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Marel Katsivela

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Résumé de l'article

Le présent article offre une vue d'ensemble des causes d'exonération du transporteur maritime des marchandises contenues dans les Règles de Rotterdam et les Règles de La Haye-La Haye/Visby. L'objectif de notre analyse est d'identifier les modifications les plus importantes apportées par les Règles de Rotterdam aux causes d'exonération existantes sous les Règles de La Haye-La Haye-Visby. La jurisprudence et la doctrine du Canada, du Royaume-Uni et des États-Unis portant sur les causes d'exonération des Règles de La Haye-La Haye/Visby fournissent la base de notre étude comparative.

Overview of Ocean Carrier Liability Exceptions Under the Rotterdam Rules and the Hague-Hague/Visby Rules

Marel Katsivela
Assistant Professor, Faculty of Law, University of Ottawa

ABSTRACT

The present article constitutes an overview of the ocean carrier liability exceptions contained in the newly adopted Rotterdam Rules and those present in the Hague-Hague / Visby Rules. Such an overview aims at identifying the main changes brought about by the Rotterdam Rules to the existing Hague-Hague / Visby exculpatory causes. Canadian, English and United States case law and doctrine commenting on the Hague-Hague / Visby Rules liability exceptions are used as the basis for the present comparative study.

Key-words: *Rotterdam Rules, Hague-Hague / Visby Rules, liability exceptions, ocean carrier, maritime law.*

RÉSUMÉ

Le présent article offre une vue d'ensemble des causes d'exonération du transporteur maritime des marchandises contenues dans les Règles de Rotterdam et les Règles de La Haye-La Haye / Visby. L'objectif de notre analyse est d'identifier les modifications les plus importantes apportées par les Règles de Rotterdam aux causes d'exonération existantes sous les Règles de La Haye-La Haye-Visby. La jurisprudence et la doctrine du Canada, du Royaume-Uni et des États-Unis portant sur les causes d'exonération des Règles de La Haye-La Haye / Visby fournissent la base de notre étude comparative.

Mots-clés: *Règles de Rotterdam, Règles de La Haye-La Haye / Visby, causes d'exonération, transporteur maritime, droit maritime.*

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INTRODUCTION

1. Despite the recent economic crisis, international seaborne trade of goods, the backbone of international trade, continues to grow.[1] The continuing growth of ocean carriage of goods worldwide has been coupled with an international effort to modernize, update and render uniform the existing ocean carrier liability regimes contained in the Hague,[2] the Hague/Visby,[3] and the Hamburg Rules.[4] Such an effort is reflected in the adoption of the *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (commonly known as the Rotterdam Rules) elaborated from 2002 to 2008 under the aegis of the United Nations Commission on International Trade Law (UNCITRAL) and, more specifically, its Working Group III. The new rules were approved by UNCITRAL and the United Nations General Assembly Legal Sixth Committee in 2008.[5]

2. Under article 94 of the Rotterdam Rules, twenty ratifications, accessions, approvals or acceptances are needed for them to enter into force. These have not yet taken place even though twenty one countries — among them many European Union nations and the United States (U.S.) — have, so far,

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1. UNCTAD, "Review of Maritime Transport", (2009), [On line]. http://www.unctad.org/en/docs/rmt2009_en.pdf (Visited August 17, 2010).

2. *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, August 25, 1924, 120 L.N.T.S. 155 (1924) [hereinafter Hague Rules].

3. The Hague/Visby Rules refer to the Hague Rules as amended by two protocols. The first protocol, the *Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, (commonly known as the "Visby Protocol 1968"), was adopted at Brussels on February 23, 1968 and entered into force on June 23, 1977. The second protocol, the *Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (August 25, 1924), as Amended by the Protocol of February 23, 1968* (commonly known as the "SDR Visby Protocol 1979"), was adopted at Brussels on December 21, 1979 and entered into force on February 14, 1984. The Hague and the Hague/Visby Rules will hereinafter be referred to as the Hague-Hague/Visby Rules.

4. The *United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)*, March 30, 1978, A/Conf.89/13 U.N.T.S., U.N. Doc., 1978 [hereinafter Hamburg Rules] entered into force on November 1st, 1992.

5. The final text of the Convention is annexed to the General Assembly Resolution 63/122, U.N. Doc. A/RES/63/122 (11 December 2008).

signed the new rules.[6] Canada has not signed the Rotterdam Rules because of the lack of consensus among its international marine transportation stakeholders (carriers, shippers, ship owners, cargo insurers, liability insurers, legal experts) as to whether or not Canada should sign the new rules, and because it believes that some of its provisions need further elaboration.[7] However, if future developments lead to the international acceptance of the Rotterdam Rules, Canada may review its position in order to ensure that its legislation on cargo liability is consistent with the laws of its major trading partners.[8] The United Kingdom (U.K.) has also not signed the Rotterdam Rules and has not reached any decision on their adoption.[9] Overall, adoption of the new rules has been quite controversial with a relatively small amount of countries adopting them so far.

3. Article 89 of the new rules clearly states that countries that ratify, accept, approve or accede to them will have to denounce the Hague, Hague/Visby or Hamburg Rules if they are parties to these conventions. The Rotterdam Rules will, therefore, take precedence over mentioned international conventions currently in force in countries that ratify, accept, approve or accede to the new rules.

4. Our study will be structured into two chapters: **Chapter I** will present the scope of our analysis and the general principles governing burden of proof under both sets of

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6. UNCITRAL, "Status", (2010), [On line]. http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (Visited August 17, 2010). Views diverge on whether and how soon these ratifications will take place. The Rotterdam Rules signatories represent, overall, more than twenty five percent of the world's trade volume. TRANSPORT CANADA, "Marine Liability Act, Part 5 : Liability for the Carriage of Goods by Water", (2010), [On line]. http://www.tc.gc.ca/eng/policy/report-acf-hamburg-menu-1099.htm (Visited August 17, 2010).

7. TRANSPORT CANADA, "Notice to the Industry", (September 15, 2009), [On line]. http://www.mcgill.ca/files/maritimelaw/Notice_to_industry_Rotterdam_Rules.pdf (Visited August 17, 2010). TRANSPORT CANADA, *loc. cit.*, note 6.

8. *Ibid.*

9. SITPRO, "The Rotterdam Rules: A Guide", (2010), [On line]. http://www.sitpro.org.uk/reports/rotterdamrulesguide.pdf (Visited August 17, 2010). After a formal consultation process has taken place in 2010, the U.K. government will take a position on whether or not it should adopt the new rules. The approach of the U.K. towards the new rules is that it should not endanger its pre-eminent position as a centre of maritime dispute resolution and that the regime it proposes should be broadly acceptable to all its commercial partners. *Id.*

rules. **Chapter II** will ponder over the comparative study of ocean carrier liability defences.

CHAPTER I. SCOPE OF ANALYSIS — BURDEN OF PROOF RULES

1. SCOPE OF ANALYSIS

5. The present study aims at comparing the ocean carrier liability defences of the Rotterdam Rules (article 17.3) with the ones of the Hague-Hague/Visby Rules (IV.2).[10] Because of the considerable number of liability defences involved under both sets of rules (seventeen under the Hague-Hague/Visby Rules, fifteen under the Rotterdam Rules), it will be impossible to exhaustively analyze every aspect of each liability defence we will be touching upon. Our analysis intends to provide an overview of the main changes brought about by the Rotterdam Rules to the existing Hague-Hague/Visby exculpatory causes.

6. Even though we will cite international sources when presenting the general Rotterdam and Hague-Hague/Visby Rules provisions (Chapter I), Canadian, English and U.S. case law and doctrine will help us analyze the Hague-Hague/Visby Rules exemption clauses (Chapter II). Canada and the U.K. currently apply the Hague/Visby Rules whereas the U.S. applies the Hague Rules.[11] Although these two countries

10. The reason for choosing the Hague-Hague/Visby Rules for our comparison is that these rules have been adopted by major seafaring nations such as the U.K., Canada (Hague/Visby) and the U.S. (Hague Rules). For some interesting remarks made on all these rules, see TRANSPORT CANADA, *loc. cit.*, note 6. The present study will not concentrate on the multimodal reach of the Rotterdam Rules or the possibility to contractually modify the terms of the carrier's liability. We will also briefly comment on burden of proof rules while commenting on Rotterdam Rules article 17.2.

11. Canada has neither acceded to nor ratified the Hague/Visby Rules and cannot, therefore, be viewed as a contracting party to these rules. However, Canada has enacted a local statute, the 1993 *Carriage of Goods by Water Act* — currently incorporated in the *Marine Liability Act* (2001, c. 6) — to which the Hague/Visby Rules is attached as a schedule. The Hague/Visby Rules also apply in the U.K. by virtue of the *Carriage of Goods by Sea Act 1971* (c. 19), [On line]. http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1971/cukpga_19710019_en_1 (Visited August 17, 2010). The U.S. has adopted the Hague Rules and applies them through the *Carriage of Goods by Sea Act 1936*: 46 U.S.C. §30701 (2006). Canadian and U.S. maritime law traditionally falls under the purview of federal jurisdiction. The reason for choosing these three countries is that they are all important seafaring nations whose case law is cited time and again in domestic and international courts.

have not signed the Rotterdam Rules, the study of their case law and doctrine will help us understand how the interpretation of the Hague-Hague/Visby Rules list of ocean carrier liability defences compares to the ones present under the Rotterdam Rules.

7. Before continuing with our analysis, we would like to make some preliminary remarks that will accompany us throughout our study and will create a context for our commentary.

8. Like the Hague-Hague/Visby Rules, the Rotterdam Rules govern ocean carrier liability. Unlike the Hague-Hague/Visby Rules that strictly regulate ocean carriage, the new instrument may apply beyond the limits of seaborne transport of goods and cover multimodal carriage (door-to-door cargo movements) provided that there is an international sea segment in the journey (article 1.1). Whether the provisions of the new rules are well drafted so as to address the challenges of multimodal carriage is a question that has raised many doubts, and constitutes one of the reasons why the new rules do not enjoy ample support at the international level.[12]

9. The door-to-door application of the Rotterdam Rules is accompanied by a longer period of carrier liability. Whereas the Hague-Hague/Visby Rules hold the carrier liable between loading and discharge, that is to say, from tackle to tackle (article 1.e), the Rotterdam Rules extend the period of carrier liability from the time the carrier or a performing party receives the goods for carriage to the time the goods are delivered (article 12 — door-to-door period of liability).[13] In a door-to-door transport, the period of carrier liability includes, for

12. Peter JONES, "The UNCITRAL Convention on Carriage of Goods by Sea: Harmonization or Deharmonization?", (2010), [On line]. http://www.forwarderlaw.com/library/view.php?article_id=602 (Visited August 17, 2010). See, for instance, the critique of Anthony DIAMOND, "The Rotterdam Rules", (2009) *L.M.C.L.Q.* 445 and the article of David GLASS, "Meddling in the Multimodal Muddle? A Network of Conflict in the UNCITRAL Draft Convention on the Carriage of Goods [Wholly or Partly][by Sea]", (2006) *L.M.C.L.Q.* 307.

13. Diego Esteban CHAMI, "The Obligations of the Carrier", (2009), [On line]. http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20Diego%20Chami%20-%20Obligations%20of%20the%20Carrier.pdf (Visited August 17, 2010).

example, the time when the goods are under the custody of a port terminal that has received them for or after carriage.[14]

10. The Rotterdam Rules have not only extended the period of carrier liability. They have also identified who may be held liable in case of loss or damage of the goods. Following the trend of more recent international transportation conventions, the Rotterdam Rules govern the liability of contracting carriers (article 1.5) and maritime performing parties (article 19). The latter term refers to sub-carriers who may perform or undertake to perform any of the carrier's obligations during the ocean segment of the transportation (article 1.7). On the contrary, the Hague-Hague/Visby Rules impose liability on the owner or the charterer who enters into a contract of carriage (article 1.a) without mentioning if they apply to other contracting carriers or the performing carrier.[15]

11. Moreover, the Rotterdam Rules render the carrier liable for the acts or omissions of maritime and non maritime performing parties, master or crew, employees and any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage at the carrier's request or under the carrier's supervision or control [hereinafter called agents] (article 18). These persons may be stevedores or terminal operators. On the contrary, the category of agents under the Hague-Hague/Visby Rules is quite limited and does not include independent contractors.[16]

12. Under both the Rotterdam and the Hague-Hague/Visby Rules, the carrier has the following obligations: 'properly and carefully load, handle, stow, carry, keep, care for and unload the goods' (article 13.1 of the Rotterdam Rules; article III.2 of the Hague-Hague/Visby Rules). To fulfill its duty, the carrier has to adopt a sound system, taking into account the

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14. *Ibid.*

15. Edgar GOLD, Aldo CHIRCOP, Hugh KINDRED, *Maritime Law*, Collection Essentials of Canadian Law, Toronto, Irwin Law, 2003, p. 437; William TETLEY, *Marine Cargo Claims*, 4th ed., Cowansville, Éditions Yvon Blais, 2008, p. 565.

16. Commenting on the Hague-Visby/Rules: E. GOLD, A. CHIRCOP, H. KINDRED, *op. cit.*, note 15, p. 437-438 and Francesco BERLINGIERI, "A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules", (2009), [On line]. http ://www.comitemaritime.org/draft/pdf/Comparative_analysis.pdf (Visited August 17, 2010).

knowledge it has or should have of the goods.[17] Under the Rotterdam Rules, however, the carrier has the additional obligations to receive and deliver the goods (article 13). These obligations are not mentioned under the Hague-Hague/Visby Rules where the carrier is only liable from tackle to tackle.[18]

13. Further, whereas the Hague-Hague/Visby Rules only obligate the carrier to exercise due diligence to make the ship seaworthy at the beginning of the voyage (article III.1), article 14 of the Rotterdam Rules extends the carrier's duty to provide a seaworthy vessel during the sea voyage. Later, we will have the opportunity to talk about the controversy that the Rotterdam Rules have brought about regarding vessel's seaworthiness. Finally, as we are going to see later, the Rotterdam Rules provide detailed provisions regarding the shipper's obligations contrary to the Hague-Hague/Visby Rules.

14. The mentioned carrier obligations but also the carrier's liability and liability limits cannot, directly or indirectly, be limited or excluded by contracting parties. This is a 'sacred' provision of the Hague-Hague/Visby Rules (article III.8) that the Rotterdam Rules have maintained (article 79). However, Rotterdam Rules article 80 explicitly sets aside the principle contained in article 79 and permits parties to contractually agree upon their 'rights, obligations and liabilities' in the presence of volume contracts. Although these contracts are not the topic of our study, we deem important to note that article 80 is a novelty of the Rotterdam Rules that has given rise to much controversy. It constitutes another reason why these rules have failed, so far, to obtain substantial support from the international community.[19]

15. The Rotterdam Rules regulate the carrier's liability for loss, damage but also delay since damages resulting from delay may be fatal for the shipper or the consignee. Delay damages are not explicitly mentioned under the Hague-Hague/Visby Rules and a debate exists today as to what extent damages due to delay are covered by these Rules and

17. D.E. CHAMI, *loc. cit.*, note 13. E. GOLD, A. CHIRCOP, H. KINDRED, *op. cit.*, note 15, p. 452.

18. D.E. CHAMI, *loc. cit.*, note 13.

19. See, for instance, the short commentary of P. JONES, *loc. cit.*, note 12.

respective national legislation or whether the applicable national laws provide a separate liability rule in this area.[20]

16. Finally, both the Rotterdam and the Hague-Hague/Visby Rules maintain a list ('litany') of ocean carrier liability defences ('excepted perils'). As we are going to see, however, the Rotterdam Rules maintain a fault based ocean carrier liability regime (article 17.2) contrary to the Hague-Hague/Visby Rules.

2. BURDEN OF PROOF RULES

17. Ocean carrier liability defences do not exist in a vacuum. They are an integral part of a set of rules that delineates the basis of carrier liability. We will comment herein on the general principles governing the basis of carrier liability while presenting the burden of proof prescribed by the Rotterdam and the Hague-Hague/Visby Rules.

18. Contrary to the Rotterdam Rules that outline a detailed order of proof, the Hague-Hague/Visby Rules do not provide for one. In practice, however, there is a surprising similarity in the order of proof demanded by the courts of the nations which have adopted the latter rules.[21]

19. Under both sets of rules, the initial burden of proof (*prima facie* case) falls on the cargo claimant who has to establish that the loss, damage or delay took place during the period of the carrier's liability (Rotterdam Rules article 17.1).[22] Once this *prima facie* case is established, the

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20. Alexander VON ZIEGLER, "The Liability of the Contracting Carrier", (2009) 44 *Tex. Int'l L.J.* 329, 348. For a more detailed analysis of the liability for delay under the Rotterdam Rules, see A. DIAMOND, *loc. cit.*, note 12, 445, 478s.

21. W. TETLEY, *op. cit.*, note 15, p. 351.

22. Unlike the Rotterdam Rules that explicitly refer to the cargo claimant's initial burden of proof in article 17(1), the Hague-Hague/Visby Rules do not contain such an explicit provision. F. BERLINGIERI, *loc. cit.*, note 16. However, Canadian, English and U.S. case law require the cargo claimant to always make its *prima facie* case: in this way, the cargo claimant has to establish its interest in the cargo, the fact that the cargo was not received at destination in the same apparent good order and condition as received on board, and the value of the transported goods lost or damaged. Canadian case law: *Kruger Inc.* v. *Baltic Shipping Co.*, [1988] 1 F.C. 262 (F.C.C.). English case law: *The Hellenic Dolphin*, (1978) 2 Ll.Rep. 336; A. DIAMOND, *loc. cit.*, note 12, 445, 473. U.S. case law: *Edouard Materne* v. *S.S. Leerdam*, 143 F.Supp 367 (S.D. N.Y. 1956).

carrier's liability is presumed and the burden of proof shifts to the carrier.

20. This presumption of liability raises the question of the nature of the carrier's obligations, that is, whether the carrier's liability is based on fault or on a strict obligation to perform the carriage and deliver the goods undamaged, irrespective of fault (strict liability). If, under the Hague-Hague/Visby and the Rotterdam Rules, the carrier's liability is based on fault, then proof of absence of fault on the part of the carrier and its agents exonerates it from liability. On the contrary, if the carrier's liability is based on a strict obligation to perform the carriage and deliver the transported goods, loss or damage of the transported cargo renders the carrier automatically liable. In such a case, the carrier can only escape liability in the presence of an act of God, act of public enemy, act of shipper or an inherent vice of the goods.[23] The latter basis of liability is more shipper protective than the former.

21. Let us illustrate the difference between the two grounds of carrier liability by taking the example of cargo's concealed damage that we often encounter in ocean carriage. Concealed damage occurs when it cannot be determined in what stage of the journey the damage or loss of the transported goods actually occurs. The damage cannot be localized. If the carrier's liability is based on fault, then the carrier can be exonerated for this type of damage by proving absence of negligence on its part and on the part of its agents. In such a case, the shipper has to assume the damage or loss except if it can prove the carrier's negligence. This is a hard proof to make considering the concealed nature of the damage. On the contrary, in the presence of a strict liability regime the carrier is

23. Amy S. PARIGI, "Shabah Shipyard SDN BHD v. M/V Harbel Tapper: Once again COGSA's $500 Limitation on Liability Proves to be the Biggest Bargain in the Shipping Industry", (2001) 75 *Tul.L.Rev.* 811, 812. These are common law defences also present under English and Canadian common law. In civil law jurisdictions, a distinction is made between an "obligation de résultat" (obligation to produce certain results) where only force majeure causes may exonerate the carrier. On the contrary, an "obligation de moyens" (obligation to provide certain means) requires proof of due diligence, of absence of fault in order to exonerate the carrier. Jean-Louis BAUDOUIN, Pierre-Gabriel JOBIN, *Les Obligations*, 6th ed., Cowansville, Éditions Yvon Blais, 2005, p. 37-40 on the explanation of the civil law concepts. Some discussion on these two types of obligations was made during the 11th session of the Working Group. See A/CN.9/526 para. 116 (11th session).

liable for concealed damage. Proof of due diligence of the carrier and its agents does not suffice to exonerate it.

22. Under the Hague-Hague/Visby and the Rotterdam Rules carrier's obligations cannot be described to be as strict as in the latter regime we presented because of the large number of statutory exceptions the carrier can rely upon.[24] In effect, both the Rotterdam and the Hague-Hague/Visby Rules maintain a list ('litany') of ocean carrier liability defences ('excepted perils') that the carrier can benefit from when a *prima facie* case is made by the shipper. Once the cargo claimant makes its *prima facie* case under the Hague-Hague/Visby Rules, the carrier is presumed liable and must prove :[25] i) the cause of the loss; ii) due diligence to provide a seaworthy vessel (we will comment as follows); and iii) one of the seventeen exculpatory causes listed in article IV.2, among which appears the absence of fault on the part of the carrier and its agents. The carrier's obligation to transport and deliver the cargo under this set of rules may not correspond to a strict liability regime but it is subject, nonetheless, to a limited number of exoneration causes listed in the rules.

23. The Rotterdam Rules follow this trend and take a step forward by structuring the basis of carrier liability differently,[26] allowing the carrier to be exonerated following a list of excepted perils but also on the basis of absence of fault on its part and on the part of its agents. In effect, once the cargo claimant makes its *prima facie* case under the Rotterdam Rules, the burden of proof shifts to the carrier who has to prove either : i) that the cause or one of the causes of loss, damage, or delay is not attributable to its fault or to the fault of any person for whom the carrier is liable under article 18 (article 17.2); or ii) that an event listed in article 17.3 (excepted perils) caused or contributed to the loss, damage, or

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24. A. VON ZIEGLER, *loc. cit.*, note 20, 329, 333. Authors do not usually talk of strict liability regarding the Hague-Hague/Visby Rules liability regime. U.S. : Robert FORCE, "*COGSA* v. *Carmack*", (2009) 36 *Transp.L.J.*, 1, 13.

25. Variations in the order of proof exist. See W. TETLEY, *op. cit.*, note 15, p. 352-356.

26. Si YUZHOU, Henry HAI LI, "The New Structure of the Basis of Liability for the Carrier", (2009), [On line]. http ://www.rotterdamrules2009.com/cms/uploads/Final%20Paper%20of%20Prof%20Si%20and%20Li%20for%20the%20Rotterdam%20Rules%202009%20Colloquium.pdf (Visited August 17, 2010).

delay (article 17.3). These excepted perils are largely based on the Hague-Hague/Visby Rules litany of exceptions.[27]

24. During the 10th and 12th sessions of the Working Group there was an issue as to whether the carrier liability defences appearing in what is now article 17.3 of the new rules should constitute exoneration causes (as under the Hague-Hague/Visby Rules) or presumptions of absence of fault.[28] It was suggested that, in practice, there was no real difference between the two approaches since under the exoneration system, a carrier's right to rely on an exemption could still be lost if cargo interests could prove the carrier's fault. In the end, there appeared to be a slight preference for the list of excepted perils to be characterized as presumptions of no fault rather than exonerations.[29] In subsequent sessions of the Working Group, the excepted perils are referred to as presumptions of absence of fault.[30] As a result, the Rotterdam Rules do not forward a strict liability regime but, rather, one based on fault.

25. If the carrier meets the above-mentioned burden of proof under the Hague-Hague/Visby Rules, the cargo claimant has to establish the negligence of the carrier or its lack of care for the cargo. Both parties have then the opportunity to provide their arguments and counterproof. Under the Rotterdam Rules, the rules are much more detailed and the cargo claimant can choose among the following:[31] a) prove that a carrier's or an agent's fault caused or contributed to the event or circumstance on which the carrier relied (article 17.4.a). If the cargo claimant succeeds in making this proof, the carrier is left with no counter proof and will be held liable for the

27. During the 12th session of the Working Group, it was agreed that a list of "excepted perils" inspired by the Hague-Hague/Visby Rules should appear in the Rotterdam Rules in order to preserve the general body of law that had developed with the widespread use of the Hague-Hague/Visby Rules, and as a compromise solution to accommodate civil and common law systems. A/CN.9/544 paras 117, 118, 129, A/CN.9/525, paras 38 and 39.

28. A/CN.9/544: paras 87, 119 (12th session); A/CN.9/525 para. 41 (10th session).

29. A/CN.9/544 para. 129 (12th session)

30. See, for instance, A/CN.9/572 para. 54 (14th session).

31. The following has been described as the 'ping-pong game' of proof. A. VON ZIEGLER, *loc. cit.*, note 20, 329, 344.

cargo damage, loss or delay; b) prove that another event or circumstance contributed to the loss, damage or delay (article 17.4.b). If this proof is made, the *onus probandi* shifts from the cargo claimant to the carrier who has to prove that this event or circumstance is not attributable to its fault or to its agents' fault (article 17.4.b); or c) prove that the loss, damage, or delay was or was probably caused by or contributed to by the vessel's unseaworthiness, improper vessel's crewing/equipping/supplying or vessel's lack of cargoworthiness [hereinafter called vessel's seaworthiness] (article 17.5.a). If the cargo claimant successfully meets this burden of proof, the carrier will be presumed liable but it will be given the opportunity to provide counterproof evidencing that the loss, damage or delay was not caused by the events described in article 17.5.a or, alternatively, that it has complied with its obligations under article 14 (exercise of due diligence in respect of vessel's seaworthiness (article 17.5.b)).

26. As we have already mentioned, article 14 of the Rotterdam Rules charges the carrier with a duty to exercise due diligence to provide a seaworthy vessel not only 'before and at the beginning of the voyage' — as is the case under the Hague-Hague/Visby Rules article III — but also during the sea journey. This provision imposes a continuous seaworthiness obligation on the carrier. It is probably to counteract the temporal extension of the carrier's obligations under article 14 that article 17(5)(a) of the Rotterdam Rules places the burden of proof of vessel's unseaworthiness on the cargo claimant. This carries considerable weight since cargo claimants cannot easily discharge the burden of proof.[32] Moreover, the list of excepted perils under the Rotterdam Rules is not subject to the carrier's proof of vessel's seaworthiness.[33] Such a provision contradicts Canadian and English case law under the Hague/Visby Rules that generally requires the carrier to produce proof that it exercised due diligence to provide a seaworthy vessel 'before and at the beginning of the journey' before it can benefit from any of the excepted

32. A/CN.9/645 para. 55 (21st session).
33. Si YUZHOU, H. HAI LI, *loc. cit.*, note 26.

perils (overriding obligation).[34] Concerns about this new burden of proof were voiced during the last session of the Working Group without finding, however, sufficient consensus to reopen the debate.[35]

27. Despite the temporal extension of the carrier's duty regarding vessel's seaworthiness, the new burden of proof introduced by the Rotterdam Rules in this area favours ocean carriers rather than cargo claimants. Proving vessel's unseaworthiness is far from being an easy task for the cargo claimant when it is the carrier who is in charge of the ship. The controversial new burden of proof regarding seaworthiness contrasts the Hague-Hague/Visby Rules provisions that tend to be more shipper protective on this point.

28. Article 17.6 of the Rotterdam Rules provides that the carrier is only liable for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable under article 17. Early in the deliberations of the Working Group, it was made clear that the intent of the drafters was to encourage courts to accurately apportion liability in the case of concurrent causes of loss, damage or delay, some of which the carrier is responsible for and some of which the carrier is not responsible for.[36] Some authors argue that article 17.6 is not clear on what may be the principles upon which an apportionment of liability should be made (i.e. apportionment based on fault; on an equal basis; or other criteria).[37] However, based on the deliberations of the Working Group, the intent of the drafters was to adopt a provision that

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34. Canadian case law follows the English authority case *Maxine Footwear Co.* v. *Canadian Government Merchant Marine Ltd*, 1959 A.C. 589, on this point : see J. THURLOW in *N.M. Paterson & Sons* v. *Robin Hood Flour Mills Ltd (The Farrandoc)*, [1968] 1 Ex.C.R. 175 (Ex.Ct of Can.), and *Beattie (R.K.) Ltd* v. *CN Marine Inc.*, [1986] 74 N.B.R. (2d) 221 (N.B. Q.B.). See also W. TETLEY, *op. cit.*, note 15, p. 881-885 for a more detailed discussion. U.S. case law is confused and contradictory in this area : it seems that few circuit courts regard proof of vessel's the seaworthiness as a prerequisite for the carrier to benefit from a liability exception under the Hague Rules. W. TETLEY, *op. cit.*, note 15, p. 886-889. Thomas J. SCHOENBAUM, *Admiralty and Maritime law*, 4th ed., USA, Thompson West, 2004, p. 604 (note 16).

35. A/CN.9/645 paras 55, 56 (21st session). For a critical analysis of the seaworthiness requirement, see A. DIAMOND, *loc. cit.*, note 12, 445, 476-477.

36. A/CN.9/572 paras 73-74 (14th session).

37. A. DIAMOND, *loc. cit.*, note 12, 445, 477-478.

would give courts significant freedom to determine how to apportion liability.[38]

CHAPTER II. COMPARATIVE ANALYSIS OF THE HAGUE-HAGUE/VISBY AND THE ROTTERDAM RULES CARRIER LIABILITY DEFENCES

29. We are pursuing our analysis with the comparative study of ocean carrier liability defences, a topic that lies at the very heart of the present paper.

1. *ROTTERDAM RULES ARTICLE 17.2 AND THE HAGUE-HAGUE/VISBY RULES ARTICLE IV.2(Q)*

30. The first ground of carrier liability that we will examine is the Rotterdam Rules equivalent of the Hague-Hague/Visby Rules article IV.2.q (hereinafter called the q exception). The reason why we decided to start with the last Hague-Hague/Visby Rules carrier liability defence is the importance of its corresponding provision under the Rotterdam Rules. The q exception provides:

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

31. This excepted peril contains a 'catch-all' no fault-liability defence exonerating the carrier for any cause of cargo loss or damage not provided for in the litany of exceptions (i.e. theft, collision, rust, sweat, bursting of pipes, breakdown of

38. A/CN.9/572 para.73 (14th session). Although the Hague-Hague/Visby Rules contain no equivalent provision to Rotterdam Rules article 17.6, if the carrier cannot prove for which of the concurrent causes of loss it is not liable, it will be responsible for the whole loss or damage. Canadian law: *The Captain Gudin*, (2002) FCT 101 (F.C.C.) citing English law quoted by Professor Tetley. W. TETLEY, *op. cit.*, note 15, p. 861. English law: *The Torenia*, (1983) 2 Ll.Rep. 210; Guenter TREITEL, F.M.B. REYNOLDS, *Carver on Bills of Lading*, 1st ed., London, Sweet & Maxwell, 2001, p. 516-517. U.S. law: T.J. SCHOENBAUM, *op. cit.*, note 34, p. 605.

machinery, etc.).[39] Its content seems to be so much more generous on the carrier than the rest of the Hague-Hague/Visby Rules liability defences since it does not require proof of a specific cause of loss or damage to the goods. In practice, however, carriers do not usually have recourse to the q exception and prefer to invoke other exoneration causes (i.e. insufficiency of packing, shipper's fault, perils of the sea, etc.) because of the heavy burden of proof this one prescribes.[40] In effect, in invoking this defence the carrier must prove that neither its negligence nor the negligence of its agents contributed to the cargo's loss or damage. In this regard, the slightest carrier's or agents' fault renders the exception inapplicable. This is not an easy burden of proof for the carrier to bear.

32. During the 14th session of the Working Group, it was decided that the q exception be deleted since its substance had been moved to what is now article 17.2 of the Rotterdam Rules.[41] Article 17.2 provides :

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

33. The first thing to note with regards to article 17.2 is that it does not make part of the list of excepted perils of the Rotterdam Rules like the q exception does under the Hague-Hague/Visby Rules. It is a separate ground upon which the carrier's liability may be based. This marks the importance attributed by the drafters of the new rules to the fault-based system of liability that this provision prescribes.

34. In effect, as we have already seen, once the cargo claimant makes its *prima facie* case, the carrier's fault is presumed and the burden of proof shifts to the carrier who has to prove either : i) that the cause or one of the causes of loss,

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39. The most common occasion when the carrier claims the benefit of this exception is loss by theft of the cargo : E. GOLD, A. CHIRCOP, H. KINDRED, *op. cit.*, note 15, p. 463.

40. Canadian law : *Canadian Nat'l S.S.* v. *Bayliss*, [1937] S.C.R. 261 (S.C.C). U.S. law : A. VON ZIEGLER, *loc. cit.*, note 20, 329, 341. English law : *Heyn* v. *Ocean S.S. Co.*, (1927) 27 Ll.L.Rep. 334.

41. A/CN.9/572 para. 57.

damage, or delay is not attributable to its fault or to the fault of any person for whom the carrier is liable under article 18 (article 17.2); or ii) the presence of an excepted peril (article 17.3). If the carrier chooses to prove that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person for whom the carrier is liable (article 17.2), the question arises whether this Rotterdam Rules provision reproduces the burden of proof placed on the carrier under the above-mentioned q exception. One could argue that this is so: after all, the Working Group III decided to move the substance of the q exception to article 17.2 of the Rotterdam Rules. However, if we take a closer look at the two provisions, article 17.2 seems to place an easier burden of proof on the carrier than the q exception since proof of absence of fault under the former may only relate to 'one' of the causes of damage, loss or delay.[42] Moreover, article 17.2 does not seem to require that the 'one' cause of damage, loss or delay with respect to which proof of absence of fault must be established, constitutes the dominant cause.[43] On the contrary, under the q exception the slightest carrier's or agents' fault contributing to the loss or damage of the goods renders the exception inapplicable. The seemingly easier burden of proof under article 17.2 of the Rotterdam Rules renders this provision more carrier protective than its Hague-Hague/Visby Rules counterpart.

2. *THE ABOLITION OF THE NAUTICAL FAULT*

35. The first carrier liability exception appearing under article IV.2 of the Hague-Hague/Visby Rules is known as the *'nautical fault' defence* and exonerates the carrier in the presence of an 'act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship'. This long-standing ocean specific carrier exoneration cause refers to acts or omissions of the

42. A. VON ZIEGLER, *loc. cit.*, note 20, 329, 341, and A. DIAMOND, *loc. cit.*, note 12, 445, 473.

43. A. DIAMOND, *loc. cit.*, note 20, 445, 473.

carrier's agents relating to the navigation or the management of the vessel which lead to the damage or loss of the cargo.[44]

36. However, in recent years, a considerable debate exists on whether the nautical fault exemption should continue to exonerate the ocean carrier. Proponents of this excepted peril argue that such an exemption operates as a protective shield for the carrier in case of grave occurrences (i.e. collisions) and constitutes an incentive for the carrier's agents not to be negligent in the navigation and the management of the vessel.[45] Should it be removed, there would be a considerable change regarding the allocation of risks between carrier and cargo interests which would be likely to have an economic impact on insurance practice.[46]

37. Opponents of the nautical fault exemption argue that international land and air carrier liability regimes do not contain such a carrier exoneration cause.[47] Moreover, survival of this excepted peril protects the worst performers, increases shippers' costs in insuring their goods, is incompatible with the carrier's duty to care for the cargo and is not supported by technological advances such as radar and GPS (global positioning system). Such devices have undoubtedly reduced the particular risks associated with the existence of the nautical fault defence since they permit ocean carriers to communicate at all times with the crew members while at sea.

38. These opposing points of view were present at the negotiating table of the Rotterdam Rules.[48] After discussion, the

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44. It may seem irrational to exempt a carrier from liability resulting from the fault or neglect of its agents. A plausible reason justifying the presence of this ocean specific carrier defence is that at the end of the nineteenth century, navigation was specialized work, not under the same control possible by a carrier on land. At that time, wooden sailing ships carried cargo and there were few reliable marine charts and navigational aids. Ship owners could not even communicate with their ships at sea. Canada: E. GOLD, A. CHIRCOP, H. KINDRED, *op. cit.*, note 15, p. 456-457. U.K.: Stephen GIRVIN, *Carriage of Goods by Sea*, Oxford, Oxford University Press, 2007, p. 365. U.S.: Eun Sup LEE, Seon OK KIM, "A Carrier's Liability for Commercial Default or Default in the Navigation and Management of the Vessel", (2000) 27 *Transp. L. J.*, p. 205, 212.

45. For more details, see Leslie Tomasello WEITZ, "The Nautical Fault Debate", (1998) 22 *Tul.Mar.L.J.*, 581, 588.

46. *Id.*, A/CN.9/525 para. 36 (10th session).

47. L. T. WEITZ, *loc. cit.*, note 45, 581, 587. For what follows in this paragraph, see *id.*

48. A/CN.9/525 paras 36, 43 (10th session).

Working Group decided to delete the nautical fault exemption, and at a later session, it refused to reinstate it.[49] The abolition of this traditional ocean carrier exoneration cause protects shippers' interests and pursues uniformity of cross-modal carrier liability defences.

39. The next two carrier liability defences (sea perils and 'act of God') can be regrouped in one category called 'natural causes'. Their common characteristic is the absence of human agency in the production of the loss or damage to the cargo.

3. *PERILS, DANGERS, AND ACCIDENTS OF THE SEA OR OTHER NAVIGABLE WATERS*

40. This carrier defence, often referred to as 'perils of the sea' or 'sea perils', is an ocean specific excepted peril present in the Hague-Hague/Visby and the Rotterdam Rules. Carriers often have recourse to it. Its wording has remained unchanged and its substance was not much debated during the deliberations of the Working Group.[50] Despite its unanimous adoption, this carrier defence has been subjected to divergent judicial interpretations under Canadian, English and U.S. case law. To better comprehend the Canadian position on this excepted peril, we will first examine the U.S. and English view of what constitutes a sea peril.

41. 'Perils of the sea' are not statutorily defined. Under U.S. case law, sea perils are perils which are peculiar to the sea, are of an extraordinary nature or arise from irresistible force or overwhelming power and cannot be guarded against by the ordinary exertions of human skill and prudence.[51] Courts insist on the extraordinary nature of the event — an element whose presence is decided based on all the circumstances of

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49. *Id.*, and A/CN.9/544: paras 127, 129 (12th session). It was also thought that even 'compulsory pilotage' (the mandatory use of pilots when vessels travel through a difficult to navigate water body) or other rule imposed by port authorities on the ocean carrier should not exonerate it. A/CN.9/525 paras 36, 43 (10th session).

50. This carrier's defence appeared for the first time in the report of the Working Group during its 10th session (A/CN.9/525 para. 29) and during its 13th session, there was a general agreement on its substance (A/CN.9/552 para. 98).

51. *The Giulia*, 218 F. 744 (2nd Cir. 1914), R.T. *Jones Lumber Co.* v *Roen Steamship Co.*, 270 F.2d 456 (2nd Cir. 1959), *The Rosalia*, 264 Fed 285 (2nd Cir. 1920).

each case — and are also of the view that reasonably foreseeable weather risks cannot constitute sea perils.[52] Regardless of whether the event is foreseeable, demonstration of negligence on the part of the carrier will result in his losing the benefit of the exception.[53]

42. Under English case law, for perils of the sea to exist, "there must be some casualty, something which could not be foreseen as one of the necessary incidents of the voyage": (*The Xantho*).[54] Courts do not insist on the extraordinary nature of the event but define sea perils in terms of their foreseeability and the possibility of averting the danger.[55]

43. English case law and doctrine have been concerned with the question of whether a foreseeable event can qualify as a sea peril. The mentioned leading case, *The Xantho*, clearly states that a sea peril cannot be foreseen. A more recent case, *The Tilia Gorthon*,[56] seems to endorse this view. However, throughout the years, other cases have allowed foreseeable events to be covered by the sea peril exception. In doing so, these cases have often based their holdings on excerpts from the *Xantho* holding.[57] Supporting the latter view, Carver

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52. *Thyssen Inc.* v. *S.S. Eurounity*, 21 F3d 533 (2nd Cir. 1994). W. TETLEY, *op. cit.*, note 15, p. 1038. T.J. SCHOENBAUM, *op. cit.*, note 34, p. 624.

53. *In re Gulf & Midlands Barge Line Inc.* v. *The Tug Ramrod*, 509 F2d 713 (5th Cir. 1975). Although negligent conduct will vitiate this carrier's defence, the carrier can usually carry this burden of proof simply by proving the unforeseeable and catastrophic nature of the event. T.J. SCHOENBAUM, *op. cit.*, note 34, p. 625.

54. *Thomas Wilson, Sons & Co.* v. *Owners of the Cargo Per the Xantho*, 1886-1890 All ER 212 (1887) [hereinafter '*The Xantho*'].

55. G. TREITEL, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 505. *The Xantho*, *supra*, note 54.

56. *The Tilia Gordton*, (1985) 1 Ll. Rep. 552.

57. As Judge Tucker noted in *NE Neter & Co. Ltd* v. *Licenses and General Insurance Co Ltd*, [1944]1 All ER 341 :

> There must, of course, be some element of the fortuitous or unexpected to be found somewhere in the facts and circumstances causing the loss, and I think such an element exists when you find that properly stowed casks, in good condition when loaded, have become stoved in as a result of the straining and labouring of a ship in heavy weather. It is not the weather by itself that is fortuitous; it is the stoving in due to the weather, which is something beyond the ordinary wear and tear, of the voyage... It was "an accident which might happen, not an event which must happen," to quote the language of Lord Herschell in *The Xantho*.

See also *Hamilton, Fraser* v. *Pandorf Judge Fitzgerald*, (1887) 12 App Cas 518, and *Canada Rice Mills Ltd* v. *Union Marine and General Insurance Co. Ltd*, (1940) 4 All ER 169.

notes that in today's times, even abnormal weather conditions can be foreseen.[58] A sure way to guard against maritime adventure is not to go to sea at all but it is rare that a carrier will be regarded as wrong in setting out.[59] According to the author, the emphasis regarding sea perils should be placed on the phrase 'guarded against' rather than on the term 'foreseen'.[60] In this regard, English law concludes that in the presence of negligence on the part of the carrier or its agents, the carrier cannot avail of the sea peril defence.[61] However, Professor Tetley seems to disagree with Carver's point of view and uses the *Tilia Gorthon* holding and other recent cases to prove that a foreseeable event cannot constitute a sea peril under English law.[62] Other authors have countered Professor Tetley's reading of recent case law, including the *Tilia Gorthon* holding.[63] As a result, English case law on this issue does not seem settled and the doctrinal discussion that ensues follows the same trend.

44. Canadian cases do not require sea perils to be of an extraordinary nature.[64] They simply state that the harm-causing event should be of such nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against.[65] However, unforeseeability of the

58. G. TREITED, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 504.

59. *Ibid.*

60. *Ibid.*

61. *Id.* and *The Xantho*, *supra*, note 54.

62. W. TETLEY, *op. cit.*, note 15, p. 1040, bases his opinion on the following cases: *The Torenia*, (1983) 2 Ll. Rep. 210; *The Friso*, (1980) 1 Ll.Rep. 469; *The Tilia Gorthon*, (1985)1 Ll. Rep. 552.

63. M.L. HENDRIKSE, N.H. MARGETSON, *Aspects of Maritime Law: Claims under Bills of Lading*, Netherlands, Kluwer Law International, 2008, p.171-174 contradicting Professor Tetley's view that the unforeseeability of the harm causing event is a necessary element of a sea peril under English law. See also C.W. O'HARE, "Cargo Disputes and the Metronome Syndrome", (1982) 2 *Monash University L.Rev.* 233, 258, [On line]. http ://www.austlii.edu.au/au/journals/MonashULawRw/1982/6.pdf (Visited August 18, 2010).

64. *Keystone Transports Ltd.* v. *Dominion Steel & Coal Co. Ltd*, [1942] S.C.R. 495 (S.C.C.), *Charles Goodfellow Lumber Sales Ltd.* v. *Verreault*, [1971] S.C.R. 522 (S.C.C.), *Kruger, Inc.* v. *Baltic Shipping Co.*, [1988] 1 F.C. 262 (F.C.C.).

65. *Id.* and *Canadian Nat'l S.S.* v. *Bayliss*, [1937] S.C.R. 261 (S.C.C), *Falconbridge Nickel Mines Ltd.* v. *Chimo Shipping Ltd.* [1974] S.C.R. 933 (S.C.C). In deciding on the presence of a sea peril wind velocity, the time of year, the geographical location, the damage to the ship and other vessels in the vicinity will be taken into account by the court. W.TETLEY, *op. cit.*, note 15, p. 1042.

harm-causing event is a condition that the carrier must fulfill in order to benefit from 'the perils of the sea' exception under Canadian case law. In this way, in *Kruger, Inc.* v. *Baltic Shipping Co.*, the court held that the storm was not just foreseeable, evidence which would have sufficed, but it was actually foreseen and could not, therefore, exonerate the carrier.[66]

45. Finally, Canadian cases do not qualify an event as a sea peril if there is negligence on the part of the carrier. In *Falconbridge Nickel Mines Ltd. et al. (Plaintiffs) Appellants and Chimo Shipping Limited et al.*,[67] the carrier could not benefit from the sea peril liability exception because the cargo damage was due to the acts and omissions of the master and the officers responsible for the ship. The damage to the cargo arising from the weather conditions could, and should, therefore, have been guarded against.

46. After examining Canadian, English and U.S. case law on the sea perils liability defence, it is obvious that even though the Rotterdam Rules kept the wording of this excepted peril identical to that of the Hague-Hague/Visby Rules, judicial interpretations of what may constitute a sea peril vary from one jurisdiction to another. These will persist after the entry into force of the new instrument since the drafters of the Rotterdam Rules did not choose to further elaborate this excepted peril.

4. *ACT OF GOD*

47. The act of God (*theominia-vis major*[68]) carrier liability defence appears in the Hague-Hague/Visby and the Rotterdam Rules. Its wording has remained unchanged throughout the

66. *Kruger, Inc.* v. *Baltic Shipping Co.*, [1988] 1 F.C. 262 (F.C.C.), *Canadian Nat'l S.S.* v. *Bayliss*, [1937] S.C.R. 261 (S.C.C) and W. TETLEY, *op. cit.*, note 15, p. 1040-1042.

67. *Falconbridge Nickel Mines Ltd. et al. (Plaintiffs) Appelants and Chimo Shipping Limited et al.*, [1974] S.C.R. 933 (S.C.C). See also *Keystone Transports Ltd.* v. *Dominion Steel & Coal Co. Ltd*, (1942) S.C.R. 495 (S.C.C.) and *C.C.R. Fishing Ltd.* v. *British Reserve Insurance Co.*, [1990] 1 S.C.R. 814 (S.C.C.).

68. *'Theominia'* is the Greek word (*'Theos'* means God and *'menos'* means rage) for the phrase 'act of God'. The Latin term *'vis major'* (a greater or superior force; an irresistible force by law, a force majeure) is also used by U.S., Canadian and English cases.

deliberations of the Working Group and few comments have been made on it.[69] Contrary to sea perils, carriers rarely have recourse to the act of God defence.

48. Although an act of God is not statutorily defined, Canadian and U.S.[70] cases have referred to English case law and authors to define and refine its content. The leading English case *Nugent* v. *Smith*[71] defined 'acts of God' as :

> natural causes directly and exclusively without human intervention and that could not have been prevented by any amount of foresight and pains and care reasonably to have been expected.

49. Based on this definition, for an 'act of God' to exist there must be : first, a natural cause of damage that denotes absence of human contribution, negligent or not, in producing the harm-causing event; second, this natural cause of damage cannot be avoided or guarded against by any means which the carrier or servants could reasonably be expected to use.[72]

50. Although the act of God and the sea perils defences may overlap, sea perils are limited to events peculiar to the sea whereas an act of God may include any natural cause that

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69. In the 10th session of the Working Group, there was some discussion on whether or not this excepted peril should be maintained in the new rules. The debate intensified during the 12th and 14th sessions of the Working Group where it was argued that the inclusion of the 'act of God' liability defence in the new rules was unnecessary due to the incorporation of the q exception in what is now article 17.2 of the Rotterdam Rules. A/CN.9/544 para. 120 (12th session). However, it was suggested that if the 'act of God' defence be deleted from the list of excepted perils, it could risk erroneous judicial interpretation as a result of speculation regarding the reasons for its deletion. *Id.* and A/CN.9/572 paras 36-37 (14th session). Another view proposed the alternative wording of 'natural phenomena' to describe this exception. A/CN.9/572 para. 36 (14th session). In the end, support was expressed for keeping the defence 'act of God' in the Rotterdam Rules. A/CN.9/572 paras 36-37 (14th session).

70. Canadian case : *Falconbridge Nickel Mines Ltd.* v. *Chimo Shipping Ltd.*, [1974] S.C.R. 933 (S.C.C); *Kruger Inc. et al.* v. *Baltic Shipping Co.*, (1987) 11 F. T. R. 80 (F.C.C.) refers to Carver who cites the *Nugent* v. *Smith* case. U.S. case : *The Mamiye Bros.* v. *Barber S. S. Lines Inc.*, 241 F. Supp. 99 (D.C.N.Y. 1965) refers to the *Nugent* v. *Smith* case. See also T.J. SCHOENBAUM, *op. cit.*, note 34, p. 625.

71. *Nugent* v. *Smith*, (1876) 1 C.P.D. 423.

72. For these two elements, see G. TREITEL, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 506, 421. Carver has been cited in the Canadian cases *Falconbridge Nickel Mines Ltd.* v. *Chimo Shipping Ltd.*, [1974] S.C.R. 933 (S.C.C) and *Kruger Inc. et al.* v. *Baltic Shipping Co.*, (1987) 11 F. T. R. 80 (F.C.C.).

damages the cargo.[73] As such, this defence can be found in motor and rail carrier liability regimes whereas a sea peril constitutes an ocean specific excepted peril. On the other hand, following case law in certain countries (i.e. some English cases we mentioned earlier) sea perils may include cargo losses which have been brought about, in part, by the act or neglect of man, an element that an act of God excludes by its definition.

51. The next three Rotterdam rules excepted perils [*war, hostilities, armed conflict, piracy, terrorism riots and civil commotions; Quarantine restrictions, interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18; Strikes, lockouts, stoppages, or restraints of labour*] are events that take place due to third party actions. As such, they can be regrouped under one category entitled : liability defences due to third party actions.

5. *WAR, HOSTILITIES, ARMED CONFLICT, PIRACY, TERRORISM, RIOTS, AND CIVIL COMMOTIONS*

52. Some of the terms of this liability defence are present in the Hague-Hague/Visby Rules as separate carrier liability exceptions. We refer to the 'war' ('act of war' under the Hague-Hague/Visby Rules article IV.2(e)) and 'riots and civil commotions' liability defences (Hague/Visby Rules article IV.2(k)) which appear under the same excepted peril in the Rotterdam Rules probably because of the similar context in which these events may arise. The 'hostilities', 'armed conflict', 'piracy' and 'terrorism' events which are present in the Rotterdam Rules do not appear in the Hague-Hague/Visby Rules. In this way, this carrier liability defence modernizes,

73. See Thomas Gilbert CARVER, *Carriage by Sea*, 13th ed., London, Stevens & Sons, 1982, p. 163 for what follows in this paragraph, i.e. rain, frost, lightening, damage by rats, cockroaches are not perils of the sea but perils at sea since they are simply encountered at sea and are not peculiar to the sea. On the contrary, a ship striking a sunken rock, floods, icebergs earthquakes, blizzards constitute perils of the sea and acts of God at the same time. For some of these, see *id.*, at 164.

clarifies and expands the scope of its HagueHague/Visby Rules counterpart.

53. This excepted peril was briefly discussed during the 10th, 12th and 14th sessions of the Working Group and its content was not substantially changed[74]. In the 12th session of the Working Group, there was general support to include piracy and terrorism in the list of excepted perils but doubts were expressed regarding the absence of a precise definition of the term 'terrorism'.[75] In effect, today, there is no universally accepted definition of this term in international law.[76] At the domestic level, definitions of terrorism may vary and/or be criticized by doctrine.[77] Despite this fact, during the 12th session of the Working Group, it was observed that 'terrorism' is defined in a number of states and that a precise definition of it is unnecessary since the important issue is whether the event is attributed or not to the fault of the carrier.[78] What is, therefore, clear from the deliberations of the Working Group is that in order to define the term 'terrorism' the carrier will have to have recourse to domestic statutes. The question arises which definition of terrorism will be adopted by courts and how uniformity of judicial interpretation of the term will be achieved at the international level. Domestic courts will be invited to play an important role in defining this term and promoting uniformity of its interpretation.

54. With piracy attacks intensifying in certain areas of the world (especially in waters off Somalia and the Gulf of Aden), ocean carriers have to be able to avoid liability in case of damage, loss or delay of the cargo that occurs as a result of

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74. The only change consisted in taking out of this liability defence the 'act of God' phrase during the 14th session of the Working Group. A/CN.9/572 paras 36, 75.

75. A/CN.9/544 : para. 121 (12th session).

76. Upendra D. ACHARYA, "War on Terror or Terror Wars : The Problem in Defining Terrorism", (2009) 37 *Den.J.Int'l.L.P.* 653, 657.

77. Canadian law : DEPARTMENT OF JUSTICE, "The View of Canadian Scholars on the Impact of the Anti-Terrorism Act", (2010), [On line]. http ://www.justice.gc.ca/eng/pi/rs/rep-rap/2005/rr05_1/p3_1.html (Visited August 18, 2010) on the criticism of the domestic definition of terrorism. English law : LORD CARLILE OF BERRIEW, "The Definition of Terrorism", (2007), [On line]. http ://www.official-documents.gov.uk/document/cm70/7052/7052.pdf (Visited August 18, 2010). U.S. law : Nicholas J. PERRY, "The Numerous Federal Legal Definitions of Terrorism : The Problem of Too Many Grails", (2004) 30 *J.LEGIS.* 249.

78. A/CN.9/544 para. 121 (12th session).

the capturing of the vessel by pirates. The 'piracy' excepted peril is a novelty of the Rotterdam Rules and contributes to the modernization and expansion of the Hague-Hague/Visby Rules list of excepted perils. Like terrorism, piracy is not defined by the Rotterdam Rules. Unlike terrorism, however, this liability defence is defined not only at the domestic but also at the international level.[79]

55. Under the Hague-Hague/Visby Rules, an 'act of war' (named simply 'war' under the Rotterdam Rules) refers to acts committed by countries at war or during civil war.[80] It does not require a formal declaration of war or the severing of diplomatic relations between governments.[81] Under the Rotterdam Rules the scope of this liability defence is clarified and/or extended by the presence of the accompanying terms of 'hostilities' and 'armed conflict'. These concepts are not defined by the Rotterdam Rules. English case law seems to suggest that the concept of 'hostilities' refers to hostile acts by persons acting as the agents of sovereign powers or by organized forces such as rebels; it does not convey the act of a private individual acting on its own initiative, however hostile

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79. One of the commonly accepted international definitions of piracy is included in the *United Nations Convention on the Law of the Sea* (UNCLOS). Article 101 of the UNCLOS provides :

> Piracy consists of any of the following acts : (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed : (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Another definition of piracy is forwarded by the International Maritime Bureau. International definitions of piracy have been criticized. See Dana DILLON, "Maritime Piracy : Defining the Problem", (2005), [On line]. http ://www.southchinasea.org/docs/Maritime%20Piracy.pdf (Visited August 18, 2010).

80. *Curtis & Sons* v. *Matthews*, (1919) 1 KB 425, *Pesqueras y Secaderos* v. *Beer*, (1949) 1 All ER 845.

81. English law : *Kawasaki Kisen Kaisha* v. *Bantham Steamship Co.*, (1939) 2 KB 544. Canadian non maritime cases have cited this English case. For U.S. law, T.J. SCHOENBAUM, *op. cit.*, note 34, p. 627 refers to the mentioned English case with respect to this exception.

its actions may be.[82] According to doctrine, the concept of 'armed conflict' does not presuppose the presence of war between countries: '[war] connotes more than mere combat or armed conflict but rather a more complete undertaking of hostilities by one State against another'.[83]

56. The 'riots and civil commotions' excepted peril of the Hague-Hague/Visby and Rotterdam Rules refers to civil wars or organized public uprising against the government.[84] This liability exception complements the 'war' and 'hostilities' defences since rioters, mobs or private individuals falling under this defence are not acting on behalf of the State.

57. Another carrier liability defence that we find in the Hague-Hague/Visby Rules and which relates to the events described above is the 'act of public enemies' event (article IV.2(f)). This excepted peril refers to acts of enemies of the State, piracy, etc.[85] and is not reproduced in the Rotterdam Rules. Although the reason for its exclusion from the Rotterdam Rules is not explained, the potential overlap of this exception with the concepts of 'war, hostilities, armed conflict and piracy' justifies its absence from the new rules.

6. *QUARANTINE RESTRICTIONS (...)*

58. Two Hague-Hague/Visby Rules liability exceptions are regrouped in this Rotterdam Rules carrier's defence: the *'quarantine restrictions'* and the *'arrest or restraint of princes, rulers or people, or seizure under legal process'* (Hague-Hague/Visby Rules article IV.2(g)(h) respectively). The reason for this assimilation is not explained by the drafters of the new rules but can be justified by the fact that quarantine

82. *Atlantic Mutual Insurance Co.* v. *King*, [1919] 1 KB 307 (marine insurance case).

83. Robert Gray BRACKNELL, "Real Facts, 'Magic Language' the Gulf of Tonkin Revolution and Constitutional Authority to Commit Forces to War", (2007) 13 *N. Engl. J. Int'l. Comp. L.* 167, 172-173.

84. Michel POURCELET, *Le transport maritime sous connaissement — Droit canadien, américain et anglais*, Montréal, Les Presses de l'Université de Montréal, 1972, p. 134. See also S. GIRVIN, *op. cit.*, note 44, p. 377.

85. *Id.*, at 132 and 373 respectively. G. TREITEL, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 506. Under English law, the old formulation of this defence used to be 'King's enemies' or 'Queen's enemies'. S. GIRVIN, *op. cit.*, note 44, p. 373.

restrictions[86] have often been treated under the Hague-Hague/Visby Rules 'arrest or restraint of princes, rulers or people, or seizure under legal process' liability defence.[87] The intent of the drafters to regroup different liability defences into categories that present similar characteristics is, therefore, obvious.

59. At the beginning of the deliberations of the Working Group, this exception was phrased 'quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process]'.[88] From the preliminary drafting of this defence, it is obvious that the more archaic language of 'arrest or restraint of princes, rulers or people' of the Hague-Hague/Visby Rules was replaced by the more analytical and clear-cut Rotterdam Rules phrase 'interference by or impediments created by governments, public authorities, rulers or people'. Examples of such 'arrest or restraint of princes, rulers or people' under the Hague-Hague/Visby Rules that would qualify as 'interference or impediments created by governments, public authorities, rulers or people' under the Rotterdam Rules are : naval blockage or embargo, confiscation of goods, prohibition on imports or exports of goods.

60. The Hague-Hague/Visby Rules 'seizure under legal process' exoneration cause refers specifically to the ordinary civil administration of justice (i.e. seizure or arrest of the vessel or the cargo)[89] on the basis of creditors' claims. It constitutes a distinct event from the 'arrest or restraint of princes, rulers or people' concept which is based on executive or administrative action.[90] Under the Rotterdam Rules, arrest, seizure and

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86. 'Quarantine' is a term during which a ship arriving in port and suspected of carrying contagious disease is held in isolation from the shore. MERRIAM WEBSTER DICTIONARY, "Quarantine" (2010), [On line]. http ://www.merriam-webster.com/dictionary/quarantine. The objective of quarantine is to ascertain that the crew and/or cargo are not infected.

87. M. POURCELET, *op. cit.*, note 84, p. 132. Grant GILMORE, Charles L. BLACK, *The Law of Admiralty*, 2nd ed., New York, The Foundation Press, 1975, p. 164. G. TREITEL, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 507.

88. A/CN.9/525 para. 29 (10th session), A/CN.9/544 : para. 85 (12th session). The brackets indicate wording under negotiation.

89. S. GIRVIN, *op. cit.*, note 44, p. 373. T.J. SCHOENBAUM, *op. cit.*, note 34, p. 627.

the newly added concept of detention which broadens the scope of this excepted peril make integral part of the 'interference by or impediments created by governments, public authorities, rulers or people...' defence.[91]

61. All events described in this Hague-Hague/Visby and Rotterdam Rules excepted peril cannot be attributable to the carrier or its agents. This requirement is explicit in the Rotterdam Rules and implicit in the Hague-Hague/Visby Rules.[92] By making explicit the absence of fault requirement, the Rotterdam Rules clarify the conditions of application of its Hague-Hague/Visby Rules counterpart.

7. *STRIKES, LOCKOUTS, STOPPAGES, OR RESTRAINTS OF LABOUR*

62. The wording of this liability defence has slightly changed under the Rotterdam Rules compared to its Hague-Hague/Visby Rules counterpart that exonerates the carrier for *'strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general'*. The Working Group did not deliberate in length on this excepted peril. As a result, its wording and substance have remained unchanged from the beginning of the deliberations of the Working Group to their very end.

63. Although there is not a universally accepted definition of what constitutes a 'strike', the term has been defined as:

> a concerted stoppage of work by men done with a view to improving their wages or conditions, or giving vent to a grievance or making a protest about something or other, or

90. S. GIRVIN, *op. cit.*, note 44, p. 373.

91. During the 12th and the 14th session of the Working Group, further clarification of this defence was deemed necessary, especially regarding the wording in brackets: [including interference by or pursuant to legal process]. It was, therefore, decided during the 14th session of the Working Group that the content of the Hague-Hague/Visby Rules defence should be broadened beyond arrest and seizure and should include detention. A/CN.9/572 paras 38, 22, 26 (14th session), A/CN.9/544 para. 122 (12th session).

92. Rotterdam Rules: A/CN.9/572 paras 75, 80 (14th session). Hague-Hague/Visby Rules: E. GOLD, A. CHIRCOP, H. KINDRED, *op. cit.*, note 15, p. 460, G. TREITEL, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 507.

supporting or sympathizing with other workmen in such endeavour.[93]

64. In a strike, the work stoppage is initiated by employees, i.e. the crew, port workers, etc. When it is the employer who does not allow employees to work following a labour dispute, then the stoppage of labour is called 'lock-out'. Among the many strike related concepts (i.e. picketing, disturbance) appears the term 'restraint of labour' which is a broader concept than that of strikes and locks-out.[94] Since the same terms are used by the Hague-Hague/Visby and Rotterdam Rules, it seems unlikely that their substance is going to change by the entry into force of the new instrument.

65. This does not mean that the content of this excepted peril has not been clarified by the new rules. During the 12th session of the Working Group, it was suggested that the Hague-Hague/Visby Rules phrase 'from whatever cause' be added to this liability defence. However, doubts were raised regarding this addition since some strikes could be caused or contributed to by the acts of the carrier such as where the carrier refuses the reasonable requests of the crew that subsequently goes on strike.[95] It was thought, therefore, that adding the phrase 'from whatever cause' could be read as exonerating the carrier even in the presence of its own fault.[96] During the same session, it was also suggested that this liability defence should make a distinction between general strikes and strikes that might occur in the carrier's

93. English case law : As stated by Lord Denning in *Tramp Shipping Corporation* v. *Greenwich Marine Inc.*, (1975) 2 ALL E.R. 989 (C.A.). Canadian case law : A similar definition has been adopted in Canada in *International Longshoremen* v. *Maritime Employers*, [1979] 1 S.C.R. 120 (SCC). See also Section 3(1) of the *Canada Labour Code* for a similar definition. U.S. law : 29 U.S.C.A. para. 142(2).

94. A/CN.9/572 para. 43 (14th session).

95. A/CN.9/544 para. 123 (12th session).

96. It should be noted, however, that under the Hague-Hague/Visby Rules the carrier cannot invoke this liability defence when it is at fault : *Crelinsten Fruit Co.* v. *Mormacsaga*, 2 Ll. Rep. 184 (Ex.Ct. of Can. 1968). G. GILMORE and C.L. BLACK, *op. cit.*, note 87, p. 165-166. The U.S. COGSA Section 1304(2)(j) has eliminated this doubt under the Hague Rules by adding the phrase 'nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts'. Also, the deletion of the phrase 'whether partial or general' appearing at the end of this liability defence under the Hague-Hague/Visby Rules has not met with any objection from the drafters of the Rotterdam Rules.

business for which the carrier might bear some fault.[97] In the 14th session of the Working Group, a more specific suggestion was made concerning the 'restraints of labour' term. It was stated that the exact meaning of this phrase is not clear and that it should be made clear that it does not include events arising from the fault of the carrier.[98] In the end, however, none of these suggestions were retained and the drafters opted for the wording of the Hague-Hague/Visby Rules exception with the changes mentioned above.

66. Finally, during the very last session of the Working Group (21st session), it was suggested that this liability defence be deleted because article 17.2 (absence of fault provision) could protect sufficiently the carrier in the case of loss, damage or delay arising out of strikes, lockouts, stoppages, or restraints of labour.[99] This suggestion did not enjoy wide support since there was not sufficient consensus to reopen negotiations on this and other provisions of article 17.[100]

8. *FIRE ON THE SHIP*

67. Under the Hague-Hague/Visby Rules, the ocean carrier is exonerated in case of '*fire* unless caused by the actual fault or privity of the carrier'. The Rotterdam Rules presume the carrier's absence of fault in the case of 'fire on the ship'.

68. Early on in the work of the Working Group III, there were three preponderant positions regarding this excepted peril:[101] one suggested that the fire exception should be deleted from the rules as it had no place in modern navigation.[102] Another argued that the exception should be

97. A/CN.9/544 para. 123 (12th session).

98. A/CN.9/572 para. 43 (14th session). Also, the suggestion was made to replace "restraints of labour" by the more modern labour law term, "labour actions". *Id.*

99. A/CN.9/645 para. 54 (21st session).

100. A/CN.9/645 para. 56 (21st session). Also, concerns were raised that the deletion of this liability exception would lead to a substantial increase of the carrier's liability. *Id.*

101. For the three positions, see A/CN.9/572 paras 59-62 (14th session). See also A/CN.9/544 para. 126 (12th session), A/CN.9/552 paras 95, 94 (13th session) and A/CN.9/525 para. 37 (10th session).

102. This was suggested despite the fact that the Working Group had decided, in its 13th session, to maintain this defence. A/CN.9/552 paras 99, 94 (13th session)

maintained as it appears in the Hague-Hague/Visby Rules. The third suggestion proposed a compromise in establishing that the fire defence : a) should apply to ocean carriage alone since such a cause of damage does not exonerate the carrier in other modes of transportation; and b) should make the carrier responsible for the acts of its agents not placing, therefore, an unfair burden of proof on the cargo claimant. The latter position finally prevailed during the 14th session of the Working Group and the wording 'fire on the ship' was adopted.[103]

69. Contrary to the Hague-Hague/Visby Rules where fire may occur from 'tackle to tackle', this Rotterdam Rules defence allows fire to take place merely 'on the ship'. Moreover, the wording of this excepted peril alters the Hague-Hague/Visby Rules burden of proof regarding this exoneration cause. In order to understand the changes brought about by the Rotterdam Rules on this point, we will explain the Hague-Hague/Visby *onus probandi* under Canadian, U.S. and English law.

70. In Canada, once the cargo claimant has made its *prima facie* case, the burden of proof shifts to the carrier who has to establish that the loss or damage was caused by fire, how the fire started and that it exercised due diligence to provide a seaworthy vessel 'before and at the beginning of the journey'.[104] Then, the burden of proof shifts back to the cargo claimant who has to establish the carrier's actual fault or privity with respect to the fire. This is a heavy burden of proof since it is the cargo claimant who must prove the carrier's personal fault; the 'largeness of authority' of this exception embraces only the carrier or its senior officers in case of corporate ownership.[105]

71. Burden of proof rules under this Hague-Hague/Visby exoneration cause become further complicated by the presence of fire statutes in certain countries such as the U.K and

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103. A/CN.9/572 para. 62 (14th session).

104. For the burden of proof in this paragraph, see W. TETLEY, "Responsibility for Fire in the Carriage of Goods by Sea", (2002), [On line]. http ://www.mcgill.ca/maritimelaw/maritime-admiralty/fire/#_ftnref30 (Visited August 18, 2010), *Dominion Glass Co. Ltd* v. *Ship Anglo Indian*, (1944) SCR 409 (S.C.C.). Canada has repealed its fire statute.

105. E. GOLD, A. CHIRCOP, H. KINDRED, *op. cit.*, note 15, p. 457-459. The test is whether the official is the directing mind of the corporation. *Id.*

the U.S. [herein referred to as 'fire statutes'].[106] Based on these statutes, which are protected from implied repeal by domestic legislation implementing the Hague-Hague/Visby Rules, fire must take place 'on board' the vessel. Moreover, it is the cargo claimant, not the carrier, who has to prove the cause of the fire as well as the actual fault or privity of the carrier. Further, the carrier may invoke the fire exception without having to prove, first, due diligence to provide a seaworthy vessel 'before and at the beginning of the journey' (with the exception of the U.S. Ninth Circuit).

72. Both the Rotterdam Rules and the mentioned fire statutes require that the fire takes place on the ship. Both sets of rules do not require the carrier to prove vessel's seaworthiness before benefiting from the fire exception. However, in order to retain the carrier's liability under the Rotterdam Rules, the cargo claimant must prove either fault on the part of the carrier or any person involved in the performance of the contract of carriage, or vessel's unseaworthiness. In contrast, under the fire statutes, only proof of the actual fault or privity of the carrier will disallow it the benefit of this exception even with regard to the lack of due diligence to provide a seaworthy vessel. In this way, the Rotterdam Rules are less carrier protective than the fire statutes.[107] When comparing the Canadian fire exception under the Hague-Hague/Visby Rules to its Rotterdam Rules counterpart, one could argue that the latter rules are also less carrier protective than the former since under the Hague-HagueVisby/Rules the cargo claimant must establish the actual fault or privity of the carrier with respect to the fire, something that is not required

106. W. TETLEY, *loc. cit.*, note 104 and W. TETLEY, *op. cit.*, note 15, p. 991s (Chapter 17) for the burden of proof that follows and for a more detailed comparison than the one contained here. Fire Statutes are shipowners' limitation statutes which, where they apply, exonerate their beneficiaries totally from liability for cargo loss or damage resulting from fire, just as the "fire exceptions" do under the Hague-Hague/Visby Rules. *Id.* For U.S. law, see also: T.J. SCHOENAUM, *op. cit.*, note 34, p. 618-622. For English law, see also: G. TREITEL, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 503-504.

107. See, however, some arguments to the contrary made by Anthony Diamond on this excepted peril. A. DIAMOND, *loc. cit.*, note 12, 445, 476. To avoid complications in the implementation of the Rotterdam Rules, it would be preferable for countries that currently maintain fire statutes not to import their provisions in the legislation implementing the new instrument.

under the Rotterdam Rules. However, such an argument does not take into account that, contrary to the Rotterdam Rules, in Canada it is the carrier who must prove that it exercised due diligence to provide a seaworthy vessel before invoking the fire defence.

73. The following five excepted perils [*latent defects not discoverable by due diligence; act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34; insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier; loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods*], can be regrouped in one category entitled : 'cargo, vessel or shipper's fault' since the mentioned events all refer to causes of loss or damage due the shipper's fault or a defect in the vessel or the cargo.

9. *LATENT DEFECTS NOT DISCOVERABLE BY DUE DILIGENCE*

74. This liability defence, which follows the same wording under both sets of rules, can be invoked by the carrier in the presence of latent defects in the vessel or cargo handling equipment (i.e. cranes) that are not discoverable by due diligence.[108] During the very last session of the Working Group, it was proposed that this excepted peril be deleted from the

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108. Canadian law : *Kruger, Inc.* v. *Baltic Shipping Co.*, [1988] 1 F.C. 262 (F.C.C.), *Scottish Metropolitan Assurance Co.* v. *Canada Steamship Lines Ltd*, (1930) S.C.R. 262 (S.C.C.). English law : G. TREITEL, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 511, Indira CARR, *International Trade Law*, 3rd ed., London, Cavendish Publishing Ltd., 2005, p. 257-258. U.S. law : *Sony Magnetic Prod.* v. *Merivienti O/Y*, 863 F2d 1537 (11th Cir. 1989).
During the 14th and 19th sessions of the Working Group the suggestion was made to phrase this exception as 'latent defects in the ship not discoverable by due diligence'. A/CN.9/572 para. 49 (14th session). This suggestion was rejected because the additional phrase 'in the ship' unduly restricted the broader scope of the Hague-Hague/Visby Rules which includes latent defects of machinery such as cranes. A/CN.9/621 para. 70 (19th session).

text of the new rules because it would be unfair to make the cargo owner liable for latent defects. In the end, however, there was no sufficient consensus to reopen negotiations on this and other provisions of article 17.[109]

75. The content of this defence evidently overlaps with the duty to exercise due diligence to provide a seaworthy vessel (article III(1) of the Hague-Hague/Visby Rules and article 14 of the Rotterdam Rules). However, as Professor Tetley notes, the two are not synonymous.[110] First, this excepted peril requires that the defect could not have been discovered by due diligence whether or not there is proof that such actually took place. On the contrary, exercise of due diligence to provide a seaworthy vessel must always take place under the Hague-Hague/Visby and the Rotterdam Rules. Second, whereas the duty of seaworthiness under both sets of rules relates to the vessel's seaworthiness, cargoworthiness, supplies, equipment, crew, the present excepted peril only relates to the vessel's or cargo's handling equipment. Third, under the Hague-Hague/Visby Rules, the carrier's duty to provide a seaworthy vessel only takes place before and at the beginning of the journey and not at any time as is the case of the present liability defence.[111] The same does not apply under the Rotterdam Rules that mandate due diligence to provide a seaworthy vessel not only 'before and at the beginning of' the voyage but also during the sea voyage (article 14). As a result, both the duty to provide a seaworthy vessel and the latent defects excepted peril apply during the same period of time under the new rules.

10. SHIPPER'S FAULT

76. This is a carrier liability defence present in the Hague-Hague/Visby and the Rotterdam Rules and frequently used by carriers. Under the Hague-Hague/Visby Rules it is

109. A/CN.9/645 paras 54, 56 (21st session).

110. See W. TETLEY, *op. cit.*, note 15, p. 1210 for what follows. The author comments merely on the Hague-Hague/Visby Rules and not on the Rotterdam Rules.

111. See also Jean PINEAU, *Le contrat de transport terrestre, maritime, aérien*, Montréal, Éditions Thémis, 1986, p. 209. This exception has been referred to as 'in transit seaworthiness'.

phrased as : '*act or omission of the shipper or owner of the goods, his agent or representative*'. The innovation of the Rotterdam Rules regarding this excepted peril lies in : a) the detailed identification of persons whose acts or omissions create a presumption of no fault benefiting the carrier; and b) the delineation of shippers' obligations and liability towards the carrier (articles 27–35), the study of which is necessary in trying to identify what constitutes an 'act or omission of the shipper' under the current liability defence.

77. **a)** Identification of persons whose acts or omissions create a presumption of no fault benefiting the carrier : although both sets of rules refer to the 'act or omission of the shipper', the Rotterdam Rules additional reference to the 'act or omission of the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper[112] is liable pursuant to article 33 or 34' is much more explicit than its Hague/Hague Visby Rules counterpart : 'act or omission of the owner of the goods, his agent or representative'.

78. The detailed reference to persons whose acts or omissions create a presumption of no fault benefiting the carrier was the result of long deliberations within the Working Group. Up to the 14th session of the Working Group, this liability defence only referred to the "act or omission of the shipper, the controlling party or the consignee".[113] It was only in the 14th session that it was stated that this excepted peril should refer to other persons acting on behalf of the shipper so that the carrier be presumed not at fault for acts performed by persons not under its control.[114] This drafters' intent was compatible with the introduction of the new concepts of 'controlling party' and 'documentary shipper' in the Rotterdam Rules, concepts which had to be taken into account in formulating the shipper's fault excepted peril. During the 19th, 20th and 21st sessions, this defence was

112. All these persons will hereinafter be referred to as 'shippers' and this exception will be referred to as the 'shipper's fault' defence.

113. A/CN.9/525 para. 29 (10th session); A/CN.9/544 para. 85 (12th session).

114. A/CN.9/572 paras 41-42 (14th session).

further elaborated to render it consistent with the newly introduced terms.[115]

79. Under the Rotterdam Rules a controlling party is a person who is entitled to exercise the right of control (article 1.13) and give, therefore, instructions relating to the goods, obtain delivery of the goods or replace the consignee (article 50). This party is basically the shipper unless the latter designates, when the contract of carriage is concluded, the consignee, the documentary shipper or another person as the controlling party (article 51.1). A controlling party can also be the holder of a negotiable transport document, such as is usually the case of the ocean bill of lading (article 51.3). A documentary shipper is defined as "a person, other than the shipper, who accepts to be named as 'shipper' in the transport document or electronic transport record" (article 1.9). In practice, a freight forwarder may be a documentary shipper since it is usually the case that the shipper contacts a freight forwarder who will be responsible for organizing the cargo transport move and whose name will appear in the bill of lading or electronic transport record. The incorporation of articles 33 and 34 further clarifies the scope of this excepted peril by determining the persons for whom the shipper is liable (article 34) and the rights and obligations of the documentary shipper (article 33).[116] Acts or omissions on the part of all the persons mentioned herein will presume the carrier not at fault when they relate to the transported cargo that is damaged, lost or delayed.

80. **b)** Delineation of shippers' obligations and liability towards the carrier: Contrary to the Hague-Hague/Visby Rules that contain practically no explicit provision regarding

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115. A/CN.9/621 paras 257-260 (19th session), A/CN.9/642 para. 111 (20th session) and A/CN.9/645 paras 105, 57-58 (21th session) respectively. In the 21st session, reference to 'the consignee' was deemed unnecessary.

116. Rotterdam Rules article 33 states that the documentary shipper is subject to the same obligations, liabilities, rights and defences as the shipper, whereas article 34 of the Rotterdam Rules provides:

> The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

the obligations of the shipper towards the carrier,[117] the Rotterdam Rules contain clear rules on the subject which are contained in articles 27 to 35. Violation of such obligations may qualify as an 'act or omission' of the shipper under the shipper's fault liability defence for which the carrier will be presumed not at fault for loss, damage or delay of the goods.[118] Examples of shipper's obligations to the carrier : the shipper must deliver the goods to the carrier ready for carriage and able to withstand the intended voyage (article 27.1) i.e. by properly stowing, lashing and securing the contents of a container (article 27.3). The shipper must cooperate with the carrier in providing information and instructions with regard to the handling, carriage and shipment of the cargo (articles 28 and 29) and in filling out the contract of carriage (article 31.1). The shipper guarantees the accuracy of the information it provides and which appears in the contract of carriage (article 31.2 comparable to article III.5 of the Hague-Hague/Visby Rules). The shipper must mark dangerous goods and inform the carrier of the dangerous nature or character of the cargo (article 32). All breaches of such obligations usually involve highly factual determinations.

81. Moreover, the Hague-Hague/Visby Rules contain practically no provision regarding the shipper's liability towards the carrier whereas the Rotterdam Rules are more explicit on this topic.[119] According to the Rotterdam Rules, the shipper will be liable to the carrier for loss or damage sustained by the latter in case of breach of the shipper's obligations (article 30.1) or in case of acts or omissions of persons which may be

117. The only references made to the shipper's obligations under the Hague-Hague/Visby Rules are article III.5 commenting on the shipper being the guarantor of the accuracy and adequacy of marks, number, quantity and weight of the goods, and article IV.3 stating that the shipper will not be responsible for damage or loss sustained by the carrier or the ship not arising or resulting from the act, fault or neglect of the shipper, his agents or his servants. See also : A/CN.9/591 para. 105 (16th session).

118. The relation between a violation of the shipper's obligations and this excepted peril was alluded to during the deliberations of the Working Group III : A/CN.9/594 para. 181 (17th session).

119. The only liability provision regarding the shipper's liability towards the carrier under the Hague-Hague/Visby Rules is article III.5 which holds the shipper strictly liable towards the carrier in the case of inaccurate marking, numbering, quantity, weight of the transported goods.

attributed to the shipper (articles 30.3 and 34).[120] The instituted liability of the shipper towards the carrier was intended to maintain a balance between the carrier's and the shipper's obligations. In this way, both the carrier's and shipper's liability regimes are based on fault with the exception of the shipper's breach in providing inaccurate information on the cargo (article 31.2) and the shipper's liability regarding dangerous goods (article 32) for which the shipper is strictly liable.[121]

11. *DEFECTIVE PACKING OR MARKING*

82. This excepted peril regroups two separate carrier exoneration causes under the Hague-Hague/Visby Rules: the 'insufficiency of packing' and the 'insufficiency or inadequacy of marks' (Hague-Hague/Visby Rules article IV.2(n)(o)). During the deliberations of the Working Group, it was noted that the shipper's obligation to deliver goods in such a condition that they can withstand the intended carriage (article 27.1 of the Rotterdam Rules) encompasses the content of this traditional, important and highly factual carrier liability defence.[122] In effect, it is the shipper who provides the carrier with the leading marks necessary for the identification of the goods (article 36.1.b) and who is usually responsible for the packing of the transported cargo, including containers (article 27.3). Insufficient packing, which means not customary or normal packing in the trade,[123] based on the nature of the goods, the way the packing is made, packing usages and other variants of the journey, cannot, therefore, engage the carrier's liability when it is performed by or on behalf of the shipper. Moreover, the shipper is strictly liable for inaccurate information concerning the goods, i.e. insufficient marking, since it is

120. Note should also be made that the shipper is not liable to the carrier for delay due, in part, to the enormous and potentially uninsurable liability the shipper may be exposed to in such a case. See suggestions made during the A/CN.9/591 paras 143-153 (16th session) and discussion in A/CN.9/594 paras 199-207 (17th session) and A/CN.9/621 para. 237 (19th session).

121. A/CN.9/591 para.153 (16th session), A/CN.9/552 para. 148 (13th session), A/CN.9/621 para. 237 (19th session).

122. A/CN.9/572 para. 46 (14th session).

123. W. TETLEY, *op. cit.*, note 15, p. 1178.

deemed to have guaranteed the accuracy of the information required for the compilation of the contract particulars (article 31.2).

83. During the 14th session of the Working Group and in an effort to clarify and modernize the wording of this defence, it was concluded that the addition of the phrase 'not performed by or on behalf of the carrier' should appear at the end of it.[124] In this way, insufficient or defective packing or marking presume the carrier not at fault as long as these are not performed by the carrier or on behalf of the carrier. During the same session, it was also suggested that this defence should be deleted as redundant because of the presence of the shipper's fault excepted peril which could encompass it. In response, however, it was stated that the text of the Hague-Hague/Visby Rules should not be revised to address an issue which did not seem to have posed a problem in practice.[125] As a result, this traditional defence was not deleted from the text of the Rotterdam Rules.

84. For the rest, the insufficiency of or defect in the packing or marking of the cargo defence entails highly factual scenarios where the nature of the cargo, the presence of containers and of a clean or claused bill of lading can play a determinative role in exonerating the carrier (Hague-Hague/Visby Rules) or presuming it not at fault (Rotterdam Rules). For instance, when the carrier issues a clean bill of lading, it cannot exclude its liability under the insufficiency or defective packing or marking liability exception of the Hague-Hague/Visby Rules as against the consignee or endorsee of a bill of lading acting in good faith.[126] He is estopped from doing so because of the third party's good faith and reliance upon the transport document. Such a conclusion does not change under the Rotterdam Rules since article 58.2 provides that a holder of a negotiable bill of lading that is not the shipper and that exercises any right under the contract of

124. A/CN.9/572 paras 46-48 and 75 (14th session).

125. *Id.*, at para. 46.

126. The English case on this point *Silver* v. *Ocean Steamships Co. Ltd*, (1930) 1 KB 416 was followed in Canada by *Torras Hostench S.A.* v. *The "SALVADOR ALLENDE"*, (1976) 2 F.C. 657 (F.C.C.). U.S. law : *J. Aron & Co.* v. *S.S. Kerlew*, 1924 AMC 560 (S.D.N.Y. 1924).

carriage, assumes any liabilities imposed on it by the contract to the extent that such liabilities are incorporated in or are ascertainable from the negotiable transport document.[127]

12. *INHERENT DEFECT*

85. This is an excepted peril to which carriers often have recourse under the Hague-Hague/Visby Rules. Its wording has remained unchanged under the Rotterdam Rules.[128] Common names used to identify it are: 'inherent vice' or 'inherent defect' of the cargo.

86. Although definitions may vary, an inherent defect refers to any existing defects, diseases, decay or other inherent nature of the commodity which will cause it to deteriorate with the lapse of time.[129] Deterioration of perishable goods, flour shrinking and losing weight with the passage of time, the presence of invisible bacteria in the cargo are examples of inherent defects of the cargo. Such events should not to be confused with the already examined 'latent defect not discoverable by due diligence' excepted peril which only relates to latent defects in the vessel or cargo handling equipment.

87. During the 11th session of the Working Group, it was suggested that this excepted peril should make explicit reference to the carriage of live animals in poor health.[130] It was generally felt, however, that the inherent defect defence was

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127. Up to the very last sessions of the Working Group, there was much debate on whether or not this paragraph of article 58 should be deleted or maintained. The controversy revolved mostly around the circumstances under which a holder would 'exercise any right under the contract' A/CN.9/645 para. 181 (21th session). A/CN.9/642 para. 22 (20th session).

128. Moreover, this excepted peril has only been referred to very briefly in sessions 10-12 and 14 of the Working Group. In its 14th session (A/CN.9/572 para. 45 (14th session), the Working Group adopted the Hague-Hague/Visby Rules wording of this defence since it deemed that it reflected established commercial practice.

129. U.S. law: *Steel Intern., Inc.* v. *Granheim*, 540 F.Supp. 1326 (D.C.N.Y. 1982). Canadian law: *Produits alimentaires Grandma* v. *ZIM Israel Navig. Co.*, (1987) 8 F.T.R. 191, *Westcoast Food Brokers* v. *Hoyanger*, 31 N.R. 82 (F.C.A.) and E. GOLD, A. CHIRCOP, H. KINDRED, *op. cit.*, note 15, p. 460-461. Somewhat different definitions are found under English law: G. TREITEL, F.M.B. REYNOLDS, *op. cit.*, note 38, p. 509.

130. A/CN.9/526 para. 216 (11st session).

difficult to characterize with respect to live animals.[131] This is one of the reasons that the drafters of the Rotterdam Rules opted to create a special regime for live animals which is contained in article 81.[132]

13. *LOADING, HANDLING, STOWING, OR UNLOADING OF THE GOODS PERFORMED PURSUANT TO AN AGREEMENT (...)*

88. This is a liability defence that does not appear in the Hague-Hague/Visby Rules but that deals with a practice which has developed under them. Under both sets of rules, (Rotterdam Rules article 12 and Hague-Hague/Visby Rules article 3(2)), 'loading', 'unloading', 'stowing' and 'handling' cargo operations are the responsibility of the carrier. In practice, however, carriers and shippers often insert clauses in the bill of lading known as 'FIO' clauses ('free in and out' clauses) according to which the shipper agrees to effect handling cargo operations, notably the loading, stowing and/or unloading of the cargo.[133] Depending on the wording of such clauses, the question may arise whether the carrier or the shipper will be held liable in case of damage or loss occurring during loading, unloading, stowing or handling of the cargo due to the fault of the shipper or the shipper's agents. Under the Hague-Hague/Visby Rules, the answer varies based on the wording of the specific clause and the applicable law in a given jurisdiction.

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131. *Ibid.*

132. Live animals are explicitly excluded from the definition of 'goods' under the Hague-Hague/Visby Rules (article 1.c). However, under the UK COGSA 1971, s. 1(7), contracting parties can subject the carriage of live animals to the Hague/Visby Rules. See also I. CARR, *op. cit.*, note 108, p. 280.

133. "FIO" ("free in and out") or "FILO" ("free in liner out") or "FIOS" ("free in and out, stowed") or "FIOST" ("free in and out stowed and trimmed"). The various FIO clauses are, in essence, clauses that transfer from the carrier to the cargo interests the obligation to nominate and the duty to pay stevedores to load, stow and discharge the cargo. Depending on its wording, the particular FIO clause may also transfer from the carrier to the cargo interests the responsibility for proper performance of such operations. The FIO clauses are at the basis of this liability defence: A/CN.9/572 para. 51 (14th session); A/CN.9/645 paras 46-49 (21st session). Experience shows that most damage in international maritime carriage occurs during loading or unloading: A/CN.9/645 para. 44 (21st session).

89. English courts sanction such clauses exonerating the carrier in case of a violation of a FIO clause.[134] U.S. courts are divided on the issue of whether or not loading, stowing and unloading cargo are "delegable or "non-delegable" duties of the ocean carrier with the majority judicial opinion considering these operations to be "non-delegable" obligations.[135] Canada has not yet litigated this question.[136]

90. Article 13.2 of the Rotterdam Rules sanctions contractual clauses that delegate loading, handling, stowing or unloading of the goods to the shipper, the documentary shipper or the consignee, i.e. FIO clauses.[137] The present liability defence presumes the carrier not at fault in case of contractual clauses sanctioned by article 13.2. The position of the Rotterdam Rules on this point aligns with English cases under the Hague-Hague/Visby Rules.[138] The only exception to this carrier's defence is when it is the carrier or a performing party that performs loading, unloading, handling, stowing operations on behalf of the shipper, the documentary shipper or the consignee. In such a case, it is the carrier and not the shipper who will be liable for the loss, damage or delay to the goods.

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134. *Pyrene Co. Ltd.* v. *Scindia Steam Navigation Co. Ltd.*, (1954) 2 All ER 158; *G.H. Renton & Co. Ltd.* v. *Palmyra Trading Co. of Panama*, (1957) A.C. 149; *Jindal Iron and Steel Co. Ltd. and Others* v. *Islamic Solidarity Shipping Company Jordan Inc.*, (2005) 1 All ER 175 [the Jindal holding]. William TETLEY, "Properly Carry, Keep and Care for Cargo", (2001), [On line]. http ://www.mcgill.ca/maritimelaw/maritime-admiralty/art3-2/#N_30_ (Visited August, 18, 2010).

135. W.TETLEY, *loc. cit.*, note 134, Mark HEGARTY, "A COGSA Carrier's Duty to Load and Stow Cargo Is Non Delegable or Is It? *Associated Metals and Minerals Corp.* v. *M/V Arktis Sky*", (1993) 18 *Tul.Mar.L.J.* 125.

136. "[The Jindal holding], while useful, is not binding in Canada, and future Canadian cases will determine whether our courts adhere to this approach." Peter SWANSON, « Case Comment : *Jindal Iron & Steel Co. Ltd and Others* v. *Islamic Solidarity Shipping Company Jordan Inc. (the "Jordan II")*, (2005), [On line]. http ://www.bernardpartners.com/images2005/pdfs/vmaaarticle.pdf (Visited August 18, 2010).

137. Article 13.2 provides, in part :

> Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

138. D.E. CHAMI, *loc. cit.*, note 13.

91. A question that arises with respect to this liability defence is whether the sanction of the FIO clauses by the Rotterdam Rules means that the carrier's liability ends before discharge. Since the Rotterdam Rules allow relieving certain cargo operations from the carrier, it is very possible that the carrier may end all of its responsibilities under the contract before discharging its goods.[139] The obvious answer to such an argument is that the FIO clauses only concern certain operations and do not — or, at least, should not — affect the period of the carrier's liability (article 12) or the carrier's obligations to deliver the cargo (article 11) or to care for it (article 13.1).[140] Such a position would go against the new rules which are, in principle, mandatory (article 79.1).

14. *THE SALVAGE DEFENCE*

92. It is the Hague-Hague/Visby Rules original liability exception of "'saving or attempting to save life or property at sea' (Hague-Hague/Visby Rules article IV.2(l)) that was split in two separate carrier liability defences under the Rotterdam Rules (Rotterdam Rules article 17.3(l)(m)). The raison d'être of these liability defences is a strong public policy consideration in favour of assisting persons or property in distress at sea.[141] The reason for the separate treatment of saving life or property at sea under the Rotterdam Rules is that during the 13th session of the Working Group, doubts were expressed as to whether the salvage or attempted salvage of property at sea should be treated on the same footing as the salvage or attempted salvage of life at sea. Broad support was expressed for the introduction of a test of reasonableness along the lines of 'reasonable measures to save or attempt to save property at sea'.[142] The reasonableness test is

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139. *Identification of Delivery*, [On line]. http://publishing.eur.nl/ir/repub/asset/6943/06.pdf (Visited August 18, 2010).

140. *Id.* and A/CN.9/645 para. 47 (21st session).

141. Michael STURLEY, "An Overview of the Considerations Involved in Handling the Cargo Case", (1997) 21 *Tul.Mar L J.* 263, 313.

142. A/CN.9/552 paras 96, 99 (13th session). From the 14th session onwards (A/CN.9/572 para. 75), the two liability defences appear in separate paragraphs. This provision was probably inspired by the Hamburg Rules that exonerate the ocean carrier in case of loss, damage or delay in delivery resulting from measures taken to save life or from reasonable measures taken to save property at sea (article 5.6).

justified by the fact that the ocean carrier should not, under pressure of considerable remuneration to be received for saving property at sea, proceed to unreasonable measures to save such property.[143]

93. In practice, the salvage defence has not retained much judicial attention under the Hague-Hague/Visby Rules. What has been litigated more extensively under these Rules is the doctrine of deviation. Article IV.4 of the Hague-Hague/Visby Rules allows 'any deviation in saving or attempting to save life or property at sea or any reasonable deviation'. Although the doctrine has been sanctioned by Canadian, English law and U.S. case law, the criteria upon which a(n) (unreasonable) deviation may exist (construction of contract, fundamental breach, geographic deviation or other type of deviation) are not the same in the three countries.[144] Moreover, the effects of an unreasonable deviation under the Hague-Hague/Visby Rules, i.e., loss of the carrier liability defences and/or the carrier liability limitation, diverge based on mentioned countries law.[145]

94. It is probably because of this lack of uniform interpretation of the doctrine of deviation that the Rotterdam Rules do not explicitly sanction (reasonable) deviations in the same way that article IV.4 of the Hague-Hague/Visby Rules does. However, in an attempt to harmonize conflicting national laws, the Working Group inserted what is now known as article 24 of the Rotterdam Rules.[146] This article provides that when, pursuant to applicable law, a deviation constitutes a breach of the carrier's obligations, such deviation shall not, of itself, deprive the carrier or a maritime performing party of any defence or limitation under the rules, except to the extent provided in article 61 which relates to the loss of the carrier

143. *Ibid.*

144. W. TETLEY, *op. cit.*, note 15, p. 227s (Chapter 5).

145. *Ibid.*

146. A/CN.9/525 paras 71-80 (10th session), A/CN.9/552 para. 101 (13th session), A/CN.9/645 para. 72 (21st session).

liability limitation benefit.[147] The result of this provision is that in countries where a deviation constitutes a breach of the contract of carriage, the carrier can still claim a defence (i.e. the salvage defence) or the liability limitation benefit prescribed by the new rules except if article 61 applies.

95. Article 24 does not define what constitutes a(n) (unreasonable) deviation under the new rules perpetuating, in this way, divergent national court interpretations of the term. However, the new provision streamlines divergent rules governing the effect of an unreasonable deviation on carrier liability defences and limitation benefit to a common standard outlined in article 24. For this reason alone, this article proposes a welcome change.

15. *REASONABLE MEASURES TO AVOID OR ATTEMPT TO AVOID DAMAGE TO THE ENVIRONMENT*

96. This liability defence is not present under the Hague-Hague/Visby Rules. By adding it to the list of excepted perils, the Rotterdam Rules expand and modernize the list of defences available to the carrier.

97. During the 13th session of the Working Group, it was suggested that special mention should be made in the new rules of an excepted peril that should result from a reasonable attempt of the carrier to avoid damage to the environment.[148] Broad support was expressed for that suggestion. During the 14th session of the Working Group, the scope of this liability exception was broadened and today includes not merely a reasonable attempt to avoid damage to the environment, but generally 'reasonable measures to avoid or attempt to avoid damage to the environment'.[149]

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147. Article 24 provides:

> When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

148. A/CN.9/552 para. 97, 99 (13th session).

149. The phrasing of this liability defence was essentially finalized during the 14th session of the Working Group. A/CN.9/572 paras 64, 75 (14th session).

98. The reasonableness test that appears in this liability defence is also the test followed by the excepted peril 'saving or attempting to save property at sea'. By analogy to the reasoning followed under the latter, the use of the reasonableness test seems justified by the fact that the ocean carrier should not, under pressure of a considerable remuneration to be received for avoiding or attempting to avoid damage to the environment, adopt unreasonable measures. This reasonableness test is also compatible with the 1989 *International Convention on Salvage* which regulates environmental salvage and applies in Canada, the U.S. and the U.K.[150] Article 8.1 of the Convention requires the salvor to exercise 'due care' to carry out the salvage operation and to 'prevent or minimize damage to the environment'. The "due care" obligation is one of reasonableness, taking into account the general standards that prevail in the salvage and marine industries.[151] The same reasonableness standard appears in other international instruments commenting on environmental salvage.[152]

99. What is not defined by the Rotterdam Rules is what constitutes 'damage to the environment'. Courts will be left with the task of interpreting this phrase. The definitions of the term 'environment' and the phrase 'damage to the environment' vary at the international level.[153] The one advanced by the 1989 *International Convention on Salvage* (article 1.d) seems to be quite restrictive *rationae loci* and *rationae materiae* to provide a source of inspiration in

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150. *International Convention on Salvage*, April 28, 1989, S. Treaty Doc. No. 102-12 (1991). For its application in Canada, see: TRANSPORT CANADA, "Introduction", (2010), [On line]. http://www.tc.gc.ca/eng/policy/acf-acfi-nairobi-introduction-2232.htm (Visited August 18, 2010). For its application in Canada, the U.S. and the U.K., see: COMITÉ MARITIME INTERNATIONAL, "Implementation of the Salvage Convention 1989", (2010), [On line]. http://www.comitemaritime.org/cmidocs/impl.html (Visited August 18, 2010).

151. Nicholas J.J. GASKELL, "The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990", (1991)16 *Tul.Mar.L.J.* 1, 41, Geoffrey BRICE, "Salvorial Negligence in English and American law", (1998) 22 *Tul.Mar.L.J.* 569, 573. See however, *ibid.* regarding the content of the Lloyd's Standard Form of Salvage Agreement (LOF) 2000.

152. For instance, UNCLOS article 79(2) provides that the coastal State may take reasonable measures for the prevention of pollution from pipelines.

153. See, for instance, articles 2.7 and 2.10 of the *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*, and article 1(d) of the 1989 *Salvage Convention*.

defining what constitutes 'damage to the environment' under the Rotterdam Rules.[154]

16. *ACTS OF THE CARRIER IN PURSUANCE OF THE POWERS CONFERRED BY ARTICLES 15 AND 16*

100. The last ocean carrier liability defence finds no equivalent in the Hague-Hague/Visby Rules. As such, it expands the scope of excepted perils of the latter rules.

101. Although the phrasing of this defence has been modified various times during the negotiations of the Working Group, its final version remains quite laconic.[155] Since this excepted peril refers to articles 15 and 16 of the Rotterdam Rules we will be examining these two articles.

102. Article 15 provides :

> Notwithstanding articles 11 [carrier's obligations relating to delivery and carriage of the goods] and 13 [carrier's specific obligations during the period of its responsibility], the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

103. This provision applies exclusively to dangerous cargo and does not, therefore, govern ordinary cargo that may become a danger in transit because it is i.e., improperly packaged. Under article 15, the phrase 'are, or reasonably appear likely to become during the carrier's period of responsibility,

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154. William L. NEILSON, "The 1989 International Convention on Salvage", (1992) 24 *Conn.L.R.* 1203, 1232-1233. Martin DAVIES, "Whatever Happened to the Salvage Convention 1989?" (2008) 39 *J. Mar. L. C.* 463 at note 89. The convention only applies to 'substantial physical damage... caused...by major incidents' (limitation *rationae materiae*) and does not extend the definition of 'damage to the environment' to include the high seas (limitation *rationae loci*). *Id.*

155. During the preliminary negotiations of the Working Group, the phrasing of this exception was more descriptive. See A/CN.9/525 para. 29 (10th session), A/CN.9/544 para. 85 (12th session), A/CN.9/572 para. 75 (14th session).

an actual danger to persons, property or the environment'[156] describes what constitute dangerous goods under the introductory clause of article 32 of the Rotterdam Rules: 'goods [which], by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment'. When incorporated in the present liability defence, article 15 presumes the carrier not at fault if the latter exercises the powers conferred by this article with respect to dangerous cargo.

104. Article IV.6 of the Hague-Hague/Visby Rules is the only article that refers to dangerous cargo. This article provides:

> Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damage and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

105. A comparative view of Rotterdam Rules article 15 and Hague-Hague/Visby Rules article IV.6 demonstrates several differences between the two provisions: first, article's IV.6 reference to "goods of an inflammable, explosive or dangerous nature" does not contain as descriptive a definition of dangerous goods as the one we find in article 15 of the Rotterdam Rules. This is probably because the Hague-Hague/Visby Rules

156. During the 16th and 19th sessions of the Working Group, it was noted that the definition of dangerous cargo should not include an 'illegal or unacceptable danger to the environment' because these terms do not add meaning to the term 'danger to the environment' and because it would be difficult for the carrier to judge when a danger to the environment would be "illegal" or "unacceptable" under the laws of the various jurisdictions in which carriers may operate. A/CN.9/591 paras 160-161 (16th session), A/CN.9/621 para. 55 (19th session).

were not aimed at regulating 'any' dangerous cargo but particularly dangerous cargo such as chemicals. What's more, the phrase 'reasonably appear likely to become...an actual danger...' which was added to article 15 during the deliberations of the Working Group, proposes a test of reasonableness in determining the dangerous nature of the goods.[157] On the contrary, article IV.6 of the Hague-Hague/Visby Rules does not mention such a test and insists on whether the carrier has knowledge of the dangerous nature of the goods and whether it has consented to their carriage. Second, reference of the Hague-Hague/Visby Rules to 'goods of an inflammable, explosive or dangerous nature' is conforming to the danger classification of such goods based on international documents (see, for instance, the categorization of dangerous goods under the International Maritime Dangerous Goods Code (IMDG)).[158] On the contrary, the definition of dangerous goods under the Rotterdam Rules is not found in international documents. As suggested during the 16th session of the Working Group, this is because such international documents serve public interest purposes and not private interests, are extremely technical, and risk becoming quickly obsolete.[159] Third, contrary to Rotterdam Rules article 15, article IV.6 of the Hague-Hague/Visby Rules does not make part of the list of excepted perils. This is one of the reasons why from the very beginning of the deliberations of the Working Group, doubts were expressed regarding the acceptability and the appropriateness of this carrier's defence[160]. Despite the objections, this excepted peril was maintained in the new rules and the finalization of its wording

157. A/CN.9/621 paras 55, 57 (19th session); A/CN.9/591 paras 157-161 (16th session). This reasonableness test also applies when assessing the powers of the carrier under article 15 : '... may take such other measures as are reasonable, including...'.

158. IMDG Code, "General Categories of Hazardous Cargo (IMDG)", [On line]. http ://papahanaumokuakea.gov/resource/reporting/imdg_codes.pdf (Visited August 18, 2010).

159. A/CN.9/591 para. 158 (16th session).

160. A/CN.9/510 para. 45 (9th session); A/CN.9/525 para. 44 (10th session). Another reason for these doubts was that this liability defence could be seen as a justification of the carrier's actions regarding dangerous goods or sacrifice of goods at sea, and not as a presumption of absence of fault. A/CN.9/572 para. 54 (14th session).

was made dependent on the finalization of the wording of what now constitute article 15 and 16.[161]

106. Article 16 is also incorporated in the last excepted peril. This article provides:

> Notwithstanding articles 11 (carrier's obligations relating to delivery and carriage of the goods), 13 (carrier's specific obligations during the period of its responsibility), and 14 (carrier's specific obligations applicable to the voyage at sea), the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

107. Article 16 refers exclusively to the sacrifice of the transported goods 'en route'. It proposes a reasonableness test similar to that of article 15: the sacrifice of the transported goods must be 'reasonably made' for the common safety or for the preservation of human life or other property involved in the adventure. When such is justified under article 16, the carrier will be presumed not at fault. We find no similar provision to article 16 in the Hague-Hague/Visby Rules.[162]

108. During the 19th session of the Working Group, it was noted that the purpose of articles 15 and 16 is different. Article 15 focuses on destroying, rendering harmless or taking other reasonable measures with respect to dangerous goods, whereas article 16 relates to the sacrifice of goods, not necessarily of a dangerous nature, in the interest of common safety.[163]

109. Although article 16 seems to refer to the ancient, ocean specific institution of general average, it does not propose exactly the same test. The presence of an imminent peril, a condition precedent to the presence of general average, does

161. A/CN.9/572 para. 56 (14th session), A/CN.9/645 paras 52-53 (21st session).

162. The closest we get to article 16 in the Hague-Hague/Visby Rules is article IV.6 and V.2 which comment, *in fine*, on general average.

163. A/CN.9/621 para. 60 (19th session).

not make part of article 16.[164] The potential confusion between article 16 and the institution of general average was resolved by the adoption of what is now known as article 84 of the Rotterdam Rules which states that 'nothing in this convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average'.[165] As a result, what constitutes general average should not be confused with the provisions of article 16. A similar provision to article 84 of the Rotterdam Rules is found in article V.2 of the Hague-Hague/Visby Rules: 'Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average'.

CONCLUSION

110. As evidenced by the present analysis, the list of excepted perils under the Rotterdam Rules has largely followed its Hague-Hague/Visby Rules counterpart, has clarified its content and expanded its scope. Such evolution was necessary considering that the drafting of the Hague-Hague/Visby Rules dates back to the beginning of the twentieth century. The addition of three new carrier liability defences (the 'acts of the carrier in pursuance of the powers conferred by articles 15 and 16', the '"reasonable measures to avoid or attempt to avoid damage to the environment'," the agreements on 'loading, handling, stowing, or unloading of the goods...') evidences expansion of the Hague-Hague/Visby Rules excepted

164. A/CN.9/544 para. 156 (12th session). The elements of general average are:

> 1st. A common danger: a danger in which vessel, cargo and crew all participate; a danger imminent and apparently 'inevitable,' except by voluntarily incurring the loss of a portion of the whole to save the remainder; 2nd. There must be a voluntary jettison, jactus, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril (*periculi imminentis evitandi causa*), or, in other words, a transfer of the peril from the whole to a particular portion of the whole; 3rd. This attempt to avoid the imminent common peril must be successful.

MARITIME LEGAL RESOURCES, "General Average", [On line]. http://www.marlegal.com/mlgen.html (Visited August 18, 2010).

165. A/CN.9/572 para. 55 (14th session).

perils. The "'quarantine restrictions; interference by or impediments created by governments...' and the shipper's fault defences have both broadened and clarified the scope of their Hague-Hague/Visby Rules counterparts. Contrary to the Hague-Hague/Visby Rules, piracy and terrorism presume the carrier not at fault under the Rotterdam Rules. This evidences, once more, the broader scope of carrier defences under the new rules. Finally, the fact that much of the substance of the Hague-Hague/Visby Rules q exception is found in article 17.2 of the Rotterdam Rules, possibly accompanied by an easier burden of proof of absence of fault, also expands the scope of carrier defences under the former rules.

111. We have also affirmed that the abolition of the nautical fault defence and the new burden of proof rules established with respect to the 'fire' excepted peril side against carrier interests.

112. Most of the Rotterdam Rules carrier defences have modernized and updated their Hague-Hague/Visby Rules counterparts. This is done either by introducing new excepted perils in the regulatory scheme (i.e. the 'acts of the carrier in pursuance of the powers conferred by articles 15 and 16" / the 'reasonable measures to avoid or attempt to avoid damage to the environment/the agreements on 'loading, handling, stowing, or unloading of the goods...'); or by rephrasing/clarifying currently applicable carrier defences (i.e. defence of war, hostilities, armed conflict, piracy and terrorism, riots and civil commotions/quarantine restrictions; interference by or impediments created by governments.../requirement of reasonable measures in saving or attempting to save property at sea/shipper's fault/strikes defence); or by abolishing liability exceptions such as the nautical fault defence and the public enemies exception.

113. As we have seen, unchanged under the new rules remain the act of God, sea perils, latent defect, inherent defect and saving or attempting to save life at sea carrier liability defences. This does not mean, however, that these defences are viewed in the same way by domestic courts (i.e. the sea perils defence).

114. In clarifying, expanding, modernizing or even maintaining Hague-Hague/Visby Rules carrier liability defences,

the Rotterdam Rules have also given rise to questions. For instance, to what extent is article 17.2 introducing an easier burden of proof than the Hague-Hague/Visby Rules q exception? How does the new burden of proof regarding vessel's seaworthiness affect cargo claimants? In maintaining unchanged the sea perils liability defence, how do we deal with the various domestic interpretations of this excepted peril? How do we interpret 'damage to the environment' in the newly introduced defence 'reasonable measures to avoid or attempt to avoid damage to the environment'? How do we define terrorism? Or, how will the new definition of dangerous goods work out in practice under the last Rotterdam Rules excepted peril? Some of these questions have given rise to controversy under the negotiations of the Rotterdam Rules and have certainly contributed to the lack of support for the new instrument which is attested by the low number of countries that have signed them up to now. The number of countries that will put into effect the new set of rules and the judicial interpretation of its terms will prove whether the new instrument will become the success that its drafters intended it to be.

Marel Katsivela
Faculty of Law, Common Law
57 Louis-Pasteur St., room 390
University of Ottawa
OTTAWA (Ontario)
Tel.: 613-562-5800, extension 2160
mkatsive@uottawa.ca