

**THE ROTTERDAM RULES: TO WHAT EXTENT DO THEY PROVIDE
APPROPRIATE SOLUTIONS TO THE SHORTCOMINGS OF THE
HAGUE-VISBY RULES AND THE HAMBURG RULES WITH
REGARD TO MULTIMODAL TRANSPORTATION, THE CARRIER'S
SEAWORTHINESS OBLIGATION AND THE NAUTICAL FAULT
DEFENCE?**

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ABSTRACT

Modern international carriage of goods by sea is largely regulated by various international conventions. Such regimes include the Hague Rules, the Hague-Visby Rules and the Hamburg Rules. We may also look to national and regional hybrid regimes that incorporate various elements of these international conventions. These international conventions, however, have significant shortcomings and are considered outdated in modern times.

The Hague Rules, although widely accepted, were drafted over ninety years ago, and the Visby amendments only made slight changes. They do not cater for modern trade practises such as containerisation (which allows for multimodal transportation) and door-to-door transport. The Hague and Hague-Visby Rules are considered outdated in this regard as they only apply to sea carriage ('tackle-to-tackle'). Due to developments in technology and communications, it is also argued that there is no reason why the carrier should only be required to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage, and not throughout the entire sea voyage. Furthermore, in the modern shipping environment it is questionable why the carrier should still benefit from the nautical fault defence, a contentious defence that exonerates the carrier from liability due to the faults of its employees in the navigation or management of the ship.

The Hamburg Rules were an attempt to address the shortcomings of its predecessors, for example, it removed the nautical fault defence from the list of exceptions available to the carrier and extended its scope of application to 'port-to-port'. However, the Hamburg Rules did not achieve widespread success and have not been ratified by major maritime trading nations.

The result of such a multiplicity of rules on the international carriage of goods by sea is that uniformity is undermined, creating legal uncertainty. These challenges are further heightened by the fact that the current sea conventions in force have significant shortcomings, which will be further discussed in this study. The international maritime community responded to these shortcomings by adopting the Rotterdam Rules in 2008. These Rules are intended to serve as a uniform and modern legal regime setting out the rights and obligations of the shipper, carrier and consignee.

In attempting to achieve their goals of uniformity and modernity, the Rules have introduced significant changes. The three major changes introduced by the Rotterdam Rules, and which form the basis of this study, are the provision for multimodal transportation, the extension of the carrier's seaworthiness obligation and the removal of the nautical fault defence. Accordingly, the purpose of this study is to critically analyse the three major changes introduced by the Rotterdam Rules and to determine the extent to which they have provided appropriate solutions to the alleged shortcomings of its predecessors, the Hague-Visby Rules and the Hamburg Rules.

This study engages in a comparative analysis of the Rotterdam Rules with the Hague-Visby Rules and the Hamburg Rules in relation to the above three major changes. It will be a literature based study (desk-top research) and will analyse relevant international conventions, legislation, case law, journal articles, foreign and South African academic opinion.

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CHAPTER ONE: INTRODUCTION

1.1 Brief overview of the topic

The international carriage of goods by sea plays a significant role in terms of global trade and economic growth,¹ with over 90 percent of global trade carried by sea.² Without ships and the transportation services they provide, the import and export of goods required for today's modern world would not be possible.³ Given the importance of and complexities involved in the carriage of goods by sea, it therefore requires regulation by a uniform and efficient set of rules that reflect the needs of the key parties involved in a carriage contract.⁴

Today's international carriage of goods by sea is largely regulated by various international regimes. Such regimes include the Hague Rules,⁵ the Hague-Visby Rules,⁶ and the Hamburg Rules.⁷ We may also look to national and regional hybrid regimes that incorporate various elements of these international conventions.⁸ With such a multiplicity of rules governing the international carriage of goods by sea, it invariably leads to fragmentation of the rules governing sea carriage laws and creates legal uncertainty, thereby frustrating uniformity and predictability.⁹ Furthermore, the abovementioned conventions have significant shortcomings. The Hague/Hague-Visby Rules, although widely accepted, are considered outdated in the modern shipping environment and it is argued that they are biased in favour of the carrier. One of the main obligations of the carrier/ship-owner is that of exercising due diligence to

¹ International Maritime Organisation (IMO) available at <https://business.un.org/en/entities/13> accessed on 22 September 2015

² 'International shipping facts and figures – Information resources on trade, safety, security, environment' available at <http://www.imo.org/en/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf>, accessed on 25 August 2015

³ 'The economic role of the shipping industry' (15 September 2012) available at <https://ramiwaheed.wordpress.com/2012/09/15/the-economic-role-of-the-shipping-industry/>, accessed on 25 August 2015

⁴ D N Metuge *Carriage of goods by sea – from Hague to Rotterdam: Safer waters* (unpublished LLM thesis, Nelson Mandela Metropolitan University, 2012) iv

⁵ International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), Hague, August 25 1924, 120 U.N.T.S. 156

⁶ Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague-Visby Rules), Brussels, February 23 1968

⁷ United Nations Convention on the Carriage of Goods by sea (Hamburg Rules), Hamburg, March 31 1978, 1695 U.N.T.S. 3

⁸ T Nikaki 'The carrier's duties under the Rotterdam Rules: Better the devil you know?' (2010) 35 (1) *Tulane Maritime Law Journal* 1

⁹ *Ibid* 2

provide a seaworthy vessel. However, in an attempt to more equitably balance the rights between carrier and shipper, under Article III of Hague/Hague-Visby Rules, the carrier is only required to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage. Therefore, the carrier is under no obligation to maintain the vessels seaworthiness throughout the sea voyage. Furthermore, the Rules contain a list of exceptions that the carrier may rely on to escape liability, including the contentious nautical fault defence that exonerates the carrier from liability due to the faults of its employees (under appropriate circumstances).¹⁰ The Rules also only apply in respect of sea carriage and do not cater for carriage that involves multiple modes of transport. The Hamburg Rules were an attempt to resolve the shortcomings of the Hague/Hague-Visby Rules and to balance the interests between carrier and shipper, however, they did not achieve widespread acceptance and are perceived as unduly favouring shipper interests.

Given the shortcomings with the abovementioned conventions and the fact that there is a lack of uniformity on the rules governing the international carriage of goods by sea, it is clear that there is a need for a single regime that will provide a uniform set of rules to modernise and harmonise the international carriage of goods by sea.¹¹ As a result, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted in 2008 (the Rotterdam Rules) and will come into force one year from the date of ratification, accession, approval or acceptance by the 20th UN member state.¹²

The Rotterdam Rules are the latest attempt to provide a uniform and modern set of rules governing the international carriage of goods involving a sea leg that will regulate the rights and obligations of the carrier, shipper and consignee.¹³ In this regard, they have introduced a number of significant changes, taking into account the technological and commercial developments in the shipping industry.¹⁴ The three major changes introduced by the Rules, and which form the basis of this study, are the provision for multimodal transportation, the

¹⁰ Article IV (2) (a) of the Hague-Visby Rules

¹¹ Nikaki op cit note 8 at 3

¹² The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), Rotterdam, December 11 2008, UN Doc. A/RES/63/122; Article 94 of the Rotterdam Rules

¹³ UNCITRAL introductory note on the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)(the "Rotterdam Rules") available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html accessed on 16 December 2016

¹⁴ Ibid

extension of the carrier's seaworthiness obligation and the removal of the nautical fault defence.

Despite these developments, however, it has been suggested that the Rotterdam Rules are overly complicated and do not necessarily achieve their intended aims of uniformity, modernity and efficiency in international trade or provide appropriate solutions to the shortcomings of the Hague-Visby and Hamburg Rules.¹⁵ With regard to the provision for multimodal transportation under the Rotterdam Rules, it has been suggested that its provisions are overly complex and it is not a truly multimodal regime, which many had hoped for. With regard to the carrier's seaworthiness obligation, it has been suggested that the basis of liability of the carrier and burden of proof under Article 17, which is inextricably linked to the carrier's seaworthiness obligation, is overly complex. Furthermore, it will need to be determined whether carriers would be able to comply with an extended seaworthiness obligation in practice. With regard to the deletion of the nautical fault defence, although there has been a call for its removal in recent years, it will need to be determined whether its removal is an appropriate solution in light of both carrier and shipper interests, and whether from a practical perspective it is an appropriate solution.

1.2 Rationale and purpose of the study

The Rotterdam Rules have become the subject of great academic debate and are highly topical at present, and rightfully so. The decision to replace a well-entrenched and long-standing regime, the Hague/Hague-Visby Rules, which, for the most part is adequate, requires an in depth understanding of its provisions. If states are to adopt an entirely new regime, it needs to be beneficial to both carriers and shippers and improve on previous regimes and facilitate ease of international trade. From a South Africa perspective, the study is also relevant. The South African government has launched Operation Phakisa,¹⁶ an initiative intended to implement its policies and programmes faster and more effectively. With aspects of the operation focusing on the economic potential of South Africa's oceans, it

¹⁵ For example, see J Alcantara ... et al 'Particular concerns with regard to the Rotterdam Rules' April 2010, available at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Particular%20concerns%20-%20Rotterdam%20Rules.pdf> accessed 22 September 2015

¹⁶ Operation Phakisa available at <http://www.operationphakisa.gov.za/Pages/Home.aspx> - Operation Phakisa – Marine Protection Services and Governance Final Lab Report. (2014). *Unlocking the Economic Potential of South Africa's Oceans*. Available at <file:///C:/Users/Image/Downloads/OPOceans%20MPSG%20Final%20Lab%20Report%20OPT.pdf> accessed 16 December 2016, pg 72)

has identified the need to monitor and keep up to date with developments regarding the carriage of goods. It is possibly looking at replacing the South African Carriage of Goods by Sea Act 1 of 1986 (SA COGSA, which gives effect to the Hague-Visby Rules) with the Rotterdam Rules, should they be widely accepted (Please see footnote 16 for more information on Operation Phakisa and the suggested updating of the SA COGSA)

An in depth analysis of the Rotterdam Rules in its entirety is beyond the scope of this study, especially all 96 articles, therefore this study will focus solely on the abovementioned three major and potentially controversial changes introduced by the Rules.

Accordingly, it will be appropriate to engage in a comparative analysis between the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to multimodal transportation, the carrier's seaworthiness obligation and the nautical fault defence to determine the extent to which the Rotterdam Rules have provided appropriate solutions to the shortcomings of its predecessors.

1.3 Research question and issues to be investigated

In answering the research question as to whether the three major changes introduced by the Rotterdam Rules are an appropriate solution to the shortcomings of its predecessors, this dissertation will critically analyse the concepts relating to multimodal transportation, the carrier's seaworthiness obligation and the nautical fault defence, thereby engaging in a comparative analysis between the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to the abovementioned changes. It will examine the positive and negative features of each regime in order to determine the extent to which the changes in the Rotterdam Rules are appropriate solutions to the shortcomings of its predecessors. To achieve this objective, this study will examine the relevant provisions under each regime with regard to multimodalism, the seaworthiness obligation and the nautical fault defence. Relevant primary and secondary sources will also be utilised.

1.4 Breakdown of chapters

This dissertation is structured as follows:

Chapter one provides a brief overview of the topic, the purpose, an outline of the main research question and an overview of the chapters of this study.

Chapter two explores the historical background and development of the various carriage of goods by sea regimes leading up to the adoption of the Rotterdam Rules in 2008.

Chapter three examines the multimodal aspects of the Rotterdam Rules and engages in a comparative analysis of its relevant provisions with those of the Hague-Visby Rules and Hamburg Rules. It will determine the extent to which the Rotterdam Rules have provided appropriate solutions to the shortcomings of its predecessors with regard to multimodal transportation. The issue will also be addressed briefly from a South African perspective.

Chapter four examines the carrier's seaworthiness obligation and engages in a comparative analysis of the relevant provisions of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules in this regard. It will determine the extent to which the extension of the carrier's seaworthiness obligation under the Rotterdam Rules is an appropriate solution to the shortcomings of its predecessors.

Chapter five examines the nautical fault defence and engages in a comparative analysis between the relevant provisions of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules in this regard. It will examine arguments both in favour of and against the removal of the nautical defence in order to determine the extent to which its removal from the Rotterdam Rules and Hamburg Rules is an appropriate solution to the shortcomings of the Hague-Visby Rules.

Chapter six provides a summary of the findings and provides a final conclusion and assessment with regard to the three major changes under the Rotterdam Rules.

CHAPTER TWO: HISTORICAL BACKGROUND

The history and development of the rules governing the carriage of goods by sea is an important one and will assist in determining the reason for a new international Convention on the carriage of goods by sea.

2.1 Roman Law

The starting point of this study can be traced back to early Roman law where owners of cargo (also referred to as shippers) had the onerous task of proving fault on the part of the carrier (either the owner or charterer of the vessel) in order to succeed in a claim for loss or damage to their goods.¹⁷ This burden was lifted slightly with the enactment of the Praetor's edict, an order or rule made by the Praetor (a Magistrate), which imposed certain liabilities on shipmasters, innkeepers and stable keepers, thereby tilting the rules in favour of the cargo owner.¹⁸ The Praetor did not trust ocean carriers and suspected that they engaged with thieves to arrange for the disappearance of the cargo in their care.¹⁹ The Praetor therefore imposed an obligation on the carrier to restore the cargo entrusted to it in good condition, failing which the carrier would be held strictly liable.²⁰ The increasing strict liability of the carrier, with few exceptions to rely on, became a part of most sea carriage liability regimes, and was received into English law.²¹

2.2 English Law

The early 19th century saw shippers protected to a great extent under both common and civil law jurisdictions.²² Carriers were held strictly liable for cargo loss or damage with few exceptions to rely on.²³ It entailed a duty on the carrier to deliver the goods at the place of destination in the same condition in which it received the goods, and a failure to do so would

¹⁷ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 618; The cargo-owner would have to prove the fault of the carrier during a time in shipping where no record was kept, placing an almost impossible task on the cargo-owner to prove the liability of the carrier

¹⁸ Hare op cit note 17 at 618

¹⁹ A Govindjee ...et al *Fresh Perspectives: Commercial Law* 2 (2007) 277

²⁰ Ibid 277

²¹ Hare op cit note 17 at 619-620

²² J A Estrella-Faria 'Uniform law for international transport at UNCITRAL: New times, new players, and new rules' (2009) 44 (3) *Texas International Law Journal* 280

²³ Hare op cit note 17 at 619

result in its liability.²⁴ Unless the carrier was able to show that its negligence was not the cause of the loss or damage and that it was due to one of the following exceptions: “an act of God; an act of public enemies; shipper’s fault; or inherent vice of the goods”, the carrier would be held strictly liable for the loss of or damage to the cargo.²⁵ This was based on the principle that whoever is in possession of the cargo and is able to exercise control over it should ultimately bear legal responsibility and ensure its welfare.²⁶

The seemingly burdensome strict liability of the carrier, however, did not place it at the mercy of the shipper.²⁷ On the contrary, carriers were entitled to contract out of liability almost entirely through the inclusion of exoneration clauses into their bills of lading.²⁸ The development of steam power allowed for the growth of shipping companies in terms of size and economic strength.²⁹ The absence of competition in sea transport also put carriers at an advantage, allowing them to fix their own terms for the carriage of goods.³⁰ And in British jurisdictions (with England operating the world’s largest fleet at the time),³¹ the courts would uphold freedom of contract, seeing their role as one of ensuring that parties upheld the terms of their agreement.³² As a result, the carrier remained the dominant contracting party until the end of the 19th century.³³

Cargo-owning nations and consignees were dissatisfied.³⁴ This was especially the case in the United States of America where courts began finding clauses in bills of lading that sought to reduce or exclude the carrier’s liability to be against public policy and therefore not valid.³⁵ They took the view that carriers could not exonerate themselves from liability for damage or loss of cargo as a result of their own negligence or failure to provide a seaworthy vessel.³⁶ This growing aversion toward the British monopoly over international transport and the

²⁴ J Adamsson *The Rotterdam Rules A transport convention for the future?* (unpublished LLM thesis, Lund University, 2011) 9

²⁵ *Ibid* 9

²⁶ Y Yang *The abolition of the nautical fault exemption: To be or not to be* (unpublished LLM thesis, Lund University, 2011) 4

²⁷ S Zamora ‘Carrier liability for damage or loss to cargo in international transport’ (1975) 23 (3) *American Journal of Comparative Law* 400

²⁸ Hare op cit note 17 at 621; Yang op cit note 26 at 10

²⁹ Zamora op cit note 27 at 400

³⁰ *Ibid* 400

³¹ Yang op cit note 26 at 11

³² I Carr, P Stone *International Trade Law* 5 ed (2014) 217

³³ Hare op cit note 17 at 622

³⁴ *Ibid* 622

³⁵ Yang op cit note 26 at 11

³⁶ *Ibid* 11

carrier's exploitation of its dominant position eventually lead to the passing of the 1893 Harter Act in the United States of America.³⁷

2.3 The Harter Act

The Harter Act, so named after Congressman Michael Harter of Ohio, was an important text, representing the first legislative attempt to set the minimum liability of the ocean carrier.³⁸ Although its main purpose was to thwart the carrier's attempts to contract out of liability,³⁹ it also sought a compromise between carrier and shipper interests.⁴⁰ It introduced the concept of due diligence as the minimum standard of seaworthiness to which the carrier could not contract out of.⁴¹ In other words, the carrier now had the obligation to exercise due diligence to make the vessel seaworthy, and could not contract out of this obligation. Furthermore, any bill of lading that sought to absolve the carrier from liability for negligence in the "proper loading, stowage, custody, care or proper delivery of the goods" would be void.⁴² As a *quid pro quo*,⁴³ a list of exceptions was added, which the carrier could rely on to escape liability, including damage or loss caused from the faults and errors in the navigation or management of the vessel.⁴⁴ As a result, the Harter Act is considered a significant milestone in the development of the rules governing the carriage of goods by sea with many of its features still present in national and international regimes today.⁴⁵

Many countries representing cargo interests followed the United States' lead and enacted legislation similar to the Harter Act, such as Australia, New Zealand and Canada.⁴⁶ However, this legislation was only applicable in respect of domestic and outbound bills of lading, meaning that importers in those countries would not benefit from their own law.⁴⁷ From an international perspective, there was also a lack of uniformity on the rules governing the carriage of goods by sea.⁴⁸ The use of different forms of bills of lading by different

³⁷ Hare op cit note 17 at 622-623; Zamora op cit note 27 at 402

³⁸ Ibid 402

³⁹ Hare op cit note 17 at 623

⁴⁰ Estrella-Faria op cit note 22 at 283

⁴¹ Hare op cit note 17 at 623

⁴² Estrella-Faria op cit note 22 at 282

⁴³ 'Quid pro quo' is a Latin phrase meaning 'something for something'. It is a favour or advantage granted in return for something else.

⁴⁴ Hare op cit note 17 at 623

⁴⁵ Ibid 623

⁴⁶ M Sturley 'The History of COGSA and the Hague Rules' 1991 (22) 1 *Journal of Maritime Law and Commerce* 8

⁴⁷ Ibid 8

⁴⁸ Adamsson op cit note 24 at 11

jurisdictions further complicated the issue of non-uniformity.⁴⁹ Many ship-owning nations still continued to uphold freedom of contract, allowing carriers to set their own liability terms.⁵⁰ The result was that the Harter Act had not achieved the uniformity in carrier liability as hoped, and it was evident that uniformity in carrier liability and harmonious global trade could only be achieved at an international level.⁵¹

2.4 The Hague Rules

With a clear need for uniformity in international trade, an initiative was taken up in 1921 by the Maritime Law Committee of the International Law Association.⁵² With the aim of adopting a bill of lading that would be uniform, simple, reasonable and suitable for use in international trade, a code of Rules was drafted and presented at a conference by the Maritime Law Committee held at the Hague in September 1921.⁵³ However, these Rules were not binding on any nations and had to be inserted voluntarily by carriers into bills of lading, which they largely ignored.⁵⁴ As a result, a decision was taken to transform the Rules from ‘model Rules’ into a draft international Convention.⁵⁵ Finally, the Rules were adopted and thereby giving it the status of international Convention in 1924 in Brussels at a conference attended by twenty-six nations, and later entered into force in 1931.⁵⁶ These Rules are known as the Hague Rules and have been widely accepted with the majority of nations becoming signatories to the Rules.⁵⁷ The Rules are based on provisions found in the Harter Act and set a minimum standard of liability that carriers cannot contract out of.⁵⁸ They represent a compromise between the interests of the shipper and the carrier, balancing the risks to be borne by each party.⁵⁹ Under the Hague Rules the carrier is bound before and at the beginning of the voyage to exercise due diligence to make the vessel seaworthy and to

⁴⁹ F Reynolds ‘The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules’ (1990) 7 *Australian and New Zealand Maritime Law Journal* 18

⁵⁰ Zamora op cit note 27 at 404

⁵¹ Ibid 402

⁵² Hare op cit note 17 at 624

⁵³ C R Dunlop ‘The Hague Rules, 1921’ (1922) 4 (Parts 1 and 4) *Journal of Comparative and International Law* 27

⁵⁴ Yang op cit note 26 at 14

⁵⁵ Ibid 14

⁵⁶ Adamsson op cit note 24 at 12; Yang op cit note 26 at 14

⁵⁷ P Myburgh ‘Uniformity or unilateralism in the law of carriage of goods by sea?’ (2000) 31 (2) *Victoria University of Wellington Law Review* 361

⁵⁸ I Carr, P Stone op cit note 32 at 218

⁵⁹ Yang op cit note 26 at 15

properly load, stow, carry, care for, and discharge the goods carried.⁶⁰ This is a minimum standard of liability and any provision in the bill of lading that attempts to limit these duties is void.⁶¹ Acknowledging that ocean transport is particularly risky,⁶² the Rules afford the carrier protection through a list of exceptions that it may rely on to escape liability where appropriate. This includes the nautical fault exception, a contentious defence allowing the carrier to escape liability for the faults of its servants in the navigation or management of the vessel.⁶³ However, the seaworthiness obligation is considered to be an overriding obligation, meaning that before the carrier may seek to rely on one of the exceptions, it must first prove that it exercised due diligence to provide a seaworthy vessel before and at the beginning of the voyage.⁶⁴

The Hague Rules were the first set of international Rules that successfully unified the law governing the carriage of goods by sea and established a mandatory set of Rules, outlining the rights and obligations of both the carrier and shipper.⁶⁵ As a result of its success, the Rules have been widely accepted and have remained the dominant carriage regime for a number of years.⁶⁶

2.5 The Hague-Visby Rules

Despite its success and widespread acceptance, certain defects were noted under the Hague Rules.⁶⁷ This included, amongst other issues, problems with the package or unit limitation, the introduction of the container,⁶⁸ and the fact that the Rules could be excluded through the inclusion of a choice of law clause opting for the law of a jurisdiction which had not adopted the Rules.⁶⁹ As a result, in 1959 the Comité Maritime International (CMI) commenced work

⁶⁰ J D Kimball 'Shipowners' liability and the proposed revision of the Hague Rules' (1975) 7 (1) *Journal of Maritime Law and Commerce* 223

⁶¹ *Ibid* 223

⁶² Zamora *op cit* note 27 at 409

⁶³ Hare *op cit* note 17 at 623; Zamora *op cit* note 27 at 409

⁶⁴ Yang *op cit* note 26 at 21

⁶⁵ Adamsson *op cit* note 24 at 11; Yang *op cit* note 26 at 15

⁶⁶ Hare *op cit* note 17 at 624

⁶⁷ See Reynolds *op cit* note 49 for an overview of the major defects of the Hague Rules

⁶⁸ Under the Hague Rules, the carrier's liability is limited to 100 pounds sterling per package or unit. 100 pounds sterling was 'taken to be gold value'. There was much confusion over the package limitation under the Rules and there were concerns that the limit was too low. With regard to the issue of the introduction of the container, cargo is increasingly being carried by containers. The Hague Rules do not deal with the increased use of containers and do not specify whether the container itself or the individual cargo inside the container constitutes a package or unit. Reynolds *op cit* note 49 at 21-22

⁶⁹ *Ibid* 20-21

on amendments to the Rules.⁷⁰ The result was a draft protocol which was approved by the CMI at a conference in 1963 and signed at Visby.⁷¹ The draft Rules were subsequently amended and formally adopted at a Diplomatic Conference held in Brussels in 1968.⁷² This Visby protocol amending the Hague Rules is known as the Hague-Visby Rules.⁷³ The Hague-Visby Rules entered into force in 1977 once it received the requisite number of ratifications.⁷⁴ Together, the Hague and Hague-Visby Rules have been widely accepted with the majority of maritime nations in the world being signatories to either of the Rules.⁷⁵

It is interesting to note that the Hague-Visby Rules preserved the provisions regulating the carrier's liability, including the list of exceptions.⁷⁶ The Hague-Visby Rules, like the Harter Act, serve as a compromise between carrier and cargo-interests.⁷⁷ It allocates risks between parties and these risks are then insured. Article 3 of the Rules sets out the obligations of the carrier, which includes a duty to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage. Article III rule 1 states as follows:

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

- (a) Make the ship seaworthy;
- (b) Properly man, equip and supply the ship;
- (c) Make the holds, refrigeration and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.”

This definition of seaworthiness is a departure from the absolute obligation under the common law to provide a seaworthy vessel.⁷⁸ Article IV rule 2 also provides a set of exceptions that the carrier may rely on to avoid liability. This also includes the contentious nautical fault defence under Rule 2 (a) which states as follows:

2. “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

⁷⁰ Estrella-Faria op cit note 22 at 292

⁷¹ Myburgh op cit note 57 at 360

⁷² Ibid 360

⁷³ Ibid 360

⁷⁴ Estrella-Faria op cit note 22 at 294

⁷⁵ P Gillies and G Moens *International Trade and Business: Law, Policy and Ethics* (1998) at 175

⁷⁶ Yang op cit note 26 at 16

⁷⁷ P Gillies and G Moens op cit note 75 at 175

⁷⁸ Adamsson op cit note 24 at 15

- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.”⁷⁹

As stated, these rules in either form have been widely accepted and served as an acceptable compromise between carrier and cargo interests for a long period of time. South Africa has even given effect to the Hague-Visby Rules in its domestic Carriage of Goods by Sea Act (SA COGSA).⁸⁰ However, the Hague Rules are over 90 years old, and the Visby amendments only made slight changes. Their roots lie in the Harter Act, drafted over a 100 years ago. Many developing states representing shipper and cargo interests that were not involved in the drafting of the Hague Rules started participating in international trade.⁸¹ They perceived the Hague/Hague-Visby Rules as favouring the ship-owning developed nations that dominated maritime trade.⁸² Accordingly, the Rules are considered outdated and are not without their concerns, particularly with regard to the carrier’s seaworthiness obligation, the nautical fault defence, and the fact that the Rules do not cater for multimodal transportation. The obligation to provide a seaworthy vessel only before and at the beginning of the voyage was suitable for its time due to restrictions in communications and technologies.⁸³ However, this is no longer the case. Due to advancements in technology and communication in the shipping industry, it is argued that there is no reason why the carrier should not be expected to exercise due diligence to make and keep the vessel seaworthy throughout the entire sea voyage.⁸⁴ Ship-owners are in constant contact with their vessels and staff, and repairs can be effected at the nearest port.⁸⁵ Furthermore, the nautical fault defence is considered to be an outdated exception dating back to when maritime ventures were perilous⁸⁶ and carriers were not able to make contact with their masters and crew once at sea.⁸⁷ It is questionable why the carrier

⁷⁹ The Hague-Visby Rules, Article IV rule 2 (a)

⁸⁰ Hare op cit note 17 at 625

⁸¹ P Sooksripaisarnkit ‘Enhancing of Carriers’ Liabilities in the Rotterdam Rules – Too Expensive Costs for Navigational Safety?’ (2014) 8 (2) *The International Journal on Marine Navigation and Safety of Sea Transportation* available at http://www.transnav.eu/Article_Enhancing_of_Carriers%E2%80%99_Sooksripaisarnkit,30,511.html, accessed on 22 September 2015 310

⁸² Reynolds op cit note 49 at 27

⁸³ Sooksripaisarnkit op cit note 81 at 313

⁸⁴ F Berlingieri ‘A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules’ 2009 available at https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf accessed on 22 September 2015 6

⁸⁵ Sooksripaisarnkit op cit note 81 at 313

⁸⁶ Reynolds op cit note 49 at 29

⁸⁷ Hare op cit note 17 at 631

should benefit from this exception in light of modern technologies and developments,⁸⁸ and the fact that this exception is not available to carriers of other modes of transport.⁸⁹ As mentioned, the Rules also do not cater for modern trade practises such as containerisation (which allows for goods to be carried by multiple modes of transport) and door-to-door transport.⁹⁰ Accordingly, one of the major criticisms levelled against the Hague-Visby Rules is that they do not cater for multimodal transportation and are a ‘tackle-to-tackle’ regime.⁹¹ Since transportation today is often multimodal due to an increase in the use of containers, a carriage regime capable of adequately regulating such transport is required.⁹²

Due to the abovementioned shortcomings, the Hague/Hague-Visby Rules are considered outdated, inefficient, and biased in favour of carrier interests.⁹³

2.6 The Hamburg Rules

The defects of the Hague/Hague-Visby Rules led to work on the formulation of a new ocean carriage regime by the United Nations Conference on Trade and Development (UNCTAD) in 1968.⁹⁴ However, this project was handed over to the newly formed United Nations Commission on International Trade Law (UNCITRAL).⁹⁵ UNCITRAL spent five years working on a draft carriage regime which was subsequently accepted in 1976.⁹⁶ After further negotiations, a Diplomatic Conference was held in Hamburg, Germany in 1978 in which the final text of the new carriage regime was approved, and these Rules are commonly referred to as the Hamburg Rules.⁹⁷

The Hamburg Rules were an attempt to address the shortcomings of its predecessors. However, the Hamburg Rules did not achieve widespread success and, unlike its predecessors, had the opposite effect of favouring cargo-interests.⁹⁸ The Rules introduce a presumed-fault based system of liability, meaning that the carrier is liable for loss of or

⁸⁸ Hare op cit note 17 at 631

⁸⁹ Sooksripaisarnkit op cit note 81 at 313-314

⁹⁰ Nikaki op cit note 8 at 2-3

⁹¹ The Hague-Visby Rules only apply to sea carriage, and do not provide for the provision of other modes of transport; Article 1 (b) of the Hague-Visby Rules

⁹² Adamsson op cit note 24 at 31

⁹³ Myburgh op cit note 57 at 361

⁹⁴ Estrella-Faria op cit note 22 at 298

⁹⁵ Estrella-Faria op cit note 22 at 298

⁹⁶ Yang op cit note 26 at 17

⁹⁷ Ibid 17

⁹⁸ Sooksripaisarnkit op cit note 81 at 309

damage to the goods if the event which caused the loss or damage took place whilst the goods were in its charge, unless it can prove that it, its servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.⁹⁹ In other words, the carrier is presumed to be at fault for any loss or damage, unless it can prove otherwise. The wording and construction of the Hamburg Rules differs substantially from the Hague/Hague-Visby Rules, with many notable differences. For example, the seaworthiness obligation and the list of defences under the Hague/Hague-Visby Rules do not feature in the text of the Hamburg Rules, including the nautical fault defence. It was argued by carriers that because the Hamburg Rules tend to favour cargo-interests, the potential for carrier liability increases. This perceived increase in carrier liability would therefore impact freight rates, insurance costs, and see an increase in litigation over the interpretation of its provisions.¹⁰⁰ It is argued that the increase in carrier liability and the removal of carrier-friendly elements, such as the nautical fault defence, are some of the reasons major maritime trading nations have not ratified the Hamburg Rules.¹⁰¹ The Rules also only apply from the period when the carrier takes the goods in its charge at the port of loading and subsequently ends at the port of discharge (port-to-port),¹⁰² and does not cover a door-to-door contract.¹⁰³ The Hague-Visby Rules and Hamburg Rules are thus both lacking in this regard. Due to its poor reception and acceptance, the Hamburg Rules have had very little impact and influence on international trade and maritime transport.¹⁰⁴

2.7 The Rotterdam Rules

The above discussed conventions are applied by various nations, many of which have implemented the convention that they are party to into their domestic legislation, sometimes even implementing a hybrid of the various conventions into their domestic legislation.¹⁰⁵ The application of different carriage regimes by different nations, including the application of domestic laws reflecting a hybrid of different regimes, creates a lack of uniformity and increases legal uncertainty.¹⁰⁶ This risk of legal uncertainty, coupled with the other significant shortcomings of the existing carriage regimes, clearly indicates that there is a need for a

⁹⁹ Hare op cit note 17 at 631; Article 5 (1) of The Hamburg Rules

¹⁰⁰ Estrella-Faria op cit note 22 at 301

¹⁰¹ Metuge op cit note 4 at 70

¹⁰² The Hamburg Rules, Article 4 (1)

¹⁰³ Berlingieri op cit note 84 at 5

¹⁰⁴ Yang op cit note 26 at 18

¹⁰⁵ Myburgh op cit note 57 at 362

¹⁰⁶ Nikaki op cit note 8 at 2; Sooksripaisarnkit op cit note 81 at 309

convention that adequately caters for modern trade and transport practises; balancing the varied commercial interests of all parties involved and creating uniformity in the application of international rules governing the carriage of goods by sea.¹⁰⁷

As a response to the above predicament, two international bodies, the CMI and UNCITRAL, joined forces in an attempt to promote greater international uniformity and to modernise the rules governing the carriage of goods by sea¹⁰⁸ The CMI appointed an International Working Group which prepared the first drafts of a new Convention.¹⁰⁹ This project was handed over to Working Group III convened by UNCITRAL in 2001 and remained closely involved with UNCITRAL in the preparation of the final draft Convention.¹¹⁰ The draft regime was presented to the General Assembly of the United Nations (UN) for review and comment, and on the 11th December 2008 during its 63rd session, the UN General Assembly passed a resolution in which it adopted the Rules as the ‘United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea’.¹¹¹ It authorised an official signing ceremony for the Convention and recommended that the Rules be known as the ‘Rotterdam Rules’, which took place on 23 September 2009 in Rotterdam.¹¹² The Rules will come into force one year from the date of ratification, accession, approval or acceptance by the 20th UN member state.¹¹³ To date, only Spain, Togo and Congo have ratified the Rotterdam Rules.¹¹⁴ Although the Rules have not yet received the requisite number of ratifications to enter into force, it is hoped that they will replace the current international conventions, specifically the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, in order to achieve uniformity and certainty in the application of the laws regulating the carriage of goods by sea.¹¹⁵

The Rules are intended to serve as a uniform and modern legal regime setting out the rights and obligations of the shipper, carrier and consignee.¹¹⁶ In an attempt to achieve these goals of uniformity and modernity, the Rules have introduced significant changes. The three major

¹⁰⁷ Nikaki op cit note 8 at 3

¹⁰⁸ Adamsson op cit note 24 at 32

¹⁰⁹ Hare op cit note 17 at 633

¹¹⁰ Ibid 633

¹¹¹ S Hashmi ‘The Rotterdam Rules: A blessing’ 2012 10(2) *Loyola Maritime Law Journal* 227-228

¹¹² Ibid 228

¹¹³ The Rotterdam Rules, Article 94

¹¹⁴ ‘The Rotterdam Rules’ available at <http://www.rotterdamrules.com/content/introduction> accessed on 22 September 2015

¹¹⁵ Ibid

¹¹⁶ See UNCITRAL introductory note on the Rotterdam Rules op cit note 13

changes introduced by the Rotterdam Rules, and which form the basis of this study, are the provision for multimodal transportation, the extension of the carrier's seaworthiness obligation and the removal of the nautical fault defence.

With regard to the provision for multimodal transportation, Article 1 of the Rules states as follows:

1. "‘Contract of carriage’ means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."¹¹⁷

The above definition indicates that the Rules not only cover sea carriage but also carriage by other modes of transport, as long as there is an international sea leg.¹¹⁸ Article 12 of the Rules sets out the period of responsibility of the carrier as follows:

1. "The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered."

The period of responsibility of the carrier has been extended from the time when the carrier receives the goods for carriage until the moment the goods are delivered, therefore, the Rules may apply to a situation where the carrier undertakes to take charge of the goods at the door of the shipper and to deliver them at the door of the consignee i.e. door-to-door.¹¹⁹ The extension of the period of responsibility and provision for multimodal carriage contracts is a significant development, going beyond the Hague-Visby Rules which only apply 'tackle-to-tackle', and the Hamburg Rules, which apply 'Port-to-Port'. As stated, transportation today is often multimodal due to developments in containerisation, thus, it is necessary for the law to be updated and to regulate these developments.¹²⁰

¹¹⁷ The Rotterdam Rules, Article 1 (1)

¹¹⁸ Nikaki op cit note 8 at 5; F Berlingieri 'Multimodal aspects of the Rotterdam Rules' paper presented at the Colloquium of the Rotterdam Rules 2009 at De Doelen on 21st September 2009 available at <http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf> accessed on 22 September 2015 2

¹¹⁹ Nikaki op cit note 8 at 5 - 6

¹²⁰ Adamsson op cit note 24 at 31-32

With regard to the carrier's seaworthiness duty, the Rotterdam Rules have kept this duty under Article 14 with similar wording to the Hague-Visby Rules. However, they extend the carriers obligation to provide a seaworthy vessel throughout the entire sea voyage, and not just before and at the beginning of the voyage i.e. a continuous seaworthiness obligation.¹²¹ The basis of the carrier's liability for damage to cargo is set out in Article 17 as well as the burden of proof. The Rules also contain a list of exceptions upon which the carrier may rely to escape liability. Notably, the Rules have also removed the contentious nautical fault defence.

These are attempts by the Rotterdam Rules to address the shortcomings of its predecessors and modernise the Rules governing the international carriage of goods by sea.

Having traced the development of the various rules governing the carriage of goods by sea, the following chapters engage in a comparative analysis between the relevant provisions of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to multimodal transportation, the carrier's seaworthiness obligation and the nautical fault defence in order to determine whether the Rotterdam Rules have provided appropriate solutions to the alleged shortcomings of its predecessors.

¹²¹ Adamsson op cit note 24 at 55

CHAPTER THREE: MULTIMODAL TRANSPORTATION

3.1 Introduction

In international trade, goods may be carried by a number of different modes of transport, such as ship transport, aviation, and land transport (including road and rail).¹²² Often, and more increasingly, goods are carried by a combination of modes of transport, commonly known as multimodal transport.¹²³ The term ‘multimodal transportation’ is used to describe the transportation of goods by a multimodal transport operator (MTO) from one place to another by two or more different modes of transport.¹²⁴ The international transportation of goods by more than one mode of transport generally only requires “one contract, one transport document and one carrier who is responsible from the moment he takes over the goods from the shipper till the moment he delivers the goods to the consignee.”¹²⁵ The carrier is generally responsible for the entire transport process, even if it sub-contracts part of the carriage.¹²⁶

The introduction of the container has had a significant impact on the growth of multimodal transportation and the efficiency of the international carriage of goods.¹²⁷ Before the development of the container, goods would have to be loaded and unloaded from one mode of transport to another.¹²⁸ As a result, the goods would have to be handled at various different stages before reaching its destination, leading to delay and loss of or damage to the goods.¹²⁹ The costs involved were also significant as the shipper would be charged separate transportation rates and handling costs each time the goods had to be transferred from one mode of transport to another.¹³⁰ Furthermore, separate contracts of carriage had to be concluded with various carriers in respect of each mode of transport, with each contract

¹²² C Besong *Towards a modern role for liability in multimodal transport law* (PhD dissertation, University of London, 2007) 3

¹²³ Ibid 3

¹²⁴ C W Kituri *The Rotterdam Rules: Do they solve the problems arising from multimodal transportation?* (unpublished LLM thesis, University of Cape Town, 2009) 14-15

¹²⁵ P Neels ‘The Rotterdam Rules and modern transport practises: a successful marriage?’ available at <http://www.rotterdamrules.com/sites/default/files/The%20Rotterdam%20Rules%20and%20modern%20transport%20practices%20-%20a%20successful%20marriage.pdf> accessed on 1 October 2015, 3

¹²⁶ Ibid 3. In other words, the carrier is legally responsible for any loss and/or damage to the goods throughout the entire transportation process even though there are multiple modes of transport and various sub-carriers involved.

¹²⁷ Besong op cit note 122 at 22; I C Conrado *Multimodal aspect of the Rotterdam Rules: a critical analysis of the liability of the MTO* (unpublished LLM thesis, Lund University, 2011) 4

¹²⁸ Kituri op cit note 124 at 13

¹²⁹ Ibid 13; Besong op cit note 122 at 22

¹³⁰ Kituri op cit note 124 at 13

subject to varying rules and regulations.¹³¹ The development of the metal container in the 1950's, however, has largely circumvented these issues, offering numerous advantages.¹³² The container is a large metal box used to hold and carry goods to its destination, which is loaded and unloaded by machines.¹³³ Through the use of these containers, "labour costs, shipping time in port, total transit time, losses due to breakage and theft and cargo-handling costs" are significantly reduced.¹³⁴ The carriage of goods by means of a container allows for cargo to be easily transferred from one mode of transport to another, such as from train to vessel or vehicle to vessel.¹³⁵ This integration of road, rail and sea carriage has allowed for the growth of multimodal transportation.¹³⁶

Traditionally, cargo carried under different modes of transport would require separate contracts of carriage, each subject to different legal regimes.¹³⁷ With the development of containerisation, cargo increasingly started being carried on a multimodal basis with the use of one contract for the entire carriage process.¹³⁸ Under a multimodal contract, the carrier will undertake to carry cargo from one place to an ultimate destination with the possibility of using multiple modes of transport with the use of one single transport document.¹³⁹ The cargo will remain in the container throughout the entire voyage until it reaches its place of destination.¹⁴⁰ Thus, instead of a shipper having to conclude multiple contracts with various carriers for each different mode of transport utilised, it is able to conclude one single contract of carriage with a single MTO, whilst its cargo remains safe and easily transferrable from one mode to the next.¹⁴¹ The MTO will undertake responsibility from when it takes the cargo into its charge until it delivers the cargo at the door of the consignee. And as mentioned, the MTO may sub-contract part or the entire voyage to different persons, whilst still remaining ultimately responsible for the carriage of the goods.¹⁴²

¹³¹ Conrado op cit note 127 at 4

¹³² M Hoeks *Multimodal transport law: The law applicable to the multimodal contract for the carriage of goods* (PhD dissertation, Rotterdam, Erasmus Universiteit, 2009) 2

¹³³ Kituri op cit note 124 at 14

¹³⁴ Ibid 14

¹³⁵ Ibid 14

¹³⁶ Ibid 14

¹³⁷ Hoeks op cit note 132 at 2

¹³⁸ Conrado op cit note 127 at 4

¹³⁹ Besong op cit note 122 at 37

¹⁴⁰ Conrado op cit note 127 at 13

¹⁴¹ Ibid 13

¹⁴² Ibid 13-14

The issue that arises, however, is that the multimodal contract is governed by differing legal regimes, with each leg of the voyage governed by a different legal regime.¹⁴³ Such regimes include, for example: the CMR Convention¹⁴⁴ which regulates carriage by road in member states within the European Union; the Warsaw Convention,¹⁴⁵ largely amended by the Montreal Convention,¹⁴⁶ which regulates carriage by air; the various versions of the COTIF-CIM,¹⁴⁷ which regulates carriage by rail; and the Hague Rules, Hague-Visby Rules and the Hamburg Rules that regulates carriage by sea. These regimes each relate to a different mode of transport and have been developed separately and independently from each other.¹⁴⁸ As a result, when any of these regimes are applied to a multimodal contract, it will only cover the mode of transport it was designed to regulate. Furthermore, and in particular to this study, the international carriage of goods by sea regimes are considered outdated and not able to cater for the multimodal transportation of goods.¹⁴⁹ The Hague-Visby Rules only apply ‘tackle-to-tackle’, whilst the Hamburg Rules apply ‘port-to-port’. The scope of application of these carriage regimes is inadequate in a multimodal situation since they are only mandatorily applicable for a certain period of the voyage, leaving part of the voyage covered by a different regime or subject to different rules.¹⁵⁰ As a result, there is a lack of uniformity in the rules that govern multimodal transport contracts and a need for a single transport regime that covers the entire transportation process and extends its application beyond ‘tackle-to-tackle’ and ‘port-to-port’.¹⁵¹ Furthermore, all attempts thus far to regulate multimodal transport through an international regime have been unsuccessful.¹⁵² These include, for example, the

¹⁴³ Kituri op cit note 124 at 15

¹⁴⁴ Convention on the Contract for the International Carriage of Goods by Road (CMR) (Geneva, 19 May 1956), as amended by the 1978 Protocol

¹⁴⁵ The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (Warsaw Convention)

¹⁴⁶ Convention for the Unification of Certain Rules for International Carriage by Air (Montreal, 28 May 1999)

¹⁴⁷ Convention Concerning International Carriage by Rail (COTIF) 9 May 1980 as amended by the Protocol of Modification 3 June 1999 – Appendix B (CIM)

¹⁴⁸ Kituri op cit note 124 at 16

¹⁴⁹ M E Crowley ‘The limited scope of the cargo liability regime covering carriage of goods by sea: The multimodal problem’ (2005) 79 (5&6) *Tulane Law Review* 1462

¹⁵⁰ T Fujita ‘The comprehensive coverage of the new Convention: Performing parties and the multimodal implications’ (2009) 44 (3) *Texas International Law Journal* 351

¹⁵¹ *Ibid* 351

¹⁵² Kituri op cit note 124 at 25. See Kituri op cit note 124 for a discussion as to the reasons for the failure to regulate multimodal transport through an international regime. For example, the Multimodal Convention did not receive the requisite ratifications to enter into force (at pg 23). See further Hoeks op cit note 132 at 19 where the author provides that although the ICC Rules and 1992 Rules for Multimodal Transport Documents have found worldwide recognition, they are not international legislation and are only applicable when incorporated into a contract of carriage and cannot set aside the compulsory provisions of international Conventions.

ICC Rules 1975,¹⁵³ the Multimodal Convention,¹⁵⁴ and the 1992 Rules for Multimodal Transport Documents.¹⁵⁵

The Rotterdam Rules attempt to address the limitations of the current carriage of goods by sea regimes in order to better meet the needs of modern trade. These Rules introduce an extended scope of application and period of responsibility of the carrier that covers not only the carriage of goods by sea, but also the carriage of goods by other modes of transport provided that at least one of the legs of carriage is by sea.¹⁵⁶ This is considered one of the most significant changes introduced by these Rules. However, the extent to which the provision for multimodal transport under the Rotterdam Rules is an appropriate solution to its predecessors needs to be determined, with concerns that the multimodal aspects of the Rules are overly complex and that it is not the multimodal Convention many had hoped for. Therefore, the following paragraphs engage in a comparative analysis between the relevant provisions of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to their scope of application and period of responsibility of the carrier. It will engage in an analysis of the multimodal aspects of the Rotterdam Rules and thereafter it will seek to determine whether the provision for multimodal transport under the Rotterdam Rules addresses the shortcomings of its predecessors and if it is an appropriate solution in this regard.

3.2 A comparative analysis between the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to their scope of application and the period of responsibility of the carrier

3.2.1 The Hague-Visby Rules

The Hague-Visby Rules are limited in terms of its scope of application and do not make provision for multimodal carriage.¹⁵⁷ As per Article 10, the Hague-Visby Rules generally

¹⁵³ ICC Rules 1975, International Chamber of Commerce, Uniform rules for a combined transport document, ICC Publication No 298;

¹⁵⁴ United Nations Convention on International Multimodal Transport of Goods (Multimodal Convention) (1980)

¹⁵⁵ United Nations Conference on Trade and Development & International Chamber of Commerce, Rules for Multimodal Transport Documents, ICC Publication No 481

¹⁵⁶ Article 1 (1) of the Rotterdam rules

¹⁵⁷ Hoeks op cit note 132 at 239

apply only to outbound carriage from a contracting state and apply only to bills of lading.¹⁵⁸ Article 1 (e) of the Hague-Visby Rules further states as follows:

(e) “‘Carriage of goods’ covers the period from the time when the goods are loaded on to the time they are discharged from the ship.”

Their scope of application is ‘tackle-to-tackle’ as the Rules are only compulsorily applicable from the moment the cargo is loaded on to the vessel until they are discharged from the vessel.¹⁵⁹ In other words, the Rules only cover ocean carriage. This creates uncertainty as the Rules do not cover the situation where the carrier undertakes responsibility and liability for the goods before they are loaded on to the vessel and the period after the goods have been discharged from the vessel.¹⁶⁰ The Hague-Visby Rules are not applicable to those non-sea legs of the voyage and it is left up to national law to regulate those parts not covered by the Hague-Visby Rules.¹⁶¹

The decision to limit the scope of application to ‘tackle-to-tackle’ under the Hague Rules was acceptable at that time since that was generally the period of responsibility undertaken by the carrier¹⁶² as goods were received for shipment and delivered to the consignee or its agent alongside the vessel (tackle-to-tackle).¹⁶³ Soon, however, the period of responsibility of the carrier widened (port-to-port) and the carrier took on greater responsibility by taking charge of the goods and delivering them to port warehouses.¹⁶⁴ Whilst the carrier’s actual responsibility had widened, the law had not kept up to date with this development and the scope of application of the carrier remained ‘tackle-to-tackle’ under the Hague Rules and was not altered by the Hague-Visby Rules.¹⁶⁵ This was due to the fact that the Hague-Visby Rules

¹⁵⁸ S Patwari *Rotterdam and Hague-Visby Rules: A comparative analysis* (Research paper, International Trade Law, 2014) 13; Article 10 of the Hague-Visby Rules

¹⁵⁹ Hoeks op cit note 132 at 240

¹⁶⁰ D E Chami ‘The obligations of the carrier’ paper presented at the Colloquium of the Rotterdam Rules 2009, held at De Doelen 21 September 2009 available at <https://www.scribd.com/document/262241074/Def-Tekst-Diego-Chami-Obligations-of-the-Carrier> accessed on 28 September 2015

¹⁶¹ Berlingieri op cit note 84 at 5, 52

¹⁶² Ibid 52

¹⁶³ Berlingieri op cit note 118 at 1

¹⁶⁴ Ibid 1

¹⁶⁵ J Hawes ‘The Rotterdam Rules revolution: Will the Rotterdam Rules have the regulatory impact upon ‘multimodal carriage’ their creators intended?’ available at <http://arno.uvt.nl/show.cgi?fid=128604> accessed on 28 September 2015, 9

were negotiated at a time when multimodal contracts were not prevalent; therefore an extension of the application of the Rules was not necessary.¹⁶⁶

3.2.2 The Hamburg Rules

In response to the limited scope of application of the Hague-Visby Rules, the scope of application and the period of responsibility of the carrier was widened under the Hamburg Rules. Article 4 (1) of the Hamburg Rules sets out the period of responsibility of the carrier as follows:

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

From this definition we see that the Hamburg Rules not only apply ‘tackle-to-tackle’, but also ‘port-to-port’. In other words, the Rules “cover the entire time the carrier is in charge of the goods starting at the port of loading and ending at the port of discharge.”¹⁶⁷ This addressed the limited scope of application of the Hague-Visby Rules by holding the carrier responsible for not only the period whilst the goods were on board the vessel, but also during the period before and after they had been placed on board the vessel at the port of loading and discharge.¹⁶⁸

As we have seen, the Hague-Visby Rules govern the international carriage of goods by sea from ‘tackle-to-tackle’, whilst the Hamburg Rules have extended the limited scope of application of the Hague-Visby Rules and apply ‘port-to-port’.¹⁶⁹ However, neither the Hague-Visby Rules nor the Hamburg Rules apply to an entire contract of carriage where the “carrier undertakes to take the goods in charge at the door of the shipper and to deliver them at the door of the consignee”, which has become increasingly popular due to the advent of containerised transport.¹⁷⁰ As a result, the trade industry has felt the need for a convention that would regulate the international carriage of goods by different modes of transport.¹⁷¹

¹⁶⁶ Hoeks op cit note 132 at 258

¹⁶⁷ Ibid 265

¹⁶⁸ Adamsson op cit note 24 at 21

¹⁶⁹ H Karan ‘Any need for a new international instrument on the carriage of goods by sea: The Rotterdam Rules’ (2011) 42 (3) *Journal of Maritime Law and Commerce* 443

¹⁷⁰ Berlingieri op cit note 84 at 52

¹⁷¹ Ibid 52

3.2.3 The Rotterdam Rules

As noted, the Hague-Visby Rules and Hamburg Rules are inadequate to regulate multimodal carriage contracts. All previous attempts at regulating multimodal transport through international regimes have also failed. In order to accommodate ‘door-to-door’ carriage, therefore, the current practice is for parties to contractually agree to extend the application of the relevant sea carriage Convention to the inland leg of the voyage.¹⁷² However, this is only possible if the agreement is not set aside by mandatory national legislation.¹⁷³ Furthermore, the sea conventions are maritime in nature and are not intended to cater for anything other than sea carriage. The decision to extend the scope of application and period of responsibility under the Rotterdam Rules was therefore prompted by the needs of international trade and the fact that the majority of containers that are carried by sea are carried ‘door-to-door’.¹⁷⁴ Even if the contract does not go so far as to extend ‘door-to-door’, the carrier’s responsibility will invariably cover carriage by some other mode of transport before or after the sea leg.¹⁷⁵

The Rotterdam Rules were initially intended to apply on a ‘port-to-port’ basis as provided for in the Hamburg Rules, as opposed to the ‘tackle-to-tackle’ approach adopted by the Hague-Visby Rules.¹⁷⁶ However, it was thought that restricting the scope of application of the Rules to ‘port-to-port’ would not add any value and would simply add another sea carriage convention to the existing three conventions, further frustrating uniformity on the rules regulating the international carriage of goods by sea.¹⁷⁷ Therefore, although the Rules were originally conceived as a maritime Convention, in order to meet the current needs of trade and accommodate multimodal carriage, the Rules were extended to cover more than sea carriage alone.¹⁷⁸ This is evident by observing the full title of the Rotterdam Rules, which reads: *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*. The Rotterdam Rules not only cover the international carriage of goods by sea, but also contemplate carriage partly by sea, thereby allowing for multimodal

¹⁷² Hoeks op cit note 132 at 270

¹⁷³ Ibid 270

¹⁷⁴ Berlingieri op cit note 118 at 2

¹⁷⁵ S Beare ‘The Rotterdam Rules: Some controversies’ 2010 available at

<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Rotterdam%20Rules%20Some%20controversies%20paper%20-%20S.Beare.doc> accessed on 26 November 2015

¹⁷⁶ Hoeks op cit note 132 at 269

¹⁷⁷ G van der Ziel ‘Multimodal aspects of the Rotterdam Rules’ (2009) 14 (4) *Uniform Law Review* 981

¹⁷⁸ Hoeks op cit note 132 at 270

carriage.¹⁷⁹ The Rotterdam Rules apply to international carriage contracts¹⁸⁰ provided one of the legs is an international sea leg and that “the contractual place of receipt, loading, discharge or delivery is located in a Contracting state”.¹⁸¹ A contract of carriage is defined under Article 1(1) as follows:

“A contract in which a carrier, against payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.”

The drafters of the Rotterdam Rules adopted a ‘maritime plus’ approach.¹⁸² The above definition highlights the fact that the Rules apply not only to contracts for the carriage of goods by sea, but contemplate the carriage of goods involving other modes of transport, such as the carriage of goods by truck on land.¹⁸³ However, an international sea leg is an absolute requirement in order for the Rules to apply, whilst the use of other modes of transport is not (the maritime plus approach).¹⁸⁴ Accordingly, the Rules were not intended to be a true multimodal Convention, but rather a Convention that would regulate contracts of carriage by sea and carriage by other modes that precede or follow the sea carriage.¹⁸⁵ However, there is no requirement that the sea leg be the primary mode of transport, neither is it a requirement that the other modes be shorter than the sea carriage.¹⁸⁶ Thus, the Rules will apply in respect of any multimodal or unimodal contract that has an international sea leg.¹⁸⁷ Furthermore, as per Article 5, the Rules not only apply to outgoing maritime carriage (as is the case with the Hague-Visby Rules), but also apply to incoming maritime carriage.¹⁸⁸ Thus, it is clear that the scope of application of the Rules is substantially wider than the Hague-Visby Rules and the Hamburg Rules. Furthermore, the above Articles of the Rotterdam Rules indicate that they

¹⁷⁹ Karan op cit note 169 at 443

¹⁸⁰ T Fujita ‘The coverage of the Rotterdam Rules’ presentation to the CMI Colloquium in Buenos Aires available at

[http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/the%20coverage%20of%20rotterdam%20rules%20\(BA2010\)%20-%20T.Fujita.pdf](http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/the%20coverage%20of%20rotterdam%20rules%20(BA2010)%20-%20T.Fujita.pdf) accessed on 1 October 2015, 1

¹⁸¹ Article 5 of the Rotterdam Rules; UNECE Working Party on Intermodal Transport and Logistics, Contribution by the UNCTAD secretariat ‘UNECE Expert Group on the Rotterdam Rules: The scope of application and the practical consequences of the Rotterdam Rules for pan-European land and intermodal transport operations’ 2011 available at <http://www.unece.org/fileadmin/DAM/trans/doc/2011/wp24/ECE-TRANS-WP24-54-inf02e.pdf> accessed on 3 December 2015, 2

¹⁸² Kituri op cit note 124 at 28

¹⁸³ Ibid 28

¹⁸⁴ Ibid 29

¹⁸⁵ Berlingieri op cit note 118 at 2

¹⁸⁶ UNECE Working Party on Intermodal Transport and Logistics op cit note 181 at 3

¹⁸⁷ Ibid 3

¹⁸⁸ Patwari op cit note 158 at 12

are not restricted to carriage covered by a ‘bill of lading or similar document of title’, as is the case with the Hague-Visby Rules as per the definition of Contract of Carriage in Article 1 of the Hague-Visby Rules.

In terms of the period of responsibility of the carrier, Article 12 (1) states as follows:

“The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.”

One of the most significant aspects of the Rotterdam Rules is the extension of the period of responsibility of the carrier.¹⁸⁹ The Rules, in contrast to the Hague-Visby Rules and Hamburg Rules, adopt a ‘door-to-door’ approach, meaning that the carrier’s period of responsibility “could begin and end outside of the port area”, or could be for the entire contractual period.¹⁹⁰ For example, the carrier could undertake to receive the goods at an inland location in the country of export and deliver them to an inland location in the country of import or the place of destination.¹⁹¹ It is noteworthy that the period of responsibility is now also in line with the scope of application of the Rules, meaning that the same rules will govern the entire period of responsibility of the carrier.¹⁹² This is significant since, in terms of the Hague-Visby Rules, the period of responsibility of the carrier and the scope of application differ.¹⁹³ The Hague/Hague-Visby Rules are only applicable ‘tackle-to-tackle’; however, the period of responsibility of the carrier would often in practice begin prior to the goods being loaded onto the vessel and extend beyond their unloading off the vessel.¹⁹⁴ And as noted, the scope of application of Hamburg Rules only extends to ‘port-to-port’ carriage.

It is important to note that although the Rules adopt a ‘door-to-door’ approach, the parties to the contract are still free to decide on the carrier’s period of responsibility and they are not precluded from agreeing on the traditional ‘tackle-to-tackle’ approach or ‘port-to-port’

¹⁸⁹ Fujita op cit note 180 at 3

¹⁹⁰ M F Sturley ‘Modernizing and reforming U.S. Maritime Law: The impact of the Rotterdam Rules in the United States’ (2009) 44 (3) *Texas International Law Journal* 434; Fujita op cit note 180 at 3

¹⁹¹ Sturley op cit note 190 at 434

¹⁹² A von Ziegler ‘The liability of the contracting carrier’ (2009) 44 *Texas International Law Journal* available at <http://www.tilj.org/content/journal/44/num3/VonZiegler329.pdf> accessed on 10 February 2016 334

¹⁹³ Chami op cit note 160 at 2

¹⁹⁴ *Ibid* 2

approach.¹⁹⁵ Article 12(3) in this regard allows the parties to agree on the “time and location of the receipt and delivery of the goods”.¹⁹⁶ The only exception to this is in terms of Article 12(3) which provides that the parties cannot agree to a period of responsibility any shorter than ‘tackle-to-tackle’.¹⁹⁷

Thus, having observed the relevant provisions of the Convention, it is clear that the Rotterdam Rules have gone significantly further than the Hague-Visby Rules and the Hamburg Rules in terms of their scope of application and the period of responsibility of the carrier by adopting a ‘door-to-door’ approach, allowing for the application of the Rules to multimodal situations.

To accommodate the carriage of goods by other modes of transport in addition to the carriage of goods by sea, the Rotterdam Rules include a number of multimodal related provisions that seek to address issues that may arise in a multimodal situation, such as conflicts with other unimodal Conventions. The following paragraphs will therefore engage in an examination of the multimodal provisions of the Rules.

3.3 An examination of the multimodal aspects of the Rotterdam Rules (with a focus on the carriage of goods by sea and road)

3.3.1 Article 1.1 and 5

As noted, the scope of application of the Rotterdam Rules is substantially wider than the Hague-Visby and Hamburg Rules. Article 1(1) read with the general scope of application under article 5 provides that a contract for the international carriage of goods by sea may also “provide for carriage by other modes of transport in addition to the sea carriage”.¹⁹⁸ If the carriage is wholly by sea, the Rules apply from the “port of loading” until the goods are delivered at the “port of discharge” (provided they are in different states); and if the carriage contract envisages other modes of transport in addition to the sea leg, the “place of receipt”

¹⁹⁵ The CMI International Working Group on the Rotterdam Rules ‘Questions and answers on the Rotterdam Rules’ 2009 available at <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Questions%20and%20Answers%20on%20The%20Rotterdam%20Rules.pdf> accessed on 25 November 2015, 6

¹⁹⁶ Ibid 7; Article 12(3)

¹⁹⁷ Fujita op cit note 150 at 354

¹⁹⁸ Berlingieri op cit note 118 at 2

and “place of delivery” of the goods are the relevant points.¹⁹⁹ Either party may reside in a contracting state for the Rules to apply, provided the sea leg constitutes an international sea leg.²⁰⁰

3.3.2 Introduction to Article 26 and 82

An area of controversy during the drafting of the Rules was the potential for conflict with other unimodal conventions. Given the fact that there is no multimodal regime currently in force that has gained enough success to govern an entire carriage contract with various legs involved (such as land and sea), each leg of the voyage is governed by different unimodal regimes, depending on the mode of transport used.²⁰¹ Since the Rotterdam Rules extend its application to accommodate multiple modes of transport in addition to sea carriage, there is potential for conflict with other unimodal conventions or national laws that apply to a particular leg of the voyage.²⁰² Furthermore, it is also possible for some of the unimodal conventions to extend their scope of application to maritime carriage, allowing for further conflict and overlap.²⁰³ In order to address the potential for conflict of the various unimodal conventions under a multimodal carriage contract, the Rules contain Articles 26 and 82. Article 26 is designed to regulate a situation where both the Rotterdam Rules and another unimodal convention apply in respect of a particular leg of the voyage.²⁰⁴ Article 82 regulates the application of unimodal conventions to maritime carriage.²⁰⁵ Articles 26 and 82 will be addressed respectively.

3.3.3 An overview of Article 26

The Rotterdam Rules, as a maritime Convention, will apply during the sea leg of the voyage; however, there may be a situation where both the Rotterdam Rules and another unimodal convention may apply in respect of the non-sea leg of the voyage due to the extension of scope of application and period of responsibility of the Rotterdam Rules. To avoid these

¹⁹⁹ Ibid 2

²⁰⁰ Ibid 2 - 3

²⁰¹ Kituri op cit note 124 at 49

²⁰² T Nikaki ‘Conflicting laws in wet multimodal carriage of goods: the UNCITRAL draft Convention on the Carriage of Goods (Wholly or Partly) (by Sea)’ (2006) 37 (4) *Journal of Maritime Law and Commerce* 523

²⁰³ E Eftestol-Wilhelmsson ‘The Rotterdam Rules in a European multimodal context’ (2010) 16 *Journal of International Maritime Law* available at

<http://www.rotterdamrules.com/sites/default/files/Wilhelmson%20RR%20in%20a%20European%20Multimodal%20context.pdf> accessed on 26 November 2015, 281

²⁰⁴ Ibid 281

²⁰⁵ Ibid 281 - 282

conflicts with other conventions, the Rules have introduced Article 26, a lengthy and complex conflict avoiding provision.

The purpose of Article 26 under the Rotterdam Rules is to resolve possible conflicts that may arise between the Rules and other applicable conventions by allowing for the continued application of the provisions of other applicable unimodal international conventions (such as the CMR and COTIF-CIM) against the carrier for loss, damage or delay where those provisions are mandatory (in place of the provisions of the Rotterdam Rules).²⁰⁶ Article 26 reads 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:

- (a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;
- (b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and
- (c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.”

Article 26 essentially states that the provisions of the Rotterdam Rules will *not* apply in a situation where loss of or damage to goods or delay occurs *solely* before loading onto the vessel or after discharge from the vessel, provided it occurs during the carrier’s period of responsibility and the conditions in Article 26 as outlined above have been met.²⁰⁷ It seeks to address conflicts between the Rotterdam Rules and other transport conventions that may arise in respect of the non-maritime legs of the voyage.²⁰⁸ It provides that the carrier’s liability for

²⁰⁶ R Force ‘The *Regal-Beloit* decision: What, if anything, would happen to the legal regime for multimodal transport in the United States if it adopted the Rotterdam Rules’ (2012) 36 (2) *Tulane Maritime Law Journal* 703

²⁰⁷ J Marin ‘The Rotterdam Rules – An overview of their key provisions’ 2010 available at https://www.pravo.unizg.hr/_download/repository/THE_ROTTERDAM_RULES_-_AN_OVERVIEW_OF_THEIR_KEY_PROVISIONS.pdf accessed on 22 August 2016 at 5

²⁰⁸ C Legros ‘Relations between the Rotterdam Rules and the Convention on the Carriage of Goods by Road’ (2012) 36 (2) *Tulane Maritime Law Journal* 729

loss or damage to cargo will be subject to the provisions of another unimodal regime that would have applied had a separate hypothetical contract for the inland land leg been concluded.²⁰⁹ In other words, where loss, damage or delay occurs before loading onto the vessel or after discharge from the vessel, the relevant provisions of any other applicable international transport convention will take preference over the Rotterdam Rules (provided the requirements of Article 26 are met).²¹⁰

Article 26 introduces a ‘limited network system’ which seeks to remove possible conflicts with other unimodal conventions.²¹¹ Its provisions have a conflict-avoiding effect²¹² in that once the requirements under Article 26 have been met, the liability provisions of the other applicable convention are incorporated by reference into the Rotterdam Rules and override the liability provisions of the Rotterdam Rules.²¹³ The application of the other international conventions is, however, limited in that only certain provisions of the convention will apply and only under those conditions as per Article 26, as will be more fully discussed below.²¹⁴ This limited network system differs from other systems that the drafters could have implemented, such as a ‘uniform system’ and a ‘full network system’. The uniform system provides that only one set of rules will govern a multimodal contract, irrespective of where the loss or damage occurs or whether the damage or loss is localised (occurring in one particular leg of the voyage).²¹⁵ Had the drafters incorporated the uniform system, the Rotterdam Rules would have applied entirely, regardless of where the damage, loss or delay occurred and irrespective of any mandatory provisions of any unimodal international convention. It also differs from a full network system in that although both systems (limited network and full network) divide the carriage into distinct stages (such as the road leg and sea leg), the full network system will apply an *entire* convention depending on which leg the loss, damage or delay occurred in, and not simply its liability provisions.²¹⁶ In other words, the applicable rules would be determined according to the leg of the voyage where the loss, damage or delay occurred and will apply the regime that would have been applicable in

²⁰⁹ L S Pallares ‘A brief approach to the Rotterdam Rules: Between hope and disappointment’ (2011) 42 (3) *Journal of Maritime Law and Commerce* 459

²¹⁰ Hashmi op cit note 111 at 232

²¹¹ The CMI International Working Group on the Rotterdam Rules op cit note 195 at 7

²¹² van der Ziel op cit note 177 at 991

²¹³ Ibid 991

²¹⁴ Adamsson op cit note 24 at 34

²¹⁵ Conrado op cit note 127 at 28

²¹⁶ The CMI International Working Group on the Rotterdam Rules op cit note 195 at 8

respect of that leg of the voyage.²¹⁷ The disadvantage of a full network system is that parties must know during which leg of the voyage the damage or loss to the cargo occurred, which is often difficult with containerised goods.²¹⁸ Given the disadvantages of the uniform and full network system, and for the sake of uniformity, the drafters of the Rotterdam Rules opted for a limited network system which allows for the application of other conventions provided they meet the conditions of Article 26 and only in respect of *certain* provisions.²¹⁹ Thus, in a case where the damage or loss cannot be localised and therefore a unimodal convention cannot be applied, the Rotterdam Rules will apply.²²⁰

In order for another transport convention to apply to the leg preceding or following the sea leg, certain conditions must be satisfied as per Article 26. The first condition of Article 26 is that the loss or damage to the goods or delay must have occurred “solely before their loading onto the ship or solely after their discharge from the ship”.²²¹ The key term used under this condition is ‘solely’ and therefore, where the loss, damage or delay occurs during the sea leg, or where the loss or damage cannot be localised; the Rotterdam Rules will apply, and not another mandatory law in terms of Article 26.²²² Furthermore, if for example the damage, loss or delay started prior to the sea carriage but worsened thereafter, or if the damage started on board the vessel and worsened after discharge (gradually occurring damage), the Rotterdam Rules will prevail over any other international instrument in this instance.²²³

The second condition relates to the hypothetical contract approach adopted by Article 26. In order for another convention to apply, such as the CMR in respect of an international road leg, it requires that such convention ought to have applied had the shipper “made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred.”²²⁴ In other words, had the parties entered into a separate and direct contract in respect of the leg where the loss, damage or delay occurred, one must ask which convention would have applied in that situation. If for example, it is determined that the CMR would

²¹⁷ Neels op cit note 125 at 5

²¹⁸ Kituri op cit note 124 at 40

²¹⁹ Adamsson op cit note 24 at 42-43

²²⁰ Eftestol-Wilhelmsson op cit note 203 at 276

²²¹ Berlingieri op cit note 118 at 5 - 6

²²² van der Ziel op cit note 177 at 986

²²³ Berlingieri op cit note 118 at 6; van der Ziel op cit note 177 at 986

²²⁴ Article 26 of the Rotterdam Rules; Berlingieri op cit note 118 at 6

have applied, then the liability provisions of the CMR will apply in place of the Rotterdam Rules.

Thirdly, the provisions on the carrier's liability, limitation of liability and time for suit must be mandatory.²²⁵ In other words, the Rotterdam Rules will only be overridden in respect of provisions which cannot be departed from or waived.²²⁶ Furthermore, it is only those provisions that relate to the liability of the carrier for loss, damage or delay that are applicable.²²⁷ These liability provisions, and any liability provisions of any future conventions, are incorporated by reference in the Rotterdam Rules.²²⁸ All other non-liability related provisions, such as jurisdiction, are excluded and are to be addressed by the Rotterdam Rules.²²⁹

It is also important to note that the Article 26 does not allow for the application of national laws. During the negotiations of the UNCITRAL Working Group, it was put forward that Article 26 should extend to national laws and not just international conventions; however, this was eventually rejected due to concerns that it would negatively affect uniformity, transparency and predictability of the Rules.²³⁰ Therefore, Article 26 only applies when another international convention would have applied either before or after the sea leg under a contract of carriage, and such leg must be international.²³¹ If a situation arises where national law would have applied under a hypothetical contract during the leg preceding or following the sea leg, then Article 26 does not come into play, and the relevant liability provisions of the Rotterdam Rules are applicable (and not the national law).²³²

Even once all these requirements have been satisfied, the wording of Article 26 is such that a court is not obliged to apply the relevant transport convention.²³³ Article 26, once the

²²⁵ Ibid 6

²²⁶ Legros op cit note 208 at 731

²²⁷ van der Ziel op cit note 177 at 984

²²⁸ Ibid 988

²²⁹ Ibid 984

²³⁰ Berlingieri op cit note 118 at 5

²³¹ van der Ziel op cit note 177 at 984

²³² Ibid 984

²³³ Fujita op cit note 150 at 360

requirements are met, merely allows the court to apply the provisions of the other conventions, but does not force the court to do so.²³⁴

3.3.4 An overview of Article 82

The next important aspect of the Rotterdam Rules regulating multimodal transport is Article 82, another lengthy and complex provision. It is a conflict of conventions provision used “...to avoid any conflicting obligation to apply the provisions of other transport conventions that are inconsistent with the Rotterdam Rules”.²³⁵ Article 82 addresses four categories of convention relating to air, road, rail and inland waterway carriage; however, for the purposes of this research, regard shall solely be had to carriage by road. Article 82 reads as follows:

“International conventions governing the carriage of goods by other modes of transport

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

...(b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;...”

During the drafting of the Rotterdam Rules, it was evident that Article 26 alone was insufficient to address all potential conflicts with existing transport conventions.²³⁶ It eliminates the majority of potential conflict of convention issues; however, there are specific situations in which a party may face conflicting obligations under the Rotterdam Rules and other international conventions.²³⁷ Article 82 identifies and addresses such situations and

²³⁴ Ibid 360. Fujita at pg 360 provides that due to the words ‘the provisions of this Convention do not prevail over those provisions of another international instrument’ in Article 26 and the fact that it does not state that the court *should* apply the provisions of the other Convention, it indicates that courts are not forced to apply provisions of other international Conventions but may do so if the conditions in Article 26 have been met.

²³⁵ Fujita op cit note 180 at 4

²³⁶ Legros op cit note 208 at 735

²³⁷ Fujita op cit note 150 at 364

therefore allows for the application of other conventions (over the Rotterdam Rules) in certain circumstances as set out from paragraphs (a) to (d) under Article 82.²³⁸

Article 82 essentially gives precedence to four categories of convention “to the extent that they apply beyond pure unimodal transportation by road, rail, air and inland waterway, respectively” (including future amendments to those conventions).²³⁹ In other words, the provisions of the conventions will take priority over the provisions of the Rotterdam Rules in the situations set out under Article 82 i.e. where they apply beyond pure unimodal transportation.²⁴⁰ The relevant conventions are those that are already in force at the time the Rotterdam Rules entered in force, including any future amendments to those conventions.²⁴¹ Article 82 therefore will not extend to any new conventions that come into force after the Rotterdam Rules.²⁴²

Article 82(b) identifies a potential area of overlap with the Rotterdam Rules with respect to “goods that remain loaded on a road cargo vehicle carried on board a ship”²⁴³ This section identifies a certain type of carriage known as ‘roll-on roll-off carriage’.²⁴⁴ Article 82(b) was therefore inserted in light of Article 2(1) of the CMR which provides that:

“Where the vehicle containing the goods is carried over part of the journey by sea...and...the goods are not unloaded from the vehicle, this Convention shall nevertheless apply to the whole of the carriage.”

To illustrate the operation of Article 82(b) Kituri²⁴⁵ provides a useful example. Parties may enter into a contract for the carriage of goods from one destination to another by international road carriage, after which the vehicle is to be loaded onto a ship whilst the goods are still loaded on the vehicle for sea carriage to another destination.²⁴⁶ In this case the goods are damaged during the sea leg.²⁴⁷ In such a situation, the CMR is applicable to the contract since

²³⁸ Legros op cit note 208 at 736; as mentioned, regard shall solely be had to carriage by sea and road, therefore only Article 82 (b) is relevant for our purposes.

²³⁹ Report by the UNCTAD secretariat ‘Review of maritime transport 2009’ 2009 available at http://unctad.org/en/docs/rmt2009ch6_en.pdf accessed on 1 December 2015, 125

²⁴⁰ Berlingieri op cit note 118 at 16

²⁴¹ Ibid 16

²⁴² Ibid 16

²⁴³ Article 82(b) of the Rotterdam Rules; van der Ziel op cit note 177 at 992

²⁴⁴ Ibid 993

²⁴⁵ Kituri op cit note 124 at 55

²⁴⁶ Ibid 55

²⁴⁷ Ibid 55

it involved an international road leg and the parties to the contract are contracting states to the Convention.²⁴⁸ Furthermore, the CMR is also applicable by virtue of Article 2(1) which provides for the application of the CMR to the whole carriage in the case of a roll-on roll-off situation.²⁴⁹ However, the contract is also subject to the Rotterdam Rules (to which the parties are contracting states) by virtue of the international sea leg.²⁵⁰ As we can see, there is an area of overlap in that both the Rotterdam Rules and the CMR apply to the sea leg of the voyage in which the damage to the goods occurred. Article 82(b) resolves this and provides that the provisions of the other international Convention (the CMR in this case) take priority over the provisions of the Rotterdam Rules.²⁵¹ If, for example, the goods had been offloaded from the vehicle first and then loaded onto the vessel, Article 82(b) would not have been applicable and the Rotterdam Rules would have applied by virtue of Article 1(1).²⁵² Had the goods been damaged during the road leg of the voyage, Article 26 would come into play and the CMR would be applicable.²⁵³

Having examined the multimodal aspects of the Rotterdam Rules, it would be appropriate to determine the extent to which the Rules are an appropriate solution to the shortcomings of the Hague-Visby Rules and the Hamburg Rules. The following paragraphs will therefore highlight some of the positive and negative aspects of the Rotterdam Rules, with a focus on the multimodal provisions.

3.4 To what extent is the provision for multimodal transportation under the Rotterdam Rules an appropriate solution to the Hague-Visby Rules and Hamburg Rules?

As we have seen, the scope of application and period of responsibility of the Hague-Visby Rules and Hamburg Rules is limited, applying only ‘tackle-to-tackle’ and ‘port-to-port’, respectively. This is insufficient to meet the needs of modern trade in which it has become increasingly popular for containerised goods to be carried door-to-door and to conclude a multimodal carriage contract.²⁵⁴ Furthermore, there is currently no convention in force to effectively regulate multimodal transport contracts.²⁵⁵ As a result of the lack of regulation by

²⁴⁸ Ibid 55

²⁴⁹ Ibid 55

²⁵⁰ Ibid 55

²⁵¹ van der Ziel op cit note 177 at 993

²⁵² Ibid 993

²⁵³ Ibid 993

²⁵⁴ Berlingieri op cit note 84 at 53

²⁵⁵ Kituri op cit note 124 at 25

a single international instrument over the entire performance of the contract and the fact that each mode of transport under a contract of carriage is regulated by a different unimodal convention (unless the maritime convention is extended inland as agreed by the parties), there is a risk of lack of uniformity, predictability and certainty.²⁵⁶ The trade industry has therefore felt the need for a single regime to govern the entire carriage of goods by multiple modes of transport.²⁵⁷ The extension of the scope of application and period of responsibility of the carrier under the Rotterdam Rules is therefore considered a significant development and improvement over the Hague-Visby Rules and Hamburg Rules.²⁵⁸ The Rules not only cover contracts for the international carriage of goods by sea, but also multimodal transport contracts (provided there is an international sea leg).²⁵⁹ However, the multimodal aspects of the Rules are not without their concerns, with many organisations and leading academics raising particular concerns in this regard.²⁶⁰ It is beyond the scope of this research to examine each of these concerns fully, however it will be useful to highlight some of the major concerns in order to determine the extent to which the provision for multimodal transport under the Rules is an appropriate and effective solution to the Hague-Visby Rules and Hamburg Rules.

One of the concerns with regard to the multimodal aspects of the Rotterdam Rules is that it is not a fully multimodal regime since the Rules require an international sea leg.²⁶¹ For example, the Rules will not apply to a multimodal contract incorporating road and air

²⁵⁶ K Lannan 'The launch of the Rotterdam Rules' available at http://www.shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/hsfyenglish_42/docs/200911/20.doc accessed on 2 December 2015, 7

²⁵⁷ Berlingieri op cit note 84 at 52

²⁵⁸ Lannan op cit note 256 at 7

²⁵⁹ Nikaki op cit note 8 at 5

²⁶⁰ See for example W Tetley 'A summary of general criticisms of the UNCITRAL Convention (The Rotterdam Rules)' 2008 available at http://www.fd.unl.pt/docentes_docs/ma/wks_MA_20185.pdf accessed on 11 December 2016 in which Professor Tetley expresses concerns regarding the Rules. See for example European Shipper's Council (ESC) 'View of the European Shippers' Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea, also known as the Rotterdam Rules' 2009 available at https://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ESC_PositionPaper_March2009.pdf accessed on 4 December 2015 where the ESC expresses concerns regarding the rules' possible conflict with the other unimodal Conventions and the fact that the more favourable terms of the CMR and CIM will not extend to short sea shipping. See further CLECAT 'Position paper RE: 2008 – United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the "Rotterdam Rules"' 2009 available at https://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/CLECATpaper.pdf accessed on 4 December 2015, 2 – CLECAT expresses concerns that the Rules are too complex and criticises that the Rules only adopt a partial network system. See further Alcantara op cit note 15

²⁶¹ Lannan op cit note 256 at 7

carriage without a sea leg.²⁶² As identified by Professor Tetley, amongst others, the limited scope of application undermines one of the very goals of the Rotterdam Rules, which is to create a “...binding universal regime to support the operation of contracts of maritime carriage involving other modes of transport.”²⁶³ Thus, by requiring an international sea leg, parties looking to conclude a multimodal contract without a sea leg will have to look to other regimes to govern their contracts.²⁶⁴ Furthermore, the CMI and those responsible for drafting the Rules have essentially sea related interests, with a focus on the international carriage of goods by sea.²⁶⁵ As a result, the Rules have been described as “something of a hybrid” and that the multimodal aspects are “incidental and only partially covered.”²⁶⁶ It has been argued further that by excluding the application of mandatory national law, it will be harmful to States with mandatory national laws and this may play a significant factor in their decision to adopt the Rules or not.²⁶⁷ It is unlikely that States will be willing to abandon their national laws governing the carriage of goods in favour of the Rotterdam Rules.²⁶⁸ As a result, it is contended that the Rules have not been successful in creating a uniform body of rules to regulate multimodal contracts of carriage, but have rather added another maritime convention to the numerous existing regimes.²⁶⁹

Further concerns were also raised in a report by the UNCTAD secretariat which participated in the preparatory work on the Rotterdam Rules. The decision to extend the scope of application to cover multimodal contracts (involving a maritime leg) in the Rotterdam Rules raised considerable debate and controversy.²⁷⁰ This was particularly so for the following reasons as highlighted by the UNCTAD report:

- (a) “Concerns about the potential for conflict with unimodal conventions in the field of road, rail, air and inland waterway carriage, which in many instances also apply to loss arising during a particular stage of a multimodal transport;

²⁶² W Tetley op cit note 260 at 1; W Tetley...et al ‘A response to the attempt to clarify certain concerns over the Rotterdam Rules published 5 August 2009’ 2009 available at <http://pysdens.com/v2/pdf/documents/Summationpdf.pdf> accessed on 4 December 2015, 3

²⁶³ Tetley op cit note 260 at 1; Preamble of the Rotterdam Rules

²⁶⁴ Tetley op cit note 260 at 1

²⁶⁵ Tetley et al op cit note 262 at 1-2

²⁶⁶ Ibid 1-2

²⁶⁷ Ibid 4-5

²⁶⁸ A Sulicu ‘Aspects of the multimodal transport in the Rotterdam Rules’ (2012) 1 (1) *Perspectives of Business Law Journal* 49

²⁶⁹ Tetley op cit note 260 at 1

²⁷⁰ Report by the UNCTAD secretariat op cit note 239 at 125

- (b) The desire by some states to ensure the continued application of existing national law on multimodal transportation;
- (c) Concerns about further fragmentation of the law applicable to international multimodal transportation; and
- (d) The fact that the substantive content of the liability regime is based exclusively on considerations and principles applicable to sea carriage, rather than multimodal transportation.²⁷¹

With regard to the potential for overlap with other unimodal conventions, point (a) above, this has been addressed by Articles 26 and 82, as discussed above.²⁷² Article 82 of the Rules gives priority to conventions relating to air, road, rail and inland waterway carriage “to the extent that they apply beyond pure unimodal transportation.”²⁷³ Article 26 also provides for the application of other conventions in respect of loss, damage or delay that occurs solely before or after the sea carriage, however, only in respect of provisions that directly relate to the liability of the carrier, limitation of liability, and time for suit that are “contained in any international convention that would have applied mandatorily to the stage of carriage where the loss occurs, had a separate unimodal transport contract been made”.²⁷⁴ The issue that arises, however, is that these mandatory provisions will have to be applied with the remaining relevant substantive rules contained in the Rotterdam Rules.²⁷⁵ For example, if under a multimodal contract loss occurs during an international road leg in which the CMR is hypothetically applicable, the rules relating to “carrier liability, limitation of liability and time for suit” will be determined by the CMR. Every other aspect is to be determined according to the Rotterdam Rules, a lengthy and complex Convention (such as jurisdiction, “shipper liability, delivery, documentation, rights of suit”).²⁷⁶ It is highly unsatisfactory to apply two sets of substantive rules to the same matter and could prove to be a difficult task for courts, leading to diverging interpretations and outcomes.²⁷⁷

With regard to point (d) above, if there is no applicable unimodal convention, or if the loss cannot be localised (which is often the case with containerised goods), the provisions of the

²⁷¹ Ibid 125

²⁷² Ibid 125

²⁷³ Ibid 125

²⁷⁴ Ibid 125

²⁷⁵ UNECE Working Party on Intermodal Transport and Logistics op cit note 181 at 4

²⁷⁶ Ibid 4

²⁷⁷ Ibid 4

Rotterdam Rules will apply to determine the rights, obligations and liability of the parties.²⁷⁸ This is a concern as the Rotterdam Rules are largely a maritime Convention.²⁷⁹ There are 96 Articles in the Rotterdam Rules and only Articles 1, 26 and 82 make reference to carriage by other modes of transport.²⁸⁰ The rest of the provisions are maritime in nature, with little regard to “the application of the Rotterdam Rules in a multimodal transport context”.²⁸¹ Thus, a situation could arise under a multimodal contract involving a sea leg where distinctly maritime law principles and concepts will regulate the carriage of goods by road, rail and/or air.

Further concerns have also been raised regarding the complexity of the multimodal aspects of the Rules as well as drafting deficiencies, allowing for divergent interpretations.²⁸² The maritime plus approach adopted by the Rules is also not unique since many unimodal Conventions have adopted a ‘unimodal plus’ approach which include multimodal aspects.²⁸³ As previously discussed, the multimodal nature of the Rotterdam Rules is considered to be one of the advantages to its predecessors. Although it is beyond the scope of this research to analyse the multimodal aspects of other unimodal conventions, it is worth noting that if other conventions similarly contain multimodal aspects, the Rotterdam Rules are clearly not revolutionary.

It is clear that the multimodal aspects of the Rotterdam Rules are not without their concerns, with many organisations and leading authors expressing their concerns over the Rotterdam Rules. As mentioned previously, the Rules were not originally conceived as a multimodal regime, but rather a maritime Convention to replace the outdated Hague-Visby Rules and unsuccessful Hamburg Rules.²⁸⁴ The decision to extend the scope of application and period of responsibility was somewhat of an afterthought.²⁸⁵ Thus, it could be argued that it is not the multimodal Convention that many had been hoping for.

²⁷⁸ Report by the UNCTAD secretariat op cit note 239 at 125

²⁷⁹ Ibid 125

²⁸⁰ UNECE Working Party on Intermodal Transport and Logistics op cit note 181 at 4

²⁸¹ Ibid 4

²⁸² See for example W Tetley op cit note 260 and UNECE Working Party on Intermodal Transport and Logistics op cit note 181

²⁸³ van der Ziel op cit note 177 at 994-995; For example: the COTIF-CIM applies to national road and inland waterways transport that is supplementary to the international rail leg; and the CMR applies to sea carriage in certain circumstances mentioned above

²⁸⁴ Kituri op cit note 124 at 59

²⁸⁵ Ibid 59

Many leading authors, however, argue in favour of the Rotterdam Rules and the limited network system approach adopted by the Rules.²⁸⁶ It was never the drafters' intention to create a truly multimodal regime since they lacked the power to draft a fully multimodal regime.²⁸⁷ It is therefore the intention of the Rules to govern the carriage of goods wholly or partly by sea. Further, it is argued that given the extensive time and effort put into drafting the Rotterdam Rules, to formulate a completely and fully multimodal instrument that harmonises the different legal instruments and the different modes of transport would be impractical and almost impossible to achieve.²⁸⁸ For example, it would be extremely difficult to determine a common limitation of liability provision in the event of loss or damage that would suit all modes of transport, particularly since the value of goods carried by the different modes of transport varies.²⁸⁹ Furthermore, even if such an undertaking were attempted, it is uncertain to what extent States would be willing to forgo their current domestic laws and unimodal conventions, such as the CMR.²⁹⁰ Thus, perhaps the arguments that the Rotterdam Rules are not a fully multimodal regime are too harsh and unfounded, especially since they have responded to some of the deficiencies in the Hague-Visby Rules and Hamburg Rules.²⁹¹ Furthermore, it could be argued that the current situation which concerns the application of various carriage regimes and national laws to the same contract is more complex than the multimodal solutions offered by the Rotterdam Rules.²⁹² The only concern that remains is the possibility that the Rules will not achieve widespread acceptance if they come into force and will merely add to the list of sea conventions currently in force, further impacting on uniformity and certainty.

3.5 A brief South African perspective

The relevant maritime convention in South Africa regulating the carriage of goods by sea is the Hague-Visby Rules which South Africa gives effect to in the Carriage of Goods by Sea Act 1 of 1986 (COGSA) as a schedule to the Act. The South African government, through

²⁸⁶ See for example F Berlingieri...et al 'The Rotterdam Rules: An attempt to clarify certain concerns that have emerged' 2009 available at <http://comitemaritime.org/Uploads/Rotterdam%20Rules/5RRULES.pdf> accessed 4 December 2015, 5, 26

²⁸⁷ R I Ortiz 'What changes in the international transport law after the Rotterdam Rules?' (2009) 14 (4) *Uniform Law Review* 897-898

²⁸⁸ G Gordon *The Rotterdam Rules: A South African Perspective* (unpublished LLM thesis, Rhodes University, 2012) 122

²⁸⁹ Ortiz op cit note 287 at 898

²⁹⁰ Gordon op cit note 288 at 122

²⁹¹ Ibid 122

²⁹² Sulicu op cit note 268 at 49

Operation Phakisa, is now possibly looking to replace the Hague-Visby Rules with the Rotterdam Rules should they be widely accepted (Please see footnote 16 for further details). One of the aspects that the South African government should take into consideration in deciding whether or not to adopt the Rotterdam Rules are the multimodal aspects of the Rules, given the potential impact they could have in South Africa. Not only will the Rules replace the current Hague-Visby Rules, but also, as we have seen under Article 26, the Rules do not extend the application to national law. The National Road Traffic Act²⁹³ and its latest amendments is the most recent attempt by the South African government to regulate the carriage of goods by road through domestic legislation.²⁹⁴ Should South Africa choose to adopt the Rotterdam Rules, national legislation such as the National Road Traffic Act will not be applicable in such contracts. And since South Africa is not a party to the CMR, the land leg preceding or following the sea leg will be governed by the Rotterdam Rules, a largely maritime Convention. Thus, it is important for the South African government to take cognisance of the multimodal aspects of the Rules in deciding whether to adopt them or not.

3.6 Conclusion

One of the most innovative and significant changes introduced by the Rotterdam Rules is the regulation of the carriage of goods by multiple modes of transport, recognising and reflecting the realities of modern shipping.²⁹⁵ However, whether or not the provision for multimodal transport under the Rotterdam Rules is an appropriate solution to the shortcomings of the Hague-Visby Rules and Hamburg Rules is debatable.

The extension of the scope of application and period of responsibility introduced by the Rotterdam Rules is considered a step forward and an improvement on the Hague-Visby Rules and Hamburg Rules, given their limited scope of application.²⁹⁶ In today's modern trading environment, it makes commercial sense to have one regime regulating the entire carriage contract between the shipper and carrier, which is what the Rules have attempted to achieve.²⁹⁷ However, the Rotterdam Rules is not a true multimodal regime, meaning that

²⁹³ The National Road Traffic Act 93 of 1996

²⁹⁴ D Lamb 'Should South Africa adopt the Rotterdam Rules: Examining the application of the Rotterdam Rules on multi-modal transportation, specifically on the road leg of transport in contracts of carriage of goods in South Africa and comparing it to existing international and domestic legislation applicable to carriage of goods by road.' (Unpublished carriage of goods by sea lecture notes, University of KwaZulu-Natal)

²⁹⁵ Conrado op cit note 127 at 62

²⁹⁶ Neels op cit note 125 at 4

²⁹⁷ Ibid 4

there may still be a need for the formulation of a fully multimodal regime (bearing in mind this may not be possible from a practical perspective).²⁹⁸ The decision to extend the scope of application of the Rules to cover multimodal contracts was only made later, and perhaps its provisions reflect this.²⁹⁹ Parties are also still free to limit the scope of application of the Convention to ‘tackle-to-tackle’ or ‘port-to-port’.³⁰⁰ Furthermore, the multimodal provisions, articles 26 and 82, are potentially overly complex and have also raised concerns and considerable debate amongst various organisations and academics. If the Rules enter into force but are not widely accepted due to concerns over the multimodal aspects of the Rules, we will have yet another maritime convention added to those currently in force, further frustrating uniformity and creating legal uncertainty. The Rotterdam Rules have also generally been criticised by many for their complexity and vagueness.³⁰¹ If States are to adopt the Rotterdam Rules, these particular concerns with regard to the multimodal aspects of the rules will need to be considered.

As to whether the Rules are an appropriate and effective solution to the shortcomings of the Hague-Visby and Hamburg Rules, it cannot be answered with a simple yes or no answer. They have both positive and negative aspects that States are to consider when, and if, they adopt the Rules. The author is inclined to suggest that since modern trade requires an international regime that regulates multimodal carriage and since the Hague-Visby Rules and Hamburg Rules are insufficient in this regard, the Rotterdam Rules are an appropriate solution to its predecessors at least in the interim. Although the Rotterdam Rules may not be the pinnacle of uniformity and perfection, nor the multimodal regime many had hoped for, perhaps it is the next best solution.³⁰² This is not to say that the Rotterdam Rules in its entirety are an appropriate and effective solution to the shortcomings of the Hague-Visby Rules and Hamburg Rules. Such an answer would require an examination in light of all its provisions, which is beyond the scope of this research. For our purposes, the multimodal provisions may be regarded as an appropriate response to the deficiencies of the Hague-Visby and Hamburg Rules.

²⁹⁸ Kituri op cit note 124 at 61

²⁹⁹ Ibid 59

³⁰⁰ Neels op cit note 125 at 17

³⁰¹ Kituri op cit note 124 at 61

³⁰² Eftestol-Wilhelmsson op cit note 203 at 287

CHAPTER FOUR: THE CARRIER'S SEAWORTHINESS OBLIGATION

4.1 Introduction

The success of any maritime venture involving the international carriage of goods by sea is dependent on the appropriate allocation of risk between the carrier and shipper, requiring that each party be prescribed certain rights and obligations.³⁰³ One of the most important obligations borne by the carrier is that of providing a seaworthy vessel. Given the hazards involved in ocean carriage, it is imperative that a vessel is able to withstand such hazards in order to protect the environment, cargo on board the vessel, and most importantly, human life.³⁰⁴ The idea of the carrier providing a seaworthy vessel can be traced as far back as the fourteenth century when the carrier was required to take proper care of its client's cargo.³⁰⁵ As threats to the safety of human life at sea and damage to cargo became more prevalent, demands for and the importance of a legal concept of seaworthiness emerged.³⁰⁶ The legal concept of seaworthiness has since flourished and is a central obligation of the carrier under the common law as well as international conventions, including the Hague/Hague-Visby Rules and the Rotterdam Rules.³⁰⁷

Under Article III (1) of the Hague-Visby Rules, the carrier is required to exercise due diligence before and at the beginning of the voyage to make the vessel seaworthy. Limiting the extent of the obligation to only before and at the beginning of the voyage (and not throughout the voyage by sea) was suitable for its time due to the lack of control the carrier was able to exercise over the vessel once at sea and the inherent risks associated with maritime carriage.³⁰⁸ However, in today's modern shipping environment it has been alleged that the Rules are out of date and tend to favour carrier interests.³⁰⁹ It is argued that there is no reason why the carrier should not be obliged to exercise due diligence to make the vessel

³⁰³ A A Sefara *Basis of carrier's liability in carriage of goods by sea* (unpublished LLM Thesis, University of Oslo, 2014) 1

³⁰⁴ T H Aladwani *A comparative study of the obligation of due diligence to provide a seaworthy vessel under the Hague/Hague-Visby Rules and the Rotterdam Rules* (PhD thesis, Plymouth University, 2015) 50

³⁰⁵ 'The importance of seaworthiness' available at

<http://www.nadr.co.uk/articles/published/shipping/Seaworthiness.pdf> accessed on 14 January 2016, 1

³⁰⁶ Aladwani op cit note 304 at 51 - 52

³⁰⁷ Ibid 52

³⁰⁸ S Bengtsson *The carriage of goods by sea Conventions – a comparative study of seaworthiness and the list of exclusions* (unpublished LLM thesis, Lund University, 2010) 25

³⁰⁹ Sooksripaisarnkit op cit note 81 at 310

seaworthy throughout the entire voyage by sea.³¹⁰ The Hamburg Rules adopted a different approach and removed the concepts of seaworthiness and due diligence from its text. The Hamburg Rules adopt a presumed fault based liability system which provides that the carrier will only be excused from liability if it can show that it took all reasonable steps to avoid the loss or damage and its consequences.³¹¹ The Hamburg Rules, however, have not achieved widespread success and have not been ratified by any of the large maritime nations.³¹² As a result of the shortcomings of the Hague-Visby Rules and the Hamburg Rules with regard to the carrier's seaworthiness obligation, the Rotterdam Rules have introduced a significant change that requires the carrier to exercise due diligence not only before and at the beginning of the voyage, but also *during* the voyage by sea to make and keep the vessel seaworthy.³¹³ However, there are concerns regarding the extension of the carrier's seaworthiness obligation under the Rotterdam Rules, with arguments that the provisions relating to the carrier's seaworthiness obligation are too complex and do not achieve a balanced allocation of risk, particularly with regard to the carrier's basis of liability and burden of proof.³¹⁴ Furthermore, by extending the seaworthiness obligation, it could alter the allocation of risk as between carrier and cargo interests, potentially placing too great a burden on the carrier. In this regard it is important to determine whether carriers will be able to comply with this extension.

The following chapter, therefore, will engage in a comparative analysis between the relevant provisions of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to the carrier's seaworthiness obligation. It will then analyse and explore the abovementioned concerns raised regarding the extension of the carrier's seaworthiness obligation under the Rotterdam Rules in order to determine the extent to which the Rules have been successful in providing appropriate solutions to the alleged shortcomings of its predecessors.

³¹⁰ Berlingieri op cit note 84 at 6

³¹¹ Article 5 of the Hamburg Rules; Berlingieri op cit note 84 at 6; Yang op cit note 26 at 17

³¹² Sooksripaisarnkit op cit note 81 at 310

³¹³ Article 14 of the Rotterdam Rules

³¹⁴ See for example Alcantara op cit note 15 at 3

4.2 A comparative analysis between the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to the carrier's seaworthiness obligation

4.2.1 The Hague-Visby Rules

4.2.1.1 Historical background and general overview

As discussed previously, under the Common law, the carrier's liability was strict, with an absolute obligation on it to provide a seaworthy vessel which could not be discharged merely by proving that it had exercised due diligence.³¹⁵ In British jurisdictions, however, carriers were almost entirely free to contract out of their obligations towards the shipper, including the obligation to provide a seaworthy vessel.³¹⁶ The obligation to provide a seaworthy vessel was an implied term included in the contract of carriage which could only be excluded if expressly stated in the contract.³¹⁷ Given the importance of freedom of contract in British jurisdictions, if the carrier expressly excluded the implied warranty of seaworthiness, this exclusion would be upheld by the courts.³¹⁸ As noted in chapter two dealing with the history and development of the carriage of goods by sea conventions, cargo-owning nations and consignees were wholly unsatisfied with the carrier's exploitation of its dominant position.³¹⁹ This was especially the case with the United States of America which found clauses exonerating the carrier from liability as against public policy.³²⁰ The growing aversion toward the carrier and the exploitation of its dominant position led to the enactment of the US Harter Act, out of which was borne the concept of due diligence as a minimum standard of seaworthiness.³²¹ The Hague and Hague-Visby Rules, with their roots in the Harter Act, have retained this obligation to provide a seaworthy vessel.

Article III of the Hague-Visby Rules sets out the main obligations of the carrier, which include the obligation to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage. Article III rule 1 accordingly states as follows:

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

³¹⁵ Sefara op cit note 303 at 16

³¹⁶ Adamsson op cit note 24 at 9

³¹⁷ Bengtsson op cit note 308 at 16

³¹⁸ Ibid 16

³¹⁹ Hare op cit note 17 at 622

³²⁰ I Carr, P Stone op cit note 32 at 217; Yang op cit note 26 at 11

³²¹ Hare op cit note 17 at 622 - 623

- (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 the goods are carried, fit and safe for their reception, carriage and preservation.”

Under the Hague-Visby Rules the carrier is no longer placed under an absolute obligation to provide a seaworthy vessel, but rather has a lesser obligation to exercise due diligence to make the vessel seaworthy.³²² The carrier will therefore not be held liable for the unseaworthiness of a vessel unless caused by a failure to exercise due diligence to make the vessel seaworthy and such failure is causative of the loss or damage.³²³ Further, the obligation is not continuous and the carrier is only required to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage. This means that the carrier is under no obligation to maintain the vessel’s seaworthiness throughout the voyage.³²⁴ Further, and in favour of the carrier, the Hague-Visby Rules contain a list of seventeen exclusions that exonerate the carrier from liability provided it has exercised due diligence to make the vessel seaworthy.³²⁵ As a *quid pro quo* and to protect cargo-owning interests, the carrier is prohibited from contracting out of its obligation to exercise due diligence to make the vessel seaworthy, even by agreement.³²⁶ This is evident from Article III (8) which reads as follows:

“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.”

Having been introduced to the seaworthiness obligation under the Hague-Visby Rules, the following paragraphs will now briefly analyse and define certain aspects of this obligation under the Hague-Visby Rules.

³²² Adamsson op cit note 24 at 14

³²³ R Aikens...et al. *Bills of Lading* (2006) 244

³²⁴ Adamsson op cit note 24 at 15

³²⁵ M Jansson *The consequences of a deletion of the nautical fault* (unpublished LLM thesis, Göteborg University, 2007) 18

³²⁶ Hare op cit note 17 at 656

4.2.1.2 Features of the seaworthiness obligation under the Hague-Visby Rules

'Seaworthiness'

Despite developments and changes in the rules governing the carrier's obligation to provide a seaworthy vessel, the definition of seaworthiness has largely remained the same.³²⁷ Therefore, the old jurisprudence on seaworthiness preceding the Hague-Visby Rules is still relevant, bearing in mind that the seaworthiness obligation under the Common law was an absolute one.³²⁸

Seaworthiness relates to all aspects that affect a vessel's ability to undertake the contractual voyage.³²⁹ It requires that "...the ship must be properly designed, constructed, maintained, repaired and fitted with all the necessary equipment in proper working order and supplied with a properly trained and qualified crew capable of dealing with all of the incidents of a voyage..."³³⁰ Therefore, it includes the physical state of the vessel, but also concerns various other factors,³³¹ such as: having the necessary documentation; being properly crewed, equipped and supplied; a consideration of the particular voyage to be undertaken; and whether it is fit to receive and carry the cargo.³³² It is not just concerned with the ship itself, but whether it is also cargo-worthy i.e. whether the vessel is able to carry the specific cargo safely and in good condition.³³³ Seaworthiness is not easily defined since what constitutes a seaworthy vessel also "varies with the place, the voyage, the class of ship [and] even the nature of the cargo".³³⁴ It essentially relates to the fitness and ability of the vessel to

³²⁷ A H Kassem *The legal aspects of seaworthiness: current law and development* (PhD thesis, University of Wales, 2006) 30

³²⁸ Jansson op cit note 325 at 19

³²⁹ Aikens op cit note 323 at 235

³³⁰ M Hartwell...et al 'Heavy weather, the carriage regimes and notes of protest' August 2014, Norton Rose Fulbright, South Africa available at <http://fringilla4.rssing.com/browser.php?indx=3652132&item=797> (accessed: October 2015) 3

³³¹ Kassem op cit note 327 at 30

³³² N J Margetson *The system of liability of articles III and IV of the Hague (Visby) Rules* (PhD thesis, University of Amsterdam, 2008) 53; S Almobideen 'A shipowners duty to provide a seaworthy ship under the charterparty' 2012 available at <http://www.tamimi.com/en/magazine/law-update/section-6/september-2/a-shipowners-duty-to-provide-a-seaworthy-ship-under-the-charterparty.html> accessed 29 May 2015

³³³ Justice M J D Wallis *Seaworthiness* (unpublished lecture notes, University of KwaZulu-Natal, 2015) 7

³³⁴ *Foley v Tabor* (1861) 2 F & F 663 at 671

encounter the ordinary perils of the contemplated voyage.³³⁵ The case of *McFadden v Blue Star Line*³³⁶ sets out the test for seaworthiness as follows:

“A vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it...If the defect existed, the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.”³³⁷

In the case of *M.D.C., Ltd. v N.V. Zeevaart Maats*,³³⁸ the following was also stated with regard to the test for seaworthiness:

“The test in a case of this kind, of course, is not absolute: you do not test it by absolute perfection or by absolute guarantee of successful carriage. It has to be looked at realistically, and the most common test is: Would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?”³³⁹

The seaworthiness test is therefore an objective one and looks at the conduct of a prudent ship-owner to determine what course of action it would have employed had it discovered the defect in the vessel.³⁴⁰

The flexibility of the test for seaworthiness is clear from the case of *The Bunga Seroja*³⁴¹ in which the following was stated;

“...seaworthiness is to be assessed according to the voyage under consideration; there is no single standard of fitness which a vessel must meet. Thus, seaworthiness is judged having regard to the conditions the vessel will encounter. The vessel may be seaworthy for a coastal

³³⁵ Margetson op cit note 332 at 52

³³⁶ *McFadden v Blue Star Line* [1905] 1 KB 697

³³⁷ Ibid 706; Margetson op cit note 332 at 52

³³⁸ *M.D.C., Ltd. v N.V. Zeevaart Maatschappij Beursstraat* [1962] 1 Lloyd's Rep. 180; Margetson op cit note 332 at 53

³³⁹ *M.D.C., Ltd. v N.V. Zeevaart Maatschappij Beursstraat* op cit note 338 at 186; Margetson op cit note 332 at 53

³⁴⁰ Kassem op cit note 327 at 15

³⁴¹ *Great China Metal Industries Co.Ltd v. Malaysian International Shipping Corp. Berhad (The Bunga Seroja)* [1999] 1 Lloyd's Rep. 512; Wallis op cit note 333 at 6

voyage in a season of light weather but not for a voyage in the North Atlantic in mid winter.”³⁴²

Whether a vessel is seaworthy is also dependant on the standards required at a particular time.³⁴³ For example, in the case of *Bradley v Federal Steam Navigation Company*,³⁴⁴ it was stated:

“In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the material time.”³⁴⁵

To summarise, the vessel must have that degree of fitness at the commencement of the voyage in order that it is able perform in terms the contract of carriage.³⁴⁶ The vessel must be seaworthy in terms of its ability and fitness to withstand the ordinary perils of the sea and contemplated voyage, and it must be able to carry and deliver the specific cargo safely to the point of destination.³⁴⁷ There is no single definition of seaworthiness, but we have seen that it relates to (but is not limited to) the physical fitness of the vessel. It is also influenced by other factors, such as the cargo to be carried, crew, equipment, loading and stowage, documentation, the contractual voyage to be undertaken, and the conditions which might be encountered on the voyage.³⁴⁸ We may specifically look to Article III rule 1 (b) and (c) which expands on what is required of seaworthiness in rule 1 sub (a) i.e. sufficiency of crew and equipment, and a cargo-worthy vessel.³⁴⁹ The vessel need not be in a perfect condition to be seaworthy, but it does need to be fit in order to encounter the ordinary perils of the intended voyage and does require a consideration of various factors.³⁵⁰ The test for seaworthiness is a broad and flexible one, allowing for a variety of factors that may affect the vessel’s seaworthiness.³⁵¹

³⁴² *Great China Metal Industries Co.Ltd v. Malaysian International Shipping Corp. Berhad (The Bunga Seroja)* op cit note 341 at para 27; Wallis op cit note 333 at 6 - 7

³⁴³ Aikens op cit note 323 at 236

³⁴⁴ *F. C. Bradley & Sons, Ltd v Federal Steam Navigation Company, Ltd* (1927) 27 Lloyd’s Rep. 395

³⁴⁵ Ibid 396

³⁴⁶ Aladwani op cit note 304 at 57

³⁴⁷ Ibid 57

³⁴⁸ Aikens op cit note 323 at 237

³⁴⁹ Hare op cit note 17 at 656

³⁵⁰ Margetson op cit note 332 at 52; *Great China Metal Industries Co. v. Malaysian International Shipping Corp. Berhad* op cit note 341 at para 31

³⁵¹ Margetson op cit note 332 at 55

'Due Diligence'

As we have seen, the standard of the obligation under Article III (1) of the Hague-Visby Rules is 'due diligence'.³⁵² This concept was introduced in the 1893 US Harter Act and has been adopted in the Hague, Hague-Visby and the Rotterdam Rules.³⁵³ It is a departure from the absolute obligation placed on the carrier to provide a seaworthy vessel under the Common law.³⁵⁴ It essentially equates to reasonable care and skill and requires the carrier to take all reasonable steps and measures as may be necessary to man, equip and make the ship fit to undertake the contemplated voyage.³⁵⁵ In the case of *The Amstelslot*,³⁵⁶ the court held that lack of due diligence is negligence.³⁵⁷ In *The Kapitan Sakharov*³⁵⁸ case it was stated:

“USC was required under art. III, r. 1, of the Hague Rules to exercise due diligence to make the vessel seaworthy. The Judge correctly took as the test whether it had shown that it, its servants, agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage. He also correctly stated the test to be objective, namely to be measured by the standards of a reasonable ship-owner, taking into account international standards and the particular circumstances of the problem in hand.”³⁵⁹

A clear and single definition of due diligence is not an easy task³⁶⁰ and whether or not due diligence has been exercised will depend on the particular facts of each case.³⁶¹ What we can conclude is that it is an objective test that looks at “the conduct of a reasonably prudent carrier at the time of exercising due diligence.”³⁶² It is concerned with whether the carrier has taken all reasonable measures that could possibly have been taken, in light of the available knowledge at that moment, in order to satisfy its obligation to provide a seaworthy vessel.³⁶³

³⁵² Article III Rule 1 of the Hague Rules

³⁵³ Kassem op cit note 327 at 75

³⁵⁴ Adamsson op cit note 24 at 15

³⁵⁵ Aikens op cit note 323 at 245; Kassem op cit note 327 at 76

³⁵⁶ *Union of India v N.V. Reederij Amsterdam (The Amstelslot)* [1963] 2 Lloyd's Rep. 223

³⁵⁷ *Ibid* 235; Margetson op cit note 332 at 45

³⁵⁸ *Northern Shipping Company v Deutsche Seereederei GmbH and Ors (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep. 255

³⁵⁹ *Ibid*; Margetson op cit note 332 at 45 - 46

³⁶⁰ *Ibid* 48

³⁶¹ Kassem op cit note 327 at 76

³⁶² *Ibid* 76

³⁶³ *Ibid* 76

Is the duty to exercise due diligence delegable?

The duty of the carrier to exercise due diligence is a personal one and the responsibility of such ultimately lies with the carrier.³⁶⁴ Thus, if the carrier chooses to delegate its duty to its agent, crew or an independent contractor, and such person did not exercise due diligence in providing a seaworthy vessel, the carrier will be held liable and cannot rely on the defence that it delegated the duty to another person.³⁶⁵ In the leading case on this matter, *The Muncaster Castle*³⁶⁶, the carrier was held liable for the negligence of an independent contractor in effecting repairs to the vessel.³⁶⁷ It is authority for the fact that the obligation of the carrier to exercise due diligence to make the vessel seaworthy is a personal one.³⁶⁸ In the same case the following was stated by Lord Keith of Avonholm:

“The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship-repairers to make his ship seaworthy. Their failure to use diligence to do so is his failure. The question, as I see it, is not one of vicarious responsibility at all. It is a question of statutory obligation. Perform it as you please.”³⁶⁹

A recent South African decision regarding due diligence

In a recent South African judgment handed down by the Supreme Court of Appeal in the case of *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd*³⁷⁰, one of the issues turned to the question of whether there was a want of due diligence on the part of the owners (Viking) of the vessel, the MFV Lindsay (even though it was a marine insurance case). The case concerned a tragic collision between the *Lindsay*, a small fishing vessel, and another vessel, a bulk juice carrier, in which the former capsized as a result of the collision.³⁷¹ The *Lindsay* was insured by Mutual and Federal under a marine hull insurance policy and the appellant (Viking) sought to claim in terms of the policy.³⁷² The appellant sought to rely on

³⁶⁴ Ibid 81

³⁶⁵ Ibid 81

³⁶⁶ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] 1 Lloyd's Rep. 57

³⁶⁷ Margetson op cit note 332 at 49

³⁶⁸ Sooksripaisarnkit op cit note 81 at 314

³⁶⁹ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* op cit note 366

³⁷⁰ *Viking In Shore v Mutual & Federal Insurance Co Ltd* (41/2015) [2016] ZASCA 21

³⁷¹ A James & M Kershoff of Clyde & Co LLP 'Inchmaree clauses, warranties and want of due diligence in South Africa' 2016 available at <http://www.lexology.com/library/detail.aspx?g=579d4d10-c963-44fe-a05c-c8a9bdc1a21d> accessed on 17 December 2016

³⁷² Ibid

two clauses known as Inchmaree clauses that provide cover in situations of loss or damage caused by negligence of the master, officers and crew.³⁷³ However, Mutual and Federal repudiated liability for the claim on the grounds that the appellant breached a warranty in terms of which they would at all times comply with the Merchant Shipping Act, 1951 (MSA) and the provisions under the Act relating to the safety and seaworthiness of the vessel.³⁷⁴ The matter proceeded to the Western Cape Division of the High Court where the appellant's claim was refused based on a written statement of one Mr Ehlers to the effect that only he and one Mr Koeries were on navigational watch at the time of the collision (and they did not possess the requisite navigational certification), despite the fact that he later recanted his statement.³⁷⁵ The owners took the matter on appeal to the SCA where one of the issues turned to whether there was a want of due diligence on the part of the owners of the vessel. The respondent denied liability under the policy, specifically the Inchmaree clause in which it states that "The cover provided in [this clause] is subject to all other terms, conditions and exclusions contained in this insurance and subject to the proviso that the loss or damage has not resulted from want of due diligence by the assured, owners or managers".³⁷⁶ The respondent, by relying on the statement of Mr Ehlers, argued that at the time of the collision, a crew member who was supposed to be on duty was not present on the bridge where he was supposed to be, and therefore the vessel was in the hands of two other persons, Mr Koeries assisted by Mr Ehlers.³⁷⁷ Neither of these two persons held the requisite certification to undertake a navigational watch and as a result, it was alleged that there was a want of due diligence on the part of the appellant.³⁷⁸ The court ultimately rejected this argument in favour of the appellants, finding the statement by Mr Ehlers unreliable.³⁷⁹ The court held that a want of due diligence must be established on the part of the assured, the owner or the manager of the vessel, or their alter ego, rather than a failure by a subordinate (for example, a crew member).³⁸⁰ Further, the court also stated that want of due diligence is concerned with

³⁷³ J Prain of Bowman Gilfillan Africa Group 'Supreme Court of Appeal considers Merchant Shipping Act warranty' 2016 available at <http://www.bowmanslaw.com/wp-content/uploads/2016/09/Supreme-Court-of-Appeal-considers-Merchant-Shipping-Act-warrant-01-June-2016.pdf> accessed 30 December 2016 2

³⁷⁴ Q van der Merwe & K Rajah of Shepstone & Wylie Attorneys 'Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance' 2016 available at <http://www.wylie.co.za/Newsletter/892> accessed on 17 December 2016

³⁷⁵ James & Kershoff op cit note 371

³⁷⁶ Ibid

³⁷⁷ *Viking In Shore v Mutual & Federal Insurance Co Ltd* op cit note 370 at para 28 pg 16

³⁷⁸ Ibid para 28 pg 16; James & Kershoff op cit note 371

³⁷⁹ Ibid

³⁸⁰ Ibid

equipping the vessel for the voyage, as opposed to seagoing and operational negligence,³⁸¹ which is accordingly in line with the Canadian case of the *Brentwood*³⁸². The following was stated in this regard:

“What must be established is a want of due diligence on the part of the insured, the owner or the manager – in this case Viking – causing the loss. And that does not depend on the conduct of the crew but on the conduct of those responsible at a higher level of management in the company. It must, as *Arnould* expresses it, ‘be personal failure of the assured, owners or managers, or their alter ego in the case of corporate bodies, rather than a failure by a subordinate’. Want of due diligence is concerned with equipping the vessel for the voyage and not with seagoing or operational negligence, which is one of the perils insured against.”³⁸³

The court stated that there were at least two officers on board the vessel who held qualifications with regard to navigation and watchkeeping who shared the watches, Captain Landers and Mr Levendal.³⁸⁴ Even if it was shown that Mr Levendal, who was on duty on the evening of the collision, neglected his duties, this would not be the result in a want of due diligence on the part of the owners.³⁸⁵ However, there was no evidence that this was the case, with the court finding Mr Ehler’s statement unreliable.³⁸⁶ Furthermore, the court stated that the proviso to the Inchmaree clauses in the marine policy operates when the want of due diligence was the *cause* of the loss or damage.³⁸⁷ Therefore, even though Mr Koeries and Mr Ehlers did not hold any certifications, the court held that there was no evidence that the absence of certification would have that causative effect resulting in the loss or damage.³⁸⁸ In any event the court held that the vessel was crewed in a manner in compliance with the requirements of the Safe Manning Regulations and that there is no provision in the MSA or regulation under it that requires a special certification for crew to be qualified to participate in navigational watch.³⁸⁹ As a result, the court was satisfied, based on the evidence, that the loss

³⁸¹ Ibid

³⁸² *Coast Ferries Ltd v Century Insurance Co of Canada and others* [1975] 2 SCR 477. In this case a vessel capsized due to the negligent loading of the master, however, it was found that there was a want of due diligence on the part of the owner of the vessel in failing to provide the master with certain information – See *Viking In Shore v Mutual & Federal Insurance Co Ltd* op cit note 370 at para 30 pg 17 - 18

³⁸³ *Viking In Shore v Mutual & Federal Insurance Co Ltd* op cit note 370 at para 29 pg 17

³⁸⁴ Ibid para 31 pg 18

³⁸⁵ Ibid para 31 pg 18

³⁸⁶ Ibid para 32 pg 18 - 19

³⁸⁷ Ibid para 45 pg 25

³⁸⁸ Ibid para 45 pg 25 - 26

³⁸⁹ Ibid para 46 pg 26; para 48 pg 27

of the vessel was not due to a want of due diligence and the owners' appeal was successful and they were entitled to an indemnity under the marine hull policy.³⁹⁰

What is meant by the term 'voyage'?

The carrier is required to exercise due diligence before and at the beginning of the *voyage*. The term 'voyage' has been taken to mean the contractual voyage i.e. from the port of loading to the port of discharge as per the bill of lading.³⁹¹ There are various stages within the contractual voyage and a vessel can call at various ports for loading and discharging of goods.³⁹² Under the Common law, the carrier was required to exercise due diligence at the beginning of each of the various stages within that voyage.³⁹³ Under the Hague-Visby Rules, however, since the voyage refers to the contractual voyage and not the stages within it, the carrier is only required to exercise due diligence to make the vessel seaworthy at the port where the cargo is loaded.³⁹⁴ In *The Makedonia* the following was held in this regard:

“I see no obligation to read into the word ‘voyage’ a doctrine of stages, but a necessity to define the word itself... ‘Voyage’ in this context means what it has always meant: the contractual voyage from the port of loading to the port of discharge as declared in the appropriate bill of lading. The rule says ‘voyage’ without any qualification such as ‘any declared stage thereof’”³⁹⁵

Accordingly, the carrier is not required to exercise due diligence before and at the beginning of each stage of the voyage to make the vessel seaworthy and the doctrine of stages does not apply under the Hague-Visby Rules.

When does the obligation commence and when does it cease?

The duration of the obligation to exercise due diligence to make the vessel seaworthy under the Hague-Visby Rules is not continuous and is only required before and at the beginning of the voyage as per Article III rule 1. In the *Maxine Footwear* case it was stated that:

³⁹⁰ Ibid para 49 pg 27 - 28

³⁹¹ Bengtsson op cit note 308 at 23

³⁹² Margetson op cit note 332 at 37

³⁹³ Ibid 37

³⁹⁴ Ibid 37 - 38

³⁹⁵ *The Makedonia*, [1962] 1 Lloyd's Rep. 316 at 329; Margetson op cit note 332 at 38

“...before and at the beginning of the voyage means the period from at least the beginning of the loading until the vessel starts on her voyage. The word ‘before’ cannot in their opinion be read as meaning ‘at the commencement of the loading’. If this had been intended it would have been said...”³⁹⁶

Determining when the seaworthiness obligation commences is not always a simple task and is largely dependent on the particular facts of each case. In the *Muncaster Castle*,³⁹⁷ it was stated that the duty will commence when the vessel comes into the carrier’s ‘orbit’.³⁹⁸ This statement is echoed by Aikens who states that the obligation will commence when the vessel comes within the carrier’s control or possession.³⁹⁹ It would not make sense for the carrier to be responsible before the vessel has even come into its control; however, this does not mean that the carrier can ignore any issues with the vessel that occurred before the vessel came within its orbit.⁴⁰⁰ Margetson is of the view that if the parties have not yet concluded a contract of carriage, there cannot be any obligation on the owners to exercise due diligence to make the vessel seaworthy.⁴⁰¹ Accordingly, the obligation to exercise due diligence only starts when the contract of carriage between the carrier and shipper comes into existence. Therefore, the contract of carriage will determine when the obligation begins.⁴⁰² It seems therefore regard should be had to both when the vessel comes within the carrier’s control and when the contract of carriage is concluded in determining when the obligation to exercise due diligence commences.

With regard to the concept of ‘beginning’, Margetson states that the obligation ceases once the “ship breaks ground for the purpose of departure”.⁴⁰³ In other words, the obligation will cease once the voyage commences and the vessel begins to leave the berth and port.⁴⁰⁴ The carrier is not required to exercise due diligence to make the vessel seaworthy after this point.⁴⁰⁵ However, courts may make a finding of unseaworthiness after the vessel has sailed if

³⁹⁶ *Maxine footwear Co. Ltd v Canadian Government Merchant Marine Ltd (The Maurienne)* [1959] 2 Lloyd’s Rep. 105 at 113; Margetson op cit note 332 at 39

³⁹⁷ *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd* op cit note 366

³⁹⁸ Ibid 85

³⁹⁹ Aikens op cit note 323 at 246 - 247

⁴⁰⁰ Aikens op cit note 323 at 247

⁴⁰¹ Margetson op cit note 332 at 40

⁴⁰² Ibid 40

⁴⁰³ Ibid 41

⁴⁰⁴ Wallis op cit note 333 at 11

⁴⁰⁵ Ibid 11

such unseaworthiness was discoverable by use of due diligence before and at the beginning of the voyage.⁴⁰⁶

Overriding obligation

The carrier's seaworthiness obligation in terms of Article III (1) has been described as an overriding obligation in that the carrier must establish that it exercised due diligence before and at the beginning of the voyage to make the vessel seaworthy before it may seek to rely on the exceptions under Article IV (2).⁴⁰⁷ If the carrier cannot do so, it must at least show that its failure to exercise due diligence was not the cause of the loss.⁴⁰⁸ This overriding obligation was expressed in the *Maxine Footwear*⁴⁰⁹ case where Lord Somervell of Harrow stated:

“Article III, rule 1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art. IV cannot be relied on.”⁴¹⁰

The overriding obligation has been interpreted to mean that if the damage is caused by the carrier's non-compliance with Article III rule 1, it may not proceed to rely on the list of exceptions under Article IV in order to escape liability.⁴¹¹ Where the cause of the damage is partly due to a failure to exercise due diligence and partly due to an excepted peril, the carrier will be held liable for the entire loss.⁴¹²

Causation

In order to determine whether a carrier is liable for cargo loss or damage, the true cause of the loss must be established.⁴¹³ If the carrier is seeking to rely on a specific defence, such defence must be causative of the loss.⁴¹⁴ The same may be said with regard to seaworthiness, in that it is only relevant insofar as it causes or contributes to the loss or damage.⁴¹⁵ If unseaworthiness did not cause the loss or damage, the carrier will not be held responsible.⁴¹⁶ And if the

⁴⁰⁶ Margetson op cit note 332 at 41

⁴⁰⁷ I Carr, P Stone op cit note 32 at 223

⁴⁰⁸ Hare op cit note 17 at 793

⁴⁰⁹ *Maxine footwear Co. Ltd v Canadian Government Merchant Marine Ltd* op cit note 396

⁴¹⁰ Ibid 113; Margetson op cit note 332 at 70 - 71

⁴¹¹ Margetson op cit note 332 at 71

⁴¹² Bengtsson op cit note 308 at 22

⁴¹³ W Tetley 'The cause of the loss or damage' 2001 available at <https://www.mcgill.ca/maritimelaw/maritime-admiralty/cause> accessed on 8 June 2015

⁴¹⁴ Hartwell...et al op cit note 330

⁴¹⁵ Wallis op cit note 333 at 4

⁴¹⁶ Kassem op cit note 327 at 159

exercise of due diligence would not have prevented the vessel being unseaworthy, the carrier will accordingly not be held liable.⁴¹⁷

Burden of proof

The burden and order of proof in the event of a cargo claim entails a series of averments made by each party, which has been described as the ‘ping-pong’ nature of a cargo claim.⁴¹⁸ In terms of the burden of proof, it determines which party is required to prove what. The Hague-Visby Rules do not provide for a detailed order of proof,⁴¹⁹ however, the Rules do make it clear in terms of Article IV rule 1 that the burden rests upon the carrier to show that it exercised due diligence to make the vessel seaworthy i.e. that it complied with Article III rule 1. According to Tetley (and not necessarily reflecting the views of all authors⁴²⁰), the order of proof is as follows:

- “1) The cargo claimant proves his loss and damage in the hands of the carrier. (This is usually done by presenting a clean bill of lading issued by the carrier evidencing that the goods were received in good condition and subsequently damaged or lost upon discharge⁴²¹);
- 2) The carrier must prove the cause of the loss;
- 3) The carrier must prove due diligence to make the ship seaworthy before and at the beginning of the voyage in respect of the loss;
- 4) The carrier must prove one of the exculpatory exceptions of art. 4(2)(a) to (q) of the Hague or Hague/Hague-Visby Rules.
- 5) The cargo claimant then attempts to prove lack of care of cargo or attempts to disprove the above evidence of the carrier, including lack of seaworthiness and lack of due diligence.
- 6) Both parties then have various arguments available to them.”⁴²²

As per the above, the cargo-claimant is first required to show loss of or damage to the cargo whilst in the carrier’s charge.⁴²³ The burden then shifts to the carrier to explain how such loss

⁴¹⁷ Aikens op cit note 323 at 248

⁴¹⁸ Von Ziegler op cit note 192 at 330

⁴¹⁹ M Katsivela ‘Overview of ocean carrier liability exceptions under the Rotterdam Rules and Hague-Hague/Visby Rules’ (2010) 40 *Revue gendrale de droit* 421

⁴²⁰ See for example Kassem op cit note 327 at 153 -154 where he sets out the order of proof as per Mr. Justice Noel in *Robin Hood Flour Mills, Ltd. v. N. M. Paterson & Sons, Ltd., (The Farrandoc)*, [1967] 2 Lloyd’s Rep. 276.

⁴²¹ Sefara op cit note 303 at 24

⁴²² W Tetley ‘The burden and order of proof in marine cargo claims’ available at <http://www.arbitrage-maritime.org/fr/Gazette/G37complement/burden.pdf> accessed on 4 December 2016 at 33-34

⁴²³ Kassem op cit note 327 at 156

or damage occurred.⁴²⁴ Thereafter, the burden remains with the carrier and is required to prove that the vessel was seaworthy or that it exercised due diligence to make the vessel seaworthy.⁴²⁵ Once having achieving this, it will then be able to prove that the cause of loss or damage was due to one of the exceptions under Article IV (2) of the Hague-Visby Rules.⁴²⁶

The reason for the order of proof as above, as per Tetley, is due to the fact that the obligation under Article III (1) is an overriding one, and accordingly, the carrier cannot seek to rely on the exceptions until it has complied with its obligation under Article III (1).⁴²⁷ Furthermore, proof as to the cause of the loss or damage to the cargo is more readily available to the carrier than the cargo-claimant, accordingly the carrier is in the better position to prove such and bear the burden in this regard.⁴²⁸

4.2.1.3 Why is there a need for reform?

When the Hague Rules were drafted, the decision to limit the extent of the carrier's seaworthiness obligation to only before and at the beginning of the voyage was logical and reasonable for its time given the risky nature of sea carriage and the fact that the carrier had little control over the vessel once it was at sea.⁴²⁹ However, due to developments in and the growth of the shipping industry, the Hague and Hague-Visby Rules are considered outdated in modern times.⁴³⁰ The carrier's seaworthiness obligation has remained unchanged since the adoption of the Hague Rules in 1924 and has therefore not developed in light of advancements in the shipping industry. In the modern shipping environment, advancements in technology and communications have allowed ship-owners and other personnel on shore to remain in constant contact with their vessels.⁴³¹ Any defects to the vessel that compromises its seaworthiness may be corrected expediently at the nearest port.⁴³² These advancements in shipping equipment, communications and safety standards⁴³³ mean that there is nothing

⁴²⁴ Ibid 156

⁴²⁵ Ibid 156

⁴²⁶ Ibid 156

⁴²⁷ Tetley op cit note 422 at 34

⁴²⁸ Ibid 34

⁴²⁹ Bengtsson op cit note 308 at 25

⁴³⁰ Gordon op cit note 288 at 16

⁴³¹ Sooksripaisarnkit op cit note 81 at 313

⁴³² Ibid 313

⁴³³ M Mynhardt of Shepstone and Wylie 'Trade contract harmony on high seas' *Business Day* 14 September 2009 at 8

preventing the carrier from exercising due diligence to keep the vessel seaworthy throughout the voyage.⁴³⁴ As a result of the limited seaworthiness obligation under the Rules, the carrier is not required to exercise due diligence to ensure the seaworthiness of the vessel during the sea voyage, even if it could have done so to avoid the loss or damage.⁴³⁵ Furthermore, due to the limited nature of the seaworthiness obligation and the host of exceptions available to the carrier, including the controversial nautical fault exception, the Rules are perceived as being carrier friendly, favouring developed nations with large maritime fleets.⁴³⁶ Therefore, there has been call for a new and updated international carriage of goods by sea regime.

4.2.2 The Hamburg Rules

4.2.2.1 General overview

As noted under the Hague-Visby Rules, the requirements for a seaworthy vessel are essentially laid out in Article III rule 1 (a) through (c).⁴³⁷ One of the concerns in this regard is that it possibly limits the courts' ability to expand on the definition of seaworthiness in light of developments in the shipping industry.⁴³⁸ The Hamburg Rules therefore opted for a different approach and adopted a general seaworthiness provision.⁴³⁹ Accordingly, the text of Articles III rule 1 and IV of the Hague-Visby Rules do not feature in the Hamburg Rules and have been replaced with Article 5(1). Article 5(1) sets out the basis of liability of the carrier as follows:

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

Article 5(1) was drafted with the views of shippers/cargo interests in mind and that carriers should be held liable for all loss, damage and/or delay caused as a result of their own fault or

⁴³⁴ Berlingieri op cit note 84 at 6; Sooksripaisarnkit op cit note 81 at 313

⁴³⁵ Gordon op cit note 288 at 18

⁴³⁶ Sooksripaisarnkit op cit note 81 at 310

⁴³⁷ Kassem op cit note 327 at 18

⁴³⁸ Ibid 18

⁴³⁹ Ibid 18

that of their servants and agents.⁴⁴⁰ Accordingly, the drafters of the Hamburg Rules, in the form of Article 5(1), adopted a presumed fault based liability system⁴⁴¹ that imposes a positive duty on the carrier to take all reasonable steps to avoid loss, damage or delay from the moment it takes the goods into its charge until they are delivered to the consignee.⁴⁴² This presumed fault based system means that the carrier is presumed to be at fault for loss or damage to the goods or for delay unless it proves that “he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.”⁴⁴³ This is evident from a post clause inserted at the end of the Hamburg Rules that states as follows:

“It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.”⁴⁴⁴

Thus, if the shipper can show that the loss, damage or delay took place whilst the goods were in the carrier’s charge, the carrier is presumed at fault with the onus on it to show otherwise.⁴⁴⁵

As noted from the wording of Article 5(1), the Hamburg Rules do not specifically provide for a seaworthiness provision, but rather adopt a general provision for the carrier’s liability.⁴⁴⁶ And although the text of Article 5(1) of the Hamburg Rules excludes the terms ‘seaworthiness’ and ‘due diligence’; the basic obligations of the carrier in terms of seaworthiness of the vessel and care of the goods are impliedly included in this provision.⁴⁴⁷ The obligation to provide a seaworthy vessel under Article 5(1) has also been made continuous due to the wording of Article 5(1) and is not limited to only before and at the

⁴⁴⁰ J Wilson *Carriage of goods by sea* 7 ed (2010) 216

⁴⁴¹ Ibid 216

⁴⁴² K G Ainuson *The Hamburg Rules: Did it increase the liability of the carrier?* (unpublished LLM thesis, University of Georgia, 2006) 32

⁴⁴³ R G Bauer ‘Conflicting liability regimes: Hague-Visby v. Hamburg Rules – A case by case analysis’ (1993) 24 (1) *Journal of Maritime Law and Commerce* 55

⁴⁴⁴ Annex II to the Hamburg Rules

⁴⁴⁵ J O Honnold ‘Ocean carrier and cargo; clarity and fairness – Hague or Hamburg?’ (1993) 24 (1) *Journal of Maritime Law and Commerce* 99; I Carr, P Stone op cit note 32 at 269

⁴⁴⁶ Kassem op cit note 327 at 18

⁴⁴⁷ Sefara op cit note 303 at 27

beginning of the voyage, which is the extent of the obligation under the Hague-Visby Rules.⁴⁴⁸

The Hamburg Rules have also removed the list of exceptions that were available to the carrier under the Hague-Visby Rules, including the contentious nautical fault defence.⁴⁴⁹ Article 5 of the Hamburg Rules only provides for certain circumstances in which the carrier will be exempted from liability, for example, in the case of fire, damage to or loss of live animals, and damage or loss caused as a result of measures taken to save life or property at sea.⁴⁵⁰ However, despite the lack of express exceptions to liability as contained in the Hague-Visby Rules, it has been suggested that the impact of its removal from the Hamburg Rules is minimal and the exceptions are impliedly retained (with the exception of the nautical fault defence).⁴⁵¹ The carrier is accordingly not prevented from asserting one of the defences from the Hague-Visby Rules as a defence under the Hamburg Rules, as long as it is able to show that it, its servants or agents were not at fault.⁴⁵² In other words, if the carrier is able to show that the loss, damage or delay is not caused by its own or its servants or agents fault, but rather some other circumstance which happens to be a defence listed under the Hague-Visby Rules, such as an act of war or an act of God, the carrier will be entitled to rely on such in order to escape liability.⁴⁵³ Therefore, despite their abolition from the Hamburg Rules, the carrier is still entitled to rely on the list of defences under the Hague-Visby Rules to the extent that they do not involve fault on the carrier's part.⁴⁵⁴

4.2.2.2 Why is there a need for reform?

Despite attempts by the Hamburg Rules to achieve a balance between the interests of the carrier and shipper in terms of their obligations and liability, the Rules have not achieved wide-spread success with very few nations having ratified the Rules (of which none include any large maritime trading nations with significant influence).⁴⁵⁵ The Rules have generally

⁴⁴⁸ Adamsson op cit note 24 at 22

⁴⁴⁹ S V Pravin Rathinam 'The Hamburg Rules, failure of success?' 2011 available at <http://pravinrathinam.blogspot.co.za/2011/06/hamburg-rules-failure-or-success-review.html> accessed on 17 December 2015

⁴⁵⁰ Articles 5(4), 5(5) and 5(6) of the Hamburg Rules; Metuge op cit note 4 at 67

⁴⁵¹ Wilson op cit note 440 at 216; Sefara op cit note 303 at 33

⁴⁵² Ibid 33; R Force 'A comparison of the Hague, Hague-Visby, and Hamburg Rules: Much ado about (?)' (1996) 70 *Tulane Law Review* 2066

⁴⁵³ Ibid 2066

⁴⁵⁴ Ibid 2066

⁴⁵⁵ Metuge op cit note 4 at 69

been opposed by ship-owning nations and carrier interests who fear that the Rules increase the carrier's liability whilst unduly favouring cargo interests.⁴⁵⁶ The removal of carrier friendly elements under the Hague-Visby Rules, such as the list of exceptions, and the change in the burden of proof are considered too radical and unreasonable, which may result in an increase in freight rates.⁴⁵⁷ Further, opponents of the Rules contend that they too readily discard and contrast existing laws, such as the widely accepted Hague-Visby Rules, which could result in uncertainty and increased litigation over the interpretation of its provisions.⁴⁵⁸ The abandonment of well-established principles under the Hague/Hague-Visby Rules, which have been subject to years of scrutiny and judicial review, such as those relating to seaworthiness and the list of exceptions, has been criticised by opponents of the Rules.⁴⁵⁹ It is argued that to simply do away with the settled jurisprudence on the carriage of goods by sea by ratifying the completely novel Hamburg Rules will set maritime law back in a very significant way.⁴⁶⁰ As a result, the Rules have not been well received by the international community and any of the large maritime nations.⁴⁶¹

4.2.3 The Rotterdam Rules

4.2.3.1 General overview

As we have seen under the Hague-Visby Rules, the carrier has a basic obligation to exercise due diligence only before and at the beginning of the voyage to make the vessel seaworthy. Under the Hamburg Rules, there is no express seaworthiness obligation, but rather the Rules adopt a general carrier liability provision. With the failure of the Hamburg Rules to achieve widespread success and arguments that the Hague-Visby Rules are outdated in modern times and tend to favour carrier interests, the Rotterdam Rules have sought to modernise and update the carrier's obligation to provide a seaworthy vessel. Under the Rotterdam Rules, the carrier is now not only obliged to exercise due diligence to make the vessel seaworthy before and at

⁴⁵⁶ O B Dagli 'Analyse obligation and liability of the carrier under the Rotterdam Rules with comparison between Visby protocol and Hamburg Rules' 2013 available at https://www.academia.edu/5376034/ANALYSE_OBLIGATIONS_AND_LIABILITY_OF_THE_CARRIER_UNDER_THE_ROTTERDAM_RULES_WITH_COMPARISON_BETWEEN_VISBY_PROTOCOL_AND_HAMBURG_RULES accessed on 2 January 2016, 9

⁴⁵⁷ Adamsson op cit note 24 at 25

⁴⁵⁸ D A Werth 'The Hamburg Rules revisited – A look at U.S. options' (1991) 22 (1) *Journal of Maritime Law and Commerce* 70

⁴⁵⁹ Ibid 70; Metuge op cit note 4 at 76

⁴⁶⁰ Werth op cit note 458 at 70; Metuge op cit note 4 at 76

⁴⁶¹ Adamsson op cit note 24 at 25

the beginning of the voyage, but also throughout the entire sea voyage.⁴⁶² Article 14 of the Rotterdam Rules accordingly states as follows:

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

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

Given the shortcomings of the Hague-Visby Rules and Hamburg Rules, the extension of the seaworthiness obligation is considered a significant change and a positive step toward achieving modernity in the rules governing the international carriage of goods by sea. However, the extension under the Rotterdam Rules is not without its concerns, with arguments that its provisions relating to the carrier’s basis of liability and burden of proof are overly complex and that they fail to achieve an appropriate allocation of risk between carrier and shipper. Accordingly, it is imperative that these provisions relating to the carrier’s basis of liability and burden of proof are examined to determine whether there is any truth to these arguments. Furthermore, the extension under Article 14 may see an alteration of the allocation of risk as between carrier and shipper, potentially placing too great a burden on the carrier. It is therefore necessary to determine what impact, if any, the extension of the carrier’s seaworthiness obligation will have on the carrier and whether it would be able to comply with this perceived increase in liability. An examination as to whether the basis of liability and burden of proof are overly complex, and the impact the extension will have on carrier liability, if any, will assist in determining whether the Rules have been successful in providing appropriate solutions to the shortcomings of the Hague-Visby Rules and Hamburg Rules. Accordingly, the following paragraphs will briefly examine the provisions relating to the seaworthiness obligation under the Rotterdam Rules. It will then examine the above issues and will determine the extent to which the extension of the seaworthiness obligation under the Rotterdam Rules is an appropriate solution to its predecessors.

⁴⁶² Metuge op cit note 4 at 76

4.2.3.2 Features of the seaworthiness obligation under the Rotterdam Rules

With the lack of success of the Hamburg Rules and a desire to avoid a similar fate, the drafters of the Rotterdam Rules⁴⁶³ adopted a seaworthiness obligation similar in wording and construction to that of Article III rule 1 of the Hague-Visby Rules, as may be seen above.⁴⁶⁴ The obligation is one of exercising due diligence and is not an absolute obligation.⁴⁶⁵ It similarly imposes an obligation on the carrier to exercise due diligence to ensure the seaworthiness of the vessel with regard to: the physical state of the vessel; sufficient crew and equipment; and the cargo-worthiness of the vessel.⁴⁶⁶ The Rotterdam Rules have also gone further in that the carrier must also ensure the seaworthiness of the vessel by providing a container⁴⁶⁷ that is fit and safe to receive, carry and preserve the cargo.⁴⁶⁸ Furthermore, the seaworthiness obligation under the Rotterdam Rules has been made continuous.⁴⁶⁹ This means that the carrier is required to exercise due diligence before, at the beginning of, and during the voyage by sea to make and keep the vessel seaworthy.⁴⁷⁰ This continuous seaworthiness obligation means that if at any point during the sea leg of the voyage the vessel becomes unseaworthy, the carrier would be required to take all reasonable steps as may be necessary to ensure the seaworthiness of the vessel, and not just before and at the beginning of the voyage.⁴⁷¹ Similarly, the Rules have also retained a list of exceptions that the carrier may rely in order to be excused from liability under Article 17(3), excluding the contentious nautical fault defence.

Since the seaworthiness obligation under Article 14 the Rotterdam Rules does not appear to differ substantially in wording and construction from that of Article III rule 1 of the Hague-Visby Rules, the current jurisprudence on the Hague-Visby Rules with regard to concepts such as ‘seaworthiness’, ‘before and at the beginning’, and ‘due diligence’ are still relevant and may be applied in interpreting the Rotterdam Rules. This has the benefit of maintaining some of the certainty and predictability created by the Hague and Hague-Visby Rules.⁴⁷²

⁴⁶³ Bengtsson op cit note 308 at 26

⁴⁶⁴ Adamsson op cit note 24 at 54

⁴⁶⁵ Aladwani op cit note 304 at 124

⁴⁶⁶ Sefara op cit note 303 at 42

⁴⁶⁷ This aspect has been added to the Rules to cater for the advent of containerization which has allowed for the growth of multimodal transportation

⁴⁶⁸ Neels op cit note 125 at 11

⁴⁶⁹ Sefara op cit note 303 at 42

⁴⁷⁰ Chami op cit note 160 at 5

⁴⁷¹ Sefara op cit note 303 at 42

⁴⁷² Bengtsson op cit note 308 at 25

Thus, the following paragraphs will highlight some of the changes introduced by the extended seaworthiness obligation under the Rotterdam Rules.

The extension of the seaworthiness obligation

As noted, the obligation to make the vessel seaworthy has been made a continuous one under the Rules by virtue of the words “during the voyage by sea to exercise due diligence to make and keep the vessel seaworthy.”⁴⁷³ However, the Rules are silent as to when the obligation to make and keep the vessel seaworthy during the voyage ceases and this could lead to divergent interpretations.⁴⁷⁴ Since the term ‘voyage’ has been interpreted to mean the contractual voyage, one view is that the obligation ceases once the vessel is at the port of destination as agreed to by the parties.⁴⁷⁵ Another view is that since the carrier is required to exercise due diligence during the time the cargo is loaded onto the vessel, it is argued that there is no reason why the obligation should not extend to the time when the cargo is discharged from the vessel.⁴⁷⁶ Another view, and perhaps the most sound, suggests that when interpreting the words ‘during the voyage by sea’, one must take cognisance of the other provisions of the Rules, such as the obligation of the carrier to deliver the cargo and that the period of responsibility of the carrier may end after the cargo has been delivered to the consignee.⁴⁷⁷ Since the obligations of the carrier include delivering and unloading the cargo, it is argued that the carrier therefore also has a duty to ensure the seaworthiness of the vessel during the unloading of the cargo, but the diligence required by the carrier here is limited to the requirements of unloading the cargo.⁴⁷⁸

The burden of proof

Central to the carrier’s seaworthiness obligation under the Rotterdam Rules is the basis of the carrier’s liability and the burden of proof as set out in Article 17. As mentioned, it has been suggested that the basis of liability and burden of proof under article 17 of the Rules is overly complex and fails to achieve the appropriate allocation of risk many had hoped for. As a

⁴⁷³ Article 14 of the Rotterdam Rules

⁴⁷⁴ T Aladwani ‘The supply of containers and ‘seaworthiness’ – The Rotterdam Rules perspective’ (2011) 42 (2) *Journal of Maritime Law and Commerce* 200

⁴⁷⁵ Bengtsson op cit note 308 at 27; J Bülent Sözer ‘Obligation of the carrier to make and keep the ship seaworthy: Some comments on art. 14 of the Rotterdam Rules’ 2014 available at

<http://www.dikeyinternational.com/files/Obligation-of-the-Carrier.pdf> accessed on 12 January 2016, 8

⁴⁷⁶ Bengtsson op cit note 308 at 27

⁴⁷⁷ Bülent Sözer op cit note 475 at 8

⁴⁷⁸ Ibid 8

result, Article 17 will be examined below in determining whether there is any validity to these claims.

4.3 To what extent is the extension of the carrier's seaworthiness obligation under the Rotterdam Rules an appropriate solution to the Hague-Visby Rules and the Hamburg Rules?

Having briefly examined the features of the seaworthiness obligation under the Rotterdam Rules, the following paragraphs will examine the concerns with the Rules as raised above in order to determine whether the Rules have provided an appropriate solution to the shortcomings of the Hague-Visby Rules and Hamburg Rules.

4.3.1 Concerns regarding the basis of liability and burden of proof under the Rotterdam Rules

Neither the Hague-Visby nor the Hamburg Rules fully regulate the burden of proof of the carrier and cargo claimant.⁴⁷⁹ In contrast, however, Article 17 of the Rotterdam Rules sets out in the detail the burden of proof of the carrier and the cargo claimant and at any given stage either party is aware of the burden of proof or counter-proof that it bears.⁴⁸⁰ Given the fact that the burden of proof is inextricably linked to the carrier's seaworthiness obligation, the following paragraphs will briefly engage in an analysis of the relevant aspects of Article 17 of the Rotterdam Rules.

As with the Hague-Visby Rules and the Hamburg Rules, the basis of liability under the Rotterdam Rules is fault, however, the Rules adopt an entirely different approach to that of the Hague-Visby Rules and the Hamburg Rules.⁴⁸¹ Under the Rotterdam Rules the initial burden rests upon the cargo claimant to assert that the loss, damage or delay took place during the carrier's period of responsibility.⁴⁸² Once the claimant has discharged this initial burden, the carrier is presumed at fault and the burden then shifts to the carrier to rebut this

⁴⁷⁹ S Yuzhou, H Li 'The new structure of the basis of the carrier's liability under the Rotterdam Rules' (2009) 14 (4) *Uniform Law Review* 934

⁴⁸⁰ *Ibid* 934

⁴⁸¹ Berlingieri *op cit* note 84 at 8

⁴⁸² L Zhao 'Liability regime of the carrier under the Rotterdam Rules' 2013 available at <http://www.hksoa.org/contents/attachments/Presentations/2013/IFSPA2013/Papers/M28.pdf> accessed 13 January 2016, 3

presumption.⁴⁸³ The carrier is then entitled to show either: that its fault did not contribute to the loss; or that the loss was due to one of the exceptions listed under Article 17(3), which is unlike the Hague-Visby Rules that requires the carrier to prove that it has exercised due diligence before relying on one of the excepted maritime exceptions.⁴⁸⁴ If the carrier is unable to prove either of the two factors discussed above, the presumption of fault will be upheld and the carrier will be held liable for the loss, damage or delay.⁴⁸⁵ If the carrier *is* able to show that the cause of the loss, damage or delay was due to one of the listed exceptions under Article 17(3), the claim does not end and the action would continue into a second round of proof and counter-proof,⁴⁸⁶ and the claimant must prove:

- (a) "...The fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies,"⁴⁸⁷ or
- (b) "...That an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage or delay and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18,"⁴⁸⁸ or
- (c) "...That the loss, damage or delay was or was probably caused by or contributed to by...the unseaworthiness of the ship..."(including uncargoworthiness and improper crewing, equipping, and supplying).⁴⁸⁹

If the claimant chooses to prove option (a) above and does so successfully, the claim ends there and the carrier will be held liable for the loss, damage or delay.⁴⁹⁰ If the claimant chooses to proceed in terms of option (b) above, the carrier would be presumed to be at fault and would be given the opportunity to prove that such event or circumstance was not attributable to its fault or that of any person for whom it is responsible.⁴⁹¹ If the carrier is unable to do so, the presumed fault will be upheld and will accordingly be held liable for the loss, damage or delay.⁴⁹² If the claimant chooses to proceed in terms of option (c) above and is successful in

⁴⁸³ Yuzhou and Li op cit note 479 at 932

⁴⁸⁴ Zhao op cit note 482 at 3; D Lamb 'Does the Rotterdam Rules achieve its objective of enhancing the carrier's liability to provide a seaworthy vessel in contracts of international carriage of goods?' (unpublished lecture notes, University of KwaZulu Natal, 2015) 5

⁴⁸⁵ Yuzhou and Li op cit note 479 at 932

⁴⁸⁶ Ibid 932; Article 17(4) states 'Notwithstanding paragraph 3 of this Article, the carrier is liable for all or part of the loss, damage, or delay...' This wording indicates that the claim does not end even if the carrier is able to prove one of the exceptions under Article 17(3).

⁴⁸⁷ Article 17(4)(a)

⁴⁸⁸ Article 17(4)(b)

⁴⁸⁹ Article 17(5)(a)

⁴⁹⁰ Yuzhou and Li op cit note 479 at 933

⁴⁹¹ Article 17(4)(b); Yuzhou and Li op cit note 479 at 933 - 934

⁴⁹² Ibid 934

this regard, the carrier will be presumed to be at fault, and will be given the opportunity to prove that unseaworthiness did not cause the loss, damage or delay, or it could prove that it exercised due diligence to make the vessel seaworthy.⁴⁹³ If the carrier is not successful in this regard, the presumption of fault will be upheld and will be held liable for the loss, damage or delay.⁴⁹⁴

Article 17 is a lengthy and complex text. It considered one of the most significant changes introduced by the Rules and differs quite substantially to the Hague-Visby and Hamburg Rules.⁴⁹⁵ The issue that arises with the extension of the seaworthiness obligation accordingly lies not in the wording or construction of Article 14, but rather in terms of the basis of the carrier's liability and burden of proof under the overly complicated Article 17 which will be discussed below.

As we have seen under the Hague-Visby Rules, the seaworthiness obligation is an overriding obligation. This means that the carrier must prove first that it exercised due diligence to make the vessel seaworthy before it can seek to rely on the list of exceptions in terms of Article IV.⁴⁹⁶ However, the wording and construction of Article 17 of the Rotterdam Rules suggests that the exceptions are no longer subject to the seaworthiness obligation and that the seaworthiness obligation is no longer an overriding one.⁴⁹⁷ In other words, the carrier does not need to show that it exercised due diligence to make and keep the vessel seaworthy before it may seek to rely on one of the exceptions to be exonerated from liability. Accordingly, it can invoke one of the exceptions to liability before proving that it exercised due diligence to make and keep the vessel seaworthy. The seaworthiness obligation is therefore only relevant when "the cargo claimant could prove unseaworthiness as a cause of damage to rebut the carrier's invocation of one of the excepted perils."⁴⁹⁸ This is a major concern with the Rules and places a great burden on the cargo claimant to show the unseaworthiness of the vessel to rebut the carrier's invocation of one of the exceptions. It would be extremely difficult for the

⁴⁹³ Article 17(5)(b) states 'The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14'; Yuzhou and Li op cit note 479 at 934

⁴⁹⁴ Ibid 934

⁴⁹⁵ Sefara op cit note 303 at 42

⁴⁹⁶ Yuzhou and Li op cit note 479 at 937 - 938

⁴⁹⁷ Ibid 938

⁴⁹⁸ UNCITRAL Report of Working Group III (Transport Law) on the work of its twelfth session (A/CN.9/544), 6-17 October 2003, Vienna available at http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html accessed on 2 January 2017

cargo claimant to gain access to the required information to prove such, for example, it may not have access to “...the crew that were on board the vessel during the voyage, practices, documents, and procedures used and followed during the voyage.”⁴⁹⁹ And it is unlikely that the carrier will be accommodating and forthcoming with such information.⁵⁰⁰ Even if the claimant is able to overcome this herculean task and manages to obtain the required information, the carrier is still given a further opportunity to escape liability by proving that none of the factors in Article 17.5 (a) caused the loss, damage or delay; or that it complied with its obligation to exercise due diligence.⁵⁰¹

The above analysis has shown that not only are the Rules overly complex and too detailed, they are also significantly flawed and have been criticised by many academics.⁵⁰² Instead of increasing the liability of the carrier to better allocate the risks as between shipper and carrier, the Rules place a great burden on the shipper. This is a major concern with the Rules as they have failed to respond to concerns that the Hague-Visby Rules tend to favour carrier interests. As a result, the Rules ought to have adopted a burden of proof similar to that of the Hague-Visby Rules which would have retained the overriding nature of the seaworthiness obligation. This would have also had the benefit of retaining the status quo, thereby promoting certainty and uniformity, and allowing for ease of transition between the Hague-Visby Rules and the Rotterdam Rules. As a result, it is submitted that Article 17 under the Rotterdam Rules is a major setback to the Hague-Visby and the Hamburg Rules and does not constitute an appropriate and effective solution to their shortcomings.

4.3.2 The impact the extension of the seaworthiness obligation will have on the carrier

One of the concerns with regard to the extension of the carrier’s seaworthiness obligation is that it would unduly increase the liability of the carrier.⁵⁰³ It has been suggested that the extension would shift the allocation of risk between the carrier and cargo claimant, unfairly in favour of the cargo claimant, potentially placing too great a burden on the carrier and

⁴⁹⁹ Lamb op cit note 484 at 5

⁵⁰⁰ Alcantara op cit note 15 at 3

⁵⁰¹ Ibid 3

⁵⁰² For example, see Alcantara op cit note 15 where leading academics raise particular concerns with regard to the Rules

⁵⁰³ V Anderson ‘A critical assessment of the Rotterdam Rules’ potential to be ratified, in light of the proposed multimodal transportation system and the proposed changes to the obligations and liability of the carrier’ (2015) 5 *Southampton Student Law Review* 24

resulting in increased freight rates.⁵⁰⁴ There were also concerns regarding the practicality of complying with the obligation once the vessel is at sea.⁵⁰⁵ If a vessel experiences a problem whilst it is in the middle of the ocean, it may not be possible or practical to remedy the problem and ensure its seaworthiness until it has reached a port of call.⁵⁰⁶ However, Sooksripaisarnkit contends that the extension may not have as great an impact on the carrier's current practices as was initially believed.⁵⁰⁷

In the modern shipping environment, there has been a move toward enhancing safety at sea and the protection of the environment.⁵⁰⁸ This is evident in the International Management Code for the Safe Operation of Ships and for Pollution Prevention (ISM Code); an international instrument adopted by the International Maritime Organisation in 1993, and later incorporated into the International Convention for the Safety of Life at Sea Convention (SOLAS) 1974.⁵⁰⁹ It is a safety regime which sets out maritime safety management standards for ship-owners and operators and requires that every ship-owner put into place its own safety management system.⁵¹⁰ It also requires companies to adopt measures to ensure the safe management of vessels at shore and at sea, which includes the obligation to ensure that the vessel is seaworthy throughout the voyage by sea.⁵¹¹ Through an observation of the relevant provisions of the ISM code, particularly Articles 6 and 10, it is evident that the code "establishes an international standard of seaworthiness throughout the voyage by sea".⁵¹² The carrier's duty to provide a seaworthy vessel throughout the voyage by sea under Article 14 of the Rotterdam Rules is likened to the obligations imposed by the ISM code.⁵¹³ It is suggested, therefore, that compliance with the ISM code is equal to exercising due diligence to make the vessel seaworthy throughout the voyage (including the duties regarding crew, equipment, and supplying the ship throughout the voyage by sea).⁵¹⁴ On the other hand a failure to comply with the ISM code and the safety management systems resulting in cargo loss or damage is *prima facie* evidence of unseaworthiness of the vessel and a lack of due diligence.⁵¹⁵ And

⁵⁰⁴ Nikaki op cit note 8 at 13-14

⁵⁰⁵ Ibid 14

⁵⁰⁶ Ibid 14

⁵⁰⁷ Sooksripaisarnkit op cit note 81 at 312

⁵⁰⁸ Nikaki op cit note 8 at 10

⁵⁰⁹ Ibid 10

⁵¹⁰ Hare op cit note 17 at 324

⁵¹¹ Nikaki op cit note 8 at 11

⁵¹² Ibid 12

⁵¹³ Sooksripaisarnkit op cit note 81 at 312

⁵¹⁴ Nikaki op cit note 8 at 12-13

⁵¹⁵ Ibid 12

since the code has been in place for more than a decade and compliance is obligatory on all 163 signatory states of SOLAS, carriers are well aware of its provisions and are obliged to comply with such.⁵¹⁶ Accordingly, there is no reason why the carrier would not be able to comply with the extended seaworthiness obligation since they already have similar obligations that they are obliged to comply with under the ISM code.⁵¹⁷

Furthermore, it is argued that there is no reason why carriers would not be able to comply with an extended seaworthiness obligation given the developments in technology and communications in the shipping industry. The rationale for limiting the seaworthiness obligation to only before and at the beginning of the voyage was suitable for its time due to the lack of control that the carrier exercised over its vessel once at sea.⁵¹⁸ Given the developments in communications and technology, ship-owners are able to exercise greater control over their vessels as they are now in constant visual and verbal contact with their vessels allowing them to stay up to date and provide instructions as need be.⁵¹⁹ Ship-owners also have a number of contacts worldwide, allowing for defects and issues that may compromise the seaworthiness of the vessel to be corrected expediently at the nearest port.⁵²⁰ Advancements in the shipping industry have also provided safer ships, up-to-date navigation equipment and more precise weather forecasts.⁵²¹ Arguments that the obligation imposes too great a burden on the carrier are defeated further by the fact that the duty imposed is only one of due diligence and is not an absolute one.⁵²² This means that the carrier need only take reasonable steps to keep the vessel seaworthy during the voyage.⁵²³ It is an objective test which looks at what a reasonable ship-owner would have done, taking into account the particular circumstances of that case (such as whether the vessel is at sea or in port).⁵²⁴ The carrier also already has a continuous obligation in terms of care of the cargo under Article III rule 2 the Hague-Visby Rules. Thus, it is contended that the extension of the seaworthiness obligation would have very little impact on the carrier in practice given these advancements in the shipping industry which have made sea carriage safer and more precise, and allows the carrier to exercise greater control over its vessel.

⁵¹⁶ Sooksripaisarnkit op cit note 81 at 312

⁵¹⁷ Ibid 312

⁵¹⁸ Ibid 313

⁵¹⁹ Neels op cit note 125 at 11

⁵²⁰ Sooksripaisarnkit op cit note 81 at 312

⁵²¹ Jansson op cit note 325 at 20

⁵²² Nikaki op cit note 8 at 14

⁵²³ Bengtsson op cit note 308 at 27

⁵²⁴ Nikaki op cit note 8 at 14

In this regard, it is submitted that the carrier would be able to comply with an extended seaworthiness obligation and it would not be unduly burdensome given the advancements in the shipping industry and the fact that the carrier already has similar obligations by virtue of the stringent safety standards that are already in force. This may be seen as a positive point that the Rules reflect the advancements in the shipping industry and are in line with modern shipping practices and stringent safety standards. However, if this is the case, it raises doubts as to whether it is worth going through all the effort of ratifying a new and complex Convention if it merely re-iterates what is already in practice and what the carrier is already required to comply with in terms of its safety obligations. The Rules do not appear to have introduced anything revolutionary in this regard but are merely re-iterating international safety standards already in place. The issues with the basis of liability and burden of proof in terms of Article 17 are also a major cause for concern. As a result, it is submitted that the extended seaworthiness obligation under the Rotterdam Rules is not necessarily a novel or appropriate solution to the shortcomings of the Hague-Visby Rules and Hamburg Rules. Therefore, an amendment to the Hague-Visby Rules through protocol would be the best solution in order for the Hague-Visby Rules to reflect the advancements in the shipping industry and safety standards, thereby allowing for the retention of the burden of proof under the Hague-Visby Rules.

4.4 Conclusion

One of the aims of the Rotterdam Rules is the harmonisation and modernisation of the rules governing the international carriage of goods by sea.⁵²⁵ In this regard, the Rules have introduced significant changes in light of modern commercial practices and technologies.⁵²⁶ One of the most significant changes attempted by the Rules is the extension of the carrier's obligation to exercise due diligence to make and *keep* the vessel seaworthy. Given the fact that the Hague-Visby Rules are considered outdated in modern times and tend to favour carrier interests, and that the Hamburg Rules have failed to achieve wide-spread acceptance, the extension is thought to be a welcomed change. However, the provisions relating to the seaworthiness extension under the Rules are not without its concerns.

⁵²⁵ T Nikaki and B Soyer 'A new international regime for carriage of goods by sea: Contemporary, certain, inclusive and efficient, or just another one for the shelves?' (2012) 30 (2) *Berkeley Journal of International Law* available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1418&context=bjil> accessed on 2 January 2017, 17

⁵²⁶ *Ibid* 17

The major concern with the Rules lies in the basis of the carrier's liability and burden of proof which has effectively removed the overriding nature of the seaworthiness obligation under the Hague-Visby Rules. It is submitted that Article 17 is overly complicated and instead of enhancing the carrier's liability in order to better allocate the risk as between shipper and carrier, it has the opposite effect of placing too great a burden on the cargo-interest to show that the cause of the loss or damage was probably due to the unseaworthiness of the vessel. Concerns were also raised as to what impact the extension will have on the liability of the carrier; however, these concerns have been defeated in light of stringent safety practises with which carriers are required to comply, such as the ISM code, as well as advancements in technologies and communications. This raises doubts as to whether it is worth adopting a new and complex Convention when its provisions are merely a reflection of what carriers are already required to comply with. As a result, it cannot be concluded that the Rules have been successful in providing an appropriate solution that addresses the shortcomings of the Hague-Visby and Hamburg Rules adequately with regard to the carrier's seaworthiness obligation. The best solution may be an amendment of the Hague-Visby Rules in order to cater for the advancements in technology and to reflect the safety measures already in force.

CHAPTER FIVE: THE NAUTICAL FAULT DEFENCE

5.1 Introduction

One of the most controversial and longstanding exceptions to liability available to the carrier is a defence commonly known as the nautical fault defence, which exempts the carrier from liability due to the negligence of its employees in the navigation or management of the ship. The defence was first successfully introduced into legislation in the US Harter Act, and over a hundred years later it may still be found in its most recent form in Article IV(2) of the Hague-Visby Rules.

Historically, the defence was justified on the grounds that carriers were unable to exercise control over their vessels once at sea, largely leaving the master and crew to act in their own judgment.⁵²⁷ It was a time when “cargo was carried in wooden sailing ships whose course was subject to the winds, reliable charts were few, navigational aids could not yet cope with cloudy weather and uncharted shoals, and ship-owners could not communicate with ships at sea.”⁵²⁸ In the words of Sellers L.J. in the *Lady Gwendolen*:

“Navigation of a ship at sea is so much in the hands of the master, officers and crew and so much out of the control of the owners that failure of an owner to establish no actual fault or privity in respect of navigation itself is exceptional and striking.”⁵²⁹

As a result, it was only fair that the carrier be excused from liability for events and consequences that it had no control over. Accordingly, the defence played an important role in the shipping industry and served as an acceptable compromise between carrier and shipper for years.⁵³⁰ However, despite its historical justification and it being firmly rooted in the laws governing the carriage of goods by sea, the defence in recent years has become subject to considerable debate and many have called for its removal. Advancements in technology and telecommunications in the modern shipping environment have defeated the historical rationale for the defence, and many claim it has created an imbalance between the interests of

⁵²⁷ Yang op cit note 26 at 1

⁵²⁸ Honnold op cit note 445 at 104

⁵²⁹ *Arthur Guinness, Son & Co. (Dublin) Ltd v Owners of the Motor Vessel Freshfield (the Lady Gwendolen)* [1965] 1 Lloyd’s Rep 335, 337-338; Yang op cit note 26 at 20

⁵³⁰ Yuzhou and Li op cit note 479 at 935

the carrier and shipper, unduly favouring the former.⁵³¹ In this regard the Hamburg Rules and Rotterdam Rules have responded by excluding the defence from their provisions.

The purpose of this chapter, therefore, is to engage in an analysis of the defence under the Hague-Visby Rules and to determine the extent to which its removal from the Hamburg and Rotterdam Rules is an appropriate solution to the Hague-Visby Rules. In other words, to what extent is the deletion of the nautical fault defence in the modern shipping environment an appropriate solution?

5.2 A comparative analysis between the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to the nautical fault defence

5.2.1 The Hague-Visby Rules

5.2.1.1 Historical background and general overview

Under the Hague-Visby Rules, Article IV (2) contains a list of seventeen exceptions exonerating the carrier from liability provided it has exercised due diligence to make the vessel seaworthy under Article III. The first of these exceptions is the nautical fault defence, which provides as follows:

“Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

- a. Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.”

The nautical fault defence is a long standing exception to liability which has existed for over a hundred years.⁵³² As shown in previous chapters, during the 19th century, carriers would insert clauses into their bills of lading exonerating themselves from liability, even for their own negligence.⁵³³ Originally, the defence only provided for exemption from liability for errors in navigation, however, as the carriers bargaining power increased, the defence

⁵³¹ Yang op cit note 26 at 1

⁵³² Ibid 5

⁵³³ Honnold op cit note 445 at 104

expanded over time to include errors in the management of the vessel as well.⁵³⁴ The carrier was in such a great bargaining position that eventually it was able to limit its liability almost entirely and was able to excuse itself from liability for its negligence and that of its servants.⁵³⁵ The nautical fault defence was subsequently born out of the carrier's freedom of contract to limit their liability, and as a result, it has found its way into national legislation and international law.⁵³⁶

The nautical fault exception was first successfully captured in legislation under the US Harter Act.⁵³⁷ It sought a compromise between shipper and carrier interests which provided that the carrier shall not be entitled to contract out of its obligation to exercise due diligence to make the vessel seaworthy, but would be entitled to rely on certain exemptions, including errors caused by its servants in the navigation and management of the ship.⁵³⁸ This compromise was carried through into international Conventions in the form of the Hague and Hague-Visby Rules and accordingly, the nautical fault defence remains available to the carrier provided it has shown that it has complied with its Article III (1) obligation.

5.2.1.2 The concept of the nautical fault defence

By way of introduction to understanding what the nautical fault defence is, the following example by Jansson⁵³⁹ may be useful:

“When a vessel is involved in an accident like grounding or collision there is often some sort of damage to the ship or even the total loss of the ship. Let us say the ship is damaged and there is seawater leakage or similar, then it is likely that the cargo will also be damaged. In most cases where the cargo is lost or damaged the claimant will generally present the plausible argument that the carrier would have been able to reduce the damage by having made a different navigational decision. In most courts...this would be to dig your own grave. The reason for this is that a *navigational error* performed by almost anyone on board, except by the carrier himself, would free the carrier from liability according to law. Furthermore a *fault in the management of the ship* that by mistake damages the cargo can also lead to the

⁵³⁴ V Rochester *Nautical fault: A historical and multi-jurisdictional study of the exemption for errors relating to navigation and management of the vessel in modern carriage law* (PhD thesis, University of Cape Town, 2008)

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⁵³⁵ Ibid 20

⁵³⁶ Ibid 6

⁵³⁷ Yang op cit note 26 at 12

⁵³⁸ Rochester op cit note 534 at 25

⁵³⁹ Jansson op cit note 325

freedom of liability for the carrier. These two grounds, available for the carrier's defence against liability for cargo, are together called the *nautical fault*.⁵⁴⁰

Having introduced the concept of the nautical fault defence, the following paragraphs will briefly analyse the elements of the nautical fault defence.

'Act, neglect, or default of the master, mariner, pilot or the servants of the carrier'

The first thing to note regarding the defence is that it only operates in respect of an error i.e. a fault, and that such error must be in the navigation or management of the *ship* (as opposed to the cargo).⁵⁴¹ In other words "...it is an erroneous act or omission, the original purpose of which was primarily directed towards the ship, her safety and well-being and towards the venture generally..."⁵⁴² Furthermore, the carrier is only exonerated from liability in respect of faults committed by one of the persons listed in Article IV (2)(a) i.e. the master, mariner, pilot or a servant of the carrier.⁵⁴³ If it is committed by a person falling outside the list of persons under Article IV (2)(a), such as a stevedore (who is an independent contractor and does not constitute a servant of the carrier), the carrier will be held liable.⁵⁴⁴ The carrier will also not be able to rely on this defence should the damage or loss be attributable to its own fault, for example if the crew are improperly trained this could lead to a finding of unseaworthiness.⁵⁴⁵ If the master also happens to be the owner or part-owner of the vessel and essentially wears 'two hats', it is excused from liability for negligence in the navigation or management of the ship in respect of its duties committed as master of the vessel, but not as owner of the vessel.⁵⁴⁶ And if the damage or loss is committed by a multitude of persons of which some fall within the category of persons as mentioned above and some that do not, the defence will not apply.⁵⁴⁷ In other words, if there is joint negligence committed by one of the

⁵⁴⁰ Ibid 5

⁵⁴¹ Yang op cit note 26 at 24

⁵⁴² See Yang op cit note 26 at 24 quoting Lloyd's of London Press, 'A Guide to the Hague and Hague-Visby Rules, An LLP Special Report' (London: Lloyd's of London Press Ltd., 1985) 29

⁵⁴³ Rochester op cit note 534 at 52

⁵⁴⁴ Ibid 60; Yang op cit note 26 at 25

⁵⁴⁵ Rochester op cit note 534 at 52; Yang op cit note 26 at 24; further, see for example *Papera Traders Co. Ltd.*

And Others v Hyundai Merchant Marine Co. Ltd. And Another (The Eurasian Dream) [2002] 1 Lloyd's Rep. 719

⁵⁴⁶ Yang op cit note 26 at 25; see for example *Westport Coal Co. v. McPhail* [1898] 2 Q.B. 130

⁵⁴⁷ Yang op cit note 26 at 25; see for example *Minister of Food v. Reardon Smith Line (Fresno City)* [1951] 1 Lloyd's Rep. 265 (K.B.)

persons falling within the listed category of persons, and one that does not, the carrier is not entitled to rely on the exception.⁵⁴⁸

'In the Navigation or in the Management of the ship'

Neither of the terms 'navigation' and 'management' have been defined in the Harter Act, the Hague or Hague-Visby Rules⁵⁴⁹ and have been subject to considerable litigation.⁵⁵⁰ The term 'navigation' has generally been taken to mean "something having to do with the sailing of the ship; that is, of course, the sailing of the ship having regard to the fact that she is cargo-carrying ship."⁵⁵¹ It essentially relates to the sailing of a ship from a known position to its destination along a predetermined route.⁵⁵² Examples of fault in the navigation of the vessel include the following:

"faulty berthing, manoeuvring and anchoring, erroneous interpretation and assessment of meteorological information, incorrect speed adjustments, abandonment of the vessel, taking refuge in a port, non-compliance with local or international navigational rules, forcing a ship through a storm, and ascertaining the time to proceed or not to proceed in a risky situation and setting a particular course over a bar. The provisions has been held to cover cargo damage where, due to the negligence of the master or crew, the vessel struck a reef, hit a quay, ran aground or had a collision."⁵⁵³

The term 'management' of the ship concerns the ship's condition, manning and equipment.⁵⁵⁴ It is described as a fault in the handling of the ship other than for navigational purposes.⁵⁵⁵ It is to be distinguished from care of the cargo, which is a separate obligation of the carrier in terms of Article III rule 2.⁵⁵⁶ If an error is made in the care of the cargo or if there is mismanagement of the cargo, the carrier will be held liable as per Article III rule 2.⁵⁵⁷ However, if an error is made in the care of the *vessel* and such indirectly causes damage or

⁵⁴⁸ Ibid 270

⁵⁴⁹ Rochester op cit note 534 at 60

⁵⁵⁰ Jansson op cit note 325 at 14

⁵⁵¹ *Canada Shipping Co. v. British Shipowners' Mutual Protection Association*. (1889) 23 Q.B.D. 342, 344.

⁵⁵² Margetson op cit note 332 at 93

⁵⁵³ See Yang op cit note 26 at 26 – 27 referencing *Bulgaris v. Bunge* (1993) 38 Com. Cas. 103, at 114; *Yawata Iron & Steel v. Anthony Shipping* 1975 A.M.C. 1602 (SD NY 1975); *President of India v West Coast SS Co (The Portland Trader)* [1964] 2 Lloyd's Rep 443; *Aliakmon Maritime Corporation v TransOcean Continental Shipping Ltd and Frank Truman export Ltd (The Aliakmon Progress)* [1978] 2 Lloyd's Rep. 499 (CA); *Complaint of Grace Line* [1974] A.M.C. 1253

⁵⁵⁴ Jansson op cit note 325 at 15

⁵⁵⁵ Yang op cit note 26 at 29

⁵⁵⁶ Margetson op cit note 332 at 94

⁵⁵⁷ Ibid 98

loss to the cargo, the carrier may invoke the exception.⁵⁵⁸ In *The Canadian Highlander* case, a summary is provided of its meaning as follows:

“...if the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability, but if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.”⁵⁵⁹

Having briefly examined the concept of the nautical fault defence and the position under the Hague-Visby Rules, the following paragraphs will examine the position under the Hamburg and Rotterdam Rules.

5.2.2 The position under the Hamburg Rules and the Rotterdam Rules

During the negotiations surrounding the Hamburg Rules, there was much debate and controversy over the nautical fault defence. Ultimately, a decision was taken to abolish the nautical fault defence due to the unsuitability of the defence in the modern shipping environment.⁵⁶⁰ During the negotiations on the Rotterdam Rules, the Working Group also found in favour of its removal and, accordingly, does not feature in the list of exceptions under Article 17(3) or at all in the text of the Rules.⁵⁶¹ Therefore, despite the success of the Hague-Visby Rules and the fact that the defence is a long-standing exception to liability, the Hamburg Rules and Rotterdam Rules took heed and responded to the calls for its removal in a modern shipping environment.

5.3 To what extent is the absence of the nautical fault defence in the Hamburg Rules and the Rotterdam Rules an appropriate solution to the shortcomings of the Hague-Visby Rules?

As we have seen, the Hamburg Rules and Rotterdam Rules have taken the bold step of removing the nautical fault defence available to carriers under the Hague-Visby Rules. A decision as controversial as this will always attract varying opinions, with those in favour of the defence, and those who oppose it. Accordingly, the following paragraphs will highlight

⁵⁵⁸ Aikens op cit note 323 at 271

⁵⁵⁹ *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd (The Canadian highlander)*, [1929] AC 223

⁵⁶⁰ Bauer op cit note 443 at 55

⁵⁶¹ Sefara op cit note 303 at 44

some of the major arguments put forward by those who oppose the defence, and those in favour of the defence. Having examined the major arguments for and against the removal of the defence, it will then determine the extent to which the absence of the defence in the Hamburg and Rotterdam Rules is an appropriate solution to the Hague-Visby Rules.

5.3.1 Arguments opposing the nautical fault defence

Opponents of the defence, usually cargo interests, argue that it is unfair that carriers be exonerated from liability for the negligence of their employees whilst shippers and cargo owners have little to no control over the care and protection of their cargo.⁵⁶² They bear a great financial risk when placing their goods in the hands of the carrier⁵⁶³ and accordingly, it is argued that since the carrier is in a better position to exercise care and control over the cargo and vessel, it should ultimately bear the risk for the cargo should the acts/negligence of its employees result in the loss of or damage to the cargo.⁵⁶⁴ Furthermore, since the defence exonerates the carrier from liability due to the negligence of its employees, it in actual fact encourages the carrier to prove the negligence of its employees and has the effect of protecting the worst performers.⁵⁶⁵

The defence is also uniquely maritime and does not feature as a defence in any other international land or air transport convention.⁵⁶⁶ As a result, it is argued that there is no reason why the carrier should be afforded such a protection when same is not available to carriers of other modes of transport.⁵⁶⁷ Accordingly, its removal would have the benefit of aligning the rules governing sea carriage with other modern transport conventions.⁵⁶⁸ This is certainly a positive step toward uniformity and predictability.

Furthermore, the defence also contradicts the concept of vicarious liability and other modern legal principles that hold an employer liable for the negligence of its employees committed within the course and scope of their employment.⁵⁶⁹ Its removal would accordingly have the

⁵⁶² L T Weitz 'The Nautical Fault Debate (the Hamburg Rules, the U.S. COGSA 95, the STCW 95, and the ISM Code' (1998) 22 *Tulane Maritime Law Journal* 587

⁵⁶³ *Ibid* 587

⁵⁶⁴ *Ibid* 587

⁵⁶⁵ *Ibid* 587

⁵⁶⁶ Katsivela *op cit* note 419 at 430

⁵⁶⁷ Sooksripaisarnkit *op cit* note 81 at 314

⁵⁶⁸ Weitz *op cit* note 562 at 587

⁵⁶⁹ Rochester *op cit* note 534 at 277

benefit of conforming to modern legal principles of many countries that hold an employer liable for the negligence of its employees.

One of the main arguments put forward by the opponents of the defence is that it is no longer suitable in modern times due to technological developments in the shipping industry.⁵⁷⁰ These developments have provided safer ships (such as steel-built ships), new state-of-the-art navigation equipment and more precise weather forecasts.⁵⁷¹ Ships are therefore more durable, able to navigate more easily and avoid harsh weather conditions as much as possible.⁵⁷² These advancements in technology and telecommunications also allow ship-owners and personnel ashore to remain in constant verbal and visual contact with the ship and master.⁵⁷³ Any defects to the vessel may also be expediently repaired at the nearest port.⁵⁷⁴ These advancements, coupled with the better employee education and training, means that the carrier is now able to exercise greater control over the vessel and the cargo, and ultimately this will reduce the risk of navigation and management incidences.⁵⁷⁵ Accordingly, the historical rationale for the defence no longer exists and it is unfathomable why a carrier should be excused from liability due to the negligence of its employees in a modern shipping context.⁵⁷⁶

Furthermore, although proponents of the defence may convincingly argue that its removal may unduly burden the carrier, these arguments do not account for the fact that carriers are able to limit their liability in terms of Articles 59-60 of the Rotterdam Rules or the Convention on Limitation of Liability for Maritime Claims, 1976.⁵⁷⁷

Furthermore, the meaning of the defence is not always clear as there is a fine line between what is meant by “care of cargo” and “management of ship”, the carrier being responsible for the former and not for the latter.⁵⁷⁸ Should the defence be removed, it will at the very least remove any ambiguity in this regard, thereby improving certainty and uniformity.⁵⁷⁹

⁵⁷⁰ Yang op cit note 26 at 38

⁵⁷¹ Jansson op cit note 325 at 20

⁵⁷² Yang op cit note 26 at 38 - 39

⁵⁷³ Ibid 39

⁵⁷⁴ Sooksripaisarnkit op cit note 81 at 313

⁵⁷⁵ Pravin Rathinam op cit note 449

⁵⁷⁶ Sefara op cit note 303 at 32

⁵⁷⁷ Sooksripaisarnkit op cit note 81 at 314

⁵⁷⁸ Yang op cit note 26 at 66

⁵⁷⁹ Ibid 66

Rather than focusing on why the defence should not be removed, Sooksrisaiparnskit argues that carriers should rather focus their efforts on avoiding or reducing the possibility of incidences of negligent navigation by implementing and enforcing better safety and security measures.⁵⁸⁰ Accordingly, parties should be prepared to embrace a new system of liability.⁵⁸¹

5.3.2 Arguments in favour of the nautical fault defence

One of the major arguments put forward by proponents of the defence is that it has served as an important compromise between cargo interests and the carrier for over a century with each party bearing certain risks.⁵⁸² It has formed an integral part of the laws on the carriage of goods by sea and simply cannot be done away without careful consideration of the implications it may have on the balance between carrier and cargo interests.⁵⁸³ Given the risky nature of sea carriage, an apportionment of risk is necessary to avoid the carrier bearing too great a burden.⁵⁸⁴ As we have seen, the absence of the defence under the Hamburg Rules and the perceived increase in carrier liability ultimately resulted in the Rules failing to achieve widespread acceptance.⁵⁸⁵ It may be a sign that carrier interests are not yet ready to forgo the nautical fault defence and the protection it affords. Its absence in the Rotterdam Rules could result in it sharing a similar fate to the Hamburg Rules, thereby further frustrating uniformity and predictability on the rules governing the carriage of goods by sea.

Although not as risky a venture as once deemed, and despite modern technologies, sea carriage still remains inherently perilous and carriers are exposed to great dangers unique to sea carriage.⁵⁸⁶ Accordingly, the defence serves the purpose of protecting carriers in instances of “grave occurrences”, and should the defence be removed, it could potentially hold the carrier to such a high level of liability that it could end up in a state of bankruptcy.⁵⁸⁷ Given the dangers of sea carriage and the value of the cargo carried, any slight act or neglect could result in a great loss for the carrier, including losing the whole of its maritime asset should there be a collision, grounding or sinking.⁵⁸⁸ Furthermore, its abolition could lead to

⁵⁸⁰ Sooksripaisarnkit op cit note 81 at 314

⁵⁸¹ Jansson op cit note 325 at 14

⁵⁸² Rochester op cit note 534 at 277

⁵⁸³ Ibid 278

⁵⁸⁴ Yang op cit note 26 at 36

⁵⁸⁵ Rochester op cit note 534 at 278

⁵⁸⁶ Ibid 282

⁵⁸⁷ Yang op cit note 26 at 37

⁵⁸⁸ Ibid 36

increased freight rates and insurance costs due to the increase in liability of the carrier.⁵⁸⁹ Although, it must be noted, it cannot be said for certain what impact it will actually have on freight and insurance costs and litigation, due to a lack of evidence in this regard.⁵⁹⁰ Most are of the opinion, however, that the economic impact on the parties involved will not be as great as may first seem.⁵⁹¹

Proponents of the defence further argue that its removal would not necessarily encourage carriers to exercise greater care over the cargo. The carrier is already inclined to exercise great care over its client's cargo as its reputation and the profitability of the company is at stake.⁵⁹² Thus, there is already an economic incentive to exercise care over the client's cargo and accordingly its removal would have no impact on the carrier's current conduct. Furthermore, it would not encourage masters and crew to act more prudently if the defence were removed as they are already conscious of their actions given the fact that their negligent conduct could affect their records and could lead to criminal sanctions.⁵⁹³

5.3.3 Overall assessment

The arguments put forward by the opponents of the defence are convincing and legitimate. It is fair to say that the nautical fault defence is an archaic exception to liability, justified largely by reasons no longer applicable in a modern shipping context. Given the advancements in technology and communications, and the fact that it does not accord with modern legal principles or feature as a defence in any other transport convention, the retention of the defence in the modern shipping environment is questionable. Its removal from the Hamburg Rules as early as 1978 when the Rules were adopted clearly reflects a strong call for its removal by the international maritime community. Its absence once again from the text of the Rotterdam Rules is a clear sign that the defence should no longer form part of sea carriage laws. Its removal would surely be a positive step toward a more modern sea carriage environment and may place cargo interests in a better bargaining position. For these reasons, from the perspective of what is fair and just, it seems that the absence of the defence in a modern shipping environment is an appropriate solution to the Hague-Visby Rules, in theory.

⁵⁸⁹ Katsivela op cit note 419 at 429

⁵⁹⁰ Rochester op cit note 534 at 279

⁵⁹¹ Yang op cit note 26 at 67

⁵⁹² Ibid 37

⁵⁹³ Ibid 38

Despite what has been said above that the absence of the nautical fault defence is an appropriate solution in theory, it is debatable whether its removal is an appropriate solution from a practical perspective. The allocation of risk is cause for concern in this regard. By adopting the Rotterdam Rules, the carrier will be losing one of the most important and long-standing defences available to it, one which it may not be willing to forgo so easily, regardless of whether or not its removal would actually have a significant financial impact or not. And since the seaworthiness obligation has also been extended, this perceived increase in carrier liability may affect a State's decision whether to adopt the Rules or not. It is questionable whether it was worth removing the defence when the success of the Rotterdam Rules is at stake and given the potential upheaval it may cause.⁵⁹⁴ If the Rules have not succeeded in achieving a compromise between the relevant interests, and does not ultimately achieve uniformity, it cannot be said that its removal is an appropriate solution.⁵⁹⁵ Should the Rules not achieve widespread success due to the perceived imbalance between carrier and shipper interests, we will have yet another maritime Convention in force, further frustrating uniformity and predictability. The absence of the defence in the Hamburg Rules and the perceived increase in carrier liability ultimately resulted in the Rules failing to achieve widespread acceptance. Accordingly, its removal was not an appropriate solution and may be an indication that the removal of the defence from the Rotterdam Rules is not an appropriate solution. In this regard, practically speaking, the appropriateness of the absence of the defence from the Rotterdam Rules is debatable.

Furthermore, it cannot be said for certain whether countries would be able to comply in practice should the defence be removed. Although one of the main arguments put forward by the opponents of the defence is that technological advancements have made the defence futile, it cannot be said that all States are so well equipped in terms of technology and telecommunications, and advanced in terms of their maritime training and education that they can afford to operate without the defence.⁵⁹⁶ To what extent parties to a contract of carriage would be able to comply in practice is beyond the scope of this study. It is merely the author's submission that broad sweeping statements that technological advancements in the shipping industry have made the defence futile may not reflect a true reality. It does not necessarily mean that all States are so well advanced in terms of technologies and

⁵⁹⁴ Rochester op cit note 534 at 278

⁵⁹⁵ Ibid 284

⁵⁹⁶ See for example Yang op cit note 26 at 60, where the author provides an explanation why China is not ready to forgo the nautical fault defence.

telecommunications and that its removal would be appropriate for each State. It will ultimately be up to each individual State to determine such.

5.4 Conclusion

There are many arguments both for and against the defence, each valid and convincing. On the one hand, the absence of the defence would be a positive step toward achieving a modern liability regime, reflecting the advancements in the shipping industry and modern legal principles. Perhaps the old adage ‘there is no time like the present’ is apt and carriers should prepare for this new shift in liability given its removal at some point is inevitable. Based on the above, in theory, the removal of the nautical fault defence is a logical and an appropriate response to the Hague-Visby Rules. On the other hand, however, one cannot ignore the fact that there is a real possibility carriers/ship-owners may not be ready for this change, despite the fact that its removal has been a long time coming. The Hamburg Rules adopted an entirely different system of liability in the form of Article 5, and perhaps this new system did not sit well with carriers and ship-owners, given the success of the Hague/Hague-Visby Rules. Thus, there may still be hope for the Rotterdam Rules, given its similarities with the Hague-Visby Rules in terms of wording and construction. However, the removal of the defence from the Rotterdam Rules is cause for concern, and perhaps, the world is not yet ready for this change. Only time will tell. For now, practically speaking, it is the author’s submission that the appropriateness of the removal of the nautical fault defence from the Rotterdam Rules is debatable.

CHAPTER SIX: CONCLUSION

6.1 Introduction

Today's international carriage of goods by sea is largely regulated by various international conventions, including the Hague Rules, the Hague-Visby Rules and the Hamburg Rules, as well as national or 'hybrid' regimes that incorporate elements of the various international conventions.⁵⁹⁷ Such a multiplicity of regimes governing the international carriage of goods by sea impacts on uniformity and creates legal uncertainty. Coupled with the fact that these regimes have significant shortcomings, it is clear that there is a need for a modern and uniform set of rules to govern the carriage of goods by sea. In this regard, the CMI and UNCITRAL took heed, resulting in the adoption of the Rotterdam Rules on 11 December 2008. The Rotterdam Rules is an international sea Convention aimed at providing a uniform and modern set of principles to govern the international carriage of goods by sea.⁵⁹⁸ They have introduced significant changes in the hopes of addressing the shortcomings of the Hague/Hague-Visby Rules and the Hamburg Rules. Three of the major changes introduced by the Rules, and which formed the basis of this study, are the provision for multimodal transportation, the extension of the carrier's seaworthiness obligation, and the removal of the nautical fault defence. The aim of this study, therefore, was to engage in a comparative analysis between the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules with regard to multimodal transportation, the carrier's seaworthiness obligation and the nautical fault defence to determine the extent to which the Rotterdam Rules have provided appropriate solutions to the shortcomings of its predecessors. In this regard, the following paragraphs will provide a summary of the findings.

6.2 Summary of the findings

In chapter three, the concept of multimodal transportation was examined. Arguably one of the most innovative and significant changes introduced by the Rotterdam Rules is the provision for multimodal transportation. In today's modern trading environment, goods are increasingly being carried by multiple modes of transport through the use of containers.⁵⁹⁹ Through the extension of the scope of application and period of responsibility of the carrier, the Rules

⁵⁹⁷ Nikaki op cit note 8 at 1-2

⁵⁹⁸ Ibid 4-5

⁵⁹⁹ Besong op cit note 122 at 3

allow for the application of one Convention to the entire contract of carriage that envisages sea carriage and carriage by other modes of transport. However, through an analysis of the multimodal aspects of the Rules it was established that they are not without their concerns, especially with regard to Articles 26 and 82 with arguments that they are overly complex. Furthermore, the Rules were never originally conceived as a truly multimodal regime, and the decision to extend the scope of application was somewhat of an afterthought, and perhaps this is reflected in the final text.⁶⁰⁰ Despite these concerns, modern trade practices require an international Convention that regulates multimodal carriage, and it is clear that the Hague-Visby Rules and Hamburg Rules are completely lacking in this regard. The multimodal aspects are not the pinnacle of perfection, nor are the Rules the multimodal regime many had been waiting for, but perhaps for now, in order to meet the needs of modern trade, they are the next best solution. This is not to say that the Rules in their entirety are an appropriate and effective solution to the shortcomings its predecessors. However, for our purposes, the multimodal aspects of the Rules may be regarded as an appropriate solution to its predecessors.

Chapter four of this study examined the carrier's seaworthiness obligation. Under the Hague-Visby Rules, the carrier is only required to exercise due diligence before and at the beginning of the voyage to make the vessel seaworthy. Under the Hamburg Rules, the drafters opted for a presumed fault based liability system, meaning that the carrier is presumed at fault for loss, damage or delay unless it can show that he or his servants took all measures reasonably possible to avoid such loss, damage or delay. Accordingly, the familiar wording of the seaworthiness obligation under the Hague-Visby Rules does not feature in the text of the Hamburg Rules. Under the Rotterdam Rules, the drafters retained the seaworthiness obligation, however, the obligation has been extended and the carrier is required to exercise due diligence to make and keep the vessel seaworthy throughout the entire voyage by sea. Given the shortcomings of the Hague-Visby Rules and Hamburg Rules, at first glance the extension under the Rotterdam Rules may seem like an appropriate solution, however, its provisions relating to the seaworthiness obligation are concerning. The main issue with the Rules lies in the basis of the carrier's liability and burden of proof, which has effectively removed the overriding nature of the seaworthiness obligation. It is submitted that Article 17 is overly complex and places too great a burden on the shipper/cargo-interest to show the unseaworthiness of the vessel. Furthermore, although the extension may reflect advancements

⁶⁰⁰ Kituri op cit note 124 at 61

in the shipping industry and stringent safety measures in force (the ISM code), it is doubtful whether it is really worth adopting a complex Convention with 96 Articles if it merely reiterates what is already in practice and what carriers are already required to comply with. The Rules are not revolutionary, they fail to achieve an appropriate allocation of risk as between carrier and shipper, and are overly complex and too detailed. As a result, it submitted that the extension of the seaworthiness obligation under the Rotterdam Rules is not an appropriate solution to the shortcomings of the Hague-Visby and Hamburg Rules. Perhaps an amendment to the Hague-Visby Rules that reflect the advancements in the shipping industry would be a more appropriate solution.

The fifth chapter provided an examination of the contentious nautical fault defence which exonerates the carrier from liability for the errors of its master and staff in the navigation or management of the vessel. The defence was first successfully introduced into legislation in the US Harter Act and has survived over a hundred years with its most recent version found in the Hague-Visby Rules. The defence was historically justified on the grounds that the carrier exercised very little control over the vessel and cargo once at sea. Such control was so much in the hands of the master and crew that it was reasonable to excuse the carrier from liability for their errors in the management and navigation of the vessel. However, due to technological advancements in the shipping industry, the historical rationale for the defence arguably no longer exists. Due to these advancements in technology, and other arguments put forward by opponents of the defence, there has been a strong call for its removal in recent years. In this regard, the Hamburg and Rotterdam Rules have responded and the defence has been excluded from the text of the Rules. In theory, from the perspective of what is fair and just, the removal of the nautical fault defence in today's modern shipping environment is an appropriate solution. However, from a practical perspective, the answer is not entirely straightforward. The balancing effect created by the nautical fault defence cannot be overstated. It is a well-entrenched defence under sea carriage laws and has served as an important compromise between carrier and shipper for years. To simply do away with the nautical fault defence may see the Rotterdam Rules share the same fate as the Hamburg Rules due to fears that the Rules may unduly burden the carrier. Accordingly, concerns regarding the fairness of the defence are not enough in determining whether its removal is an appropriate solution. Furthermore, it cannot be said for certain that all parties to the Convention involved in a carriage of goods contract would be able to cope without the defence, despite the advancements in technology. Therefore, from a practical perspective, the

appropriateness of the absence of the nautical fault defence under the Rotterdam Rules as a solution to the alleged shortcomings of the Hague-Visby Rules is debatable and only time will tell whether ship-owning nations are ready to forgo the protection of the nautical fault defence.

6.3 Conclusion

The introductory chapter of this study revealed that there is a need for a modern and uniform transport Convention that will cater for the needs of the shipping industry and that will also balance the allocation of risk as between carrier and shipper. The historical overview of this study has shown that the Hague/Hague-Visby Rules, although widely accepted and highly successful, are considered outdated in modern times and it is argued that the Rules tend to favour carrier interests. Conversely, the Hamburg Rules have failed to achieve widespread acceptance, and tend to favour cargo interests. In this regard, the Rotterdam Rules are intended to serve as a modern set of rules that will replace the current sea conventions in force for the purpose of achieving uniformity and predictability in the rules governing the international carriage of goods by sea. The Rules represent a serious attempt to meet the needs of the shipping industry and that caters for the various parties involved.⁶⁰¹ The Rules have attempted to achieve their goal of providing a modern set of rules to some extent by providing for multimodal transportation, extending the carrier's seaworthiness obligation and by removing the contentious nautical fault defence. However, an analysis into these three major changes has revealed that they are not without their concerns. They are potentially over-complicated and do not appropriately allocate risks as between carrier and shipper. The Rules had the potential to be a modern and uniform Convention that balanced the obligations and risks of the carrier and shipper. However, having analysed these three major changes it cannot be said they have achieved this. Accordingly, it is debatable whether the Rotterdam Rules have provided appropriate solutions to the shortcomings of the Hague-Visby Rules and Hamburg Rules. This is not to say the Rules in their entirety fail to achieve their goals and respond appropriately to the shortcomings of the Hague-Visby and Hamburg Rules as a whole. Such is beyond the scope of this study and it cannot be said whether the Rules ought to replace the current sea Conventions in force. However, with 96 Articles, there are concerns that the Rules are potentially overly complex. Furthermore, given the fact that they have been open for signature since 2009 and have only received three ratifications, it may be a reflection

⁶⁰¹ Adamsson op cit note 24 at 69

of the current attitudes towards the Rules. If the Rules do not achieve the requisite number of ratifications to enter into force, all the years of effort of UNCITRAL and CMI would have been in vain.⁶⁰² If, however, they do receive the requisite number of ratifications to enter into force but do not achieve widespread success, this will lead to a further fragmentation of the rules governing the carriage of goods by sea, thereby further frustrating uniformity and predictability.⁶⁰³ Perhaps an amendment to the Hague-Visby Rules, a widely accepted Convention, is the best solution for the time being (as they do not cater for multimodal transportation) in order that the technological advancements and stringent safety standards are reflected and that burden of proof under the Hague-Visby Rules is retained. This will have the benefit of maintaining some of the certainty and predictability created by the Rules.

⁶⁰² Nikaki op cit note 8 at 44

⁶⁰³ Nikaki op cit note 8 at 44

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07 November 2016

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Dear Mrs Andrews,

Protocol reference number: HSS/1906/016M

Project title: The Rotterdam Rules: To what extent do they provide appropriate solutions to the shortcomings of the Hague-Visby Rules and the Hamburg Rules with regard to multimodal transportation, the carrier's seaworthiness obligation and the nautical fault defence?

Full Approval – No Risk / Exempt Application

In response to your application received on 03 November 2016, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol have been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment/modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

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Dr Shamila Naidoo (Deputy Chair)

/ms

Cc Supervisor: Deepa Lamb
Cc Academic Leader Research: Dr Shannon Bosch
Cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

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