - typically used for chartering vessels in the containerization field - in which at cl.18 (a) it is stated that:

> " the Charterers shall be responsible for all third party claims in respect of any liability or expense whatsoever arising in connection with the containers and/or goods carried pursuant to this Charter Party or to any contract of carriage issued pursuant thereto".

Similar clauses allow to conclude by observing that, under the provisions which can be found in the charter parties forms, time charters represent a contractual model - deeply characterized by a great autonomy in the determination of the contents - which, through the disposal of a ship during a fixed period of time, allows the fulfillment of maritime transports, to be effected with different dynamics in order to satisfy different needs often depending on the positions of the parties involved.

The flexibility of time charters forms that offer different, and – at the same time - reasonable solutions depending on the kinds of cargoes and on their belonging to different parties certainly allows to reach concrete and very satisfactory results and thus constitutes a means able to give substantial replies to the maritime world's demands.

At the same time, however, it is clear that - considering the wide range of forms available on the shipping market - maritime operators are required to pay considerable attention in selecting the most appropriate form or, as an alternative, in re-drawing those clauses which do not exactly meet their requirements in order to obtain excellent results.

The voyage charters forms

As far as voyage charters are concerned, it must be first of all pointed out that even in the most common forms usually adopted in the maritime field, the clauses' contents are differently expressed, particularly in respect to the identifications of all the obligations to be assumed by charterers, thus posing – at least at a first sight – even in connection with this model of contract some questions about the relationships between the obligations concerning the delivery of a seaworthy ship and the obligations relating the carriage of the goods loaded on board.

Actually, considering the outcome of the contractual rules contained in the forms most commonly adopted by maritime operators, it is possible to realize the existence of particular situations that are differently appreciated and regulated and that, just owing to their peculiar contents, are worthy to be more deeply examined and compared particularly in consideration of their relevance on the determination of the actual scopes of these contracts.

In this respect, it has to be previously underlined that some voyage charters forms do not contain any specific clause intended to provide an express obligation posed on shipowners and concerning a convenient care, custody and carriage of goods, even if they just provide their liability for loss, damage or delay in the redelivery of the goods in the case of non-fulfillment of their obligation to use due diligence to make the ship seaworthy; such liability would thus seem to be closely linked to the typical shipowners' obligation to deliver a ship in seaworthy conditions. So, for instance, the classic Gencon form states while providing at cl. 2 that:

> "The Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respect seaworthy and to secure that she is properly manned, equipped and supplied, or by the personal act or default of the Owners or their Manager " .

Some other voyage charters forms, differently, merely recall the Hague Rules, or the Hague-Visby Rules, or even some COGSA (Carriage of Goods by Sea Acts) enforced in some country of common law through the insertion of a Paramount Clause without including any further detail or clarification. On this matter, mention can be made to Sinacomex 2000 form which states at cl. 22 that:

> " Except as otherwise provided and stipulated in this Charter Party, it is hereby expressly agreed that this Charter Party shall have effect subject to the provisions of the Hague Rules contained in the International Convention for the Unification of certain Rules regarding to Bill of Lading dated Brussels the 25th August 1924 as enacted in the country of shipment" .

There are also forms that contain a charterers' obligation to indemnify the shipowners for any loss or damage arising out from signing a bill of lading under charterers' instructions or orders, if the bill of lading terms impose more onerous liabilities than those provided for in the charter party. In this respect, it is possible to recall – as relevant examples - both Shellvoy 6 form and Chemtankvoy form which, respectively at cl. 33 and at cl. 37, state that:

> "… the signing of bills of lading shall be without prejudice to this Charter .. and the Charterers hereby indemnify Owners against all liabilities that may arise from signing bills of lading to the extent that same imposes liabilities upon in excess of or beyond those imposed by this Charter."

and that:

> "Bills of lading are to be signed as presented without prejudice to this Charter Party and the Charterers hereby indemnify the Owners against all liabilities that may arise from signing of Bills of Lading as presented to the extent that the terms of such Bills of Lading impose more onerous liabilities upon the Owners than those assumed by the Owners under the terms of this Charter Party".

At this point, it should also be mentioned the trend showed by those different forms that have come to treat some particular issues requiring, for instance, the charterers to indemnify the shipowners in connection with the consequences arising out from any claims brought by third parties/bearers of the bill of lading, as well as from any deviation ordered by the charterers as per charter party, and for any other damage or loss caused by the re-delivery of the goods to a receiver according to the charterers' instructions, without submission of the bill of lading. See, for instance, cl. 30.1.2 of BP Voy 4 form which requires the charterers to indemnify and hold harmless the owners

> "…against claims brought by holders of Bills of Lading against Owners by reason of any deviation required by the Charterers under 22,23 or 28"

as well as cl. 30. 30. 3.1 which permits the delivery of the cargo without submission of the bill of lading only if receivers are reasonably identified and charterers undertake anyway

> "to indemnify Owners (which term shall, for the purpose of this Clause, include Owners' servants and agents) and to hold Owners harmless in respect of any liability, loss, damage, cost or expense of whatsoever nature which Owners may sustain by reason of delivering the cargo to the Receivers in accordance with Charterers' instructions.

Moreover it must be added that some other voyage charters forms – used for the carriage of particular dry cargoes such as corns and grains – contain clauses dealing with specific situations – typical in respect to those kinds of trades – imposing, for instance, the charterers to indemnify the shipowners in the event of " any shortage " : see in this respect the Amwels form whose cl . 22 so states:

> " The bills of lading shall be prepared in accordance with the dock or railway weight and shall be endorsed by the Master, agent or Owners, weight unknown, freight and all conditions as per this

> Charter, such bills of lading to be signed at the Charterers ' or shippers' office within twenty four hours after the Vessel is loaded. The Master shall sign a certificate stating that the weight of the cargo loaded is in accordance with railway weight certificate. The Charterers are to hold the Owners harmless should any shortage occur."

From the above mentioned provisions it is possible to argue that the background which can be deduced from the usual contractual arrangements inserted in voyage charter parties can be quite varied but, in spite of some different formulas expressed in consideration of very peculiar circumstances, however it cannot help pointing out that – apart from a few peculiar cases – the wordings of the clauses usually adopted by these traditional voyage charter parties do not differ remarkably from those that normally are inserted in time charters forms.

The criteria on which are based the provisions on the parties' liabilities for damages or losses suffered by the cargo – except for some more unusual case - seem in fact to be based on similar references to situations connected, for instance, with the seaworthiness conditions of the vessel (which determine the possible shipowners' liabilities), or discrepancies between charter parties provisions and those contained in the bills of lading signed under charterers' instructions (which involve the possible charterers' liabilities).

It should also be noted that voyage charters forms seem to keep in mind – and, ultimately, to confirm – the dualism that may occur between the cases in which the receiver, i.e. the party having title on the goods, is the charterer or a third party: consequently it cannot be excluded *a priori* that even in voyage charters the carriage of the goods by sea be, in some cases, undertaken by the charterers in respect of a third party, where it is certainly not disputed that, in other – and certainly classical situations - the shipowner has to be considered as the carrier. In this respect, it is sufficient to recall cl. 22 of Synacomex form that identically exclude liabilities both on shipowners and on charterers

> "for any loss or damage or delay or failure of performance hereunder resulting from Act of God, war, civil commotion, quarantine, strikes, lock outs, arrest or restrain t of princes, rulers and peoples or any other event whatsoever which cannot be avoided or guarded against".

or cl. 21 (c) of Projecton form which, imposing specific liabilities on charterers, particularly states that

> "…the Charterers shall be liable for all loss or damage or delay of whatsoever nature and however caused or sustained by the cargo…"

and that

> "…the Charterers shall indemnify, defend and hold all these (i.e. the Owners) harmless from and against any all claims, losses, costs, damages and expenses of every kind and nature including legal expenses arising from the foregoing".

Even if it is suitable to confirm the high proportion of transport terms and provisions that is inherent in voyage charters, it is clear that even in these contracts particular attention is drawn to the obligation to put at charterers' disposal a seaworthy vessel; at the same time, and generally speaking, it is equally clear that no general reference to an express obligation of care, custody and carriage of the goods is always imposed on shipowners exclusively.

The above considerations, therefore, are able to confirm the existence, even in this contracts, of qualities of great flexibility and reasonableness that make possible their use in quite different situations.

Conclusive remarks

The short analysis of some clauses, concerning the above mentioned topics, inserted in some of the most well-known time and voyage charters

forms – even if more detailed studies should be deserved to this item – allows to come conclusively to some considerations on the results of the research carried out, for the purpose of showing the most salient (and, perhaps, surprising) points.

As we have seen, modern maritime contracts do not exclude *a priori* that the obligations relating to carriage of goods and the relevant liabilities may sometimes be allocated on shipowners and sometimes on charterers.

This seeming "confusion" in the roles can be justified by observing that the usual charter parties – adopted for the purpose of carrying different kinds of good sometimes belonging to the same charterers and sometimes to third parties – take into account these different situations trying to focus those solutions that it is assumed to be mostly preferred by the parties which commonly use a particular form.

Thus, in this perspective, it is possible to well understand and to share the trend of those provisions that in time charter parties predominantly place the risks concerning the carriage on shipowners whenever the goods (such as, for instance, liquid products) belong to charterers (frequently an oil company), as, in parallel, it is equally possible to understand and share the trend shown by some other provisions that in voyage charter parties (whose operational essence is always remarkably close to transports) do not exclude *a priori* that the obligation concerning the carriage of the goods may be undertaken by charterers in respect to third parties.

The most important aspect – which here deserves to be appropriately pointed out – concerns primarily the fact that, as far as the matter in discussion is concerned, the literal wording as well as the contents of the most classical clauses do not seem to differ substantially or even antithetically in time charters forms in comparison with voyage charters forms: indeed it is undeniable that the said provisions, even if differently structured, to a large extent appear to be similarly shaped in both models of charter parties.

The common basis which is deducible by the examined charter parties forms surely consents to share the theory that recognizes a basically

unitary nature both to time charters and to voyage charters: it is in fact self evident that, in practice, time charters as well as voyage charters intend to create contractual instruments which primarily locate and regulate the vessel's disposal and use in connection with irrefutable and consequential purposes of carrying goods whose outlines – particularly as regards the contents of the relevant obligations and liabilities - may assume different connotations depending on whether charterers have a direct title on the goods or simply undertake to carry goods on behalf of third parties.

Thanks to a common flexibility of the above mentioned contracts which appear to be able to realize all the "nuances" typical of the maritime field, it is therefore possible to reach more and more sophisticated goals, giving thus, consequently, reasonable answers to the different needs of the maritime world through contractual texts that – despite their unitary nature – may be differently structured in order to assume different roles as the case may be.

Actually, the multiform ways of carrying goods by sea may find in the charter parties forms adequate and reasonable solutions that can be well adapted to all the ever- changing maritime situations; their natural qualities of flexibility really represent a precious aid for the modern maritime negotiations.

The extending concepts of laytime and demurrage

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Content

Introduction

Laytime and demurrage are prominent and important contractual provisions in voyage charterparties, which tend to produce a significant number of disputes which often have to be resolved by litigation or reference to arbitration.

Laytime alludes, primarily, to the period of time allowed under the charterparty for loading and/or discharging cargo, and demurrage to the compensation payable in the form of liquidated damages when the charterer takes longer than the agreed period of time[1].

The laytime period is determined contractually by the parties. In the tanker trades it is usually a period of 72 or 96 running hours[2]; the position in dry cargo trades is much more various with the period often determined indirectly by reference to an agreed loading rate[3].

Demurrage refers to the damages payable when the charterer is in default. If the charterer fails to comply with the laytime period, he is in breach of contract and liable to pay damages. The agreed demurrage rate, settled by the parties, is in the nature of liquidated (quantified) damages[4].

It follows that demurrage is a distinct concept from freight. The latter may be negotiated freely by the parties and is subject to market forces. By contrast, demurrage is not so freely negotiable and must represent a fair and sensible compensation for the detention of the vessel[5].

Under English law the parties are allowed material latitude when negotiating the demurrage rate but there are constraints. If the demurrage rate is considered oppressive, as where the rate is excessive and bears no relationship to the actual losses suffered or likely to be suffered, it may be struck down as a penalty, with the agreement to that extent void. To

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1 See generally, Laytime and Demurrage, 6thed, Schofield (2011, Informa, London): Summerskill on Laytime (5th ed) ed Baughen (2013, Stevens, London).

2 See, Tanker Voyage Charter Parties, Ventris (1986, Kluwer, The Netherlands).

3 E.g. Americanized Welsh Coal Charter (AMWESH 93) cl. 7.

4 President of India v Lips Maritime Corporation (The Lips) 2 Lloyd's Rep 311, 315, per Lord Brandon.

5 See, Thomas, Demurrage-Losing sight of first principles (2006) 12 JIML 363-364.

be valid under English law a liquidated damages clause must represent a genuine pre-estimate of the likely loss that will be suffered by the innocent contractor[6].

The expanding concepts of laytime and demurrage

Although laytime and demurrage are concepts that are inseverably connected with loading and discharging cargo carried under voyage charterparties, they have in contemporary commercial practice come to acquire a much wider role, extending in their reach both within and outside the voyage charterparty contract.

Within voyage charterparties, the concepts may be extended to encompass performance and operational delays, and the demurrage rate may also be adopted as the measure of agreed compensation for such delays. When this is done, it means that the agreed laytime period may be consumed for all kinds of delay arising in the context of the charterparty, in addition to delays associated with loading and discharging of cargo. It is not impossible for the whole agreed laytime to be used up before the vessel arrives at the port of loading.

Outside voyage charterparties, laytime and demurrage terms may appear in international sale contracts. Although such contracts are separate and distinct; they may, nonetheless, have a close operational association with the voyage charterparty under which an international seller or buyer, as may be the case, performs its contractual obligation to transport or receive delivery of the sale goods. This will typically be the case with regard to CIF and FOB contracts. As a result, laytime and demurrage provisions may appear in the voyage charterparty and related international sale contract. The precise legal relationship between these parallel provisions can give rise significant difficulties and will be analysed later.

[6] Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79, 87-88, per Lord Dunedin

The extension of laytime and demurrage provisions within voyage charterparties.

As previously indicated, although laytime and demurrage emerged historically in connection with loading and/or discharging cargo, they may now also be applied by express terms to delays incurred in the management and operation of the chartered vessel.

This has been brought about as an accompaniment to the growing flexibility of voyage charterparties, in response to the demands of international traders. In the result, modern voyage charterparties are often much more than simple port- to- port transport contracts. Traders may require flexibility as to the port(s)/place(s) of loading and discharge, and as to cargoes lifted. They may also demand the right to control the performance of the vessel, with power to order that it anchor or slow steam, or that it adjust its speed, or deviate to a new port or place of loading or discharge, or to stop and await further instructions.

In agreeing to such a contract the owners will be exposed to many risks, but the risks I wish to pause and consider in this paper are risks of loss of time and additional expenses incurred.

Operational delays treated as used laytime

Where the voyage charterer is given the contractual power to vary the contractual performance, such as a right to change the port of loading or discharge, it is customary for the owner to negotiate an indemnity for expenses and charges incurred and compensation for time lost by crediting that period of time to laytime or, where applicable, the demurrage period. The precise nature of the protection is a question of contract and the wording of the clauses may vary greatly as between different charterparties.

In the Asbatankvoy form, clause 4(c) provides-

> Any extra expense incurred in connection with any change in loading or discharging ports (so named) shall be paid for by the

> Charterer and any time thereby lost to the vessel shall count as used laytime.

Under this provision, where there has been a change in the load or discharge port, the owners are given an indemnity for additional expenses thereby incurred, and any consequential loss of time is treated as used laytime.

The sub-clause was considered in *The Antiparos*[7] where it was held that it entitled owners to recover the additional cost of bunkers resulting from a change to the bunkering arrangements that the owners were compelled to make following a change to the load port nomination made by the charterers.

Loss of time credited to laytime and time on demurrage

In BPVOY4, clauses 22 and 23, various remedies are set out for the consequences of delay and/or resulting costs, arising from the exercise of the power to give revised port orders under clause 22.1. The remedy directly relevant to the present discussion is to be found in clause 22.3, which provides -

> 'Any additional period by which the steaming time taken to reach the alternative port exceeds the time that should have been taken had the vessel proceeded to such port directly shall count as laytime or, if the vessel is on demurrage, as demurrage. Such additional period shall be the time required for the Vessel to steam the additional distance at the average speed actually achieved by the Vessel during the voyage or the Charter Speed as stated in Section B.25 of PART 1, whichever is the higher. Charters shall pay Owners for additional bunkers consumed for steaming the additional distance at the price paid by Owners, net of all discounts or rebates, for last bunkers lifted'.

If the vessel is ordered to proceed to an alternative port, any additional time taken to reach the alternative port, as compared with the time that would have been taken had the vessel proceeded directly to that port,

[7] [2008] 2 Lloyd's Rep 237

shall count as laytime; and, if the vessel is on demurrage, as demurrage. The clause further provides a formula for measuring the additional time taken. The charterers are also obliged to pay for additional bunkers consumed in steaming the additional distance, and provides a mechanism for determining the price. The provision is effectively repeated in clause 23.4.

Demurrage rate chosen as the measure of compensation

In *The Jasmine B*[8] the special clauses incorporated into the Asbatankvoy contract included the following–

> D. Any extra time and expense incurred by Owners in complying with Charterer's orders shall be for Charterer's account and calculated in accordance with Part 1, Clause I plus any proven expense of this Charter Party.
>
> E. Freight shall be based on the voyage actually performed.

In clause D the reference to Part 1, Clause I, is to the agreed demurrage rate, which is a rate per day or pro rata. It follows that the extra time used up by owners in response to the revised nomination is to be compensated at the demurrage rate; but the time used does not count as time on demurrage.

The same approach is adopted in SHELLVOY6, clause 26(1) of which provides –

> …Charterers shall reimburse Owners at the demurrage rate provided in Part 1 clause (J) for any deviation or delay which may result therefrom and shall pay at replacement cost for any extra bunkers consumed. Charterers shall not be liable for any other loss or expense which is caused by such variation.

The clause provides compensation at the demurrage rate for delay (loss

[8] [1992] 1 Lloyd's Rep 3

of time) arising from a port or rotation variation, but it does not indicate how the loss of time is to be measured. It also provides an indemnity for the replacement cost of additional bunkers consumed. Significantly, it expressly excludes the charterers from 'any other loss or expense' suffered by owners.

A final comment

The clauses discussed above, which are a representative sample, are quite clearly and understandably a protective response on the part of owners to the growing demands by charterers for increased contractual flexibility. Such flexibility is clearly to the advantage of traders/charterers, but it involves many risks for owners, only some of which have been discussed in this article. It is important that owners appreciate the nature of these risks and it would be reckless of them not to seek protection from charterers who benefit from the flexibility conceded.

Laytime and demurrage provisions in international sale contracts

Introduction

The voyage charterparty may exist as a transport contract solely, or it may be integrated into an international sale contract as the transport element to be performed by seller or buyer. It is particularly well suited to serve this purpose, much better than a time charterparty, although these contracts are also on occasions utilised, but raise commercial and legal considerations which are absent when voyage charterparties are used.

A consequence of adopting a voyage charterparty is that a party to an international sale contract may incur demurrage obligations under the voyage charterparty. Typically, this may arise under port-to-port

international sales of wet and dry bulk commodities under CIF, CFR, FOB and FAS contracts[9].

In response to this possibility, international sale contracts will often contain distinct laytime and demurrage provisions, with the same language and analogous substantive provisions adopted as are to be found in the voyage charterparty, the broad object being to pass the cost associated with the demurrage liability under the charterparty to the buyer or seller, depending on the type of sale contract entered into.

How these international sale contractual provisions are to be understood and the interrelationship between them and the laytime and demurrage provisions in the voyage charterparty raise many difficult questions. Ultimately, all will depend on the way the provisions are drafted and construed.

The following terms provide an example of the kind of contractual provisions that may be found in an international sale contract -

> 10. Laytime
>
> Laytime allowed shall be a total of 36 hours SHINC to commence 6 hrs after NOR is tendered or upon berthing whichever is the earlier and time shall cease to count at disconnection of hoses.
>
> 11. Demurrage: as per Charter party per day pro rata.

On their face these contractual provisions appear to be typical voyage charterparty terms and a person, without wider knowledge of the context, might readily assume that to be the case. But in truth they are not; they appeared in an international sale contract made on C&F terms, and were considered by the English Commercial Court and Court of Appeal in *The Devon*[10]. Of course, in this context we are not dealing with standard clauses, and consequently the drafting may vary greatly as between different international sale contracts.

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9 As defined in INCOTERMS (2010).

10 Fal Oil Co Ltd & Another v Petronas Trading Corp (The Devon) [2004] 2 Lloyd's Rep 282(CA).

Countering the demurrage risk

In a CIF contract it is the seller who is responsible to organise the shipment, and who, therefore, fixes the voyage charterparty. It is the seller who may consequently become obliged to pay demurrage at the load and/or discharge port. There is a greater risk with regard to the disport because over that operation the seller may have far less control, with the buyer in managerial control. The delivery, for example, may be to an installation or plant operated by the buyer. Nonetheless, the consequences of delay as the disport in the form of demurrage will fall contractually on the seller as charterer, and it is in respect of this potential liability that the seller may seek protection through the sale contract.

In a FOB contract it is the buyer who directly or through the agency of the seller fixes the ship and it is the seller who delivers the goods to the ship. It is, therefore, the buyer who may be obliged to pay demurrage for delay at the load port and in respect of this risk may seek protection through the sale contract. The buyer bears a greater risk in relation to the loading of the vessel rather than the discharging because managerial control is with the seller, whereas the discharging of the cargo may be wholly under the control of the buyer.

It is commercially legitimate for the CIF seller and FOB buyer to seek protection for their respective exposure to the demurrage risk by incorporating appropriate terms into the international sale contract. These terms are wholly separate from the voyage charterparty terms, but they may nonetheless follow the traditional language of laytime and demurrage, and also the nature and substance of such terms. They may even be a mirror image or close reflection of the voyage charter terms, or may expressly incorporate one or more of the voyage charterparty terms. On the other hand they may be wholly different. The precise way the international sale terms are drafted is for the parties to determine and the drafting may vary significantly.

When this practice is followed, it means that as between seller and buyer an obligation is being assumed that the vessel will be loaded or unloaded, as the case may be, within a specified period of time, the

laytime period; and the sale terms may indicate how that period of time is to be measured , when it will start, usually connected with the giving of a notice of readiness(NOR), and whether it runs continuously or if interruptions are permitted. In the event of breach, as when a longer period of time is taken to load or discharge, the terms will indicate the agreed damages payable, described as demurrage.

It must be emphasised that the obligations assumed and the agreed damages payable on a breach are embodied in the international sale contract, and this fundamental principle is unaffected by the fact that the language and substance of the terms may be similar to those found in the voyage charterparty, or that the sale terms may expressly or impliedly incorporate laytime and demurrage terms from the voyage charterparty.

Construing the international sale terms

As previously indicated, the ultimate effect of the provisions in an international sale contract will depend on their drafting and proper construction. There is no standard drafting formula and the provisions in each international sale contract must be construed in their commercial context. Nonetheless, the legal debate about such clauses is currently focused on the issue into which of two possible categories they fall.

They either may be distinct and independent provisions, separate from the voyage charterparty, or, in the nature of an indemnity for any liability arising under the voyage charterparty. Into which category particular sale terms will fall raises a question of construction, and the answer to that question is not without its relevance.

It is now proposed to analyse further the significance of the distinction.

Distinct and independent obligations

The laytime and demurrage provisions in the international sale contract may be construed as a separate and independent legal code, establishing distinct contractual undertakings, wholly apart from the voyage charterparty. This construction is based on the recognition that in the context

of an international sale, the voyage charterparty and the sale contract, although commercially connected, may operate independently.

When this is the case the obligation of seller or buyer with regard to loading or unloading the vessel, and agreed damages payable for breach, are determined wholly by the sale terms. As previously indicated, the sale terms need not follow the contractual code in the voyage charterparty: they need not run in parallel and there need not be any cross-referencing or incorporation, and even if there are parallel provisions they need not necessarily be construed in the same way.

It follows that under the sale contract the laytime provisions may be breached but not the laytime provisions in the voyage charterparty, or vice versa; and there may be a liability to pay demurrage under the sale contract but not under the voyage charterparty, or vice versa. And even if demurrage is payable under the sale contract and charterparty, the rate may be different or the period of time for which demurrage is payable may differ.

In the result, the sale contract may establish a greater liability to pay demurrage than under the voyage charterparty, so that there might exist a greater right to recover demurrage under the sale contract than the liability to pay demurrage under the voyage charter party. In this circumstance the sale contract could provide a profit. This is acceptable in principle and it may be considered as an additional payment to the price when there has been delay[11]. There is however an important proviso, the provisions in the international sale contract must represent a genuine pre-estimate of the relevant party's loss under the sale contract. If it does not, then, to this extent, the demurrage terms are void, as being in the nature of a penalty[12]. The closer the demurrage rate in the sale contract is to the rate in the voyage charterparty the greater the likelihood that the sale rate will be viewed as a sensible and commercial rate, and not a penalty[13]. In many instances the sale contract will expressly incorporate

[11] Suzuki & Co v Companhia Mercantile Internacional (1921) 9 Ll.L.R. 171(CA).

[12] Fal Oils Co Ltd v Another v Petronas Trading Corp (The Devon) [2004] 2 Lloyd's Rep 282(CA)

[13] ibid

the charterparty rate[14].

Indemnity

Alternatively, the international sale provisions may be construed to be in the nature of an indemnity, with a party only entitled to recover demurrage if and to the extent paid under the voyage charterparty[15]. Under this construction there is no liability under the sale contract except when a liability is incurred and an actual demurrage payment is made under the voyage charterparty.

This is a much simpler position than where the obligation to pay demurrage is construed to be based on an independent code. It also precludes the possibility of profit-making. The indemnity is dependent not only on liability arising under the voyage charterparty, but also on an actual payment made in respect of that liability. If the shipowner waives his right to demurrage under the voyage charterparty, or accepts part-payment in full satisfaction, then in the first case there is no right under the sale contract, and in the second the right is limited to the actual settlement sum.

In this context, the obligation to pay an indemnity will entail much uncertainty because the indemnifier will not initially be aware of the precise implications of the obligation, and may not even be aware of the charterparty terms because it has yet to be fixed.

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[14] e.g. Gill & Duffus SA v Rionda Futures Ltd [1994] 2 Lloyd's Rep 67, O.K. Petroleum A.B. v Vitol Energy S.A. [1995] 2 Lloyd's Rep 160.

[15] *Suzuki & Co v Companhia Mercantile Internacional* (1921) 9 Ll.L.R. 171(CA).

Factors influencing the process of construction

In the absence of compelling language suggesting the alternative, there is a judicial inclination to construe laytime and demurrage provisions in international sale contracts as establishing independent rights. It is perceived that parties find it simpler and more acceptable to tie themselves to an independent contractual regime under which they will know precisely where they stand, rather than contract on the basis where their rights *inter se* are dependent on rights and liabilities arising under the voyage charterparty, which might only be known after a lengthy dispute. It is also the case that when the sale contract is entered into, the charterparty will in all probability not have been fixed and therefore the parties will not have knowledge of its terms. Only later will this knowledge be acquired[16].

Ultimately the construction of the sale terms will depend on the words adopted and the commercial context of the contract[17]. Nonetheless, it is possible to identify a number of factors which may influence the judicial approach; they are not set out in any order of priority.

Where a voyage charterparty contract is not fixed, as where the seller/buyer uses his own ship or fixes a vessel under a time charterparty, the question of laytime and demurrage does not arise[18].

Where the sale terms do not expressly or impliedly refer to or incorporate the charterparty terms, the high probability is that the sale terms will be construed as establishing an independent code[19].

The more the laytime and demurrage terms in the sale contract differ from those in the voyage charterparty, the greater the likelihood that the sale terms will be construed as establishing an independent code. The indemnity principle is difficult to apply where the laytime periods and

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16 Fal Oils Co Ltd & Another v Petronas Trading Corp (The Devon) [2004] 2 Lloyd's Rep 282(CA).

17 For a recent example, see Glencore Energy (UK) Ltd v Sonal Israel Ltd (The Team Anmaj) [2011] 2 Lloyd's Rep 697.

18 Mallozzi v Carapelli S.p.A.[1976] 1 Lloyd's Rep 407(CA).

19 Houlder Bros v The Commissioners of Public Works [1908] A.C. 276(PC), Establissements Soules et Cie v Intertradex S.A. [1971] 1 Lloyd's Rep 378.

the demurrage rates are different in both contracts[20].

A reference in the sale contract to 'demurrage as per charterparty' will be construed as a reference to the demurrage rate in the charterparty, and not to the collateral demurrage conditions[21].

The existence of a cesser clause in the charterparty will suggest an intention to create an indemnity, because its effect may be to protect the charterer from any exposure under the charterparty once the cargo has been loaded[22].

Conclusion

Few concepts stand still with the passage of time and this is equally true of commercial contractual concepts. The familiar concepts of laytime and demurrage were historically wholly associated with lifting and discharging cargoes under voyage charterparties, but developments associated with the evolution of international trade and the growing demands made by international traders for increased contractual flexibility have resulted in the concepts acquiring a mobility both within and without the sphere of voyage charterparties.

As a consequence both concepts have acquired a presence within the internal workings of a voyage charterparty which extends much more widely than delays associated with loading and/or discharging cargoes.

The concepts have also migrated into international sale contracts, though in this connection the presence is primarily one of language, save where the sale terms are construed as establishing an indemnity. This development has served to reinforce the close commercial relationship between the two contracts, but at the same time acknowledging that the two can exists and function independently of each other.

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20 O.K. Petroleum A.B. v Vitol Energy S.A. [1995] 2 Lloyd's Rep 160.

21 Gill & Duffus SA v Rionda Futures Ltd [1994] 2 Lloyd's Rep 67; O.K.Petroleum A.B. v Vitol Energy S.A. [1995] 2 Lloyd's Rep 160.

22 Suzuki & Co v Companhia Mercantile Internacional (1921) 9 L. L.R. 171(CA).

Contractual flexibility in volume contracts: Rotterdam Rules and French law perspective

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Content

1 Background and terminology insight

With Rotterdam Rules (United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea) the contract of volume makes its official entrance to the rank of contracts regulated at international level by international convention, introducing the bargaining freedom into the traditionally one-way mandatory carriage of goods by sea regime. Through the mechanism of volume contracts Rotterdam Rules take into account commercial reality of the growing use of so-called volume trade and give more flexibility to the parties in the allocation of their rights, obligations and liabilities.

Well before the adoption of Rotterdam Rules, volume contracts, or let's say its' ancestors, knew multiform life and a number of namings:

- in French: *contrat au/de tonnage, contrat de fret, l'affrètement au tonnage*,
- in English: contract of affreightment (COA), volume contract, service contract (for the latter under specific US regulations).

In this respect LARS GORTON wrote « as the most important characteristic of a COA compared with other contracts of carriage is that it is more linked to the cargo and less to the vessel, it would perhaps be better to use terms like Cargo Contract of Affreightment, Cargo Contracts, Quantity Contracts, Volume Contracts, etc., but ... the term Contract of Affreightment now seems to be generally used and accepted... »[1].

Hamburg Rules, even though they do not regulate volume contract relationship, have already taken into consideration its existence. They expressly govern the situation arising from volume contract, as they apply to its contrats d'applications:

> if a contract provides for future carriage of goods in a series of shipments during an agreed period, the provisions of this Convention apply to each shipment" (Article 2 § 4). In the same

[1] LARS GORTON, Shipbroking and chartering practice, LLP, 3 edition, 1990, p.231.

way as Rotterdam Rules, the Hamburg Rules do not apply to the shipment made under a charter-party

Rotterdam Rules volume contracts concept originates from so-called US service contracts (or Ocean Liner Service Agreements)[2]. Even though American service contracts have initially inspired the adoption of this partially mandatory regime of the volume contracts[3], the adopted definition of the volume contracts in Rotterdam Rules is not identical; it appears to be broader than the US service contracts"[4]. According to Rotterdam Rules Article 1(2), ""volume contract" means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range".

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[2] Transport Law : Preparation of a draft instrument on the carriage of goods [by sea] - Proposal by the United States of America, A/CN.9/WG.III/WP.34, 2003, §§ 18-29.

[3] « I doubt whether excluding volume contracts in the liner trade would have been controversial either, but the US wishes to include them, at least insofar as they are service contracts within the definition in the US Shipping Acts », BEARE S.,

[«] UNCITRAL Draft Convention on the Carriage of Goods », in CMI Yearbook 2005-2006, p. 399.
See also Proshanto K. MUKHERJEE & Abhinayan BASU BAL, « A Legal and Economic Analysis of the Volume Contract Concept Under the Rotterdam Rules : Selected Issues in Perspective », Journal of Maritime Law & Commerce, Volume 40, Issue No. 4, October, 2009.
U.S. Federal Maritime Commission, « The Impact of the Ocean Shipping Reform Act of 1998 », September 2001, p.84.

[4] Section 3 (19) du Shipping Act of 1984, modified by Ocean Shipping Reform Act of 1998 states that « service contract means a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreeement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of non performance on the part of any party ».
BURSANESCU S., Reform of COGSA in the U.S.: Between COGSA 1999 and UNCITRAL's Draft Convention on the Carriage of Goods [Wholly or Partly] by Sea, Master's Research Project, TETLEY W. (supervisor), Montreal, 2007, pp. 44-49.

2 Bargaining freedom introduced into the traditionally one-way mandatory carriage of goods by sea regime

Rotterdam Rules Article 80(1) states that a volume contract (to which the convention applies) between carrier and shipper may provide for greater or lesser rights, obligations and liabilities than those imposed by Rotterdam Rules.

By specific mechanism of volume contracts, shifting from a fundamentally mandatory regime to a largely derogative regime, Rotterdam Rules introduce a major change in the carriage of goods by sea[5]. A thorny question of introducing bargaining freedom into traditionally one-way mandatory carriage of goods by sea regime has been subject to a long discussion by UNCITRAL working group on the draft convention. The adopted Rotterdam Rules volume contract regime is result of extensive negotiations that have taken place during the sessions of the UNCITRAL working group for several years.

At its 19th session it was highlighted that, while generally desirable in the case of parties with equal bargaining power, unlimited freedom of contract might in other cases deprive the weaker party, typically small shippers, of any protection against unreasonable unilateral conditions imposed by carriers (in this respect, it is interesting to mention that, according to BIMCO, small and medium sized shippers sign the majority of volume contracts[6]). The UNCITRAL working group therefore agreed on the necessity of a desirable level of protection for a weaker party to be incorporated into the Rules[7].

Thus, Article 80(2) sets out certain conditions, which have to be fulfil-

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5 Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]. Joint proposal by Australia and France on freedom of contract under volume contracts, A/CN.9/612, 2006, § 6.

6 www.bimco.org

7 Report of Working Group III (Transport Law) on the work of its nineteenth session, A/CN.9/621, p.36.

led for the derogation to be binding[8]. A derogation is binding only when the volume contract contains a prominent statement that it derogates from the Rotterdam Rules (a); the volume contract is either individually negotiated, or prominently specifies the sections containing the derogations (b); the shipper is given an opportunity to conclude a contract of carriage on terms and conditions that comply with the Rules without any derogation (c); and the derogation is neither incorporated by reference from another document, nor included in a contract of adhesion that is not subject to negotiation (d). All these conditions are cumulative.

3 Contractual flexibility in individually negotiated contracts

Together with contractual freedom the Rotterdam Rules volume contract introduces contractual flexibility to the international carriage of goods by sea regime. It is intended to provide more flexibility into relationship between carrier and a shipper when a contract of a specified quantity of goods in a series of shipments during an agreed period of time is to be negotiated.

This flexibility was initially justified *inter alia* by the existence of individually negotiated contracts and the necessity of more flexibility for such specific contractual relationship. But it appears that such volume contract departing from Rotterdam Rules mandatory provisions may not be an individually negotiated contract to the extent it prominently specifies the sections containing the derogations[9]. However such derogation at least is deemed to be individually negotiated as it should not be incorporated by reference from another document, nor included in a

[8] Further limitations of the right to derogate under a volume contract as well as some other information with regard to the volume contract are set out in paragraphs 3 to 6 of the Article 80.

[9] According to Rotterdam Rules Article 80(2), a derogation is binding only when: « (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations ».

contract of adhesion that is not subject to negotiation. In this respect Austrian and French delegations underlined that "the principle of freedom of contract should … be based on genuine negotiation between the shipper and the carrier. If volume contracts are to be the basis of wide-ranging derogations from the terms of the draft conventions, it is imperative that those volume contracts be genuinely negotiated between the parties"[10].

4 Volume contracts *v.* standard contracts

As previously mentioned, a volume contract to which Rotterdam Rules apply (or at least the derogation provisions from the Rotterdam Rules regime) could not be a standard contract. But standard contracts in volume trade existed well before the Rotterdam Rules. Standard contracts of affreightment such as BIMCO VOLCOA 1982 (revised in 2004 it is known as GENCOA) are a commonly used documentary tool in volume trading environment. GENCOA is BIMCO Standard Contract of Affreightment for the Transportation of Bulk Dry Cargoes.

BIMCO recalls that this contract is designed to define mutual obligations of the parties and, in contrast to a charter party for consecutive voyages, is not linked to any particular vessel. The basic purpose of this contract is the provision of transportation for the shipment of large quantities of cargo over an extended period (expressed as an amount or a number of voyages). This type of contract provides a degree of flexibility between the parties to agree on the timings of each shipment and which vessels are to be employed for each lifting[11].

As the GENCOA contract does not seem to be tailored for liner transportation, this kind of non-liner bulk dry cargo transportation will be out of the scope of the Rotterdam Rules, as the Rules do not apply to

[10] Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]. Joint proposal by Australia and France on freedom of contract under volume contracts, A/CN.9/612, 2006, § 9.

[11] https://www.bimco.org/

the contracts used in non-liner transportation or other contracts for the use of a ship or of any space thereon in liner transportation (Rotterdam Rules Article 6). In this respect it should be mentioned that BIMCO has recently started working[12] on a Standard Service Agreement for the liner sector – a type of volume contract for containers. It would be therefore interesting to analyse this document in the light of Rotterdam Rules Article 80 and specifically in the light of the provision stipulating that derogation from Rotterdam Rules could not be included in a contract of adhesion.

5 Protection of a weaker party

Rotterdam Rules article 80 (2) (c)[13] was introduced as an additional safeguard to ensure that the shipper enters into the contract based on individual will and is given a real choice to derogate or not. According to Professor HANNU HONKA, in practice (c) will mean that the shipper is offered two freight rates, one based on the Rotterdam Rules and another based on derogations[14]. It seems to us that in this context the shipper's contractual freedom could be hindered to some extent by a monetary factor.

Ass. Pr. SCHELIN thinks that forwarders, who consolidate goods

[12] «BIMCO Standard Service Agreement for the liner sector is currently being developed by representatives from a number of major liner operators and targets small to medium sized shippers who sign the majority of such volume contracts. The Global Shippers Forum, who represent a number of major national shippers associations worldwide, have been contacted by the group and they have agreed to appoint a representative to join the drafting process to ensure that the views of shippers are properly taken into account in the agreement. At the current rate of progress it is hoped to have a draft ready to be put forward for adoption in November 2012 », https://www.bimco.org

[13] According to it the shipper has to be given an opportunity to conclude a contract of carriage that complies without any derogation from Rotterdam Rules.

[14] HANNU HONKA, « United Nations Convention on contracts for the international carriage of goods wholly or partly by sea. Scope of application and freedom of contract », CMI-colloquium on the Rotterdam Rules, Rotterdam, september 21, 2009, p.15.

and ship under space charters, are the ones who are most likely to lose from this new regime[15]. He points out that parties are likely to agree to volume contracts in two situations: (1) where there are large shipments between different industries, *i.e*., in so called long term industry shipping; or (2) in relation between ocean carriers and freight forwarders shipping large amounts of consolidated goods, *i.e.,* in situations where goods are shipped under space charters.

According to JOHAN SCHELIN, the freight forwarders will face mandatory rules, because they act as carriers for their clients, small shippers and consignees, with no or minimal ability to derogate from the convention's liability. However, they will have to accept derogations from carrier liability in their space charter agreements with larger ocean carriers. He concludes then that it is most likely that forwarders will be squeezed between exporters and carriers. This might lead the forwarders to refuse to take on carrier liability because of the lack of back-to-back arrangements, and instead to return to the role of intermediaries. He underlines that in the long term, this would be detrimental to small shippers, especially when it comes to multimodal transports[16].

In this regard, it should be mentioned that if in Common law a freight forwarder is regarded either as a carrier if he acts as principal, or as an agent; in French law a freight forwarder is usually considered as *commissionaire de transport* -- a specific figure of French law where *commissionaire de transport* is acting in his own name for the principal. It is different from French *mandataire* (agent under Common law) – an intermediary acting on behalf of a disclosed principal[17]. Therefore the perspective of changing their status from carrier to intermediary by freight forwarders to which JOHAN SCHELIN refers to, will not have the same implication

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15 JOHAN SCHELIN, « The Uncitral Convention: Harmonization or De-Harmonization? », TEXAS INTERNATIONAL LAW JOURNAL, VOL. 44:321, p.325.

16 JOHAN SCHELIN, « The Uncitral Convention: Harmonization or De-Harmonization? », TEXAS INTERNATIONAL LAW JOURNAL, VOL. 44:321, p.325.

17 KOZUBOVSKAYA-PELLÉ A., « De la qualité juridique de transporteur maritime de marchandises : notion et identification », thèse, PUM, 2011, p.144.

in French legal system, provided that such a freight forwarder had not behaved as a *transporteur apparent*, i.e. acted as if he was a carrier in the eyes of his client (shipper or consignee)[18].

Rotterdam Rules Article 80 (5) provides additional protection to consignee - third party to the initial contractual relationship regulated by volume contract-, "the terms of the volume contract that derogate from this Convention … apply between the carrier and any person other than the shipper provided that:

(a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and

(b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record".

It appears clearly from these provisions that any derogation from Rotterdam Rules will not be binding on third parties, unless those third parties accept it expressly. In this respect some parallels could be made with French jurisprudence with regard to the express acceptance by third party of so-called *clauses ne faisant pas partie de l'économie du contrat de transport*, i.e. provisions which are not considered by French courts to be integral part of the essence of the contract of carriage of goods by sea, such as, for example, arbitration clauses. If such provision is not accepted expressly by the third party, this third party will not be bound by it[19].

The question how the Article 80(5) will work in practice remains open. Will such third party have a real choice to accept the contract without consenting to derogation or will there be a kind of automatic requirement for such an agreement? All will probably depend on the commercial context.

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[18] KOZUBOVSKAYA-PELLÉ A., « De la qualité juridique de transporteur maritime de marchandises : notion et identification », thèse, PUM, 2011, p.160.

[19] KOZUBOVSKAYA A., « La situation juridique du destinataire porteur du connaissement », Neptunus, Volume 11, 2005/2, http://www.cdmo.univ-nantes.fr/

6 Volume contract and French law[20]

The legal qualification of the volume contract relationship appeared to be source of some hesitation in French courts[21] and knew a deep interest in the doctrine in 1980[22].

Under French law the volume contract has been classified as framework contract concerning series of shipments[23]. The legal qualification of each contract concerning series of shipment (*contrat d'application*) and the applicable regime (carriage of goods by sea or affreightment) to it is matter of each case[24]. The framework contract – volume contract – is regulated by French Commercial Code, although the *contrats d'application* are subject to specific rules lied down in the law n°66-420 of the 18th of June 1966. Under French law the mandatory regime of carriage of goods by sea will be applicable to its *contrat d'application* if the latter is qualified as contract of carriage of goods by sea.

In principle, there is no inconsistency with the French law and Rotterdam Rules provisions allowing derogation from its mandatory regime for volume contracts, as French Commercial Code provides much more contractual freedom than the law of the 18th of June 1966.

International regulation of the carriage of goods by sea is known as a progressive introduction of mandatory rules on liability of the carrier

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20 KOZUBOVSKAYA-PELLÉ A., « Le contrat de volume et les Règles de Rotterdam », DMF 712, Mars 2010, p.175.

21 ACHARD R., « Exploitation du navire - Affrètement - Règles communes : nature, formation et rupture du contrat », Juris-Classeur, 2004, Fasc. 1215, § 87.

22 BOULOY P., « Le contrat de tonnage », DMF 1980, pp.312-319 ; RODIERE R., « Le contrat au tonnage », DMF 1980, pp.323-327 ; ACHARD R., DMF 1980, pp. 544-547. TASSEL Y., « Le contrat de tonnage », Gazette de la Chambre, lettre d'information de la CAMP, n°7, 2005, p. 3 ; SABADIE B., « L'affrètement d'espaces », thèse, Université de Nantes, 2005, p.42.

23 CAMP sentence n° 1039, 12 décembre 2000, DMF 2001, pp. 404-406. Cass. civ., 22 juin 1981, n°288, Bull.civ., pp. 28-29.

24 « Si les contrats à caractère répétitif peuvent se classer distinctement en contrats d'affrètement (au voyage) régis par la libre volonté des parties et en contrats de transport soumis impérativement à la loi ou convention applicable, la détermination de leur nature juridique ne peut résulter que de l'analyse des dispositions significatives de chacun d'eux », CAMP sentence n°552, 10 décembre 1984, DMF 1985, p.310.

in order to protect the shipper from excessively used freedom of contract by the ship-owners. Therefore the introduction of freedom of contract into traditionally one-way mandatory carriage of goods by sea regime through the mechanism of volume contracts in liner trade appears to be a major change and thus represents a risk that in some countries these new provisions will differ considerably from national legislation and would appear incompatible with fundamental principles of the domestic law and thus block the ratification of Rotterdam Rules[25]. The future will show if the safeguards introduced for the weaker party will counterbalance in such countries the apprehension of the excessive use of the freedom by the carriers.

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[25] Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea]. Joint proposal by Australia and France on freedom of contract under volume contracts, A/CN.9/612, 2006, § 4 and 6.

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Effect of shipping standards on the charterparty obligation of seaworthiness - the example of SOLAS

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Content

Introduction[1]

Laws relating to the Carriage of Goods by Sea have emerged from policies of customs of practice, precedents and ships' operators. For example, the Hague/Hague-Visby Rules and Hamburg Rules[2] were contrived from the common law to properly regulate the commercial interests of a contract at the relevant time. Law is changeable, which means that it can be reformed according to the development of the shipping industry. This development results from the practice of good seamanship, quality customs, scientific researches, and so on,[3] which make a major involvement in setting the shipping sector to form codification in regulations, codes, conventions and so on, whereby constituting the standard of the shipping industry. This is the standard that courts take into consideration in deciding their cases[4] and the benchmark for measuring and distinguishing prudent and diligent shipowners from negligent ones who do not perform their obligations prudently and diligently when they exercise their obligations, i.e. in providing a seaworthy vessel.

It is known that there is no formal obligation for the decision-maker

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1 I should like to thank Dr Gotthard Gauci for his helpful comments on an earlier draft to this paper. It was published in EJCCL 3:2 (2011).

2 Before that, there was the Harter Act.

3 Numerous groups and associations (of non-governmental origination) have contributed to the process of developing safety regulations, such as: shipbuilders and equipment manufacturers; shipping companies including shipowners, charterers, fleet operators and managers; seafarers; shippers and cargo owners; insurers; classification societies and standard-setting bodies; port authorities; and navigational aid services. The rise in marine incidents led to extensive research funded by governments: The UK Department of Transport, in 1988, funded research carried out by the Tavistock Institution. This research resulted in the report *The Human Element in Shipping Casualties 2* (HMSO, London, 1988) ISBN 0 11 551004 4. This report was then taken to the IMO. In 1992, the House of Lords Select Committee on Science and Technology, chaired by Lord Carver, issued a report on the *Safety Aspects of Ship Design and Technology* House of Lords Session 1991-92, HL Paper 30-II and HL Paper 75.

4 The shipping industry's conventions, codes, regulations, and so on are the standards which create the force behind nearly all the technical standards and legal rules for safety at sea and prevention of accidents, pollution, loss of life and cargo at sea. See P. Boisson *Safety at Sea* (Bureau Veritas, 1999), 137.

to accept such standards. For example, despite what has been said above that the law is a dynamic, international convention, i.e. Hague/Hague-Visby Rules, they do not usually maintain all of the recent developments of the industry; for example, the emergence of new regulations or recommendations which would influence directly or indirectly the carrier's[5] obligations to provide a seaworthy vessel if they did not comply. The need to adopt new standards to cope with the thrust of new technologies and developments applying to vessels and their equipment has caused the shipping industry to experience numerous developments, starting with the Safety of Life at Sea (SOLAS) Convention and the Convention on Standard of Training, Certification and Watchkeeping for Seafarers (STCW Convention). And as part of the solution to keep abreast of new development, such development must be taken into consideration, i.e. standard form charterparties.

In addressing the subject of shipping industry, this paper sheds light, in general, on only one important perspective of the shipping industry, namely, SOLAS Convention as well as its problems which affect the obligation of seaworthiness. It is therefore essential to deal with the current Carriage of Goods by Sea law (under common and Hague/Hague-Visby Rules) which is of crucial importance to the industry's standards, and that may influence a carrier in complying with the obligation of seaworthiness.

The objective concept of seaworthiness in statutory regulations and charterparty

Shipowners[6] have to comply with a number of requirements required by the charterparties. These obligations, ordinarily, are set out in the statutory regulations and often are mentioned in the contract of carriage, in

[5] This word is used for the entire paper referring to shipowners or demise charterer.

[6] The term shipowner is used throughout this paper in its widest meaning. This includes the bareboat charter and ship manager; in other words, is the sea carrier excluding the time or voyage charterer.

general terms, and in standard form charterparty.[7]

(a) Statutory regulations

The Hague/Hague-Visby Rules bind the carrier before and at the beginning of the voyage to exercise due diligence to:[8] '(a) make the ship seaworthy;[9] (b) properly man,[10] equip[11] and supply the ship;[12] (c) make the holds,[13] refrigerating and cool chambers, and all other parts of the

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7 Although the word 'seaworthiness' may well not be present. (see i.e. *Hong Kong Fir Shipping Co. Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 Q. B. 26; [1961] 2 Lloyd's Rep. 478), for instance the New York Product Exchange form 1946, lines 21-24, expressly provides that on her delivery, the ship shall be 'ready to receive cargo with clean swept holds and tight, staunch, strong and in every way fitted for the service…with a full complement of officers, seamen, engineers and firemen - for a vessel of her tonnage.' See also NYPE 1993 cl.6.

8 Article III r.1.

9 *The Toledo* [1995] 1 Lloyd's Rep. 40: damaged plating and deformation of the bracket rendered the vessel unseaworthy; *Southern Sugar & Molasses Co Insurance* v *Artemis Maritime Co Insurance* [1950] AMC 2054: loose rivets rendered the vessel unseaworthy; *Huilever SA* v *The Otho* [1943] AMC 210: a crack in one of the ship's hull plates rendered the vessel unseaworthy.

10 *The Roberta* (1938) 60 Ll Rep. 84: the court held the ship to be unseaworthy because the shipowners employed an engineer who proved to be incompetent. *The Eurasian Dream* [2002] 1 Lloyd's Rep. 719: the master's ignorance of fire hazards, supervising stevedores and particular characteristics of the fire fighting on the ship constituted incompetence consequently rendering the vessel unseaworthy due to improper manning.

11 *Project Asia Line Inc* v *Shone (The Pride of Donegal)* [2002] 1 Lloyd's Rep. 659: defects in the generators which amounted to a real risk that the ship might have been left without power during the course of voyage rendered the vessel unseaworthy; *Haracopos* v *Mountain* (1934) 49 Ll. L. Rep. 267: a defect in the steering gear rendered the vessel unseaworthy.

12 *A Turtle Offshore SA* v *Superior Trading Inc (The A Turtle)* [2009] 1 Lloyd's Rep. 177: there was a breach of the exercise of due diligence in providing adequate bunker at the commencement of the voyage which rendered the tug unseaworthy; however, the defendants were protected from liability by an exemption clause; *Owners of Cargo Lately Laden on Board the Makedonia* v *Owners of the Makedonia (The Makedonia)* [1962] 1 Lloyd's Rep. 316: contaminated bunker fuel rendered the vessel unseaworthy.

13 As far as the English law concerns, unfit container (uncargoworthy) that supplied by the carrier does not render the vessel unseaworthy. See, T. Aladwani, "The Supply of containers and "seaworthiness"- The Rotterdam Rules perspective", 42 J. Mar. L. & Com. (2011) 185.

ship in which goods are carriers, fit and safe for their reception, carriage and preservation'[14] to encounter the contemplated perils of the voyage.

(b) Charterparty

The vessel and her equipment must be reasonably fit to withstand the perils which may foreseeably be encountered on the voyage and also fit to keep the contracted cargo. This approach is taken in both voyage and time charter. This is often mentioned in general terms in standard form charterparty. Alternatively, the word 'seaworthiness' may well not be present;[15] for instance, the New York Product Exchange form 1946, lines 21-24,[16] whereas, some forms are requesting further details in additional typed clauses.[17] Other forms may impose a continuing obligation to maintain the vessel and a clause paramount which incorporates the Hague/Hague-Visby Rules; similarly the US COGSA.[18] If no mention is included in the charterparty, the seaworthiness will be implied on the basis of the term from the English law or on the basis of legislation of the law of the country, i.e. the Scandinavian countries.

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[14] There are two important elements of cargoworthiness, which in their breach, would render the vessel unseaworthy; first, the readiness of the cargo hold; See, i.e. Elder, Dempster and Company, Limited, and Others Appellants; v. Paterson, Zochonis and Company, Limited and Others, [1924] A.C. 522. Second, the proper stowage of the cargo; see,, i.e. Northern Shipping Co. v. Deutsche Seereederei G.M.B.H. and Others (The Kapitan Sakharov), [2000] 2 Lloyd's Rep. 255. (the vessel is rendered to be unseaworthy, only, when the improper stowage or securing of cargo is rendering the vessel unseaworthy).

[15] See i.e. *Hong Kong Fir Shipping Co. Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 Q. B. 26; [1961] 2 Lloyd's Rep. 478.

[16] It expressly provides that on her delivery, the ship shall be 'ready to receive cargo with clean swept holds and tight, staunch, strong and in every way fitted for the service… with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage.' See also NYPE 1993 cl.6.

[17] See, i.e. NYPE 1993 cl.6.

[18] See, i.e. NYPE 1993 cl.31. in such a case, if the Hague/Hague-Visby Rules are incorporated into a charterparty and if they provide an absolute obligation of seaworthiness, the obligation thus will be reduced to one to exercise due diligence to provide a seaworthy vessel. See *Time charters*, para. 34.5.

The impact of the industry on the standards of seaworthiness

The drafting of the statutory regimes, such as the Hague/Hague-Visby Rules, is a codification of old laws, precedents and customised conditions, which were gathered in one set of rules to meet the standards of the industry. This shows that when drafting such rules, they are reflecting the industry at the time of their codification. Therefore, with the improvement of sea carriage and the development of the industry, it emerges that the legal question which determined the required level of seaworthiness has possibly reformed over time and will continue to change with the trends of the shipping industry.[19]

It was noted that 'the concept of seaworthiness both in contracts for the carriage of goods by sea and in chartering contracts includes evaluations by the shipping community as a whole.'[20] Therefore, seaworthiness, which might be in the form of an international convention or standard form charterparty, is judged by the standards and the practices of the industry. [21]

However, these same international requirements include the origin of the industry itself. Cresswell J. in *The Lendoudis Evangelos II22* affirmed the words of Lord Sumner that '[s]eaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable.'[23]

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19 *Bradley & Sons Ltd* v *Federal Steam Navigation Co.* (1926) 24 Ll. L. Rep. 446 (1927) 27 Ll. L Rep. 395 as per Lord Sumner. Lord Sumner describes the situation: 'In the law of Carriage of Goods by Sea, neither seaworthiness nor due diligence is absolute, both are relative among other things to the state of knowledge and the standards of [industry] prevailing at the time.'

20 Hannu Honka, 'The Standard of the Vessel and the ISM Code', cited as Chapter 4 in Johan Schelin, *Modern Law of Charterparties* (Axel Ax:son Johnson Institute of Maritime and Transport Law, University of Stockholm, 2003), at p.114.

21 Cooke, J., Young, T., Kimball, J., Lambert, L. & Martowski, D. *Voyage Charter* (3rd edn, 2007), Chapter 11, para. 11,19.

22 *The Lendoudis Evangelos II* [2001] 2 Lloyd's Rep. 304, at p. 306.

23 This exact approach is followed by the same judge in the *Papera Trades Co Ltd and Others* v *Hyundai Merchant Co. Ltd and Another (The Eurasian Dream)* [2002] 1

These aspects of the industry's standards are a yardstick for measuring and distinguishing good shipowners from those who do not comply with these standards, breaches of which might cause the unseaworthiness of their vessels. [24]

It was mentioned above that there are vast numbers of regulations governing the industry's standards and it would be impossible to cover every one of them in this study.[25] Despite that, there are several numbers of regulations relating to the industry's standard. However, this paper will cover the international public standards of the industry which have a direct impact on obligation of seaworthiness. These particular standards of the industry, which govern the seaworthiness of vessels, are regulated primarily by IMO conventions, namely:[26]

- International Convention on Safety of Life at Sea (SOLAS), 1974[27]

These industry regulations are determining the level of adequacy that the vessel's structure and cargo holds must be designed thereof; also, they are necessary to define the required reliability of its machinery and equipment, which reflect the shape of the minimum standard of seaworthiness.

This means that the required standard of care or due diligence set by law might be assessed by the reference to the standards of the industry that reasonable prudent shipowners would require such a standard to

Lloyd's Rep. 719 at para. 127.

24 Talal Aladwani, 'The supply of containers and "seaworthiness"-The Rotterdam Rules perspective, *Journal of Maritime Law & Commerce* 42:2 (2011), p.185-209, at p. 194.

25 Although other regulations contribute to the industry's standards, such as the Classification Society, they generally exclude the ship's operational standards (i.e. manning, crew qualification, equipment management and lifesaving appliances such as lifeboats, life rafts and lifejackets), navigational aids (onboard equipment and navigational equipment such as radar, electronic charts and Gyro).

26 Susan Hodges has affirmed that safety of ships relates to seaworthiness, although it has a specific and precise meaning under the maritime law. Still, this particular aspect of safety is regulated primarily by IMO conventions, namely: SOLAS 1974, Load Lines Conventions 1966 and STCW 1978.

27 For example, certificates required by SOLAS are to be issued by the flag administrations including international tonnage certificate, passenger ship safety certificate, cargo ship safety certificate and load line certificates.

his vessel.[28] For instance, when science produces new means or improvements to ensure safety at sea, their purpose is to develop the industry's standard;[29] for example, if international conventions require the vessel to be modified, the absence of them might render the vessel unseaworthy, even in the case that their usage has not become common practice.[30] Non-compliance with these new means (regulations) might constitute the vessel unseaworthy in two ways: On the one hand, at least for UK vessels, if a vessel is not carrying certificates such as Load Lines[31] or a radio equipment[32] certificate then that declares that the vessel, among other matters, does not comply with the international regulations, so therefore the vessel will be unseaworthy.[33] On the other hand, if the vessel's construction does not comply with the industry's standards, for example SOLAS, then the vessel will be rendered unseaworthy.[34]

Therefore, considering the purpose of the SOLAS Convention which is a part of the shipping industry, 'to specify minimum standards for the

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28 In due diligence case the judge in *Papera Traders Co Ltd* v *Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118, at p. 127 case said that '…seaworthiness must be judged by the standards and practice of the industry at the relevant time at least, so long as those standards are practical and reasonable…' per Cresswell Judge; see *The Subro Valour* [1995] 1 Lloyd's Rep. 509 at p.516; also the same point in *The Kapitan Sakhrov* [2000] C.L.C. 933, Auld LJ stated: '…the test to be objective, namely to be measured by the standards of a reasonable shipowner, taking into account international standards and the particular circumstances of the problem in hand,' at p.947.

29 The common law implied undertaking requires that the vessel be a seaworthy vessel. There is no implied undertaking that the vessel be a 'safe ship' in UK law, though this is probably is in the USA for American cases; see *Hutton* v *Royal Exchange Assurance* [1971] N.Z.L.R. 1045 Sc.; *The Fiona* [1994] 2 Lloyd's Rep, 506; Woolf v *Clagget* [1800] 170 E.R. 607.

30 As far as British vessels are concerned

31 Schedule 3 of the MSA 1995, this schedule gives effect to the international convention on load lines signed in London on 5 April 1966.

32 These rules were adopted into English law by the Merchant Shipping (Safety of Navigation) regulations 2002 SI 2002/1473, as amended by SI 2004/2110.

33 See *Cheikh Boutros* v *Ceylon Shipping Lines (The Madeleine)* [1967] 2 Lloyd's Rep. 224 where the documentation for the voyage was inadequate and this was held to render the vessel unseaworthy.

34 See *The Miss Jay Jay* [1987] 1 Lloyd's Rep. 32 (C.A.), a design error; namely, using materials during design which were quite unsuitable for the purpose of navigation was held to render the vessel unseaworthy.

construction, equipment and operation of ships, compatible with their safety,[35] the industry's standard of conduct is mandatory by virtue of SOLAS.

SOLAS[36]

The SOLAS Convention sets some rules for the minimum standards for safe construction of vessels and the basic safety equipment necessary to be on board. The Safety Convention, such as SOLAS, has an influence on the objective seaworthiness[37] concept in chartering.[38] The obligation of seaworthiness[39] imposes on the carrier a duty to carry out all reasonable measures in the light of the standards in the industry for the purpose of providing a seaworthy vessel and to ensure the safe state of the vessel.[40] SOLAS regulates these minimum standards for the construction of the vessels and her cargo holds.[41] Materials used should have a particular

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35 The International Safety Organisation. Available: http://www.imo.org/conventions/contents.asp? Topic_id=257& doc_id=647.

36 The generally accepted international regulations, procedures and practices governing ship construction, equipment and seaworthiness which are required by Article 94 and other provisions of UNCLOS to observe are basically those contained in SOLAS, Load Lines Convention and MARPOL.

37 But only to the extent that safety rules and regulations intended to prove safety and protect the ship and cargo on board.

38 Hannu Honka, 'The standard of the vessel and the ISM Code cited as Chapter 4 in Johan Schelin, *Modern Law of Charterparties* (Axel Ax:son Johnson Institute of Maritime and Transport Law, University of Stockholm, 2003), at p.114.

39 Whether implied seaworthiness by the common law or expressed by the carriage conventions, i.e. Hague/Hague-Visby Rules or Hamburg Rules, or by the standard form charterparties.

40 Under the revision introduced by the Merchant Shipping Act 1974, there was a change of terminology from an unseaworthy ship as in the old s457 M.S.A. 1894 to a 'dangerously unsafe ship' under s44 M.S.A. 1988 in respect of a vessel 'unfit to go to sea'. This certainly seems to return it closer to the concept of seaworthiness than ambiguous term 'unsafe' which fails to specify safety regarding the ability to go to sea and safety for the crew, vessels and cargoes. The most recent section of M.S.A. 1995 has altered all the above section numbers.

41 See *The Princess Victoria* [1953] 2 Lloyd's 619. Inadequacy in the stern doors were of

standard and construction. It should also be designed in such a way to withstand the perils of the sea and the weight of the cargo so as to protect the lives of personnel and the cargo from damage and/or loss.[42] As regards to the equipment of the vessel, they should be of an approved type of machinery with enough spares on board in case of failure; for example, navigational equipment, there should be a spare or stand-by equipment ready to be used at all times. This indeed includes the electric insulations. Vessels should be fitted with adequate means of fire detection and protection along with different means of extinguishers to fight fire.[43] Life-saving appliances should be adequate to ensure that the crew are prepared to save their life and others in case of emergency.

SOLAS also contributes to preventing pollution of the environment. If its provisions are not properly observed, this might equally constitute

a poor design. The vessel was not capable of coping with the ordinary perils of the sea and sank in the Irish Sea. The court of appeal upheld the lower court that the vessel was unseaworthy due to the inadequate construction of the stern doors which made her unable to cope with the peril of the sea, per Lord MacDermott, CJ. Also see *The Marine Sulphur Queen* [1973] 1 Lloyd's 88. The court held that the vessel breached building regulations and was therefore unseaworthy. It is important to say that the construction regulations of merchant vessels are extracted from the regulations of SOLAS, Load Lines and classifications society of the vessel; see also Leonard v Leland (1902) 18 T.L.R. 727. During lifeboat drill, a hook fell off and a davit broke. The plantiff, the lifeboat and the hook fell into the water. The jury, due to a defective hook and davit of the lifeboat, has ruled for the plaintiff. The lifeboats, their hooks and davits are regulated nowadays by SOLAS regulation, Chapter III regulation 19-20.

42 See *The Princess Victoria* [1953] 2 Lloyd's 619: inadequacy in the stern doors were of a poor design. The vessel was not capable of coping with the ordinary perils of the sea and sank in the Irish Sea. The Court of Appeal upheld the lower court's decision that the vessel was unseaworthy due to the inadequate construction of the stern doors which made her unable to cope with the perils of the sea, per Lord MacDermott, C.J. See also *The Marine Sulphur Queen* [1973] 1 Lloyd's 88. The court held that the vessel breached building regulations and was therefore unseaworthy. It is important to state that the construction regulations of merchant vessels are extracted from the regulations of SOLAS, Load Lines and classifications society of the vessel.

43 This proposition is discussed below by the examples of *Papera Trades Co Ltd and Others* v *Hyundai Merchant Co. Ltd and Another (The Eurasian Dream)* [2002] 1 Lloyd's Rep. 719, as per Creswell J.; also see *The Star Sea* [1995] 1 Lloyd's Rep. 651. (When the fire broke out in the engine room, the master did not know how to operate the CO2 system to fight the fire. Tuckey J. held that the vessel was unseaworthy due to an incompetent master).

a lack of due diligence. [44]

This again makes no difference when comparing SOLAS with the duty to exercise due diligence, which is the effort of a competent and reasonable carrier or any person working for him to provide a safe and seaworthy vessel to fulfil the requirements set out in Article III r.1.[45]

Due diligence obliges the shipowner to carry out all reasonable measures in the light of the standards of the industry for the purpose of providing a seaworthy vessel and to ensure the safe state of the vessel.[46] In this manner, the safety of shipping is, at present, governed principally by the international industry standards, i.e. conventions and regulations. SOLAS is therefore one of those standards.[47] However, is SOLAS, being a standard bearer of the industry, adequate enough to govern the major part of aspects of seaworthiness?

The effect of SOLAS' deficiency on seaworthiness

A carrier has equipped his vessel according to SOLAS, but due to the

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[44] Both Safety of Life at Sea and the Load Line Conventions deal with safety and seaworthiness of the vessel; see Carbett H. Spurin *The Law of International Trade and Carriage* Chapter 9, at p. 33. Available: electronic book cited in The National Academy for Dispute Resolution website: <www.nadr.co.uk/articles/ articles.php?category=4>. The same point was raised by Philippe Boisson *Safety at Sea: Policies, Regulations & International Law* (Bureau Veritas, 1999), 197.

[45] W. Tetley, *Marine Cargo Claims* 4th edn. (Éditions Yvon Blais, 2008), Chapter 15, p. 876. He defines due diligence as 'genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Article III (1) of the Hague/Hague-Visby Rules.' See also, N. J. Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Zutphen: Uitgeverij Paris 2008).

[46] Under the revision introduced by the Merchant Shipping Act 1974, there was a change of terminology from an unseaworthy ship as in the old s.457 M.S.A. 1894 to a 'dangerously unsafe ship' under s.44 M.S.A. 1988 in respect of a vessel 'unfit to go to sea'. This certainly seems to revert more closely to the concept of seaworthiness than ambiguous term 'unsafe', which fails to specify safety regarding the ability to go to sea and safety for the crew, vessels and cargoes. The most recent section of M.S.A. 1995 has altered all the above section numbers.

[47] W. Tetley, *Marine Cargo Claims* 4th edn. (Éditions Yvon Blais, 2008), Chapter 15, p. 876. He defines due diligence as 'genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Article III (1) of the Hague/Hague-Visby Rules.' See also, N. J. Margetson, *The System of Liability of Articles III and IV of the Hague (Visby) Rules* (Zutphen: Uitgeverij Paris 2008).

deficiency of SOLAS, the vessel is still regarded as unseaworthy despite the fact that such unseaworthiness is not a lack of the carrier's action to provide a seaworthy vessel, but merely due to the inadequacy of regulations. Case law illustrates the point.

For instance, in *The Eurasian Dream* case, the standard of the industry set by the SOLAS Convention was clearly questioned. In *The Eurasian Dream*, the court criticised the safety standards of the vessel, in particular the inadequacy of her safety equipment. SOLAS had set out the required amount of safety equipment to be placed onboard. A fire broke out causing the vessel and its cargo to be a totally lost. The court held that, *inter alia*, the vessel was unseaworthy for not being fitted with the adequate number of walkie-talkies as part of its safety equipment, which would have assisted the crew to communicate with each other in case of an emergency.[48] Despite the owner of the *Eurasian Dream* having complied with the standards of SOLAS by providing the exact number of walkie-talkies required, the court nevertheless found that the owner had breached the obligation to exercise due diligence in providing an adequate number of walkie-talkies. The vessel, therefore, was unseaworthy.

Even with the aid of the International Safety Management System (ISM) Code,[49] such problems might not have been discovered and would contradict the statement that ISM 'is a system used daily which is actually growing and developing through a process of continual improvement.'[50]

Compliance with the SOLAS Convention does not guarantee the seaworthiness of a vessel in all respects because the compliance with the

[48] Another example of SOLAS deficiency. For instance, SOLAS required a chart as a replacement of the regular paper chart. The same regulator might not have adequate or clear directions on the use of the new equipment. Eventually, it will result in a response by another regulator to produce guidelines promoting safe use of such equipment.

[49] Hannu Honka, 'The Standard of the Vessel and the ISM Code' cited in Johan Schelin (ed) *Modern Law of Charterparties* (Jure AB, 2003). It was noted that some ISM Clauses, such as the BIMCO Standard ISM Clause: 'seems to leave room for uncertainties. In any case, it is clear that the owner will not be liable on the basis of this clause, unless there is a causal link between the breach of the clause and the damage, expenses and delay.' at p.112.

[50] Philip Anderson *ISM Code: A Practical Guide to the Legal Insurance Implications* (2nd edn, 2005), Chapter 1, para, 1.1.

shipping industry's conventions, such as SOLAS, does not have the same value in international law. For instance, the direct effect of the incompliance with the regulations of the industry by the shipowner may be prone to the vessel being refused to commence her voyage from the port in question by denial to provide the vessel with clearance certifications and documents, or due to incompliance of such regulations including the shipowner incurring a fine or being refused entry to the port of destination. The consequences of incompliance/compliance with such regulations are not clear whether it amounts to a breach of seaworthiness or not. Subsequently, it may affect their legal bearing and the practical effectiveness on the obligation of due diligence to provide a seaworthy vessel. In other words, the shipowner on one hand will be reluctant to comply with such regulations if it is not enforced under the flag of the vessel or included in the terms of the particular contract. On the other hand, the judgement by the port state in regard to whether the vessel is unseaworthy/seaworthy, due to incompliance with SOLAS regulations, will be determined by the notion of the port inspector when having in mind that the SOLAS Convention is not a decisive evidence of seaworthiness. The judgment of such inspector,[51] indeed, will be affected on the way that such a flag state implements SOLAS to its law.[52]

For example, the English court in *The Eurasian Dream* held that the SOLAS Convention was not a decisive evidence of seaworthiness. When the fire started, the ship was offloading a cargo of cars in Sharjah. The crew were not able to contain the fire and as a result the vessel was abandoned and towed away from her berth. She was eventually lost. The cargo owners claimed for the cargo damage arguing that the vessel was unseaworthy. The court held that the vessel was unseaworthy, *inter alia*, due to the inadequacy of its safety equipment; *The Eurasian Dream* needed more walkie-talkies for communication and more sets of breat-

[51] This, in turn, might result in a dispute as to whether the refusal or delay of the vessel caused the failure of the carrier to exercise due diligence to provide a seaworthy vessel.

[52] See Baris Soyer and Richard Williams, *Potential legal ramifications of the International Ship and Port Facility Security (ISPS) Code on Maritime Law* (2005) LMCQL 515, at 525.

hing apparatus to fight the fire, despite the fact that *she* had complied with the SOLAS Convention by possessing the required amount of safety equipment, i.e. walkie-talkies and fire-fighting equipment at the time of the incident.

What can a shipowner do to overcome the inefficiencies of SOLAS?

The judge in the *Eurasian Dream* case alluded to the point that the shipowner had exercised the required standard of due diligence to provide a seaworthy vessel and to identify the 'risk' of unseaworthiness to 'establish safeguards' to avoid loss or damage from that unseaworthiness.[53] Mere compliance with the one of the industry's standards, i.e. the SOLAS Convention, is not conclusive as having exercised due diligence by the carrier, nor is it sufficient for the vessel's physical seaworthiness. However, that suggests the following: the carrier needs to determine his vessel's seaworthiness by assessing the standard of seaworthiness, not merely at the outset of the voyage, i.e. before and at the beginning of the voyage, but at all times and not merely relying on meeting the industry regulations or recommendations, such as SOLAS. He should draw on the inherent specialised knowledge that he possesses or ought to possess regarding the fitness of his vessel and by so doing[54] will know the standard of care necessary to fulfil the obligation of seaworthiness. The point that 'the standard of seaworthiness must rise with improved knowledge of shipbuilding and navigation'[55] is not fully embraced by SOLAS. That is

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53 See the ISM Code para. 1.2.2.2.

54 Knowledge is known exclusively to the carrier/shipowner, such as the stability of the vessel. See *Onega Shipping & Chartering BV* v *JSC Arcadia Shipping (The SOCOL 3)* [2010] EWHC 777. The improper stowage of cargo had affected the vessel's overall stability on departure from the last loaded port in Finland. This was an aspect that only the chief officer and master would have known about, not the charterers. The Judge, Mr Justice Hamblen, found that there had been a failure on the part of the master and chief officer to supervise the cargo stowage properly with the ship's stability and ultimate seaworthiness in mind. See also Donaghy, T. 'There goes the deck cargo', *Maritime Risk International* (12 Nov. 2010).

55 *Burges* v *Wickam* (1863) 3 B. & S. 669, at p.693, per Blackburn J.

to say, relying exclusively on the regulations of the shipping standards (such as SOLAS) to determine the satisfactory standard of seaworthiness is an erroneous approach.[56] Those regulations, especially technical ones such as involving fire and safety equipment,[57] mostly evolve from reactions[58] to maritime incidents and are therefore the initiator or amendments to the regulation. As a result, the adherence to them by the carrier will not satisfy the obligation of seaworthiness.

What can be done to improve the current situation and reduce malpractice regarding shipping standards?

Maintaining the standard of shipping by the use of particular standard forms

Since the introduction of the Hague/Hague-Visby Rules, there have been tremendous technological developments with regard to electronic aids and navigation. New methods of performing contracts of carriage have become possible. Thus, 'the standard of due diligence [to provide a seaworthy vessel] required from the carrier gets higher and higher

[56] It is important to note that the private sector plays an important role nowadays in the enhancement of the safety and seaworthiness of vessels. The International Chamber of Shipping, for example, issues recommendations to reinforce precautionary measures during loading or discharging operations. See *Long Campaign* Lloyd's List, 7 Sept., 1995; the international Cargo Handling Coordination Association (ICHCA), to ensure proper performance of operations. See 'Pressure grows for action on overloading/discharging practices' *International Bulk Journal* Dec. 1994, 99-101; Insurers also have large contributions to enhance the proper practice that failed to reflect due diligence or due care. See for example *Figures hide why bulk carrier sinkings are still a problem* Lloyd's List, 14 Aug. 1992.

[57] Horrocks, C. *Challenges Facing the Shipping Industry in the 21st Century* Sixth Annual Cadwallader Memorial Lecture (15 Sep. 2003) at p. 3.

[58] For example, the origin of the ISM Code was as a reaction from representatives of the UK during the 15th session of the IMO in November 1987. They requested that the IMO immediately investigate designs to improve the safety of roll-on/roll-off ferries. The Secretary of the General International Chamber of Shipping said: 'It is often said that advances in the technical regulation of shipping tend to follow a casualty - that the maritime sector responds to, rather than anticipates its problems.' Horrocks, C. *Challenges Facing the Shipping Industry in the 21st Century* Sixth Annual Cadwallader Memorial Lecture (15 Sep. 2003) at pp. 3-4.

everyday'.[59] It is debatable whether seaworthiness requires the shipowner of an older vessel to upgrade its machinery and equipment in order to satisfy the existing standards of seaworthiness. A shipowner cannot be expected to constantly keep up with all the latest expensive advanced technology. However, the shipowner is to some extent required to furnish his vessel with some recent developments in the industry. The requirement of a 'reasonable shipowner' in preparing or providing a seaworthy vessel is determined objectively to change over time[60] and with technological developments.[61] Further, it was argued that the shipowner is obliged to implement such new technology that will affect the seaworthiness of the vessel, if it is directly related to the shipping industry as is the case with the International Safety Management System (ISM) Code[62] which has become mandatory.[63] Ignorance of the provisions of the International Maritime Organisation (ISM, SOLAS, MARPOL and so on) may point to the violation of seaworthiness duty on the part of the shipowner in connection with safe operation of his vessel.[64] That said, there has been judicial reluctance to include the development of machinery and equipment of the industry as part of the shipowner's duty to provide a seaworthy vessel,[65] provided that those technological advances are not yet standard for a particular carriage.

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59 Hakan Karan (2005) *The Carrier's Liability under International Maritime Conventions: The Hague, Hague-Visby, and Hamburg Rules* (Edwin Mellen Press) 282.

60 Sze Ping-fat, *Carrier's Liability under the Hague, Hague-Visby Rules* (Kluwer Law, 2000), 60.

61 See W. E. Astle *Shipping and the Law* (Fairplay Publication, 1980), 87.

62 See W. E. Astle *Shipping and the Law* (Fairplay Publication, 1980), 87.

63 W. Tetley, *Admiralty Law*, 84, Sze, *Liability*, 60.

64 Sze Ping-fat *Carrier's Liability under the Hague, Hague-Visby Rules* (Kluwer Law International, 2000), 60. It might be right to say that the ISM Code strengthened the connection between the shipping standard and seaworthiness, but does not create the view that the shipping standard is part of the seaworthiness evaluation. However, the code may provide the basis for deciding fault or lack of due diligence.

65 *President of India* v *West Coast Steamship Company (The Portland Trader)* [164] 2 Lloyd's Rep. 443. (United States case); *American Smelting & Refining Co.* v *S. S. 'Irish Spruce' and Irish Shipping Co. Ltd (The Irish Spruce)* [1976] 1 Lloyd's Rep. 63, at p. 68. (US District Court of New York).

Nonetheless, an obligation in the current law on the part of the shipowner to provide a seaworthy vessel accompanied by a clause similar to Clause 52 of the Shelltime charterparty[66] would put the shipowner at risk of breach of due diligence (to provide a seaworthy vessel) as it puts a burden on him to exercise all the practicable precautions, i.e. modify or fit new equipment according to the shipping industry in order to bring it in line with the recently developed standards of the industry. For example, *The Elli* and *The Frixos*,[67] although a recent case concerning not only SOLAS but also MARPOL. However, it illustrates the fact that a shipowner must modernise to meet the latest amendments of the standards of the industry. The owner of the two oil tankers, *The Elli* and *The Frixos*, time-chartered the vessels on a Shelltime 4 form. The tankers were described as 'double-sided'. After approximately 20 months, and before the end of the charter period, new MARPOL Regulations 13F, 13G and 13H came into force which required all oil tankers to have the relevant documents relating to the physical condition of the vessel in order to carry heavy grade oil cargo. Vessels should be fitted with double bottoms or double sides, extending along the total length of the cargo tanks. The double bottom tanks of *The Elli* and *The Frixos* did not run the entire length of the cargo tanks. Instead, bunker tanks protected the last two tanks (slops tanks) rather than ballast tanks as required by the new MARPOL regulations. It was held that the warranty in Clause 52 of the charter applied to both upon and after delivery of the vessels to the charterer. Furthermore, the same clause explicitly applied to future sailings and expressly referred to the SOLAS and MARPOL Conventions. Thus the vessel was unseaworthy for not complying with the new amendment of MARPOL as required in Clause 52.[68] It is arguable as to whether

[66] Clause 52 of the Shelltime 4: 'Owners warrant that the vessel is in all respects eligible under application (*sic*) conventions, laws and regulations for trading to and from the ports and places specified in Clause 4 of the Charter Party…but not limited to, MARPOL 1973/1978 as amended and SOLAS 1974/1978 as amended and extended.'

[67] *Golden Fleece Maritime Inc* v *ST Shipping and Transport Inc (The Elli* & *The Frixos)* [2008] 2 Lloyd's Rep. 119; [2009] 1 All ER (Comm) 908.

[68] It is difficult to argue that obtaining a document which was not required at the time of delivery can be part of an obligation to 'maintain the vessel in or restore her to' the condition in which she was at delivery.

the industry standards always meant that the standard of due diligence resulted in a seaworthy vessel.[69] This statement would be beyond doubt if a clear obligation in the contract of carriage enforced the shipowner to adopt the new regulations. This is commensurate with saying that the obligation is an ongoing one. But is it enough to overcome the above problems and adopt future shipping industry and therefore add a provision in the charterparty to impose a continuous obligation on the carrier?

Because the obligation of obtaining a document relating to SOLAS or other certificates of the IMO were not required prior to the commencement of the voyage or at least at the time of delivery, this does not equate to the obligation to 'maintain the vessel in or restore her to' her condition on delivery. Therefore, the standard of seaworthiness does not render it to be adequate even if a provision in the charterparty is imposing a continuous obligation of seaworthiness for the entire voyage without a maintenance clause similar to Clause 3(a) in the Shelltime 4. For that reason, the seaworthiness standard will be based on a standard that was set at the time before and at the beginning of the voyage or at her delivery which is not an adequate standard if a new regulation is being enforced after the commencement of the voyage. Thus, it would not be regarded as a duty after the beginning of the voyage. Furthermore, not any maintenance obligation would be a solution. For example, a form such as NYPE[70] would not impose adequate obligation of seaworthiness to solve the problem even if requiring the owner to maintain the vessel in 'a thoroughly efficient state in hull and machinery during service', because it omits the requirement that she be efficient for the service, rather than

[69] In some countries, they have taken the lead in promoting safety and seaworthy vessels by adopting new navigational and other safety requirements in advance of the international conventions. Ropner, W. G. D. *Promoting High Standards at Sea - The Shipowners' Contribution: a paper delivered in Fitness at Sea* - The International Conference on Seaworthiness in 1980 organised by Newcastle University, at p. 44.

[70] NYPE 1993 cl.6, also Clause 1 of the NYPE. It was said that 'New York Product form differs from the Shelltime form in that it requires to maintain the efficiency of the ship for the service, rather than her fitness.'

her fitness.[71] The same is relevant with the Shelltime 4[72] combined with the obligation of due diligence. The carrier will be only required to exercise due diligence to maintain or restore the vessel to the original status as was prior to the commencement of the voyage, unless if Clause 3(a) is being added to the charter and is not confined to hull, machinery or equipment which has deteriorated since delivery. If a new SOLAS requirement came into force or it was suggested to fit new equipment or to modify the structure of the vessel, then the carrier has to take a diligence effort to restore such changes.[73]

The standard is, however, said to be raised if a new regulation under the conventions comes into existence requiring the shipowner to carry out further tasks, such as modification to the hull, other than those previously required for maintaining the vessel. This is only possible if there is a clause in the charterparty contract obliging the shipowner to do so, i.e. Clause 52 of the Shelltime 4. Otherwise, the owner is obliged to carry out such modification before a new contract of carriage is agreed, when the regulation would be part of an initial obligation of due diligence.[74]

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71 See Terence Coghlin, Andrew W. Baker, Julian Kenny and John D. Kimball *Time Charter* (6th edn., 2008), para. 11.17.

72 Words appear in Line 6, introducing Clause 1 and is Line 45. See *Time Charters*, para.38.23. See *The Fina Samco* [1994] 1 Lloyd's Rep. 153, in a report of the first instance court Colman J. stated that: 'The clause expressly contemplates that in the course of the charter service the passage of time or wear and tear or an event make it necessary for the owners to take action so that the vessel is maintained in the condition which she was required to have on delivery or, having lost that condition, is restored to it. The clause directs itself to a need to act which arises *after* delivery. It assumes that at delivery the vessel did have the required characteristics but that after delivery something has happened which either has already caused the vessel to lose one or other of those characteristics or will in future do so unless the owners act to maintain that characteristic. It is in those circumstances that the owner's duty to exercise due diligence arises.' at p.153. See also *The Trade Nomad* [1998] 1 Lloyd's Rep. 57, upheld the court of appeal decision [1999] 1 Lloyd's Rep. 723.

73 *The Elli* and *The Frixos* [2008] 1 Lloyd's Rep. 262 [2008] 2 Lloyd's Rep. 119.

74 To that extent, the charterer will be prevented from trading to some parts of the world. *Golden Fleece Maritime Inc* v *ST Shipping and Transport Inc (The Elli* & *The Frixos)* [2008] 2 Lloyd's Rep. 119, at p.127. Sir Anthony Clarke MR concluding 'at a particular South East Asian country suddenly required all fuel oil carrying vessels to be doubled hulled.'

The Elli and *The Frixos* case confirmed that the court will not take into consideration developments in the industry that might take place any time after the vessel commences her voyage during the course of the charter period as part of the seaworthiness obligation even if the obligation was a continuous one. Therefore, it was noted that considerations of expediency are already reflected in the charterparty contract and to add a clauses to them would indicate an extension of the shipowner's obligation in maintaining the fitness of the vessel rather than the basic obligation of the Hague/Hague-Visby Rules.

If a contract of carriage is governed by the Hague/Hague-Visby Rules, the shipowner tends to rely mainly on the case law that states: 'It is not the duty of an owner to adopt or use the latest inventions or regulations'[75] which seems to make the need for new equipment non-essential. In other words, the shipowner would be reluctant to adopt new provisions of SOLAS or any other regulations; for example, to fit new equipment when their presence is essential to the vessel's seaworthiness,[76] such as radar equipment[77] or a Loran system.[78]

Perhaps, if there is no binding system in the context of the contract

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[75] *F. C. Bradley & Sons Ltd* v *Federal Steam Navigation Company, supra* , see Lord Justice Scrutton at pp. 454-455. See also *Virginia Co.* v *Norfolk Shipping Co.* 17 Com. Cas. 277 at p. 278.

[76] *The T. J. Hooper* 60 F.2d 737, 1932 AMC 1169 (2 Cir. 1932), Hand J. decided that tugs should be equipped with radios, although their use on such vessels at that time was still not customary. Also see Professor William Tetley *Marine Cargo Claims* (4th edn, 2008), Chapter 15 *Due Diligence to Make the Ship Seaworthy* at p. 42, taken from Professor Tetley's website: <www.mcgill.ca/maritimelaw/mcc4th/>.

[77] In *President of India* v *Coast S.S. Co (S.S. Portland Trader)* 213 F. Supp 352 at pp.356-357, 1963 AMC 649 at p.654, [1963] 2 Lloyd's Rep. 278 at p.281 (D. Ore. 1962), The District J commented on the desirability of vessels having radar on board. The judge warned however that in the near future it was most likely that radar would become a condition of seaworthiness. The court said that, with the brilliant clarity of hindsight, it was easy to rationalise how the disaster could have been avoided if the vessel had been equipped with either one of these modern aids to navigation (radar or Loran), but the court has the duty to determine the seaworthiness of the vessel from the standpoint of the commencement of the voyage rather than measuring the standard by what happened at the time of occurrence.

[78] A subsequent judgment on this question is *Argo Merchant Lim* Procs. 486 F. Supp. 436 at p.459. 1980 AMC 1686 at p.1702 (S.D. N.Y. 1980). Loran was not deemed essential.

of carriage, compliance with new non-enforced regulations will result in shipowners relying on the 'slowness of the traditional procedure for adoption and entry coming into force of the international regulations and conventions.'[79] Nonetheless, adherence to the new standards of an existing law will only be imposed during the initial obligation of due diligence.

In order to arrive at a proper conclusion, one may have the notion that there is a close analogical point between, on the one hand, case law that rendered the carrier/shipowner liable for unseaworthiness due to damage caused by not providing their master and crew with diagrams or plans of the ship's recently fitted equipment or modifications,[80] or, on the other hand, the future readiness of the court to render the vessel unseaworthy for not fitting the equipment that is required by the industry.

This section suggests that the current law in seaworthiness needs improvement. This will be the following point.

Problems of the current law - the need for improvement

The Hague/Hague-Visby Rules state 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;

[79] Sir Michael Wood: *Lawmaking and implementation in International Shipping: Which Law Do We Obey?* Tenth Cadwallader Memorial Lecture, 1 October 2008. Cited: <www.shippinglbc.com/content/uploads/ documents/cad10_mensah.pdf>.

[80] See *Robin Hood Flour Mills Ltd* v *N. M. Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Rep. 276.

The above article of the Hague/Hague-Visby Rules illustrates that the obligation of due diligence expires upon sailing from the port of loading and does not apply at each stage of the voyage.[81] Any new requirements under the regulations that govern the standard of the industry will not be adopted after leaving the load port. This is normally the case for an obligation under the Rules which starts and is ongoing until the time the vessel commences her voyage. As this shows, the Rules give no obligation on the part of the shipowner to imposing an ongoing exercise of due diligence, i.e. adopting new regulations during the sea voyage. This apparently avoids the important ongoing duty to keep the vessel in line with the latest regulations, especially those important regulations which, if contravened, will constitute unseaworthiness.

a) The need for new Rules - prospective of container shipping

The English court has expressed the relevant test as being: 'would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?' Equally, the test to be applied under the Rotterdam Rules for a vessel that has not adhered to new regulations which may affect her seaworthiness is: 'would a prudent shipowner, if he had known of the new regulations, have continued the intermediate voyage without affecting any possible compliance?' In the age of containerised shipping, it seems that vessels are more than likely to call into intermediate ports.[82] This is where the ongoing obligation of due diligence under the Rotterdam Rules becomes more important in solving the problems of unseaworthiness that might arise due to non-compliance with the new regulations, especially in the age of containerised vessels which were invented before the drafting of the Hague/Hague-Visby Rules. Under the later Rules, it is possible that one of two adjacently loaded containers could be subject to different findings on the question of the liability of the carrier, depending on the port of loading.

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81 Article III r. 1.

82 It is common for container vessels to be involved with large numbers of loading/discharging ports. For instance, a container vessel may load cargo from the Far East destined to North Africa and en route she may call at two ports in the Middle East.

For instance, assume a vessel commenced her voyage from Port A to Port C and called at Port B with perishable refrigerated cargo on board. She loaded the container in Port A and was classed as being seaworthy at that time, and then sailed to Port B where she loaded another container destined for Port C. Prior to sailing to Port C, a new regulation came into force. When she arrived at Port C, the vessel was detained for some days by the port state for not having a valid certificate reflecting the compliance with the new regulation which resulted in the refrigerated cargo being damaged. Subsequently, the vessel would be regarded as seaworthy for the container loaded in Port A, whereas she would be considered unseaworthy for the container that was loaded in Port B. The shipowner,[83] therefore, will incur the liability for unseaworthiness for breaching the overriding obligation, thus he is not allowed to use any of the exceptions under Article IV r. 2. On the other hand, for the container loaded in Port A, the shipowner is able to use exceptions under the Article IV r. 2 despite the damage to the cargo which resulted from the same reasons but the effect was different for each of the owners of the containerised cargo.[84] Therefore, the change brought about by the context of Article 14 of the Rotterdam Rules is likely to lead to fairer consequences in such circumstances. If the Rotterdam Rules were incorporated into the charterparty, the court in a case similar to the above would, hypothetically, undoubtedly hold the shipowner in breach of exercising due diligence to provide a seaworthy vessel. There are reasons why an English court would reach a similar decision and would not find a less favourable compliance with a new regulation, such as SOLAS. First, the English court was not unfamiliar with the ongoing duty that was applied on certain occasions to time charterparties, which contained a clause

[83] In *Leesh River Tea Co.* v *British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193, it was held that, where seawater damaged cargo due to the pilferage of the cover plate of a storm valve at an intermediate port while loading of another cargo, there was unseaworthiness after loading within the scope of Article 4(2)(q) of the Hague Rules.

[84] This principle is applicable even where the containerised cargoes are subject to the same contract of carriage but loaded at different neighbouring ports for the same destination. See F. Berlingier *The Liability of the Carrier by Sea in Studies on the Revision of the Brussels Conventions on Bills of Lading* (Genoa, 1974), 68 and 95.

obliging the shipowner to ensure the fitness of his vessel on an ongoing basis, even in the course of the voyage after the vessel had commenced her trip.[85] This means that if a case of unseaworthiness occurred after leaving the port of loading, the shipowner, his servants or agents should exercise due diligence to bring the vessel to a seaworthy state.[86] Secondly, the law of doctoring of stages, under common law, is believed to be a good law. It provides some commercial flexibility for vessels to commence their voyage from their loading port without incurring superfluous delays by complying with charterparty obligations to provide a seaworthy vessel. This is, for example, when the condition of the vessel has a deficiency or cannot comply with the regulations at the loading stage which may not amount to a breach of the duty of seaworthiness, provided it is remedied by the sailing stage or at an intermediate stage.[87] By analogy, the common law[88] doctrine of stages with the maintenance of obligation means that the English courts would not find it difficult to adopt a system that renders the vessel seaworthy on calling in at intermediate ports, not only for loading/unloading, but in case of a container vessel exercising due dili-

[85] Maintenance clauses, such as NYPE 1946 charterparty in lines 36-38, state the following: 'that the owners shall maintain the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.' See also NYPE 93 Clause 6 lines 80-82. BALTIME 1939, Clause 3 lines 43-48. GENTIME Clause 11 lines 263-267. Also see the above case *Golden Fleece Maritime Inc* v *ST Shipping and Transport Inc (The Elli* & *The Frixos)* [2008] 2 Lloyd's Rep. 119.

[86] *Snia* v *Suzuki* (1924) 17 Ll. L. Rep. 78, Greer, J. said: 'though that does not mean that she will be in such a state during every minute of the service, it does mean that when she gets into a condition when she is not thoroughly efficient in hull and machinery they will take, within a reasonable time, reasonable steps to put her into that condition' at p. 88.

[87] *The Quebec Marine Insurance Company* v *The Commercial Bank of Canada* (1869-71) L.R. 3 P.C. 234. Lord Penzance stated: 'The case of *Dixon* v *Sadler* and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well-recognised, and distinctly separate stage of the voyage.' *The Vortigern* [1899], p.140.

[88] The charterparty doctrine of stages, under which the vessel is required to be seaworthy at the commencement of each stage, is not applicable under the Hague/Hague-Visby Rules. See *Leesh River Tea Co.* v *British India Steam Navigation Co.* [1966] 2 Lloyd's Rep. 193. A vessel was held not to be unseaworthy within the meaning of Article III when the cargo was damaged by the surreptitious removal of a storm valve plate by a person unknown while the vessel was calling at an intermediate port.

gence in complying to the latest regulations, such as fitting a small piece of equipment or adding an important publication to the documentations of the vessel, for the purpose of maintaining the obligation of seaworthiness during the course of the voyage. It is widely known that nowadays, ports are well-equipped with agents and ship chandlers who are able to provide the vessels with supplies and repair services during their loading/unloading operations.

b) Potential effect of the Rotterdam Rules on the obligation of seaworthiness

This raises the issue as to whether the advent of the Rotterdam Rules will lead to a rise in the standards shown by the shipowner and to be proactive in furnishing his vessel to a higher standard, i.e. adopting the new regulations of the industry, rather than to react to and adopt them at a later stage. Consequently, he will avoid the breach of the continuous due diligence obligation which is likely to occur. The ISM Code requires the shipowner to establish and maintain procedures for repairs and scheduled regular maintenance for his vessel and to ensure that she is fit and complies with the applicable rules and regulations in a timely manner in respect of the trade, cargo and crew. However, the industry, for newly emerged regulations, allows some flexibility for the shipowner to comply.[89]

The case would be different under a contract of carriage that incorporates the Rotterdam Rules. The additional words 'and during the voyage by sea' in context of Article 14 has addressed an ongoing due diligence to make the vessel seaworthy throughout the course of a voyage. The Rules are expected to raise the standard of due diligence and improve the position of the cargo interests for many reasons. On the one hand, the effect of the Rotterdam Rules, if it was incorporated to the bill of lading or carriage contract, will set aside flexibility in the regulation in regard to their compliance. The obligation to exercise due diligence to

[89] For example, the phasing out of single hull tankers for categories 2 and 3 built in 1984 or later to be allowed to sail until 2010. Also, the IMO does not have to penalise failure to comply. See 'IMO to avoid flag sanctions', *Lloyd's List*, 1 Sept. 1998.

make the vessel seaworthy 'at the beginning of, and during the voyage'[90] will equally amount to an express clause[91] that may be surpassed by the obligation 'during the voyage' over the granted flexibility to comply with the regulation instanced by *The Elli* and *The Frixos* when the Court of Appeal's judgment stated that: 'the vessel is in all aspects eligible under applicable conventions, laws and regulations for trading to and from the ports and place.'[92] For this purpose, owners will need to comply with the amendments or extensions of the shipping industry, which might affect the trading of the vessel.[93] In addition, the seriousness of the consequences of a particular kind of non-compliance with a regulation that has not yet been enforced brings up the question of whether the shipowner would be keen to prepare for a compliance in advance before the regulation had become compulsory bearing in mind that the 'compliance with conventions such as MARPOL or SOLAS is [n]ot in itself a meaningless concept' which 'relates to compliance while performing the charterparty service …' Clearly, a vessel in dry dock can be modified for compliance more easily than a vessel performing her duty under the charterparty contract.[94]

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90 Article 14 (Specific obligation applicable to the voyage by sea) of the Rotterdam Rules: 'The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to: (a) Make and keep the ship seaworthy; (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage …'

91 Clause 52 of Shelltime 4: 'Owners warrant that the vessel is in all respects eligible under application (sic) conventions, laws, regulations and ordinances of any international, national, state or local government entity having jurisdiction including, but not limited to, the US Port and Tanker Safety Act, as amended; the US Federal Water Pollution Control Act, as amended; MARPOL 1973/1978 as amended and extended; SOLAS 1974/1978/1983 as amended and extended; and OPA 1990.'

92 *Golden Fleece Maritime Inc* v *St Shipping and Transport Inc (The Elli* and *The Frixos)* [2008] EWCA Civ 548, para. 24.

93 See *Golden Fleece Maritime Inc* v *St Shipping and Transport Inc (The Elli* and *The Frixos)* 1 Lloyd's Rep. 262. Where the inconsistency appears in clause 1(g) between the opening words in the heading 'At the date of delivery of the vessel under this charter' and the requirement within the wording in para. (g) to have 'on board all certificates, documents … required from time to time' was surpassed by the Court of Appeal by giving prevalence to the particular words in sub para. (g) over the general words in the heading of para. 1, on the basis that 'the particular should prevail over the general.'

94 The nature of the intended voyage may affect the stringency with which the ship is

Therefore, this will make the shipowner keen to comply with the regulations prior to the date of enforcement.[95] On the other hand, commercially speaking, on some occasions it would be more convenient for the shipowner to comply with the regulations in advance of entering into a contract of carriage, such as a liner contract. At a later stage, during the course of performing the contract of carriage, the vessel might be constrained when trading between ports that have no facilities, such as a dry dock, from providing the services required for compliance. It is worth stressing that *The Elli* case alluded to the ongoing obligation. This will make shipowners the bearers of the cost of compliance as well as incurring any financial loss attributed from a delay in compliance.[96] The shipowner, being contractually responsible (Rotterdam Rules), would raise the burden of the obligation by making him more conscious of investing in an earlier compliance with the relevant regulations.

Furthermore, the standard of 'due diligence of a prudent shipowner, as at the relevant act or omissions, must not be judged in light of hindsight.'[97] It would not be necessary for a shipowner of container vessels to appreciate when a regulation comes into force if the prudent shipowner had complied with such a regulation in advance, prior to the date of enforcement. The shipowner would have set a proper system within the

examined before sailing. See for example *The Assunzione* [1956] 2 Lloyd's Rep. 468 at p.487.

95 The duty of seaworthiness imposed on the carrier under the Rotterdam Rules is that of due diligence, therefore, the test is objective and taking into account international standards and the particular circumstances of the case. See *The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255, at p.266. (where stowage of container under deck is breach of SOLS and IMDG).

96 See Knowles, B. *Who bears the cost of change?* Vol.22 (6), (July, 2008). ISBN: 1742-9404.<

97 The owners of cargo lately laden on board the ship *Subro Valour* v *The owners of the ship Subro Vega (The Subro Valour)* [1995] 1 Lloyd's Rep. 509 at 516. Clark J. stated in this case: the plaintiff cargo-interests claimed damages against the defendant shipowner in respect of loss to a cargo of peas sustained as a result of a fire on the vessel. The court held that the cause of the fire that made the loss was an electrical fault which was in turn caused by mechanical damage to the wiring. It followed that the vessel was unseaworthy at the commencement of the voyage. No one suggested that conditions during the voyage were in any way unexpected or out of the ordinary.

vessel's SMS in order to maintain the regulations as part of the ongoing due diligence obligation and, therefore, comply with any potential regulations to avoid the unseaworthiness of his vessel.[98] It is for this reason that constant regulations and observances are believed to have a similar effect on the normal routine on the vessel's machinery to provide a seaworthy vessel.

c) The differences in the standard of seaworthiness

As mentioned above, the standard that courts should take into consideration in deciding whether the vessel is seaworthy is the shipping standard at the time of the incident. It has been held in the USA[99] that the standard of seaworthiness (that is determined by the shipping standard) is depending to the ports of the state to which the vessel belongs rather than by the needed standard for the contemplated voyage.[100] In other words, the standard of the shipping industry deemed necessary for the seaworthiness of the vessel is not determined by the need to make the vessel fit for the peril of the contemplated voyage, but it is determined in relation to the standard of shipping and safety generally accepted in the trade or the custom and usage of the port or country from which the vessel sails.[101] More importantly, this approach will render a variable standard of sea-

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98 *The Toledo* [1995] 1 Lloyd's Rep. 40 at p.50. Clarke J. held that the shipowner had failed to exercise due diligence to provide a seaworthy vessel before the vessel commenced her voyage, also he added that a reasonable shipowner would have set up a proper system for the inspection and ascertainment of the internal damage or problems which caused the unseaworthiness.

99 See *Tidmarsh* v *Washington Ins Co.* (1827) 4 Mason 439 where Story J said that: 'It seems to me that where a policy is underwritten on a foreign vessel, belonging to a foreign country, the underwriter must be taken to have a knowledge of the common usages of trade in such country as to equipment of the vessel of that class, for the voyage in which she is destined.' Also, see Sir M. Mustill and Gilman, J. C. B. *Arnould's Law of Marine Insurance and Average* (16th edn, 1981), para. 732.

100 This approach is inconsistent with the Marine Insurance Act, Section 39(4): 'A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.'

101 See *Cocoa* v *S.S. Lindenbank* [1979] AMC 283 SDNY. 'Whether a ship is considered seaworthy depends on her state of repair and fitness of her equipment and crew in relation to the standard of safety generally accepted in the trade or the custom and usage of the port or country from which the vessel sails' at p.296.

worthiness for two vessels on the same journey, depending on the port where the vessel starts the journey from. Thus, a British flag vessel could be rendered unseaworthy for an accident that occurred in the Mediterranean Sea because, for instance, it is not fitted with the navigational equipment required by an international convention. Whereas, a Cyprus flag vessel involved in the same incident would not be considered unseaworthy.[102] This hypothetical example shows that the countries consider differently the matters to which seaworthiness extends, according to the nationality of the vessel. This is another reason that charterparty, and particularly those with the SOLAS, ISM or MARPOL clauses, require that the vessel must be continuously maintained to keep abreast of new developments and technology. The effect of this clause would continuously keep the vessel seaworthy for the entire voyage. To overcome this problem the reduction of the standard of seaworthiness that might result from considering the standard according to the country where the voyage started rather than by the peril of the contemplated voyage.

Furthermore, it is worth mentioning that the Rotterdam Rules would turn up to be relevant; not only to circumstances where a defect in a vessel manifests itself requiring repair, but also having an influence on the shipowners to equip their vessels to a higher standard[103] by implementing the latest inventions of equipment to avoid the unseaworthiness in a situation similar to the above hypothetical example.

d) The nautical error

So, as long as the carrier has exercised due diligence to make the vessel seaworthy, he may rely on the exceptions in Article IV r.2 of the Hague/Hague-Visby Rules. Article IV r.2(a) exception reads that 'an act of neglect

[102] Another example is also relevant that a vessel in hot climatic countries is not required to be fitted with equipment for ice areas. Therefore, in applying the American approach, a vessel that sails from a hot climatic port would not be rendered unseaworthy for trading in the Northern Baltic, despite the fact of her incapacity to penetrate ice area in the Northern Baltic.

[103] See Nicholas, A. 'The duties of carriers under the conventions: care and seaworthiness' cited as Chapter 6 in D. R. Thomas (ed) *The Carriage of Goods by Sea under the Rotterdam Rules* (Lloyd's List, 2010), para 6.13.

or default of the Master, mariners, pilot or the servants of the owners in the navigation or the management of the vessel" is of great significance because the general exception clause in the charterparty might not embrace nautical negligence of the crew, whereas Article IV r.2(a) does. Therefore, if the carrier exercises due diligence in recruiting a second officer who holds the required certification and that second officer has the basic ability to perform his job properly but fails to carry them out, he is acting negligently in navigation during his alluded watch and the vessel, as a result, has collided. The carrier is exempted from liability relating to such navigational error. Despite the fact that there is a little chance that the carrier, in case of crew negligence in navigation, is not always exempted, therefore establishing that the crew were incompetent (and, in turn, the vessel unseaworthy) is paramount. A carrier may still have a defence to an unseaworthiness claim if he can prove that he exercised 'due diligence' in providing a competent crew. Carriers must not enjoy the exclusion to navigational errors; they virtually always have control of the evidence at the inception of the case, which can make proving incompetence a daunting task on the part of the cargo-interest. In addition, the above argument suggests that part of keeping the vessel seaworthy is to keep abreast with all shipping standards, which, inter alia, enhance the safety of the vessel and thus prevent from rendering the vessel unseaworthy. A final point, it must be noted that the improvement of communication and navigational technology, i.e. GPS, radar and electronic charts, assist the officer of the watch in navigating safely and therefore, reduces the navigational fault. Therefore, it must be said that a similar increase in demand on the qualitative standard of the vessel must be demanded in the sphere of charterparty.

Over what has been said above, one might ask whether it is fair and sound imposing on the part of the carrier in the charterparty an extended obligation of seaworthiness?

Winn LJ in the court of appeal stated that: 'The law must apply a standard which is not relaxed to cater for their factual ignorance of all activities outside brewing: having become owners of ships, they must behave as reasonable shipowner.' A relaxed standard must not be permitted, where

an unseaworthy vessel is not merely risking her safety and her cargo, but also risking other vessels and the personnel on board as well as the environment. The cost of keeping a vessel seaworthy is not necessarily more expensive than incurring a claim. One can suggest that avoidance of accidents, due to prolonged seaworthiness, helps to promote the adoption of the shipping industry, whereby an increase directly or indirectly of the safety of the vessel results in unnecessary costs incurred from accidents and their consequences on the insurance premiums would be avoided.

The attitude of the court, on the one hand, moves slowly toward adopting a higher standard including the commercial considerations, i.e. cutting costs; on the other hand, it would affect the seaworthiness of the vessel. This would be stopped or reduced by imposing a continuous seaworthiness on the carrier for the entire voyage.

Conclusion

It can be concluded that, on the optimistic side, the shipping industry is proving to be of considerable importance for the vessels' seaworthiness. The shipping industry can be said to increasing, to some extent, the standards of due diligence and eventually minimising the possibility of unseaworthiness of vessels operating at sea. Seaworthiness is a particular aspect that promotes safety and is regulated primarily by the shipping standard conventions, such as SOLAS, Loadline and STCW…etc.

However, the downside is that it is left to the member states to apply these conventions. Some states might apply these conventions more strictly, while others may be more lax, due to poor resources, supervision, enforcement or even inefficiency of convention standards themselves. Hence, seaworthiness cannot be guaranteed, at least by the relevant conventions. Consequently, standards may be lowered and differences appear between member states applying the conventions with varying degrees of strictness.[104]

[104] Shipping companies might be encouraged to register their vessels in flag states which

Furthermore, not only old vessels can be unseaworthy. Accidents can also happen to modern vessels built and equipped to the latest shipping standards but manned by incompetent or inadequate seafarers who have inadequate training from substandard marine schools, or are suffering from fatigue.

In order to improve the effectiveness of shipping industry standards, they should be applied effectively. This can be achieved if the IMO were to create a scheme of sanctions applying to all the states parties to the relevant convention. Such a scheme might include creating a blacklist of shipowners, vessels, marine institutions and especially member states and may withdraw the right to issue certification.[105] Also, the relevant provisions of the convention should be checked by IMO personnel,[106] or it should assign such a task to a reputable entity to check that the standards are strictly applied.

It should be noted that the onerousness of the obligation of due diligence sometimes needs to be re-examined during the voyage. If, for example, the vessel encounters unusual problems then the shipowner should 'engage staff of exceptional ability, experience and dependability'.[107] This indicates a necessity to examine the existing law to extend the obligation of due diligence for the whole voyage, as is the case under the Rotterdam Rules. This might be a difficult route to follow. A clause in the charter party to impose a continuous obligation to make the vessel fit for the entire voyage would be a quicker choice. This should not be considered a problem as the industry had already adopted such an approach which can be seen in some recent charterparties. In fact, the

have neither administration nor independent surveyors and who have promulgated no laws, decrees, orders or regulations and have set no standards for seaworthiness. See Sass, C. A. '*The Enforcement of Safety Standards on Board Merchant Vessels*', pp. 66-77, delivered as a paper in the Fitness at Sea: An International Conference on Seaworthiness, (9-10 September, 1980) held at Newcastle University.

105 Lord Donaldson of Lymington. 'The ISM Code: The road to discovery?' *Lloyd's Maritime and Commercial Law Quarterly* 4 (1998), 526-534 at p. 532. An example was given on the ISM Code.

106 In order for IMO to carry out such a task, the number of its personnel should be increased. Currently, there are only 300 staff.

107 *The Hong Kong Fir* [1961] 1 Lloyd's Rep. 159 at p.169.

continuous obligation is in line with the present and future practice of shipping industries utilising the burgeoning advances in communications and navigation. Common sense says that the development of new regulations and conventions, concurrent with the needs of development to some charterparties as a quick solution in case the Rotterdam Rules adoption is taking time or never to be adopted.

Adopting the Rotterdam Rules is not a choice that can simply be made by the party of the contract; there are several elements that contribute in the process of their adoption, i.e. political, thus, their adoption, if it takes place needs time. Adding a clause in the charterparty might be a better solution; imposing on the part of the carrier a continuous obligation of seaworthiness for the entire voyage rather than limiting it to the onset of the voyage.

Jurisdiction clauses in bills of lading - the latest developments in Italian case law

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Content

Introduction

The two Supreme Court Judgements, n. 731 of 17th January 2005[1] and 3568 of 14th February 2011[2], seem, on the one hand, to have put an end to the longstanding problem of the interpretation of art. 17, par. 1, c) of the Brussels Convention and of art. 23, par. 1, c) of Reg. 44/2001[3] (with special reference to the expression "trade usage") as regards the validity of the jurisdiction clause incorporated in the bills of lading; on the other hand to the interpretation of art. 4, par. 2, of l. 218/1995[4], as regards the

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1 Cass. civ., Sez. Unite, 17th January 2005, *Soc. S.G.L. Carbon c. Agenzia marittima La Rosa S.r.l.* (*The Herceg Novi*) in Dir. mar., 2006, 154, with case note by F. Berlingieri (at 155), and in Giur. it., 2006, 266, with case note by S. Errico, *L'interpretazione evolutiva dell'art. 4, 2° comma, della legge 218 del 1995: la rilevanza degli sui del commerci internazionale* (at. 269); with case note by E. Righetti, *Polizza di carico e requisiti di forma per le clausole di deroga alla giurisdizione: circolazione dei modelli tra disciplina comunitaria e disciplina interna?*, in Int's lis, 1/2007, 29.

2 Cass. civ., Sez. Unite, 14th February 2011, *Fondiaria SAI S.p.a. c. COSCOS S.r.l.*, on Giust. Civ. Mass. 2011, 2, 234.

3 At the time in which the Author gave his speech at the VII European Colloquium on Maritime Law Research, held in Palermo, on 27th and 28th September 2012, the Reg. 44/2001 was in force. On 12/12/2012, the European Parliament and the Council of European Union approved the Reg. 1215/2012, published on OJEU L 351/1 of 20.12.2012. The Reg. 44/2001 has been recast in the new regulation and repealed by art. 80 of the latter.
Specifically, art. 23 of Reg. 44/2001 has been recast, with amendments, on art. 25 of Reg. 1215/2012, but as far as the subject of this paper is concerned, the law reform did not produce any change as the wording of art. 23 par. 1, c) and of art. 25, par. 1, c) are exactly the same.
Given the foregoing, further in this paper, reference will be made only to art. 23 of Reg. 44/2001, for three reasons. Firstly, this paper is the written version of the speech given in Palermo at the VII ECMLR, on 27th September 2012, when Reg. 1215/2012 did not exist; secondly, the Italian Supreme Court, in the judgments under scrutiny in this paper, made express reference to art. 23 of Reg. 44/2001 in the ambit of the construction of art. 4, par. 2, of l. 218/1995; thirdly, as art. 25 par. 1, c) of Reg. 1215/2012 has the same wording as art. 23, par. 1, c) of Reg. 44/2001, the present paper maintains his topical importance.

4 As for the bibliography on art. 4 of the law 31st May, 1995, n. 218 (Riforma del sistema italiano di diritto internazionale privato, in G.U. Suppl. ord. 128 del 3 giugno 1995) see: S. M. Carbone, *La (nuova) disciplina italiana della deroga alla giurisdizione*, in Dir. comm. int., 1995, 553; idem, *Commentario all'art. 4, l. 31 maggio 1995, n. 218*, in *Riforma del sistema Italiano di diritto internazionale privato*, S. Bariatti (ed. by), on

formal requirements of the jurisdiction clause.

The two judgments have laid down the principle of law that in matters of prorogation of the Italian jurisdiction in favour of a foreign judge or court, art. 4, l. 31st May 1995, n. 218 – which requires that the said prorogation is to be proved in writing – must be interpreted in light of art. 17 of the Brussells Convention of 27th September 1968[5], as well as of art. 23 of Council Regulation (EC) n. 44/2001 and of the European Court of Justice case law. As a consequence, according to the Court, it is to be given significance, as suitable equivalent of the prorogation clause in writing, signed by both parties, to their conclusive behaviour, where it proves to be effective, in the field of the international trade – in which the parties act – a usage considering that behaviour able to disclose their

NLCC, 1996, 918; A. Attardi, *La nuova disciplina in tema di giurisdizione internazionale e di riconoscimento delle sentenze straniere*, in *Riv. dir. civ.*, 1995, 775; G. Campies – A De Paulis, *La nuova disciplina della giurisdizione nella riforma del sistema italiano di diritto internazionale privato (l. 31 maggio 1995, n. 218)*, in Foro Pad., 1995, II, 107; V. Starace, *La disciplina italiana dell'ambito della giurisdizione (art. 3-11)*, in Corr. giur., 1995, 1234.

[5] The Convention has been ratified and implemented in Italy by the law 21st June 1971, n. 804. The bibliography on the Brussels Convention and on the Protocols of accession of 1978 and 1982 is extensive. Without demanding completeness, see: S. M. Carbone, *Il nuovo spazio giudiziario europeo. Dalla convenzione di Bruxelles al Regolamento 44/2001*, IV ed., Turin, 2002; L. Mari, *Il diritto processuale civile della convenzione di Bruxelles – Il sistema della competenza*, Padua, 1999; F. Salerno, *La convenzione di Bruxelles del 27 settembre 1968 e la sua revisione*, Padua, 2000; F. Pocar, *La convenzione di Bruxelles sulla giurisdizione e l'esecuzione delle sentenze*, III ed., Milano 1995; G. Gaja *La Convenzione di Bruxelles e la riforma della normativa comune sulla giurisdizione e sul riconoscimento delle sentenze straniere*, in Riv. dir. int. priv. proc., 1983, 741; R. Luzzato, *Giurisdizione e competenza nel sistema della Convenzione di Bruxelles del 27 settembre 1968*, in Dir. comm. int., 1991, 163; with specific reference to the art. 17: S. Bariatti, *Sull'interpretazione dell'art. 17 della convenzione di Bruxelles del 27 settembre 1968*, in Riv. dir. int. priv e proc., 1986, 819; M.J. Bonell, *L'art. 17 della Convenzione di Bruxelles sulla competenza ed il diritto transnazionale*, in Riv. comm., 1997, 214; S. M. Carbone, *La disciplina comunitaria della "proroga della giurisdizione" in materia civile e commerciale*, in Dir. comm. int., 1989, 351; M.B. Deli, *Gli usi del commercio internazionale nel nuovo testo dell'art. 17 della convenzione di Bruxelles del 1968*, in Riv. dir. int. priv. e proc., 1989, 27; S. Pieri, *La disciplina della proroga della competenza della convenzione di Bruxelles nella giurisprudenza della Corte di giustizia della C.E.E.*, in *L'unificazione del diritto internazionale privato e processuale. Studi in memoria di Mario Giuliano*, Padua, 1989, 731; I. Queirolo, *Accordi sulla competenza giurisdizionale: riflessioni a margine di alcune recenti decisioni*, in Dir. mar. 2001, 32.

consensus to the prorogation clause. It follows that, in the field of international maritime transport, where the bill of lading is signed, by trade practice only by the carrier, and not by the shipper, it can be held as adequate proof of the agreement as to prorogation, the bill of lading written on a standard form, issued and signed only by a party, containing the prorogation of jurisdiction clauses in favour of a specific court, when the shipper, in the aware adhesion to a trade usage, has received it without objections and transferred to the consignee.

Even if the two judgments quoted above, at first glance, may seem to proceed in the trail blazed by the Court of Justice of the European Union, in the field of the interpretation of art. 17 of the Brussels Convention of 1968 (as amended by the two protocols of Accession of 1978[6] and 1989[7])

[6] Protocol of Luxembourg of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (in OJEC, L 304 of 30 October 1978), has been ratified and implemented in Italy by the law 29 Novembre 1980 n. 967 in (GU 1st August 1981, n. 210). The Protocol entered into force among Belgium, Denmark, Frace, Germany, Luxembourg and Holland and Italy, on 10 November 1986; among the aforesaid Countries and United Kindom and Northern Ireland, on 1st January 1987. On this Protocol, see: F. Berlingieri, *Entrata in vigore della convenzione relativa all'adesione della Danimarca, dell'Irlanda e del Regno Unito alla Convenzione del 1968 sulla competenza giurisdizionale e l'esecuzione delle decisioni in materia civile e commerciale*, in Dir. mar., 1987, 167; for comments on the Protocol, see: R. Luzzato, *Commento*, in NLCC, 1982, 890; F. Pocar, *Le linee di tendenza della convenzione di Bruxelles sulla giurisdizione e l'esecuzione delle sentenze, dopo l'adesione di nuovi Stati*, in Riv. dir. int. priv e proc, 1990, 5.

[7] Protocol of Donostia – S. Sebastian, 26th May 1989, on the accession of the Kingdom of Spain and the Portuguese Republic to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice with the adjustments made to them by the Convention on the accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Nothern Ireland and the adjustments made to them by the Convention on the accession of the Hellenic Republic. As far as the issue dealt with in this presentation is concerned, it does not need to focus on the complete evolution of the system of the Brussels Convention, but it only needs to focus on the most important stages of the evolution of art. 17. In this respect the consolidated text of the said article 17 is resulting by the emendments brough by art. 11 of the 1978 Protocol and by art. 7 of 1989 Protocol. On the evolution of the system of the Brussels up to the Reg. 44/2001, and on the relationships between theese Convention and Protocols and the Lugano Conventions of 1988, between Eu Members and EFTA Members, see S. M. Carbone, *Il nuovo spazio giuridico*, cit. 7 – 16. On the Lugano

and of 23 of the Reg. 44/2001, extended to the interpretation of art. 4 of the law 218/1995 (so, for those cases falling outside the scope of application of the aforesaid international instruments) they actually, give an original solution to the problem of the validity of the jurisdiction clause inserted in a bill of lading, which is worth careful examination as, under apparently simple reasoning, many issues of general theory of law are involved. Moreover, the conclusion of the Court shows a certain degree of incoherence that will be highlighted in the following discussion.

As far as the topics of this Colloquium are concerned, suffice it to say that at least two issues are involved, namely the issue of foreseeability, as well as the issue of reasonableness, both, of course, with reference to the jurisdiction clauses.

As for foreseeability, it is well known that the jurisdiction clause is one of the most frequent legal tools, used in international transactions, in order to avoid the concurrence of different legal proceedings on the same dispute, before different national courts or judges, and, as a consequence, prospective conflicting decisions. By inserting a forum selection clause in a contract it is possible, in addition, to prevent parties from shopping in different jurisdictions, depending on the one they believe to be most favourable to their interests[8].

Convention of 30 October 2007, which repeals the Lugano Convention 1988, see the Explanatory Report by Prof. F. Pocar in OJEU, 23.12.2009, C-319. In the Italian case law, on the evolution of the Brussels Convention and on the influence, on its emendments, of the Lugano Convention 1988, see: Cass. Civ. Sez. Un., 11.06.2001, n. 7854, *Maritranspot S.r.l. v. Rewico Italia S.r.l. and Multiarredo S.r.l.* (*The "Eliana", "Aurora", "Mee May", "Sextum", "Federica*"), in Dir. Mar., 2002, 1297.

8 M. Lopez De Gonzalo, *Forum shopping, litispendenza e clausole di scelta del foro: il caso del trasporto marittimo*, in Dir. comm. int., 2002,1, 163. The Author underlines that in the field of maritime trasports the phenomenon of the forum shopping is particularly spread, due to its international nature, to the high mobility of the goods and to the scant territorial rootedness of the subjects involved. He goes on saying that: "*Le caratteristiche appena delineate dei contratti di trasporto marittimo creano una situazione potenzialmente idonea a dar luogo a conflitti di giurisdizione. L'interesse concreto delle parti a radicare la controversia nell'una piuttosto che nell'altra giurisdizione (o, detto in altre parole, il fatto che nella percezione e nelle valutazioni delle parti la sede di soluzione delle controversie non sia mai un fattore "neutro") trova il suo fondamento, non solo nell'ovvio desiderio di "giocare in casa" ogni qualvolta ciò sia possibile, ma anche e soprattutto nel mancato conseguimento di una reale uniformità della disciplina sostanziale. Ciò significa che, a seconda della*

The CJEU, in the subject matter, interpreting art. 17 of the Brussels Convention, so stated: "…….*it is in keeping with the spirit of certainty, which constitutes one of the aims of the Convention, that the national court seized should be able readily to decide whether it has jurisdiction on the basis of the rules of the Convention….*"[9],

In short, by inserting a forum selection clause in the contract, parties agree to confer exclusive jurisdiction to a Court of a specific state, relying on the legitimacy, validity and possibility of enforcement of the decision adopted by that Court or judge.

As far as the issue of reasonableness is concerned, I refer, here and now, to the next paragraphs two and three, as it is closely related to the examination of the nature of international trade usages, according to art. 17 of the Brussels Convention, as outlined in the aforesaid Judgements of the Italian Supreme Court.

The present paper will be divided into four parts: the first will focus on the evolution of the Italian case law and the validity of the jurisdiction clause contained in the bills of lading with regard to the evolution of the CJEU case law, on the matter; in the second part, the problem of the interpretation of the trade usages according to art. 17 of the Brussels Convention and 23 of Reg. 23/2001 will be scrutinized; the third part will deal with the new solutions adopted by the Italian Supreme Court; and finally, in the fourth part, some critical conclusions on the results of the Supreme Court's interpretative process will be drawn.

giurisdizione alla quale è deferita la soluzione della controversia, potrà essere diversa la disciplina applicata al merito della controversia (in particolare, per quanto riguarda la determinazione di esoneri e limitazioni della responsabilità del vettore)". See also S. M. Carbone, *Il nuovo spazio giudiziario*, cit., 37. More recently with respect to the transport law in general, M. Lopez De Gonzalo, *Diritto uniforme dei trasporti e forum shopping*, in Dir. mar., 2010, 235.

[9] CJEU, 16 March 1999, Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali S.p.A. v. Hugo Trumpy SpA*, in [1999] ECR, I, 1597, at par. 48.

1 The Italian case law, before and in between the Judgements n. 731/2005 and 3568/2011

The evolution of the Italian case law and of the doctrinal debate[10] regarding the issue of the validity of the jurisdiction clause, inserted in standard form bills of lading has been complex and influenced by the change of the Italian law on the domestic system of private international law adopted with the specific aim of "adapting" the former to the International Brussels Convention of 1968[11]. This was done in order to overcome the difference in the legal treatment of situations that had basically the same needs.

[10] F. Berlingieri, *Trasporto marittimo e arbitrato*, in Dir. mar., 2004, 423; S.M. Carbone, *Contratto di trasporti di cose*, in *Trattato di diritto civile e commerciale, Cicu Messineo, Mengoni, Schlesinger*, VI ed, Milano 2010II ed., Milano, 2010, at 576 – 599; A. La Mattina, *Clausole di deroga alla giurisdizione in polizza di carico ed usi del commercio internazionale tra normativa interna e disciplina comunitaria*, in Dir. mar., 2002, 441; I. Queirolo, *Accordi sulla competenza giurisdizionale: riflessioni a margine di alcune recenti decisioni*, in Dir. mar. 2001, 32, at 50; A. Vio Gilardi, *Clausola di giurisdizione: consenso effettivo o presunto?*, in Riv. trim. dir e proc.civ., 2001, II, 487; M. Rossini, *Ancora sulla clausola di deroga alla giurisdizione in polizza di carico: brevi riflessioni a margine di tre recenti sentenze*, in Dir. mar., 2007, 995; M. Rossini, Brevi note in tema di requisiti della clausola di deroga alla giurisdizione italiana contenuta in polizza di carico ex art. 4 legge 218/1995, ibidem, 2006, 196; A. Salesi, *Clausola di deroga alla giurisdizione contenuta in polizza di carico*, in ibidem, 1997, 209; 21 G. Contaldi, *Clausole di proroga della giurisdizione contenute in polizze di carico ed il nuovo testo dell'art. 17 della Convenzione di Bruxelles del 1968*, in Riv. dir. int. priv e proc., 1998; G. Tassinari, *Deroga alla giurisdizione nel contratto di trasporto – Il modello*, in Contratti, 1/1996; F. *Bruno, Clausola di deroga alla giurisdizione in polizza di carico e Convenzione di Bruxelles del 1968*, in Dir mar. 1995, 111I, 79; F. Maganza, *Brevi note sulla recente giurisprudenza relativa all'art. 17 della Convenzione di Bruxelles del 1968*, in Dir. mar., 1994, 1149; L. Castellana, *La deroga della giurisdizione dopo il protocollo di Lussemburgo del 9 ottobre 1978*, *ibidem*, 1990, 1225; S. M. Carbone, *La nuova disciplina comunitaria relativa all'esercizio della giurisdizione e il trasporto marittimo*, in Riv. dir. int. priv. e proc., IV, 1988, 633, at 637 – 643; E. Francardo, *Clausola di deroga alla giurisdizione in polizza di carico*, ibidem, 1988, 1147; E. Morelli, *Sul tema della clausola di giurisdizione in polizza di carico fuori del campo della Convenzione europea*, ibidem, 1986, 451.

[11] S. M. Carbone, cit., at 598; A. La Mattina, *Clausole di deroga alla giurisdizione in polizza di carico ed usi del commercio internazionale tra normativa interna e disciplina comunitaria*, cit., at 442; Cass. civ., Sez. Un., n. 731/2005 and Cass. civ., Sez. Un., n. 3568/2011, cit.

In fact, if, under art. 17 of the Brussels Convention, it was possible for the parties, one or more of whom were domiciled in Italy, to agree that a court (or the courts) of a Contracting State was to have jurisdiction to settle any dispute which had arisen or which may have arisen in connection with their legal relationship, it was almost incomprehensible why the Italian domestic law should remain anchored to the principle stated in art. 2 of the Code of Civil Procedure, according to which (with few minor exceptions, in any case not applicable to an Italian citizen domiciled in Italy) the Italian jurisdiction could not be derogated, by agreement of the parties to the contract. Moreover, in the minor exceptions in which it could be derogated, in order for the clause to be valid, it had to be in writing.

The Italian Supreme Court, being in effect the aforesaid art. 2 c.p.c., was very strict in assessing the validity of the clause, as far as its form was concerned, never admitting any equivalent to the writing, especially in cases in which the document was issued by only one of the parties[12]. As a consequence, the validity of the jurisdiction clause in the bill of lading, a unilateral document signed only by the carrier, was virtually impossible.

As stated above, in order to remove this unjustified difference of treatment, the law 218/1995, on the reform of the Italian system of private international law, was approved and the art. 2 of the Code of Civil Procedure, repealed.

The law reform, as authoritative doctrine has underlined, has resulted firstly in bringing the exercise of jurisdiction back into the field of the protection of subjective rights, rather than in that of public law and, secondly, of conferring on party autonomy a central part in the coordination of the different jurisdictions involved and interested in a specific dispute[13].

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[12] See, for instance, Cass. Civ. S. U., 20.12.1985, n. 6519, *Bergold c. Manni*, in Giust. Civ. Mass., 1985, issue XII, 1978; Cass. Civ., Sez. Un. 21.12.1990, n. 12129, *Società Lasiniska c. Società Progettazioni Consulenze e Partecipazioni*, in Giust. Civ. Mass., 1990, 2073; C.A. Venezia, 30.06.1987, *The Nothern Assurance company Ltd. v. Radonicich & Co. (The Prvi Splitski Odred*) in Dir. mar., 1988, 1147, with case note by E. Francardo, cit.; Trib. Venezia 14.10.1985, *Alpina S.A. v. Agenzia Marittima Radonicich & Co. S.A.S., (The Pharos)*, ibidem, 450, with case note by E. Morelli, cit.

[13] S. M. Carbone, *Commento all'art. 4*, in *Commentario alla Legge 31 maggio 1995 n. 218, Riforma del sistema italiano di diritto internazionale private*, S. Bariatti (ed. by), in NLCC, 918, at 919.

But, even in this context, it is to be emphasized that the enactment of the l. 218/1995 did not solve the problem of the full correspondence between the Italian and the European systems, as for the relevance of party autonomy in the choice of law, because if it is true, on the one hand, that art. 4 recognizes the importance of party autonomy in the choice of law, it is true as well that, as for the form of the clause, the aforesaid law provides only that the choice of law is to be proved in writing, unlike what is provided for, in this respect, by art. 17 of the Brussels Convention (as emended by the Accession Protocols of 1978 and 1979) and now by the art 23 of Reg. 44/2001, that, in the international trade and commerce, recognizes the validity of such a clause, also where expressed in a form which accords with usages regularly observed in the particular trade or commerce concerned.

The full correspondence between the Italian system on private international law and the system of the Brussels Convention and of Reg. 44/2001 will be achieved by way of interpretation, to be more precise, as will be covered in the following discussion, by the extension of the interpretative results on art. 17, to art. 4 of the law 218/1995.

The Italian Supreme Court has always been strict in assessing the validity of the jurisdiction clause, in cases falling within the scope of application of art. 17 of the Brussels Convention, paying the utmost attention to the formal requirements of the clause itself and, first of all, to the requirement that the clause be signed by both parties to the contract.

Specifically, in cases in which the validity of the jurisdiction clause inserted in the bill of lading was under scrutiny, the Supreme Court held that the requirement of the proof in writing of the jurisdiction clause, contained in the back of the bill, according to art. 17, par. I, of the Brussels Convention, was respected only if such a clause was signed by both parties, the carrier and the shipper[14].

[14] Cass. civ., Sez. Un. 17.02.1992, *Soc. Alpina Zurigo v. Agenzia Marittima Ghianda*, in Giust. Civ. mass., 1992, II; in Giur. it., 1992, I, 1, 2167; Cass. Civ. Sez. Un. 11.12.1987 n. 9210, *Soc. Forestale Veneta v. Soc. Adriacostanti*, in Foro it. 1988, I, 3363; Cass. Civ. Sez. Un., 18.07.1986, n. 4636, *Soc. Cantieri Metallici v. Soc. Borriello, in Giust. Civ. Mass.*, VII; Cass. Civ. Sez. Un., 21.11.1984, n. 5944, *Soc. Gondrand v. Soc. Vanetti*

As a consequence, with specific reference to the position of the third party holder of the bill, the Court held that, in the absence of the signature of the shipper, the jurisdiction clause was not enforceable against the third party.

The reasoning of the Court was aimed at protecting, as much as possible, the real consent of the parties as to the validity of the clause.

In fact, as it is well known, the bill of lading, in Italy is not a contract, but rather, a unilateral document that has the three basic functions of evidence of the contract of carriage of goods[15], receipt of the goods, and document of title, incorporating obligations and rights deriving from the contract of carriage[16].

On the contrary, the jurisdiction clause is an agreement ontologically different from the document of title[17] so that, for it to be valid, it is necessary, when the validity of the clause is challenged, to prove the bilateral consent to the clause, in the form required by the law[18]. And this is even more so if one considers that, once the consent is validly expressed by the parties, the negotiation of the bill imports the transfer of rights and obligations to the third party holder, including those not directly related to the contract of carriage (as the jurisdiction clause is) according to the doctrine of the so called "literality", through which the rights and

agenzia marittima, in Gius. Civ. Mass., XI and Cass. Civ. Sez. Un., n. 5495, *Vanetti e Bangkok Motors v. Agenzia Marittima Sagital*, ibidem. A case law stream was as much as strict as the one of the Supreme Court. Trib. Livorno, 09.08.1983, *Siat v. Agenzia Marittima Conti*, in Dir. mar, 1984, 621 and in Vit. Not. 1985, 308. More recently, interpreting art. 17 of the Brussels Convention, even if in a different field, on the need for the jurisdiction clause to be signed by both parties to the contract, Cass. Civ., Sez. Un., 27.09.2006, 20887, *Soc. Saneco v. Soc. Tuscoline*, in Dir. mar., 2007, 116. In the territorial courts' case law, Trib. Of La Spezia, 05.03.2009, *Soc. Caglificio Clerici v. P&O Nedlloyd Ltd. and Soc. La Spezia Container Terminal – L.S.C.T.*, in Dir. mar., 2011, 930.

15 D. Di Bona, *Brevi considerazioni sul valore probatorio della polizza di carico*, case note to Cass. Civ., 21.07.2003, n. 11319, in Dir. mar., 2004, 994

16 On the bill of lading, under the Italian law, A. Pavone La Rosa, *Studi sulla polizza di carico*, Milan, 1958; Idem, *Polizza di Carico*, Enc. del Dir., XXXIV, Milano, 1985; L. Murtas, *Efficacia probatoria e costitutività della polizza di carico*, Turin, 1996; N. Balestra, *La polizza di carico nel trasporto di carico e nel noleggio a viaggio*, Milan, 1968; C. Medina, *Polizza di carico*, in Digesto disc. priv., sez. comm., Turin, 1995.

17 F. Berlingieri, Trasporto marittimo e arbitrato, in Dir. mar. 2004, 423, at 426 and 429.

18 G. Contaldi, *Le clausole di proroga della giurisdizione contente in polizza di carico*, cit., 81.

obligations transferred to the third party holder are only those resulting from the literal context of the title[19].

The trend of the Italian Supreme Court was in tune with that of the ECJ, before the entry into force of the Protocol of amendment of Luxembourg 1978, as expressed in the *Tilly Russ*[20], that referring to her previous case law[21], stated that the jurisdiction clause could be considered valid only where a consensus to that effect between the parties was clearly and precisely demonstrated, being the purpose of art. 17, one of ensuring that the consensus between the parties was in fact established.

Regarding the formal requirements of the jurisdiction clause provided for by art. 17 of the Convention (viz. an agreement in writing, and an oral agreement evidenced in writing), as an expression of consent, the Court held that, as a matter of principle, a strict interpretation of them should be given.

In this perspective, the Court held that a unilateral declaration in writing was not sufficient to constitute an agreement on jurisdiction by consent, even with a lack of challenge by the party to which the declaration had been notified.

The only cases in which the Court had departed from the general rule that proof must be in writing or of the oral agreement evidenced in writing,

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19 F. Berlingieri, *Trasporto marittimo e arbitrato*, cit., at 429 who undelines that: *pur riconoscendo che il documento del trasporto contiene due negozi giuridici distinti, e cioè quello del trasporto e quello compromissorio o di proroga della giurisdizione, resta sempre aperto il problema se il ricevitore, che utilizza questo unico documento, può scinderne il contenuto. Anche ammettendo questa possibilità, dovrebbe ritenersi che occorrerebbe quanto meno una espressa manifestazione di volontà nel momento della adesione al contratto da parte del ricevitore, e cioè nel momento in cui il ricevitore richiede la consegna della merce* (430-431). Cass. civ. Sez. Un. 731/2005, cit; Cass. civ., Sez. Un. 3568/11, cit.

20 *Partenreederei Ms. Tilly Russ and Ernst Russ v. S.A. Haven & Vervoerbedrijf Nova and S.A. Goeminne Hout*, CJEU, 19.06.1984, C – 71/83, in Dir. mar. 1985, 580, with case note by M. Lopez De Gonzalo, *Le clausole di deroga alla giurisdizione nelle polizza di carico di fronte alla Corte di giustizia delle Comunita Europee*, at 581.

21 CJEU, 14.12.1976, *Estasis Salotti v. Ruwa Polstereinmaschinen*, C – 24/76 (in Riv. dir. int. priv. e proc., 1977, 434), and, Galeries Segoura v. Bonakdarain C – 25/76 (in Riv. dir. int. priv. e proc., 1977, 439), and, on which M.J. Bonell, *Le tecniche di redazione dei contratti internazionali e il problema della validità formale della deroga convenzionale alla giurisdizione, in AA.VV., Nuovi tipi contrattuali e tecniche di redazione nella pratica commerciale*, Milan, 1978, 413; CJEU 6.5.1980, Porta Leasing c. Prestige International, C – 784/79, in Racc., 1980, 1518.

were when it could be held that there was a relationship between the parties, in which the choice of jurisdiction clause had been constantly included and where it would be *mala fide* for one side to seek to rely on the non compliance with the formal rule laid down by art. 17 of the Convention[22].

In short, the condition precedent of the validity of a jurisdiction clause in a bill of lading, according to the CJEU's case law, up to the *Tilly Russ* case, was the clear and precise demonstration of the consensus to the clause, which has been considered subsisting every time: a) the shipper had demonstrated his consent in writing and, in cases in which the jurisdiction clause was inserted in the back of the bill, it was clearly referred to; b) the jurisdiction clause was the written evidence of an oral agreement; c) there had been a continuous trading relationship between the parties in which the choice of jurisdiction clause had been included[23].

It is to be pointed out that even if the Italian case law, as noted above, followed the reasoning and conclusions of the CJEU in the cases quoted, the Italian case law flowing from the territorial Courts (not confirmed by the Supreme Court), already under the original text of art. 17 of the Brussels Convention, had made some attempts to overcome the rigidity of the formal requirements stated in it, by assessing the validity of jurisdiction clauses inserted in a bill of lading, in cases in which the shipper had signed the bill of lading on the front of it, in the box reserved to the terms of payment[24] or, on other occasions, considering the signature for endorsement of the bill, as equivalent to the signature of all terms and conditions, included the jurisdiction clause[25].

After the entry into force of the first Protocol of Amendment of the

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22 See, for instance, the cases: *Tilly Russ*, *Galeries Segoura* and *Porta Leasing*, quoted above, fn. 20; *Nikolaus Meeth v. Glacetal*, 1978 C – 23/78, in Racc. 1978, 2133;

23 See the conclusions of the Advocate General, in case *Tilly Russ*, par. 18; S.M. Carbone, *Il trasporto marittimo di cose*, cit., 593

24 Trib. of Genoa, 22.01.1977, *Basso Legnami c. Licences Insurances Co. Ltd et alt*., in Dir. mar., 1977, 201, and in Riv. dir. int. priv. e proc., 1977, 613.

25 Trib. of Genoa, 11.03.1981, *Weltra c. Siamar*, Dir. maritt. 1982, 680; Trib. of Genoa, 19.02.1982, *Gottordo Ruffoni c. Lloyd Triestino*, quoted by L. Castellana, *La deroga della giurisdizione*, cit. at 1226; contra Cass. Civ., Sez. Un., 18.05.1995, n. 5475, *Agenzia marittima Spadoni v.* Soc. Insurance Company of North America e altro, in Dir. mar., 1997, 967 with case note by P. Terrile

Brussels Convention, the one of Luxembourg of 1978, the interpretation of art. 17 of the Brussels Convention, given by the Italian Territorial Courts, experienced a substantial change[26], as a reflection, first, of the change of the legal framework, and second, of the interpretation of art. 17 of the Brussels Convention given by the CJEU, whose results, later, would have been applied to the interpretation of art. 4, l. 218/1995, the latter being inspired by the system of the Brussels Convention.

Before dealing with the Italian case law, it is worth examining the CJEU case law regarding the interpretation of the formal requirements of art. 17 of the Brussels Convention, as amended by the aforementioned Luxembourg Protocol 1978, with special reference to the famous judgment in case C-159/1997, *Trasporti Castelletti c. Hugo Trumpy S.p.a.*, on a reference for a preliminary ruling, from the Italian Supreme Court[27].

The latter[28] asked the ECJ nothing less than fourteen questions of law, about the interpretation of art. 17, as for the validity of the jurisdiction clause, and specifically about the interpretation of the following lines: "*in the international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware*".

By the first question, the Italian Supreme Court asked whether article 17 of the Convention, as amended by the Accession Convention of 9 October 1978, in so far as it refers to the notion of "practices" (usages) whilst using the term "concluded", necessarily requires that the consent of the parties to the jurisdiction clause be established.

The ninth, fourth, fifth and eighth questions concerned the meaning

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[26] Pret. of Genoa, 21.11.1994, *Eagle Star insurance Co. C. Maersk italia, (The Arild Maersk)*, in Dir. mar., 1995, 1110, with case note by F. Bruno, *Clausole di deroga alla giurisdizione in polizza di carico e Convenzione di Bruxelles del 1968*, at 1111; Trib. of Genoa, 14.12.1989, *Castelletti S.p.a. c. Hugo Trumpy S.p.a. (The Mashu Maru)*, in Dir. mar., 1990, 1079.

[27] CJEU, 16. 3. 1999, Case C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy S.p.A.*, in Dir. mar., 1999, 507. Bortolotti, Lombardi e Venturello, *Brevi note sulla più recente giurisprudenza comunitaria relativa alla convenzione di Bruxelles del 1968: il caso trasporti Castelletti ed il caso Leathertex*, in Contratto e impresa/Europa, 1999, 889.

[28] Cass. Civ. Sez. Un., Ord. 15.01.1997 n. 20, in Foro it., 1999, I 1634.

of the expression "usages in international trade or commerce".

More precisely, in the fourth question, it was asked whether the constant insertion of the clause in the bills of lading, issued by associations or by a consistent number of carriers, was sufficient in order to hold that the clause was valid or whether it was necessary to prove a silent adhesion to the behaviour of the counterpart.

The second, eleventh and tenth questions were aimed at ascertaining the meaning of the expression "form which accords with practices".

In particular, in the tenth question, the Italian Supreme Court sought to ascertain whether the application of the usages were able to derogate from the application of mandatory statutory rules of the different Countries.

Finally, the twelfth, thirteenth and fourteenth questions were aimed at ascertaining the meaning of the expression "parties' awareness of the usage".

In the twelfth question, more specifically, whether it was necessary that the usage was known or simply ascertainable, having regards to the specific bill of lading; in the fourteenth question, if the expression "ought to have known" was referring to the good faith and diligence principles intended in an objective sense, as to the formation of the contract, or rather, in a subjective sense.

These questions of law, whose meaning under a general theory point of view, will be dealt with in the next paragraph, were answered by the CJEU, by stating, referring to previous case law[29], that the existence of a usage, which must be determined in relation to the branch of trade or commerce in which the parties to the contract operate, is established where a particular course of conduct is generally and regularly followed by operators in that branch, when concluding contracts of a particular type; that it is not necessary for such a course of conduct to be established in specific countries or, in particular, in all the Contracting States; that a specific form of publicity cannot be required in all cases (ninth, fourth, fifth and eighth questions).

The Court went on to hold that the specific requirements covered by

[29] CJEU, *Mainshiffahrts –Genossenchaft (MSG) v Gravières Rhénanes*, Case C-106/95 [1997], ECR I-911, paragraph 16 and *Elefanten Schuh* v *Jacqmain* Case C -150/80 [1981] ECR 1671, paragraph 25.

the expression "form which accords with practices" had to be assessed solely in light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements, which national provisions might have laid down (second, eleventh and tenth questions).

Finally, the Court stated, as far as the topic of this lecture is concerned, that awareness of the usage would be established when, regardless of any specific form of publicity, in the branch of trade or commerce in which the parties operate a particular course of conduct was generally and regularly followed in the conclusion of a particular type of contract, so that it may have been regarded as an established usage.

The Italian Supreme Court[30] in the principal proceedings, following the compulsory CJEU interpretation of art. 17, held that the existence of no usage was proven by the plaintiff, because the production, before the territorial Court, as documentary evidence, of numerous bills of lading, issued by the same carrier, in which the jurisdiction clause was inserted was insufficient to show the parties' consent to the jurisdiction clause, by trade usage.

On the contrary, some territorial Courts[31] held that, in light of the new version of art. 17 of the Brussels Convention, the signing of the bill of lading only by the carrier (or his agent) was valid, because it was existing a custom, according to which all terms and conditions inserted in the bill of lading, included the jurisdiction clause, had to be considered as accepted, absent observations by the shipper who negotiated it by endorsement. Then, this interpretation of art. 17 was extended to the aforesaid art. 4, l. 218/1995, because the latter was inspired by the former.

The aforesaid interpretation of articles 17 and 4, was upheld by the Supreme Court, for the first time, through the judgment n. 731/2005,

[30] Cassazione Civile, Sez. Un., 25 ottobre 1999, n. 748, in Giust. civ. mass. 1999, 2148 and in Giur. it., 2000, 1011.

[31] Trib. of Turin, 24.11.2000, *Chinese Polish Joint Stock Shipping Co. v. Zust Ambrosetti S.p.a. ("The Boleslaw Prus")*, in Dir. Mar., 2002, 622; Trib. of Naples, 3.5.2001, bidem, 631 (in the reasoning) and in Dir. Trasp., 2002, 1029; Trib. Naples, 28.04.2000, *Shams S.r.l. Import-Export v. Società Castaldi e c. S.p.A. ("The Pioneer")*, in Dir. mar., 2002, 634; Trib. of Naples, 31.10.2001, *G.A. S.r.l. and Trans Express S.n.c. v. COMAG S.r.l.* ("Mad Taipei"), in Dir. mar., 2002, 666. See. A. La Mattina, *Clausole di deroga alla giurisdizione*, cit.

that going further stated, for the first time, that the trade usages of art. 17 of the Brussels Convention, amounted to international legal norms[32].

Nonetheless, the latter judgment did not put an end to the different interpretation of art. 4, in respect of the art. 17 of the Brussels Convention and of art. 23 of the Reg. 44/2001, since, on the one hand the same Supreme Court, one year later[33], stated that the form in writing required by art. 23 Reg. 44/2001, for the jurisdiction clause, in cases in which it is inserted in standard form terms and conditions printed in the back of the document, were respected only if the document was signed by both parties and if there was an express reference to the said terms and conditions. Moreover, two years later the same Supreme Court[34] stated that art. 17 of the Brussels Convention, referred only to trade practices, rather than to trade usages.

Finally, a territorial Court[35] followed the very strict interpretation according to which the jurisdiction clause, inserted in the reverse of the bill of lading, could be enforced to the third party holder, only if by the latter explicitly accepted.

At last, through the judgment n. 3568/2011, the Supreme Court endorsed the reasoning and conclusion of Cass. 731/1995, stating that in the field of international maritime transport, is existing a usage amounting to a legal norm, according to which, being the bill of lading signed only by carrier, it can be held suitable proof of the agreement as to the jurisdictional clause inserted in a standard form bill of lading, the mere fact that the shipper, adhering consciously to such a usage, has received it without objections and transferred it to the consignee.

Before commenting on these two judgments it is worth discussing briefly the nature of trade usages in international law, with specific refe-

[32] As for the territorial Courts' case law, see, Trib. C. A. of Genoa, 29.05.2010, *Axa Assicurazioni S.p.a. c. Delta Agenzia Marittima S,r,l, ("The Ville Tanya"),* in Dir. mar., 2011, 1272; Trib. Naples, 25.03.2010, *IFI – Iniziative Forestali e Industriali c. Pappalardo & Co.*, ibidem, 2011, 252.

[33] Cass. Civ., Sez. Un. (Ord) 27.09.2006 n. 20887*, Saneco S.A. v. Tuscoline S.r.l.,* in Dir. mar., 2007, 1164.

[34] Cass. Civ. Sez. un., 02.04.2007, n. 8095, *Soc. Lloyd's syndacate et alt. v. Soc. S. e alt.*, in Giust civ. mass., 2007, 4.

[35] Trib. of La Spezia, 5.3.2009, *Caglificio Clerici S.p.a. c. P&O Neddloyd Ltd.*, cit.

rence to those of art. 17 of the Brussels Convention and 23 Reg. 44/2001[36], using the principles elaborated by CJEU, in particular those of *Trasporti Castelletti*, quoted above.

2 The nature of international trade usages, according to articles 17 of the Brussels Convention and 23 of the Reg. 44/2001

It is very well known that, in international trade and commerce, the significance to be given to trade usages, in the ambit of stipulation, execution, integration and construction of the contract has always been a matter of controversy among scholars, as there in no definition of trade usages, valid for every legal system[37].

[36] See foot note number 3, on Reg. 1215/2012, at page 301.

[37] With the term "usages" in international trade is usually indicated a set of behaviours or course of conduct repeated and adopted by the generality of operators in a specific branch of international trade or commerce. Under the terminological point of view, is to be underlined that in Italy the term "usage" is tantamount of consuetudine (*consuetudo*) whenever it amounts to a legal norm, and in this respect they are called "usi normativi" (legal usages) otherwise they will be simply trade practices (or contractual usages). In the Italian legal doctrine see: N. Bobbio, *Contributi ad un dizionario giuridico*, Torino, 1994, 17 e *La consuetudine come fatto normativo*, Padua, 1942; S. Romano, Frammenti di un dizionario giuridico, Milan, 1947, 41; A.Pavone la Rosa, *Consuetudine (usi normativi e negoziali)*, in Enc. dir., IX, 513, Milan, 1961; A. Asquini, *Usi legale e usi negoziali*, in Riv. dir. comm., 1944, 71; A. Genovese, *Usi negoziali e interpretativi (dir. priv.)*", in Enc. giur., Rome, 1988; in the International law, F. Marrella, *La nuova Lex Mercatoria, Principi Unidroit ed usi dei contratti del commercio internazionale, in Trattato di diritto commerciale e di diritto pubblico dell'economia*, dir. da F. Galgano, Padua, 2003, 188 – 245. About the applicability of the domestic principles of law to the international law, B. Conforti, "*Diritto internazionale*", V ed., Napoli, 1999, who specifically underlines that "*la nozione di consuetudine secondo il diritto internazionale……non differisce dalla nozione di consuetudine elaborata dalla teoria generale del diritto ed utilizzata anche nel diritto interno*", at 34. In common law Countries in less recent times it was used to distinguish the legal customs from the trade usages. The former would be rules of action amounting to legal norms, having local relevance, the latter, course of conduct not amounting to a legal norm but of general application in a specific branch of trade or commerce. So trade customs are defined by Scrutton, *On charterparties*, S. Boyd, S.

From a general point of view, it can be said that the most controversial issue is whether the constant course of conduct amounts to a legal norm, or, on the contrary, whether it is relevant only to the plan of the contract, which means that trade usages should be simply tools to be used by the Judge a) to discover the real consent of the parties to the contract, as for a specific clause; b) to resolve the disputes regarding the performance of the obligations or; c) to construe the meaning of the clauses whenever they are obscure.

In the first case, being sources of law, the trade usages must be considered part of the contract irrespective of any hypothetical or tacit reference by the parties to the contract and of any awareness they have of them (in Italian legislation, within the limits of art. 8 of the Civil Code's preliminary dispositions). Nevertheless, as contract law is based, for the most part, on a set of non-mandatory rules, parties are allowed to agree otherwise.

In the second case, on the contrary, trade usages may only be used in order to establish what are the requirements of the course of conduct, relevant to express the intent of the parties for a specific clause or for the performance of the contract.

Moving on to the texts of art. 17(1), letter c), of the Brussels Convention, and of art 23(1) c) Reg. 44/2001, it is to be said that they do not contribute, per se, to clarify the nature of trade usages with reference to the form of the jurisdiction clauses, since no definition of trade usage is laid down and the mechanism of their application seems compatible with

Berry, A.S. Burrows, B. Eder, D. Foxton, C. Smith (ed. by), London, 2008: "*A custom is a reasonable and universal rule of action in a locality followed not because it is believed by the general law of the land or because the parties following it have made particular agreements to observe it, but because it is in effect the common law within that place to which it extends, although contrary to the general law of the realm*", 14. In the modern legal doctrine the two terms are used as synonyms: R. Good, *Usage and his reception in transnational commercial law*, in ICLQ, 1997: "*Usage is sometimes used to denote practice or behaviour, sometimes to indicate a pattern of behaviour which have arisen to the level of a norm. It has been traditional to distinguish customs from usage, but the distinctions have been drawn in widely different ways. E.g. according to some authorities custom is the practice of a particular locality, usage the practice of a trade, profession or vocation. Others consider that usage is merely a pattern of behaviour and that custom is the application of the usage from a sense of binding obligation. Others again divide customs in different categories, according to the degree of antiquity or universality. The modern approach is to treat the two terms as interchangeable*", at 7.

both the categories of usages. In fact, according to the aforementioned articles, the jurisdiction clause can be concluded in a form which accords with usages only where:

a) The contract in which it has been incorporated is concluded in the international trade;

b) The parties to the contract are or ought to have been aware;

c) The usage is commonly known to, and regularly observed by, parties to contracts of the type involved in the particular trade and commerce.

As far as the issue of this presentation is involved, the meaning of letters b) and c) is to be construed. In fact, according to part of the legal doctrine, letters b) and c) by stating that the parties, on the one hand, have to be aware of the trade usages, and, on the other, have to know them, seems to express a sort of "silent consent" by them, as to the jurisdiction clause.

As a consequence, trade usages of articles 17 an 23 would not amount to a substantive law – as such, applicable to the contract, if a party ought to be aware of them and irrespective of the concrete awareness – but, on the contrary, would be relevant and applicable only to the plan of stipulation and interpretation of the contract[38].

This interpretation would be confirmed by the Schlosser Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention, that, at par. 179 reads as follows: "*This is however, as should be clearly emphasized, only a relaxation of the formal requirements. It must be proved that a consensus existed on the inclusion in the contract of the general conditions of trade and the particular provisions, though this is not the place to pass comment on whether questions of consensus other than the matter of form should be decided according to the national laws applicable or to unified EEC principles*"[39].

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[38] M. B. Deli, *Gli usi del commercio internazionale*, cit., at 39-42.

[39] P. Schlosser, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice, signed at Luxembourg, 9 October 1978*, in Official Journal EC, C 59, 5 March 1979. See also

Hence, according to the Schlosser report the trade usages of art. 17 (and 23 Reg. 44/2001), in respect of jurisdiction clauses, would be relevant only to the plan of formal requirements, but the consent of the parties as to the jurisdiction clause always "must" be proved.

This construction of the meaning of articles 17 e 23 would be in line with the previous CJEU case law, and, as far as the jurisdiction clause in bills of lading is concerned, to the principles of law stated in *Tilly Russ*, quoted and commented above.

According to a different legal doctrine, the importance of trade usages of articles 17 and 23 cannot be reduced only to the issue of the formal requirements of the jurisdiction clause.

It has been written (even in matters of consent to arbitration) "…...*it is more accurate to refer to a modern approach of consent; an approach that is more pragmatic, more focused on the analysis of facts, which places more emphasis on commercial practice, economic reality, trade usages……; an approach that is no longer restricted to express consent but that takes into consideration all its various expressions and tends to give much more importance than before to the conduct of the individuals or companies concerned*"[40].

According to this doctrinal stream, the trade usages of art. 17 and 23 would be real international customs having force of law[41], so that they would be applicable to the legal transactions, irrespective of the knowledge that parties may have of them and of their explicit or implicit consent to them.

The significance of the trade usages of articles 17 and 23 would, hence, be comparable to that of the trade usages of art. 9(2) of the Vienna Convention 1980 on Contracts for the International Sale of Goods (CISG), that, almost unanimously, are considered as having the force of law[42].

CJEU 9. 11. 2000 — CASE C-387/98, *Coreck Maritime GmbH v. Handelsveem BV and Others,* in Dir. mar., 2001, 251.

40 B. Hanotiau, *Consent to Arbitration: Do we share a common vision*?, in Arb. Int., 27, n. 4, 539-554, at 554.

41 F. Marrella, *Lex mercatoria,* cit., 206; G. Contaldi, La clausole di proroga della giurisdizione, cit., 91, sub fn. 27.

42 F. Marrella, *Lex mercatoria*, cit. 206; C. Pamboukis, *Trade usages in the UN Sale of*

This being said, is to be emphasized that the most authoritative Italian doctrine, even noticing the similarity and analogy between art. 17 of the Brussels Convention and art. 9 (2) of the Vienna convention, has considered the trade usages of art. 17 (and 23) as a sort of reconciliation between the two theories about trade usages, as discussed above, namely the subjective-contractual theory and the objective-normative one[43].

And in fact, the States who are parties to the Convention, conditioning the binding force of the trade usages to the concrete possibility, by the parties, to know or to be aware of them, and, at the same time, to their wide knowledge and regular observation (by parties to contracts of the type involved in the particular trade or commerce concerned) have intended to confer upon the trade usages an "almost-normative" power, so making them become one of primary sources of the international legal relationships.

This conclusion permits to shift the focus on the content of the behaviour alleged as customary and, as a consequence, in matter of jurisdiction clause, to carry out an objective reasonableness test[44].

The latter assertion may seem contradictory, but really it is not.

In fact, the relationship between awareness or potential awareness and the wide knowledge and regular observation as it is stated by articles 17 and art. 23, may be read as a relationship of cause and effect: it is just due to the wide knowledge and observation of the course of conduct, by parties to contracts of the type involved, that it can be presumed that the parties to the contract of the same type were or ought to have been aware of the form of the jurisdiction clause.

The content of the clause itself, hence becomes of fundamental importance in order to verify the reasonableness and coherence of the jurisdiction clause with the specific trade usage, because it is the trade usage itself,

Goods Convention, 25 J. L&C., 107, 2005-2006; L. Graffi, *Remarks on trade usages and business practices in international sale law*, in 29 J.L & Comm., 273, 2010-2011; M.J. Bonell, Art. 9, in *Convenzione di Vienna sui contratti di vendita internazionale dei beni mobili*, in Comm. coord. by C.M. Bianca, Padua, 1992, 37, at 40 .

43 S. M. Carbone, *La disciplina comunitaria della proroga della giurisdizione in material civile e commerciale*, in Dir. Comm. Int., 1989, 351, 360

44 Contra, G. Contaldi, *Le clausole di proroga di giurisdizione*, 94 – 97; and F. Bruno, *Clausola di deroga alla giurisdizione in polizza di carico e la Convenzione di Bruxelles*, 1995, cit., at 1113.

and so the course of conduct generally observed, that is to be considered reasonable. It is non supposable an unreasonable trade usage.

The latter is, in fact, a *ius involontarium* that rises spontaneously as reasonable and rational objective will[45], or as a normative fact[46].

This conclusion, that is aimed at the protection of an objective control of the jurisdiction clause's content, in order to discover the presumed consent of the parties to it, is not in contrast, but rather is confirmed by the reasoning of CJEU Advocate General G. Tesauro, in case 106/95 (Mainshiffahrts), quoted above, according to which: "*To take the view, however, that the relaxation thus introduced relates solely to the requirements as to form laid down by Article 17 by merely eliminating the need for a written form of consent would be tantamount to disregarding the requirements of non-formalism, simplicity and speed in international trade or commerce and to depriving that provision of a major part of its effectiveness. Thus, in the light of the amendment made to Article 17 by the 1978 Accession Convention, consensus on the part of the contracting parties as to a jurisdiction clause is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard of which the parties are or ought to have been aware*" (at par. 19) [47].

On the same line, as far as I read it, is the judgment in case *Trasporti Castelletti*, quoted above.

First of all, it is to be clearly understood the meaning of the questions of law contained in the reference for preliminary ruling by the Italian Supreme Court to the CJEU.

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45 S. Romano, *Frammenti di un dizionario giuridico*, cit, at 66; L. Ferri, *Autonomia privata*, Milan, 1958, at 102.

46 N. Bobbio, *La consuetudine come fatto normativo*, cit., at 17.

47 And he goes on (at. par. 20): "*It must therefore be considered that the fact that one of the parties to the contract did not react or remained silent in the face of a commercial letter of confirmation from the other party containing a pre-printed reference to the courts having jurisdiction and that one of the parties repeatedly paid without objection invoices issued by the other party containing a similar reference may be deemed to constitute consent to the jurisdiction clause in issue, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice*".

Especially through questions one, four, ten, and twelve the Italian Supreme Court asked to the CJEU, even if implicitly, what were the nature of trade usages under art. 17 of the Brussels Convention, that is, if they had to be considered simple customary contractual clauses or if they amounted to substantive law.

It couldn't be explained otherwise the reason why the Italian Supreme Court asked to the Court of Luxembourg about the relevance of the awareness of the clause by the parties to the contract; whether the verification of the concrete consensus to the jurisdictional clause, was necessary or not; whether, in order to consider valid the jurisdictional clause in the relaxed form of art. 17, it was sufficient the repetition of the course of conduct or whether, in addition, it was necessary to prove a silent adhesion by the non drafter party; whether the Court chosen by the parties was able to conduct a reasonable text on the content of the clause; whether the trade usages were able to supersede the statutory mandatory rules of a Country.

The Court of Luxembourg stated that:

a) the contracting parties' consent to the jurisdictional clause is presumed to exist where their conduct is consistent with a usage which governs the area of international trade or commerce in which they operate and of which they are, or ought to have been, aware;

b) it is not necessary for a trade usage to be established in specific countries or, in particular, in all the Contracting States, being sufficient that a practice is generally and regularly observed by operators;

c) any publicity which might be given in associations or specialised bodies to the usage may help to prove that it exists, but cannot be considered as a requirement for establishing the existence of it;

d) formal requirements had to be assessed solely in the light of the commercial usages of the branch of international trade or commerce concerned, without taking into account any particular requirements which national provisions might lay down.

The Court, hence, implicitly seems to opt for the normative or almost normative nature of trade usages, laid down in art. 17 of the Brussels Convention.

It is now time for an in-depth analysis of the Italian Supreme Court's Judgements n. 731 of 17th January 2005 and 3568 of 14th February 2011, that as I explained in the introduction of this presentation have applied the principles of law elaborated by the CJEU, in the ambit of the interpretation of art. 17 of the Brussels Convention, to the construction of art. 4 l. 218/1995, hence, in cases falling outside the scope of application of the said convention (and of Reg. 44/2001), even in order to see which position in the doctrinal debate described in this paragraph has been taken by the Italian Supreme Court.

3 The Judgements n. 731 of 17th January 2005 and 3568 of 14th February 2011

3a) Case histories

These cases' histories are quite simple and, as far as the issues involved in this paper are concerned, can be summarized as follows: the holders of the bill of lading, Italian consignees of the cargo sought to recover damages to the cargo (both before the Tribunal of Genoa) against the respective agents of the carriers (both domiciled in Italy), owners of the chartered ships, domiciled in the first case in Japan, in the second in China, who had issued the bills of lading and consigned them to the shipper in a negotiable form. In both cases, the bills of lading contained on the reverse a clause conferring exclusive jurisdiction, in the first case, to the Tribunal of Tokyo, in the second, to different Tribunal of the Republic of China, precisely, those of Guangzhou or Shanghai or Tianjin, Qingdao or Dalian. The consignees challenged the validity of the jurisdiction clauses, inserted on the reverse of the bills of lading, on the ground that the shippers had not signed it.

Moreover, in the first case, the one decided by the Judgement n. 731/2005, the validity of the clause was challenged by the consignees, because of the lack of consent to it by the parties to the charter (on a

GENCON form) that was incorporated in the bill by reference and which contained, under clause 43, an arbitration clause. According to the defendants the jurisdiction clauses were validly stipulated, because the bill of lading is never signed by the shipper, who, receiving it without raising any objection and negotiating it to the third party, follows a conduct that, by international trade usage, amounts to implicit consent to every term and condition inserted in the bill, including the jurisdiction clause.

The Tribunal, first, and the Court Appeal of Genoa, later, upheld this defence and referred the jurisdiction, respectively to the Tribunal of Tokyo (sent. 731/2005) and to one among the Chinese Courts specified in the bill of lading (sent. 3568/2011, stating, in this case, that it was a matter of Chinese internal procedural law, to determine which was the competent Court, among those specified in the bill of lading).

Both cases were brought before the Supreme Court, by the consignees that, once again, challenged, inter alia, the validity of the jurisdiction clause for the lack of proof in writing, as required by art. 4, l. 218/1995. The Court dismissed both claims.

3b) The reasoning of the Court

A methodological preliminary remark: the Supreme Court, in the judgement n. 3568/2011 (as far as the issue involved in this presentation is concerned) endorsed the reasoning of the Judgement n. 731/2005, so that, in the following, both rationales will be dealt with as one.

b.1) At first, the Court had to determine which law was to be applied to the cases: as the plaintiffs consignees, domiciled in Italy, had brought the claims against the agents of the carriers both domiciled in Italy, and as the jurisdiction was referred to Courts of a Country that was not party to the Brussels Convention or to the Reg. 44/2001, the Court, in both cases, held that the applicable law in order to assess the validity of the jurisdiction clause was the Italian law, and precisely art. 4 of the law 218/1995, on the Reform of the Italian system of private international law, according to which, as for the form, the jurisdiction clause has to be proven in writing.

The decisions on this point are both correct so, as far as the issue dealt

with in this presentation is concerned, no further comment is necessary.

Once the application of the aforementioned art. 4 was established, the court went on to construe the meaning of the "proof in writing", laid down in paragraph two.

First of all the Supreme Court chose among the interpretative tools, stating that the interpretation of art. 4 l. 218/1995 should be made in light of the CJEU's case law regarding the construction of art. 17 of the Brussels Convention, as amended by the Protocols of Accession of Luxembourg 1978 and Donostia – S. Sebastian 1989, because the former (art. 4) was inspired to the latter (art. 17).

It followed that the need of proving in writing the jurisdiction clause, according to art. 4, could be somewhat relaxed, in the sense of admitting as the equivalent of the proof in writing, a form admitted by the trade usages of which the parties to the contract were aware or ought to have been aware, provided that this form was widely known and regularly observed by the parties to contracts of the type involved.

Also this reasoning is, in the opinion of the writer, correct: the Court in fact realized how it would not have made any sense to confer to party autonomy two different significances, depending on the field in which it was destined to carry out its functions.

And in fact, recognizing the significance of trade usages as a means to create forms of manifestation of the consent as to specific clauses – considering that, as explained above, the content of the course of conduct is closely connected to its manifestation – is tantamount to recognizing the normative significance to party autonomy, as a general principle of law[48].

It would be, at least, odd conferring in the same Country to party autonomy two different significances in the same situation, depending only on the different formal requirements laid down by the different laws, one of which, was furthermore, inspired by the other.

Conclusively on that point, the Court held that in construing the meaning of art. 4, l. 218/1995 it was necessary to go beyond its wording

[48] About the normative character of party autonomy, L. Ferri, *Autonomia privata*, cit, passim. In private international law with specific regards to the jurisdiction clause, S.M. Carbone, *Commento all'art. 4*, cit., 919.

– which takes no consideration of the trade usages – and to approve an evolving interpretation of it, based on the evolution of art. 17 of the Brussels Convention and on the related CJEU's case law.

b.2) The Supreme Court, once established the applicable law and the interpretative criteria that she would have followed, moved on to the interpretation of art. 17 of the Brussels Convention and (in judgement 3568/2011) of art. 23 of Reg. 44/2001, focusing on the meaning and significance to be conferred to the expression "trade usages".

In so doing, the Court held that the formal requirements established by trade usages were aimed at discovering the real consent of the parties as to the jurisdiction clause, as already stated by the CJEU in *Mainshiffahrts*, and *Trasporti Castelletti*, quoted above.

More precisely, according to the Supreme Court the parties' conduct could amount to an equivalent of the proof in writing, required by art. 4, l. 218/1995, where this conduct accorded to the trade usages, of which the parties were or ought to have been aware.

Up to that point the two judgements of the Court under scrutiny are not particularly innovative, because they simply limit themselves to merely point out the bases of application of the aforesaid articles 17 and 23[49].

On the contrary, they seem innovative, even if objectionable (as will be explained later) at the point in which they define the nature of the trade usages, according to articles 17 and 23, and the mechanism of their application.

In fact the Court in the debate about the very nature of these usages, states that they are relevant as objective norms rather than merely to the plan of the contract.

Using almost the same wording in both judgements the Court, in fact states that, in the field of maritime transport the bill of lading, by notorious practice – acknowledged by the doctrine that has examined the issue and widely confirmed by the published case law of the territorial court – who has determined the formation of a trade usage, is signed only by the carrier, not by the shipper.

The choice of the Court is, hence, apparently clear, as it draws a line

[49] As for the lower Courts' case law, refer to fn. 31.

between the trade practice and usage: according to it, in fact, when a practice or commercial course of conduct becomes so "mature" and repeated as to be followed by the generality of members of a "society", the said course of conduct becomes a trade usage and, therefore, a source of substantive law[50].

That being said, the Court followed by stating that the consent of the shipper as to the jurisdiction clause, could have been drawn by the conduct of the former who had received the bill of lading issued by the carrier and signed only by him, without raising objections and had negotiated it, by endorsement, to the third party holder, adhering consciously to an international trade usage, consisting, on the one hand, on the invariable presence of the jurisdiction clause in the standard form bills of lading, and on the other in the lack of subscription of the shipper.

The reasoning of the Court, although innovative, especially in respect of the judgement n. 748/1999, in case *Trasporti Castelletti*, is clearly criticisable for the following reasons:

a) In *Trasporti Castelletti* the Supreme Court[51] held that the trade usage allegedly consisting in the general and uniform acceptance of the jurisdiction clauses inserted in the bills of lading, in lack of objections by the shipper, could not be considered as proven, by means of the production as documentary evidence in the trial of bills of lading issued by the same carrier, in which a jurisdiction clause was constantly inserted.

That means that the Supreme Court – which in matters of jurisdiction is also the Court that decides the merits – in both judgements n. 731/2005 and 5568/2011, had to clearly explain what had been the process of formation of the trade usage, now considered existing, and clearly explain what were the findings of fact upon which it rested its conclusion as to the existence of such a usage. It is really unsatisfying, in fact, on that point, the only statement (at par. 6.2) according to which the alleged trade usage would have been reflected by the legal doctrine and by the territorial courts' case law (neither the former, nor the latter quoted in the judgement). In fact, as it has been said above, the territorial Courts, as well as

[50] F. Gazzoni, *Manuale di diritto privato*, ed XIII, Napoli, 2007, 915

[51] Cass. Civ. Sez. Un., 25.10.1999, n. 748, cit.

the Authors, have always had different opinions on the matter.

That even more so, if one considers that the reasoning of both judgements, by quoting *Trasporti Castelletti*, stated that the difference between the latter and them lied in the fact that in *Trasporti Castelletti* the trade usage was not considered proven by the party that alleged his existence.

Moreover, it has been noted by the most authoritative doctrine[52] that the material course of conduct consisting in the constant insertion of the jurisdiction clause in the bills of lading is very questionable: in fact, if, on the one hand, the insertion of the jurisdiction clause is frequent in the standard forms issued by different carriers, on the other, it is not less frequent that many carriers use standard documents issued by third parties, as those issued by the BIMCO, in which the insertion of the jurisdiction clause is anything but frequent[53].

b) If the observations under paragraph a) concerns the material existence of the conduct constituting one of the two material elements of usage, further observations can be made under the general theory's point of view.

In both judgments of the Supreme Court, the problem of application of trade usages, seems to be reduced to a matter of formal requirements, or, better, to a matter of formation of the consent by way of procedure, irrespective of the concrete content of the course of conduct, namely, irrespective of the specific content of the jurisdiction clause, and as a consequence of the concrete jurisdiction chosen unilaterally be the carrier.

Well then, any trade usage consists in a specific course of conduct that, as such, has got a specific content. If it could be possible to deduct a silent consent simply by the formal requirements of a clause without paying any attention to the content of the clause, in theory once the form is respected, every content would be admissible, even if does not accord with trade usage. As a consequence, every type of forum selection clause, would be admissible, even if not respecting the ordinary course of trade.

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52 F. Berlingieri, in *Case note* to Cass. Civ. Sez. Un. n. 731/2005, in Dir. mar., 2006, 155.

53 F. Berlingieri, *Case note* to Cass. civ. Sez. Un. n. 731/2005, cit., 155. As for the documents: Austwheat bill; Congenbill 2007; Combinecombill. Contains the jurisdiction clause the Conlinebill 2000 (clause 4)

So, assuming that the carrier inserted in a bill of lading a jurisdiction clause in which the forum selected is different from the one of his principal place of business, or from the one in which it has its seat, or is any forum different from the ones in which the dispute arising from the performance of the obligations deriving from the contract is generally referred, would it be possible consider it as a "customary" forum? Would in this case be possible talking about a jurisdiction clause inserted in the bill, according to trade usage?

It is worth repeating that the relationship between the form of the jurisdiction clause and its content cannot be severed, in order to verify if the clause, intended as a whole of form and content, accords to the trade usages, that means it is coherent with them and, as such, reasonable.

In fact, the problem of the form in the field of international trade or commerce is the problem of simplification: in other words, when the course of conduct, having a specific legal meaning, is so repeated, well known, and followed to make the same parties to the international transaction believe that it will form part of the contract, it is not worth specifying same in the contract, in any detail, or through a specific clause explaining the legal significance of this course of conduct. Parties, in fact, know or ought to know the significance of this practice. This means that the formal problem is subsequent to content problem and that, being the form's simplification the result of a repeated tacit consensus to a specific clause's content, the clause, as I have just said, had to be considered as a whole of form and content, when it comes to construe it, in order to verify its compliance with trade usages.

Only this overall assessment of the validity of the clause may protect the non-drafting party, and as a consequence, in the case of negotiation of the bill of lading, the third party holder, for whom the real problem arises[54].

In fact, if the Supreme Court reasoning was correct, and the lack of objections by the non-drafting shipper amounted to a presumption of

[54] F. Berlingieri, *Trasporto marittimo e arbitrato*, in Dir. mar., 2004, 423, even if with specific reference to the aritration clause inserted in the bill of lading, that follows the same legal regime. It woul be difference in case of incorporation by reference to a charterparti in wich it would be necessary an express reference to the clause (*relatio perfecta*).

consent by trade usage, the only defence of the third party holder, who sought to challenge the validity of the jurisdiction clause, would be that of proving that parties had agreed otherwise. But this proof is virtually impossible to be shown.

In the judgement 731/2005, it is to be noted, that the holder of the bill of lading challenged the jurisdiction clause, on the ground that in the charterparty, incorporated in the bill through a short form, under number 43, an arbitration clause was inserted.

Hence, according to the third party holder the original parties to the contract of carriage had not agreed to any jurisdiction clause. As a consequence, the said clause, inserted in the bill unilaterally, was null and void.

The Supreme Court rejected this defence on the grounds that:

a) The arbitration clause was not incorporated by specific reference in the bill, so as it had been long established by Authorities, was not binding for him;

b) If the parties, in the bill of lading, did not make express reference to the arbitration clause, but, on the contrary, inserted in the bill a jurisdiction clause in a form admitted by trade usages, it meant that they wanted to supersede the arbitration clause by means of the jurisdiction one. This because the bill of lading had been dated and signed after the charterparty, containing the jurisdiction clause.

In other words, the Court, before the challenge of the jurisdiction clause in a form admitted by the trade usages, for lack of consent by the original parties to the contract, held that the consent was expressed by trade usage. A labyrinth.

Well then, if we generalize the Supreme Court reasoning, considering that a bill of lading is always issued after the contract of carriage is concluded (and many times during its execution) the third party holder can never rebut the presumption of consent, admitted by trade usages.

c) The last observation regards the reasoning of the Court, when it points out the relationship between usages and adhesion to them by the parties to the contract, stating that the consent to the jurisdiction clause inserted in a bill of lading signed only by the carrier according to trade

usages, can be considered as proven when the shipper consciously adhering to the trade usages, doesn't raise objections and negotiate it.

In that case, once recognized the existence of the trade usage having force of law, it is submitted that it is of no importance whether the shipper adheres consciously to it or not. This reasoning could have been admissible if the Court had considered the trade usage as relevant only to the plan of the contract. But once stated that the course of conduct amounts to a rule of law, to a norm, the only way to exclude the application of it to the contract is to prove that the parties have agreed otherwise (as in the art. 9, par. 2, of CISG). In the absence of this proof, as it is presumed that the parties ought to have been aware of the trade usage, amounting to a norm, they will be bound by it.

4 Conclusions

The two judgements have the undeniable merit of trying to dissolve the doubtful interpretation of the jurisdiction clause's formal requirements, according to art. 17 of the Brussels Convention and 23 Reg. 44/2001 and – through an extensive application of the interpretative criteria elaborated as regards the aforementioned articles 17 and 23 – to art. 4 l. 218/1995, confirming the case law elaborated by the Territorial Court.

They are certainly correct when pointing out the need for an interpretation of the aforesaid art. 4, in the light of the international Brussels Convention of 1968 (as emended by the protocol of Accession of 1978 and 1989) and of art. 23 of the Reg. 44/2001, thus recognizing party autonomy, as far as the issue of the jurisdiction clause is concerned, the same significance, irrespective of the scope of application of the two different legal tools, and irrespective of the wording of art. 4, par. 2, l. 218/1995.

In the opinion of the writer, it is considered valuable the attempt of meeting the expectation of rapidity and lack of formalism required by the international traders, and it is considered "bold" the clear "choice of

battlefield" of the qualification of the trade usage as sources of objective law. Actually, it can be said that Italian case law confirms its role of pioneer on that point[55].

Nonetheless, it cannot be denied that the two Supreme Court judgements leave themselves open to criticism especially because they sever the formal requirements from that of the content of course of conduct, that in the perspective of the international trade usages cannot be distinguished, without losing the possibility of control of reasonableness of the jurisdiction clause allegedly corresponding to the trade usage.

Perhaps, judgements n. 731/2005 and 3568/2011 will bring a higher degree of foreseeability in the Italian case law, as far as the issue of the validity of the jurisdiction clause in bills of lading is concerned, but along with the risk that what is foreseeable may not be reasonable.

[55] Cass. civ., 8 .02.1982 n. 722, *Fratelli Damiani v. August Topfer & Co. GmbH*, in Riv, dir. int. priv. e proc., 1982, 829, about which A. Giardina, "*Arbitrato transnazionale e lex mercatoria di fronte alla Corte di Cassazione*, *ibidem*, 754

Article 58 of the Rotterdam Rules: A dance between flexibility and foreseeability?

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Content

Abstract[1]

Transferee liability is regulated in Chapter 11 of the Rotterdam Rules. Chapter 11 of the Rotterdam Rules, in its Arts 57 and 58 sets out the principle that the holder of a negotiable transport document or a negotiable electronic transport record obtains rights and liabilities under the contract of carriage. While transfer of rights seems to be less controversial, when and how should liabilities be transferred? This paper focuses on imposition of liability on the holder of the negotiable transport document/electronic record and how the requirements of Chapter 11, Article 58 of the Rotterdam Rules may be understood and interpreted.

It is argued that the Rules where possible should be interpreted autonomously, taking into account the international nature of this instrument and without drawing narrow inferences from prior national law concepts. The article looks at the clarifications achieved by the Rotterdam Rules as well as at the elements which still need further interpretation. It is argued that national courts ought to take the opportunity to reassess any value judgments and criteria developed under national law before imposing such understanding on the Rotterdam concepts, in order to remain true to the spirit of Rules. In this process the opposing interests of the parties need to be balanced taking account of the need for flexibility on one hand, but also for foreseeability and reasonableness on the other. The article attempts to highlight some of the considerations that may be of particular relevance in this interpretation, with the aim of enhancing uniformity in this area.

A) Introduction

For the first time in the era of sea carriage conventions governing the

[1] My gratitude goes to Professor George Gretton, David Holloway and Neil Dowers, all of Edinburgh University, for their comments on the draft. Any mistakes are obviously my own.

rights and duties of the parties to the contract of carriage, the Rotterdam Rules[2] also attempt to regulate[3] the transfer of rights and imposition of duties on the holder of a negotiable bill of lading.[4] The transfer of liabilities and the conditions under which these can be imposed on a third party holder of a bill of lading or negotiable transport document is the focus of this paper. The parties connected to the bill of lading contract have different interests in this context, with flexibility on the carrier's behalf on the one hand and the cargo interests'[5] need for predictability on the other. The purchaser of goods, who was not involved in the making of the contract of carriage and thus stands as third party, but takes over rights and potentially also duties arising from this contract by accepting the bill of lading representing the goods, ought to be able to determine his potential exposure before becoming bound by the terms of the contract originated between others. The carrier on the other hand wishes to be as flexible as possible to be able to claim against the consignee/third party holder for any freight, expenses or liabilities arising during the carriage. Freight may be outstanding, the carrier may have had to take action to keep the goods safe,[6] for which he wishes to claim expenses incurred. The carrier may also wish to claim for compensation in case the goods' character had not been declared appropriately and the goods

2 The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008.

3 In Chapter 11, which is headed 'transfer of rights', a title that clearly fails to convey the full picture.

4 In the spirit of the Rules to apply as widely as possible and to enable electronic transfer the terminology used by the Rotterdam Rules is 'negotiable transport document or negotiable electronic transport record'. For ease and to shorten the reference in the following, references to a 'negotiable bill of lading' or 'negotiable transport documents' are intended to include 'negotiable electronic transport records'.

5 Parties interested in the cargo, such as the shipper/consignor, the consignee (to whom the goods are consigned/shipped; often the buyer as indicated as consignee in the bill of lading), the holder of the bill of lading (the bill of lading as a document of title can be passed to another person and possession and possibly even property in the goods can be transferred in this manner) or the cargo owner. For further information on the sale contract context see below.

6 Such as re-stowing or treatment of some kind, e.g. fumigation of infected cargo or separation and discharge of cargo damaged due to circumstances for which the carrier is not liable.

have caused injury or damage to the carrier or caused him to incur liability in respect of other cargo. The goods may have been shipped under a charterparty[7] where demurrage[8] may have accrued either in direct connection with the particular goods under the bill of lading or for cargo in general loaded under the charterparty. The carrier will want to pursue his claims in the most effective way, which may be against the goods and/or the person with an active interest in the goods, the consignee of the goods or holder of the bill of lading wishing to collect them. This would also be of particular interest to the carrier where the shipper is not creditworthy or unlikely to pay. Since the third party holder of a bill of lading can pursue rights against the carrier, it is also necessary to balance this position with giving the carrier a right to claim as against this privileged third party in relation to the goods and their carriage. The question is when this should occur and how far reaching these claims should be. This paper will analyse the position as envisaged by the Rotterdam Rules.

After giving a very brief introduction to the Rotterdam Rules and in particular to the relevant rules for their interpretation, this article will set out the international sales context in which the transfer of the bill of lading arises and on which this potential harmonisation impacts. To illustrate the issues a case-scenario is introduced to unfold throughout the paper. Although mostly written against the background of English law, an overview over national law solutions for such transfer of the bill of lading and the related liabilities of the parties is given thereafter, before analysing the requirements of the Rotterdam solution in detail. This article aims to show the progress made by including the chapter on transfer of rights in the Rotterdam Rules, setting out, on the one hand, the position that has been clarified and unified by the Rotterdam provisions and, on the other hand, which aspects still need further elaboration and interpretation and to suggest points for consideration in the latter process.

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7 Contract for the hire of a ship or part thereof.

8 Liquidated damages payable by the shipper loading the goods or the consignee collecting the goods for exceeding the time contractually allowed for (and thus already included in the freight charges) for loading and discharge operations.

1. The Rotterdam Rules

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules, was adopted in 2008 in order to establish a uniform and modern legal regime between the carrier, shippers and consignees for contracts of carriage of goods door-to-door involving a sea-leg.[9] The Convention is intended to be an alternative to earlier conventions on the carriage of goods by sea and has a much wider reach than traditional sea carriage conventions. The Convention is not (yet) in force.[10] If and insofar as the Convention enters into force it replaces other sea carriage conventions which must be denounced by States on accession to these new Rules.[11]

Interpretation of the Rotterdam Rules

As with every new international legal instrument, the provisions of the convention will need to be analysed and their meaning identified, interpreted and tested. Article 2 of the Rotterdam Rules requires the Rules to be interpreted in a manner that gives regard to their international character, to the need to promote uniformity in their application and the observance of good faith in international trade.[12] As generally with international treaties intended to harmonise an area of law, there is a danger

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9 See introductory comments of UNCITRAL (United Nations Commission on International Trade Law) on the Convention at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html. The Rules apply to contracts of carriage, which fulfil certain territorial requirements (Art 5) and exclude application to charterparties (Art 6 and 7).

10 It was signed by 24 States, but out of the required 20 ratifications (Art 94 RR), it has as of August 2012 only achieved two by Spain and Togo. The Norwegian Maritime Law Commission has also recommended that Norway should, in the interest of uniformity, ratify the Rotterdam Rules at a time when the United States or the larger European Union Member States ratify. See Norge Offentlinge Utredninger (NOU) 2012:10 Gjennomforing av Rotterdamrelene i Sjoloven at 1.4 Summary in English, available at http://folk.uio.no/erikro/WWW/sjolov/English.pdf or via http://folk.uio.no/erikro/WWW/sjolov/index.html. It remains to be seen whether this condition will be fulfilled.

11 Art 89 RR.

12 In detail as to the relevant principles, see Gebauer, "Uniform Law, General Principles and Autonomous Interpretation", (2005) 5 Unif L Rev 683.

that contracting states will continue to apply their pre-existing domestic understanding and concepts in application of the convention, here the Rotterdam Rules. This is even more so, where the provisions are lacking in detail or are ambiguous due to difficulties in reaching a compromise at negotiation stage.[13] The temptation is certainly great to use a body of law already developed and fine-tuned,[14] and to search for loopholes or to mould interpretation in order to accommodate the traditional understanding within or despite the new Rules. The drawback of using established principles of a national system is that this approach blocks wider and truly international harmonization. While it is clearly useful and important to learn from past developments, interpreting the new Rules and filling the gaps with established concepts can enhance uniformity only where this is done in the spirit of the Rules and in line with an international, rather than domestic, understanding and trajectory.

To aid interpretation in this vein this article aims to highlight discussions in the *travaux préparatoires* in order to show, insofar as possible, the intended purpose behind the provision. The rules for interpretation as set out in the Vienna Convention on the Law of Treaties require the interpretation to be made "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[15] The convention's text is only one part of the context as per Article 31 of the Vienna Convention, although at

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13 See in the context of the 1980 United Nations Convention on Contracts for the International Sale of Goods, which entails a similar interpretation provision, Goode, Kronke, Mckendrick, *Transnational Commercial Law, Text, Cases and Materials,(OUP, 2007) at paras 3.36 – 3.65* with further references.

14 Maybe even including Law Reform such as in the United Kingdom, where the Bill of Lading Act of 1855 was replaced by the Carriage of Goods by Sea Act 1992 in order to address certain fundamental issues. See for a comparison of the Rotterdam Rules with the CoGSA 1992 Thomas, "A comparative analysis of the transfer of contractual rights under the UK Carriage of Goods by Sea Act 1992 and the Rotterdam Rules, (2011) 7 JIML 437 and Debattista, "Transfer of Right", Chapter 11 in Baatz, Debattista, Lorenzon, Serdy, Staniland and Tsimplis (hereafter Baatz et al). *The Rotterdam Rules: A Practical Annotation,* (Informa, London 2009) and Williams, "Transport Documentation – the new approach" in Chapter 8 in Thomas, *A New Convention of the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Pub, Witney 2009).

15 Art 31.1 of the 1969 Vienna Convention on the Law of Treaties.

this moment arguably the most important one,[16] with the text being equally authentic in Arabic, Chinese, English, French, Russian and Spanish, thus limiting the authority of a term as construed by literal interpretation in any one of the languages alone. The context again forms only one part of the interpretation approach to establish the ordinary meaning in good faith together with the object and purpose of the treaty. The Vienna Convention particularly invites[17] the use of additional tools including the *travaux préparatoires* to (a) confirm a meaning found by way of application of the principles set out above,[18] or to (b) determine the meaning still ambiguous or where the result would be otherwise manifestly absurd.[19]

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16 Article 31 of the 1969 Vienna Convention, General rule of interpretation, reads:
"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(*c*) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

17 In Art 32.

18 That is Art 31 of the Vienna Convention on the Law of Treaties.

19 Article 32, Supplementary means of interpretation, states: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (*a*) leaves the meaning ambiguous or obscure; or (*b*) leads to a result which is manifestly absurd or unreasonable."

2. Carriage of goods in the context of the international sales transaction

Carriage of goods is not conducted in a vacuum, but against the background of other related contractual arrangements such as a sale contract, which may already be in place or are yet to be made. Depending on the sale contract terms chosen it may be for the seller to arrange for the transportation of the goods.[20] Where the carriage contract was taken out by the seller, but the risk of loss of or damage to the goods, possession and possibly also property is to pass during transit, the buyer will need both access to the goods and a means to claim against the carrier. The seller will thus traditionally procure a bill of lading, which acts as evidence of the contract of carriage, receipt of the goods and document of title, so that possession of and, if intended, also property in the goods can be passed, in conjunction with[21] the transfer of the document. The buyer who has become holder of the bill is then also enabled to claim delivery of the goods from the carrier and take action in case of loss of or damage to the goods. Where the goods in transit were insured, the buyer may choose to claim under the insurance contract and leave his insurer, under the doctrine of subrogation,[22] to claim against the carrier. Where the goods have been financed they may be pledged to a bank by means of transferring the bill of lading to it. The banks' interest is to hold access to the goods as security; it does not normally deal with the goods themselves unless it needs to realize the security, and thus wishes to remain free from any involvement in and liabilities under the carriage contract.[23]

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[20] For example for sale contracts on Delivered terms such as DAT(Delivered At Terminal), DAP (Delivered A Place) or DDP (Delivered Duty Paid) or C-Terms CIF (Cost , Insurance, Freight), CIP (Cost and Insurance Paid to) or CPT (Carriage Paid To) terms, as opposed to Ex works, or F-Terms such as Free Carrier, FAS (Free Alongside Ship) or FOB (Free On Board) terms where it is normally on the buyer to organize and take out the contract of carriage.

[21] The latter may coincide with the time of the transfer of the documents, but may also, particularly in respect of property pass at another, usually later stage, for example in case of unascertained goods; see e.g. in UK, ss 16,18 Rule 5 and 20A of the Sale of Goods Act 1979.

[22] See for example the UK Marine Insurance Act 1906, s 79.

[23] For further detail on the sale contract context see for example Thomas, "Transfer of

Differing national solutions exist with the purpose of enabling the holder of a bill of lading to demand delivery and to claim directly against the carrier, and liabilities to varying degree have been imposed on him in return.[24] The imposition of liability may be particularly serious for the holder where the cargo consigned under the bill of lading is of dangerous nature and has caused damage. If, in such cases, the shipper had not fulfilled his duties to give the carrier timely notice of the dangerous nature[25] and, where necessary, appropriate instructions, liability may be incurred not just by the shipper, but also by the holder of the bill of lading, depending on the applicable law and whether the relevant conditions are met. This can potentially lead to a buyer qua third party bill of lading holder acquiring liability beyond the value of and benefit derived from the goods.

To illustrate some of the issues encountered in this context, the following simplified case scenario may be of help:

Seller S, in fulfilment of his duties under a sale contract with buyer B, ships a

contractual rights under COGSA 1992 and the Rotterdam Rules" (2011) 17 JIML 437 at 438-439 and von Ziegler, "Transfer of Rights and Transport Documents", paper delivered at UNCITRAL Congress "Modern Law for Global Commerce", 9-12 July, 2007, Vienna, available at www.uncitral.org/uncitral/en/about/congresspapers.html at p1-2.

24 Some countries such as the UK for example, have tackled the problem by means of statutory assignment (see Carriage of Goods by Sea Act 1992, reforming and repealing the Bill of Lading Act 1855), others, such as The Netherlands and Germany, by the doctrine of a contract in favour of third parties ("Derdenbeding" or "*Vertrag zugunsten Dritter*" respectively) or for example in France as a three-party contract (*contrat à trois personnes*); see Smeele, "The bill of lading contracts under European national laws (civil law approaches to explaining the legal position of the consignee under bills of lading)" in Thomas, *The Evolving Law and Practice of Voyage Charterparties* (Informa, London 2009) at p 251 et seq. and more generally Sturley, Fujita, van der Ziel, *The Rotterdam Rules, The UN Convention on Contracts for the International Carriage of Goods wholly or Partly by Sea*, (Sweet & Maxwell, London 2010) (hereafter Sturley et al) at para 10.002.

25 As internationally recognised, see Art IV (6) of the Hague and Hague-Visby Rules (1924 International Convention for the Unification of certain Rules relating to Bills of Lading (Hague Rules) and the Hague Rules as amended by the 1968 Brussels Protocol (Visby Protocol) respectively), Art 13 of the Hamburg Rules (1978 United Nations Convention on the Carriage of Goods by Sea) or Art 32 of the Rotterdam Rules.

consignment of drums filled with chemicals with carrier C. S obtains a bill of lading in his name; the bill contains a wide merchant liability clause also clearly burdening the merchant with liability for dangerous cargo. S indorses and delivers the bill to a bank nominated pursuant to a letter of credit facility opened by B in S's favour. The bank, after debiting B's account, indorses and delivers the bill of lading to B. B presents the bill at the port of destination to C in order to take delivery, only to find that some of the drums had broken and some had been leaking during transit, causing damage to other cargo and the vessel. B alleges poor stowage as cause and wishes to claim against the carrier for his loss, whereas C claims that the goods, due to their dangerous nature and poor packaging, of which he had not been appropriately informed, had caused the damage. According to C, B and the bank as former indorsee are liable for the damages caused to the vessel and also owe C indemnification for any cargo liabilities incurred by C as a result of the leakage. B, considering the cargo damage, is no longer interested in receiving the goods and sells them for a discount to D, who actually takes delivery of the goods from the carrier. Due to their better financial standing, C still wishes to pursue the bank and buyer B for his claims.

Variant I: FOB buyer B had chartered the vessel on which the goods were shipped. S shipped the goods under the bill of lading in his name. Transfer of the bill to B via the bank as above.

Variant II: B is FOB buyer, but not involved in the carriage, although named as shipper on the bill of lading.

To provide for the interests under the sales transaction, including those of financing institutions, and to harmonize the variety of approaches used in national laws, the Rotterdam Rules codify the holder's rights and liabilities in chapter 11.[26] This chapter together with other rules of the Convention will be relevant in deciding on the rights of suit and liabilities between the parties to the case scenario as set out above and will be referred to as appropriate.

3. Intended effects of harmonization

It is to be commended that an attempt was made to harmonize this

[26] Entitled "Transfer of Rights".

notoriously difficult area with its variety of national law doctrines and solutions.[27] As with many attempts at international level to find an acceptable solution it is a compromise as best possible at the time, catering for the needs of different legal systems. It will therefore be naturally unable to deal with all issues as developed under the various national laws. Guidance on the meaning associated under the Rules and possible ways of interpretation of some of the concepts and potential gaps is therefore necessary.

Inclusion of the concept of assumption of rights and duties should also alleviate some rather difficult aspects of private international law regarding the classification and characterization of these concepts and the identification and use of appropriate connecting factors.[28] This is

[27] While since inception of the project the aim was to also harmonize and clarify the issues relating to transfer of rights and, to a certain degree, the transfer of some obligations of the contractual shipper (see A/CN.9/WG.III/WP.52 - Transport Law: Preparation of a draft instrument on the carriage of goods [wholly or partly] [by sea] - Transfer of Rights: Information presented by the Swiss delegation (hereafter Swiss Report) at para 2) this was riddled with difficulty and several times the suggestions were made to delete the chapter altogether (see for example the Draft Convention of the 19th Session had the whole Chapter in Square brackets A/CN.9/WG.III/WP.81 at p 43 et seq. and see WG III Report of its 17th session A/CN.9/594 at paras 72, 77 and A/CN.9/WG.III/WP.96 - Transport Law: Preparation of a draft convention on the carriage of goods [wholly or partly] [by sea] - Proposal on Chapter 12 "Transfer of Rights" submitted by the Delegation of the Netherlands (hereafter Netherlands' Report) at paras 1-2, 4). See also Diamond QC, "The next Carriage Convention?", [2008] LMCLQ 135 at 182 welcoming the solution, but expressing regret that it was not articulated further and Sturley et al, *op cit.,* at para 10.040 embracing the solution as a substantial improvement of the status quo.

[28] An initial hurdle is whether such rules are classed as procedural or rules on the substance of the case and thus should be governed by the lex causae or the lex fori. How should this transfer be categorized, as contractual, quasi-contractual or other? Are there further incidental questions that need to be addressed? Is it relevant where the documents were transferred and does the place of business of the lawful holder matter? Is a transferrable bill of lading a "negotiable instrument" in the sense of Art 1.2 (d) of the Rome I Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)) and Art 1.2 (c) of the Rome II (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)). See for example Sing, Conflict of Law implication of the Carriage of Goods by Sea Act 1992 [1994] LMCLQ 280, Boonk, "Determining jurisdiction and choice of law in contractual disputes coupled with property-related claims", [2011] LMCLQ 227, Fawcett, Harris, Bridge, *International*

particularly relevant for the question whether a third party can be bound by clauses of a contract originating between other persons. Even though the question remains as to the appropriate method of identifying the transport convention,[29] it is submitted that since any applicable law that recognized and implemented the Rotterdam Rules would have had to amend its rules to accommodate the convention's provisions,[30] the inclusion of chapter 11 will side-step some of these difficult conflict of laws questions by directly providing the substantial rules to be applied as a matter of the identified uniform international law.[31]

B) Chapter 11 in context

The advancement of the law by the introduction of chapter 11 is best appreciated when looking at the different national law solutions. Some examples are offered below, before going into more depth in analysing the Rotterdam solution.

Sale of Goods in the Conflict of Laws (OUP, 2005) at Chapters 5 & 14 and Dicey, Morris and Collins, *The Conflict of Laws* (14th edn, Sweet & Maxwell, London 2006) at para 33-290.

29 As a matter of unified international law in force in the forum state or as a convention recognised by the identified applicable law. If the applicable law approach was taken within a European Union Member State and the matter was categorized as "voluntary assignment or contractual subrogation" the questions of assignability, the relationship between the debtor and the assignee and the conditions under which assignment can be invoked, would according to Art 14.2 of Rome I Regulation be governed by the law governing the assigned or subrogated claim. Thus the Rotterdam Rules, if they applied to the carriage contract, would also govern the carrier - third party holder relationship.

30 See Arts 90 and 79 of the Rotterdam Rules.

31 See however Swiss Report A/CN.9/WG.III/WP.52 at para 15 and Netherlands Delegation Paper for 20th Session A/CN.9/WG.III/WP.96 at para 4, suggesting that the matter of whether the third party bill of lading holder would be bound by the terms of the negotiable document was and remained a matter for the applicable law.

1. Selected National Law solutions

United States

In the United States, while the rights of the bill of lading holder for bills issued in the United States are codified in the Promerene Bills of Lading Act,[32] the liabilities are left to common law.[33] Liabilities have been held to be assumed by the consignee taking delivery as implied contractual obligations or implied promise to pay, potentially all, outstanding charges. Case-law implying liability includes situations where the cargo was received without having held the bill of lading, - holding that the consignee had taken the risk of the content of such document even without having seen it -, but also going further and, in contradiction to clear statements on the bill, implying liability on a consignee unaware of the true facts, - here a freight prepaid notation on the bill.[34] Thus, liability may be incurred without it being ascertainable from the bill of lading, a danger for the consignee and possibly impairing tradability of bills of lading.[35] Transfer of the shipper's liabilities arising from his duty to forewarn the carrier of the dangerous nature of the goods on the buyer/consignee has found inconsistent treatment.[36] This disparity may partly stem from the

[32] 49 USC Chapter 801 (§§80101 – 80116); the Act deals with the nature of bills of lading, in particular title and rights under them, rules on negotiation and consequences of their transfer, duty to and liability for delivery and statements under the bill. See in particular § 80105 which states: "(a) Title. – When a negotiable bill of lading is negotiated – ...
(2) the common carrier issuing the bill becomes obligated directly to the person to whom the bill is negotiated to hold possession of the goods under the terms of the bill the same as if the carrier has issued the bill to that person."

[33] See Bools, *The Bill of Lading – A Document of Title to Goods, an Anglo-American Comparison* (London: LLP Limited, 1997) at p 107.

[34] See Bools, *op cit*, at p 111 referring to *USA v Ashcraft-Wilkinson (The Vittorio Emmanuele III*) [1927] AMC 872 and *Ivaran Lines and Farovi Shipping Corp. v. Sutex Paper and Cellulose Corp*, [1987] AMC 690.

[35] See Bools, *op cit* at p 112.

[36] In *Rickmers Genoa Litigation (In re M/V)* (2009) 622 F Supp 2d 56; 2009 AMC 609 (SDNY); clarified on reconsideration (2009) 643 F Supp 2d 553 (SDNY), summary available at (2009) 782 LMLN 4, this imposition had been denied despite a broad merchant's liability clause including a buyer/consignee in its definition. On the contrary a broad merchant's indemnification agreement was held to be valid as against

opposing views as to whether the liability of the shipper for the shipment of dangerous cargo is strict or fault based. Both views have been expressed under general maritime law as well as under the US CoGSA.[37]

Canada

While the third-parties' rights and liabilities were subject to legislative reform in the UK in the mantle of the Carriage of Goods by Sea Act 1992,[38] replacing the 1855 Bills of Lading Act,[39] legislation based on the 1855 Act is still in force in several Commonwealth countries. For example,

the bill of lading holders in *APL Co PTE Ltd v UK Aerosols Ltd,* 2006 AMC 2418 (N.D. Cal. 2006), summary at (2007) 726 LMLN 2, upheld in the Court of Appeals (9th Circuit) (2009) 582 F3d 947, 2009 AMC 2234, summary at (2009) 781 LMLN 3. Also reporting the case Tetley, *Marine Cargo Claims*, Vol I, (4th edn, Thompson Carswell, 2008) at p 1135; Robertson & Sturley, "Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits", 34 (2010) Tul Mar LJ 443 at 482 & 484 and Davies & Force, "US Maritime Law" [2010] LMCLQ (Yearbook) 214 as §§ 302 and 316.

37 See Lord Lloyd in *Effort Shipping Co Ltd v Linden Management SA and Others (The Giannis NK),* HL [1998] 1 Lloyd's Rep 337 at 343 referring to *Sea-Land Service Inc v The Purdy Company of Washington* [1982] AMC 1593 cited with approval in *Excel Shipping Corp v Seatrain International SA* (1984) 584 F Supp 734 at p 748, for decisions requiring fault as a prerequisite for liability (thus remaining only with the shipper) and Force, "Shipment of Dangerous Cargo by Sea", 31 (2007) Tul Mar LJ 315 (2006-2007) and in particular at 340 showing the differing views under the General Maritime Law and at 340 et seq. under CoGSA, highlighting and querying the impact of the decision of the Court of Appeals for the Second Circuit in *Senator Line GmBH& Co KG v Sunway Line Inc.* (2002) 291 F.3d 145, 2002 AMC 1217 interpreting the CoGSA dangerous cargo provision as strict, persuaded by the UK HL decision in *The Giannis NK*. But see also the Court of Appeals for the Second Circuit approach in *The DG Harmony* (2008) 518 F.3d 106; (2008) AMC 609, summary at (2008) 740 LMLN 3, requiring further fact finding as to whether the shipper of dangerous cargo under the CoGSA to which the carrier had agreed had negligently failed to warn the carrier of the present dangers; see also Robertson & Sturley, "Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits", 34 (2010) Tul Mar LJ 443 at 484 and Gay, "Dangerous Cargo and "Legally Dangerous" Cargo", Chapter 6 in Thomas, *The Evolving Law and Practice of Voyage Charterparties* (Informa, London 2009) at paras 6.168 et seq.

38 Thereafter COGSA 1992.

39 Under the 1855 Act, the third party holder became automatically subject to the rights and duties as a whole, if the requirements of the Act (that the holder obtained property by virtue of the transfer of the bill, were fulfilled.

under Canadian law,[40] the bill of lading holder not only obtains rights, but also automatically full liabilities under statue,[41] insofar as property is transferred together with the negotiation of the document, and otherwise only if a contract between the carrier and the holder can be implied. However even a party named as the shipper, if he was not responsible for arranging or otherwise involved in the contract of carriage, was held not to be a party to the contract.[42] In application of the Bills of Lading Act further problems arise, for example whether or not the consignee can rely on freight prepaid notations on the bill.[43] In addition to setting out the "rules for transfer", both issues have been regulated and thus clarified in the Rotterdam Rules.[44] Whether the shipper's personal liabilities are transferred under the Bills of Lading Act is not fully clear, but since the legislation is still based on the UK's 1855 Act, it is likely that the UK's position is taken into account.[45]

United Kingdom

The UK CoGSA 1992 is based on the principle of mutuality. In contrast

40 Canadian Bills of Lading Act, R.S.C. 1985, c. B-5, which nearly verbatim follows the UK 1855 Act.

41 Canadian Bills of Lading Act, R.S.C. 1985, c. B-5, states at s. 2 that "Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes on or by reason of the consignment or endorsement, has and is vested with all rights of action and is subject to all liabilities in respect of those goods as if the contract contained in the bill of lading had been made with himself".

42 *Union Industrielle et Maritime v. Petrosul International Ltd ("The Roseline")*, Federal Court of Canada [1987] 1 Lloyd's Rep 18, a decision which would no longer apply under the Rotterdam Rules due to its Art 33; the latter binding the documentary shipper to the same contractual rights and duties as the shipper.

43 See the for example the decision of the Ontario Superior Court *Cassidy's Transfer & Storage Limited v. 144736 Ontario Inc.*, 2011 ONSC 2871 with further reference to case-law.

44 See Art 33 and 42; and see also Art 58.2 for the requirement of an ascertainable liability.

45 See also Tetley, opt. ciit. at page 1135 opining that on grounds of reasonableness and fairness the duties under Art 4(6) and 3(5) HR and HVR should be personal to the shipper and not transferred by statute, but that these liabilities may be transferrable by contract by using appropriate clauses such as merchant clauses with a wide definition of this term.

to its forerunner, the CoGSA 1992 firstly transfers rights under the contract of carriage to the lawful holder of the bill of lading irrespective of the acquisition of proprietary rights,[46] and secondly requires the lawful holder of the bill of lading to take steps "activating liability" by approaching the carrier in assumption of his rights under the Act.[47] Only if the holder takes or demands delivery or makes a claim under the contract of carriage in respect of any of the goods to which the document relates, does he "become subject to the same liabilities under that contract as if he had been a party to that contract." [48]

Germany - law until 24th April 2013

Once the goods arrived at the port of destination German law afforded the bill of lading holder/consignee a right to delivery on the basis that the bill of lading contract was, and still is, a contract in favour of a third party.[49] Until the taking of delivery of the goods no liabilities were incurred, since the contract was not one to the detriment or burden of the third party, but in his favour. However, as a condition for taking up the rights under the contract, liabilities were incurred once delivery of the

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46 See ss 2(1) and 5(2) CoGSA 1992 in contrast to the previous s 1 of the Bills of Lading Act 1855.

47 See s 3(1) CoGSA 1992.

48 Section 3(1) *Liabilities under shipping documents* reads: "(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection
(a) takes or demands delivery from the carrier of any of the goods to which the document relates;
(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or
(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,
that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract." Relevant case-law as to the interpretation of these requirements is referred to below at C) 4.

49 "*Vertrag zugunsten Dritter*", § 328 BGB (Bürgerliches Gesetzbuch - the German Civil Code).

goods was accepted.[50] By law,[51] and only when taking delivery, the consignee/receiver of the cargo became liable to pay freight and any other charges, expenses and demurrage claims as per contract of carriage or, if a bill of lading was issued, as ascertainable from the bill.[52] The third party consignee could also become bound to contract clauses in the bill burdening him with further liability, such as liability for damages caused by the cargo where the third party consignee, by using the bill in taking delivery, showed its consent to being bound by them. However in such a case, since the level of liability could not be determined from the bill, there was a duty on the carrier to inform the receiver of the actual charges connected with the delivery, allowing the receiver to decide whether to take delivery after all.[53] This safeguarded the receiver from hidden costs and traps and was in line with the German law on standard clauses.[54]

Germany – new law as of 25th April 2013

A slightly different position is proposed under the new German maritime law,[55] which also took some inspiration from the Rotterdam Rules and may thus be of particular interest. Rather than simply leaving the matter to the application of principles of a contract in favour of the third party, the new law[56] now clearly sets out the rights of the consignee/receiver. The contractual shipper retains his contractual rights, but also his liabilities.[57] A full transfer of the debt, as under the previous law, with the

50 Rabe, Seehandelsrecht (4th edn, 2000) Vor § 556 para 14.

51 The then § 614 HBG (Handelsgesetzbuch – Commercial Code).

52 See the then § 614 HBG. The carrier had a right to withhold delivery until the freight and charges were paid and only with delivery did the contractual shipper's liability seize to exist (the then § 625 HBG). Thus German law conceived a true transfer of liability on delivery, freeing the original party from its liability to the same extent as the receiver became liable.

53 Rabe, Seehandelsrecht (4th edn, 2000) § 564b para 14 and § 614 para 20.

54 See § 9 AGBG (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen).

55 See the law reforming German maritime law, the Gesetz zur Reform des Seehandelsrechts of 20th April 2013 (Bundesgesetzblatt 2013 I 831).

56 In § 494 (1) HGB.

57 § 494 (1) 2, (4) and 521 (1) HGB.

effect of freeing the original contracting party of its obligations no longer takes place. A consignee who is using his rights of demanding delivery or claiming against the carrier under the contract of carriage, is charged with the duty to pay (a) the outstanding freight, insofar as it is determinable from the transport document or, where no reference is made, insofar as reasonable, and (b) certain delay charges if the amount was notified to the consignee on delivery of the goods.[58] In similar vein of being able to determine the cost related to the goods, a receiver of cargo transported under a voyage charter must only pay load-port demurrage where the amount has been notified to him on delivery of the goods, although demurrage accumulating at the port of discharge is borne by the consignee without such notification.[59] The provisions are not designed to impose a liability on the consignee, rather it is a condition of receiving the goods, as the carrier is entitled to withhold delivery until payment is made[60] and, in case of a bill of lading, also until return of the bill with delivery notation.[61]

The drafters took the conscious decision not to burden the consignee with further duties or with liabilities imposed on him under the bill of lading, for the reason that the legitimate holder of the bill of lading usually had no influence over the content of the bill. While he may be able to inform himself of the corresponding duties, particularly in cases where the exact level of obligations is not directly determinable from the bill, this could be laden with considerable difficulty. Instead, the consignee should not be exposed to undeterminable risks and should only be taking on the clearly prescribed obligations under the Act.[62] The actions of a consignee as controlling party or interim holder in giving directions to

58 § 494 (2) and (3) HGB.

59 § 530 (3) 2 and 535 (1) 2 HGB.

60 The carrier has an extended lien on the goods for charges from the carriage of the goods, but also on the goods for other non-contentious claims arising out of other contracts with the shipper as long as the goods are the shipper's property; § 495 HGB.

61 § 494 (1) and 521 (1), (2) HGB. See also the explanatory notes to § 494 (1) 1 of the reform bill of 9th May 2012 (Gesetzesentwurf der Bundesregierung of 09.05.2012 (http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/RegE_Seehandelsrecht.pdf?).

62 Explanatory notes to § 494 (1) 1.

the carrier to deliver the goods to another recipient and/or at another place would not be sufficient to trigger liability under the contract of carriage beyond reimbursing the carrier for the extra cost and freight arising out of the directions. The consignee in this case would not demand delivery nor obtain the goods and it was sufficient that the final receiver would become liable in addition to the shipper.[63] The German law thus strongly emphasises foreseeability above other considerations by clearly defining the potential liabilities and setting out the circumstances in which they can be incurred by the consignee.

Norway

Norwegian law distinguishes between the delivery of the goods against a bill of lading and delivery otherwise.[64] In the former case the receiver becomes liable only on receiving the goods and then only for freight and other claims due to the carrier pursuant to the document. Where delivery is effected otherwise than against a bill of lading the receiver is only liable for freight and other claims according to the contract of carriage if the receiver had notice at the time of delivery or if he was aware or ought to have been aware that the carrier had not received payment. The key issue seems to be that the receiver taking delivery is aware of the liability incurred, whether by clear terms in the bill, [65] where delivery is against a bill of lading, or by notice at delivery otherwise. Liability for dangerous cargo is on the contractual shipper,[66] but can potentially be imposed on the receiver by clear stipulation in the transport document.

Thus national law solutions vary in technique from mere implied contracts, contracts in favour of third parties, to statutory assignment or statutory imposition of liability, in some cases of narrow liabilities, in others of most or all liabilities connected with the goods. Under some

63 Explanatory notes to § 494 (2).

64 S 269 of the Norwegian Maritime Code (NMC). Many thanks go to Professor Erik Røsæg of the Scandinavian Institute of Maritime Law, Oslo, for this information.

65 The terms of the bill of lading are definitive as between the carrier and the holder of a bill of lading and no other clauses of the contract of carriage can be invoked (s 292 (3) NMC).

66 As per s 291 NMC

solutions the bill of lading, including its stipulations and notations, is taken as definitive, yet in others even freight pre-paid notations cannot be relied upon. While most laws allow bill of lading clauses burdening the holder with liability, in some this must be clearly identifiable from the bill or, at least known to the third party holder/consignee, whereas other solutions do not allow imposition of further duties other than by statute. Some of these divergences are directly or indirectly covered by the corresponding provisions of the Rotterdam Rules or may be considered useful in the interpretation of some of the requirements.

2. The Rotterdam Rules

Chapter 11 of the Rotterdam Rules consists of two articles, dealing separately in Article 57 with the transfer of rights and in Article 58 with the imposition of liabilities on the holder. The title of the chapter sadly does not convey the full picture as it rather unsatisfactorily reads "Transfer of Rights", omitting altogether to identify the very important liability implications, which are the focus of this paper. The principles enshrined in chapter 11 are that a transfer of rights takes place by means of passing the bill to the named person in the bill of lading or by negotiation of a bill of lading or its electronic equivalent. Thereafter, and in line with the principle of mutuality, once rights are exercised by the holder, he may become liable under the document. The Rules also make clear that simply being a holder or negotiating a bill is harmless and does not trigger liability. It is further clarified that not all liability moves to the holder, but only liability imposed on the holder under the contract of carriage and only insofar as the holder has a chance of becoming aware of the burden connected to taking up the document that he is to assume. It is welcome that consensus at least to this level has been achieved, considering the many different solutions existing under national law as to the position of the holder under a bill of lading. Chapter 11 however also introduces many uncertainties, which will be highlighted in more detail in Part C) below.

C) The Rotterdam Rules liability provision

Article 58, entitled "Liability of holder" states:

> "Liability of holder
>
> Without prejudice to article 55[67], a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.
>
> A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.
>
> For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:
>
> (*a*) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or

[67] Article 55 RR reads:
"Providing additional information, instructions or documents to carrier
1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.
2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents."

(*b*) It transfers its rights pursuant to article 57." [68]

Thus, while Article 58 burdens the holder that has used his rights under the contract of carriage with liabilities, it also clarifies the position of intermediate holders, who have remained passive and denotes certain activities as insufficient of constituting the exercise of any rights. Article 58 is qualified by Article 55,[69] where the holder as controlling party may be called upon to provide information, documents and instructions. The latter provision operates independently and liability thus incurred prevails over the rule of Article 58.1.[70] The liabilities with which the holder under Article 58 may be burdened are only those imposed on it by the contract of carriage, and only insofar as these are incorporated in or ascertainable from the negotiable transport document. But how are these criteria to be understood?

1. Scope of Chapter 11 "Transfer of Rights"

Chapter 11 of the Rotterdam Rules only regulates the holder's position with respect to negotiable transport documents,[71] whether enshrined in paper

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[68] Article 57 provides:
"*When a negotiable transport document or negotiable electronic transport record is issued*
1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:
(*a*) Duly endorsed either to such other person or in blank, if an order document; or
(*b*) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.
2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1."

[69] Art 55 imposes information and instruction duties on the controlling party.

[70] See A/CN.9/645 – WG III Report on its 21st Session at para 180 and Sturley et al, *op cit.,* at para 10.027.

[71] This is clarified by both the heading of Art 57 "When a negotiable transport document or negotiable electronic transport record is issued" and the definition of holder in Art 1.10 referring to negotiable transport documents or negotiable electronic transport records only.

form or as an electronic record.[72] Non-negotiable transport documents[73] such as waybills or straight bills of lading[74] are not included and are left to

[72] Indeed Art 57 was seen as being of great importance for the purposes of electronic commerce in order to achieve functional equivalence of electronic transport documentation with paper documents; see A/CN.9/642 – WG III Report of its 20th Session at para 116.
Art 1.15 RR defines "negotiable transport document" as "a transport document that indicates, by wording such as "to order" or "negotiable" or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being "nonnegotiable" or "not negotiable"."
According to Art 1.19. "Negotiable electronic transport record" means an electronic transport record:
(*a*) That indicates, by wording such as "to order", or "negotiable", or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being "non-negotiable" or "not negotiable"; and
(*b*) The use of which meets the requirements of article 9, paragraph 1."
The focus in the following discussion will be on terminology and procedures applied to the traditional paper documents.

[73] According to the Rotterdam Rules, Art 1.16. ""Non-negotiable transport document" means a transport document that is not a negotiable transport document." Art 1.20. ""Non-negotiable electronic transport record" means an electronic transport record that is not a negotiable electronic transport record."

[74] Several discussions were held whether straight bills should or could be included in the provisions for transfer as between shipper and named consignee, see Swiss Delegation Report for the 16th Session A/CN.9/WG.III/WP.52 at paras 5, 10 – 12 and A/CN.9/526 – WG III Report of its 11th Session at paras 132 – 133, but it was decided against; insofar expressing regret, see Diamond QC, "The next Carriage Convention?", [2008] LMCLQ 135 at 181. There would however be nothing to stop any national law from adopting a similar approach to Chapter 11 of the Rotterdam Rules for non-negotiable documents and in particular straight bills of lading. For examples for an application of provisions to create such mirror effect in the conflict of laws area, see the application of the European choice of law rules of Rome I (Regulation (EC) No 593/2008 on the Law Applicable to Contractual Obligations (OJ L 177, 4.7.2008, p 6)) and Rome II (Regulation (EC) No 864/2007 on the Law Applicable to Non-Contractual Obligations (OJ L 199, 31.7.2007, p 40)) also for intra-UK disputes (by virtue of regulation 5 of the Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations 2009/3064, regulation 4 of the Law Applicable to Contractual Obligations (Scotland) Regulations 2009/410 and see Regulation 6 of the Law applicable to Non-contractual Obligations (England and Wales and Northern Ireland) Regulations 2008/2986, regulation 4 of the Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008/404) and similarly for allocation of jurisdiction for intra UK disputes (by virtue of section 16 and Schedule 4 of the Civil Jurisdiction and Judgments Act 1982) in accordance with

be dealt with by the applicable law.[75] This may seem a somewhat limited field of application since, for example, the UK Carriage of Goods by Sea Act 1992 deals with sea waybills, including in its definition straight bills of lading,[76] and delivery orders, and Norwegian and German laws extend beyond bills of lading;[77] the concept of a contract in favour of a third party neither limits its application to freely transferable bills of lading,[78] nor do the principles of agency law stop at this very point. Irrespective, the efforts were concentrated only on documents which are freely transferrable and thus can be used as pledge. Detailed harmonization of non-negotiable documents was never truly approached, and while attempts had been made to provide conflict of laws rules to identify at least the applicable law deciding over the third party status, these were later abandoned.[79]

In order to transfer rights in accordance with Article 57, the person must be a "holder". In order to have liabilities imposed by Article 58 the

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the Rules of the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (OJ L12, 16.1.2001, p 1).

75 The Norwegian draft for the Rotterdam legislation for example envisages supplementing the codification of the Article 58 content (Art 320f of the Draft) with the re-enactment of its existing section under the Norwegian Maritime Code (Art 320g of the Draft) and thus reverting to the original position where the Rotterdam provision does not apply. Draft Section 320g reads:
"Duty of the receiver to pay freight, etc.
(1) If the goods are delivered against a transport document, the receiver becomes liable on receiving the goods for freight and other claims due to the carrier pursuant to the document unless otherwise follows from section 320f.
(2) If the goods were delivered otherwise than against a transport document, the receiver is only liable to pay freight and other claims according to the contract of carriage if the receiver had notice of the claims at the time of delivery or was aware or ought to have been aware that the carrier had not received payment." The term "transport document" in the draft includes electronic transport records. Many thanks go to Professor Erik Røsæg of the Scandinavian Institute of Maritime Law, Oslo, for this information.

76 See s 1(2) (a), (3) CoGSA 1992.

77 See above B) 1.

78 See Rabe, Seehandelsrecht (4th edn, CH Beck, München 2000), Vor § 556 No. 14 for details on how the principle applies.

79 See for example Art 12.3 of the UNCITRAL Draft for its 9th Session, A/CN.9/WG.III/WP.21 and Art 61 of the Draft for the 19th Session, A/CN.9/WG.III/WP.81 and WG III Report of its 20th Session A/CN.9/642 at para 132.

person must be a "holder that is not the shipper", since the shipper's liability is regulated separately under the Rotterdam Rules and directly under the contract of carriage.[80] This goes hand in hand with the definition of a holder who must be in possession of the negotiable transport document, and, either the named shipper or consignee[81] in the document or the person to whom, in case of an order bill, the document has been duly indorsed, or who is the bearer of the document, in case of a bearer bill or of a blank indorsed order bill.[82]

In the case scenario above, none of the concerned players, B, the bank or D were in direct contractual relationship with C in respect of the carriage, and thus Arts 57 and 58 RR would come into play to identify who could claim against whom. In particular, Article 58 would decide whether the carrier had a claim against buyer B, the bank or sub-buyer D.

The application of chapter 11 only extends so far as the Rotterdam Rules themselves are applicable. The Rules do not apply to charterparties, although they apply to a bill of lading issued under a charterparty, once or so long as it is in the hands of a holder or controlling party who is not an original party to the charterparty.[83] As long as the charterer holds the bill, the charterparty will prevail over the bill of lading. This must also

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80 See Chapter 7 and Art 55; on the shipper's liability under the Rotterdam Rules see for example Thomas, "The Position of Shippers under the Rotterdam Rules", [2010] EJCCL 22, Baughen, "Obligations owed by the shipper to the carrier", Chapter 7 in D. Rhidian Thomas, *A New Convention of the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Pub, Witney 2009), Sturley et al, *op cit*, at Chapter VI or Lorenzon "Obligations of the Shipper to the Carrier", Chapter 7 in Baatz et al, *The Rotterdam Rules: A Practical Annotation,* (Informa, London 2009).

81 According to Art 1.11 RR "Consignee" means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record."

82 According to Art 1.10 RR "holder" means:
"(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or
(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1."

83 See Arts 6 and 7 RR.

be so where the charterer is not shipper under the bill of lading but the bill was transferred to him at a later stage.[84]

Thus in Variant I, B, even as transferee under the bill, is liable under the charterparty and not via chapter 11 of the Rotterdam Rules under the bill.

There are also cases where the application of chapter 11 is not necessary. Presumably in order to cater for the type of FOB contracts where the buyer makes the carriage contract, while the shipper will deliver the goods to the carrier and may be named as shipper on the transport document,[85] the Rotterdam Rules have adopted an approach binding also the documentary shipper[86] to the contractual shippers' rights and duties,[87] insofar making a transfer of rights or assumption of liabilities via chapter 11 or other contractual constructions superfluous.[88] The documentary shipper would seem to be a "holder that is <u>also</u> the shipper"' and thus does not fall within Article 58.

In Variant II, B, who is named as shipper under the bill, although not involved in the contract of carriage, is liable as documentary shipper under the Rotterdam Rules, Article 33. He has the same obligations and liabilities as the shipper and can avail himself of the same defences. Article 58 RR does not apply.

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84 See last sentence of Art 7 RR. For this position under English law see *Hansen v Harrold Bros* [1894] 1 Q.B. 612, CA and P*resident of India v Metcalfe Shipping Co Ltd (The Dunelmia)* [1970] 1 Q.B. 289, [1969] 2 Lloyd's Rep. 476, CA; note, in both cases signing of bills of lading was to be "without prejudice to the charterparty".

85 See also Thomas, "The Position of Shippers under the Rotterdam Rules", [2010] EJCCL 22 at 25.

86 As defined in Art 1.9 as "a person, other than the shipper, that accepts to be named as "shipper" in the transport document or electronic transport record" as compared to the shipper, defines in Art 1.8 as meaning "a person that enters into a contract of carriage with a carrier."

87 See Arts 33 and 55.2 RR.

88 Cf. *The Roseline*, Federal Court of Canada [1987] 1 Lloyd's Rep 18, which held the seller-shipper not party to the contract in such a scenario. And see for the reverse situation the English case of *Pyrene v Scandia* [1954] 2 QB 402, which held the bill of lading contract and terms also applicable between the fob seller as actual shipper and the carrier, even though the bill of lading contract was taken out by the fob buyer; further on this see Baughen, "The legal status of the non-contracting shipper", [2000] IJSL 21.

2. When and how can liabilities be imposed on the holder?

According to Article 58.2,[89] the liabilities must (a) be imposed on the holder by the contract of carriage and (b) must be appropriately incorporated in or ascertainable from the negotiable transport document. When are these criteria fulfilled and what are their boundaries? While one will need to distinguish between detailed liability clauses in bills of lading and charterparty incorporation clauses in bills, the liability incurred in this manner seems to be largely dependent on what clauses are included into the carriage contract and/or the transport document and how clear the contract clauses and/or incorporation clauses are.

Bills of lading clauses

Bills of lading clauses specifically burdening the holder with duties and liabilities seem to fall within these requirements but also more general merchant liability clauses typically used in container liner transportation, since the holder is usually included in the definition of merchant.[90] For example the Maersk Multimodal Bill of Lading[91] and BIMCO's COM-

[89] It reads: "A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record."

[90] See for example BIMCO defines in Clause 2 of its Combined Transport Bill of Lading as revised in 1995 (COMBICONBILL) "merchant" as including "the Shipper, the Receiver, the Consignor, the Consignee, the holder of this Bill of Lading and the owner of the goods" and similarly in clause 1 of its Liner Bill of Lading as revised in 2000 (CONLINEBILL) only with the addition of "and any person entitled to possession of the cargo"; equally Maersk Multimodal Transport Bill of Lading defined Merchant as including "the Shipper, Holder, Consignee, Receiver of the Goods, any Person owning or entitled to the possession of the Goods or of this bill of lading and anyone acting on behalf of such Person".

[91] See for example Maersk Multimodal Bill of Lading, clauses 1. Definitions; cl 15. Merchant's Responsibility; cl 16. Freight, Expenses and Fees; cl 17. Lien; cl 20. Matters Affecting Performance and 21. Dangerous Goods available at: http://www.maersk-line.com/link/?page=brochure&path=/our_services/general_business_terms/bill_of_lading_clauses.
In particular, extracts from Clauses 15 and 21 state: Clause 15 Merchant's

BICONBILL[92] burden the merchant with liability to differing degrees including liability for dangerous cargo, whereas BIMCO's MULTIDOC[93] only imposes rather limited liability on the merchant and does not do so for dangerous cargo, the latter being on the consignor only, and BIMCO's CONLINEBILL 2000[94] in general imposes liabilities on the merchant, including loading duties and liabilities, but without including a specific dangerous cargo clause, thus leaving this liability to the shipper alone.

These clauses, all being directly included in the negotiable transport document, thus seem to impose liability on the holder as per Article 58.2 of the Rotterdam Rules whether or not[95] the bill includes a stipulation on the front to the effect that the merchant agrees to all clauses of the bill as if he had signed them, as found for example in BIMCO's

Responsibility reads at 15.1 "All of the Persons coming within the definition of Merchant in clause 1, including any principal of such Person, shall be jointly and severally liable to the Carrier for the due fulfilment of all obligations undertaken by the Merchant in this bill of lading.." Clause 21. Dangerous Goods states in 21.3 "The Merchant shall indemnify the Carrier against all claims, liabilities, loss, damage, delay, costs, fines and/or expenses arising in consequence of the Carriage of such Goods, and/or arising from breach of any of the warranties in clause 21.2 including any steps taken by the Carrier pursuant to clause 21.1 whether or not the Merchant was aware of the nature of such Goods."

92 BIMCO's Combined Transport Bill of Lading, revision 95, available at www.bimco.org. See in particular the following clauses designed to impose merchant/holder liability: cl 2 Definitions; cl 17 Shipper-packed Containers, etc; cl 18 Dangerous Goods; cl 19 Return of Containers; cl 20 Freight.

93 The following clauses of the BIMCO Multimodal Transport Bill of Lading, revision 1995, available at www.bimco.org, may be of interest: MULTIDOC 95: cl 2 Definitions; cl 18 Return of Containers; cl 19 Dangerous Goods; cl 20 Consignor-packed Containers, etc.; cl 21 Freight. It is noteworthy that in this transport document liability is mostly on the consignor and only in few instances on the consignee (i.e. return of containers) or on merchant (i.e. freight).

94 BIMCO's Liner Bill of Lading as revised in 2000, available at www.bimco.org; see in particular clauses: cl 1. Definitions; cl 9. Loading and discharging; cl 10. Freight, Charges, costs, Expense, Duties, Taxes and Fines; cl 11. Lien; cl 12. General Average and Salvage; cl. 17 Shipper-Packed Containers, Trailers, Transportable Tanks, Flats and Pallets; cl 18. Return of Containers.

95 Conversely BIMCO's COMBICONBILL 1995 or MULTIDOC 1995 only contain clauses to refer to the limitation provisions in favour of the carrier, but not to other clauses imposing liability on the holder or merchant.

CONLINEBILL 2000[96] or in Maersk's Line Bill for Ocean Transport or Multimodal Transport.[97]

However, Article 58.2 also requires that the liability is incorporated in or ascertainable from the document. Are these clauses sufficiently detailed to fulfil this requirement? Could it be required that the liability must be directly discernible or at least computable from the transport document, setting out, if not the exact extent of the claim, at least the basis of calculation? Could one require the boxes on the front of the bill of lading regarding freight and other charges, to be correctly completed, and to include, where applicable, any demurrage rates and any rates for other charges that may become payable? Where the bill contains a freight prepaid notation, one could argue that what is ascertainable is that no freight charges are due, as the transport document clearly declares no payments insofar to be outstanding. This position, which was traditionally approached with diverse results under national laws,[98] is indeed clarified in Article 42 of the Rules. As against a third party holder the carrier is estopped from asserting that he has in fact not been paid. Could a similar

[96] The front of the CONLINEBILL 2000 form includes the following clause: "... In accepting this Bill of Lading the Merchant expressly accepts and agrees to all its stipulations on both Page 1 and Page 2, whether written, printed, stamped or otherwise incorporated, as fully as if they were all signed by the Merchant...."

[97] See the clause on the front of the Maersk Line Bill, including "…such carriage being always subject to the terms, rights, defences, provisions, conditions, exceptions, limitations, and liberties hereof (INCLUDING ALL THOSE TERMS AND CONDITIONS ON THE REVERSE HEREOF NUMBERED 1-26 AND THOSE TERMS AND CONDITIONS CONTAINED IN THE CARRIER'S APPLICABLE TARIFF) and the Merchant's attention is drawn in particular to the Carrier's liberties in respect of on deck stowage (see clause 18) and the carrying vessel (see clause 19). ... In accepting this bill of lading, any local customs or privileges to the contrary notwithstanding, the Merchant agrees to be bound by all Terms and Conditions stated herein whether written, printed, stamped or incorporated on the face or reverse side hereof, as fully as if they were all signed by the Merchant."

[98] See for US case-law, requiring the unsuspecting bill of lading holder to pay freight despite such notation, above at B) 1., as opposed to the position under English law: while such notation does not mean that no more freight is due under the contract, such notation acts as an estoppel where reliance has been put on this representation, for example by a consignee accepting and paying for the bill of lading on the basis of the notation (see Carver on Carriage by Sea (13th edn, Stevens & Sons, 1982) at para 1753 and Cooke et al, Voyage Charters (3rd edn, Informa, 2007) at para 13.114 et seq.).

point be made for the inclusion, or lack thereof or a clear notation of load-port demurrage? Where it had already accrued at the time of issue of an onboard bill, should one require the amount to be indorsed on the bill in order for the third party holder to be bound by it, similar to the requirement in Article 16.4 of the Hamburg Rules? If so, this may require practice to be amended to reflect the full position on completion of loading, but it seems that the carrier is better placed to amend procedures and to clarify the amounts payable, rather than to require the third party consignee, in the words of Lord Diplock, to accept "blindfold a potential liability to pay an unknown and wholly unpredictable sum for demurrage... even though that sum may actually exceed the delivered value of the goods to which the bill of lading gives title".[99]

Where would this leave claims for charges or damages that cannot be substantiated at the time the bill is issued? Surely in such cases there can be no reliance on the sums as expressed or enumerated in the bill? Should this oust liability of the third party altogether, or would it be sufficient in such cases that the clauses setting out the potential liability are clear and explicit?

Could the broad merchant liability clause together with the dangerous goods clause in the case scenario lead to liability of the holder of the bill of lading? It seems very likely, as the clauses are set out clearly in the bill of lading, providing C can prove that the damage was caused by the dangerous nature of the cargo. Although it may be questionable whether one should accept that a typical shipper's duty, such as the adequate packing of cargo and the information duties about the nature of the goods and any dangerous character can, by means of standard clause, be passed to the holder of the bill of lading. More on this below at C) 4.

Where should the drive for transparency in the consignee's interest end in favour of flexibility benefiting the carrier? For the latter evaluation

[99] *Miramar Maritime Corp v Holborn Oil Trading (The Miramar),* HL [1984] 2 Lloyd's Rep 129 at p 132, although in the context of a charterparty incorporation clause, with respect to the undesirable consequences if one accepted all charterparty demurrage claims burdening "the charterer" as validly incorporated into the bill of lading as against the consignee.

one may also wish to bear in mind that the shipper normally[100] remains liable insofar as liability is not transferred to the holder and, it is arguable also in addition to the third party, but the latter will depend on how this issue is approached under the Rotterdam Rules.[101] The broader the clauses and the higher the burden imposed by the bill, the higher the threshold may be set for what is clearly imposed by the bill or clearly ascertainable from the bill.

Charterparty incorporation clauses

The question of incorporation and ascertainability takes on another level in case of charterparty bills of lading[102] purporting to incorporate obligations and liabilities as per charterparty. The difficulties in ascertaining the content of the bills of lading have been widely recognised such that the tender of a bill of lading that is subject to charterparty terms is seen as defective under a letter of credit with the consequence that the bank ought to reject it unless the use of a charterparty bill of lading has been specifically authorised under the credit.[103]

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100 Unless subject to a cesser clause, a clause where the charterer ceases to be liable for freight and other charges connected to the shipment of the cargo once goods have been loaded; although these clauses have been interpreted in the English courts as being operative only insofar as the carrier has an effective alternative remedy by way of lien on the cargo; see Donaldson J in *Overseas Transportation Co v Mineralimportexport (The Sinoe)* [1971] 1 Lloyd's Rep 514 at 516, affirmed by CA [1972] 1 Lloyd's Rep 201; see further Baughen, "Charterparty Bills of Lading – cargo interests' liabilities to the shipowner", Chapter 6 in Thomas, *The Evolving Law and Practice of Voyage Charterparties* (Informa, London 2009) at 11.7 *et seq*. Cesser clauses, if used within the application range of the Rotterdam Rules, would also seem to fall foul of Art 79.2 RR (see insofar below at C) 3 and 7), although charterparties would only by contractual incorporation and not by application of law fall within the Rotterdam Rules' scope (see Art 6 RR).

101 Insofar see discussion below at C) 7.

102 Insofar as the holder is not an original party to the charterparty, the Rotterdam Rules are applicable (see Art 7 RR).

103 See the Uniform Customs for Documentary Credits (UCP) no. 600 (2007 edition), Art 20 (a) (vi) for bills of lading and equally in Art 21 (a)(vi) for a non-negotiable sea waybill, but see Art 22 for the requirements of a charterparty bill of lading insofar as the credit allows for it.

Liability imposed on the holder

Problems in this context include the clarity and extent of the incorporation clause, as well as the question whether the charterparty must be tendered together with the bill of lading to allow transparency as to which duties and liabilities are incurred. Even then it may not be clear from the documents which actual liabilities are imposed on the holder, depending on the wording and content of the charterparty clauses. One may take the condition in Article 58.2 that **liability must be imposed on the holder** by the contract of carriage to mean that the charterparty must do so explicitly, with the consequence that clauses only burdening the "charterer"[104] with certain duties and liabilities would be insufficient, absent further clarification, to burden the holder of a bill of lading issued under the charterparty. Such interpretation may appeal, for example, to English courts which have generally aimed to identify whether the charterparty clause would be consistent in the new context and have, in cases of general incorporation clauses without more explicit instructions in the incorporation clause, been reluctant to engage in too much manipulation of the wording of the charterparty clause in order to fit it into the new context.[105]

Incorporated in or ascertainable from the negotiable transport document

It goes without saying that the incorporation clause would have to be found in the transport document itself and that charterparty clauses insofar are irrelevant. Charterparty incorporation clauses in bills of lading differ in breadth and detail and while some are very specific,[106] others are very broad indeed.[107] What liability should be incurred by such

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104 Rather than, for example, the "charterer/receiver".

105 See for example *The Miramar, HL* [1984] 2 Lloyd's Rep 129 at p 132, where a demurrage duty on "the charterer" was held not to be incorporated by the general charterparty incorporation clause as binding on the consignee under the bill of lading.

106 Such as "freight payable as per charterparty", limiting the incorporation to provisions on freight and lien for freight.

107 See for example BIMCO's CONGENBILL 1994 (Bill of Lading to be used with

a clause? Where the liability is described in the clause, it should be interpreted in this manner. Indeed in England clauses stating "freight as per charterparty" have been held apt to incorporate charterparty provisions for freight and on lien on the goods for freight, but not to include demurrage or exclusion clauses.[108] But should a general incorporation clause such as "all terms and conditions, liberties and exceptions as per charterparty" or "all terms whatsoever" be sufficient to fulfil the requirement of the liability incurred being **incorporated in or ascertainable from** the transport document itself, assuming that the clauses of the charterparty were capable of being applied to the bill of lading holder/cargo receiver? Would the bill of lading itself have to put the third party holder on guard as to the potential liabilities incurred and how explicitly should this be done?

English courts, for example, faced with general incorporation clauses have only held clauses germane to the main undertakings under a bill of lading agreement, such as shipment, carriage or delivery as validly incorporated. This included liabilities for dead freight and demurrage.[109] If one accepted general incorporation clauses, should they be capable of including, without more, payments for load-port demurrage incurred at a time before the bill of lading was issued?[110] In such case there is the option to indorse the bill with the relevant charges and it could be argued that without further clarification, a general incorporation clause should therefore not be capable of including such liability. And what about liability for damage, loss or injury caused by the cargo itself? The broader

Charterparties) cl.1 reads: "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated."

108 See Baughen, "Charterparty Bills of Lading..." *op cit* at 11.34 *et seq* and Girvin, *Carriage of Goods by Sea* (2nd edn, OUP: Oxford, 2011) at 12.22 with further references.

109 See Girvin, *op cit* at 12.20 with further references to case-law.

110 This seems to be a question debatable under English law and much seems to turn on the precision of the incorporation clause and the wording of the charterparty; see Carver on Carriage by Sea (13th edn, Stevens & Sons, 1982) at paras 1951-1952, Eder et al, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell, 2011) at paras 14-047 *et seq*. and Baughen, "Charterparty Bills of Lading…" *op cit* at 11.34 with further references.

the liability intended to be imposed, the clearer the clause would need to be. It may be that for duties and liabilities beyond the main undertakings of a bill of lading agreement, the liabilities ought to be clearly described if the holder should be bound by them, possibly similar to the requirement of incorporation of arbitration and jurisdiction clauses under English law. The English courts saw these as clauses merely ancillary to the subject matter of bills of lading that had to be clearly identified in order to be incorporated.[111] Where clear words of incorporation were employed in the bill, would this overcome the lack of precision in the charterparty? The bill of lading is the contract that springs to life and is to be relied upon as contract of carriage between the carrier and the third party holder, but the charterparty is the contract of carriage as between the owner and charterer.[112] Would the liability imposed on the holder have to be thus in the charterparty or would a clear provision in the bill of lading contract suffice? If one saw Article 58.2 as a rule intending to provide a certain level of predictability to the holder as to his exposure, surely the focus on the transport document itself is more convincing.

And last, but not least, how clearly would the charterparty have to be identified? Would the charterparty have to be tendered together with the issue of the charterparty bill of lading or would this stretch Article 58.2's requirement of "incorporated in" too much? Such tender would certainly clarify which charterparty was included and would also allow the holder to better determine which liabilities he may incur, but may be difficult or impractical from the carrier's viewpoint.[113] Indeed under the 1990 version of the INCOTERMS,[114] the CIF-sales terms required the seller

[111] However note the different approach under US law; for a comparison see Lielbarde, "A comparison of the UK and US approaches to the incorporation of a charterparty arbitration clause into bills of lading", (2011) 7 JIML 291 and also Tetley, *op cit*, at p 1448 et seq where US, UK, Canadian and French decisions are discussed.

[112] That is, at least under English law.

[113] For example, it maybe that the charterparty, while agreed, has not yet been fully drawn up or collated into one document or that the vessel is sub-chartered and the person issuing the bill of lading does not have immediate involvement in or access to the charterparty.

[114] INCOTERMS standing for International Commercial Terms developed and updated by the International Chamber of Commerce (ICC) in Paris. These trade terms are

who tendered a charterparty bill of lading to also produce a copy of the charterparty. This requirement was however deleted in the 2000 and 2010 updates of the INCOTERMS, but can nevertheless still be found in some standard form contracts.[115] Or may courts still accept that the incorporation was successful, even where no details of the charterparty, for example not even the date, were inserted into the bill of lading, provided that the charterparty was otherwise identifiable? Such findings, while sufficient in English courts, seem not to be as readily accepted in other jurisdictions such as Spain or the United States.[116] Thus, in order to promote harmonisation through the Rotterdam Rules, it is submitted that the charterparty ought to at least be clearly identified in the bill of lading and even better, if any doubt is to be avoided, appended to the charterparty bill of lading.

3. Limitation to contractual variations

For the first time in sea carriage conventions, not only the carrier's obligations and liabilities are mandatory but also those of cargo interests. Article 79.2 states:

commonly used in international sale contracts to allocate the rights and duties between the parties to the sale contract, which is usually the driving factor behind the shipment. See above at A).

115 See Bridge, *International Sale of Goods*, (2nd edn, OUP, 2007) at para. 4.120 and see Lorenzon, *Sassoon, CIF and FOB Contracts*, (5th edn, Sweet & Maxwell, 2012) at paras 5-014 et seq.

116 See insofar *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa) (No 2)* [2003] EWCA Civ 938, [2003] 2 Lloyd's Rep 509, where the orally agreed charterparty at the time of the bill of lading had only been contained in a recap telex and not yet executed and National *Navigation Co v Endesa Generation SA (The Wadi Sudr)* [2009] EWHC 196 (Comm); [2009] 1 Lloyd's Rep 666, where the vessel was subject to several charterparties: the English High Court found that a charterparty arbitration clause was incorporated, whereas a Spanish court had decided against a valid incorporation. On appeal the English decision was reversed but only on the basis of breach of EU Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments for not recognising the Spanish decision as binding; see [2009] EWCA Civ 1397; [2010] 1 Lloyd's Rep. 193. See also Tetley, *op cit*, at p 83 *et seq* with further references in particular to US incorporation requirements; insofar see also see Lielbarde, *op cit* at 302.

> "2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:
>
> (*a*) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or
>
> (*b*) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention."

Unless the convention allows modification to specific rules,[117] the cargo interest's obligations and liabilities under the Convention can neither be limited nor excluded, nor can they be increased,[118] thus imposing a two-way mandatory regime.[119] The parties may however include additional obligations not mentioned by the Convention.[120]

Might this be interpreted as meaning that this provision could safeguard the holder from incurring any liability not already directly imposed on him via the Rotterdam Rules and therefore rendering void attempts to burden the holder with liability originally on the shipper, such as the delivery obligation of the cargo for carriage, information and instruction duties and in particular information duties of the shipper as to the dangerous nature of cargo?[121] Since cargo interest's liabilities, as opposed to the carrier's are unlimited and only subject to the two-year time bar but not to any monetary limitation[122] and thus hardly insurable, this

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117 For example regarding the shipper's delivery duty to the carrier under Art 27 and Art 56 on right of control; see further Sturley et al, *op cit,* at paras 13.016, 6.005 and 9.054 – 9.055.

118 While the carrier's obligations and liabilities can be increased (Art 79.1).

119 Lorenzon, "Validity of Contractual Terms", Chapter 16 in Baatz et al, *The Rotterdam Rules: A Practical Annotation,* (Informa, London 2009) at paras 79-01 and 79-05.

120 See Sturley et al, *op cit,* at para 13.030 with reference to WG III Report on its 19th Session - A/CN.9/621 at para159.

121 See Baughen, "Charterparty Bills of Lading – cargo interests' liabilities to the shipowner", *opt.cit* at para 11.80, Gay, *op cit* at para 6.148 and Baughen, "Obligations owed by the shipper to the carrier", *op cit* at page 188.

122 See the Rotterdam Rules at Chapters 12, Limits of Liability, and 13, Time for Suit.

might be a rather welcome solution for the holder.

However, with respect, such a conclusion seems not to hold up to scrutiny. It is submitted that the provision needs to be read in the overall context, in conjunction with other relevant rules and in particular with Article 58. The latter sets out the requirements in which the holder can be burdened with liabilities arising from the contract of carriage,[123] separately from those already imposed on him in the mantle of controlling party by the Rotterdam Rules in Arts 52.2[124] and of Article 55[125]. Should no additional imposition of liability on the holder be possible and therefore no possibility of burdening him with further duties, then Article 58.2 would be close to meaningless.

What Article 79.2 may however provide is a measurement as to the extent liability that can be imposed, as well as the level of clarity necessary before the holder may find himself liable. It seems logical that if the holder may incur the shipper's liabilities then the holder should only do this insofar as the liabilities can be lawfully imposed under Article 79.2 on the shipper. The holder's liability should not be a mechanism to distort the balance of rights, obligations and liabilities so carefully negotiated in the drafting of the Rotterdam Rules. In addition, the requirements of Article 58.2 will need to be clearly fulfilled and, one may find, explicit enough, thus potentially ousting vague and unspecific charterparty incorporation clauses which do not sufficiently highlight the liabilities thus assumed by the holder.[126] Articles 13.2 and 54.2 may insofar give a guideline as to the principle. In Article 13.2 where the typical division of contractual duties regarding loading, stowing and discharge as set out in the Rules are altered by contract, a statement to that effect needs to be

123 Which are imposed on it as holder.

124 Where the controlling party exercises its right of control, it has to reimburse expenses and indemnify the carrier for loss or damage incurred in carrying out the instructions under Art 50. Here, there is interaction between the controlling party and the carrier usually instigated by the controlling party.

125 Art 55 burdens the controlling party on request by the carrier to give information, instructions or procure documents which had not yet been provided by the shipper and which are not otherwise reasonably available to the carrier and that the carrier may reasonably need to perform his contact duties.

126 Insofar see above C) 2.

made in the contract particulars[127] and thus at the relevant place in the transport document/record.[128] Equally, later variations to the contract of carriage are to be recorded and signed on a negotiable transport document/electronic record,[129] so that, it is submitted, the content of such a document can be trusted to explicitly and clearly show the contract details, with its corresponding rights and liabilities.

It seems however that widely phrased merchant liability clauses that are capable of putting the holder on guard as to his potential exposure could be deemed sufficient. The same could be said for charterparty incorporation clauses highlighting the particular duties to be incurred by the holder, which are beyond those imposed by the Rotterdam Rules, such as demurrage in particular if incurred at the load port, expenses, and possibly also damages incurred due to breach of information and instruction duties by the shipper and in particular where caused by the undeclared dangerous nature of cargo.[130] Courts may however decide that certain categories of liability, such as those arising out of typical shipper's duties, are not capable of being imposed on the holder.[131]

It remains to be seen how the industry and its contract drafters will react and to what extent (standard) contracts and bill of lading forms will be rewritten and/or additional clauses inserted in order to burden the holder with further liabilities. Depending on their bargaining power, it remains open to buyers and financing institutions to require the seller to tender bills free from extensive merchant/holder liability clauses, which may in turn influence the clauses typically included in transport documents.

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127 As defined in Art 1.23 RR a " any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record."

128 Further to this see Sturley et al, *op cit,* at paras 5.033 et seq.

129 Or a non-negotiable transport document that requires surrender; see Art 54.2 RR.

130 Although see the arguments advanced above at C) 4. against imposition of such duties.

131 See below C) 4.

4. Can any type of liability be validly imposed?

Working Group discussions

Which liabilities are or can be incurred via Article 58 of the Rotterdam Rules? The working group documents show several discussions on this topic: views differed as to whether the determination of liabilities to be incurred should be left to the applicable law or dealt with in the rules. Already in the first discussion of the draft provisions in the 11th session concern was raised regarding the breadth of the relevant sub-paragraph and the resulting opportunity for the carrier to expand the holder's liability significantly by including standard clauses in the contract of carriage to extend the shipper's liability. As an alternative and safer solution it was requested to stipulate exactly which liabilities a holder who exercised a right would attract, to avoid an unfair burden. [132] In response it was argued that an itemization would be difficult and that it was sufficient that the circumstances in which such assumption of liability took place were set out.

In a later meeting the working group considered an amended draft of the paragraph, which included as alternative to the general liability provision an itemised list, which the Secretariat in response to the requests had provided. The itemization read: "the liabilities imposed on the controlling party under chapter [10[133]] and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or negotiable electronic transport record".[134] In the end the majority in favour of the general liability provision prevailed over those supporting a closed list, while some delegates would have preferred an open list.[135] Suggestions to delete paragraph 2

[132] A/CN.9/526 at para 137; interestingly the wording of Art 58.2 is, apart from minor alterations, the same as the then draft Art 12.2.2.

[133] It had been Chapter 11 at the time of the draft.

[134] See Art 60.2 of the Draft of the 12th Session, A/CN.9/WG.III/WP.32 and note 204 thereof and Art 62.2 of Draft of the 16th Session, A/CN.9/WG.III/WP.56 and Draft of 19th Session A/CN.9/WG.III/WP.81.

[135] Swiss Delegation Paper for 16th Session A/CN.9/WG.III/WP.52 at paras 6, 13 - 17.

altogether, leaving only the now Article 58.1 and 58.3,[136] had been rejected, as it was said to be still a useful step enhancing harmonization. It was seen as "desirable that the carrier should be able to ascertain if the holder had assumed any liabilities under the contract of carriage and to which extent it had done so".[137]

Can and should a typical shipper's duty[138] be imposed on the holder?

In our case scenario, S should have packed the goods appropriately to ensure that they do not leak and thus become dangerous. According to C's allegations, S has failed to do so and has not given appropriate notice of the dangerous characteristics of the cargo to C, since he did not inform C of the leaking drums. Should it be possible that liability for this damage can be imposed on B, who at this stage had no dealings with the goods or knowledge of these circumstances?

A certain reluctance

The consequences of un-curtailed application of merchant clauses can be far-reaching and the broader the clause, the more difficult it may be to convince a court to conclude that the liability was "imposed" on the third-party holder.[139] Sturley et al in this context query whether a consignee would be held liable for a typical shipper's breach of a shipper's obligation, such as the timely delivery of the goods to the carrier at the load port.[140] Diamond QC does not see that "any of the obligations of the shipper under chapter 7 of the Convention [could] be said to be imposed

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136 See Netherlands Delegation Paper for 20th Session A/CN.9/WG.III/WP.96 at 4-5 and WG III Report of its 20th Session A/CN.9/642 at paras 116-117. The reason given was the lack of maturity of the Working Group discussion and the notorious difficulty of this topic under the diverse national laws; it was argued that this subject may be more suited for a Model Law than a binding convention.

137 WG III Report of its 21st Session, A/CN.9/645 at para 181.

138 Such as the delivery of the cargo for shipment, information and instruction duties of the shipper about the nature of the cargo, the handling and information required for the contract particulars, etc.

139 See Sturley et al, *op cit,* at para 10.039.

140 At para 10.039.

under the contract on a holder who is not the shipper".[141]

However Article 58 does not speak of imposition of "obligations" but of "liability", similarly the French text uses "responsabilité"[142], and while the obligations may need to be fulfilled in person by the shipper, would this fact limit the possibility of accepting liabilities arising out of the breach of another? On the other hand, what of transfer or imposition of the shipper's strict liability for providing and guaranteeing accurate information with respect to the description of the goods and to provide full indemnity for false description of goods in bills of lading?[143] Should it be possible in that manner to circumvent the protection of the third party intended by the Rules? Should a holder as "merchant" have to indemnify the carrier for claims arising out of statements on the bill of lading concerning the goods, which specifically in the holder's interest are treated as conclusive evidence?[144] This would destroy in effect the reliance on these statements by a third party holder. To uphold such clauses seems therefore to be inappropriate.

And what with imposition of the potentially very serious liability for the breach of the shipper's duty to inform the carrier of the dangerous nature of cargo? While there is some mention in the *travaux préparatoires*, only little guidance can be derived from it: In conjunction with the draft of a liability list, the Secretariat drew the attention of the Working Group to the issue of liability in respect of loss, damage or injury caused by the goods, stating that perhaps this category should also be included in the list.[145] In this context, informal consultations showed that those who

[141] Diamond QC, "The next Carriage Convention?", [2008] LMCLQ 135 at 182.

[142] Paragraphs (1) and (2) of the French text of Art 58 (1) of the Rotterdam Rules reads: "1. Sans préjudice de l'article 55, un porteur qui n'a pas la qualité de chargeur et qui n'exerce aucun droit découlant du contrat de transport n'assume aucune responsabilité en vertu de ce contrat en cette seule qualité de porteur.
2. Un porteur qui n'a pas la qualité de chargeur et qui exerce un droit quelconque découlant du contrat de transport assume toutes les responsabilités qui lui incombent en vertu de ce contrat dans la mesure où elles sont énoncées dans le document de transport négociable ou le document électronique de transport négociable ou peuvent en être inférées."

[143] See Art 31, 36.1 and 30.2 RR.

[144] See Art 41(b) RR.

[145] Although specifically excluding the shipper's duties to and surrounding the delivery

preferred a general provision wished to clarify the position of the holder for liability for dangerous cargo, whereas for delegates preferring the closed list, the matter was dealt with by the lack of inclusion of this type of liability.[146] It is not clear from the report whether the supporters of clarification would have excluded or included the holder's liability for dangerous cargo. Can it therefore be said that a decision was reached or was the matter left to the applicable law? The latter seems more likely.

Application of concepts of the applicable national law?

If it is thus left to the applicable law to determine this point, interpreting the requirements of Article 58 insofar brings with it the opportunity to reconsider the question and problem of imposition of shipper's duties in the light of the consequences. Which industry sector should pay for the damage and under what circumstances? It may be important to remember that the shipper's duty is unlimited and thus rather difficult to insure, if at all,[147] and that the shipper and documentary shipper are already strictly liable.[148] While it seems appropriate that in the relationship between shipper and owner/carrier it is the shipper who, being closest to the goods, must bear the risks inherent to the nature of the goods, although not all legal systems apply a strict duty,[149] it seems far from clear that the consignee should bear the risk of bankruptcy[150] of the shipper in such situa-

of the goods to the carrier, see A/CN.9/WG.III/WP.32 at p 59, n 204, also in A/CN.9/WG.III/WP.56 at p 128 n 531 and A/CN.9/WG.III/WP.81 at p 44 n 176.

146 Swiss Delegation Paper for 16th Session A/CN.9/WG.III/WP.52 at paras 13 – 17.

147 Whereas a breach of a carrier's duty is subject to limitation under the rules and normally insured.

148 See Arts 32, 30.2 and 33 RR.

149 See for example Gay, Dangerous Cargo and "Legally Dangerous" Cargo, Chapter 6 in Thomas, *The Evolving Law and Practice of Voyage Charterparties* (Informa, London 2009) at paras 6.163 et seq. and Baughen, "Obligations owed by the shipper to the carrier", Chapter 7 in D. Rhidian Thomas, *A New Convention of the Carriage of Goods by Sea – The Rotterdam Rules* (Lawtext Pub, Witney 2009) at page 170 et seq.).

150 Where the carrier chooses to sue the third party holder rather than the shipper for damages sustained or liability incurred towards other cargo owners, the holder qua buyer may have a right of recourse against the shipper qua seller under the sale contract. However, this will inflict an extra burden on the third party holder, who himself has not breached any duties as against the carrier and could end up with him

tions. It is submitted that the applicable law should take this opportunity to readdress this question under the Rotterdam Rules, even if settled under a former and different instrument, so that it may align with the value judgments under this Convention overall.

Transport Conventions

Other transport conventions, although not dealing with negotiable transport documents but with waybills impose on the consignee only freight and related charges, but, it seems, no further liability.[151] For example, the CMR[152] requires the consignee to pay the "charges shown to be due on the consignment note".[153] In rail carriage the goods are to be delivered "against payment of the amounts due under the carriage contract",[154] and in air carriage under the Montreal Convention "on payment of charges due and on complying with the conditions of carriage".[155] Is sea carriage really that different so as to justify a much broader liability imposition on the third party holder? While the typical risks arising from the shipment of commodities may be rather different from the carriage of manufactured goods, and the perils at sea rather different from land or air transport, this does not mean that the consignee, as opposed to the shipper, necessarily ought to incur a different exposure.

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having to bear the full burden in case where his right of recourse is useless due to the shipper's/seller's financial difficulties or bankruptcy.

151 For the inference that under the CMR no further liabilities can be passed to the consignee, see Clarke, *International Carriage of Goods by Road: CMR* (5th edn, Informa Law, 2009) at para 40c and Koller, *Transportrecht, Kommentar,* (7th edn, Verlag C H Beck, 2010) at Art 13 CMR para 11.

152 The United Nations Convention on International Carriage of Goods by Road 1956.

153 See Art 13.2 CMR.

154 Art 17.1 CIM 1999; CIM standing for Uniform Rules Concerning the Contract of International Carriage of Goods by Rail, being Appendix B to the Convention concerning International Carriage by Rail 1999 (COTIF).

155 See Art 13.1 MC (Convention for the Unification of Certain Rules for International Carriage by Air (Montreal) 1999) and similar under Art 13.1 WC (the Warsaw Convention: Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw) 1929), although the latter specifically requires the charges to be "set out in the air consignment note".

What would be the consequence for the application of these rules if the damage caused by the goods occurred under a Rotterdam multimodal contract, but where another transport convention would be applicable via Articles 26 or 82 of the Rotterdam Rules? Would it then matter and could a different result be justified simply on the basis that the different rules of the transport convention apply? For example, in a case of ro-ro sea carriage,[156] would Article 13.2 of the CMR[157] override Article 58 via Article 82 (b), both of the Rotterdam Rules, to the effect that a consignee/holder of the negotiable transport document would not become liable, whereas he would have, had the container been offloaded from the vehicle?

The new German maritime law – a case supporting narrow interpretation of what can be imposed?

As set out in more detail above, the new German provisions clearly limits the liability incurred by the consignee to outstanding freight and discharge port demurrage, and allow the imposition of load-port demurrage and certain delay charges only to the extent that the consignee has been notified of their amount on delivery. Irrespective of bill of lading clauses to the contrary, the consignee is not burdened with further liabilities, thus also excluding liabilities for breach of the shipper's personal duties.[158]

US case-law in favour of restrictive interpretation?

A similar line of argument as set out by Diamond and Sturley[159] seems to have been advanced in, at least, some of the US case law, where the COGSA was seen as a negligence statute that required fault as prerequisite for re-

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156 Ro-ro stands for roll-on/roll-off, denoting that the lorry as a whole is carried together with its cargo; thus no unloading from the road transport device takes place despite carriage by other means such as by sea or rail. In such a case, where the lorry is carried by sea the CMR would apply: see Art 2.1 CMR and Art 82 (b) RR.

157 Which is mandatory as per Article 41 CMR.

158 See above at B).

159 See above at C) 3.

covery and the act to warn the carrier thus as a personal act of the shipper.[160] In *Rickmers Genoa Litigation (In re M/V)*[161] a CIF buyer was not held liable for damage caused by the dangerous nature of cargo under the bill of lading despite a broad merchant clause. It was held that notwithstanding the clause, the act of warning the carrier of the dangerous nature of the goods was to be performed (a) at the time when the goods were placed for shipment and (b) by the shipper, here the seller of the goods, and not the buyer. The shipper's duties thus remained with the shipper only. On the other hand *APL Co PTE Ltd v UK Aerosols Ltd*[162] held a broad merchant's indemnification agreement to be valid as against the bill of lading holder, not taking issue with transferring such liability.

The UK developments – an argument for restrictive interpretation?

Arguments regarding the non-transferability of the shipper's personal duties had also been discussed in the UK, with the result that since the transfer of such liability was assumed, the requirements for imposition of such a duty were interpreted extremely restrictively, in light of the potential consequences.

Whether the shipper's liability should be assumed by the holder of the bill was not clear cut under the 1855 Act, the forerunner to the current 1992 Carriage of Goods by Sea Act. It was argued that subjecting the holder to the same liabilities "as if the contract contained in the bill of lading had been made with himself" may mean liability as "holder" and not as "shipper", thus not including the shipper's personal duties. There was support in case law and literature[163] that the term shipper in the Hague and Hague-Visby

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160 Although this view is not uniformly applied; see above at B) United States.

161 (2009) 622 F Supp 2d 56; 2009 AMC 609 (SDNY); clarified on reconsideration (2009) 643 F Supp 2d 553 (SDNY) as per case summary by Davies & Force, "US Maritime Law" [2010] LMCLQ (Yearbook) 227.

162 2006 AMC 2418 (N.D. Cal. 2006), upheld in the Court of Appeals (9th Circuit) (2009) 582 F3d 947, 2009 AMC 2234.

163 See N. Gaskell, R. Asariotis, Y. Baatz, Bills of Lading: Law and Contracts, (LLP Limited, London 2000) at paras 4.51 – 4.55 and Scrutton on Charterparties (20th edn, Sweet & Maxwell, 1996) at pp 343 and 453, but the latter has changed view on

Rules was meant to denote the shipper in person and no other.[164] This argument could have also been advanced in the context of the wording of section 3(1) CoGSA 1992, as the Act does not make the holder liable "as if he had been the shipper", but rather "as if he had been a party to that contract".[165] However, this approach was not pursued much further.

Mustill J in *The Athanasia Comninos* left the question unanswered whether liability for dangerous cargo could be transferred via the 1855 Act, although he opined that as regards potential liability under a Brandt v Liverpool contract[166] the consignee only assumed obligations concerning the carriage and delivery of the goods and payment therefore.[167] Later however in *The Giannis NK*,[168] it seemed that the House of Lords assumed that such a transfer could take place under the 1855 Act. Although the

Art IV (6) in the 21st edition.

164 See Baughen, "Charterparty Bills of Lading – cargo interests' liabilities to the shipowner", *op cit* at para 11.66 with references to *The Filikos*, CA [1983] 1 Lloyd's Rep 9 (regarding Art IV (2i)), *The Aegean Sea* [1998] 2 Lloyd's Rep 39 (in respect to Art IV (3)) and Scrutton on Charterparties (21st edn 2008) at pp. 391 – 392 in the context of Art III (5), but at p 410 no longer following a similar line of argument regarding Art IV (6).

165 Baughen, "Obligations owed by the shipper to the carrier", opt.cit., at pages 177/178; see also *The Aegean Sea Traders Corp v Repsol Petroleo SA (The Aegean Sea)* [1998] 2 Lloyd's Rep 39 where is seems that Thomas J, with reference to the opinion expressed in the then Scrutton, suggested obiter at 70 that dealings of the shipper in his capacity as shipper, not just under Art IV (3), but also under Art IV (6) were personal and thus would not be transferred.

166 A contract implied between the parties often on the basis of taking delivery at the discharge port against payment or agreement to pay outstanding dues. The consideration element of such a contract may be fulfilled by the by the shipowner giving up his lien over the goods, making or agreeing to make delivery and in turn the holder of the bill seeking or obtaining delivery; insofar see The Aramis [1989] 1 Lloyd's Rep 213 at 224 per Bingham LJ.

167 [1990] 1 Lloyd's Rep. 277 at 281.

168 *Effort Shipping Co Ltd v Linden Management SA and Others* HL (The Giannis NK) [1998] 1 Lloyd's Rep 337. A cargo of ground-nut extraction meal pellets were, on arrival of the vessel, found to be infested with Kaphra beetle. The ship was not allowed to discharge and eventually had to dump all cargo at sea. The owners sued the shipper for damages arising out of the shipment of dangerous cargo. It was held that the liability under Art IV (6) was strict, and obiter that this was also the case under the common law duty. It was held that under the Bill of Lading Act 1855 the shipper remained liable. In this context it was assumed that with rights also the liabilities for the shipment of dangerous cargo were transferred.

question that concerned the House of Lords was not whether transfer took place, but whether the shipper remained liable after such an argued transfer. This remaining liability of the shipper under the 1855 Act, was affirmed, a position that is now clearly set out in section 3(3) CoGSA 1992.[169]

The joint report of the Law Commission and the Scottish Law Commission in preparation of the 1992 Act showed clear intention to burden the holder with the shipper's liability for loss or damage caused by dangerous cargo.[170]

[169] Section 3 (3) reads: "This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract."

[170] The Report on Rights of Suit in Respect of Carriage of Goods by Sea of 19th March 1991 (LAW COM No 196, SCOT LAW COM No 130) at para 3.22 states: "It was also suggested to us that special provision should be made so that the consignee or indorsee should never be liable in respect of loss or damage caused by the shipper's breach of warranty in respect of the shipment of dangerous cargo. This is said to be a particularly unfair example of a retrospective liability in respect of something for which the consignee/indorsee is not responsible. However, we have decided against such a special provision. We do not think that liability in respect of dangerous goods is necessarily more unfair than liability in respect of a range of other matters over which the holder of the bill of lading had no control and for which he is not responsible, as for instance liability for loadport demurrage and dead freight. Also, it may be unfair to exempt the indorsee from dangerous goods' liability in those cases where he may have been the prime mover behind the shipment. Furthermore, it is unfair that the carrier should be denied redress against the indorsee of the bill of lading who seeks to take the benefit of the contract of carriage without the corresponding burdens."

Later case law, as in *The Berge Sisar*[171] and *The Ythan*[172] seem to have

[171] *Borealis AB v. Stargas Ltd (The Berge Sisar)* [2001] UKHL 17, [2002] 2 AC 205. The simplified facts in The Berge Sisar were that the buyer of propane had directed the vessel to its import jetty in view of discharging the cargo, but after taking a sample of it, rejected it towards the seller and also refused to take delivery from the carrier. The bills of lading, which arrived later, were then indorsed to another, after the cargo had been discharged elsewhere. The House of Lords had to decide whether (a) the buyer had become liable under s 3 (1) CoGSA 1992 and (b) whether this liability remained after the bill of lading had been transferred to another party. The decision concluded that the buyer had never assumed liability and shows a restrictive interpretation of the requirements of s 3 (1) (a) – (c), thus clearly limiting the instances in which such liability can be incurred. What was necessary was a formal step, claim or demand, under the contract of carriage, asserting a legal liability or the contractual rights for delivery of the carrier under the contract to the holder of the bill of lading. Delivery equally was interpreted as a voluntary transfer of possession which had to amount to more than just co-operation in the discharge from the vessel. What was needed was a conduct that was expected to have an element of relative finality. Whether liability remained after transfer of the bill was decided in the negative, by referring to the principle of mutuality or reciprocity of fairness. Whilst it was acceptable that the lawful holder would take the bill with liability, this was no longer proper when the link between benefit and burden was lost due to indorsement of the bill (with reference to *Smurthwaite v Wilkins* (1862) 11 C.B. (N.S.) 842 at 848 – 849.), at least insofar as his liability had been incurred as a reversible step. See the judgment of Lord Hobhouse at paras 31 – 45. With respect to the step having to be reversible see the distinction drawn by the majority of the Court of Appeal in The Berge Sisar [1999] QB 863 at 884 and insofar also Carver on Bills of Lading (2nd edn, 2005) at para 5-100 and Treitel, "Bills of Lading: Liabilities of Tranferee, The Berge Sisar" [2001] LMCLQ 344 at 350.

[172] [2005] EWHC 2399, [2006] 1 Lloyd's Rep 457; the outcome was similarly restrictive. Primetrade bought cargo on fob terms, that was shipped by the seller Orinoco, and which Primetrade on-sold on a CIF basis to China. Primetrade opened a letter of credit in favour of its seller and pledged the goods and any proceeds out of insurance claims; thus the bill of lading was held by the bank. The vessel exploded, the cargo insurance proceeds were paid to the bank and the bill was forwarded to Primetrade's insurance brokers. In the meantime loss adjusters acting for Primetrade and cargo underwriters had requested a letter of undertaking from the shipowner's P&I Club for loss of the cargo, which had been given. The shipowner claimed against Primetrade under s 3 (1) CoGSA for the damage caused by the dangerous cargo. Whilst transfer of dangerous cargo liabilities was again assumed, liability of Primetrade was rejected with detailed reasoning analysing the technicalities of the Act. The decision turned on the fact that the transferee had not become lawful holder in accordance with Art 5 (2) (c) CoGSA 1992, since it had only received the bills of lading because of the loss of the goods in order to collect the insurance proceeds. Had the contract been effected as planned it would never have received the bills as they would have been passed by the bank to which the bills were pledged, directly to the sub-buyers on payment. (See comment insofar by Reynolds, "Bills of lading and voyage charters", Chapter 10

proceeded on the assumption that such liability is indeed transferable via section 3 (1) CoGSA 1992, although each time concluding against any liability on behalf of the holder due to a rather narrow interpretation of the requirements of the Act.[173] Thus while the imposition of liability for loss or damage arising from the dangerous nature of the goods had been assumed, English courts carefully avoided burdening the holder with this liability. It is submitted, that the extremely cautious and restrictive interpretation of the technical requirements of the Act is born out of unease with respect to the resulting harsh consequences.[174]

Dangerous Cargo under the Rotterdam Rules

Although there are some differences under the Rotterdam Rules compared to English law in how liability for dangerous cargo is defined, it is submitted that similar considerations apply under the Rotterdam Rules and are likely to be applied by national courts: the more severe the consequences of imposition of liability, the higher the threshold of the requirements leading to this liability. Thus whether this category is seen as being assumed by the holder will influence how the criteria of Article 58 are interpreted.

While dangerous cargo liability under English law is strict and

in Thomas, *The Evolving Law and Practice of Voyage Charterparties* (Informa, London 2009) at 10.37.) Since Primetrade had never become lawful holder, it thus had never obtained rights of suit under s 2(1) CoGSA 1992, which was a necessary pre-condition for incurring liability under the Act (see s 3(1)). In addition, no formal claim as required by s 3(1) (b) had been made by Primetrade for the following reasons. Firstly, the request for security in the form of a letter of undertaking did not amount to making a claim under s 3(1) (b) of the Act. Secondly, the request of a letter of undertaking was made by the loss adjusters and Primetrade, was only one of the possible claimants represented them.

[173] The facts and legal reasoning in each of the cases is set out above in the preceding footnotes.

[174] See the speech of Lord Hobhouse in Borealis AB v. Stargas Ltd [2001] UKHL 17; [2002] 2 AC 205 at para 33: "From the context in the Act and the purpose underlying section 3(1), it is clear that section 3 must be understood in a way which reflects the potentially important consequences of the choice or election which the bill of lading holder is making. The liabilities, particularly when alleged dangerous goods are involved, may be disproportionate to the value of the goods; the liabilities may not be covered by insurance; the endorsee may not be fully aware of what the liabilities are."

comprises liability for physically and legally dangerous cargo,[175] irrespective of whether the shipper knew or could have known of its nature,[176] under the Rotterdam Rules it is strict,[177] but limited to cases where "goods by their nature or character are or reasonably appear likely to become a danger to persons, property or the environment", which does not seem to extend to cargo that unexpectedly becomes dangerous.[178]

If the cargo of chemicals in the case scenario was stored in leaking drums, it would be classed as foreseeably physically dangerous, leading to liability of the shipper under Article 32 of the Rotterdam Rules.

Thus the Rotterdam Rules include a hurdle of foreseeability before this liability is incurred by the shipper or documentary shipper. While there is a duty to comply with government regulations regarding marking and labelling of the goods, and the liability insofar is strict, falling within Article 32 at para (b), the breach of other documentation duties is fault

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[175] Under common law, dangerous cargo is cargo that endangers other cargo, the crew or the vessel, and encompasses physically dangerous and legally dangerous characteristics (see *Mitchell, Cotts v Steel* [1916] 2 KB 610 where lacking Government permission to discharge caused delay). In contrast, it seems that the parallel obligation under the Hague-Visby Rules, Art IV (6), only covers physically dangerous cargo, but as per *The Giannis NK* (HL, [1998] 1 Lloyd's Rep 337) with the extension to cargo that is liable to cause damage to the ship or other cargo, but it has also been held to be a strict duty, unqualified by Art IV (3), which exempts the shipper from liability in case he, his servants or agents, were not at fault. However where the applicable law is English law it has been held that even where the contract is subject to the Hague-Visby Rules the common law rule would remain applicable in case of legally dangerous cargo that has not caused damage to the ship or other cargo, but rather lead to forfeiture or detention, as there is no overlap between the rules. (See *The Giannis NK*, CA [1996] 1 Lloyd's Rep 577 as per Hirst LJ at 587. See also Gay, op cit. at para 6.57 and Baughen, "Charterparty Bills of Lading…" at para 11.62, note 125 and Baughen, "Obligations owed by the shipper to the carrier", opt.cit. at page 170 et seq.).

[176] *Brass v Maitland* (1856) 6 E&B 470 (majority decision in favour of strict liability in contract of affreightment context) and *The Athanasia Comninos* [1990] 1 Lloyd's Rep. 277 (duty also applicable to charterparties, obiter confirming strict liability) and strict liability was confirmed albeit obiter for both legs of the common law duty in *The Giannis NK*, HL [1998] 1 Lloyd's Rep 337.

[177] See Art 32 and 30(2).

[178] See and Baughen, "Obligations owed by the shipper to the carrier", *op cit*, at page 180 et seq.

based.[179] Also, liability for dangerous goods under the Convention is limited to loss or damage sustained by the carrier, but does not extend to economic loss incurred due to delay.[180] Although delay claims may be possible under national law,[181] it seems that Article 79.2 would prevent contractual clauses achieving this effect.[182]

It remains to be seen how courts will approach this topic and whether they will categorise shipper's liabilities as "incurable" by the holder or rather not.

5. Activity not triggering potential liability

Article 58.1 provides that merely being a holder does not without more entail liability and Article 58.3 explains that (a) an agreement to exchange the form of the transport documentation from paper form to electronic version and *vice versa*, and (b) a transfer of the documents pursuant to Article 57, does not qualify as exercising a right and thus is not classed as an action activating liability. Article 58.3 (a) demonstrates again the Rules' emphasis on the facilitation of the use of electronic transport documentation. Both Article 58.1 and 58.3 can be seen as working together, to ensure that intermediate holders, substantively in-active under the contract of carriage,[183] such as banks, holding the documents for security only and commodity traders in a string of sales merely selling on the documents,

179 In contrast to the position under English law.

180 See Baughen, "Obligations owed by the shipper to the carrier", *op cit,* pp 184-185 with detailed reference to working group discussions: see WG III Report of its 19th Session A/CN9/621 at paras 180 (b) and 184, concluding the deletion altogether of imposition of damages for delay on the shipper due to failure to find a suitable means to limit that liability and at para 237 concluding on the deletion of references to delay in Art 30, with the potential inclusion of text clarifying that the applicable law relating to shipper's delay was not intended to be affected, although this clarification was never included in the Rules, and with further detail Sturely et al, *op cit*, at paras 6.024 – 6.028.

181 See Sturley et al, *op cit*, at paras 6.028 and Baughen, "Obligations owed by the shipper to the carrier", *op cit,* p 185.

182 Thus, if the shipper cannot be burdened with liability under the Convention, the holder also should not incur such liability via Art 58.

183 Not needing direct involvement in the contract of carriage as part of their normal business; see Sturley et al, *op cit,* para 10.026.

will not be caught by liabilities simply by processing the documents.[184] The sub-articles equally clarify that as long as those intermediate holders do not take substantive steps under the carriage contract, they remain unaffected by merchant clauses in the transport document which may aim to include/burden them with obligations and liabilities.[185]

In our case scenario, the bank accepted the bill of lading as part of its duties under the letter of credit, held it as security until payment and then indorsed it to B. It was never actively involved with the carrier and never took action under the contract of carriage or the bill, thus not incurring liability. Whether buyer B could equally count as a holder who has not taken substantive steps is questionable and needs further consideration below.

The question that arises is whether the events set out in Article 58.3 were intended to be the only exceptions or whether these were only examples of what could be classed harmless activity. The *travaux préparatoires* show that the content of paragraph 3 although slightly reworded has never been substantially changed. While the particular items expressed therein were said to be non-contentious,[186] concerns had nevertheless been raised asking for further elaboration and examples to clarify harmless dealings. What seemed clear to the reporters at the time was that any activity under Article 58.3 which would not trigger liability should be of 'administrative nature' and should only refer to 'non-substantial matters'. After reworking of the paragraph with expansion of the list as intended, this was then thought to become exhaustive.[187] However,

[184] According to the *travaux préparatoires* this was seen as a particularly important clarification to secure the acceptance of these important stakeholders; see the Netherlands Delegation Paper for 20th Session A/CN.9/WG.III/WP.96 at paras 6-7. Similarly the position under the UK CoGSA 1992 requiring mutuality of transfer of rights is necessary in order to incur liabilities; see The Law Commission and The Scottish Law Commission Report on Rights of Suit in Respect of Carriage of Goods by Sea (Law Com No 196, Scot Law Com No 130) at para 2.30 et seq. and Williams, *op cit*, p 220.

[185] See Sturley et al, *op cit,* at para 10.026.

[186] Swiss Delegation Paper for the 16th Session A/CN.9/WG.III/WP.52 at paras 20 – 21 and The Netherlands Delegation Paper for the 20th session A/CN.9/WG.III/WP.96 at para 8.

[187] Swiss Delegation Paper for the 16th Session A/CN.9/WG.III/WP.52 at paras 20 - 21.

only little time seemed to have been devoted to the chapter in the following working group sessions due to other pressing matters and thus while the retention of paragraph 2 as a whole was queried, paragraph 3 simply remained without much further elaboration,[188] thus only enshrining obvious examples. The Netherlands Delegation Report prepared to aid discussions at the time on the chapter also worked on the basis that paragraph 3 of Article 58 was of explanatory nature only and thus not an exclusive list.[189]

The above clarifications also correspond with discussion on the meaning of "exercises any right" as we will see below.

6. Meaning of "exercises any right" (Articles 58.2 and 58.3)

Which activities therefore fall within the context of "exercises any rights"? Even in its 21st session the working group still discussed whether paragraph 2 of what is now article 58 should be deleted in its entirety,[190] due to concern that the phrase "exercises any rights" may be interpreted in a way that minor actions would be deemed an exercise of rights and might thus cause liability.[191] In the end it was reported that

> "broad support was expressed to retain paragraph 2, as it was desirable for the carrier to ascertain if the holder had assumed any liabilities under the contract of carriage and to which extent it had done so. It was noted that that approach also reflected the current practice and *it was viewed as clear that minor actions would not* be seen as an exercise of rights."[192]

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188 See A/CN.9/642 – WG III Report of its 20th Session at paras 116-117 and A/CN.9/645 – WG III Report of its 21st Session at paras 179 - 182.

189 See A/CN.9/WG.III/WP.96 - the Netherlands Delegation Paper for the 20th Session at para 8 as it argued for the deletion of paragraph 2 but retention of paragraph 3.

190 A/CN.9/645 at para 181 on the then article 61 (2). The paragraph had been placed in square brackets during earlier deliberations.

191 A concern raised already from the start of discussion on this chapter; see A/CN.9/526 – WG III Report on its 11th Session at para 135.

192 A/CN.9/645 – WG III Report of its 21st Session at para 181. Emphasis added.

It is therefore submitted that the deliberations concerning paragraphs 2 and 3 show that the legislative intention was that minor actions should not lead to liability, giving merely some undisputed examples in paragraph 3. The question therefore arising is what activity could be classed as a minor action or as actions within paragraph 3 as being of 'administrative nature', only referring to 'non-substantial matters'?

According to the commentary on the Rules by Sturley et al, the purpose of Article 58 was to "clarify the position of the third-party holder in the context of its possible assumption of substantive obligations under the contract of carriage." The rights expressed in Article 58.3 would have more of a procedural than a substantive character and were thus not strongly connected to this purpose. Information requests, such as the query as to the vessel's expected time of arrival (ETA) to find out the possible timeframe for a resale, were seen as a further example of harmless activity. The reasoning provided points out that generally simple information requests between parties within the scope of the contract of carriage or similar communications inherent to the bona fide implementation of the contract should not have specific legal consequences.[193]

So what are the boundaries between different types of activity? It seems that the intention behind the formulation of Article 58 was to allow parties to interact in a bona fide manner without at every step being concerned with incurring liability, thus enabling a smooth execution of the contract and facilitating basic collaboration where this is necessary. A good example of such procedural collaboration is the exchange of documentation from paper to electronic version. But how far is the reach of this category?

What about acts of collaboration to allow the ship to berth at the holder's berth or with (a request for) sampling of the cargo in order to decide whether delivery of the cargo will be claimed at all? Will such interaction be classified as close enough to mere bona fide interaction similar to information exchange? Would sampling be a similar information request just that the answer is not given verbally but in kind as a probe of the cargo? This action does not seem to commit the carrier to

[193] Sturley et al, at para 10.025-10.026 and note 32.

any further liability and this action alone does not seem to give the holder a lasting advantage from the contract of carriage. It merely serves as a tool to decide whether to accept the cargo under the sale contract and thus whether to demand delivery as against the carrier.

Would this therefore mean for our case scenario that B as buyer and sub-seller could claim that his interaction with the carrier was of minor character and insufficient to be called the exercise of any right? He presented the bill of lading with the aim of obtaining the goods, but then did not take delivery of the goods and re-sold them to D, who collected them. Even if his activity was held to trigger liability, B is only an intermediate holder, the position of which will depend on the applicable law.[194]

Where the holder as controlling party interacts with the carrier in order to vary the contract[195] and amend the documents accordingly he substantively interacts with the contract of carriage and obtains a commitment from the carrier, which one may assume ought to trigger liability. A request for an exchange of transport document beyond the mere change of form,[196] for example an exchange of bill of lading to ship's delivery orders seems to be a similar commitment by the carrier which may equally be seen as triggering liability.

However is the case as clear cut where an intermediate seller, who was not the shipper or documentary shipper requests an on-board notation on the received for shipment bill?[197] Or will this action be close enough to the category of Article 58.3(b) of simply transferring its rights to another person, only that a simple step, an annotation was added by the carrier?

Should the question be whether the action requested from the carrier is far reaching enough so as to change the latter's liability or commitments, thus requiring mutuality in that the holder also becomes liable?

194 This is discussed further below in this section.

195 Art 54 RR.

196 As in Art 58.3 (a) form paper for to electronic or vice versa.

197 Art 35 and 36.2 (c) RR, assuming that the custom of the trade demands an on-board bill of lading, thus requiring the carrier to make such statement.

Could one take into account whether the holder is acting as fully fledged contract party requiring the fulfilment of the carriage contract as a whole or whether he is simply taking steps of intermediary nature so to enable him to sell the goods or to make decisions on acceptance of the goods? It needs to be remembered that once liability is activated it is not limited to the correlation of the right that was exercised but to the extent as imposed by the contract, as long as the further criteria of Article 58.2 are fulfilled. Liability of the holder is also unlimited, quite in contrast to the carrier's liability which is subject to the package limitation.[198] It is thus submitted that mere collaborative acts as precursor to any further decision on whether to take up the contract of carriage should not be seen as a liability-triggering exercise of rights.[199] While it is likely that such activity would only lead to the holder being an intermediate holder – the position of which was not covered and thus left to the applicable law[200] -, in the interest of harmonization it would be preferable to develop as clear categories as possible.[201]

In the interest of mutuality, would there be room at all in Article 58 to consider what rights are exercised in the light of the obligations they

198 Arts 59 – 61 RR.

199 Contrast Sturely et al at para 10.031 on the issue of sampling.

200 It seems that the position of an intermediate holder who exercised its rights was not uncontroversial. The Swiss Delegation Paper A/CN.9/WG.III/WP.52 at paras 19 suggests that while there seemed general support for the position of the holder remaining liable, others preferred this to be left to the national law. While there were related discussions on other issues, there is no further mention of the topic. See for example Art 33(2) RR in the context of the binding of a documentary shipper to the shipper's obligations, where a clarification on remaining liability of the shipper was indeed made. As per WG III Report of its 20th Session A/CN.9/642 at paras 122 and 123 discussions were held on the position of the controlling party that had not exercised its right and whether to clarify that it was discharged from any liabilities imposed on the controlling party by the contract of carriage. The draft to this effect in the then Art 53.6 was then however deleted with reference that the now Art 58.1 was more precise and covered the issue. While both points are related although it seems not sufficiently to show any general inclination, one may have to conclude that since no rule covering the position of the intermediate active holder was formulated, the matter was indeed left to the applicable law.

201 For example, under English law the holder can divest himself of liability on transfer to another or rejection as against the seller by endorsing the bill over to this other; see *The Berge Sisar* [2001] UKHL 17, [2002] 2 AC 205.

require of the carrier and whether the consequences of liability potentially thus activated would be comparable?

It seems clear that where the holder demands delivery of the cargo[202] or claims against the carrier for loss of or damage to the cargo[203] that he is indeed using his substantive rights under the contract of carriage. Thus, if a bank holding the documents as collateral security, acts on default of the buyer and instructs the carrier to deliver to its agent, the bank will be activating its liability as holder. Where a claim for damages is preceded by a request to put up security[204] or where the vessel is arrested, the holder seems to be showing his clear intention to hold the carrier to his substantive obligations under the contract.

Under the equivalent legislation in the UK,[205] however a distinction was drawn between these two conducts and only a formal claim to the courts or in arbitration was said to be sufficient to fulfil the requirements of "making a claim" under the CoGSA 1992.[206] Already in *The Berge Sisar207* it was stipulated that in case of a demand for delivery a conduct of relative finality was necessary to take account of the serious implications and that this was not fulfilled where the conduct was tentative or equivocal, nor conduct which was equally consistent with leaving it to a later endorsee to exercise the rights against the carrier under the Act. The principle of mutuality also required that there was a link between benefits and burdens and this was no longer fulfilled where the buyer after sampling rejected delivery and sold the goods on.[208] Should and could similar considerations be applied to Article 58? It seems that the boundaries fall slightly differently in Article 58. The English decisions need to be read in the light that the CoGSA 1992 gives full liability to

202 Art 47 RR.

203 Arts 17 - 23 RR.

204 Whether as against the carrier or its insurer. Insofar see Williams, *op cit*, at p 222 on demand for security.

205 See above B) and fn 47 for the text of s 3(1) of the CoGSA 1992.

206 *The Ythan*, [2005] EWHC 2399, [2006] 1 Lloyd's Rep 457 at para 103 *et seq*; see fn 170 above for a summary of the case.

207 [2001] UKHL 17, [2002] 2 AC 205; for a summary of the case see above fn 169.

208 See *The Berge Sisar op cit*, at para 33, 41 and 45; see also Williams, *op cit*, at p 221.

the holder, as if he was a party to the contract without more, and that these cases decided on strict liability for dangerous cargo to be transferred to the holder, whether the shipper could have known the propensities of the goods or not. The courts were thus extremely cautious not to impose undue burdens. In the Rotterdam Rules this is different as other requirements need to be met and also since liability for the dangerous nature of cargo is on the shipper and documentary shipper only insofar as it was foreseeable.[209]

It is submitted however that the type of liability imposed, for example whether covering exposure for dangerous cargo or not, may influence also under the Rotterdam Rules how strict the requirements of Article 58.2 are construed and how far reaching the paragraph 3 category will be extended.

7. Shipper's liability?

What is the position of the shipper after imposition of liability on the holder? It seems that the words chosen in Articles 57 and 58 are indicative. In Article 57 the word "transfer" is used suggesting that the rights are moved from one person to another, to the exclusion of the former. Yet in Article 58 the wording is markedly different and speaks of the holder "assuming" liability[210] rather than liability being "transferred" to him. According to the commentary of Sturley et al this wording was indeed carefully chosen to allow for cumulative liability.[211] While the same clarification as in Article 33.2, where it is set out that while the documentary shipper was also liable, the obligations, liabilities, rights and defences of the contractual shipper remained unaffected, has not been made, it is submitted nevertheless a decision in favour of the remaining

[209] See Art 32 RR; and see above at C) 4.

[210] The same is also clear from the French text: "assume toutes les responsabilités".

[211] At para 10.037; also see Swiss Delegation Paper A/CN.9/WG.III/WP.52 at paras 19 on the discussion on whether contractual shipper and prior holders should remain liable, and that this received general support, although some delegations preferred no clarification in order to leave related issues to national law. It is submitted that the final text is indicative enough however of the accepted position regarding the shippers remaining liability.

liability of the shipper has been expressed. The question would also be to what extent such an assumption of liability by the holder could relieve the shipper. Would this be automatic and up to the extent of the holder's liability? Would it be irrespective of the wording of the contractual clause, thus even if the clause was designed to add the holder to the persons liable? Since the assumption of liability by the holder extends not necessarily to the full extent of the shipper's liability under the contract, but only as far as imposed on the holder under the contract of carriage and ascertainable from the transport document, what has indeed been 'transferred' may require a rather complicated and detailed analysis of the situation which may be necessary even if the carrier only intended to sue the shipper. Should this open a tactical advantage for the shipper to escape liability? It seems unlikely that such complications were intended.

This view also goes hand in hand with the decisions taken in Article 79.2 that the shipper's liability is to be mandatory and cannot be contracted out of, decreased or increased. If a clause in a carriage contract, imposing liability on the holder,[212] would result in the shipper's release from liability, this clause according to Article 79.2 would to this extent be null and void. It is therefore submitted that a holder's liability clause could not have the effect of relieving the shipper of the corresponding liability. It is also interesting that this stance has now been adopted by the new German maritime law, in contrast to the previous position.

Shipper S should therefore remain liable under the contract of carriage for his breach of duty to ship dangerous cargo, irrespective of whether B could be held liable via Article 58.

8. Limitation to keeping of old concepts

To what extent can previously established principles and concepts survive a coming into force of the Rules? The Rotterdam Rules do not allow reservations.[213] Thus, only insofar as areas are not covered by the Rules,

[212] As long as it also fulfilled the other requirements of Art 58.2.

[213] Article 90, Reservations, states: "No reservation is permitted to this Convention."

national law will continue to govern the issue and provide the solution. This will for example be the case for the transfer of rights and liabilities under waybills and ship's delivery orders as well as straight bills of lading which are left unregulated by the Rotterdam Rules.[214]

However, the approach of envisaging a claim strategy in parallel under either instrument, the Rotterdam Rules or national law depending on the facts,[215] seems, with respect, not to be acceptable and national law insofar would need to be amended to conform with international obligations arising from the UN Convention.[216]

D) Conclusion

Thus while important clarifications as to mutuality, foreseeability of liability and "dormant" third parties were made in chapter 11, there is nevertheless a wide scope for national courts to interpret the requirements of Articles 58.2 and 58.3. In so doing courts should be conscious to interpret the Rotterdam Rules autonomously, striving to develop an understanding of the individual rules of the Convention in its overall context and spirit. It is submitted that the many criteria interrelate and interpretation of one may lead to a particular approach on the other, for example which liabilities can in fact be imposed and by means of which clauses. Thus a wide and broad imposition of liability may need to be balanced with the transferability of only limited liabilities and vice versa.

Should the Rotterdam Rules come into force, an accessible database of national case-law of all contracting states should be developed. Due to the many areas in need of further interpretation particular attention

214 See above C) 1.

215 See for example the suggestions in Debattista, *op cit*, at para 58-09 and Williams, *op cit*, p 223 for suggestions when a claim against the holder should still be brought under the UK Carriage of Goods by Sea Act, s 3(1), where the requirements of Art 58 are not fulfilled.

216 See also Gay, *op cit*, at para 6.156 at note 130 (as to the need for amendment) and Williams, *op cit*, p 223 (alluding to some potential conflict between Art 58 RR and s 3 of the UK CoGSA 1992).

should be given to the aim of the Convention to harmonise the law and, providing it was embraced by contracting states' courts, such database could help to forestall further fragmentation due to disparate application of the Rules.

Liability regime of carriers and maritime performing parties in the Rotterdam Rules

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Content

I. Objectives of the Rotterdam Rules[1]

This article aims to examine the newest aspects of the carrier's liability regime due to the loss of or damage to goods, and delays in their delivery, contained in the "United Nations Convention on Contracts for the International Carriage of Goods, Wholly or Partly by Sea", known as the "Rotterdam Rules" (hereinafter RR). This Convention was approved by the General Assembly of the United Nations during its 67th plenary session, on 11th December 2008[2], with two aims[3]: 1st.) To form a uniform legal framework for the international maritime transport of goods, in an attempt to overcome the inconveniences generated by its precedents, the Hague-Visby Rules (hereinafter HVR) and the Hamburg Rules (abbreviated to HambR). 2nd.) To adapt to the reality of the modern multimodal transportation of goods ("door to door") and to the use and effectiveness of electronic transport records.

The Rotterdam Rules have received the support of shipping companies and their insurers (P&I clubs). Likewise it should be noted that the Convention was drafted with the active participation of the USA.

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2 A/RES/63/122, 2.2.2009 (www.uncitral.org).

3 In this sense, BERLINGIERI, "The Rotterdam Rules: The «The Maritime Plus» Approach to Uniformity", *EJCCL*, 2009-2, p. 1; DIAMOND, "The Rotterdam Rules", LMCLQ, 2009-4, pp. 445-446; ILLESCAS ORTIZ, "Some Keys to the Rotterdam Rules", *Scritti in Onore di Francesco Berlingieri, Il Diritto Marittimo*, 2010, vol. I, pp. 547-550; HONKA, "General Provisions", in VON ZIEGLER/SCHELIN/ZUNARELLI (Eds.), *The Rotterdam Rules 2008. Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Austin, 2010, pp. 27-28; STURLEY/FUJITA/VAN DER ZIEL, *The Rotterdam Rules. The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, London, 2010, pp. 1-6; and STURLEY, "General Principles of Transport Law and the Rotterdam Rules", in GÜNER-ÖZBEK (Ed.), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. An Appraisal of the «Rotterdam Rules»*, Berlin-Heidelberg, 2011, pp. 63 and following.

II. Liability in the event of: loss, damage and delay

The responsibility of the carrier regulated in articles 17 et following RR is a contractual responsibility, derived from the failure to comply with the goods transport contract[4]. Specifically, art. 17.1 RR establishes that the events or circumstances of non-compliance that entail the responsibility of the carrier are those of loss, damage and delay in the delivery. Precisely, this express mention of a delay as one of the circumstances of responsibility is a new improvement of the Rotterdam Rules with respect to the Hague-Visby Rules, as the latter do not establish a specific regime for delivery delays, unlike the Hamburg Rules that do contemplate delays among the circumstances that lead to the responsibility of the carrier (art. 5)[5].

Loss of and damage to the goods are not defined in the Convention, as opposed to what happens with a delay the concept of which is contemplated in art. 21 RR. Despite this silence of the Rotterdam Rules as regards the concepts of loss and damage, *loss* can be defined as failure to deliver at the destination all (total) or part (partial) of the goods. This loss constitutes a definitive impossibility of delivering the goods. On the other hand, *damage* (the average) consists of an alteration of the goods (oxidation, mould, breakage, scratches, etc.) which causes a decrease in its value. The carrier delivers the goods transported, but with damage.

A *delay* is conceived as a failure to deliver the goods within the time agreed (art. 21 RR): "Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed". Therefore, the existence of a "time agreed" to carry out the carriage is an essential requirement for the delay to occur. The Convention does not establish the subsidiary criterion of *reasonable*

[4] See, DELEBECQUE, "Obligations and Liability Exemptions of the Carrier", *EJCCL*, 2010-1/2, p. 89.

[5] More details in BERLINGIERI, "A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules", in: www.comitemaritime.org/draft/pdf/Comparative_analysis.pdf, p. 6.

time for delivery, in the absence of an agreement, to determine the occurrence of a delayed delivery, a criterion that other Conventions, such as the Hamburg Rules, do adopt (art. 5.2) or the CMR (art. 19). Nor do the Rotterdam Rules set maximum delivery deadlines. In this respect, the concept of delay in the Rotterdam Rules is, as has been rightly criticised, restrictive, as it does not anticipate the above mentioned subsidiary criterion of reasonable time[6] and because in practice delivery times are not usually agreed[7]. However, in a different issue to that of responsibility, such as Chapter 9 -dedicated to the "delivery of the goods"-, the Rotterdam Rules do contemplate a reasonable delivery time, as a criterion to obligate the consignee to accept the delivery of the goods (art. 43 RR), which could lead to the admission by the courts of the claims of responsibility of delay protected by reasonable period of delivery.

The agreement on the period can be explicit or implicit, it may be in written form -in the contract of carriage or in another document or electronic medium- or simply be verbal[8], with the resulting problem of proving its existence.

Finally, it must be noted that notice of loss due to delay (within twenty-one consecutive days after the delivery) is essential to be able to carry out the appropriate compensation action (art. 23.4 RR), as opposed to what happens in the event of loss or damage, in which the notice of loss

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6 In this sense, RUIZ SOROA, "La responsabilidad del transportista marítimo de mercancías en las Reglas de Rotterdam. Una guía de urgencia", *Revista de Derecho del Transporte*, 2010, n. 4, pp. 25-26; GÓRRIZ, "Contrato de transporte marítimo internacional bajo conocimiento de embarque. (Reglas de La Haya, Reglas de Hamburgo y Reglas de Rotterdam)", *Anuario de Derecho Marítimo*, vol. XXVI, 2010, p. 54; and RECALDE, "Reflexiones sobre la significación de las Reglas de Rotterdam en la ordenación del contrato de transporte marítimo de mercancías", in *XVII Jornadas de Derecho Marítimo de San Sebastián*, Vitoria, 2011, p. 110. Against this point of view, BERLINGIERI/DELEBECQUE/ILLESCAS and others, "The Rotterdam Rules. An attempt to clarify certain concerns that have emerged", p. 6 (in www.comitemaritime.org/draft/pdf/5RRULES.pdf), p. 10.

7 Compare, THOMAS, "An appraisal of the liability regime established under the new UN Convention", *JIML*, 2008, vol. 14, p. 501; and VON ZIEGLER, "Liability of the Carrier for Loss, Damage and Delay", in VON ZIEGLER/SCHELIN/ZUNARELLI (Eds.), *The Rotterdam Rules 2008…*, cit., p. 122.

8 TSIMPLIS, "Liability of the carrier for loss, damage or delay", in *The Rotterdam Rules: A Practical Annotation*, London, 2009, p. 67.

(within seven working days after the delivery, for loss or non-apparent damage) is not entirely necessary, as its omission will not affect the right to claim compensation (art. 23.2 RR)[9].

III. Period of responsibility

1. The general rule

The carrier will be responsible for the loss, damage or delay in the delivery of the goods, but provided that such events, or that the fact or circumstance that caused it or contributed to causing it, take place within the so-called *period of responsibility* of the carrier (art. 17.1 RR). This period is the space of time, defined by the actual Convention, during which the carrier responds for the damages and losses that their failure to comply with the contract of carriage causes.

The general rule regarding the temporal definition of the period of responsibility of the carrier due to loss, damage or delay is outlined in art. 12.1 RR. According to this art. 12.1 RR, said period of responsibility "begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered". This provision is in keeping with the concept of transport in the Rotterdam Rules as a "maritime plus", that is, as a *door to door* transport that goes beyond the strictly maritime stage to include the land or air stages preceding or following transport by sea[10]. Thus, port operations such as loading,

[9] VON ZIEGLER, "Compensation for damage: the Rotterdam Rules Appraised", *EJCCL*, 2010-1/2, p. 60; and ZURIMENDI ISLA, "Reclamaciones: aviso previo y plazo de su ejercicio", in EMPARANZA (Dir.), *La Reglas de Rotterdam. La regulación del contrato de transporte internacional de mercancías por mar*, Madrid, 2010, pp. 306-307.

[10] ILLESCAS ORTIZ, "What Changes in International Transport Law after the Rotterdam Rules?", *Uniform Law Review*, vol. XIV, 2009, p. 893; and ILLESCAS ORTIZ, "L'Espagne ratifie les règles de Rotterdam: ce qui change au niveau de droit du transport international suite à ces règles", *Droit Maritime Français*, n. 728, 2011, p. 696.

unloading, stowage, unstowage, storage, non-maritime transport within the port (and outside it) are included in the period of responsibility, provided they take place after the receipt of the goods and before their delivery, that is, while the goods are in the possession of the carrier –or a performing party- and the obligation of their custody lies with them.

With this limitation of the period of responsibility there is an extension of it that exceeds the temporal stage of responsibility described in the Hague-Visby Rules and in the Hamburg Rules[11]. This is so as in the Hague-Visby Rules the period of responsibility of the carrier covers the period "from the time when the goods are loaded on to the time they are discharged from the ship" [art. 1.e)]. According to this provision, the Hague-Visby Rules are only applied to the strictly maritime stage of the carriage that occurs between the loading and discharge (period represented with the well-known expressions *tackle to tackle*), which leaves out of its scope the non-maritime stages of the carriage during which the carrier is in charge of the goods before loading and after their discharge. This exclusion from the scope of the Convention of the non-maritime stages of the carriage led to the so-called sectioning of the legal framework for the carriage, in reference to the fact that the maritime stage is subject to the Convention while the non-maritime stage is governed by its specific internal or international regulations.

Distancing itself from the Hague-Visby Rules, in the Hamburg Rules the temporal period of the carrier's responsibility covers "the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge" (art. 4.1), where the port operations are included in the period of responsibility, in which is known as *port to port* transport, but leaving out the non-port and non-maritime stages of the carriage.

The inclusion in the Rotterdam Rules of a period of responsibility longer than that in the Hague-Visby Rules and in the Hamburg Rules, as has been pointed out, it extends to the port and non-port stages of the

[11] See, STURLEY, "Transport law for the twenty-first century: an introduction to the preparation, philosophy, and potential impact of the Rotterdam Rules", *JIML*, 2008, vol. 14, p. 480; and TSIMPLIS, "Obligations of the carrier", cit., p. 35.

carriage (prior to and after the maritime carriage) it is one of its main advantages with respect to its predecessors[12].

2. Freedom of contract and minimum period of responsibility

The general rule mentioned, included in art. 12.1 RR, which extends the period of responsibility of the carrier from its receipt of the goods to their delivery, presents a limitedly non-mandatory nature. Effectively, art. 12.3 RR allows the parties that agree on the time and location of the receipt and delivery of the goods, provided that such agreements respect the limits adopted in said precept, as the clauses that establish the time of receipt of the goods as posterior to the start of the initial loading operation or the time of delivery as one prior to the end of the final discharging operation will be void.

Faced with the admission by art. 12.3 RR of a limited margin for freedom of contract in the limitation of the responsibility period, the following appreciations could be made:

1st. In "door to door" carriages (multimodal) the period of responsibility covers from the start of the initial loading, that is, from the start of the loading of the first vehicle or means of transport (ship, truck, train, etc.) until the completion of the discharge to the last vehicle or means of transport, while neither party can agree on a shorter period of responsibility, otherwise under penalty of annulment, which offers adequate protection for shippers and consignees[13]. Thus, in "door to door" transport contracts, in which the maritime stage follows or precedes the transport by other means (over land by road or rail, air transport, etc.) the operations of handling the goods at the port will be included within the carrier's period of responsibility: intra-port transport, storage, loading onto the ship, unloading from the ship, stowage, unstowage, etc.

2nd. In exclusively "port to port" transports (from the port of origin

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[12] STURLEY, "Transport law...", cit., p. 482; and RUIZ SOROA, "La responsabilidad del transportista marítimo...", cit., p. 26.

[13] Compare, DELEBECQUE, op. cit., pp. 88-89.

to the port of destination), the parties may agree, under art. 12.3 RR, that receipt of the goods coincides with the start of the loading operations of the same on board the ship and the delivery with the completion of the discharge operations from the ship. As a result, the port operations (storage, stacking, transport within the port, etc.) prior to the start of the loading from the ship's dock at the port of origin and those following the completion of the unloading from the ship to the dock at the port of destination would be excluded from the carrier's period of responsibility, to which the corresponding national regulations should be applied, different, therefore, to the Rotterdam Rules, leading to the undesired sectioning of the regulation of the contract of carriage[14].

3rd. The limited margin for action that is recognised for freedom of contract, in art. 12.3 RR, in order to limit the carrier's period of responsibility clashes with the content of certain standard clauses such as FIO, FIOS, FIOST or similar. By means of the FIO (*free in and out*) clauses the parties in the contract of carriage agree that the loading and discharge of the goods is to be carried out by the shipper or by the consignee, considering them to be received by the carrier once loaded onto the ship and understood to be delivered to the consignee at the moment the discharge from the ship starts to take place.

The Rotterdam Rules have chosen to recognise the validity of said standard clauses, as is deduced, particularly, from the content of its arts. 13.2 and 17.3.i). However, although the FIOS and similar clauses do not modify the minimum period of responsibility, they can be used by the carrier as circumstances of reversal of the burden of proof, under art. 17.3.i) RR, in those cases in which the shipper and the carrier agree that the loading, unloading, stowing or handling of the goods will be carried out by the shipper, the documentary shipper or the consignee. This approach distances itself from the position that continental case-law has maintained concerning these clauses, opposed to considering them as causes for the exoneration of the carrier's responsibility for the damages

[14] TETLEY/RAMBERG and others, "A response to the attempt to clarify certain concerns over the Rotterdam Rules published 5 August 2009", in: www.iidmaritimo.org/doctrina.html, p. 3.

derived from the operations of loading, unloading..., as it understands that the monitoring and supervision of these is the responsibility of the carrier[15].

In any event, the FIOS and similar clauses cannot be used as circumstances of reversal of the burden of proof when the loading, unloading, etc. is carried out by the carrier *on behalf of* the shipper, the documentary shipper or the consignee, as the Rotterdam Rules expressly refer to this exclusion in art. 17.3.i). This exception is fully justified, as the admission of these agreements for action by the carrier *on behalf* of the shipper or the consignee would be a cause of insurmountable exoneration for the latter, as they would not have access to the events that actually took place and, therefore, they would be unable to attest to the negligence of the carrier which had materially carried out or supervised such actions, although formally they had done so *on behalf* of the shipper or the consignee[16].

IV. Basis of liability

The Rotterdam Rules contemplate a framework of liability through presumed fault, by virtue of which the carrier will be considered responsible for the damage, loss or delay caused during the period of responsibility, except when it can prove that the cause of the damage, loss or delay cannot be attributable to their fault or to that of their dependent or auxiliary parties.

The arguments used to reject the adoption of a stricter basis for the carrier's responsibility have been diverse. Among them we can point out the statement that a more severe system would not be possible nor

[15] See, RUIZ SOROA, "La responsabilidad del transportista marítimo...", cit., p. 31; ARIAS VARONA, "La delimitación del período de responsabilidad y las operaciones de carga y descarga", in EMPARANZA (Dir.), *La Reglas de Rotterdam…*, cit., pp. 59-60; and GARCÍA ÁLVAREZ, *La carga y descarga en el contrato de transporte de mercancías*, Madrid, 2011, p. 60.

[16] In this sense, A/CN.9/WG.III/WP.21/Add.1. Annex II, 6.2.2002, pr. 61.

convenient as it would raise transportation prices[17]. But possibly, the reason for such a rejection lies in that the inclusion in the Rotterdam Rules of a stricter system of responsibility for the carrier would not be supported by shipping companies nor, therefore, by countries with shipping interests, meaning that the Convention would run the risk of failing, as happened with the Hamburg Rules.

V. Distribution of the burden of proof

Art. 17 RR establishes a type of guide which details the different steps that, regarding the matter of the burden of proof, should be followed by the claimant and defendant so that the resolution of the litigation –in judicial or arbitral proceedings- is favourable to their interests, leading either to the declaration of the carrier's responsibility or absence of responsibility, if there is any cause for their exoneration or a lack of proof offered by the claimant. The description in the Convention of the steps to be taken regarding proof and counter-proof (like a "tennis match"), which can be up to four, is particularly complex, until the several stages are completed. However, it will not always be necessary to complete the four stages of the process, as depending on the specific circumstance dealt with and on the gathering of evidence carried out by the carrier and shipper, it is possible that the, second, third or fourth stage are not reached[18].

The four stages included in art. 17 RR, through which the burden of proof among the carrier and claimant are distributed, are the following[19]:

[17] BERLINGIERI/DELEBECQUE/ILLESCAS and others, "The Rotterdam Rules. An attempt to clarify certain concerns that have emerged", p. 6 (in www.comitemaritime.org/draft/pdf/5RRULES.pdf).

[18] STURLEY, "The carrier's liability under the Rotterdam Rules: the «well-balanced compromise» of article 17", in *Scritti in onore di Francesco Berlingieri*, Vol. II, *Dir. Mar.*, 2010, p. 986.

[19] BERLINGIERI in BERLINGIERI/ZUNARELLI/ALVISI, "La nuova Convenzione Uncitral sul trasporto internazionale di merci «wholly or partly by sea» (Regole di

1st stage: The burden of proof initially falls on whoever claims the appropriate compensation for damage, loss or delay. Specifically, the claimant must prove, on the one hand, the reality of the damage, loss or delay, and on the other, either that these circumstances have taken place during the period of responsibility of the carrier, or that the event or circumstance that caused it or contributed to cause it took place within this period (1st par. art. 17 RR).

The claimant is not required to prove the specific cause of the damage, loss or delay, but it is enough that they prove the reality of the damage and that it has been produced during the period of responsibility[20]. As an alternative (or second option), the claimant is permitted to prove that the cause of the damage has taken place during the period of responsibility (in addition to the reality of the damage), thinking of cases in which the damage is manifested after the period of responsibility, but the cause of the same (humidity...) occurs within such a period. However, if the claimant chooses this second alternative of ascertaining the cause of the damage and the result is that several causes have contributed to causing the damage, said claimant will only need to prove that at least one of the causes that have contributed to producing the damage took place during the period of responsibility. This can be deduced from par. 1 of art. 17 RR when it refers to the proof of the event or circumstance that "caused or *contributed*" to cause the damage, loss or delay[21].

That the loss, damage or delay was produced during the period of responsibility can be ascertained by the formulation of the appropriate claim ("notice") by the consignee, under art. 23 RR. This claim manages to undermine the presumption that the carrier has delivered the goods in a correct state. In this respect, the recognition by the carrier that the

Rotterdam)", *Il Diritto Marittimo*, 2008-IV, pp. 1176-1178; and ILLESCAS ORTIZ, "Obligaciones y responsabilidad del porteador", in ILLESCAS ORTIZ/ALBA FERNÁNDEZ (Dirs.), *Las Reglas de Rotterdam y la práctica comercial internacional,* Navarra, 2012, pp. 177-185.

20 ALBA FERNÁNDEZ, "Las obligaciones y responsabilidad del porteador en las Reglas de Rotterdam", in ILLESCAS ORTIZ/ALBA FERNÁNDEZ (Dirs.), *Las Reglas de Rotterdam desde la perspectiva del contrato de seguro*, Cuadernos SEAIDA, 5, Madrid, 2011, p. 24.

21 STURLEY, "The carrier's liability...", cit., p. 987.

damages occurred during the period of responsibility can also be used to consider that such a circumstance has been ascertained[22]. Likewise, other ways to ascertain the reality of the damage and that it has occurred during the period of responsibility are the joint inspection of the goods between the carrier and the consignee (inspection of art. 23.3 RR), expert evidence, etc.

If according to the proof provided by the claimant or by the carrier the damage, loss or delay has occurred outside the period of the carrier's responsibility, the latter shall be free from liability as none of the necessary circumstances are present (stated in art. 17.1 RR) to attribute this responsibility to the carrier.

2nd stage: Once the damage, loss or delay has been proved and that they have occurred during the period of responsibility, the burden of proof is then transferred to the carrier, who in order to be exonerated of the responsibility must prove any of the following two circumstances [a) or b)]:

a) That the cause or one of the causes of the loss, damage or delay is not due to its fault, nor to the fault of any of the persons that it responds for (persons indicated in art. 18 RR).

Proof by the carrier that the event that caused the damage is not attributable to its fault may consist of either "negative" evidence, that is, aimed at ascertaining its lack of fault, for having acted with due diligence, without specifying, therefore, whether there is any fault in the causation of the damage and without attributing fault to anyone; or "positive" evidence aimed at ascertaining the cause of the damage and attributing it to another specific party (shipper, consignee...). Tribunals will possibly be reluctant to admit the first modality of proof, as it is very complicated to ascertain an absence of fault –diligence- when the goods have been damaged during the period of custody and because to admit that evidence as a way to exonerate the carrier of any responsibility means that it would be exonerated in the circumstances of damages whose real causes are

[22] SÁNCHEZ CALERO, *El contrato de transporte marítimo de mercancías. Reglas de La Haya-Visby, Hamburgo y Rotterdam*, 2ª. ed., Cizur Menor, 2010, p. 727.

unknown, as the responsibility is not attributed to any party[23].

b) That the cause of the damage lies, totally or partially, in one or more of the "excepted perils" of the list included in art. 17.3 RR, comprising fifteen letters that contain events or circumstances of non-fault, fault of other parties other than the carrier (shipper, consignee...), etc.

The Rotterdam Rules maintain the legislative technique of the list of the "excepted perils", which is a step backwards with respect to the Hamburg Rules where such a list was abandoned. However, the new catalogue presents differences with respect to the traditional list of the Hague-Visby Rules. The main differences between both catalogues lie, first of all, in that the Rotterdam Rules remove the exoneration due to "error in navigation" ("nautical fault") in art. 4.2.a) RHV[24] (exoneration that has never been justified, meaning that its removal is a significant move forward). And secondly, in that the new Convention modifies the regime of exoneration due to fire in art. 4.2.b) RHV (in which the fortuitous nature of the fire is presumed, and on the other hand, it requires the existence of fault of the actual carrier, meaning that a fire caused by the crew or any other persons other than the carrier are a cause for exoneration), as the carrier shall be responsible for the damage, loss or delay derived from a fire caused through their own fault, or the fault of the captain, crew, performing party or any other person mentioned in art. 18 RR, giving fire the same treatment as the rest of the "excepted perils" [art. 17.3.f) RR][25].

Despite the differences mentioned between the current list of "excepted perils" of the Rotterdam Rules and the traditional catalogue included in the Hague-Visby Rules, and although the authors of the Convention consider that the events or circumstances in the list constitute cases of

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23 In this sense, STURLEY, "The carrier's liability...", cit., p. 988.

24 Compare, THOMAS, "An appraisal...", cit., p. 505; VON ZIEGLER, "Liability of the Carrier for Loss, Damage and Delay", in VON ZIEGLER/SCHELIN/ZUNARELLI (Eds.), *The Rotterdam Rules 2008*…, cit., pp. 102-103; and RECALDE, "Reflexiones…", cit., p. 114.

25 GIRVIN, "Exclusions and limitation of liability", *JIML*, 2008, vol. 14, p. 528; and STURLEY/FUJITA/VAN DER ZIEL, *The Rotterdam Rules*..., cit., p. 105.

reversal of the burden of proof[26], and no causes for exoneration, the truth is that from a legal and equitable point of view the resurgence of the list of excepted perils that takes place with the Rotterdam Rules is unjustifiable[27]. The distribution of the burden of proof cannot be considered equitable when it is the shipper who must ascertain the causes of the fire on board the ship (for example, at high sea), in the event that the carrier simply proves that the goods were damaged by fire. The claimant has no access to the facts, so how can the claimant prove the cause of the fire if the carrier does not collaborate? The claimant will find it particularly difficult to prove that the fire was the fault of the carrier. And from a legal point of view, the responsibility due to custody related to the contract of carriage is incompatible with attributing to the claimant, instead of the carrier, the burden of proof of the cause of the damage.

3rd stage: Proof given by the carrier of an event or circumstance in the list of art. 17.3 RR as the cause of the damage does not automatically exonerate it of its responsibility, but rather leads to the presumption of absence of fault of the carrier or its auxiliary or dependent parties, thus reversing the burden of proof. This presumption can, therefore, be defeated through three different alternatives that art. 17 RR offers the claimant and which consist of the latter proving any of the following events:

a) That the fault of the carrier or of any of the persons it must respond for (mentioned in art. 18 RR) totally or partially caused the "excepted peril" (of those listed in par. 3 art. 17 RR) alleged by the claimant in order to be relieved of their responsibility [art. 17.4.a) RR]. In this case, the proof process would end, as the carrier has no additional mechanisms for their defence, and the responsibility for the loss, damage or delay of said carrier must be declared[28].

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[26] BERLINGIERI, "The discipline in the Rotterdam Rules of the obligations of the carrier and of his liability", in ILLESCAS ORTIZ/ALBA FERNÁNDEZ (Dirs.), *Las Reglas de Rotterdam: una nueva era en el Derecho uniforme del transporte*, Madrid, 2012, p. 229; and ILLESCAS ORTIZ, "Obligaciones y responsabilidad del porteador", in *Las Reglas de Rotterdam y la práctica comercial…,* cit., p. 182.

[27] See, DIAMOND, "The Rotterdam Rules", cit., p. 491.

[28] BERLINGIERI, "The Rotterdam Rules: The «The Maritime Plus»…", cit., p. 53.

b) That an event or circumstance different to the "excepted perils" from the list of par. 3 art. 17 RR, is the cause or at least the concurrent cause of the loss, damage or delay [art. 17.4.b) RR]. The catalogue of "excepted perils" of art. 17.3 RR is broad, but in no event does it exhaust the possible causes of the damage, loss or delay, meaning that their origin may lie –totally or partially- in other events not listed. Under the above mentioned art. 17.4.b) RR the claimant can prove, in order to make the carrier responsible, that another event or circumstance not listed in par. 3 has caused the damage. The claimant does not have to prove the fault of the carrier in producing said event, it is enough to ascertain that that event led to the damage. It will be the carrier who must prove that that event or circumstance not listed is not its fault nor the fault of any of the persons it must respond for.

c) That the loss, damage or delay was or was probably caused, totally or partially by ("caused by or contributed to by") a failure to comply with any of the specific obligations that art. 14 RR imposes on the carrier. Specifically, the claimant must ascertain that the *cause or probable cause* of the damage (wholly or in part) was: "i) the unseaworthiness of the ship; ii) the improper crewing, equipping and supplying of the ship; or iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods" [art. 17.5.a) RR].

The burden of proof of the claimant regarding unseaworthiness is less than that contemplated for the events or circumstances examined above, as it is enough to ascertain that the unseaworthiness is *probably* the cause of the damage[29]. The claimant is not required to ascertain that the unseaworthiness is the *cause* but the *probable cause* of the damage. In this respect, to prove the *probable cause* it must be understood that it is enough to ascertain the mere probability or plausibility[30]. However,

[29] ALBA FERNÁNDEZ, "Las obligaciones y responsabilidad del porteador…", cit., p. 31.

[30] VON ZIEGLER, "Liability of the Carrier for Loss, Damage and Delay", in VON ZIEGLER/SCHELIN/ZUNARELLI (Eds.), *The Rotterdam Rules 2008*, cit., p. 107; and ALBA FERNÁNDEZ, "Las Reglas de Rotterdam: tercera vía e instrumento para la

this proof will not simply consist of claiming the circumstance of unseaworthiness, nor of theoretical speculation unrelated to the specific case, but it cannot be compared to the proof of the relationship between the unseaworthiness and the damage either.

As has already been rightly claimed, it is unjustifiable that it must be the claimant who must ascertain that unseaworthiness is the cause or the probable cause of the damage, loss or delay[31]. Attributing this burden of proof to the claimant contradicts the principles of ease of proof and responsibility due to custody, in addition to not responding to an equitable distribution of the risks, as proof is required from the party with the most difficulties to provide it and from who does not have the goods in their charge. The shipper losses control over the goods once they are given to the carrier, the latter being who goes on to possess and control such goods, meaning that they assume the responsibility of their custody. As a result, if any damage occurs to them during the carriage it will be the carrier who can more easily determine the specific cause of the damage, as they know the circumstances in which said carriage took place (qualifications of the crew employed to carry out the carriage, characteristics of the ship of the holds, of the container provided by the shipper, state of the goods, etc.) or, at least, they assume the legal obligation of knowing how it has been carried out (art. 14 RR).

4th stage: a) When the claimant has chosen the path of proof of art. 17.4.b) RR, that is, when it has proved that the damage has been caused totally or partially by an event or circumstance not included in the list of "excepted perils", then the carrier may prove in their defence that this unlisted event or circumstance is not attributable to their fault nor to the fault of any of the persons it must respond for, as stated in art. 17.4.b) RR.

modernización del régimen del contrato de transporte internacional de mercancías", in *XVII Jornadas de Derecho Marítimo de San Sebastián*, Vitoria, 2011, p. 31.

[31] In this sense, RAMBERG, "UN Convention on contracts for international carriage of goods wholly or partly by sea", en *CMI Yearbook 2009*, Antwerp, 2009, pp. 278-279 (www.comitemaritime.org/year/2009/pdffiles/YBK_2009.pdf); and RAMBERG// TETLEY and others, "Particular concerns with regard to the Rotterdam Rules", in: www.iidmaritimo.org/doctrina.html, p. 3. Against this approach, BERLINGIERI in BERLINGIERI/ZUNARELLI/ALVISI, "La nuova Convenzione Uncitral...", cit., pp. 1177-1178.

b) When the claimant has chosen the path of proof of art. 17.5.a) RR, that is, when it has proved that the unseaworthiness, or the deficient equipping, supplying, etc. is the cause or the probable cause of the damage, then the carrier must prove, under art. 17.5.b) RR, in their defence i) that the unseaworthiness, or the inadequate equipping, etc. were not the cause of the damage (for this purpose they must prove that the ship was in a seaworthy state) or ii) which, despite the unseaworthiness or inadequate equipping, etc. being the cause of the damage, it exercised due diligence to maintain the ship in an adequate seaworthy state and to carry out the rest of their specific obligations in art. 14 RR.

VI. Liability of the carrier through its own actions and those of third parties.

The liability of the carrier through its own actions is included under the generic declaration of liability of the carrier due to loss, damage or delay of art. 17 RR. This regime, as we have already pointed out, is based on the presumed fault of said carrier, understood as such any person that enters into a contract of carriage with a shipper (art. 1.5 RR). Therefore, any person that contracts a carriage with a shipper will be a carrier, regardless of whether they carry it out themselves or entrust it to a different person, as happens with agencies, freight forwarders, etc. To facilitate the task of identifying the carrier, art. 37.1 RR establishes that when the carrier is identified by name in the contract particulars, any identification clause of the carrier will be void when it does not coincide with said identity included in the contract. If from the contract particulars it were not possible to identify the carrier, art. 37.2 RR presumes *iuris tantum* that the carrier will be the registered owner or, in the event of a bareboat charter, the charterer, except if the registered owner or the charterer identify and indicate the address of the true carrier[32]. In any event, the

[32] LORENZON, "Transport documents and electronic transport records", in *The Rotterdam Rules: A Practical Annotation*, London, 2009, p. 110.

claimant may prove that the carrier is a different person to that identified in the contract particulars or in accordance with section 2 of art. 37.

However, the carriage of the goods by the different transport companies is carried out in practice by resorting to different persons –dependent and independent auxiliary parties- who collaborate with said task (carriage, loading, unloading, handling the goods, etc.). In this respect, the content of the Rotterdam Rules regarding the liability of the carrier through its dependent and auxiliary parties is highly relevant. In this respect, art. 18 RR establishes the liability of the carrier due to actions by third parties, making a broad definition of the persons they must respond for, in the event that their actions or omissions lead to a failure to comply with any obligation imposed by the Convention on said carrier. Specifically, the carrier will be responsible for the actions or omissions of four categories of persons: a) any performing party, b) the master or any member of the ship's crew, c) the employees of the carrier or of a performing party, or d) any other person that performs or who undertakes to perform any of the carrier's obligations under the contract.

a) "Any performing party". According to art. 1.6.a) RR the term "performing party" means a person, other than the carrier, "that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control"[33]. Later, art. 1.7 RR states, under the category of the performing parties, what is understood as "maritime performing party", to distinguish it from the "non-maritime performing party". However, section a) of art. 18 RR refers to "any performing party", for which reason all the performing parties, maritime and non-maritime, are included under the collective of persons that lead to the liability of the carrier due to actions by third parties.

[33] See, PULIDO BEGINES, "Elementos personales del contrato de transporte total o parcialmente marítimo de mercancías: porteador, cargador, parte ejecutante, y destinatario", in *Las Reglas de Rotterdam y la práctica comercial…*, cit., pp. 84 and following.

One of the most significant advances of the Rotterdam Rules with respect to its predecessors is, precisely, the figure of the "performing party"[34]. The problems concerning interpretation posed by the Hague-Visby Rules and the Hamburg Rules regarding the performance of all or part of the carriage by a person other than the carrier who has contracted the carriage with the shipper, is solved by the new category of "performing party", thus overcoming the more restricted conception of the distinction between the "contractual carrier" and the "actual carrier" of the Hamburg Rules (art. 10). Included under the category of "performing party" are all the persons subcontracted by the contractual carrier to materially perform any of the obligations required of said carrier by virtue of the contract of carriage[35]. As a result, not only will the actual carrier be part of this new category but also the dependent or independent auxiliary parties that perform any other of the carrier's obligations derived from the contract of carriage. Then, the performing parties may be described as the companies of loading, unloading, stowage, storage, depositing or any other handling of goods, intra-port carriers[36], loading terminals, logistics companies, tug vessels[37], dock pilots, etc. On the other hand those who only perform activities indirectly related to the carriage will not be considered performing parties, such as, for example, ship repair or goods repair companies, crewing agencies, etc.

b) "The master or crew of the ship". The express mention of the captain and the rest of the ship's crew members is made due to the possibility that they are not considered as employees of the carrier, which can occur in cases where the (contractual) carrier is the ship's time charterer[38], as in time chartering the master and the rest of the crew are dependent on the charterer.

c) "Employees of the carrier or a performing party". Given that section

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34 RUIZ SOROA, "La responsabilidad del transportista marítimo...", cit., p. 22.

35 BERLINGIERI in BERLINGIERI/ZUNARELLI/ALVISI, "La nuova Convenzione Uncitral...", cit., p. 1180.

36 THOMAS, "An appraisal...", cit., p. 498.

37 SMEELE, "The Maritime Performing Party in the Rotterdam Rules 2009", *EJCCL*, 2010-1/2, p. 81.

38 BERLINGIERI, "The Rotterdam Rules: The «The Maritime Plus»...", cit., p. 54.

a) of art. 18 RR refers to the subcontractors and other external auxiliary parties of the carrier, section c) complements the category of the persons the carrier must respond for, extending it to its own employees and to the employees of the performing parties (maritime and non-maritime).

d) "Any other person that performs or undertakes to perform any of the carrier's obligations". This group of persons is included in art. 18 RR, as a "closing" generic clause, so that any dependent party (to the extent that they act under the "supervision or control" of the carrier) or independent auxiliary party (by simply acting "at the carrier's request" but not under their dependence) of the carrier that cannot be included in the three previous categories [sections a), b) or c)], also leads to the liability of the carrier due to actions by third parties. This would be the case, for example, of a company that ships, stows or handles goods contracted by the shipper but which acts under the supervision or control of the carrier[39], or that of an unloading company contracted by the consignee that performs its functions under the supervision of the carrier.

VII. Liability of the maritime and non-maritime performing parties

The framework of liability of the performing parties established in the Rotterdam Rules is different depending on whether it is a maritime or non-maritime performing party. In the case of *maritime performing parties* the same liability framework envisaged in the Convention for the carrier is applied, remaining, therefore, subject to the obligations and responsibilities set in the Convention for the carrier, but benefiting from the exceptions and limited liabilities established in the Rules for said carrier (art. 19.1 RR). Therefore, the new Convention is applied to the maritime performing parties, with the advantage that the shipper or the consignee can claim compensation directly from the maritime perfor-

[39] TSIMPLIS, "Liability of the carrier...", cit., p. 63.

ming parties[40], under the above mentioned art. 19 and 20 RR, that declares as joint and several the plural liability of the carrier and one or more maritime performing parties.

The liability of the maritime performing party extends both to its own failure to fulfil the obligations that the Convention imposes on it and to the failure of any person that the maritime performing party has entrusted to fulfil any of the obligations that correspond to the carrier in compliance with the contract of carriage (art. 19.3 RR). As a result, the maritime performing parties will respond for the actions and omissions of their dependent and independent auxiliary parties, provided they act upon request of the maritime performing party to performance any of the carrier's obligations.

Unlike what happens with the maritime performing parties, the liability regime described in the Rotterdam Rules is not applied to the *non-maritime performing parties*[41]. This is deduced from an *a contrario sensu* interpretation of art. 19.1 RR, in which the liability framework described in the Convention for the carrier only extends to the maritime performing parties. A systematic interpretation of, among others, arts. 4.1, 19.1, 20.1, 23.3, 24 and 79.1 RR, where there is an exclusive reference to the carrier and to the maritime performing party as those liable or as the beneficiaries of the exonerations and limitations of liability established in the Convention, leads to the same conclusion. The current exclusion in the Rotterdam Rules of the non-maritime performing parties is inadequate. This is due to the fact that if one of the aims of the Convention is to harmonise the "door to door" international carriage of goods by sea, a performing party of this carriage, such as the non-maritime performing party, cannot be left out. We are referring to those events or circumstances in which the non-maritime stages that follow or precede the maritime stage are subject to national regulations, as the International Conventions on the matter are not applicable (CMR, CIM, Montreal

[40] SMEELE, "The Maritime Performing Party…", cit., p. 83.

[41] In this sense, BERLINGIERI in BERLINGIERI/ZUNARELLI/ALVISI, "La nuova Convenzione Uncitral...", cit., p. 1181; and LÓPEZ RUEDA, "Noción de contrato de transporte y aplicación del Convenio a los contratos de transporte por más de un modo" in *Las Reglas de Rotterdam y la práctica comercial…*, cit., p. 55.

Convention). In these cases, the liability of the carrier will be subject to the Rotterdam Rules and the responsibility of the non-maritime performing party will be subject to a different internal regulation. The avoidance of conflicts that the inclusion would have generated with the regulations of the non-maritime stages of the carriage does not seem argument enough for the exclusion of non-maritime performing parties[42].

VIII. Joint and several liability

When the carrier and one or more maritime performing parties are responsible for the damage, loss or delay, said responsibility will be considered joint and several, although only up to the quantitative limits set in the actual Convention (art. 20.1 RR). To know the specific scope of this precept it will be necessary to resort to the content of the internal/national Law concerning joint and several liability (*lex fori*)[43]. In this respect, the claimant may take reparatory action directly against the maritime performing party, under arts. 19 and 20 RR.

The Rotterdam Rules (art. 20) establish joint and several liability only for events or circumstances in which the carrier and one or more maritime performing parties are responsible for the damage to the goods. As a result, it must be understood that in the rest of the cases with many responsible parties (for example, carrier and non-maritime performing parties) the liability will not be joint and several, interpreting art. 20 RR *a contrario sensu*.

[42] In favour of the exclusion of the non-maritime performing parties, BERLINGIERI, "The Rotterdam Rules: The «The Maritime Plus»...", cit., p. 55.

[43] See, THOMAS, "An appraisal...", cit., p. 505.

IX. Application of the Rules regardless of the claim procedure used.

The Rotterdam Rules (art. 4), along the same lines as the Hague-Visby Rules (art. 4 bis) and the Hamburg Rules (art. 7), guarantee that the carrier's regime of liability, with its exonerations and limitations, will be applied in any legal (commercial, social, administrative, civil, criminal, etc.) or arbitral proceeding used by the claimant and regardless of the legal bases used for the claim due to damage, loss or delay[44].

Likewise, the framework of responsibility of the carrier contemplated in the Rotterdam Rules will be applied if the claim is made against the actual carrier, or against a maritime performing party, the captain, a crew member, any other person that provides services on board the ship or the employees of the carrier or of a maritime performing party (art. 4.1 RR).

However, the solution provided by arts. 4.1, 19.1 and 79.1 RR is unsatisfactory, as it leaves the non-maritime performing party out of the list of subjects that benefit from the exonerations and limitations of liability recognised by the Convention. As a result, the non-maritime performing parties (road carriers that perform activities outside the port area, air carriers, etc., that are not employees of the carrier, in short, non-employee auxiliary or dependent parties) cannot make use of the exonerations and limitations that are applied to the carrier in the Rotterdam Rules[45]. This exclusion is contrary to the harmony of the legal framework of the door to door international carriage of goods sought by its authors.

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[44] Compare, DEBATTISTA, "General Provisions", in *The Rotterdam Rules: A Practical Annotation*, London, 2009, pp. 12 y 13.

[45] STURLEY/FUJITA/VAN DER ZIEL, *The Rotterdam Rules...,* cit., p. 150.

X. Minimum mandatory nature of the carrier's liability regulation

The new Convention establishes two different mandatory levels of the obligations and of the liability included in the same, depending on whether they are those envisaged, on the one hand, for the carrier or a maritime performing party; or, on the other, for the shipper, consignee, controlling party, holder or documentary shipper:

1st. As regards the *carrier and the maritime performing party* the obligations and the responsibility cannot be excluded or limited, directly or indirectly, by means of clauses or agreements between the parties of the contract of carriage, as such agreements or clauses would be void [art. 79.1.a) and b) RR]. Therefore, the responsibility imposed on the carrier and on the maritime performing party in the Rotterdam Rules presents a minimum mandatory nature, in such a way that the clauses inserted in the contracts of carriage that envisage an exclusion or a reduction of the levels of responsibility under this minimum would be void[46].

Art. 79 RR omits any mention concerning the clauses in which the responsibility of the non-maritime performing party is excluded or limited. This precept must be interpreted alongside art. 19 RR, a precept that excludes the non-maritime performing parties from the responsibility framework imposed on the carrier, in such a way that they will not enjoy the exonerations and limitations that the Convention recognises for the carrier. Given that the responsibility of the non-maritime performing party is not governed by the Convention, as we have pointed out above, art. 79 of this Convention does not say anything about the validity or not of the clauses on the responsibility of such a non-maritime performing party, as it will be the internal/national regulations or international regulations (CMR, CIM...) regulating such responsibility which will determine whether they are valid or not.

2nd. As regards the *shipper, consignee, controlling party, holder or*

[46] Compare, ASARIOTIS, "The Rotterdam Rules...", cit., p. 121.

documentary shipper, the responsibility and the obligations contemplated in the Convention cannot be modified by the parties (art. 79.2 RR)[47].

As an exception to this general rule of mandatory nature, the Rotterdam Rules enshrine the primacy of "freedom of contract" with regard to volume contracts (art. 80 RR), the transport of live animals [art. 81.a) RR] and the transport of "special goods" [art. 81.b) RR][48].

[47] In this sense, STURLEY/FUJITA/VAN DER ZIEL, *The Rotterdam Rules...*, cit., p. 371.

[48] See, BERLINGIERI in BERLINGIERI/ZUNARELLI/ALVISI, "La nuova Convenzione Uncitral...", cit., pp. 1223-1226; DIAMOND, "The Rotterdam Rules", cit., pp. 485-489; HONKA, "Validity of Contractual Terms", in VON ZIEGLER/SCHELIN/ZUNARELLI (Eds.), *The Rotterdam Rules 2008…*, cit., pp. 337 and following; THOMAS, "An appraisal...", cit., pp. 509-511; and LÓPEZ SANTANA, "Ámbito de aplicación del Convenio", in EMPARANZA (Dir.), *La Reglas de Rotterdam…*, cit., pp. 44-47.

Liability for Delay in Multimodal Transport under the Rotterdam Rules

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Content

1 Introduction

Delay in commercial law is a multifaceted subject involving many aspects. In carriage of goods based on a sale contract, late delivery of goods might have serious legal and commercial implications. Added to this verity, the consequences of delay are more problematic when goods are carried by different modalities. The delivery time of goods in multimodal transport is becoming increasingly crucial. This is largely due to the "just in time" concept which requires not the fastest delivery of goods but rather delivery at the expected time. It is well recognised that unlocalised loss or damage is a major problem in multimodal transport especially in view of increasing container traffic worldwide. However, to localise delay in multimodal transport and determine the primary cause is not an easy task, and international transport law is neither explicit nor adequate with regard to this matter. Among the extant sea carriage conventions only the Hamburg Rules deals with liability for delay. Transport conventions on other modalities do contain provisions relating to delay, but there are no specific rules addressing this issue in multimodal transportation simply because there is no governing international regime.

The Hamburg Rules, non-maritime unimodal conventions and some national laws provide that delivery must be made within the agreed period of time, or in the absence of such agreement, within a reasonable time given the circumstances of the case. It is apparent that in practice parties frequently do not specify the time of delivery in their contracts; thus, what constitutes reasonable time and at what point in time delay becomes unreasonable in a particular instance warrants discussion.

An important observation in this regard is that the recently adopted Rotterdam Rules contain specific provisions on liability for delay. This convention is not truly multimodal but is rather one that is colloquially referred to as a "maritime plus" regime. It is applicable to door-to-door carriage if certain conditions are met. The principal purpose of this article is to examine the concept of delay in multimodal transport law in the context of the Rotterdam Rules.

The discussion starts with an examination of the current unimodal conventions on the subject of delay. The second part of this article will consider the difficulties associated with delay in multimodal transport. Thereafter, the focus will be on the delay provisions in the instruments concerning multimodal transport which are not in force together with the non-mandatory instruments. This is followed by a critical analysis of the relevant provisions of the Rotterdam Rules, including a short background to the convention, a brief explanation on how it attempts to deal with multimodal transport and, lastly, the provision on delay in delivery. It concludes with an opinion on the veracity and adequacy of these provisions.

2 Delay in commercial law

2.1 Timely delivery in commercial contracts and definition of "delay"

In international commercial transactions the sale contract is the major agreement being the basis for the associated contracts and closely interrelates with them. These contracts include the contracts of carriage, insurance and financing[1]. In accordance with the doctrine of freedom of contract, the parties to a sale contract are free to determine their rights and obligations and distribute the risks, including the delivery terms and time limits. It should be emphasised that the terms and construction of the sale contract will have paramount importance for the carriage contract[2]. Therefore, it is crucial for the parties to fix all the time limits in the sale contract. However, as practice shows, in many cases the contracting parties fail to pay necessary attention with regard to the time

[1] Jan Ramberg, *International Commercial Transactions*, Fourth Edition, (Stockholm: Nordsteds Juridik AB, 2011), p. 37 and Michael Bridge, *The International Sale of Goods. Law and Practice*, (Oxford: OUP, 1999), p. 2.

[2] Simon Baughen, *Shipping Law*, Third Edition, (New York: Cavendish, 2004), p.3-4.

limits of their obligations leaving it to the court to decide for them in case of a dispute.

It may be recalled that the UN Convention on Contracts for the International Sale of Goods (CISG)[3] in Chapter II of Part III deals with the obligations of the seller. Article 33 stipulates that -

> The seller must deliver the goods:
>
> (a) if a date is fixed by or determinable from the contract, on that date;
>
> (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
>
> (c) in any other case, within a reasonable time after the conclusion of the contract.

The first two paragraphs are quite straightforward. However, in the third paragraph we encounter imprecision of wording in the phrase "within reasonable time" which notably is repeated in the subsequent articles of the Convention. Section III provides the buyer with remedies in the event of a breach of contract by the seller. In particular, the buyer may fix an additional period of time of reasonxable length for performance by the seller of his obligations. In the second part of the article it is stipulated that the buyer may not, during that period, resort to any remedy for breach of contract if he receives notice from the seller assuring that he will perform within the period so fixed. At the same time, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance[4]. As noted by one commentator, "delay in performance is a

[3] Adopted on 11 April 1980 in order to provide a modern, uniform and fair regime for contracts for the international sale of goods. The Convention has 78 State parties, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html, 31 August, 2012.

[4] CISG, Article 47.

common difficulty in contracts of all kinds"[5]. Notably, some legal systems define delay as a distinct type of breach, applying to it special rules[6].

At this juncture, the definition and meaning of "delay" and "reasonable time"[7] should be clarified. A very general definition of delay is provided in the *Black's Law Dictionary*[8]. In the third alternative, it is defined as "the period during which something is postponed or slowed". *The Oxford Dictionary* defines "delay" in similar words, namely, "a period of time by which something is late or postponed". Professor Kurt Grönfors refers to delay as "being late" in everyday language and suggests that delay has to be measured in relation to something[9].

In summary, it can be stated that "delay" in a commercial context means that one of the contractual parties did not perform a particular obligation within the agreed time which sometimes might lead to losses for the other party and sometimes might not. Delay in delivery of goods implies that the time limit has been exceeded whether or not the delivery is performed within an agreed time or within a reasonable time. However, it should be noted that not every delay will lead to losses and accordingly be relevant for determining the carrier's liability. The next question in this respect is when the delay becomes relevant especially in cases when the time limits are not fixed by contract and delivery is to be performed within a reasonable time.

2.2 "Reasonableness" and "reasonable time" in commercial contracts

It is a point of observation that in commercial law the notions associated

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5 John E. Stannard, *Delay in the Performance of Contractual Obligations*, (New York: OUP, 2007), p. v.

6 John E. Stannard, *Delay in the Performance of Contractual Obligations*, (New York: OUP, 2007), p. v.

7 See further Section 2.2.

8 Bryan A. Garner (ed.), *Black's Law Dictionary,* Ninth Edition, (USA: WEST, 2009), p. 491.

9 Kurt Grönfors, "The Concept of Delay in Transportation Law", *European Transport Law* (1974), p. 400.

with "reasonable" and "reasonableness"[10] are quite often encountered in legal instruments as well as in legal writings without being defined with regard to its intended meaning. As a concept it lacks precision. Despite being frequently used by practitioners and academics the actual meaning of "reasonableness" is vague. Closely associated concepts such as reasonable time, reasonable care, reasonable deviation and reasonable man are among those that warrant analytical discussion. It is submitted that the word "reasonable" is to be construed objectively. In other words the test is what should have been said or done in the particular circumstances rather then what was actually said or done. Reasonableness imports the concept of average rather than extremities. Lord Denning described the "reasonable man" as "the man on the Clapham omnibus"[11], depicting the ordinary person who would conduct himself in the ordinary course of life in a way that would not be extreme in any sense. With few exceptions, the law applies the objective test to determine fault or liability rather than the subjective test to maintain a standard of behavior or conduct that is considered to be average and therefore acceptable in the eyes of the law. *The Oxford Companion to Law* defines the reasonable man as a "hypothetical creature whose imaginary characteristics and conduct by way of foresight, care, precautions against harm, susceptibility to harm and the like, are frequently referred to as the standard for judging the actual foresight, care, *etc*. of a particular defendant"[12].

Reasonableness in the legal context is defined by one commentator as follows:

> Reasonableness, as a concept employed in modern legal systems, is both elusiveand multifaceted. The word appears in statutes and in precedents. It is written into contracts and wills. It is also an

[10] For a detailed discussion on the legal concept of reasonableness see Guillaume Weiszberg, Le "Raisonnable" en Droit du Commerce International [pour le doctorat en droit de l'Université Panthéon-Assas (Paris II), 7 novembre 2003], Doctoral thesis on "Reasonableness" in International Commercial Law.

[11] See also Greer L.G in *Hall* v. *Brooklands Auto Racing Club* [1933] 1K.B.205, p.224.

[12] *The Oxford Companion to Law*, the definition is attributed to Walker, 1980:1038, see also Michael Saltman, *The Demise of the 'Reasonable Man': A Cross-Cultural Study of a Legal Concept*, (London: Transaction Publishers, 1991), p. 12.

> adjective used to qualify other concepts, such as care, cause, time, maintenance, and so forth[13].

Reasonable time (in contracts) is defined as the time needed to do what a contract requires to be done, based on subjective circumstances. In cases when the contracting parties do not agree on a time for performance of their obligation, a reasonable time will be presumed. Notably, the meaning of it is not always the same in common and civil law jurisdictions.

As pointed out by Professor Fletcher -

> One of the most striking particularities of our discourse is its pervasive reliance on the term "reasonable". We routinely refer to reasonable time, reasonable delay, reasonable reliance, and reasonable care…We cannot even begin to argue about most issues of responsibility and liability without first asking what a hypothetical reasonable person would do under the circumstances[14].

It is further contended that in contrast to the common law system, in continental Europe, the words "reasonable" and "reasonable person" do not bear the same importance. Professor Fletcher postulates that the concept of a legal Right (*Recht*) shapes German legal thought in the same way as reasonableness directs common law reasoning[15].

When timely delivery is vital for the parties, they fix time limits in their contract and insert a "time is of the essence" clause which is a contractual provision making timely performance a condition[16]. However, in cases where the parties fail to provide the time frames within which they expect performance of a particular obligation, the law implies a

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13 Michael Saltman, *The Demise of the 'Reasonable Man': A Cross-Cultural Study of a Legal Concept*, (London: Transaction Publishers, 1991), p. 107.

14 George P. Fletcher, "The Right and the Reasonable", *Harvard Law Review*, Vol. 98, No. 5 (Mar., 1985), p. 949.

15 George P. Fletcher, "The Right and the Reasonable", *Harvard Law Review*, Vol. 98, No. 5 (Mar., 1985), pp. 950-951.

16 Andrew J. Bateson, "Time in the law of contract", *JBL*, (1957), p. 357, Bryan A. Garner (ed.), *Black's Law Dictionary,* Ninth Edition, (WEST, 2009), p. 1621.

term that these obligations must be performed within a reasonable time[17].

In this context it is instructive to refer to the statement of Devlin J. in *Universal Cargo Carriers Corporation* v. *Citati* as follows:

> Where time is not of the essence of the contract - in other words, when delay is only a breach of warranty - how long must the delay last before the aggrieved party is entitled to throw up the contract? The theoretical answer is not in doubt. The aggrieved party is relieved from his obligations when the delay becomes so long as to go to the root of the contract and amount to a repudiation of it[18].

He further emphasises as follows:

> I think that, while the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact. The period has to be measured, no doubt, in the light of the principles that have been laid down in cases as to the sort of thing that amounts to frustration, but it is in the end a finding of fact[19].

Be that as it may, it will be shown below that most conventions and non-mandatory instruments contain a provision stipulating that in cases where parties do not specify time-limits for delivery, performance should be within a reasonable time. A similar provision is inserted in shipping contracts used by major shipping companies. However, such provision does not give a clear understanding of how "reasonable time" is to be measured in each particular case and what is the point of time when delay becomes unreasonable and the carrier becomes liable for delay. Such vagueness provokes further analytical discussion.

In case the parties do not agree on a delivery time-frame, the claimant needs to prove that the length of time used for delivery was unreasonable. Since there is no definitive meaning of what is unreasonable delay, it follows that the claimant must show what would be a reasonable time of

[17] See further in Andrew J. Bateson, "Time in the Law of Contract", *JBL*, (1957), p. 357.

[18] *Universal Cargo Carriers Corporation* v. *Citati* [1957] 2 Q.B. 401, p. 426.

[19] *Universal Cargo Carriers Corporation* v. *Citati* [1957] 2 Q.B. 401, p. 435.

delivery in a particular situation. To facilitate this task, the schedules of the particular carrier involved might be considered, as well as those of its competitors on the same route to determine the reasonable time for delivery[20]. Especially in the container trade, schedules are available well in advance and are freely accessible.

2.3 Types of losses

Before proving whether delay was reasonable or not, the claimant must show that he suffered loss as a consequence of late delivery. The loss in question may be in the form of loss or damage to the goods, including progressive damage and economic loss. The progressive damage mainly concerns perishable goods that run the risk of deterioration on the way due to a longer time for delivery. Technology advancements in the container trade have resulted in much less turnaround time than before; therefore goods delivered later than expected can cause substantial loss for the claimant regardless of whether or not there is physical loss or damage to the goods. The goods might not be lost in physical terms and presumably are still in transit, but this uncertainty could have the same consequences for the consignee as would a complete destruction of the goods. There are numerous examples explaining how goods can become a total loss even if they still physically exist. For instance, the claimant might bear a financial loss in case of seasonal goods that are needed only within a specific period such as Christmas goods, new seasonal fruits and vegetables etc. A late delivery of this type of goods can result in the stores being filed with goods by competitor importers and the initial price will drop dramatically. Another exemplary situation that can lead to serious consequences is when a needed machinery component is delivered late for a manufacturing or production plant. Even a slight delay may cause disruptions in the production chain. In many situations, delay may also result in the claimant himself becoming liable for late delivery under a subsequent sale contract in which he is a seller.

[20] Hugh M. Kindred and Mary R. Brooks, *Multimodal Transport Rules*, (Den Haag: Kluwer Law International, 1997), p. 92.

The above examples vividly demonstrate that late delivery of undamaged goods can cause more harm for the claimant than if the goods were completely lost. Whether delay is a type of damage or rather is its cause needs to be investigated further. For example, a ship by deviating from its planned route may have caused a delayed delivery of the goods. If the goods are perishable, the loss may be characterised as a physical loss attributable to a longer time for delivery than that which is normally required. In such a situation the loss or damage would have been caused by delay. Professor Ralph de Wit states that "delay in itself is simply a cause of damage. As such, it has a conceptual value which is totally different from that of loss or damage to goods"[21]. The question therefore is whether delay in delivery is the principal or sole cause for the loss or damage to the goods, or whether delay also aggravated the loss or damage suffered which is primarily attributed to another cause. The author agrees with the scholars who claim that delay is not a type of loss, but rather a particular *cause*[22] of loss to the effect that delay only causes temporary loss of use of the goods which are otherwise delivered whole. This results in financial loss suffered by the claimant[23] and such loss can be characterised as an economic loss that is consequential to a physical loss or damage[24]. It should also be noted that rules on loss of or damage to the goods are focused on the goods themselves, their handling and carriage whereas liability for delay is focused on a period of time, not on the goods[25]. Therefore, breach of contract by delay in delivery differs signi-

21 Ralph De Wit, *Multimodal Transport. Carrier Liability and Documentation*, (London: LLP, 1995), p. 215.

22 Emphasis added by the author.

23 Hugh M. Kindred and Mary R. Brooks, *Multimodal Transport Rules*, (Den Haag: Kluwer Law International, 1997), p. 90, see also Ralph De Wit, *Multimodal Transport. Carrier Liability and Documentation*, (London: LLP, 1995), p. 216. Max Ganado and Hugh M. Kindred, *Marine Cargo Delays*, (London: LLP, 1990), p.1.

24 See the distinction between concepts of economic loss, financial loss and consequential loss in Proshanto K. Mukherjee, "Economic Losses and Environmental Damage in the Law of Ship-Source Pollution" at *The Regulation of International Shipping: International and Comparative Perspectives, Essays in Honour of Edgar Gold*, ed. Aldo Chircop and al. , (Leiden: Martinus Nijhoff Publishers, 2012), pp. 343-349.

25 Kurt Grönfors, "The Concept of Delay in Transportation Law", *European Transport Law* (1974), p. 412.

ficantly from breach by damage or destruction of the goods. It should be emphasised that economic loss (loss of market, loss of business) could be much higher than the value of the goods. What must be added in this respect is that loss of business attributable to delay in delivery is an increasingly frequent occurrence these days.

In attempting to prove that there was a delay and that the claimant suffered a loss due to it, he needs to demonstrate a causal link between the delay and his loss. He must also show that the damage was not too remote. In English law the position has been that economic loss that is too remote is not compensable[26]. However, since the decision of the House of Lords in *Junior Books* v. *Veitchi*[27], an economic loss can be compensated if there is a "special relationship" between the parties in question. Losses that do not qualify under this doctrine are often referred to as "secondary" or "relational"; in other words, they are just too remote to be compensable[28]. Once the causal link is established the question of a carrier's liability for delay can be addressed adequately. Furthermore, to determine the carrier's liability it must be clarified whether the same rules apply when dealing with loss, damage or delay. Another complication in delay cases lies in the fact that it is difficult to measure delay until the final delivery is made or notice that the goods are completely lost is received. To localise loss or damage in time and space is relatively easier than in the case of delay especially in multimodal transport as will be explained later. In the next section the approaches taken in various transport conventions will be considered and analysed.

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[26] See the classic case of *Hadley* v. *Baxendale* (1854) 9 Ex. 341; 156 E.R. 145.

[27] *Junior Books Ltd.* v. *Veitchi Co. Ltd.* [1982] 3 W.L.R. 477 (H.L).

[28] See in Gotthard Mark Gauci, "The Problem of Pure Economic Loss in the Law Relating to Ship-source Oil Pollution Damage", *WMU Journal of Maritime Affairs* 2(1), 2003: 79.

3 Liability for delay in maritime and transport law

3.1 Carriage by sea

It is a point of observation that maritime law is not explicit on the issue of delay in the carriage of goods conventions as will be illustrated in this section. It has been emphasised that "case law on delay is scarce at best in both the continental law and common law systems, let alone with regard to multimodal carriage of goods"[29].

Rather critical views on lack of sufficient provisions on delay in carriage of goods have been expressed by Ganado and Kindred in their work on Marine Cargo Delays[30]. Arguing strongly against the constant disregard of delay in carriage of goods as a separate topic they conclude that this will result in an inefficient system of law. The authors also state that the principles governing delay in the carriage of goods are uncertain and finally observe that "delay is worthy of separate analysis and consideration as a distinct topic of maritime law due to its many special characteristics and implications, both legal and commercial"[31]. Elaborating on the concept of delay in transportation law, Professor Kurt Grönfors observes that delay has never been strictly described or defined regardless of it being used often in legal rules and in scholarly writings. In his critical analysis he notes that usually delay is considered as a topic secondary to the loss of or damage to goods. Such unsatisfactory practice leads to disregard of delay as a topic of its own[32].

At this juncture, the current regime of carriage of goods by sea needs to be revisited. International instruments that have mandatory application and binding force for their parties are the Hague Rules, Hague-Visby

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29 Ralph De Wit, *Multimodal Transport. Carrier Liability and Documentation*, (London: LLP, 1995), p. 215.

30 Max Ganado and Hugh M. Kindred, *Marine Cargo Delays*, (London: LLP, 1990).

31 Max Ganado and Hugh M. Kindred, *Marine Cargo Delays*, (London; LLP, 1990), p. 3.

32 Kurt Grönfors, "The Concept of Delay in Transportation Law", *European Transport Law* (1974), p. 400.

Rules, Hamburg Rules[33] and the Rotterdam Rules[34] if and when it enters into force in the future. Along with these international instruments, some countries have adopted a hybrid approach[35] and contain in their legislation a combination of the mentioned conventions including local variations, and sometimes also regional instruments (*e.g.* EU countries).

Despite recent technological and commercial developments in the field of carriage of goods globally, the Hague Rules that were adopted almost a century ago, in 1924, modified by the Hague-Visby Rules in 1968, and remain the governing regime for most maritime countries. With regard to delay it should be noted that neither the Hague Rules nor Hague-Visby Rules include any explicit provisions on delay. It is to be noted that the Hague-Visby Rules focus mainly on physical loss and damage, being silent with respect to the time of delivery. As evident from Article III of the Hague-Visby Rules, the main obligation of the carrier covers seaworthiness of the ship and proper manning before and at the beginning of the voyage. The carrier also has to exercise due diligence pertaining to loading and storage facilities to make them fit and safe for the reception, carriage and preservation of the goods.

As gleaned from Article III (6) -

> Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the

[33] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (Hague Rules); Protocol Amending the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924, (Hague-Visby Rules) 1968; Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, as Amended by the Protocol of 1968, 1979; United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules).

[34] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted by A/RES/63/122, on 11 December 2008.

[35] For example Scandinavian Countries.

> delivery by the carrier of the goods as described in the bill of lading.

At this juncture, Article III (8) is of a particular interest. It provides that

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

It is conspicuous that the authentic French version of the Hague-Visby Rules contains a slightly different expression. The wording "*perte ou dommage concernant des marchandises*"[36] literally means "loss or damage in relation to the goods" and seems to be more precise than the English alternative, leaving little space for ambiguity in interpretation.

It must be added that Article III (8) has been interpreted by the Court in *Anglo-Saxon Petroleum Co. Ltd* v. *Adamastos Shipping Co. Ltd*[37]. One of the questions posed to the Court was whether the words "loss or damage" relate only to physical loss of or damage to goods? Devlin J. elaborated on that matter as follows:

> The Act [US COGSA 1936] is dealing with responsibilities and liabilities under contracts of carriage of goods by sea; and clearly such contractual liabilities are not limited to physical damage. A carrier may be liable for loss caused to the shipper by delay or misdelivery, even though the goods themselves are intact. I can see no reason why the general words "loss or damage" should be limited to physical loss or damage.

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[36] Toute clause, convention ou accord dans un contrat de transport exonérant le transporteur ou le navire de responsabilité pour *perte ou dommage concernant des marchandises* provenant de négligence, faute ou manquement aux devoirs ou obligations édictées dans cet article ou atténuant cette responsabilité autrement que ne le prescrit la présente Convention, sera nulle, non avenue et sans effet.

[37] *Anglo-Saxon Petroleum Co. Ltd* v. *Adamastos Shipping Co. Ltd* [1957] 2 Q.B. 233 (C.A), pp. 519-519.

In this regard Devlin J. referred to *Renton* v. *Palmyra Trading Corporation of Panama,*[38] decided by the House of Lords who agreed with the findings of the Court. In this case the words "loss or damage to or in connection with goods" in Article III (8) of the Hague Rules were interpreted by the Court as not limited to actual loss of or physical damage to the goods.

As seen from the Judgment, Lord Morton of Henryton opined as follows:

> In my view, the phrase covers four events – (a) loss "to" goods (whatever that may mean); (b) damage to goods; (c) loss in connection with the goods; (d) damage in connection with the goods. Comparing the wording of Article III (8) with other clauses in which loss or damage are mentioned, it would seem clear that the words "or in connection with" were inserted in order to give a wider scope to the clause[39].

Lord Tucker in his turn stated:

> I agree that the words "loss or damage to or in connection with goods" in Article III (8), are not confined to physical damage[40].

Elaborating on the actual meaning of Article III (8) Devlin J. postulated in *Anglo-Saxon Petroleum Co. Ltd* v. *Adamastos Shipping Co. Ltd* that he gives the same meaning to "in relation to" as to "in connection to" and also stated that –

> Phrases like "in relation to" and "in connection with" are no doubt very wide but the character of the compensation claimed must bear some relation to the goods and that relation must not be too remote[41].

Further provisions of the Hague-Visby Rules illustrate focus on loss and

[38] *Renton* v. *Palmyra Trading Corporation of Panama* [1957] 2 W.L.R (H.L).

[39] *Renton* v. *Palmyra Trading Corporation of Panama* [1957] 2 W.L.R (H.L), p. 390.

[40] *Renton* v. *Palmyra Trading Corporation of Panama* [1957] 2 W.L.R (H.L), p. 393.

[41] *Anglo-Saxon Petroleum Co. Ltd* v. *Adamastos Shipping Co. Ltd* [1957] 2 Q.B. 233 (C.A), p. 520.

damage. Article IV contains a few provisions that explicitly refer to the loss of or damage to goods. As provided in Article IV (1) -

> Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy… Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

A well-known list of exceptions is found in Article IV (2) which provides that the carrier and the ship are not responsible for loss or damage arising or resulting from any of the events listed in this Article. The next paragraph 3 of this Article states that the shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

Finally, Article IV (4) contains a provision on deviation. It provides that any deviation in saving or attempting to save life or property at sea or any reasonable deviation is not in violation of the Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting from such deviation. As may be gleaned from scholarly writings in the common law system, delay is often treated as a quasi-deviation[42]. However, Ganado and Kindred argue that delay in fact is a breach relating to time, while geographical deviation is a breach relating to space[43].

The possible reasons why delay was not specifically dealt with in the Hague-Visby Rules can be explained as follows. Since the Hague Rules were adopted in 1924, in those times, timely delivery was not so crucial as it is nowadays. In addition, the duration of sea voyages was harder to

[42] Max Ganado and Hugh M. Kindred, *Marine Cargo Delays*, (London: LLP, 1990), p. 2, *Carver's Carriage by Sea*, Twelfth Edition, (London: Stevens, 1971), pp. 864-899, see also Theodora Nikaki, "The Quasi-Deviation Doctrine", *J.Mar.L. & Com.*, Vol. 35 (1), (2004), pp.60-62.

[43] See further Chapter 2 "Deviation and Delay" in Max Ganado and Hugh M. Kindred, *Marine Cargo Delays*, (London: LLP, 1990).

predict. Nowadays, with modern navigational equipment, instantaneous communications between ship and shore and innovations in shipbuilding, enables the time of a sea voyage to be calculated with considerable precision. Hence, sea voyages are becoming more predictable. Moreover, time schedules of ports of calls are available online well before the voyage. Therefore, the argument that it is problematic to know the exact time of the voyage is not valid anymore. Another possible reason why delay did not get enough attention in the Hague-Visby Rules might be its focus on damage to or loss of the goods. It should be remembered that the Hague Rules were adopted long before the beginning of the container revolution that has changed international carriage of goods dramatically. The subsequent protocol to the Hague Rules was adopted in 1968 when the container trade and linkages between different modes of transport were still in their infancy. Therefore, they failed to address the problems that appeared in the course of modernised transportation. The manner in which multimodal transport is affected by delays in delivery will be considered in Section 4 of this article.

By contrast, the Hamburg Rules of 1978 contains rules pertaining to delay in Article 5 on "Basis of liability". This article comprises three parts, the first of which stipulates that "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. In the second part of this article a definition of "delay" is formulated for the first time. It states that:

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

Finally, the third part of this article entitles the claimant to treat the goods as lost if they have not been delivered within sixty consecutive days following the expiry of the time for delivery according to paragraph 2 of this

Article. This concept, also known as "conversion"[44] is found in other transport conventions as will be explained in the next sections of the paper.

With regard to the limitation amount, the Hague-Visby Rules contains in Article IV (5)(a) the following figures - 666,67 units of account per package or unit or 2 units of account per kilo of gross weight of the goods lost or damaged. In contrast, in the Hamburg Rules there is a specific provision on limitation of liability for delay in addition to loss of or damage to the goods. Article 6 (1)(b) stipulates an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the contract of carriage of goods by sea.

In conjunction with the above discussion, it is interesting to observe that the Nordic Maritime Codes 1994[45] specifically include liability for delay. As seen in Section 278 of the Norwegian Maritime Code the definition of "delay" resembles the one given in the Hamburg Rules. It also incorporates the conversion rule providing the claimant with sixty days before he can claim damages as for loss of the goods. As to the limits of liability, Section 280 (2) states that the liability for delay shall not exceed the full freight according to the contract of carriage.

In concluding this section it should be noted that liability for delay has not so far created any major problems in carriage of goods law. The possible explanation to this could be the fact that the parties include in most bills of lading a clause on delay which relieves the carrier from liability for damage caused by delay, completely or partly[46].

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[44] *Winfield and Jolowicz on Tort* refer to "conversion" as the wrong committed by dealing with the goods of a person which deprives him of the use or possession of them. It may be committed by wrongfully taking possession of goods, by wrongfully disposing of them, by wrongfully misusing them, by wrongfully destroying them or by wrongfully refusing to give them up when demanded, see in W.V.H. Rogers, Eighteenth Edition (Sweet & Maxwell, 2010), p. 823.

[45] It has been mentioned that even the previous version of the Code included provisions on delay in §118, §130 and §235 of Swedish Maritime Code - Sjölag (1891:35 s.1), suspended by SFS 1994:1009. See also Hannu Honka (Ed.), *New Carriage of Goods by Sea: The Nordic Approach Including Comparisons with Some Other Jurisdictions*, (Åbo Academi, 1997), pp. 93-98.

[46] Kurt Grönfors, "Exception clauses on delay in ocean bills of lading", *Il Diritto Marittimo,* (1973), p. 230. One example of such a clause could be taken from AS Tallink Grupp Standard Conditions of Carriage. Clause 12 (3) stipulates -

3.2 Carriage by land

3.2.1 CMR

Carriage by road is governed mainly by the Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR)[47]. It must be noted that Article 17 of the CMR contains the rules on delay in delivery as follows:

> The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.

In accordance with Article 18 (1), the burden of proving loss, damage or delay rests upon the carrier. As in the Hamburg Rules, the CMR also provides a definition for "delay" in Article 19 which states that -

> Delay in delivery shall be said to occur when the goods have not been delivered within the agreed time-limit or when, failing an agreed time-limit, the actual duration of the carriage having regard to the circumstances of the case, and in particular, in the case of partial loads, the time required for making up a complete load in the normal way, exceeds the time it would be reasonable to allow a diligent carrier.

Article 20 (1) sets out, in a similar manner as the Hamburg Rules, that the claimant can treat the goods as lost if they are not delivered within thirty days following the expiry of the agreed time-limit or if there is no agreed time-limit, within sixty days when the goods are taken over by the carrier.

If the Carrier is held liable in respect of delay, consequential loss or damage other than loss of or damage to the goods, the liability of the Carrier shall be limited to the freight for the transport or to the value of the Goods as determined in Clause 11, whichever is least.

47 CMR is considered as a European Convention as evident from the list of the contracting states to this Convention. It has the force of law in practically all European states, See < www.unece.org/trans/conventn/legalinst_25_OLIRT_CMR.html>, visited on September 10, 2012.

Limitation of liability for delay is provided in Article 23 (5). Pursuant to it, if the claimant proves that damage has resulted from delay, the carrier must pay compensation for such damage not exceeding the carriage charges. Another provision which is worthy of noting is Article 30 (3) of the CMR which reads as follows –

> No compensation shall be payable for delay in delivery unless a reservation has been sent in writing to the carrier, within twenty-one days from the time that the goods were placed at the disposal of the consignee.

It is interesting to observe that the above provisions of Articles 17, 23 and 30 of the CMR have been considered in *Gefco (UK) Ltd* v. *Mason*[48]. One of the questions posed to the court was whether the defendant's claim for pure economic loss (in the form of loss of profit) was excluded or otherwise irrecoverable by virtue of the CMR and, in particular, Article 17 and 23. It was held by Judge Gibbs, Q.C. –

> There is nothing in the CMR to prevent recovery of economic loss, including loss of profits, arising out of delay; provided that the amount of loss is limited to the carriage charges.

As seen from the above authority, the provisions of the CMR dealing with compensation for delay was given a broader meaning, also allowing compensation for economic loss within the limits of carriage charges.

3.2.2 CIM-COTIF

The International Convention on Rail Carriage was adopted in 1890[49] and subsequently amended a number of times until its last version was adopted in 1999. As regards delay in delivery, CIM-COTIF deals with it in Article 23 (1) which provides that -

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48 *Gefco (UK) Ltd* v. *Mason,* [2000], Vol. 2 (Q.B.), p. 565.

49 Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), Appendix B to the Convention Concerning International Carriage by Rail (COTIF), May 1980, Protocol to amend CIM-COTIF, 1999.

> The carrier shall be liable for loss or damage resulting from the total or partial loss of, or damage to, the goods between the time of taking over of the goods and the time of delivery and for the loss or damage resulting from the transit period being exceeded, whatever the railway infrastructure used.

As seen from the above passage, the English version does not contain the phrase "delay in delivery", but refers to "transit period being exceeded". In contrast the French version uses the term *délai de livraison* which literally means "delay in delivery". According to Article 29 (1) if the goods are not delivered to the consignee or placed at his disposal within thirty days after the expiry of the transit period, he may consider them as lost. Under CIM-COTIF the limitation of liability for loss of or damage to goods amounts to 17 units of account per kilogramme of gross mass of goods in shortage. As to the limitation of liability for delay, Article 33 (1) stipulates that if loss or damage to goods results from the transit period being exceeded, the carrier must pay compensation not exceeding four times the carriage charge. According to Article 33 (5) the total compensation for exceeding the transit period together with the compensation for loss and damage cannot exceed the amount which is payable in case of total loss of the goods.

Notably, this provision clearly demonstrates that the compensation for delayed delivery under CIM-COTIF is significantly higher than the one provided by the CMR. This allows a cargo claimant whose goods are carried by rail to recover the sum which could be as high as four times the carriage charges.

3.2.3 CMNI

The Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) was adopted in 2000. The Convention states an obligation of the carrier to deliver the goods within the time limit agreed in the contract of carriage or, if no time limit has been agreed, within the time limit which could reasonably be required of a diligent carrier, taking into account the circumstances of the voyage and unhin-

dered navigation as stated in Article 5. Furthermore, under Article 16 the carrier is liable for loss resulting from loss or damage to the goods caused between the time when he took them over for carriage and the time of their delivery, or resulting from delay in delivery, unless he can show that the loss was due to circumstances which a diligent carrier could not have prevented and the consequences of which he could not have averted.

With respect to the limitation of liability for delay in case of loss, the carrier's liability shall not exceed the amount of the freight. Moreover, the aggregate liability shall not exceed the limitation which would be established for total loss of the goods with respect to which such liability was incurred[50].

3.2.4 Montreal Convention

International carriage by air of passengers, luggage and goods was regulated in 1929 by the Warsaw Convention, which was amended by the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention)[51] and entered into force in 2003. The Montreal Convention governs liability for delay in Article 19 and, unlike the above conventions, in addition to carriage of cargo also covers carriage of passenger and their baggage. It stipulates that -

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

As noted by one commentator, Article 19 has many gaps and shortcomings: it is completely silent on the duration of the liability for carriage.

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[50] Article 20.

[51] Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention), 1929; The Hague Protocol, 1955; Montreal Protocol No. 4, 1975; The Montreal Convention, 1999.

It does not give any indication either concerning the circumstances to be taken into account in cases of delay, nor about the length of the delay[52].

With respect to carriage of cargo, limits of liability resulting from destruction, loss, damage or delay are 17 SDR per kilogram unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at the destination[53]. In the case of partial destruction, loss, damage or delay, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned[54]. This provision illustrates the different approach taken in comparison with CMR, CIM-COTIF and CMNI, in that all make references to freight charges. The Montreal Convention clearly indicates that limitation of compensation is linked with the weight of cargo, whether it is total or partial loss, destruction, damage or delay.

It follows from the above that despite providing for liability for delay, each convention prescribes different amounts of compensation and also different approaches to calculating the damages due to delay. Hence, it is apparent that the law is this regard is not harmonised. At this juncture, it is necessary to investigate the issue of delay in multimodal transport as a core element of this article and the adequacy of the international law regime in this regard.

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52 I.H. Ph.Diederiks-Verschoor, "The Liability for Delay in Air Transport", 26 *Air & Space L*. 300 2001, p. 301.

53 Article 22 (3).

54 Article 22 (4).

4 Delay in multimodal transport

4.1 Defining multimodal transport[55]

It is instructive to note that nowadays arrangements for the international carriage of goods commonly involve multimodal carriage[56]. Multimodal transport[57] in its turn consists of different stages and may include various modes of transport (*i.e.* carriage by a combination of road, rail, inland waterway, sea or air). It is glaringly obvious that the international transport industry "clearly has moved into a new era the age of multimodalism, door-to-door transport based on efficient use of all available modes of transportation by air, water and land."[58] As demonstrated, the modern maritime contract in the liner trade is multimodal[59] or mixed,[60] since it includes not only sea but also land transport and is arranged under a single contract with one person – multimodal transport operator (MTO) who is responsible to the consignors for safe and timely arrival of the goods[61].

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55 D. Rhidian Thomas, "Multimodalism and Through Transport – Language, Concepts, and Categories", *Tulane Maritime Law Journal*, Vol. 36(2), (2012).

56 Brian Harris, *Riddley's Law of the Carriage of Goods by Land, Sea and Air*, (UK: Sweet & Maxwell, 2010), p. 1.

57 A definition of "international multimodal transport" was introduced in the Multimodal Convention, 1980 as follows
[t]he carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country. The operations of pick-up and delivery of goods carried out in the performance of a unimodal transport contract, as defined in such contract, shall not be considered as international multimodal transport.

58 Robert Force, "The Aftermath of Norfolk Southern Railway v. Kirby, PTY LTD.: Jurisdiction and Choice-of Law Issues", *Tulane Law Review,* June 2009, p.1395.

59 Gertjan van der Ziel, "Multimodal Aspects of the Rotterdam Rules", *CMI Yearbook* 2009, p. 301.

60 Robert Force, "The aftermath of Norfolk southern railway v. Kirby, PTY LTD.: Jurisdiction and choice-of law issues", *Tulane Law Review,* (June 2009), p.1394.

61 John F. Wilson, *Carriage of Goods by Sea,* Sixth Edition, (Dorchester: Pearson, 2008), p. 246, Brian Harris, *Riddley's Law of the Carriage of Goods by Land, Sea and Air*, Eighth Edition, (UK: Sweet & Maxwell, 2010), p. 71, Malcolm A. Clarke, "Multimodal

4.2 Localisation of delay in multimodal transport

The timely performance of delivery obligations is crucial in the current milieu since modern transportation systems, handling containerised or otherwise unitised goods, compete with the rapidity of the carriage as a main selling argument and, therefore, liability for delay cannot be disregarded any longer[62]. With the introduction of containers, the time for delivery of goods has gained more importance than before. This is largely due to the concept of "just-in-time" that reduces inventory cost and demands delivery at the expected date, not too early to avoid storage cost and not too late as it can cause a disruption in the production chain or leaving a store without seasonal retail. The logistics solutions are of great importance for these types of transport operations. In the current global trend towards just-in-time production, the volume of high value products moving multimodally has grown dramatically. As pointed out, the value:freight ratio has also grown and, therefore, the value of freight increasingly fails to grant adequate compensation in the event of delay[63].

Carriers now must comply with tight schedules of a complicated logistics chain. In turn, the carriage process has acquired an extended meaning covering the whole chain of consolidation, grouping, sorting, trans-shipment and delivering door-to-door to the customer. The slightest delay on one transport leg may produce a series of further delays resulting in sufficient delay for the claimant. What must not be overlooked in this regard is the number of parties involved in the carriage process, including intermediaries both in the country of origin and in the destination country.

In a classic example concerning Christmas decorations, the goods

Transport in the New Millenium", *WMU Journal of Maritime Affairs*, , No.1, (2002), pp. 71-84, Lars Gorton et al., *Shipbroking and Chartering Practice,* Seventh Edition, (London: Informa, 2009), pp. 80-81. Gertjan van der Ziel, "Multimodal Aspects of the Rotterdam Rules", *CMI Yearbook* 2009, p. 302.

62 See Kurt Grönfors, "Exception Clauses on Delay in Ocean Bills of Lading". *Il Diritto Marittimo* (1973), p. 231, see also Kurt Grönfors, "The Concept of Delay in Transportation Law", *European Transport Law* 4. (1974).

63 Hugh M. Kindred and Mary R. Brooks, *Multimodal Transport Rules*, (Den Haag: Kluwer Law International, 1997), p. 110.

must be in the stores by November and December. To avoid storage costs they are needed at the warehouse by mid-October and not sooner[64]. Conversely, Christmas decorations that arrive after the time they were expected will no longer be competitive. Their price might be reduced or they might even arrive too late when no one requires them anymore. In that case, the buyer (importer) might suffer a reduction in profit, even though the goods are delivered in perfect condition.

It is a well-known fact that the localisation of loss of or damage to the goods in multimodal transport chain presents considerable difficulties since the containers are sealed before carriage and not opened until they reach their final destination. In particular, this concerns gradual damage as containers are normally sealed by the shipper or consolidator and opened only upon their delivery. In this respect, it can be even more problematic if not impossible to detect the stage of transport, and the time and location when delay has occurred.

A few scenarios are provided by Professor Kurt Grönfors in his article devoted to delay in combined transport[65] that are relevant to this discussion. According to him, the most complex situation could be when during both the first and third legs there was a delay for half a day so that both contributed to an overall delay of one day and caused considerable loss as a result. Furthermore, as noted by him, to show the time and place when the damage to or loss of the goods occurred is easier than to determine the delay in time and space as an event causing delay might happen at one place, but the effect can be realised at a later stage[66]. What is important to observe is that "the rules on liability for delay are not focused on the goods but on the contractual time-limit, agreed upon, or otherwise determined by what is reasonable in the circumstances to permit a diligent carrier to perform his contract".

Therefore, the question of localisation of delay remains largely pro-

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64 Michael F. Sturley, Tomotaka Fujita and Gertjan van der Ziel, *The Rotterdam Rules*, (London: Sweet & Maxwell, 2010), p. 120.

65 Kurt Grönfors, "Liability for Delay in Combined Transport", *J. Mar. L. & C.* 483, (1973-1974).

66 Kurt Grönfors, "Liability for Delay in Combined Transport", *J. Mar. L. & C.* 483, (1973-1974), p. 478.

blematic since it will have implications regarding which legal regime should apply and will raise the issues of time-bar and limitation of liability. As seen in Section 3, there are certain discrepancies in various transport conventions and a convention governing multimodal transport internationally is lacking. The current international regime pertaining to carriage of goods that includes multimodal arrangements will be revisited and critically assessed.

4.3 Liability for delay in multimodal transport

4.3.1 Multimodal transportation instruments

It is apparent that there are no mandatory rules on delay in multimodal transport due to the lack of a regime governing multimodal transport. Despite numerous attempts to draft such an instrument in the past none of them have been successful, leaving a gap in governing international legislation on this subject matter. The only Convention devoted to multimodal transport, namely the UN Multimodal Convention failed to enter into force giving way to contractual arrangements made by the parties. Serving as a temporary solution, they obviously have a non-mandatory application and are binding on the parties only when specifically inserted in carriage contracts. Notably, these instruments can be overridden by mandatory international conventions or mandatory national laws. These arrangements include, *inter alia*, the UNCTAD/ICC Rules, FIATA Bill of Lading, MULTIDOC 95 and others.

UN Multimodal Convention

The UN Convention on International Multimodal Transport of Goods (UN Multimodal Convention) was adopted in 1980. It failed to achieve the required number of ratifications and hence, it is not in force. Nevertheless, it is instructive to consider its provisions relating to delay in delivery. The rules on delay are provided in Article 16, which explicitly states that the MTO shall be liable for loss resulting from loss or damage to the goods, as well as from delay in delivery. Article 16 (2) defines delay

in terms of when the goods are not delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent MTO, having regard to the circumstances of the case. Hence, it resembles the wording of the Hamburg Rules which served as a basis for the drafting of the UN Multimodal Convention. The third part of Article 16 contains a conversion rule, extending the period of time after which the claimant may treat the goods as lost to ninety days in contrast to the Hamburg Rules which provides for sixty days.

UNCTAD/ICC Rules

The UNCTAD/ICC Rules for Multimodal Transport Documents which are non-mandatory in their nature apply when they are incorporated, in writing or in other manner, into a contract of carriage, irrespective of whether it is a contract for unimodal or multimodal transport contract involving one or several modes of transport or whether a document has been issued or not[67]. Regardless of their non-mandatory character, as indicated above, the UNCTAD/ICC Rules have been incorporated in widely used multimodal transport documents such as the FIATA FBL 1992 and the "MULTIDOC 95" of BIMCO[68], and therefore are actually a part of the contractual relationships that govern multimodal transport today. A very similar definition for "delay in delivery" to the one mentioned above in the UN Multimodal Convention is provided in Section 5.2. Under this provision the delivery shall be performed with the time agreed or within a reasonable time. Section 5.3 allows the claimant ninety days from the date of delivery to treat the goods as lost.

MULTIDOC 95

Under Section 10 (b), the MTO shall be liable for loss of or damage to the goods as well as for delay in delivery. However, the MTO shall only

[67] UNCTAD/ICC Rules for Multimodal Transport Documents, Article 1.1.

[68] UNCTAD/SDTE/TLB/2, 25 June 2001, UNCTAD Implementation of multimodal transport rules. Report prepared by UNCTAD secretariat, para.6.

be liable for loss following from delay in delivery if the consignor has made a written declaration of interest in timely delivery which has been accepted in writing by the MTO. The MULTIDOC 95 provision on delay in delivery is identical to the one mentioned above in the UNCTAD/ICC Rules and the UN Multimodal Convention. The same rule on conversion applies, giving the claimant ninety days before treating them as lost.

5 Liability for delay under the Rotterdam Rules

5.1 Background

Harmonisation and unification of transport law is still a topical issue and some progress has been made in this direction. A new transport convention was adopted by the United Nations General Assembly on 11 December 2008 and signed in 2009 in Rotterdam, hence their name - the "Rotterdam Rules". The full title of the Convention is "United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea"[69]. From the title it is clear that the application of the new Convention also is intended to cover preceding and subsequent land carriage provided that there is an international carriage by sea.

Its ultimate goal is to promote legal certainty and improve the efficiency of international carriage of goods and replace all previous instruments with a modern, contemporary convention taking into account recent trends in containerised multimodal transport. Among other innovations, the Rotterdam Rules introduce certain multimodal aspects by means of a new concept – colloquially known as "maritime plus" , which will be discussed in more detail below. The major reasons behind this innovation lie in the fact that the drafters of the Rotterdam Rules considered current practices have demonstrated that the majority of

[69] Current status: 24 signatories, 2 ratifications as on October 29, 2012, see further www.uncitral.org.

manufactured goods nowadays are carried from "door-to-door"; in other words, on a multimodal basis.

5.2 Multimodal aspects of the Rotterdam Rules

The Rotterdam Rules' definition of "contract of carriage" is provided in Article 1(1). Regardless of the fact that the word "multimodal" is not mentioned in its text, unlike its predecessor the UN Multimodal Convention[70], a close reading of the wording gives a clear understanding that the carriage may extend beyond the sea leg. The words that "the contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to sea carriage" underline the intention of this provision to cover other transport modes before and/or after the required sea carriage concepts. Consequently, "wholly or partly" by sea includes door-to-door transport, expanding the traditional tackle-to-tackle and more recent port-to-port carriage. The decision to include door-to-door application was not spontaneous. Notably, the Working Group had spent a significant amount of time in considering the scope of the Draft Instrument and its suitability for contracts of carriage that included other modes of transportation in addition to carriage by sea[71].

The Rotterdam Rules adopted a limited network liability principle and contains two articles designed to deal with conflict of conventions, namely Articles 26 and 82. Article 26 "Carriage preceding or subsequent to sea carriage" as follows:

> When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay.

[70] Definition of "multimodal transport contract" provided in Article 1(3) of the UN Multimodal Convention.

[71] Report of the UNCITRAL, Forty-first session, General Assembly Official Records, Sixty-third session, Supplement No.17 A/63/17, para. 24.

The second part of Article 26 introduces the so-called "hypothetical contract", which implies that the Rotterdam Rules will be overridden by international mandatory instrument in case the loss, damage or delay is localised on-land and such stage is governed by that instrument, that would have applied had the shipper made a separate and direct contract with the carrier in respect of that stage of transport specifying the carrier's liability, limitation of liability or time for suit, at that time. Article 82 deals with conflict of conventions that are in force at the time this Convention enters into force. The provision includes any future amendment to these conventions that regulate the liability of the carrier for loss of or damage to the goods. They include conventions pertaining to road, rail, air and inland waterway transport[72]. It should further be observed that these unimodal conventions also include certain provisions pertaining to multimodal transport[73].

5.3 Liability and limitation for delay in delivery under the Rotterdam Rules

The provisions on delay introduced in the Rotterdam Rules will be scrutinised in this Section. In addition to liability for loss of or damage to the goods, liability for delay has been provided for in the Rotterdam Rules. It should be observed that this liability specifically focuses on economic loss, as will be seen below.

At the outset, it is instructive to analyse the provisions pertaining to the carrier's liability under this Convention. In accordance with Article 11 of the Rotterdam Rules the carrier has a duty to carry the goods to the place of destination and deliver them to the consignee. The period of responsibility for the goods starts upon the goods being received for the carriage by the carrier or performing party and ends when the goods are delivered pursuant to Article 12. Additionally, Article 17 provides the basis of liability. Under Article 17 (1) the carrier is liable for loss of

[72] See in Section 3.

[73] These are Article 2 of the CMR, Article 1(3) and (4) of CIM-COTIF, Article 18(4) of the Montreal Convention, Article 2 of the CMNI.

or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility. Taking into account the extended coverage of the on-land carriage in addition to the international sea carriage under Article 5, the mentioned period of carrier's liability can be both "port-to-port" and "door-to-door", depending on the contract of carriage.

It is evident from the *travaux préparatoires* that delay in delivery has been on the agenda since 2002 and further discussed during subsequent sessions[74]. Section 6.4 is devoted to delay and here the definition of which reads as follows:

> 6.4.1. Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within any time expressly agreed upon [or, in the absence of such agreement, within the time it would be reasonable to expect of a diligent carrier, having regard to the terms of the contract, the characteristics of the transport, and the circumstances of the voyage].

As may be gleaned from above provision, the second part of it pertains to the situation where the time is not agreed by the parties and delivery is thus to be made within a reasonable time. The relevant words were initially put in parentheses. The main reason for that was the lack of support for the second part due to the controversial nature of the "reasonable time" element. With regard to the compensation for delay, a reference to non-physical loss or economic loss was made by the drafters. Elaborating on these concepts it has been conceded that economic loss is sometimes referred to as "consequential" loss and there is no agreement on its actual meaning in various legal systems. In the Preliminary Draft of 2002 the amount payable was not agreed at that time; however, the provisions of the Hamburg Rules on limitation for delay in delivery were taken into account.

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[74] Working Group III (Transport Law) Ninth session New York, 15-26 April 2002,A/CN.9/WG.III/WP.21.

In the Report of Working Group III in 2004[75] there were certain doubts as to whether the issue of delay should be addressed at all due to its mainly commercial nature. However, regardless of expressed concerns, it was decided to leave the issue for further consideration. During that session it was decided to delete the second part pertaining to reasonable time to avoid any ambiguities in the Draft Instrument. This is evident from the passage below:

> The reference to "reasonable time" was objected to on the grounds that it was too subjective, imprecise, open to extensive interpretation by local courts and thus likely increase disharmony in international jurisprudence. In the same line of thought, it was stated that creating an obligation for the carrier to deliver the goods within "reasonable time" would further upset the balance of obligations between carriers and shippers[76].

The issue of limitation is as germane to delay as it is to other areas of carriage law. With regard to this issue, existing transport conventions and international instruments were taken into account. Since most of them made reference to the freight for calculation of compensation for consequential damages, it was suggested that the limit should be no higher than one time or 2.5[77] times or 4 times[78] the amount of the freight payable on the goods delayed. The last two alternatives did not attract enough support in the beginning; however, the second alternative which is provided for in the Hamburg Rules was inserted into the Final Draft and later in the Convention itself[79].

A proposal to insert a provision giving a right to the cargo claimant

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75 A/CN.9/552 Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004).

76 A/CN.9/552 Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004), para. 21.

77 Hamburg Rules.

78 CIM-COTIF.

79 A/CN.9/552 Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004), paras. 26 and 27.

to treat the goods as lost if not delivered after ninety consecutive days[80], did not receive enough support. Objectors were of the view that it might make the instrument more complex.

The US delegation strongly opposed any inclusion of liability for delay in the Draft Instrument, warning that it "would result in legal uncertainties, unnecessary costs, and severe difficulties in practical implementation"[81]. The delegates pointed out that loss or damage caused by delay is covered by the Draft Instrument and, therefore, the issue of delay is better be left to contractucal arrangements between the parties[82].

At its twenty-first session, Working Group III, despite the concerns expressed by the US delegation, decided to retain the provisions on liability for delay. It was noted by the Working Group that a number of jurisdictions already contain mandatory liability of the carrier for delay, whether by way of the Hamburg Rules or through national law. It was further suggested that adopting a new convention with no mandatory liability for delay of the carrier will not be supported by those states, especially since draft article 27 allowed the operation of unimodal regimes that provided for mandatory liability of the carrier for delay[83].

Be that as it may, the definition of "delay in delivery" is stipulated in Article 21 to say that it occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed. Notice for loss or damage to the goods Article 23 (4) provides that no compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.

Another complication is attributed to the new concept of "maritime performing party" (Article 17), who has the same obligations and liability

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80 A/CN.9/552 Report of Working Group III (Transport Law) on the work of its thirteenth session (New York, 3-14 May 2004), para. 29.

81 Proposal of the United States of America on carrier and shipper delay, A/CN.97WG. III/WP.91, para. 2.

82 Proposal of the United States of America on carrier and shipper delay, A/CN.97WG. III/WP.91.

83 A/CN.9/645 Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), para. 64.

as the carrier under this Convention as well as carrier's defences and limits of liability. The cargo claimant might encounter difficulties in proving that delay occurred during the period for which a maritime performing party was responsible.

With regard to the limitation of liability for loss of or damage to the goods, the Rotterdam Rules slightly increased the numbers in comparison with the Hague-Visby Rules and the Hamburg Rules. According to Article 59 the carrier's liability for breach of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods, whichever amount is the higher.

Moreover, the limits of liability for loss caused by delay are defined in Article 60. It states that compensation for loss of or damage to the goods attributable to delay shall be calculated in accordance with Article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable may not exceed the limit that would be established in respect of the total loss of the goods concerned. Finally, Article 61 (2) deals with loss of the benefit of limitation of liability. The limitation is breakable if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result[84].

6 Conclusion

In this article, an attempt has been made to probe into the subject of delay in multimodal transport in the context of the Rotterdam Rules. It has been pointed out that provisions pertaining to liability for delay are

[84] See further Alexander von Ziegler, "Compensation for Damage: The Rotterdam Rules Appraised", *European Journal of Commercial Contract Law,* 2010-1/2, p. 59, see also Alexander von Ziegler, "Delay and the Rotterdam Rules", *Rev Dr. Unif.,* (2009), *The Rotterdam Rules*, (London: Sweet & Maxwell, 2010).

scarce and not harmonised in transport law, to say nothing of multimodal transportation in particular. As seen above, not only the provisions on liability for delay differ but also approaches as to how liability is allocated and how damages are calculated. Following the pattern of the Hamburg Rules and the UN Multimodal Convention, the Rotterdam Rules introduce liability for delay mostly focusing on economic loss, a concept which itself is still vague and uncertain in transport law.

Despite being a positive development, it is submitted that the so-called maritime plus application of the Convention might upset the uniformity that is desirable in a number of ways. In the opinion of this author, there are certain problematic issues that must to be taken into consideration. First of all, the application of a network liability system under Article 26 in cases where delay is localised might trigger the application of unimodal transport conventions and disturb the compensation rules as a result. As mentioned earlier, those transport conventions are further specified in Article 82 and as seen earlier encompass their own liability provisions, limitation of liability and time-bars. Therefore, localisation of delay, in particular, on-land delay will deprive the carrier of relying on the compensation limits under the Rotterdam Rules and therefore will be unpredictable and uncertain. The same concerns the cargo claimant, since the limitation of liability under other transport conventions will prevail and therefore might not be as attractive as under the Rotterdam Rules.

Moreover, it should be stressed that in delay cases involving different modes of transport, compensation under the Rotterdam Rules might be a rather difficult task for the cargo claimant. A consignee in the place of destination might not be aware of the strict limitation of twenty-one days when he is allowed to give notice of delay under Article 23 (4). Failure to give notice within a stated time-limit will deprive him of any compensation under the Convention. The issue of limitation is naturally of interest to national jurisdictions. The Norwegian Maritime Law Commission's Report on the Rotterdam Rules is relevant to the present discussion on limitation. The Report was presented to the Ministry of Justice 12 April 2012[85]. As has been noted in this Report, in respect of the limits of liability

[85] Gjennomføring av Rotterdamreglene i sjøloven, NOU2012:10.

for delay, the limit of the Rotterdam Rules is higher than those applying to other modes of transport. Hence, special rules for domestic transports are not required in the Maritime Code. It is proposed that the limits of liability for delay in other modes of transport should be increased to the level of the Rotterdam Rules as far as domestic transport is concerned. This will create predictability in domestic carriage which could be followed as an example by other states that ratify the Rotterdam Rules.

Concluding this article, it is submitted that it remains unclear at the moment whether the Rotterdam Rules provides a proper solution for delay in delivery in multimodal transport at all. Being only a limited multimodal convention, it will not cover the delay cases when there is no international sea transportation; hence, it will only concern so-called "maritime plus delays". As a final observation, it is submitted that while there is no international mandatory regime for multimodal transport, the conclusions are of a somewhat speculative nature. It is a particular concern that if the Rotterdam Rules do not enter into force, the anticipated unification of transport law, including multimodal transport, though limited, and in particular, liability for delay, will continue to be an open question.

The Criterion of Reasonableness in the Convention of London on Salvage

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Content

1 Introduction

This session focuses, *inter alia*, on the action of the reasonableness[1] criterion on the contract of salvage, and in particular on the importance it assumes in the *Standard Salvage Form Contracts*. The reasonableness, indeed, represents the parameter, which the behaviors of all the parts of the salvage relationship shall be proportional to, even under the statutory scheme established by the Convention of London on *salvage* in 1989[2],

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1 On the topic cf., *inter alia*, Troiano, *La "ragionevolezza" nel diritto dei contratti*, Padova, 2005; Ricci, *Il criterio della ragionevolezza nel diritto privato*, Padova, 2007.

2 The *International Convention on Salvage* has been approved by the *International Conference on Salvage* in the plenary session on the 28th April, 1989 on a *draft convention*-basis arranged by the *Legal Committee* of IMO (*International Maritime Organization,* already IMCO), which – in its turn – has made use of a project elaborated in the C.M.I. (*Comité Maritime International*) framework. The Convention came in force on the 14th July, 1996. On the 30th September, 2012, 63 States are included: Albania, Algeria, Saudi Arabia, Australia, Azerbaijan, Brazil, Belgium, Bulgaria, Canada, China, Congo, Croatia, Denmark, Dominica, Ecuador, Egypt, United Arab Emirates, Estonia, Finland, France, Georgia, Germany, Jordan, Greece, Guinea, Guyana, India, Iran, Ireland, Iceland, Italy, Kenya, Kiribati, Marshall Islands, Latvia, Liberia, Lithuania, Mauritius, Mexico, Montenegro, New Zealand, Nigeria, Niue, Norway, Deutchland, Oman, Palau, Poland, United Kingdom of Great Britain, Romania, Russia, Saint Kitts and Nevis, Sierra Leone, Syria, Slovenia, Spain, Sweden, Switzerland, United States of America, Tonga, Tunisia, Vanuatu, Yemen. For a first general approach cf.: Gold *Marine Salvage: Towards a New Regime*, in *Jour. Mar. Law Comm*., 20, 1989, p. 487 ff.; Gaeta, *La Convenzione di Londra 1989 sul soccorso in acqua*, in *Dir. Mar.,* 1991, p. 291 ff.; Gaskell *The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990*, in *Tul. Mar. Law Journ*., 16/1991, p. 1 ff.; Darling-Smith, *LOF 90 and the New Salvage Convention,* London, 1991; Vincenzini E., *La Convenzione internazionale di Londra del 1989 sul salvataggio ed il contratto L.O.F. 1990*, Milano, 1992; Rizzo, *La Convenzione internazionale di Londra sul soccorso*, Messina, 1990 (prov. Ed.); Idem, *La nuova disciplina internazionale del soccorso in acqua e il codice della navigazione,* Napoli, 1996; Camarda, *Il soccorso in mare. Profili contrattuali ed extracontrattuali,* Milano 2006. On specific topics, see: Cleton, *The IMO Draft Salvage Convention*, in *Europ. Transp. Law*, 1/1989, p. 3 ff.; Brice, *The New Salvage Convention: Green Seas and Grey Areas,* in *Lloyd's Mar. Comm Law Quart*., 1990, p. 32 ff.; Kerr, *The International Convention on Salvage 1989 - How it came to be*, in *Int. Comp. Law Quart*., 39, 1990, p. 530 ff.; *Salvage The 1989 Convention. Conference Papers 12th February 1990,* organised by the Conference Department Lloyd's of London Press Ltd., London, 1990; Wooder, *The New Salvage Convention: A Shipowner's Perspective*, in *Jour. Mar. Law Comm*., 21, 1990, p. 81 ff.; Allen, *The International Convention on Salvage and LOF 1990*, in *Jour. Mar. Law*

internationally in force and towards Italy since 1996[3], and containing repeated references to reasonableness in the discipline of the duties in the salvage operations.

As it will be better seen later, the application of the reasonableness criterion within the concrete definition (which the law operator is called for) of the duties contents of the parties in the salvage relationship, highlights the centrality of the theme developed in this session.

In the system of the "London Convention the relationship of salvage can indifferently find its fundamental principle either in an act or activity spontaneously undertaken by the salvor, or in a contract, as well as in an order of authority[4] without thereby the configuration of the same relationship changes in its essential features. This does not mean, however, that the system of the source from which it derives is not highlighted for the purposes of the relationship regulation; in fact it must be taken as a reference both to integrate the discipline - were lacking- and also to assess the impact that the connection with a specific source of obligations produces on the totality of the effects settling the relationship itself.

It is true, however, that the structure of the relationship outlined by the London Convention stands out for certain recurring characters and for being the object of a discipline which - in its heart - remains constant,

Comm., 22/1991, p. 119 ff.; Camarda, *Convenzione "Salvage" 1989 e ambiente marino*, Milano, 1992; Gaeta, *Appunti di diritto marittimo*, in *Dir. Mar.*, 1992, p. 621 ff.; *The 1st International Salvage, the Marine Environment and Salvage Awards Seminar*, 27-28 June 1994, London, organised by the Conference Division Lloyd's of London Press Ltd (papers); Rizzo, *Considerazioni sulla natura giuridica del contratto di soccorso*, in *Studi in onore di Gustavo Romanelli*, Milano, 1997, p. 1147 ff.; Berlingieri F., *L'introduzione nell'ordinamento italiano della Convenzione del 1989 sul salvataggio: i suoi effetti sulla normativa previgente*, in *Dir. Mar.,* 1998, p. 1370 ff.; Rizzo, *Soccorso in acqua e legge regolatrice,* in *Studi in memoria di Maria Luisa Corbino*, Milano, 1999, p. 613 ff.

[3] See the previous note.

[4] The relationship created following upon completion of the hypothetical fact situation under Art. 10 of the London Convention, which obliges the masters of the vessels to provide salvage to persons in danger of being lost at sea, goes beyond the notion of salvage relationship, defined here in connection with the salvage operation.

regardless of the source of classification of the relationship, thus resulting a legal type.[5]

2 The duties relating to the enforcement of salvage operations

2.1 Duties on the part of the salvor

Unlike the Brussels Convention of 1910 for assistance and salvage at sea which simply adjusts property relationships among parties, but does not contain any provision governing the execution of the salvage operation, the 1989 Convention introduces, for the purpose, a rule (Article 8), whose provision is, in terms of content, one of the most important novelty of the uniform regulations agreed upon in London.

Firstly it shall be clarified that the duties therein expected[6], whatever their object is, have an *inter partes*[7] nature: the salvor shall owe a duty to

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5 Cf. Rizzo, *La nuova disciplina internazionale del soccorso in acqua*, cit., p. 294 ff.

6 As regards the precise meaning of the term used under Art. 8 in order to describe the various obligations imposed to the parties, it must be said that the rule uses the word *duty*, in the English version, and the word *obligation* in the French one. In the UK regulations *duty* is, generally speaking, a general obligation, while the contractual obligation is made by the terms *promise* or *liability* (thus de Franchis, *Dizionario giuridico inglese-italiano*, Milano, 1984, term *duty*, p. 671 f.) and by the term *obligation* (cf. Sansoni, *Dizionario delle lingue italiana e inglese,* II parte, Firenze, 1985, term *obligation,* p. 875). In the French language, the word *obligation* indicates the contractual obligation, the duty and the general obligation as well (cf. Tortona, *Dizionario giuridico*, 3rd edition, Italian-French/French-Italian, Milano 1994, respectively p. 136, 245-246, 651). As the meanings of the above analysed items are the most common ones of duty and obligation (for the differences among duty, general obligation and contractual obligation, see, for all, Romano, *Frammenti di un dizionario giuridico*, Milano, 1947, p. 104 f.), and dealing with juridical positions which pertain to a relationship, it is normally believed to indicate them with the term duty, unless the specific nature of the legal situation requires the use a different terminology.

7 Thus already Rizzo*, La convenzione*, cit., p. 136; Brice,*The New Salvage Convention*, cit., p. 39; Idem, *Maritime Law of Salvage*, London, 1993, second edition, para. 4-148, p.305. In the same meaning, with specific regard to the duties whereof Article 8.1 (b) cf. Gaskell, *The 1989 Salvage Convention*, cit., p.19; always in relation to duties of

the owner of the vessel or other property in danger (Art 8.1); the master and the owner of the vessel or the owner of other property in danger

environmental protection, it has said in tenet they are reciprocal and indefeaseable, by exactly correlating the binding character thereof to their instrumentality over the pursuit of a public interest (thus Camarda, *Convenzione "Salvage 1989"*, cit., p.174 f.). The same doctrine seems to contradict these statements where they assume (*op. ult. cit.* p. 187 f.) that the character of the mandatory nature of the duties under Article 8 (but, to be honest, only the duties referred to in Article 8.1 (b) and 8.2 (b) are mandatory) can provide (with specific reference to protection of the environment during the salvage) a further justification for the absence, in the Convention, of another rule of almost identical content, specifically intended to explicitly define the nature (even) absolute of these duties. As regards the theory concerning the duty in preventing or minimizing the damage to the environment which probably could be also invoked by third parties - damaged as a consequence of the default of this duties - cf. Cleton, *The IMO Draft Salvage,* cit., p. 9. The author, however, fails to consider that in Art 8, the binding relationship is clearly *inter partes*: in fact, the third parties, injured by pollution caused by a shipping incident, well may obtain - if appropriate conditions exist - compensation for the damage under the system of the CLC '69 and subsequent Protocols or in accordance with applicable national laws, but not invoking the Article 8 and the non-performance of a duty which does not exist towards them and that they do not have the right to enforce.

For the different opinion according to which the duties indicated under Art 8, with the exception of that one under Art. 8.2 (c), are not true duties, but simple methods for the salvage operation, affecting only the measurement of compensation, cf. Gaeta, *La Convenzione*, cit., p.303 f.. Although sharing the theory that Article 8.2 (c) provides a real duty to accept the return of the vessel or other property to the parties claiming the provision of salvage, we disagree in everything else with the eminent author, considering that the various obligations set forth by Art. 8 cannot be downgraded to simple "way of operation". Except that they are still conceived as figures to whom active legal situations correspond – situations whose the counterparty is entitled - it is perplexing that a similar evaluation also invests the duties under Article 8.1 (b) and 8.2 (b), to whom, under Article 6.3 of the same Convention, the parties may not derogate by agreement. As regards the salvor's duty to carry out the salvage operations with due care (Article 8.1 (a)), if it is true that the reference to care sets a parameter to determine whether the debtor's activity corresponds to the exact fulfillment of the obligation, it is also undeniable that in the care enforced by the rule the same primary duty of performance is expressed (for such considerations, expressed in relation to obligations with a similar structure to Art 8.1 (b), such as the obligation of the agent to execute the warrant with the care of *bonus paterfamilias* (Art 1710 of the Italian civil code), cf. Mengoni, *Obbligazioni "di risultato" e obbligazioni "di mezzi"*, in *Riv. Dir. Comm*., 1954, I, p. 185, 205). The circumstance that even Gaeta (*op. loc. ult. cit.*) alleges in support of the aforesaid theory, namely that Article 8 gives no mention of the principal duty (of all those interested in shipping) to pay the compensation, is well explained if one considers that this rule is included in Chapter II entitled, precisely, "*Performance of salvage operations*", while the aforesaid duty finds a correct collocation in Chapter III, entitled "*Rights of salvors*" (Art 12).

shall owe a duty to the salvor (Art. 8.2)[8].

Analyzing the provisions of Article 8, we firstly consider the duties of the salvor.

He is required to carry out the salvage operations for the vessel or other property in danger with *with due care*[9] (Art 8.1.(a)). The primary

[8] The subjects indicated under para. 1 and 2 of Art 8 are those who are bound by the drawing up of a salvage contract according to Article 6.2. It could seem, *prima facie*, that there is a no whole correspondence between the subjects entitled to the private salvage relationship (as specified in Rizzo, *La nuova disciplina internazionale del soccorso in acqua*, cit., p. 94 ff.) and those indicated in Article 8. Indeed, the formula used in Art 13.2 is an open formula (*toutes les parties intéressées au navire et aux autres biens sauvés)* that is determined on the basis of the internal systems of reference. Article 8.1 states, on the contrary, that the salvor is bound against the owners of the vessel or any other property in danger, which are certainly the most important *parties* (and, in many jurisdictions, the only ones) *intéressées au navire et aux autres biens sauvés*. Among those "saved" co-debtors of the obligation to pay the reward (Art 13.2) we have also referred to the shipowner (Rizzo, *La nuova disciplina internazionale del soccorso in acqua*, cit., p. 124 f.) when he is a different person than the owner of the vessel (and it may well occur in the Italian legal system), in relation to its interest in the salvage of the freight. However, if the shipowner is a different figure than the owner of the vessel, his interest is limited and it is not surprising, therefore, that it has not been specifically mentioned in Art 8, no impediment to prevent the applicable national legal systems to provide that the obligations of the salvor regarding the execution of salvage operations also exist against the shipowner as well as to order that the duty of co-operation under Article 8.2 burdens also on him. As regards the fact that the master of the vessel, although not subject of salvage relationship (and this is confirmed by the fact that the reciprocal is not worth, that is the salvor is not bound against him), is obliged to provide his collaboration to the salvor, we can appreciate the rationale for this prediction: the master of the vessel is obliged because - due to his powers of organization and marine adventure chief, and his presence on the unsafe vessel (although this is not always true nor always necessary, as the collaboration may exist providing requested information about the vessel and the cargo, which he, more and better than others, can do) - he is the most suitable subject able to co-operate effectively with the salvor, falling anyway (and without prejudice to any personal liability) the consequences of his behavior on the represented subjects.

[9] In the legal English literature the term *care* means the diligence, while the term *due* means owed, lawful, reasonable, and the *duty of care* conveys the reasonable diligence requested in the circumstances, asserted from time to time by the judge, considering the judicial precedents (cf. de Franchis, *Dizionario giuridico*, cit., items *care, due* and *duty of care*, respectively p. 410, p. 669 and p. 672). For others the expression *duty of care* should be translated in Italian as "dovere di attenzione", whose infringement, where as provided for by law as in this case, causes claim for damages (Gallo, *Negligence*, in *Dig. Disc. Priv. Sez. Civ.,* XII, Torino, 1985, p. 22, 23). For the theory that "*the requirement of due care is essentially an objective one based on reasonableness, taking account of the general standards in the salvage and marine industries*" cfr.

obligation of the salvor - to undertake any act or activity in order to remove a vessel or any other property from danger - is, therefore, fulfilled with the care required by the facts and circumstances of the real case[10], which is significantly less burdensome than the so called "*use of all the best endeavours*", which the salvor is bound to by the formula "*shall use his best endeavours to salve*" contained in several Lloyd's Standard Form of Salvage Agreement (LOF)[11], which forces him to implement the contractual obligation to save the vessel "*even though it may involve him in greater expense than he first envisages or interferes with his other commitments*"[12].

The C.M.I. Project[13], in accordance with Article 1 (a) of the LOF '80 (8) had adopted the aforesaid formula (s*hall use his best endeavours*) (Article 2-2.1)), but this prediction was considered too burdensome and, as such, discouraging for the salvor, and therefore expunged[14].

Gaskell, *LOF 1990, in Lloyd's Mar. Comm. Law Quart.*,1991, p. 104, 113; Idem, *The 1989 Salvage Convention*, cit., p. 41; in the same meaning see also Brice, *Maritime Law of Salvage*, cit., *second edition*, para. 4-145, p. 304, for which " *'due cure' is synonymous with 'reasonable care' "*. It must be said, for completeness, that *due diligence* means reasonable care or diligence required by the circumstances, and this concept is also synonymous with *reasonable care* (as de Franchis, *Dizionario giuridico*, cit. sub-term *due diligence*, p. 669). On this point see, however, also Rizzo, *La nuova disciplina internazionale del soccorso in acqua*, cit., p. 216 note 10 and p. 234 note 40.

10 Brice, *Maritime Law of Salvage*, cit., para. 7-198/7-202, p. 574 s., according to which "*the court will exercise leniency before finding the charge proved; but the degree of leniency will depend on the circumstances*".

11 Cf. also the 2011 edition, clause A, restricting the force, *in peius* for the salvor, of the London Convention.

12 Thus Bishop, *LOF 90 and other Standard Salvage Contracts,* in *1st International Salvage*, cit., p. 7, for whom the only limit to the efforts of the salvor is the fact that "*the costs of the operation far exceeds the ultimate value of the property*". In the sense that " '*best endeavours*' *may require the individual to do more than a reasonable person would, provided it is within the capabilities of that individual*" and that the salvors who are required to put in place their best efforts "*to salve, then they have an obligation to continue with the service*" cf. Gaskell, *The 1989 Salvage Convention,* cit., p. 41 f.

13 Cf. Rizzo, *La nuova disciplina internazionale del soccorso in acqua,* cit., p. 34 f.

14 Cf. IMO LEG 54/7 of 26th April, 1985, p. 7-8; see also document IMO LEG 56/9 of 21st April, 1986, p. 18-20. Furthermore, in the *common law*, the salvor is not required to make all his best efforts, but "*may abandon his efforts at will*": thus Steel-Rose, *Kennedy's Law of Salvage*, London, 1985, fifth edition, p. 392 ff. Regarding the theory

In order to assess the conformity of the debtor's performance in the operation of salvage according to the parameter of due care, the quality as a professional or occasional salvor has its own importance[15]: this last one, in fact, cannot be requested to own that specific technical competence, that expertise requested to the salvor performing salvage as a profession and that is taken into consideration also when determining the compensation[16]. Among the criteria listed in Art. 13.1 of the

according to which the salvors - when they are required to follow the due care, as in the London Convention system – "should certainly be liable for damages for failing to exercise due care if they left the ship in a perilous position. Otherwise, there seems to be no concept that it is compulsory to continue a salvage service once started" cf. Gaskell, *The 1989 Salvage Convention*, cit., p. 42.

15 Thus also Brice*, op .loc. ult. cit.*

16 For similar considerations cf. Dani, *In tema di responsabilità del soccorritore* (confirming note to *House of Lords,* 12, 13, 14, 15, 18, 19, 20, 25, 26, 27 January 1971, case *Tojo Maru*), in *Dir. Mar.,* 1972, p. 435, 442 f.; see also Norris, *The Law of Salvage*, in *Benedict on Admiralty*, New York, 1980, seventh edition, vol. 3A, *section* 270-271, pp. 21-29/21-32. In the Italian legal system, the Art. 1176 of civil code finds application in terms of care. The rule provides that, in fulfilling obligations, the debtor shall use the care of a *bonus paterfamiias* (Article 1176, sub-para. 1), but in the implementation of the obligations concerning the practice of a professional activity, care shall be assessed with regard to the nature of the business (Article 1176, sub-para. 2). According to a doctrinal trend (Mengoni, *Obbligazioni "di risultato" e obbligazioni di "mezzi",* cit., p. 185, 206 f.), when the debtor does not practice the craft corresponding to the technical activity deduced in the obligation, the actions, required for the purpose of final utility towards which the obligation tends, are due to the extent of the obligor's personal skills. For another theory, D'Amico, *Negligenza*, *Dig. Disc. Priv. sez. civ.,* XII, Torino, 1995, p. 24, 44) indeed, the rule would introduce a distinction, but not in terms of the "subjective" point of view (of the debtor's professional quality or not), but in terms of the "objective" nature of the activity that is the object of the obligation. The application of these concepts to the case does not seem to lead to satisfactory results. If it is believed that the salvage requires an "unprofessional" activity, the performance of a salvage firm, provided and equipped for the purpose, should be assessed in the same way as "social" standard of behavior, having to refer to the "common" experience and to the "normal" capacity: which does not completely justify the adequate reward that the high professionalism of these firms receives when fixing the reward (Art. 13.1 of the London Convention). If, on the contrary, it is assumed that such activities are "professional", the activity of the fortuitous salvor should be appreciated (and it would be very punitive and discouraging to him) according to the technical standards (expertise, skills etc.), forming the parameter for the evaluation of the professional care: these are conclusions which we do not feel to consider, given the spirit of solidarity that underlies the institution of salvage.

London Convention, the majority, in fact, refers to the technical skills of the salvor, the availability and use of vessels or other equipment specifically intended for salvage operations.

As regards the obligation under Art. 8.1 (b) "*to exercise due care to prevent or minimize damage to the environment",* being provided "*in performing the duty specified in subparagraph (a)*, and then (during and/or in that occasion) of the obligation's fulfilling to render assistance to the vessel or other property in danger it could be considered, *prima facie*, that it has the nature of the obligation, collateral to that of assisting the vessel or other property, which is certainly the main one[17].

But an obligation is collateral when, considered in relation to all results of the model fact situation, it has been caused to serve as the mean to the (possible) fulfillment of another performance[18].

Indeed, the duty to exercise due care to prevent or minimize damage to the environment is not (normally) functional to the realization of the

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[17] Cf. Rizzo, *La Convenzione*, cit., p. 54, p. 138. Camarda (*Convenzione "Salvage 1989",* cit., p. 184 ff.) has realized the inadequacy of such a qualification (furthermore in relation to all the provisions under Article 8 of the Convention), but his alternative presentation is not very clear to us. The author emphasizes the "close connection" between the duty under Article 8.1(b) and the principal obligation of the salvor, also observing "the legal impossibility of separating the so-called main service from the duty to prevent or minimize damage to the environment". Indeed, the collateral relationship does not exclude the connection between the main and the collateral performance: on the contrary, if the latter is not recognized as having a character of a clear instrumentality than the former (for this theory, rather, see Rizzo, *La nuova disciplina internazionale del soccorso in acqua*, cit., p. 308 note 259), it is recognized, however, that it has the function of "propiziating" the realization of the accessed performance (see *op. ult. cit.,* p. 308 note 261). As for the second aspect highlighted by the author, namely the impossibility of separating the main service from the duty to protect the environment, this connotation is typical of supplementary instrumental duties (see Betti, *Teoria generale delle obbligazioni*, I, cit. p. 96), but it does not seem that the author intended to refer about it.

[18] Thus Balbi, *L'obbligazione di custodire*, Milano, 1940, p. 210; in the same direction, although in much less peremptory term (the collateral obligation tends to allow - or facilitate - the achievement of a specific performance for the benefit of the creditor), see Ciccarello, *Dovere di protezione e valore della persona*, Milano, 1988, p. 39, which, however, soon after notes (*ibid.,* p. 40, note 24) that if it is considered as collateral the duty which is the necessary means to achieve the interest deducted in the principal obligation, then it proves to be difficult to distinguish between the instrumental and collateral nature.

main interest (the salvage of the vessel or any other property), but it aims to achieve a value which is external to the strict salvage relationship and which is higher than the interests of private parties, so much so that the parties themselves cannot conventionally derogate or exclude it (Article 6.3 of the London Convention), operating, in this case and in the Italian system, the mechanism of the contract legal integration.

Such interest is to be protected as part of the relationship where, in its context, the conditions of prejudgment (or threat of prejudgment) of the "environment property" are fulfilled (to the extent and as far as it is relevant in the London Convention system).The duty to "protect" the environment arises upon completion of the hypothetical fact situation to which the rule attaches the salvor's primary obligation (to render assistance to the vessel and / or other property), due to the adding of a further element: the damage (or threat of damage) to the environment.

In conclusion, it is assumed that the duty under Article 8.1(b) can be represented as a "legal effect" on a value, of a higher-level than the interests of the subjects of the salvage relationship, which constitutes a measure of the behavior of both parties, burdening both on the debtor and on the creditor of the salvage service; the latter is specifically required to co-operate with the salvor in order to protect the environment in accordance with Art. 8.2 (b)[19].

In order to ensure that salvage operations are carried out with speed and efficiency - which were often missing in the past, sometimes with disastrous results for the unsafe means and for the environment - the Art. 8.1 imposes further obligations on the salvor upon occurrence of certain events or situations. Whenever circumstances reasonably require, the salvor shall seek assistance from other salvors (Art. 8.1. (c)); at the same time he shall owe the duty to accept the intervention of other salvors when reasonably requested to do so by the master or owner of the vessel or other property in danger (Art. 8.1. (d)).

As it is obvious, the provision in question repeatedly recalls to the

[19] For similar considerations with reference to the duty of protection under the compulsory relationship, cf. Ciccarello, *Dovere di protezione e valore della persona,* cit., p. 61

criterion of reasonableness, which, even elsewhere in the system of the Convention, is relevant as a limit to the opposition of the refusal by the vessel's master (or owner of the property) in danger of accepting the offered salvage (Article 19)[20]. Because the reasonableness represents the parameter whose way circumstances of the real case will be appreciated, as well as the requests of the salved parties and the salvor determinations on the basis of one and the other, he is called upon to evaluate the data characterizing the accident (namely the state of danger of the salved property, the available resources, the risk of damage to the environment and any other available elements), placing them in comparison with the goal of property salvation[21] (and the environment protection, where it is at risk). Basing on all the circumstances of the real case, if it may be presumed that the purpose of salvation of property can be better achieved with the intervention and the combined efforts of more salvors, the one who has started salvage operations shall either request or accept the help of co-salvors. Failure to comply with this requirement will have its weight in any judgment, being the actions of salvor open to censure in terms of reasonableness. However, the first occurred does not remain unprotected as he shall require or allow access to other salvors only if this satisfies the criterion of reasonableness, and namely if the circumstances (as above specified) demand it. In the event that, on request of the people referred to in Article 8.1. (d), he has accepted the intervention of other salvors, his right to compensation shall remain unaffected if it proves the irrationality of the request.

The duties referred to in Article 8.1 (c) and (d) fall into the category of "instrumental supplementary" duties which are designed to ensure the due performance and which are so closely connected to it so that they cannot be split. Therefore, they are not obligations due for themselves, but their violation, if causes an inaccurate or incomplete fulfillment, will

[20] See Rizzo, *La nuova disciplina internazionale del soccorso in acqua,* cit., p. 252 ff.

[21] For similar considerations expressed with specific regard to the requirement of reasonableness of the master's actions in general average see Tullio, *La contribuzione alle avarie comuni,* Padova, 1984, p. 116 f.; Idem, *Avarie comuni*, in *Enc. Giur. Treccani*, IV, Roma, 1988, p. 1, 3.

make the salvor liable for non-fulfillment[22].

2.2 Duties upon the master and the owner of the vessel or the owner of other property in danger

Article 8, par. 2, provides for the duties of co-operation related to the implementation of the salvage operation, which are borne by the parties creditor of the salvage performance (or their representatives) and which affect (separately[23]) the master and the owner of the vessel towards the salvor and, always with respect to this latter, the owner of other property in danger[24].

According to Art. 8.2 (a), it is incumbent on the persons listed in para.

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[22] For the feature of the above category see Betti, *Teoria generale delle obbligazioni*, I, Milano, 1953, p. 96 ff. Not by chance that, with reference to the requirement under Art. 8.1 (c), Gaskell (*The 1989 Salvage Convention*, cit., p. 43) states: "*The sanction here is a possible damages action by the salved interests, if the operations fail or are unduly delayed, or a reduced award*".

[23] Thus Nielsen (*CMI Report to I.M.O. on the Draft International Convention on Salvage (Montreal 1981)*, in *CMI Newsletter*, September 1984, p. 16), although with particular reference to the duty under Art 8.2 (b) ("*the owner and master of a vessel in danger each has the duty, separately and indipendently, to use best endeavours to prevent or minimize damage to the environment*"). Indeed, if this interpretation in relation to the duties specified in paragraph (b) is accepted, the same should be extended to all the duties contained in the rule, since they exist between the same parties with identical modalities ("*The owner and master of the vessel or the owner of other property in danger shall owe a duty to the salvor*" (Art. 8.2)).

[24] Among these obligations, the duty to take prompt and reasonable initiatives *to arrange for salvage operations,* provided by the Art. 2-1.1 of the Project by C.M.I, does not appear. Of this prediction there is no trace in Article 8 of the London Convention. The IMO Legal Committee welcomed a proposal by the United Kingdom (that mixed Articles 2-1 and 2-2 of the CMI Project), with no reference about it (cf. document IMO LEG 56/4/5, para. 16, p. 4 f.; see also *Compilation of Proposed Amendments to the Draft Articles for a Convention on Salvage* (*Annex*), document IMO LEG 57/3/*Add*. 1 of 15th May 1986, pp. 6-7), on the assumption that the duty to promptly take action in order to enter into a reasonable settlement of salvage did not directly concern the relationship between the salvor and the salved properties (cf. Document IMO LEG 57/12, para. 132, p. 27; Wall, *Overview: Improvements and Deficiencies from a Governments Viewpoint in "Salvage" – The 1989 Convention,* cit., p. 75). These considerations reiterated the "philosophy" of the new uniform framework, in whose system also the duties of a distinctly public law are formulated in such a way as to be necessarily led back in the context of private law relationships existing between the parties.

2, same rule, to fully co-operate with the salvor during salvage operations.

The content of the duty is neither specified, nor preparatory works - which allow to the most to exclude that some specific performance are due - help for the purpose. In our opinion, the owner and the master of the vessel in danger are not required to allow the salvor to make free (reasonable) use of the vessel's machinery, equipment, fittings, anchors, chains, or other material of the vessel (contrary to LOF 2011, clause F (i)). In fact, it is considered that, in the text of Art. 2.1 in C.M.I. Project, the proposal to include a rule having similar contents has not been accepted[25]. The preparatory works do not mention the reasons for this rejection, but it certainly cannot be assumed that the rule has been considered unnecessary and that such a requirement, however, burdens on the salved parties as under Article 8.2 (a).

The above mentioned prediction, in fact, formed part of a wider additional section of the aforesaid Article 2-1, which was not accepted as a whole[26]. It also contemplated the duty of the vessel's owner to provide guarantees, indemnities or deposits, where there was a reasonable request made by public authorities, port authorities or suchlike to allow the entry of the damaged vessel in a port of refuge. The adoption of the rule was severely hindered by the owners of the vessel[27] because their position would have been significantly worse. Furthermore, even under the corresponding provision contained in clause F (iii) of the 2011 LOF, the owner of the vessel and/or of other asset covered by the salvage (and its agents) are required to co-operate with the salvor also in order to get the entry of the damaged vessel into the designated port, but they are not

[25] Cf. *Consideration of the Question of Salvage in particular the Revision of the 1910 Convention on Salvage and Assistance at Sea and related Issues* (*Submission by the International Salvage Union*), document IMO LEG 52/4/3 of 13th August 1984, p. 2; see also *Consideration of the Question of Salvage in particular the Revision of the 1910 Convention on Salvage and Assistance at Sea and related Issues* (*Submission by the International Salvage Union*), document IMO LEG 53/3/1 of 12th November 1984, p. 11.

[26] Cf. document IMO LEG 52/4/3 of 13th August 1984, p. 2; document IMO LEG 53/3/1 of 12th November 1984, p. 9.

[27] Cf. document IMO LEG 52/9, cit., para. 59, p. 13.

obliged to provide deposits or other payments required by the port authorities: and this also because, being the property at that time under the control of the salvor, this last one is the best suitable subject to respond[28].

In fulfilling their duties to provide full co-operation, the persons referred to under Article 8.2 shall also act, individually and separately, with due care to prevent or minimize damage to the environment (Article 8.2 (b)).

The same persons - each one separately and once the vessel or other property has been brought to a place of safety – shall owe the duty to accept the redelivery of property, retained by the salvor for the entire duration of the operations, when reasonably requested by the salvor to do so.

Such provision reflects the need to foster the salvor[29], allowing him to get rid of the duties and to promptly receive the compensation. It is not uncommon, in fact, that the owner of the vessel does not accept the redelivery because the property has no longer a market value and is more convenient for him to remain under the control and at the expense (in relation to maintenance costs) of the salvor.

As regards the problem of the classification of the duties under Art. 8.2, it seems to be solved in a homogeneous way, although the first two hypotheses are more easily classified than the third one.

Under Art 8.2, letter (a) and (b), the creditor's co-operation of the salvage provision is the object to a duty which - depending on the orientation of the doctrine that is supposed to be accepted in terms of involvement of the creditor in the performance - can be qualified as a secondary[30] obligation or it can be generically indicated as a "mere duty of

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[28] For similar considerations expressed by the CMI delegate, see *Report of the Legal Committee on the Work of its fifty-fourth Session,* document IMO LEG 54/7 del 26th April 1985, para. 21, p. 6; in the same meaning see also *International Chamber of Shipping* (ICS), in *Consideration of the Question of Salvage, in particular the Revision of the 1910 Convention on Salvage and Assistance at Sea, and related Issues*, document IMO LEG 54/4/6 8th March 1985, p. 2.

[29] On the reasons of the frequent reluctance of owners of vessel and property to accept the redelivery, and on the utility of a provision that obliges them to this, cf. document IMO LEG 53/3/1, cit., pp. 7-8; as well as Cleton, *The IMO Draft*, cit., pp. 9-10.

[30] According to an authoritative doctrinal orientation (Falzea, *L'offerta reale e la liberazione coattiva del debitore*, Milano, 1947, p. 58 f.), if the performance requires the

conduct"[31].

Indeed, given the formula used in the rule - which, in the first case (letter a), places a general duty to co-operate, and, in the second case (letter b), lays down a duty to act with due care in order to prevent or limit damage to the environment but within the framework of the co-operation referred to the previous letter – in either of the two hypothesis the debtor's interest to co-operation rises on the same level of the creditor's interest to the principal performance, so that - in the Italian legal system - both are protected through the institution of *mora accipiendi*.

With regard to the hypothesis under letter (c), which establishes the duty of the creditors to accept redelivery of the salved property (upon occurrence of model fact situation provided by law), the question is whether in this case the interest of the salvor - just because it is not generally taken into account but it is stated by law - is not guaranteed through the entitlement of a main right to co-operate. The doctrine agrees that, for this to occur, it shall be specifically required by law or by the parties[32]. In this case, however, it does not seem that a so strengthened protection[33] is given to the salvor. In the Italian system, after all, the

co-operation of the creditor, two hypotheses can occur: one, "exceptional ", in which the participation of the creditor forms the object of a "main" duty, the other one, "ordinary", in which it, instead, forms the object of an "collateral" duty. In relation to the second hypothesis, the legal system creates a system of complementary relationships, an "essential" one, which concerns the activities required to implement the "principal" interest of the right holder and a "collateral" one regarding the necessary activities in order to protect the "secondary" interest of the obligor (*ibid.,* p. 79).

31 For Romano G., *Interessi del debitore e adempimento,* Napoli, 1990 ed. provv., p. 194 ff., disassociating from Falzea *(op. loc. ult. cit.)*, if the interests in addition to the interest of the creditor to the performance do not justify the shift of wealth achieved through the performance, they do not give rise to a mandatory relationship, although secondary, but to "mere duties of conduct", whose fulfillment is, at most, guaranteed by the right to compensation for damages.

32 Cf. Falzea, *L'offerta reale*, cit., p. 83; Romano G., *Interessi del debitore e adempimento*, cit., p. 196.

33 In legal literature it is believed that the duty – which, under Article 1587 of the Italian civil code, burdens on the lessee in order to take delivery of the leased property - is set on the same level of the creditor's right to the performance (so Falzea, *L'offerta reale,* cit., p. 83). In this case, as noted above, the same rule imposes the aforesaid duty among the lessee's primary ones.

procedure "*di offerta reale*" and "*di offerta per intimazione*" are fully appropriate remedies in order to protect the interest of the debtor to the release from his obligation in the event of refusal of the salved parties to accept the redelivery of the vessel or of other salved property.

Standard salvage contract forms: The scope of best endeavours – reasonableness and foreseeability

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Content

Abstract

The Paper examines the contractual duty of a salvor to perform with best endeavours while engaged in salvage operations, as required by a number of standard salvage contract forms in use, such as the LOF, Scandinavian Salvage Contract, MARSALV Form, 1994 China Form, 1991 JSE Form and the TOF. The standard of 'best endeavours' is compared to the standard of 'due care' as promulgated by the 1989 Salvage Convention, and to the standard required by those standard salvage contract forms according to which a different criteria of salvor's performance is expected, such as is the case with the Boat Owners' Associations of the United States Standard Form Yacht Salvage Contract and the MAK form. The purpose of the examination and comparison is to determine what the salvor's 'reasonable' conduct consists of, as compared with the principle of reasonableness as found in the common law and civil law jurisdictions.

As neither the 1989 International Salvage Convention nor the commonly used salvage forms define the contents of the standard of care, the salvor's performance is governed by the general non-contractual and contractual liability rules, subject to the particularities of salvage services, depending on whether the main salvor's obligation is an obligation of result or an obligation of means. Whereas the 19th and early 20th century salvor's duty of care corresponded to that of an ordinary seaman, the development of the tort of negligence and professional liability rules in the second part of the 20th century created a division of performance expectation between professional and non-professional salvors, with different consequences in terms of the scope of the overall liability exposure. The 1989 Convention introduced two separate duties of care, one concerning the general salvage operation and the other concerning the environmental services performed during a salvage operation. The duty to perform with due care while protecting the environment was made mandatory, causing a possible overlap with a general duty to protect the object of salvage. Coincidently, a number of commonly used salvage

forms incorporate a clause on the exclusion of liability, this being in direct contradiction with the 1989 Convention and general domestic contractual and non-contractual liability rules.

1 Introduction

In January 2008, following the grounding of the merchant vessel *Serine* on the island of Unije in the Adriatic Sea, a salvage tug was called in by the local port authority to aid the vessel and prevent a possible threat to the marine environment.[1] The salvor undertook a number of off-board activities in an effort to prevent a possible escape of bunker oil (eg placing the protection nets), but failed to perform any tasks on board the vessel, allowing an undisturbed flow of seawater into the vessel. The escape of oil never occurred, but the seawater caused damage to the engine room and the cargo on board. Nevertheless, the salvor claimed special compensation and the salvee counterclaimed damages. Whereas the salvor contended that because he was called in by the port authority his prime concern had been the protection of the environment and that, owing to this mandatory obligation as stipulated by the 1989 Salvage Convention, he could not have reasonably performed any (additional) tasks in regard the salvee's vessel and property on board, the salvee claimed that the salvor had failed to exhibit (any) proper care regarding the wellbeing of the vessel and cargo. As the issue was resolved through a settlement,[2] the main question concerning the possible primacy of the duty to preserve the environment over the general duty to protect the imperiled object of salvage was not addressed by the Croatian court.

The paper will address this issue in an effort to provide different

[1] For more information on the case, see M Mudrić 'Whether the duty to protect the marine environment takes precedence over the general duty to protect the imperiled object of salvage: Article 8 of the 1989 Salvage Convention' (2012) *The Journal of International Maritime Law* vol. 18 issue 5.

[2] The *Serine* case, Pž 4900/09--7, High Commercial Court of Republic of Croatia (19 May 2011).

considerations with regard to the possible conflict of anteriority between the duty to exhibit a certain level of care during the performance of salvage services in general and the duty to exhibit a certain level of care during the performance of environmental services. Two major impediments prevent a clear and uniform understanding of the possible clash of primacy: (i) these duties originate from two different sources (the 1989 Salvage Convention and domestic law liability rules) and (b) these duties are differently worded in international and private law documents (the 1989 Salvage Convention and standard salvage contract forms).

In order to approach the issue it is necessary, first, to assess how the issue of standard of care is perceived (a) in general, and, (b) in the context of salvage operations. This presupposes a general understanding of the relevant national law liability provisions and court practice, and the general understanding of the standard of care as expected from salvors. In addition, it is important to assess to what extent the different standards, as present in the 1989 Convention and most commonly used standard salvage contract forms, differ or are mutually compatible. What is of particular interest is an occurrence when salvage contracts exclude the application of liability when a particular standard, approved by the 1989 Convention, is not adhered to. Finally, the difference in performance expectation from a non-professional and a professional salvor will be taken into consideration when determining what the appropriate minimal standard of behavior is expected from each class of salvors.

2 General liability rules applied in salvage cases

2.1 Domestic law as basis of case law practice

Most of the ground-breaking decisions regarding the scope of the duty of salvors concerning good performance were made prior to the adoption of the standard of care as stipulated by the 1989 Convention (common

law jurisprudence in the 1960s and civil law jurisprudence in the 1980s), and were assessed based on general domestic law liability rules and the relevant general and salvage-related court practice. The general (professional and non-professional) standard of (proper) care is regularly defined in both the contractual and non-contractual rules of national law provisions and/or relevant general case law. Bearing this in mind, it was possible to omit such a provision in the 1989 Convention (as was the case with the 1910 Salvage Convention), especially because most salvage services are regulated by standard salvage contract forms, all of which incorporate a certain standard of care.

2.2 England and Wales

In the famous salvage case *Tojo Maru*[3], London arbitration held (and the House of Lords confirmed) that a salvor can be held liable in damages caused through negligent performance of salvage services, based on the lack of proper care as required during the performance of such a service.

The decision was made on the merits of English law, where, in principle, a contractual obligation is strict (a breach of contract arises out of a failure to complete a contractual obligation),[4] although a more recent case law clearly recognizes the necessity of proving the lack of adequate performance in order to claim the breach of contractual duty.[5] In *Hadley v Baxendale*,[6] the court determined that losses must be qualified as typical losses usually resulting from a breach of contract of a similar nature and, if special circumstances are present, it is necessary to establish the defendant's awareness of such circumstances at the time of the conclusion of contract (the factor of foreseeability).[7] With regard to the tort of neg-

[3] *Owners of the Motor Vessel Tojo Maru v NV Bureau Wijsmuller (The Tojo Maru)* [1972] AC 242.

[4] See generally E McKendrick *Contract Law* (Oxford University Press 2012) 754-755.

[5] See *Platform Funding Ltd v Bank of Scotland plc* [2008] EWCA Civ 930, [2009] 2 W.L.R. 1016, and, N Andrews *Contractual Duties: Performance, Breach, Termination and Remedies* (Sweet & Maxwell 2011) 87-88.

[6] *Hadley v Baxendale* (1854) 9 Exch 341.

[7] See *Victoria Laundry (Windsor) Ltd v Newman Industries* [1949] 2 KB 528, [1949] 1 All ER 997 and *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350, [1967] 3 All

ligence, liability, as established in *Donoghue v Stevenson*,[8] arises in instances where a general duty of care has been breached.[9] The claimant needs to prove on the balance of probabilities[10] that the defendant has been negligent in applying the duty of care,[11] and that the negligent conduct caused such harm[12] to the claimant that is not too remote[13] and that is recoverable.[14] Negligence is understood as a lack of care leading to the breach of duty of care[15] and is not presumed, therefore requiring the claimant to prove the lack of care on the part of defendant[16]. With regard to the standard of care, English courts regularly apply the 'reasonable man'[17] test, according to which a behavior is deemed negligent in cases where a person does not behave in accordance with a standard of care required from the ordinary reasonable man. The duty of care may be expressly inserted into a contract, implied by a contract, regulated (in certain situations) by statute or encompassed in a general duty to take reasonable care for others[18] (as established in *Hedley Byrne v Heller*[19]). In cases where the defendant is a professional, a person claiming to be an expert in a specific field or claiming to possess certain skills, a different standard of the 'reasonable professional' is applicable.[20] The so-called

ER 686; M Simpson *Professional Negligence and Liability* (LLP 2004) 2--33; Stone (n 5) 473.

8 *Donoghue v Stevenson* [1932] AC 562.

9 See J Steele *Tort Law: Text, Cases and Materials* (Oxford University Press 2007) 109, and, C van Dam *European Tort Law* (Oxford University Press 2006) 367

10 ibid 134; van Dam (n 9) 381.

11 ibid 109.

12 See generally D R Howarth, J A O'Sullivan *Hepple, Howarth and Matthews' Tort: Cases and Materials* (Butterworths 2000) 414.

13 R Stone *The Modern Law of Contract* (Routledge 2009) 461; C Turner *Unlocking Contract Law* (Hodder & Stoughton 2004) 451.

14 ibid 136 and 176.

15 See *Blyth v Birmingham Water Works* (11 Ex 781, 784, 156 ER 1047, 1049, Ex 1856).

16 U Magnus, H W Micklitz *Liability for the Safety of Services* (Nomos 2006) 92.

17 See *Vaughan v Menlove* (1837) 132 ER 490 (CP); V Harpwood *Modern Tort Law* (Cavendish Publishing Limited 2003) 116--117.

18 See Simpson (n 7) 1--7 and 1--10.

19 *Hedley Byrne and Co Ltd v Heller & Partners Ltd* [1968] AC 465. See also Simpson (n 7) 1--33.

20 See *Greaves & Co (Contractors) Ltd v Baynham, Meikle & Partners* [1975] 1 WLR 1095

Bolam test adopted in *Bolam v Friern*[21] refers to an ordinary competent person (or skilled person) exercising a particular profession,[22] where proper conduct is set in accordance with the opinion of the body of professionals of that particular profession.[23]

2.3 United States

In the United States, two landmark salvage cases have explored the effect of poor salvage performance on the salvor's exposure to liability -- the *Noah's Ark*[24] and the *Kentwood*[25] cases. In the *Noah's Ark*, the court found the lack of care on the part of a (non-professional) salvor, who caused 'distinguishable' damage (ie damage that would not have occurred but for the action of the salvor) to the salvee's vessel, and held the salvor liable for damages. The *Kentwood* established a rule according to which a professional salvor may additionally be held liable for damages even if the damage caused through his poor performance was not distinguishable. Both decisions were made on the basis of the US law.

In general, according to US legislation and court practice, contractual responsibility[26] arises in instances of non-performance or bad performance. In order to succeed in a claim for negligence,[27] the claimant needs to

1100; *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172; and *Matrix Securities Ltd v Theodore Goddard (a firm)* [1998] PNLR 290, 322.

21 *Bolam v Friern Hospital Management Company* [1957] 1 WLR 582, generally reconfirmed in *Adams v Rhymney Valley District Council* [2000] Lloyd's Rep PN 777, 786.

22 Steele (n 9) 109.

23 See *Sansom v Metcalfe v Metcalfe Hambleton & Co* [1998] PNLR 542 (CA); van Dam (n 9) 151.

24 *The Noah's Ark v Bentley & Felton Corp.*, 292 F2d 437, C.A.Fla.1961 (5th Cir. 1963), 322 F.2d 3, 1964 A.M.C. 59.

25 *Kentwood v United States*, 930 F. Supp. 227, 1997 A.M.C. 231 (E.D. Va. 1996).

26 American Law Institute, Restatement (Second) of Contracts, 1 IN NT (1981), current until April 2012 (2012) § 235; G Klass *Contract Law in the USA* (Wolters Kluwer 2010); E A Farnsworth *Farnsworth on Contracts* (Aspen Publishers 2004) 189 ff; and G E Maggs 'Ipse dixit: The Restatement (Second) of Contracts and the modern development of contract law' (1998) *Geo. Wash. L. Rev* 66. See *Ocean Reef Club, Inc. v UOP, Inc.*, 554 F.Supp. 123, 130, S.D.Fla. 1982 and *Magnusson Agency v Public Entity Nat. Company-Midwest*, 560 N.W.2d 20 (Iowa 1997).

27 See generally R A Epstein *Torts* (Aspen Law & Business 1999) ch 1.

establish the existence of a duty of (reasonable) care,[28] a breach of that duty, a causal link and damage.[29] Negligence[30] is understood as a failure to exercise reasonable care in accordance with a standard of care as expected from a reasonable person[31] under the same circumstances.[32] The principle of 'the reasonable man'[33] was examined in *United States v Carroll Towing Co*,[34] employing a method of assessing the standard of care known as the '*Hand*' test, according to which a person is under and obligation to behave in accordance with the standard of care required, provided that the cost of taking precautions is less than the harm caused, multiplied by the probability of harm.[35] In other words, the test provides a 'cost-benefit' analysis aimed at determining whether a specific behavior is negligent, depending on whether the magnitude of risk is greater than the burden of taking precautions.[36] As in English law, the US jurisprudence adopted the principle according to which a standard of care required from a professional person is higher than a standard expected from an ordinary person,[37] and where special knowledge and skills are taken into consideration when considering whether such a person has performed reasonably.[38]

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28 See J M Church, W R Corbett, T E Richard and J V White *Tort Law: The American and Louisiana Perspectives* (Vandeplas Publishing 2008) 18 and Steele (n 9) 141. See *MacPherson v Buick Motor Co.* (1916) 217 NY 382.

29 See J W Glannon *The Law of Torts: Examples and Explanations* (Aspen Publishers 2005) 69. See *The Gov Ames*, 108 Fed. 969 (5th Cir. 1901).

30 See American Law Institute, Restatement (Third) of Torts (n 28) GP S.4 and Epstein (n 25) 110 ff.

31 W L Prosser, W P Keaton *Law of Torts* (West Pub Co 1984) 174; R E Barnett *Contracts: the Oxford Introduction to US Law* (Oxford University Press 2010) 190.

32 American Law Institute: Restatement (Third) of Torts (n 28) 8.

33 For more on the standard of a reasonable man see K S Abraham, A C Tate *A Concise Restatement of Torts* (American Law Institute Publishers 2000) 33 ff.

34 *United States v Carroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1947).

35 See Glannon (n 39) 73 and Church (n 26) 136. See *McCarty v Pheasant Run, Inc.*, 826 F.2d 1554 (7th Cir. 1987) and *Conway v O'Brien*, 111 F.2d 611, 612 (2nd Cir. 1940).

36 American Law Institute, Restatement (Third) of Torts (n 28) 31.

37 See for example: *Lasley v Shrake's Country Club Pharm., Inc.*, 880 P.2d 1129, 1132--33 (Ariz. 1994) and *O'Hare v Merck & Co.*, 381 F.2d 286, 291 (8th Cir. 1967).

38 American Law Institute, Restatement (Third) of Torts (n 28) § 12 'Knowledge and Skills' 141.

2.4 Germany

The German courts affirmed the above mentioned common law practice in several salvage case decisions, such as the one made in the case *6 U 207/83*[39], according to which a salvor can be held liable for damages caused through poor performance, based on general domestic law liability rules.[40]

The German law regulates basic responsibility arising from contractual obligations in Article 280 of the *Bürgerliches Gesetzbuch* (BGB), and non-contractual obligations[41] in Article 823 BGB.[42] In the contract law, the claimant must prove that the defendant is responsible for a breach of duty, and it is up to the defendant to prove that the conduct did not amount to intention or negligence in order to escape liability[43].

Non-contractual responsibility is set *ex lege*, and the claimant must prove that the defendant harmed one of the protected interests[44]. The conduct is perceived as negligent (Article 276(2) BGB), when it shows a disregard of the standard of care as expected from a reasonable person in the same circumstances.[45] If a person is part of a specialist group, special knowledge and a higher standard of care is required, bearing in mind the ability to foresee and avoid the harm.[46]

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39 *Urteil des OLG Hamburg* vom 5.1.1984 (6 U 207/83). A similar more recent case is *ÖLG Karlsruhe Beschluss* vom 2.2.2009 (22 U 3/08 BSch).

40 R Herber *Seehandelsrecht: Systematische Darstellung* (Walter de Gruyter 1999) 394--99; H Prüssmann, D Rabe *Seehandelsrecht: fünftes Buch des Handelsgesetzbuches; mit Nebenvorschriften und internationalen Übereinkommen* (C H Beck 2000) 1040 ff, K U Bahnsen *Internationales Ubereinkommen von 1989 uber Bergung* (Lit. 1997) 214 and H J Puttfarken *Seehandelsrecht* (Recht und Wirtschaft 1997) 318.

41 See generally N Foster, S Sule *German Legal System and Laws* (Oxford University Press 2010) 485 and M Reimann, J Zekoll *Introduction to German Law* (C H Beck 2005) 205 ff.

42 See generally B Markesinis, H Unberath and A Johnston *The German Law of Contract: a Comparative Treatise* (Hart Publishing 2006) 446 ff.

43 See P Zumbansen *The Law of Contract*, in: M Reimann, J Zekoll *Introduction to German Law* (Beck 2005) 146, and, Markesinis (no 52) 444-446.

44 See H Koch, The Law of Torts, in: M Reimann, J Zekoll *Introduction to German Law* (Beck 2005) 205-211.

45 See BGH, NJW (1972) 151.

46 See RGZ 119, 397 = JW 1928, 1049 (14 January 1928). See also F J Säcker, R Rixecker *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (C H Beck 2009) § 276; J von Staudinger, K-D Albrecht, C von Bar, C Baldus and J von Staudingers *Kommentar*

2.5 France

In the *Germain*[47] case, a French court explored the salvor's possible negligence as a consequence of alleged poor performance and stated, before ultimately dismissing the case, that a salvor, in accordance with French law, can be held liable for damage caused through intentional or negligent performance.[48]

The French law perceives fault[49] as an objective violation of the standard of behavior normally required.[50] According to the *Code civil*, if the defendant is under an obligation of result,[51] in cases of non-performance fault is presumed and it is up to the defendant to show the existence of an external cause[52] in order to escape liability (the defendant may be held liable even for the slightest negligence[53]). If the defendant is under an obligation of means,[54] the main obligation is not focused on a specific result but on the defendant's performance, which needs to be conducted as best as possible, compared with a certain standard.[55] The standard of care is usually defined as the standard of a good father of the family, and

zum Bürgerlichen Gesetzbuch (Sellier de Gruyter 2009) § 276 and O Palandt, P Bassenge *Bürgerliches Gesetzbuch* (C H Beck 2012) 251 ff.

47 *Navire 'Germaine'* Cour d'appel d'Aix-en-Provence (8 juin 1983).

48 See Cass 1re civ (13 janv 1998). Villeneau, however, reminds that in the salvage context, as visible from the older cases, the have courts regularly considered various mitigating factors when assessing the alleged salvor's fault. See V Villeneau *Contrat d'assistance maritime* (édn 1990), 'tenant compte des innovations de la Convention de 1989 à titre contractuel' (1990) 236 *DMF* 289 ff, referring to the case *Sent, Dor et Mansâti* (8 mars 1955) DMF (1955). See also A Montas *Le quasi-contract d'assistance: essai sur le droit maritime comme source de droit* (Librairie Générale de Droit et de Jurisprudence 2007) 88--89, 190, 227.

49 See generally E Steiner *French Law: a Comparative Approach* (Oxford University Press 2010) 345 ff.

50 See van Dam (n 9) 396--98.

51 See generally J C B Mohr (Paul Siebeck) *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers 1983) 147.

52 J Bell, S Boyron and S Whittaker *Principles of French Law* (Oxford University Press 2008) 342.

53 P le Tourneau, L Cadiet *Droit de la responsabilité et des contrats* (Dalloz 2000) no 6707.

54 See generally Mohr (n 68) 147.

55 F Terré, P Simler and Y Lequette *Droit civil: les obligations* (Dalloz 2009) no 6.

if the defendant is professing to possess certain specialist skills the standard is elevated to the standard of a 'reasonable prudent businessman'.[56] Under the obligation of means, it is up to the claimant to show the existence of fault on the part of the defendant[57]. In addition, the French legal doctrine generally classifies fault as an intentional conduct, under the segment of delicts or, as a non-intentional conduct, which is generally considered to be a quasi-delict,[58] based on lack of due care expressed through negligent or careless behavior.[59] The Code regulates basic contractual responsibility in Articles 1137 and 1147 and non-contractual responsibility in Articles 1382--1383[60].

3 Categorization of salvage services

3.1 Nature of salvage services

As reconfirmed by Article 6 of the 1989 Convention, the parties to a salvage agreement are generally free to regulate their relationship, provided that the mandatory provisions of international and domestic norms are respected. The salvors, before commencing the salvage operation, usually offer their services under one of the commonly used standard salvage contract forms,[61] and it is up to a potential salvee either to accept the service or risk suffering potential damage resulting from the lack of salvage assistance. Salvage services regularly consist of different activities undertaken by salvors. Apart from preventing harm to a salvee's object (eg extinguishing fire, preventing collisions, sinking, washing ashore), a salvor is often asked to perform additional services (eg partial repairs of hull and machinery,

56 See Cass 3e civ (7 March 1978) Bull civ III No 108.

57 See Bell (n 69) 343.

58 See generally M Fabre-Magnan *Droit des obligations: responsabilité civile et quasi-contrats* (Presses Univ de France 2010) 14, 88.

59 See generally Mohr (n 68) v, vol XI Torts ch 2: 'Liability for one's own act' 5.

60 See generally van Dam (n 9) 9.

61 Magnus (n 19) 573.

supply of goods) and is generally expected to watch over the salved object (eg vessel, cargo, equipment) until handed over to a responsible person. Depending on the nature of services actually performed, salvage contracts can be categorized into a number of different types of contracts, most usually into the contracts for services, contracts for work (and labor) and, in some instances, custodian contracts. Such categorization is significant as it establishes different methods of assessing the parties' obligations, and the effect of salvor's liability in instances of non-performance or bad performance. The service contracts in general require a certain level of performance, the so-called 'obligation of means' principle, according to which a salvor is required to use a certain level of diligence when performing, this performance being considered as the salvor's main duty (ie to use best efforts or best endeavours to salve the vessel).[62]

In the work, labor and custodian contracts, a salvor is required, in accordance with the 'obligation of result' principle, to achieve a certain result (eg to repair the vessel, to refloat a vessel or to protect the salved object). Unlike a standard service contract where the conductor (salvee) bears the risk of failure and the locator (salvor) can expect payment provided he has performed as expected,[63] the 'no-cure, no-pay' principle, as promulgated by the 1989 Convention and many standard salvage contract forms, prevents payment in the absence of a result, stipulating the aleatory nature of a salvage service.[64]

This leads to the conclusion that a salvage service should be categorized as a contract for work, where the locator bears the risk of failure and the main object of any contract is a positive result.[65] The exception, again, can be seen in the special compensation instrument where, irrespective of the result as understood under the no-cure, no-pay principle, a salvor can recover expenses provided he has rendered environmental

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62 A Fiale *Diritto della Navigazione Maritima e Aerea* (Gnippo Editorials Esselibri -- Simone 2006) 292.

63 ibid 290.

64 E Volli 'Riflessioni sulla natura giuridica dell'istituto dell'assistenza e salvataggio' (2004) *Il Diritto Marittimo* 3 829--31 and W T Brough 'Liability salvage: by private ordering' (1990) 19(1) *Journal of Legal Studies* 100.

65 I H Wildeboer *The Brussels Salvage Convention* (A W Sythoff 1965) 48--49, 134--41.

services, irrespective of whether such services were successful,[66] leading to the conclusion that such service is to be considered as a contract for services.[67] What also needs to be taken into consideration is the fact that, in practice, a salvage operation often consists of numerous activities, involving the utilization of various materials and equipment, and employing a number of third parties.

Therefore, whether a salvage contract, owing to its particular nature and utilization in practice, can be understood as a nominated contract,[68] or whether a salvage service can only be classified under one or more of the previously mentioned (or other) contracts, is a matter of domestic law construction.[69]

3.2 Types of salvage services

In US law, a salvage contract is usually perceived as a contract for services,[70] although some reported salvage cases indicate the use of a contract of employment, where a payment is owed regardless of success of the operation.[71] In English law, a salvage contract is usually understood as a contract for work and labor[72] or a contract for services.[73] In addition, English practice takes into consideration the fact that a salvage contract may contain ele-

66 J L P Begines 'El contrato "Lloyd's Open Form of Salvage Agreement 2000"' (2002) 20 *ADM* 117; A Antonini *Trattato Breve di Diritto Marittimo* (vol III 2010) pt 5 'Le obbligazioni e la responsabilité nella navigazione marittima'.

67 See generally S Jelinić *Spasavanje ljudskih života i imovine na moru* (Sveučilište u Osijeku 1979) 178 ff; M J C Gomes *O Ensino do Direito Marítimo* (Almedina 2004) 217--218.

68 J L G Garcia, J M R Soroa *Manual de Dereçho de la Navigacion Maritima* (Marcial Pons 2006) 748 and Begines (n 69) 117--118.

69 H R Baer *Admiralty Law of the Supreme Court* (Michie Co 1979) 575; G Camarda *Il soccorso in mare* (Giuffrè Editore 2006) 196--97, 361 ff.

70 See *The Bayamo*, 171 F. 65 (C.C.A. 5th Cir. 1909).

71 See *The Camanche*, 75 U.S. 448, 19 L. Ed. 397, 1869 WL 11454 (1869), and especially *Canadian Government Merchant Marine v U.S.*, 7 F.2d 69 (C.C.A. 2d Cir. 1925) (payment allowed despite no result having been achieved).

72 F D Rose *Kennedy and Rose: Law of Salvage* (Sweet & Maxwell 2010) 515.

73 G Brice *Brice on Maritime Law of Salvage* (Sweet & Maxwell 2003) 493--94. See generally on service contracts S Whittaker 'Contracts for Services in English Law and in the DCFR' in R Zimmerman *Service Contracts* (Mohr Siebeck 2010).

ments of a contract for the supply of services,[74] a contract for the sale of goods[75] and a contract for the supply of goods.[76] The custodian element (ie a salvor in possession of a vessel and goods on board) is also recognized as a part of a salvage contract.[77] In German law, a salvage contract[78] can be construed either as a contract for services[79] or as a contract of work[80]. According to some German salvage cases, it is additionally possible to construe a salvage service as a hiring contract[81] and a benevolent intervention into another's affairs.[82] In French law[83] the distinction between a contract of work and a contract for services can be expressed through a specific obligation required by each contract.[84] In addition, it is possible to construe salvage services as custodian contracts[85] or, similar to the German older case law, as a benevolent intervention into another's affairs.[86]

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74 J Chitty, A G Guest and H G Beale *Chitty on Contracts* (Sweet & Maxwell 2004) ch 39.

75 Rose (n 89) 499--500.

76 ibid 501--505; Brice (n 90) 493--95.

77 See *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 and *The Winson* [1982] AC 939.

78 See generally U Magnus *Bergungsverträge in Staudinger BGB* (Neubearbeitung 2011) Rn 122 123.

79 Markesinis (n 52) 153.

80 F Kastenbauer 'Bergung und Hilfeleistung in Seenot von Sportschiffen' (1980) 13(A) *VersR Heft* 305--14; Rabe (n 50) 1019; L F Schrock 'Das International Übereinkommen über Bergun' (28 April 1989) 9 *TranspR Heft* 303 and K H Thume 'Gemischte Verträge mit Gemischtbetrieben' (1994) *TranspR* 383.

81 See 'Urteil' (26 March 1996) X ZR 100/94 (BGH Frankfurt am Main); R Saller 'Die Rechtsnatur des Autokran-Vertrages' (1995) 4 *TranspR* 145--46.

82 D A Kley *Hulp-en Bergloon* (M Witt & Zonen 1904) 104 ff.

83 See generally Bell (n 55) 417 ff, Montas (n 51) 281 ff and at 331, G Ripert *Droit maritime* (Tome III Éditions Rousseau 1950) 140; B Fauvarque-Cosson, D Mazeaud *European Contract Law: Materials for a Common Frame of Reference* (Sellier 2008) 35 ff and M Remond-Gouilloud *Droit maritime* (A Pedone 1988) 198--99. See also A L Deschamps 'La convention internationale de Londres sur l'assistance maritime et le droit français des contrats' (1993) 533 *DMF Sommaire* 684--85, referring to C Com (14 octobre 1997) *Navire 'Tevera' DMF* 577 1080 (décembre 1997).

84 E Clive, C von Bar *The Common European Law of Torts* (Oxford University Press 2000) vol 1 bk III 1:102 673 and Deschamps (n 86) 693.

85 F Moussu-Odier 'La responsabilité de l'assistant' (1975) *Annuaire de Droit Maritime et Océanique* 301--303.

86 ibid 303; R Rodière, E du Pontavice *Droit maritime* (DaIIoz 1997) 457 ff; Ripert (n 100) 142--43; and Wildeboer (n 82) 42.

4 Due care and best endeavours

4.1 Historical background

The wording of the 1989 Salvage Convention refers to the salvor's duty of care, which created an undesired effect as to the choice of the term used, since the practice preferred and still prefers the use of best endeavours, and neither the Convention nor the relevant preparatory work on the subject matter provided a definitive answer as to the relationship of these two terms, their contents and definition, or the prevalence of the one over the other. This is especially important when comparing the liability of professional as opposed to non-professional salvors, and applying sanctions in cases of breach of duty.

A duty of care can be defined as a standard of behavior subject to contractual and non-contractual regulation and case practice,[87] based either on the legal norms enforced as *ius cogens* (ie the standard of due care present in Article 8[1a and 1b] of the 1989 Salvage Convention)[88] or, on the contractual stipulations, either expressly stated or implied owing to the nature of a specific contractual relationship. Bearing in mind that salvage services were not always provided almost exclusively in a contractual form, the scope and understanding of the salvor's duty of care evolved independently of contractual stipulations, during the second half of the 19th century.[89] A good example can be found in the *Cape Packet*[90] case, where it was determined that a salvor is under a general duty to exercise ordinary skill and prudence equal to the behavior of persons conducting similar activities.[91] At that time, a salvor was required

87 Fauvarque-Cosson (n 100) 3.

88 See generally Simpson (n 9) 1--27.

89 J L Rudolph 'Negligent salvage: reduction of award, forfeiture of award or damages?' (1975--1976) 7 *J. Mar. L. & Com.* 420 ff. See *The Blaireau*, 6 U.S. (2 Cranch) 240 (1802); *The Duke of Manchester* 6 Moore (1847) PC 100; *The Marie* 7 PD 203; and *The Capella* (1892) P 70.

90 *The Cape Packet* (1848) 3 W Rob 12.

91 See *The Lockwoods* (1845) 9 Jur 1017 and *The Magdalen* (1861) 31 *L.J. Adm.* 22.

to exercise ordinary skill and prudence inherently present in the group of persons (common sailors) performing salvage operations[92] and his performance was to be judged according to the circumstances of each case.[93]

The standard has been 'enhanced' in modern times, emphasizing the 'professional skill and knowledge' criteria as required from modern day professional salvors. The 1989 Salvage Convention applies the term due care, whereas most standard salvage contract forms in use utilize the term best endeavours. However, despite a theoretical possibility of a state of affairs under which the norms of the 1989 Convention would regulate salvage operations in one way, whereas the private law would utilize other rules and methods (such as is the (exceptional) example of the SCOPIC clause), it needs to be stressed that the drafting procedure of the new convention was heavily influenced by the provisions and clauses of the commonly used standard salvage contract forms, and that such contracts usually originate from jurisdictions that are parties to the 1989 Salvage Convention. As will be analyzed below, it can be argued that the norms of the Convention and the standard contract forms are interdependent and complementary.

4.2 Standard(s) utilized by salvage contracts

Most standard salvage contract forms currently in use[94] differ from the

92 See *The Perla* (1857) Swab 230, 166 ER 1111; *The Neptune* (1842) 1 W Rob 297, 300.

93 See *The Cato* (1930) 37 Lloyd's Law Rep 33.

94 For information on older standard salvage contract forms see the International Shipowners' Association (INSA) 'Salvage contract "no cure -- no pay" 1974', 'Common Market Form of Salvage Agreement' and the French standard salvage contract 'L. D'; see also P Stanković Spašavanje *Poseban Institute našeg prava pomorsko i unutrašnje plovidbe* (Sveučilište u Zagrebu 1975) 164--68; J G R Griggs *Aspects of Salvage* (Redazione ed amministrazione 1965) 211--217, 321--30; G Darling, C Smit *LOF 90 and the New Salvage Convention* (Lloyd's of London Press Ltd 1991) 116--117. For the French Maritime Assistance Contract (1990 edn), see Villeneau (n 65) and N Hesiter *La notion d'assistance en mer* (1975) 347. For the Yugoslavian Standard Form 84 (no-cure, no-pay, recognising to a certain extent the liability salvage principle) see Stanković (ibid) 78 and Appendix No 20 and for the Bugsier Contract Form see W Schimming *Bergung und Hilfeleistung im Seerecht und im Seeversicherungsrecht* (Versicherungswirtschaft 1971) 162 and Darling (ibid) 99 ff.

1989 Salvage Convention's standard with regard to the choice of the term defining the main salvor's obligation. Under clause A of the LOF 2011, salvors agree to use best endeavours to salve the salvee's property, and under clause B the same standard is expected regarding the efforts to prevent or minimize the damage to environment. The Scandinavian form applies the same standard in clause 1, the Chinese form follows such practice in clause 1 and clause 4, and the same can be observed in clause 1 of the JSE 91 form, as well as in the Turkish Open Form (TOF) in Article 2(1). The standard form Yacht Salvage Contract makes no special mention of the protection of the environment as regards the standard of care, whereas regarding property, the salvor is expected to endeavour to protect the salvee's property (clause 1). MARSALV refers back to the best endeavours principle, but as with the previously mentioned standard Yacht form, it concentrates solely on the standard of care to be employed in an effort to salvage property. The MAK form mentions no particular standard of care.

4.3 The 1989 Convention's standard

Article 8 of the 1989 Salvage Convention regulates duties of the salvor and the owner or master of the vessel.[95] Article 8, paragraphs (1a) and (1b) stipulate that a salvor: '*… shall owe a duty to the owner of the vessel or other property in danger: (a) to carry out the salvage operations with due care; (b) in performing the duty specified in subparagraph (a), to exercise due care to prevent or minimize damage to the environment*'. The 1989 Convention incorporated a standard of care (Article 8) as an expected model of behavior. Despite the fact that a particular salvor's standard of care was already present in the standard salvage contract forms, even prior to the adoption of the 1910 Convention, the 1989 Convention clearly enables a remedy for such a breach, even in the absence of a contractual setting (as discussed below).

[95] For a focused analysis of salvors' and salvees' duties according to Article 8 of the 1989 Salvage Convention see N J J Gaskell 'The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990' (1991--1992) 16(1) *Tul. Mar. L.J.* 5--6.

However, the choice of the formulation of the standard of care expected from a salvor as incorporated in the 1989 Salvage Convention, led to a variety of proposals and discussions during the drafting procedure.[96] What proved to be particularly troublesome during the drafting process was the fact that a number of proposals called for the parallel utilization of the terms due care and best endeavours, casting serious doubt as to the meaning, definition and interaction between the two terms. According to one interpretation made available during the discussions,[97] the two use a different method of assessment; 'due care' refers to an objective criterion of the standard of care and 'best endeavours' incoporates a subjective criterion encompassing a duty to employ all available means during a salvage operation.[98] Other opinions[99] supported the notion that due care and best endeavours are to be understood as a different measure of the same standard of care. Since many delegations were wary of the possibility that the incorporation of two different standards could produce unwanted confusion,[100] the due care standard was chosen

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96 See Report by the Chairman of the International Sub-Committee 'Document Salvage 5/IV-80' in CMI *The Travaux Préparatoires of the Convention on Salvage 1989* (2003) 219; CMI 'The Montreal Draft Salvage Convention' (Winter 1985) CMI News Letter; 'Document Salvage-18/II-81' and LEG 52/4-Annex I: Montreal Draft, available in CMI *Travaux on Salvage* (ibid) 219--20; LEG 56/9 Report on the Work of the 56th Session, available in CMI *Travaux on Salvage* (ibid) 231. As noted by some delegations see LEG 52/9 Report on the Work of the 52th Session, available in CMI *Travaux on Salvage* (ibid) 227 and LEG 56/9 (ibid) 231--32.

97 CMI 'The Montreal Draft Salvage Convention: the work of the Legal Committee of IMO at its 56th session' (Spring 1986) CMI News Letter 10.

98 See R Shaw, M Tsimplis *The Liabilities of the Vessel in IML Southampton on Shipping Law* (Informa 2008) 173 (the standard of best endeavours seen as a 'subjective measure of care', while the standard of due care seen as a 'standard of professional care and skill').

99 For more on this issue see B Makins, P McQueen and B White 'Salvage and the environment' (1987) 4 *MLAANZ Journal* 227 and LEG 52/9 (n 99) 227.

100 See LEG 54/7 Report on the Work of the 54th Session of the Legal Committee, available in CMI *Travaux on Salvage* (n 99) 227 and Committee of the Whole of the Diplomatic Conference to Change the 1910 Salvage Convention in 1976 available in CMI *Travaux on Salvage* (ibid) 217. See LEG 57/12 (ibid) 232--33. Also see A Mandaraka-Sheppard *Modern Admiralty Law With Risk Management Aspects* (Cavendish Publishing Limited 2001) 706--709 (concerning the appearance of the term best endeavours in the 1989 Convention).

regarding both the protection of property and the prevention of marine pollution.[101] However, no definition of the standard utilized by the Convention has been made available,[102] thus allowing (or rather, forcing) the courts and arbitral panels to define the term[103], subject to the applicable national law regulation and case law.[104]

4.4 The content of duty of care

The standard of care is particularly important in service contracts, where the main obligation of a service provider is stipulated as an obligation of means and where, owing to a certain level of uncertainty as to the possibility of reaching a specific result (ie a situation where it is not certain whether a vessel can or cannot be salved), the focus is placed on the performance of certain activities, and a service provider is under an obligation (duty) to exhibit a certain level of effort and diligence (care) during the performance of that service. A breach of care will not result as a consequence of a failure to reach a specific result but from the lack of diligent performance as expected from a service provider. A duty of care, therefore, refers to an express or implied duty to perform in accordance with a certain standard of care as normally (reasonably) expected. The standard of care, understood as a measure of a specific duty to take care, is determined by specifying the level of knowledge and diligence required during the performance of certain activities (professional expectation). This level of knowledge and diligence is usually referred to as an obligation to take due care, to endeavour to behave in a certain way or to use (all) reasonable or best endeavours during the

101 See LEG 56/9 (n 99) 229.

102 Brice (n 90) 488 and F Berlingieri *Le Convenzioni Internationali di Diritto Marittimo e il Codice della Navigazioni* (Giuffrè Editore 2009) 522 ff.

103 For more information on LOF arbitral decisions concerning the standard of care see Lloyd's List *LOF Digest* (Lloyd's List 2005) 63.

104 For more on the issue of applicable law see J Trappe 'L'arbitrage en matière d'assistance maritime' (1989) 18(7) *European Transport Law*, especially at 732 ff; P Mankowski *Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht* (Mohr 1995); Bahnsen (n 50) 317.

performance of a particular service.[105]

In this context, due care is to be understood as a standard of care requiring behavior comparable to that of an ordinarily reasonable (prudent) person, aimed at preventing an occurrence of harm to others, under the same or similar circumstances. This is an objective evaluation of behavior, based not on a subjective understanding of the circumstances and conduct required, but on an objective comparison of the actual (poor/non-) performance with a performance as expected from a reasonable person.[106] If a person is claiming to possess certain skills and knowledge, the standard of care required is higher, when compared with the expectations from a non-professional person. In this context, best endeavours can be understood as due care applicable for professionals or, in other words, as an enhanced version of due care with specific (elevated) levels of diligence expected. In the salvage context, due care can be perceived as a minimal standard of behavior, applicable in any circumstance (ie non-professional salvage), whereas the term best endeavours is utilized when a salvage service is performed by a professional salvor through a standard salvage contract form incorporating such a standard. Whereas under due care a (usually non-professional) salvor is required to (or commits himself to endeavour to) exhibit such knowledge and diligence as expected from a reasonably prudent sailor offering assistance at sea, according to the best endeavours criteria, a (usually professional) salvor is expected to perform in accordance with the behavior of a reasonably prudent salvor, including (employing) all possible (all reasonable) actions (means) that can be undertaken under the given circumstances.[107] The limitation of such performance is based on reasonably assessed boundaries (ie a departure from the activities based on the certainty of a

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[105] For a general comparison of 'best endeavours', 'all reasonable endeavours' and 'reasonable endeavours' see K Lewison *The Interpretation of Contracts* (Sweet & Maxwell 2011) 739--41.

[106] For the salvage context see L S Chai *Une introduction au droit maritime Coréen* (Pau-Aux-Marseille 2006) 215 and Y Baatz *Maritime Law* (Sweet & Maxwell 2011) 256.

[107] See *IBM United Kingdom v Rockware Glass Limited* [1980] FSR 335 and *Bloor v Falstaff Brewing Corp.*, 601 F.2d 609 (2d Cir. 1979); Clive (n 87) 208 ff.

commercial failure or a commercial write-off).[108]

Another term sometimes employed in the salvage forms is the reasonable endeavours standard, which, in accordance with the general case law practice, requires the utilization of at least one reasonable effort aimed at a successful performance, thus decreasing the level of commitment as required under the term best endeavours.[109]

4.5 The interaction between the terms

According to Brice,[110] the term best endeavours was introduced into the 19th century contracts in order to clarify that a salvage service was focused on the expected performance, rather than on a specific result. The first issue of LOF (LOF 1908) incorporated a duty to take best endeavours to salve the vessel and cargo on board (clause 1).[111] According to the general case practice in the first part of the 20th century,[112] such a duty included all possible activities necessary to complete the service, unless such activities are unreasonably harmful to a service provider. Another standard salvage contract form, the International Salvage Union Ltd's Agreement

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108 See generally *Terrell v Mabie Todd & Co Ltd* (1952) 69 RPC 234, *Pips (Leisure Prods) Ltd v Walton* (1981) EGD 100 and *Jet2.com Limited v Blackpool Airport Limited* [2012] EWCA Civ 417. In a salvage context, Gaskell (n 112) at 323 enumerates case law examples where it is reasonable for a salvor to stop the service, referring to clause G of LOF 2000. Similarly, concerning clause H of LOF 2000 see Brice (n 90) 547--48; Bahnsen (n 50) 343; and M Kerr 'The International Convention on Salvage 1989: how it came to be' (1990) *Int'l & Comp. L.Q.* 512.

109 See *Rhodia International Holdings Limited v Huntsman International LLC* [2007] EWHC 292; *Yewbelle Limited v London Green Developments Limited* [2007] EWCA Civ 475 and *LTV Aerospace and Defense Co. v Thomson (In re Chateaugay)*, 186 B.R. 561, 594 (Bankr. S.D.N.Y. Aug. 23, 1995). Also see R E Scott, G G Triantis 'Anticipating litigation in contract design' (2006) 115 *Yale L.J.* 835--36; K A Adams 'Understanding "best efforts" and its variants (including drafting recommendations)' (2004) *Prac. Law.* 50; Farnsworth (n 24) § 7.17 and § 7.17b. For a case concerning the term all reasonable endeavours (the recent case law practice seems to favour the opinion that there is no substantive difference between that term and the term best endeavours) see *Trecom Bus. Sys., Inc. v Prasad*, 980 F. Supp. 770, 774 n.1 (D.N.J. 1997).

110 Brice (n 90) 547.

111 Courtesy of Mr Mike Lacey, Secretary General of the ISU, email correspondence (17 August 2012).

112 See *Sheffield District Railway Co v Great Central Railway Co* (1922) 27 TLR 451.

Salvage Contract 1897,[113] incorporated an obligation to endeavour to (to use due care to) salve the vessel and her cargo (clause 1). Both forms predated the 1910 Salvage Convention, but the drafters of the 1910 Convention decided against incorporating any specific duties into the text of the 1910 Convention.[114]

Gaskell is of the opinion that, in salvage related matters, the term best endeavours requires a salvor to do more than a reasonable salvor would do under the same circumstances, and further considers the term due care to be below the standard required when contracting under best endeavours.[115] Kerr states that the application of the 1989 Convention's much lower standard of care enables an easier method of avoiding negligence claims[116]. Based on such notions, it can be argued that the use of a more onerous standard in standard salvage contract forms places more responsibility on a salvor acting through contractual relations than that generally expected under the convention's standard. If it is not clear which standard of care to apply (a term present in the 1989 Convention or a term present in a standard salvage contract form), Gaskell suggests that tribunals should apply such understanding of salvor's duty which is most appropriate for encouraging salvage operations.[117] It seems, however, that such wide discretion would allow too much space for arbitrary decisions leading to further confusion regarding the expected performance of salvors in general. Brice theorizes that it is possible to define the best endeavours standard as nothing more than exercising due care,[118] as many standard forms presuppose the application of national law, subject to the 1989 Convention. Montas warns that a general salvor's obligation to act with due care is already present in domestic (French) legislation,[119]

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113 Courtesy of Mr Mike Lacey, Secretary General of the ISU, email correspondence (6 August 2012.)

114 J Villeneau *Répertoire pratique de l'sssistance* (Librarie Générale 1952) 290.

115 Gaskell (n 112) 41 and Garcia (n 71) 747.

116 Kerr (n 125) 511--512.

117 Gaskell (n 112) 48.

118 Brice (n 90) 549; Gaskell (n 112) 42.

119 Montas (n 51) 86; I Arroyo 'Comentarios al Convenio de Salvamento de 1989' (1993) 10 *Annuario de Derecho Maritimo* 92 ff.

subject to the professional liability regulation and case practice. Accepting such reasoning, however, neglects the fact that the standard salvage contract forms support a different standard of performance when compared with the convention and that a different service is expected from a professional salvor as opposed to a non-professional salvor, which is also evident from the cost of the service.

5 The effect of the 1989 Salvage Convention

5.1 Environmental salvage

Unlike the 1910 Salvage Convention, where the public policy principle of encouraging salvage services and the protection of life at sea were the main objectives to be achieved through the adoption of the international instrument, the main drive of the 1989 Salvage Convention was centered on an effort to provide greater incentives towards protection of the marine environment.[120] Whereas the 1910 Convention was, in principle, founded on the core relationship between a salvor and a salvee, the 1989 Salvage Convention makes third-party interests a vital part of the salvage operation. According to one opinion, in the hierarchy of the 1989 Convention's salvage objectives, the salvage of property (Article 12) comes in third place, preceded first by the saving of life (Article 10) and, secondly, by the preservation of the marine environment (Article 14).[121]

In addition to the practice as already established through private law salvage contracts,[122] the Convention's rule introduced a wider application of the effort to protect the marine environment. The private law contrac-

[120] See CMI 'Presentation of the Draft Salvage Convention' made at the Legal Committee of IMCO (December 1981) CMI News Letter 2.

[121] LEG 54/7 (n 117) point 32 at 228.

[122] J B Wooder 'The new salvage convention: a shipowner's perspective' (1990) 21 *J. Mar. L. & Com.* 81--83; P Coulthard 'A new cure for salvors? A comparative analysis of the LOF 1980 and the CMI Draft Salvage Convention' (1983) 14 *J. Mar. L. & Com.* 52 ff.

tual obligations[123] referred to specific operations that, as a consequence, lead to the protection of the environment as a part of a general effort to salve a vessel and property on board. The 1989 Convention clearly separates the two objectives by referring to two separate duties of care: one regarding the salvage operation *in generali sensu* and the other regarding the protection of the environment *in speciali sensu*. This, however, does not suggest that the duty to protect the marine environment stands out as a separate, public duty, irrespective of a salvage operation. Article 8(1b) clearly stipulates that such an obligation is only relevant during a salvage operation, and Article 8 is only applicable for the relationship of private parties (ie a salvor and a salvee).

5.2 Direct application of the Salvage Convention

Unlike the position in the 1989 Salvage Convention, the 1910 Salvage Convention refrained from regulating any specific duties of care. Looking back at the drafting procedure of the 1910 Convention, the little discussion that was held around this particular issue reveals that the delegations were of the opinion that salvors are under a general duty of care present in domestic non-contractual and, to a certain extent, contractual liability rules, and that there is, therefore, no need to implement an express duty in an international instrument.[124] In this sense, Rodière considers Article 8 to be superfluous,[125] as the general domestic liability rules already contain sufficient provisions with regard to the mandatory general duty to take care. The drafters of the 1989 Convention, however, considered it necessary to incorporate such duties into the text of the Convention in order to confirm that they are not the exclusive subject of contractual relations.[126] For example, the standard form Yacht Salvage Contract

[123] Such as the example of a duty to use best endeavours in preventing an escape of oil as present in the LOF 1980.

[124] Villeneau describes the drafting procedure of the 1910 Convention, stipulating that this issue of incorporating a standard of care was never thoroughly considered; see J Villeneau (n 131) 290 ff.

[125] Rodière (n 103) 458.

[126] Committee of the Whole (n 103) 244--45 and International Conference Committee of the Whole, LEG/CONF.7/3 (20 April 1989), available in CMI *Travaux on Salvage* (n

utilizes the term 'to endeavour to' in reference to the protection of the salvee's property, whereas the MARSALV form utilizes the term 'best endeavours' in reference to the protection of the salvee's property. No mention is made of the duty to protect the environment, although both forms refer to Articles 13 and 14 of the 1989 Convention in respect of compensation. As US law is valid for both forms (and the US is a contracting party to the 1989 Convention), the mandatory duty to protect the environment as envisaged by the 1989 Convention is directly applicable regarding the environmental services performed during a salvage operation contracted under these forms.[127]

5.3 The issue of primacy

Bearing in mind that one of the criteria for assessing a salvage award as set out in Article 13(1b) includes an effort to protect the environment, the lack of the exhibited skill and care in combating a threat to the environment may be perceived as a negative factor for the assessment of a salvage award. Based on this assumption, it is possible to interpret the salvor's specific duty to preserve the marine environment (when possible and necessary) as being included within the scope of the general duty to act with due care while rendering salvage services. According to that hypothesis, there are no grounds to define the environmental services as a separate existing entity, irrespective of the general salvage service and requiring an extra effort. However, as the duty to protect the marine environment during a salvage operation has been pronounced mandatory (unlike the general duty to take due care) and clearly annotated as a specific duty required during the performance of salvage services, it could be argued that this duty has primacy in a salvage operation and that the interests of the salvee's property have a secondary value in the overall salvage effort.

99) 242--43. In addition, it would be most uncommon to incorporate a mandatory provision regarding a specific obligation during the performance of salvage services, but at the same time omitting at least to stipulate a general duty of care required during the overall performance of a salvage service.

127 A R M Fogarty *Merchant Shipping Legislation* (Informa Law 2005) ch 8 at 8.39. The same can be observed regarding the MAK form.

The scope and availability of sanctions regarding the breach of a general duty to take due care during the performance of salvage services is significantly broader when compared with sanctions available in cases of breach of duty to take due care during the performance of environmental services (Article 18 as opposed to Article 14[5] of the Convention, as briefly discussed in later text). Based on this comparison, it could be argued that the former is more important than the latter. Such a conclusion would suggest that salvors will continue to be primarily concerned with the salvage of property (owing to the scope of sanctions available to the salvee in cases of poor performance) and will undertake environmental services only in exceptional cases (ie when this is profitable).

5.4 Inequitable terms in salvage contracts

In certain instances, contracts may establish a standard of care and obligations different from those as understood to be within the concept of negligence liability in the law of tort (non-contractual liability).[128] The parties are, as stated earlier, free to contract out of the 1989 Salvage Convention (Article 6[1]), but if such contracts contradict mandatory rules (Article 7) of the Convention (as in the example of Article 8), certain contractual clauses or the entire contract may become void. Although most salvage contracts allow remedies in damages for the breach of duty of care,[129] there are a few examples where contracts include the so-called 'knock-for-knock' or 'hold harmless' clauses, stipulating an exclusion of liability for, *inter alia*, negligent conduct.[130]

For example, according to clause 19.3 of the SALVCON 2005,[131] breach of contract, negligence or any other type of fault will not produce the effect of liability and compensation, and the damage so sustained is for the sole account of the party suffering the damage. This particular contract is, however, utilized by salvors when hiring the services of third

[128] Markesinis (n 52) 14.

[129] Gaskell (n 112) 14.

[130] Darling (n 111) 123.

[131] International Salvage Union Lumpsum Sub-Contract and SALVHIRE 2005 contracts, both available at www.marine-salvage.com.

parties. However, the TOF, unlike any other previously observed standard salvage contract forms, incorporates a clause (Article 3(4) of the TOF[132]) relieving a salvor from liability. Furthermore, Article 6(1) of the TOF creates a duty on the salvee to provide remuneration for salvage services. Thus, the salvee's duty to pay the salvage award is confronted with the lack of salvor's obligation to act with due care to prevent the harm from occurring, as there are no appropriate sanctions for such behavior.[133] As the TOF stipulates Turkish law as applicable and as Turkey is as of yet still not a party to the 1989 Salvage Convention, the possible invalidity of such a clause can only be determined by comparing this clause with Turkish general non-contractual liability rules. Taking into consideration that the new Turkish Commercial Code[134] incorporates the material provisions of the 1989 Convention, the problematic clause present in Article 3(4) should be considered as void.

The above described problematic clause, if present in a contract governed by the national law of a jurisdiction party to the Convention, would be void not only by virtue of Article 7 of the 1989 Convention, but also due to its incompatibility with general non-contractual/tort regulation and general case practice. Such is the example of the French standard salvage form (not in active use anymore) that incorporated a so-called 'draconian' clause, according to which a salvee was responsible for all damage arising out of a salvage operation.[135] However, it must be emphasized that the existence of a 'hold harmless' clause does not necessarily exempt a salvor from liability *in toto*. Villeneau reported[136] a Dutch case occurring in 1925,[137] where a reduction of salvage remuneration was made despite the fact that a salvage contract contained a 'hold harmless' clause, as the salvee made a claim in tort and succeeded in proving the existence

132 Darling (n 111) 102.

133 ibid 111--114 (the German form and the French form incorporated a similar clause as that found in the TOF).

134 The Turkish Commercial Code, No. 6102.

135 Moussu-Odier (n 102) 305.

136 Villeneau (n 131) 275.

137 Commercial Court of Antwerp (13 July 1925) (Jwr Aimers 1925 at 280; Dor T XII at 60).

of fault on the side of the salvor, which in effect rendered the clause void.[138] Since the 1910 Salvage Convention did not contain any provisions regarding the duty to take reasonable care, the Dutch court applied the general domestic non-contractual liability provisions, and found such a clause to be in direct contradiction with a general duty to take (due) care.

5.5 Breach of duty to protect the environment

During the discussions preceding the adoption of the 1989 Convention, the French delegation proposed[139] a provision to sanction a salvor who failed to make an(y) effort to preserve the environment.[140] The majority of delegations considered this option as being already present within the draft article concerning special compensation. Although the French delegation insisted that the option other delegations were referring to covered the application of sanctions strictly in relation to the award of special compensation and not the salvage award, it was generally perceived that recognition of such a provision would diminish the positive aspects of the special compensation instrument in general. Although the 1989 Convention is clear regarding the salvor's duty to perform with due care when attempting to prevent or minimize damage to the environment, it is arguable whether a salvor is under a duty to render environmental service whenever such a threat arises, or only when actually engaged in such services. It is possible to argue, bearing in mind the provisions of Article 14(5) of the Convention, that a situation in which a salvor could easily engage in environmental activities during a standard salvage operation without increased costs or putting himself in significant danger, but omits to do so, falls outside of the scope of the Convention. Or, in other words, the sanction in Article 14(5), available for the breach of duty stipulated in Article 8(1b), cannot be utilized in instances where no actual environmental services were provided and where a salvor does not claim

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138 See generally J Beatson, A Burrows and J Cartwright *Anson's Law of Contract* (Oxford University Press 2010) 197; Camarda (n 86) 362.

139 See LEG/CONF.7/24 (n 117) 436. For more on this issue see Berlingieri (n 105) 591 ff.

140 For a lengthy discussion on this issue see LEG/CONF.7/VR.126--28, LEG/CONF.7/VR.163--65 and LEG/CONF.7/VR.170--71 (n 117) 436--43.

special compensation. This leads to the conclusion that a salvor can be negligent through non-performance when failing to engage in environmental services, or may be negligent during the performance of environmental services but at the same time successful in the performance of salvage services in general and thus earning a right to a salvage award (Article 13), without having to answer for poor (non-) performance of environmental services.[141]

Having in mind the overall aim of the Convention, this is a rather limited remedy. Had the French proposal been accepted, it would have been made clear that a mandatory duty to protect the environment is applicable in all instances of a salvage operation, and that a failure to, at least, attempt to render environmental services (non-performance) when required, or a failure to perform adequately (provided a negligent performance can be ascertained), may result in the application of sanctions available through (a modified) Article 18 (salvor's misconduct) or (a modified) Article 14(5).[142] The predominant opinion among delegations present at the drafting discussion considered, however, that the key purpose of Article 14 was to attract more environmental services not through an introduction of sanctions but through a promise of a reward in the case of environmental services being successfully rendered.

6 Conclusion

Keeping in mind the differentiation between due care and best endeavours discussed above, it could be argued that the general standard of due care is more suitable for instances of non-professional salvage services, and it is likely that this is exactly what the drafters of the 1989 Salvage Convention had in mind when considering the provisions of Article 8. Ac-

[141] See the speech of the Japanese delegate in LEG/CONF.7/VR.93-103, available in CMI *Travaux on Salvage* (n 117) 242 and the speech of Mr Jacobsson before the International Oil Pollution Compensation Fund in LEG/CONF.7/VR.60, W/1500e/d1 2--3. See also Bahnsen (n 50) 142.

[142] Shaw (n 115) 223; Camarda (n 86) 323.

cording to such a hypothesis, the Convention established a minimal requirement of the standard of care, which is, at the same time, *de facto* mandatory, based on the established salvage principles in practice and domestic law regulations, and applicable to all instances of salvage activities performed either by professional or non-professional salvors in both contractual and non-contractual salvage operations.[143]

The parties are free to agree the utilization of a more enhanced level of care, and courts and arbitral panels are free to employ a higher standard of care when considering the performance of a professional salvor, irrespective of the contractual stipulations (or the lack of them). Had the general duty of care been pronounced mandatory, it would have been more difficult to determine the applicable standard of care in cases when a different standard of care is present in a salvage contract subject to the 1989 Convention's applicability. In such a scenario, the *ius cogens* standard of the 1989 Convention would necessarily have to prevail. With this in mind, the choice of a proper standard regarding the mandatory duty to protect the environment is problematic, as the 1989 Convention refers to 'due care', whereas salvage contracts usually utilize 'best endeavours'. A salvor could argue that the mandatory provision of the 1989 Convention should prevail and that his environmental conduct should be reviewed in accordance with the standard included in the Convention. This implies, for example, that the term best endeavours used in the LOF contract should be evaluated in accordance with the due care requirement in the 1989 Convention. Should such an assumption be correct, an odd situation could arise where a salvor would be required to act in accordance with a contractual obligation to use best endeavours during the performance of a (general) salvage operation, whereas with regard to the activities undertaken to protect the environment during the same operation a different (lower) standard would apply, despite the fact that the contractual stipulation concerning the environmental activities refers to the best endeavours standard.

[143] Especially when recalling that a general duty to take due care is regularly present in both the contractual and non-contractual domestic law regulations. See W D White *Australian Maritime Law* (The Federation Press 2000) 253.

Such reasoning directly contradicts the main purpose of the 1989 Convention to enhance the means of protecting the marine environment, as the salvor would be required to use less care when protecting the environment than when protecting the salvee's property. A reasonable interpretation would be to interpret the mandatory provision of Article 8(1b) as a minimal standard applicable in all contractual and non-contractual salvage operations, subject to stricter degrees of the standard of care present in contractual provisions. In support of this notion, the recent revision of the LOF 2011 reconfirmed the best endeavours standard, indicating that the industry is interested in maintaining high professional standards of conduct and is prepared to offer a high-performance service.

On the basis that best endeavours are more onerous than due care, as suggested above, the overall duty under the best endeavours standard should correspondingly incorporate the overall duty as expected under the term due care, thus fulfilling the requirements of the mandatory provisions of Article 8(1a and 1b) of the 1989 Convention. This is in accordance with the possibility as anticipated in Article 6(1) of the 1989 Convention, according to which the parties have an opportunity to contract (expressly or by implication) otherwise, including a possibility to agree on a more stringent obligation on the part of a salvor, subject not to interpretation and evaluation of the Convention's terminology (due care), but to the interpretation of the term best endeavours in practice.

Thus, the standard of best endeavours, if stipulated in a contract, should take precedence in all contractual settings, irrespective of the (non-professional) nature of the service provided, and should additionally apply to professional salvors irrespective of the existence of a contract (in a non-contractual salvage setting). To be more precise, the standard of due care as stipulated by the 1989 Convention serves as a general 'reminder' of the existence of a duty of due care in salvage operations, and is subject to further clarification by the domestic statute and/or case law determinations regarding the standard of care as expected from a reasonable person (ie a non-professional salvor) or a reasonable professional person (e a professional salvor).

Scandinavian Maritime law and application of reasonableness principles in relation to salvage

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Content

1 Introduction

Scandinavian maritime laws have a long tradition of unified legislation together with a Nordic collection of case law on maritime cases.[1] The tradition of harmonized legislation goes back in time for more than a century. All Scandinavian countries have ratified the two international conventions on salvage[2].

Scandinavian maritime codes all have the equivalent legal rule:

> "A salvage agreement can wholly or partly be set aside or modified if the agreement was concluded under undue influence or under the influence of danger, and it would be unreasonable to rely on it. An agreement concerning the amount of a salvage reward or special compensation can be set aside or modified if the claim is not reasonably proportionate to the salvage work that has been performed."

This rule has its historical roots back in time when it was common to negotiate a share of salved property or specific sum to be remunerated for the salvage services, which still were not performed - or even had not been started. The idea was - and still is – in cases like this, even though these cases are now rare, that the court would then decide if the services, which were rendered, were not worth the sum, or if the share of the value, that was decided before the work was started, was considered unreasonable.

During the 20th century it became common practice that the sum was left open in cases when Lloyds Open Form (later referred to as LOF) was used and when it became common practice to use it also within Scandinavian and Baltic sea-areas. This development forms the background for the topic to be discussed in this paper.

During the last 15 years it has become more common to avoid the use of Lloyds Open form in such cases where it can be avoided. It is not

[1] Nordiske Domme I Sjöfartsanliggender, since 1900

[2] 1910 and 1989 conventions

the salvor´s who have taken this initiative but the ship owners, cargo owners or their insurers. Towage contracts have been negotiated for long on the basis of towing rates whenever it has been possible. The newer trend has been that the owners demand other standard contracts to be used also in cases which are clearly salvage situations, for example when vessel has been grounded in heavy ice conditions or is stuck in rocks in a way that parts of it need to be cut away in order to release it for removal/ towage.

When these kinds of services are rendered without Lloyds open form, sometimes complex agreements are negotiated, especially when subcontractors are involved, and the final result needs adjustment by mediator, arbitrator, average adjuster or court. The contracts which have been used are often tailor made salvage agreements, modified versions of Towcon/ towhire or Wreckhire or combinations of all these.

Even though the salvor´s are often aware of the legal risks they accept when signing these contracts, they are forced to do it by the competitors who otherwise are willing to accept the risk. Because contracts are drafted/modified hastily, before it is possible to predict how difficult the work will be, problems often arise.

Two typical problems which have arisen are the following; first application of § 443,3[3] in the chapter 16 of the maritime code and secondly § 450 in relation to salvor´s own fault as a fact which has to be taken into account in relation to assessment of the award. In some cases both of these have to be applied simultaneously, which makes the interpretation and assessment of the reward especially difficult for the court or arbitrator.

In this paper some recent cases will be used to illustrate the problem. One of the reasons why 2011 Lloyds Open Form was created, was the increased use of other modified standard contracts for salvage related purposes.

[3] Norwegian numbering

2 Recent case examples

2.1 Introduction

The two recent case examples are used below to illustrate the situations which commonly arise today in situations when for some reason the LOF has not been concluded between parties. Both cases are much more complex than they appear in this brief description. Only some points are raised that concerns the topics of flexibility and reasonableness as an introduction to the topics discussed here.

2.1.1 ”Stadiongracht”

A Dutch cargo vessel “Stadiongracht” grounded off Rauma 28.12.2010. The vessel was stuck in a rock in already ice covered water area, which made the salvage work difficult and more dangerous especially for the divers working under moving ice. According to the owners instructions the LOF was not taken as basis for the salvage work. A Finnish salvage company started to mobilize its fleet and to prepare the agreements with subcontractors based on *towhire* forms. Owners suggestion of the use of *wreckhire 99* was denied.

The problem that often arises when adjusting contract forms to suit for purposes where they have not been formed originally, also became crucial also in this case. When salvage clauses had been deleted from *Towhire* forms they were accepted. Other work had been negotiated through emails (and orally) between salvage master and the owner’s master. The salvor´s had to take into account the time when the work was supposed to be concluded, when pricing their additional services. When starting the work on 29.12 it was holiday season with higher salaries for all persons listed in the agreement and it was especially hard to quickly hire extra professionals for the time around New Years Eve. However to avoid further damage and problems created by moving ice, the work had to be performed continuously, efficiently and quickly. This meant working in shifts 24/7. The Vessel was released from the rocks five days later and

towed to Rauma harbour.

The legal problem after the salvage operation was mainly connected to the use of divers, expertise and equipment for the five days work; work which was accepted and controlled also by the Owners master, as the crew remained on board and also assisted in the work.

The owners were of the opinion that the master had not been competent to accept the services with the provided terms and that the sums for the work of the Salvage masters, divers and equipment were unreasonably high, especially in relation to what has been stated in SCOPIC clause (then 2005 version). The Salvor´s claimed that even though the *Towhire* agreements had been negotiated between owners and the salvors, the master still had the authority to decide on details concerning the salvage work in and around the vessel if he was in doubt, he should have consulted the owners in this respect. The problem was that all the contracting and work was performed around New Year's Eve and all necessary persons and expertise were not available at all times.

This also caused more pressure for the master to make independent decisions. According to the salvor´s evaluation of the work performed and the expenses incurred, if the remuneration had would be based on SCOPIC, the outcome would have been ridiculous as the real cost for the wages to be paid for the workers in that specific time of the year would have been much higher.

The case was raised in Maritime Court, but a solution between the parties was reached between parties before the Maritime Court started to hear the case.

2.1.2 "Multibrava"

A Russian barge "Multibrava" grounded off Pori in West-Coast of Finland on 25th of October in heavy autumn storm. The Finnish salvors concluded a tailored, self made salvage contract on 5th of November for salvage operation in order to refloat the barge from the rocks.

The Contract specified the responsibilities and liabilities of both the Owners and the Salvor´s. According to the contract, the owners Tugboats were also contracted in the salvage work. The price for the Salvor´s ser-

vices was specified in the contract. The Salvage contract was based on the knowledge of the barges condition according to divers reports. The Contract had inter alia following specific clauses:

> *"If the work proves to be more extensive than described in the divers report…the parties shall in good faith negotiate the terms and costs of such extra work to be performed."*

And

> *"the Salvor shall not be liable to compensate the Owners for any damage caused by the Salvor to the barge or other equipment unless caused intentionally or by gross negligence with knowledge that such damage will probably result."*

The Barge was refloated, but the work proved to be much more extensive than what the first divers reports anticipated. At that point, the parties were not able to "in good faith negotiate the terms and costs of such extra work to be performed" as stated in the contract. Additionally the owners claimed that the Salvor had negligently used wrong and unsuitable methods and caused more damage to the barge when they used explosives to remove parts of the rock to refloat her. Due to an unrevealed part of the rock, which had penetrated deep in the barges compartments, the work to be performed was much more extensive than anticipated before signing the contract. Costs for materials and needed work heavily exceeded the original amounts in the salvage contract and the parties were not able to agree in good faith on the outcome of the extra costs and compensation for the claimed damage to the barge.

Unreasonableness arguments were raised by both parties among many others when the case entered the Maritime Court. After extensive written preparations the parties were able to agree on a financial settlement of the case before the Court hearings started.

3 Reasonableness in Scandinavian maritime law, contract law and as a legal principle

3.1 Introduction

The two cases illustrate the existing problems with salvage operations when national law is applied to the case. These problems do not arise when using Lloyds Open Form.

However, the Owners or insurance companies have a tendency to avoid Lloyds Open form in situations where they can negotiate another solution. One reason is that although English legal practice around LOF can offer certain predictability in the interpretation, the costs together with the legal costs for arbitration in London are often unpredictably high. The small claims procedure has not solved the problem.

The severe competition for salvage services has increased the Owners possibilities to avoid using the LOF contract. This tendency leads to increased use of national laws in contracts instead of the English law, and the revival of the rules in national legislation which were originally created for somewhat different situations.

3.2 Scandinavian Maritime Codes and the § 443,3

3.2.1 The § 443,3 in general

The following clause is common to all Scandinavian countries and can be found in their respective Maritime codes in Chapter 16 of the Code:

> "A salvage agreement can wholly or partly be set aside or modified if the agreement was concluded under undue influence or under the influence of danger, and it would be unreasonable to rely on it. An agreement concerning the amount of a salvage reward or special compensation can be set aside or modified if the claim is not reasonably proportionate to the salvage work that has been performed."

The Scandinavian unity of Maritime legislation goes back to the 19th century and the preparation of Maritime Codes in each country was connected through co-operation when legislation was prepared.[4] In the 1800s and in the beginning of 1900s, it was common to negotiate a share of salved property or specific sum to be remunerated for the salvage services, which still were not performed - or even had not been started.

According to the idea of the § 443,3[5] the court would then decide if the services, which were rendered, were not worth the sum, or if the share of the value, that was decided before the work was started, was considered unreasonable or not. In 1910 when Brussels' Salvage convention was made, the basis of the apportionment principle was changed. The rules were altered to better take into account the real value of the services. These rules, when incorporated into national legislation, gave the courts much better tools to decide whether the salvage reward was reasonable or unreasonable in relation to the real services which were made by the salvor.

During the last half of the last century very little case law can be found where the § 443,3 has been applied. The main reason for this is the wide use of LOF in salvage situations also in Scandinavia.

During the last 15 years the discussion of its application has started again when LOF has been set aside and different varieties of other standard contracts and self made salvage contracts based on national Maritime Codes has increased again. The reason why we still do not have case law on the subject is clear. The Owners still rely on LOF when the case is a clear salvage situation with very high financial values in question with highly unpredictable risk that needs to be covered by the LOF, as well as and the practice and certainty guaranteed by its provisions and highly specialized arbitration. Also Salvor´s are in these cases in a situation where they usually need not to negotiate if LOF will be used or not.

Another reason for lacking court decisions is the legal cost and slow

[4] Although Finland was part of Russia from 1809 to 1917 and was not able to participate, the legislation in this respect followed the Swedish tradition and after Finland became independent the work which was done during the time under Russian governance was soon codified also in Finland.

[5] Different numbering at that time, but practically the same rule of law.

legal procedure in courts in maritime matters. When there is no arbitration clause, the cases will be handled by national Maritime Courts, which often lack the experience to assess the reward. This can lead to especially slow procedure and parties during this procedure often find each other's again and reach a commercially reasonable solution to avoid further litigation. This also happened in the two cases described earlier.

The LOF is often avoided and the use of the paragraph 443 of the Maritime Code comes in question when the cases are "smaller" and seem to be more predictable for both the owners and Salvor´s. I have underlined the words seem to be as that is usually the fact which afterwards has proved to be untrue. All salvage situations are individual and new difficulties often arise during the salvage work. In these cases, if the contract between the parties does not take into account specifically enough the new possible difficulties which the salvor can encounter before the work has been concluded, it is often difficult to negotiate a solution in good faith and in common understanding.

3.2.2 "…under undue influence or under the influence of danger and it would be unreasonable to to rely on it"

The first sentence of § 443,3 has historically been targeted to situations where the salvor is in better situation to negotiate the terms of the contract with the owner or the owners master and uses this position to gain better result than he would otherwise have when signing the contract. The degree of danger is often connected to the time which can be used for negotiating the contract before the situation becomes worse, the danger grows or new dangers arise.[6] In most salvage cases time is of the essence.

In these situations the decisions are often made without a perfect salvage plan as the amount of information required for planning the work to be performed is limited. The need to get the preparations started and work going is often imminent. At this century, I find the *"under the influence of danger"* -wording highly more important than the *"under undue influence"* criteria.

[6] for example weather changes, sea will be frozen etc.

Danger is almost always present – otherwise the situation would not usually be a salvage situation[7]. Depending on the circumstances itmay be claimed that free content of the contract was affected by imminent danger, and first it therefore can be adjusted by the court *"…if it would be unreasonable to rely on it"* as has been stated in § 443,3 of Norwegian Maritime Code.

As stated in the first part of the same sentence: *"A salvage agreement can wholly or partly be set aside or modified if the agreement was concluded…"*

The Court can therefore modify the contract or even set it aside and then use the Maritime Code provisions to determine the salvage reward basing its decisions on the provisions in § 446 which are the same as in London salvage convention and LOF. This is clearly stated in 443,3 second sentence:

> "An agreement concerning the amount of a salvage reward or special compensation can be set aside or modified if the claim is not reasonably proportionate to the salvage work that has been performed."

Even though the rule has originally been formed to protect the Owners from the "greedy" salvors who misuse their position and try to press the owners to sign unreasonable agreements when the vessel is in danger, the provision in law should be considered to work both ways. Also in a situation when the salvor´s situation is considered unreasonable due to the changes in degree of danger and the scope of work to be performed.

3.2.3 Salvor´s right to rely on reasonable solution

LOF has usually guaranteed the salvor a fair and reasonable compensation for the work done. When LOF is nowadays more often not concluded,

[7] Even though in Section 441 Norwegian maritime code Definitions it is stated that: For the purpose of this Chapter, the following words have the following meanings: a) salvage; any act the purpose of which is to render assistance to a ship or other object which has been wrecked or is in danger in any waters

and the bargaining power has moved more and more to the owners benefit, as the salvor´s are forced to compete against each other, the unreasonableness arguments are more often raised by the salvors. With modern communication systems offers for salvage can be negotiated fast between the owners and possible salvor´s, who can in turn negotiate fast with possible subcontractors. The situation concerning contracting is very different than in those days when the § 443,3 was originally enacted.

Competition in the salvage industry benefits all only if law can be applied simultaneously in a way which supports the equality of both the owners and the salvor´s in the new situation. Salvor´s should also be aware that when salvage is successful, they will be able to gain a proportion of the salved value. Entering into an agreement before the operations costs can be estimated in full should not force them to take unreasonable financial risks. A concluded contract should also guarantee that they are not working on "no cure – no pay" basis. Therefore a reasonable outcome should be achieved also by using § 443,3 in benefit to the salvor´s - at least when the outcome of the salvage operation is clearly unjustified or unreasonable in relation to the contract which was concluded before the work was started.

A clear precedent in Scandinavia on this issue would be useful to make the owners understand the situation. It would also help the parties in achieving a reasonable result together and lengthy legal process with high costs would then be avoided. When we currently do not have a clear precedent, the situation is unclear, and reaching a reasonable solution takes too much time and money.

3.3 Contract law in Scandinavia

Contract acts in Scandinavian countries also have similar provisions.

Finnish Contracts Act Section 36 states:

> *Section 36 (956/1982)*
>
> *(1) If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining*

> *what is unfair, regardshall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors.*
>
> *(2) If a term referred to in paragraph (1) is such that it would be unfair to enforce the rest of the contract after the adjustment of the term, the rest of the contract may also be adjusted or declared terminated.*

In legal practice this rule has had quite limited use in commercial relation between companies. The § 443,3 of the Maritime Code has actually been a model when it was created. Therefore the special provision in Maritime Code should rather be applied to salvage contracts. However, it is not possible to fully exclude its application to situations when other contract forms are used in order to release a vessel from distress or assist her. For a lawyer working with a practical case, this could be taken up together with § 443,3 arguments in a situation where parts of the contract are based on other standards forms than LOF and some parts of the work is performed on another basis. The rule in the Contracts Act could also be a usable argument when the word ”salvage” is removed or excluded from the contracts.

Paragraph 443,3 of the Maritime Code mentions both the salvage agreement and SCOPIC as a contract which can be set aside or modified. Therefore one solution would be to argue on the basis of § 443,3 in relation to SCOPIC and Contracts Act § 36 in situations where SCOPIC is used as basis for expenses together with some other standard agreements. It would then be up to the court to decide if the application of SCOPIC as the basis of expenses to be remunerated on the basis of other standard contracts makes the contract entity a “Salvage Agreement” described in § 443,3.

4 Conclusions

The lack of clear precedents on the issues discussed above will not be solved in the near future. In Finland where the Courts work rather slowly in maritime matters, it takes sometimes even 15 year before a maritime case is finally decided by the Supreme Court after the first two instances. Until we receive the first precedent on this subject from Finnish or other Scandinavian supreme courts, we can only stick to legal literature and wish that parties understand by reading the legal opinions of the University legal scholars that the reasonable solution can be guaranteed by interpreting the § 443,3 in both ways. This interpretation benefits the salvors and not just the owners.

Abandonment following a piracy attack – breach or no breach of the employment contract?

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Content

Abstract

Abandonment of seafarer is a topic that is currently been extensively debated in the maritime circles. The advent of the Maritime Labour Convention in 2006 (not yet in force) attempting to regulate abandonment cases, followed by IMO proclamation of 2010 as the year of the seafarers, justified by the importance of these professionals to the maritime industry as well as the daily hazards, such as abandonment, faced by them raised special attention to the subject.

The existing definitions for abandonment of seafarers provided by IMO Resolution A.930(22) "Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers" and for the Appendix I Proposal for the text of an amendment to the Maritime Labour Convention 2006 are quite badly drafted and limiting but nevertheless able to give an idea about what is considered to be abandonment of seafarer. The reading of these leads towards the assumption that the current view is that abandonment will happen when the employment contract is breached by the shipowner, causing its termination, being the seafarer constructively dismissed and entitled to sue for damages. However, this may not always be the case.

Employment contracts are the cornerstone of any employment relationship, since this is partially governed by a body of statute law and partially based on the written terms and conditions given by employers to their employees.[1] Nevertheless, situations that are not provided for in the contract might occur, raising questions about responsibilities and obligations caused by this. For instance, the seafarers' employment contract depending on will not have a clause dealing with a possible

[1] "This mariners' contract, thus constituted, was simple and intelligible, and as such well suited to the humble capacities and attainments of one set of the contracting parties; it notified and recorded the two important particulars, which could only be known by communication and agreement. Other reciprocal duties of the two parties to each other, did not depend on contract, but on the general law, which notified and enforced them." Lord Stowell in *the Minerva (1825) 1 Hagg. Ad,. 347 at p.358; 166 ER 123*

kidnap of the seafarers by pirates. Some might argue that nowadays piracy is an event that might be foreseen depending on the route taken by the ship. Hence why most shipowners include in the charterparty extra costs relating to security and piracy prevention depending on the charter choice of route. However, a possible kidnap/retention of the crew can still be considered as an unforeseen event and therefore not provided for. Furthermore, shipowners are not responsible for the prevention of piracy attacks; this is a responsibility that falls under international bodies and governments. Thus, the questions are:

- Who is responsible for the seafarers' repatriation after the ransom has been paid?
- Is the seafarer entitled to wages for the months he was held captive? Who is responsible for the possible seafarers' funeral expenses?
- Is the seafarer entitled of damages?

There have been cases where the ransom was paid and the ship released and the seafarers left in the nearest port without money, accommodation, food and waiting for repatriation, satisfying all the requirements prescribed by IMO to be considered abandoned. However, can this in fact be considered abandonment.

This article will try to answer all the above questions by analyzing the seafarers' employment contract, the ship owners' implied duty towards the seafarers, the doctrine of frustration and Force Majeure and, as it could not be different, the current regulations and practice regarding piracy attacks.

Introduction

The existing definitions for abandonment of seafarers provided by IMO Resolution A.930(22) "Guidelines on Provision of Financial Security in Cases of Abandonment of Seafarers" and for the Appendix I Proposal for the text of an amendment to the Maritime Labour Convention 2006

are, despite of being limiting and a bit confusing (in this writer's opinion), able to give an idea about what its drafters intended to be considered abandonment of seafarer. Thus, the reading of these leads towards the assumption that abandonment will happen when the employment contract is breached by the shipowner, causing its termination, being the seafarer constructively dismissed and entitled to sue for damages. However, this may not always be the case.

As is well known, employment contracts are the cornerstone of any employment relationship, since this is partially governed by a body of statute law and partially based on the written terms and conditions given by employers to their employees. As well stated by Lord Stowell in *the Minerva2:* "This mariners' contract, thus constituted, was simple and intelligible, and as such well suited to the humble capacities and attainments of one set of the contracting parties; it notified and recorded the two important particulars, which could only be known by communication and agreement. Other reciprocal duties of the two parties to each other, did not depend on contract, but on the general law, which notified and enforced them."

Seafarers' employment contracts do not have a standard form. Its form and content is circumscribed by the need to comply with any applicable national legislation or for Member States to comply with ILO C22. Therefore, contracts articles may vary but most importantly different rights may be applicable under different laws. Even once the Maritime Labour Convention comes into force, it only be applicable to States that have ratified it, therefore consideration will still need to be taken to the applicable legislation to the employment contract.

Furthermore, situations that are not provided for in the seafarer's contract might occur, raising questions about responsibilities and obligations caused by this. For instance, while some seafarer's contract provide for cases of a possible pirate attack, others are completely silent about it. In the silent cases the answer for the questions arising out of a possible attack (Who is responsible for the seafarers' repatriation after the ransom has been paid? Is the seafarer entitled to wages for the months

[2] *the Minerva (1825) 1 Hagg. Ad,. 347 at p.358; 166 ER 123*

he was held captive? Who is responsible for the possible seafarers' funeral expenses? Is the seafarer entitled of damages?) will have to be found on the applicable law to the contract.

This paper will analyze the ship owner's contractual obligations with the crew when this has suffered a pirate attack and consequently try to answer some of the questions that such event raise in terms of contractual responsibilities and obligations.

This paper will mainly focus on the common law/ UK perspective of the ship owner responsibilities and obligations arising out of a seafarer's employment contract. Nevertheless, it will also try to give the reader the Civil Law perspective of it, however less extensively.

General overview on seafarers' employment contracts

In the United Kingdom an Act was passed at the beginning of the Reign of George II 'For the better Regulation and Government of Seamen in the Merchants Service, marking the beginning of the modern regulation of the employment of seamen. Nevertheless, the purpose behind The Act remained identical to that behind the ancient codes of Oleron, Wisby and the Hanseatic League. It basically prescribed penalties for desertion and absence without leave, provisions on the form of the contract were introduced not to further the mariner's case against the master for wages (even though provisions were also made in this respect) but to ensure the captivity of the labour force for the duration of the commercial venture. [3]

When reading the Act's Preamble one can clearly perceived that contrary to what most legislations/ conventions apparently try to accomplish today, the Act objective was to ensure the ship owners rights,

[3] Kitchen, Jonathan S., The employment of merchant seamen, Croom Helm, (London:1980), page 312

basically providing only for cases of fair dismissal.[4]

The source of the 'articles' system as the seafarer's contract came to be known, is thus bound up with both the system of payment of wages and the various disciplinary provisions which have always cast employment at sea into a category of its own.[5]

The 1723 Act was only introduced for a limited period of time. It was continued in 1735 and 1749 and finally made 'perpetual in 1762 when the provisions were extended to the colonies of America. In 1791 the provisions were extended to ships of over 100 tons engaged in the coasting trade, with the declaration that they have been found to be highly beneficial to the trade and navigation of the country. However this does not seem to be wholly truthful since for a mere six years later an Act was passed to prevent the desertion of seamen from ships trading to the West Indies. Apparently seafarers were deserting for higher wages and the Act introduced a limitation on the wages payable by the shipowner accompanied by penalties. The Act also introduced the crew list – a list of all the persons signed on board, and those who deserted or died, to be delivered to the controller of customs on return – and the certificate of discharge. The purpose of these lists were clear since they were available to all ships' master to consultancy, being this able to distinguish between the 'problematic and non problematic' seafarers. Besides the production of a certificate of discharge relieved the seafarer from the penalties for hiring himself out at inflated wages after desertion. Furthermore and perhaps more important, it was introduced by the Act a specific form for the agreement to be signed by the master and crew, known as articles.[6]

At the international level on 1926 ILO passed the convention n. 22 regarding articles of agreement. The convention calls for the signing of articles by both parties, with facilities for the seafarer to examine the

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4 *Ibid*, page 313

5 *Ibid*, page 312/315

6 See Chanel j in Harrison v Dodds (1914) - ' For the wages contracted for in the articles the seaman is bound to give his full services, and there is no such thing recognized as overtime or payment in respect of overtime merely because the seamen is called to work longer hours than are expected by the parties when they entered the contract.

content, and national law to make provision to ensure the contents are understood. Members States form of employment contracts are bound to comply with the convention and any applicable legislation. Therefore, the convention can be perceived as a reasonable basis for identifying typical terms. Nevertheless, freedom of contract still exists insofar as the details of the contract, as for instance the duration and scope of the voyage and wages rates, need to be spelled out.[7] Furthermore, the Convention sets out the basic information to be contained in the articles of agreement, and while some of them are specific to the type of contract, others depend on the national law.

There are innumerous forms of employment contracts available, not yet an uniform form has been adopted. Nevertheless, they tend to fall into at least three main categories. Firstly, there are the forms prescribed by legislation or in respect of whose production, governments have taken an active role as for instance: the POEA Contract providing for standard terms and conditions governing the employment of Filipinos Seafarers and the UK Maritime and Coastal guard Agency Crew Agreement Form ALC (British Shipping Federation).

Secondly, there are the forms produced by trade unions or shipping employers' associations. These may be individual employment contracts, or of collective agreements operating in particular States or Trades. Examples of these forms of contracts are: ITF Standard Collective Agreement and ITF Uniform TCC Agreement.

Finally, there are the private forms produced by individual shipping companies and shipping agencies. It is difficult to systemize this category since usually these contracts are considered private and confidential.[8]

The only form of contract that this writer could personally find providing for cases of piracy was ITF IBF collective Agreement. The Agreement provides that companies operating vessels or installations in "High Risk Areas" (areas previously established by IBF considering current international reports and statistics) should have sufficient security

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7 Fitizpatrick Anderson, Deirdre and Michael, *Seafarers' Rights* (New York: 2005, Oxford University Press) page 178

8 *Ibid*, page 178/179

arrangements to safeguard their personnel, given the nature of the risk, and should provide adequate protection, advice and compensations to the crews. Furthermore, it provides that the seafarer is entitle to receive a bonus equal to 100% of his basic wages plus receive double compensation in case of death or injury, both applicable during the entire period of transit through the High Risk Area, regardless of whether the ship is inside or outside the International Recommended Transit Corridor.[9]

Piracy

This paper is not about piracy but about the contractual responsibilities and obligations arising out of a possible pirate attack. Nevertheless, a small introduction on the subject might be proven relevant.

Piracy is not something new, in fact is almost as old as navigation itself. Indeed, the concept of piracy started to emerge as early as 800-900 BC.[10] Law of piracy started developing from the Rodhian Code,[11] which was also the first clear regulation regarding seafarers, being chapters 5 and 7 exclusively dedicated to them. Piracy laws developed from the Code through Roman Law and Post Westphalia Law, both British and American and finally being regulated by UNCLOS, as still is Today.[12] The 1982 Convention provides the framework for the repression of piracy under international law, particularly in its articles 100 to 107 and 110. As reaf-

[9] See: http://www.itfseafarers.org/coping-with-piracy.cfm and http://www.seafarers-rights.org/2012/03/ibf-declares-piracy-high-risk-area-in-w-african-waters/

[10] De Souza P. (1999) Piracy in the Craceo Roman World, Cambridge CUP.

[11] The *Rhodian Sea Code* is the earliest codification of written maritime customs. Even though it was a Byzantine creation, probably written in the 7th and 8th Century, it reflects the customary law of the previous centuries. The *Rhodian Sea Code* covers all aspects of commercial shipping. Seafarers are specifically covered by chapters 5 to 7, which establish their liability for fights and the responsibility of the ship owner for seafarers' personal injuries. See L Pleionis, The Influence of the Rodhian Sea Law to the other maritime Codes , Extrait de la Revue Hellenique de droit international, 1967, page 173

[12] Widd, Peter G. (2008) *The seafarer, piracy and the law: a human rights approach*. PhD thesis, University of Greenwich, page 17

firmed innumerous times by the Security Council "(…) international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ('The Convention'), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities".[13]

When piracy emerged, the concept of state sovereignty did not yet existed hence states were not that powerful and navy was inexistent. Thus, the safeguarding of the sea was left to merchant and ship owners. However, this is no longer the reality. Article 100 of UNCLOS provides that "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." Furthermore, the General Assembly has also repeatedly encouraged States to cooperate to address piracy and armed robbery at sea in its resolutions on oceans and the law of the sea. For instance by resolution 64/71 of 4 December 2009, the General Assembly recognized "the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy". Thus, if initially the combat of piracy was left in charge of ship owners, now it is up to the States to do something about it. For instance, an Internationally Recommended Transit Corridor was established (IRTC), The corridor is located in a High Risk Piracy area, more specifically in the Gulf of Aden and it is under constantly surveillance of naval ships.[14]

Nevertheless, ship owners and seafarers are still expected to comply with a few safety measures. IMO action plan to contain piracy aims among other things to "promote compliancy with industry best management practices and the recommended preventive, evasive and defensive measures ships should follow." Indeed, even an Industry Best Management Practices booklet was elaborated. Nevertheless, the practices containing in the booklet are only guidelines and therefore is up to ship owner to follow it or not, as it is also up to ship owner to decide to transit in the

[13] Security Council resolution 1897 (2009), adopted on 30 November 2009).

[14] See: http://www.un.org/News/briefings/docs/2010/100128_Piracy.doc.htm and http://www.shipping.nato.int/operations/OS/Pages/piracyupdate.aspx

IRTC when the ship's route includes the Gulf of Aden.

Therefore, it is not the ship owner's obligation to combat piracy, he is strongly recommended to follow some international safety measure to avoid a possible attack but no international liability will arise in the case he choses not to comply with the recommendations and guidelines. Nevertheless, the ship owner has to comply with his contractual obligations towards the seafarers in case of a possible attack and this is what will be analyzed next.

Frustration of the employment Contract

According to English law "a contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders physically or commercially impossible to fulfill the contract or transforms the obligation to perform it into a radically different obligation from that undertaken at the moment of the entry into the contract."[15]. No doubt exists that a possible piracy attack followed by the kidnap of the ship or the crew will render the employment contract impossible to be performed, the ship will most likely never reach is intended destination, or of it does not timely and the cargo will most definitely not be delivered.

This so called doctrine of frustration is applicable to employment contracts as well as any other contracts, which from the public policy perspective makes perfect sense since the termination through frustrations does not constitute a dismissal for the purposes of the employment protection legislation.[16]

In France, as followed by most civil countries, there is the concept of force majeure, which in French literally means "major force". It may be noticed that in French law, the concept has the force of law, have being

[15] *Chitty on Contracts, Sweet & Maxwell,* 13th edition, (UK:2008) at 23-001.

[16] Brodie, Douglas, Performance Issues and Frustration of contract, Employment law Bulletin, 2006, accessible by westlaw

codified and it thus means that essentially both contractual parties are not liable or have an obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, or an event described by the legal term act of God (such as hurricane, flooding, earthquake, volcanic eruption, etc.), prevents one or both of them from fulfilling their obligations under the contract.[17] Some may allege that a pirate attack can be classified as a force majeure event, thus preventing the parties of any liability. However, this can be seriously questioned since most ship owners are aware of piracy risk zones and routes. Indeed, ship owners often protect themselves including in the charterparties specially provisions dealing with cases of piracy once the route to be taken is decided, hence making the piracy attack a foreseeable event. Also, ITF IBF[18] collective agreement make special provisions for " High Risk Areas". These areas were delimited by IBF and it basically comprises the entire Gulf of Aden, extending 400 miles east of Somalia, and covers wider part of the West Indian Ocean. Nevertheless, the fact that the ITF IBF agreement clearly delimitates the "High Risk Areas" a pirate attack outside these areas, would not be provide for in the contract and could be perceived as a unforeseeable event.[19]

The frustration test was first formulated by the House of Lords in *Davis Contractors Ltd v Fareham U.D.C* Lord Radcliffe stated that:

> "Frustration occurs whenever the law recognises that without default of either party a contractual **obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.** *Non haec in*

[17] *SA Saint-Louis Union Académiev v Mme Bonjour* Bull. Civ. 1998.I, no.53, p.34; *Delphin et Société des Docks de Plombières v Lugagne GP* 1926. 1. 68; *Porel v Bataille* D. 1910. 2. 292

[18] The International Bargaining Forum (IBF), consists of representatives of the International Transport Workers' Federation (ITF, representing the seafarers) and the Joint Negotiating Group (JNG, representing employers)

[19] See: http://www.itfseafarers.org/files/seealsodocs/22363/IBF%20High%20Risk%20Area%20–%2025%20March%202011.pdf and http://www.itfseafarers.org/coping-with-piracy.cfm

> *foedera veni*. It was not this that I promised to do…. that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. **There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for**"[20]

In cases of employment contracts the death of either of the parties and permanent illness of the employee are examples of when the doctrine applies. Nevertheless, other situations may frustrate a contract of employment. [21] Indeed, one can claim, that a kidnaped seafarer can hardly be said to be fulfilling his employment contract. Furthermore, there are some suggestions in the Court of Appeal that a contract might be considered terminated under the doctrine of frustration when the employee is sentenced to a substantial term of imprisonment. [22]

Taking into consideration general contractual principals frustrations cannot occur where the parties have anticipated the event that might otherwise give rise to frustration. Therefore, a contract cannot be considered frustrated if it contains any provision dealing or mentioning the event that would otherwise give reason for the frustration. Nevertheless, this will only be the case where the courts do not adopt a purposive interpretation approach recognizing that anything other than a restrictive approach to frustration will be detrimental to employment protection.[23] Thus, in the case *Four Seasons Healthcare Ltd V Maughan*, the Court of appeal decided the employment contract could not be considered frustrated by the conviction of the employee due to physical abuses committed by him at his work place since the contract contained expressed provisions referring to physical abuses towards the residents of the Clinique. [24] In

[20] *Contractors Ltd v Fareham U.D.C [1956] A.C. 696*

[21] *Chitty on Contracts, Sweet & Maxwell,* 13th edition, (UK:2008) at 39-168

[22] *Norris V Southampton City Council [1982] I.C.R. 177*

[23] Brodie, Douglas, Performance Issues and Frustration of contract, Employment law Bulletin, 2006, accessible by westlaw

[24] *Four Seasons Healthcare Limited v MrH Maughan, (2004) UKEAT/0274/04/CK*

the event of a piracy attack, a restrictive approach towards the seafarers' employment contract might not be the most favored one. Indeed, the seafarers' employment contract might not contain a clause providing for a piracy attack but the chaterparty may, hence proving that the ship owner anticipated a possible occurrence of the event.

Nevertheless, Courts appear to consider the chaterparty and the employment contract to be completely unrelated contracts even though most often it is the case that the seafarer is hired just to complete that particular voyage stipulated in the charterparty. Thus, accordingly to this court's approach, the frustration of one of the contracts will not necessarily represent the frustration of the other. In the *Constantine SS Line* case the court decided that the contract that had been frustrated was the one between the owner and the charterers and not the contract between the owners and the crew, stating that the failure of the enterprise does not discharge the seafarer who has all their rights under maritime law.[25] This approach does not seem to be the most correct one to all cases. This is not to say that the ship owner does not have to comply with his responsibility to repatriate the seafarer and pay his/hers back wages since these are always due at the end of the employment contract[26] however without a question the frustration of the charterparty can indeed prevent the employment contract to be performed at all or at the minimum rendering its performance something radically different from what the parties contemplated when they entered into it, since either the voyage will be cancelled or the ship owner will engage in another charterparty, changing the route and thus changing the seafarer's employment contract. [27] Nevertheless, this approach seems to be the most correct one for the case of piracy attack. Even though Courts still believe that piracy is only a hazard of the sea, as any other hazard it cannot be precisely predicted, it is very unlikely that a pirate attack happening in one of the already

[25] *Constantine SS Line Case [1941] 2 All ER 165*

[26] As Hanna J stated in Archilles Herman and others v The owners and Master of the SS Vicia [1942] 1 IR 305: " (…) this is an accrued right vested in the seamen under their contracts before the alleged frustration and it is well established that frustration; does not relieve the owners from liability in respect of such accrued rights.

[27] See: *Four Seasons Healthcare Limited v MrH Maughan, (2004) UKEAT/0274/04/CK*

established High Risk areas will be able to be classified as an unforeseeable event. In this case the employment contract can hardly be considered frustrated, even though the most likely will be considered frustrated. In these cases, even though the seafarer is unable to perform his duties, he should still be considered an employee nevertheless.

Duties arising out of the seafarers' employment contract

Ship owners might not be liable for a pirate attack in essence, since it is not in theory their responsibility to prevent piracy. However, a ship owner it is responsible to comply with his duties arising out of the employment contract, as for instance the healthy and safety of his employees in the work place and in the case of the seafarers, their work place is the ship.

Regulation 4.2 of the MLC[28] provides for the ship owner's liability. Standard A4.2 (1) states that "Each Member State shall adopt laws and regulations requiring that shipowners of ships that fly its flags are responsible for health protection and medical care of all seafarers working on board of the ships (…)". Thus, it makes clear that the ship owner is liable for any case of sickness or death occurring during the performance of the employment contract.

Additionally, regulation 4.3 tries to "ensure that seafarer's work environment on board ships promotes occupational safety and health", it is suppose to regulate Health and Safety protection and accident prevention. However, Regulation 4.3, leaves up to the states to promulgate laws and guidelines regulating health and safety on board ship. This does not seem to be the most efficient approach since most states already have laws regulating the subject. Thus, it does not seem that much will be change in this respect. Nevertheless, analyzing the already existent re-

[28] The MLC at the time this paper was written was not yet in force. Thirty-one countries had signed it, but only one, Gabon, had ratified it. See: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO::P11300_INSTRUMENT_ID:312331

gulation it is possible to observe that the ship owner is responsible to provide the seafarer with a safe work place, especially since the duty to take reasonable care of the employee's safety is an implied term of the employment contract.

Indeed, a distinctive consequence of the employment relationship is the employer extensive duty (both at common Law and By Statute) to take measures to protect the health, safety and welfare of his employees, and to provide safe equipment and premises, and a safe system of working. [29] In the UK, according to the Health and Safety at Work Act 1974 (HSWA) Section 2 (1) it is an offence (both for individual and corporations) of failing to ensure, so far as reasonably practicable, the safety and welfare at work of employees. Thus, a Court could easily conclude that in the case of a foreseeable pirate attack the ship owner did not take the appropriate measures to guarantee the safety and welfare of the seafarer. Thus, a ship that choses to not navigate on the ITRC or even that choses not to follow the Best Management Practices recommendation can be said to have purposely failed to ensure the safety of the seafarers, and the ship owner can be easily accused of negligence hence being liable for damages.

Furthermore, the ship owner has the implied duty of trust and confidence and accordingly the trust and confidence that a seafarer has on the ship owner must be preserved.[30] Accordingly to Lord Steyn in Malik V Bank if Credit and Commerce International SA: "The major importance of the implied duty of trust and confidence lies in its impact on the obligations of the employer… and the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he see fit and the employee's interest in not being unfairly and improperly exploited."[31] Thus, a seafarer might claim that the referred duty was breached once the ship owner did not informed him that the ship was

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[29] See: *Chitty on Contracts, Sweet & Maxwell,* 13th edition, (UK:2008) at 39- 006

[30] *Ibid,* at 39- 143

[31] Malik V Bank of Credit and Commerce International SA *(In Liquidation)* [1997] I.R.L.R. 462 HL at 55

going to be sailing on High Risk Areas.

Moreover, the employment contract imposes a duty on the employer to indemnify or reimburse the employee against all expenses, losses and liabilities incurred by the latter in the execution of the former's instructions, or within the authority granted to him by the employer or during the reasonable performance of his employment.[32] Thus, this implied duty of the employment contract leaves no doubt that the ship owner is liable for any damage suffered by the seafarer as a consequence of a piracy attack.

Provisions on seafarer's repatriation

Repatriation is an important aspect of an abandonment of seafarer. When left in a foreigner country, a seafarer is left out of his comfort zone. A seafarer will most likely feel more comfortable to search for assistance in his/ hers home country since there is no language barrier and everything is familiar. Also, as every human been, probably after suffering a distress caused by a piracy attack, a seafarer will want to be surrounded by his/hers love ones or at least in a familiar environment where he feels safe. Thus, this paper will now examine the current legislation regarding repatriation.

The international position about repatriation seems to be a uniform one, placing the responsibility on the ship owner to cover the seafarers' repatriation at the termination of his employment contract (except in cases of fair termination), or in case o shipwreck. Thus, it is the ship owner responsibility to repatriate the seafarer after the event of a pirate attack. ILO has two conventions dealing exclusively with the subject, Convention 23 1926 and 166 1987.

The ILO C23 1926 was ratified by forty-six countries, including the United Kingdom, Ukraine, Panama, China, Russia and Philippines among others, being fully in force. The Convention provides in its article

[32] See: *Chitty on Contracts, Sweet & Maxwell,* 13th edition, (UK:2008) at 39- 109

3 (1) that: "Any seaman who is landed during the term of his engagement or on its expiration shall be entitled to be taken back to his own country, or to the port at which he was engaged, or to the port at which the voyage commenced, as shall be determined by national law, which shall contain the provisions necessary for dealing with the matter, including provisions to determine who shall bear the charge of repatriation". Nevertheless, article 4 of the convention states that the repatriation shall not be a charge on the seafarer left behind in situations such: injury sustained in the service of the vessel, shipwreck, illness not due to his own willful act or default, or discharge for any cause for which he cannot be held responsible. The list seems to be an exhaustive one. Therefore it would not be wrong to assume that in cases when the seafarer is fairly dismissed the ship owner has no obligation to pay the seafarers' repatriation expenses accordingly to the convention since the convention is clear that the ship owner is responsible for the repatriation only in cases where the termination of the contract was not caused by the seafarer.[33]

Nevertheless, some member states of the convention opted for a more broad approach such the UK[34]. In the UK the Merchant Shipping Repatriation Regulations 1979 article 2(a) provides that the ship owner is obliged to repatriate the seafarer "as soon as the seamen is available to return", which makes fair to say that it does not matter what caused the contract to terminate, the ship owner carries in any case repatriation obligation. The Regulation does provide in its article 3 for situations that would cease the ship owner' obligation to repatriated the seafarer. However, these situations are only able possible to happen after the termination of the contract and the repatriations arrangements made or if the seafarer gives up the right in writing.[35]

The Philippines in the other hand opted to release the ship owner

[33] Accordingly to article 2 (a) of ILO C23, the master is not to be considered a seaman definition different from the one given by the MLC 2006, which in its article II, 1 (b) defines a seafarer as "any person who is employed or engaged or works in any capacity on board a seagoing ship".

[34] Please note that the writer did not analyze all the Member States of the Convention legislations.

[35] Merchant Shipping Repatriation Regulations 1979 Article 3(c)

from his obligation to repatriate the seafarer in case the termination of contract was caused due to a fair dismissal. Accordingly, section 19 (E) of the Standard terms and Conditions governing the employment of Filipino Seafarers on Board of ocean going vessels, the ship owner is entitle to deducted from the seafarer' wages or other earnings the costs of the repatriation when he/she was fairly dismissed.

Panama took the same approach of the Philippines regarding repatriation by providing in Article 37 (b) of the Law Decree 8/98 that the ship owner is only responsible for the repatriation expensed in case the seafarer been dismissed without a just caused, which means to say in the cases on an unfair or wrongful dismissal.

Russia was once again very specific on the cases where the ship owner was responsible for the seafarers' repatriation expenses. Accordingly, the Merchant Shipping Code Article 58 s. 1 provides that seafarers are entitle of repatriation when the employment contract is terminated upon initiative of the ship owner or a crew member in case of expire of the term specified in the notice delivered in conformity with the contract; shipwreck, illness or injury requiring medical treatment outside the ship; ship owners inability to perform his legal responsibilities towards the seafarer as provided by law or by other acts of the Russian Federation or by the employment contract itself due to bankruptcy, sale of the ship or change of flag; allocation of the vessel to a military zone or zone of epidemiological hazard without crew members' consent; or expiry of the maximum term of employment of a crew member established by the employment agreement. Since the list seems to be an exhaustive one is fair to say that the ship owner is not responsible for the seafarers repatriation in case of fair dismissal.

China and Ukraine[36] do not have any domestic law provision regarding the repatriation of seafarers. Therefore, being assumable that once again a ship owner will not be responsible for the seafarers' repatriation in case of a fair dismissal. Furthermore, a typical supplemental clause in a seafarer' employment contract in China is that if he/she has to be re-

[36] Bokareva, Olena and other, Transport Law in Ukraine, Kluwer Law International (USA: 2011) page 24

patriated twice during the course of his employment for his/hers own reasons, the ship owner is entitle to terminate the contract.[37]

The ILO Convention 166 from 1986 dealing with seafarers' repatriation was only ratified by thirteen countries, including Brazil and Turkey (none of the above countries ratified the convention). The convention provides in its Article 2(1) the situations entitling a seafarer to be repatriated. They are as follows:

"(a) if an engagement for a specific period or for a specific voyage expires abroad;

(b) upon the expiry of the period of notice given in accordance with the provisions of the articles of agreement or the seafarer's contract of employment;

(c) in the event of illness or injury or other medical condition which requires his or her repatriation when found medically fit to travel;

(d) in the event of shipwreck;

(e) in the event of the shipowner not being able to continue to fulfil his or her legal or contractual obligations as an employer of the seafarer by reason of bankruptcy, sale of ship, change of ship's registration or any other similar reason;

(f) in the event of a ship being bound for a war zone, as defined by national laws or regulations or collective agreements, to which the seafarer does not consent to go;

(g) in the event of termination or interruption of employment in accordance with an industrial award or collective agreement, or termination of employment for any other similar reason."

The list is clearly an exhaustive one. Once again it seems that the drafter abstained to impose to ship owner the responsibility to repatriate the seafarer in case of a fair dismissal.

Brazil implemented the Convention by Decree 2670/1988. Nevertheless, the Brazilian Commercial Code in its session concerning exclusively maritime labour is very vague on its provision dealing with repatriation.

[37] Fitizpatrick Anderson, Deirdre and Michael, *Seafarers' Rights* (New York: 2005, Oxford University Press) page 269

Thus, article 547 of the Code states only that if the voyage is interrupted due to orders of the owner of the vessel, Master, or other member of the crew, or by decree, the seafarer is entitle of repatriation regardless of the terms of their employment contract being silent however with regard to the person or entity responsible for the repatriation costs. This provision gives space for debate since a fair dismissal of the seafarers could be regarded as a order of the ship owner or the master, besides as an interruption of the voyage caused by the proper seafarer could also be perceived as a case of fair dismissal. The provision basically states that the seafarer is entitle to repatriation in any circumstance but fails to say who has the responsibility over the repatriation. The application of this rather controversial provision will rely on the interpretation given to it by each particular Court, as up to yet there is no pacified jurisprudence regarding it.

Furthermore, the USA did not ratified any of the two mentioned ILO Conventions neither it possess a express provision under the general maritime law providing for repatriation, the doctrine of maintenance and cure is interpreted broadly to include transportation home at the expense of the ship owner in cases of illness and injured of the seafarer.[38] However, is well established that in cases of misconduct, desertion, mutual consent between the seafarer and the ship owner and even the event of shipwreck repatriation will be denied to the seafarer.[39]

Therefore, it does not seem wrong to conclude that in the international arena is pretty much pacified that a ship owner will only not be responsible to cover the expenses of a seafarer' repatriation in a fair dismissal case. Thus, there is no doubt that it is the ship owner responsibility to repatriate the seafarer after a pirate attack.

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[38] *Brunent v Taber. F Cas No 2054 (1854, DC Mass)*

[39] See MJ Norris, Law of the Seamen, (4th ed, 19850, Ch 18, ' Transportation and Repatriation' and U.S. Department of Foreigner Affairs Mannual Volume 7 – Consular Affairs, 7 FAM 750, Repatriation of Seamen

Conclusion

Hopefully, this paper was able to demonstrate that the ship owner has a contractual duty with the seafarer to pay for all the damages arising out of a piracy attack, as well as to repatriate him and pay his salaries up to day of his repatriation since the contract can not be considered have been frustrated, much less fairly terminated hence being the date of his termination, the day of the seafarer's repatriation.

Nevertheless, cases where the ship owner fails with his obligations are very common. In 2009 the *Charelle*, a German-owned, Antigua and Barbuda-flagged vessel, was captured by Somali pirates in 2009 and held for six months before the ship and crew were released for a ransom. Even though, the crew was held captive for 6 months, they only received for 5. Cases like this a deemed to still continue to happen. As it can be observed the Charelle was a FOC ship, hence it can be expected that the legislation regulating the employment contract was fairly weak. Indeed, ship owner that opt for register his ship in a FOC country are most likely searching to more flexible regulations. Nevertheless, this is not a problem exclusive to FOC ships, ship owner are aware the it is always quite a complex issue for seafarers to file law suit against them for a different issues, conflict of laws, lack of financial resources, fear to not be employer again… Issues these that will not be discussed in this paper.

Furthermore, often the insurance industry has been accused of its lack of "concern" about seafarers' related issues. For instance, in 2007 the seafarers working on the Danish-owned *Danica White* were captured by pirates in June 2007. The five crew members – three Danes, two Filipinos – were held for 89 days before they were eventually freed. At the time, Henrik Berlau, a secretary of the union's maritime affairs section accused the master of negligence and thus contributing to the ship's capture and the hostages' stress. He also largely criticized the marine insurance industry alleging that ship insurance covers only the ship and its cargo and not the crew, flowing by claiming that and the industry prefers to abide by the maritime law that gives six months before a ship

is considered a total loss, giving them time to negotiate for a cheaper deal with the pirates before they have to pay out insurance.[40] Well, the ship owner negligence or the master is still deemed to exist, nevertheless, since July 2012, the industry has been offering to Kidnap and Ransom Cover (K&R) for its members, which extend insurance to all expenses associated to the event including crew liabilities. The Standard Club state that its K&R policy is designed for ship owners whose vessels frequently transit high-risk piracy areas.[41]The K&R cover can make ship owner's lives even more difficult, since now they have an option to insure themselves for any situation arising out of a piracy attack.

I would like to seize this opportunity to thank my supervisor, Professor Jason Chuah, for all the attentive reading and necessary criticism, which without this article would not be possible.

40 See: http://www.itfseafarers.org/danica-white.cfm

41 See: http://www.lloydslist.com/ll/sector/Insurance/article404170.ece

What law for the international maritime employment contracts? Between flexibility and reasonableness

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Content

1 Introduction

In recent months, the Court of Justice of European Union has interpreted article 6 of Rome Convention of 1980 (RC)[1] [as for extension the art. 8 of Rome I Regulation of 2008[2], which sets out the European Union's conflict of law rules in relation to contractual obligations] in the context of employment contracts characterized by the mobility or, more exactly in the cases in which the employee carries out his work in more than one contracting State[3]. In the first of those proceedings, the CJ interpreted the criteria of *lex loci laboris* contained in article 6.2.a) of RC to a case (Koelzsch[4]), where the applicant was an international truck driver. In

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1 OJ 1980 L266, p. 1.

2 Regulation (EC) Nº 593/2008, of the European Parliament and the Council on the law applicable to contractual obligations (Rome I). OJ 2008, L177, p. 6. About this regulation and employment contracts, see inter alia, GARDEÑES SANTIAGO, M: "La regulación conflictual del contrato de trabajo en el Reglamento Roma I: Una oportunidad perdida", *Anuario Español de Derecho Internacional Privado*, t. VIII, 2008, pp. 387-424. DI FILIPPO, M: "La legge applicabile al contratto di lavoro subordinato tra la Convenzione di Roma e la proposta di Regolamento presentata dalla Commissione nel 2005", in VV.AA (DI FILIPPO –Dir-): *Hacia un derecho conflictual europeo: realizaciones y perspectivas*, University of Sevilla Publisher service, 2008, pp. 81-90. HANSEN, L.L: "Applicable employment law after Rome I –The Draft Rome I regulation and its importance for employment contracts", *European Business Law review*, issue 4, 19, 2008, pp. 767-774. MANKOWSKI, P: "Employment contracts under the article 8 of the Rome I Regulation" in FERRARI, F and LEIBLE, S (eds): *Rome I Regulation: the law applicable to contractual obligations in Europe*, European Law Publishers, Munich, 2009, pp. 177 et seq. MOLINA MARTIN, A.M: "Nuevo sistema de determinación del Derecho aplicable en supuestos de movilidad geográfica internacional de trabajadores: el reglamento Roma I", en VV.AA: *Los mercados laborales y las políticas sociales en Europa.* Vol. II, XX Labor and Social Security Law Congress, Labor and immigration Ministry, Madrid, 2010, pp. 236-261. More recently CARRILLO POZO, L.F: "La ley aplicable al contrato de trabajo en el Reglamento Roma I", *Civitas-Revista Española de Derecho del Trabajo* nº 152, 2011, pp. 1023-1068.

3 At this moment, there exists a reference for a preliminary ruling in the Case C-64/12, from the Hoge Raad der Nederlanden (Netherlands) lodged on 8 February 2012 –A. Schlecker, Trading under the name "Firma Anton Schlecker", other partu: M.J. Boedeker, in which is asking to CJ to respond about the interpretation of article 6.2.b) of the Rome Convention.

4 Judgment of the Court (Grand Chamber), 15 March 2011, C-29/10, Heiko Koelzsch v État du Grand-Duché de Luxembourg.

the second case (Voogsgeerd[5]), instead, the dispute submitted to the CJ aims at the clarification of article 6.2.b) of RC related to connecting factor "*of the place of business through which [the employee] was engaged*" in a case in which the protagonist was a chief engineer who served in different vessels.

Under the basis of this second CJ decision[6], our aim is no other than to explain critically the broad, flexible and extensive interpretation that the CJ has rendered in relation to the criteria laid down by article 6.2.a) of RC (and 8.2 Rome I) to the issues raised by maritime employment contracts, in which it is very difficult to accept that the expression of "*the country from which the employee habitually carries out his work*" could be applied, as some different authors have sustained[7]. In the same way,

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5 Judgment of the Court (Fourth Chamber), 15 December 2011, C-384/10, Jan Voogsgeerd v Navimer SA.

6 Commented by JUNKER, A: "Neues zum Internatoinalen Arbeitsrecht", *Europäische Zeitschrift für Wirtschaftsrecht,* 2012, pp. 41-42. CHAUMETTE, P: "De l'établissement d'explotation du navire et du lieu habituel de travail d'un marin", *Le droit maritime français*, 2012, pp. 227-233. LHERNOULD, J-P: "L'actualité de la jurisprudence européenne et internationale. Notion de lieu habituel de travail et d'établissement au sens de l'article 6.2 de la Convention de Rome", *Revue de jurisprudence sociale*, 2012, pp. 264-266. JAULT-SESEKE, F: "La loi applicable aux salariés mobiles: la Cour de justice de l'Union Européenne poursuit son travail d'interprétation de l'article 6 de la Convention de Rome", *Revue de droit de travail* 2012, pp. 115-119. LAVELLE, J: "Employment contracts in the international transport and maritime sectors", *Shipping and Trade Law* 2012, pp. 1.3.

7 In this sense, ZANOBETTI, A: "Employment contracts and the Rome Convention: The Koelzsch ruling of the European Court of Justice", *Cuadernos de Derecho Transnacional*, vol. 3, nº 2, 2011, pp. 351 to 353. Also, ASIN CABRERA, Mª A: "La ley aplicable a los contratos de embarque internacional y el Reglamento Roma I", *Anuario español de Derecho Internacional privado* nº 8, 2008, pp. 373-386. GRASS, E: "Routier polonais et principe de faveur en droit communautaire : l'important arrêt Koelzch*", Droit social* nº 701, 2011, p. 849. As well, BOSKOVIC, O: "La protection de la partie faible dans le règlement Roma I", *Recueil Dalloz*, 2008, p. 2175. For cases related with crews aboard aircrafts, the French jurisprudence accepts its applicability: "*Dans le même sens, le Conseil d'Etat a considéré qu'un transporteur aérien est établi en France « lorsqu'il exerce de façon stable, habituelle et continue une activité de transport aérien à partir d'une base d'exploitation située sur le territoire national », ce qui rattache les navigants aériens à la loi de la base d'exploitation, leur centre effectif de travail" (CE 11 juillet 2007, Sté Ryanair et Easyjet*, n° 299787, *Revue de Droit de Travail*, Dalloz, 2007, p. 578. MORVAN, P: *«Y a t il du droit français dans l'avion ? Réflexions sur les salariés low cost, de Air Afrique à Easyjet », Droit social* 2007, n° 2, pp. 191-196.

we want to point out that the established criteria in relation to *lex loci laboris* not only reduce the operating space for the subsequent connecting factor of the place of the business through which the employee was engaged (art. 6.2.b) CR or 8.3 Rome I), but it implies, as in the Voogsgeerd case is clearly established, a very formal interpretation of this second connecting factor, which leaves open the possibility for employers to use registries and jurisdictions with low employment standards in order to force vulnerable seafaring employees into unfavourable contracts; not in vain the seafarers' recruitment, although it can be made directly by the shipowner, is, most commonly, indirectly carried out through specialised manning agencies which operate around the world.

2 The dispute in the main proceedings and the questions referred for a preliminary ruling

The judgment that is going to be analyzed is a consequence of a preliminary ruling under article 267 TFEU submitted to the European Court by the Belgian Hof van Cassatie in order to interprete article 6.2.b) Rome Convention on the law applicable to contractual obligations. The reference for a preliminary ruling was made in the course of a dispute between Mr. Voogsgeerd – the Netherlands national employee- and his former employer –Navimer-, a firm based in Luxembourg, for which he worked as a first engineer on two different vessels to navigate in the North Sea. The dispute concerns a claim for compensation for the alleged wrongful termination of his employment relationship. The point at issue in that context is which national law should ultimately be applicable to the main proceedings, particularly given that, in the event of the applicability of Luxembourg law, which had originally been agreed as the *lex contractus* [ex electio iuris made by the parties (art. 6.1 RC and 8.1 Rome I)], the action for damages brought by Mr. Voogsgeerd would be precluded by a three-month limitation period which has now expired. In this regard,

the employee takes the view that that limitation period does not apply, as it is contrary to the mandatory rules contained in Belgian Law, which he considers to be applicable to his employment contract. In support of his claim as to the applicability of Belgian Law, he relies in particular on the fact that, in the performance of his employment contract, he always took instructions from Navigoble, a firm based in Antwerp where the contract was formally signed, where the employee was required to be present when the ships were loaded and the place to which he returned after each voyage. Mr. Voogsgeerd concludes that Navigoble must be regarded as the place of business of his employer within the meaning of article 6.2.b) of the RC to the effects of being applicable the Belgian Law's mandatory rules as a limit of applicable law selected by the parties.

After different internal procedural steps, in which the employee's requirement was refuted, the dispute arrives to the Court of Cassation of Belgium, which referred different questions to the Court for a preliminary ruling. Basically, the question was to determine how article 6.2.b) RC or 8.3 Rome I has to be understood. In this regard, the referring Court asks, in essence, in the first and second questions, whether the concept of "the place of business through which the employee was engaged", within the meaning of article 6.2.b) of the RC, must be understood as referring to the place of business of the undertaking to which the employee is connected through his current employment and, in the latter case, if that connection can follow from the fact that the employee must report regularly to and receive instructions from that undertaking. The third question is relating to the formal requirements that the place of business must fulfil for the purposes of applying the connecting criterion set out in article 6.2.b) of the RC. Finally, as for the last question, the Belgian Court asked whether, for the purposes of applying the connecting criterion provided for in article 6.2.b) of the RC, the place of business of an undertaking other than that which is the employer can be regarded as acting in that capacity even though the authority of the employer has not been transferred to that other undertaking.

Once we have described the case facts and the questions submitted to the CJ, we should first expose, briefly, the conflict of law regulation

system and the answers given by the CJ to the Voogsgeerd case. Secondly, we shall analyze critically the answers provided by European Court and its negative implications in relation to maritime employment contracts.

3 Brief notes about the Rome Convention and Rome I regulation system in relation to employment contracts

The Rome Convention and its counterpart Rome I regulation establishes uniform rules to determine the law applicable to contractual obligations. In addition to general rules, the Convention contains specific rules for certain types of contracts where one of the parties is deemed to be socially and/or economically weaker than the other party, as for example the individual employment contract[8], where the governing law must be exclusively ascertained by the rules contained in article 6 of the CR or in article 8 of the Rome I regulation. The structure of the conflict rules in force is simple.

Article 6 RC (and 8 Rome I) starts giving to the parties in the contract the freedom to choice of law, but this election shall not have the result of depriving the employee of the protection afforded him by the mandatory provisions of the law that would otherwise be applicable to the employment contract in the absence of such a choice. This limit or restriction is not more than an "exception" to the party autonomy in conflict of contract laws as a general connection principle with the intention –as

[8] Vid, GILLIÉRON, P.R: "La protection du faible dans les contrats", *Revue de droit suisse*, 1979, pp. 233-266. POCAR, F: "La protection de la partie faible en droit international privé" en *Recueil des Cours* 1984-I, vol. V, pp. 349-417. SALVADORI, M.M: "La protezione del contraente debole (consumatori e lavoratori) nella convenzione di Roma" en SACERDOTI, G. Y FRIGO, M: *La Convenzione di Roma sul diritto applicabile ai contratti internazionali*, Giuffrè editore, Milano, pp. 121-151. LECLERC, F: *La protection de la partie faible dans les contrats internationaux (Etude de conflit de lois)*, Bruylant, Brussels, 1995.

we have mentioned before- of protecting the employee as the weaker party of the employment contract, introducing the so-called *favor laboratoris* principle. In consequence, although the parties are able to choose the law applicable to the employment contract –as it occurs in the case Voogsgeerd -, a judge has to examine the a priori applicable chosen law and compare it with the laws that should be applicable in absence of choice or, if it is preferred, with the objectively applicable law. In other words, the judge has to examine whether the law ascertained according to article 6.2 (a); (b) and b) in fine RC or articles 8.2 to 8.4 of Rome I contain mandatory rules, which are more favourable to the employee and if this is the case, apply them[9].

In absence of choice, the applicable law is designated by art. 6.2 of the RC or the conflict of law rules contained in articles 8.2 to 8.4 of Rome I regulation; these regulations provide the connecting criteria of the employment contract on the basis of which the *lex contractus* must be determined. The first criterion –*lex loci laboris*- contained in article 6.2.a) RC is the country in which the employee "*habitually carries out his work in performance of the contract, even if he is temporarily employed in another country*". Traditionally, this connection in relation to maritime employment contracts has been interpreted by analogy with the law of the flag, considering the vessel as a territorial extension of the country, which gives its flag (nationality). This provision has been sensitively changed in Rome I regulation. In this regard, article 8.2 of the Rome I regulation adds to the previous text that the *lex loci laboris* criterion also contains "the country from which the employee carries out his work". In the cases Koelzsch first, and Voogsgeerd later, the CJ has sustained the applicability of this connecting factor to the maritime employment contracts; this affirmation should be discussed below. The second objective criteria contained in art. 6.2.b) of the RC (and in art. 8.3 Rome I) refer to the law of the country "in which the place of business through

[9] See, WOJEWODA, M: "Mandatory rules in private international law: with special reference to the mandatory system under the Rome Convention on the law applicable to contractual obligations", *Maastricht Journal of European and comparative law* nº 2, 2000, pp. 183 y ss. LIUKKUNEN, U: *The role of mandatory rules in International labour law: a comparative study in the conflict of laws*, Talentum, 2004.

which [the employee] was engaged is situated", being applicable when the employee does not performs habitually his work in one single country. The interpretation of this connecting factor has been made by the CJ in the case Voogsgeerd. Then, we shall reflect about the considerations maintained by the CJ and its implications for the maritime employment contracts. Finally, and in spite of the connecting factors described before, if the employment contract is more closely connected –from the circumstances as a whole- with another country, in that case this last country law may apply to the contract (art. 6.2.b) in fine RC and 8.4 Rome I). It is the so-called "escape clause".

4 The answers given by CJ in Voogsgeerd case

The CJ in Voogsgeerd case solution confirms the solution given in Koelzsch case, determining that in case of employment in more than one country, the criterion of *lex loci laboris* should in principle apply when it is possible, relegating the subsequent objective connecting factor (the place of business through which [the employee] was engaged is situated) aside. In this regard, the CJ establishes a hierarchical relation between those criteria, so in all the cases in which it is possible to determine a state with which the work has a significant connection, the *lex loci laboris* criteria should apply. As such, the criterion of the country in which the work is habitually carried out must be understood as referring to the place in which or from which the employee actually carries out his working activities and, in the absence of a centre of activities, to the place where he carries out the majority of his activities.

Therefore, in the light of the nature of work in the maritime sector, such as that at issue in our case, the court must take into account of all the factors which characterise the activity of the employee and must, in particular, determine in which State is situated the place from which the employee carries out his transport tasks, receives instructions concerning

his tasks and organises his work, and the place where his work tools are situated. This last factors characterising the employment relationship have to be included as elements to be taken into account in order to determine the applicable law to the international employment contracts under article 6.2.a) of the RC (or 8.2 of Rome I regulation) and not under the subsequent connecting factor. In consequence, the CJ sustains that if, in the light of all the factors which characterise the employees' activity, it is possible to locate a country in which or from which the employee performs the main part of his obligations towards his employer, this country should be the country in which the employee habitually carries our his work.

In the Voogsgeerd case, it is clear that in attention to the answer given in the Koelzsch case, the applicable law should be Belgian Law as the applicant wanted. Nevertheless, the referring court thought that article 6.2.a) of the RC was not applicable, so the CJ proceeded to interpret the second objective connecting factor. The referring court requested the CJ to interpret the meaning of "the country in which the place of business through which the employee was engaged" within the meaning of article 6.2.b) of the RC (or article 8.3 of Rome I regulation), and clarify the factors relevant to determine this place of business. In this regard, the CJ asserted that the use of the term "engaged" in article 6.2.b) of the RC is clearly referring "just to the conclusion of the contract", or, in the case of a de facto employment relationship, "to the creation of the employment relationship and not to the way in which the employee's actual employment is carried out". In this way, the Court noted the necessity for a strict interpretation of article 6.2.b) in order to guarantee the complete foreseeability of the law applicable to an employment contract, given the subsidiary nature of the criterion. Consequently, the CJ provided that the referring court should take into account the factors relating to the procedure for concluding the contract, such as "*the place of business which published the recruitment notice and that which carried out the recruitment interview*", and the courts must endeavour to determine the real location of that place of business. If, however, it is clear that the undertaking which concluded the contract of employment acted in the

name of and on behalf of another undertaking, then the law of the country in which the latter undertaking is situated may instead apply to the contract on the basis of article 6.2.b) of the RC.

Regarding the third question concerning the satisfaction by the place of business of any formal requirements, such as the possession of legal personality, the Court answered in the negative, holding that it is "apparent from the wording" of article 6.2.b) of the RC, that it is not limited to those business units of the undertaking in question that have legal personality. Subsidiaries, branches and other units, such as the offices of an undertaking, could constitute places of business within the meaning of the provision. A degree of permanence is however required, so that "the purely transitory presence in a State of an agent of an undertaking from another State for the purpose of engaging employees cannot be regarded as constituting a place of business which connects the contract to that State". As well, if the same representative travels to a State wherein the employer maintains a permanent establishment of his undertaking, then that establishment may suffice as a place of business. The place of business must also belong to the undertaking, which engages the employee, thereby forming an integral part of its structure.

Finally, the last question, referred to situations where an undertaking, other than who the contractual employer is, can be regarded as acting in the capacity of the employer, even though such authority has not been transferred to that undertaking, and how it is may affect to the application of article 6.2.b) of the RC. This issue is particularly relevant to the facts in the main proceedings, as Mr. Voogsgeerd claimed to receive instructions from Navigoble, the company that formally engaged the seafarer. The CJ Court answered that it is a matter for the referring court to assess what is the real relationship between the two companies in order to establish whether, in reality, Navigoble is the employer of the personnel engaged by Navimer. In doing so, the court must consider all the objective factors enabling it to establish the actual situation, which differs from that which appears from the terms of the contract.

5 The criterion of Lex loci laboris and maritime employment contracts

The criterion of *lex loci laboris* (the country in which the worker habitually carries out his work) as a connecting factor in the context of conflict of laws related to employment contracts has been classic and prior with respect to other connecting factors[10]. This is logical due to the fact that this country –place of habitual performance of the work- should be better linked with all the socio-economic aspects related to the employment contract, as well as allow a better protection to the weaker part of this contract through the application of mandatory rules of the regulation determined by this connecting factor[11]. It is true too that the *lex loci laboris* is perfect to be applicable to all the typical employment relationships characterized by the stability[12] in the execution of work in one single State. In this regard, the country in which the work is performed is a criterion based on territorial references[13], which can be used in most cases. In other words, the *lex loci laboris* criterion is a very convenient connecting factor in all the cases in which the work is permanently and habitually carried out in a country and it is executed in a concrete geographical space. However, this criterion is not very adequate for particular situations, where the work is not performed in any territory or is executed in different states, as it occurs in the majority of maritime employment relationships.

In the case of maritime employment contracts, this connecting factor has traditionally been applied in analogy to the law of the flag, so it would

[10] VIRGÓS SORIANO, M: *Lugar de celebración y de ejecución en la contratación internacional*, Tecnos publisher, Madrid, 1989, p. 38.

[11] "*La compétence en principe attribuée à la lex loci laboris intéresse à la fois les relations individuelles et les relations collectives de travail…* ". In this regard, RODIÈRE, P: "Conflits de lois en droit du travail...", loc. cit. p. 125.

[12] COURSIER, P, says: "*Il est pertinent lorsque le préposé travaille de façon stable et durable sur un territorie national et s'intègre à cette occasion à un groupe de salariés*", en *Le conflit de lois en matière de contrat de travail. Étude en droit international privé français*, LGDJ, Paris, 1993, p. 94.

[13] MALINTOPPI, A: "Les rapports de travail en droit international privé", *Recueil des Cours* 1987-V, p. 376.

be necessary to analyze the territoriality as the first element contained in the scholastic notion of *lex loci laboris*; not in vain article 6.2.a) of the RC is referring to a "country". As well as this single point, our intention is to analyze the second interpretation that has been drawn in relation to *lex loci laboris* connecting factor in Koelzsch and Voogsgeerd cases, according with it, for it can be understood as the country from which the worker habitually carries out his work too. Then, we shall distinguish the two different versions of the connecting factor regulated in article 6.2.a) of the RC (and art. 8.2. of Rome I regulation) and its implications in relation to maritime employment contracts. In epigraph 5.1, we shall see the classical interpretation of the country in which the worker habitually carries out his work where the element of the territoriality has to be discussed; and subsequently, in epigraph 5.2, we shall study the new version of its connecting point as the country from which the workers habitually carry out their work wherein the problem should be how to interpret the element of habitually included in the *lex loci laboris* notion too.

5.1 The abandonment of an extraterritorial fiction: the traditional analogy between the country in which the employee habitually works and the law of the flag

In relation to the criterion established in article 6.2.a) of the RC –*lex loci laboris*- and the maritime employment contracts, it is possible to claim that an analogical interpretation has been traditional drawn in relation to the flag of the State as a territorial part of the country which gives the vessel its nationality[14]. In other words, it has been accepted that the vessel should be considered as a part of the territory of the State represented

[14] Considering the law of the flag almost as a "dogma". In this regard, CARBONE, S,M: *La disciplina giuridica del traffico marittimo internazionale*, Il Mulino, Bologna 1982, p. 200. LEANZA, U declared that this principle has been considered as "*quasi un valore di un dogma, di un principio indiscutibile e insuscettibile di aprezzamento critico*" in "Navi private (diritto internazionale)", *Novissimo Digesto* XI, 1965, p. 102 y ss.

by the flag[15] and, consequently, the ship itself as a habitual place of performance of the work. This interpretation did not create any problem while all the connecting factors related to the vessel were linked with the country which offered its nationality, such as the nationality of the crew, the undertaking domicile, etc…; but the growing of Flags of convenience phenomena has laid down this consideration, when there would be no connection between the country whose flag the ship is flying and the ship itself. In consequence, there are some legal writers who hold that this connecting factor –*lex loci laboris*- cannot be applied to maritime employment contracts due to the existence of FOCs. This reality has produced a gradual abandonment of the law of the flag as a connecting factor, considering that its use has to be residual[16], only applicable when it would be impossible to find a more suitable connecting factor[17].

We agree with the scholars who consider that the law of the flag as a connecting factor cannot be applied, but not only in the cases of the existence of Flags of convenience or open registries in general, but in all

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15 Inter alia, CALVO CARAVACA, A.L & FERNÁNDEZ DE GÁNDARA: *Contratos internacionales*, Tecnos editorial, Madrid, 1997, p. 1901. IRIARTE ANGEL, J.L: *El contrato de embarque internacional*, Beramar publisher, Madrid, 1993, p. 122.

16 Inter alia, BONASSIES, P: "La loi du pavillon et les conflits de droit maritime", *Recueil des Cours*, 1969-III, p. 511-593. EHRENZWEIG: "La lex fori nel diritto internazionale privato marittimo" in *Diritto Internazionale*, 1968, p. 3-19. MEDINA, C: "La legge regolatrice del diritto di sciopero dei marittimi", *Il Diritto Marittimo* 1975-II, p. 263, citating CARBONE, S.M: *Legge della bandiera e ordinamento italiano*, Milano 1970. MARESCA, M: "La riforma delle norme di diritto internazionale privato della navigazione e gli esiti del recente progetto in corso di elaborazione", *Il Diritto Marittimo* 1982-IV, p. 598 y ss. CARBONE. S.M: "Conflitti di leggi e diritto marittimo nell'ordinamento italiano: alcune proposte", *Il Diritto Marittimo* 1983-I, pp. 70-71. Idem, *Rivista di Diritto Internazionale Privato e processuale*, 1983, pp. 14-16 y 23-24. QUEIROLO, I: "La "residualitá" della nave nelle norme di conflitto in campo marittimo", *Rivista di Diritto Internazionale Privato e Processuale* 1994, p. 539. MENGHINI, L: "Tutela dei marittimi e diritto internazionale privato del lavoro: l'abrogazione dell'art. 9 Cod. Nav. a opera della convenzione di Roma di 1980", *Rivista Giuridica del Lavoro e della previdenza sociale* nº 2-1996, pp. 215 y ss.

17 In this regard, CARBONE, S.M, who sustains as follows: "*Sulla base di un sistema che determina espressamente la prioritá del impiego di alcuni criteri-guida di collegamento, il ruolo e la posizione della legge della bandiera non puó che risultare necessariamente redimensionato*" in "Per una modifica delle disposizioni preliminari del Codice della navigazione", *Rivista di Diritto Internazionale Privato e Processuale*, 1997, pp. 5-32, particularly p. 19.

the cases –except in cases of performance of work on board in territorial waters-, due to the fact that the vessel cannot be considered as a part of the state whose flag the ship flies, since –obviously- the vessel is not a territory. In this regard, the flag only determines a nationality of the State which exercises its jurisdiction in accordance with the Montego Bay Convention (art. 91 of the UNCLOS 1982), but not its sovereignty, so it is not possible to understand the analogical interpretation between the law of the flag and the *lex loci laboris* connecting factor[18], since this connecting factor implies two notions: territoriality when its referring to a "country in which the employee carries out its work) and habitually (the work has to be performed habitually in contrast with temporality in the execution). Then, in this classical interpretation of the *lex loci laboris* in accordance with the flag of state is clearly disrupting the notion of territoriality included in the scholastic concept of *lex loci laboris*[19].

In this context, and contrary to other opinions, the Koelzsch and Voogsgeerd cases do not confirm the applicability of the law of the flag[20], since the CJ is not applying article 6.2.a) of the RC (or 8.2 of Rome I

[18] Another opinion has recently be maintained by ZANOBETTI, A: "Employment contracts and the Rome Convention: The Koelzsch ruling of the European Court of Justice", *Cuadernos de Derecho transnacional* vol. 3, nº 2, 2011, p. 352. As well, WURMNEST, W: "Maritime Employment contracts in the conflict of Laws" in BASEDOW, J et al: *The Hamburg Lectures on Maritime Affairs* 2009 & 2010, Springer-Verlag, Berlin-Heildeberg, 2012, p. 127. In this regard, we must realize that this last author is sustaining the applicability of the law of the flag on the basis of UNCLOS Convention of 1982. Concretely, he states that "*The United Nation Convention of the Law of the Sea of 1982 grants flag jurisdiction upon the States whose flag the ship flies. These States may regulate the labour conditions on board of the ship. Even though the ship is not a form of a territoire flottant of a State and flag sovereignty is not as powerful as proper territorial sovereignty, the flag nonetheless links the ship with a very certain State, since the flying of two different flags is proscribed*". In our opinion, it is true that the Flag State has to regulate and control the social conditions on board, but it does not mean that in accordance with the different domestic laws the control or regulations could be different for seafarers from different nationalities or working in vessels of the first or second (international, etc.) registries of the same State, depending on the economical interests that prevails over the maritime industry.

[19] Vid. CHAUMETTE, P: " *Il en résulte un naufrage de la loi du pavillon, en tant que loi du lieu de travail*" en "Loi du pavillon ou statut personnel. Du navire comme lieu habituel de travail?, *Droit Social* 1995, p. 997.

[20] As ZANOBETTI, A claims in Employment contracts and the Rome Convention: The Koelzsch…", loc. cit. p. 353.

regulation in this traditional sense (as the country **in which** the employment carries habitually out its work) but in a new sense (as the country **from which**), that it should be analyzed in the following epigraph. Contrary to this position, we sustain that the CJ assumes the definitive abandonment of the law of the flag as a connecting factor to maritime employment contracts, so at least, we prefer to confirm that this classical extraterritorial fiction[21], determined by the consideration of the ship itself as a habitual place of performance of the work as a part of the country in which the vessel is registered, is being definitively abandoned.

5.2 A new connecting fiction: "the port state law" as the country from which Seafarers habitually carry out their work?

Although the territorial fiction based on the law of the flag has been fortunately abandoned[22], the problem that arises from the determination of applicable law to the maritime employment contracts persists as it is demonstrated in Voogsgeerd case. In this regard, the Koelzsch and Voogsgeerd cases establish the "theory" that *lex loci laboris* connecting factor includes "the country **from which** the employee carries out his work" too and that it can be applicable to maritime employment con-

[21] VILLANI, U: "I contratti di lavoro" in AAVV: *Verso una disciplina comunitaria della legge applicabile ai contratti*, Padova, 1983, p. 288. MORGENSTERN, F: "*Siempre se ha considerado que la relación de trabajo de la gente de mar está sujeta a la ley del "pabellón" (o del registro marítimo en que esté inscrito el buque)*" in the "La importancia que revisten en la práctica los conflictos entre legislaciones de trabajo", *Revista Internacional de Trabajo* nº 1, 1985, vol. 104, p. 5. In the same way, MOURA RAMOS, R.M: "*É o que se passa, desde logo, como os contratos de trabalho ligados à utilizaçao dos navios. Uma tenência já antiga, estribada na autoridade das resoluçoes do Instituto de Direito Internacional e com eco em vários ordenamentos e diversos projectos da legislaçao uniforme, defende a sua sujeiçao à lei da bandeira ou do pavhilao que o navio arvore, com base na ideia de que esta debe constituir o sistema de referência fundamental para a disciplina internacionalprivatística dos transportes marítimos*" en *Da lei aplicável ao contrato de trabalho internacional*, Almedina publisher, Coimbra, 1991, p. 928.

[22] PERAKIS, M: "Modern tendencies towards a disruption of the bond between the ship's flag and the applicable law", *Annuaire de Droit Maritime et Océanique*, University of Nantes, t. XXIX, 2011, pp. 341-357

tracts. In this regard, as we have pointed out before, the CJ maintains that the lex loci laboris criterion should be applicable when the habitual workplace of the employee is in the country "from which" (the employee carries out his work), taking into account all the circumstances of the case, he in fact performs the essential part of his duties vis-à-vis his employer. Thus, the CJ sustains that this country should be localised when the work has a **significant connection** with this State, so in accordance with the Court, the *lex loci laboris* should apply, if it is possible, to determine in which State is situated the place from which the employee carries out his transports tasks, receives instructions concerning his tasks and organises his work, and the place where his work tools are situated. As we have said before, these last factors characterising the employment relationship have to be included as elements which must be taken into account to determine the applicable law to the international employment contracts under article 6.2.a) of the RC (or 8.2 of Rome I regulation) and not under the subsequent connecting factors. In consequence, the CJ sustains that if, in the light of all factors, which characterise the employee's activity, it is possible to locate a country from which the employee performs the main part of his obligations towards his employer, this country should be the country in which the employee habitually carries out his work. This interpretation is consequence of the parallel application of CJ case Law in relation to article 5.1 of the Brussels Convention (section 5 of the Brussels I regulation) about jurisdiction in civil and commercial matters to conflict of laws system[23]. In other words, the CJ has attracted

[23] We refer particularly to Mulox and Rutten cases, as well as to the Weber Case. Mulox: ECJ 3 of july 1993, Case C-125/92, Rec. 1993, pp. 4075 y ss. 2 Rutten: ECJ 9 january of 1997, Case C-383/95, Rec. 1997, pp. 57 y ss. Weber, ECJ 27 february 2002, case C-37/00, Weber, Rec. p. I-2013. In relation with the critics made to the ECJ solution in weber case, see GONZALEZ VEGA, J.A: "Instalaciones *offshore* y competencia judicial: el Convenio de Bruselas de 1968, el TJCE y la <obsesión por el territorio>", *La Ley-Unión Europea*, nº 5556, mayo de 2002, pp. 1-6. A comment CHAUMETTE, P in *Droit Maritime Français* nº 628, 2002, pp. 632-648. It is very interesting from an International private law perspective, see ADRIÁN ARNÁIZ, A.J: "Nuevas dificultades para determinar el órgano jurisdiccional competente para conocer del contrato individual de trabajo en la Unión Europea (Algunas reflexiones a propósito de la sentencia del Tribunal de Justicia de las Comunidades Europeas de 27 de febrero de 2002 en el asunto Weber)", *Información Laboral* nº 4, 2002, pp. 5-22. ZABALO

to the applicable law the same conclusions that it has taken in relation with jurisdictional matters in some cases in which the facts where related to temporary posting of workers in a period in which the Directive 96/71 did not exist, neither –obviously- was in force.

As it is visible, this "theory" implies in maritime employment contracts that the seafarer carries out his work in a different place from the ship. In the Voogsgeerd case, the applicable law according to this interpretation should be the Belgian Law, as the place in which the seafarer has the port basis, as well as where he receives instructions, etc… as significant connection elements. I am of the opinion that this flexible and broad interpretation of the *lex loci laboris* connecting factor (now codified in article 8.2 of Rome I regulation) cannot be applicable to maritime employment contracts, because the basis port is not the place in which the seafarer habitually carries out his work. If it is accepted that the basis port for the seafarers (as well as other elements in the case) is the place from which the sea worker carries out his work in the meaning of article 6 of the RC and article 8.2 of the Rome I regulation, then we should be accepting a new type of fiction in the applicability of the *lex loci laboris:* the habitually fiction. In this regard, the only case wherein this interpretation could be acceptable should be in the cases of cabotage (coasting trade), in which the *lex contractus* is not altered for the temporary execution of work in another place. This is the only way to understand the CJ decision, but the same Court does not clarify this question either in Koelzsch, or in Voogsgeerd.

In my opinion, the Court has reached this narrow conclusion –that we cannot share- by confusing different notions, which not only derivates from the intentional parallel interpretation between two different bodies of international private law regulations (jurisdictional and conflict of

ESCUDERO, MªE: "Sucesión de lugares de trabajo y competencia judicial internacional: nuevos problemas planteados ante el TJCE", *Revista de Derecho comunitario Europeo*, nº 14, 2003, pp. 225-239. GÓRRIZ, C: "Competencia judicial internacional y trabajo marítimo. (A propósito de la STJCE de 27 de febrero de 2002: Weber vs. Universal Odgen Services Ltd.)", *Anuario de derecho Marítimo*, vol. XX, 2003, pp. 307-332.

laws one[24]), but in particular from the confusion between the connecting factor regulated in article 6.2.a) of the RC (*lex loci laboris*) in this second version of it and the escape clause contained in the same regulation (article 6.2 in fine of the RC or 8.4 of Rome I regulation), such as the most closely connected factor. In this regard, the CJ creates "the significant connection elements" as the elements to be taken into account to localise the country from which the worker habitually carries out his work as something different from the elements to localise the law of one state according to escape clause. This embarrassment leads the CJ to affirm that the *lex loci laboris* should apply to maritime employment contracts, but its interpretation should offer to the shipowners the possibility of choosing indirectly the applicable law to maritime employment contracts to the total detriment of the seafarers; not in vain those substantial elements understood under the *lex loci laboris* in accordance with the CJ interpretation could easily be manipulated by them (port basis; instructions, etc). This is the reason why I prefer to sustain the applicability to maritime employment contracts of the escape clause[25].

[24] The same critic in ZANOBETTI, A: "Employment contracts and the Rome Convention: the Koelzsch…", loc. cit. pp. 355-357.

[25] In this sense, FOTINOPOULOU BASURKO, O: *El contrato de trabajo de la gente de mar*, Comares publihser, Granada, 2008. As well as, CARBONE, S.M in "Chapter III: La loi applicable aux contrats maritimes.-II. Les rapports de travail maritime" in *Conflits de lois en droit maritime*, l'Académie de Droit International de la Haye, 2010, pp. 147-202, and particularly p. 185, where it is claimed that "*En effet, à propos du travail maritime l'article 8, paragraphe 2, ne peut pas jouer parce que, d'une part, la nationalité du navire a perdu la connotation "territoriales" qui précédemment lui était dévolue et ,d'autre part, les prestations de travail son exécutées habituellement dans le cadre de trafics que impliquent les intérêts de plusieurs Etats. Ce n'est qu'au cas où le navire est concerné par le trafic de cabotage nacional, relatif à un Etat spécifique, que la reglamentation de ce systeme pourra être invoquée à titre de lex loci executionis laboris*".

6 The criteria of lex loci celebrationis in accordance with CJ: what are the consequences of a strong interpretation for seafarers?

As we have described before, when article 6.2.a) of the RC cannot be employed, then, according to article 6.2.b) of the RC (or article 8.3 of Rome I regulation) the contract will be governed by the law of the country where the place of business through which the employee was engaged is situated (*lex loci celebrationis*). In Voogsgeerd case, the problem was to determine if the law of Belgium (Navigoble) or Luxembourg (Navimer) were applicable as mandatory rules in attention to the place of business in which the employee was engaged. In this regard, the problem that arises from this perspective is the interpretation of the extension of this connecting factor, and more particularly, if it should have to be considered formally as the place in which the contract was signed or, more broadly, as the country in which the employee was recruited[26]. In the first case, this would be to look at the business in which the employee is (after the contract is signed) organizationally integrated[27].

[26] Vid. CARRILLO POZO, L.F: "La ley aplicable al contrato de trabajo…", loc. cit. pp. 1046-1047.

[27] There are different opinions about how to understand this connecting factor. In this sense, PLENDER, R. takes the view that the place of Business through which the employee was engaged must be understood as referring not only to the head office as a "letterbox" company but also to the place of business which was actively involved in engaging the employee, for example, by entering into contractual negotiations with the employee in *The European contracts convention – The Rome convention on the Choice of law for contracts*, London, 1991, p. 145.].VAN EECKHOUTTE, W points out that there must be an actual Business at the place of the undertaking and that the employee must actually have been employed by a branch of that undertaking, It is not sufficient for the employment contract simply to have been concluded at the place of Business in "The Rome convention on the law applicable to contractual obligations and labour law" en BLANPAIN, R (ed): *Freedom of services in the European Union – Labour and social security law: The Bolkestein Initiative*, La Haya, 2006, p. 171]. Finally, according to SCHLACHTER, M., the place of engagement must in principle be understood as being the place where the contract was concluded. This position brings the author to consider that term must be understood as referring only to

The interpretation of this connecting factor in one or another sense is especially important to the case of maritime employment contracts where the most common recruitment practice is to use crewing or manning agencies to engage seafarers[28]. In this regard, these agencies act as intermediaries in the maritime employment relationship[29], whose relationship with the shipowners has been improved over time through the so-called Crewman A and Crewman B agreements, both of BIMCO. It should be noted that these manning agencies do not perform a mediation or isolated representation, but they are dedicated –in a professional, organized and systematic manner- to recruitment and formalization of their employment contracts[30]; so that while they may be considered as employers for the purposes of substantive regulation (Maritime Labour Convention, 2006 of ILO); its participation in seafarers engagement may give rise to difficulties in the application of article 6.2.b) of the RC[31]. In

establishments which, by at least controlling and organising the working activities of the people recruited, served the commercial purpose of the undertaking, but not to mere recruitment agencies. See, SCHLACHTER, M: "Grenzüberschreitende Arbeitsverhältnisse", *Neue Zeitschrift für Arbeitsrecht* nº 2, 2000, p. 60.

28 See JUNKER, A: "Gewöhnlicher Arbeitsort im Internationalem Privatrecht", *Festchrift für Andreas Heldrich zum 70. Geburtstag*, Munich, 2005, p. 731. This author refers to a widespread practice in the recruitment of sailors. According to his information, sailors are often recruited by so-called hire agencies or crewing companies based in States with low minimum standards of employment law and low rates of pay. In those circumstances, the place of Business through which the employee was engaged is not the shipping company, but, for example, an employment agency in a third country.

29 MONZANI, E: "Crew managers e manning agencies", *Il Diritto Marittimo* 2004-I, pp. 669-673.

30 RUIZ SOROA, J.M y DIAZ SANCHEZ, J: " Reflexiones sobre las banderas de conveniencia y el derecho marítimo y laboral español" *Anuario Derecho Marítimo* vol. IV, págs 91-155. BORNAECHEA FERNÁNDEZ, J.I: "Contrato de embarco entre trabajador español y armador extranjero, interviniendo consignataria española. Informe sobre la naturaleza jurídica y la legislación aplicable al contrato", *Relaciones Laborales* 1985-II, pp. 805-815. IRIARTE ANGEL, J.L: *El contrato de embarque internacional*, editorial Beramar, Madrid, 1993, pp. 71 y ss. GÓRRIZ LÓPEZ, C: "Análisis comparativo entre los Acuerdos-tipo *Shipman* para la gestión de buques, *Crewman*, para la gestión de la tripulación", *Anuario de Derecho Marítimo*, vol. XV, 1998, pp. 421-451. Recently, MELÉNDEZ MORILLO-VELARDE, L: *La dimensión laboral del empresario marítimo*, Ediciones Laborum, 2002, pp. 237-271.

31 In these cases, we have to underline that the crewing or manning agencies operate in different ways in relation to the seafarer, so although these agencies are located in a

this regard, depending on which of both interpretations, we incline or tend to, the result may lead the regulation of maritime employment contracts to a legal system scarcely connected with the contract itself, to the detriment of seafarers' labour rights[32].

As we have exposed before, the CJ gives a formal interpretation of this connecting factor[33], saying "*only a strict interpretation of that subsidiary criterion can guarantee the complete foresseability of the law applicable to the contract of employment*". Thus, in the Voogsgeerd case, the place of engagement of seafarer should be the place of Navimer, the formal employer as it appears from the terms of the contract, irrespective of if Navigoble exercised or not the faculty of authority, as the seafarer sustained. It is only where one of the two companies acted for the other that the place of business of the first could be regarded as belonging to the second, for the purposes of applying the connecting criterion provided for in article 6.2.b) of the RC.

This solution has very serious consequences for maritime employment contracts, not in vain the manning agencies, not necessary appear as a part of a maritime company group and, moreover, on some occasions, they do not act for the other (as for example if they employ Crewman B agreement). Thus, the determination of applicable law according to this connecting factor to maritime employment contracts may lead –in the majority of cases- to the application of a labour legal system extraneous to the contract and probably less protector for the seafarers if it is not possible to prove a more closely connection with another country. In the concrete case of Voogsgeerd, the problems were not so hard because both

territorial place, do not maintain –in some cases – any formal relationship with the ship-owner and, also, sometimes, they do not act as human resources companies. All these circumstances, better expressed in FITZPATRICK, D & ANDERSON, M: *Seafarers' Rights*, Oxford University Press, New York, 2005, pp. 174-178, made it very difficult to determine the applicable law in accordance with article 6.2.b) of the RC or 8.3 of Rome I regulation.

32 CHAUMETTE, P : "Le marin à la recherche de son employeur", *Il Diritto Marittimo* 1993, pp. 173-174.

33 See JAULT-SESEKE, F: "Loi applicable aux salariés mobiles: la Cour de justice de l'Union Européenne poursuit son travail d'interprétation de l'article 6 de la Convention de Rome", *Revue de droit de travail* 2012, p. 118.

undertakings (Navigoble and Navimer) were domiciled in EU territory whose national labour systems are –a priori- more protective than such of third States[34]. But now, with the CJ given interpretation is going to be easy to avoid the more protective social regulations, since it should be enough for the real shipowner to engage the seafarer through an undertaking placed in a third country, expressing in the employment contract that it is formal shipowner. If we add that the tendency of the CJ is to interpret the jurisdictional and conflict of laws system in a parallel way, the problem is served. In this regard, the seafarer should be forced to litigate before the courts in which the domicile of business which formally engaged him is situated, that would be located in a non-EU State, so not complied to apply either RC (or Rome I regulation) or Brussels convention (or Brussels I regulation)[35].

That is the reason why there have been writers who have sustained different solutions to the problem of the existence of recruitment agencies in the maritime industry. It should be the case of the proposal hold by Prof. Chaumette, who already pleaded at the time for considering that one of the solutions to this problem, should be the recognition of the existence of several societies, formally distinct but in reality grouped around a same operative unit[36]. Although this solution should be valid,

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[34] Using the rule contained in article 6 of Brussels I regulation [Council regulation (EC) nº 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters], OJ L12, 16th January 2001. About this rule concretely and its applicability to international employment contracts, see FOTINOPOULOU BASURKO, O: "Competencia judicial internacional en pleitos laborales con pluralidad de demandados (El foro por conexidad tras la STJCE de 22 de mayo de 2008), *Aranzadi Social* nº 10, vol. 1, 2008, pp. 69-90. At this time, this regulation is in the process of modification, vid. COM (2010) 748 final.

[35] See the case judged by the Cour d'appel d'aix en Provence, 18th January 2012, commented by CHAUMETTE, P., who has kindly provided me with the text. Nevertheless, it would be applicable in brief in *Le Droit maritime français*, 2012.

[36] CHAUMETTE, P said "*S'il apparaît que les sociétés propriétaires des navires, gestionnaires commerciales des navires, gestionnaires des équipages sont imbriquées, quant à la composition de leur capital, quant aux dirigeants et managers, quant aux statuts ou avantages conventionnels du personnel sédentaire, il se peut qu'elles constituent un groupe de sociétés ou mieux encore une unité économique et sociale, c'est-à-dire une entreprise unique au delà des découpages obtenus par l'utilisation du droit des sociétés*", in "Le marin à la recherche…", loc. cit. p. 164.

it should not always be easy to ascertain that we are in front of a company group to the effects of the applicability of article 6.2.b) of the RC (or 8.3 of Rome I regulation)[37], and in consequence to sue the agency and the shipowners company for the labour liability as employers. Then, if it is not possible to prove the existence of a group or that one of the undertaking has acted on behalf of another one, then –in accordance with CJ- it should only be considered as a place of business to conflict of law effects the place in which the seafarer has been formally engaged (in our case Navimer). It has to be noted that the CJ arrives to this consideration sustaining that material and factual elements characterizing the employment contract, such as the authority capacity, cannot be employed to designate the law governing the maritime employment contract through this connecting factor. In this regard, according to CJ, the only factors that the referring court should take into account are those relating to the procedure for concluding the contract, so it should be very easy for the shipowner to manipulate them to his owns interests.

The opinion that CJ has expressed in the Voogsgeerd case is just contrary to the interpretation that, for example, Prof. Carbone has rendered to the same purposes. In this regard, although this scholar holds that the applicability of article 6.2.b) of the RC (or art. 8.3 Rome I regulation) may result complex in view of the recruitment practices in this industrial sector, he does not hesitate to affirm that its operating capacity should be possible if it is taken into account some material or factual factors such as if the business place of engagement is coincident with the location in which the ship is effectively employed or if it is coincident with the place where the shipowner may have his real operational centre and/or activity. In addition, this author proposes the applicability of this connecting factor when the shipowner operational centre is coincident with the State in which the habitual port basis is located (real port and not administrative one), or where one finds the operational base in the sense of the North American jurisprudence of the Jones Act[38].

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[37] PALAO MORENO, G: *Los grupos de empresas multinacionales y el contrato individual de trabajo*, Tirant lo Blanch publisher, Valencia, 2000, p. 169.

[38] CARBONE, S.M: Conflits de lois…, op. cit. pp. 185-187, particularly p. 187. About the

In my opinion, the position sustained by Carbone in relation with this conflict of laws rule applicable to maritime employment contracts produces better results than the interpretation sustained by CJ.

7 Conclusions

In the Voogsgeerd case, the CJ opted for a very formal interpretation of art. 6.2.b) of RC, dissociating the place of business in the sense of the conflict of law rule from the factual elements that define the employer notion from a labour law perspective, as for example the authority capacity. This opinion is consequence of the desire of the Court to interpret the conflict of laws system giving prevalence to the *lex loci laboris* connecting factor, but as we have seen, this interpretation produces very serious and inconsistent results in the context of determining the law applicable to maritime employment contracts cases. In my view, it should be better to incorporate all the substantive elements under the significant connection in the sense of the escape clause. This last interpretation would link the maritime employment contract in a real way with a certain country, since otherwise, the seafarer would remain unprotected. Thus, I hope that the CJ should make a more favourable interpretation of these rules in the context of maritime employment contracts and also more respectful with the normative systems of international private law. On the contrary, the situation can result especially disastrous for the seafarers, given the socio-economic context in which they perform work.

Jones Act, see "Panlibhon registration of american-owned merchant ships: government policy and the problem of the Courts", *Columbia Law Review* vol. 60, 1960, pp. 711-737. CARBONE, S.M: "Legge della bandiera e diritto del lavoro in alcune recenti decisioni statunitensi", *Rivista di diritto internazionale privatto e processuale*, 1970, pp. 164-188. GINATTA, F: "Applicabilitá del Jones Act ad un rapporto di lavoro su nave straniera", *Il Diritto Marittimo*, 1971-I, pp. 131-135. Also, ROBERTSON, D.W y STURTLEY, M.F: "The right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the procedure", *Journal of maritime Law and Commerce*, vol. 30, nº 4, 1999, pp. 649-676.

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