



UNIVERSITY OF  
KWAZULU-NATAL  

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YAKWAZULU-NATALI

**A COMPARATIVE ANALYSIS OF THE CARRIER'S  
LIABILITY UNDER THE HAGUE VISBY AND ROTTERDAM  
RULES**

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Mini Dissertation submitted in 2016 to the School of Law in fulfilment of the requirements of the degree of Master of Laws in Maritime Law

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## **II. Dedication**

This dissertation is dedicated to Mitzi and Theg. I have been blessed beyond measure with parents who support my passion, this dissertation is a mirror of the sacrifices that they have made to ensure that I live out my dreams.

### **III. Acknowledgements**

I would firstly like to thank God for being my pillar of strength throughout my academic journey.

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#### **IV. Abstract**

This study provides a historical overview of the development of the carrier's obligation to maintain a seaworthy vessel in contracts of carriage by sea, as well as a comparative analysis of the extent and duration of this obligation under the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 (the Hague Visby Rules) and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (the Rotterdam Rules).

The comparative analysis of the two carriage regimes undertaken in this study is of importance from a South African perspective as it examines whether the country should ratify the Rotterdam Rules in accordance with the recommendation made under the 'Operation Phakisa' project. The writer will briefly elaborate on the background and objectives of this governmental project in the study.

This study briefly examines good shipping practices under the International Safety Management Code, 1994 (the ISM Code) and International Ship and Port Facility Security Code, 2002 (the ISPS Code) in the context of whether the extension of the duration of the carrier's obligation to provide a seaworthy vessel under the Rotterdam Rules, imposes any additional duties on the ship owner.

The study also explores the requirements that the parties to a cargo claim have to meet by analysing the burden of proof under both the Hague Visby and Rotterdam Rules. This examination includes an overview of the commonly invoked exceptions contained in both carriage regimes, particularly the negligent navigation exception and the reasons and possible cost implications of excluding this exception from the list of exceptions contained in the Rotterdam Rules.

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# **Chapter 1: Introduction, Purpose Statement and Chapter Overview**

## **1.1 Introduction**

One of the most contentious issues in the maritime trade industry is the balancing of the competing interests of the ship owner and the cargo owner in cargo claims. With the development of each international carriage regime, drafters attempt to bring about a balance between these competing interests. An in-depth analysis of the standard and duration of the ship owner's obligation in maintaining a seaworthy vessel as well as any immunities allowing the carriers to escape liability under each of the prevailing regimes, enables us to determine whether these regimes' operate in favour of one party or the other.

At common law, ship owners were bound by an absolute obligation to provide a seaworthy vessel. The United States Harter Act of 1893 (the Harter Act) diluted this obligation to one of 'due diligence'. The subsequent International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 (the Hague Rules) and the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1968 (the Hague Visby Rules) retained this watered down obligation. Most maritime trading nations have incorporated one or the other of these two regimes (the Hague and Hague Visby Rules) into their law and these regimes are therefore considered to be the prevailing carriage regimes. Many cargo owning nations are of the view that the Hague Visby Rules are in dire need of modernisation and unfairly operate in favour of the ship owner. The United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules), which followed on from the Hague Visby Rules were drafted in an attempt to modernise these regimes and to provide a fairer balance in the competing interests of the contracting parties; however, these have not been widely accepted or ratified. More recently, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, 2008 (the Rotterdam Rules), were created with the hopes of attaining wider acceptance than the Hamburg Rules.

## **1.2 Purpose Statement of the Study**

The writer will examine the abovementioned carriage regimes and explore the domestic initiatives governing the carriage of goods by sea in South Africa.

The focus of this dissertation is to ascertain the scope and extent of the carrier's obligation to maintain a seaworthy vessel under both the Hague Visby and Rotterdam Rules and to determine whether there is a material difference between the two regimes in this respect. This question is of importance as it is at the core of cargo claims resulting from the loss or damage of goods carried by sea and therefore at the heart of maritime trade.

There are various difference in the nature and extent of the carrier's liability and the requirements of proof in a cargo claim as set out under the Hague Visby and Rotterdam Rules. This study undertakes to explore these differences and the effectiveness and implications thereof.

In order to determine the effectiveness of the proposed extension of the carrier's liability under the Rotterdam Rules, the writer will examine good shipping practices that ship owners who are from member states of the International Convention for the Safety of Life at Sea, 1974 (the SOLAS Convention) are already obliged to comply with under the International Safety Management Code, 1994 (the ISM Code) and International Ship and Port Facility Security Code, 2002 (the ISPS Code). Such examination will allow the writer to determine whether the Rotterdam Rules actually extend the duration of the carrier's liability or whether this proposed extension of the carrier's liability is merely a reiteration of existing safety standards and codes that most ship owners are already obliged to comply with.

As part of the comparative analysis undertaken in this study, the writer will discuss the nature of the burden of proof requirements that each party to a cargo claim has to discharge under the different carriage regimes. If the vessel is proven to be seaworthy, the carrier may rely on one of the exceptions provided for in the Hague Visby Rules in order to escape liability. The writer will therefore also briefly examine the commonly invoked exceptions under the different carriage regimes; specifically the negligent navigation exception and the reasons for its exclusion under the more recently drafted Rotterdam Rules. There is a perception in the maritime trade industry that the possible abolishment of the negligent navigation exception would bring about an unnecessary cost implication to the ship owner. This perception stems from the fact that under the Rotterdam Rules, the carrier may not escape liability for the negligent navigation or management of the vessel by the master or crew members, resulting in cargo loss or damage. In this study the writer will explore the merits of this point.

This study is of specific importance in South Africa, due to government's recent commitment to 'the Operation Phakisa' project. One of the key initiatives of this governmental project is the review of ocean specific legislation, which explores the possible ratification of the Rotterdam Rules - should the Rules gain wide acceptance from South Africa's major trading partners. The writer will explore the outcome of this point and provide recommendations based on the findings of the research undertaken.

### **1.3 Chapter Overview**

**Chapter 1** is an introduction to this study. This chapter provides the purpose statement and a chapter breakdown.

**Chapter 2** explores the historical background and development of the laws, international conventions and domestic initiatives regulating the carriage of goods by sea.

**Chapter 3** is an examination of the concept of seaworthiness and the elements comprising it. This chapter also includes a discussion of terminology (by examining the interpretation of relevant provisions by both foreign and South African courts) used in the Hague Visby Rules. In addition, this chapter also examines the duration of the seaworthiness obligation under the Hague Visby and Rotterdam Rules.

**Chapter 4** provides a discussion of good shipping practices under the ISM and ISPS codes in the context of whether the extension of the duration of the carrier's obligation to provide a seaworthy vessel under the Rotterdam Rules creates any onerous duties and cost implications for the ship owner.

**Chapter 5** outlines and comparatively discusses the burden and order of proof in cargo claims under the Hague Visby and Rotterdam Rules. In addition, this chapter also examines the exceptions found under the immunity clauses in both carriage regimes that allow the carrier to limit its liability.

**Chapter 6** is the conclusion to this study. This chapter presents a summary of the findings of the study and the writer's recommendations.

## **Chapter 2: Historical Background of the Seaworthiness Obligation**

### **2.1 Introduction**

In this chapter the writer traces the historical background of the carrier's obligation to provide a seaworthy vessel in a contract of carriage of goods to provide a seaworthy vessel. An examination of how this obligation has evolved from its strictest form under Roman and later English law, to that of the onus of proving the exercise of due diligence as reflected in subsequent international carriage liability regimes, provides the context for the development of this obligation and the reasons thereof.

### **2.2 The roots of carriage of goods by sea and the carrier's obligation to maintain a seaworthy vessel prior to the 19th century**

The growth of international trade through time brought about a need for uniformity and legal certainty in the laws regulating the carriage of goods sold internationally. Since the 19<sup>th</sup> century, there have been various initiatives to try and harmonise the laws governing the international carriage of goods by sea. Many of these initiatives, including the current international carriage regimes governing these are predominantly rooted in English common law.<sup>1</sup> While English law provides the main foundation for these international initiatives, Roman law cannot be ignored as the carrier's obligation to provide a seaworthy vessel under English law can be traced back to its historical roots of strict liability derived from Roman law.

#### **2.2.1 Roman law**

Under Roman law, cargo owners had to discharge the burdensome onus of proving fault or *dolus* on the part of the ship owner in order to successfully claim for damage or loss of goods carried.<sup>2</sup> The enactment of the Praetor's Edict (between 75BC-78BC), was to a certain extent, aimed at lifting this burdensome onus of proof placed upon the cargo owner, by imposing the 'strict liability' to provide a seaworthy vessel upon the ship owner.<sup>3</sup> The edict is an ancient Roman law concept, referring to a declaration of principles made by the Praetor.<sup>4</sup>

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<sup>1</sup> J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) at page 618.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> A Praetor was a person elected as a magistrate and took control of administering justice within the city of Rome. F Du Bois *Wille's Principles of South African Law* 9 ed (2007) at page 968.

In an attempt to try and balance the interests of the cargo owners and those of ship owners, Roman law commentators and legislators sought to give effect to two exceptions that a carrier could rely on in a cargo claim against it, thereby escaping the strict liability imposed upon it. These exceptions were:

- i. if the loss or damage to goods occurred as a result of *Viz Major* (acts of God), or
- ii. in the case of *domnum fatale* - the occurrence of an inevitable accident beyond the control of the carrier, causing damage or loss of cargo e.g. ship wrecks or piracy.<sup>5</sup>

Under Roman law, the absolute obligation to maintain a seaworthy vessel was vested in the ship owner, subject only to the abovementioned exceptions.

### **2.2.2 English law**

As mentioned above, the Roman law concept of the carrier's strict liability was adopted into English law. This was enacted through the concept of bailment.<sup>6</sup>

The strict liability imposed on the carrier has been modified and softened over the years due to a number of commercial and practical considerations necessary to facilitate the development of international trade. These modifications included subjecting such liability to a limited list of commonly accepted maritime exceptions. The first six commonly accepted maritime exceptions were developed under English law and have been given effect to in the laws of most maritime trading nations, including South Africa.

These original six exceptions developed under English law include:<sup>7</sup>

- Acts of God,
- Inevitable accidents,
- Inherent vice of cargo,
- Latent defect of cargo,
- Defective packaging of cargo and

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<sup>5</sup> Hare *op cit* n 1 at page 619.

<sup>6</sup> Bailment refers to placing personal property into the hands of another party, that party either having temporary control or possession, depending on what was agreed by the parties: *Ibid*.

<sup>7</sup> *Ibid* at page 620.

- Queen's enemies.

Freedom of contract is a fundamental principle on which English law of contract is based.<sup>8</sup> Therefore, even though English common law on the one hand, imposed strict liability on ship owners who were party to a contract of affreightment under a bill of lading, on the other hand it allowed them the freedom to insert clauses into the bill of lading that would substantially limit, or even completely exclude their liability. British ship owners dominated the international trade markets for a long time. They dictated freight rates and often contracted out of their common law obligations to provide a seaworthy vessel. This position of British ship owner supremacy was met with hostility by many cargo owning nations that were adversely affected by it. In an effort to minimise these adverse effects and to try and achieve a compromise between the rights of cargo owners and ship owners, various international attempts were made to create uniform laws that would adequately and equitably regulate the carriage of goods by sea.

Due to the growth of international trade and the need to transport the goods sold internationally, the majority of which was transported by sea, there was a need for the unification of the rules governing maritime trade activities. This was particularly important to ensure that unified rules were in place regulating important aspects of the contract of carriage, such as the result of breach of contract by either party.<sup>9</sup> This resulted in various maritime conventions being introduced to govern different aspects of maritime transactions.<sup>10</sup>

### **2.3 International conventions governing the carrier's obligation to maintain a seaworthy vessel**

In 1882, with the hopes of reaching a compromise between the interests of cargo owners and that of ship owners, the Comité Maritime International (the CMI) established by the International Law Association prepared a model bill of lading that could be adopted voluntarily by shipping interests. It was known as the Liverpool Bill of Lading and included compromises similar to those contained in the Harter Act, which came into operation in 1893. However, the International Law

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<sup>8</sup> 'Freedom of contract' means that parties can agree to anything that is possible and lawful: D Hutchison and et al *The Law of Contract in South Africa* 2 ed (2012) at page 7.

<sup>9</sup> AH Kassem *The Legal Aspects of Seaworthiness: Current Law and Development* (unpublished PHD, University of Wales, 2006) at page 3.

<sup>10</sup> *Ibid.*

Association's efforts were unsuccessful as final agreement on the Liverpool Bill of Lading was never reached.<sup>11</sup>

The writer will more fully discuss and scrutinise the reasons behind the enactment of the Harter Act and the methods it introduced to try and achieve a balance between the interests of cargo owners and ship owners.

## **2.4 International conventions governing the carriage of goods by sea and the carrier's obligation to maintain a seaworthy vessel**

### **2.4.1 The Harter Act**

Until the end of the 19<sup>th</sup> century, British ship owners still dominated the shipping industry, as the bulk of the transatlantic trade was conducted by British shipping. The English courts enforced the exclusion of liability clauses contained in contracts of carriage of goods by sea on the basis of freedom of contract.<sup>12</sup> In the 1870's, the majority of the US courts declared that clauses which sought to unreasonably limit the liability of ship owners were against public policy and therefore void.<sup>13</sup> Hare points out this position taken by US courts in his discussion of *The Liverpool* case,<sup>14</sup> where a British ship carried a shipment of cargo from New York to Liverpool. The goods on board the vessel were lost due to the negligence of the crew. The bill of lading contained a clause exempting the ship owner from the negligence of the master or any other crew members of the vessel. The court held that clauses that exempt the carrier from his duty to exercise due diligence were against public policy and the ship owner was therefore held liable for the loss of the goods due to the negligence of the crew.<sup>15</sup>

Legislators in the US subsequently formulated a bill designed to bring an end to carriers contracting out of liability.<sup>16</sup> The original bill was drafted in favour of cargo interests by imposing such obligations as an absolute duty of a carrier to furnish a seaworthy vessel.<sup>17</sup> Immediate concerns arose regarding the potential of the bill to adversely affect the ability of US ship owners

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<sup>11</sup> M Sturley 'The History of COGSA and the Hague Rules' (1991) 22 *THE JOURNAL OF MARITIME LAW & COMMERCE* 1 at page 6 and 7.

<sup>12</sup> V Rochester *The Lone "Carrier"* (published LLM dissertation, University of Cape Town, 2005) at page 5.

<sup>13</sup> Hare *op cit* n 1 at page 622.

<sup>14</sup> *Liverpool & Great Western Steam Co. v Phenix Insurance Co.* 129 U.S. 397 (1889).

<sup>15</sup> Hare *op cit* n 1 at page 622.

<sup>16</sup> *Ibid.*

<sup>17</sup> Sturley *op cit* n 11 at page 12.

to compete with their English counterparts; this led to several amendments being effected to the bill once it reached senate level.<sup>18</sup> Senate debates led to the absolute duty to furnish a seaworthy ship being reduced to a standard of due diligence. Furthermore, exceptions allowing the carrier to escape liability for loss or damage to goods, provided that the vessel was seaworthy, were included in the bill.<sup>19</sup> The exceptions given effect to in the Harter Act were:

- the nautical fault exception,
- perils of the sea,
- acts of God,
- public enemies,
- inherent defects in the goods carried,
- insufficiency of packaging and
- deviation for the purpose of saving life or property at sea.<sup>20</sup>

The most controversial exception is the nautical fault exception (also referred to as the negligent navigation exception), which provides that the carrier escapes accountability for loss or damage of the cargo, on the grounds of fault or error in navigation by the master or crew (the writer will discuss this exception in greater detail in Chapter 5 of this study).

The Harter Act was finally passed in the United States in 1893 and is based on the premise that any attempt by a carrier to contract out of liability or to reduce its liability beyond the minimum standard of due diligence prescribed in the Act, was void and punishable as an offence.<sup>21</sup> The Harter Act remains in force; however it is now only applicable to the interstate carriage of goods and not to foreign carriage contracts.<sup>22</sup> The provisions of the Harter Act influenced other nations that supported its initiative to hold the ship owner liable to a minimum standard of liability that it could not contract out of. Just over a decade after the Harter Act came into operation, comparable

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<sup>18</sup> Sturley *op cit* n 11 at page 13.

<sup>19</sup> Hare *op cit* n 1 at page 622.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

legislation was ratified in a number of countries.<sup>23</sup> Australia, New Zealand, Canada, and Fiji enacted legislation fashioned after the Harter Act.<sup>24</sup> The Harter Act was the first piece of legislation to influence the international harmonisation of the rules regulating the carriage of goods by sea and it created the platform for future carriage conventions.

#### 2.4.2 The Hague Rules

In September 1921, the Maritime Law Committee presented a code of rules at a conference in The Hague.<sup>25</sup> The Hague Rules were subsequently adopted three months later.<sup>26</sup> One of the primary objectives of these rules was to protect cargo owners from exclusionary clauses used by carriers to absolve themselves from any liability for loss or damage to cargo carried in their vessels.<sup>27</sup> The Hague Rules were not mandatory and the drafters of the rules hoped that ship owners would voluntarily adopt the convention in order to create uniformity and an element of fair trade in the international carriage of goods by sea.<sup>28</sup> Not surprisingly, however, ship owners were unwilling to voluntarily give up their stronger bargaining position. This reluctance by ship owners, coupled with a rather underwhelming response from the cargo owners, resulted in another conference being held at Brussels in 1923. The rules were amended shortly thereafter and is referred to as the Hague Rules, 1924.<sup>29</sup> This set of rules provided a new bench mark on the minimum obligations imposed on parties to a contract of carriage.<sup>30</sup> The freedom British ship owners had enjoyed to contract out of liability or substantially limit their liability was finally curtailed when the United Kingdom enacted the Hague Rules into their domestic legislation. Following the example of the Harter Act, the provisions of the Hague Rules not only favour the interests of the cargo owner, but also attempts to favour the ship owner by substantially watering down the “absolute obligation of a carrier to provide a seaworthy vessel to that of a minimum duty to exercise due diligence in making the vessel seaworthy”.<sup>31</sup> Furthermore, the Hague Rules also contain a list of exceptions that the

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<sup>23</sup> Rochester *op cit* n 12 at page 8.

<sup>24</sup> Hare *op cit* n 1 at page 623.

<sup>25</sup> *Ibid.*

<sup>26</sup> F Berlingieri *The Travaux Preparatoires of the Hague Rules and the Hague Visby Rules* (1997) Comite Maritime International at page 32.

<sup>27</sup> F Wilson *Carriage of Goods by Sea* 7 ed (2010) at page 174.

<sup>28</sup> *Ibid.*

<sup>29</sup> Carriage of Goods by Sea Act, 1924.

<sup>30</sup> Hare *op cit* n 1 at page 624.

<sup>31</sup> Kassem *op cit* n 9 at page 4.

carrier can rely on, provided that it has exercised due diligence in maintaining a seaworthy vessel. The Hague Rules remained the supreme carriage regime for forty four years after its enactment.

### 2.4.3 The Hague Visby Rules

The Hague Rules were amended in 1968 and were adopted by the ‘Brussels Protocol’,<sup>32</sup> paving the way for the negotiations and signing of the Hague Visby Rules shortly thereafter.<sup>33</sup> The Hague Visby Rules are a product of the Hague Rules. The UK ratified the Hague Visby Rules, thereby enacting the provisions of the Rules into its domestic Carriage of Goods by Sea Act of 1971.<sup>34</sup> South Africa never ratified the Hague Visby Rules i.e. it is not a member state thereof, however, it did incorporate the rules into its domestic Carriage of Goods by Sea Act of 1986 (hereafter referred to as SA COGSA).<sup>35</sup> The Hague Rules and the Hague Visby Rules have been widely accepted mainly by developed nations which include the United Kingdom, United States of America, Hong Kong and Singapore.<sup>36</sup>

The Hague Visby Rules retain the minimum standard of liability of a carrier to exercise due diligence in making the vessel seaworthy as well as all of the maritime exceptions contained in the Hague Rules. Many cargo owning nations perceive the Hague Rules as predominantly favouring the ship owning developed countries that are already powerful players in international maritime trade and not adequately protecting the interests of cargo owners. The rules were especially unpopular among cargo owning nations due to its retention of the controversial negligent navigation exception,<sup>37</sup> allowing ship owners to escape liability for damage or loss of cargo resulting from the negligent actions of their servants or agents “in the navigation or management of the vessel”.<sup>38</sup>

### 2.4.4 The Hamburg Rules

Given that the Hague Rules came into effect nearly a century ago and the Hague Visby Rules came into effect over four decades ago, and both have their origins in the US Harter Act which itself

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<sup>32</sup> Hare *op cit* n 1 at page 624.

<sup>33</sup> P Sooksripaisarnkit ‘Enhancing of carriers’ liability in the Rotterdam Rules – Too expensive costs for navigational safety? (2014) 8 *The International Journal on Marine Navigation and Safety of Sea Transportation* at page 310.

<sup>34</sup> Wilson *op cit* n 27 at page 175.

<sup>35</sup> Hare *op cit* n 1 at page 625.

<sup>36</sup> Sooksripaisarnkit *op cit* n 33 at page 310.

<sup>37</sup> This maritime exception is also often referred to as the ‘nautical fault exception’.

<sup>38</sup> Sooksripaisarnkit *op cit* n 33 at page 310.

was enacted a hundred and twenty three years ago, is indicative of the fact that the laws regulating the international carriage of goods are acutely in need of updating and modernisation in order to adequately regulate and cater for the needs of modern maritime trade.

Cargo owners were of the view that the Hague Rules were unfair as they focused mainly on the interests of ship owners.<sup>39</sup> Ship owners also became wary of the Hague Rules after the ruling by the House of Lords in the case of *The Muncaster Castle* (this case will be discussed in greater detail in Chapter 3);<sup>40</sup> where the House of Lords held that the ship owners had not exercised due diligence in making the vessel seaworthy due to the goods sustaining water damage as a result of the inspection covers of the vessel being improperly fitted by fitters from a reputable firm hired by the ship owner.<sup>41</sup> The ship owners contested that they had exercised the necessary due diligence by hiring professional fitters to inspect the vessel and could not be held liable for the negligence of the independent contractors hired to ensure the seaworthiness of the vessel. This argument was however rejected by the House of Lords.<sup>42</sup>

A new convention was drafted to address the concerns of both ship and cargo owners. In March 1978, at an international conference held in Hamburg this convention was adopted.<sup>43</sup> The Hamburg Rules came into effect in November 1992. Only thirty four states have ratified the Hamburg Rules and none of these states are considered influential in global maritime trade.<sup>44</sup> South Africa has not adopted the Hamburg Rules, nor is it likely to do so in the future. The Hamburg Rules however, cannot be ignored by South African maritime practitioners and scholars because some of its trading partners have acceded to the Convention.<sup>45</sup> From an academic and policy making perspective, the convention is also worthy of further scrutiny regarding the reasons behind its failure to attract wider acceptance from the major maritime trading nations i.e. the United States of America and China.<sup>46</sup> The main reason for its unpopularity among ship owning nations can be attributed to the fact that it shifts liability for loss or damage of cargo squarely on to the shoulders of the carrier.<sup>47</sup>

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<sup>39</sup> By the insertion of the limitation of liability article (Article IV).

<sup>40</sup> *Riverstone Meat Company, Pty., Ltd v Lancashire Shipping Company Ltd.* [1961] 1 Lloyd's Rep 57.

<sup>41</sup> Hare *op cit* n 1 at page 626.

<sup>42</sup> *Ibid.*

<sup>43</sup> Wilson *op cit* n 27 at page 215.

<sup>44</sup> *Ibid.*

<sup>45</sup> The major trading partners of South Africa that have acceded to the Convention are Botswana, Nigeria and Zambia.

<sup>46</sup> Hare *op cit* n 1 at page 625.

<sup>47</sup> *Ibid.*

The Hamburg Rules deviate from its predecessors on the position of the carrier's obligation to provide a seaworthy vessel in a number of ways:

- the seaworthiness obligation is not dealt with in a separate detailed article;
- the carrier's duty to exercise due diligence is extended to the entire duration that the cargo is in the custody of the carrier, not just before and at the commencement of the voyage; and
- the carrier's liability for loss or damage of the cargo is presumed, unless it can prove its innocence and there is no list of exemptions allowing the carrier to limit its liability.<sup>48</sup>

It is therefore not surprising that predominantly ship owning maritime nations have not adopted the Hamburg Rules as it does not operate in favour of the ship owner or carrier.

#### **2.4.5 The Rotterdam Rules**

The Hague Visby Rules have been the subject of international criticism for decades. The view shared by many maritime scholars and practitioners is that the Hague Visby Rules are extremely outdated and do not adequately address the needs of modern maritime trade.<sup>49</sup> A need for a new regime to create a sense of uniformity presented itself (and still presents itself in sea trade), the drafting of what is now known as the Rotterdam Rules began in 1996 as a project of both the United Nations Commission on International Trade Law (UNCITRAL) and the CMI.<sup>50</sup>

The General Assembly of the United Nations adopted the Rotterdam Rules on 11 December 2008. At the signing ceremony, which was held on 23 September 2009, due to the presumption of a proper balance between the interests of the ship owners and cargo owners being achieved under the Rotterdam Rules, there was an expeditious approval of the Rules from a number of nations that have become signatories to the Convention (including the United States of America).<sup>51</sup> However, the Rotterdam Rules will only come into effect as an international convention governing the carriage of goods in international maritime trade, one year after it has been officially ratified by a minimum of twenty signatory countries.<sup>52</sup> This process of ratification has been very slow and six

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<sup>48</sup> Kassem *op cit* n 9 at page 4.

<sup>49</sup> Hare *op cit* n 1 at page 628.

<sup>50</sup> Sooksripaisarnkit *op cit* n 33 at page 308.

<sup>51</sup> Wilson *op cit* n 27 at page 231.

<sup>52</sup> Sooksripaisarnkit *op cit* n 33 at page 308.

years after being opened for signature, the Rules have not received the requisite number of signatures to allow it to come into operation. Furthermore, the few countries that have formally ratified it, are not perceived as states with any significant shipping influence.<sup>53</sup> The need for uniformity and for a set of modified rules led to the drafting of The Rotterdam Rules. The Rotterdam Rules have been described as a carriage regime for the future and its drafters and supporters had hoped that it would achieve the success that its predecessor, the Hamburg Rules could not achieve.<sup>54</sup>

The Rotterdam Rules are unique in that they are a multimodal convention that applies to door-to-door coverage as opposed to the port-to-port coverage provided by its predecessors.<sup>55</sup> Door-to-door coverage by the Rotterdam Rules are only applicable where the carriage includes a sea leg and that sea leg involves cross-border transport.<sup>56</sup> The effect of the door-to-door coverage is that it extends the duration of the carrier's responsibility for the cargo from the time of receipt of cargo right up to the delivery of the cargo to the consignee.<sup>57</sup> It could render the carrier liable for loss, damage or delay occurring during the inland carriage of the goods prior to or subsequent to the sea leg carriage of the goods.<sup>58</sup> Conflict may potentially present itself between other conventions (the Hague and Hague Visby Rules) which provide for port-to-port coverage and the Rotterdam Rules (door-to-door coverage).<sup>59</sup> There are provisions which deal with this potential conflict, which will not be discussed in this study as it goes beyond the scope of this dissertation.

The drafters of the Rotterdam Rules aimed to increase the liability and responsibility of the carrier. With regard to the seaworthiness obligation of the carrier, the Rotterdam Rules introduce two fundamental deviations to the approaches stipulated in the Hague Rules and Hague Visby Rules. Firstly, the carrier's obligation to maintain a seaworthy vessel is extended to the duration of the entire voyage, and secondly, the Rotterdam Rules have removed the nautical fault exception from the list of the carrier's immunities against liability.

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<sup>53</sup> Spain, Congo and Togo have ratified the Rotterdam Rules: Sooksripaisarnkit *op cit* n 33 at page 308.

<sup>54</sup> Hare *op cit* n 1 at page 630.

<sup>55</sup> Wilson *op cit* n 27 at page 231.

<sup>56</sup> Article 5 of the Rotterdam Rules.

<sup>57</sup> Wilson *op cit* n 27 at page 231.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

## 2.5 South African Perspective on the Ratification of the Rotterdam Rules

South Africa has not ratified the Rotterdam Rules.<sup>60</sup> Therefore, the current laws governing the carriage of goods by sea in South Africa are in line with the Hague Visby Rules incorporated into its domestic carriage legislation, specifying that the carrier has an obligation to exercise due diligence in maintaining a seaworthy vessel only ‘before and at the beginning of the voyage’ and still permitting a carrier in a cargo claim to rely on the negligent navigation exception in order to escape liability, provided that the carrier is able to prove that due diligence was exercised in maintaining a seaworthy vessel. This position in South Africa may however change, due to a recently adopted governmental project calling for the review of certain domestic legislation regulating maritime law.

South Africa was introduced to an innovative project called the ‘Big Fast Result Methodology’ during a diplomatic visit to Malaysia in 2013. This project deals with development of certain national key priority areas specific to Malaysia and allows the government to achieve significant governmental as well as economic transformation within a short time frame. South Africa sought to replicate this project and with the support of the Malaysian government, launched the ‘Operation Phakisa’ initiative in August 2014.<sup>61</sup> The project was initiated with the view of addressing national key priority areas specific to South Africa. Its relevance to maritime law can be seen in the series of ocean economy initiatives intended to be launched in order to stimulate economic growth and job creation within the country. Amongst other initiatives, Operation Phakisa has called for the review of ocean related legislation in order to achieve its goals.<sup>62</sup>

There are a number of South African statutes that will go under review, the one relevant to this study is the Carriage of Goods by Sea Act (SA COGSA) that currently incorporates the Hague Visby Rules.<sup>63</sup> The project highlights the need for the modernisation of the SA COGSA in line with modern trends, including, considering the possibility of adopting the Rotterdam Rules and incorporating it into domestic legislation, should the Rotterdam Rules gain wider acceptance.<sup>64</sup>

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<sup>60</sup> Hare *op cit* n 1 at page 625.

<sup>61</sup> M Hartwell ‘The changing face of South Africa’s shipping legislation’ (October 2014), *Norton Rose Fulbright, South Africa*, available at <http://www.nortonrosefulbright.com/knowledge/publications/122442/the-changing-face-of-south-africas-shipping-legislation> accessed on 05/06/2016.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> ‘Unlocking the Economic Potential of South Africa’s Oceans’ (August 2014), Marine Protection Services and Governance Final Lab Report, available at

The justification for this is based on the need to maintain uniformity with the current applicable international carriage regimes “that encourage ship owners to register vessels on the South African Registry”.<sup>65</sup>

## 2.6 Conclusion

The majority of the World’s major trading nations, including South Africa and most of its trading partners have either ratified or incorporated some version of the Hague or Hague Visby Rules into its domestic laws.<sup>66</sup> There have been numerous attempts to update these applicable carriage regimes and all these attempts are aimed at creating a balance between the interests of the ship owners and cargo owners. The Rotterdam Rules is the latest of this kind of attempt in striking a balance between these competing interests. The Rotterdam Rules have thus far failed to achieve the widespread acceptance that was hoped for. None of South Africa’s major trading partners (China, the US and UK) have ratified the Rotterdam Rules,<sup>67</sup> therefore South Africa has adopted a wait and see approach with regard to ratifying the Rotterdam Rules and will probably only do so if its major trading partners ratify it. This study will scrutinize the feasibility of adopting the Rotterdam Rules from the perspective of the carriers seaworthiness obligation in cargo claims and will illustrate that this would be a somewhat detrimental shift from the current provisions regulating this liability under the Hague Visby Rules.<sup>68</sup>

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[www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Govenance%20Documents/Marine%20Protection%20and%20Govenance%20Reports/OPOceans%20MPSG%20Final%20Lab%20Report%20OPT.pdf](http://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Govenance%20Documents/Marine%20Protection%20and%20Govenance%20Reports/OPOceans%20MPSG%20Final%20Lab%20Report%20OPT.pdf), accessed on 04/06/2016.

<sup>65</sup> Hartwell *op cit* n 61.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

## Chapter 3: Seaworthiness in Context

### 3.1 Introduction

Chapter 2 of this study focused on the evolution of the law governing the carriage of goods by sea from its historical roots to present day maritime trade. This chapter will consider the nature of seaworthiness. The traditional common law definition of seaworthiness (please see the discussion of this concept under common law in Chapter 1 of this study) remains important as it is unchanged, however the nature of the obligation and the extent to which the carrier would be liable in the event of loss or damage of goods resulting from the unseaworthiness of the vessel has subsequently been altered.<sup>69</sup> Thus, it can be seen that even though it has been illustrated that over time, the common law of carriage has been somewhat displaced, it still plays an important role when interpreting statutes<sup>70</sup> and contracts defining parties contractual rights and duties.<sup>71</sup>

Seaworthiness is a broad concept which is difficult to define. The term not only encompasses the physical state of the vessel but extends to other factors such as the equipment in the vessel, fitness of the crew, documentation necessary for the voyage etc.<sup>72</sup> In this chapter, the writer will examine this common law definition of seaworthiness, which was later reflected in the Hague Visby Rules and imported into the SA COGSA.

### 3.2 The definition of seaworthiness under common law

As illustrated from the discussion on the historical development of the carrier's obligation in Chapter 1; at common law derived from Roman and later English law, the carrier was obliged to provide a seaworthy vessel for the purposes of carrying goods by sea.<sup>73</sup> The absolute obligation to provide a seaworthy vessel was watered down by the 'due diligence' provision introduced in the Harter Act, and this provision was retained in the Hague Rules and the subsequent Hague Visby Rules.<sup>74</sup>

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<sup>69</sup> Kasseem *op cit* n 9 at page 14.

<sup>70</sup> *South African Railways & Harbours v Conradie* 1922 AD 137 at 149.

<sup>71</sup> *Philip Bros v Koop* (1885) 4 SC 53.

<sup>72</sup> Wilson *op cit* n 27 at page 174.

<sup>73</sup> Hare *op cit* n 1 at page 640.

<sup>74</sup> *Ibid.*

At common law, the carrier is liable to the cargo owner for any loss of cargo resulting from the unseaworthiness of the vessel at the commencement of the voyage.<sup>75</sup> The vessel must be capable of withstanding the perils of the sea and other incidental risks that it may encounter during the course of the voyage.<sup>76</sup> Seaworthiness is defined as “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.”<sup>77</sup> The absolute obligation to provide a seaworthy vessel does not mean that the vessel has to be perfect.<sup>78</sup> The absolute obligation entails that the vessel must be reasonably seaworthy, or be able to be made so by means known to and available to a reasonable and careful owner.<sup>79</sup>

The ship owner undertakes to provide a vessel that is reasonably fit for the purpose for which it is contracted and any ignorance regarding the unseaworthiness of the vessel at the commencement of the carriage is no excuse.<sup>80</sup> Thus “if the ship is in fact unfit at the time when the warranty begins, it does not matter that its unfitness is due to some latent defect which the ship-owner does not know of, and it is no excuse for the existence of such a defect that he used his best endeavours to make the ship as good as it could be made”.<sup>81</sup>

Carver comments on the objective test to determine whether the carrier fulfilled his duty to provide a seaworthy vessel or not:

“Would a prudent owner have required that it (the defect) 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”.<sup>82</sup>

Kassem explains that this test involves taking into account the conduct of a reasonable and careful ship owner and the actions he would take were he to become aware of a defect in his vessel.

“If a prudent ship owner decided that the defect should be repaired before sending the vessel to sea, then the vessel would be unseaworthy if she was sent without repairs, but

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<sup>75</sup> Hare *op cit* n 1 at page 640.

<sup>76</sup> *Kopitoff v Wilson* (1876) 1 QBD 377 at 380.

<sup>77</sup> *McFadden v Blue Star Line* [1905] 1 KB 697 at 706.

<sup>78</sup> *Wilson op cit* n 27 at page 174.

<sup>79</sup> *Blue Star supra* n 77.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> TG Carver *Carriage by Sea* 13 ed (1982).

if he decided that the defect did not need to be repaired and it would be safe without doing so, then she would be seaworthy if sent in such a condition".<sup>83</sup>

In order to determine whether a vessel is seaworthy various circumstances surrounding the loss and damage to the goods must be considered e.g. the type of vessel, the route the vessel is going to take, the cargo that it is carrying, the season in which the vessel was set to sail and the degree of knowledge available at the relevant times.<sup>84</sup> The standard of seaworthiness may differ with improved knowledge or technology becoming available to the ship owner.<sup>85</sup> Provided that the vessel is factually seaworthy, it is not necessary for the ship owner to ensure that the vessel is equipped with the latest technology and navigational aids.<sup>86</sup> A vessel may therefore be seaworthy upon sailing, although the vessel, in that condition, is not necessarily fit to complete its voyage.<sup>87</sup>

### **The elements that make up seaworthiness under common law:**

#### **i. Physical seaworthiness of the vessel**

This means that the vessel must be physically fit for the voyage. According to Hare, the ship has to be physically seaworthy for the purpose of the entire voyage i.e. sailing from the port of loading to the port of unloading.<sup>88</sup>

#### **ii. Cargo-worthiness**

This means that the vessel must be suitable for the particular cargo she is required to carry.<sup>89</sup> Thus, if for instance the vessel is scheduled to carry frozen goods, then the carrier will have to ensure that appropriate refrigerating and freezing apparatus are on board the vessel.

#### **iii. The vessel has to properly manned by competent crew**

This means that the crew on board the vessel must be properly trained and competent for the envisaged voyage. The carrier has to therefore employ crewmen who fulfil this requirement.

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<sup>83</sup> Kasseem *op cit* n 9 at page 15.

<sup>84</sup> *Ibid.*

<sup>85</sup> Hare *op cit* n 1 at page 642.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

It is important to note that, in the event that any one of the abovementioned elements are lacking, then the vessel will be deemed to be unseaworthy (the same applies equally to the Hague Visby Rules).

It is not sufficient to assert that the vessel is unseaworthy and cargo is lost or damaged, a causative connection between the unseaworthiness of the vessel and the subsequent loss or damage of the cargo needs to be established.<sup>90</sup> The owner of the cargo that is lost or damaged bears the onus of proving that the vessel was unseaworthy at the commencement of the voyage and that the unseaworthiness of the vessel was the cause of the loss or damage suffered (the burden of proof will be examined in greater detail in Chapter 5 of this study).<sup>91</sup> Furthermore, it must be proven that the loss or damage would not have occurred if the vessel was seaworthy.<sup>92</sup> It does not matter that the ship owner took all reasonable precautions and steps to prepare his vessel for the impending voyage, if the vessel sails in a factually unseaworthy condition and if the condition causes a loss, the ship owner is liable.<sup>93</sup>

The vessel is required to be seaworthy at the commencement of each stage, if the vessel is to engage in a voyage in series.<sup>94</sup> Where a ship is lost at sea immediately upon embarking on a voyage, there is a presumption that operates in favour of the cargo claimant against the ship owner. Thus, in the absence of a reasonable explanation as to loss, the courts will presume unseaworthiness at the commencement of the voyage.<sup>95</sup>

At common law, the undertaking of seaworthiness is regarded as a “warranty”, the breach of such warranty would not entitle the cargo owner to resile from the contract, and instead it would give rise to damages.<sup>96</sup>

In 1893, the Harter Act was introduced in the United States of America and it contained no alterations to the common law definition of seaworthiness. There was however a change in the nature of the obligation to provide a seaworthy vessel.

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<sup>90</sup> Per Lord Esher MR in *Baumwoll v Gilchrist* [1893] 1 QB 253.

<sup>91</sup> *The Europa* [1904 – 7] All ER Rep 394.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Steel v State Line SS Co* [1877] 3 AC 72 (HL).

<sup>94</sup> *The Vortigern* [1899] P 140.

<sup>95</sup> *Levy v Calf & Others* [1857] Watermeyer 1 at 4.

<sup>96</sup> *Hare op cit* n 1 at page 641.

“That it shall not be lawful for any vessel transporting merchandise or property from or between the ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage ... shall in anywise be lessened, weakened, or avoided”.<sup>97</sup>

The rationale behind the introduction of the Harter Act was to put an end to the insertion of clauses which exempt carriers from liability for loss or damage to the cargo in bills of lading. The absolute obligation to provide a seaworthy vessel was watered down to the minimum exercise of due diligence under the Harter Act. It was a minimum requirement that the carrier would exercise due diligence in making the vessel sea and cargo worthy and this minimum standard could not be contracted out of.<sup>98</sup> The Act was the first step towards placing a minimum standard of obligation on the carrier to exercise due diligence to make the vessel seaworthy.<sup>99</sup>

“If the owner of any vessel transporting merchandise or property to or from any port in the United State of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel”.<sup>100</sup>

The exercise of due diligence is a defence to the carrier where cargo has suffered loss or damage. Section 3 of the Harter Act introduced what is now known as the “error in navigation exception” (which will be discussed in detail in Chapter 5). Where cargo is damaged or lost, the Harter Act introduced exceptions which the carrier could rely on, provided that the carrier has exercised due diligence.

As mentioned in Chapter 2, the Harter Act sought to balance the interests of the cargo owner and those of the ship owner. Although the carrier had an absolute obligation to provide a seaworthy vessel under common law, the Harter Act was the first step in increasing the carrier’s liability by holding it to a minimum standard that it could not contract out of. The Harter Act prevented any attempt by the carrier to exempt or reduce his responsibility of exercising due diligence to provide a seaworthy vessel.<sup>101</sup> As mentioned above, the traditional definition of seaworthiness was not

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<sup>97</sup> Section 2 of the Harter Act, 1893.

<sup>98</sup> Kassem *op cit* n 9 at page 16.

<sup>99</sup> *Ibid.*

<sup>100</sup> Section 3 of the Harter Act, 1893.

<sup>101</sup> Hare *op cit* n 1 at page 623.

altered by the Harter Act. The exceptions contained in the Harter Act were retained in the Hague and subsequent Hague Visby Rules, it is therefore evident that these Rules are modelled after the Harter Act. The writer will in the next section discuss seaworthiness in the context of the Hague Visby Rules.

### **3.3 Seaworthiness under Article III of the Hague Visby Rules**

The Hague Visby Rules define seaworthiness in Article III Rule 1 by providing what factors constitute seaworthiness.

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

(a) Make the ship seaworthy;

(b) Properly man, equip and supply the ship;

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.”

Having set out the relevant provision, the writer will elaborate on the fundamental terminology as expressly provided in the abovementioned Rules.

#### **3.3.1 Who is the carrier?**

Article I of the Hague Visby Rules defines the carrier as:

“(a) 'Carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.”

The term “carrier” does not have a precise definition under any of the Rules. It is however expressed in the Hague and Hague Visby Rules and implied in the Hamburg Rules, that a carrier is an owner or charterer. Such persons are only entitled to limit their liability to the extent that the claims arise under a contract of carriage (charterparties are not contracts of carriage for this purpose, unless a paramount clause is inserted in the charterparty extending the applicability of the Rules to the agreement).

The Convention on Limitation of Liability for Maritime Claims 1976, states that owners and charterers acting as ship owners are persons entitled to limit liability. However charterers who are not acting as ship owners are also entitled to limit their liability. Under the Hague, Hague Visby

and Hamburg Rules, the definition of carrier is wide enough to include carriers who are not owners or charterers, thus freight forwarders may be entitled to limit their liability.

With regard to servants and agents of a carrier under the Hague Rules, persons other than the carrier cannot limit their liability under the Rules. However, a Himalaya clause<sup>102</sup> can be inserted in the bill of lading to protect servants or agents of the carrier. If the bill of lading is subject to English law, then they have a statutory right to rely on clauses in the bill intended to allow them to limit their liability.

Under the Hague Visby Rules (Article IV bis, Rule 2), a servant or agent of the carrier can limit his liability in the same way and to the extent that the carrier can, however, that servant or agent is not an independent contractor. Independent contractors,<sup>103</sup> may rely on the insertion of a Himalaya Clause or rely on statutory rights (mentioned above). It is therefore submitted that a wide interpretation is attached to the term ‘carrier’.

### **3.3.2 The duration of the seaworthiness obligation**

Article III Rule 1 of the Hague Visby Rules:

“1. The carrier shall be bound before and at the beginning of the voyage”

In the case of *The Makedonia*,<sup>104</sup> the cargo owners alleged that the vessel was unseaworthy due to insufficient bunkers (fuel). The wording of the judgment illustrates that the ship owner’s obligation is to exercise due diligence in arranging bunkers at the commencement of the voyage and not at every stage of the bunkering operations, unlike the common law position where the doctrine of stages is applied.

In the case of *Maxine Footwear*,<sup>105</sup> upon loading the cargo on board the vessel, it was discovered that the ship’s pipes were blocked with ice. The Master ordered members of the crew to use an acetylene torch to melt the ice and due to the negligence of crew members, the ship caught fire and the cargo was destroyed. The Privy Council explained the phrase ‘before and at the beginning of

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<sup>102</sup> A Himalaya clause is a provision inserted into contracts that exempt third parties who are not party to the contract from liability benefit e.g. stevedores. This term comes from the case of *The Himalaya: Adler v Dickson* [1954] 2 Lloyd’s Rep 267.

<sup>103</sup> These types of clauses are usually intended to cover stevedores.

<sup>104</sup> *The Makedonia* [1962] 1 Lloyd’s Rep 316.

<sup>105</sup> *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine Ltd.* [1999] AC 589.

the voyage’ to mean ‘the period from at least the beginning of the loading until the vessel starts on her voyage.’<sup>106</sup> It was further held that the use of the words ‘at least the beginning’ provides a *minimum* duration of the carrier’s obligation to provide a seaworthy vessel.

The decision of the Privy Council in the *Maxine Footwear* case is the authority on the duration of the obligation to exercise due diligence in maintaining a seaworthy vessel under the Hague Visby Rules.

### **3.3.3 The concept of due diligence**

The concept of due diligence was introduced by the Harter Act in 1893 and subsequently adopted into the Hague, Hague Visby and Hamburg Rules. None of the conventions define what is meant by exercising ‘due diligence’.

Hare describes due diligence as a ‘first base’ requirement of the carrier.<sup>107</sup> He reasoned that the carrier will not be able to rely on one of the exceptions listed in Article IV of the Hague Visby Rules, unless he is able to prove that there was no connection between the unseaworthiness of the vessel and his obligation to exercise due diligence.<sup>108</sup>

The standard of due diligence was explained in *The Papera* case,<sup>109</sup> that involved a car carrier that was destroyed by fire on board the vessel. The cargo claimants alleged that loss was suffered due to the unseaworthiness of the vessel. Cresswell J, explained that the standard of due diligence is equivalent to the exercise of reasonable care and skill. He further stated that professional negligence amounts to a failure of the carrier to exercise due diligence and the issue in this case was whether there was an error of judgment amounting to professional negligence. It was held in *The Papera* case that the standard of due diligence to provide a seaworthy vessel is ‘non-delegable’.

In *The Muncaster Castle* case,<sup>110</sup> sea water entered the cargo hold and cargo was damaged. It was later found that sea water entered due to the negligence of the fitter. The court however emphasised

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<sup>106</sup> *Maxine op cit* n 105.

<sup>107</sup> Hare *op cit* n 1 at page 657.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Papera Traders Co Ltd and Others v Hyundai Merchant Marine Co. Ltd and Another* [2002] EWHC 118 (Comm).

<sup>110</sup> *Riverstone op cit* n 40.

the point made in *The Papera* case that the standard of due diligence to provide a seaworthy vessel is non-delegable and subsequently held that the ship owner failed to exercise due diligence.

“Due diligence means that the carrier must take all reasonable measures that could possibly be taken by him, or his servants or agents, to man, equip and make the ship in all respects fit to undertake the agreed voyage”.<sup>111</sup>

From the above definitions, it is evident that the concept of due diligence requires the carrier to act reasonably i.e. the carrier has the obligation to exercise reasonable care.<sup>112</sup> Furthermore, the obligation to exercise due diligence is the obligation of the carrier and none other than the carrier.

A test was formulated to determine whether the carrier exercised due diligence, it is an objective test which refers to the conduct of a reasonably prudent carrier at the time of exercising due diligence.<sup>113</sup> Being that the test is objective the standard may differ based on the merits of the case and the surrounding circumstances.

“Due diligence can be defined as: the efforts of the prudent carrier to take all reasonable measures that can be possibly taken, in the light of available knowledge and means at the relevant time, to fulfil his obligation to provide a seaworthy vessel.”<sup>114</sup>

In light of this definition, due diligence refers to the conduct of the carrier alone in ensuring that the vessel is seaworthy by taking the requisite reasonable steps in light of the surrounding circumstances.<sup>115</sup>

The concept of due diligence was discussed in the recent South African case of *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd*.<sup>116</sup> The difference between the cases mentioned above and the case that follows is that the latter deals with the concept of seaworthiness from an insurance perspective. In this case, a fishing trawler had capsized and sank soon after it collided with a bulk carrier, fourteen lives were lost as a result of this tragedy. Lengthy court proceedings arose following the tragedy as well as litigation between the owner of the fishing

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<sup>111</sup> Kassem *op cit* n 9 at page 76.

<sup>112</sup> *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* (41/2015) [2016] ZASCA 21 (18 March 2016) available at <http://www.saflii.org/za/cases/ZASCA/2016/21.html> accessed on 03/06/2016.

<sup>113</sup> *The Kapitan Sakharov* [2000] 2 Lloyd's Rep 255 at 266.

<sup>114</sup> Kassem *op cit* n 9 at page 76.

<sup>115</sup> *The Papera op cit* n 109 and *The Riverstone Meat op cit* n 40.

<sup>116</sup> *Viking op cit* n 112.

trawler (the insured) and its hull underwriters (the insurer). Such litigation arose from the repudiating of the claim for the loss of the fishing trawler. The court of first instance, the Western Cape High Court, found in favour of the insurers. The case went on appeal to the Supreme Court of Appeal (SCA) and two fundamental issues were raised. The writer will however, only discuss the issue that is relevant to this study i.e. whether the loss of the fishing trawler resulted from the failure of the insured to exercise due diligence in maintaining a seaworthy vessel.

It was found that the obligation on the carrier to exercise due diligence by equipping the vessel to safely carry cargo, is a positive obligation and is not necessarily the same thing as showing that the loss or damage to the insured vessel was caused by a want of due diligence. It was however submitted that, just as the carrier has to show the exercise of reasonable care, a failure to exercise reasonable care by the insured, that is causally connected to the loss will operate to exclude the insurer's liability. Furthermore it was found that the need to prove the exercise of due diligence only arises once the insurer has discharged evidence that the cause of the loss or damage was a want of due diligence. The court asserted that this 'want of due diligence must be established' on the part of the, insured, owner or manager. It was held that this does not depend on the conduct of the crewmen instead the focus is on the conduct of those who are responsible for the vessel at a more superior placement of management in the company. The Court held that the evidence proved that the vessel was properly crewed by the appellant and on that ground the SCA overturned the High Court's decision.

It is submitted that the finding of the SCA in the abovementioned case is similar to the finding in the Papera case i.e. the duty to exercise due diligence is non delegable. Furthermore, where a vessel is not properly crewed the vessel will be found to be unseaworthy.

### **3.4 Seaworthiness under Article 14 of the Rotterdam Rules**

#### *Article 14*

##### *Specific obligations applicable to the voyage by sea*

“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.”

Having set out the relevant provision under the Rotterdam Rules it is evident that the only aspect that has been expressly amended (in comparison to the provision in the Hague Visby Rules), is the duration of the carrier’s obligation to exercise due diligence in maintaining a seaworthy vessel. The writer will, in the section below elaborate on this express extension.

### **3.4.1 The duration of the seaworthiness obligation under the Rotterdam Rules**

The Rotterdam Rules is a recently drafted international convention taking into account the realities of modern day transportation of cargo.<sup>117</sup> The Hague Visby Rules, on the other hand is an older convention which was derived from the Harter Act, 1893, thus these Rules do not take modern transportation systems into account.

At first glance, it would seem that the Rotterdam Rules increase the period in which the carrier is obliged to provide a seaworthy vessel. The Rotterdam Rules make the carrier responsible for any loss or damaged incurred due to the carrier’s failure to exercise due diligence in maintaining a seaworthy vessel *throughout* the voyage. This deemed extension of the carrier’s obligation to maintain a seaworthy vessel impacts on the allocation of risks in sea carriage contracts between the ship owner and cargo owner.<sup>118</sup> The Rotterdam Rules emphasise the extension of such obligation by adding the word ‘keep’ into the description of seaworthiness in *Article 14*.<sup>119</sup>

### **3.5 Conclusion**

Prior to examining the seaworthiness and safety standards set out in the ISM and ISPS Code, the provisions in the Rotterdam Rules extending the carrier’s liability throughout the voyage appears to be a novel concept of much significance.<sup>120</sup> The question therefore is, whether this extension of

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<sup>117</sup> Sooksripaisarnkit *op cit* n 33 at page 309.

<sup>118</sup> *Ibid.*

<sup>119</sup> Article 14(a) of the Rotterdam Rules.

<sup>120</sup> The ISM Code extends the duration of the carrier’s obligation to exercise due diligence in maintaining a seaworthy vessel through the voyage already.

the duration of the obligation to exercise due diligence in maintaining a seaworthy vessel throughout the voyage, will have any impact on the carrier's current obligation. This will be examined in detail in Chapter 4 of this study.

## Chapter 4: The ISM and ISPS Codes

### 4.1 Introduction

The ISM Code, was produced to enhance the safety of navigation and environmental protection. The ISM Code was incorporated into the SOLAS Convention under Chapter IX. This code is mandatorily applicable to all ships carrying flags of SOLAS member states.<sup>121</sup> The ISPS Code, was created to elevate the security of vessels as well as the port facilities. The ISPS Code applies to those states that are party to the SOLAS Convention. In this chapter the writer will discuss both codes in relation to the obligation of the carrier to provide a seaworthy vessel.

### 4.2 The origin of the ISM and ISPS Codes

#### 4.2.1 The origin of the ISM Code

In the late twentieth century there was an increase in maritime accidents, which resulted in loss of life, vessels' and cargo. These incidents include the *MS Herald of Free Enterprise* (1987),<sup>122</sup> *MS Scandinavian Star* (1990)<sup>123</sup> and *MS Estonia* (1994),<sup>124</sup> which were all high profile incidents that attracted global attention. The maritime industry was consequently under immense pressure to alleviate the losses aforementioned, because these accidents “could lead to a boost in litigations, insurance claims and premiums and, eventually, freight rates.”<sup>125</sup> In an effort to find a solution, extensive research was embarked on, which was funded either by governments or NGO's. Research revealed that the majority of these accidents were due to human error, thus in order to minimise accidents of a maritime nature it was imperative to introduce safety measures and systems to reduce risks of human error.

Following the aftermath of the *MS Herald of Free Enterprise*, representatives of the United Kingdom requested the International Maritime Organization (the IMO) to promptly investigate measures to ensure safer operations of roll-on roll-off ferries.<sup>126</sup> The request was accepted at the

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<sup>121</sup> Kassem *op cit* n 9 at page 35.

<sup>122</sup> The *MS Herald of Free Enterprise* was a roll-on roll-off ferry. The ship capsized, which resulted in the death of 193 passengers and members of the crew.

<sup>123</sup> The *MS Scandinavian* was a car and passenger ferry. The ship was set on fire in 1990, which resulted in the death of 158 people.

<sup>124</sup> The *MS Estonia* was a cruise ferry. The ship sank and resulted in the death of 852 people.

<sup>125</sup> Kassem *op cit* n 9 at page 202.

<sup>126</sup> P Anderson *The ISM Code: A Practical Guide to the Legal and Insurance Implications* 3 ed (2015) at page 3.

15th session of the IMO in November 1987. The Organisation's Secretary-General suggested that, broad guidelines be developed by the IMO to be utilised by officers and crew members' onboard the vessel in the management of safety and pollution prevention measures.<sup>127</sup> The Secretary-General informed the Assembly that clear and well-known shipboard operating procedures together with periodic spontaneous inspections were needed to ensure compliance.<sup>128</sup> The Assembly accepted this through resolution A.596(15) which was titled "Safety of Passenger Ro-Ro Ferries". The IMO's Maritime Safety Committee was instructed by the Resolution to create guidelines regarding the management of roll-on and roll-off ferries.<sup>129</sup> Measures were put forward by the United Kingdom to enhance the safety of roll-on roll-off ferries, among these measures was the provision of supplementary emergency lighting.<sup>130</sup> These measures were unanimously adopted by delegates of countries who attended the April 1988 meeting of the IMO's Maritime Safety Committee.<sup>131</sup>

At the IMO's 16th session held in October, 1989, the Assembly adopted Resolution A.647(16) which contained the first IMO "Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention".<sup>132</sup> Unlike the 1987 resolution, Resolution A.647(16) applied to *all* ships. Resolution A.647 (16) recognised the importance of having the guidelines reviewed and revised on a periodic basis.<sup>133</sup>

At the 17<sup>th</sup> session held in November, 1991, the Assembly adopted the IMO's revised guidelines through Resolution A.680 (17).<sup>134</sup> This process of reviewing and revising continued until the 18th session of the IMO Assembly in 1993. In November, 1993, Resolution A. 741(18) was adopted by the Assembly which constitutes the ISM Code.<sup>135</sup> The ISM Code was adopted as a recommendation, however, due to the potential positive impact of the Code in enhancing safety and prevention of pollution and the general ineffectiveness of the Code's voluntary predecessors,

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<sup>127</sup> AJH Rodriguez and *et al.* 'The International Safety Management (ISM) Code: A new level of uniformity' (2005) 73 *Tulane Law Review* at page 4.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> Anderson *op cit* n 126 at page 5.

<sup>132</sup> Rodriguez *op cit* n 127 at page 5.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> BM Batalden and AK Sydnnes 'Maritime safety and the ISM code: a study of investigated casualties and incidents' (2014) 13 *World Maritime University Journal of Maritime Affairs* at page 3.

the Code was made mandatory by the incorporation of it as a new SOLAS Chapter IX: “Management for the Safe Operation of Ships” on 19 May 1994 by the IMO Assembly. It is stated in SOLAS that the company and vessel shall comply with the requirements of the ISM Code.<sup>136</sup> The ISM Code was produced to provide a framework for companies to establish integrated Safety Management Systems (SMS) to reduce accidents caused by human error.<sup>137</sup>

Thus the ISM Code was created by the IMO as a direct response to the accidents and claims arising from the various maritime incidents described above.<sup>138</sup>

The primary reason for incorporating the ISM Code into the SOLAS Convention, as opposed to retaining it as a stand-alone convention is that, more than 96% of the world tonnage countries are SOLAS member states, making the ISM Code mandatorily applicable to all contracting states unless an express reservation excluding the application of the code was made by a contracting state.<sup>139</sup> Thus, the incorporation of the ISM Code into the SOLAS Convention is a means to ensure the efficient and widespread application of the Code, ensuring that all contracting states of the SOLAS Convention abide by the safety measures set out in it.

#### **4.2.2 The origin of the ISPS Code**

Terrorism is another crime that occurs at sea (other than piracy and armed robberies). Thus it became necessary in the twentieth century to create a legal framework to reduce and eventually overcome acts of terrorism at sea. The trigger incident for the creation of the ISPS Code was that of the *Achille Lauro* in 1985 where a cruise ship was hijacked in an attempt to coerce the release of fifty Palestinians in Israel.<sup>140</sup> In 1986, the United Nations General Assembly briefed the IMO to draft a convention that dealt with unlawful acts against the safety of maritime navigation. It should be noted that the existing provisions relating to piracy could not be applied accordingly, as piracy has specific elements,<sup>141</sup> which do not exist in relation to terrorism.

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<sup>136</sup> IMO ‘SOLAS: consolidated text of the International Convention for the Safety of Life at Sea, 1974, and its Protocol of 1988: articles, annexes and certificates (incorporating all amendments in effect from 1 July 2009)’ (2012)

<sup>137</sup> Rodriguez *op cit* n 127 at pages 5 and 6.

<sup>138</sup> DA Mamahit and et al ‘Compliance behavior analysis of the ship crew to the International Safety Management (ISM) Code in Indonesia’ (2013) 2 *International Journal of Management and Sustainability* at page 15.

<sup>139</sup> *Ibid.*

<sup>140</sup> M Halberstam ‘Terrorism on the high seas: The Achille Lauro, piracy and the IMO Convention on Maritime Safety’ (1988) 82 *The American Journal of International Law* at page 269.

<sup>141</sup> Article 101 of the United Nations Convention on the Law of the Sea, 1982.

The Convention for the Suppression of Unlawful Acts against Safety of Maritime Navigation (the Convention) was adopted in Rome in 1988 and came into force in 1992. The Convention creates a list of offences and provides for the compliance and enforcement by contracting parties. In 2005, a protocol was added to the Convention. Article 3 (bis) was inserted, which criminalised intentional transport of biological, chemical and nuclear (BCN) weapons and equipment.<sup>142</sup>

In December 2002 – in direct response to the infamous 9/11 attacks in 2001, work was undertaken by the IMO which led to the adoption of amendments of the SOLAS Convention and the ISPS Code.<sup>143</sup> Chapter XI-2 of the SOLAS Convention read together with the ISPS Code provide a number of mandatory measures aimed at increasing the security of vessels’ engaged in global voyages and port facilities serving them. It addresses all realms of security and are not limited to decreasing acts of terrorism. The code has both a mandatory and a recommendatory part and the reasons for its incorporation into the SOLAS Convention are the same reasons for the incorporation of the ISM Code into the SOLAS Convention.

### **4.3 The objectives of the ISM and ISPS Codes in relations to the carrier’s obligation to provide a seaworthy vessel**

#### **4.3.1 The objectives of the ISM Code**

The ISM Code is an innovative regime in that it creates increased safety management standards for ship owners and operators which no other regime successfully does. It aims to identify and hold ship owners accountable for maritime accidents that may occur.<sup>144</sup>

The objective of the ISM Code is described in its preamble i.e. “the purpose of this Code is to provide an international standard for the safe management and operation of ships and for pollution prevention”.<sup>145</sup> To give substance to what is stated in the preamble, the aim of the ISM Code is to prevent the occurrence of maritime accidents due to human error, which as mentioned above is the cause of many maritime accidents. Thus correct application of the ISM Code would lead to the

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<sup>142</sup> A Roach and R Smith *Excessive Maritime Claims* 3 ed (2012) at page 593.

<sup>143</sup> *Ibid.*

<sup>144</sup> Hare *op cit* n 1 at page 323.

<sup>145</sup> The Preamble of the ISM Code.

eradication of the occurrence of maritime accidents due to human error.<sup>146</sup> This consequently raises the international shipping standards and safety at sea as well as prevention of sea pollution.<sup>147</sup>

The ISM Code states that:

“The objectives of the Code are to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, to the marine environment, and to property.

1.2.2 Safety management objectives of the Company should, inter alia:

1. provide for safe practices in ship operation and a safe working environment;
2. establish safeguards against all identified risks; and
3. continuously improve safety management skills of personnel ashore and aboard ships, including preparing for emergencies related both to safety and environmental protection.

1.2.3 The safety and management system should ensure:

1. compliance with mandatory rules and regulations; and
2. that applicable codes, guidelines and standards recommended by the Organization, Administrations, classification societies and maritime industry organizations are taken.”<sup>148</sup>

From the wording of section 1.2 of the ISM Code, it would seem that the objective of the code is to make certain that ship owners’ develop and utilise their own safety management system (in addition to the generalised ship safety requirements that have to be complied with by all ship owners’).<sup>149</sup> By coercing ship owners’ to create additional safety management standards, the ISM Code attempts to increase the safety of ships and reduce maritime accidents, ultimately preventing the loss of life, vessels and cargo.

Lord Donaldson sums up the objective of the ISM Code as follows:

“in the short and medium term it is designated to discover and eliminate sub-standard ships, together with sub-standard owners and managers, not to mention many others who contribute to their survival and, in some cases, prosperity. In the longer term its destination is to discover new and improved methods of ship operation, management and

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<sup>146</sup> Kassem *op cit* n 9 at page 204.

<sup>147</sup> Section 1.2 of the ISM Code.

<sup>148</sup> *Ibid.*

<sup>149</sup> Hare *op cit* n 1 at page 323.

regulation which will produce a safety record more akin to that of the aviation industry. But as I readily admit, that is very much for the future”.<sup>150</sup>

A substandard ship is one whose “hull, machinery, equipment or operational safety is substantially below the standards required by the relevant convention or whose crew is not in conformance with the safe manning document”.<sup>151</sup> This means that the immediate aim of the ISM Code is to clear the shipping industry of non-compliant vessels and crewmen. Furthermore, the Code acknowledges that drastic changes cannot occur over night, thus its aim is to gradually create and implement improved means of achieving safer shipping operations.

#### **4.3.2 The objective of the ISPS Code**

The objective of the ISPS Code is to identify security threats and implement appropriate security measures to deter from such threat. The purpose of the ISPS Code is to found an international framework which will be based on the co-operation of the different international bodies, to establish security measures to deter a security breach that may occur against a vessel or port facility. Furthermore, the ISPS Code aims to establish the obligations of each party for maritime security enhancement. In addition, the code aims to establish and implement procedures to efficiently circulate information regarding security, develop methods to identify security threats or breaches and ultimately to ensure that appropriate as well as efficient security measures are put into place.

In a nutshell the ISPS Code aims to ensure proper security measures for all vessels and port facilities in order to eradicate any security threat or breach which might ultimately result in the loss of life, vessels’ or cargo. The ISPS Code attempts to do this by creating appropriate security measures to deal with such security breaches.

#### **4.4 The relevance of the ISM and ISPS Code in relation to the carrier’s obligation to provide a seaworthy vessel.**

##### **4.4.1 The ISM Code in relation to the carrier’s obligation to provide a seaworthy vessel**

The ISM Code is incorporated into the SOLAS Convention as opposed to the Hague or Hague Visby Rules, so it could be incorrectly assumed that the Code has no significance in relation to the

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<sup>150</sup> Lord Donaldson of Lynton ‘The ISM Code: the road to discovery?’ (1998) 4 *Lloyd’s Maritime and Commercial Law Quarterly* at page 527.

<sup>151</sup> IMO. Resolution A.1052 (27). Procedures for Port State Control, 20 December 2011.

topic of seaworthiness. However, the objectives for incorporating the ISM Code into the SOLAS Convention discussed above, clearly indicate that the Code does in fact deal with the seaworthiness of vessels carrying the flags of SOLAS member states. Furthermore there is a correlation between all international maritime conventions whether directly or indirectly.

As mentioned above, the ISM Code sets out minimum safety standards that aim to decrease and eventually eliminate human errors that result in maritime accidents. These minimum safety standards set out in the Code extend the carrier's obligation to provide a seaworthy vessel.<sup>152</sup> In the *Eurasian Dream* case, it was held that "the ISM Code, is a framework upon which good practices should be hung."<sup>153</sup> Thus it would be good practice for a prudent carrier to follow the ISM Code when fulfilling the obligation to provide a seaworthy vessel. This point should be followed by the fact that the ISM Code contains current good practice standards to be followed by 'prudent ship owners' (ensuring that the vessel is regularly maintained, up to date charts are kept on board the vessel etc.), emphasising good practice in the shipping world and ensuring that all the companies and ship owners of member states abide by it.<sup>154</sup> The ISM Code does not set out requirements that are difficult to follow, instead it contains requirements that are already carried out by prudent ship owners.

There are two section of the ISM Code that are relevant to the consideration of the seaworthiness of a vessel:

“6. RESOURCES AND PERSONNEL

6.1 The Company should ensure that the master is:

- .1 properly qualified for command;
- .2 fully conversant with the Company's SMS; and
- .3 given the necessary support so that the master's duties can be safely performed.

6.2 The Company should ensure that each ship is:

- .1 manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements; and
- .2 appropriately manned in order to encompass all aspects of maintaining safe operation on board.

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<sup>152</sup> Kassem *op cit* n 9 at page 76.

<sup>153</sup> *Eurasian Dream* [2002] 1 Lloyd's Rep 719 at 143.

<sup>154</sup> Kassem *op cit* n 9 at page 76.

6.3 The Company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarization with their duties. Instructions which are essential to be provided prior to sailing should be identified, documented and given.

6.4 The Company should ensure that all personnel involved in the Company's SMS have an adequate understanding of relevant rules, regulations, codes and guidelines.

6.5 The Company should establish and maintain procedures for identifying any training which may be required in support of the SMS and ensure that such training is provided for all personnel concerned.

6.6 The Company should establish procedures by which the ship's personnel receive relevant information on the SMS in a working language or languages understood by them.

6.7 The Company should ensure that the ship's personnel are able to communicate effectively in the execution of their duties related to the SMS.”<sup>155</sup>

The abbreviation referred to as ‘SMS’ in the ISM Code means Safety Management System.

#### “10. MAINTENANCE OF THE SHIP AND EQUIPMENT

10.1 The Company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the Company.

10.2 In meeting these requirements the Company should ensure that:

- .1 inspections are held at appropriate intervals;
- .2 any non-conformity is reported, with its possible cause, if known;
- .3 appropriate corrective action is taken; and
- .4 records of these activities are maintained.

10.3 The Company should identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The SMS should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use.

10.4 The inspections mentioned in 10.2 as well as the measures referred to in 10.3 should be integrated into the ship's operational maintenance routine.”<sup>156</sup>

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<sup>155</sup> Section 6 of the ISM Code.

<sup>156</sup> Section 10 of the ISM Code.

The ISM Code is a fairly new framework containing modern regulations regarding the safety of ships unlike the Hague Visby Rules, which were created in 1963 (not long after World War II) and contain rules regarding seaworthiness that had not been amended since 1924 (the Hague Rules).

As mentioned above, the obligation to maintain a seaworthy vessel was limited to ‘before and at the beginning of the voyage’ under the Hague Rules in 1924. The rationale for this limited duration was due to the restricted methods of communication that existed in that era that did not permit ship to shore communication. Difficulties arose when a vessel was out at sea and information could not be quickly efficiently sent to relevant persons on shore.<sup>157</sup> This has since changed. The advent of modern technology and satellite systems has brought about multiple methods of communication, keeping crewmen, masters and ship owners as well as their personnel on shore in constant communication. The effect of this is that any defect affecting the seaworthiness of the vessel that occurs during the voyage may be identified and expediently rectified at the nearest port. Furthermore, ship owners may-if they deem necessary, enroll their crewmen at training institutions that are created to ensure the competence of crewmen.

The ISM Code has been in existence for over a decade, so ship owners should be acquainted with the requirements of the Code. Nikaki notes that while the Rotterdam Rules do not create an extended obligation on ship owners to maintain a seaworthy vessel,<sup>158</sup> ship owners will not find themselves incurring additional costs in complying with the extended seaworthiness obligation under the Rotterdam Rules as most of them are already complying with such obligations under the ISM Code.

Compliance with the ISM Code creates a presumption that due diligence in providing a seaworthy vessel is exercised by the ship owners. On the other hand failure of compliance with the ISM Code creates a presumption of not exercising due diligence.<sup>159</sup> The ISM Code (which is in keeping with good shipping practice) results in the extension of the obligation of the ship owner to provide a seaworthy vessel *throughout* the voyage. This extension arises from the fact that the ISM Code is a fairly modern regime that takes into account modern technology, which was lacking in the past, limiting the duration of the obligation to provide a seaworthy vessel. Thus by following the

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<sup>157</sup> Sooksripaisarnkit *op cit* n 33 at page 313.

<sup>158</sup> N Theodora ‘The Carriers’ duty under the Rotterdam Rules: Better the Devil you Know?’ (2010) 35 *Tulane Maritime Law Journal* at page 35.

<sup>159</sup> G Stephen *Carriage of Goods by Sea* 2ed (2007) at paragraph 26.20.

requirements in the ISM Code ship owners are complying with their obligation to exercise due diligence. It is for this reason that many scholars such as; Jose Alcantara, Nikaki Theodora and Poomintr Sooksripaisarnkit (to name a few) are of the opinion that the Rotterdam Rules do not increase the duration of the obligation to provide a seaworthy vessel. The Rotterdam Rules do not introduce anything novel in this respect, they merely bring private law obligations of the carrier in line with its public law obligations (the ISM Code).

#### **4.4.2 The ISPS Code in relation to the carrier's obligation to provide a seaworthy vessel**

As a way of introduction it should be noted that unlike the ISM Code, the ISPS Code does not deal with the maintenance of the vessel, training of the crew and crew competence or machinery (physical aspects of the seaworthiness of the vessel).

The ISPS Code deals with the training of certain crew members responsible for specific security duties in relation to navigational operations of the ship and emergencies that may arise on board the vessel, impacting on the seaworthiness of the vessel e.g. firefighting skills. It however, does not address crew members' duties relating to the updating of vessel documents e.g. charts, manual etc.<sup>160</sup> The ISPS Code prescribes security duties that Security Officers and other crew members must comply with on board the vessel.<sup>161</sup> Such officials will have to undergo specific training which is detailed within the Code. Additionally, the ISPS Code prescribes that the carrier is to provide the vessel with adequate security equipment e.g. fence, lights etc.<sup>162</sup> Furthermore, the ISPS Code obliges the carrier to keep certain records regarding changes in levels of security, breaches of security, ship security plan etc.<sup>163</sup> If the carrier complies with the requirements set out in the ISPS Code, it will be awarded a compliance certificate by the administrator, and these certificates must be kept on board.<sup>164</sup> This has an impact on the seaworthiness of the vessel; the rationale is that the ISPS Code requires that the vessel has to comply with its requirements to obtain certain certificates. In the event that the vessel does not comply this will result in invalidation of the certificates issued under the Code. Such invalidation may result in the authority

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<sup>160</sup> Kassem *op cit* n 9 at page 225.

<sup>161</sup> Section 11 of the ISPS Code.

<sup>162</sup> The fence helps keep pirates away from the vessel and the lights assist with the navigation of the vessel at night.

<sup>163</sup> Section 9 of the ISPS Code.

<sup>164</sup> Kassem *op cit* n 9 at page 226.

at the port of destination preventing the ship from entering, from loading/unloading or leaving the port.<sup>165</sup>

According to the ISPS Code, the vessel has the obligation of carrying all the documents required by the law and regulation of its flag state, those required by the country that the vessel is visiting, or the local administration of that country.<sup>166</sup> Where a vessel does not possess documents required by the ISM or ISPS Code, the vessel will be found to be unseaworthy for the aforementioned reasons.<sup>167</sup> However where a vessel does not possess certain documents but can get possession of them quickly (without delay), the vessel will not be found unseaworthy.<sup>168</sup>

Consequently, the ISPS Code requires that the carrier carries valid compliance certificates at all times during the voyage (not limited to ‘before and at the beginning of the voyage’). Even though the Hague and Hague Visby Rules only require the carrier to maintain a seaworthy vessel ‘before and at the beginning of the voyage’, the ISPS Code requires the carrier to have valid documents and certificates ensuring seaworthiness of the vessel at the beginning as well as during the voyage, which is in line with the seaworthiness requirements contained in the Rotterdam Rules.

#### **4.5 Conclusion**

It is therefore submitted that the extension of the carrier’s liability to provide a seaworthy vessel throughout the voyage and not just at the beginning and commencement of the voyage is not a novel concept. This extension provided for in the Rotterdam Rules is merely giving effect to compliance standards ensuring seaworthiness of the vessel that carriers in most SOLAS nations are already obliged to comply with.

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<sup>165</sup> Kassem *op cit* n 9 at page 226.

<sup>166</sup> *Ibid* at page 230.

<sup>167</sup> *The Derby* [1985] 2 Lloyd’s Rep 325.

<sup>168</sup> *The Delian Spirit* [1971] 1 Lloyd’s Rep 64.

## Chapter 5: Limitation of the Carrier's Liability

### 5.1 Introduction

The Hague Visby and Rotterdam Rules contain a list of exceptions which exempt the carrier from liability in the event of loss or damage to the cargo provided that the vessel was seaworthy at the relevant times. In this chapter, the writer provides a brief overview on the burden of proof in cargo claims and an in-depth examination of some of the commonly invoked exceptions contained in the Hague Visby Rules. The primary focus will however be on the controversial negligent navigation exception that the carrier may rely on in a cargo claim. Furthermore, the writer will examine the rationale for the abolition of the negligent navigation exception in the Rotterdam Rules which, critics of the Rules claim to be “the only saving grace” of the Rotterdam Rules.<sup>169</sup>

### 5.2 Burden of proof

#### 5.2.1 Burden of proof under common law

When determining who bears the burden of proof in cargo claims, the court must take heed of the maxim of “he who asserts must prove”.<sup>170</sup> At common law, the cargo owner must prove the loss and the cause of the loss; the carrier may then prove that there is a limitation or immunity that is plausible under the contract or statute and that it is categorised as a defence to a cargo claim.<sup>171</sup> At common law, exception clauses were narrowly and strictly interpreted either for or against the carrier i.e. there was no grey area.<sup>172</sup>

#### 5.2.2 Burden of proof under the relevant carriage regimes

At first glance (with the exception of the extension of the period of liability of the carrier), the Rotterdam Rules appear to prescribe an order of proof in cargo claims similar to that provided for in the Hague Visby Rules.<sup>173</sup>

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<sup>169</sup> JM Alcantara and *et al* “Particular concerns with regard to the Rotterdam Rules” (2010) 2 Cuadernos de Derecho Transnacional.

<sup>170</sup> *Szymonowski & Co v Beck & Co* [1923] I KB at 466.

<sup>171</sup> Hare *op cit* n 1 at page 788.

<sup>172</sup> *The Hydaspes* [1903] 20 SC 325 at 328.

<sup>173</sup> Tetley *W Marine Cargo Claims* 4 ed (2008) at page 351.

### **i. Burden of proof under the Hague Visby Rules**

Article IV Rule 1 of the Hague Visby Rules states that:

“Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article”.

Under the Hague Visby Rules, which is incorporated into the South African Carriage of Goods by Sea Act, in a cargo claim the onus of proof shifts from the cargo owner to the carrier and *vice versa*. According to Hare, exceptions and limitations are raised by the carrier as ‘substantive defences’ in the carrier’s plea to a cargo claim.<sup>174</sup>

To illustrate the effect of the shifting of the burden of proof, the writer will explain how this is done in practice. Under both the Hague Visby and Rotterdam Rules, the initial burden of proof (*prima facie* case) falls on the cargo claimant who has to establish that the loss or damage of the cargo took place during the period of the carrier's liability.<sup>175</sup> Once this is established, the carrier's liability is presumed and the burden of proof then shifts to the carrier.

Once the cargo claimant establishes the abovementioned *prima facie* case, the carrier must prove:

- “i) the cause of the loss;
- ii) due diligence to provide a seaworthy vessel; and
- iii) one of the seventeen exculpatory clauses listed in article IV.2, among which appears the absence of fault on the part of the carrier and its agents”.<sup>176</sup>

If the carrier successfully meets these requirements, the cargo claimant must prove either negligence of the carrier or lack of care for the goods by the carrier. The cargo claimant and the carrier are then respectively given the right to put forward their arguments as well as present

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<sup>174</sup> This is in South African practice: Hare *op cit* n 1 at page 788.

<sup>175</sup> Article 17.1 of the Rotterdam Rules.

<sup>176</sup> Katsivela ‘Overview of ocean carrier liability exceptions under the Rotterdam Rules and the Hague/Visby Rules’ (2010) 40 *Revue générale de droit* at page 423.

counterproof.<sup>177</sup> Tetley describes the shifting of the burden of proof abovementioned as the ‘ping pong conduct of a cargo claim’.<sup>178</sup>

## ii. Burden of proof under the Rotterdam Rules

The basis of the carrier’s liability is set out in article 17 of the Rotterdam Rules. Article 17 is a complicated and unnecessarily wordy provision. In this section the writer unravels the provision to explain how the burden of proof shifts from the carrier to the cargo claimant and vice versa.

Under the Rotterdam Rules, once the cargo claimant establishes a *prima facie* case of loss, damage or delay of the cargo within the period of the carrier’s liability, the burden of proof shifts to the carrier who has to prove either:

- i) that its fault did not contribute to the loss suffered; or<sup>179</sup>
- ii) that the loss suffered was due to one of the maritime immunities contained in the Rotterdam Rules.<sup>180</sup>

If the carrier can establish the existence of one of the maritime immunities contained in the Rotterdam Rules, the burden of proof shifts to the cargo claimant, who must prove any one of the following:

- that the loss suffered was a result of the carriers fault,<sup>181</sup> or
- that the loss suffered was probably a result of a breach of the carriers’ seaworthiness obligation.<sup>182</sup>

If the cargo claimant successfully discharges this onus of proof, the carrier will be presumed liable but will be given the opportunity to provide counterproof asserting that the loss, damage or delay was not caused by or contributed to by any of the following;<sup>183</sup>

- that the loss was not a result of unseaworthiness, or<sup>184</sup>

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<sup>177</sup> Katsivela *op cit* n 176.

<sup>178</sup> Tetley *op cit* n 173.

<sup>179</sup> Article 17.2 of the Rotterdam Rules.

<sup>180</sup> Article 17.3 of the Rotterdam Rules.

<sup>181</sup> Article 17.4.a and 17.4.b of the Rotterdam Rules.

<sup>182</sup> Article 17.5.a of the Rotterdam Rules.

<sup>183</sup> Katsivela *op cit* n 176 at page 425.

<sup>184</sup> Article 17.5.b of the Rotterdam Rules.

- that the carrier had exercised his duty to exercise due diligence in making the vessel seaworthy.<sup>185</sup>

As mentioned in Chapter 3, the Rotterdam Rules seemingly extends the carrier's duty to exercise due diligence to provide a seaworthy vessel during the entire voyage (thereby enhancing the carrier's liability),<sup>186</sup> as opposed to the Hague Visby Rules which requires the carrier to maintain this obligation from 'before and the beginning of the voyage'.<sup>187</sup> In relation to cargo claims under the Hague Visby Rules, before the carrier is given the opportunity to rely on any of the listed maritime immunities, the carrier has the duty to prove that it has fulfilled the minimum standard of due diligence in maintaining a seaworthy vessel 'before and at the beginning of the voyage'. On the other hand, the Rotterdam Rules only impose the burden of proving that it exercised due diligence to a minimum standard of liability on the carrier after it has had the opportunity to rely on one of the listed maritime immunities. Article 17(5)(a) of the Rotterdam Rules appears to place the burden of proving the unseaworthiness of the vessel on the cargo claimant.<sup>188</sup> Despite the fact that the seaworthiness obligation is seemingly extended in the Rotterdam Rules, the carrier is still favoured in this regard, as proving that the vessel is unseaworthy is a difficult task for the cargo claimant because the carrier is in charge of the vessel. What is even more noteworthy is that the immunities under the Rotterdam Rules are not subject to the carrier's proof of the seaworthiness of the vessel.<sup>189</sup>

Article 17.6 of the Rotterdam Rules provides that "when the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article". This means that the carrier will only be liable for a part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable under article 17. This provision gives the court judicial freedom to determine how to apportion liability.<sup>190</sup> There is no similar provision under the Hague Visby Rules.

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<sup>185</sup> Katsivela *op cit* n 176 at page 425.

<sup>186</sup> Article 14 of the Rotterdam Rules.

<sup>187</sup> Article III Rule 1 of the Hague Visby Rules.

<sup>188</sup> Katsivela *op cit* n 176 at page 425.

<sup>189</sup> *Ibid.*

<sup>190</sup> Article 17.6 of the Rotterdam Rules.

## 5.3 The immunities contained in the Hague Visby Rules and the Rotterdam Rules

### 5.3.1 The Hague Visby Rules

#### Article IV

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

- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.
- (b) Fire, unless caused by the actual fault or privity of the carrier.
- (c) Perils, dangers and accidents of the sea or other navigable waters.
- (d) Act of God.
- (e) Act of war.
- (f) Act of public enemies.
- (g) Arrest or restraint of princes, rulers or people, or seizure under legal process.
- (h) Quarantine restrictions.
- (i) Act or omission of the shipper or owner of the goods, his agent or representative.
- (j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
- (k) Riots and civil commotions.
- (l) Saving or attempting to save life or property at sea.
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
- (n) Insufficiency of packing.
- (o) Insufficiency or inadequacy of marks.
- (p) Latent defects not discoverable by due diligence.
- (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.”<sup>191</sup>

The immunities listed above are the maritime exceptions contained in the Hague Visby Rules that may be relied on by a carrier to a cargo claim. In the next section (5.3.2), the writer will, identify

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<sup>191</sup>Article IV of the Hague Visby Rules.

which of these exceptions are repeated in and deleted from the Rotterdam Rules and in the preceding section (5.4) discuss the commonly invoked exceptions.

### **5.3.2 The Rotterdam Rules**

Article 17(a)-(o) of the Rotterdam Rules contains a list of exceptions that the carrier can rely on in the event of a cargo claim.

It is important to note that the Rotterdam Rules contain majority of the defences contained in the Hague Visby Rules with the exception of the negligent navigation defence, which will be examined in greater detail in the section below.<sup>192</sup>

## **5.4 Overview of the defences commonly invoked in light of modern day maritime trade**

In this section the writer will focus on a select few of the exceptions that are commonly invoked by carriers where there is loss or damage of cargo. For the purpose of this study the primary focus is on the negligent navigation exception. The writer will present an in-depth background overview and analysis on this exception. This examination of the negligent navigation exception is imperative in establishing the rationale for its abolishment under the Rotterdam Rules.

### **5.4.1 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**

This defence of the ‘nautical fault’ exception has been described as a ‘notorious’ defence in the maritime world.<sup>193</sup> According to Hare, of all the defences the nautical fault exception attracts the most controversy.<sup>194</sup>

The nautical fault exception was first introduced as a defence 123 years ago by the Harter Act. It has since been incorporated into the Hague and Hague Visby Rules, thus is applicable to the majority of maritime trading nations, including South Africa, that have enacted either of these Rules.<sup>195</sup> Noteworthy is the fact that this exception does not feature in the Hamburg or Rotterdam Rules.

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<sup>192</sup>Article IV Rule 2(a) of the Hague Visby Rules.

<sup>193</sup> S Yuzhou and HH Li ‘The new structure of the basis of liability for the carrier’ (2009) *Institut international pour l’unification du droit privé* at page 935.

<sup>194</sup> Hare *op cit* n 1 at page 799.

<sup>195</sup> *Ibid.*

This defense allows the carrier to escape liability, and refers specifically to the acts or omissions of the carrier, its agents or servants in relation to the navigation or the management of the vessel that leads to the damage or loss of the cargo.<sup>196</sup> The term ‘navigation’ and the duration thereof is interpreted broadly.<sup>197</sup>

Difficulty arises when interpreting the term ‘management’. Management in the context of this exception refers to management of the vessel and not of the cargo. The primary purpose test is utilised where the crew’s actions have an impact on both the vessel and the cargo.<sup>198</sup> When determining what constitutes management of the vessel, one must take heed of the carrier’s primary obligation i.e. to exercise due diligence in maintaining a seaworthy vessel. If the crew’s management of the vessel is something that could have been avoided had the crew undergone proper training, then the carrier may not rely on this exception as the carrier would not have fulfilled its duty to exercise due diligence in making the vessel seaworthy. Hare lists a few examples of what constitutes fault in ‘management of the vessel’:

“Transferring bunkers and vessels’ fresh water from one tank to the other with an error in valve sets causing damage to cargo; failing properly to secure inspection covers in double-bottom tanks which, when being later pressed up with fuel or water, allow ingress into cargo tanks; operating ships’ refrigeration equipment (used primarily for the ships’ own stores) improperly, thereby causing damage to cargo stowed therein; and want of proper attention to pumps and waste pipes used primarily for pumping a ship’s bilges have all been treated as fault in management of the vessel”.<sup>199</sup>

According to Hare, an issue that often surfaces when invoking the negligent navigation defence is a question of whether the error in navigation arose as a ‘*bona fide* error made by a competent seaman’ or where a mariner relies on ‘charts or other information or navigational aids incorrectly supplied or updated by the owner in want of its obligation to exercise due diligence to make the ship seaworthy’.<sup>200</sup> Hare points out that principle of causation is utilised to resolve this issue.<sup>201</sup>

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<sup>196</sup> Katsivela *op cit* n 176 at page 430.

<sup>197</sup> Hare describes the interpretation of such as broad as Carver cites a variety of examples that are considered to be an error of navigation e.g. ‘the master ignoring weather bureau warnings of an impending storm’: Hare *op cit* n 1 at page 799.

<sup>198</sup> The United States resolved this issue by using the primary purpose test to determine whether the action of the crew was performed in the interests of the vessel or the cargo: *Ibid* at page 800.

<sup>199</sup> Hare *op cit* n 1 at page 800.

<sup>200</sup> *Ibid*.

<sup>201</sup> *Ibid*.

As mentioned in Chapter 3 of this study, the carrier has an obligation to make the vessel seaworthy and this requirement of seaworthiness comprises three aspects i.e. the obligation is to provide a vessel that is properly equipped and in good physical condition, cargo-worthy and is managed by skilled crew members.<sup>202</sup> Thus where an error made by a seaman in the management of the vessel appears to be due to incompetence, this creates doubt as to whether the vessel was manned by properly trained and skilled crew members. In these circumstances, it may be found that the cause of the loss or damage was as a result of the carrier not fulfilling its obligation to exercise due diligence in making the vessel seaworthy and the carrier may be unable to rely on the nautical fault exception due to its failure to properly man the vessel.<sup>203</sup>

The nautical fault exception was recently invoked in *The Tasman* case.<sup>204</sup> In this case, the master deviated from the agreed navigational route of the voyage and chose a shorter course. The vessel hit rocks along the new route resulting in damage to its hull. Seawater entered the vessel, but the master proceeded with the voyage without informing the ship-owner or relevant authorities of the damage. It was established that the cargo sustained water damage due to the delay of the master in taking appropriate measures to mitigate such damage. The master attempted to conceal the route deviation and grounding. It was found that the master continued to steam the vessel for a few hours after the grounding, fraudulently concealed the deviation of the vessel from the course plotted on the chart and chose not to timeously inform the relevant authorities of the damage sustained to the vessel. In this case the Court held that a ship owner could rely on the negligent navigation exception contained in the Hague Visby Rules based on 'barratry', thus introducing barratry as the only qualification to this exception.<sup>205</sup> Barratry is established when "damage has resulted from an act or omission of the master or crew done with intent to cause damage, or recklessly and with knowledge that damage would probably result".<sup>206</sup> However, it was held that the master's actions did not amount to barratry, instead the master's intent as pleaded, was to derive a benefit for himself i.e. concealing the unauthorised deviation from the agreed route and choosing not to timeously inform the relevant authorities of the damage done to the vessel, thereby attempting to evade liability.

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<sup>202</sup> Article III Rule 1 of the Hague Visby Rules.

<sup>203</sup> Hare *op cit* n 1 at page 800.

<sup>204</sup> *Tasman Orient Line CV v New Zealand China Clays and Others* [2010] NZSC 37.

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid.*

## 5.4.2 Fire

This exception exonerates the carrier from cargo loss or damage that occurred as a result of fire, provided that the fire did not occur due to the actual fault or privity of the carrier. The carrier will therefore be liable if the fire was a result of his personal fault. The carrier however, will not be liable for the damage or loss caused by the fire that is a result of the negligent actions of its servants or agents.<sup>207</sup> The question of whether personal fault is in existence is a question of fact based on the surrounding circumstances of each case.<sup>208</sup>

The fire exception is one of the two exceptions listed in the Hague Visby Rules which is qualified by the requirement that the loss or damage was not caused by actual fault or privity of the carrier.<sup>209</sup> In order to rely on any of the listed exceptions, the carrier must prove that it has exercised due diligence in making the vessel seaworthy and cargo-worthy before and at the commencement of the voyage. However, in relation to the fire exception, the carrier must prove lack of its actual fault or privity in addition to proving the exercise of due diligence in making the vessel seaworthy.<sup>210</sup> The cargo claimant bears the onus of establishing actual fault or privity on the part of the carrier, and the carrier must prove the fire exception it wishes to rely on.<sup>211</sup>

Determining ‘actual fault or privity’ is a difficult task for the cargo claimant and the level of difficulty is amplified where the carrier is a company.<sup>212</sup> In practice, companies act through their agents and it is often a complex task to decide whether the negligent act in question is to be considered as an act of the organisation or that of its agents.<sup>213</sup> It has been held that the actual fault or privity required is not that of someone who is merely a servant or agent of the company i.e. liable on the basis of vicarious liability.<sup>214</sup> Instead the ‘actual fault or privity’ required is that of someone whose actions are considered to be that of the company.<sup>215</sup> Such person can be described as the ‘directing mind’ of the company.<sup>216</sup>

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<sup>207</sup> Wilson *op cit* n 27 at page 275.

<sup>208</sup> *Ibid.*

<sup>209</sup> Article IV Rule 2(c) and (q) requires that the carrier lacks actual fault or privity: Hare *op cit* n 1 at page 803.

<sup>210</sup> *Ibid* at page 804.

<sup>211</sup> *Ibid.*

<sup>212</sup> Wilson *op cit* n 27 at page 275.

<sup>213</sup> *Ibid.*

<sup>214</sup> Viscount Haldane LC in *Lennards Carrying Co v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713.

<sup>215</sup> *Ibid.*

<sup>216</sup> Lord Denning in *Bolton (Engineer) Co Ltd v Graham & Sons Ltd* [1957] 1 QB 159 at 172. In this case it was held that the actions of a managing director constituted the actions of the company.

Carriers are entitled to delegate performance of certain duties to its servants or agents and are considered to have adequately fulfilled such duties provided that due care was exercised in delegating such duties.<sup>217</sup> The negligence of such subordinates will not usually equate to ‘actual fault or privity’ on the part of the carrier.<sup>218</sup> In the event that the carrier delegates performance of certain duties to the master of the vessel (as is often done in practice), it is required to adequately supervise the masters actions.<sup>219</sup> A lack of such supervision may equate to ‘actual fault or privity’ on the part of the carrier, preventing the carrier from relying on such exception.<sup>220</sup>

Wilson explains that English carriers rarely rely on the fire exception set out in the Hague Visby Rules, but rather turn to section 502(1) of the UK Merchant Shipping Act (the Act).<sup>221</sup> Section 502 of the Act deals with the exclusion of liability. According to Wilson, the fire exception set out under the Hague Visby Rules will soon become even less popular among English carriers due to the replacement of section 502(1) of the 1894 Act with section 18 of the Merchant Shipping Act of 1979 (the ‘1979 Act’).<sup>222</sup> Under section 18 of the 1979 Act, the cargo claimant bears the burden of proving that the fire was a result of the carrier’s “personal act or omission, committed with intent to cause such loss, or recklessly, and with knowledge that such loss would probably result”. This would be difficult for the cargo claimant to prove due to the subjectivity of the qualification.<sup>223</sup>

However according to Wilson there are two advantages that are afforded to carriers under the Hague Visby Rules that are not present under the UK Merchant Shipping Act.<sup>224</sup> Firstly, the Hague Visby Rules apply to all carriers who are subject to the Rules, while the UK Merchant Shipping Act only applies to owners of British ships.<sup>225</sup> Secondly, the UK Merchant Shipping Act can only be relied upon in this instance when the fire is on the carrying vessel itself, however, the fire

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<sup>217</sup> Wilson *op cit* n 27 at page 276.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*

<sup>221</sup> The Merchant Shipping Act of 1894.

<sup>222</sup> Wilson *op cit* n 27 at page 277.

<sup>223</sup> The qualification mentioned is that of proving the carriers ‘personal act or omission, committed with intent to cause such loss, or recklessly, and with knowledge that such loss would probably result’.

<sup>224</sup> Wilson *op cit* n 27 at page 277.

<sup>225</sup> *Ibid.*

exception under the Hague Visby Rules extends to cargo damage or loss resulting from fire that occurred at any stage during the entire shipping operations i.e. from tackle to tackle.<sup>226</sup>

The South African Merchant Shipping Act,<sup>227</sup> does not contain a provision similar to that contained in section 18 of the UK Merchant Shipping Act pertaining to fire exceptions. The South African Merchant Shipping Act gives effect to the provisions of the fire exception set out in the Hague Rules.<sup>228</sup>

It was held in the *Maxine Footwear*<sup>229</sup> case (the facts of this case are mentioned in Chapter 3 of this study), that the fire exception under the Hague Visby Rules cannot be invoked where the carrier failed to exercise due diligence in maintaining a seaworthy vessel from the period ‘before and at the beginning of the voyage’, and the loss or damage to cargo resulted from such failure. The ship owner in this case did not bear any ‘actual fault or privity’ however, it failed to exercise due diligence in maintaining a seaworthy vessel at the required period and the loss was a result of this failure.<sup>230</sup> When the question arises whether the carrier can rely on this immunity where there are both unseaworthiness and fire on the vessel, it will be answered by applying the principle of causation.

Despite the complexities arising due to the qualification of ‘actual fault or privity’, the fire exception proves helpful in that it extends to the coverage of damage caused to the cargo due to fire extinguishing methods as well as smoke damage.<sup>231</sup>

### **5.4.3 Perils, dangers and accidents of the sea or other navigable waters**

This exception exonerates the carrier from cargo loss or damage that occurs due to natural or accidental occurrences out at sea. This exception according to Wilson is in scope broader than that of the ‘act of God’ immunity in that it extends to any damage or loss caused by “risks peculiar to

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<sup>226</sup> Wilson gives the example of damage or loss that occurred to the cargo while on board a lighter (a flat bottomed vessel used to transfer cargo onto the ship used for the contemplated voyage) during the discharging operation is covered under the Hague Visby Rules: Wilson *op cit* n 27 at page 277.

<sup>227</sup> Act 57 of 1951.

<sup>228</sup> Hare *op cit* n 1 at page 802.

<sup>229</sup> *Maxine op cit* n 105.

<sup>230</sup> *Ibid* at 113.

<sup>231</sup> That is damage resulting from water or other means used to extinguish fires on board a vessel, as well as damage resulting from smoke in the case of fire on board the vessel: Hare *op cit* n 1 at page 804.

the sea, or to the navigation of a ship at sea, which cannot be avoided by the exercise of reasonable care”.<sup>232</sup>

It may therefore be invoked where loss or damage is a result of the vessel being steered onto rocks in a gale, vessel collision,<sup>233</sup> or heavy weather etc.<sup>234</sup> Where a vessel collides with another vessel and there is damage or loss, in order for the carrier to successfully invoke this immunity, the carrier must not be at fault.<sup>235</sup>

According to Hare, heavy weather as a peril of the sea is the most commonly invoked defence by carriers.<sup>236</sup> The Hague Visby Rules allow the carrier to escape liability for a cargo claim arising due to heavy weather. A common misconception is that heavy weather as a defence to a cargo claim is synonymous with ‘bad weather’.<sup>237</sup> Almost 90% of the globe’s shipping trade is governed by the Hague or Hague Visby Rules. However these jurisdictions may interpret the phrase ‘heavy weather’ differently; some applying it broadly while others applying it more narrowly e.g. American, English, Australian and South African courts have all attached their own interpretations of this phrase.<sup>238</sup>

In order for a carrier to escape liability in a cargo claim on the basis of heavy weather, American courts require the cargo loss or damage to be a result of a severe storm that could not have been prevented, suggesting a degree of unpredictability.<sup>239</sup> It may prove difficult to rely on this defense in the US due to accurate modern weather forecasting techniques that eliminate the element of unpredictability of the weather. It is clear that the US courts adopt a narrow approach when applying this defense and the success of the carrier depends on the merits of the case.<sup>240</sup>

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<sup>232</sup> Wilson *op cit* n 27 at page 266.

<sup>233</sup> *The Xantho* (1887) 12 AC 503.

<sup>234</sup> Hare *op cit* n 1 at page 795.

<sup>235</sup> Wilson *op cit* n 27 at page 266.

<sup>236</sup> Hare *op cit* n 1 at page 795.

<sup>237</sup> M Hartwell *et al* ‘Heavy weather, the carriage regimes and notes of protest’ (August 2014), *Norton Rose Fulbright, South Africa*, available at <http://www.nortonrosefulbright.com/knowledge/publications/119814/heavy-weather-the-carriage-regimes-brand-notes-of-protest> accessed on 20/04/2016.

<sup>238</sup> Hare *op cit* n 1 at page 796.

<sup>239</sup> *The Naples Maru* 106 F.2d 32, in this case cargo of sugar was damaged and the carrier proved that ‘perils of the sea’ was the cause of the loss. The court held that the cargo claimants failed to prove negligence of the carrier and that one of the exceptions existed. According to judge Learned Hand: “The phrase, “perils of the sea” has at times been treated as though its meaning were esoteric.”

<sup>240</sup> Hartwell *op cit* n 237.

It was held by Lord Herschell of the English House of Lords that: “There must be some casualty, something which could not be foreseen as one of the necessary incidents of the voyage.”<sup>241</sup> This suggests that English courts allow the carrier to rely on the ‘peril of the sea’ immunity even if the heavy weather that caused the loss or damage was reasonably foreseeable, provided that there is some element of unpredictability to the event.<sup>242</sup> Furthermore, the incident relied on when invoking this defense, need not be uncommon e.g. encountering rough sea during a voyage is not an uncommon incident, however it may be relied upon as an incident falling within the scope of the ‘peril of the sea’ immunity.<sup>243</sup> This stands, provided that the carrier has exercised due diligence in making the vessel seaworthy before and at the commencement of the voyage.<sup>244</sup> This approach is slightly broader than that adopted by US courts.

The Australian courts take a slightly different approach to the English Courts with regard to the ‘peril of the sea’ exception. In *The Bunga Seroja* case,<sup>245</sup> a ship sailed into a storm and encountered conditions that had been forecasted and expected. The cargo suffered damage and the court upheld the ‘peril of the sea’ immunity due to the fact that it had found that the master took reasonable steps to prevent damage of the cargo and to prepare the ship for her voyage. This suggests a much broader interpretation of incidents falling within the scope of the heavy weather defense, provided that the carrier can prove that it exercised due diligence in making the vessel seaworthy before and at the commencement of the voyage. This decision is however only binding in Australia.

South African courts interpret the relevant provisions of the Carriage of Goods by Sea Act,<sup>246</sup> in a manner similar to that of English Courts. In order for a carrier invoking this defence to be successful, it must prove that cargo loss or damage is as a result of the sea’s wind or waves and not any incident out of the sea.<sup>247</sup> Even when foreseen and not uncommon incidents are encountered during a voyage, these may fall within the scope of this exception provided that there is some element of unpredictability and that such damage did not arise from want of the carrier

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<sup>241</sup> *The Xantho* *op cit* n 233.

<sup>242</sup> Hare *op cit* n 1 at page 796.

<sup>243</sup> Carver *op cit* n 82 at page 214 and 215.

<sup>244</sup> *Ibid.*

<sup>245</sup> [1999] 1 Lloyds Rep 512.

<sup>246</sup> The Carriage of Goods by Sea Act 1 of 1986.

<sup>247</sup> Hare *op cit* n 1 at page 796.

exercising due diligence in making the vessel seaworthy before and at the commencement of the voyage.<sup>248</sup>

#### 5.4.4 Insufficiency of packaging

This defence exonerates the carrier from liability where there is cargo loss or damage due to insufficient packaging. The shipper is under most circumstances responsible for the packaging of the cargo including containers.<sup>249</sup> Thus where there is insufficiency of packaging, it is the fault of the shipper and this is the rationale on which this defence is based. Insufficient packaging does not refer to the normal or traditional packaging in the trade. It refers to the packaging of cargo based on a number of surrounding circumstances i.e. “the nature of the goods, the way the packing is made, packing usages and other variants of the journey”.<sup>250</sup> It is for this reason that the carrier cannot be liable for damages resulting from want of proper packaging, when the packaging of the cargo is performed by or on behalf of the shipper.<sup>251</sup>

The nature of the goods, the existence of a container and of a clean bill of lading are three important factors considered in determining whether the carrier will be exonerated of liability using this defence.<sup>252</sup> In the event that the cargo is conferred for loading and it is packaged in a manifestly insufficient manner and the carrier accepts it for loading, then it may run into difficulty when invoking this defence.<sup>253</sup> A clean bill of lading in the hands of the endorsee for value is conclusive proof of the condition of the cargo (this includes the packaging that the cargo is shipped in).<sup>254</sup> If the carrier is aware of the insufficiency or unsuitability of the packaging, it would be bound by a higher standard of proper care of the cargo during the voyage.<sup>255</sup> Thus when a carrier who has knowledge of the insufficiency of the packaging issues a clean bill of lading,<sup>256</sup> he cannot escape liability by invoking the insufficiency of packaging defence under the Hague Visby and Rotterdam

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<sup>248</sup> Hare *op cit* n 1 at page 796.

<sup>249</sup> Article 27.3 of the Rotterdam Rules.

<sup>250</sup> Katsivela *op cit* n 176 at page 452.

<sup>251</sup> *Ibid.*

<sup>252</sup> Exonerating the carrier (The Hague Visby Rules) or presuming the carrier not at fault (the Rotterdam Rules): *Ibid.*

<sup>253</sup> Hare *op cit* n 1 at page 806.

<sup>254</sup> *Ibid.*

<sup>255</sup> If the carrier fails to fulfil this higher standard of proper care of cargo, then the loss or damage of the cargo may shift from the insufficiency of packaging, to failure of proper and careful care of cargo, that Article III Rule 2 of the Hague Visby Rules require: *Ibid.*

<sup>256</sup> A clean bill of lading is one not subject to any qualifications by the carrier: *Ibid.*

Rules.<sup>257</sup> Under both the Hague Visby and Rotterdam Rules,<sup>258</sup> the carrier “is estopped from doing so because of the third party's good faith and reliance upon the transport document”.<sup>259</sup> Therefore, in order to rely on this immunity, the carrier must qualify its reservation in respect of the packaging of the cargo on the mates receipt and on the face of the bill of lading, in order to draw to the attention of third parties its reservations regarding the packaging of the cargo.<sup>260</sup> The same applies equally to the insufficiency or inadequacy of marks and the inherent vice exception.

In *Silver v Ocean*,<sup>261</sup> a cargo of cans of frozen eggs were shipped, and the bill of lading did not contain any reservations. Thus, a clean bill of lading ‘in apparent good order and condition’ was issued. When the cargo was unloaded, it was evident that a few of the cans were damaged i.e. some contained gashes and pinholes. The court held that the gashes appearing on the cans were ‘discernible by reasonable external examination’ and the carrier was therefore estopped from denying that the cans which were gashed were shipped ‘in good order and condition’. It was however found that the pinholes on the cans were not evident upon reasonable external visible examination and the carrier was therefore able to successfully defend itself on this ground.<sup>262</sup> Thus where the insufficiency of packaging of the cargo is discernible by reasonable external examination, the carrier cannot successfully rely on the insufficiency of packaging or inadequacy of marks defence.

#### **5.4.5 Insufficiency or inadequacy of marks**

This defence exonerates the carrier from liability where there is cargo loss or damage due to insufficiency or inadequacy of marks. It is evident by the wording of this exception that it contains two exceptions for the carrier i.e. exoneration of the carrier’s liability where there is either insufficiency or secondly inadequacy of marks. The shipper has the duty of providing the leading marks necessary for the carrier to identify the cargo.<sup>263</sup> Therefore, where there is insufficiency or inadequacy of marks it is the fault of the shipper and not the carrier.<sup>264</sup> The shipper is exposed to strict liability for inaccurate information regarding the cargo i.e. insufficient marking. The

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<sup>257</sup> Katsivela *op cit* n 176 at page 452.

<sup>258</sup> Article 58.2 of the Rotterdam Rules.

<sup>259</sup> Katsivela *op cit* n 176 at page 452.

<sup>260</sup> Third parties are the shipper, consignee and any endorsee: Hare *op cit* n 1 at page 663.

<sup>261</sup> *Silver v Ocean Steamship* [1929] All ER 611 (CA).

<sup>262</sup> *Ibid*, per Scrutton LJ.

<sup>263</sup> Article 36.1.b of the Rotterdam Rules.

<sup>264</sup> Katsivela *op cit* n 176 at page 446.

rationale for this stems from the fact that, it is deemed that the shipper guarantees the accuracy of the information required for the compilation of the contract particulars.<sup>265</sup>

#### **5.4.6. Latent defects not discoverable by due diligence**

This defence exonerates the carrier from liability where there is cargo loss or damage due to a latent defect on the vessel or of equipment on the vessel that is not discoverable by due diligence.<sup>266</sup>

In relation to this defence, a latent defect refers to flaws with the vessel or cargo holding equipment that would not be discovered readily by reasonable inspection.<sup>267</sup>

This is a common law exclusion of liability that is incorporated into both the Hague Visby and Rotterdam Rules. The difference between the provisions in the two sets of rules, is the duration of the obligation to exercise due diligence. It is evident from the wording of this exception, that it coincides with the carrier's obligation to exercise due diligence in providing a seaworthy vessel. However, the two are not the same.<sup>268</sup> There are three fundamental differences between the two. Firstly, the latent defect exception requires, as a prerequisite, that the defect in question could not have been discovered by due diligence regardless of whether there is proof that the discovery took place.<sup>269</sup> In contrast under both the Hague Visby Rules and the Rotterdam Rules, the exercise of due diligence in making the vessel seaworthy is mandatory and therefore must occur.<sup>270</sup> Secondly, seaworthiness under the Hague Visby and the Rotterdam Rules refers to the vessel's seaworthiness, cargo worthiness, equipment and crew; while the latent defect exception only relates to the vessel and the cargo's handling equipment.<sup>271</sup> Thirdly, as explained in chapter 3, under the Hague Visby Rules, the carrier has the duty to exercise due diligence in providing a seaworthy vessel from before and at the beginning of the voyage, however under the Rotterdam Rules, the carrier has such duty throughout the voyage. Thus, under the Rotterdam Rules the obligation to provide a seaworthy vessel, like the latent defect exception, is applicable throughout the duration of the voyage and not just before and at the commencement of the voyage.<sup>272</sup>

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<sup>265</sup> Article 31.2 of the Rotterdam Rules.

<sup>266</sup> Katsivela *op cit* n 176 at page 447.

<sup>267</sup> *Ibid.*

<sup>268</sup> Tetley *op cit* n 173 at page 1210.

<sup>269</sup> Katsivela *op cit* n 176 at page 447.

<sup>270</sup> Article III Rule 1 of the Hague Visby Rules and Article 14 of the Rotterdam Rules.

<sup>271</sup> Katsivela *op cit* n 176 at page 447.

<sup>272</sup> *Ibid.*

## 5.5 Rationale for the abolishing of the negligent navigation exception

The nautical fault exception is an unpopular defence in a number of countries that have primarily cargo owner interests such as; Austria, Romania, Syria, Jordan and Botswana, which are some of the signatories of the Hamburg Rules that has done away with this defence. The defence does not feature in the Hamburg and the Rotterdam Rules. To understand the reasoning for the abolition of the exception in the Rotterdam Rules, one has to understand the rationale for its inclusion, rooted in the Harter Act and for its exclusion from the Hamburg Rules.

The Harter Act of 1893 dates back approximately one hundred and twenty three years. During the 19th century, once the vessel and subsequently the cargo had left the carrier's physical care, the carrier had little or no instant means of communication with the crew. This was due to the lack of technology and instant means of messaging in this era. Thus, the prime reason for the inclusion of the negligent navigation exception was that it would have been unfair to hold the carrier liable for any "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",<sup>273</sup> after the vessel left its care and it had no means of communicating with the master or crew of the vessel throughout the duration of the voyage.

While negotiating the Hamburg Rules, a minority of the delegates favoured the retention of the negligent navigation exception.<sup>274</sup> However, the vast majority felt that this exception "was no longer justified, particularly since it had no parallel in other fields of law relating to contract. The compromise between these points of view was to delete the nautical fault exception but to set the limits of liability of the carrier at relatively low amounts (only slightly above those of the Visby Protocol) and to allow the limits of liability to be broken only in case of the carrier's serious misconduct".<sup>275</sup> "Another element of the compromise was to create an exception to the 'presumed fault' basis on the carrier's liability by requiring the claimant to prove the carrier's fault or neglect in the case of loss, damage or delay in delivery caused by fire".<sup>276</sup>

Preceding these negotiations, there have been more informative discussions and debates on the abolishment of the negligent navigation exception and it should be noted that the view favoured is

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<sup>273</sup> Article IV Rule 1(a) of the Hague Visby Rules.

<sup>274</sup> L Christoff and J Andrew *A Guide to the Hamburg Rules: from Hague to Hamburg Via Visby* 2 ed (1991) at page 87.

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*

that the exception should be abolished. The CMI pointed out that the negligent navigation exception and the fire exceptions are the ‘traditional exceptions’ contained in the Hague and Hague Visby Rules and that there is strong opposition against retaining these exceptions, especially from cargo owning nations.<sup>277</sup>

Furthermore, research reveals that the global industry perceptions are that the removal of the exception from the Rotterdam Rules is a fundamental step towards modernising and harmonising international transport law. The rationale behind the deletion of the negligent navigation exception is therefore, to hold ship owners to the same standards of liability as operators of other modes of transport,<sup>278</sup> thus creating a more equitable balance between the interests of the cargo owner and the ship owner. In addition modern day technology e.g. Global Position Services (GPS) reduces accidents due to error in navigation from occurring.

The UNCITRAL reports further reveal that during the discussions held by the Working Group tasked with facilitating the negotiations surrounding the Rotterdam Rules, a number of delegates were of the view that the negligent navigation exception should not be abolished as it would result in an ‘economic impact on insurance practice’ as a result of an alteration of the current “risk allocation between the carrier and the cargo owner”.<sup>279</sup> There were however an even larger number of delegates who did not agree with this view. This increased cost implication arises from large cargo claims against the negligent navigation of the vessel by the crewmen, as the ship owner may no longer rely on the negligent navigation exception.<sup>280</sup> However, these increased cost implications may be minimised by the provisions in the Rotterdam Rules (Article 59 and 60) that allow the ship owner to limit its liability, as well as the Convention on Limitation of Liability for Maritime Claims, 1976.<sup>281</sup> In addition, to soften the blow of the cost implications of the abolishment of the negligent navigation exception, ship owners may also reasonably increase freight charges. This does not mean that cargo owners would be exposed to excessive costs of freight, as there will be a

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<sup>277</sup> Report of Working Group III (Transport Law) on the work of its ninth session (A/CN.9/WG.III/WP.21) at paragraph 69, available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V02/501/49/PDF/V0250149.pdf?OpenElement> accessed on 03/05/2016.

<sup>278</sup> Sooksripaisarnkit *op cit* n 33 at page 314.

<sup>279</sup> Report of Working Group III (Transport Law) on the work of its tenth session (A/CN.9/525) at paragraph 36, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V02/585/44/PDF/V0258544.pdf?OpenElement> accessed on 03/05/2016.

<sup>280</sup> *Ibid.*

<sup>281</sup> *Ibid.*

penalty by industrial mechanisms for carriers who increase the cost of freight in a deceitful manner.<sup>282</sup> The best way for carriers to avoid the increased cost implications would be for them to be proactive by preventing accidents from occurring due to negligent navigation i.e. improve and enhance safety and security measures, as well as focusing on methods to eliminate or reduce liability for negligent navigation.<sup>283</sup>

## 5.6 Conclusion

The need for the negligent navigation exception no longer exists in the modern sea trade industry. From the above findings, it would seem that the speculated cost implications attached to such abolition, may be avoided or minimised by ship owners' being more proactive when implementing safety standards and regulations. It is therefore submitted that, while the Rotterdam Rules has its inherent flaws e.g. the complexity of the burden of proof provisions, the redeeming feature of the Rules is that the negligent navigation exception has been excused from the list of exculpatory clauses.

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<sup>282</sup> Report of the Working Group III *op cit* n 279.

<sup>283</sup> "This can be done, for example, by appointing owners' representatives regularly joining the vessel to provide ship staff with guidance, especially when significant decisions in relation to navigation have to be made. Placing many procedure manuals on board for ship staffs to comply would no longer be efficient. Regular drillings should be conducted on shore and on board for ship staff and shore staff so they are familiar with decision making and they can co-ordinate with each other in emergency situations. Promotion of ship staffs into significant ranks such as the Master needs to be carefully considered, taking into account experiences of relevant ship staffs": Sooksripaisarnkit *op cit* n 33 at page 314.

## Chapter 6: Conclusion

Due to the evolving nature of international trade, the laws governing sea trade are meant to be flexible and subject to changes brought about by globalisation and modern technological advancements. The Hague and Hague Visby Rules have been widely accepted by nations which are considered to have a strong influence in the maritime trade industry. As illustrated in this study, the Hague and Hague Visby Rules have been widely accepted by nations with a strong maritime influence; unlike the Rotterdam Rules, which have not been widely accepted and notably, none of South Africa's major trading partners (the UK, the US, China etc.) have ratified it.

As pointed out in this study, the Hague and Hague Visby Rules have their roots in the Harter Act, which dates back to the 1800s and therefore does not take into consideration the evolution of modern day trade and technology. Therefore, it is submitted that while the Rotterdam Rules do not truly enhance the carrier's seaworthiness obligation by extending the duration of the obligation beyond the commencement of the voyage, as it is merely a repetition of good shipping practices already in force; it does however, bring some clarity to cargo claims by expressly providing an extension of the carriers obligation. Furthermore, the Rules bring sea carriers' liability in line with that of carriers' from other modes of transport (e.g. rail and road carriers) by removing the negligent navigation exception, which is a step in the right direction for the harmonisation of modern carriage laws.

However, the Rotterdam Rules comprise of ninety six narrow and complex provisions, while the Hague Visby Rules contain merely ten, which may be in need of modernisation, but are more reader friendly. It is submitted that, one of the reasons many nations have not welcomed the Rotterdam Rules and many maritime practitioners are wary of these Rules, is due to the fact that adhering to ninety six new as oppose to the familiar ten articles seems like a daunting task. Among these ninety six provisions provided for in the Rotterdam Rules, are the provisions pertaining to the burden of proof requirements in a cargo claims. It is further submitted that the common interpretation of the said provisions, defeat the purpose of the proposed extension of the carrier's liability and operates prejudicially against the cargo claimant. In contrast, the burden of proof requirements set out in the Hague Visby Rules have over the years through judicial interpretation been applied in a fairer and more just manner. It therefore seems that the only redeemable

characteristic (in terms of liability) under the Rotterdam Rules is that the negligent navigation exception does not feature in it.

Furthermore, it does not seem practical or feasible for nations to completely abandon the precedents regarding liability that are attached to the Harter Act, Hague and Hague Visby Rules for a completely new regime which, may conflict with other international conventions and is subject to different interpretations by different jurisdictions due to its ambiguous wording. This would create divergence and not the unity that was hoped for. Thus, it is submitted that due to the fact that the Rotterdam Rules have not been widely accepted, the logical and rational manner in which to proceed would be to merely modify the current widely accepted carriage regimes. Thereby, allowing the many judicial precedents and interpretations created under these regimes to live a longer life span as opposed to the ratification of the Rotterdam Rules.

Even though the Rotterdam Rules have not received the widespread acceptance that was hoped for; it is proposed that from an academic and policy making perspective, further scrutiny of the Rules is of value due to the fact that it is an innovative and plausible international carriage convention that incorporates significant provisions that were not successfully incorporated by its predecessors e.g. it is a multimodal convention allowing for door-to-door coverage. Thus, as much as it has its inherent flaws, the Rules are a step in the right direction towards modernisation and innovation in the maritime transport industry. It may be more widely accepted if it is modified in order to properly balance the competing interests of ship owners and cargo owners, and clears up the ambiguity pertaining to the burden of proof requirements contained under the Rules.

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PLEASE NOTE THAT THE FORM MUST BE COMPLETED IN TYPED SCRIPT. HANDWRITTEN APPLICATIONS WILL NOT BE CONSIDERED

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3.3				

## SECTION 2: PROJECT DESCRIPTION

### 2.1 Project title

A Comparative Analysis of the Carriers Liability Under the Hague Visby and Rotterdam Rules

### 2.2 Questions to be answered in the research

(Set out the critical questions which you intend to answer by undertaking this research.)

- i. Does the obligation to maintain a seaworthy vessel under the Hague Visby Rules materially differ from the obligation under The Rotterdam Rules?
- ii. Whether the extended duration of the carriers' seaworthiness obligation under the Rotterdam Rules is a novel concept?
- iii. Whether there is a material difference of the application of the burden of proof between the Hague Visby and Rotterdam Rules.
- iv. The rationale for the abolishment of the negligent navigation exception from the Rotterdam Rules?
- v. Whether there are impractical cost implications attached to the abolishment of the negligent navigation exception?
- vi. Whether South Africa should ratify the Rotterdam Rules?

### 2.3 Research approach/ methods

I will embark on qualitative research methodology for most of the dissertation and desktop research. For the examination of the seaworthiness obligation I will make use of primary resources (case law) and gather information from journal articles (desktop research). In order to answer my research question I will need to compare The Hague Visby Rules with The Rotterdam Rules thus qualitative research methodology will be utilized.

## SECTION 3: FORMALISATION OF THE APPLICATION

### APPLICANT

I have familiarised myself with the University's Code of Conduct for Research and undertake to comply with it. The information supplied above is correct to the best of my knowledge.

DATE: 16 JUNE 2016

SIGNATURE OF APPLICANT: 

### SUPERVISOR/PROJECT LEADER/DISCIPLINE ACADEMIC LEADER

DATE: 16 June 2016

SIGNATURE OF SUPERVISOR/ PROJECT LEADER/DISCIPLINE LEADER



**RECOMMENDATION OF SCHOOL RESEARCH ETHICS COMMITTEE/HIGHER DEGREES COMMITTEE**

The application is (please tick):

<input type="checkbox"/>	Recommended and referred to the Human and Social Sciences Ethics Committee for further consideration
<input type="checkbox"/>	Not Approved, referred back for revision and resubmission

**NAME OF CHAIRPERSON:** \_\_\_\_\_

**SIGNATURE:** \_\_\_\_\_

**DATE** .....

**RECOMMENDATION OF UNIVERSITY RESEARCH ETHICS COMMITTEE (HUMAN AND SOCIAL SCIENCES)**

The application for Exemption is (please tick):

<input type="checkbox"/>	Approved by Chairperson
<input type="checkbox"/>	Not Approved. Sent back for further clarity and resubmission

If approved, the Exemption Number to be recorded: \_\_\_\_\_

**NAME OF CHAIRPERSON:** \_\_\_\_\_ **SIGNATURE** \_\_\_\_\_

**DATE** .....