

THE BASIS OF THE CARRIER'S LIABILITY AND THE
BURDEN OF PROOF IN CARGO CLAIMS ARISING UNDER
CONTRACTS FOR THE CARRIAGE OF GOODS BY SEA
EVIDENCED BY BILLS OF LADING

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Mini Dissertation submitted in 2018 to the School of Law in fulfilment of the requirements of the degree of Master of Laws in Maritime Law

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DEDICATION

This dissertation is dedicated to my parents, Cliffy and Tweedy, who are my greatest blessings in life.

ACKNOWLEDGMENTS

Firstly, I would like to Thank God for being an unconditional light in my life and for giving me the strength and courage to overcome all obstacles.

I would like to acknowledge my late granddad, Nat. I was blessed with the most wonderful granddad who was an inspiration to me, who encouraged me to always reach for the stars and turn my dreams into reality.

I would like to express my sincere gratitude and appreciation to my parents, Cliffy and Tweedy, for their unconditional love, guidance, and encouragement throughout my life. Thank you for always having faith in me and in my ability to succeed. Thank you for the numerous sacrifices that you have made to ensure that I live my best life. This dissertation would not have been possible without your unwavering support.

I am deeply indebted to my brother Nivesh, for being a pillar of strength to me during my period of study, and to my sister Simone for her constant support.

I would like to thank my astute supervisor, Mrs Dusty-Lee Donnelly, for her dedication, patience, support and guidance. Thank you for so willingly providing me with extensive personal and professional guidance. I appreciate your expert advice and efforts in facilitating my dissertation.

I would like to thank my friends and family for their endless love and support.

ABSTRACT

The burden of proof in maritime law has proven to be an issue in some of the cases that pertain to cargo claims. It is therefore important to analyse and compare the basis of liability and the burden of proof in the various international maritime regimes, being the Hague/Hague-Visby rules, the Hamburg rules and the Rotterdam rules.

The Hague/Hague-Visby rules were formed in order to aid in the operations of international maritime trade and to create a balance in the risks between the carrier and the cargo owner. The Hamburg rules were then drafted as its drafters were of the view that the Hague/Hague-Visby rules had failed to create a balance between the carrier and cargo owner's interests. It was hoped that this regime would lead to uniformity within maritime trade, however, the regime has not been widely adopted. The Hamburg rules is said to have further frustrated the laws relating to maritime trade, however it did change the fault based system from proved fault to presumed fault. This change in the system of fault requires an analysis to determine whether or not it impacts the outcome of the cases.

The latest regime that was drafted with the object of reaching uniformity and creating a modernised multimodal regime which no other regime has ever done, is the Rotterdam rules. The Hague/Hague-Visby rules are therefore regarded as outdated as they do not take the modern technologies into consideration. The proponents of the Rotterdam rules take the view that this regime will in fact reach its objective whilst the detractors believe that it will only fragment the laws of maritime trade further. The incidence of the burden of proof and the basis of the carrier's liability is an important question and given the impact on cargo claimants (who may be South African shippers or consignees) it is a consideration that may assist in determining whether it would be in the interests of South Africa to retain the Hague/Hague-Visby rules or consider ratifying either the Hamburg rules or the Rotterdam rules.

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1.1. Brief overview of topic.....	1
1.2. Rationale and purpose of study.....	3
1.3. Research objectives.....	3
1.4. Breakdown of chapters.....	4
1.5. Methodology.....	5

CHAPTER TWO: THE HAGUE AND HAGUE-VISBY RULES

2.1. Introduction.....	6
2.2. Background to the Hague and Hague-Visby Rules.....	7
2.3. Seaworthiness.....	8
2.4. Due diligence.....	8
2.5. Care of cargo.....	13
2.6. Period of responsibility of the carrier.....	17
2.7. Role of the Bill of Lading as proof.....	18
2.8. Exemptions from liability.....	19
2.8.1. Nautical fault exception.....	20
2.8.2. The fire exemption.....	23
2.8.3. Perils of the sea defence.....	25
2.8.4. Inherent vice defence.....	28
2.9. Conclusion.....	31

CHAPTER THREE: BURDEN OF PROOF AND ORDER OF PROOF

3.1. Introduction.....	32
3.2. General principals of evidence in South Africa.....	33
3.2.1. The distinction between burden of proof, order of proof and evidently burden.....	34
3.2.2. Prima facie Proof.....	37

3.2.3. Conclusive Proof	38
3.3. Shifting onuses and the duty of care	38
3.4. Concurrent causes of loss under the Hague and Hague-Visby Rules	39
3.5. Analysis of the traditional position: Four principals of proof in marine Cargo claims	41
3.6. The position in terms of the burden of proof prior to the Hague rules	45
3.7. The position after the Hague rules	46
3.8. Great China metal industries Co Ltd, V Malaysian International Shipping Corporation berhad (The Bunga Seroja)	49
3.9. Volcafe Ltd and others v company Sud Americana de vapores (trading as “CSAV”)	51
3.10. Summarising the onus and order of proof	54
3.11. Conclusion	57

CHAPTER FOUR: THE BASIS OF LIABILITY AND THE BURDEN OF PROOF UNDER THE HAMBURG RULES

4.1. Introduction	58
4.2. Background of the Hamburg rules	58
4.3. Article 5(1) of the Hamburg rules	60
4.4. The period of responsibility under the Hamburg rules	62
4.5. Seaworthiness	64
4.6. The abolition of the nautical fault exception	67
4.7. The modified fire defence	75
4.8. Interpretation of the Hamburg rules	79
4.9. Conclusion	80

CHAPTER FIVE: THE BASIS OF LIABILITY AND THE BURDEN OF PROOF UNDER THE ROTTERDAM RULES

5.1. Introduction	81
5.2. Background of the Rotterdam rules	81
5.3. Seaworthiness	83

5.4. Period of responsibility.....	86
5.5. Basis of liability and burden of proof under the Rotterdam rules.....	87
5.5.1. First round of proof and counter proof.....	87
5.5.2. Second round of proof and counter proof.....	89
5.5.3. Concurrent causes of loss.....	91
5.5.4. Critique of Article 17	92
5.6. Removal of the nautical fault under the Rotterdam rules.....	93
5.7. Exceptions of Fire, Perils of the Sea and Inherent Vice.....	94
5.8. Interpretation of the Rotterdam rules.....	95
5.9. Conclusion.....	97

CHAPTER SIX: CONCLUSION

6.1. Summary of findings.....	99
6.2. Recommendations.....	101

BIBLIOGRAPHY	102
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CHAPTER ONE: INTRODUCTION

1.1 Brief overview of topic

'Like under the common law, the burden of proof under the Hague and Hague-Visby rules shifts more frequently than the winds on a stormy sea'.¹

The burden of proof is of particular importance in establishing which party to the cargo claim will bear the onus of discharging the proof throughout the case. The general rule applied is that '[h]e who alleges must prove', however, it will have to be determined whether the Hague/Hague-Visby rules are in line with this maxim. A contrast of the traditional approach to the burden of proof advocated by professor Tetley, and the case law which supported his approach, and the recent case law is significant in establishing the current approach to the application of the burden of proof in maritime trade. The order of proof which Tetley refers to as being the 'ping pong'² conduct of a claim between the claimant and carrier will also be discussed.

The Hague/Hague-Visby rules follow a proved fault system which will be contrasted with the presumed fault system followed under the Hamburg rules, in order to determine whether the Hamburg rules have in fact increased the carrier's liability in the carriage of goods by sea. Previously, under the common law, there was strict liability placed on carriers even if they were not responsible for damage to the cargo in terms of negligence. However, in the 19th century, carriers that had a superior bargaining power managed to find a way around this 'strict liability'.³ The carriers found a way to introduce more 'exception' clauses into the bill of lading. The carriers would abuse their power as they were allowed to contract out of liability under the common law,⁴ and eventually the carriers were exempted from liability for almost all causes of damage to cargo as well as for their negligence. The carriers would even go so far as to include a clause in the contract of carriage which provided for an exclusion of liability in its entirety.⁵

¹ *Banana Services Inc v MV Fleetwave 911 F2d 519 521 (11th Cir 1990).*

² W Tetley 'The Burden And Order Of Proof In Marine Cargo Claims' at 31, available at <https://www.arbitrage-maritime.org/fr/Gazette/G37complement/burden.pdf>, accessed on 10 April 2018.

³ T Nikaki; B Soyer 'New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just Another One for the Shelves?' (2012) 30 *Berkeley J. Int'l L.* at 303.

⁴ T Nikaki; B Soyer *op cit* note 3 at 303.

⁵ *Ibid.*

A desperate need then arose to balance the risks of the carrier and cargo owner as well as to facilitate international trade.⁶ In an attempt to address this issue the Harter Act was passed in the year 1893.⁷ The Act provided that the carrier may escape liability using the exception of navigation or management of the ship where he satisfies certain conditions. However, the Act went on to disregard any provisions relating to the bill of lading whereby the carrier would be exempted from making the ship seaworthy or in the care of cargo.⁸ The navigation and management exception was known as the Harter Act's 'compromise' and continued to remain in the latter regimes, being the Hague Rules and thereafter the Hague-Visby rules. This exception is known as possibly the most 'contentious' exception in maritime trade.⁹ The Hague/Hague-Visby rules are outdated in that sense as they include this defence even though modern technology defeats the purpose of the defence.¹⁰ It can be argued that the reason for keeping this defence is that it serves as a balancing act between the carrier and cargo owner.¹¹ However, other maritime regimes such as the Hamburg rules and the Rotterdam rules have abolished this defence and take the view that it is detrimental to cargo owners and more in favour of carriers.

In dealing with the carrier's liability, the burden of proof is of great significance as it plays a major role in determining the outcome of certain cases. Establishing when the carrier or claimant will be expected to discharge the burden of proof becomes an issue in such cases where there is uncertainty as to the cause of the damage or loss and where the parties put forward conflicting evidence. In cases where the damage or loss occurs at sea, it is difficult for the claimant to establish how the damage or loss had taken place since the claimant would not have been present at the time of the incident.¹² It was said that the burden of proof in the case of negligence is a highly

⁶ T Nikaki; B Soyer *op cit* note 3 at 303.

⁷ R Hellowell 'Allocation of Risk between Cargo Owner and Carrier' (1979) 27 *Am. J. Comp. L.* 357.

⁸ *Ibid* at 358.

⁹ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 799. Also see S R Mandelbaum, 'Creating uniform worldwide liability standards for sea carriage of goods under the Hague, COGSA, Visby and Hamburg conventions' (1996) 23 *Transp. L.J.* 471 at 487.

¹⁰ F Reynolds 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules' (1990) 7 *Australian and New Zealand Maritime Law Journal* at 28.

¹¹ S R Mandelbaum, 'Creating uniform worldwide liability standards for sea carriage of goods under the Hague, COGSA, Visby and Hamburg conventions' (1996) 23 *Transp. L.J.* 471 at 488.

¹² R Force 'A Comparison of the Hague, Hague Visby, and Hamburg rules: Much ado about (?)' (1995-1996) 70 *Tulane Law Review* at 2085, Also see D K Schollenberger, 'Risk of Loss in Shipping under the Hamburg Rules' (1981) 10 *Denv. J. Int'l L. & Pol'y* at 568 and F Reynolds *op cit* note 10 at 29.

controversial issue¹³ and as a result, the question arises as to whether a carrier will have to first disprove negligence before relying on an excepted peril.

1.2 Rationale and Purpose of the study

The purpose of this study is to analyse the burden of proof and to compare and contrast the manner in which the basis of liability and the burden of proof is set out and to be applied in the various international maritime regimes, namely; the Hague/Hague-Visby rules, the Hamburg rules and the Rotterdam rules. The writer will attempt to do this by examining how each regime makes provision for the interests of the carrier and the cargo owner. The defences relied on most frequently by the carrier will be discussed under both the Hague/Hague-Visby rules and the Rotterdam rules. The Hamburg rules do not provide a list of exceptions which the carrier may rely on and instead provides for liability solely under the basis of liability article. This will also be analysed and discussed in order to compare the regimes. This topic is of particular importance due to the fact that South Africa applies the Hague/Hague-Visby rules by virtue of the Carriage of Goods by sea Act 1 of 1986 ('COGSA') and therefore whether or not this regime should be retained is a pertinent question.

1.3 Research Objectives

Research question 1:

How do each of the international maritime regimes make provision for and deal with the basis of the carrier's liability in the carriage of goods by sea?

Research question 2:

How do each of the international maritime regimes make provision for and deal with the burden of proof?

Research question 3:

How do the operation of the major international maritime regimes compare and contrast?

¹³ *The Torenia* [1983] 2 Lloyd's Rep 210 at 218.

1.4 Breakdown of chapters

Chapter one entails a brief overview of the topic, the purpose of this study and goes further to set out the research questions as well as a breakdown of the chapters.

Chapter two examines the key provisions under the Hague/Hague-Visby rules, and in particular, the provisions dealing with the burden of proof in cargo claims. The chapter deals with the carrier's obligation to exercise due diligence in making the vessel seaworthy and covers the period of responsibility of the carrier. The chapter goes further and focuses on the defences frequently relied on by carriers to escape liability.

Chapter three entails an overview of the concept of proof applied in the South African law of evidence. The chapter deals with issues that have surrounded the burden of proof in cargo claims. A detailed analysis on the burden of proof under the Hague/Hague-Visby rules is set out and case law is used to illustrate the approach that has been adopted.

Chapter four will examine whether or not the Hamburg rules have changed the carrier's duties and if so, the extent to which the carrier's duties have increased. The chapter will set out the burden of proof under the Hamburg rules and compare the application of the burden of proof under the Hague/Hague-Visby rules and the Hamburg rules by doing a case analysis on how the Hamburg rules would be used to decide matters which have already been decided by the courts that have applied the Hague/Hague-Visby rules.

Chapter five will examine the Rotterdam rules and the burden of proof will be set out and analysed in detail to illustrate the shifting of the burden of proof and counter proof under this regime. The chapter will also discuss some of the defences under the Rotterdam rules, including an in-depth discussion of the abolition of the nautical fault rule.

Chapter six concludes the dissertation. It provides a summary of the findings and the writer's recommendations.

1.5 Methodology

The methodology adopted for this dissertation was desktop research. The writer has surveyed textbooks and journal articles as well as referred to the texts of the relevant conventions and case law. The writer has done a thorough search of reported and unreported South African case law dealing with cargo claims but has also, because there is lack of reported South African authorities, considered foreign case law from the United Kingdom, Australia and America, focusing on decisions that have been analysed in the journal articles and in textbooks under the discussion of the burden of proof. Several of the authors adopted a comparative methodology where they used a case decided under the Hague/Hague-Visby rules to illustrate how the Hamburg or Rotterdam rules might have applied differently and I will adopt the same approach in those chapters as a means of illustrating how the burden of proof changes under the three regimes.

CHAPTER TWO: THE HAGUE AND HAGUE-VISBY RULES

2.1 Introduction

This chapter deals with the key provisions in the Hague and Hague-Visby rules¹, that being articles 3 and 4 of the rules. The provisions dealt with in this chapter, pertain specifically to the burden of proof in cargo claims arising in respect of the carriage of goods by sea. It covers the period of responsibility of the carrier, the carrier's due diligence in making the ship seaworthy under article 3 rule 1, as well as the duty to properly care for the cargo under article 3 rule 2. The chapter focuses on certain of the carrier's exemptions from liability under article 4 rule 2, namely; the nautical fault exception, the fire exception, the perils of the sea defence and inherent vice. The chapter focuses on these defences in particular as they are relied in cargo claims and the nautical fault exception specifically, is relied on frequently under the Hague/Hague-Visby rules.² The chapter considers the allocation of the burden of proof as well as the allocation of the risk of loss between the cargo owner and the carrier under the regime as part of an assessment of the carrier's liability in terms of the regime.

The types of contracts of carriage considered in this dissertation are contracts for the carriage of goods by sea evidenced by bills of lading.³ The focus is on cargo claims for the loss of or damage to the goods. The parties to such a claim are referred to in this dissertation as the claimant and the carrier. The claimant would ordinarily be the holder of the bill of lading and/or the owner or party bearing the risk of loss in and to the goods, and the carrier as defined in the rules 'includes the owner or the charterer, who enters into a contract of carriage with the shipper.'⁴

¹ The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol 1968, available at <https://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html>, accessed on 03 January 2017.

² J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 799. Also see R Aikens... et al *Bills of Lading* 2 ed (2016), who states that the fire exception is an important exception at 363.

³ H/HV art 1(b) 'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

⁴ H/HV art 1.

2.2 Background to The Hague/ Hague Visby rules

The Hague rules were drafted in the 1920's as a result of the need that had arisen to create an international regime that would facilitate international trade. It needed to accommodate two purposes:⁵

1. To create a liability regime that would enable a fair allocation of risks between the carrier and the cargo owner;⁶ and
2. To prevent the abuse of power and to protect those who have less bargaining power.⁷

The Hague/Hague-Visby rules originated from the Harter Act. The Harter Act was passed in 1893 with the aim of curtailing the carrier's right to contract out of liability whilst decreasing the standard of seaworthiness to a minimum standard.⁸ In 1921 the Maritime Law Committee prepared a model bill of lading which incorporated rules from the Harter Act, and they drafted other rules with the aim of bringing uniformity to the carriage of goods by sea, resulting in the adoption of the Hague Rules in 1924.⁹ Further work was carried out on the 1924 rules and they were the subject of the international protocol to the 1924 convention adopted at Brussels in 1968; the Hague-Visby rules.¹⁰ The Hague-Visby rules provide satisfactory protection for the cargo interests and govern a large amount of international shipments.¹¹

The regime is criticised for being outdated to an extent in that it does not make provision for modern transport, as it was created long before multimodal transport became a regular mode of transporting the goods.¹²

⁵ T Nikaki and B Soyer 'A new international regime for carriage of goods by sea: Contemporary, certain, inclusive and efficient, or just another one for the shelves?' (2012) 30 (2) *Berkeley Journal of International Law* 303.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Hare *op cit* note 2 at 623.

⁹ *Ibid* at 624.

¹⁰ F Reynolds 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules' (1990) 7 *Australian and New Zealand Maritime Law Journal* at 22.

¹¹ T Nikaki *op cit* note 5 at 304.

¹² A Von Ziegler, 'The Liability of the Contracting Carrier', (2008-2009) 44 *Texas International Law Journal*, 44, 330.

2.3 Seaworthiness

Seaworthiness can be defined as 'a degree of fitness which an ordinary, careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all of the probable circumstances of it.'¹³

With regards to vessel seaworthiness it is not a concept that concerns only the physical fitness of the vessel, for example where the vessel is damaged or has an engine malfunction.¹⁴ Vessel seaworthiness is a broad aspect which covers the vessel's equipment, the competency of the crew, documentation and any issue that may possibly affect the fitness of the vessel and its efficiency to encounter the ordinary perils of the sea.¹⁵

The physical seaworthiness of the vessel covers:

'the state of the vessel itself, i.e. its readiness to encounter the ordinary perils of the sea that may be faced during its voyage, taking certain factors into consideration, that being, the type of vessel, its age, the type of navigational water, the route it is going to take, and the time of the year at which it is going to embark on the journey'.¹⁶

In order to ensure the seaworthiness of a vessel, the carrier is required to exercise due diligence.

2.4 Due diligence

Under the Roman and English law systems the carrier was under an absolute duty to provide a seaworthy ship.¹⁷ However, this was changed when the international regimes adopted the due diligence approach.¹⁸ The English Carriage of Goods by Sea Act of 1971 and the South African Carriage of Goods by Sea Act 1 of 1986 provide that under no circumstance will there be an absolute undertaking to provide a seaworthy ship in a contract of carriage of goods by sea.¹⁹ Due diligence applies to

¹³ *McFadden v Blue Star Line*, [(1905) 1 KB 697] 607.

¹⁴ A H Kassem, *The Legal Aspects of Seaworthiness*, (LLD Thesis, University of Wales, 2006) at 25.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Hare *op cit* note 2 at 640.

¹⁸ *Ibid.*

¹⁹ Hare *op cit* note 2 at 640, Also see sec 3 of the English Carriage of Goods by Sea Act and sec 1 of the South African Carriage of Goods by Sea Act- which states that '[t]here shall not be implied in any contract for the carriage of goods by sea to which the Rules apply by virtue of this Act any absolute undertaking by the carrier of the goods to provide a seaworthy ship.'

all contracts of carriage and according to the provisions of the Hague-Visby Rules 'the carrier must exercise due diligence before and at the commencement of the voyage to make the ship seaworthy'.²⁰

The restriction in the regime is thus that the use of due diligence in making the ship seaworthy is only at the beginning of the voyage²¹ and does not continue throughout the voyage.

It is required of the carrier to ensure that the vessel is fit and that he has exercised due diligence before his vessel sails. The carrier will need to prove that he exercised due diligence in order to guard himself against liability for any damage or loss that may occur. If the carrier had exercised due diligence before and at the beginning of the voyage then he will not be liable for any loss resulting from unseaworthiness that 'could not have been discovered by the use of due diligence'.²²

The seaworthiness of the vessel entails being dependant to a great extent on the different circumstances that surround the voyage. This could mean the various waters, the weather conditions for that voyage, the season of the voyage and so on.²³

A causative connection must exist between the unseaworthiness and the loss. Proof that a ship went to sea in an unseaworthy condition does not establish a breach of the bill of lading contract. It must be shown that the unseaworthiness was the actual cause of the loss.²⁴ Therefore, the cargo owner bears the onus of proving that the vessel was not in a seaworthy condition when she set to sea on her voyage, and that the loss would not have occurred had it not been for the unseaworthiness of the vessel.²⁵

The carrier's main obligation is to take reasonable steps to ensure that the equipment on the vessel, together with all other parts of the vessel, including its engine, are in 'good condition' 'before and at the beginning of the voyage'.²⁶ It was held in the case

²⁰ Article 3(1) of the H/HV, Also see Hare *op cit* note 2 at 640.

²¹ Article 3(1) of the H/HV, Also see A Von Ziegler *op cit* note 12 at 330.

²² R Force, 'A Comparison of the Hague, Hague Visby, and Hamburg rules: Much ado about (?)' (1995-1996) 70 *Tulane Law Review* 2061.

²³ A H Kassem *op cit* note 14 at 25.

²⁴ Hare *op cit* note 2 at 640.

²⁵ *Ibid.*

²⁶ *Ibid.*

of *Union of India v NV Reederij Amsterdam*²⁷, that a failure to exercise due diligence is tantamount to negligence.²⁸

A recently decided South African case, *Viking Inshore Fishing (Pty) Ltd v Mutual and Federal Insurance Co Ltd* is a marine insurance case,²⁹ which is only relevant to this dissertation based on its second issue which was a question of due diligence. In this case, a fishing vessel called the *Lindsay* had collided with the *Ouro do Brasil*, a bulk juice carrier that was on a voyage from Singapore to Santos, Brazil.³⁰ The collision resulted in the sinking of the fishing vessel and many lives were lost.³¹ The *Lindsay* was owned by Viking Inshore (Pty) Ltd (hereinafter referred to as the insured), who had been insured by Mutual and Federal Insurance Co Ltd (hereinafter referred to as the insurer).³² The insured sought to rely on Inchmaree clauses in the marine insurance contract which made provision for the cover of loss or damage to the vessel caused by 'any accident or by negligence, incompetence or error of judgement of any person whatsoever'.³³ The policy stated that the cover provided was subject to the proviso that the loss or damage has not resulted 'from want of due diligence by the Insured, the owner or any person at a superior level of management'.³⁴ The insured had claimed from the insurer to recover for the loss of their fishing vessel, and this claim was repudiated.³⁵ The insurer repudiated the claim on the grounds that there was a breach of warranty by the insured as they did not comply with the Merchant Shipping Act in that the crew on watch were not properly certified.³⁶

The court, in an obiter remark, compared the reference to "due diligence" in Inchmaree clauses to the Hague/Hague-Visby rules requirement that 'the carrier is required before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy; properly to man, equip and supply the ship; and to make the holds

²⁷ *Union of India v NV Reederij Amsterdam* [1963] 2 Lloyd's List Rep 223, 235.

²⁸ S C Derrington, 'Due diligence, causation and Article 4(2) of The Hague Visby Rules', (1997) 3 *Int'l. Trade & Bus. L. Ann.* 176.

²⁹ *Viking Inshore v Mutual & Federal Insurance Co Ltd* 2016 (6) SA 335 (SCA).

³⁰ *Viking Inshore supra* note 29 at para 1.

³¹ *Ibid.*

³² *Ibid* at para 2.

³³ *Ibid* at para 4.

³⁴ *Ibid* at para 4.

³⁵ *Ibid* at para 50.

³⁶ *Ibid* at para 1.

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'.³⁷ The court remarked that the rules create 'a positive obligation resting on the carrier to exercise due diligence'.³⁸ The court cautioned that this is not necessarily the same thing as demonstrating that loss or damage to an insured vessel was caused by a want of due diligence.³⁹

Despite this caution, the court, referring with approval to the work of Professor Rose⁴⁰ remarked further that in the case of a carrier's obligations under the Hague/Hague-Visby rules 'it is necessary for the carrier to show the exercise of reasonable care'.⁴¹ However, in relation to the marine insurance policy in question the court approved the view that the insured only need discharge proof of due diligence when the insurer has 'provided some evidence that the cause of the loss or damage was a want of due diligence'.⁴² It was however, found that it was not necessary to 'express a firm view in regard to the onus of proof on this issue and whether it rests on the insurer to show a causal want of due diligence or on the insured to show that there was no want of due diligence'.⁴³ This statement made by the court illustrates that the question as to who bears the onus of proof, will not always be necessary for the court to consider in those cases where the facts are clear and no dispute regarding the onus of proof is raised.

The court found that there was no evidence to illustrate any deviation from the arrangement that had been made between Mr Levendal and Captain Landers, to keep watch , and that even if there had been a deviation and therefore a neglect of their duties, it would not result in a want of due diligence by the insurer.⁴⁴

The court held further that there was no evidence to show that the lack of qualification had a causative effect.⁴⁵ The judge considered that there may have been a specific certification required for the navigational watch but that the MSA did not make any provision for a specific certification. The court held therefore that there was no 'proper

³⁷ *Viking Inshore supra* note 29 at para 1. Although the judgment doesn't repeat the exact wording of the Convention, this statement is a reference to the obligations of the carrier contained in sections of H/HV r.

³⁸ *Viking Inshore supra* note 29 at para 27.

³⁹ *Ibid.*

⁴⁰ *Ibid*, citing Francis D Rose *Marine Insurance: Law and Practice* 2 ed (2012) para 13.12 at 259.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid* at para 31

⁴⁵ *Ibid* at para 45.

foundation' for the insurer's argument that the loss of the *Lindsay* was as a result of a want of due diligence by the insured.⁴⁶

Some commentators are of the view that in order for a carrier to rely on the exceptions under the Hague/Hague-Visby rules that protect them from liability, the carrier will have to have fulfilled his obligation to exercise due diligence to make the vessel seaworthy.⁴⁷

It is thus crucial that a carrier employ an expert/surveyor to carry out an inspection to ensure that everything on the vessel is in working order.⁴⁸ It is the responsibility of the carrier to also prove that, if not he, then 'his servants, agents, or an independent contractor exercised due diligence to make the vessel seaworthy, and that the defects which caused the loss or damage were not discoverable even with the help of competent prudent experts'.⁴⁹

In the case of *The 'Hellenic Dolphin'*⁵⁰ it was stated that the cargo owner could attempt to override the use of the exception by proving that the vessel was not seaworthy at the commencement of the voyage and that ultimately this was the cause of the loss.⁵¹

With regards to the burden of proof in terms of seaworthiness, it does not shift from the claimant but the court can draw inferences from the evidence.⁵² When the cargo owner proves that damage has resulted from unseaworthiness of the ship, the carrier will have the burden of proving that he or she has exercised due diligence in ensuring that the ship is seaworthy.⁵³

It is clear that the Hague/Hague-Visby rules place a 'heavy burden' on the claimant in terms of the basis of liability. Instead of the carrier having to prove that the vessel was seaworthy, the claimant must prove that it was not seaworthy.⁵⁴

⁴⁶ *Viking Inshore supra* note at para 49.

⁴⁷ S C Derrington *op cit* note 28 at 176. Also see R force *op cit* note 22 at 2086, F Reynolds *op cit* note 10 at 18, S Rares 'The onus of proof in a cargo claim, articles III and IV of the Hague-Visby Rules and the UNCITRAL Draft Convention' (2008) (FCA) *FedJSchol* 20 at 7.

⁴⁸ A H Kassem *op cit* note 14 at 25.

⁴⁹ *Ibid.*

⁵⁰ *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336 at 339.

⁵¹ *Ibid* at 339.

⁵² S Rares *op cit* note 47 at 10. Also see A H Kassem *op cit* note 14 at 168.

⁵³ S Rares *op cit* note 47 at 10.

⁵⁴ A Von Ziegler *op cit* note 12 at 330.

Von Ziegler argues that taking into consideration the knowledge that the carrier possesses, it makes more sense for the carrier to prove the seaworthiness of the vessel rather than to make the claimant prove the unseaworthiness of such vessel.⁵⁵

Reynolds, on the other hand, assesses the risks borne by both the carriers and the cargo owners. He argues that the risks between the carrier and cargo owner balance out in a sense that the carrier will have to apply due diligence in terms of seaworthiness of the vessel and will have to make provision for adequate care of the cargo.⁵⁶ In exchange for fulfilling that obligation, the carrier would not be liable for negligence in the navigation and management of the ship.⁵⁷ However, cargo owners' interests may see the Hague/Hague-Visby rules as a regime that heads in the direction of the carriers' interests.⁵⁸

2.5 Care of cargo

In terms of article 3 rule 2,⁵⁹ subject to the provisions of article 4, 'the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.'⁶⁰

It is the duty of the carrier to make certain that cargo is loaded both safely and timeously.⁶¹ The carrier must ensure that the cargo is protected in its entirety.⁶²

There is a duty on the carrier to exercise both care and skill in doing so.⁶³ Precautions must be taken in order to prevent the goods from being damaged and appropriate measures must be taken to prevent further deterioration in the case of goods that have already been damaged.⁶⁴

The carrier is expected to care for the cargo for the duration of the period of responsibility of the carrier.

⁵⁵ A Von Ziegler *op cit* note 12 at 330.

⁵⁶ F Reynolds *op cit* note 10 at 17.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ H/HVR.

⁶⁰ H/HVR, art 3(2).

⁶¹ M D G Ozbek, *The carriage of dangerous cargo, duties of the carrier*, 2007, 123.

⁶² *Ibid.*

⁶³ Ozbek *op cit* note 61 at 123.

⁶⁴ Ozbek *op cit* note 61 at 123.

The carrier's obligation to care for the cargo is set out in the case of *Albacora SRL v Westcott & Laurance Line Ltd*⁶⁵ where it was held that the word 'properly' has a slight difference in meaning to the word 'carefully'. Referring to the case of *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama*⁶⁶ it was held that the word 'properly' means that it is in keeping with a 'sound system' which could extend further than merely carrying the goods 'carefully'.

In the case of the *MV Sea Joy*⁶⁷ the claimant had claimed for damages in respect of cargo that was damaged as a result of improper stowage.⁶⁸ The claimant based its claim on article 3 rule 2 of the Hague-Visby rules (as set out in the Schedule to the Carriage of Goods by Sea Act 1 of 1986).⁶⁹

The carrier relied on the 'FIOS' (free in and out stowed) term that was included in the bill of lading and contended that it had no obligation (and nor did the ship owner) in terms of the loading, stowage or discharge of the cargo.⁷⁰ The carrier also relied on article 4 rule 2(i) and (q) and argued that the damage to the cargo was as a result of either an act or omission by the claimant or its agent or representative and that this was not as a result of the fault or privity of the carrier, its agents or servants.⁷¹ Stevedores were instructed by the claimant, however, the stevedores did not actually have any part in the loading and stowage as there was an administrative issue.⁷² The charterer had then employed an agent to carry out the stowage.⁷³ The charter party contract included a clause which provided that 'the charterers are to load, stow, trim and discharge the cargo at their expense under the supervision of the captain'.⁷⁴ Upon inspection, the captain and the surveyor were not satisfied with the arranging of the cargo and therefore insisted that further measures be taken to secure the cargo.

⁶⁵ *Albacora SRL v Westcott & Laurance Line Ltd* [1966] 2 Lloyd's Rep 53 at 58.

⁶⁶ *GH Renton & Co Ltd v Palmyra Trading Corporation of Panama* [1957] 2 Lloyd's Rep 379 at 388.

⁶⁷ *The MV Sea Joy: Owners of the Cargo lately laden on board the mv Sea Joy v The MV Sea Joy* 1998 (1) SA 487 (C).

⁶⁸ *Ibid* at 488.

⁶⁹ *Ibid*.

⁷⁰ *Ibid* at 492.

⁷¹ *Ibid*.

⁷² *Ibid* at 488.

⁷³ *Ibid*.

⁷⁴ *The MV Sea Joy supra* note 67 at 502.

Nevertheless, the further measures taken, were not up to standard and the Captain still set sail.⁷⁵

The inclusion of the FIOS term into the bill of lading was common cause. However, the issue was whether or not Article 3 rule 2 of the Hague/Hague-Visby rules could be applied even though the clause made a contrary provision. Furthermore, the issue as to whether or not Article 3 rule 8 had to be applied.⁷⁶

Article 3 rule 8 provides that:

‘Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.’⁷⁷

Even though the carrier and claimant could agree on terms providing that the claimant would arrange the loading and stowage of the cargo at its own expense, the court stated that this agreement could not relieve the carrier of its ‘overriding obligation’ to ensure that the cargo is properly and carefully loaded and stowed.⁷⁸ However, the court went further to state that such an obligation will be subject, to the provisions of article 4 rule 2(i) or (q) of the Hague-Visby Rules.⁷⁹

The court in arriving at its decision, quoted Tetley:⁸⁰

‘The final responsibility for proper stowage remains in all circumstances with the carrier. In consequence a clause in the bill of lading stating that the carrier is not responsible for stowage carried out by the shipper is invalid under art 3(8) of the Hague or Hague/Visby Rules. Questions of stowage are under the absolute control of the master of the vessel and as such he has the final say as (to) how stowage is to be effected. This is so not only because of the carrier’s responsibility for the stability of the

⁷⁵ *The MV Sea Joy supra* note 67 at 497.

⁷⁶ *Ibid* at 489.

⁷⁷ Article 3(8) H/HV.

⁷⁸ *The MV Sea Joy supra* note 67 at 499.

⁷⁹ *The MV Sea Joy supra* note 67 at 499.

⁸⁰ *The MV Sea Joy supra* note 67 at 499.

ship and the safety of the ship and crew, but also because of the carrier's obligation to care for other cargo.'

The court held that the plaintiff was not liable for the agents' failure to stow the cargo properly as these agents were not employed by the plaintiff.⁸¹ The court held, further, that, since the captain had set sail in spite of his reservations regarding the stowage and lashing of the claimant's cargo, 'it was at least as likely as not that fault or neglect on the part of the captain had contributed to the damage'.⁸² The defendant could therefore not rely on article 4 rule 2(q) of the Rules.⁸³ In terms of the 'FIOS' inscription on the bill of lading, the court held that it does not absolve the carrier from liability, as the carrier retained an 'overriding' duty/obligation to properly and carefully stow the claimant's cargo on the vessel.⁸⁴ The carrier did not contract out of liability for the breach of its overriding obligation and therefore the carrier was held liable for damages to the claimant.⁸⁵

In terms of the aspect of fault, there are two fault based systems in place, the proved fault based system and the presumed fault based system.⁸⁶ The Hague/Hague-Visby rules follow the proved fault based system.⁸⁷ This system entails the cargo owner proving that the loss or damage is as a result of the carrier's fault or negligence or due to the actions of the agents/servants of the carrier.⁸⁸ If this is not proved, the carrier will not be held liable.⁸⁹ Article 4 rule 1 of the Hague/Hague-Visby Rules, makes provision for the proved fault based system.⁹⁰

The shifting burden of proof when a claimant alleges a breach of article 3 rule 2 and when the carrier relies on an exception under article 4 rule 2 is further discussed in chapter three.

In the "*Hellenic Dolphin*"⁹¹, mentioned above, Lloyd J had also said that a prima facie case could be brought against a ship-owner by illustrating that the cargo that was

⁸¹ *The MV Sea Joy supra* note 67 at 504.

⁸² *The MV Sea Joy supra* note 67 at 497.

⁸³ *The MV Sea Joy supra* note 67 at 497.

⁸⁴ *The MV Sea Joy supra* note 67 at 504.

⁸⁵ *Ibid.*

⁸⁶ A H Kassem *op cit* note 14 at 141.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ H/HVR, Article 4 Rule 1.

⁹¹ *The Hellenic Dolphin supra* note 50 at 339.

shipped 'in good order and condition was out-turned damaged or in bad condition'.⁹² In such scenario there is automatically a prima facie breach of article 3 rule 2. Therefore, the carrier would be liable 'unless' he is able to prove that the damage or loss is as a result of a circumstance which protects him under article 4 rule 2 exceptions.

2.6 Period of responsibility of the carrier

It is ultimately the responsibility of the carrier to properly care for the cargo even though some acts or failure to act may be that of the master or crew. The duty of the carrier to care for cargo extends from the beginning of the voyage and applies throughout the voyage.⁹³

In terms of the period of application and responsibility, the carrier will be responsible from the beginning of the loading of goods on to the ship until the end of the discharge of the goods from the ship.⁹⁴ The Hague/Hague-Visby rules do not extend responsibility beyond the carriage of the goods.⁹⁵

This 'tackle to tackle' period of responsibility is dissatisfactory to an extent as it does not provide for accountability for damage to cargo during periods before or after the carriage. It excludes the period at the 'port of loading and at the port of discharge'⁹⁶ even though the carrier had "charge" of the cargo before and after the voyage.⁹⁷ It would also exclude from the compulsory application of the rules any earlier or later period of carriage or storage under a multimodal contract of carriage.

⁹² *The Hellenic Dolphin supra note 50 at 339.*

⁹³ F Berlingieri, 'A comparative analysis of The Hague visby rules, The Hamburg rules and The Rotterdam rules' 2009 at 5, available at https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf, accessed on 28 March 2018.

⁹⁴ *Ibid* at 5.

⁹⁵ S R Mandelbaum 'Creating uniform worldwide liability standards for sea carriage of goods under the Hague, COGSA, Visby and Hamburg conventions' (1996) 23 *Transp. L.J.* 471 at 487.

⁹⁶ R Force *op cit* note 22 at 2058.

⁹⁷ J C Sweeney, 'UNCITRAL and the Hamburg rules-The risk allocation problem in maritime transport of goods' (1991) 22 *J. Mar. L. & Com.* at 519.

2.7 Role of the Bill of lading as Proof

Van der Linden has described the bill of lading as follows:

'The master gives the shipper a written acknowledgement of the goods loaded on board, containing a statement of the goods, their quantity, marks and numbers, the place of destination, the name of the freighter and often also of the consignee and the freight stipulated for.'⁹⁸

According to article 3 rule 3 of the Hague/Hague-Visby rules, 'upon demand of the shipper the carrier shall issue to the shipper a bill of lading that sets out the leading marks for identification of the goods as well as the number of packages, pieces, quantity, weight and condition of the goods.'⁹⁹

The Hague/Hague-Visby Rules lists information that must be stated in the bill of lading. The duty to issue the bill of lading falls on the carrier.¹⁰⁰ Once the bill of lading is issued it then becomes evidence of the terms of the contract of carriage.¹⁰¹ If there is any inaccurate information provided on the bill of lading, the carrier will bear the consequence of being held liable to the consignee.¹⁰² The shipper must ensure that the information provided on the bill of lading is accurate, however, if the carrier suspects that the goods are not in good condition as set out by the bill of lading, the carrier may refuse to issue the bill of lading in that form, and may clause the bill of lading with a reservation.¹⁰³

Article 3 rule 4 of the Hague/Hague-Visby rules emphasises the importance of the bill of lading as proof.¹⁰⁴ It provides that the bill of lading is a form of prima facie evidence between the carrier and the shipper.¹⁰⁵ Inter alia, it serves as evidence between the carrier and the consignee that the goods were received in good condition as set out in the bill of lading.¹⁰⁶ However, proof of the contrary will be inadmissible when the bill of

⁹⁸ Hare *op cit* note 2 at 690. Also see *Roos v Rennie* (1859) 3 S 253 at 261.

⁹⁹ H/HVR.

¹⁰⁰ R Low 'Replacing the paper bill of lading with an electronic bill of lading: Problems and possible solutions' (2000) 5 *Int'l. Trade & Bus. L. Ann.* at 159.

¹⁰¹ R Aikens... et al *Bills of Lading* 2 ed (2016) at 54.

¹⁰² A A Sefara Basis of carrier's liability in carriage of goods by sea (unpublished LLM Thesis, University of Oslo, 2014) at 17.

¹⁰³ *Ibid.*

¹⁰⁴ H/HVR.

¹⁰⁵ H/HVR. Also see R Aikens *op cit* note 101 at 102, para 4.24.

¹⁰⁶ H/HVR. Also see R Aikens *op cit* note 101 at 102, para 4.24.

lading has been transferred to a third party acting in good faith.¹⁰⁷ The order and condition of the goods shipped, provided for in the bill of lading, cannot be contradicted by the carrier.¹⁰⁸ Aikens makes reference to section 4 (b) of the UK COGSA which provides that in the hands of the lawful holder, the bill of lading becomes conclusive evidence against the carrier.¹⁰⁹

2.8 Exemptions from liability

The carrier's exemptions from liability are dealt with in Article 4 rule 2.¹¹⁰ The Hague/Hague-Visby rules provide that:

'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;

...

- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; and

...

- (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage..'

¹⁰⁷ R Aikens *op cit* note 101 at 110 para 4.50.

¹⁰⁸ *Ibid* at 114 para 4.65.

¹⁰⁹ *Ibid* at 112 para 4.59.

¹¹⁰ H/HVR.

2.8.1 Nautical fault exception

The nautical fault exception is said to be the most controversial defence.¹¹¹ A carrier will not be responsible for any loss or damage that arises from any act, neglect or default of the carrier in the navigation or management of the ship.¹¹²

Whether or not a carrier has responsibility depends on defective management of the vessel. If there is a 'vessel management default' then the ship owner may escape liability to the cargo owner.¹¹³ Prior to the nautical fault rule, carriers were subjected to a strict level of liability.¹¹⁴ Carriers were liable for any damage that occurred even though technology was not sufficiently advanced at that point in time to allow a carrier to prevent damage and effectively manage its ship and crew from afar.¹¹⁵

Carriers take the view that the nautical fault rule provides for an equal distribution of risks¹¹⁶ and ensures that there is a balance of the risks between cargo and carrier interests. In terms of this defence the carrier will not be liable for negligent acts or a negligent failure to act by the master and crew in relation to the navigation or management of the vessel.¹¹⁷ The critics of the exception point out that it 'goes against the vicarious liability doctrine' and is not justified.¹¹⁸

Maritime technology has become more advanced over the years and therefore carriers have the ability to control the ship and its crew through technology.¹¹⁹ Shippers are of the view that the advanced telecommunications of this day allows ship owners to maintain constant verbal and visual contact with their ships and crew, and therefore the contention that ship owners are unable to control their vessels at sea is a thing of

¹¹¹ S R Mandelbaum *op cit* note 95 at 487. Also see Hare *op cit* note 2 at 799.

¹¹² E S Lee, S O Kim, 'A carrier's liability for commercial fault and default in navigation or management of the vessel' (2000) 27 *Transp. L.J.* 205 at 213.

¹¹³ *Ibid* at 205.

¹¹⁴ Liang and Li 'Abolishing the exemption of liability for fault in ship management in the nautical fault exemption system' (2006) *China oceans L.R.* 537 at 539-542.

¹¹⁵ T Nikaki, B Soyer *op cit* note 5 at 329.

¹¹⁶ S R Mandelbaum *op cit* note 95 at 488.

¹¹⁷ L T Weitz, 'The Nautical Fault Debate (the Hamburg Rules, the U.S. COGSA 95, the STCW 95, and the ISM Code)' (1998) 22 *Tul. Mar. L.J.* 581 at 588.

¹¹⁸ S R Mandelbaum *op cit* note 95 at 488.

¹¹⁹ L T Weitz *op cit* note 117 at 587.

the past.¹²⁰ Carriers should be able to prevent loss from occurring.¹²¹ It is for this reason that it is said that the nautical fault exception is one that is outdated.¹²²

However, there may be situations that arise where the ship-owner will be unable to sufficiently control and monitor the vessel or the crew.¹²³ There may also be a situation where the ship-owner may not be aware of the events or acts that led to the negligence in management of the vessel as the master and crew may be withholding certain information.¹²⁴ Another example would be where a breakdown of technology hinders effective communication between the ship-owner and the carrier which would result in preventing the ship-owner from directing its captain or crew.¹²⁵

The application of the nautical fault rule can be seen in the *Tasman Orient Line CV v New Zealand China Clays and Others (The Tasman Pioneer)*¹²⁶. The case was decided under the Hague/Hague-Visby rules.¹²⁷ The ship was set on a voyage from Yokohama, Japan to Busan and Korea.¹²⁸ The master on board had taken it upon himself to make the decision to change the route in order to pass through the inner island instead of the initial route which was to have gone around the island.¹²⁹

The ship then struck the island rocks.¹³⁰ The master had not attempted to establish whether the ship had suffered any damage and this failure to act, resulted in him not being able to establish that there was in fact a hole in the hull causing water to enter the vessel.¹³¹ The master had also failed to notify the coastguard and the ship-owner of the situation at hand.¹³² If the master had notified the coastguard, the claimant's cargo could have been saved.¹³³ Furthermore, in an attempt to conceal what he had done, the master had gone through the route that was planned initially.¹³⁴

¹²⁰ S R Mandelbaum *op cit* note 95 at 488.

¹²¹ L T Weitz *op cit* note 117 at 587.

¹²² F Reynolds *op cit* note 10 at 28.

¹²³ *Ibid*.

¹²⁴ *Ibid*.

¹²⁵ F Reynolds *op cit* note 10 at 28.

¹²⁶ *Tasman Orient Line CV v New Zealand China Clays And Others*(The Tasman Pioneer), 2009 NZCA 135, Lloyd's Rep Vol 2, 308.

¹²⁷ *Ibid* at 313.

¹²⁸ *Ibid* at 310.

¹²⁹ *Ibid* .

¹³⁰ *Ibid* at 311.

¹³¹ *Ibid* .

¹³² *Ibid* at 308.

¹³³ *Ibid*.

¹³⁴ *Ibid* at 313.

The master had misadvised the vessel manager and had further instructed the crew to lie that they had taken the route initially planned and that the ship was struck by an unidentified floating object.¹³⁵

The matter was then taken to the High Court and the issue was whether the master's actions fell under article 4 rule 2(a) of the Hague-Visby Rules, that being acts 'in the navigation or in the management of the ship'.¹³⁶ The court held that the act of neglect or default must be bona fide in order to fall under the exception of article 4 rule 2(a).¹³⁷ The court found that Captain Hernandez had devised a plan in order to absolve himself from liability and therefore the court held that the carrier was not entitled to the use of the exception.¹³⁸ The court held further that the carrier was liable for the damage to cargo.¹³⁹

An appeal against the judgment was dismissed by the Court of Appeal on the grounds that the majority had agreed with the judgment of the High Court.¹⁴⁰ On a further appeal to the Supreme Court of New Zealand¹⁴¹ it was held that even though the master's conduct was wrongful, it was in the navigation and management of the ship.¹⁴² Therefore the appellant was not held liable to compensate the respondents.¹⁴³ Aikens cites this case and states that the carrier was entitled to invoke article 4 rule 2 based on the fact that the exception had been 'designed to protect carriers from the actions of their employees [which] are beyond their control'.¹⁴⁴ Furthermore, Aikens stated that this did not amount to barratry.¹⁴⁵

The writer submits that this case is significant as it illustrates the application of the nautical fault rule and sheds light on the abuse of this exception as it was relied upon and accepted even when the master's conduct was wrongful. The Supreme Court's

¹³⁵ *Tasman Orient supra* note 126 at 310.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at 320.

¹⁴¹ *Tasman Orient Line CV v New Zealand China Clays And Others(The Tasman Pioneer)*, 2010 NZSC 37, *Lloyd's Rep Vol 2*, 13.

¹⁴² *Ibid* at 16.

¹⁴³ *Ibid.*

¹⁴⁴ R Aikens *op cit* note 101 at 360 para 10.220.

¹⁴⁵ *Ibid.*

reasoning for the decision was that the master's conduct was reprehensible, however, that it fell under the navigation and management exception.¹⁴⁶

2.8.2 The Fire Exception

The Hague/Hague-Visby Rules exception of 'fire' contained in article 4 rule 2 (b) of the Rules states that:

'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'.

If the carrier failed to exercise due diligence in making the ship seaworthy they will not be able to rely on the fire exception.¹⁴⁷ Furthermore, if the fire was caused by the actual fault or privity of the carrier then they will also be unable to rely on the exception.¹⁴⁸

The English case of *The Apostolis*¹⁴⁹ concerned a fire that broke out during loading operations, when a cargo of cotton bales caught on fire.¹⁵⁰ The issue to be decided on appeal was whether sparks from the welding works that were performed on the decks resulting in the sparks coming into contact with inflammable cotton, rendered the vessel unseaworthy.¹⁵¹

The carrier can rely on the fire exception if the carrier proves that he exercised due diligence to make the ship seaworthy,¹⁵² however, this is subject to the claimant proving that the fire was as a result of the actual fault or privity of the carrier.¹⁵³

Irrespective of the fact that welding works were performed on the decks, the court held that this did not render the vessel unseaworthy. In order for the ship to be rendered unseaworthy, some aspect of the ship must pose a risk to the cargo on board.¹⁵⁴

¹⁴⁶ *The Tasman Pioneer SCA supra* note 126 at 18.

¹⁴⁷ H/HV.

¹⁴⁸ Refer to wording of art 4(2)(b).

¹⁴⁹ R Aikens *op cit* note 101 at 324 para 10.121.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² S Rares *op cit* note 47 at 32, Also see *The Toledo* [1995] 1 Lloyd's Rep. 40 at 50.

¹⁵³ S Rares *op cit* note 47 at 32, Also see *The Apostolis*, [1996] 1 Lloyd's Rep. 475 at 483, col. 2; Scrutton on Charterparties (20th ed.), at 444.

¹⁵⁴ R Aikens *op cit* note 101 at 324.

In the Canadian case of *Maxine Footwear Company Ltd. v. Canadian Government Merchant Marine Ltd*¹⁵⁵, a contractor had been employed to thaw out scupper pipes on the carrier company's ship as the pipes had been frozen whilst loading.¹⁵⁶ An acetylene torch was used, which in turn set fire to the cork insulation on board.¹⁵⁷ A part of the claimant's cargo was damaged in the fire and the claimant had then claimed for the value of the damaged cargo.¹⁵⁸ The cargo on the vessel had been stowed after the fire broke out but before it was discovered.¹⁵⁹

The issue was whether or not the carrier could rely on the exception provided for by article 4 rule 2 of the Hague/Hague-Visby rules. The court a quo held that, the carrier was entitled to rely on article 4 rule 2.¹⁶⁰ The court's reasoning was that the fire broke out as a result of the negligence of the crew or employees of the carrier in the management of the ship, and held further that the fire was not as a result of the actual fault or privity of the carrier. Therefore, the carrier could rely on article 4 rule 2 (b).¹⁶¹ The majority decision of the Supreme Court was that the carrier had discharged the burden of proving that they had exercised due diligence and that they were entitled to rely on the exceptions.¹⁶²

The carrier submitted that article 3 did not come into operation in cases of fire, even though the fire rendered the ship unseaworthy, the fire aspect is to be dealt with under article 4 rule 2 (b).¹⁶³ The judges in the Court of Appeal did not agree with this point on the basis that article 3 rule 1 is an overriding obligation, which, if not fulfilled by the carrier, will prevent the carrier from relying on the immunities provided for by article 4.¹⁶⁴

In terms of the burden of proof aspect, the carrier's representative had put forward the proposition that it was for the carrier to discharge its burden of proof that the loss was caused by an excepted peril and was of the opinion that the carrier had discharged

¹⁵⁵ *Maxine Footwear Company Ltd. v. Canadian Government Merchant Marine Ltd*, [1959] 2 Lloyd's Rep.

¹⁵⁶ *Ibid* at 106.

¹⁵⁷ *Ibid*.

¹⁵⁸ *Ibid*.

¹⁵⁹ *Ibid* at 112.

¹⁶⁰ *Ibid* at 107.

¹⁶¹ *Ibid*.

¹⁶² *Ibid*.

¹⁶³ *Ibid* at 113.

¹⁶⁴ *Ibid*.

this burden of proof.¹⁶⁵ It was argued that the carrier had illustrated that the loss was as a result of the fire which was not caused by the carrier's actual fault or privity.¹⁶⁶ The carrier felt that this showed the loss occurred as a result of the act or neglect or default in the management of the ship.¹⁶⁷ Further, that if 'material unseaworthiness' was confirmed, the burden of proof would shift to the carrier to show that the unseaworthiness was not by the carrier's want of due diligence.¹⁶⁸ The court held that if due diligence was exercised, the unseaworthiness that had occurred would have been prevented or if the root of such unseaworthiness was established prior to the loss, the claimant's loss would have been avoided.¹⁶⁹ The court held further that article 3 rule 1, 'was an overriding obligation, and, if it was not fulfilled and the non-fulfilment caused damage, the immunities of Art. IV could not be relied on'.¹⁷⁰ In conclusion the court held that the ultimate cause of loss was due to a failure in exercising due diligence as was required by Article 3 rule 1 of the Hague Visby rules and therefore the appeal succeeded.¹⁷¹

2.8.3 Perils of the sea defence

The carrier's most frequently invoked defence is the perils of the sea defence as a huge amount of the ocean cargo claims are due to heavy weather at sea.¹⁷²

In an American context the peril of the sea has been defined as:

'those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.'¹⁷³

¹⁶⁵ *Maxine Footwear supra* note 155 at 108.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid* at 109.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Maxine Footwear supra* note 155 at 113.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² A Trichardt; A Cull 'Perils of the sea Down under' (1999) 10 *Stellenbosch L. Rev.* 436 at 436, Also see Hare *op cit* note 2 at 795.

¹⁷³ *Shipping Corporation of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142, para 48, also see T L. Tisdale, Newsletter, Sea venture issue 4, 01 January 2006, at 5, available at https://www.steamshipmutual.com/Downloads/Sea-Venture/SeaVenture_4.pdf, accessed on 22 February 2018.

In the case of *J Gerber & Co Inc v The Sabine Howaldt*¹⁷⁴, the *Sabine Howaldt*, was time chartered to Contramar S/A for a voyage carrying steel products from Antwerp, Belgium to Wilmington, Delaware and Alexandria, Virginia.¹⁷⁵ The cargo had been loaded in good condition, however, upon arrival at the port in the United States, ‘the steel showed extensive salt water damage from rust and pitting’.¹⁷⁶ The vessel had encountered extremely heavy weather.¹⁷⁷

The trial court had found in favour of the contentions of many of the carrier’s experts.¹⁷⁸ The trial court was in agreement that the hull was twisted due to the rough seas and that this was what had led to the sea water entering the vessel.¹⁷⁹

On appeal it was held:¹⁸⁰

‘that where the vessel was seaworthy at the beginning of the voyage, was operated in good and seamanlike manner throughout voyage, and there was no negligence on part of carrier and damage to cargo was caused by hurricane force winds and resulting cross seas which, through wrenching and twisting the vessels, set up torsions within the hull which forced up hatch covers and admitted seawater to the holds, loss to cargo was from peril of the sea and vessel owner was exonerated from liability.’¹⁸¹

However, it was held in the *Gamlen Chemical case*¹⁸² that the American and Canadian approach differs from the approach taken in England and Australia. In the latter jurisdictions, even a reasonably foreseeable weather event can be a peril of the sea.¹⁸³

The *Bunga Seroja*¹⁸⁴ is an Australian case that dealt with the meaning of the perils of the sea.¹⁸⁵ Trichardt and Cull argue that the case is of significance to South Africa

¹⁷⁴ *J Gerber & Co Inc v S.S Sabine Howaldt*, 437 F. 2d 580 (2d Cir. 1971), available at <https://law.justia.com/cases/federal/appellate-courts/F2/437/580/351945/>, accessed on 18 February 2018.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

¹⁷⁸ *J Gerber supra* note 174.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Gamlen supra* note 173.

¹⁸³ *Ibid* at para 48.

¹⁸⁴ *Great China Metal Industries Co.Ltd v. Malaysian International Shipping Corp. Berhad* (The Bunga Seroja) [1999] 1 Lloyd’s Rep. 512.

¹⁸⁵ A Trichardt; A Cull *op cit* note 172 at 437.

due to the fact that 'South Africa like Australia, adopted the Hague Visby Rules and incorporated it into a schedule to the Carriage of Goods by Sea Act'.¹⁸⁶

Although not binding, the case aids South African courts in interpreting the meaning of the perils of the sea defence and to an extent, persuades the decisions of the courts.¹⁸⁷ Although the case was decided under the Hague rules¹⁸⁸, the interpretation of the High Court is also applicable to the Hague-Visby Rules article 4 rule 2(c) as there is no difference between the interpretation and application of the Hague and Hague-Visby rules in this respect. In chapter three, the court's comments on the burden of proof are examined in more detail, and should not, it is submitted, to be followed in South Africa.

The *Bunga Seroja* had been on her journey to deliver goods when heavy weather occurred at sea.¹⁸⁹ The ship's master was well aware of the fact that the Great Australian bight is known for its heavy weather.¹⁹⁰ Furthermore, the crew had received a weather bulletin prior to departing Melbourne.¹⁹¹ The bulletin had advised of the 'gale warning'.¹⁹²

The heavy storm had caused major damage to the coils of the containers on board and therefore resulted in a loss of goods.¹⁹³

The cargo owner claimed that the carrier was in breach of his obligations under article 3 rules 1 and 2.¹⁹⁴ In response the carrier denied that he was in breach of the obligations and alleged that he had exercised due diligence in making the vessel seaworthy as well as all parts of the vessel in which goods were carried fit and safe for their carriage.¹⁹⁵ Further the carrier had relied on the exception of perils of the sea under article 4 rule 2(c).¹⁹⁶

¹⁸⁶ *A Trichardt; A Cull op cit* note 172 at 437.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Bunga Seroja HCA supra* note 184 at para 3.

¹⁸⁹ *Bunga Seroja HCA supra* note 184 at para 4, Also see *A Trichardt; A Cull op cit* note 172 at 437.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Bunga Seroja HCA supra* note 184 at para 6.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

On the facts the question arose whether heavy weather must be unexpected to be regarded as a peril of the sea. The court of first instance held, with reference to the decision in *Gamlen Chemical* that even a reasonably foreseeable storm was a peril of the sea.¹⁹⁷ This finding was arguably obiter¹⁹⁸ but was upheld by the Court of Appeal¹⁹⁹ and the High Court of Australia.²⁰⁰

2.8.4 Inherent Vice Defence

Inherent vice can be defined as a '[h]idden defect (or the very nature) of a good or property which of itself is the cause of (or contributes to) its deterioration, damage, or wastage.'²⁰¹

Inherent vice means the unfitness of the goods to withstand the ordinary incidents of the voyage, given the degree of care which the carrier is required by the contract to exercise in relation to the goods.²⁰²

Despite the fact that the carrier will not be liable for any damage caused by the nature of the cargo itself, the carrier is still expected to exercise due diligence in caring for the cargo and in its attempt to prevent or minimise the loss or damage caused by such cargo.²⁰³

The principle derived from this exemption is that the carrier will not be held liable if the damage to cargo is not the fault of the carrier.²⁰⁴ Ultimately the shipper of such goods should bear the responsibility of guarding against any damage or loss resulting from inherent vice of the goods and should possess knowledge on the inherent characteristics of such goods.²⁰⁵

¹⁹⁷ *Bunga Seroja HCA supra* note 184 at para 65-69.

¹⁹⁸ *Ibid* at para 46 stated that on the findings of fact by the court of first instance it was not necessary to consider the exception. Also see R Aikens *op cit* note 101 at 345 para 10.178.

¹⁹⁹ *Bunga Seroja HCA supra* note 184 at para 69.

²⁰⁰ *Ibid* at para 42.

²⁰¹ Definition of inherent vice, available at <http://www.businessdictionary.com/definition/inherent-vice.html>, accessed on 18 March 2018.

²⁰² *Ozbek op cit* note 61 at 72.

²⁰³ *Ibid*.

²⁰⁴ *Ibid* at 73.

²⁰⁵ *Ibid* at 73.

In the case of *Volcafe Ltd v Compania Sud Americana De Vapores*²⁰⁶ CSAV had carried nine consignments of coffee in containers that were lined and unventilated. There was condensation damage to an amount of 2.6 percent of the total value.²⁰⁷

The court of first instance held that CSAV was liable for the damage as they were unable to show inherent vice and an absence of negligence, that is that they had properly carried and cared for the goods in terms of what was required under article 3 rule 2.²⁰⁸ The court therefore found in favour of the cargo claimants and held further that the carrier did not have a sound system in place for protecting the cargo for carriage.²⁰⁹

Arising from the manner in which the court dealt with the burden of proof the following issues, inter alia, were taken on appeal:

1. Is a breach of article 3 rule 2 inferred when goods are received in good condition and delivered in a damaged condition or does that situation give rise to a 'sustainable cause of action'?²¹⁰
-) If there is an inference of a breach of article 3 rule 2, in order to establish a prima facie case of inherent vice what will the carrier be required to show?²¹¹
2. Was there 'complete circularity' between article 4 Rule 2 (m) and article 3 rule 2 such that Rule 2 (m) 'was not a true exception'?²¹²
3. What must be illustrated in order to establish a 'sound system'?²¹³

²⁰⁶ *Volcafe Ltd and Others v Compania Sud Americana De Vapores (trading as CSAV)* [2017] 1 Lloyd's Rep 32.

²⁰⁷ *Ibid* at 32.

²⁰⁸ *Ibid* at para 15.

²⁰⁹ *Volcafe Ltd and Others v Compania Sud Americana De Vapores (trading as CSAV)* [2015] 1 Lloyd's Rep 649 at para 48 and 50 (*Volcafe a quo*) *Volcafe CA* supra op cit note 206 at para 17.

²¹⁰ B Weijburg, HFW, Briefings available at <http://www.hfw.com/Volcafe-Ltd-v-Compania-Sud-Americana-de-Vapores-SA-December-2016>, accessed on 18 March 2018.

²¹¹ *Ibid*.

²¹² *Ibid*.

²¹³ *Ibid*.

With regards to the question of circularity between the provisions of article 3 rule 2 and article 4 rules 2(m), it was held on appeal that there is a 'clear separation' between the use of the inherent vice defence and proving negligence.²¹⁴

The court held that the 'carrier need not disprove negligence in order to raise the defence of inherent vice'.²¹⁵ It was further held to be wrong to assume that the inherent vice defence did not apply to goods that are not defective, when in fact it does apply when there are inherent qualities in 'sound' cargo that render it unable to withstand the voyage.²¹⁶

In terms of the issue of there being a sound system, the court held that a sound system had been in place for the caring of the goods and that a sound system does not entail preventing damage.²¹⁷ However, the carrier must have the necessary and required knowledge regarding the nature of the goods.²¹⁸ The court held that it is 'unfair to have an expectation of the carrier to go beyond what was required by the law'.²¹⁹

In this case the court found that the carrier had done all that was required by law accepting the carrier's expert witness evidence that it acted in accordance with 'industry practice'.²²⁰

It should be noted that there is a measure of overlap between inherent vice and dangerous goods, and it can be challenging to distinguish dangerous goods from goods that have inherent defects.²²¹ If the goods on a shipment are of a dangerous nature, whereby it is possible that they may cause damage or loss to the ship, other goods or even endanger persons then the goods will be classified as dangerous goods.²²²

²¹⁴ B Weijburg *op cit* note 210.

²¹⁵ *Volcafe CA op cit* note 206 at para 50.

²¹⁶ *Ibid*

²¹⁷ *Ibid* at para 64.

²¹⁸ *Ibid* at para 65.

²¹⁹ *Ibid*.

²²⁰ *Ibid* at para 69

²²¹ *Ozbek op cit* note 61 at 73.

²²² *Ibid*.

2.9 Conclusion

It is clear that the Hague/Hague-Visby regime has been applied successfully, however it does not make provision for modern international trade in terms of multimodal transportation of goods. With regards to the aspect of due diligence, the regime has a restriction in that the carrier should only exercise due diligence in making the ship seaworthy at the beginning of the voyage and not throughout the voyage. In terms of the period of responsibility for cargo, the carrier is not responsible for damage to cargo before or after the carriage, even though the carrier had charge of such cargo. It is established that the Hague-Visby rules provide for a balance in the allocation of risks: the carrier bears the risk of ensuring that the ship is seaworthy and the claimant's risk is the defence of navigational error and management. Nevertheless, cargo owners feel that the regime is more in favour of the interests of the carriers due to the application of this defence. Carriers on the other hand, are of the view that the nautical fault rule creates an equal distribution of risks between the carrier and the cargo owner. This chapter set out the basis of liability under the Hague/Hague-Visby rules and the use of the proved fault based system.

The next chapter will deal with the manner in which the Hague-Visby rules make provision for and deal with the burden of proof. The case of *Volcafe Ltd v CSAV* will also be dealt with in more detail in the next chapter as it is a recent case that pertains to the burden of proof.

CHAPTER THREE: BURDEN OF PROOF AND ORDER OF PROOF

3.1 Introduction

Depending on the circumstance of the case,¹ the rules on the burden of proof can be crucial and of great significance to the outcome.² When incidents take place at sea the cargo owner is not present and may not be able to advance evidence of an event that led to the damage of cargo. Therefore a claimant will not be able to establish that the loss or damage to the cargo was caused by the carrier. Thus, the determination of where the burden of proof lies in such cases 'has been problematic for the international maritime community'.³ Force refers to two such instances: when it is not clear how the damage in question has occurred or where the evidence is in conflict.⁴ It will be difficult for a party that bears the onus of proof to discharge the onus of proof. Scholengerger⁵ and Reynolds⁶ express similar views about the importance of the burden of proof in such instances.

Conversely, in situations where the cause of damage is clear from looking at the evidence provided, the burden of proof may not be critical to the outcome of such case.⁷ In this instance, who the risk of loss falls on will need to be established but not who the burden of proof falls on.⁸ By risk of loss, Force means the 'substantive differences' between the defences available to the carrier under the different liability regimes.⁹

This chapter will commence with an overview of concepts of proof applied in the South African law of evidence. The chapter will then discuss an issue that seems to have surrounded the burden of proof in marine cargo claims for many years, that being

¹ R Force 'A Comparison of the Hague, Hague Visby, and Hamburg rules: Much ado about (?)' (1995-1996) 70 *Tulane Law Review* at 2085. Also see C. W. H. Goldie, 'Effect of the Hamburg Rules on Shipowners' Liability Insurance' (1993) 24 *J. Mar. L. & Com* at 111. Goldie indicates that various countries differ in their application of the Hague/Hague Visby rules in terms of the burden of proof and the type of evidence required to establish the exercise of due diligence in making the ship seaworthy.

² R Force *op cit* note 1 at 2085.

³ D K Schollenberger, 'Risk of Loss in Shipping under the Hamburg Rules' (1981) 10 *Denv. J. Int'l L. & Pol'y* at 568.

⁴ R Force *op cit* note 1 at 2085.

⁵ D K Schollenberger *op cit* note 3 at 570.

⁶ F Reynolds, 'The Hague Rules, The Hague Visby Rules, and The Hamburg Rules' (1990) 7 *Austl. & N.Z. Mar. L.J.* at 29.

⁷ R Aikens... et al *Bills of Lading* 2 ed (2016). Aikens says the burden of proof is often a theoretical and not a practical problem.

⁸ R Force *op cit* note 1 at 2085.

⁹ R Force *op cit* note 1 at 2085.

whether or not it will suffice for a carrier to prove that an exception applies in order to absolve the carrier from liability or whether the carrier will have to prove both that an exception applies and that they were not negligent in the care of the cargo. The starting point of this discussion is the case of *The Glendarroch*¹⁰. The case of *Gosse Millerd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)*¹¹ being one of the first cases decided after the enactment of Hague rules into English law in the Carriage of Goods by Sea Act of 1924¹² will then be discussed to show a significant change from the position adopted in the *Glendarroch*.¹³ In terms of Australian law the *Bunga Seroja case*¹⁴ will be discussed as well as the most significant recent English case on this issue, being the *Volcafe case*.¹⁵

3.2 General Principles of Evidence in South Africa

The Hague/Hague-Visby rules apply in South Africa by virtue of the South African Carriage of Goods by Sea Act of 1986 as a schedule to the Act.¹⁶ When a South African court hears a cargo claim, it will apply the Hague-Visby rules (unless another regime is applicable to the contract) against the background of South African procedural rules of evidence.¹⁷

¹⁰ *Glendarroch, The (CA)* [1894] P.226.

¹¹ *Gosse Millerd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)* [1927] 2 KB 432.

¹² Carriage of Goods by Sea Act 1924.

¹³ *The Glendarroch supra* note 10.

¹⁴ *Great China Metal Industries Co. Ltd v. Malaysian International Shipping Corp. Berhad (The Bunga Seroja)* [1999] 1 Lloyd's Rep. 512 (*Bunga Seroja HCA*).

¹⁵ *Volcafe Ltd and Others v Compania Sud Americana De Vapores (trading as CSAV)* [2017] 1 Lloyd's Rep 32 (*Volcafe CA*)

¹⁶ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) at 625.

¹⁷ K Hopkins 'International Law in South African Courts' (2001) *De Rebus-SA Attorneys Journal*, Archived issues, available at <https://www.mylexisnexis-co-za.ukzn.idm.oclc.org/Index.aspx?permalink=emlvemtmyWEvYnN4aGEvc3pqYmEvdHpgYmEvNmhuYmEvcWZkdWEkLTEkNyRMaWJyYXJ5JGRwYXRoJExpYnJhcnk>, accessed on 25 November 2018. This author states that an international source of law should be carefully scrutinised to establish its applicability to South Africa.

3.2.1 The distinction between 'burden of proof', 'order of proof' and 'evidentiary burden'

The information that we provide to a court in order to establish certain facts is 'generally termed evidence'.¹⁸ Evidence is presented to court by bringing forward the documents relevant to the case, witnesses, objects, photographs and other relevant material.¹⁹

In cases where the defendant is of the opinion that the plaintiff has not discharged his or her evidentiary burden, the defendant can make an application for absolution from the instance at the close of the plaintiff's case.²⁰ In this situation the test to be applied is 'whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff'.²¹ The test to be applied when the court grants absolution from the instance at the close of the defendant's case (that is after hearing evidence for both parties) is different, namely: the judge will grant an absolution from the instance 'where the evidentiary burden is on the plaintiff and neither the plaintiff nor the defendant has been able to establish a case or defence on a balance of probabilities'.²²

The case of *Control Chemicals (Pty) Ltd v Safbank Line Ltd and Others (Mv Recife)*²³, was not a cargo claim by a cargo owner but a case in which the carrier had sought damages from the shipper of dangerous cargo. The Supreme Court of Appeal granted an appeal and substituted the lower court's order with a judgment of absolution from the instance on the basis that the respondent did not discharge its onus of proof.²⁴ In the earlier judgment the carrier had instituted an action in the provincial division for damages to both the vessel and cargo and argued that the appellant was liable for breach of contract as a result of an explosion and an outbreak of fire which it alleged was caused by the appellant's cargo of calcium hypochlorite.²⁵ The respondents claimed that the appellants were liable in terms of article 4 paragraph 6 of the Hague-

¹⁸ A Bellengere...et al *The Law of Evidence in South Africa, Basic principles* (2013) 33.

¹⁹ *Ibid* at 37.

²⁰ *Ibid* at 37. Also see *S Pete...et al Civil Procedure, A Practical Guide 3 ed* (2016) at 307.

²¹ *Ibid*. Also see *Claude Neon Lights SA (Ltd) v Daniel* 1976 (4) SA 403 at 409 G-H.

²² *S Pete...et al Civil Procedure, A Practical Guide 3 ed* (2016) at 308.

²³ *Control Chemicals (Pty) Ltd v Safbank Line Ltd And Others* 2000 (3) SA 357 (SCA) (*MV Recife*)

²⁴ *Ibid* at 358.

²⁵ *Ibid* at 357.

Visby rules.²⁶ The court of first instance had without any evidence, rejected the appellant's possible reasons for the fire, being that the adjacent cargo caught on fire first or that the cargo caught on fire as a result of the heat from the sun, and accepted the source of the fire advanced by the respondents as the most probable cause, being that there was a defect in the calcium hypochlorite.²⁷ The court of first instance had therefore found in favour of the cargo owner.²⁸

The court held, that there were no reasons to justify an inference that the explosion was associated with the calcium hypochlorite and that something 'extraordinary and unknown' could have occurred on the voyage.²⁹ In this type of situation the burden of proof is an aspect to be decided.³⁰ The respondents had not been able to discharge the burden of proof by proving that the explosion was either as a result of improper stowage or the state of the calcium hypochlorite at the time of shipment.³¹ The judge stated that the onus of proof remains on the claimant throughout the case.³² The respondents had therefore 'failed to establish that the shipment of the 'goods' had been without the consent of 'the carrier, master or agent' within the meaning of art IV para 6 of the Hague Visby Rules'.³³ It was held that the court of first instance had erred in not granting absolution from the instance and an order of absolution from the instance was then granted.³⁴

If a court is satisfied that 'a fact has been proved', it then becomes 'proof'.³⁵ Basically that happens 'once evidence has been admitted, assessed and relied on to establish proof'.³⁶ The word 'proof relates to the presenting of evidence that the court relies on'.³⁷

²⁶ *MV Recife supra* note 23 at 361.

²⁷ *Ibid* at 357.

²⁸ *Ibid* at 357.

²⁹ *Ibid* at 369.

³⁰ *Ibid*.

³¹ *Ibid* at 369.

³² *Ibid* at 365.

³³ *Ibid* at 369.

³⁴ *Ibid*.

³⁵ *A Bellengere op cit* note 18 at 34.

³⁶ *Ibid*.

³⁷ *Ibid*.

Tetley states that the term burden of proof ‘determine[s] which party to a suit had the responsibility of adducing evidence of one particular issue of fact (often referred to as the ‘evidentiary burden’).³⁸

The ‘order of proof relates to the sequence in which the facts or allegations had to be proven by one party or the other to the suit during the trial’.³⁹

This distinction between the burden of proof and order of proof was understood and applied in marine cargo claims.⁴⁰ According to Tetley, there is a ‘ping pong conduct of a claim’⁴¹ and this means that the order of proof moves from the cargo claimant to the carrier and vice versa.

The question that stems from the term burden of proof is, whether the cargo owner or carrier will bear the onus of proving their case.

The burden of proof or onus of proof is defined as ‘the obligation to persuade the court, by the end of the trial, of the truth of certain allegations’.⁴² The burden of proof may also be seen as a ‘duty’ that the party has to fulfil in order to be successful in ‘finally persuading the court that he is entitled to succeed on his claim or defence’.⁴³

In terms of the onus, the general principle is that ‘he who alleges must prove’.⁴⁴ This principle is in line with the principles set out in the case of *Pillay v Krishna*,⁴⁵ where Davis AJA said that the burden will rest upon the person that makes the claim.⁴⁶

An evidentiary burden is different from the burden of proof or onus of proof. It is the ‘duty or burden’ that rests on a party throughout the trial, where at any given time that party may ‘need to lead sufficient evidence in order to force the other side to respond’.⁴⁷ It is often said to be a duty to lead evidence that will give rise to a tri-able issue.⁴⁸ It is not a burden of proof because the party need not prove anything. If no

³⁸ W Tetley ‘The Burden And Order Of Proof In Marine Cargo Claims’ at 3, available at <https://www.arbitrage-maritime.org/fr/Gazette/G37complement/burden.pdf>, accessed on 10 April 2018.

³⁹ W Tetley *op cit* note 38 at 31.

⁴⁰ *Ibid.*

⁴¹ W Tetley *op cit* note 38 at 31.

⁴² A Bellengere *op cit* note 18 at 34.

⁴³ *Ibid.*

⁴⁴ *Ibid* at 36.

⁴⁵ *Pillay v Krishna* 1946 AD 946 at 951-2.

⁴⁶ *Ibid.*

⁴⁷ A Bellengere *op cit* note 18 at 36.

⁴⁸ PJ Schwikkard and SE Van der Merwe, *Principles of Evidence* 3 ed (2009) at 576.

evidence is adduced it will mean that the issue will not be raised.⁴⁹ If evidence is adduced and an issue is raised then it will mean that the other party will have the burden of proving that those facts are untrue.⁵⁰

In the case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*, Corbett JA referred to the *Pillay v Krishna* case and noted that there are two 'distinct concepts', one of which is a duty to satisfy the court that he/she will succeed on his or her defence/claim and the other is a duty to adduce evidence in order to rebut a prima facie case presented by the other party.⁵¹ Corbett JA defined the evidentiary burden as 'the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent'.⁵²

The evidentiary burden usually rests on the plaintiff unless by virtue of admissions by the defendant during the course of pleadings the burden shifts on to the defendant.⁵³ Once the plaintiff proves a prima facie case, the burden shifts to the defendant who may lose the case if he or she does nothing to defend himself or/herself.⁵⁴

3.2.2 Prima facie proof

The term prima facie means 'superficially compelling with the potential to become conclusive, but still subject to the possibility of being challenged'.⁵⁵ Therefore Schwikkard and Van der Merwe describe prima facie proof as that 'which implies that proof to the contrary is (still) possible'.⁵⁶

A prima facie case is a case where there is sufficient evidence to find in favour of the plaintiff if the other party does nothing to rebut. This means that a prima facie case may in fact be challenged, and if it is not challenged it becomes conclusive proof.⁵⁷ Stratford JA defines prima facie proof in the case of *Ex Parte the Minister of Justice*:

⁴⁹ PJ Schwikkard and SE Van der Merwe *op cit* note 48 at 576.

⁵⁰ *Ibid.*

⁵¹ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

⁵² *Ibid.*

⁵³ A Bellengere *op cit* note 18 at 37.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at 40.

⁵⁶ PJ Schwikkard and SE Van der Merwe, *Principles of Evidence* 3 ed (2009) at 20.

⁵⁷ A Bellengere *op cit* note 18 at 40.

In Re Rex v Jacobson and Levy.⁵⁸ He states that evidence produced by a party who bears the burden of proof will be regarded as sufficient evidence to ‘call for an answer’ from the other party.⁵⁹ This means that he has produced prima facie proof that will become conclusive proof and he ‘discharges his onus of proof’ if the other party fails to answer. If a dissatisfactory answer is provided it is tantamount to no answer and the prima facie proof will remain as conclusive proof.⁶⁰ It is also said that ‘a prima facie case is established if evidence is adduced which, if accepted, will establish a valid cause of action in law’.⁶¹

3.2.3 Conclusive Proof

The standard of proof in civil cases is on a balance of probabilities.⁶² This means that the party that bears the onus of proof must ‘persuade the court that their case is more probable than that of their opponent’.⁶³ Whether or not they will be able to persuade the court will depend on the ‘strength of their opponent’s case’.⁶⁴

3.3 Shifting Onuses and the Duty of Care

Article 4 rule 2 of the Hague/Hague-Visby rules sets out seventeen exceptions and states that ‘neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from’ said exceptions.⁶⁵

At trial the cargo owner must make out a prima facie case by showing that he/she delivered the cargo to the carrier in good condition and that the goods were received in bad order or were not received.⁶⁶ Once there has been a prima facie case shown, the burden will shift to the carrier to then prove ‘sufficient’ evidence to overturn the claimant’s prima facie case.⁶⁷ There is no such thing as presumed fault of the carrier

⁵⁸ *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478.

⁵⁹ A Bellengere *op cit* note 18 at 41. Also see *Ex parte Minister of Justice: In re R v Jacobson and Levy* supra note 57 at 478.

⁶⁰ A Bellengere *op cit* note 18 at 41.

⁶¹ *Marubeni Corporation; MMSL Pte Limited; MV IVS Crimson Creek v Intergris Co Ltd* (A 122/2015)(unreported) 2016 JDR 2103 (KZD) at para 7.

⁶² A Bellengere *op cit* note 18 at 34.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ See chapter 2 for discussion on Article 4 rule 2.

⁶⁶ R Hellawell, ‘Allocation of Risk between Cargo Owner and Carrier’ (1979) 27 *Am. J. Comp. L.* 357 at 361. Also see R Aikens *op cit* note 7 at 337 para 10.158.

⁶⁷ W Tetley *op cit* note 38 at 5.

in cargo claims in terms of the Hague/Hague-Visby rules merely because the goods were in the carrier's charge during the period of the carrier's responsibility.⁶⁸

The ship owner may escape liability by relying on any one of the above mentioned exceptions and this in turn will meet the opponent's prima facie case. With regards to this aspect, the position will remain the same regardless of whether or not the Hague or the Hague-Visby Rules are applied. The carrier bears the onus of proving that he will be able to rely on one of the carrier's defences listed under article 4 rule 2. The onus placed on the carrier stems from 'the common law principle that he who seeks to rely upon an exception in his contract must bring himself within it'.⁶⁹

3.4 Concurrent causes of loss under the Hague/Hague-Visby Rules

In the case of *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Limited*⁷⁰, Wilson JJ considered the question of concurrent causes of loss under the Hague rules. In this case the goods were not properly stowed, however, the carrier wanted to escape liability based on the fact that there was also a peril of the sea that contributed to the loss.⁷¹ The court held that 'had the goods been properly stowed, the damage would not have occurred'. The negligent stowing and the perils of the sea were concurrent causes of the loss.⁷²

Mason and Wilson JJ said:

'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. The loss would not have occurred but for the faulty stowage, but on the other hand, the faulty stowage did not cause the loss by itself. On this view, and treating the matter strictly as a matter of construction of the rule, it cannot be said that the damage resulted from a peril of the sea, and the appellant fails.'⁷³

⁶⁸ D R Thomas *The carriage of goods by sea under the Rotterdam Rules* 2 ed Lloyd's List London (2010) at 143 para 8.8 and 8.9.

⁶⁹ W Tetley *op cit* note 38 at 4

⁷⁰ *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Limited* (1980) 147 CLR at 163-164

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Gamlen Chemical supra* note 70 at 163-164.

The case of *Hilditch Pty Ltd v Dorval Kaiun KK (The "Golden Lucy 1") (No 2)*⁷⁴ supports this view as it was held in this case that a carrier will only escape liability if it is proved that 'the loss or damage was caused by an excepted peril alone'.⁷⁵

In America a rule was made in order to aid in dealing with matters that came about as a result of concurrent causes. This rule is known as the Vallescura rule.

The term Vallescura rule stems from the rule that was formulated by the United States Supreme court in the case of *Schnell v The Vallescura* in 1934.⁷⁶ The rule was made under the Harter Act.⁷⁷

The rule states that:

'when cargo is lost or damaged for more than one reason, one of which the carrier is responsible for and the other for which the carrier is not responsible, the carrier must establish what portion of the loss or damage s/he is responsible for and if s/he fails to demonstrate his/her portion of liability, then the carrier may be responsible for all the damage'.⁷⁸

The rule is still applied under the U.S COGSA.⁷⁹ The application of the Vallescura rule results in fairness or may sometimes seem unfair, depending on the circumstances of each case.⁸⁰ There are circumstances where it is difficult for the carrier to prove concurrent causes of loss and he may even lack adequate proof of damage caused by an excepted peril even when it is clear that there is a concurrent cause of loss.⁸¹ In the case of *Thyssen Inc v S/S Eurounity*⁸² the seawater coming into contact with the vessel had resulted in the rusting of the steel.⁸³ There had been a storm and therefore a great amount of seawater had entered the holds of the ship. Had it not been for the

⁷⁴ *Hilditch Pty Ltd v Dorval Kaiun KK (The "Golden Lucy 1") (No 2)* 245 ALR 125; [2007] FCA 2014.

⁷⁵ *Ibid.*

⁷⁶ S Rares 'The onus of proof in a cargo claim, articles III and IV of the Hague-Visby Rules and the UNCITRAL Draft Convention' (2008) (FCA) *FedJSchol* 20 at 15.

⁷⁷ SB Cannon 'Navigating uncharted waters of liability apportionment: The Rotterdam rules and American cargo damage claims' 2014 *Rutgers law review* 66 at 478.

⁷⁸ Vallescura Rule Law and Legal Definition, USLEGAL.COM, available at <https://definitions.uslegal.com/v/vallescura-rule/>, accessed on 26 March 2018.

⁷⁹ SB Cannon *op cit* note 77 at 478. The author referred to the Vallescura as still being good law.

⁸⁰ *Ibid* at 481.

⁸¹ *Ibid.*

⁸² *Thyssen Inc v S/S Eurounity* No. 89 Civ. 8477, 1993 WL 158511, at 2-3 (S.D.N.Y. May 13, 1993), *aff'd*, 21 F.3d 533 (2d Cir. 1994).

⁸³ SB Cannon *op cit* note 77 at 481.

storm that amount of seawater would not have entered the holds.⁸⁴ The carrier was held liable for the full damage to the cargo as it did not prove that the storm was the only cause of the damage which means that the seawater could have entered through the unseaworthy hatches.⁸⁵ However, it is possible to meet the requirements of the Vallescura rule as can be seen in the case of *Trade Arbed Inc MI v Swallow*⁸⁶, where the trial court found the carrier had met the requirement of the Vallescura rule in that the carrier was able to establish the portion of damage that it had caused and the portion of damage that was not caused by it.⁸⁷ The carrier had shown which damage was caused by salt water and which damage was caused by fresh water.⁸⁸ In terms of the application of the rule in countries other than the United States, there are 34 countries that are signatories of the Hamburg rules and therefore these 34 countries apply the Vallescura rule⁸⁹ as the Vallescura rule is now codified as part of article 4 rule 7 of the Hamburg rules⁹⁰ which will be discussed in the next chapter.

3.5 Analysis of the Traditional Position: four ‘principles of proof’ in marine cargo claims⁹¹

According to Professor William Tetley, there are four basic principles of the burden of proof and these principles are applied through the Hague/Hague-Visby rules.⁹² ‘The first principle is that a carrier is prima facie liable for all loss or damage to cargo received in good order and out-turned short or in bad order’.⁹³ This principle is linked to the *Vallescura* rule mentioned above as the rule aims to rebut the presumption that stems from the first principle of proof.⁹⁴ The first principle reflects the position adopted in cases such as *Edouard Materne v. S.S. Leerdam*⁹⁵ and *Transatlantic Marine Claims*

⁸⁴ *SB Cannon op cit note 77 at 481.*

⁸⁵ *Ibid.*

⁸⁶ *Trade Arbed Inc MI v Swallow* 688 F. Supp. 1095, 1106-07 (E.D. La. 1988).

⁸⁷ *SB Cannon op cit note 77 at 481.*

⁸⁸ *Ibid* at 482.

⁸⁹ United Nations Commission on International Trade law, Status, United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978), accessed on 26/04/2018, available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html.

⁹⁰ *S Rares op cit note 76 at 16.*

⁹¹ *W Tetley op cit note 38 at 4.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *W Tetley op cit note 38 at 12.*

⁹⁵ *Ibid* at 6.

*Agency, Ltd. v. M/V OOCL Inspiration*⁹⁶. This is referred to by Rares as the ‘traditional’ approach.⁹⁷ Tetley asserts that the principle was already well established prior to the Hague Rules coming into effect.⁹⁸

The first principle operates as an inference that the loss had occurred whilst the goods were in the carrier’s charge which renders the carrier prima facie liable. The bill of lading serves as prima facie evidence of the receipt of the goods by the carrier in good condition and the fact that prima facie proof is rebuttable means that the carrier can ‘overturn the claimant’s prima facie case’, by proving the existence of an excepted peril.⁹⁹

In the case of *Edouard Materne v. S.S. Leerdam*¹⁰⁰ the following was noted:

‘It is well established that a carrier of goods by sea is prima facie liable for damage to cargo received in good condition but which is out turned in a damaged condition at the end of the voyage, unless the carrier can show that the immediate cause of the damage is an excepted cause for which the law does not hold him responsible’.¹⁰¹

In terms of making a prima facie case against the carrier, it was held in the case of *Transatlantic Marine Claims Agency, Ltd. v. M/V OOCL Inspiration*¹⁰² that a prima facie case of liability of the carrier can be established in two ways.¹⁰³ The first is by ‘adducing direct evidence’ of the condition in which the cargo was delivered to the carrier and its damaged condition on outturn’.¹⁰⁴ Secondly, a prima facie case may be established by illustrating that the nature of the damage is coherent with the theory that the damage occurred whilst in the carrier’s charge.¹⁰⁵ An example of adducing direct evidence is by putting in evidence of a clean bill of lading on delivery and of there being a damaged condition at outturn. This case is an example of the second way of

⁹⁶ *Transatlantic Marine Claims Agency, Ltd. v. M/V OOCL Inspiration* 137 F.3d 94, 1998 AMC 1327 (2 Cir. 1998). Also see W Tetley *op cit* note 37 at 8.

⁹⁷ S Rares *op cit* note 76 at 18.

⁹⁸ W Tetley *op cit* note 38 at 5.

⁹⁹ *Ibid* at 4.

¹⁰⁰ *Edouard Materne v. S.S. Leerdam* 143 F. Supp. 367 at p. 369, 1956 AMC 1977 at p. 1980 (S.D. N.Y. 1956).

¹⁰¹ *Ibid* at 369.

¹⁰² *Transatlantic Marine Claims Agency supra* note 96 at 94.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Transatlantic Marine Claims Agency supra* note 96 at 94.

proving a prima facie case whereby the court in this case had found that the nature of the damage was due to seawater wetting and that this was irrevocably associated with an at sea occurrence which means that the carrier had charge of the goods when the damage occurred.

The question is whether or not the carrier must both prove an excepted peril and disprove its own negligence to care for the cargo in order to rebut the inference of liability. This is what occurred in some of the old English decisions.¹⁰⁶ However, in more recent English decisions it has been held that 'the carrier may rebut the claimant's prima facie case by merely proving that the loss was due to an excepted peril.'¹⁰⁷ However it can be said that whilst proving an excepted peril, the carrier also proves an absence of negligence on his part.¹⁰⁸

Tetley's second principle of proof is that the parties are obliged to prove all of the facts that are at their disposal/available to them.¹⁰⁹ Since the carrier has charge of the cargo from the time they receive the cargo until it is delivered, they have the 'principal burden of proof'.¹¹⁰ Thus, they may attempt to prove certain facts by using the information provided by the master, crew and servants as to what exactly had happened.¹¹¹ This second principle justifies the Vallescura rule.¹¹²

In the case of *American Tobacco Co. v. Goulandris*¹¹³, the second principle of proof was applied but in this case it was applied to the cargo owner. It was held that if the damage was caused due to the initial condition of the tobacco at the time of shipment then the cargo owner must bear the loss. The Court held further that '[i]t seems reasonable to place the burden of proof on the shipper once damage is shown to have been of internal origin for he is clearly the one who has access to the information on this question.'

In the case of *Caemint Food Inc v Lloyd Brasileiro*¹¹⁴, the judgment emphasised a similar view. The court held that it is fair for the burden to rest on the plaintiff of showing

¹⁰⁶ W Tetley *op cit* note 38 at 10.

¹⁰⁷ *Ibid* at 11.

¹⁰⁸ *Ibid*.

¹⁰⁹ W Tetley *op cit* note 38 at 15.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*.

¹¹² *Ibid* at 12.

¹¹³ *American Tobacco Co. v. Goulandris* 281 F. 2d 179 at 182, 1962 AMC 2655 at 2659 (2 Cir. 1960).

¹¹⁴ *Caemint food Inc v Lloyd Brasileiro* 647 F.2d 347 (2d Cir. 1981).

the condition of the packaged goods upon delivery as the plaintiff has 'superior access' to this information while the carrier on the other hand would have 'superior access' to information regarding what had occurred after receiving the goods.

Tetley's third principle of proof is that the 'onus of proof means making proof to a reasonable degree'.¹¹⁵ This principle was applied in the case of *Dominion Tankers Ltd v Shell Petroleum Co. (John A. McDougald)*.¹¹⁶ The vessel had lost gasoline and the carrier stated that this was as a result of a stranding which had damaged the hull of the ship.¹¹⁷ The claimant on the other hand took the position that the gasoline had been pumped overboard in order to decrease the weight of the ship.¹¹⁸ On appeal it was held that the carrier's explanation for the damage and loss was in fact 'reasonable and consistent with the occurrence of the stranding and damage to the ship'.¹¹⁹ The carrier therefore would not have to prove all the circumstances of the loss, only those necessary to establish to a reasonable degree that an excepted peril occurred.¹²⁰

Furthermore, the case of *States Marine Corp. v. Producers*¹²¹ indicates that the carrier has an 'ordinary burden of proof'. This means that the burden of proof is on the 'preponderance of evidence and need not show clear and convincing proof'.¹²²

Lastly, Tetley's fourth principle of proof relates to 'concealment, modification or destruction of key evidence'.¹²³ The manner in which this principle is applied is that once a party 'conceals, modifies or destroys evidence', all other evidence brought forward by that party is seen as suspicious.¹²⁴ This principle of proof is seldom applied in comparison to the three other principles and will not be further discussed.¹²⁵

¹¹⁵ W Tetley *op cit* note 37 at 24.

¹¹⁶ *Dominion Tankers Ltd v Shell Petroleum Co. (John A. McDougald)* [1939] Ex. C.R. 192 at p. 203, [1939] AMC 541 at p. 551.

¹¹⁷ *Ibid* at 551.

¹¹⁸ *Ibid*.

¹¹⁹ *Dominion Tankers Ltd supra* note 116 at 551.

¹²⁰ W Tetley *op cit* note 38 at 24.

¹²¹ *States Marine Corp. v. Producers* 310 F. 2d 206, 1963 AMC 246 (9 Cir. 1962).

¹²² *Ibid*.

¹²³ W Tetley *op cit* note 38 at 25.

¹²⁴ W Tetley *op cit* note 38 at 25.

¹²⁵ *Ibid*.

Tetley's four principles will be considered further below in relation to case law dealing with the shifting onus of proof when the carrier relies on an exception, and the question of whether it is for the carrier to disprove negligence.

3.6 The position in terms of the burden of proof prior to the Hague Rules

At common law the cargo owner must prove the damage or loss and the carrier will have the burden of proving that the damage or loss falls under one of the exceptions or is not as a result of his fault.¹²⁶ The burden of proving that the carrier is not entitled to the use of the exceptions based on negligence is for the cargo owner to prove.¹²⁷ Proof of damage or loss raises an inference of breach of article 3 rule 2 and the burden rests on the carrier to rebut.¹²⁸ The common law approach is still important as it is similar to that of the approach in the Hague/Hague-Visby rules.¹²⁹

In the *Glendarroch* case¹³⁰, the carrier had relied on the perils of the sea exception.¹³¹ The bill of lading had not made any provision for loss due to the carrier's servants' negligence in the navigation and management of the vessel.¹³² The court a quo held that the carrier will have to prove that a peril of the sea exception applies as well as that the peril was not caused by its own negligence.¹³³ The decision was reversed on appeal.¹³⁴ It was held that the onus is on the claimant to prove the contract and that the carrier must prove that the loss was as a result of perils of the sea.¹³⁵ If they did so, the burden of proving that the carriers were not entitled to the benefit of the exception on the basis of negligence was on the parties who alleged it, who in this case were the claimants.¹³⁶

¹²⁶ R Aikens...et al *op cit* note 7 at 337.

¹²⁷ *Ibid.*

¹²⁸ *Ibid* at 341.

¹²⁹ *Ibid* at 388.

¹³⁰ *The Glendarroch supra* note 10 at 226.

¹³¹ *The Glendarroch supra* note 10 at 226, Also see R Aikens *op cit* note 7 at 198 para 10.25

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *The Glendarroch supra* note 10 at 231. Also see R Aikens *op cit* note 7 at 199 para 10.27.

¹³⁶ *The Glendarroch supra* note 10 at 232. Also see R Aikens...et al *op cit* note 7 at 337 para 10.158, *The Torenia* [1983] 2 Lloyd's Rep 210, 217 and *Joseph Constantine Steamship Line v Imperial Smelting Corporation* [1942] A.C. 154.

3.7 The position after the Hague rules

The *Gosse Millerd v Canadian Government Merchant Marine Ltd (The Canadian Highlander)*¹³⁷ case was one of the first to be decided after the Hague rules had come into force.¹³⁸

Cargo was delivered damaged possibly due to rain water.¹³⁹ The carrier had relied on several exceptions in article 4 rule 2 including 2(q).¹⁴⁰

Article 4 rule 2(q) reads:

‘Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.’

Unlike the other exceptions in article 4 rule 2, it expressly indicates that the carrier must prove that it was not negligent. The judge held that ‘the provision in rule 2(q) that it was for the carrier to disprove its own fault or neglect or that of its servants’, also applied to the rest of the exceptions.¹⁴¹ The judge took the view that it was sufficient for the cargo owner to merely prove that the goods were received in good condition and out-turned damaged, and that they did not have to go further and prove that the carrier was negligent.¹⁴² The judge went on to say that:¹⁴³

‘The general rule applicable in English law to the position of bailees is that the bailee is bound to restore the subject of the bailment¹⁴⁴ in the same condition as that in which he received it, and it is for him to explain or to offer valid excuse if he has not done so. It is for him to prove that reasonable care had been exercised.’

¹³⁷ *Gosse Millerd supra* note 11 at 91.

¹³⁸ Casmine Brief on the *Volcafe case*, Para 38, available at <https://www.casemine.com/judgement/uk/5b2897fd2c94e06b9e19ead3>, accessed on 28 November 2018.

¹³⁹ *Gosse Millerd supra* note 11 at 91.

¹⁴⁰ Casmine Brief on the *Volcafe case op cit* note 138 at para 38.

¹⁴¹ *Gosse Millerd supra* note 11 at 103.

¹⁴² *Ibid.*

¹⁴³ Casmine Brief on the *Volcafe case op cit* note 138.

¹⁴⁴ R D Claassen ‘Bailment’ The English term bailment is similar to the contract of deposit known under Roman Dutch law- available at <https://www-mylexisnexis-co-za.ukzn.idm.oclc.org/Index.aspx?permalink=QkFJTE1FTlQkMzg5MDQ2MyQ3JExpYnJhcnkkSkQkTGlicmFyeQ>, accessed on 27 November 2018.

In coming to its decision the court had relied on a passage from the case of *F.C Bradley and Sons Ltd v Federal Steam Navigation Company Ltd*¹⁴⁵ whereby the contract of carriage provided for several exceptions as well as for the incorporation of the Australian Carriage of Goods Act.¹⁴⁶ Some of the goods were out-turned damaged and Viscount Summer held that:

‘On proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the ship owners to prove some excepted peril which relieved them from liability . . . and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country.’¹⁴⁷

The decision in the *Gosse Millard* case is inconsistent with the principle that he who alleges must prove, whereas the decision in the *Glendarroch* case is in line with this principle.¹⁴⁸

Since Judge Wright’s application of this formulation of the onus of proof the judgment in the *Gosse Millard* case has been applied in many other cases, to name a few, *Borthwick and sons Ltd v New Zealand Shipping Co Ltd*¹⁴⁹, *Phillips and Co (Smithfield) Ltd v Clanline Steamers Ltd*¹⁵⁰, and *Svenska Traktor Aktie Balaget v Maritime Agencies(Southampton) Ltd*.¹⁵¹

In the case of *Borthwick v New Zealand Shipping*¹⁵² Roche J followed the judgment of Wright J in the *Gosse Millard case*¹⁵³ and stated that if goods were received in good order and condition and delivered damaged this would mean that the carrier must

¹⁴⁵ *F.C Bradley and Sons Ltd v Federal Steam Navigation Company Ltd* 27 Ll.L.Rep at 396.

¹⁴⁶ Carriage of Goods by Sea Act 1991, http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/cogbsa1991196/, accessed on 27 November 2018.

¹⁴⁷ *F.C Bradley and Sons Ltd* supra note 145. at 396.

¹⁴⁸ Weightmans, Burden of proof for cargo claims under Hague Rules, <https://www.weightmans.com/insights/burden-of-proof-for-cargo-claims-under-hague-rules/>. Accessed on 27 November 2018. Also see R Aikens...et al *op cit* note 7 at 337, he quotes from the *Glendarroch* that ‘If the loss apparently falls within the exception, the burden of [proving] that the shipowner is not entitled to the benefit of the exception, on the ground of negligence, is upon the person so contending’.

¹⁴⁹ *Borthwick & Sons Ltd v New Zealand Shipping Co Ltd* (1934) 49 Lloyd’s Rep 19 at page 24. See *Volcafe* CA supra note 15 para 39.

¹⁵⁰ *Phillips & Co (Smithfield) Ltd v Clan Line Steamers Ltd* (1943) 76 Lloyd’s Rep 58 at page 61. See *Volcafe* CA supra note 15 para 39.

¹⁵¹ *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton) Ltd* [1953] 2 Lloyd’s Rep 124 [1953] 2 QB 295.

¹⁵² *Borthwick & Sons Ltd* supra note 149 at 24.

¹⁵³ *Ibid.*

show that he exercised reasonable care.¹⁵⁴ Therefore the carrier may not only rely on one of the exceptions provided for but must prove that the damage was not caused by want of his negligence.¹⁵⁵ The defendants produced evidence of the temperatures on board the vessel being 'safe and proper'.¹⁵⁶ The court accepted the evidence produced by Mr Swainston (consulting maritime engineer) that a temperature of 17 degrees is safe and proper for the carriage of normal cargo even though it is not the recommended temperature of 15 degrees.¹⁵⁷ Judgment was entered for the ship owners and the damage was held to be as a result of inherent vice.¹⁵⁸

The case of *Phillips v Clanline Steamers*¹⁵⁹ quoted what Roche J had said about following the law applicable in the recent formulation in the *Gosse Millard* case.¹⁶⁰

In the case of *Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton) Ltd*¹⁶¹ the court held that there had been no evidence to show that an unexpected peril had occurred and as a result the carrier had not shown that they exercised reasonable care of the goods.¹⁶² Therefore judgment was entered for the claimants.¹⁶³ This decision was also in line with that of the *Gosse Millard* decision.

In the case of *Aktieselskabet de danskse sukkerfabrikker v Bajamar compania Naviera SA (The Torenia)*¹⁶⁴, Hobhouse J noted that the burden of proof in terms of proving negligence is a highly controversial issue.¹⁶⁵ Hobhouse J was of the opinion that the analysis of the burden of proof in the *Glendarroch* case was the correct approach.¹⁶⁶ However he did not make any decision as to whether that approach would be applicable under the Hague rules.¹⁶⁷

¹⁵⁴ *Borthwick & Sons Ltd supra* note 149 at 24.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* at 22.

¹⁵⁷ *Ibid* at 28.

¹⁵⁸ *Ibid* at 19.

¹⁵⁹ *Phillips & Co (Smithfield) Ltd supra* note 149 at 61.

¹⁶⁰ *Ibid.* Also See *Volcafe CA supra* note 15 para 39.

¹⁶¹ *Svenska Traktor Aktiebolaget supra* note 151.

¹⁶² *Ibid* at 133.

¹⁶³ *Ibid* at 134.

¹⁶⁴ *The Torenia* [1983] 2 Lloyd's Rep 210 vol 1.

¹⁶⁵ *Ibid* at 218.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

In the earlier Australian case of the *Minister of Food v Reardon Smith Line Ltd*¹⁶⁸ the cargo owner had argued that the carrier must prove that he did not contribute to the damage in order for him to rely on one of the exceptions. McNair J held that the common law rule applies to the Hague rules and he said that:

‘The burden of proof shifts from time to time: the cargo-owner first has to make out a prima facie case of liability which is sufficient to cast upon the ship the obligation of shifting that onus by proving that the damage was caused by some matter falling within the exceptions, and then if the cargo-owner in turn wishes to deprive the shipowners of that protection, it is for the cargo-owner to establish affirmatively (a) that the ship was unseaworthy, and (b) that that unseaworthiness caused the damage.’¹⁶⁹

McNair J’s decision is in line with that of the *Glendarroch* case.

3.8 Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad (The Bunga Seroja)¹⁷⁰

This case is a major case in Australian law and was mentioned earlier in chapter 2 in relation to the perils of the sea defence. In this case, heavy weather had occurred when the ship was traversing through the Great Australian bight. The storm had caused major damage to the coils of the containers on board and therefore resulted in damage and a loss of goods. The issues were whether or not the carriers could rely on the perils of the sea exception and whether or not the carrier was negligent, both in relation to exercising due diligence to make the ship seaworthy and in relation to its handling of the cargo, in particular stowage for the sea passage.

However, Gaudron, Gummow and Hayne J.J in their judgment in the *Bunga Seroja*¹⁷¹ were of the view that the common law principles established in cases such as the *Glendarroch*¹⁷², cannot serve as an ‘aid’ in interpreting the Hague rules.¹⁷³ They reasoned that the Hague rules are a ‘self-contained code’.¹⁷⁴ Further, they held that

¹⁶⁸ *Minister of Food v Reardon Smith Line Ltd* [1951] 2 Lloyd’s Rep, 265.

¹⁶⁹ *Ibid* at 271.

¹⁷⁰ *Bunga Seroja HCA supra* note 14.

¹⁷¹ *Bunga Seroja HCA supra* note 14.

¹⁷² *The Glendarroch supra* note 10.

¹⁷³ *Bunga Seroja HCA supra* note 14 para 22. Also see W Tetley *op cit* note 38 at 9. Also see Martin Davies ‘Application of the Hague Rules Perils of the Sea Defense in Australia: The Bunga Seroja’ (1999) 23 *Tul. Mar. L.J.* 449 at 460.

¹⁷⁴ *Bunga Seroja HCA supra* note 14 para 22. Also See W Tetley *op cit* note 37 at 9. Also see Martin Davies *op cit* note 172 at 454.

the existence of an exception (that is the carrier's duty to prove the peril of the sea defence) did not arise as the claimant had not proved unseaworthiness under article 3 rule 1 or negligent handling of the cargo under article 3 rule 2.¹⁷⁵

This distinction has significant consequences if the plaintiff does not discharge the onus of proof in relation to a breach of article 3 rule 2 as it will then lose the case. Thus it was held that 'once Justice Carruthers [the trial judge] found that there was no breach of the carrier's obligations in this case, the immunities conferred by art. IV, r. 2 became irrelevant.'¹⁷⁶

According to Tetley, the position taken under Australian law is different from the position taken in other jurisdictions.¹⁷⁷ Under Australian law there is no legal onus cast on the carrier to prove that an exception applies and to illustrate the use of 'general diligence and care' will suffice in allowing the carrier to escape liability for 'unidentified harm' caused to the cargo.¹⁷⁸ The carrier will not need to show how the cargo was harmed.¹⁷⁹

Thus Australia is not in line with the other major maritime countries in terms of its understanding of Tetley's first principle of proof. Tetley states that the effect of the position taken in the *Bunga Seroja* is that the carrier may escape liability in circumstances where the cause of loss is unclear or has not been established.¹⁸⁰ This is unlike the application of the Hague/Hague-Visby rules in other jurisdictions where the carrier is obliged to prove which of the exceptions apply and what exactly caused harm to the cargo.¹⁸¹ Rares agrees that the decision of the majority in the *Bunga Seroja* has departed from 'the traditional common law application of the onus and order of proof', but points out that the comments were obiter.¹⁸² He also criticises the judgment, arguing with reference to the travaux preparatoires of the Convention that the purpose of article 4 rule 2 'was to ensure that the common law concept of exclusion

¹⁷⁵ *Bunga Seroja* HCA *supra* note 14 para 36. Also see Martin Davies *op cit* note 172 at 455.

¹⁷⁶ *Bunga Seroja* HCA *supra* note 14 para 36.

¹⁷⁷ W Tetley *op cit* note 38 at 10.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ W Tetley *op cit* note 38 at 10.

¹⁸¹ *Ibid.*

¹⁸² S Rares *op cit* note 76 at 19.

of liability was incorporated into the Rules.¹⁸³ Aikens argues that the majority decision 'does not reflect English law on the point'.¹⁸⁴

The decision of the majority can be contrasted with the careful distinction drawn between the onus of proof and a mere evidentiary burden in the minority decisions in the case of *the Bunga Seroja*¹⁸⁵ where McHugh J took the following view:¹⁸⁶

'The delivery of goods in a damaged state is evidence of a breach of art. III and imposes an evidentiary burden on the carrier to show that no breach of art. III has occurred. But unlike the common law, failure to deliver the goods in the state received does not cast a legal onus on the carrier to prove that the state of, or non-delivery of the goods, was not due to the carrier's fault.'

Kirby J¹⁸⁷ and Callinan J¹⁸⁸ each referred with approval to the order of proof outlined in the cases of the *Glendarroch* and *Gamlen*.¹⁸⁹

It is submitted that the views of the minority cannot be reconciled with the majority decision and are to be preferred. While the overall legal onus remains on the claimant, an evidentiary burden does shift to the carrier to establish facts that would bring him within one of the exceptions.

3.9 *Volcafe Ltd and others v Compania Sud Americana de Vapores SA (Trading as "CSAV")*¹⁹⁰

It can be argued that *Volcafe v CSAV* is the most significant case in terms of the issue of the burden of proof under the Hague Rules as it can be shown that it sets this issue to rest. The facts of this case were discussed in the previous chapter.

The first instance decision by Mr Donaldson QC¹⁹¹ was that where the goods were loaded in good order and condition and out-turned in a damaged state, then an inference of breach of article 3 rule 2 would be justified.¹⁹² He held further, that, the

¹⁸³ *S Rares op cit* note 76 at 21.

¹⁸⁴ R Aikens *op cit* note 7 at 367 para 10.243.

¹⁸⁵ *Bunga Seroja* HCA *supra* note 14 para 98.

¹⁸⁶ *Ibid* per McHugh J.

¹⁸⁷ *Bunga Seroja* HCA *supra* note 14 para 154 and 156 per Kirby J.

¹⁸⁸ *Bunga Seroja* HCA *supra* note 14 para 224 and 225 per Callinan J.

¹⁸⁹ M Davies, 'Application of the Hague Rules Perils of the Sea Defence in Australia: The *Bunga Seroja*' (1999) 23 *Tul. Mar. L.J.* 449 at 460.

¹⁹⁰ *Volcafe* CA *supra* note 15.

¹⁹¹ *Ibid* at 33.

¹⁹² *Ibid*.

carrier would then be required to 'produce evidence' in order to establish that he had not been in breach of his obligations.¹⁹³ The judge stated that this had to be done prior to relying on any of the exceptions provided for in article 4 rule 2 of the Hague/Hague-Visby rules.¹⁹⁴

Some of the issues that were not set out in the previous chapter and that arose on appeal are as follows:

First, must the carrier prove that the damage was inevitable or is there 'merely an evidential burden to raise a prima facie case of inherent vice'?¹⁹⁵

Secondly, what does the carrier have to establish to raise a prima facie case of inherent vice?¹⁹⁶

Finally, '[i]f reliance on inherent vice or other exceptions under article 4 rule 2 can be negated by negligence or failure to properly and carefully carry the goods, upon which party does the burden of proof lie?'¹⁹⁷

In terms of the burden of proof, the judge did not agree with the claimant's argument being that the carrier is regarded as a common carrier under the Hague rules and that the carrier would be liable for the damage to the cargo that he is unable to prove was as a result of inherent vice or another cause in respect of which he was not negligent.¹⁹⁸ The judge stated that this is an incorrect approach to the Hague Rules internationally.¹⁹⁹ This is in line with the comments in the minority decision of McHugh J in the *Bunga Seroja* that there is no legal onus on the carrier to prove that the damage or state of the goods upon outturn was not due to the fault of the carrier.²⁰⁰

In terms of the burden of proof issue the court held that evidence of goods arriving in a damaged condition does not give rise to a sustainable cause of action but rather is a fact from which the court can draw an inference of a breach of article 3 rule 2.²⁰¹ The court held that there is a four stage process to be followed, whereby the burden of

¹⁹³ *Volcafe CA supra note 15 at 33.*

¹⁹⁴ *Volcafe Ltd and Others v Compania Sud Americana De Vapores (trading as CSAV) [2015] 1 Lloyd's Rep 649*

¹⁹⁵ *Volcafe CA supra note 15 at 39.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Volcafe CA supra note 15 at 37.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Bunga Seroja HCA supra note 14 para 98 per McHugh J.*

²⁰¹ *Volcafe CA supra note 15 at 40 para 25.*

proof shifts from claimant to carrier, carrier to claimant.²⁰² This decision illustrates that Tetley's first principle of proof is now simply wrong as the carrier will not be automatically prima facie liable for goods that were received in good order and condition and out turned damaged. This is merely a fact from which the court can draw an inference that there has been a breach of article 3 rule 2. The four stage process is as follows;²⁰³

- 1) 'The claimant must firstly show that there is an inference of breach;
- 2) The carrier must then show his defence of an applicable exception;
- 3) It is then the duty of the claimant to establish negligence on the part of the carrier;
- 4) Lastly, if negligence has been established, it is then the carrier's duty to prove what part of the damage was not caused by its negligence'.

The judge held that once the carrier is able to show that he may rely on one of the exceptions, namely the exception of inherent vice in article 4 rule 2(m) in this case, the burden then shifts to the cargo owner to establish that the carrier was negligent; only then will the cargo owner be able to prevent the carrier from relying on the exception.²⁰⁴

The court held that:

'[t]his analysis is consistent with the weight of the authorities, which apply the principles enunciated in *The Glendarroch*, even where the Hague Rules apply to the contract of carriage'.²⁰⁵

Further the court held that this decision is in line with the common law principle that he who alleges must prove.²⁰⁶ The judge went further to say that:

'this principle is "one which accords with fairness" and, although the Hague Rules are to be construed against the background that they are an internationally adopted convention, I do not consider that there is anything in the Rules themselves which points to a different construction than that, in relation to exceptions such as article IV

²⁰² *Volcafe CA supra note 15 at 40 para 25.*

²⁰³ *Ibid at 40 para 23 to 25.*

²⁰⁴ *Volcafe CA supra note 15 at 46 para 50.*

²⁰⁵ *Volcafe CA supra note 15 at 46 para 50.*

²⁰⁶ *Ibid.*

rule 2(m) (or for that matter other exceptions such as rule 2(c)), the carrier does not need to disprove negligence to rely upon the exception.²⁰⁷

The court referred to the three stage analysis put forward by Mr Bryan QC in this case and stated that:²⁰⁸

‘Where the carrier sets up a case within the exception, it is for the cargo claimant to establish that the exception does not apply because of the carrier’s negligence. That would seem to be so, whether the burden at stages one and two is a legal one, as the claimants contend, or only an evidential one. As to whether the burden of proof at the first and second stages is a legal burden on the cargo claimant to prove delivery in a damaged condition or non-delivery, then a legal burden on the carrier to establish the operation of one of the article IV rule 2 exceptions, or merely in each case an evidential burden, I consider that the better view is that in each case, the burden is a legal one.’

The court is therefore of the view that there is a legal burden that shifts between the claimant and the carrier. Furthermore that the burden of discharging whether or not a carrier can rely on the exception, rests on the claimant.²⁰⁹

3.10 Summarising the onus and order of proof

According to Tetley, there are six facts a claimant must prove to make out a case:²¹⁰

1. ‘That he is the owner of the goods and/or is the person whom is entitled to make the claim.
2. The existence of a contract.
3. That the person to whom the claim is made is the person who bears the responsibility.
4. That the loss or damage took place in the hands of the carrier, this is usually done by proving the condition of the goods when received by the carrier and the condition at discharge.
5. The physical extent of the damage or the loss.
6. The actual monetary value of the loss or damage.’

²⁰⁷ *Volcafe CA supra note 15 at 46 para 50.*

²⁰⁸ *Ibid* at 42 para 35.

²⁰⁹ *Volcafe CA supra note 15 at 42 para 35.*

²¹⁰ W Tetley *op cit* note 38 at 31.

According to Tetley the burden of proof then shifts to the carrier to prove:²¹¹

- (a) 'The cause of the loss.
- (b) That he exercised due diligence to make the vessel seaworthy at the beginning of the voyage, in respect of the loss.
- (c) That a Peril of the Sea existed (or another applicable exception).'

The reasoning that Tetley makes for the upholding of this view of the order of proof is that the obligation to exercise due diligence is an overriding obligation, and a carrier cannot rely on the exceptions if he has not exercised due diligence.²¹²

Further Tetley argues that:

'The due diligence provision of article 3(1) of the Hague and Hague Visby Rules, unlike article 3(2) of those rules obliging the carrier to care properly and carefully for the cargo, is not subject to the exculpatory exceptions stated in art. 4(2) (a) to (q);'²¹³

Tetley also reasons that the proof of the cause of the cargo loss or damage is more easily available to the carrier than to the cargo claimant and should therefore be made by the carrier, according to the second basic principle of proof stated above.

Tetley's order of proof must be understood in the context of the decision in *Volcafe* that an evidentiary burden shifts to the carrier when an inference of breach of article 3 rule 1 or 2 can be drawn from evidence adduced by the claimant. It should also be added that where a carrier has made out a defence using an exception, it is then for the claimant to show that the carrier's negligence negated the use of the exception.²¹⁴

The decision in the *Volcafe* case has dealt with the controversial issue of the burden of proof and has 'laid to rest' the alternative approach regarding negligence that was put forward in the *Gosse Millerd* case.²¹⁵

²¹¹ W Tetley *op cit* note 38 at 32.

²¹² *Ibid* at 12. Tetley relies on the authority of *Maxine Footwear Co Ltd v Canadian Merchant Marine Ltd* 1959 Vol 2, 105 at 113.

²¹³ W Tetley *op cit* note 38 at 34.

²¹⁴ *Volcafe CA supra* note 15 at 40 para 25.

²¹⁵ Hill Dickinson 'Volcafe & others v CSAV [2016] EWCA Civ 1103'

available at <https://www.hilldickinson.com/insights/articles/volcafe-others-v-csav-2016-ewca-civ-1103>, 14 December 2016, accessed on 28 March 2018. Also see Essex Court Chambers Barristers, 'Court of Appeal Determines Burden of proof under Hague Rules' (11 November 2016), available at <https://essexcourt.com/court-appeal-determines-burden-proof-hague-rules/>, accessed on 28 March 2018.

'It is not for the carrier to disprove its own fault or negligence but for the cargo interests to positively establish it'.²¹⁶ This is in accordance with the principle that he who alleges must prove.²¹⁷

It is a complete change from the decision by Wright J in the case of *Gosse Millerd* whereby it was held that such burden fell on the carrier.²¹⁸ The burden is no longer on the carrier in that respect.²¹⁹

The *Volcafe* case considered the earlier case of *The Torenia*²²⁰ where it was held that proof by the claimant of damaged delivery or non-delivery of the goods established a sustainable cause of action.²²¹ However, the judges did not agree with this decision.

The case of *Government of Ceylon v Chandris* is also in line with the general principle of proof and the court in this case held, that the general rule is that the burden of proof rests on the party claiming the relief.²²²

²¹⁶ H Dickinson *op cit* note 215.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *The Torenia supra* note 164 at 210.

²²¹ *Ibid* at 211.

²²² *Government of Ceylon v Chandris* [1965] 2 Lloyd's Rep 204.

3.11 Conclusion

In conclusion it can be said that the application of the Hague/Hague-Visby rules have come a long way in terms of applying the burden of proof. Since the decision in the *Volcafe* case there is now clarity on the matter. The decision in that case is in line with the principles from the *Glendarroch* case and rejects the principle formulated in the *Gosse Millerd* decision that the carrier is to disprove negligence as well as prove the existence of an excepted peril. The carrier proving an excepted peril will be sufficient in shifting the burden of proof back to the claimant. The next chapter will deal with the Hamburg rules and the manner in which the Hamburg rules make provision for and apply the burden of proof. The next chapter will also entail a comparison of the Hague/Hague-Visby rules and the Hamburg rules in terms of the application of the burden of proof in the respective regimes.

CHAPTER FOUR: THE BASIS OF LIABILITY AND THE BURDEN OF PROOF UNDER THE HAMBURG RULES

4.1 Introduction

In this chapter the writer will discuss whether or not the carrier's duties have changed under the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)¹ and if so, to what extent. The writer will go further and establish whether or not the carrier's liability has increased substantially and discuss the defences available to the carrier under this convention. A comparison of the operation of the burden of proof under the Hague/Hague-Visby rules and the Hamburg rules will then be made and case law will be used to illustrate this.

In order to analyse the carrier's liability under the Hamburg rules it is important to understand the background of the rules and why the rules were created.

4.2 Background of the Hamburg rules

The Hamburg rules were inspired by a report that had been written during the 1970's by the secretariat of UNCTAD.² The legal features of the Hague/Hague-Visby rules that were found to be at issue at the conference were provisions that favoured carriers and were not in line with modern day maritime transport.³ The report by the secretariat set out these issues.⁴ One of the major issues found was the nautical fault exception.⁵ The application of this exception is intrinsic to the Hague/Hague Visby-rules as courts need to establish the difference between a case of unseaworthiness of the ship, and the management of the ship, as well as between the care of the cargo, and the management of the ship.⁶ The Hague/Hague-Visby rules also fail to deal with the

¹ United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), 1978, available at https://unctad.org/en/PublicationsLibrary/aconf89d13_en.pdf, accessed on 5 November 2018.

² F Reynolds 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules' (1990) 7 *Australian and New Zealand Maritime Law Journal* at 27.

³ R R Pixa 'The Hamburg Rules Fault Concept and Common Carrier Liability under U.S. Law' (1979) 19 *Va. J. Int'l L.* 433 at 440.

⁴ F Reynolds *op cit* note 2 at 27.

⁵ R R Pixa *op cit* note 3 at 441.

⁶ *Ibid.*

burden of proof shifting from carrier to cargo owner in cases which deal with concurrent negligence whereby the carrier shows that an exception applies.⁷

A draft convention and draft provisions were considered at the U.N conference that was held on the carriage of goods by sea in Hamburg.⁸ The convention was then adopted and twenty seven states, one of which is the United States became signatories of the convention.⁹ However, the United States has never ratified the convention and of the 34 countries¹⁰ that are now parties to the convention, none are ship owning nations or large developed economies and the rules appear unlikely to attract further support.¹¹

The Hamburg rules came into force in November 1992 and aimed to balance the risks between the carrier and cargo owner.¹² The Hamburg rules were intended to be a modern shipping convention which dealt comprehensively with the possible issues of damage and loss of cargo between the carrier and the cargo owner.¹³

The principle feature of the Hamburg rules is the new basic rule of liability in article 5. In terms of article 5(1), the carrier will be held liable unless '*the carrier proves* that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences' (own emphasis).¹⁴ Therefore most carriers are not in favour of the Hamburg rules, as they are of the view that it has marked a fundamental shift from proved fault to 'presumed fault', with a consequent reversal of the ordinary onus of proof in cargo claims under the Hague/Hague-Visby rules.

The Hamburg rules are, however, not clear on the manner in which the burden of proof will operate.

⁷ R R Pixa *op cit* note 3 at 442.

⁸ R Hellowell 'Allocation of Risk between Cargo Owner and Carrier' (1979) 27 *Am. J. Comp. L.* 357 at 354.

⁹ *Ibid* at 355.

¹⁰ Status-United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978), available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html, accessed on 5 November 2018.

¹¹ B Makins 'The Hamburg Rules: A Casualty, Part 4-Hamburg rules-Judgment of the International community' May-June 1994, available at <https://www.tandfonline.com/doi/abs/10.1080/07266472.1994.10878383?journalCode=ramo19>, accessed on 31 October 2018.

¹² R G Bauer 'Conflicting Liability Regimes: Hague-Visby v. Hamburg Rules - A Case by Case Analysis' (1993) 24 *J. Mar. L. & Com.* at 53.

¹³ J C Sweeney 'UNCITRAL and the Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods' (1991) 22 *J. Mar. L. & Com.* 511 at 520.

¹⁴ Article 5(1) of the Hamburg Rules.

4.3 Article 5(1) of The Hamburg Rules

Article 5(1) of the Hamburg rules states that:

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

Article 5(1) is regarded as the single test for the carrier's liability.¹⁵ This rule is meant to take the place of all of the defences provided for in the Hague/Hague-Visby rules.¹⁶ The lack of providing a list of defences does not prevent the carrier from relying on one of the defences listed under the Hague/Hague-Visby-rules, except for the nautical fault defence.¹⁷ The Hague/Hague-Visby rules are said to be 'impliedly retained' in the Hamburg rules.¹⁸

Article 5(1) of the Hamburg rules, like its predecessor, is based on a principle of fault and not strict liability.¹⁹ However, the basis for liability is now 'presumed fault', in that it is necessary for the carrier to prove that he is not liable.²⁰

While the division of the burden of proof between carrier and cargo owner under the Hague/Hague-Visby rules seems to lack clarity,²¹ the Hamburg rules on the other hand takes a more unified approach.²² This approach is applied as follows:

The cargo owner must firstly prove that the goods were in the carrier's charge when the loss or damage took place.²³ The burden will thereafter shift on to the carrier to prove that the damage or loss was not as a result of the carrier's neglect or fault.²⁴

¹⁵ S M Thompson 'The Hamburg Rules: Should They Be Implemented in Australia and New Zealand' (1992) 4 *Bond L. Rev.* [i] at 174.

¹⁶ D A Werth 'The Hamburg Rules Revisited - A Look at U.S. Options' (1991) 22 *J. Mar. L. & Com.* 59 at 68.

¹⁷ J Wilson *Carriage of Goods by Sea* 7 ed (2010) 216.

¹⁸ A A Sefara *Basis of Carrier's Liability in Carriage of Goods by Sea* (unpublished LLM Thesis, University of Oslo, 2014) at 33.

¹⁹ E Selvig 'The Hamburg Rules, the Hague Rules and Marine Insurance Practice' (1981) 12 *J. Mar. L. & Com.* 299 at 305. Also see E S Lee 'The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of the Hamburg Rules' (2002) 15 *Transnat'l Law.* 241 at 246.

²⁰ J J Donovan 'The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea' (1979) 4 *Mar. Law.* 1 at 7.

²¹ J O Honnold 'Ocean Carriers and Cargo; Clarity and Fairness - Hague or Hamburg' (1993) 24 *J. Mar. L. & Com.* 75 at 99.

²² *Ibid.*

²³ J O Honnold *op cit* note 21 at 99.

²⁴ *Ibid.*

The Hamburg rules therefore hold the carrier liable from the start up until the carrier discharges its burden of proof.²⁵

The carrier is assisted in this proof by the insertion of a reservation in the bill of lading, where he has no reasonable way of verifying the condition of the goods on receipt of them.²⁶ However:

‘If a clean bill of lading has been issued, prima facie evidence of the taking over of the goods by the carrier and proof to the contrary by the carrier is not admissible if the bill of lading has been transferred to a third party, including a consignee, who in good faith has acted in reliance on the description of the goods therein.’²⁷

This shift in the burden of proof increases the difficulties a carrier will face when defending a ‘large claim’.²⁸ The Hamburg rules have ‘fundamentally’ changed the rules on the allocation of risks between cargo owners and carriers and in doing so have done away with some of the very old concepts.²⁹

The carrier’s risks under the Hamburg rules have been increased in a number of ways.³⁰ In addition to a heavier burden being placed on the carrier, the duration of the carrier’s duties are extended, and the Hamburg rules also make provision for liability as a result of delay in the delivery of goods.³¹

In terms of article 4 rule (2)(a) of the Hague/Hague-Visby rules the carrier is exonerated from liability for errors in the navigation and management of the ship as was previously discussed in chapter two. The detractors of the Hamburg rules believe that the rules place a heavier burden on carriers.³² Some are of the view that the Hamburg rules do not allow for a proper and economically efficient allocation of risks

²⁵ F Berlingieri ‘A Comparative Analysis of The Hague-Visby Rules, The Hamburg Rules and The Rotterdam rules’ 2009 at 8 available at https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf, accessed on 21 July 2018.

²⁶ Art 16 of the Hamburg rules. Bills of lading: reservations and evidentiary effect.

²⁷ D E Murray ‘The Hamburg Rules: A Comparative Analysis’ (1980) 12 *Law. Am.* 59 at 75.

²⁸ C W H Goldie ‘Effect of the Hamburg Rules on Shipowners’ Liability Insurance’ (1993) 24 *J. Mar. L. & Com.* 111 at 114.

²⁹ R Hellawell *op cit* note 8 at 357.

³⁰ D A Werth *op cit* note 16 at 72.

³¹ *Ibid.*

³² S R Mandelbaum ‘International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules’ (1995) 5 *J. Transnat’l L. & Pol’y* 1 at 29.

and one of the reasons for this is the removal of the nautical fault rule.³³ It seems that the Hamburg rules do not achieve the objective to reduce the costs of international trade on shippers especially in developing countries.³⁴

The proponents of the Hamburg rules on the other hand believe that the rules balance the risks equally rectifying the position under the Hague/Hague-Visby rules, which place the majority of the risks of loss on to the cargo owner.³⁵

Professor Tetley has also stated that 'in most of the cases the Hamburg convention does not clarify the law at all'.³⁶ He goes further to say that it does not achieve the desired social balance, that:

'instead [it] makes concessions to shippers and creates new law in one direction and concessions to carriers and new law in another all while establishing a third international convention.'³⁷

In Tetley's opinion, this goes against the goal of uniformity in international trade and shipping law.³⁸

4.4 The Period of Responsibility under the Hamburg Rules

The Hamburg rules distinguish between the terms 'carrier'³⁹ and 'actual carrier'.⁴⁰ According to the definitions in the Hamburg rules a carrier would be a person who makes a contract of carriage⁴¹ of goods by sea and an actual carrier is a person 'to whom all or part of the performance of the carriage has been entrusted' (also known

³³ S V P Rathinam 'The Hamburg Rules, failure of success?' 2011, available at <http://pravinrathinam.blogspot.co.za/2011/06/hamburg-rules-failure-or-success-review.html>, accessed on 11 August 2011.

³⁴ *Ibid.*

³⁵ S R Mandelbaum *op cit* note 32 at 29.

³⁶ B Makins 'Uniformity of the Law of the Carriage of Goods by Sea in the 1990s: The Hamburg Rules - A Casualty' (1991) 8 *Austl. & N.Z. Mar. L.J.* 34 at 41.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Article 1(1)-"Carrier" means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper'.

⁴⁰ Article 1(2)-"Actual carrier" means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted'.

⁴¹ Article 1(6)-"Contract of carriage by sea" means any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea for the purposes of this Convention only in so far as it relates to the carriage by sea'.

as the performing carrier).⁴² According to the Hamburg rules the contracting carrier remains liable for the duration of the carriage, being the period 'while the goods were in his charge as defined in article 4.'⁴³

Article 4(1) deals with the period of responsibility of the carrier for the care of goods⁴⁴ and according to this article this period extends further than that provided for in the Hague/Hague-Visby rules.

'The responsibility of the carrier for the goods under this Convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge.'⁴⁵

The period of responsibility is throughout the voyage and for as long as the goods are in the care of the carrier, including the port of loading and discharge.⁴⁶ Honnold,⁴⁷ Donovan⁴⁸ and Rathinam⁴⁹ note that this approach is very much like that of international conventions regarding carriage of goods by road, rail and air.⁵⁰ The Hamburg rules thus appear to place sea carriers in the same position as carriers under the other various modes of transport used in international trade.

There is also a similarity between the Hamburg rules and the Harter Act.⁵¹ The latter Act, which continues to govern domestic sea transport in America, also provides that the carrier is responsible for the goods for the entire duration of the voyage.⁵² As discussed in chapter two, the Hague/Hague-Visby rules did not follow the Harter Act in this respect, and restricted the carrier's period of responsibility to the voyage itself (tackle to tackle). The carrier's period of responsibility has increased to a great extent under the Hamburg rules as compared to the period of responsibility under the

⁴² J O Honnold *op cit* note 21 at 87.

⁴³ Article 5(1). Also see J O Honnold *op cit* note 21 at 87.

⁴⁴ J O Honnold *op cit* note 21 at 82.

⁴⁵ Article 4(1).

⁴⁶ D A L Defossez 'Seaworthiness: The Adequacy of the Rotterdam Rules Approach' (2015) 28 *U.S.F. Mar. L.J.* 237 at 243.

⁴⁷ J O Honnold *op cit* 21 at 82.

⁴⁸ J J Donovan *op cit* note 20 at 5.

⁴⁹ S V P Rathinam *op cit* note 33.

⁵⁰ Convention on the Contract for the International Carriage of Goods by Road 1956 (CMR convention), Uniform rules concerning the contract for international carriage of goods by rail 1962 (CIM convention) and The Warsaw convention on International transportation by air 1928 (Warsaw convention).

⁵¹ The Harter Act 1893.

⁵² D E Murray *op cit* note 27 at 62.

Hague/Hague-Visby rules.⁵³ Berlingieri, points out that the Hamburg rules clearly extend the 'tackle to tackle' regime of Hague/Hague Visby rules to a 'port to port' regime, but this is not the same as covering the whole period the goods are in the custody of the carrier.⁵⁴ He gives the example of a carrier who has a terminal outside the port and thus for the period from when the carrier receives the goods to the period where 'they are in charge of the goods at the port of loading' article 4(1) the Hamburg Rules might not apply.⁵⁵

4.5 Seaworthiness

In terms of the carrier's obligations, the Hamburg rules do not expressly state that the carrier has an obligation to take reasonable steps to ensure the seaworthiness of the vessel before and at the beginning of the voyage. However, article 5 is a general article which makes provision for the carrier's liability in its entirety.⁵⁶ In a case of unseaworthiness, the general rule pertaining to presumed fault would be applied and the carrier would therefore be presumed to be at fault unless he is able to prove that the loss or damage, and the unseaworthy state of the vessel which caused it, was not as a result of the carrier's fault or the fault of his servants or agents.⁵⁷ The Hamburg rules have eliminated reference to 'due diligence.'⁵⁸ Moreover article 5(1) extends the seaworthiness obligation to the entire voyage by extending the carrier's period of responsibility.⁵⁹

It is stated that the Hague/Hague Visby rules place a stricter duty to ensure seaworthiness as compared to the Hamburg rules.⁶⁰ The duty under the Hague/Hague Visby rules is non delegable and a carrier will be liable even if he appointed an independent contractor, whereas under the Hamburg rules the carrier will only need

⁵³ J J Donovan *op cit* note 20 at 7.

⁵⁴ F Berlingieri *op cit* note 25 at 5.

⁵⁵ *Ibid.*

⁵⁶ D A L Defossez *op cit* note 46 at 243.

⁵⁷ S V P Rathinam *op cit* note 33.

⁵⁸ J J Donovan *op cit* 20 at 7.

⁵⁹ R Pixa *op cit* note 3 at 444.

⁶⁰ K G Ainuson *The Hamburg Rules: Did it increase the liability of the carrier?* (unpublished LLM thesis, University of Georgia, 2006) at 43.

to show that he exercised reasonable care in the appointing an independent contractor.⁶¹

In the case of the *Kuo International Oil Ltd. And Others v. Daisy Shipping Co. Ltd. And Another*⁶², the relevant contracts of carriage were governed by the Hague rules.⁶³

In this case, there was a defect in the main reduction gearing which led to the propeller not being able to turn.⁶⁴ The vessel engaged salvors and declared general average.⁶⁵ The cargo owners disputed their liability for general average, asserting that the vessel was unseaworthy.⁶⁶ This brought to the fore the issue of whether or not the unseaworthiness of the vessel was caused by the carrier's failure to exercise due diligence.⁶⁷

It was accepted that the burden of proof rested on the carrier, and that in terms of article 4 rule 1, the carrier must prove either that they have failed to exercise due diligence, or insofar as they have failed to do so, that this did not cause or contribute to the incident.⁶⁸ Aikens continues to cite the case as authority for the position that the carrier 'is only liable ... if the failure [to exercise due diligence] was causative of the loss.'⁶⁹ Similarly, if the carrier invokes the latent defects exception under article 4 rule 2(p) the carrier bears the onus of proof, but will escape liability even if he failed to exercise due diligence where he can show that the defect was latent, which is by definition one that could not have been discovered by the exercise of due diligence.⁷⁰

The defendants had admitted that they did not exercise due diligence because at the vessel's last special survey, no thorough inspection of the gear was undertaken.⁷¹ The court accepted that due diligence required that the casing be lifted to perform a

⁶¹ K G Ainuson *op cit* note 60 at 43.

⁶² *Kuo International Oil Ltd. And Others v. Daisy Shipping Co. Ltd. And Another (The Yamatogawa)* [1990] 2 Lloyd's Rep 39.

⁶³ *Ibid* at 39.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

⁶⁶ *Ibid*.

⁶⁷ H/HV art 4 rule 1.

⁶⁸ *The Yamatogawa supra* note 62 at 40.

⁶⁹ R Aikens... et al *Bills of Lading* 2 ed (2016) at 332 para 10.145

⁷⁰ *Ibid* at para 10.282. Also see D R Thomas *The Carriage of Goods by Sea Under the Rotterdam Rules* Lloyd's List London (2010) at para 8.46 comparing H/HV art 4(2)(p) and Rotterdam rules art 17(3)(g).

⁷¹ *The Yamatogawa supra* note 62 at 48.

thorough inspection of the gear teeth.⁷² The court accepted that even with a thorough inspection, it would not have been possible to detect the defect.⁷³

The court rejected the plaintiff's argument that the inspection should have gone further and involved dismantling the gear as this was not reasonable, being contrary to the manufacturer's recommendation (and itself a risky process which might have caused damage to the gear).⁷⁴

As the carrier had proved that the exercise of due diligence, weighed on a balance of probabilities, would not have prevented the casualty from occurring, the claim was dismissed.⁷⁵

Bauer analyses the case to consider what the position would have been if the Hamburg rules were applicable.⁷⁶ Article 5(1) of the Hamburg rules would have been applicable.⁷⁷ As discussed earlier in this dissertation, the Hamburg rules require the carrier to prove 'that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'. Article 5(7) of the Hamburg rules provide that the carrier will only be liable to the extent of the loss or damage being attributable to the carrier, but it follows that if the carrier cannot prove what part of the loss or damage is not attributable to his fault, then he is liable for all of it.⁷⁸

If the classification society and its surveyor were regarded as the carrier's agents⁷⁹ then Bauer asserts that outcome of the case would probably have been the same.⁸⁰

The only failure to have exercised due diligence would have been in the 1984 inspection of the vessel but the court would have still have held that the 'casualty would have occurred even if due diligence had been exercised'.⁸¹

⁷² *The Yamatogawa supra* note 62 at 48.

⁷³ *Ibid* at 45 and 50

⁷⁴ *The Yamatogawa supra* note 62 at 50.

⁷⁵ *Ibid*.

⁷⁶ R G Bauer *op cit* note 12 at 53.

⁷⁷ *Ibid* at 58.

⁷⁸ A similar position was decided in *Schnell v the Vallescura* 293 US 296, 1934 AMC 1573 (1934). See R G Bauer *op cit* note 12 at 58. Also see R Aikens...et al *op cit* note 70 at para 10.146 citing *Govt of Ceylon v Chandris* [1965] 2 Lloyd's Rep 204, at 216.

⁷⁹ Under the H/HV rules it was established in *The Muncaster Castle* [1961] A.C. 807 that the shipowner is liable for the actions of independent contractors. See R Aikens...et al *op cit* note 70 at para 10.135.

⁸⁰ R G Bauer *op cit* note 12 at 58.

⁸¹ *Ibid*.

4.6 The abolition of the nautical fault exception

One of the major and significant changes in the Hamburg rules is the removal of the exceptions as under the Hague/ Hague-Visby rules and replacing that with a 'unitary concept of fault'.⁸² Bauer discusses the case of the *Yawata Iron & Steel v. Anthony Shipping*⁸³, to illustrate how the case would have been decided if the Hamburg rules were applied. In this case *Antonio Demades*, a vessel, being a 700 foot cargo ship was carrying 25 000 tons of steel scrap to Japan.⁸⁴ On its way to Japan the vessel sank in the North Pacific.⁸⁵

The cargo owner (Yawata Iron and Steel) alleged that the carrier was liable for the vessel's loss.⁸⁶ There had been one account of bad weather from the Atlantic Ocean to the Caribbean Sea.⁸⁷ The vessel was then re-provisioned and set sail from Balboa to Japan.⁸⁸ On the 6th of February the wind force was at a speed of 7 on the Beaufort scale; the vessel then reduced its speed, and it was at that time that the hatch cover on the most forward hold had 'failed and flooded'.⁸⁹ The wave action on the forward part of the ship was so intense that the master had to change its course in order to allow the hatch cover to be examined as an examination of the cover would not be possible if the vessel was to continue in the direction of the storm.⁹⁰ It was discovered that the hatch cover had been twisted in two places and there was no way to re-seal the cover, since the hold was filled with water. The master had then turned the vessel back into the direction of Japan and his crew attempted to pump out the water from the other holds.⁹¹

The applicable law governing the carriage in this case was U.S COGSA.⁹²

⁸² R Pixa *op cit* note 3 at 443.

⁸³ *Yawata Iron & Steel Co., Ltd. v. Anthony Ship. Co., Ltd.*, 396 F. Supp. 619 (S.D.N.Y. 1975) available at <https://law.justia.com/cases/federal/district-courts/FSupp/396/619/1873414/>, accessed on 27 November 2018.

⁸⁴ *Ibid* at para 620.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at para 621.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

⁹¹ *Ibid*.

⁹² United States Carriage of Goods by Sea Act of 1936, §1304.

The defendant's argument was that they should be absolved from liability based on two exceptions provided by the U.S COGSA, one that the incident at sea was in fact a peril of the sea and two that the loss was due to an act by, or the neglect of, the master in the navigation or management of the ship.⁹³ Under US COGSA the rights and immunities which the carriers may rely on, are in line with the SA COGSA's provision for the carrier's immunities in that it provides for the carrier's defences of the peril of the sea and the error in navigation and management.⁹⁴

In terms of the first exception, the court held that this was not a peril of the sea as there were instances of such storms occurring regularly in the North Pacific during the month of February. Experts from both sides were called to determine the weather faced by the vessel. The claimant's expert had erred in his positioning of the ship and even though it was difficult to establish the exact position, the court was of the view that defendant's version was more accurate.⁹⁵ The court in reaching its decision on this point, made reference to the case of *J. Gerber & Co. v. S.S. Sabine Howaldt*⁹⁶ where Judge Anderson held that force 9 winds have been considered a peril of the sea in only a few cases.⁹⁷ The court found that the judgment in that case is in line with this case.⁹⁸

In respect of the error in navigation and management exception, the defendants argued that the Master was liable as he turned the ship around and headed for the storm instead of continuing to move in the downwind direction until the storm had subsided.⁹⁹ The defendant's architectural expert provided evidence which suggested that had the vessel continued in the downwind direction, it would have stayed afloat for a longer duration.¹⁰⁰ Furthermore, that there would not have been much wave

⁹³ *Yawata Iron & Steel Co supra* note 83 at para 622.

⁹⁴ US COGSA art 2(a) and (c). Also see E C. Radzik, Esq...et al, Understanding the Carriage of Goods by Sea Act 46 U.S.C. §1300 et seq at 21, available at <http://www.aimuedu.org/aimupapers/COGSAPresentation.pdf>, accessed on 28 November 2018.

⁹⁵ *Yawata Iron & Steel Co supra* note 83 at para 623.

⁹⁶ *Ibid*. Also see *J. Gerber & Co. v. S.S. Sabine Howaldt* 437 F.2d 580, 594-97 (2d Cir. 1971), Facts of which were discussed in chapter 2 of this dissertation.

⁹⁷ *Yawata Iron & Steel Co supra* note 83 at para 623.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* at para 624.

¹⁰⁰ *Ibid*.

action had the ship remained in a downwind direction.¹⁰¹ It was found that when the Master turned the ship in the downwind direction, an inspection was able to be carried out unlike that of the direction of the storm which did not allow for an inspection of the vessel.

The court agreed with the expert's view that if the vessel was able to remain afloat for a longer duration, the pumping efforts and repairs would have been more effective, and furthermore, there would not have been as much water entering the vessel. The court concluded that the defendant's expert was correct in stating that the vessel may not have sunk if the master did not reverse the vessel and sail back into the storm.¹⁰²

Thus the court held that the defendant fell within the nautical fault exception as the ship would not have sunk if it were not for the master's decision to turn the ship back into the storm's direction.¹⁰³ It was established that the defendant had discharged its burden of proof in this respect and that the burden then shifted to the claimant to prove that the vessel was unseaworthy.¹⁰⁴

The claimant alleged that the vessel was unseaworthy for the following reasons: the ship had insufficient bunkers, the progressive flooding in holds one and two were as a result of the vessel being structurally unsound, hatch cover on hold no 1 was not altered properly and lastly that the vessel was overloaded.

In terms of the insufficient bunkers, the court had examined the evidence and held that the evidence did not show that there were insufficient bunkers.¹⁰⁵ Furthermore, the ship was not unseaworthy because of insufficient bunkers as there was a reserve fuel supply of around 25% when the vessel had sailed from Balboa.¹⁰⁶ It was held that 'the sufficiency of the fuel supply was not a factor in the cause of loss'.¹⁰⁷

On the issue of inadequate repairs on the hatch cover of hold 1, it was held that evidence of stresses to the holds when the ship was grounded did not infer that there

¹⁰¹ *Yawata Iron & Steel Co supra* note 83 at para 625.

¹⁰² *Ibid* at para 626.

¹⁰³ *Ibid* at para 625.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid* at para 626.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

were inadequate repairs performed. Furthermore, the independent surveyor in Japan reported that the repairs were adequately performed.¹⁰⁸

It was concluded by the court that although the failure of the no. 1 hold hatch cover was not explained, the plaintiff had 'not established that it was due to improper repairs of prior damage or unauthorized structural modification'.¹⁰⁹

With regards to the issue of structural inefficiencies,¹¹⁰ the court held that there was nothing to show that this was the case and in terms of the issue of overloading.¹¹¹ The vessel was not overloaded and therefore not unseaworthy on any of the above mentioned grounds.¹¹²

In conclusion the court held that the defendant was able to bring himself within the nautical fault exception and that the plaintiff was unable to prove unseaworthiness of the vessel.¹¹³ The court held further that the carrier exercised due diligence to ensure that the vessel was seaworthy, and for these reasons found in favour of the defendant.¹¹⁴

According to Bauer's analysis, if this case were to be decided under the Hamburg rules, it is unclear what the outcome would be.¹¹⁵ The case may be decided either for or against the defendant.¹¹⁶ Furthermore, he states that there is an absence of the nautical fault defence under this regime, however, that the master's error may 'have been an error in judgement'.¹¹⁷ According to Bauer, the issue would then be whether or not the master acted reasonably in all ways, considering the circumstances.¹¹⁸ He then goes further and adds that the master's act could in fact be reasonable under these circumstances.¹¹⁹ The court would probably have to look at whether any reasonable master would have acted this way or made the same or similar decisions in these circumstances.

¹⁰⁸ *Yawata Iron & Steel Co supra* note 83 at para 627.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid* at para 628.

¹¹¹ *Ibid* at para 630.

¹¹² *Ibid* at para 631.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ R G Bauer *op cit* note 12 at 61.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

Detractors of the Hamburg rules, typically arguing for the carrier's position, take the view that the Hague/Hague-Visby rules are more appropriate as they have carefully specified each defence, whereas the Hamburg rules merely replace the seventeen defences with three defences which leave room for vagueness and inconsistencies.¹²⁰ The carriers see this as a 'step back in the legal process'.¹²¹ Furthermore, a 'removal of the defences weakens the ship owners position', although a contrary view is that a removal of the specified 'exemptions' is not excluding those as defences, provided the carrier can prove his negligence was not the cause of the loss.¹²²

On the former view the removal of the nautical fault rule is a 'fatal flaw in the Hamburg rules'¹²³ as the nautical fault defence is significant in the allocation of risks under the Hague/Hague-Visby rules.¹²⁴ The United Kingdom was averse to the elimination of the nautical fault rule and was of the view that eliminating the error in navigation and management defence would lead to an increase in the cost of maritime transport thereby having a negative effect on international trade as a whole.¹²⁵ The United Kingdom was of the view that the increase of the carrier's exposure to risk results in an increase of insurance costs.¹²⁶

Supporters of the Hamburg rules, typically taking the position of the cargo owners, are of the view that the Hamburg rules leave all the defences in place under the wording of the three defences and only excludes the nautical fault rule. They are of the view that the Hamburg rules is a simplified regime as the rules do not contain the long list of exceptions provided for under the Hague/Hague-Visby rules.¹²⁷ Some believe that this has resulted in a unified burden of proof and more clarity in maritime law.¹²⁸ It is also believed that the Hamburg rules are more predictable than the Hague/Hague-

¹²⁰ S R Mandelbaum *op cit* note 32 at 487.

¹²¹ *Ibid.*

¹²² C W H Goldie *op cit* note 28 at 114.

¹²³ F M Hannah 'Adoption of the Hamburg Rules in Australia and New Zealand' (1993) 9 *Austl. & N.Z. Mar. L.J.* 33 at 43.

¹²⁴ F M Hannah *op cit* note 123 at 43.

¹²⁵ J J Donovan *op cit* note 20 at 9.

¹²⁶ *Ibid.*

¹²⁷ E Selvig *op cit* note 19 at 306.

¹²⁸ *Ibid.*

Visby rules and therefore will lead to a decrease in litigation costs,¹²⁹ and enable a proper distribution of the risk of loss, especially in a case of negligence. Conversely detractors of the Hamburg rules argue that the nautical fault exception is a legal tool that was used to balance the risks between the carrier and the cargo owner,¹³⁰ and does in fact ensure an equal distribution of risk.¹³¹

Honnold's analysis shows that the exceptions in article 4 rule 2(b)-(q) 'are probably still available'.¹³² Goldie concurs as the carrier can escape liability by proving an absence of fault.¹³³ Likewise, Rathinam states that for the majority of exceptions in article r rule 2 of the Hague/Hague-Visby rules, the effect of replacing the specific exception with a unitary fault concept is 'minimal'.¹³⁴ However, under the unitary concept of fault, the exception for negligence in the navigation and management of the ship,¹³⁵ the so-called nautical fault exception, is entirely excluded.¹³⁶

The removal of the nautical fault exception is thus a material change which Rathinam calls 'a major shift in the carrier's responsibility'.¹³⁷ The vicarious liability of the carrier in respect of his employees and agents is now encompassed under the general provision.¹³⁸ The nautical fault exception was criticised as it is not in keeping with the principle of vicarious liability that is applied in most countries and as such is regarded as a 'privilege' for ship owners/carriers.¹³⁹

The exception is criticised for being at odds with the care of cargo provision, in article 3 of the Hague/Hague-Visby rules,¹⁴⁰ and for lacking clarity -so crucial in risk management- on the extent of the application of the error in navigation and management exception.¹⁴¹ It is also argued by some that increasing the liability of the

¹²⁹ M F Sturley 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence' (1993) 24 *J. Mar. L. & Com.* 119 at 121.

¹³⁰ L Yonggang; L Zhongsheng 'Abolishing the Exemption of Liability for Fault in Ship Management in the Nautical Fault Exemption System' (2006) *China Oceans L. Rev.* 537 at 542.

¹³¹ S R Mandelbaum *op cit* note 32 at 29.

¹³² J O Honnold *op cit* note 21 at 99.

¹³³ C W H Goldie *op cit* note 28 at 114.

¹³⁴ S V P Rathinam *op cit* note 33.

¹³⁵ H/HV Art 4(2)(a).

¹³⁶ R Pixa *op cit* note 3 at 444.

¹³⁷ S V P Rathinam *op cit* note 33.

¹³⁸ E Selvig *op cit* note 19 at 306.

¹³⁹ *Ibid* at 310.

¹⁴⁰ E S Lee; S O Kim 'A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel' (2000) 27 *Transp. L.J.* 205.

¹⁴¹ E S Lee; S O Kim *op cit* note 140 at 207.

carrier would lead to a reduction in insurance costs as there would be less damage to cargo as a result of the higher standard of care.¹⁴²

Murray, taking a view based on the American experience, asserts that the Hague/Hague-Visby rules were developed primarily to immunise the carrier from liability, whilst the Hamburg rules 'have taken exactly the opposite approach'.¹⁴³ This, Murray argues, can be seen from the opposite applications of these two conventions to a situation involving the crew's negligence in the navigation of the vessel. Under the Hague/Hague-Visby rules the carrier would be absolved from liability in the case of negligence in navigation of the ship whereas, under the Hamburg rules, the carrier will need to show that all reasonable measures were taken to avoid the occurrence. Only when the carrier is able to prove this will he be absolved from liability. Murray may be overstating the point when he suggests that carrier exoneration was the *primary* focus of the Hague/Hague-Visby rules, by overlooking the extent to which the Hague/Hague-Visby rules sought a compromise between absolute liability, on the one hand, and contractual exclusion of all liability on the other. The aim of the Hague/Hague-Visby rules was not to immunise carriers from all liability but to achieve a fair balance of risks between ship owner and cargo owner. As discussed in chapter 2, many commentators attribute the success of the Hague/Hague-Visby rules to its accomplishment of this delicate balancing act. Nevertheless, Murray does identify an important shift in approach to this balancing of risks, which is illustrated by the provisions relating to carrier negligence, and he is not alone in criticising the Hague/Hague-Visby rules as being inclined more towards the carrier's interests than the cargo owner's interests.¹⁴⁴ Article 4 Rule 2(a) of the Hague/Hague-Visby rules provides:

'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from an 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.'¹⁴⁵

This is a very wide exception, and according to Bauer probably has its origins in the era of sailing vessels 'when the owner lost control of his ship as soon as it vanished

¹⁴² M F Sturley *op cit* note 129 at 121.

¹⁴³ D E Murray *op cit* note 27 at 63.

¹⁴⁴ J A Maher; J D Maher 'Marine Transport, Cargo Risks, and the Hamburg Rules, Rationalization or Imagery' (1979) 84 *Dick. L. Rev.* 183 at 201. Also see D E Murray *op cit* 27 at 63.

¹⁴⁵ H/HV rules, Article 4 rule 2(a).

over the horizon'.¹⁴⁶ The reason for this was that technology was not advanced during that period of time and this made the carrier's task a difficult one in terms of navigation and monitoring of the vessel's systems.¹⁴⁷ The nautical fault was seen as a reasonable exception that took into consideration the interest of the public as well as created an equal balance of the risks in terms of costs that would be borne as a result of damage or loss.¹⁴⁸ The nautical fault rule also led to a substantial increase in the development of the international shipping industry, however, in this modern day the notion that ship-owners cannot control the vessel at sea does not exist any longer as telecommunications are so advanced that the ship-owner is able maintain both verbal and visual contact with the captain and crew at all times.¹⁴⁹

The rule also provided for a broad protection for the carriers as the tasks on board the vessel are performed by the employees most of the time and therefore no liability could be passed on to the carrier if he did not actively perform any of the tasks or get involved with the management of the vessel.¹⁵⁰ It is for this reason that even though the Hague/Hague-Visby rules were seen as a 'good compromise between carriers and cargo owners', it is now such that there is a 'growing dissatisfaction' with the Hague and Hague-Visby rules.¹⁵¹ The technology is such that the nautical rule is no longer the legal tool that creates the balance of risks.¹⁵² In fact it seems as though it has now become an aid to the carriers and it gives the carriers a greater advantage to escape liability even though they could and should prevent the damage or loss. It is unfair to allow a carrier to escape based on the negligence of its employees.¹⁵³

Most critics of article 4 rule 2(a) agree that today a ship-owner can retain close control over the vessel. Weitz argues that the risk of loss should be placed on the carrier as opposed to the cargo owner since the carrier is in the position to prevent damage or loss from occurring.¹⁵⁴ Furthermore, according to Weitz, it is unfair to allow a carrier to escape liability using negligence and that the use of the nautical fault defence affords

¹⁴⁶ R G Bauer *op cit* note 12 at 54.

¹⁴⁷ L Yonggang; L Zhongsheng *op cit* 130 at 543.

¹⁴⁸ *Ibid.*

¹⁴⁹ S R Mandelbaum *op cit* 32 at 28.

¹⁵⁰ F M Hannah *op cit* note 123 at 49.

¹⁵¹ E S Lee *op cit* note 140 at 244.

¹⁵² L Yonggang; L Zhongsheng *op cit* note 130 at 543.

¹⁵³ S R Mandelbaum *op cit* note 32 at 29.

¹⁵⁴ L T Weitz 'The Nautical Fault Debate (the Hamburg Rules, the U.S. COGSA 95, the STCW 95, and the ISM Code)' (1998) 22 *Tul. Mar. L.J.* at 581.

protection to some of the shipping industry's worst performers.¹⁵⁵ Thus, the drafters of the Hamburg rules excluded the errors in navigation and management exception for the reason that, in their view, the exception placed more of the burden of risk and losses on to the cargo owners thereby creating an imbalance in the allocation of risks.¹⁵⁶ Further, according to Weitz,¹⁵⁷ Katsivela¹⁵⁸ and the travaux préparatoires of the Hamburg rules, the exclusion of the nautical fault exception 'is consistent with the aim of harmonizing the international conventions governing different modes of transport.'¹⁵⁹

4.7 The modified fire defence

From as early as 1786 fire statutes were created in England and the United States, which are said to have influenced the Hague/Hague-Visby rules fire exception.¹⁶⁰

The fire exception was not excluded under the Hamburg rules. It was retained and modified in exchange for the new heavy obligations that the carrier had under the Hamburg rules to prove that the carrier was not liable for the damage or delay of the goods,¹⁶¹ and as a 'horse traders compromise' for the removal of the nautical fault exception.¹⁶² Article 5(4)(a)(i) of the Hamburg rules states that:

'The carrier is liable for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents'

It is clear that the only major burden of proof requirement on the cargo owner under the Hamburg rules is in relation to the fire exception.¹⁶³ The Hague/Hague-Visby rules

¹⁵⁵ L T Weitz *op cit* note 154 at 587.

¹⁵⁶ R Pixa *op cit* note 3 at 444.

¹⁵⁷ L T Weitz *op cit* note 154 at 581.

¹⁵⁸ M Katsivela 'Overview of ocean carrier liability exceptions under the Rotterdam Rules and Hague/Hague/Visby Rules' (2010) 40 *Revue gendrale de droit* at 430.

¹⁵⁹ Travaux Préparatoires at 45 para 60, available at http://www.uncitral.org/pdf/english/travaux/transport/hamburg/A_CONF89_14.pdf, accessed on 17 October 2018.

¹⁶⁰ R G Bauer *op cit* note 12 at 65.

¹⁶¹ J J Donovan *op cit* note 20 at 5.

¹⁶² R G Bauer *op cit* note 12 at 66.

¹⁶³ F M Hannah *op cit* note 123 at 49.

have a different provision. Article 4 rule 2(b) of the Hague/Hague-Visby rules states that:

‘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’.

Article 4 rule 2(b) refers only to ‘actual fault or privity of the carrier’. This has been interpreted to mean fault of the carrier’s management not fault of the crew.¹⁶⁴ The cargo owner must prove not only that the carrier’s servants were negligent, but that the carrier *itself* was negligent.¹⁶⁵ Under the Hamburg rules a cargo owner can prove liability by showing fault or neglect either on the part of the carrier, or on the part of his servants, or his agents. In this respect, the Hague/Hague-Visby rules offered ‘greater protection’ to carriers.¹⁶⁶

However, a second difference in application of the fire defence is that under the Hague/Hague-Visby rules the carrier could not invoke the fire defence unless he proved that he had exercised due diligence to make the vessel seaworthy.¹⁶⁷ The Hamburg rules, on the other hand, require the cargo owner to prove both lack of due care, and that the carrier is liable for the fire.¹⁶⁸

In the case of *Papera Traders Co. Ltd. And Others v Hyundai Merchant Marine Co. Ltd. And Another (The Eurasian Dream)*¹⁶⁹, a fire had broken out on deck 4 of the *Eurasian Dream*. The master and crew did not stop the fire and as a result, the cargo of vehicles was damaged.¹⁷⁰ The claimants had argued that the vessel was unseaworthy and that due diligence had not been exercised.¹⁷¹

The claimants based their argument on two aspects, one of which was that the defendants were in breach of their obligations under art. 3 rule 1 of the Hague/Hague-Visby Rules.¹⁷² Their alternative case fell under art. 3 rule 2 of the Hague/Hague-Visby

¹⁶⁴ R G Bauer *op cit* note 12 at 67.

¹⁶⁵ K G Ainuson *op cit* note 60 at 43.

¹⁶⁶ R G Bauer *op cit* note 12 at 66.

¹⁶⁷ H/HV rules, Article 4(2)(b) read with Article 4(1).

¹⁶⁸ F M Hannah *op cit* note 123 at 49.

¹⁶⁹ *Papera Traders Co. Ltd. And Others v Hyundai Merchant Marine Co. Ltd. And Another (The Eurasian Dream)* [2002] 1 Lloyd’s Rep. 719.

¹⁷⁰ *Ibid* at 720.

¹⁷¹ *Ibid*.

¹⁷² *Ibid*.

rules. The claimants argued that the evidence showed the 'fault or privity' of the defendants in respect of the fire exception.¹⁷³

The claimant's submission revealed that the vessel was unseaworthy in the following respects: 'vessel's equipment, the competence/efficiency of the master and crew and in the adequacy of the documentation supplied to the vessel'.¹⁷⁴ It was argued that the crew were not properly equipped in that they lacked proper training, did not have sufficient walkie talkies, had an insufficient number of working fire extinguishers and did not take cognisance of what carrying a cargo of vehicles entailed.

In terms of the issue of the burden of proof, the claimants bear the burden of proving that the vessel was unseaworthy before and at the beginning of the voyage as per article 3 rule 1, and secondly that the unseaworthiness caused the loss or damage.¹⁷⁵ The burden then shifts to the defendants to show that they exercised due diligence to make the ship seaworthy.¹⁷⁶ Only if the defendant is able to discharge this burden of proof will he be able to rely on the fire exception as a defence to breaching the obligations under article 3 rule 2, 'subject to the claimant proving that the loss or damage was caused by the actual fault or privity of the carrier'.¹⁷⁷ Therefore the carrier may not rely on the fire exception when he has breached the 'overriding obligation' to provide a seaworthy vessel.¹⁷⁸

It was found that the vessel was not in a 'suitable condition'.¹⁷⁹ In terms of the vessel's equipment, there were insufficient walkie talkies (only 4), which prevented communication between the officer on duty and the master.¹⁸⁰ Upon examination, the fire extinguishers were found to not have been properly serviced, the CO₂ systems were corroded, there was a shortage of breathing apparatus sets and lastly, two fire

¹⁷³ *The Eurasian Dream supra note 169.*

¹⁷⁴ *Ibid* at 744 para 155.

¹⁷⁵ *The Eurasian Dream supra note 169* at 735, para 123. On this point the case cites *The Europa*, [1908] P.84 at pp. 97-98.

¹⁷⁶ *The Eurasian Dream supra note 169* at 735, para 123. On this point the case cites *The Toledo*, [1995] 1 Lloyd's Rep. 40 at 50.

¹⁷⁷ *The Eurasian Dream supra note 169* at 735, para 123. On this point the case cites *The Apostolis*, [1996] 1 Lloyd's Rep. 475 at p. 483, col. 2; Scrutton on Charterparties (20th ed.), p.444.

¹⁷⁸ *The Eurasian Dream supra note 169* at 738, para 135. On this point the case cites the case of *Maxine Footwear Co Ltd v Canadian Merchant Marine Ltd* 1959 Vol 2, 105 discussed in chapter 2.

¹⁷⁹ *The Eurasian Dream supra note 169* at 742.

¹⁸⁰ *Ibid.*

hydrants were tied with ropes and this indicated poor training and incompetence of the master and crew.¹⁸¹

With regards to the competency/efficiency of the master and crew, it was held that the master and crew were ignorant in respect of their failure to take cognisance of the fire hazards that are associated with carrying vehicles as cargo as well as special fire risks.¹⁸² Furthermore that this is as a result of inadequate training. Aikens cites the *Eurasian Dream* case to show that seaworthiness does not only entail the physical aspects; it goes further and considers the equipment, crew and documentation.¹⁸³ Aikens continues to cite the case to show that 'a vessel that does not have a sufficient, efficient, and competent crew is unseaworthy'¹⁸⁴. The court held that had there been proper training, a sufficient number of walkie talkies, serviced fire extinguishers and proper training and instructions then the fire would have been extinguished and the damage reduced to only one or two vehicles as opposed to a total destruction of all vehicles.

The court held therefore that a 'reasonable prudent owner knowing all the relevant facts' would have not allowed the *Eurasian Dream* to set sail with an incompetent master and crew who had lacked the proper training.¹⁸⁵ The court held further that the defendants failed to exercise due diligence in all relevant respects and that the claimants were able to prove that the loss and damage was as a result of the defendant's failure to provide a seaworthy vessel.¹⁸⁶ It was held that the master and crew were negligent.

If the Hamburg rules were applied, section 5(4)(a)(ii)¹⁸⁷ would be applied, which states that the carrier is liable:

'for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier, his servants or agents in taking all

¹⁸¹ *The Eurasian Dream supra note 169 at 742.*

¹⁸² *Ibid.*

¹⁸³ R Aikens...et al *op cit* note 70 at 316.

¹⁸⁴ *Ibid* at 325. On this point he also cites *The Hong Kong Fir* [1962] 2 Q.B. 26 and *The Makedonia* [1962] 1 Lloyd's Rep. 316.

¹⁸⁵ *The Eurasian Dream supra note 169 at 744.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Hamburg rules-5(4)(a)

measures that could reasonably be required to put out the fire and avoid or mitigate its consequences’.

In applying this article, the carrier would be found liable under the Hamburg rules as was found under the Hague/Hague Visby rules. The reasons for this conclusion are that the carrier and crew failed to exercise due diligence and the carrier and crew were therefore negligent and had failed to take reasonable measures to put out the fire.

4.8 Interpretation of the Hamburg rules

The application of the rules was based on the need to promote and consider uniformity.¹⁸⁸ The basis of liability set out in article 5(1) is unprecedented and its interpretation seems to be left open to courts. The language is such that ‘it is a language of compromise’.¹⁸⁹ Establishing what the language means in terms of the use of words such as ‘occurrence’¹⁹⁰ and the term ‘all measures that could reasonably be required’ is open to argument and possible conflicting decisions on the interpretation and application of Article 5(1).¹⁹¹

¹⁸⁸ D E Murray *op cit* note 27 at 59.

¹⁸⁹ R G Bauer *op cit* note 12 at 55.

¹⁹⁰ F M Hannah *op cit* note 116 at 50.

¹⁹¹ R G Bauer *op cit* note 12 at 55. Also see the criticism of F M Hannah *op cit* note 116 at 50.

4.9 Conclusion

Selvig states that the Hamburg rules have continued the 'traditions of maritime law' in terms of the basis of liability, however, he asserts that they have also 'moderately increased the level of liability of carriers by sea'.¹⁹² This moderate increase in liability can be seen in the fault based system provided for by the Hamburg rules. The Hague/Hague-Visby rules provide for a proved fault based system whereas the Hamburg rules provide for a presumed fault based system which places the burden of discharging proof on the carrier from the start and according to Berlingieri, 'the Hamburg rules ignore the reversal of the burden of proof alternative except for the loss, damage or delay caused by fire'.¹⁹³ Furthermore the period of responsibility provided for in the Hamburg rules is also a factor that increases the liability in its extension of the period of responsibility under the Hague/Hague-Visby rules. One of the most significant deviations from the Hague/Hague-Visby rules is the exclusion of the nautical fault defence. The detractors of the Hamburg rules feel that the nautical fault defence is an important 'legal tool', as it balances the risks between carrier and cargo owner, while the proponents of the Hamburg rules feel that it is unfair on cargo owners and is not in line with the law of other modes of transport. Nevertheless, an analysis of the basis of liability Article 5(1) of the Hamburg rules, reveal that the application of the article would probably have a similar outcome to the application of the Hague/Hague-Visby rules. It is therefore submitted that Selvig is correct in stating that there is only a moderate increase in liability since the outcomes of the application will more often than not be the same or similar.

It must be noted that several trading partners of South Africa have ratified the Hamburg Rules and therefore its provisions must not be completely disregarded by South Africa's shipping community.¹⁹⁴

¹⁹²E Selvig *op cit* note 19 at 305.

¹⁹³F Berlingieri *op cit* note 25 at 9.

¹⁹⁴The International Comparative Legal Guide to: A practical cross-border insight into shipping law 3rd Edition Shipping Law 2015, pg 191, <http://www.wylie.co.za/wp-content/uploads/chapter-south-africa-international-comparitive-legal-guide-to-shipping-law-2015-edition.pdf>, accessed on 28 November 2018.

CHAPTER FIVE: THE BASIS OF LIABILITY AND THE BURDEN OF PROOF UNDER THE ROTTERDAM RULES

5.1 Introduction

This chapter focuses on the Rotterdam rules, being the latest maritime regime and the only multimodal regime. The chapter will discuss the aim of the new convention and will cover aspects such as seaworthiness, the period of responsibility, and go further to discuss the manner in which the Rotterdam rules operate in terms of the basis of liability and the burden of proof. There will be a detailed discussion on the shifting of the burden of proof and counter proof under article 17 as well as a critique of this provision. The chapter will also discuss some of the defences under the Rotterdam rules, including an in depth discussion of the abolition of the nautical fault rule.

5.2 Background of the Rotterdam Rules

The most widely applied international maritime regime to govern international carriage by sea is the Hague/Hague-Visby rules. The Hamburg rules were then drafted in an effort to ameliorate the balance between the shipper and the carrier in terms of their respective interests, however, it did not achieve its purpose of gaining wide acceptance.¹

Moreover, international uniformity remained elusive. Some countries followed the Hague/Hague-Visby rules, some followed the Hamburg rules and some countries went the route of using 'hybrid regimes'.² With such a range of rules available it leads to a division of the 'international transport laws applicable to carriage of goods by sea'³ which results in legal uncertainty.

¹ T Nikaki; B Soyer 'New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just Another One for the Shelves' (2012) 30 *Berkeley J. Int'l L.* 303 at 304.

² T Nikaki 'The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know' (2010) 35 *Tul.Mar. L.J.* 1 at 2.

³ T Nikaki *op cit* note 2 at 2. Also see M Katsivela 'Overview of Ocean Carrier Liability Exceptions under the Rotterdam Rules and the Hague-Hague/Visby Rules' (2010) 40 *Rev. Gen.* 413 at 415.

Accepting that the Hague/Hague-Visby rules were no longer in line with the technological and commercial developments,⁴ and that the Hamburg rules had left much to be desired, the CMI decided to embark on the preliminary work for a new regime.⁵ The regime was then passed on to The United Nations Commission on International Trade Law ('UNCITRAL') and the draft of the convention was then finalised.⁶ In December 2008, after 8 years of work,⁷ the General Assembly of the United Nations adopted the new carriage convention, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea ('the Rotterdam rules').⁸

The Rotterdam rules aim at meeting the long evident need for 'uniform rules to modernise and harmonise rules that govern the international carriage of goods by a sea',⁹ but also go beyond any of the previous regimes and cover multimodal transport.¹⁰

It is said that 'the core of the convention is the carrier's liability'¹¹ set out in extensive detail in chapter 5 of the rules. The carrier's liability is primarily governed by article 17, setting out the basis of the carrier's liability, as well as the allocation of the burden of proof.¹²

The Hague/Hague-Visby rules, the Hamburg rules and the Rotterdam rules are all fault based systems. However, there is a difference in the structure of fault in the previous regimes as compared to that of the Rotterdam rules.¹³ The Rotterdam rules were an attempt to do away with the 'shortcomings of the previous conventions and create a new structure for the basis of the carriers liability'.¹⁴ The new regime provides for

⁴ T Nikaki *op cit* note 2 at 6. Also see M F Sturley, Chapter 2, General Principles of Transport Law and the Rotterdam Rules at 78, available at http://www.newbooks.services.de/MediaFiles/Texts/2/9783642196492_Excerpt_001.pdf, accessed on 18 October 2018.

⁵ T Nikaki; B Soyer *op cit* note 1 at 304.

⁶ *Ibid.*

⁷ M F Sturley *op cit* note 4 at 64.

⁸ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam rules) available at https://unctad.org/en/Docs/sdtetlb20042_en.pdf, accessed on 10 November 2018.

⁹ T Nikaki *op cit* note 2 at 6.

¹⁰ *Ibid.*

¹¹ S Yuzhou; H H Li 'The New Structure of the Basis of the Carrier's Liability under the Rotterdam Rules' (2009)14 *Unif. L. Rev.* 931 at 931.

¹² S Yuzhou; H H Li *op cit* note 11 at 931.

¹³ *Ibid.*

¹⁴ S Yuzhou; H H Li *op cit* note 11 at 931.

detailed rules on the allocation of the burden of proof.¹⁵ Furthermore, it is said that the new regime is meant to enhance legal certainty, strengthen international trade and provide more efficient rules that will be beneficial both domestically and internationally.¹⁶ This change in law where there should be one regime to cover both inland and sea legs of performance was first seen as being controversial.¹⁷ However, it is said that the only way to achieve uniformity, certainty and predictability is for one legal regime to govern the entire performance of the contract.¹⁸

In order for the convention to come into force there must be ratification or acceptance by twenty countries.¹⁹ This has not yet taken place. In fact, only four countries have ratified the convention.²⁰ Ratification by several countries who play an important role in international trade may persuade other countries to sign in order to continue trading with some of its major trading partners.²¹ Countries such as the United States, France and the Netherlands are all signatories to the Rotterdam rules and are key role players 'of the global shipping market',²² but they have not yet ratified the convention and may never do so.

5.3 Seaworthiness

Article 14(a) of the Rotterdam rules provide that:

'The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to make and keep the ship seaworthy'.²³

¹⁵ *S Yuzhou; H H Li op cit* note 11 at 931.

¹⁶ S Hashmi 'The Rotterdam Rules: A Blessing' (2012) 10 *Loy. Mar. L.J.* at 227.

¹⁷ M F Sturley 'Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States' (2009) *Texas International Law Journal*, Vol 44:427 at 434.

¹⁸ M F Sturley *op cit* note 17 at 434.

¹⁹ J S Mo 'Determination of Performing Party's Liability under the Rotterdam Rules' (2010) 18 *Asia Pac. L. Rev.* 243 at 244.

²⁰ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008)-Status, available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html, accessed on 10 November 2018.

²¹ M Katsivela *op cit* note 3 at 415.

²² J S Mo *op cit* note 19 at 257. The author places Netherlands and the United States in the top ten globally in terms of fleets owned.

²³ Rotterdam rules Article 14(a).

A vessel is seaworthy under Article 14(a) if 'she is fit to confront the ordinary perils that are expected of the voyages and her engines are free of defects'.²⁴

The duty to ensure seaworthiness under the Rotterdam rules is not an absolute duty; it is one of due diligence as it is under the Hague/Hague-Visby rules.²⁵

However, the carrier has a duty of seaworthiness throughout the voyage and not just at the beginning of the voyage, unlike the Hague/Hague-Visby rules. This is a substantial modification of the carrier's responsibility.²⁶ A possible issue may arise with regards to the practicality of this obligation due to the fact that it may not be practical to actually make the vessel seaworthy whilst the vessel is still out at sea and it may only be reasonable to wait until the vessel is in the port.²⁷ The reasonable ship-owner test is the solution to the possible problem regarding this obligation as an objective test will be done in order to establish what steps would be considered reasonable for the carrier to have taken in light of the situation at hand.²⁸ A contributing factor to consider is whether the vessel was at sea or at a port of call when there was a need for corrective measures.²⁹

The continuing duty to provide a seaworthy ship to an extent 'alters the overall risk allocation between the carrier and cargo interests under the Rotterdam Rules'.³⁰ The reason for this is that a heavy burden will rest on the carrier which may ultimately result in an increase of the freight rates.³¹

Defossez notes that the Hamburg rules had already introduced a continuous duty of seaworthiness.³² However, according to Defossez, the duty should be 'less onerous' as it is not fair on the carriers to be accountable for the entire carriage.³³ Conversely, it can be argued that the continuing duty of the carrier under the Rotterdam rules is in

²⁴ S Hashmi *op cit* note 16 at 245.

²⁵ T Nikaki *op cit* note 2 at 14.

²⁶ D A L Defossez 'Seaworthiness: The Adequacy of the Rotterdam Rules Approach' (2015) 28 *U.S.F. Mar. L.J.* at 244.

²⁷ T Nikaki *op cit* note 2 at 14.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² D A L Defossez *op cit* note 26 at 244.

³³ *Ibid.*

line with the 'current practice in this industry'³⁴ and the reason for this is that there is now a constant means of communication between the carrier and the vessel.³⁵

The International Safety Management Code³⁶ (hereinafter referred to as the ISM Code) contains provisions in articles 6³⁷ and 10³⁸ that are in line with article 4 of the Rotterdam rules in terms of the period of responsibility of the carrier. Articles 6 and 10 of the ISM Code are 'consistent' with the Rotterdam rules in that their responsibilities are similar.³⁹ The continuing duty of the carrier found in the Rotterdam rules to ensure seaworthiness throughout the voyage is much like that of the duty under the ISM Code.⁴⁰ The ISM Code makes provision for the obligation to 'make and keep the vessel seaworthy throughout the voyage'.⁴¹ This duty entails taking measures to ensure that the vessel is seaworthy, for example, by conducting inspections at intervals and reporting any issues with the vessel.⁴² In terms of article 10 of the ISM code, the duty also extends throughout the voyage in that corrective measures must be taken if a problem arises.⁴³

³⁴ D A L Defossez *op cit* note 26 at 244.

³⁵ *Ibid.*

³⁶ The International Safety Management Code-IMO Assembly Resolution A.741 (18) – 1993.

³⁷ ISM Art 6 reads '...6.1 The Company should ensure that the master is: properly qualified for command; fully conversant with the company's SMS; and given the necessary support so that the master's duties can be safely performed.

6.2 The Company should ensure that each ship is: .1 manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements; and .2 appropriately manned in order to encompass all aspects of maintaining safe operations on board.

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

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

³⁸ ISM Art 10 reads '...10.1 The Company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the Company.

10.2 In meeting these requirements the Company should ensure that: inspections are held at appropriate intervals; any non-conformity is reported with its possible cause, if known; appropriate corrective action is taken; and records of these activities are maintained. 10.3 The Company should establish procedures in SMS to identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The SMS should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use.

10.4 The inspections mentioned in 10.2 as well as the measures referred to 10.3 should be integrated in the ship's operational maintenance routine.

³⁹ D A L Defossez *op cit* note 26 at 245.

⁴⁰ *Ibid.*

⁴¹ T Nikaki *op cit* note 2 at 11.

⁴² T Nikaki *op cit* note 2 at 11.

⁴³ D A L Defossez *op cit* note 26 at 245.

5.4 Period of responsibility

Article 12 rule 1 of the Rotterdam rules makes provision for the period of responsibility of the carrier. It states that:

‘The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.’⁴⁴

Article 12 of the Rotterdam rules go further than the previous conventions and extends the period of responsibility.⁴⁵ This extension is referred to as a ‘door to door’ period of liability. This ‘door to door’ period includes responsibility for the goods at the port and not only on board the vessel ‘subject to loading, storage, relocation, and unloading.’⁴⁶ There is a significant increase in the period of responsibility when compared to the Hague/Hague-Visby rules ‘tackle to tackle’ period of responsibility⁴⁷ and the Hamburg rules ‘port to port’ period of responsibility.⁴⁸

The period of responsibility under the Rotterdam rules is different from the previous conventions in that it makes provision for multimodal carriage of goods; however, there must be a sea leg to the carriage of goods in order to make use of multimodal carriage.⁴⁹ In terms of the periods before loading or after discharge, the parties may use their discretion and agree on any other rules ‘subject to any other mandatory national law that may apply’.⁵⁰

However, it seems that article 12 creates uncertainty in a situation of multiple carriers as to whether the multimodal carrier or the inland carrier will be liable for damage on loading or discharge.⁵¹ There are instances where both of these carriers are used. It

⁴⁴ Rotterdam rules-Article 12(1).

⁴⁵ M Katsivela *op cit* note 3 at 418

⁴⁶ D M Bovio ‘Ocean Carriers’ Duty of Care to Cargo in Port: The Rotterdam Rules of 2009’ (2009) 32 *Fordham Int’l L.J.* 1162 at 1168.

⁴⁷ S Hashmi *op cit* note 16 at 245.

⁴⁸ M F Sturley *op cit* note 17 at 434.

⁴⁹ M Katsivela *op cit* note 3 at 418.

⁵⁰ M F Sturley *op cit* note 17 at 434.

⁵¹ J M Alcantara...et al ‘Particular Concerns with Regard to the Rotterdam Rules’ (2010) 2 *Cuadernos Derecho Transnacional* 5 at 7.

is submitted that the liability would fall on the multimodal carrier and not the inland carrier if there is a problem that arises.⁵²

Furthermore, another issue with the 'door to door' period of responsibility contained in the Rotterdam rules, is that it 'fails to achieve its object of unifying the carriage of goods by sea' as the rules on liability are not in keeping with other conventions.⁵³

5.5 Basis of liability and burden of proof under the Rotterdam rules

Alcantara criticises article 17 for 'excessive and unnecessary complexity'.⁵⁴ In terms of the burden of proof it is said to fall on whichever party has the 'ability to prove the issue in question'.⁵⁵ According to Yuzhou and Li, there are two rounds of proof and counter proof that make up the basis of liability and the burden of proof, and this includes three presumptions of the carrier's fault.⁵⁶

5.5.1 First Round of Proof and Counter-Proof⁵⁷

Article 17(1) of the Rotterdam rules states that:⁵⁸

'The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4'

The abovementioned article clearly outlines the initial burden of proof and provides that this initial burden of proof will rest on the claimant. When the claimant discharges his burden of proof, the carrier is presumed to be at fault.⁵⁹ This is where the counter proof comes in, as the carrier will be able to rebut the presumption of fault, by making use of either article 17(2) or (3) of the convention.⁶⁰

Article 17(2) states that:

⁵² J M Alcantara...et al *op cit* note 51 at 7.

⁵³ S Hashmi *op cit* note 16 at 235.

⁵⁴ J M Alcantara...et al *op cit* note 51 at 7.

⁵⁵ *Ibid.*

⁵⁶ S Yuzhou; H H Li *op cit* note 11 at 932.

⁵⁷ *Ibid.*

⁵⁸ Rotterdam rules, Article 17(1)-Basis of Liability.

⁵⁹ S Yuzhou; H H Li *op cit* note 11 at 932.

⁶⁰ *Ibid.*

‘The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.’⁶¹

Article 17(3) provides that:

‘The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

- (a) ‘Act of God;
- (b) Perils, dangers, and accidents of the sea or other navigable waters;
- (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
- (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
- (e) Strikes, lockouts, stoppages, or restraints of labour;
- (f) Fire on the ship;
- (g) Latent defects not discoverable by due diligence;
- (h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;
- (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;
- (j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

⁶¹ Rotterdam rules, Article 17(2)-Basis of Liability.

- (k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;
- (l) Saving or attempting to save life at sea;
- (m) Reasonable measures to save or attempt to save property at sea;
- (n) Reasonable measures to avoid or attempt to avoid damage to the environment;
- or
- (o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.⁶²

If the carrier fails to prove one of the above alternatives, the carrier will be liable. If the carrier proves the first alternative then that proof will be sufficient. In situations where the carrier is partly to blame, further proof may be necessary to fully relieve the carrier. If the cause or causes of the loss were in no way attributable to its fault there will be no need for any 'counter proof' by the claimant.⁶³ In a situation where the carrier elects to prove the second alternative, being the existence of an excepted peril which caused or contributed to the loss, damage or delay, a second round of further proof by the claimant is required.⁶⁴

5.5.2 Second Round of Proof and Counter-Proof⁶⁵

When it is proved that one of the excepted perils under article 17(3) apply the claimant will then need to establish further proof.

As stated in article 17(4):

'Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:

- (a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies;
- or
- (b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove

⁶² Rotterdam rules, Article 17(3).

⁶³ S Yuzhou; H H Li *op cit* note 11 at 932.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at 933.

that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.⁶⁶

As stated in article 17(5):

'The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:

(a) 'The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

(i) the unseaworthiness of the ship;

(ii) the improper crewing, equipping, and supplying of the ship; or

(iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and

(b) The carrier is unable to prove either that:

(i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or

(ii) it complied with its obligation to exercise due diligence pursuant to article 14.'

If it is proved by the claimant that the fault of the carrier caused an excepted peril in terms of Art 17(4)(a) then the carrier will no longer be able to show counter proof and will be held liable.⁶⁷ However, if an unlisted peril contributed to the loss, which the claimant must prove under article 17(4)(b), the carrier must show counter proof that the peril was not attributable to its fault. In the event of the carrier not being able to do so, there will be a presumption of liability which Yuzhou and Li refer to as the second presumption under article 17.⁶⁸

With regards to article 17(5), if the claimant elects to prove the unseaworthiness of the vessel⁶⁹ and successfully discharges this burden of proof, the carrier will be presumed liable with an option of providing counter proof in this respect.⁷⁰ The wording of article

⁶⁶ Rotterdam rules-Article 17(4)

⁶⁷ S Yuzhou; H H Li *op cit* note 11 at 934

⁶⁸ *Ibid.*

⁶⁹ Which could also entail improper manning or uncargoworthiness of the vessel i.e. one or more of the circumstances outlined in article 17(5)(a)(i)-(iii).

⁷⁰ S Yuzhou; H H Li *op cit* note 11 at 934

17(5)(a) refers to ‘probably caused or contributed to’, which may have to be interpreted as prima facie proof, even if open to some doubt.⁷¹ If the carrier is unable to successfully discharge the burden of proof, he will not be able to rebut the presumption of liability and will therefore be held liable.⁷² This is the third presumption of liability in article 17 which will be sustained if not proven otherwise.⁷³ In terms of article 17(5)(b) the carrier can rebut the presumption by proving that the unseaworthiness did not cause the loss, damage or delay.⁷⁴ To distinguish this from article 17(5)(a) this may have to be understood as conclusive proof, being, proof on a balance of probabilities.⁷⁵ The carrier can also rebut the presumption by proving that it complied with the obligation to exercise due diligence.⁷⁶

5.5.3 Concurrent causes of loss

Article 17(6) states that:

‘When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.’

During the drafting of article 17(6), the working group considered the position on the Vallescura rule.⁷⁷ In the *Schnell v Vallescura*⁷⁸ case, which was discussed in chapter three, the U.S. Supreme Court held that ‘the carrier is liable for the whole of the loss or damage unless he proves the portion of the loss or damage which is attributable to the excepted peril.’⁷⁹

⁷¹ S Yuzhou; H H Li *op cit* note 11 at 934.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ F Berlingieri ‘A Comparative Analysis of The Hague-Visby Rules, The Hamburg Rules and The Rotterdam rules’ 2009 at 9 available at https://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf, accessed on 21 July 2018.

⁷⁵ *Ibid* at 9.

⁷⁶ M Katsivela *op cit* note 3 at 425. See also J M Alacantara *op cit* note 51 at 7.

⁷⁷ S Yuzhou; H H Li *op cit* note 11 at 939.

⁷⁸ *Schnell v The Vallescura* 293 U.S.296 (1934).

⁷⁹ *Ibid.*

The Rotterdam Rules take a different approach and does not state how exactly the burden of proof works in terms of the carrier proving the extent to which he is liable and the extent to which he is not liable for contributing to the loss, damage or delay.⁸⁰ In cases dealing with concurrent causes of loss under the Rotterdam rules it will probably be left to the national courts of each country to make a decision as to liability.⁸¹

5.5.4 Critique of Article 17

Proponents of the Rotterdam rules argue that it 'marks clear progress'⁸² as it states exactly which party has the burden of proof in relation to any particular issue or event. They argue that the previous conventions did not make it clear when the burden of proof rested on the claimant.⁸³ However, while it has resolved some of the previous 'complexities' found in the regimes that preceded it, it may also result in 'ambiguity' where there are concurrent causes of loss.⁸⁴ Article 17.2-5 does not provide any clarity in the 'allocation of liability' in concurrent causes of loss.⁸⁵

The article is not only complicated but also fails to make provision for other modes of transport. The Rotterdam rules is a multimodal regime yet it fails to provide exceptions under article 17 for any mode other than maritime.⁸⁶ In terms of the burden of proof, article 17(5)(a) makes provision for what the cargo owner must prove in order for the carrier to be held liable, however, it will be difficult for the cargo owner to discharge its burden of proof without the full cooperation of the carrier.⁸⁷ Furthermore, if the cargo owner discharges this burden of proof the carrier will be allowed the option to counter prove which suggests that the due diligence of the carrier has decreased.⁸⁸ In terms of article 17(6), there is no clarity on the apportionment of liability when a carrier is

⁸⁰ F Berlingieri, An analysis of two recent commentaries of the Rotterdam Rules, available at <https://comitemaritime.org/wp-content/uploads/2018/05/An-analysis-of-two-recent-commentaries-of-the-RR-F.Berlingieri.pdf>, accessed on 25 October 2018.

⁸¹ F Berlingieri *op cit* note 80.

⁸² S Yuzhou; H H Li *op cit* note 11 at 934.

⁸³ *Ibid.*

⁸⁴ T Nikaki; B Soyer *op cit* note at 318.

⁸⁵ *Ibid.*

⁸⁶ J M Alcantara...et al *op cit* note 51 at 7.

⁸⁷ *Ibid.*

⁸⁸ J M Alcantara...et al *op cit* note 51 at 7.

only partially liable and the rules fail to make provision for the burden of proof in this respect.⁸⁹ Nikaki and Soyer are of the view that the ‘ambiguities’ in the Rotterdam rules are not merely in respect of a technical nature but rather ‘ambiguities’ that pertain to the ‘central provisions of liability’.⁹⁰

5.6. Removal of the nautical fault rule under the Rotterdam rules

The removal of the nautical fault rule under the Rotterdam rules is still viewed as a ‘drastic change for the carriers’,⁹¹ although foreshadowed by the Hamburg rules.⁹² Hashimi discusses the impact of this change in an analysis of the decision in *Compania Sud Americana de Vapores SA v Sinochem Tianjin Import & Export Corp (The Aconcagua)*,⁹³ which was decided under the Hague rules. In this case a container of calcium hypochlorite exploded due to it having been negligently stowed next to a fuel tank, which was then heated during the voyage.⁹⁴ The carrier admitted that it had been negligent in stowing the container; failing to handle the cargo properly and carefully under article 3 rule 2 of the Hague/Hague-Visby Rules. However, it argued that ‘the heating of the bunker fuel was an act, neglect or default in the management of the vessel’ and that it could therefore rely on article 4 rule 2(a) to escape liability.⁹⁵ The court upheld this argument, finding that the negligent decision of the chief officer to heat a cargo of calcium hypochlorite adjacent to the bunker tank, fell within the neglect and default of management exception provided for under article 4 rule 2(a).⁹⁶ If the Rotterdam rules were applied there would have been a different outcome as the nautical fault exception is removed.⁹⁷ Therefore, the carrier would not have been able to escape liability even if the liability was due to a default in the management of the

⁸⁹ T Nikaki; B Soyer *op cit* note 1 at 318.

⁹⁰ *Ibid* at 319.

⁹¹ S Hashmi *op cit* note 16 at 247.

⁹² M F Sturley *op cit* note 4 at 78.

⁹³ *CSAV v. Sinochem Tianjin Limited* [2010] 1 Lloyd’s Rep., *affd.* [2011] 1 Lloyd’s rep. 683.

⁹⁴ *Ibid* para. 359-379, *affd.* [2011] 1 Lloyd’s rep. 683. Also see R Aikens... et al *Bills of Lading* 2 ed (2016) at 323 para 10.118 and S Hashmi *op cit* note 16 at 247.

⁹⁵ *CSAV supra* note 93 at 53 para 372.

⁹⁶ *Ibid* at 683.

⁹⁷ S Hashmi *op cit* note 16 at 247.

vessel.⁹⁸ The analysis of this case emphasises the negative impact that the possible removal of the nautical fault rule will have on the carriers.

Yuzhou and Hai Li on the other hand, after a survey of the discussions in the working groups that led to the convention, indicate that the removal of this rule would be a development for international maritime legislation adequate to the demands of the present time, and was favoured by most delegates.⁹⁹ There is a misconception that there is a need for the nautical fault rule due to the inability of the carrier to control the vessel, however, 'contemporary satellite technologies, for instance, enable continuous monitoring and control of ship operations (including the actions of the ship's crew) through, inter alia, radar and GPS.'¹⁰⁰ Thus, technology has solved the problem that was the reason for the drafting of the nautical fault rule, and therefore there is no longer a need for the rule.¹⁰¹ Yuzhou and Hai Li are also of the view that the removal of the rule is the only way to open the way for multimodal 'door to door' carriage as the nautical fault rule is not in line with laws other than maritime laws.¹⁰²

5.7 Exceptions of Fire, Perils of the Sea and Inherent Vice

Article 17 rule (3)(f) makes provision for the defence of fire on a ship.¹⁰³ According to Thomas, the 'main concern of the working party in relation to the Hague rules fire exception was the incidence of the burden of proof'.¹⁰⁴ They believed that the burden of proof on the claimant provided for by the fire exception under the Hague/Hague-Visby rules was 'excessive', furthermore that in most cases it would be 'impossible' to prove that the fire was caused by the actual fault or privity of the carrier.¹⁰⁵

⁹⁸ S Hashmi *op cit* note 16 at 247.

⁹⁹ S Yuzhou; H H Li *op cit* note 11 at 937.

¹⁰⁰ P Leau 'Dead in the Water: The Nautical Fault Exemption of the Hague-Visby Rules' (2015/2016) *Juris*, Vol 7 available at <http://www.singaporelawreview.com/juris-illuminaeentries/2016/wqfuuhr7jl0obc8ig1klfe8exka0ea>, accessed on 25/10/2018.

¹⁰¹ P Leau *op cit* note 100.

¹⁰² S Yuzhou; H H Li *op cit* note 11 at 938.

¹⁰³ Rotterdam rules-Article 17(3)(f).

¹⁰⁴ D R Thomas *The Carriage of Goods by Sea Under the Rotterdam Rules* Lloyd's List London (2010) at 148 para 8.23.

¹⁰⁵ *Ibid* at 148 para 8.23.

The retention of the Hague/Hague-Visby rules fire exception gained support from some, while others sought that the exception be removed from the rules.¹⁰⁶ 'The brief wording appearing in the Rotterdam rules is the result of a compromise'.¹⁰⁷ The Rotterdam rules provide that the cargo claimant must either prove the fault of the carrier or he may prove the fault of any other person 'involved in the performance of the contract of carriage, or the vessel's unseaworthiness.'¹⁰⁸ In Canada, a comparison of the Hague/Hague-Visby and the Rotterdam rules show that the Rotterdam rules afford the carriers less protection as compared to the Hague/Hague-Visby rules.¹⁰⁹ The Hague/Hague-Visby rules require the cargo claimant to prove actual fault or privity of the carrier whereas the Rotterdam rules do not have the same requirement.¹¹⁰

Article 17(3)(b) provides for the perils of the sea exception under the Rotterdam rules and the 'format' of this provision mirrors the exception under the Hague/Hague-Visby rules.¹¹¹ Thomas mentions that the working group took the view that the Hague-Hague-Visby rules had to be 'followed closely' if 'certainty and predictability' was to be maintained.¹¹² In practice however, there will be a change in terms of the shifting of the burden of proof as provided earlier on in this chapter.

Article 17(3) makes provision for inherent vice as stated earlier on in this chapter. This provision is said to be unchanged and therefore the Hague/Hague-Visby case law would be applicable to the provision under the Rotterdam rules.¹¹³

5.8 Interpretation of the Rotterdam rules

Article 2 of the Rotterdam rules expresses the ideal of international uniformity in the interpretation and application of the rules as follows:

'In the interpretation of this Convention, regard is to be had to its international

¹⁰⁶ D R Thomas *op cit* note 104 at 149 para 8.24.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid* at 149 para 8.25, See also M Katsivela *op cit* note 3 at 445.

¹⁰⁹ M Katsivela *op cit* note 3 at 445.

¹¹⁰ *Ibid* at 446.

¹¹¹ D R Thomas *op cit* note 104 at 149 para 8.27.

¹¹² *Ibid.*

¹¹³ *Ibid* at 155 para 8.41.

character and to the need to promote uniformity in its application and the observance of good faith in international trade.’

Nikaki argues that because the rules are an ‘update’ of the familiar basis of liability of the Hague/Hague-Visby rules, ‘extensive’ case law decided under the Hague/Hague-Visby rules will assist in the interpretation of the Rotterdam rules, and largely avert any major issues that may have to be litigated on.¹¹⁴ That will, however, only be possible if there is uniformity in interpreting article 3(1) and 3(2) of the Hague/Hague-Visby rules, and where the rules cover similar issues.¹¹⁵ However, where there are already divergent approaches under the Hague/Hague-Visby rules, such as to the interpretation of the duty of care under article 3, or where the Rotterdam rules go beyond the Hague/Hague-Visby rules, there is a need for courts to develop a uniform interpretation of ‘key concepts’ within the Rotterdam rules.¹¹⁶ On Nikaki’s analysis the courts in different jurisdictions take a uniform approach in looking at seaworthiness and due diligence as well having agreed that there is an objective reasonable ship-owner in place to determine whether or not the carrier acted accordingly.¹¹⁷

However, the duty to care for the cargo under the Rotterdam rules still presents an issue of uncertainty. The duty to ‘properly and carefully’ carry out the duties under article 3 rule 2 of the Hague/Hague-Visby rules, is the same as the duty under the Rotterdam rules.¹¹⁸ It is agreed by the courts around the world that the term ‘properly’ means ‘a sound system’, however, in as much as there is agreement on the definition of the term ‘properly’, there is no uniformity in the approach of the standard of care of the carrier.¹¹⁹ The difference in approach can be seen in the approach of Canada and the United States as follows:¹²⁰

‘Some courts in Canada have ruled that the obligation to care for the goods is stringent, being qualified by the words "properly and carefully," and not that of "due diligence," as "due diligence" only appears in the Hague and the Hague-Visby Rules at article 3.1 (due diligence to make the ship seaworthy), and article 4.2(p) (latent defects not discoverable by due diligence). At the other end of the range, the courts in the United

¹¹⁴ T Nikaki *op cit* note 2 at 16.

¹¹⁵ *Ibid* at 16 and 18. Also see S Yuzhou; H H Li *op cit* note 11 at 938.

¹¹⁶ T Nikaki *op cit* note 2 at 24, referring to, in particular, the term ‘during the voyage’.

¹¹⁷ *Ibid* at 19.

¹¹⁸ *Ibid* at 22.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at 23.

States have construed article 3.2 as requiring the carrier to only exercise due diligence as regards the cargo.’

The divergent interpretations on the appropriate standard of care under article 3 rule 2 of the Hague and the Hague-Visby Rules may be seen as a potential threat to the uniform application of article 13 of the Rotterdam Rules, which will not only jeopardise the intended harmonisation of the international carriage of goods by sea laws, but will also encourage ‘forum shopping’ practices.¹²¹

5.9 Conclusion

Some argue that, the current shipping industry as it stands today requires the adoption of a regime such as the Rotterdam rules and that its universal adoption is therefore inevitable.¹²² There may be deficiencies within the Rotterdam rules that are not foreseeable but that will only come to light once the Rotterdam rules are being applied.¹²³ However, the deficiencies within the Rotterdam rules noted by detractors are not such that the rules will not be able to operate efficiently.¹²⁴ Perhaps the greatest danger lies in Rotterdam rules coming into force and only receiving minimum support from states. If so, then it will have a similar effect to the receipt of the Hamburg rules, leading only to ‘further fragmentation of the carriage of goods by sea laws.’¹²⁵ It is argued that an alternative to ratifying the Rotterdam rules would be to apply the Hague/Hague Visby rules and address their shortcomings by excluding certain provisions, such as the nautical fault rule and including other beneficial provisions from the Rotterdam rules, such as provisions for electronic documents.¹²⁶ South Africa could consider implementing such a suggestion through an amendment to COGSA. However, for nations to do so would greatly increase the fragmentation of laws and in South Africa’s case would put it out of step with its Hague/Hague-Visby international trade partners.

¹²¹ T Nikaki *op cit* note at 24.

¹²² J S Mo *op cit* note 19 at 257.

¹²³ D M Bovio *op cit* note 46 at 1204. Also see J S Mo *op cit* note 19 at 257.

¹²⁴ J S Mo *op cit* note 19 at 257.

¹²⁵ Theodora Nikaki *op cit* note 2 at 45.

¹²⁶ J M Alcantara...et al *op cit* note 51 at 14.

Ultimately on the question of the burden of proof, the proof outlined in the Rotterdam rules is detailed in terms of the burden of proof and order of proof. This means that there is progress in terms of the provisions for the burden of proof as the Rotterdam rules have outlined the burden of proof in comprehensively, whereas the previous regimes have not adequately done so. The Hague/Hague-Visby rules and the Hamburg rules fail to make provision for which burden of proof will rest on the claimant. Article 17 has been drafted in such a way that both the cargo owner and the carrier will at all times know where they stand in terms of the burden of proof or the counter of proof. This is clearly a step in the right direction. However, article 17 is too long and complicated which may prove to be problematic in its entirety when applied.

One of the main objectives of the Rotterdam rules is to create uniformity. However, it seems that instead of reaching its objective of uniformity it may do the opposite¹²⁷ and bring about more uncertainty and confusion.

¹²⁷ J M Alcantara...et al *op cit* note 51 at 15.

CHAPTER 6: CONCLUSION

The purpose of this dissertation was to examine the various international regimes in the carriage of goods by sea, to establish how each regime makes provision for and deals with the basis of the carrier's liability and the burden of proof. Furthermore, to compare and contrast the operation of the regimes, namely; the Hague/Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules. Depending on the circumstances, it is clear that the burden of proof may be of great significance to the outcome of a case. Establishing which party the burden of proof lies on has proven to be a difficult task in matters where an incident takes place at sea and the claimant would then have difficulty discharging the burden of proof. As stated by Force, this difficulty may arise when it is unclear how the damage or loss occurred or where there is an unresolvable conflict of evidence.¹

6.1 Summary of findings

In chapter two, the Hague and Hague-Visby rules were considered and the findings were that the Hague/Hague-Visby rules have successfully been applied for decades. The rules however, do not make provision for modern international trade in terms of the multimodal transportation of goods and this suggests a lack of progression in international trade in terms of modern practices in the shipping industry. The Hague/Hague-Visby rules have attempted to balance the allocation of risks between the cargo owner and carrier by placing the risk of ensuring the seaworthiness of the vessel on the carrier and the cargo owner's risk is the carrier's use of the errors in navigation and management defence.

Chapter three then examined the burden of proof under the Hague and Hague-Visby rules in more detail. It contrasted the traditional approach advocated by professor Tetley and supported in some case law with the approach adopted in the United Kingdom in the *Volcafe* case and in Australia in the case of the *Bunga Seroja*. It is submitted that the approach adopted in *Volcafe* is correct and therefore that the burden of proof in the Hague/Hague-Visby rules rests on the claimant, which is in line

¹ R Force 'A Comparison of the Hague, Hague Visby, and Hamburg rules: Much ado about (?)' (1995-1996) 70 *Tulane Law Review* at 2085.

with the maxim that he who alleges must prove. It is insufficient for a claimant to therefore rely solely on proof that the goods were loaded in good order and condition and discharged damaged. In certain circumstances that may be sufficient for the court to draw an inference that the goods were damaged during the period of the carrier's responsibility and that may set up a prima facie case which, if the carrier does not offer any evidence to rebut, could become conclusive proof. However, the claimant bears the overall onus of proof throughout the case and must therefore put forward whatever proof they have to show that the carrier has failed to take proper care of the cargo. In other words to establish the carrier's negligence or that the vessel was unseaworthy, and that this caused the loss or damage. In the latter instance the onus would shift to the carrier to prove that he had exercised due diligence to make the vessel seaworthy. Understood in this way, the shift is a shift of an evidentiary burden to the carrier to discharge a prima facie case set up by the claimant but is not a shift of the burden of proof and this is in line with the view accepted by academics that the Hague-Visby rules is a proved fault system.

Chapter 4 considered the Hamburg rules. It is more difficult to assess the extent to which the Hamburg rules will have an effect in practice on the outcome of cargo claims as each case will be determined by its own facts. Force argues that although the Hamburg rules do mark a change from the proved fault system to a presumed fault system, in many cases this will not affect the outcome of the cargo claim. He argues that it is only 'factually sensitive' cases that the burden of proof will have a decisive impact, that is in cases where it is unclear what caused the damage to the cargo or cases where there is contradictory evidence on what caused the damage to the cargo. In both those cases the party with the burden of proof would be unable to discharge the burden on a balance of probabilities. It is therefore significant in those cases to determine whether the burden is in fact on the carrier as provided in article 5(1) of Hamburg rather than on the claimants as provided under Hague/Hague-Visby.

Chapter 5 examined the Rotterdam rules and the changes made in this latest regime. One such change is that the Rotterdam rules do set out in some detail the shifting burden of proof and the order of proof, however, this has been criticised as being too

complicated² as well as ambiguous³ in the case of concurrent causes of loss. Although the Rotterdam rules sets out the burden of proof expressly, it could be more practical and easier for judges if there were fewer clear and concise principles. The objective of the Rotterdam rules is to reach uniformity in international maritime trade, however if it comes into force and does not gain adequate support it is clear that it will have the same effect as that of the Hamburg rules and further fragment maritime laws.

6.2 Recommendations

As stated above, the purpose of this dissertation was to compare the burden of proof provided for in the international maritime regimes. Currently, the Hague/Hague-Visby rules are incorporated into South African law by virtue of COGSA. The question then arises as to whether or not we should retain the Hague/Hague-Visby rules. One of the reasons for its retention would be that most of the international maritime community still subscribes to the Hague/Hague-Visby rules and it would therefore be safer in the interests of uniformity that we continue to apply the Hague/Hague-Visby rules. According to Alcantara⁴, we presently have a system of liability that works well and that is not complicated. Thus, the way forward could be to amend the COGSA by simply removing the nautical fault defence, on the basis that there is no longer a need for this defence in modern maritime trade. This is an approach that South Africa should endorse and it is not appropriate for us to consider adopting the Hamburg rules or the Rotterdam rules, at least not until it becomes clear that either of them have received significant support from a large number of trading nations.

The analysis of the basis of liability and the burden of proof in the various maritime regimes has brought the writer to the conclusion that based on the above findings, South Africa should retain the widely accepted Hague/Hague-Visby rules.

² J M Alcantara...et al 'Particular Concerns with Regard to the Rotterdam Rules' (2010) 2 *Cuadernos Derecho Transnacional* 5 at 7.

³ T Nikaki and B Soyer 'A new international regime for carriage of goods by sea: Contemporary, certain, inclusive and efficient, or just another one for the shelves?' (2012) 30 (2) *Berkeley Journal of International Law* at 318.

⁴ J M Alcantara...et al *op cit* note 2 at 14.

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17 January 2019

Ms Nivani Chetty (211532491)
School of Law
Howard College Campus

Dear Ms Chetty,

Protocol reference number: HSS/0046/019M

Project title: The basis of the carrier's liability and the burden of proof in cargo claims arising under contracts for the carriage of goods by sea, evidenced by bills of lading

Full Approval – No Risk/ Exempt Application

In response to your application received on 11 December 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

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

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

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

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

Yours faithfully

.....
Dr Rosemary Sibanda (Chair)

/ms

Cc Supervisor: Mrs Dusty Donnelly
cc Academic leader Research: Dr Freddy Mnyongani
cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

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