UNIVERSITY OF KWAZULU-NATAL ™

INYUVESI YAKWAZULU-NATALI

ARTICLE IV RULE II OF THE PROTOCOL TO AMEND THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES OF LAW RELATING TO BILLS OF LADING: A CRITICAL ANALYSIS OF THE THREE MOST LITIGATED MARITIME DEFENCES AVAILABLE TO THE CARRIER.

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II. DEDICATION

This dissertation is dedicated to my parents, Anil and Nishi, whose sacrifices and love gave me the greatest gift of all: an education, the most precious legacy bestowed by a parent to their child.

III. ACKNOWLEDGEMENTS

All glories to Lord Ganesha, the master of wisdom, guardian of knowledge and remover of obstacles.

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IV. ABSTRACT

The defences of negligent navigation; fire and heavy weather as a peril of the seas will be examined in this study as they have been identified as the most controversial and litigated defences contained in the Hague-Visby Rules. Articles III and IV of the Hague-Visby Rules which are the relevant provisions pertaining to the defences will be critically analysed in the study. Case law of the jurisdictions of the United States of America, the United Kingdom, Australia and South Africa pertaining to the defences will be examined in order to critically analyse and evaluate the defences.

The aim of this study is to examine how these defences are interpreted and applied in different jurisdictions in order to draw conclusions on their relevance and whether they still have a place in modern maritime trade.

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CHAPTER 1: INTRODUCTION

1.1 Introduction

The carrier's obligation to exercise due diligence in making a vessel cargo and seaworthy has been a source of great debate in the field of carriage of goods by sea. Articles III and IV of the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* (hereinafter referred to as 'The Hague-Visby Rules'),[1] has adapted this common law implied obligation into an express obligation on the carrier to exercise due diligence in making the vessel cargo and seaworthy.

Under the Hague-Visby Rules, the carrier in a cargo claim has to prove that it exercised due diligence in all material respects pertaining to the vessel. If the carrier is unable to prove such due diligence, it at the very least must prove that its failure to exercise due diligence was not the cause of the loss or damage to the cargo. If the carrier can prove that the loss arose due to factors other than its lack of due diligence, further defences will remain open to the carrier.[2]

Article IV Rule 2 of The Hague-Visby Rules contains a list of sixteen defences that a carrier may rely upon in order to avoid liability in a cargo claim. This study will however only focus on the below listed three defences, as these are considered to be the most controversial and have been the subject matter of much litigation since the Rules first came into operation. As per Article IV Rule 2 of The Hague-Visby Rules,

> '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;'

[1] In 1969 certain amendments were made to the Hague Rules by the 'Brussels Protocol' with the new amended rules being known as the Hague-Visby Rules.
[2] J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 794.

These are amongst the most common defences that arise in cargo claims globally, but their application across different jurisdictions is what makes them controversial in nature.

Different jurisdictions take different approaches to the application of these defences in cargo claims. Hence, it is of importance to study these three defences in detail and to examine judgments in order to gain insight into the different approaches in the interpretation and application of these defences and the basis for such differences. As the facts of each case are different, it is interesting to examine how these defences are applied in cases where the facts are complex and unique.

1.2 Aim of the Thesis

As highlighted above, the aim of this thesis is to critically analyse and examine the three most litigated and controversial defences of The Hague-Visby Rules, namely; the defence of negligent navigation, the defence of fire and the defence of perils, dangers and accidents of the sea, commonly referred to as the 'heavy weather defence'.

These defences contained in the Hague-Visby Rules can only be relied on by a carrier if it has exercised due diligence in making the vessel cargo and seaworthy prior to the voyage. Examining the standard of this obligation on the carrier and how it is interpreted in different jurisdictions is of importance in gaining insight into the reasons behind the varied application and interpretations of these defences in different jurisdictions and the legal and commercial implications for carriers, shippers and insurers in the maritime industry.

Many Commonwealth nations e.g. South Africa and Australia follow the English approach when adjudicating maritime claims in which these defences have been invoked. However, the United States of America, a major maritime trading nation, is known to deviate from the English approach. It is submitted that studies such as this one, examining the jurisdictional differences in the application of these defences and ascertaining the merits and flaws of each approach in order to make recommendations for the much needed modernising and updating of current carriage liability regimes, will ultimately lead to legal certainty and harmonisation of the laws governing the international carriage of goods by sea.

1.3 Statement of Purpose

The three maritime defences that form the subject matter of this study are considered controversial for inter alia the following reasons:

- They are contained in the Hague-Visby Rules that came into operation many decades ago, which in turn was heavily influenced by the Harter Act[3] that is more than a century old
- These defences do not take into account modern technological and navigational advancements. They are antiquated and do not cater for modern maritime trade to the detriment of cargo-owners.
- They are thought to be unfairly advantageous to the carrier in a cargo claim.

This study therefore looks at how these defences are interpreted and applied in different jurisdictions in order to draw conclusions on the relevance of these defences and whether they still have a place in modern maritime trade. It will also attempt to make practical recommendations on how to update this area of carriage of goods by sea.

1.4 Outline of the Research Questions

The key questions when examining the three most controversial and heavily litigated defences that a carrier may rely upon in a cargo claim:

- Where does the carrier's obligation to provide a cargo and seaworthy vessel for the carriage of goods by sea stem from and how did it evolve to its present form?
- Were there any exceptions to the carrier's obligation historically and are any of these exceptions still relevant?
- What are the conditions attached to the carrier relying on these three defences?
- Who bears the onus of proof and the order it follows in each stage of a cargo claim where the carrier is disputing liability?
- How do the courts approach these three defences in the jurisdictions of the United States of America, Australia, the United Kingdom and South Africa?

[3] The Harter Act of 1893.

- Have the Hague-Visby Rules created uniformity and harmonisation in the application of its provisions relating to the three defences?
- Are the Hague-Visby Rules an effective and modern carriage of goods by sea regime for modernised maritime transportation?

In order to analyse the three defences and to address the research questions based on the defences, court decisions from the above mentioned four jurisdictions will be extensively examined.

1.5 Scope and Limitations of the Thesis

As mentioned, the main objective of this study is to examine the jurisdictional differences in the interpretation and application of the three most controversial and heavily litigated defences available to a carrier in cargo claims. In order to achieve this objective, the study will briefly trace the historical development of the carrier's obligation to provide a cargo and seaworthy vessel and any exceptions available to a carrier in this regard, by examining the common law position and how it has evolved under various carriage regimes.

A comprehensive discussion on all the maritime defences listed under the Hague-Visby Rules is beyond the scope of this study. As mentioned, this study will focus on the negligent navigation defence, the fire defence and the 'heavy weather defence' as provided for under the Hague-Visby Rules. These three defences are identified above as the most controversial and heavily litigated upon defences available to a carrier. Relevant sections of Articles III and IV of the Hague-Visby Rules pertaining to these defences will therefore be examined in this study.

Each defence will be comprehensively dealt with in separate chapters. This study will also examine the carrier's obligation to exercise due diligence, focussing on the standard of this obligation and how the various jurisdictions interpret it in respect of the above three defences. A brief outline of the burden and order of proof in a cargo claim will also be discussed.

In respect of the controversial negligent navigational defence, an overview of the attempt to get rid of this defence in the United Nations Convention on Contracts for

the International Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as the 'Rotterdam Rules')[4] will be included in this study.

Only judgements pertaining to the relevant maritime defences from the jurisdictions of the United States of America, Australia, the United Kingdom and South Africa will be examined in this study.

The one limitation of this study, is the fact that there is very limited reported case law in South Africa, in which the three defences have been interpreted and applied. This limitation negatively impacts this study, as no conclusions can be drawn as to the effective application of the defences in South African maritime law.

1.6 Research Methodology

This is a desktop-based doctrinal research study. The research methodology encompasses an analysis of relevant provisions international conventions and treaties; and a comparative study of foreign and domestic legislation and case law; and scholarly writings. These sources have been utilised in order to examine the judicial interpretation and application of the three defences under the Hague-Visby Rules in different jurisdictions. Some of the notable South African and international scholarly workks examined in this study include those of John Hare, William Tetley, John Wilson and Richard Aitkens.

1.7 Chapter Overview

Chapter 1: *Introduction*, outlines the objectives, relevance, research questions and scope of study. It further provides a brief chapter by chapter overview of the study.

Chapter 2: *The Historical Development of the Common Law Defences Available to an Ocean Carrier in respect of Cargo Claims,* briefly traces the origins of the carrier's obligation to provide a seaworthy vessel and the various common law defences that were available to the carrier throughout the history of seafaring. It examines the evolution of this obligation under early Roman and English law and the implied obligation of the carrier under the American Harter Act. This chapter also looks at the development of The Hague-Visby Rules, ending with a brief comparison of its relevant provisions with that of the Hamburg and the Rotterdam Rules.

[4] The Rules were signed in the port city of Rotterdam in 2009.

Chapter 3: *The Essential Averments of the Claims and Defences under Article III and IV of The Hague-Visby Rules*, is a brief outline of the burden and order of proof that is followed in a cargo claim.

Chapter 4: *The Defence of Negligent Navigation*, this chapter examines the defence provided under Article IV Rule 2(a) of The Hague-Visby Rules. This defence exempts a carrier from liability if a cargo claim resulted from any act or neglect committed by a servant of the carrier in the navigation or management of the vessel. This chapter will examine both the aspects of this defence pertaining to errors in the navigation of the vessel as well as errors in the management of the vessel.

Chapter 5: *The Defence of Fire*, this chapter examines the defence as listed in Article IV Rule 2(b) of The Hague-Visby Rules, which states that the carrier is excluded from responsibility for loss or damage resulting from 'fire, unless caused by the actual fault or privity of the carrier.' This defence is contentious among carriers due to the additional burden it places on carriers to prove the lack of actual fault or privity.[5]

Chapter 6: *The Defence of Heavy Weather as a Peril of the Seas*, is an examination of defence as listed in Article IV Rule 2(c) of The Hague-Visby Rules. This chapter shall also include an analysis of the different approaches taken in the jurisdictions of the United States of America, Australia, the United Kingdom and South Africa by a study of the case law of these jurisdictions.

Chapter 7: *Conclusion*, this thesis will conclude by evaluating the pertinent defences of Article IV Rule 2 of The Hague-Visby Rules, as studied in the preceding chapters and the significance of these defences in present maritime law.

[5] Hare op cit note 2 at 80.

CHAPTER 2: THE HISTORICAL DEVELOPMENT OF THE COMMON LAW DEFENCES AVAILBLE TO AN OCEAN CARRIER IN RESPECT OF CARGO CLAIMS

2.1 Introduction

In this chapter, the author traces the historical development of the common law defenses that were available to the carrier prior to the 19th century under Roman law and later English law. These common law defenses have been codified and adopted by various jurisdictions through the enactment of international conventions and legislation. The first country to enact legislation pertaining to the defenses available to a carrier was the United States of America namely, its enactment of the Harter Act of 1892. This was then followed by *the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (*hereinafter referred to as 'The Hague Rules') in 1924, which was then amended in 1968 and known as the Hague-Visby Rules. The Hamburg Rules followed suit in 1978. The latest international Convention that attempts to regulate the carrier's defenses is the Rotterdam Rules. These four international Conventions will be explored further below.

As mentioned, the United States (hereinafter referred to as the 'US') was the first country to create legislation that developed the common law rights and liabilities of the parties to contract of the carriage of good by sea. This was as a result of the international outcry against the forceful strong-hold of powerful British ship-owners, who dominated the maritime trade industry. The Harter Act proved to be a success in the US, and its success inspired the creation of international Conventions, namely, the Hague Rules and the Hague-Visby Rules.

The Hague Rules and Hague-Visby Rules have proved to be extremely popular and most maritime trading nations of the world have adopted some version of the Rules. However, these Rules are now many decades old and have not kept up with the modern advancements in maritime trade. In an effort to update the carriage of goods regimes in line with the advancements experienced within the global maritime trade industry, two international conventions have been enacted, namely the Hamburg Rules and the Rotterdam Rules. The creation of both these Conventions were attempts at modernising carriage regimes on an international scale and leveling the playing field between the parties involved in a carriage contract.

It is important to explore the background and development of the four international Conventions listed above; as they have all contain provisions relating to the defenses available to a carrier in a sea carriage contract.

2.2 Common law defenses available to the carrier prior to the 19th Century

International trade has dramatically increased over the past centuries and the use of sea carriage can be noted as the preferred mode of trade transportation used from early times till present. As such, the contractual relationship between the carrier and the shipper is central to maritime trade. An examination of the carrier's liability and the defenses available to it in the event of a cargo claim is of significance in this regard. This study will attempt to trace the early origins of the common law defenses that were available to the carrier, in order to gain insight into the application and development of these maritime defenses as they are currently interpreted and applied through the provisions of the various carriage liability regimes.

2.2.1 Early Roman Law

In early Roman law, the onus of proof for the loss or damage of cargo in a cargo claim lay with the cargo owner.[6]The cargo owner would have to prove fault or *dolus* on the part of the carrier, this would be near impossible as there were little to no records that would have been kept by either party to the claim.[7] The cargo owner's burdensome onus of proof was somewhat eased by the enactment of the Praetor's Edict,[8] which brought the carrier's liability in line with the ordinary principles of contract that were applicable at that time.[9] The Praetor's Edict provided that *'nautacaupones et stabularii'* (sea carriers, innkeepers and stable keepers) would be held liable 'if they fail to restore to any person any property of which they have undertaken the safe-keeping.'[10]

This strict liability to provide a seaworthy vessel, imposed on the carrier under Roman law through the enforcement of the Praetor's Edict, was somewhat eased

[6] Hare op cit note 2 at 618.
[7] Ibid.
[8] Under Roman law an individual was appointed as a praetor (magistrate) and had the capacity to make laws that governed the city of Rome. The Praetor's Edict was the declaration of legal principles to be administered. F Du Bois *Wille's Principles of South African Law* 9 ed (2007) 968.
[9] Hare op cite note 2 at 619.
[10] Anderson Shipping (Pty) Ltd 1995 (3) SA 42 (A) at 46.

with the introduction of the below exclusions that the carrier could rely upon in a cargo claim:

I. *Vis Maior*- an act of God, or
II. *Damnum Fatale*- an unavoidable, accidental circumstance, such as ship wreck, piracy.[11]

2.2.2 English Common Law

The English Court of Admiralty was highly influenced by the Roman principles of maritime law, thus incorporating the Roman law model of strict liability of the carrier. The concept of strict liability was enacted under the law of bailment in England.[12] Under bailment, the bailee's was subject to strict liability, which was based upon possessory remedies granted to the bailee. The bailee could claim from third parties in any event, regardless of negligence and thus the bailee remained strictly liable for the lost goods of the bailor.[13]

Under English law, the liability of the carrier was that of strict liability with a few exceptions. The list below sets out the six original common law exceptions developed through English law. These exceptions are widely accepted by most of the major maritime trading nations including South Africa, as a result of the British colonisation of these nations. The carrier could only rely on these exceptions if it could prove that it had taken reasonable steps to avoid damage or loss to the goods and to mitigate further damage.

The six common law exceptions available to the carrier that were developed under English law, are:

- Acts of God (*vis maior*);
- Inevitable Accidents (*damnun fatale*);
- Inherent vice of the cargo;
- Latent defect of the cargo;
- Defective packaging of the cargo; and

[11] Hare op cit n 2 at 619.
[12] Bailment refers to the transfer of possession of goods from the bailor to the bailee, until the goods are to be returned or depending on what was agreed upon by both parties.
[13] VH Chacon *The Due Diligence in Maritime Transportation in the Technological Era* (published LLD thesis, University of Hamburg, 2016) 42.

- Queen's enemies.[14]

The application of the rule of strict liability of the carrier was consistent in English law until the end of the 18th century. The new century brought about many changes for the maritime industry in England. England began flourishing as a major maritime trading nation and English ship-owners dominated the maritime trade markets. This was as a result of the rise of liberalism in England and the economic boom of the Second Industrial Revolution.[15]

English ship-owners increasingly relied on the English contractual principle of party autonomy to limit the burdensome common law standard of strict liability.[16] They conceived more and more elaborate liability exception clauses in the bills of lading, even excluding liability for damages resulting from negligence.

Such exception clauses had the effect of freeing the carrier of any liability for loss or damage to the cargo they carried and placed the cargo-owner in a difficult position. This inequality of power led to much dissatisfaction among cargo-owners and a disregard for maintaining standards of seaworthiness and cargo care by ship-owners.[17]

2.3 International Conventions Pertaining to the Carrier's Exceptions

As maritime trade continued to flourish globally, cargo owners began to voice their displeasure at the unfavourable position that they were placed in. The dominant stance of the English ship-owners over cargo owners from other maritime nations began to cause conflict in the international trade markets. There was consensus among the maritime trading nations that compromises achieving a more equitable balance between the interests of cargo-owners and ship-owners had to be achieved. There was also international consensus that the best way to achieve this would be through the effective regulation and harmonisation of the laws regulating the international carriage of goods by sea.

[14] Hare op cit note 2 at 620.
[15] Chacon op cit note 13 at 52.
[16] Ibid 53.
[17] Ibid 56.

2.3.1 The Liverpool Conference of 1882

The first international attempt at achieving uniformity in the rules governing the carriage of goods by sea was initiated by the International Law Association,[18] in 1882, at a conference in Liverpool.[19]

At the conference a draft model bill of lading was put forward for approval, this was known as the 'conference form'. The main focus of the conference form was to limit the number of exception clauses that the carrier could insert into a bill of lading to escape liability for the loss or damage of cargo.[20] Giermann explains that there were two main principles that were introduced in the 'conference form'. The first being the introduction of liability of the carrier for negligence 'in all matters relating to the ordinary course of the voyage.' The second being the introduction of standard of 'due diligence' to be exercised by the carrier in making the vessel seaworthy.[21] However, the 'conference form' did not gain the international acceptance that was hoped for and was eventually abandoned by the International Law Association.

2.3.2 The Hamburg Rules of Affreightment

In a conference held in Hamburg in 1885, the International Law Association developed a set of rules, known as the *'Hamburg Rules of Affreightment'*.[22] The main areas of focus of the Rules were how to deal with the responsibilities of the carrier in instances of negligence and the provisions ensuring that any clauses inserted by the carrier with the intention of lessening its liability, would be deemed unlawful.[23] However, like their predecessor, the Liverpool 'conference form', these Rules were met with an underwhelming response from the international community and were eventually abandoned.

2.3.3 The Implied Obligation under the Harter Act

As previously discussed, even towards the end of the 19th century, English ship-owners maintained their dominance in the international shipping industry. Through

[18] The Association for the Reform and Codification of the laws of Nations was formed in 1873, and in 1895 changed its name to the International Law Association.
[19] HA Giermann *The Evidentiary Value of Bills of Lading and Estoppel* (2004) 28.
[20] Ibid 29.
[21] Ibid 29.
[22] Chacon op cit note 13 at 58.
[23] Ibid.

their monopolistic dominance, English carriers were able to avoid liability by inserting exception clauses, as well as choice of law and forum clauses ensuring that contractual disputes were resolved under English law in English forums.[24] Hare notes that the carrier's dominance was not as guaranteed in the US as it was in England. Courts in the US enforced the doctrine of public policy, finding clauses that sought to unfairly limit the carrier's liability as unlawful.[25] In the *Liverpool* case for example,[26] a clause in the bill of lading excluding the carrier from liability for negligence caused by the crew of the vessel was held to be invalid. These differing views caused divergence in the application of the liability of the carrier. English courts allowed carriers to avoid all liability, while American courts applied the doctrine of strict liability and rejected the attempts of British ship-owners to evade liability in cargo claims.[27] The US Harter Act of 1893, thus emerged in response to the unsatisfactory position of ship-owner dominance of the shipping industry to the detriment of cargo-owners.[28]

Section 192 of the Harter Act states,

> 'If the owner of any vessel transporting merchandise or property to or from any port in the United States 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, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or the management of the said vessel nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea, or other navigable waters, acts of God or public enemies or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for the loss resulting from any act or omission of the shipper or the owner of the goods,

[24] Y Yang *The Abolition of the Nautical Fault Exception: To be or not to be* (published LLM thesis, Lund University, 2011) 12.
[25] Hare op cit note 2 at 622.
[26] *Liverpool & Great Western Steam Co. v Phenix Insurance Co. 129 U.S. 397 (1889).*
[27] Hare op cit note 2 at 622.
[28] Ibid.

his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.'[29]

The Harter Act was instrumental in watering down the absolute obligation of the carrier under common law and instead, introducing the notion of due diligence as a minimum standard of the obligation of the carrier to provide a seaworthy vessel.[30] Drafters of the Harter Act were tasked with balancing the interests of both the carrier and the cargo-owner. The Harter Act was deemed to be a success in the development of carriage liability regimes. It placed a minimum standard of liability on the carrier that it could not contract out of, while softening the carrier's absolute obligation of seaworthiness to that of a minimum standard of due diligence and still embodied the common law exceptions under Roman law that a carrier could rely on, provided it had exercised due diligence in making the vessel seaworthy.[31]

Among the list of exceptions contained in the Harter Act, it introduced the 'nautical fault' exception also known as the defense of 'negligent navigation' or 'error in navigation or management of the vessel'. The carrier could rely on this exception to escape liability in a cargo claim, where loss or damage of cargo resulted from faults in the navigation or management of the vessel. This exception will be discussed in greater detail in Chapter Four of this study.

The Harter Act remains in force more than a century after it was first enacted. It has greatly influenced the international and domestic legislation regulating the carriage of goods by sea. The Harter Act became a prototype for legislation that was enacted by Australia, Morocco, and New Zealand, among other maritime nations.[32]

2.3.4 The Development of the Hague Rules

The Harter Act had a profound effect on the regulation and harmonisation of carriage of goods by sea. Other maritime nations were quick to employ provisions of the Harter Act within their own jurisdictions. At a diplomatic conference in the Hague in 1921, the Maritime Law Committee of the International Law Association, presented a code of rules similar to provisions of the Harter Act that were adopted at the

[29] Section 192 of the Harter Act of 1893.
[30] Hare op cit note 2 at 623.
[31] Ibid.
[32] Yang op cit note 24 at 13.

conference and became known as 'The Hague Rules, 1921'.[33] The code of rules differed slightly from the Harter- style provisions, in that the Rules formed a self-contained code that would not need to reference domestic law, and contained provisions that created rights and immunities for both the carrier and cargo-owner.[34]Although the rules had no binding effect, it was anticipated by the drafters that its adoption by maritime trading nations would bring about uniformity in the laws governing the carriage of goods by sea.[35] Unsurprisingly, carriers were reluctant to adopt the Rules and give up their dominant position in maritime trade. Pressure from cargo-owners, resulted in a second conference that was held in Brussels in 1923.[36]

After much deliberation and discussion by the conference in Brussels, the amended Hague rules were signed into effect as an international convention on 25 August 1924.[37] The amended rules were officially titled as *The International Conventional for the Unification of Certain Rules of Law Relating to Bills of Lading*. It was commonly known as 'The Hague Rules'. The Hague Rules sought to develop a compromise between the interests of the carrier and cargo-owner. Article III (1) and Article IV (1) of the Hague Rules turned the implied obligation into an express obligation imposed on the carrier to exercise due diligence in making the vessel seaworthy. The imposition of a minimum standard of liability on the carrier pacified the cargo-owners and also had the effect of replacing the carrier's absolute obligation of strict liability under common law with the obligation of a minimum standard of exercising due diligence in making a vessel seaworthy 'before and at the beginning of the voyage'.[38] This watered down the carrier's liability substantially as it was only liable for the cargo during certain time frames and not for the entire voyage. In addition to merely stating the vessel had to be seaworthy, the Hague Rules also set out the elements of seaworthiness in finer detail. The carrier was required 'to properly man, equip and supply the ship'.[39] A further obligation to make the vessel cargo-worthy[40] was also

[33] Hare op cit note 2 at 624.
[34] M F Sturley 'The History of COGSA and The Hague Rules' (1991) 22(1) *The Journal Of Maritime Law and Commerce* 20.
[35] Hare op cite note 2 at 624.
[36] Ibid.
[37] Ibid.
[38] Article III (1) of the Hague Rules.
[39] Article III (1) (b) of the Hague Rules.
[40] Article III (1) (c) of the Hague Rules.

placed on the carrier. These provisions placated the cargo-owners, whilst reducing the common law absolute obligation of the carrier. The carrier also succeeded in obtaining additional exceptions in the amended Rules. In addition to the common law exceptions, the Hague Rules allowed for the carrier to further escape liability for damage or loss arising from acts of war;[41] quarantine restrictions;[42] riots and civil commotions;[43] insufficiency or inadequacy of marks;[44] and latent defects that are not discoverable by due diligence.[45]

The Hague Rules were an international success in the harmonisation of the rules governing the carriage of goods by sea. Based on the Harter model, it attempted to achieve a better balance between the interests of carriers and cargo-owners on a global scale.

2.3.5 The Hague- Visby Rules

In 1968, the Hague Rules were amended and these amendments were adopted by the 'Brussels Protocol', with the amended rules becoming known as the *'Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading'*, commonly known as the 'Hague-Visby Rules'. The United Kingdom became a signatory to the Hague- Visby Rules and enacted the provisions of the Rules into their domestic legislation through the Carriage of Goods by Sea Act, 1971 (hereinafter referred to as 'UK COGSA').[46] Despite not having ratified the Hague-Visby Rules, South Africa enacted the provisions of the Hague-Visby Rules as a Schedule to the South African Carriage of Goods by Sea Act of 1986 (hereinafter referred to as 'SA COGSA').[47] The Hague-Visby Rules have been ratified by a host of developed and developing maritime nations, including England, China, France, Italy and Singapore.[48] Both the Hague and Hague-Visby Rules have

[41] Article IV (2) (e) of the Hague Rules.
[42] Article IV (2) (h) of the Hague Rules.
[43] Article IV (2) (k) of the Hague Rules.
[44] Article IV (2) (o) of the Hague Rules.
[45] Article IV (2) (p) of the Hague Rules.
[46] Hare op cit note 2 at 625.
[47] Hare op cite note 2 at 648.
[48] E van Dijckkaai *Comite Maritime International Yearbook Annuaire 2016* (2017) 381.

received wide global acceptance and most maritime trading nations of the world, have adopted some version of the Rules into their domestic legislation.[49]

The Hague-Visby Rules retained the minimum standard of liability placed on a carrier that it has to discharge through exercising due diligence in making a vessel seaworthy before and at the commencement of the voyage. The Hague-Visby Rules also maintained the list of exceptions available to a carrier as per the Hague Rules. Three exceptions from this list will be discussed in the following chapters of this study.

The main criticisms leveled against the Hague and Hague-Visby Rules are that the Conventions are considered to be outdated due to the modern advancements experienced within the global shipping industry. The Rules do not adequately cater for containerisation or multimodalism.

The Hague-Visby Rules were not universally adopted by some of the major maritime trading nations, such as the United States of America and Australia as they do not fully address the needs of both parties to a contract for the carriage of goods by sea. The Hague-Visby Rules did not cater for the advancing global economy, even at the time of its enactment. Developed economies sought to gain a strong-hold over developing nations in sea trade and would only ratify a Convention if it catered solely to their needs in respect of carriage of goods by sea.

Most developing economies rely on the importation of consumer goods and are not among the major ship-owning nations, thus the carrier remained the dominant party with the most negotiating power and the rules are perceived to be ship-owner oriented, thereby, negatively impacting on developing nations.[50]

The negligent navigation exception is a good example of why the Rules are perceived to be too ship-owner oriented to the detriment of the cargo-owner.[51] This led to cargo-owning nations viewing the Rules with hostility, as the Rules do not adequately protect their interests.

[49] Yang op cit note 24 at 16.
[50] Hare op cit note 2 at 652.
[51] Ibid.

Ship-owners are also wary of the effects of applying certain provisions of the Hague-Visby Rules to their contracts of carriage. This was as a result of the notorious decision made by the House of Lords in the *The Muncaster Castle* case.[52] Hare discusses this judgment where the House of Lords held that the ship-owners were liable for the damage caused to the cargo onboard the vessel through the negligence of the fitter appointed by the ship repairers whose services were enlisted by the ship-owner prior to the voyage. The said fitter failed to correctly re-tighten the nuts of an inspection cover after effecting repairs on the vessel. The cargo was water-damaged as a result of water entering through the inspection cover that had not been correctly reinstalled and therefore, came loose during a period of heavy weather. The ship-owners argued that they had exercised due diligence as per the provision of the Hague Rules by hiring the services of reputed ship repairers in making the vessel seaworthy before the voyage and could not be held liable for the repairer's negligence; however their argument was rejected by the House of Lords on the basis that the obligation of the ship-owner was non-delegable.[53] Thus, ship-owners became wary of the Rules, especially regarding interpretations of the Rules, on the scope and extent of the carrier's obligation to exercise due diligence in ensuring that a vessel is sea and cargo worthy before and at the commencement of the voyage.

The Hamburg Rules and Rotterdam Rules are examples of global attempts to modernise the Rules regulating the international carriage of goods by sea and to level the playing field by creating a more equitable balance between the interests of the cargo owners and ship-owners.

2.3.6 The Hamburg Rules

Due to the inadequacy of the Hague and Hague-Visby Rules in keeping up with technological advancements, it became imperative to bring about uniformity and harmonisation in the rules governing the carriage of goods by sea. New measures needed to be taken to regulate and balance the powers and responsibilities of both contracting parties, in order to modernise the rules regulating maritime trade.

[52] Riverstone Meat Company Pty Ltd. v Lancashire Shipping Company Ltd. (The Muncaster Castle) [1961] 1 Lloyd's Rep 57.
[53] Hare op cite note 2 at 626.

The United Nations Convention on the Carriage of Goods (hereinafter referred to as 'The 'Hamburg Rules) were adopted 1978 but only came into effect in 1992.[54] Listed below are some of the changes contained in the Hamburg Rules pertaining to the carrier's obligations that are relevant to this study.

- The carrier was liable for loss or damage to the cargo for the entire duration of the voyage, regardless as to what was stated on the bill of lading;[55]
- The nautical fault defense that the carrier could raise under previous carriage Conventions was deleted;
- The defense of fire that was available to the carrier under previous carriage Conventions was modified. Under the Hamburg Rules, the carrier is liable for loss or damage to cargo if the cargo- owner can prove that the fire arose as a result of fault or negligence by the carrier or its servants.[56] Under the Hague-Visby Rules, the cargo-owner had to prove actual fault by the carrier, thus if the fire arose as a result of fault or negligence by a servant of the carrier, the carrier would be exempted from liability.[57] Under the Hamburg Rules, the cargo-owner merely has to prove fault or negligence, not actual fault, thus swinging the pendulum of onus back to the carrier.

Unlike the Hague-Visby Rules, the Hamburg Rules extend the period for which the carrier is liable for loss or damage to the goods for the entire duration of the voyage. The Hamburg Rules also provides more extensive coverage for the period of responsibility of the carrier to 'cover the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.'[58] Due to the increase in international trade and ports becoming busier, cargo owners resort to leaving their goods at the carrier's warehouse until the vessel is ready to be loaded. Consignees also have to utilise warehousing for cargo that is to be discharged and delivered.[59] Hence, the carrier is responsible for the cargo whether it

[54] Ibid.
[55] Article IV (1) (2) of the Hamburg Rules.
[56] Article V (4) of the Hamburg Rules.
[57] K G Ainuson *The Hamburg Rules: Did It Change the Liability of the Carrier?* (published LLM thesis, University of Georgia, 2006) 45.
[58] Article V (1) of the Hamburg Rules.
[59] Chacon op cit note 13 at 83.

is onboard the vessel or not.[60] The provisions for extended period of responsibility of the carrier in the Hamburg Rules is more clearly worded than the provision contained in the Hague-Visby Rules.[61] These changes were introduced in order to benefit the cargo-owner.

The defence of negligent navigation was the subject of much discussion at the Hamburg diplomatic conference. Carriers maintained that the defence was an important mechanism, as it distributed risk amongst the insurers in serious casualties. Carriers also argued that the deletion of the defence would result in increased suits against the carrier in the event of serious casualties at sea such as collision and fire; this would also result in higher insurance premiums for the carrier.[62] Cargo owners argued that this defence would give an undue advantage to the carrier, as the carrier would be able to escape responsibilities, even when they were negligent. The defense was not included in the Rules as cargo-owners successfully argued that due to the technological advancements in sea transport, the occurrences of real errors in navigation are rare.[63]

The Hamburg Rules have only been ratified by a handful of West African and European countries that have no major influence on maritime trade.[64] The Rules are perceived as being cargo- owner oriented to the detriment of ship-owners and have been rejected by many of the major maritime trading nations, such as the US and China.[65] The Hamburg Rules have not been adopted by South Africa and there are no likely prospects of this happening in the near future, as many of its major trading partners have also chosen not to adopt the Rules.[66]

2.3.7 The Rotterdam Rules

There is an international perception that the provisions of the Hague/Hague-Visby Rules favour ship-owners to the detriment of cargo-owners. The Hague-Visby Rules came into operation many decades ago and their provisions were heavily influenced by the US Harter Act, which itself was drafted in the late 1880s. The Rules are

[60] Ibid.
[61] Ibid.
[62] Chacon op cit note 13 at 84.
[63] Ibid.
[64] Ainuson op cit note 57 at 2.
[65] Ibid.
[66] Hare op cit note 2 at 627.

therefore regarded as antiquated considering modern advancements of technology and the rapid development of economies over the last five decades.[67] As discussed earlier in this chapter, the Hamburg Rules have not gained widespread support from the major maritime trading nations and are considered a failure in harmonising global carriage of goods by sea regimes. In an effort to assuage the failure of the Hamburg Rules, the United Nations Commission on the International Trade Law (hereinafter referred to as 'UNCITRAL') and the Comite Maritime International (hereinafter referred to as 'CMI') worked together to draft a new international convention that would address the shortcomings of the Hague-Visby Rules and the Hamburg Rules.[68]

On 11 December 2008, the General Assembly of the United Nations adopted the *'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* (commonly known as the 'Rotterdam Rules'[69]).[70] The Rotterdam Rules introduce two noteworthy changes in the liability of the carrier compared to the Hague-Visby Rules. The first being the period of responsibility of the carrier is extended over the entire sea voyage; the second change, being the exclusion of the defense of negligent navigation.[71] These two changes were considered necessary to ensure the wider international acceptance of the Rules.

Article 12 of the Rotterdam Rules provides that the carrier's period of responsibility begins when the goods are first received for carriage and ends upon the delivery of the goods.[72] The intention of Article 12, read together with Article 11, is to cater for multi-modal transportation. The use of the words 'place of destination' instead of 'port of destination' in the text is used to allow for the multimodality in the modern carriage of goods.[73]

[67] Yang op cit note 24 at 18.
[68] Ibid.
[69] The Rules were signed in the Dutch port city of Rotterdam on 23 September 2009.
[70] P Sooksripaisarnkit 'Enhancing of Carriers' Liabilities in the Rotterdam Rules- Too Expensive Costs for Navigational Safety?' (2014) 8(2) *The International Journal on Marine Navigation and Safety of Sea Transportation* 309.
[71] Ibid.
[72] Article 12(1) of the Rotterdam Rules.
[73] Chacon op cit note 13 at 87.

Article 14 of the Rotterdam Rules has extended the carrier's obligation of exercising due diligence to make the vessel seaworthy throughout the voyage at sea.[74] The extension of the carrier's obligation to exercise due diligence throughout the sea voyage has been met with hostility by carriers who fear that it will result in an increase of freight charges and create uncertainty in the rules regulating the voyage at sea. It has been suggested that lack of clarity in the wording of Article 14 creates some uncertainty as to when the voyage actually ends.[75] It could be argued that the voyage ends when the vessel docks, it could also be argued that voyage ends only once the cargo is unloaded, resulting in divergent interpretations of this provision.

Like the Hamburg Rules, the Rotterdam Rules have done away with the negligent navigation defense. The rationale behind the exclusion of this defense is to bring the carrier's liabilities in line with their current responsibilities under public international law.[76] The *'International Management Code for the Safe Operation of Ships and for Pollution Prevention'*[77] (hereinafter referred to as the 'ISM Code'), provides that: the carrier needs to define and document all the responsibilities and authority of all personnel who perform, verify and manage work conducted on the vessel relating to and affecting safety and pollution prevention. The carrier is also required to ensure that adequate resources and shore-based support are provided to personnel or designated persons to carry out their functions and duties.[78] The exclusion of the negligent navigation defense in the Rotterdam Rules has proven to be unpopular among ship owning nations.

The aim of the drafters of the Rotterdam Rules was to extend the liability of the carrier further than the provisions contained in the Hague-Visby Rules.[79] This was in an effort to bring about uniformity and keep abreast of technological advancements in the modern era of maritime transport. At a glance, the Rules seem to increase the liability of the carrier through the deletion of the negligent navigation defence and extending the period of responsibility of the carrier. However, upon closer inspection

[74] Chacon op cite note 13 at 89.
[75] Ibid.
[76] Sooksripaisarnkit op cit note 70 at 312.
[77] The ISM Code was first adopted by the International Maritime Organization (hereinafter referred to as the 'IMO') and was incorporated in 1974 into the International Convention for the Safety at Life at Sea (hereinafter referred to as 'SOLAS'): Ibid.
[78] Part A (3) of the ISM Code.
[79] Ibid.

of the Rules, they appear unsuccessful in increasing the carrier's liability, as the deletion of the negligent navigation defence is an effort to balance the interests of both ship-owners and cargo-owners.[80] The obligation to provide a seaworthy vessel throughout the voyage is already a current practice that is contained in the ISM Code.[81] Practitioners and academics also caution that the lengthy and complicated provisions of the Rules would make it challenging to interpret and apply them, causing legal uncertainty.

It is of importance to note that since 2015,[82] the Rotterdam Rules have only been signed by 25 states and ratified by 3 states.[83] The Rules can only come into operation within a year of ratification by the twentieth signatory state.[84] The ratification process has been extremely slow and the major maritime trading nations are reluctant to accede to the Rules. According to the CMI, the Executive Council established an International Working Group (hereinafter referred to as the 'IWG') to monitor the implementation and adoption of the Rotterdam Rules.[85] Recent attempts of drafting an 'Accession Kit of the Rotterdam Rules'[86] by the Secretariat of UNCITRAL are examples of efforts made by the international community to try and promote the ratification of the Rotterdam Rules. One of the objectives of the kit is to assist developing nations in adopting the Rotterdam Rules. Whether the 'Accession Kit to the Rotterdam Rules' actually achieves its objective of enabling more nations to ratify the Rules, remains to be seen.

2.4 The Rotterdam Rules- A South African Perspective

The Rotterdam Rules have not been ratified by South Africa nor any of South Africa's major trading partners.[87] South Africa passed the *Merchant Shipping Act 57 of 1951* (hereinafter referred to as 'SA Merchant Shipping Act') as domestic legislation giving effect to the Hague Rules. The SA Merchant Shipping Act was repealed by the *Carriage of Goods Act in 1986* (hereinafter referred to as 'SA COGSA'). The SA COGSA has enacted the Hague-Visby Rules as Schedule to the

[80] Sooksripaisarnkit op cit note 70 at 314.
[81] Ibid.
[82] E van Dijckkaai *Comite Maritime International Yearbook Annuaire 2015* (2016) 436.
[83] The Rotterdam Rules have been ratified by Congo, Spain and Togo: Ibid
[84] Article 94 of the Rotterdam Rules.
[85] E van Dijckkaai *Comite Maritime International Yearbook Annuaire 2015* (2016) 436.
[86] Ibid at 437.
[87] Hare op cit note 2 at 639.

Act.[88] The Hague-Visby Rules now appear verbatim as Schedule 1 of the SA COGSA.

In August 2014, the South African government launched Operation Phakisa, which is based on the Malaysian approach of the 'Big Fast Results Methodology'.[89] This methodology was proven to give remarkable results in economic transformation and service delivery within a very short time frame.[90] Operation Phakisa has been launched to fast track the priorities of the National Development Plan, which include job creation and socio-economic services.[91] Operation Phakisa is being implemented in a number of sectors including the oceans economy, which is relevant to South African maritime law. The aim of Operation Phakisa in terms of the oceans economy is to harness the commercial opportunities stemming from South Africa's vast coast line and areas of maritime practice in order to grow the economy while still protecting the South African coastline and maritime environment.[92] One of the main objectives of Operation Phakisa is a review of ocean related legislation.[93] A review and amendment of SA COGSA has been proposed, to bring it in line with the Rotterdam Rules, in the event that the Rules will be widely accepted and ratified.[94]It is hoped that the international perception that the Rotterdam Rules favour the carrier will encourage ship-owners to register their ships on the South African registry.[95]

Operation Phakisa has not shown much achievement from its inception to date.[96] It is hoped that under the presidency of Cyril Ramaphosa, who has promised

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[88] Hare op cit note 2 at 648.
[89] 'An Overview of Operation Phakisa' (7 April 2017) available at *http://nahf.co.za/an-overview-of-operation-phakisa-2017-04-07/*, accessed on 10 August 2018.
[90] Ibid.
[91] 'Zuma in Durban to report on Operation Phakisa Oceans Economy' (5 October 2017) Berea Mail, available at *https://bereamail.co.za/118495/zuma-in-durban-to-report-on-operation-phakisa-oceans-economy/*, accessed on 10 August 2018.
[92] 'Unlocking the Economic Potential of South Africa's Oceans' (15 August 2014) Marine Protection Services and Governance Executive Summary, available at *https://www.operationphakisa.gov.za/operations/oel/pmpg/Marine%20Protection%20and%20Govenance%20Documents/Marine%20Protection%20and%20Govenance/OPOceans%20MPSG%20Executive%20Summary.pdf*, accessed on 10 August 2018.
[93] Ibid.
[94] Ibid.
[95] 'Address by President Jacob Zuma to update stakeholders on the implementation of the Operation Phakisa: Oceans Economy Programme' (6 October 2017) available at *http://www.thepresidency.gov.za/speeches/address-president-jacob-zuma-update-stakeholders-implementation-operation-phakisa%3A-oceans*, accessed on 10 August 2018.
[96] Ibid.

economic reform, that the aims and objectives of the oceans economy will be realised.

2.5 Conclusion

The global rules pertaining to the carriage of goods by sea have developed through the centuries as a result of constant codification and reform. As discussed in this chapter, the common law defences available to the carrier stem from early Roman law and were developed further under English common law. As maritime trade flourished through the ages, these defenses were in some form or the other, incorporated into all the major international carriage regimes that regulate the rules pertaining to the carriage of goods by sea. The Harter Act and the Hague-Visby Rules have proved to be the most influential maritime regimes in contributing to the development of the carrier's rights and responsibilities. Under the Harter Act, the two most significant developments pertaining to the carrier were the lessening of the absolute obligation of the carrier to that of the exercise of due diligence and the introduction of the negligent navigation defence.[97] The Hague-Visby Rules have been ratified or incorporated by the majority of maritime trading nations, including South Africa and its trading partners and has been widely accepted as the dominant regime regulating the carriage of goods by sea. The Hague-Visby Rules contain a comprehensive list of defences that may be invoked by the carrier, one of the reasons that fosters the perception that the Rules are carrier oriented to the detriment of the cargo owner. The relatively new Rotterdam Rules that aim to bring about uniformity in the modern era of transportation of goods, has yet to prove whether it will be successful in achieving this objective. The continuous, fast-paced technological and economic advancements of maritime trade create the need for the modernisation and harmonisation of the international rules governing the carriage of goods by sea.

[97] Hare op cit note 2 at 623.

CHAPTER 3: THE ESSENTIAL AVERMENTS OF THE CLAIMS AND DEFENCES UNDER ARTICLESS III AND IV OF THE HAGUE-VISBY RULES

3.1 Introduction

This chapter serves as a general summary for the order of procedures in cargo claims. In this chapter the author will briefly outline the onus of proof that the parties are subject to, followed by the order of proceedings and examination of the essential averments of a cargo claim under the Hague-Visby Rules. This chapter serves as a practical guide to the running of cargo claims and needs to be read in conjunction with the general principles of the three defences that will be examined in the following chapters of this study.

3.2 Onus of Proof

The Hague Visby Rules do not specifically set out a general rule for the division of the onus of proof in a cargo claim. However, Article IV (1) specifically provides for the onus of proof where the loss or damage to the cargo was caused by unseaworthiness. Article IV (1) states '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.'[98] The second specific provision contained in the Rules relating to the onus of proof is Article IV (2)(q). This provision is also known as the 'catch all' exception. Article IV(2)(q) provides that the carrier is not responsible for any loss or damage to cargo arising from any other cause arising without the actual fault or negligence of the carrier or its servants, but the burden of proof shall rest on the carrier or the persons relying on this exception to prove that no negligence or fault on their part contributed to the loss or damage.[99]

In a cargo claim, the carrier bears the heavier onus of proof, which rests upon four general principles of proof that are derived from common law and that are also present in the Hague-Visby Rules.[100] The first principle that is a requirement under both the common law and the Hague-Visby Rules is that 'the carrier is prima facie liable for all loss or damage to cargo received in good order and out-turned short or

[98] Article IV (1) of the Hague-Visby Rules.
[99] Article IV (2)(q) of the Hague-Visby Rules.
[100] Hare op cit note 2 at 788.

in bad order.'[101] The carrier is *prima facie* liable for loss or damage to cargo that is presumed to have occurred while the cargo was under its care, provided that the cargo was received in good order, and then subsequently delivered in bad order. This presumption is reflected in the Hague-Visby Rules, which state that: 'Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c)'[102] The carrier will discharge the burden by showing that the loss or damage was caused by one of the excepted defences as contained in Article IV (2)(a) to (q).

The second principle is that the parties must make proof of all the facts available to them.[103] The maxim 'who asserts must prove' applies in a cargo claim.[104] Courts will consider all the evidence in a cargo claim and will require proof that goes beyond a clean bill of lading and a bad order receipt. Litigants must ensure that upon first sight of damage, early inspections and surveys are conducted on both the vessel and the cargo; this is useful to both the carrier and the cargo- owner.[105] The carrier will want to know the extent of the damage to the cargo, and the cargo-owner will want to be aware of the condition of the vessel. It is of importance for litigants, especially the carrier, to preserve contemporaneous evidence as well as documentary evidence such as log books; maintenance records; [106] bills of lading that may contain qualifications relating to the cargo and bad order receipts.

Article III Rule 6 of the Hague-Visby Rules stipulates that the cargo-owner is required to notify the carrier of damage at the port of discharge before or at the time of the removal of the goods for delivery, or within three days of the loss becoming apparent. Failure to notify the carrier, will result in a prima facie assumption that the cargo was received in good condition or as described in the bill of lading.[107]Article III Rule 6 further stipulates that the carrier shall be discharged from all liability for

[101] Tetley W *Marine Cargo Claims* 2 ed (1978) 47.
[102] Article III (4) of the Hague-Visby Rules.
[103] Tetley op cit note 101 at 50.
[104] Szymonowski & Co v Beck & Co [1923] 1 KB at 466.
[105] Hare op cit note 2 at 789.
[106] Ibid.
[107] Ibid.

damaged cargo unless summons has been issued within one year of the delivery of the cargo or the date when the cargo ought to have been delivered.[108]

The third principle of proof is that the onus of proof in a cargo claim is that of making proof to a reasonable degree.[109] The onus of proof needs to be of a reasonable degree in the circumstances. The onus of proof, even in the rebuttal of *prima facie* evidence only needs to be proven on a balance of probabilities.[110] In *States Marine Corp v Producer Coop Packing Co*,[111] it was held that the carrier only has an 'ordinary burden of proof' i.e. on the preponderance of evidence, and the carrier need not show 'clear and convincing' proof.

The fourth principle of proof relates to the 'concealment, modification or destruction of key evidence'.[112] If courts find any concealment, modification or the destruction of key evidence, all evidence put forth by that party will be viewed as suspicious.[113] Proper investigations must be conducted by both parties especially in claims where the cause of the loss or damage is not clearly established and the parties must have adequate documentary evidence to discharge the burden of proof placed on them.[114] In *The Fjord Wind*,[115] the ship's crankpin bearings had failed for unknown reasons, and prior failings had not been fully investigated by the carrier. The court held that the carrier can only discharge the burden of proof by showing that it and the vessel's engine builder did not fail to observe any lines of enquiry that competent experts would have been reasonably expected to carried out and that in the absence of evidence of investigations that were expected to be carried out, the carrier was unable to discharge the burden of proving that it exercised due diligence in making the vessel seaworthy.[116] In *The Fjord Wind*,[117] the carrier also did not supply

[108] Article III Rule 6 of the Hague-Visy Rules.
[109] Tetley op cit note 101 at 51.
[110] Balance of probability is referred to the preponderance of evidence.
[111] States Marine Corp of Delaware v Producers Coop Packing Co., 310 F. 2d 206, 1963 AMC 246 (9 Cir. 1962).
[112] Tetley op cit note 101 at 52.
[113] Ibid.
[114] Ibid.
[115] Eridania SPA & Others v Rudolf A. Oetker& Others (The Fjord Wind) [1999] 1 Lloyd's Rep. 307.
[116] Eridania SPA & Others v Rudolf A. Oetker& Others (The Fjord Wind) [1999] 1 Lloyd's Rep. 307; upheld [2000] 2 Lloyd's Rep. 191.
[117] The Fjord Wind op cit note 115.

sufficient documentary evidence on the engine builder's investigations and these omissions were regarded as lack of due diligence on the part of the carrier.[118]

3.3 The Order of Proof and the Essential Averments in a Cargo Claim under the Hague-Visby Rules

3.3.1 The Order of Proof

The order of proof is the order in which the parties will present their evidence at trial. Under the Hague-Visby Rules, the parties need to address their respective obligations by a series of essential averments. These averments will follow a certain order of stages, beginning with the plaintiff in a cargo claim and the onus of proof then shifting from the cargo-owner to the carrier and back, with each stage of the proceedings. The nature of the order of proof in a cargo claim can be described as a game of 'ping-pong'.

The order of proceedings in a maritime claim at court is as follows:[119]

(a) The claimant (cargo-owner) begins by prima facie proving its loss.
(b) The defendant (carrier) will then prove, on a balance of probabilities, that the cause of the loss or damage was not as a result of lack of due diligence on the part of the carrier to make the vessel seaworthy and/or cargo-worthy; and/or that the loss or damage was caused by one of the exculpatory exceptions contained under Article IV (2) of the Hague-Visby Rules.
(c) The claimant will counter-argue and on a balance of probabilities prove the essential averments of its loss.
(d) The defendant may either succeed on its averments at (b) and the claim will fail or the claimant will succeed with the claim through its counter-argument, notwithstanding the carrier may prove its right to limit its liability.

3.3.2 The Essential Averments of a Cargo Claim under the Hague-Visby Rules.

As aforementioned, the onus of proof in a cargo claim shifts from the cargo-owner to the carrier and back at each stage of the proceedings. Under the Hague-Visby

[118] The Fjord Wind op cit note at 204 and 206.
[119] Summarised from the breakdown of Onus of Proof set out in Hare op cit note 2 at 790-791.

Rules, the parties need to make a series of essential averments to satisfy their respective obligations.

The essential averments that the cargo-owner and carrier need to make during their arguments are set out below:

The cargo-owner must primarily aver the following:[120]

- The cargo-owner is the owner of the cargo or has the right to sue;
- There was a contract of carriage or a commission of a delict (tort);
- The defendant is the carrier or the carrier's servant;
- The cargo was handed in good order and condition.
- The cargo was out-turned damaged or short.
- The quantified/ monetary value of the loss or damage.[121]

The carrier must aver the following in its rebuttal averment:[122]

- That the loss or damage was caused by an exception contained in Article IV (2) of the Hague-Visby Rules.
- If the 'catch all' exception 2(q) is pleaded, the carrier will also need to show its absence of actual fault or privity.

The cargo-owner's counter-argument must contain the following averments:[123]

- That the vessel was unseaworthy and the unseaworthiness was as a result of the carrier's lack of due diligence;[124] or
- The loss or damage was as a result of the carrier's failure to make the vessel cargo-worthy.[125]
- If the carrier is relying on the defence of fire, that the fire was caused by the actual fault or privity of the carrier.[126]

[120] Summarised from the breakdown of Essential Averments set out in Tetley op cit note 101 at 54-55.
[121] Article IV (5)(b) of the Hague-Visby Rules.
[122] Hare op cit note 2 at 791.
[123] Ibid.
[124] Article IV (1) read with Article III (1) of the Hague-Visby Rules.
[125] Article III (2) of the Hague-Visby Rules.
[126] Article IV (2)(b) of the Hague-Visby Rules.

In the event of the cargo claimant succeeding in its claim, the carrier may still assert its right to limit its liability, on a balance of probabilities.

The carrier's limitation plea would contain the following pleadings:[127]

- The cargo-owner did not declare the value or the nature of the cargo, or if such declaration was made, the carrier was justified in not entering such declaration on the bill of lading.
- The number of packages or units or the mass of the cargo was stated on the bill of lading.
- The Special Drawing Right (SDR)[128] is equivalent to the currency to be determined by the law of the Court in which the claim was adjudicated upon.[129]

3.4 The Exercise of Due Diligence and the defences available to the carrier under the Hague-Visby Rules

As per Article III (1) of the Hague-Visby Rules, the carrier in a cargo claim has to prove that it exercised due diligence before and at the beginning of the voyage to make the vessel both seaworthy and cargo-worthy in all aspects. Article IV (1) stipulates that if the carrier cannot prove such due diligence, it must at the very least prove that its lack of exercise of due diligence was not the cause of the loss or damage. The carrier has a primary obligation to exercise due diligence, however, if the carrier can show that the cause of the loss or damage was as a result of something other than its lack of due diligence, additional defences remain open to the carrier, as contained in Article IV (2) of the Hague-Visby Rules.

Hare explains that the burden of proving due diligence or reliance upon one of the exculpatory exceptions as contained in the Rules rests upon the carrier.[130] This is as a result of the legal maxim 'who asserts, must prove', since the carrier is relying on

[127] Hare op cit note 2 at 791.
[128] The Special Drawing Right (SDR) is an international reserve asset, created by the International Monetary Fund (IMF) to supplement its member countries' official reserves. The value of the SDR is based on a basket of five currencies- the U.S dollar, the euro, the Japanese yen, the Chinese renminbi and the British pound. 'Special Drawing Right (SDR)' (19 April 2018) available at https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/14/51/Special-Drawing-Right-SDR, accessed on 10 November 2018.
[129] Article IV(5)(d) of the Hague-Visby Rules.
[130] Hare op cit note 2 at 794.

the exception the onus is on him to prove same. Further, the carrier will have access to information proving causation, which would not ordinarily be available to the cargo claimant.[131]

The list of exceptions contained in Article IV (2) of the Hague-Visby Rules, take the place of the common law exceptions that the carrier would have otherwise relied upon. This is an essential consequence of the parties agreeing, or the statutory provisions of the Rules providing, that the carrier can have no lesser liability than what is prescribed by the Rules.[132] The exceptions of nautical fault, fire and heavy weather will be discussed in the following chapters.

3.5 Conclusion

The Hague-Visby Rules do not specifically contain a general rule for the division of the burden of proof. However, the parties to a cargo claim under the Rules have to make essential averments during their arguments to address their respective obligations and discharge the onus placed on them. There are a number of general principles pertaining to the burden of proof that the parties have to adhere to in order to successfully discharge the burden placed upon them. The exercise of due diligence to make a vessel seaworthy and cargo- worthy is central to a cargo claim, want of due diligence leaves the carrier vulnerable to suit, but at the same time it also provides for the carrier to rely upon the exculpatory exceptions as contained in the Hague-Visby Rules.

[131] Ibid.
[132] Ibid.

CHAPTER 4: THE DEFENCE OF NEGLIGENT NAVIGATION

4.1 Introduction

It is commonly agreed among maritime commentators and lawyers that the defence of negligent navigation is one of the most notorious defences that is available to the carrier in a cargo claim due to the controversy surrounding this defence and the fact that it has been the subject matter of much litigation. This defence has also been among the most fiercely contested issues that have come up in the negotiations leading up to the finalisation of the modern international conventions regulating the carriage of goods by sea. This defence is also commonly and interchangeably known by its common law names, 'the negligent navigation defence' or 'nautical fault'.

Even prior to the inclusion of this defence in the Harter Act and the Hague-Visby Rules, exceptions pertaining to errors in navigation or the management of the vessel have routinely been included in bills of lading to exempt the carrier from liability in the event of loss or damage resulting from this exception.[133] The defence of negligent navigation was first enacted into legislation by the Harter Act in 1893 and was subsequently incorporated into the widely ratified Hague and Hague-Visby Rules. Thus, this defence is available to carriers in the majority of maritime trading nations, including South Africa, as a result of its enactment of the Hague-Visby Rules.[134] It is of importance to note that later created international carriage conventions, such as the Hamburg Rules and the Rotterdam Rules do not contain this defence in favour of the carrier. The reasons for this will be discussed later in this chapter.

4.2.1 The Definition and Scope of Article IV(2)(a) of the Hague-Visby Rules

The defence of negligent navigation is contained in Article IV (2)(a) of the Hague-Visby Rules.

Article IV Rule 2:

'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from-

[133] J F Wilson *Carriage of Goods by Sea* 7 ed (2010) 273.
[134] Hare op cit note 2 at 799.

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.'[135]

This defence is unique as it affords protection to the sea carrier, which protections are not available to carriers of other modes of transport or provided for under international conventions governing other modes of transport.[136] In its simplest form, the aim of the defence is to provide the carrier protection against liability for loss or damage to cargo resulting from errors in navigation or management of the vessel.[137] Once negligence on the part of the carrier is established the defence becomes inapplicable.[138] However, Article IV (2)(a) is aimed at providing the carrier with a defence where negligence has occurred.

4.2.1.1 'Act, Neglect or Default'

This exception covers the carrier for the 'act, neglect or default' of the master, mariner, pilot or the servants of the carrier. As can be seen in some of the cases briefly referred to hereunder, courts have interpreted this cover to extend to the failure to act and non-performance of the duties of the carrier.[139] This point is illustrated in *The Olivebank* case,[140] where the 5th Circuit Court of Appeal upheld the decision of the court of first instance. In this case, cargo was damaged as a result of the decision by management, not to close the skylight or the vent covers of the vessel. The claimants argued that the decision taken by management of the vessel was not an act but rather an omission. The Court of Appeal held that the claimants had misconstrued the district court's use of the phrase "management decision".[141] Neglect by management also relieves the carrier/ship of liability under COGSA.[142] In the case *The Sanfield*,[143] the court held that the decision not to open a sluice gate which would have been used to empty the bilges, for twenty days, was an error in management.

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[135] Article IV (2)(a) of the Hague-Visby Rules.
[136] Wilson op cit note 133 at 273.
[137] Ibid
[138] The Satya Kailash [1984] 1 Lloyd's Rep 588.
[139] V Rochester *Nautical Fault: A Historical and Multi-Jurisdictional Study of the Exemption for Errors Relating to Navigation and Management of the Vessel in Modern Carriage Law* (published LLD thesis, University of Cape Town, 2008) 49.
[140] Folger Coffe Co. v Oliverbank, 2000 AMC 844 (5 Cir. 2000).
[141] Ibid at 849.
[142] Carriage of Goods by Sea Act of 1936. The United States of America incorporated The Hague Rules into their domestic legislation passing the Carriage of Goods by Sea Act in 1936. (Hereinafter referred to as 'US COGSA').
[143] The Sanfield 92 F.663 (1989).

The phrase ‘act, neglect or default’ has been given a broad interpretation by maritime scholars and jurists. Rochester explains that the phrase goes further than simple acts of negligence and can include ‘gross negligence’.[144] Maritime authors concur that the wording of the exception extends protection to the carrier by covering wilful acts and conduct by the master and servants of the vessel as well as intentional acts that include ‘malicious acts, barratry and felonious acts’.[145] Thus, the carrier is afforded greater protection that extends past simple fault.

4.2.1.2 ‘the Master, Mariner, Pilot or the Servants of the Carrier’

The provision states that the act, neglect or default must be committed by either the 'Master, Mariner, Pilot or servants of the carrier', in order for the exception to be relied upon by the carrier. If the fault or error is as a result of the carrier's own negligence, the exception becomes inapplicable. Examples of such negligence on the part of the ship-owner include a ship-owner negligently appointing an intoxicated captain or negligently failing to instruct that a pilot be employed for the vessel.[146]

The provision does not expressly state that a ship-owner's personal acts and knowledge do not fall within the ambit of Article IV (2)(a) of the Hague-Visby Rules. In order to determine when the carrier can rely on this exception in order to escape liability, certain jurisdictions have amended their sea carriage legislation to provide that the liability of the carrier is based on its personal fault.[147] The British *Merchant Shipping Act of 1894* contains the expression 'actual fault or privity' and the US *Limitation of Liability Act of 1851*, contains the equivalent expression, 'privity or knowledge'.[148] In Article IV (2)(b) and Article IV (2)(q) of the Hague-Visby Rules, expressly provides for the 'actual fault or privity of the carrier,' this is instructive of when fault is attributable to the ship-owner.[149]

In the Australian case, *James Patrick & Co Pty Ltd v Union of SS Co of New Zealand*,[150] 'actual fault or privity' is described as 'implies some culpability on the part of the owner. It may consist in being privy to the neglect, unskilfulness or improper

[144] Rochester op cit note 139 at 51.
[145] Rochester op cit note 139 at 52.
[146] S Boyd *Scrutton on Charterparties and Bills of Lading* 20 ed (1996) 238.
[147] Rochester op cit note 139 at 54.
[148] Ibid.
[149] Ibid.
[150] James Patrick & Co Pty Ltd v Union SS Co of New Zealand (1938) 60 CLR 650 (Australian High Court).

act or omission of a servant or agent. It may be the neglect or the impudent or wrongful act of the ship-owner himself. But the ship-owner must in some way be to blame... A failure to make himself aware of what he ought to know is or may be an actual fault'.[151]

If a vessel is owned personally by a sole owner, the act or fault must be of that sole owner itself. However, in modern maritime trade, ships are almost always owned by corporations and fault or liability is attributable to the personality of the corporation.[152] Liability is attributable to a corporation through the concept of the 'alter ego',[153] this concept together with the concept of 'actual fault or privity' is discussed in the English case of *Lennard Carrying Co v Asiatic Petroleum Co*.[154] In this case, it was held that a corporation is directed by someone directing the mind and will of the corporation. These persons may include anyone under the direction of the shareholders, members of the board of directors or persons having authority under the articles of association.[155]

English Approach to the ‘alter-ago’ of a corporation

Who constitutes the ‘alter ego’ of a company has been deliberated upon extensively in English case law. In *Lennard Carrying Co v Asiatic Petroleum*,[156] the Privy Council held that the alter-ego of a corporation would be attributed to its board of directors; this would also include persons in senior management positions. However, the English Court of Appeal in the case *The Lady Gwendolen*[157] extended the ‘alter-ego’ to include middle management personnel.

American Approach to the ‘alter-ego’ of a Corporation

The term used in the United States of America, when looking at this issue is ‘privity or knowledge’. Courts in the United States have determined that ‘privity or knowledge’ goes further than that interpreted and applied in English jurisprudence

[151] James Patrick & Co Pty Ltd v Union SS Co of New Zealand (1938) 60 CLR 650 (Australian High Court) 670.
[152] N Gaskell, R Asariotis & Y Baatz *Bills of Lading: Law and Contracts* (1999) 344.
[153] Rochester op cit note 139 at 55.
[154] Lennard Carrying Co v Asiatic Petroleum Co [1915] A.C. 705 (H.L.).
[155] Ibid at 713.
[156] Ibid.
[157] The Lady Gwendolen [1965] 1 Lloyd’s Rep. 335 (C.A).

and also encompasses management that is lower on the corporate ladder.[158] Rochester explains that courts in the United States of America have held that employees of a corporation with supervisory or discretionary powers will have privity or knowledge of the corporation.[159] In the case of *In re Hercules Carriers Inc*,[160] an allision with a bridge occurred whilst the pilot was in control of the vessel; the allision resulted in the loss of life and cargo. The allision occurred as a result of the pilot's excessive speed in poor visibility conditions. The Court of Appeal held that the crew were negligent as they failed to halt the pilot's negligent actions.[161] It was further held that the ship-owner was aware of the negligence of the crew and on that point; the ship-owner had allowed the practice of letting the pilots on board make navigational decisions.[162]

As discussed above, the approach taken by the United States in respect of 'privity or knowledge' of the ship-owner is considered contentious as it casts a wider net, encompassing employees further down in the corporate ladder. This notion favours the cargo interest and places stricter liability on the ship-owner, making it difficult for the carrier to be able to rely on the exception of negligent navigation. The jurisprudence of the Commonwealth countries in respect of 'actual fault or privity,' considers the expression to only encompass management and senior personnel such as members of the board of directors.[163] In taking this stance, the number of persons that actual fault or privity can be attributed to personally, decreases and the ship-owner will be liable for fault or negligence that is attributed to him personally. This is considered a much softer stance than that of the United States of America and what appears to be the approach preferred by most other maritime trading nations. Thus, taking the stance, that the act or fault must be that of one of the classes of persons stipulated in the provision.[164] The actions of any other persons, such as an agent of the vessel or an independent contractor will be unable to invoke this exception.[165] If act or fault pertaining to the navigation or management of the

[158] Rochester op cit note 139 at 57.
[159] Ibid.
[160] In re Hercules Carriers Inc., 768 F. 2d 1558 (11th Circ.1985).
[161] Ibid at 1566.
[162] Ibid at 1571.
[163] Lennard Carrying Co v Asiatic Petroleum Co [1915] A.C. 705 (H.L.).
[164] Article IV (2)(a) of the Hague-Visby Rules.
[165] The Chyebassa [1967] 2 Q.B. 250.

vessel is not committed by a person falling within categories expressly stated in the provision, then the carrier is liable for the loss or damage to the cargo.

4.2.1.3 'In the Navigation or in the Management of the Ship'

The exception contained in Article IV (2)(a) of the Hague-Visby Rules cover acts or fault in the navigation and management of the vessel, however, the words 'navigation' and 'management' are not expressly defined in Rules.

In maritime practice the word 'navigation' can be broadly defined as, the sailing and manoeuvring of a vessel, it would also include matters of seamanship[166] and matters concerning the safety and security of the vessel.[167] Wilson lists examples of faults of navigation, where cargo was lost or damaged due to the negligence of the crew or master.[168] These include incidents where the vessel struck a reef,[169] ran aground[170] or collided with another vessel.[171]

An act, neglect or default in the management of the ship leads to difficulty in courts interpreting, which acts or defaults fall under the management of the vessel. Article III (2) of the Hague-Visby Rules explains that the carrier shall 'properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried'.[172] Difficulty arises as fault in the management of the vessel needs to be distinguished from the carrier's duty to properly care for the cargo as contained in Article III Rule 2 of the Hague-Visby Rules.[173]

In the case of *Gosse Millerd v Canadian Government Merchant Marine*,[174] the House of Lords held that the term 'management of the ship' as stated in the Rules, reflect their common law meaning. Lord Hailsham held that words did not extend to cover 'want of care of cargo but it did include 'want of care of vessel indirectly affecting the

[166] The Hill Harmony [2001] 1 Lloyd's Rep. 147 at 465.
[167] R Aikens, R Lord & M Bools *Bills of Lading* 2 ed (2006) 270.
[168] Wilson op cit note 134 at 274.
[169] The Portland Trader [1964] 2 Lloyd's Rep. 433.
[170] Complaint of Grace Line [1974] AMC 1253.
[171] The Xantho (1887) 12 APP Case 503.
[172] Article III (2) of the Hague-Visby Rules.
[173] Wilson op cit note 134 at 274.
[174] Gosse Millerd v Canadian Government Merchant Marine [1929] A.C. 223.

cargo'.[175] The cases of *The Ferro*[176] and *The Glenochil*[177] reflect the view taken in by the House of Lords in *Gosse Millerd v Canadian Government Merchant Marine*.[178]

If an act, default or negligence relates primarily to the care of the vessel, it shall fall under the management of the vessel. If the act or fault relates primarily to the cargo, it will not be an act of the vessel's management, falling under the exception of Article IV (2)(a) of the Rules.[179] In *The Iron Gippsland*,[180] the negligent operation of a gas tanker which was utilised for the protection of the vessel constituted mismanagement of the cargo. The same view was taken in the case of *The Eternity*,[181] where the negligent operation of a valve constituted mismanagement of the cargo. On the other hand, in *The Hector*,[182] failure to secure tarpaulins on the vessel's hatches amounted to an act in the management of the ship, 'as the structure in its entirety formed part of the ship's defences'.[183] In *The Hector*,[184] failure to secure tarpaulins on the hatches at the beginning of the voyage resulted in cargo damage due to the ingress of water during rough weather. The forecast indicated that weather conditions may improve, thus the master did not instruct the crew to secure the tarpaulins. The court held that the master exercised due diligence in making the vessel seaworthy and that securing the tarpaulins was an act in the management of the vessel.[185]

In the US, courts apply the 'primary purpose' test to establish whether the actions were conducted in the interests of the ship or the cargo.[186]

The defence of negligent navigation does not extend to cover negligent failure to use the apparatus of the vessel for protection of the cargo.[187] In the case of *Foreman and Ellams Ltd v Federal Steam Navigation Company*,[188] refrigerating machinery that

[175] Ibid.
[176] The Ferro [1900] P. 112.
[177] The Glenochil [1903] 2 K.B. 666.
[178] Gosse Millerd v Canadian Government Merchant Marine [1929] A.C. 223.
[179] P Leau 'Dead In the Water: The Nautical Fault Exemption of the Hague-Visby Rules' (2015/2016) 7 *Singapore Law Review* 6.
[180] The Iron Gippsland [1994] 1 Lloyd's Rep. 335 at 358.
[181] The Eternity [2009] 1 Lloyd's Rep. 107.
[182] The Hector [1955] 2 Lloyd's Rep. 218.
[183] Ibid at 234.
[184] The Hector [1955] 2 Lloyd's Rep. 218.
[185] Ibid at 234.
[186] The Germanic 196 US 589 (1905).
[187] Aikens, Lord & Bools op cite note 167 at 271.
[188] Foreman and Ellams Ltd v Federal Steam Navigation [1928] 1 K.B. 424.

was negligently operated by the crew of the vessel did not fall under this exception, as the machinery was employed solely for the care of the cargo.[189]

Difficulty in discerning whether an act or neglect pertains to ship or cargo management arises when containerised cargo is involved. Containers are considered to be part of the ship's apparatus or equipment if the containers are supplied by the vessel itself,[190] or containers can be viewed as being an extension of the vessel's superstructure.[191] Faults or neglect relating to the cargo can equate to a breach of Article III (2)- proper care of the cargo, or mismanagement of the vessel as contained in Article IV (2)(a) of the Hague-Visby Rules. If the breach falls within the exception of Article IV (2)(a), the vessel will not be liable irrespective of any breach of Article III (2), as Article III (2) is 'subject to the provisions of Article IV'.[192]

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

The scope of the defence of negligent navigation becomes complicated as a result of the intersection between faults where the defence can be relied upon, and faults under which the carrier is liable for as a result of its failure to fulfil its obligations towards cargo care or its seaworthiness obligations, as contained under Article III (1) of the Hague-Visby Rules.[193] Each case will have to be decided on the facts of the case and courts can resolve the issue by applying the 'primary purpose' test to the facts.

4.3 Common Errors falling under the Defence of Negligent Navigation

4.3.1 Errors in the Navigation of the Vessel

Errors in navigation are perceived to be fairly straightforward in nature and clear cut. The critical issue pertaining to errors in navigation is distinguishing between an actual error and the incompetence of the master or crew.[194] This shall be discussed further below in the paragraphs pertaining to grounding, collisions and storms.

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[189] Ibid.
[190] Houlden & Co v S.S. Red Jacket [1978] 1 Lloyd's Rep. 300.
[191] Leau op cit note 179 at 6.
[192] As contained in Article III (2) of the Hague-Visby Rules.
[193] Rochester op cit note 139 at 64.
[194] Rochester op cit note 139 at 115.

4.3.1.1 Grounding

Grounding is considered to be the most common error in navigation. A plethora of case law demonstrates that grounding as a result of faults, errors or negligence on the part of the pilot allows the carrier to escape liability under the negligent navigation exception.

In the case of *The Santa Leonor*,[195] the vessel ran aground as a result of wrong commands and a misjudged turn by the pilot; this led to the carrier being exempt from liability under the negligent navigation exception.[196]

Rochester explains that where there are updated charts and notices available onboard a vessel, failure of the crew to utilise such resources would enable the carrier to rely on the exception, however, in a situation where no updated charts were provided, the exception would not apply.[197]

Where the carrier is exempt from liability for damage as a result of grounding, the carrier still needs to exercise reasonable care to protect the cargo from further damage.[198] In the case of the *The West Cajoot*,[199] the court relieved the carrier of liability for the damage to the cargo that was caused by the grounding of the vessel. However, it was held that the carrier was responsible for the failure to remove the cargo of coconut oil from the deep tanks, so that the tanks could be examined for leaks.[200]

4.3.1.2 Collisions

Collisions are almost always considered to be an error in navigation, rather than a failure on the part of the carrier to make the vessel seaworthy. Collisions involving structures or allisions[201] are considered to be an error in the navigation of the vessel.[202] It was held that the exemption contained in Article IV (2)(a) of the Hague-

[195] Grace Line Lim Procs (The Santa Leonor) 517 F.2d 404 (2 Cir.1975).
[196] Ibid at 406.
[197] Rochester op cit note 139 at 98.
[198] Rochester op cit note 139 at 100.
[199] United States of America v Los Angeles Soap Co. (The West Cajoot), 1936 AMC 850 (9 Cir. 1936).
[200] Ibid.
[201] An allision is defined as the striking or action of dashing of a vessel against a fixed object or another vessel which is stationary. An example of an allision would be a vessel hitting the wall of a wharf. 'Allision' available at *https://www.merriam-webster.com/dictionary/allision*, accessed on 22 March 2019.
[202] The Seaway [2004] SGCA 57 (C.A. Singapore).

Visby Rules applied in the case of *Insurance Co of North America v S.S. Georgis A Georgilis*.[203] In this case, the cargo was damaged as a result of the ingress of water from the ballast tank due to an allision of the vessel with the wall of a lock.[204]

There are certain instances where collisions have been considered to be a as result of failure to exercise due diligence in making the vessel seaworthy.[205] An example of such is when the certifications or training of the crew responsible of the collision are considered to be insufficient. In the case of *Protomac Transport v Ogden Marinew Inc*,[206] the master of the vessel was not present, standing watch, when the 3rd mate, who was on his first voyage, was at the wheel when the collision occurred. The Court held that the carrier did not exercise due diligence in the selecting of the crew, as the 3rd mate was inexperienced and he should have been supervised by the master.[207]

4.3.1.3 Storms

A classic example of an error in navigation is when a seaworthy vessel sets sail despite storm warnings or adverse weather reports.[208] It is also considered an error in navigation when a vessel sails through a storm despite an alternative route being available.[209] In the case of *Hershey Chocolate Co v S.S. Mars*,[210] the master of the vessel sailed right through a centre of a storm, which resulted in the consignment of cocoa beans being damaged through a lack of ventilation. The claimant argued that the damage to the cargo could have been avoided if the master had sailed around the storm. The court found in favour of the carrier and held that the vessel was not liable for the damaged cargo as master's action to sail through the storm constituted an error in navigation.[211]

[203] Insurance Co of North America v S.S. Georgis A Georgilis, 1983 AMC 1916 (S.D.N.Y. 1983).
[204] Ibid.
[205] Rochester op cit note 139 at 103.
[206] Protomac Transport v Ogden Marinew Inc. 909 F. 2d 42 (2 Cir. 1990).
[207] Ibid.
[208] Rochester op cit note 139 at 105.
[209] Yawata Iron & Steel v Anthony Shipping, 1975 AMC 1602 (S.D.N.Y. 1975).
[210] Hershey Chocolate Co v S.S. Mars 1961 AMC 17727 (3 Cir. 1960).
[211] Ibid.

In the case of *Texas & Gulf S.S. v Parker*,[212] the 5th Circuit Court of Appeals held that the carrier may only rely on the defence of negligent navigation if the vessel was seaworthy for the voyage or for the anticipated bad weather.[213]

Article 4 of the *Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels* (hereinafter referred to as the '1910 Collision Convention') states that:

> 'If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.
>
> The damages caused, either to the vessels or their cargoes or to the effects or other property of the crews, passengers, or other persons onboard, are borne by the vessels in fault in the above proportions, and even to third parties a vessel is not liable for more than such proportions of such damages.'[214]

As a result of the above principle of division of liability contained in the 1910 Collision Convention and the negligent navigation defence contained in the Hague Carriage Conventions, the owner of cargo carried on a vessel involved in a collision, shall only claim damages from the owner/s of the other colliding vessel in proportion to the fault of such vessel in contributing to the collision. The US is not a party to the 1910 Collision Convention and their domestic law allows cargo-owners to 'recover the full extent of [their] damages from the non-carrying vessel, including physical loss or damage, loss of value due to delay, cargo contribution to general average and lost pre-paid freight'.[215] The non-carrying vessel will then seek a contribution from the carrying vessel, rendering the defence of negligent navigation inapplicable to the claim.[216] This has been a source of contention for both US and foreign shipping interests. In order to remedy the situation, the Both-to-Blame Collision Clause was

[212] Texas & Gulf S.S. v Parker, 263 F. 864 (5 Circ. 1920).
[213] Ibid.
[214] Article 4 of the 1910 Collision Convention.
[215] Hare op cit note 2 at 642.
[216] Rochester op cit note 139 at 104.

introduced in the US It has become commercial practice in the US to have a Both-to-Blame Collision clause inserted into the bill of lading so that the vessels can benefit from the exemption as contained in Article IV (2)(a) of the Rules should a collision situation occur.[217] The Both-to-Blame Collision Clause allows the cargo-owner to hold the carrier liable where it would otherwise be exempt from liability by virtue of the provision contained in Article IV 9(2) (a) of the Hague-Visby Rules.[218]

4.3.2 Errors in the Management of the Vessel

There are three common errors that constitute errors in the management of the vessel, namely errors in refrigeration; ballasting and errors pertaining to hatch covers and tarpaulins. These errors shall be discussed in detail in the paragraphs below. Maritime courts and tribunals across the globe have repeatedly examined a host of various errors that constitute errors in management. These errors include, errors pertaining to drainage pipes, errors in sounding out and pumping bilges, and errors in activities pertaining to the cleaning, pumping and ventilation of the vessel.[219]

4.3.2.1 Refrigeration

Case law from various jurisdictions has consistently held that errors relating to the refrigeration apparatus of a vessel are not considered to be errors in the management of the vessel. In the English case of *Forman & Ellams v Federal S.N. Co*,[220] a cargo of meat was damaged as a result of mismanagement of the vessel's refrigeration apparatus, the court held that the cargo damage did not arise within the management of the vessel. It was further held that refrigerating hold and equipment form part of the vessel, however it is solely provided for the care of special cargo that may require refrigeration.[221]

In the case of *The Heinz Horn*,[222] a cargo of bananas was spoilt as a result of negligent operation of the refrigeration equipment. The court held that the negligent operation of refrigeration equipment caused the damage to the cargo and that operation and control of such equipment constituted management of the cargo and

[217] Ibid.
[218] Ibid
[219] Rochester op cit note 139 at 114.
[220] Forman & Ellams v Federal S.N. Co [1928] 30 L1. Lloyd's Rep. 52 (K.B.).
[221] Ibid at 62.
[222] Heinrich C. Horn v CIA De Navegacion (The Heinz Horn) [1970] 1 Lloyd's Rep. 191 (5 Cir.1969).

not the vessel, as the primary purpose of the refrigeration apparatus was the proper storage of the cargo of bananas.[223]

The above two cases illustrate that the operation of refrigeration equipment and apparatus clearly constitutes acts in the management of the cargo and not in the management of the vessel. This approach has been routinely followed in various jurisdictions across the globe. Refrigeration is considered to be provided solely for the use of cargo that requires special conditions and care. A carrier will not be able to rely on the defence of negligent navigation in a claim where there is loss or damage of refrigerated cargo due to these reasons. Article III (1)(c) of the Hague-Visby Rules states that the carrier has to exercise due diligence in making the refrigerating holds, equipment and apparatus cargo-worthy. In a cargo claim for refrigerated cargo, the cargo claimant will have to show that the carrier did not exercise due diligence in making the vessel cargo-worthy under Article III (1)(c) of the Hague-Visby Rules. Justice Wright in *Forman & Ellams v Federal S.N. Co,*[224] further explained that a vessel could continue being safely navigated and managed, even in the event of its refrigeration equipment failing and spoiling or damaging refrigerated cargo.[225] This reinforces the idea that acts relating to refrigeration equipment shall constitute acts in the management of the cargo and not that of the vessel itself.

4.3.2.2 Ballasting

Errors pertaining to ballasting are considered to be errors in the management of the vessel. In the case of *The Glenochil*,[226] cargo was damaged as a result of negligent ballasting operations; the court held that the carrier was exempt from liability as it was an error in the management of the vessel.[227]

When dealing with ballasting operations, it can often be difficult to distinguish between negligence in the management and care of cargo and errors in the management of the vessel. In the case of *The Mormacsurf*,[228] the Appeal Court

[223] Ibid at 202.
[224] Forman & Ellams v Federal S.N. Co [1928] 30 L1. Lloyd's Rep. 52 (K.B.).
[225] Ibid 60.
[226] The Glenochil [1896] P 10 (P.D.) (Dic Ct).
[227] Ibid
[228] General Foods Co. v S.S. Mormacsurf, 1960 AMC 1103 (2 Cir. 1960).

found that the primary purpose of ballasting was to ensure the welfare of the entire vessel and not focus primarily on the care of the cargo and held that the ballasting, therefore, constituted an error in management.[229]

The safety of the vessel as a whole is of paramount importance whilst at sea. Ballasting operations are performed to ensure optimal safety of the entire vessel during a voyage and the above-mentioned cases illustrate the view of most jurisdictions that that ballasting operations constitute acts in the management of the vessel.

4.3.2.3 Hatch Covers and Tarpaulins

Errors pertaining to hatch covers and tarpaulins are often contentious in nature. Each case needs to be decided upon its own facts, as these errors are often fact specific.

When dealing with an error pertaining to hatch covers is it is often difficult to distinguish whether the error relates to the cargo or whether it is an error in the management of the vessel.[230] A fair amount of case law exists in which the courts have deliberated on the liability and other implications of such errors, one such judgement, pertaining specifically to whether these errors fall within the ambit of the nautical fault exemption, will be examined in this study.

In the case of *International Packers v Ocean Steam Ship Co*,[231] during heavy weather conditions, tarpaulins were stripped from the hatch covers, and cargo was damaged by the inlet of seawater. It was established that the crewmembers failed to lash the hatches securely and this error fell within the ambit of the nautical fault exception.[232]

The carrier will be protected under the exemption in the event where tarpaulins or hatches have not been properly secured and as a result cargo has been lost or damaged. Tarpaulins and hatch covers are considered to be part of the vessel and are deemed to be essential to the safety of the vessel. However, as stated above, each case is fact specific and needs to be decided on its own facts and merits.

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[229] General Foods Co. v S.S. Mormacsurf, 1960 AMC 1103 (2 Cir. 1960) at 1104.
[230] Rochester op cit note 139 at 110.
[231] International Packers v Ocean Steam Ship Co [1955] 2 Lloyd's Rep. 218 (Q.B.).
[232] Ibid.

4.4 Exclusion of the Defence of Negligent Navigation

The defence of negligent navigation has been excluded in the latest two conventions relating to the carriage of goods by sea, namely, the Hamburg Rules and the Rotterdam Rules. One of the key objectives behind the formation of these two conventions was to modernise the laws regulating the carriage of goods by sea and bringing these in line with the technological advancements of the modern maritime trading. The rationale of the drafters of both the conventions is based on the argument that thanks to modern satellite technologies and innovations, such as radar and GPS,[233] vessel operations as well as the actions of the crew can be monitored and controlled by expert land-based personnel.[234] The use of such technology has therefore solved the issue of the shore- based carrier losing control of the vessel once it departs from the port, which has always been the main concern justifying the birth and retention of the negligent navigation defence.[235] Critics of the defence have further faulted it for defying the widely established legal doctrine of vicarious liability, arguing that maritime law in the context of the doctrine should not be promoting principles contrary to this important and widely accepted norm.[236]

4.4.1 Exclusion of the Defence of Negligent Navigation under the Hamburg Rules

As discussed in Chapter 2 of this study, none of the major maritime trading nations have acceded to the Hamburg Rules, nor have they incorporated its provisions into their domestic legislation. Upon deliberation of its provisions at the diplomatic conference preceding the Rules, it found that developing nations opposed the inclusion of the defence, while developed nations objected to the higher standard of liability being imposed on the carrier.[237] The drafting of the Rules turned into an internationally negotiated political agreement rather than commercial compromise.[238] Drafters of the Hamburg Rules took heed of cargo interests by basing carrier liability on fault and holding the carrier responsible without exception for all loss or damage

[233] Global Positioning Systems
[234] Leau op cit note 179 at 2.
[235] Ibid.
[236] Leau op cit note 179 at 3.
[237] M Jansson *The Consequences of a Deletion of the Nautical Fault* (published LLM thesis, Goteborg University, 2007) 19.
[238] Ibid.

that results from the carrier's own fault, or the fault of his servants or agents.[239] Needless to say, this approach did not sit well with delegates representing ship owning nations that were participating in the negotiations leading to the formation of these Rules.

The varied views and interests of the different nations participating in these negotiations ultimately resulted in the lack of success of the Rules. Many delegates were of the view that the deletion of the defence was a mistake and that it played an important role in balancing the risks allocated between the parties to a sea carriage contract, which otherwise places a disproportionately heavier burden of liability on the carrier.

Other delegates were of the view that despite the deletion of the outdated defence, the Hamburg Rules was not a major maritime achievement as it only slightly shifted the balance of liability in favour of cargo-owners, without revolutionising the existing liability system.[240]

The Hamburg Rules have not been well-received by the majority of maritime trading nations and have only been acceded by few nations with no significant influence in maritime trade. It is therefore difficult to determine what impact, if at all any, that the deletion of the nautical fault defence in the Hamburg Rules, has had on maritime cargo liability.

4.4.2 Exclusion of the Defence of Negligent Navigation under the Rotterdam Rules

The Rotterdam Rules emerged as a result of the failure of the Hamburg Rules and the urgent need to harmonise the rules governing carriage of goods by sea.

The Rotterdam Rules followed the lead of the Hamburg Rules by omitting the negligent navigation defence. The Rules state that notwithstanding the exceptions contained in Article 17,[241] the carrier will be liable for the loss, damage, or delay of the cargo if the claimant proves that the fault of the carrier contributed to, or caused

[239] Yang op cite note 24 at 17.
[240] Jansson op cit note 237 at 21.
[241] Article 17 of the Rotterdam Rules contain a list of exceptions that a carrier can rely on when cargo claim arises.

the circumstances that the carrier relies upon in the listed exceptions.[242] The exceptions contained under the Rules act as rebuttable presumptions of the absence of fault as opposed to exonerations from liability as contained in the Hague-Visby Rules.[243]

As stated in Chapter 2 of this study, the aim of the Rotterdam Rules is to establish uniformity in the rules governing the international carriage of goods. The deletion of the negligent navigation defence is an adjustment aimed at balancing the interests of both the cargo-owner and the ship-owner, and it further seeks to bring the liabilities of the sea carrier in line with the liabilities of carriers of other modes of transportation.[244]

The Rotterdam Rules will only come into effect upon ratification by twenty countries; to date only four countries have ratified the Rules. The ratification process over the past eleven years has been extremely slow. The majority of maritime trading nations are cautious of the Rules and have chosen not to accede to the Rules. Reasons attributed to the non-accession of the Rules by the majority of the states, are firstly, their familiarity of the well-known and applied Hague-Visby Rules that have been in existence for many decades, and secondly, ship-owning nations are wary of the Rotterdam Rules due to the perception that the deletion of the defence will lead to an increase in the risks borne by the carrier and this in turn will result in increased freight rates that would negatively impact on cargo interests.[245]

Due to technological advancements discussed above, it is argued that there is no longer the need to include an antiquated defence, such as the negligent navigation defence, in international carriage conventions, that has the potential to harm cargo interests. However, the deletion of the defence in the Rotterdam Rules has not been as widely welcomed as was expected. As already mentioned, the reluctance of maritime nations to embrace the Rotterdam Rules is evident from the lack of ratification of the Rules. It was hoped that the 'Accession Kit of the Rotterdam

[242] Article 17 of the Rotterdam Rules.
[243] Yang op cit note 24 at 19.
[244] Sooksripaisarnkit op cit note 70 at 314.
[245] Leau op cit note 179 at 8.

Rules'[246] would promote the faster ratification of the Rules. However, at present it does not look too promising.

The case of the *Tasman Pioneer*,[247] illustrates the continued dominance of the Hague-Visby Rules in recent years. In the case, which was heard before New Zealand courts, cargo was lost as a result of the vessel grounding due to the master of the vessel, deviating from the agreed route in order to take a shortcut.[248] The master attempted to conceal his deviation of the vessel, which was the cause of the grounding, by falsifying charts and failing to honestly and timeously inform the coastguard about the grounding. The cargo-owner argued that such misconduct on the part of the carrier would not allow the carrier to rely on the defence of negligent navigation as contained under Article IV (2)(a) of the Hague- Visby Rules. The court of first instance held that the carrier could not rely on the defence under Article IV (2)(a) of the Rules, as the master's actions were not *bona fide* in the navigation or management of the vessel. The Court of Appeal interpreted the provision narrowly and held that an 'act in the navigation or the management of the ship' would exclude selfish or dishonest conduct by the master. Duly, the carrier was unable to rely on the defence. The Supreme Court, however, overturned the decision of the lower courts and held that the ordinary meaning of the words in the provision should be applied; however, carriers would not be able to rely on the defence in the event of barratry.[249] The Supreme Court held that the purpose of the wording in the provision was to make carriers liable for loss or damage caused by events in their direct control but not otherwise. Thus, the carrier was able to escape liability. This case is a prime example of how the defence contained under Article IV (2)(a) of the Hague-Visby Rules continues to adversely affect cargo interests.

In the above case, the Supreme Court held that the carrier cannot rely on the defence where his acts amount to barratrous conduct. Prior to the Hague Rules, an exception for barratry was included on bills of lading. At the negotiations in 1921, it was rejected in order to facilitate the negotiated compromise between ship-owners

[246] E van Dijckkaai *Comite Maritime International Yearbook Annuaire 2015* (2016) 437.
[247] Tasman Orient Line CV v New Zealand China Clays Limited and Others [2010] NZSC.
[248] Ibid at 37.
[249] Barratry is an intentional wrongful act committed by the master or crew to the detriment of the ship-owner or charterer.

and cargo owners.[250] The text of the Hague-Visby Rules provide an insight to the exclusion of barratry in the Rules. Article IV(5)(e) and Article IV bis (4) of the Hague-Visby Rules which deal with the limitations of the Rules, state that damage with actual intent, barratry, is a limitation as per the Rules. The Supreme Court held that the post grounding actions of the Master did not constitute an act of barratry as the carrier admitted that the Master's intention was alleged and that it was not alleged that the Master acted with intent or was reckless with the knowledge that damage may occur to the vessel or cargo.[251] Thus, the cargo-claim failed.

The above case, illustrates the alarmingly expansive ambit of Article IV(2)(a) of the Rules, even though intentional faults are excluded. The ruling in this case negatively impacts cargo-interests, as the case clearly demonstrates that cargo claimants literally have no recourse against the faults or negligence of the carrier's personnel, unless they can show that the agents or servants of the carrier acted with actual intention to cause damage.[252] This is an almost impossible task on the part of the claimants to prove as they are not privy to the management of the vessel or its navigation at sea, thus, realistically they cannot be expected to prove such.[253] Further, there is no rational reason as to why a carrier is liable for its servants barratrous acts but not for acts of a lesser degree than barratry, which are also deemed to be serious in nature. Once again, cargo interests suffer injustice as a result of more favourable conditions in the Rules for the carrier.

4.5 Conclusion

Despite its mounting notoriety over the years, carriers' reliance on the defence of negligent navigation defence has been an integral part of the rules governing the carriage of goods by sea. Even in contracts of carriage where the Hague- Visby Rules are not utilised as the governing law, it has become standard practice for carriers to incorporate the defence of negligent navigation by way of an express provision or by virtue of a clause paramount into the bill of lading or charterparty agreement.

[250] Tasman Orient Line CV v New Zealand China Clays Limited and Others [2010] NZSC 69.
[251] Ibid 162
[252] Leau op cit note 179 at 5.
[253] Ibid.

Recent attempts to remove the defence in the Hamburg Rules and the Rotterdam Rules, have failed and this defence in favour of the carrier, continues to be relied upon to the detriment of cargo interests.[254] As illustrated in some of the above discussed judgements, errors pertaining to the defence, namely, errors in the navigation and management of the vessel become contentious issues across jurisdictions.

The wording of Article IV (2)(a) of the Hague-Visby Rules, is perceived to be an allocation of risk in favour of the carrier. Critics of the Hague-Visby Rules argue that this evidences the inability of the Rules to adapt to the needs of a modern maritime industry. Furthermore, it places cargo interests in a vulnerable position with a burdensome onus to discharge and little protection in a cargo claim.

This defence in favour of the carrier is entrenched in the current Rules governing the carriage of goods by sea applicable in the majority of maritime trading nations. However, there appears to be growing international consensus that measures have to be taken to eliminate the defence in order to create a more equitable balance in the interests of ship-owners and cargo-owners. The need for uniformity in the laws regulating carriage of goods by sea is an ongoing debate and it would not be unreasonable to predict that the provision contained in Article IV (2)(a) of the Hague-Visby Rules will either be modified or removed all together in the future, in order to bring these Rules more in line with the needs of the modern shipping industry.

[254] Rochester op cit note 139 at 286.

CHAPTER 5: THE DEFENCE OF FIRE

5.1 Introduction

Fires at sea, have proven to be amongst the most dangerous perils that a vessel may encounter, due to the trail of destruction it leaves in its wake and the colossal risk it poses to life and property at sea. The peril of fire has a widespread effect on all the parties involved in the carriage of goods by sea, namely, the ship-owner, the carrier or charterer, the cargo-owner, and the insurers including P & I Clubs. Losses that the carrier incurs include losses in fighting the fire, repairs to the vessel and bringing the vessel into a port of safety. The cargo-owner and insurer incur losses in respect of the damaged cargo and general average contribution claims.

Carriers' continue to rely on the defence of fire due to their limited means at sea to battle and contain the blaze. The risk of fires at sea, has increased exponentially due to the carriage of containerised cargo by sea. Carriers engaged in shipping containerised cargo run the risk of having such cargo being misdeclared, as they are dependent on the declaration given by the shipper. Hazardous or flammable cargo are often misdeclared as these types of cargo attract higher freight and insurance rates. Hazardous and flammable cargo require proper care and stringent requirements as to how such cargo is to be stowed and carried. Often safety provisions have to be made by the carrier when such cargo is carried aboard which results in higher freight rates being levied. Without the proper equipment and informed expert personnel required for the shipment of flammable cargo, the vessel and its crew are placed in a dangerous and life-threatening position should a fire occur at sea.

The exception of fire, as contained in the Hague-Visby originated as a common law exception that was later codified in a number of English fire statutes. *The English Merchant Shipping Act of 1894*[255] consolidated the liability of the carrier by dealing with exclusions of liability and limitations of the carrier.[256] The defence is aimed at protecting the carrier even in the modern era of maritime trade.

[255] The Merchant Shipping Act of 1894.
[256] The Merchant Shipping Act of 1894 will be discussed in greater detail further on in this chapter.

5.2. The Definition and Scope of Article IV(2)(b) of the Hague-Visby Rules

The defence of fire is contained in Article IV (2)(b) of the Hague-Visby Rules.

Article IV Rule 2:

'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from-

Fire, unless caused by the actual fault or privity of the carrier.'[257]

The Hague-Visby defence of fire allows the carrier to escape liability for loss or damage to cargo that arose or resulted from fire, unless caused by the actual, personal fault of the carrier. As a result, whilst the carrier is not liable for fire damage or loss resulting from the negligent conduct of its servants or agents, whose acts the carrier would otherwise be vicariously liable for, the carrier will not be able to rely on the protection of the defence if it is at fault personally.[258] The determination of the presence or absence of personal fault will have to be taken in light of all facts and circumstances of the case in question.

5.2.1 'Fire'

The *Oxford Advanced Learner's Dictionary of Current English* defines fire as 'a process in which substances combine chemically with oxygen from the air and typically give out bright light, heat, and smoke; combustion or burning'.[259] In light of the Hague-Visby Rules, 'fire' is interpreted narrowly.[260] Therefore for the defence to be applicable there has to be an actual flame, mere smoke or heat will not constitute a fire. In the case of *Tempus Shipping Co. v Louis Dreyfus*,[261] it was held that heat damage which did not result from incandescence, ignition or flames does not constitute damage caused by fire.[262] Fire damage includes smoke damage and water damage sustained in the labour of putting out the fire.[263] Cargo claims as a result of explosions onboard, attract greater scrutiny by the admiralty courts. The first

[257] Article IV (2)(b) of the Hague-Visby Rules.
[258] Wilson op cit note 133 at 275.
[259] A S Hornby *Oxford Advanced Learner's Dictionary of Current English* 8 ed (2010) 557.
[260] S Bengtsson *The Carriage of Goods by Sea Conventions- A Comparative Study of Seaworthiness and the List of Exclusions* (published LLM thesis, Lund University, 2010) 33.
[261] Tempus Shipping Co. v Louis Dreyfus [1930] 1 K.B. 699.
[262] Wilson op cit note 133 at 272.
[263] The Diamond [1906] P. 282.

clear-cut argument is that an explosion resulting from combustion would fall under the ambit of 'fire'. This would be accurate where there is a flame or incandescence and this will also include the resulting production or expansion of gases which would ultimately cause the damage.[264] The opposing argument is that in order to fall within the ambit of 'fire', the explosion has to be more than a momentary ignition and must be of a negligible duration to constitute a 'fire'.[265] Therefore, explosions produced by over-pressurised boilers and explosions resulting from chemical reactions without a flame or light will not fall within the ambit of 'fire' as contained in the Hague-Visby Rules.[266]

5.2.2 'unless, caused by the actual fault or privity'

In order for the carrier to rely on the defence of fire, the fire cannot be caused due to the fault or privity of the carrier. The expression 'actual fault or privity of the carrier' is indicative of fault being directly attributable to the ship-owner. The expression has been derived from numerous English statutes and also referenced in US legislation. It is important to identify any individuals who may be identified or included as the carrier. Where the ship-owner is a corporation, liability is attributable to the personality of the corporation, the alter-ego.[267] Therefore, liability would be attributed to the board of directors and senior management, persons who are directing the mind and will of the corporation.[268]

'Fault' constitutes negligence and reckless acts or omissions, while 'privity' denotes knowledge, actual or 'blind-eye knowledge' of the acts or omissions of others.[269] 'Blind eye knowledge' would include circumstances where the carrier deliberately failed to inquire as to the acts or more particularly the omissions of others which resulted in the fire.[270] In the case of The Sea Star,[271] it was held that in the absence of actual knowledge, the 'privity' of the person concerned will only be proven once it is shown that the said person deliberately failed to inquire as to the act or omission

[264] Aikens, Lord & Bools op cite note 167 at 272.
[265] Ibid.
[266] Ibid.
[267] A detailed account of 'actual fault or privity' including the English approach to the alter-ego of a company is contained in Chapter 4 of this study.
[268] Lennard Carrying Co v Asiatic Petroleum Co [1915] A.C. 705 (H.L.).
[269] Bengtsson op cit note 260 at 34.
[270] 'Blind eye knowledge' was first defined in the marine insurance case, Compania Maritima San Basilio S.A. v The Oceanus Mutual Underwriting Association (Bermuda) Ltd (The Eurysthenes) [1976] 2 Lloyd's Rep. 171.
[271] The Sea Star [2003] 1 A.C. 496.

'in the hope that by his lack of inquiry he will not know for certain what the situation is.'[272]

In the case of *The Apostolis*,[273] it was held that the burden of proving fault or privity for purposes of the Hague-Visby Rules rests with the person asserting it, usually the cargo interests in the matter.[274]

Whilst a ship-owner is not liable for the faults or omissions of its employees, agents or sub-contractors, through delegation of its duties to a third party, the ship-owner will not be able to escape liability for the third party's defaults.[275] Recent case law[276] suggests that ship-owners are now exercising more supervision on the activities of their Master and crew than before, ensuring that Masters are performing their duties with care and expertise. In such cases the failure to render adequate supervision may amount to actual fault or privity on the part of the ship-owner, leaving the ship-owner without the protection of the defence of fire.[277] Due to the limited means of a vessel being able to fight fires at sea, ship-owners have become more conscientious about training their crew members in fire-fighting procedures and regulations to be followed in the event of a fire at sea. Furthermore, ship-owners are actively involving themselves in the exercise of due diligence so as to minimise exorbitant insurance and cargo claims in the event of a fire.

5.2.3 The Scope of Article IV (2)(b) of the Hague-Visby Rules

A carrier relying on Article IV (2)(b) of the Hague-Visby Rules, will need to first establish the actual cause of the loss and that he exercised due diligence before he will be afforded the protection under the defence of fire.[278] Once these two requirements have been satisfied, the carrier needs to prove that the fire was the actual cause of the loss or damage.

As explained above, in order to prevent a ship-owner from relying on the fire defence, it must be proven that the claim arose as a result of the fault or privity of the

[272] The Sea Star [2003] 1 A.C. 496, 486-487.
[273] A. Meredith Jones and Co. Ltd v Vangemar Shipping Co. Ltd (The Apostolis) [1996] 1 Lloyd's Rep 475.
[274] Ibid at 483.
[275] Aikens, Lord & Bools op cit note 167 at 272.
[276] The Marion [1984] 2 Lloyd's Rep 1.
[277] Wilson op cit note 133 at 276.
[278] American Mail Line v Tokyo M. & F Insurance Co[1959] A.M.C. 2220.

ship-owner personally. There must be a direct link between the ship-owner, the cause of the fire, and the loss or damage that has occurred.[279] While the carrier is not liable for the actions of its crew in the starting of a fire, the carrier has a duty to exercise due diligence in employing competent crew to deal with the peril of fire.

In the case of *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd*,[280] it was held that the first base obligation to exercise due diligence contained in Article III (1) of the Hague-Visby Rules, is an overriding obligation, irrespective of the exceptions contained in Article IV (2) of the Rules.[281]

Article III Rule 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; and
(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.'[282]

Courts needs to ensure that the due diligence by the carrier has been exercised in respect of seaworthiness and the provisions listed above, before the carrier can rely on the defence of fire. In the case of *Sunkist Growers Inc. v Adelaide Shipping Lines Ltd*,[283] the Ninth Circuit Court held that the carrier must have exercised due diligence in making the vessel seaworthy as per Article III (1) of the Hague-Visby Rules, before the carrier may rely on the immunity of fire.[284] The carrier will be absolved from responsibility for a claim, where the cause of the fire cannot be determined or established.[285] This will result in cargo-owners being unable to prove actual fault and carriers' being able to escape liability easily.

[279] M Benmoha *The Carriers Responsibilities and Immunities Under the Hague and Hamburg Rules* (published LLM thesis, University of Montreal, 2001) 58.
[280] Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd [1959] 2 Lloyd's Rep. 105.
[281] Ibid.
[282] Article III (1) of the Hague-Visby Rules.
[283] Sunkist Growers Inc. v Adelaide Shipping Lines Ltd, 603 F.2d 1327 (9th Cir. 1979).
[284] Ibid.
[285] Benmoha op cit note 279 at 61.

5.3 The Fire Statutes

The US and the United Kingdom both have national statutes regulating the defence of fire that a carrier can rely on in a cargo claim. These statutes have been in existence prior to the Hague-Visby Rules. The fire statutes continue to co-exist with the fire exception contained in these jurisdictions' version of the Hague-Visby Rules, and these statutes continue to be invoked by carriers in the US and the United Kingdom. The Fire Statutes read as follows:

The United States Fire Statute:

The Limitation of Liability Act of 1851 (46 U.S. Code, s 182, R.S. 4282)[286] states that,

> 'No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board any such vessel, unless such fire is caused by the design or neglect of such owner.'[287]

British Fire Statute:

Section 502 of The Merchant Shipping Act of 1894[288] states that;

> 'The owner of a British sea-going ship or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely; -
>
> (1) where any goods, merchandise or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship…'[289]

Section 502 of *The Merchant Shipping Act of 1894* must be read with *The Merchant Shipping (Liability of Shipowners and Others) Act of 1958*, which extends the

[286] The Limitation of Liability Act of 1851 (46 U.S. Code, s 182, R.S. 4282), hereinafter referred to as the 'US Fire Statute.'
[287] 46 U.S. Code, s. 182, R.S. 4282.
[288] Section 502 of The Merchant Shipping Act of 1894, hereinafter referred to as the 'British Fire Statute.'
[289] Ibid.

owner's benefit to 'any charter and any person interested or in possession of the ship, and in particular, any manager or operator of the ship.'[290]

The United States of America enacted the Hague Rules into their domestic legislation though *The Carriage of Goods by Sea Act (46 U.S. Code, s307).*[291]

Tetley states that both the British and United States Fire Statutes apply even when the Hague-Visby Rules are in force.[292]

5.3.1 Differences between Article IV(2)(b) of the Hague-Visby Rules and The Fire Statutes

The Fire Statutes originated almost a century prior to the advent of the Hague- Visby Rules. The codification of the defences under the Rules drew strongly from historical maritime statutes and legislation and the defence of fire is no exception. However, there are a number of differences between the Rules and the Fire Statutes.

The first and most glaring difference is that the Rules protect the 'carrier.' The term 'carrier' extends to include the charterer as well as the owner of the vessel.[293] The US Fire Statute only protects the 'owner' of the vessel.[294] The term 'owner' extends to include bareboat or demise charterers; however time charterers are excluded from limiting their liability. [295] Where a vessel is owned by the United States, the government will be regarded as the 'owner' of the vessel in terms of the US Fire Statute.[296] When litigating a cargo claim pertaining to the defence fire, in the United States, it would be an easier option for the carrier to invoke the defence under the US COGSA, as the 'carrier' is protected.

The US and British Fire Statues only cover US and British vessels, while the Hague-Visby Rules, cover all ships irrespective of nationality.[297]

The wording of the Fire Statutes suggests that they apply before loading and after discharge, as the Statutes refer to fires on board a vessel and extends to cover loss

[290] Section 3(1) of The Merchant Shipping (Liability of Shipowners and Others) Act of 1958.
[291] The Carriage of Goods by Sea Act (49 U.S. Code, s 307), hereinafter referred to as 'U.S. COGSA.'
[292] Tetley op cit note 101 at 190.
[293] Article I(a) of the Hague-Visby Rules.
[294] 46 U.S. Code s 30504.
[295] R Force *Admiralty and Maritime Law* 2 ed (2013) 148.
[296] Ibid.
[297] Tetley op cit note 101 at 190.

or damage to cargo by reason of fire, not necessarily on board the vessel at the time.[298] In a similar situation, The Hague-Visby Rules would not be available to the carrier as the cargo would have already been discharged in terms of Article I (e) of the Rules.

Under the Hague-Visby Rules, lack in the exercise of due diligence in making a vessel seaworthy by the agents or servants of the carrier is imputed to the carrier itself. However, under the Fire Statutes, both the charterer and the owner under British law and the owner under US law will only be liable if they contributed personally to the unseaworthiness of the vessel.[299] In the case of *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd*,[300] provisions of the Canadian *Water Carriage of Goods Act of 1936*[301] were applied. The Privy Court held that due to the servants of the carrier not exercising due diligence in making the vessel seaworthy, before and during the voyage, the carrier is liable for fire damage.[302] If the same case was adjudicated upon under the British or US Fire Statutes, the judgment might be different, as the Fire Statutes do not contain any reference to the exercise of due diligence in making a vessel seaworthy.[303] This is evidenced in the US case, *Consumers Import Co v Kawasaki Kisen Kabushiki Kaisha (The Venice Maru)*,[304] where the court found that due diligence had not been exercised by the servants of the owner of the vessel in respect its seaworthiness. A highly flammable cargo of sardine meal caught fire due to improper stowage. The court further held that the carrier could invoke the Fire Statute, as the carrier had delegated the supervision of the stowage of the cargo and neglect in the exercise of due diligence by the servants is not the neglect of the carrier personally.[305]

[298] Hare Shipping op cit note 2 at 803.
[299] Tetley op cit note 101 at 190.
[300] Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd [1959] 2 Lloyd's Rep. 105.
[301] Canada enacted the Hague Rules into their domestic legislation by way of The Water Carriage of Goods Act of 1936.
[302] Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd [1959] 2 Lloyd's Rep. 105.
[303] Tetley op cit note 101 at 190.
[304] Consumers Import Co v Kawasaki Kisen Kabushiki Kaisha (The Venice Maru) .133 F. 2d 781, 1943 A.M.C. 277.
[305] Ibid.

5.3.2 Reconciliation of The Fire Statutes with The Hague-Visby Rules

In an effort to reconcile the issue of who is deemed to be the 'carrier' in terms of the US Fire Statute and US COGSA, judges in the case of *The Edmund Fanning*,[306] decided to extend the definition of the term 'carrier' to include servants and agents of the carrier. In this case, the court held that an expeditor, whose main duty was to provide assistance in the stowage of the cargo, was a managerial agent, as the expeditor's privity and knowledge of dangerous cargo was deemed to be the privity of the owner under the US Fire Statute and of the carrier under US COGSA.[307]

Under the US Fire Statute, the burden of proof falls upon the cargo owner[308] and upon the carrier under the British Fire Statute.[309] This stance is surprising as Britain is considered to be a major ship-owning nation and it has surprisingly favoured the cargo claimant in this instance. Under the Hague-Visby Rules, the burden of proof in establishing actual fault or privity falls upon the cargo claimant, as he who asserts, must prove. This was held in the case of *The Apostolis*[310] and has been considered as the correct approach by maritime scholars. Furthermore, courts, in general, are reluctant to burden a litigant with a negative onus, an onus requiring either party to show that it was not in actual fault or privity.[311] In a cargo claim, the carrier must first assert and prove the exception of fire, the cargo claimant must then go on to allege and prove the carrier's actual fault or privity.[312]

Maritime scholars[313] have maintained that the Fire Statutes are no longer a necessity in modern maritime law as the Hague-Visby Rules have been enacted into the domestic legislation of both the United States and the United Kingdom, and majority the major maritime trading nations. By maritime courts encouraging the application and enforcement of the Hague-Visby Rules in cargo claims relating to the exception of fire, uniformity in application of the Rules will be achieved and there would be an

[306] The Edmund Fanning [1953] A.M.C. 86.
[307] Ibid.
[308] In the case of American Tobacco v SS Katingo Hadjipatera [1951] A.M.C. 1933, the US Court of Appeal held that the burden of proving fault under the US Fire Statute is upon the cargo owner.
[309] Lennard Carrying Co v Asiatic Petroleum Co [1915] A.C. 705 (H.L.).
[310] A. Meredith Jones and Co. Ltd v Vangemar Shipping Co. Ltd (The Apostolis) [1996] 1 Lloyd's Rep 475.
[311] Hare op cit note 2 at 804.
[312] Ibid.
[313] The scholars whose texts have been analysed in this chapter: Aikens, Hare, Force and Tetley.

increase in jurisprudence of the Hague-Visby Rules which would benefit both the carrier and the cargo-owner in future claims.

5.4 Issues Pertaining to The Defence of Fire

There are a number of issues which may arise when the defence of fire is invoked in a cargo claim, These included but are not limited to, the care of the cargo once a fire has started; any deviations made by the vessel during a fire and the right to claim general average in a cargo claim involving fire. These issues will be briefly discussed below.

5.4.1 Cargo Care in the Peril of Fire

Once the peril of fire has been discovered on a vessel, the carrier may be held responsible if it is negligent in extinguishing the blaze. There are two US cases that entrench this view. In the case of *American Mail v Tokyo M. & F. Insurance Company*, [314] the court held that negligence in the extinguishing of a fire is negligence in the care and the custody of the cargo.[315] In the case of *Asbestos Corporation. Et al. v Cyprien Fabre*,[316] a fire which was not caused by the negligence of the carrier, started in the engine room of the vessel and spread to the cargo holds a few hours later. The carrier could not extinguish the fire as all the fire-fighting equipment was located and controlled from the engine room of the vessel. This resulted in widespread fire damage to the vessel and its cargo. The US Court of Appeals held that the carrier was responsible for the cargo damage, as carriers are exempt from liability for cargo damage caused by fire, except when the fire is 'caused by the design or neglect of such owner' or 'caused by the actual fault or privity of the carrier.' These two phrases essentially have the same meaning and are often used interchangeably.[317]

These two cases clearly illustrate that the fire exception, where the carrier is exempt from liability will apply, unless it can be proven that the fire and damage caused thereof, arose as a result of the negligence and/ or fault of the carrier. Even if the fire arose due to reasons that cannot be attributed to the carrier, it is the carrier's duty to

[314] American Mail v Tokyo M. & F. Insurance Company [1959] A.M.C. 2220.
[315] Ibid.
[316] Asbestos Corporation. Et al. v Cyprien Fabre [1973] A.M.C.
[317] Ibid at 1683.

mitigate damage and the carrier can be held responsible for any damage that can be shown to have occurred due to the carrier not satisfactorily mitigating such damage.

5.4.2 Deviation and the Peril of Fire

The defence of fire may not be available to a carrier whose vessel had deviated from its contracted path of voyage. In the case of *Thiess Brothers (Queensland) Pty Ltd v Australian Steamships Pty Ltd*,[318] loss was caused as a result of a fire breaking out in a shipment of coal that was being carried from Gladstone to Melbourne. During the voyage, the vessel deviated to Newcastle, situated in New South Wales in order to bunker for the next stage of the voyage. The vessel experienced a delay in Newcastle that resulted in the coal heating up. The master deemed the heating of the coal to be of a serious nature and decided to discharge the cargo. During the course of discharge, the coal caught alight and had to be sold at the quayside as it lay. The court held that the vessel had deviated for its sole benefit and that the deviation was outside of the contracted voyage, this led to the contract of carriage being abrogated and therefore, the carrier was not entitled to rely on the defence of fire as contained under Article IV (2)(b) of the Rules.[319] The reasoning of the court is considered as correct as the deviation was not justified through the construction of the contract of carriage and as a result the carrier was liable for the loss and damage sustained by the cargo-owner.

5.4.3 General Average in a Fire Claim

General average is a complex subject which does not fall within the ambit of this study. However, when discussing the exception of fire, the subject of general average is important to touch on. Maritime scholar *Astle*[320] describes the doctrine of general average below:

> 'If a ship and cargo are exposed to a common danger of damage or destruction, and if, in order to avert that danger, some part of the cargo of the ship or her appurtenances is deliberately abandoned or damaged or destroyed, the losses caused are regarded as a general average sacrifice,

[318] Thiess Brothers (Queensland) Pty Ltd v Australian Steamships Pty Ltd [1955] 1 Lloyd's Rep 459 (SC NSW).
[319] W E Astle Shipping and The Law (1980) 117.
[320] Ibid at 112.

and are to some extent made good by contribution in general average by the ship and the cargo as a whole.'[321]

The Hague-Visby Rules do not contain any express provision pertaining to general average however, Article V of the Rules allows for the insertion of any lawful provision regarding general average into a bill of lading. Therefore, if the cargo claimant is unable to recover his losses for fire damage under the Rules, there are other means of redress, namely general average. The cargo claimant can claim general average after the peril of fire, when an act has been carried out by the carrier to save the cargo or vessel and put out the fire which resulted in the damage or loss of cargo.[322] In the case of *Starlight Trading v San Francisco Maru*,[323] carbon dioxide was injected into a cargo hold and its hatches were then sealed in order to fight a fire. The cargo was subjected to a smoke-filled atmosphere for 42 hours, which resulted in cargo damage. The US Court of Appeals held that the cargo damage was a general average loss.[324]

In February 2017, a fire broke out in a cargo hold on the *mv APL Austria*, a containership, which was 30 nautical miles west of the coast of Port Elizabeth, South Africa.[325] The vessel entered the harbour of Nqura, at Port Elizabeth, where local fire-fighting units and representatives of the carrier spent a number of days extinguishing the blaze. As a result of the fire, the cargo-owners and their insurers suffered significant loss from the damage to the cargo, delays and general average contributions.[326] The carrier also experienced monetary loss as there was substantial damage to the vessel and the carrier had to cover the costs of having to tranship the cargo to Cape Town and various other destinations in West Africa.[327]

In the above-mentioned cases, the loss and damage sustained by both the cargo-owner and carrier was as a result of the action taken by the carrier to avert danger to both the cargo and the vessel. These two cases clearly illustrate how the doctrine of

[321] Ibid.
[322] Tetley op cit note 101 at 191.
[323] Starlight Trading v San Francisco Maru [1974] A.M.C. 1523.
[324] Ibid.
[325] C Holness 'The dangers of fires at Sea: Damage to containerised cargo' July 2017 available at *https://www.nortonrosefulbright.com/en/knowledge/publications/686b42ae/the-dangers-of-fires-at-sea-damage-to-containerised-cargo*, accessed on 10 October 2019.
[326] Ibid.
[327] Ibid.

general average works in a cargo claim pertaining to fire damage, in order to establish fairness in the financial burden to be borne by both parties.

5.5 Conclusion

Justification for reliance on the fire exception is that the peril of fire is one of the greatest dangers that a vessel could ever face, and which may result in insurmountable damage and destruction including loss of life. As a result of the pertinent reasons, as highlighted in this chapter, this defence has always been a significant one in the history of maritime trade and has been utilised as immunity long before the Hague-Visby Rules were adopted. The Fire Statutes of the United States and the United Kingdom gave the exception special status and both these statutes were legislated prior to the enactment of the Rules and continue to be used in adjudicating cargo claims today.

Article IV (2)(b) of the Hague-Visby Rules clearly defines the exception by stating that the defence of fire allows the carrier to escape liability for loss or damage to cargo that arose or resulted from fire, unless caused by the actual, personal fault of the carrier.

In order to recover for losses or damage, the cargo-claimant needs to show that there was a lack of due diligence of the ship-owner to make the vessel seaworthy or safe to receive, stow and discharge the cargo. As the ship-owner is not liable for an act or omission by the crew or servants, where there is a fire that was caused by the negligence of the crew or servants, the exception would stand as a complete defence for the ship-owner. The ship-owner would only be liable if the cargo claimant can show lack of due diligence on the part of the ship-owner personally.

Examples of lack of due diligence on the part of the carrier would include a lack of adequate fire-fighting measures or a lack of training or competent guidance for the crew. A cargo claimant would also be successful in the claim if it can be show that the carrier failed to safely stow dangerous or hazardous cargo. The carrier will need to show compliance with general fire safety requirements as well as the safety measures of the ISM Code, as evidence to rebut the averment of unseaworthiness. Regular fire drills, fire-fighting equipment checks and current information and procedures regarding hazardous and flammable cargo would suffice as evidence

that the carrier must put forth in a fire damage claim. It is of utmost importance that carriers equip their vessels with the latest fire-fighting technology and train their crew in efficient and effective fire-fighting tactics in order to minimise the risk of loss of life and cargo at sea.

The case law discussed in this chapter clearly illustrates the litigious nature of the exception of fire. Fires at sea continue to pose as a highly dangerous risk to maritime transportation that gives rise to long-winded and complex claims for loss and damage to cargo. Claims involving the defence of fire often result in expensive litigation and even where the cargo-claimant may be successful in the claim, the 'guilty' carrier may be a brass plate company with little to no assets to satisfy claims worth millions of dollars for damage to the vessel and cargo.

CHAPTER 6: THE DEFENCE OF HEAVY WEATHER AS A PERIL OF THE SEAS

6.1 Introduction

The defence of heavy weather as a peril of the seas arose as a contentious defence when it was first codified in Rhodian law; by exempting the master of the vessel from liability in the contract of carriage of goods if the vessel became unnavigable due to perils of the sea.[328] In the same vein, the Hague-Visby Rules and the Rotterdam Rules contain clauses exempting the carrier from liability for damage caused by perils of the seas. This ocean specific defence,[329] has been constant in wording and substance in its application to vessels carrying cargo on the high seas and exposed to perils of the sea. This particular exception is also commonly referred to as the 'heavy weather defence' as it applies to claims arising out of accidents caused due to heavy weather conditions out at sea.

The heavy weather defence continues to remain relevant due to the frequency of perils, dangers and accidents of the seas. Such perils and dangers, may result in the damage and/ or loss of cargo, as well as damage to the vessel itself, thereby affecting both the carrier and the cargo-owner. Both parties can suffer substantial losses and this defence is known to be one of the most litigated of the Hague-Visby defences. When contemplating the heavy weather defence, there are a number of factors that need to be considered, including the obligation of seaworthiness and due diligence. These factors will be discussed later on in this chapter.

The heavy weather exception can be found in all standard charter forms as a listed exception. It can be worded simply as 'perils of the sea' or extend to the further encompassing 'all dangers of the sea, rivers and navigation.'[330] The Hague-Visby Rules extends coverage to a sea carrier on the high seas as well as a carrier voyaging through inland navigable waters. This may include rivers, canals and lakes.

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[328] M Katsivela 'The Treatment of The Sea Peril Exception of The Hague-Visby Rules in Common Law and Civil Law Jurisdictions' (2017) 1 *WMU Journal of Maritime* Affairs 19.

[329] In the case of Thames & Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co (The Inchmaree) [1887] 12 AC 484, it was held dangers only specific to the sea will fall under the exception.

[330] 'New York Produce Exchange Form 2015' (3 June 2015), available at *https://www.bimco.org/-/media/BIMCO/Contracts-and-Clauses/Contracts/Sample-copies/Sample-copy-NYPE-2015.ashx*, accessed on 27 November 2019.

6.2. The Definition and Scope of Article IV(2)(c) of the Hague-Visby Rules

The defence of heavy weather as a peril of the seas is contained in Article IV(2)(c) of the Hague-Visby Rules.

Article IV Rule 2:

> 'Neither the carrier nor the ship shall be responsible for loss or damage arising from or resulting from-
>
> Perils, dangers, and accidents of the sea or other navigable waters.'[331]

6.2.1 The Definition of Article IV(2)(c) of the Hague-Visby Rules

The Hague-Visby defence of heavy weather exempts the sea carrier from liability for loss or damage in the event of a peril, danger or accident of the sea. These events, sea peril; dangers and accidents of the sea are not further defined by the Hague-Visby Rules, neither are these events statutorily defined in any conventions or domestic legislation. In order to determine whether an incident falls under this exception, case law from various maritime jurisdictions would need to be considered in order to reach a conclusion. However, this may prove problematic as there are divergent judicial interpretations of this exception in the various maritime jurisdictions, namely, Australia, the US and the United Kingdom. Therefore, the writer will attempt to narrow down the definition of this exception by discussing the interpretations of different jurisdictions under separate subheadings dealing with different elements of this exception.

6.2.2 The Scope of Article IV(2)(c) of The Hague-Visby Rules

Wilson, offers a number of examples of events that fall under the heavy weather defence.[332] These include but are not limited to: a vessel running aground in fog, a vessel driven onto rocks in a gale storm and collisions with other vessels during storms.[333] It is important to note that the carrier may also invoke this defence to cover for loss or damage arising from actions taken to avoid or counteract a peril of

[331] Article IV(2)(c) of the Hague-Visby Rules.
[332] Wilson op cit note 122 at 266.
[333] Ibid.

the seas.[334] In the case of *Canada Rice Mills v Union Marine Insurance*,[335] it was held that the cargo of rice which suffered heat damage was as a result of the actions taken by the carrier in trying to counteract the incursion of sea water during a storm.[336] The carrier was able to successfully rely on the heavy weather defence as the damage to the cargo was as a result of the consequence of trying to avoid the sea peril.

When dealing with the defence of heavy weather, the maritime concepts of seaworthiness and due diligence need to be considered, as these two concepts are of value in the study of this defence.[337]

In a cargo claim arising from the damage caused through perils of the seas, the carrier will have to satisfy the initial obligation as contained under Article III (1) and (2) of the Hague-Visby Rules before invoking the exception. This is an overriding obligation, irrespective of the exceptions contained under Article IV(2) of the Rules. Article III of the Rules states that the carrier is to exercise due diligence before and at the beginning of the voyage in making the vessel seaworthy. The carrier further has to man, equip and supply the vessel as well as properly and carefully stow, load, handle and discharge the cargo.

Article IV (1) of the Rules entrenches the initial obligation by stating 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 suppled, and to make the holds, refrigerating and cool chambers and all other party 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 the loss or damage has resulted from unseaworthiness the burden of proving the exercise of due

[334] Ibid.
[335] Canada Rice Mills v Union Marine Insurance [1941] AC 55.
[336] Ibid at 70.
[337] Due diligence has been extensively discussed in chapters 3 and 5 of this study. Seaworthiness will be discussed under the headings of the interpretations of the exception of heavy weather taken by the different jurisdictions.

diligence shall be on the carrier or other person claiming exemption under this article.'[338]

The above provision clearly states that the carrier's success on its reliance on the Hague-Visby exceptions, will be dependent on whether it exercised due diligence in making the vessel seaworthy and the burden of proving such shall be on the carrier. Once the carrier is able to prove such due diligence was exercised, the exceptions become readily available for its defence.

Thus, if a vessel that is seaworthy and cargo-worthy, sustains damage to the vessel itself and loss of its cargo overboard during a storm at sea, the carrier or ship-owner shall be able to invoke and succeed on the heavy weather defence as the vessel was in good condition and the goods were properly secured. However, as it will be discussed below, certain jurisdictions apply a stricter interpretation of this exception compared to others, and do not permit the carrier to succeed in easily avoiding liability on the basis of this exception.

There are two elements that need to be taken in to account when deciding if a particular event amounts to a peril of the seas. The first element being the factual considerations such as the construction of the vessel and the nature of the event. These factual indications are non-exhaustive and case dependant.[339] The second element relates to whether the event was foreseeable This element is often one of the most contentious factors to prove in a cargo claim. These elements will be discussed in greater detail further in this chapter.

6.2.2.1 Seaworthiness

There is no special requirement for a vessel to be in perfect condition, therefore the carrier need only exercise due diligence to equip the vessel to withstand the perils of the sea voyage. Carver, explains that the vessel needs to be fit to sail voyage contemplated by the parties and be suitable to carry the cargo through the voyage.[340]

[338] Article IV (1) of the Hague-Visby Rules.
[339] N J Margetson *The system of liability of Articles III and IV of the Hague (Visby) Rules* (published PhD thesis, University of Amsterdam, 2008) 138.
[340] G H Treitel & F M B Reynolds *Carver on Bills of Lading* 2 ed (2005) at 501-502.

In order to properly examine the different interpretations of the heavy weather defence, it is essential to provide a brief analysis of the various judicial interpretations of seaworthiness. The term 'seaworthy' is not defined in the Hague-Visby Rules. Definitions of this particular term have been coined by various academics and judges in maritime texts and case law. As a brief introduction to the concept of seaworthiness, listed below are three definitions from the jurisdictions of Britain, the US and Australia.

6.2.2.2 The United Kingdom

In the English case *Mcfadden v Blue Star Line*,[341] the court citing Carver, defined seaworthiness as a degree of fitness which an ordinary and careful owner would exercise over his vessel, at the commencement of its voyage, taking into account all probable circumstances of the voyage.[342]

From the above we can deduce the following question when trying to determine seaworthiness before an English court: Was the vessel reasonably fit to encounter the ordinary perils that might be expected on that voyage at that time of the year? Hence the English standard for seaworthiness is one of reasonableness.

6.2.2.3 The United States

The definition for what constitutes seaworthiness is derived from case law. In the cases of *The Sylvia*[343] and *The Isis*,[344] it was held that in order to determine seaworthiness, the vessel must be reasonably fit to carry the cargo it has undertaken to transport. Further to this general rule, the facts of each case will need to be taken into consideration when determining seaworthiness.[345]

Thus, in the US, the standard for seaworthiness appears to be one of reasonableness.

[341] Mcfadden v Blue Star Line [1905] 1 K.B. 697.
[342] Margetson op cit note 339 at 53.
[343] The Sylvia 171 U.S. 462, 464.
[344] The Isis 290 U.S. 333, 352.
[345] Margetson op cit note 339 at 55.

6.2.2.4 Australia

The definition and test for seaworthiness that was applied in the Australian case of the *Great China Metal Industries Co. Ltd. v Malaysian Shipping International Corporation Berhad (The Bunga Seroja)*,[346] covers many aspects of seaworthiness, as well as the flexibility of the test for seaworthiness. In *The Bunga Seroja*, the court held that the carrier has to take into consideration the kinds of conditions that the vessel may encounter, when exercising due diligence in making the vessel seaworthy at the beginning of the voyage. The vessel will be deemed to be seaworthy if it is fit under those conditions to reach its destination safely and transport its cargo to the destination undamaged.[347]

It was further held, that seaworthiness within the ambit of the Hague- Visby Rules must be considered in light of its common law meaning. A vessel shall be deemed to be seaworthy if it can face any weather or storm through its intended voyage.[348] Thus, when a carrier wishes to invoke the heavy weather defence in an Australian court, it will have to prove that that it exercised due diligence at the beginning of the voyage in making the vessel seaworthy in light of any anticipated weather conditions that the vessel may encounter during the journey.

In *The Bunga Seroja*, the court concluded that the test for seaworthiness is one of flexibility.[349] The carrier, when exercising due diligence as per the responsibilities contained under Article II) (1) and (2) of the Rules, will need to take into account the voyage itself and the conditions that the vessel may encounter. Hence, the due diligence to be exercised in each case will vary.

The decision taken by court in the *Bunga Seroja*, has been criticised by many academics as in its simplest form, the court held that if a vessel is seaworthy, then the carrier has already discharged its duty and cannot be held liable for what was reasonably foreseeable, predictable weather at the time of the voyage. This decision goes further than that taken by English courts, where there has to be an element of

[346] Great China Metal Industries Co. Ltd. v Malaysian Shipping International Corporation Berhad (The Bunga Seroja), [1999] 1 Lloyd's Rep. 512.
[347] Ibid at point 33.
[348] Ibid at point 86.
[349] Ibid at point 35.

fortuity in the peril. Australian courts have disregarded the element of fortuity,[350] making it easier for carriers to rely on this defence even in predictable weather. The Australian stance favours the carrier, in that it has been argued by many of its supporters that the decision taken in the *Bunga Seroja*, now represents the position of the defence under all common law jurisdictions.[351] On the other end of the spectrum is the more stringent approach taken by US court, insisting that the event has to be unforeseeable and extraordinary in nature in order for the exception to be relied upon by the carrier.[352] These interpretations will be discussed in greater detail hereunder.

From the case law discussed above, it is clear that the various jurisdictions unanimously agree that the standard for seaworthiness is one of reasonableness. The question to be posed by maritime courts in a cargo claim will be: Was the standard of the due diligence exercised in making the vessel seaworthy one of reasonableness? There are a number of considerations that need to be considered when determining the seaworthiness of a vessel, these include the ports of destination and departure, nature of the cargo and the class of the vessel.

6.3 The Interpretation of the Heavy Weather Defence Under Various Jurisdictions

6.3.1 English Law

Since there is no exact definition of the exception, English law places reliance on the elements of un-foreseeabilty and the extraordinary nature of the events in deciding if the incident falls within the ambit of the exception.

In the case of *Thames and Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co (The Inchmaree)*, the court held that a rigid definition of the expression 'perils of the sea' should be avoided.[353] English courts continue to follow this sentiment when

[350] M Hartwell, A Robinson & P Lamb 'Heavy Weather, the Carriage Regimes and Notes of Protest' Norton Rose Fulbright South Africa August 2014 at 2, available at *http://www.nortonrosefulbright.com/knowledge/publications/119814/heavy-weather-the-carriage-regimes-brand-notes-of-protest*, accessed on 7 July 2015.
[351] Ibid.
[352] Ibid.
[353] Thames & Mersey Marine Insurance Co Ltd v Hamilton, Fraser & Co (The Inchmaree) [1887] 12 AC 484.

deliberating on the exception and examine the incident in terms of foreseeability and the carrier's ability to avoid the effects of the incident.

6.3.1.1 The Requirement that the Event was Unforeseeable

Over the years there have been divergent rulings by English courts regarding the aspect of foreseeability pertaining to the heavy weather defence. In some cases, judges have ruled that the event must have been unforeseeable, while in other cases it was held that a foreseeable event would still result in the carrier being able to rely on the defence. In order to reach a conclusion as to how English courts in general treat this particular element of the exception, various English cases will be examined below.

In the three cases discussed below, the court held that in order to rely on the defence, the event must have been unforeseeable and unanticipated.

In the case of *Balli Trading Ltd. v Afalona Shipping Co. Ltd. (The Coral)*,[354] cargo collapsed during the voyage as a result of negligent stowage. It was held that the damage was as a result of the negligent stowage and therefore, the event was foreseeable and the defence failed.[355]

In the case of *The Friso*,[356] cargo was jettisoned as the vessel encountered heavy weather and suffered great damage resulting in the vessel finally being abandoned. The court found that the vessel was unseaworthy at the beginning of the voyage and therefore, the carrier could not rely on the defence as the event was foreseeable due to the lack of due diligence exercised in making the vessel seaworthy.

In the case of *Aktiselskabet de Banske Sukkerfabrikker v Bajamar Compania Naviera S.A. (The Torenia*),[357] loss was suffered as a result of the vessel sinking in heavy weather together with its load of cargo. The court found that the vessel sank as it was unseaworthy and its unseaworthiness would have been discovered if due diligence was exercised. Therefore, the event was not unforeseeable as the carrier

[354] Balli Trading Ltd. v Afalona Shipping Co. Ltd. (The Coral) [1992] 2 Lloyd's Rep 158.
[355] Ibid.
[356] The Friso [1980] 1 Lloyd's Rep. 469.
[357] Aktieselskabet De Danske Sukkerfabrikker v Bajamar Compania Naviera S.A. (The Torenia) [1983] 2 Lloyd's Rep. 210.

was negligent in the performance of its duties, making the event one that would have been foreseeable.

In the cases discussed below, the courts held that the carrier can rely on the defence, where the events were reasonably foreseeable, provided that the loss suffered was fortuitous.

The leading case in English law pertaining to foreseeability is *Wilson, Sons and Co v Owners of the Cargo Per the Xantho (The Xantho)*.[358] In this case, the Xantho sank after colliding with another vessel during heavy fog. The ship-owner averred that the loss was as a result of the collision which itself was a peril of the seas. The House of Lords agreed with this and found that the collision was in fact a peril of the seas.[359] The exception was applied in the presence of a non-extraordinary event,[360] as fog at sea is not deemed to be an extraordinary event, but rather an event that is encountered often by carriers.

In the case *of Hamilton, Fraser and Co v Pandorf and Co (The Pandorf)*, during voyage, rats gnawed a hole in the pipe of the vessel leading to the ingress of seawater which subsequently caused damage to the cargo of rice.[361] The court held that the event can be regarded as a sea peril as there was no negligence on the part of the carrier.[362] Lord Macnaghten stated:

> 'Under these circumstances it seems to me that the accident which caused the damage was one of the excepted perils or accidents and that there is no reason why the shipowner should not avail himself of the exception. It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care.'[363]

Judge Fitzgerald agreed with the above opinion and explained that even when an event is fortuitous and unforeseeable, the event does not have to be unforeseeable in character to constitute a peril of the seas.[364]

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[358] Wilson, Sons and Co v Owners of the Cargo per the Xantho (The Xantho) (1887) 12 App Cas 503, HL.
[359] Ibid.
[360] Katisvela op cite note 328 at 21.
[361] Hamilton, Fraser and Co v Pandorf and Co (The Pandorf) [1887] 12 App Cas 518.
[362] Ibid.
[363] Ibid at 530
[364] Ibid at 528.

However, in an unusual twist, in case of *The Tilia Gorthan*, the court held that foreseeability of the event will not allow the carrier reliance on the defence.[365] In this case, a cargo of timber was lost overboard as a result of heavy weather conditions encountered by the vessel. These included rough seas and winds in excess of Beaufort Force 10 in the Atlantic Ocean.[366] The court held the carrier was liable for the damage as it stated that there was always the possibility of the vessel encountering heavy weather conditions, which should not have been ignored. The court reasoned that heavy weather conditions were not of an exceptional nature in the Atlantic Ocean at the time of the voyage, which was in winter. These conditions were to be expected on the voyage route of the vessel, hence the vessel ought to have been able to withstand the conditions of the event.[367]

Tetley, supports the view that the event must be unforeseeable and unanticipated.[368] This view was held by the court in the cases of The Coral,[369] The Friso[370] and The Torenia, [371] as discussed above. From these cases, it is evident that the 'unforeseeabilty' of the event is merely a perspective to be considered and not a primary element of the defence. These cases illustrate that foreseeability is a point of view in a case and not the deciding factor.

Carver, supports the view that the defence can be relied upon when the event is reasonably foreseeable or fortuitous in nature.[372] Margetson, citing Carver, explains that emphasis should be placed on the phrase 'guarded against' rather than 'unforeseeabilty'.[373] Courts need to focus on the carrier's ability to avoid the effects of the peril rather than the foreseeability of the occurrence of the peril. This has become a leading standard in English law, as maritime trade continues to grow, and carriage of goods by sea is essential in the growth of such trade. If a carrier, fearing liability for perils of the seas, desists from contracting to carry goods by seas, it will adversely affect global commercial trade. It is important to note that there are few events at sea that are considered to be unforeseen.

[365] The Tilia Gorthan (1985) 1 Lloyd's Rep. 552.
[366] Katisvela op cite note 328 at 21.
[367] The Tilia Gorthan (1985) 1 Lloyd's Rep. 552, 555
[368] Margetson op cite note 339 at 139.
[369] The Inchmaree.
[370] The Coral.
[371] The Friso.
[372] The Tilia Gorthan,
[373] Margetson op cite note 339 at 142.

From the above discussion of English case law, it can be concluded that is more practical to absolve the carrier for liability in the presence of unforeseen sea peril events rather than asserting that the event be unforeseeable. Thus, English law appears to focus on the fortuity or chance occurrence of the event rather than its extraordinary character.

6.3.1.2 The Extraordinary Nature of the Event

As discussed above, common incidents of a voyage, such as rough seas, will constitute perils of the seas, even though it is not an extraordinary event, however, the carrier will only be able to avoid liability if it can show that due diligence was exercised and reasonable care was taken.[374]

In the cases of *The Xantho*[375] and *The Pandorf*,[376] the courts applied the exception in the presence of non-extraordinary events, namely fog and destruction of piping by rodents. Examples of non-extraordinary perils include a vessel running aground on a sunken rock in calm waters and storms at sea which are not of exceptional force.

It can be concluded that English law defines perils of the seas in terms of its foreseeability and the carrier's ability to avoid its effects, rather than the extraordinary character of the event.

6.3.2 US Law

Under US law, emphasis is placed on the un-foreseeabilty of the event as well as the event constituting the sea peril being extraordinary in nature. The three cases below set out the stringent definition under US law.

In the case of *The Rosalia*, perils of the seas were defined as: 'something so catastrophic as to triumph over those safeguards by which skilful and vigilant seamen usually bring ship and cargo to port safely.'[377]

Judge Hand in the case of *The Naples Maru*,[378] expanded on the definition given in *The Rosalia* as follows:

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[374] Ibid.
[375] The Torenia.
[376] Katisvela op cit note 339 at 21.
[377] The Rosalia (1920) 264 F 285 288.

> ‘The phrase ‘Perils of the sea’ has at times been treated as though its meaning were esoteric; Judge Hough’s vivid language in the ‘Rosalia’ has perhaps given currency to the notion. That meant nothing more, however, than that the weather encountered must be too much for a well found vessel to withstand.’[379]

Both these cases clearly illustrate that under US law, in order for a carrier to rely on the defence of perils of the sea, the event in question needs to be unforeseeable as well as extraordinary or extreme in nature.

6.3.2.1 The Requirement that the Event was Unforeseeable

As it has been established above, the event needs to have been unforeseeable, in order to be defined as a peril of the seas. In the case of *Bradley Fertilizer Co v Lavender (The Edwin I Morrison)*,[380] cargo was damaged due to the ingress of seawater through an open bilge pump. The cover of the bilge pump was allegedly knocked out during heavy weather. The court held that carrier had to show that the plate and cover was firmly fixed into place at the beginning of the voyage and that the plate and cover could have only be ripped out through an extraordinary event that could not have been reasonably anticipated.[381] The court further held that the severity of the weather encountered by the vessel during that particular stretch of the voyage was to be expected in that particular area at the time.[382]

In the case of *Johnson v S.S. Schickshinny*,[383] a cargo of cotton and lumber was damaged as a result of the spillage of incorrectly stowed lard, during heavy weather. The court cited *The Rosalia* in its judgment and held that despite the rough weather and heavy seas encountered by the vessel, the carrier would not be able to rely on the defence if the vessel was not subjected to a greater risk than reasonably anticipated on the voyage.[384]

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[378] The Naples Maru (1939) 264 F.2d 32.
[379] The Naples Maru (1939) 264 F.2d 32, 34.
[380] Bradley Fertilizer v Lavender (The Edwin I Morrison) [1984] 153 U.S. 99.
[381] Ibid at 211
[382] Ibid.
[383] Johnson v S.S. Schickshinny (1942) 45 F Supp. 813.
[384] Ibid.

Based on the cases discussed above, it can be concluded that under US law, the event must be unforeseeable in order for the carrier to rely on the defence. Tetley and Sturley, emphasise the rigid application of the exception in US courts, pointing to numerous cases that illustrate this.[385] Thus, a carrier litigating under US law, who wishes to invoke the defence of heavy weather, will have a much harder time in proving that the peril is an unforeseen event. The carrier stands a greater chance of losing his claim and defence in a US court than if he was litigating in an English or Australian court.

6.3.2.2 The Extraordinary Nature of The Event

As mentioned above, in 6.3.2. the sea peril must be of an extraordinary nature as was held in the case of *The Rosalia*[386]

In the case of *The Giulia*,[387] a cargo of hemp was damaged due to flooding which occurred during a storm that caused the vessel to pitch and roll violently. The carrier's defence of heavy weather was dismissed, as the court found that the vessel was unseaworthy at the beginning of the voyage.[388] The court defined sea perils as, 'those perils which are particular to the sea, and which are of an extraordinary nature or which arise from an irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.'[389]

The above reiterates that the event must be extraordinary in nature. Thus, under US law, when an event of heavy weather results in damage, the heavy weather must be extraordinarily heavy weather and not just mere heavy weather.

From the above case law, it can be concluded that under US law, for the defence of heavy to succeed, the sea peril must be unforeseeable, peculiar to the sea and extraordinary in nature. Thus, in the US, the defence of perils of the seas rarely ever succeeds, as it appears that US courts' interpretation of the defence is protective of the cargo-owner, placing the carrier in a precarious position in this regard.

[385] Margetson op cite note 339 at 145.
[386] The Rosalia.
[387] The Giulia 218 F 744
[388] Ibid 746.
[389] Ibid.

6.3.3 Australian Law

There are two noteworthy Australian judgements focusing on the exception of perils of the sea, namely, *The Bunga Seroja*[390] and *Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd (The Gamlen)*.[391] These two cases will be examined extensively hereunder. It is important to note that the court in the case of The Bunga Seroja[392] extensively analysed the application of the Hague-Visby Rules in its judgment, making it an essential case to examine in this study.

In the case of *The Gamlen*,[393] a cargo of cleaning solvent was damaged due to heavy weather when the vessel was crossing the Great Australian Bight, which is notorious for severe weather. The weather conditions at the time were unusual but they were not unforeseeable. The carrier claimed that the damage was caused by the perils of the seas and invoked the exception as its defence. Upon investigation, it was found that the improper stowage of the solvent was the cause of the loss, thus the carrier was found to have breached his obligations under Article III (2) of the Hague-Visby Rules.[394] This being the obligation to properly and carefully stow the cargo carried. The court rejected the carrier's defence and held that the failure to properly and carefully stow the cargo, was the decisive cause of the damage and the carrier's breach had to be read joint with the sea peril exception.[395] The judgement stated, 'It seems to us that an accurate reflection of these findings requires one to treat the two concurrent causes of the loss as inseparable and therefore joint.'[396] Thus the carrier's defence of perils of the seas was dismissed.

In respect of foreseeability of the event, the court stated that, 'sea and weather conditions which may reasonable be foreseen and guarded against may constitute a peril of the sea.'[397] The court further held that there is a difference in the construction of the exception of perils of the seas under US law and Anglo-Australian law.[398]

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[390] The Bunga Seroja at point 33.
[391] Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd (The Gamlen) 1980 147 CLR 142 (HC).
[392] The Bunga Seroja at point 33.
[393] The Gamlen at page 65.
[394] Shipping Corp of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd (The Gamlen) 1980 147 CLR 142 (HC) 163.
[395] Ibid at 65.
[396] The Gamlen at 163-164.
[397] Ibid.
[398] Margetson op cit note 339 at 149.

It can be deduced from the judgment of the above case that Australian courts favour the English approach to sea peril defence, as the event does not have to be unusual nor is the element of un-foreseeability required.

In the case of *The Bunga Seroja*,[399] a cargo of aluminium coils being shipped from Sydney to Taiwan was damaged during heavy weather, traversing the Great Australian Bight. The adverse weather was actually foreseen, as the weather forecast for the area warned that gale force winds as well as rough seas were to be expected. In actuality, the weather was much more extreme and violent as the winds exceeded Beaufort Force 10 and wave heights exceeded 10 metres. The cargo owner brought a claim for damages against the carrier alleging that the carrier had breached its obligations under Article III of the Hague-Visby Rules.[400] The court found that the carrier had exercised due diligence in making the vessel seaworthy and carefully and properly stowed the cargo on board the vessel. It therefore concluded that the carrier had discharged its obligations under Article III of the Rules and accordingly dismissed the claim. Though the sea peril defence need not have been examined, the judgment went into great detail regarding its definition as well as its context within the ambit of the Hague-Viby Rules.

Regarding foreseeability, the court agreed with the decision in *The Gamlen*, which held that the Anglo-Australian approach differed to that of the US approach when defining the sea perils defence.[401] With regards to the extraordinary element of the defence, the court stated that, 'in the UK and Australia, it is not necessary that the losses or the cause of the losses should be 'extraordinary'. Consequently, sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea.'[402]

The Gamlen and *The Bunga Seroja*, clearly illustrate that Australian law favours the English approach to the sea peril defence. In order for a carrier to rely on the defence, the event need not be extraordinary nor unforeseen. This is a carrier friendly approach to the defence considering that few perils at sea are rarely

[399] The Bunga Seroja at para 20.
[400] Ibid at para 77.
[401] Ibid at para 51.
[402] Ibid at para 39.

unforeseen. This wide interpretation of the defence seems to be more plausible than the narrower, less popular approach taken under US law.

6.3.2.1 The Requirement that the Event was Unforeseeable

In *The Gamlen*, the court held that a peril of the sea can be regarded as sea or weather conditions that may reasonably be foreseen and guarded against.

The above finding was also agreed upon in *The Bunga Seroja*, where further aspects of the peril were discussed. The court held that foreseeable weather conditions would be of importance in deciding other issues such as allegations of unseaworthiness or negligent navigation. Likewise, weather conditions that could have been guarded against may be of importance when considering these issues. The court reasoned that the Anglo-Australian approach 'better reflects the history of the rules, their international origins and is the better construction of the rules as a whole.' [403] Judge Cullinan explained that, even though there are modern advancements in communications and technology to reduce exposure to sea perils as well as more reliable methods in forecasting weather conditions, the sea peril exception is still relevant to the modern carrier. The primary purpose of the defence is to absolve the carrier from liability, especially in cases where the carrier has not been found guilty for lack of due diligence or fault. Judge Cullinan stated that, 'cases in which the carrier has acted as expressly required by the Rules, and is not guilty of negligence, and, events at sea can be shown to be the causes of the loss and damaged, the carrier should be entitled to immunity.'[404]

As examined above, all aspects and facts of the case need to be taken into account when contemplating the sea peril exception. Foreseeability is merely one aspect and certainly not the decisive factor. In order for a carrier to successfully rely on the defence, it would need to show it exercised due diligence in the performance of its duties under Article III of the Hague-Visby Rules.[405]

[403] Ibid at para 51.
[404] Ibid at para 221-222.
[405] The duties in making the vessel seaworthy and carefully and properly stowing its cargo.

6.3.2.2 The Extraordinary Nature of The Event

The court analysed this element under US law and disagreed with its rigid approach. As discussed above, under US law, as sea peril must be extraordinary or extreme in nature. The High Court in citing *The Giulia*,[406] disagreed with its reasoning and subsequent judgement. The court held that the aspect of deciding weather conditions, such as intensity, can play a role in deciding whether a peril contributed to the damage or loss, however it not the decisive factor.[407]

The above reiterates that under Australian law, the event need not be extreme or extraordinary in nature. An ordinary event such as rough weather or fog may constitute a peril of the seas.

In *The Bunga Seroja*, under Australian law, the elements of 'foreseeability' and 'extraordinary nature of the event' are merely factors to be considered that do not amount to decisive factors. Instead, all aspects of the case at hand need to be deliberated upon in order to ascertain if the sea peril will succeed or fail. The carrier will be able to rely on the defence if it has exercised due diligence in the performance of its duties under Article III of the Hague-Visby Rules. However, if the carrier has failed to exercise such diligence, and the loss or damage was as a result of such failure or negligence, it will not be able to rely on the defence.

6.4 The Heavy Weather Defence in South Africa

As discussed in Chapter 2 of this study, South Africa enacted the Hague-Visby Rules as a Schedule to the South African COGSA.

As a former British colony, much of South African admiralty law, is based on English common law. Therefore, it follows that South African admiralty courts would look to English judgments when there is no relevant case law of their own. According to Hare, South African courts would adopt the British approach in interpreting and applying this defence.[408]

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[406] The Giulia at 746.
[407] Judge Kirby at para 147 - Great China Metal Industries Co. Ltd. v Malaysian Shipping International Corporation Berhad (The Bunga Seroja), [1999] 1 Lloyd's Rep. 512.
[408] Hare op cit note 2 at 796.

6.5 Conclusion

The defence of heavy weather as a peril of the seas, has proved to be among the most litigated defences listed under Article IV of the Hague-Visby Rules, owing to its divergent judicial interpretations. The case law discussed in this chapter, highlight but a few judgements in the various jurisdictions, revealing the litigious nature of this defence.

The reason for the divergence in the interpretation of this defence, is due to the lack of clear guidance in the text of the Rules itself, concerning the definition and elements of the defence. It must be noted that at the initial discussions of the drafting of the Rules, all participants were in favour of retaining defence as a listed exception, however, despite this unanimous adoption, it is still subject to divergent interpretation.

The two elements of the construction of the defence, namely the requirement that the event was unforeseeable and the extraordinary nature of the event are among the most contentious aspects of the sea perils defence, due to the different stances taken by the various jurisdictions.

The US approach to the defence of perils of the sea can be described as being rigid as the sea peril must be un-foreseeable, peculiar of the sea and extraordinary in nature. This place a heavy burden of proof on the carrier. As a result, carriers rarely end up succeeding with this defence under US law.

It is of greater purpose to focus on the foreseeability rather than the unforeseeabilty of an event; and focus on the fortuity of an event rather an its extraordinary character, as per the Anglo-Australian approach. This approach seems to be a better fit for sea perils defence as it also takes into account all the aspects of the case when determining if the defence will succeed.

The divergent interpretations of the heavy weather defence in different jurisdictions, impacts on the uniformity of the laws governing the carriage of goods by sea, particularly as the Hague-Visby Rules are widely ascribed to.

CHAPTER 7: CONCLUSION

7.1 Introduction

The Hague-Visby Rules, are considered to be among the most influential maritime regimes that have contributed to the development of the laws governing the carriage of good by sea and regulating the rights and liabilities of the parties involved. Article IV of the Rules contains a comprehensive list of maritime exceptions that a carrier may rely on to defend itself against liability in a cargo claim. Though the list is extensive, these exceptions are complex in their nature and application. Each of these defences have specific elements that must be satisfied in order for a carrier to escape liability in a cargo claim based on those defences.

Carriers are often quick to invoke defences contained in the Rules in an attempt to avoid liability in a cargo claim brought against them, and as illustrated in this study, the defences of negligent navigation, fire and heavy weather as a peril of the sea, have proven to be among the most contentious and heavily litigated aspects in cargo claims.

7.2 The Defence of Negligent Navigation

The first contentious defence analysed in this study was the defence of negligent navigation. The expansive ambit of this defence under the Rules, has resulted in it being a heavily litigated defence. In its simplest form, the aim of the defence is to provide the carrier with protection against liability for loss or damage to cargo resulting from errors in navigation or management of the vessel.

As illustrated in Chapter 2, the extensive list of errors that fall under this defence, easily allow the carrier to escape liability under many different scenarios. The wording of the defence under Article IV (2)(a) of the Rules, clearly favours the carrier over the cargo-owner, by allocating the risks in favour of the carrier. This unfair advantage has been highlighted in court judgments in which this defence has been applied, offering little protection to the cargo-owner who already has a burdensome onus to discharge in a cargo claim.

The technological advancements made in the area of carriage of goods by sea, allows the actions of the crew to be monitored and controlled by expert land-based

personnel and the use of such technologies has resolved the issue of the shore-based carrier losing control of the vessel once it departs from the port, which has always been the main concern justifying the birth and retention of this defence.

The deletion of the defence in the Rotterdam Rules has proven to be futile as the majority of maritime trading nation have not ratified the Rotterdam Rules and carriers continue to rely on this defence to the detriment of cargo-owners. Despite the growing concerns about its antiquity and ill-suitedness in modern carriage of goods by sea, the defence remains relevant due to the continued dominance of the Hague-Visby Rules in maritime jurisdictions around the world.

In order to bring current carriage of goods regimes in line with the needs of the modern shipping industry, provisions relating to this long-standing defence available to a carrier, must be modified or removed altogether in order to better balance the interests of the parties involved in a carriage of goods by sea contract. As discussed above, due to the dominance of the Hague-Visby Rules, it is suggested that the defence under the Rules be modified to balance the interests of cargo-owners by removing the cargo-owner's burdensome onus to discharge negligence in a negligent navigation claim. This amendment would place the cargo-owner in a less vulnerable position and would result in an equitable balance of interests for both the carrier and the cargo-owner.

7.3 The Defence of Fire

Fires at sea is the most dangerous peril that can occur on a vessel, due to the colossal risk it poses to life and the cargo carried. Due to the increase in sea carriage of containerised cargo, the risk of fires has increased considerably. The reason for reliance on this defence is due to the carrier's limited means to battle and contain the blaze at sea.

As discussed in Chapter 4, the Hague-Visby defence of fire allows the carrier to escape liability for loss or damage to cargo that arose or resulted from fire, unless caused by the actual, personal fault of the carrier. As the carrier is not liable for an act or omission by the crew or servants, where there is a fire that was caused by the negligence of the crew or servants, the exception would stand as a complete defence for the carrier. It would only be liable if the cargo-owner can show lack of

due diligence on the part of the carrier personally. The additional burden of the carrier having to prove its lack of actual fault or privity, is the main contentious issue pertaining to this defence.

The defence of fire has been firmly entrenched in maritime law even prior to the enactment of the Rules, as a result of the US and British Fire Statutes, which have been discussed in detail in Chapter 4. The Rules have merely cemented the defence for the continued protection of the carrier in carriage of good by sea in present times.

As illustrated in Chapter 4, the defence of fire will continue to be invoked by carriers due to the unpredictable nature of fire and the insurmountable destruction it can cause, to both the vessel and cargo. This defence is not deemed to be as highly contentious as other defences discussed in this study, due to fires at sea posing great risks to both the carrier and the cargo-owner.

Although the defence of fire is not as contentious as the other defences discussed, the defence is still a controversial and heavily litigated defence as the Hague-Visby Rules interpret 'fire' in the narrow sense of its definition and state that in order for the carrier to rely on the defence, the fire must not have been caused due to the actual fault or privity of the carrier. The controversiality of these two issues has been discussed extensively under Chapter 4 of this study together with the relevant case law.

Carriers are continuously working on finding new ways and means to minimise the risk of fires at sea. It is imperative that carriers equip their vessels with the latest fire-fighting technology and train their vessel crew in the latest fire-fighting and combative measures.[409] Misdeclaration of containerised cargo, is at present the biggest cause of fires at sea. It is imperative to further address this issue in current and future carriage regimes in order to minimise this risk.

7.4 The Defence of Heavy Weather as a Peril of the Seas

The defence contained under Article IV (2)(c) of the Hague-Visby Rules is amongst the most controversial of the defences listed in the Rules, due to the divergent judicial interpretations of the defence in the various maritime jurisdictions.

[409] These risk management measures fall beyond the scope of the study, nevertheless it is a useful analysis as fires at sea are one of the most dangerous perils that can be encountered by a vessel.

Furthermore, due to its precarious nature, it is also one of the most highly litigated defences in maritime law.

Chapter 6 of this study, discusses the strict US approach and the wider Anglo-Australian interpretation of the two elements that make up the construction of the defence and highlights the lack of uniformity in the interpretation and application of this defence.

The US approach to this defence is rigid and strict in its application, by defining the sea peril as being an event unforeseeable and extraordinary in nature. The burdensome onus placed on the carrier to prove such, often results in the failure of this defence. The Anglo-Australian approach of focussing on the foreseeability and fortuitousness of the event is a more apt definition and a better fit for the defence as illustrated in Chapter 6 of this study.

The contentiousness of the defence is due to the lack of clear guidance in the text of the Rules itself. As a result, there is a need to properly address and expand the definition in current and future carriage of goods by sea regimes. Achieving uniformity in the definition of the defence will balance the interests of both the cargo-owner and the carrier, as the Rules are thought to be advantageous to the carrier is a cargo claim. It is important that the definition of this exception is uniformly and consistently applied in all jurisdictions using the Hague-Visby Rules as their relevant law, in order to ensure the global harmonisation of the Rules, worldwide and to further ensure that case law pertaining to this defence is uniformly developed in a fair and consistent light.

7.5 Conclusion

Due to the continuous and fast-paced technological and economic advancements in maritime trade, there is a need for the modernisation and harmonisation of the international rules governing the carriage of goods by sea. The Hague-Visby Rules will continue being the dominant regime governing the carriage of goods by sea due to the unpopularity of the more modern carriage regimes such as the Rotterdam Rules.

From the list of defences contained under Article IV (2) of the Hague-Visby Rules, the defences of negligent navigation and heavy weather as a peril of the seas are

the two defences with the most concerns in respect of uniformity. The defences and their concerns have been discussed at length in this study.

As discussed in this study, all three of the defences are unique and complex in nature, and have varied legal and commercial implications for carrier, cargo-interests and insurers in the maritime industry. In ascertaining the merits and flaws of these defences taken by the various maritime jurisdictions, there is a need for the modernisation of the current carriage of by sea regime, in order to keep up with the demands of modern maritime transportation. The burgeoning growth in maritime trade, over the last century, demands for clear and modernised rules to be implemented in order to effectively regulate the carriage of goods by sea and further facilitate international trade.

It must noted that these defences are still relevant in modern maritime trade, as acts of negligent navigation; fires at sea and heavy weather as a peril of the seas, are constant risks borne by the carrier in a sea carriage contract. These defences are entrenched in maritime law, through common law and codification in international conventions as well as the enactment of domestic legislation, suggesting that these exceptions will remain available to a carrier.

A level of uniformity in the interpretation and application of the laws regulating the commonly invoked maritime defences discussed in this study, will lead to greater legal certainty and reduction of legal costs for all parties involved in sea carriage contracts. This requires the revision and modernisation of the carriage regimes regulating the carriage of goods by sea. It is submitted that this will lead to the development of these laws and achieving a better balance between the interests of the parties involved in sea carriage contracts.

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