ALLOCATING SHIPMENT RISKS AND THE UNCITRAL CONVENTION

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The hazards of transportation generate risks of pecuniary and economic loss to the participating cargo interests, and it is the function of legal redress to apportion those risks between the cargo interests and carrier. International trade is facilitated if the legal division of risk is standardised and uniform. International conventions have attempted to unify legal responsibilities for road, rail, air, inland waterway and sea carriage[1] and proposals are under way to standardize liability in a combined transport operation. In 1978, a draft convention prepared by the United Nations Commission on International Trade Law will be submitted to a Conference of Plenipotentiaries to supersede the current conventions governing international carriage by sea. This article attempts to outline the division of liability, its development and proposed amendments. In conformity with the existing and proposed convention, the profile is confined to liner carriage and does not extend to charter parties.

A. DEVELOPMENT

For almost one hundred years, the law of carriers' liability has attracted sustained criticism and recurring appraisal. It was precipitated in the second half of the 19th century when rapid expansion of international trade, the advent of safer and faster vessels, and the rationalization of liner freights all contributed to an escalating demand for shipping services which exceeded the carrying capacity of available ships. The prevailing economic conditions created such an imbalance in bargaining strength that shippers were compelled to accept standard form contracts of shipment in which carriers disclaimed liability for damage to, or loss of, cargo. This produced friction between trading interests and shipowners, and brought judicial policies in Europe and the United States into conflict.

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1 See *Convention on the Contract for the International Carriage of Goods by Road* (CMR) 1956; *International Convention Concerning the Carriage of Goods by Rail* (CIM) 1961 and 1970; *Convention for the Unification of Certain Rules Relating to International Carriage by Air* 1929; *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* 1924, with Protocol 1968.

The law merchant, derived from the customs of merchants[2] and embodied in the great sea codes,[3] had successfully standardized carriers' liability quite independently of the contract. But in the wake of declining maritime courts, Western Europe witnessed the ascendancy of the contract as the vehicle best suited to implement contemporary laissez-faire ideologies until, in English common law[4] and continental codes[5] alike, the contract attained supremacy as the source of legal rights and liabilities. Common law and civil codes did preserve objective standards of strict liability[6] but they were subordinated to contrary intentions expressed in the contract.[7] In the United States, however, the contract did not achieve such eminence. Not without close scrutiny would the federal courts permit the parties to modify their common law responsibilities.

The carrier's common law liability divided into two segments. First, an obligation was imposed on both common and private carriers to furnish a seaworthy vessel.[8] In this respect, even the English courts were less inclined to permit the carrier to contract out of an obligation seen to be fundamental to the contract of shipment and personal to the shipowner. In principle, parties were free to modify the implied warranty of seaworthiness by contradictory terms expressed in their contract,[9] but courts were loathe to construe contracts to this end.[10] It was the second facet of common law liability which generated friction between the two legal systems. At the time, British shipowners enjoyed a virtual monopoly in maritime transport over America's flourishing mercantile trade. They commonly inserted clauses in their contracts of shipment purporting to absolve them from liability for the negligence of the master and crew

2 See, generally, T. Mears, "The History of the Admiralty Jurisdiction", *Select Essays in Anglo-American Legal History* (1968) Vol. II, 312; W. S. Holdsworth, *A History of English Law*, Vol. VIII (2nd ed., London, Sweet & Maxwell, 1966); R. G. Marsden (ed.), *Select Pleas in the Court of Admiralty* Vols. 1, 11 (London, Selden Society, 1894, 1897).

3 See generally, T. Twiss, *The Black Book of the Admiralty* (1873) Vols. I-IV.

4 *Gibbon* v. *Paynton* (1769) 4 Burr. 2298; *Nicholson* v. *Willan* (1804) 5 East. 507; *Carr* v. *Lancashire and Yorkshire Rly Co.* (1852) 7 Exch. 707.

5 A. N. Yiannopoulos, *Negligence Clauses in Ocean Bills of Lading* (1962) Ch. 3; UNCTAD *Report on Bills of Lading* (1971) 12. "Continental" and "European" systems include the Scandinavian countries.

6 Ibid. *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909; *Riley* v. *Horne* (1828) 5 Bing. 217; *Nugent* v. *Smith* (1876) 1 C.P.D. 19.

7 *Liver Alkali Co.* v. *Johnson* (1874) L.R. 9 Exch. 338; *Steel* v. *State Line Steamship Co.* (1877) 3 App. Cas. 72; *Nelson Line (Liverpool) Ltd* v. *James Nelson & Sons Ltd* [1908] A.C. 16.

8 *Steel* v. *State Line Steamship Co.* (1877) 3 App. Cas. 72; *Kopitoff* v. *Wilson* (1876) 1 Q.B.D. 377; *The Edwin I. Morrison* 153 U.S. 199 (1894); *The New Jersey Steam Navigation Co.* v. *The Merchants' Bank of Boston* 47 U.S. 344 (1848).

9 *Elderslie Steamship Co. Ltd* v. *Borthwick* [1905] A.C. 93; *Nelson Line (Liverpool) Ltd* v. *James Nelson & Sons Ltd* [1908] A.C. 16; *W.R. Varnish & Co. Ltd* v. *Kheti* (1949) 82 Ll.L.Rep. 525.

10 *Steel* v. *State Line Steamship Co.* (1877) 3 App. Cas. 72; *Gilroy Sons & Co.* v. *Price & Co.* [1893] A.C. 56; *S.S. "City of Lincoln"* v. *Smith* [1904] A.C. 250; *The Rosetti* [1972] 2 Lloyd's Rep. 116.

at sea.[11] Though acceptable to English courts[12] these negligence clauses, as they were known, represented such a flagrant departure from the strict liability of public carriers[13] that they were unequivocally declared void by United States courts[14] on the grounds of public policy.[15] To circumvent the unfavourable American law and capitalise on indigenous policy, British shipowners designated English law or the law of the (English) flag as the proper law to govern the contract. English courts were prepared to apply the law which reflected the intent of the parties[16] but, subject to some exceptions,[17] U.S. courts were disinclined to recognise the contractual selection of a foreign law so incompatible with their own public policy.[18]

The extreme polarity of trans-Atlantic judicial policies was commercially unsatisfactory to both cargo owners and shipowners. One continent was amenable to no liability, the other was committed to strict liability, and the outcome turned on the place in which litigation was brought. In an effort to reconcile the conflict, the International Law Association[19] prepared a series of model contracts which attempted to apportion risk equitably between shipper and carrier.[20] The *Liverpool Bill of Lading* 1882 proposed to exempt the shipowner from specified risks including the negligence of his servants, but in return he was liable to exercise due diligence in rendering the ship seaworthy. The *Hamburg Rules of*

11 *The Delaware* 161 U.S. 459, 472-3 (1895). See generally, A. W. Knauth, *Ocean Bills of Lading* (4th ed., 1953) 118 *et seq.*

12 *The Duero* (1869) L.R. 2 A & E 393; *Westport Coal Co.* v. *McPhail* [1898] 2 Q.B. 130; *The Torbryan* [1903] P. 35; *Blackburn* v. *Liverpool Brazil and River Plate Steam Navigation Co.* [1902] 1 K.B. 290; *Marriott* v. *Yeoward Bros.* [1909] 2 K.B. 987. For other exemption clauses, see *T. Wilson, Sons & Co.* v. *The Xantho* (1887) 12 App. Cas. 503; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887) 12 App. Cas. 518.

13 As in English common law, public carriers were insurers of the cargo: *The Niagara* v. *Cordes* 62 U.S. 7 (1859); *Howland* v. *Greenway* 63 U.S. 491 (1860); *La Tourette* v. *Burton* 68 U.S. 43 (1863); and private carriers were strictly liable to render the ship seaworthy, but otherwise liable only for negligence, *The New Jersey Steam Navigation Co.* v. *The Merchants' Bank of Boston* 47 U.S. 344 (1848); *The Dan* 40 F. 691 (1889); *The Wildenfels* 161 F. 864 (1908).

14 *The Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.* 129 U.S. 397 (1889); *The Iowa* 50 F. 561 (1892); *The Guildhall* 58 F. 796 (1893), 64 F. 867 (1894); *The Seaboard* 119 F. 375 (1902); *Ansaldo San Giorgio* v. *Rheinstrom Bros. Co.* 294 U.S. 494 (1934).

15 *The Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.* 129 U.S. 397 (1889); *The Energia* 56 F. 124 (1893); *The Guildhall* 58 F. 796 (1893), 64 F. 867 (1894).

16 *Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1865) 3 Moo. P.C. (N.S.) 272; *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co. Ltd* (1883) 10 Q.B.D. 521; *In re Missouri Steamship Co.* (1889) 42 Ch.D. 321.

17 *The Oranmore* 24 F. 922 (1885); *The Trinacria* 42 F. 863 (1890); *Baetjer* v. *La Compagnie Generale Transatlantique* 59 F. 789 (1894).

18 *The Brantford City* 29 F. 373 (1886); *Lewisohn* v. *National Steamship Co.* 56 F. 602 (1893); *The Glenmavis* 69 F. 472 (1895).

19 Until 1895 called the Association for the Reform and Codification of the Law of Nations.

20 The following contracts are reproduced in T. G. Carver, *Carriage of Goods by Sea,* (4th ed., 1905) 883 *et seq.*

Affreightment 1885 reiterated the due diligence concept and expanded liability to embrace the negligence of servants, yet in so doing they distinguished negligence from errors in judgment. At its London conference in 1887 and in its *London Rules of Affreightment* 1893, the Association modified the negligence formula into divisions between faults in the management of the cargo, for which the shipowner was accountable, and faults in the navigation of the ship, for which he was not. As a commercial exercise, the common form contracts were unsuccessful, partly because the recommended reduction of the absolute warranty of seaworthiness to the fault standard of due diligence was alien to American common law. Nevertheless, the debates sponsored by the Association demonstrated that if the conflict between no liability and strict liability were to be resolved, the only viable compromise would lie in the area of fault liability. In fact the formulae devised by the Association crystallised in 19th and 20th century legislation.

Responsive to mercantile pressure for legislative intervention, the United States passed the *Harter Act* 1893.[21] The legislation did not directly relieve the carrier from his implied warranty to furnish a seaworthy vessel,[22] yet it did allow him to relax it from absolute to fault liability, but no further.[23] Furthermore, the carrier could avail himself of a number of exemptions, including fault or error in navigation, but they were contingent upon his exercising due diligence in making the ship seaworthy. Despite the prevailing judicial view that American courts would not entertain foreign law, the Supreme Court itself had not had occasion to express its opinion since an earlier decision which had reserved the question.[24] To dispel any confusion, the legislature applied the Act to all inward and outward traffic irrespective of the parties' choice of law and irrespective of where the contract was made.[25] The legislation governed courts in the United States, but of course had no binding effect on English courts. Curiously, the Act did not insist upon the inclusion in American contracts of a clause paramount to incorporate the legislation as a term of the contract, which would secure some measure of uniformity in courts likely to adhere to the contractual terms. Nevertheless the criminal sanction against exemption clauses seems to have encouraged the inclusion of legislative terms in contracts emanating from America.[26] The judiciary continued its reticence towards the removal of a plaint to a foreign

[21] For detail of its history see Knauth, op. cit. 118 *et seq.*
[22] *International Navigation Co.* v. *Farr and Bailey Manufacturing Co.* 181 U.S. 218 (1901); *The Wildcroft* 201 U.S. 378 (1906); *McFadden* v. *Blue Star Line* [1905] 1 K.B. 697.
[23] *The Carib Prince* 170 U.S. 655 (1898).
[24] *The Liverpool and Great Western Steam Co.* v. *Phenix Insurance Co.* 129 U.S. 397 (1889).
[25] *Botany Worsted Mills* v. *Knott* 76 F. 582 (1896); *The E.A. Shores Jr.* 73 F. 342 (1896); *The Kensington* 183 U.S. 263 (1902).
[26] *Dobell* v. *Rossmore Steamship Co.* [1895] 2 Q.B. 408; *McFadden* v. *Blue Star Line* [1905] 1 K.B. 697.

jurisdiction,[27] perhaps for the justifiable reason that the *Harter Act* would not be applied as enthusiastically in alien courts.[28]

Within two decades, other trading nations introduced legislation. New Zealand with the *Shipping and Seamen Act* 1903,[29] Australia in its *Sea-Carriage of Goods Act* 1904, and Canada by the *Water-Carriage of Goods Act* 1910, each imposed minimum standards of liability on the carrier. By contrast with the *Harter Act,* the Australian legislation was counter-productive to importers because the Act was restricted to outward traffic. Local importers were subject to the proper law of the contract and foreign importers could derive legislative protection only if they could acquire jurisdiction in a local forum whose jurisdiction was then entrenched by statute. The carrier's exemptions were contingent upon his obligations of seaworthiness[30] but, abandoning the conciliatory Harter policy, the Australian legislation retained the strict warranty of seaworthiness in preference to the due diligence concept.

The legislation represented modest progress to local trade. To merchants importing cargo from Europe, their legal position was vastly improved if they could acquire jurisdiction in the United States. And to merchants importing from protected nations to whom the preferred jurisdiction may have been inaccessible, the legislative influence on contracts was beneficial. Yet, in respect of standardised liability on a global scale, the impact of the legislation was marginal. Indeed, while it remained localised and segmented it was disruptive to international commerce. It created uncertainty about the law applicable to a transaction until a forum had been selected. It promoted forum-shopping with its attendant costs and inconvenience. It could not correct the disparity between the exporter's and importer's rights against the carrier. And, of course, it could not overcome the diversity of standards in international transport. These unpredictable elements had serious repercussions for the assessment of insurance risk, the financing of shipments, and the settlement of claims.

Governments had instigated enquiries to scrutinize the shipping conferences[31] whose anti-competitive structure contributed to the bargaining strength and standard form rigidity of the shipping lines. Favourable

[27] *The Etona* 64 F. 880 (1894); *The Kensington* 183 U.S. 263 (1902); *Kuhnhold* v. *Compagnie Generale Transatlantique* 251 F. 387 (1918).

[28] See comments in *Gosse Millard* v. *Canadian Government Merchant Marine Ltd* [1928] 1 K.B. 717, 730-2; decision reversed [1929] A.C. 223.

[29] Re-enacted in the *Shipping and Seamen Act* 1908.

[30] *McGregor* v. *Huddart Parker Ltd* (1919) 26 C.L.R. 336.

[31] Agreements between shipping proprietors were known in 1868 but the opening of the Suez Canal in 1869 is said to have stimulated the first successful conference which regulated trade between U.K. and India. See D. Marx, *International Shipping Cartels* (1953) 46; N. Singh, *International Conventions of Merchant Shipping* (London, Stevens & Sons, 1973) 1638; B. M. Deakin, *Shipping Conferences* (1973) 3.

reports in Australia,[32] Britain[33] and the United States[34] enabled the cartels to secure preferential treatment under anti-trust legislation in the interests of stabilising freights and rationalising services. These concessions were counterbalanced by the legislation on liability in Australia and the United States, but it left European trade bereft of any legislation protection. At no time did the charter market attract the mercantile grievances which characterized liner trade. Exporters who could provide a full cargo, and therefore charter the vessel in its entirety, could command a more favourable bargaining position. American common law regarded the charter as tantamount to private carriage, and therefore free of the absolute liability which shackled public carriage.[35] Even after the passing of the *Harter Act,* the parties were free to settle their terms of liability by contract where the charterer exclusively supplied the ship's cargo.[36]

The movement for universal reform gathered momentum after the cessation of World War I. In the post-war revival of commercial activities there was a reversal in the economic climate. Over-reaction to war-time losses produced a surplus of ships, causing a depression in the industry, and some countries hitherto dominated by European shipowners had become more self-reliant on their own merchant fleets.[37] Faced with the task of restoring war-torn Europe, governments assumed a closer political involvement in international trade, and merchants seized the opportunity to channel grievances through international forums. Following the World Shipping Conference 1920, Great Britain set up a departmental investigation which in 1921 announced its support for uniform legislation in the British Empire similar to the Canadian Act.[38] The Comité Maritime International compiled reports on the desirability of a fault liability standard in international trade, and the International Law Association invited submissions on a widely circulated draft contract for discussion at its forthcoming conference at The Hague. The conference produced a revised code of fault liability known as the *Hague Rules,* and recommended that carriers voluntarily incorporate the code into their contracts of shipment. In an effort to avert legislative interference, some shipowners acceded to the recommendation but, in the expectation that voluntary

[32] *Australian Royal Commission on Ocean Shipping Services* (1906).

[33] *Royal Commission on Shipping Rings* (1909).

[34] *United States Congress House of Representatives' Committee on Merchant Marine and Fisheries Investigation of Shipping Combinations* (1914), known as the Alexander Committee.

[35] Supra fn. 13.

[36] *The G. R. Crowe* 294 F. 506 (1923); *Jefferson Chemical Co.* v. *Grena* 413 F. 2d 864 (1969); so long as no bill of lading is issued and negotiated, *The Jupiter* 1945 A.M.C. 1161; *The Ferncliff* 1938 A.M.C. 206, 1939 A.M.C. 1420.

[37] L. Jones, *Shipbuilding in Britain between the Wars* (1957); S. G. Sturmey, *British Shipping and World Competition* (1972) Chs. 3, 4, 5.

[38] For history of proceedings, see generally, A. A. Mocatta & Ors., *Scrutton on Charterparties and Bills of Lading* (18th ed., London: Sweet & Maxwell, 1974) 402 *et seq;* A. W. Knauth, *Ocean Bills of Lading* (4th ed., 1953) 125 *et seq;* Yiannopoulos, op. cit. Ch. 1.

initiative would again prove unsuccessful, trade associations demanded mandatory legislation. In 1922, the Comité Maritime International was invited to debate the *Hague Rules* and assume its time-honoured role of sponsoring a conference at diplomatic level under the patronage of the Belgian government.[39]

So dramatically had the tide turned that it was Great Britain, now conscious of its dependence on international trade and its relations with member countries of the Empire, which took the initiative. With the aim of adopting uniform legislation in the Empire, it prepared a draft Bill based on the *Hague Rules,* but it delayed the Bill's introduction into parliament pending the recommendations of the Comité and the outcome of diplomatic debates. At the same time, it announced its intention to proceed with the Bill, if necessary in isolation of other European countries, should a satisfactory agreement not be concluded. The *Hague Rules* and suggested amendments were submitted to the Comité Maritime International for deliberation at its London conference in October 1922. The Comité referred its report to the Fifth International Diplomatic Conference on Maritime Law assembled by the Belgian government that same month.[40] The Conference accepted the need for law-sanctioned rules in preference to a voluntary code and prepared a convention text based on the *Hague Rules* which it would commend to governments represented. Modifications were made in committee stages one year later by the annexure of a protocol designed to harmonize English and Continental legal concepts. Yet before the revised text was submitted to the Conference, to be reconvened at Brussels in August 1924, Great Britain, on the advice of the Imperial Economic Conference in 1923, introduced legislation implementing the revised text. The text underwent further amendment before the International Convention for the Unification of Certain Rules relating to Bills of Lading was signed at Brussels on 25th August 1924.

The Convention was successful in articulating a compromise standard of liability acceptable to commerce but the struggle for unification was to suffer further setbacks. The Convention itself did not come into force until 1931, and then only between the four High Contracting Parties who first ratified it, Great Britain being one of those parties. However, the Convention itself was of little relevance to Britain and her dominions by whose law international treaties are not self-executing but must be transformed into municipal law by legislation. Both the United Kingdom[41] and Australia[42] annexed the body of the Convention as appendices to

[39] Founded in 1897 to promote uniform maritime law, the Comité debates issues topical to maritime law and has prepared a number of draft conventions. See A. Lilar and C. van den Bosch, *Le Comité Maritime International* (1972).

[40] For an account of proceedings, see Comité Maritime International Bulletin No. 65 (1923).

[41] *Carriage of Goods by Sea Act* 1924.

[42] *Sea-Carriage of Goods Act* 1924.

legislation enacted in 1924. Canada[43] did not follow suit until 1936, and New Zealand[44] 1940. By 1940, a substantial number of maritime nations had either ratified or adhered to the Convention and applied it to domestic law. The development of America's pluralist economy may account for its prevarication in adopting the Convention. Formerly the leader in mercantile reform, the United States experienced division among its commercial groups.[45] Shipowners opposed the new Rules, and even some cargo interests would have preferred the amendments of the *Harter Act* to accommodate the Rules, in preference to the Convention text. During and after the Convention proceedings, a number of Bills were instigated in Congress only to lapse through lack of interest, opposition, and the repercussions of the great depression. It was not until 1933, when the Supreme Court interpreted the *Harter Act* adversely to carriers,[46] that legislation[47] was passed in 1936 and the Convention ratified in 1937. In the United States, a treaty has direct operation of law, but in this case the government announced that in the event of a conflict between the enacting legislation and the Convention text, the former would prevail.[48]

The *Hague Rules,* to give the Convention its popular name, subscribed to a theme of fault liability. The absolute warranty of seaworthiness was abandoned in favour of the due diligence concept. Enumerated exemptions from liability, including faults in navigation which shipowners insisted upon retaining,[49] were no longer conditional upon the exercise of due diligence. Misgivings about the Rules were neutralised by the more stabilised insurance cover made possible by standardisation. Yet the fluctuation of national currencies after World War II caused concern to underwriters. The Convention expressed the maximum amount per package for which the carrier could be held liable in terms of sterling relative to a gold standard. This alone was difficult to apply, as the gold content of sterling drifted. But, more importantly, national legislation converted the sterling sum to its domestic currency at the rates of exchange then prevailing, and the fluctuation of currencies relative to sterling introduced a serious element of disunity into the operation of the Rules. The decline of sterling against the American dollar, for example, started a trend of forum shopping in the United States. To offset this tendency the British Maritime Law Association drafted the *Gold Clause Agreement* 1950[50] by which contracting commercial bodies voluntarily agreed to increase liability if claims were presented and pursued in

[43] *Water Carriage of Goods Act* 1936.
[44] *Sea-Carriage of Goods Act* 1940.
[45] Knauth, op. cit. 128 *et seq.*
[46] *May* v. *Hamburg* 63 F. 2d 248; 290 U.S. 333 (1933).
[47] *Carriage of Goods by Sea Act* 1936.
[48] See the Second Understanding deposited on ratification of the Convention, Knauth, op. cit. 77.
[49] See UNCTAD, *Report on Bills of Lading* (1971) 3 fn. 9.
[50] See R. Colinvaux, *Carver's Carriage by Sea* (12th ed., London: Stevens & Sons, 1971) 1350 *et seq;* Mocatta, op. cit. 528 *et seq.*

England. Australian merchants, carriers and underwriters entered into a similar arrangement in 1957.

For a decade, the currency question, problems for containerized transport and jurisdictional restrictions of the Rules punctuated the proceedings of the Comité Maritime International. At its 1959 conference in Rijeka, the Comité resolved to study adaptations to the Rules in the light of economic and technological developments. In 1963 at Stockholm, a draft protocol to amend the *Hague Rules* was prepared, incorporating provisions which would overcome two controversial British decisions.[51] The amendments, known as the *Visby Rules,* were submitted in 1967 to the Twelfth Diplomatic Conference on Maritime Law which, on 23rd February 1968 at Brussels, signed a protocol to amend the earlier convention. To come into force, the Protocol required the ratification or accession of ten states, of which at least five should each have a gross tonnage of one million tons. In 1977, the Protocol became operative, and Britain proclaimed 1971 legislation[52] to give effect to it and repeal the 1924 legislation.

As matters stand, the Brussels Convention serves as the model from which a large number of maritime nations derive domestic law. In some countries, the Convention is self-executing, in others the text has been incorporated into existing codes, and in still others specific legislation has been introduced.[53] The United Kingdom annexed a text to its *Carriage of Goods by Sea Act* 1924 which was replaced by the *Carriage of Goods by Sea Act* 1971 introducing the *Hague-Visby Rules.* Australia appended a text in a schedule to her *Sea-Carriage of Goods Act* 1924, as did Canada to the *Water Carriage of Goods Act* 1936, and New Zealand in the *Sea-Carriage of Goods Act* 1940. The United States incorporated a text into statutory form in the *Carriage of Goods by Sea Act* 1936. The difference between the final Convention and the text on which the Commonwealth countries based their legislation is minor.[54] There exists far greater diversity amongst nations by virtue of other factors. Even where the final Convention is self-executing, there is dispute as to which articles of the Convention apply.[55] Where the text has been followed closely, shades of diversity creep into translations from the original French. The Convention itself contained a Protocol of Signature whereby countries could make reservations on provisions in the text. To varying degrees, many countries departed from the text when introducing it as legislation, some to the extent that the spirit is reflected but resemblance to the Convention text is marginal.[56] In the British context, the enabling legislation constrains

[51] *Scruttons* v. *Midland Silicones Ltd* [1962] A.C. 446 in respect of which the proposals were accepted, and *Riverstone Meat Co. Pty Ltd* v. *Lancashire Shipping Co. Ltd* [1961] A.C. 807 in respect of which they were not.
[52] *Carriage of Goods by Sea Act* 1971.
[53] See Yiannopoulos, op. cit. Ch. 3.
[54] See Mocatta, op. cit. 522 *et seq.*
[55] Yiannopoulos, op. cit. Ch. 2.
[56] Ibid.

the application of the text. And of course judicial construction, municipal and private international laws, and conceptual nuances will vary with the jurisdiction.

In 1964, the United Nations Conference on Trade and Development (UNCTAD)[57] was established as an organ of the United Nations to formulate policies on international trade and economic development, with particular reference to the problems of developing countries. Its Trade and Development Board appointed a Committee on Shipping to consider a wide range of shipping issues concerning trade relations between developed and developing countries.[58] In 1969, a Working Group was set up specifically to assess the implications of international shipping legislation, of which the *Hague Rules* were accorded first priority. Through its committee structure, UNCTAD initiated a programme to examine the underlying policy of the *Hague Rules*[59] and produce legislation aimed at achieving equilibrium between cost and safety, between freight charges and liability, between shipowners' insurance and cargo insurance.[60] Satisfactory legislation is critical to developing countries which lack the expertise, technology and capital investment to establish competitive shipping industries, and whose dependence upon developed nations is analogous to the disparity between 19th century shippers and shipowners. Shipping costs are estimated to account for at least one third of the entire balance of payment deficit of the underdeveloped countries whose high proportion of turnover in cargo lies in stark contrast to their extremely low participation in the world's mercantile fleet.[61]

Late in 1966, the United Nations created the United Nations Commission on International Trade Law (UNCITRAL), to which body UNCTAD referred its proposals for draft legislation.[62] In 1971, in the light of UNCTAD resolutions, UNCITRAL resolved "that within the priority topic of international legislation on shipping, the subject for consideration for the time being shall be bills of lading".[63] UNCITRAL referred specific topics relating to the *Hague-Visby Rules* for examination by a Working Group "with a view to revising and amplifying the rules as appropriate, and that a new international convention may, if appropriate, be prepared for adoption under the auspices of the United Nations".[64]

[57] For accounts of its proceedings, see L. Andreani, "Revision of the Hague Rules" in F. Berlingieri (ed.), *Studies on the Revision of the Brussels Convention on Bills of Lading* (1974) 11; G. N. Wilner, "Survey of the Activities of UNCTAD and UNCITRAL in the Field of International Legislation on Shipping" (1971) 3 *J.M.L.C.* 129.

[58] For the importance attached to shipping in world trade, see Andreani op. cit. 35.

[59] See UNCTAD *Report on Bills of Lading* (1971) 17 *et seq.*

[60] See generally, UNCTAD *Report on Shipping in the Seventies* (United Nations, New York, 1972).

[61] L. Andreani, op. cit. 21.

[62] For the structure and work of UNCITRAL, see C. M. Schmitthoff, "The Unification of the Law of International Trade" [1968] *J. Bus. L.* 105; Wilner, op. cit. 129; UNCITRAL *Yearbooks*

[63] UNCITRAL *Report of the Working Group* 1972 A/CN.9/63/Add 1, 6.

[64] UNCITRAL *Report of the Working Group* 1974 A/CN.9/88, 4.

Pursuant to deliberations by the Working Group and UNCITRAL plenary sessions, a drafting party was formed to prepare a Draft Convention to replace the *Hague-Visby Rules.* A Working Draft was produced in 1975, which has since been modified by the Ninth plenary session of UNCITRAL.[65] The Final Draft, as it is referred to in this text, will be submitted to a Conference of Plenipotentiaries for debate in 1978. It is therefore opportune to canvass some of the inadequacies of the *Hague Visby Rules,* and analyze some of the proposals for a convention which may govern world shipping trade at least until the turn of the next century.

In attempting such a review, I have divorced the issue of general average. Both the *Hague Rules* and the UNCITRAL proposals acknowledge the law of general average, although there is room to challenge the appropriateness of this, the oldest law in jurisprudence, to modern shipping. Broadly, general average applies where an intentional sacrifice is suffered, or expenditure incurred, to escape danger which threatens the common safety of a maritime adventure. The loss of expenditure does not lie where it falls but, being in the interests of all parties to the adventure, is distributed proportionally among them. It follows that if a general average situation arises it is not, nor will it be, governed by legislation governing carriers' liability.

Revision of the law relating to carriers' liability centres upon the distribution of risk and insurance cost between carriers and shipper. I propose to canvass selected issues associated with the *Hague-Visby Rules,* and evaluate the UNCITRAL proposals for a Draft Convention. To be successful, international legislation should pursue three objectives. One: the scope of the legislation must be comprehensive. That is to say the legislation must cast its parameters to embrace as wide a range of maritime transport as possible and minimise opportunities to evade the legislation. Two: the legislation must be suitably drafted to reduce diversity between nations and promote unification. Three: liability should be standardised to a satisfactory formula. Ideally, the most satisfactory formula is one which apportions risk to the mutual economic advantage of vested interests in preference to one which merely compromises the tension between polarized interests. It is to that third objective that this paper is directed.

B. STRUCTURE OF THE *HAGUE RULES*

The segmentation of common law liability germinated the distinction between an obligation (to supply a suitable vessel) which was within the personal competence of the carrier and a responsibility (for the conduct

[65] For an examination of the Drafts and the Working Party debates, see J. C. Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea" (1976) 7 *J.M.L.C.* 69, 327, 487, 615; (1977) 8 *J.M.L.C.* 167.

of master and crew at sea) over which he could exercise no supervision or control—a distinction adapted by the International Law Association and which found expression in the *Harter Act* and its progeny. Basically, the same distribution of risk is observed in the *Hague Rules*. Extracting from the Schedule to the *Sea-Carriage of Goods Act* 1924 (Cth), Article II of the *Hague Rules* provides that the carrier "shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth". Article III is then headed "Responsibilities and Liabilities" and Article IV "Rights and Immunities". However, the division is not as precise as the headings would indicate, and the apportionment of risk between carrier and merchant must be gleaned from the interaction of the two articles. The basic structure of liability is most conveniently classified under four categories.

Seaworthiness

The *Hague Rules* legislation rejected the absolute warranty of seaworthiness,[66] and substituted the *Harter Act* formula which requires the carrier to exercise "due diligence" or, as expressed in the French text of the Convention, *"diligence raisonnable"*. Given that "infinite shades of care and diligence" exist, the view has been expressed that national courts may apply different standards of care when administering the Rules.[67] Although judgments have used such contrasting tests as "the utmost care and diligence"[68] and "the reasonably careful man",[69] the verbal explanation of an abstract concept can be as illusory as a comparative analysis is unreliable, because in the end each judge will exercise his subjective assessment of the facts before him. Both American and English courts purport to construe "due diligence" uniformly and accord it the same meaning as was attributed under the *Harter Act*.[70] On both sides of the Atlantic, "due diligence" represents the ordinary standard of care expected from a skilled and competent man.[71] In both jurisdictions, the responsibility is personal to the carrier and he cannot escape it by delegating performance to a competent person[72] unless that person satisfies the

66 *Carriage of Goods by Sea Act* 1924 (U.K.) s. 2, 1971 (U.K.) s. 3; *Sea-Carriage of Goods Act* 1924 (Cth) s. 5.

67 See G. Alpa and F. Berlingieri, "Liability of the Carrier by Sea", in F. Berlingieri op. cit. 69, 73 *et seq.*

68 *Flint, Eddy & Co.* v. *Christall, The Irrawaddy* 171 U.S. 187, 192 (1897).

69 *Union of India* v. *N.V. Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223, 233.

70 *Riverstone Meat Co. Pty Ltd* v. *Lancashire Shipping Co. Ltd* [1961] A.C. 807, 850, 855, 869; *The Esso Providence* 1953 A.M.C. 1317, 1325. Cf. *Monarch Steamship Co. Ltd* v. *Karlshamns Oljefabriker A/B* [1949] A.C. 196, 230, 231.

71 *M.D.C. Ltd* v. *"Beursstraat"* [1962] 1 Lloyd's Rep. 180, 187; *Union of India* v. *N.V. Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223, 231, 235; *The Southwark* 191 U.S. 1, 15 (1903); *Oceanic Steam Navigation Co.* v. *Aitken* 196, U.S. 589, 596 (1905); *General Foods Corp.* v. *The Troubador* 98 F. Supp. 207, 210 (1951).

72 *Riverstone Meat Co. Pty Ltd* v. *Lancashire Shipping Ltd* [1961] A.C. 807; *The Leerdam* 1927 A.M.C. 509; *Artemis Maritime Co.* v. *Southwestern Sugar and Molasses Co.* 189 F. 2d 488 (1951).

required standard of care.[73] At the Diplomatic Conference in 1967, a suggested inclusion in the *Visby Rules* to protect the carrier from liability for the conduct of competent delegates was rejected. Like the usual objective standard of care, the obligation is relative to the circumstances. Consequently a charterer's responsibility depends upon the time available since he acquired access to the vessel.[74] And no doubt the obligation will vary in courts whose perception of skill and competence will be influenced by local standards of expertise, a factor which is often material to underwriters. The domestic law governing the dispute will be relevant in assessing the performance and discharge of the carrier's duty. For example, the *International Convention for the Safety of Life at Sea*[75] and the *International Convention on Load Lines*[76] both prescribe safety standards.

Article III rule 1 provides

"The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to—(a) make the ship seaworthy; (b) properly man, equip and supply the ship; and (c) make the holds, refrigerating and cool chambers and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation."

Article IV rule 1 states the obverse

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

The common law concept of seaworthiness was wide enough to embrace the duties expressed in all three paragraphs of the Rule[77] but, because the *Harter*-type legislation dissected the concept and restated its component duties,[78] there was a danger of interpreting the concept of seaworthiness in a narrow sense and the Rules advisedly amplified all facets of the

[73] *Union of India* v. *N.V. Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223. Cf. *Westfal-Larsen & Co. A/S* v. *C.S.R. Co. Ltd* [1960] N.S.W.R. 170; *The Brabant* [1967] 1 Q.B. 588.

[74] *Riverstone Meat Co. Pty Ltd* v. *Lancashire Shipping Co. Ltd* [1961] A.C. 807.

[75] See *Merchant Shipping (Safety Convention) Act* 1949 (U.K.) supplemented by *Merchant Shipping Act* 1964 (U.K.); *Navigation Act* 1912 (Cth) Part IV, Schedule VI.

[76] See *Merchant Shipping (Load Lines) Act* 1967 (U.K.); *Navigation Act* 1912 (Cth) Part IV, Schedule VII.

[77] Cf. *Elder, Dempster & Co. Ltd* v. *Paterson, Zochonis & Co. Ltd* [1924] A.C. 522, 539.

[78] *Harter Act* 1893 (U.S.) s. 2, cf. s. 3; *Sea-Carriage of Goods Act* 1904 (Cth) s. 5(b), cf. s. 8(1).

common law concept. Put at its simplest, seaworthiness demands a ship reasonably fit to carry the cargo safely on the voyage undertaken.[79] The many examples of seaworthiness[80] illustrate the breadth and importance of its application.[81] The ship must be tight, staunch, strong and reasonably fit to encounter the perils which may be expected on the voyage, having regard to the route, season and climatic conditions. It must be manned by a competent crew, supplied with adequate fuel, food and victuals and equipped with proper machinery, nautical instruments and navigational aids and charts. It must also be suitable for the stowage of the cargo.

At common law, the material time of seaworthiness is the commencement of the voyage,[82] a precept adopted by the *Hague Rules*. Under the early Australian legislation, terms of contract were void if they purported to relieve the carrier from obligations to make *"and keep"* the ship seaworthy,[83] yet the Act implied the warranty of seaworthiness only at the beginning of the voyage.[84] At the Brussels Conference, it was argued that the obligation should continue throughout the voyage, but the proposal was rejected on the grounds that the carrier could not be expected to maintain the vessel unless she lay in port under the carrier's control.[85] The existence of the time barrier renders the moment of commencement critical[86] and the interpretation of "voyage" essential. If the voyage is construed without reference to particular items of cargo, it is difficult to ascribe to it a beginning and conclusion. Consequently, the accepted meaning is the contractual voyage from the port of loading to the port of discharge as declared in the bill of lading at issue.[87] Yet this means that the obligation is confined to the initial port of loading of each independent piece of cargo, and does not extend to intermediate ports of call. At common law, the obligation of seaworthiness did not continuously run with the ship at sea, but the "doctrine of stages" did revive the obligation at the departure from each port in respect of each stage of the

[79] *Steel* v. *State Line Steamship Co.* (1877) 3 App. Cas. 72; *Hedley* v. *Pinkney & Sons Steamship Co. Ltd* [1894] A.C. 222; *The Silvia* 171 U.S. 462 (1898); *The Southwark* 191 U.S. 1 (1903).

[80] See R. Colinvaux, op. cit. 89-104; A. A. Mocatta & Ors., op. cit. 80-8; A. W. Knauth, op. cit. 185 *et seq.*

[81] For examples, see *The Ship "Maori King"* v. *Hughes* [1895] 2 Q.B. 550; *Elder Dempster & Co. Ltd* v. *Paterson, Zochonis & Co. Ltd* [1924] A.C. 522; *Standard Oil of New York Ltd* v. *Clan Line Steamers Ltd* [1924] A.C. 100; *Smith, Hogg & Co. Ltd* v. *Black Sea and Baltic Gen. Ins.* [1940] A.C. 997; *The Edwin I. Morrison* 153 U.S. 199 (1894); *Oxford Paper Co.* v. *The Nidarholm* 282 U.S. 681 (1930); *The West Kebar* 1945 A.M.C. 191; *The Esso Providence* 1953 A.M.C. 1317.

[82] *Maxine Footwear Co. Ltd* v. *Canadian Govt. Merchant Marine Ltd* [1959] A.C. 589; *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.* 181 U.S. 218 (1901).

[83] *Sea-Carriage of Goods Act* 1904 (Cth) s. 5(b) (emphasis added).

[84] Ibid. s. 8(1), (2).

[85] G. Alpa and F. Berlingieri, op. cit. 93.

[86] See *Whybrow & Co. Pty Ltd* v. *Howard Smith Co. Ltd* (1913) 17 C.L.R. 1; *Mississippi Shipping Co.* v. *Zander & Co.* 270 F. 2d 345 (1959).

[87] *The Makedonia* [1962] P. 190.

voyage.[88] It followed that the ship need only take on board sufficient fuel to complete the immediate leg of the voyage.[89] But the obligation under the Rules must be satisfied at the port of loading, and the carrier must therefore make satisfactory bunkering arrangements to see the vessel through its intermediate stages to the port of discharge.[90] And the cargo owner has no redress against the carrier for his failure to make a reasonable adjustment to the seaworthiness of the ship at an intermediate port unless the unseaworthiness could have been predicted before departure from the port of loading. Yet the cargo owner whose goods are loaded at that intermediate port would have recourse against the carrier in respect of what, for the intermediate cargo, is the beginning of the voyage.[91]

Carriage

Article III rule 2 provides that "the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried", thereby substituting fault liability for the strict liability of common law. The standard of responsibility set by this Rule originates from the *Harter Act* and derivative legislation which interchanged "properly" with "carefully". The conjunctive use of these words in the *Hague Rules* precipitated some judicial comment which suggests that "properly" connotes a sound or efficient system of work in addition to the care which is expected to a prudent carrier.[92] Any distinction between these words is unnecessary, as either would appear to represent an objective standard of care which embraces the use of a sound and efficient system. When read in conjunction with Article IV rule 2(p) and (q), the standard of care required of a carrier under this rule appears to the identical with the "due diligence" concept.

In contrast with rule 1, which both imposes a duty to perform and prescribes the standard of performance, rule 2 merely regulates the standard of performance of a duty contractually undertaken.[93] Rule 2 itself does not impose an obligation on the carrier to load, handle, stow, carry, keep, care for and discharge the cargo. It requires that, should the carrier undertake the performance of these services, he will execute them

[88] *The Vortigern* [1899] P. 140; *Northumbria Shipping Co. Ltd* v. *E. Timm & Son Ltd* [1939] A.C. 397. It is not clear to what extent the "doctrine of stages" has been absorbed by American jurisprudence. Compare *May* v. *Hamburg* 290 U.S. 333 (1933), *U.S.A.* v. *American Trading Co.* 1933 A.M.C. 1293 with *S.S. Steel Navigator* v. *Catz-American Co.* 1928 A.M.C. 388.

[89] Ibid. and see *The Willdomino* v. *Citro Chemical Co. of America* 272 U.S. 718 (1927).

[90] *The Makedonia* [1962] P. 190.

[91] See *Biccard* v. *Shepperd* (1861) 14 Moo P.C. 471.

[92] *G.H. Renton & Co.* v. *Palmyra Trading Corp.* [1957] A.C. 149, 166; *Albacora S.R.L.* v. *Westcott & Laurance Line* [1966] 2 Lloyd's Rep. 53, 58, 62, 64.

[93] *Chandris* v. *Isbrandtsen-Moller Co.* [1951] 1 K.B. 240; *G.H. Renton & Co. Ltd* v. *Palmyra Trading Corp.* [1957] A.C. 149; *Ismail* v. *Polish Ocean Lines* [1976] 1 All E.R. 902.

properly and carefully.[94] The carrier's duty to perform therefore derives from the contract of shipment. By definition, the carrier is contractually bound to perform the carriage bailment and therefore, by virtue of rule 2, obliged to do so properly and carefully. By not participating in stowage, he could in theory escape liability for negligent stowage; yet his disregard may render him liable under rule 1 where the negligent stowage amounts to unseaworthiness of the vessel,[95] a responsibility which derives from the legislative source. Once activated, rule 2 impose liability on the carrier personally irrespective of who is entrusted with the performance of a service on his behalf.[96]

Specific reference to delay is conspicuously absent from the *Hague Rules*,[97] yet the incidence of delay may result in financial loss to the cargo owner. Delay in the delivery of cargo may cause physical loss or damage to the goods where, for example, the cargo deteriorates through effluxion of time. In this sense, the cargo owner's redress is to pursue an action under rule 2 on the grounds that, given the carrier's knowledge of the nature of the cargo and in the other circumstances of the case, the carrier negligently performed the carriage. There is no reason to differentiate the effect of delay from any other loss or damage, the issue being whether the carrier is liable for its cause. Another adverse effect of delay is economic loss. The cargo may befall no physical harm, yet it may arrive too late for use by the importer, or too late to meet his contractual commitments, causing him loss of profits.[98] Here too, the cause of delay may constitute negligent carriage if a duty to prosecute the voyage within time limits can be established. And yet the topic of delay does illustrate some weaknesses, particularly as common causes of delay shade from negligent performance into non-performance.

One example of delay is misdelivery. In contrast with the *Harter*-type legislation, Article III rule 2 does not direct the carrier to properly deliver the cargo. The meaning generally attributed to "discharge" *("décharg-ment")* denotes unloading and not delivery of the cargo.[99] No redress is available for the mis-delivery or non-delivery of cargo under the *Hague Rules* unless it can be construed as a negligent means of carriage, or a negligent means of unloading, which demonstrates the delicate distinction

[94] *Pyrene Co. Ltd* v. *Scindia Navigation Co. Ltd* [1954] 2 Q.B. 402, 417-8; *Ismail* v. *Polish Ocean Lines* [1976] 1 All E.R. 902.

[95] *Elder, Dempster & Co. Ltd* v. *Paterson, Zochonis & Co. Ltd* [1924] A.C. 522; *Knott* v. *Botany Worsted Mills* 179 U.S. 69 (1900).

[96] *International Packers Ltd* v. *Ocean Steamship Co. Ltd* [1955] 2 Lloyd's Rep. 218, 236; *The Ocean Liberty* 1952 A.M.C. 1681.

[97] See the *Uniform Law an International Sale of Goods*, Arts. 26-9.

[98] On which see *Adamastos Shipping Co. Ltd* v. *Anglo-Saxon Petroleum Co. Ltd* [1959] A.C. 133; *Koufos* v. *Czarnikow* [1969] 1 A.C. 350; *U.S.* v. *Palmer & Parker Co.* 61 F. 2d 455 (1932); *The Caledonia* 157 U.S. 124 (1895).

[99] *Albacora S.R.L.* v. *Westcott & Laurance Line* [1966] 2 Lloyd's Rep. 53, 64; *Hoegh* v. *Green Truck Sales Inc.* 298 F. 2d 240 (1962); *Milikowsky Bros* v. *Kampman's Bevrachtingsbedrijf* 1969 A.M.C. 111.

between non-performance and a negligent means of performance. The cargo owner may sue the carrier on the contract but this takes him outside the Rules and into the realm where, in some jurisdictions, the carrier may contractually exculpate himself from liability. And the outcome may turn on whether his contractual relief is identified as an exemption clause or is framed as a term of performance.[100] This illustrates the conceptual problems inherent in rule 2 of failing to prescribe duties, of relating non-performance to negligent performance, and of applying objective duties of care relative to the terms of the contract.

Exemptions

Article IV rule 2 comprises a catalogue of exceptions from liability introduced by the prefatory sentence: "neither the carrier nor ship shall be responsible for loss or damage arising or resulting from . . .". Except in the United States legislation,[101] the general responsibilities of the carrier under Article III rule 2 are expressed to be subject to the enumerated exemptions. However, in those exemptions where fault is not expressly condoned, the carrier's negligence may counteract the excepted defence.[102] The obligations of seaworthiness under Article III rule 1 are said to override the exemptions.[103] The exercise of due diligence, therefore, is judicially regarded as a condition precedent to the carrier's reliance on an excepted item, as was the legislative scheme under the *Harter*-type legislation.[104] The contents of the exemptions reflect the divisions of risk formulated in the 19th century and incorporated in the *Harter* legislation.

Items (i) and (m)-(o)[105] exonerate the carrier from causes within the responsibility of the shipper. Exemption (i) is expressed to depend upon the fault of the shipper. Others place the loss on the cargo owner irrespective of fault. These items are superfluous in that the carrier's liability simply turns on the presence or absence of fault, whatever the specific nature of the cause. Damage caused by the inherent vice of the

[100] See C. W. O'Hare, "The Hague Rules Revised" (1976) 10 *M.U.L.R.* 527, 551-2.

[101] *Carriage of Goods by Sea Act* 1936 (U.S.) s. 3(2) omits the prefatory qualification contained in the Convention and the British and Australian legislation.

[102] *The Nichiyo Maru* 89 F. 2d 539 (1937); *Levatino Co.* v. *American President Lines Ltd* 337 F. 2d 729 (1964).

[103] *Maxine Footwear Co. Ltd* v. *Canadian Govt. Merchant Marine Ltd* [1959] A.C. 589; *Smith Hogg & Co. Ltd* v. *Black Sea and Baltic Inc. Co.* [1940] A.C. 997; *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.* 1940 A.M.C. 670; *Wessels* v. *S.S. Asturias* 1941 A.M.C. 761, 1942 A.M.C. 360; *Asbestos Corp. Ltd.* v. *Compagnie de Navigation* 1973 A.M.C. 1683.

[104] *Harter Act* 1893 (U.S.) s. 3; *Sea-Carriage of Goods Act* 1904 (Cth) s. 8. Unlike *May* v. *Hamburg* 290 U.S. 333 (1933) however, there must be a causal connection between the unseaworthiness and the loss or damage in order to abrogate the exception.

[105] (i) act or omission of the shipper or owner of the goods, his agent or representative; (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; (n) insufficiency of packing; (o) insufficiency or inadequacy of marks. See, for example, *Albacora S.R.L.* v. *Westcott & Laurance Line* [1966] 2 Lloyd's Rep. 53; *Jahn* v. *Turnbull Scott Shipping Co. Ltd* [1967] 1 Lloyd's Rep. 1; *The Nagisan Maru* 14 F. Supp. 1010 (1936).

cargo or insufficient packing, for example, merely accentuates the freedom from fault on the part of the carrier unless, in the course of carriage, he fails to meet the standards expected of him in the light of known cargo characteristics. A receipt issued by the carrier may, under Article III rule 5 or other legislation, preclude the carrier from raising insufficiency of packing and inadequacy of marks as a defence.[106] Item (p)[107] is both ambiguous and superfluous. If confined to latent defects in the ship, the item duplicates liability for seaworthiness. If intended to apply to shore installations, it raises questions about the nature of the carrier's liability.

Exemption (1),[108] supported by rule 4, is an important instance of justified deviation which should be treated in that context. Items (e)-(h), (j) and (k)[109] encompass damage and loss caused by the intervention of third parties. All give rise to difficulties in construction which are quite unnecessary if they are merely examples of non-fault situations for which the carrier would not be liable under the amorphous principle of liability. Exemptions (c)[110] and (d)[111] likewise reflect the absence of fault on the part of the carrier. These items must be reconciled with the carrier's responsibilities for seaworthiness which require him to prepare the ship to meet reasonably foreseeable situations which could endanger the cargo. To qualify for exemption, some jurisdictions require that the cause be unavoidable only, others that it be both unavoidable and unforeseeable.[112]

Items (a) and (b)[113] are the most controversial in the catalogue because they conflict with the basic concept of carriers' liability for fault.

106 *Silver* v. *Ocean Steamship Co.* [1930] 1 K.B. 416.

107 (p) latent defects not discoverable by due diligence. See, for example, *Corporacion Argentina* v. *Royal Mail Lines* (1939) 64 Ll.L.Rep. 188; *The Tulsa* 63 F. Supp. 895 (1941).

108 (l) saving or attempting to save life or property at sea.

109 (e) act of war; (f) act of public enemies; (g) arrest or restraint of princes, rulers or people, or seizure under legal process; (h) quarantine restrictions; (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general; (k) riots and civil commotions. See for example *Liverpool & London War Risks Ins. Assoc. Ltd* v. *S.S. Richard de Larrinaga* [1921] 2 A.C. 141; *J. Vermaas Scheepvaartbedrif* v. *Association Technique de L'Importation Charbonniere* [1966] 1 Lloyd's Rep. 583; *The Wildwood* 133 F. 2d 765 (1943); *General Foods Co.* v. *U.S.* 1952 A.M.C. 310. Note that the *Carriage of Goods by Sea Act* 1931 (U.S.) s. 4(2)(j) adds the proviso. "Provided that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts".

110 (c) perils, dangers and accidents of the sea or other navigable waters. See for example, *T. Wilson, Sons & Co.* v. *The Xantho* (1887) 12 App. Cas. 530; *Canada Rice Mills Ltd* v. *Union Marine & General Ins. Co. Ltd* [1941] A.C. 55; *The Rosalia* 264 F. 285 (1920); *J. Gerber & Co.* v. *The Sabine Howaldt* 1971 A.M.C. 539.

111 (d) act of God. See for example *Nugent* v. *Smith* (1876) 1 C.P.D. 423; *The Merchant Prince* [1892] P. 179; *Gans S.S. Line* v. *Wilhelmsen* 275 F. 254 (1921); *Levatino Co.* v. *American President Lines Ltd* 337 F. 2d 729 (1964).

112 Alpa and Berlingieri, op. cit. 129.

113 (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 priority of the carrier.

Item (a) creates concepts of management[114] and navigation[115] of the ship around which the carrier's immunity revolves. This leads to artificial distinctions between unseaworthiness and management of the ship[116] and between care of the cargo and management and navigation of the ship.[117] Item (a) is complementary to the ideology underlying the carrier's liability for unseaworthiness in Article III rule 1 in that the carrier is held accountable for matters within his personal control before the commencement of the voyage, but thereafter the management of the vessel ceases to be his responsibility. However, on occasions the fine distinction between these two categories encourages litigation which demands a delicate and often unrealistic distinction. For example, the need to differentiate between the two categories revives the distinction between negligent stowage incurred in the management of the ship and improper stowage which renders the ship unseaworthy.[118] Likewise, it is difficult to identify, let alone justify, the boundary between the carrier's responsibility to properly and carefully carry the cargo, and his immunity from the ship's mismanagement. For example, conduct at sea may be preceived as a negligent means of carrying the cargo, for which the carrier is responsible, or on the other hand an error in the management or navigation of the ship, for which he is not.[119] Item (a) also exposes the plight of the cargo owner in recouping his loss caused by collision of vessels. On the one hand, the master's fault contravenes the basic principle of liability under rule 2, yet on the other the carrier is immune from liability for the master's error in navigation. And, while the *International Regulations for the Prevention of Collision at Sea*[120] provide some criteria against which to evaluate the ship's conduct, the defence robs them of some incentive.

[114] *Gosse Millard* v. *Canadian Govt. Merchant Marine Ltd* [1929] A.C. 223; *Tojo Maru* v. *N.V. Bureau Wysmuller* [1972] A.C. 242; *Chubu Asahi Cotton Spinning Co. Ltd* v. *Tenos* (1968) 12 F.L.R. 291; *Compania General de Tabacos* v. *U.S.* 49 F. 2d 700 (1931).

[115] *The Cressington* [1891] P. 152; *The Southgate* [1893] P. 329; *The Marianne* 1938 A.M.C. 1327; *Director-General of India Supply Mission* v. *S.S. Janet Quinn* 335 F. Supp. 1329 (1971).

[116] *Minister of Food* v. *Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep. 265; *Commonwealth of Australia* v. *Burns Philp & Co. Ltd* (1946) 46 S.R. (N.S.W.) 307. Compare *The Silvia* 171 U.S. 462 (1898); *International Nav. Co.* v. *Farr & Bailey Mfg. Co.* 181 U.S. 218 (1901); *The Steel Navigator* 1928 A.M.C. 388; *The President Polk* 1930 A.M.C. 1358.

[117] *C.H. Smith & Sons* v. *P. & O. Steam Nav. Co.* (1938) 60 Ll.L.Rep. 419; *International Packers Ltd* v. *Ocean Steamship Co. Ltd* [1955] 2 Lloyd's Rep. 218; *Oceanic Steam Navigation Co.* v. *Aitken* 196 U.S. 589 (1905); *The Persiana* 185 F. 396 (1911).

[118] *Kopitoff* v. *Wilson* (1876) 1 Q.B.D. 377; *Elder, Dempster & Co. Ltd* v. *Paterson, Zochonis & Co. Ltd* [1924] A.C. 522; *Knott* v. *Botany Worsted Mills* 179 U.S. 69 (1900); *Alaska Native Industries Co-op. Assoc.* v. *U.S.A.* 206 F. Supp. 767 (1962).

[119] *Rowson* v. *Atlantic Transport Co. Ltd* [1903] 2 K.B. 666; *Foreman & Ellams Ltd* v. *Blackburn* [1928] 2 K.B. 60; *Andean Trading Co.* v. *Pacific Steam Navigation Co.* 263 F. 559 (1920); *The Vallescura* 1934 A.M.C. 1523.

[120] Annexed to the *International Convention for the Safety of Life at Sea* 1960, 1975.

If the latter is a successful defence, the cargo owner can recover nothing from the carrying vessel.[121]

Item (b),[122] which excuses the carrier from responsibility for fire unless caused by his personal fault or privity, has a counterpart in legislation extraneous to the *Hague Rules* in the United States,[123] United Kingdom and Australia.[124] The key words in item (b) are identical with the legislation operative in the British jurisdictions, and variation in language in the American statute seems to produce no conflict. Indeed, the *Carriage of Goods by Sea Act* 1936 expressly preserves the earlier legislation.[125] The fire statutes were instituted in the 19th century to protect the shipowner from the high danger of fire in wooden ships and the magnitude of damage which fire could cause in proportion to the few precautions which could be taken to prevent and control it.[126] This policy is questionable today. Furthermore it is artificial to impute personal fault to a corporate carrier.[127] Courts will deny the benefit of the exception to a corporate carrier where the fault lies with the directors of the company and with employees of executive and managerial rank,[128] but these vague formulations have done little to promote a concrete policy about the liability for independent contractors, the master and other employees. Referring to such expressions as "privity" and "knowledge", one commentator remarks that they "are phrases devoid of meaning . . . empty containers into which the courts are free to pour whatever content they will".[129] And yet the failure to provide a proper system of work for employees need not of itself render the carrier personally liable.[130] This

121 Where the cargo owner can recover only portion of his total loss from each of the colliding vessels in proportion to their contributory negligence, the *Hague Rules* deny recovery of that proportion for which the carrying vessel would have been liable, see *Navigation Act* 1912 (Cth) s. 259; *Maritime Convention Act* 1911 (U.K.) s. 1; *U.S.* v. *Reliable Transfer Co.* 421 U.S. 397 (1975). Indeed, as the contributory fault of the carrying vessel increases so the total compensation recoverable by the plaintiff declines.

122 *Maxine Footwear Co. Ltd* v. *Canadian Govt. Merchant Marine Ltd* [1959] A.C. 589; *Royal Exchange Ass.* v. *Kingsley Nav. Co. Ltd* [1923] A.C. 235; *Earle & Stoddart Inc.* v. *Ellerman's Wilson Line* 287 U.S. 420 (1932); *Consumers Import Co.* v. *Kabushiki Kaisha* 320 U.S. 249 (1943).

123 *Limitation of Liability Act* (1851) 46 U.S.C. s. 182 (known as the *Fire Statute*).

124 *Merchant Shipping Act* 1894 (U.K.) s. 502.

125 Section 8. See *Asbestos Corp.* v. *Compagnie de Navigation Fraissinet* 1973 A.M.C. 1683.

126 *Merchant Shipping Acts* 1854, 1894 (U.K.). *The Fire Statute* 1851 (U.S.) was passed following *New Jersey Steam Nav. Co.* v. *The Merchants' Bank of Boston* 47 U.S. 344 (1848).

127 *Lennard's Carrying Co. Ltd* v. *Asiatic Petroleum Co. Ltd* [1915] A.C. 705, 713; *Coryell* v. *Phipps* 317 U.S. 406, 410-1 (1943).

128 *The Yarmouth* [1909] P. 293; *The Lady Gwendolen* [1965] P. 294; *Rederij Groen* v. *The England* [1973] 1 Lloyd's Rep. 373; *The Pocone* 1947 A.M.C. 306; *American Tobacco Co.* v. *Katingo Hadjipatera* 1949 A.M.C. 49, 1951 A.M.C. 1933; *The Black Gull* 1958 A.M.C. 277.

129 G. Gilmore and C. L. Black, *The Law of Admiralty* (2nd ed., New York: Foundation Press, 1975) 877.

130 *The Truculent* [1952] P. 1; *Beauchamp* v. *Turrell* [1952] 2 Q.B. 207; *Everard & Sons* v. *London & Thames Haven Oil Wharves Ltd* [1961] 2 Lloyd's Rep. 117.

item, too, necessitates complex investigation into the cause of fire in order to reconcile the conflicting categories of care in carriage and immunity from loss caused by fire.

Item (q)[131] is the catch-all exemption which reinforces the fault/no fault division of liability implemented by the Act. It is by no means uniformly administered, as some jurisdictions recognise the specific exemptions (a) to (p) as absolute defences. Others implement them as defences only to the extent that the carrier's negligence did not contribute to the existence of the cause or aggravate the damage.

Burden of Proof

Criticism has been levelled at the *Rules'* burden of proof mechanism, both because it lacks uniform directives and because in some jurisdictions it is prejudicial to the merchant plaintiff. Disharmony between jurisdictions in the prosecution of claims is a serious obstacle to the international currency of dispute settlement and, worse, an inequitable rule of procedure may well distort the theoretical allocation of substantive liability.

For the merchant plaintiff to succeed, the carrier must be held responsible for loss or damage under Article III rule 1 or 2. It would be an extremely onerous burden on the plaintiff to prove the carrier's negligence under these rules when he has little opportunity to investigate and explain the cause of loss of or damage to the cargo. Consequently, English,[132] American[133] and Australian[134] systems acknowledge a prima facie case against the carrier when the plaintiff proves the loss or damage and proves that it occurred while the carrier was responsible for the cargo. This in itself can be a difficult exercise if no bill of lading issues. But should the plaintiff hold a bill of lading testifying to the carrier's receipt of cargo in good order and condition, the onus will shift to the carrier to rebut the case.

Article IV rule 1 stipulates that the burden rests with the carrier to prove that he exercised due diligence in the preparation of the vessel. Yet it does not indicate on whom lies the onus of proving that unseaworthiness was the cause of loss or damage, which is a logical prerequisite to the carrier's proving his lack of fault. Article IV rule 2(q) specifically requires

[131] (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 exemption 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.

[132] *Gosse Millard Ltd* v. *Canadian Government Merchant Marine Ltd* [1929] A.C. 223, 234; *Dent* v. *Glen Line Ltd* (1940) 67 Ll.L.Rep. 72, 78; *The Glendarroch* [1894] P. 226, 233.

[133] *The Medea* 179 F. 781 (1910); *Schnell* v. *S.S. Vallescura* 293 U.S. 296 (1934); *American Tobacco Co.* v. *The Katingo Hadjipatera* 1949 A.M.C. 49, 57; *General Foods Corp.* v. *The Troubador* 1951 A.M.C. 662, 664.

[134] *Chubu Asahi Cotton Spinning Co. Ltd* v. *Tenos* (1968) 12 F.L.R. 291, 293.

the carrier to disprove his fault in respect of any cause of loss or damage other than those enumerated in the catalogue of exemptions. This, too, begs the question of who bears the onus of establishing the cause which invokes the particular rule. Since the onus now lies on the carrier, if he is to mount a defence under either of these rules, he must first establish the cause which brings him under them in order to assert his innocence. The carrier therefore must allege unseaworthiness[135] and plead his due diligence, or allege a cause (other than one excepted under items (a) to (p)) and affirmatively show the freedom from fault on his part and the part of his servants and agents.[136] At this point, any semblance of unanimity expires, as controversy surrounds the third possible and more likely defence on which the carrier may rely—the items (a) to (p) in Article IV rule 2.

The burden of alleging and proving causation exempted by items (a) to (p) lies with the carrier. Yet, having succeeded in this, the carrier may yet be liable if his negligence contributed to the exempt cause. This may arise in one of two ways. The unseaworthiness of the ship may have concurred in the cause of items (a) to (p) (although unlikely in items (e) to (h), (j), (b), (o)), or the carrier's negligence may have contributed to the occurrence of items (b) to (p). In the Anglo-American systems, although it is by no means universal, items (c) to (o) are not absolute defences but are effective only to the extent that negligence is absent. The contentious issue is whether the onus of proving unseaworthiness as a concurrent cause or the carrier's negligence as a contributing factor remains with the carrier to negative or reverts to the plaintiff to affirm. With the possible exception of items (c), (d) and (p) in which jurisprudence views the absence of negligence as an intrinsic component to be satisfied by the carrier,[137] the American scholars[138] suggest that the onus reverts to the plaintiff.[139] English commentators[140] also incline to the view that the plaintiff must prove the affirmative, citing conflicting and confusing[141] judicial authorities, some of which suggest the onus rests

[135] Cf. cases cited fn. 144 infra.

[136] *Herald Weekly Times Ltd* v. *New Zealand Shipping Co. Ltd* (1947) 80 Ll.L.Rep. 596; *The Vizeaya* 1946 A.M.C. 469; *Copco Steel and Engineering Co.* v. *The Prins Frederik Hendrik* 1955 A.M.C. 2052; *Chubu Asahi Cotton Spinning Co. Ltd* v. *Tenos* (1968) 12 F.L.R. 291.

[137] *The Lady Drake* 1937 A.M.C. 290; *Levatino Co.* v. *American President Lines* 337 F. 2d 729 (1964); *Waterman Steamship Co.* v. *U.S. Smelting Refining & Mining Co.* 155 F. 2d 687 (1946); *The Tulsa* 63 F. Supp. 895 (1941).

[138] G. Gilmore and C. L. Black, *The Law of Admiralty* (1975) 183-5; A. W. Knauth, *Ocean Bills of Lading* (1953), 193-6; 227-9; cf. W. Tetley, *Marine Cargo Claims* (Toronto: Carswell, 1965) 35, 93-5.

[139] *Pettinos* v. *American Export Lines* 1946 A.M.C. 1252, 1253; *Wessels* v. *S.S. Asturias* 1941 A.M.C. 761, 1942 A.M.C. 360; *The Southern Cross* 1940 A.M.C. 59; *Schnell* v. *S.S. Vallescura* 293 U.S. 296 (1934); *The Maui* 1949 A.M.C. 1299.

[140] R. Colinvaux, op. cit. 232-3; A. A. Mocatta and Ors., op. cit. 439.

[141] See *Blackwood Hodge (India) Private Ltd* v. *Ellerman Lines Ltd* [1963] 1 Lloyd's Rep. 454, 456.

with the carrier,[142] others indicating that the plaintiff must assume the burden.[143]

The majority approach leads to incongruities. On the issue of unseaworthiness, Article 4 rule 1 requires the carrier to prove his freedom from fault, yet the plaintiff must assert and prove unseaworthiness as a causation, a task which he may be in no position to do. Indeed, it demands of the plaintiff proof in rejoinder of a causation[144] which, if pleaded as an original defence, should rest with the carrier. Furthermore, if the affirmative axiom is consistently applied to item (p), the burden would revert to the plaintiff to prove the carrier's want of due diligence which is a back-door avenue of reversing the burden laid down in Article IV rule 1 on latent defects of unseaworthiness.[145] On the issue of negligence in rejoinder, the majority view should impose on the plaintiff the onus of proving the carrier's negligence. Yet this is the very burden which Article IV rule 1 and rule 2(q) explicitly reversed for all other causes, because of the difficulty it placed on a plaintiff who is inaccessible to evidence of the carrier's conduct. Moreover, the application of the affirmative principle to item (b), favoured in the United States,[146] would place an intolerable burden on the plaintiff to prove the actual fault or privity of the carrier, an onus which in English law would appear to rest with the carrier to negative,[147] and which indeed, under American limitations legislation, appears to reside with the carrier.[148]

At its lowest level, the present mechanism is cumbersome and promotes prolixity in pleadings. Whatever the theory be, the realities are that the plaintiff must assert and adduce evidence in his case of the causation and perhaps the carrier's negligence, if he is to meet a formal defence or establish a case in rejoinder. Except in the instance where the carrier has no explanation whatever for the cause of loss or damage, the party in the

142 *F.C. Bradley & Sons Ltd* v. *Federal Steam Navigation Co. Ltd* (1927) 27 Ll.L. Rep. 395, 396; *Paterson Steamships Ltd* v. *Canadian Co-operative Wheat Producers Ltd* [1934] A.C. 538, 545; *Svenska Traktor Aktiebolaget* v. *Maritime Agencies [Southampton] Ltd* [1953] 2 Q.B. 295, 303.

143 *The Glendarroch* [1894] P. 226; *S.S. Matheos* v. *Louis Dreyfus & Co.* [1925] A.C. 654, 666; *Joseph Constantine Steamship Line* v. *Imperial Smelting Corp. Ltd* [1942] A.C. 154, 164; *Jahn* v. *Turnbull Scott Shipping Co. Ltd* [1967] 1 Lloyd's Rep. 1, 8.

144 *Lindsay* v. *Klein* [1911] A.C. 194; *Hiram Walker & Sons Ltd* v. *Dover Navigation Co.* (1950) 83 Ll.L.Rep. 84, 89; *Minister of Food* v. *Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep. 265, 271; *Federazione Italiana* v. *Mandask Compania de Vapores* 1968 A.M.C. 315, 318; *The Maui* 1940 A.M.C. 1299.

145 *Corporacion Argentina* v. *Royal Mail Lines Ltd* (1939) 64 Ll.L.Rep. 188; *The Tulsa* 63 F. Supp. 895 (1941).

146 *The Rio Gualeguay* 1953 A.M.C. 1348; *The Shell Bar* 1955 A.M.C. 1429.

147 *Royal Exchange Ass.* v. *Kingsley Navigation Co. Ltd* [1923] A.C. 235. Under the *Merchant Shipping Act* 1894, s. 502 see *Asiatic Petroleum Co. Ltd* v. *Lennard's Carrying Co. Ltd* [1914] 1 K.B. 419; *Koninklijke Rotterdamsche Lloyd N.V.* v. *Western Steamship Co. Ltd* [1957] A.C. 386, 402; *The Dayspring* [1968] 2 Lloyd's Rep. 204.

148 *Coryell* v. *Phipps* 317 U.S. 406, 409 (1943); *The Arthur N. Herron* 235 F. 2d 618 (1956).

less opportune position must bear a significant burden of proof. Consequently, the effective apportionment of risks is constrained by the administration of claims, and the uniformity of the *Rules* suffers from the diversity of procedures.

C. COMMERCIAL FRAMEWORK

The foregoing outlines the basic structure of liability under the *Hague Rules* against which the UNCITRAL reforms can be compared. To understand and appraise the Draft Convention it is necessary to make a brief excursus into a number of influential policy considerations and the role played by the marine insurance industry.

Insurance

Just as England nurtured the insurance industry, so it pioneered the protection and indemnity clubs now operating in the major commercial centres.[149] In the 19th century, shipowners formed mutual associations to supplement their conventional insurance. By maintaining a mutual fund, shipowners were able to spread among all members losses and expenses which were not reimbursed under conventional hull policies. Legislation in the United Kingdom[150] and Australia[151] accommodates associations of members who mutually agree to insure one another. Even in those organisations whose size of membership compels them to incorporate, the notion of mutuality remains a feature of their commercial structure and operations. By contrast with conventional insurance which fixes a premium for particular risks, the p. & i. associations found it cheaper and more convenient to make annual calls on members to contribute to a common fund. The call on each member is based on the gross registered tonnage of his ships covered by the scheme. Members' claims are then subject to a loading or deductible which is the portion of risk carried by each member himself.

Mutual associations were first formed to cover the "protection class" of risks. The hull policy had been designed to indemnify the shipowner from damage to his ship caused by perils of the sea. As traffic and the prospects of collision between vessels increased, shipowners had to contend with the courts' view that the insured's liability for collision was not a peril of the sea and therefore irrecoverable from his insurer.[152] The "indemnity class" association was established to cover shipowners' liability for cargo loss and damage rendered unpredictable by the vicissitudes of exemption

149 See generally, UNCTAD (Draft) *Report on Marine Cargo Insurance.*
150 *Marine Insurance Act,* 1906, s. 85.
151 *Marine Insurance Act,* 1909, s. 91.
152 *De Vaux* v. *Salvador* (1836) 4 A & E 420; *General Mutual Ins. Co.* v. *Sherwood* 55 U.S. 352 (1852). Insurers were not liable for damages payable by the insured at fault to a colliding vessel.

clauses. Although today conventional "all risks" and "extended liability" policies bridge the gap between insurance cover and legal liability, p. & i. clubs continue to render valuable services to shipowners by carrying the excesses of liability above members' deductibles, by covering expenses in excess of claims recoverable under conventional policies, by providing advice and service to members and frequently underwriting the expenses of litigation and arbitration and the cost of strike delays. Carriers' liability for cargo may be covered by conventional insurance and/or p. & i. clubs; however, major lines usually rely upon p. & i. clubs exclusively.

The cargo owner generally arranges conventional insurance to indemnify his cargo losses.[153] The form of cover may be confined to a single shipment, or arrangements may be made for a floating policy or open cover. The floating policy is issued for a gross sum insured which is reduced by the value of each shipment made. Open cover provides a time interval during which shipments are insured at a fixed scale of premium charges. Whatever its form, the cost of insurance will vary according to the risks covered and actuarial factors which may take into account the class of the ship, the mode of transit, the nature of the cargo, the nationality and expertise of the crew and the insured's loss record. The cargo owner arranges insurance cover for any number of reasons. It is more convenient to him to recoup his investment speedily from the insurer than pursue dilatory litigation against the carrier. Even arbitration can be cumbersome and costly at an international level. The underwriter is in a better position to handle the claim and bring or settle action against the carrier because he has access to investigators, loss assessors and technical information. Determining fault can be an extremely difficult task, particularly where there is no overt incident which could have caused loss and damage. This particular feature of container cargo causes difficulties in apportioning liability between the various handlers of containers in a combined transport operation. The cargo owner also needs to protect his investment from loss which is irrecoverable from the carrier, including his contribution to the general average. And it may be that he needs cover in excess of the maximum amount for which the carrier is liable. Another advantage of insuring is to protect cargo during transport phases where the carrier is not himself liable, and this is frequently done by obtaining cover from door to door or warehouse to warehouse. In addition, the insurance policy has become an integral part of the sales and finance documentation, and is therefore necessary to the merchant in order to obtain finance. The carrier requires insurance cover to protect him from liability which, despite limitations on its quantum, can amount to a sizeable sum. In addition, he derives advantages similar to the cargo owner in having claims processed by a professional organisation.

[153] See UNCTAD *Report on Marine Cargo Insurance.*

Broadly, the liability of a carrier is initially covered by p. & i. clubs which are concentrated overseas, particularly in the United Kingdom. Cargo cover is more widely diversified in domestic markets. In Australia, it is estimated that approximately half of the marine underwriters operating in Australia are Australian companies. The total cargo insurance premium income to Australia is increasing from the 1974-75 figure of $50 million, of which 70% is attributed to import trade and 30% to export insurance.[154]

In the commercial setting of international transport, legal liability and insurance are complementary to one another, and any attempt to settle a code of liability should by synchronized with the availability of insurance. The motivation of shipowners to exonerate themselves from liability was partly attributable to their inability to secure reliable insurance cover or, at least, to secure it at a cost which was not disproportionate to viable freight rates. When liability was standardized, the legislative exemptions offered to shipowners broadly reflected the risks which were not covered by underwriters or for which the premium was prohibitive. One advantage of standardized liability is that it stabilizes the insurance risk and the quantum of liability. Indeed, p. & i. club rules tend to restrict their cover to the liability which would be incurred under the *Hague Rules*. This is turn provides incentive to shipowners to observe the Rules and conduct their operations accordingly.

Policy Considerations

A report prepared for UNCITRAL examined the economic merits of legal liability ranging from carriers' absolute liability through a spectrum from apportioned liability to merchants' absolute liability.[155] In order to compose a formula of liability to the parties' mutual benefit, the report assessed the impact of liability upon the cost of insurance, the safety of cargo and the cost of litigation.

First, the report considered measures which could be taken to eliminate unproductive insurance costs.[156] It canvassed the issue that if cargo insurance indemnifies the cargo owner from loss, and the carrier's cover protects him from legal liability in respect of that same loss, then insurance costs may be unnecessarily duplicated. It would be to the parties' advantage if risk could be adjusted between them to reduce the aggregate cost of insurance cover. However, the report concluded that in an efficient economic system the readjustment of liability between carrier and merchant would produce no significant decrease in the combined cost

154 Attorney-General's Dept., *International Trade Law Meeting* (1977) 321-2.
155 Ibid. 292.
156 UNCTAD Report on Marine Cargo Insurance; J. E. Bannister, "Containerisation and Marine Insurance" (1974) 5 *J.M.L.C.* 463; A. E. Rossmere, "Cargo Insurance and Carrier's Liability: A New Approach" (1975) 6 *J.M.L.C.* 425.

of insurance. In recouping his loss, the cargo owner's claim will be paid by one or other of the insurers or divided between them, but certainly both insurers cannot each be liable for the total loss. Therefore, when insurers construct their rates, they do so not in anticipation of each being liable for the total loss, but rather on the proportion of the loss that each will bear. It follows that, although both insurers appear to cover the same risk, the insurance cost relative to that risk is not duplicated but is represented by the aggregate cost. Moreover, the respective rates should be inversely proportional. For example, if the carrier's liability were to increase, his increased insurance contribution would be offset by the commensurate reduction in the cargo owner's insurance reflecting his diminished liability. The adjustment may suffer from a time lag while the insurers adapt to the re-arranged liability, but one would expect the cargo insurer to pursue more claims and recover larger amounts from the carrier's insurer, consequentially increasing p. & i. calls and decreasing cargo premiums. In turn, the carrier would recoup his additional cost by increasing freight rates which would restore parties to their original position. Of course, there may be a discrepancy between actual calculations and the theoretical model, but as a matter of principle there is no cost advantage in juggling liability unless the aggregate insurance cost is decreased by other measures. In one respect the dual insurance of carrier and cargo owner does duplicate costs. That portion of charges which is notionally attributed to the insurer's sales, management and administrative costs would reduce the aggregate cost if confined to one insurer. A scheme along these lines has been proposed by shipping lines to rationalise the division of risk in multimodal container traffic.[157] One indivisible policy covering all risks throughout the door to door operation would replace separate cover for carrier's liability and cargo indemnity in each of the sectional phases of the operation.

The second area relevant to the division of legal liability is the fortification of economic safety standards. In the words of the UNCITRAL report, "the allocation of risks should be arranged to encourage the carrier to set and maintain an optimum standard of care". The carrier's incentive to reduce the incidence of cargo loss and damage derives from competition between shipowners to attract shippers' business. A decline in standards will force the carrier to increase his freight rates either directly, because he himself bears the loss, or indirectly through increased insurance contributions. Wherever the line is drawn to divide risk between carrier and merchant, a carrier will operate economically if the savings exceed the expenditure incurred to meet his standard of responsibility. It does not follow that the higher the standard of liability on the carrier the more economic the standard of safety will be. The higher standard of

[157] UNCITRAL (1972) III Yearbook 291.

responsibility should produce a lower level of cargo loss and damage, but so will it generate a greater expenditure of funds on safety devices and systems. The optimum standard is achieved when the savings exceed the expenditure incurred to produce those savings. It is necessary, then, to assess the division of responsibility most likely to promote the optimum standard of safety.

The third economic zone in which liability has a direct bearing is in the cost of administering claims. The report urges the reduction of friction, that is the cost of investigation, negotiation, arbitration and litigation of claims.[158] Directly or through insurance, these expenses affect the cost borne by parties. Friction is decreased by reducing the incidence of cargo damage and loss, and also by the implementation of a uniform and comprehensive code of liability which allows little room for dispute, not only in legal principle but also in the necessity for fact finding exercises.

The most appropriate formula for liability is one which supports these economic objectives, thereby maintaining low structural insurance costs, optimum safety standards and low friction. In the light of these objectives, we may proceed to consider the most effective solution to legal liability under the proposed Convention.

One extreme possibility is for the shipper to bear the loss or damage to cargo. The advantage of this solution is to place insurance arrangements entirely at his disposal and remove friction by eliminating recourse against the carrier. However, its disadvantages far outweigh the cost savings. If the carrier were immune from responsibility, his safety standards could decline, his claims record deteriorate, and the safety element in his freight rates would cease to be competitive. The shipper's insurance costs would escalate to prohibitive dimensions and exclude risks which would leave the shipper bereft of recourse against insurer and carrier. The severity of this proposal could be mitigated by imposing liability on the carrier for intentional acts of omission or damage, but then the cost of friction is reintroduced and the single insurance arrangement defeated.

At the other extreme, the carrier could bear the absolute liability. The major risks being with the competence of the carrier, he is placed in a better position to maximize safety standards relative to expenditure, and he has the incentive of competition to do so. At first blush, this solution appears to promote a single insurance arrangement and eliminate friction between the parties. However, it has been argued that merchants would continue to arrange double insurance to retain its practical advantages. This argument is more valid for a consignee who buys F.O.B. rather than one who buys C.I.F., because the latter's contact with an insurer appointed by the shipper may be no more accessible than one nominated by the

[158] Ibid. 294.

carrier. More importantly, the merchant may require insurance to cover risks uninsured by the carrier's extended cover or, as a safeguard against an insolvent carrier failing to procure insurance at all. Furthermore, both the *Hague Rules* and domestic legislation impose maximum limitations on the amount for which the carrier is liable. If limits are maintained, the owner may be disposed to protect the excess value of his cargo by private insurance. Under present insurance concepts he can do this safely only by insuring to the full value, or the principle of particular average may reduce his claim. If the quantum limits are deleted it is unlikely that p. & i. clubs could continue to absorb the members' unlimited liability. As a result, conventional insurance would replace p. & i. cover and the aggregate insurance cost would increase to underwrite the formidable liability of the carrier for each voyage. Alternatively, it has been argued that absolute carriers' liability would tend to obscure fault from non-fault damage and the actuarial risk would be spread among all p. & i. club members. The importance of individual ratings would decline, and with it the incentive to maintain standards of care. Nor could the present level of insurance absorb damage or loss caused by the shipper's lack of responsibility, for example in packing the cargo.

The most feasible solution is to apportion risks amongst the parties, but to divide the spectrum of risks so as to extract maximum economic benefits. At one end of the spectrum lies the risk of loss and damage caused by the fault of the shipper and at the other extremity the intentional and negligent conduct of the carrier and his employees. In between are gradations of causes due to the fault of intermediaries, third parties and fortuitous accidents. As an incentive to prevent loss and damage to cargo and to keep friction and insurance costs as low as possible, there is good reason to hold parties responsible for their respective fault, as the existing *Hague Rules* do. However, within those extremities UNCITRAL has challenged the line of division drawn by the present Rules. As matters stand, a cargo owner bears losses caused by the fault of the carrier's employees in the management and navigation of the ship and in respect of fire as well as fortuitous accident. Apart from factors associated with the shipper's business such as inherent vice of the cargo, insufficiency of packing and the like, there are legal advantages in shifting the line of division towards the strict liability of the carriers.

In so far as there is no increase in aggregate insurance costs, the UNCITRAL report argues that the initial increase in carrier's costs and freight rates is counterbalanced by the reduction in cargo insurance. The closer responsibility moves towards strict liability, so the incentive for the carrier to maintain economic safety standards increases, and so investigation into causation diminishes. On the other hand, it has been argued that the increase in insurance costs and freight rates would in fact exceed the reduction of cargo insurance costs,[159] and the additional claims

[159] UNCITRAL (1973) IV Yearbook 140 fn. 14.

processed by cargo insurers against the carrier and his underwriter would aggravate friction costs. Certainly, the cost of enquiry into the cause of loss or damage cannot be eradicated in situations where it may have arisen as a result of either carrier's or shipper's liability, for example in the case of fire. Consequently, there has been no serious suggestion that the carrier's responsibility be extended to fault-free incidents from which he is presently exempt, notwithstanding that they lie within the ambit of his professional concern, just as the shipper bears responsibility for his business association with the cargo irrespective of his fault. The debate centres upon the advisability of rendering the carrier liable for the fault of his servants in the navigation and management of the ship and their responsibility for fire. The experience of other conventions has been that the carrier can absorb this added responsibility and indeed should do so, not only for the policy reason that he should be liable for the wrongs of his employees in the course of his business, but also that he is in a better position than the merchant to administer the most economic systems of safety.

Against the UNCITRAL line of reasoning a counter-argument has been put in the context of Australian trade. Both arguments agree that the *Hague Rules* need to be overhauled to correct legal anomalies and improve the settlement of international trade disputes. The conflict centres on the shift of carriers' liability to encompass errors in navigation. This policy proposal must be justified on economic grounds and the counter-argument contends that even if the UNCITRAL proposals do benefit trade on a global scale (and this is by no means clear), it may be to the disadvantage of Australian trade. The effect of the UNCITRAL proposal is to redistribute some of the insurance risk presently covered by cargo insurance to the carrier and his insurers. Consequently, business presently handled by Australian cargo insurers is diverted overseas to p. & i. clubs, and an Australian industry would therefore lose a portion of its marine insurance revenue. The argument proceeds that because the cargo interest must carry some insurance, administrative costs are not eliminated. Australian merchants would have to pursue settlement through overseas bodies without the professional service of domestic insurers to investigate and process claims. And the division of insurance between general average and carriers' liability may generate conflict between the insurers as to which applies. For these reasons, it is contended that friction costs are likely to increase. In short, Australia would be deprived of some revenue, the service to Australian merchants could become more expensive or less efficient, and Australian merchants may find overseas settlement of claims less convenient. Consequently, even assuming the UNCITRAL forecast to be accurate, the meagre savings are offset by the serious repercussions it could have on Australian trade. It is difficult to quantify the repercussions of this argument. Errors in navigation constitute only a small proportion of cargo claims, yet not of insignificant monetary value. And should

merchants duplicate insurance to retain the facilities of cargo insurance, the economic object of the proposal is defeated.

D. UNCITRAL CONVENTION

Article 5 rule 1 of the draft provides

> "the carrier shall be 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 . . . unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences."

Strict liability of either party being politically and economically unacceptable, the draft selects the carrier's fault as its criterion of liability. Subject to specific exceptions to be discussed later, it omits the catalogue of exceptions. To what degree the division of risk has been adjusted within the fault liability spectrum will emerge from a closer scrutiny.[160]

Carrier's Risk

The draft proposes to amalgamate the dual charging provisions in the *Hague Rules,* Article III rules 1 and 2, into one homogeneous duty to exercise care. Although the draft departs from traditional language which no doubt will be judicially restated in many versions, it preserves the orthodox concept of reasonableness. The learning accumulated under the *Harter* legislation and the *Hague Rules* on duties of seaworthiness and safe carriage will continue to serve as an invaluable source of law to exemplify the standards of care expected of the carrier. Yet the draft's failure to itemize a duty of seaworthiness has been criticized lest the judicial emphasis is diverted from the preparation of the vessel to activities while the cargo is in the carrier's custody. On the other hand, the translation of the dual categories of responsibility into the singular format of the draft does eliminate existing anomolies.

The draft removes the time limitation placed on the duty of seaworthiness which obviates the associated need to identify the commencement of the voyage. It is therefore open to a court to hold the carrier accountable for his failure to correct any unseaworthiness to the vessel which may contribute to loss or damage caused during the course of the voyage. It follows that all cargo owners are placed on an equal footing, each from the time when his cargo is received in the carrier's charge until delivery. No longer tenable is the theory which confined the carrier's responsibility for the state of his vessel to a base port within his control. To start with, he is presently liable in respect of cargo he chooses to accept at an intermediate port notwithstanding his inability to personally

[160] See generally, J. D. Kimball, "Shipowner's Liability and the Proposed Revision of the Hague Rules" (1976) 7 *J.M.L.C.* 217.

supervise maintenance, and in any event modern telecommunications enable him to receive information from, and give instructions to, the master. Indeed, the very notion of personal responsibility is antiquated by corporate structures and the theory of vicarious liability. The carrier is no longer an independent owner with personal expertise, but a business organisation whose commercial enterprise is to provide the service of safe transportation. The mechanism which moderates liability is the judicial scrutiny of what is reasonable in the circumstances, taking into account the lack of opportunities and facilities available to effect repairs. On the one hand, inadequate facilities may ameliorate the carrier's liability or, on the other, condemn him for failing to provide those facilities. But it is unreasonable to ask the merchant to bear the brunt of ship's maintenance which is the product of a distinction between seaworthiness and safe carriage.

Conversion of the two distinct categories of responsibility into a continuing amorphous principle of liability can be accomplished only if liability for the ship's management at sea, Article IV rule 2(a), presently borne by the cargo owner, is transferred to the carrier. The draft proposes to delete all reference to the exemption so as to eliminate the clumsy distinctions between unseaworthiness and management of the ship, and between care of the cargo and management of the ship, and their attendant friction costs. The line of division between negligence before and after the ship leaves port is artificial because the causation of loss or damage may well transcend that time barrier. As a result, needless expenditure is incurred in enquiries attempting to delineate the causation and characterise it by category. No less does the contradictory distinction between safe carriage and management of the ship create unnecessary exercises in mental gymnastics by differentiating between conduct for the preservation of cargo on the one hand, and conduct for the well-being of the ship, which may indirectly affect the cargo, on the other. The proposed modification is consistent with the view that the carrier should bear risks associated with his commercial undertaking. The distinction created by 19th century shipowners could only be rationally justified on the grounds that the carrier's liability derived from factors within his personal control. Today there is no justification for the view that the corporate carrier should be any less liable for the conduct of employees at sea and personnel engaged on the voyage than he is for shore-based employees and personnel engaged before the ship leaves port. Moreover, the transition of risk from the merchant to the carrier stimulates optimum economic values because the carrier is in a better position to control the selection and training of crew, their organizational efficiency and systems of cargo safety.

These reasons also justify the carrier's responsibility for errors in navigation from a legal point of view. But the economic effect of the transition of liability to the carrier is disputed. The proposed division of

liability is consistent with the approach taken in international conventions governing rail, road and air transport.[161] They each implement a scheme of fault liability in which the carrier is liable for negligence during his charge of the goods. Indeed, the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* signed at Warsaw in 1929 originally contained an exemption comparable to Article IV rule 2(a) of the *Hague Rules,* by which the carrier was excused from damage occasioned by an error in piloting, handling of the aircraft or in navigation. A protocol signed at The Hague in 1955 repealed this provision with what has been reported to be no adverse commercial effects.[162] In the interests of administering an identical concept of liability in all forms of transport, as one author commented: "It is in fact difficult to see for what reason the general principle of 'respondeat superior' should undergo so conspicuous an exception in the field of shipping."[163]

The amalgamation of liability equally affects the time and voyage charterer who contracts to carry the cargo of a third party. If the charterer is the contracting carrier, Article 5 imposes liability on him for the default of the shipowner's servants and agents notwithstanding that the charterer may have little opportunity to supervise them. Hitherto he escaped liability for the management and navigation of the ship by virtue of the general exemption, but under the draft he must accept vicarious liability irrespective of the control he exercises. However, it is uncertain whether courts will judge him by a standard of care comparable with a shipowner in respect of the preparation of the ship. The due diligence required of the charterer under the existing rules is relative to the time available to him and his accessibility to the ship to render it seaworthy. Continuation of this policy would create dual standards of liability of shipowner on the one hand and charterer on the other, to the detriment of the cargo owner. Yet to maintain a stable standard of liability, the courts must imply a duty equivalent to seaworthiness at the time the ship sails, which is the very barrier that the draft proposes to repeal. This would mean that the charterer becomes vicariously liable for the retrospective neglect of the shipowner over the period before the ship sails.

The compatibility of seaworthiness with the general principle is of some importance. Article 5 rule 1 of the draft attaches liability to the carrier where "the occurrence which caused the loss, damage or delay took place while the goods were in his charge". To harmonize this rule with existing concepts of seaworthiness, the occurrence which is confined to the period of the carrier's charge must be construed as the proximate

[161] *Convention on the Contract for the International Carriage of Goods by Road* (C.M.R.) 1956, Art. 17; *International Convention Concerning the Carriage of Goods by Rail* (C.I.M.) 1961 and 1970, Art. 27; *Convention for the Unification of Certain Rules relating to International Carriage by Air* 1929, Arts. 18, 20.

[162] UNCITRAL (1972) III Yearbook 296.

[163] G. Alpa and F. Berlingieri, "Liability of the Carrier by Sea", in Berlingieri, op. cit. 131.

cause. So that if loss, damage or delay occur at sea through the impact of the elements on the cargo, for example, the "occurrence" is established and the court must notionally administer a retrospective test to determine whether the carrier took "all measures that could reasonably be required to avoid the occurrence and its consequences". That retrospective responsibility should include acts and omissions for which the carrier is presently liable under the guise of the seaworthiness concept. It is important that in cases where unseaworthiness is a less proximate but direct cause of the occurrence, or in cases where unseaworthiness is itself the occurrence, the act or omission giving rise to unseaworthiness is not confined to the limitation of time during which the cargo is in the carrier's charge. Liability should extend to an indefinite period before the vessel sails, to embrace responsibility comparable with obligations or reasonable seaworthiness. The word "cause" in this context must therefore reflect the immediate cause, and not a less proximate cause nor the initial act or omission of a continuing cause. It is uncertain to what extent the proposed formulation of responsibility will revive the doctrine of stages and to what extent implementation will be uniform. With the time barrier removed, unseaworthiness at an intermediate port could well produce a proximate cause which the carrier can be reasonably required to avoid.

Whereas under the *Hague Rules* the carrier is not liable for loading and stowage undertaken by the shipper, he will bear liability under the draft unless one of two arguments is successful. The first is that the carrier is not in charge of cargo which is controlled by the shipper. This, as with all allegations of causation occurring before the ship sails, will depend upon an enquiry into the facts. The enquiry is generally facilitated if the carrier has issued documentation which is evidence of receipt. Yet, if the carrier relinquishes control to the shipper after taking over the cargo, on the face of Article 4 it is still deemed to be in his charge. Whether this can be challenged by the carrier is questionable as against the shipper for whom the interim bill of lading bears only prima facie value, but certainly as against the consignee the evidence is conclusive. The second is that the reasonableness of measures which the carrier should take to avoid the causation is evaluated relative to the terms of his contractual commitments. If the carrier takes no part in loading because the shipper undertakes its performance, relative to that fact the carrier's conduct may be reasonable. But if the standard applied is purely objective, then the carrier could be liable for failing to participate in the loading as a prudent carrier would.

The problems associated with delay and non-delivery are largely overcome. Article 5 of the draft entitles the cargo owner to recover losses occasioned by delay in delivery. Rule 2 provides

> "delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time

expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case."

If the carrier, despite dilatory conduct which allows the cargo to deteriorate, delivers the cargo within the contractually stipulated time, no delay has occurred. Nevertheless, he may be liable, for damage under rule 1 depending to what extent his contractual commitments are taken into account when assessing reasonableness of his conduct. If the cargo suffers no loss or damage, delivery within the contractual period would disentitle the cargo owner from recovery of economic loss, notwithstanding that the carrier could reasonably have prosecuted the journey more rapidly. Because the carrier's liability under Article 4 of the draft extends to the time when cargo is delivered to the consignee, misdelivery could be actionable as a cause of loss or delay which reasonable precautions would have prevented. To what extent courts will take into account a contractual term authorizing the carrier to deliver at an alternative port is not entirely clear. At one extreme, it could be taken to prescribe the performance required of the carrier relative to which his duty of care is assessed. At the other extreme, it could be struck down under Article 23 as an attempt to reduce the liability which a purely objective test would prescribe. More likely it will be taken into account as one among many factors determining the reasonableness of the carrier's conduct. In the case of alleged misdelivery, the problem becomes more acute because Article 4 rule 2 permits the carrier to deliver the goods by placing them at the disposal of the consignee in accordance with the contract. This too invites the question to what extent the contract will preclude scrutiny of the circumstances when the cargo can be said to be "at the disposal of the consignee".

Cargo Owner's Risk

As we have seen, the draft assumes some mutual economic advantage in adjusting the apportionment of risk between carrier and cargo owner towards the strict liability of the carrier. The policy of the draft expands the carrier's liability by embracing those aspects of fault from which he is presently exempt. However, political issues and the lack of concrete economic evidence constrained the working party from extending liability further. Consequently, loss and damage caused by any factor which is not the fault of the carrier is borne by cargo interests. By focussing on the criterion of carrier's fault, there is no need for the draft to preserve the catalogue of exemptions which superfluously illustrate situations of non-fault. Article 17 does make it clear that the shipper guarantees the accuracy of particulars relating to the general nature of the goods, their marks, number, weight and quantity, and should the carrier be liable to the consignee/holder for such inaccuracies in the bill of lading, he is

entitled to indemnity from the shipper. Other causes, whether fortuitous or the fault of the shipper or third party, simply negative the carrier's fault. Article 5 rule 7 clarifies liability where both the carrier's fault and some other factor contribute to the loss or damage. Consequently, causation, which is presently an item for exemption, does not avail the carrier of an absolute defence unless he took reasonable precautions to avoid it and mitigate damages. Rule 7 reads

> "Where fault of neglect on the part of the carrier, his servants or agents, combines with another cause to produce loss, damage or delay in delivery the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect. . . ."

It follows that for risks outside the control of the carrier and the merchant, they are partners in a maritime venture, each accepting the speculative dangers confronting his respective property. Theoretically this division of risk should not increase aggregate insurance costs, as it redistributes initial liability; yet to Australia this may have the most serious consequences. It does maximize optimum safety standards within the control of the carrier. Friction costs are not eradicated, as the question of fault must be determined, yet the removal of the more complex enquiries under the *Hague Rules* must in the long run reduce friction costs and provide incentive to the carrier to maintain additional safety standards in areas where, under the existing rules, legal complexity induced the merchant to settle his claim for a lower sum.

Burden of Proof

The uniform legislation can function only if properly lubricated by suitable rules governing the burden of proof. Apart from the need to clarify and unify the burden of proof, the onus borne by the merchant plaintiff at present is quite inequitable. Certainly the plaintiff must bear the burden of showing that he is entitled to make the claim, the terms of the contract, the fact of loss or damage, that it took place during the period for which the carrier is responsible, and the monetary value of the loss or damage. Particularly in the case of the consignee, the issue of proper documentation is very important to enable him to establish the conditions of the cargo when received by the carrier. His case is more difficult when the damage occurs before the issue of a bill of lading. Thereafter, the burden which the plaintiff presently bears is intolerable, even allowing for variations between jurisdictions. To establish the cause, and perhaps the carrier's degree of fault, is extremely difficult to a person whose knowledge is confined to the simple fact of not having received cargo or receiving damaged cargo. The merchant and his underwriter may have no indication of how and when the damage occurred, he has no access to witnesses and the vessel (which may have since sailed), he has no knowledge of the

carrier's working systems and conduct, and if he bears the onus of proving fault he, and to a lesser extent his insurer, has no technical knowledge against which to allege carrier's fault. Of necessity, friction costs are increased if the cargo owner is forced to pursue investigations which the carrier could more cheaply conduct in the course of his business.

With one exception, the draft therefore places the onus on the carrier to disprove his fault. Article 5 rule 1 makes it clear that the carrier is liable "unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences". Rule 7 provides that where both carrier's fault and non-fault contribute to the loss and damage, "the carrier is liable only to the extent of his fault . . . provided that the carrier proves the amount of loss, damage or delay in delivery not attributable thereto". Yet the draft is deficient if the onus of proving causation or the "occurrence" under Article 5 rests with the plaintiff. Pursuing the affirmative axiom adopted by the majority of courts, that the onus lies on him who alleges the affirmative proposition, it would appear on a literal reading of Article 5 rule 1 that it is insufficient for the plaintiff to prove that the loss or damage occurred during the carrier's custody. Article 5 rule 1 suggests that the plaintiff must prove that the "occurrence" which gives rise to the loss or damage took place during the carrier's custody in order to shift the onus to the carrier to rebut the inference of his negligence. This may be construed as a burden on the plaintiff to allege and prove the proximate cause of loss, damage or delay, a burden which he is ill-equipped to discharge.

The one incomprehensible exception lies in Article 5 rule 4 which provides: "In case of fire the carrier shall be liable, provided the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents." For reasons previously discussed, it is consistent with the underlying approach of the draft that the carrier should be liable for all fault, including the fault of his servants and agents causing fire. It is difficult to accept the argument advanced by some UNCITRAL delegates that fire is such an extraordinary cause of damage that it requires specialized treatment. They argue that not only can the results of fire be catastrophic, but also the cause is so difficult to determine. For those very reasons the carrier should bear no responsibility for preventive measures, fire fighting systems and control of a blaze. For the obvious reasons that the carrier is in a far better position to explain the cause of fire and the conduct of his crew in both preventing and controlling a blaze, he should bear the burden of proof. The burden of proving carrier's fault is quite inconsistent with the general approach of the draft in respect of other causes of damage which can be just as inexplicable and catastrophic. Furthermore, in those cases of unexplained fire where risk attaches to the party unable to discharge his burden of proof, the

merchant plaintiff may assume an onus which he does not presently bear in the English procedure of the *Hague Rules*. The consequences are that a procedural mechanism will distort the substantive principle of liability laid down in Article 5.

If the carrier is to bear vicarious liability for fire, governments must ensure that extraneous legislation which exonerates the carrier from liability is amended accordingly.

Conclusion

In the continuing quest to apportion international cargo risks between ship and cargo, it took some fifty years to codify a 19th century solution. The carrier's fault liability was the obvious compromise between strict liability and immunity. Yet the solution was influenced by the underlying notion that cargo transportation was a maritime adventure in which both shipowner and cargo owner were partners. The shipowner would bear responsibility for cargo losses occasioned by his personal fault, but the master at sea was an independent agent accountable to the cargo owner in respect of the cargo, as he was to the shipowner in respect of the ship, and risks were allocated accordingly. It has taken another fifty years to prepare a 20th century solution, one which incorporates the notion that cargo transportation is a commercial venture. In return for a fee, the shipowner contracts to provide a service, and thereby assumes responsibility for the conduct of all personnel engaged to perform that service as a matter of internal business administration. Yet because transportation is a commercial venture, any proposed legal reforms must be evaluated by financial considerations, of which the impact of insurance costs is foremost. Certainly, the UNCITRAL proposals simplify the legal difficulties associated with the division of risk formulated by the *Hague—Visby Rules*. Perhaps that fact alone places the onus on the critics of the UNCITRAL draft to prove detrimental financial repercussions, repercussions which could be of significant magnitude to the Australian marine insurance industry.