



LJMU Research Online

Okanigbuan, FA

'Carriers' Liability in Contracts for the Carriage of Goods by Sea: Is there a Justification for the Hamburg and Rotterdam Rules?'

<http://researchonline.ljmu.ac.uk/id/eprint/10299/>

Article

Citation (please note it is advisable to refer to the publisher's version if you intend to cite from this work)

Okanigbuan, FA (2016) 'Carriers' Liability in Contracts for the Carriage of Goods by Sea: Is there a Justification for the Hamburg and Rotterdam Rules?'. Business Law Review, 37 (6). pp. 222-230. ISSN 0143-6295

LJMU has developed **LJMU Research Online** for users to access the research output of the University more effectively. Copyright © and Moral Rights for the papers on this site are retained by the individual authors and/or other copyright owners. Users may download and/or print one copy of any article(s) in LJMU Research Online to facilitate their private study or for non-commercial research. You may not engage in further distribution of the material or use it for any profit-making activities or any commercial gain.

The version presented here may differ from the published version or from the version of the record. Please see the repository URL above for details on accessing the published version and note that access may require a subscription.

For more information please contact researchonline@ljmu.ac.uk

<http://researchonline.ljmu.ac.uk/>

Carriers' Liability in Contracts for the Carriage of Goods by Sea: Is there a Justification for the Hamburg and Rotterdam Rules?*

ABSTRACT

This paper argues that in light of the restricted application of the 'navigation and management exception' under the Hague-Visby Rules, the exclusion of the exception in the Hamburg and Rotterdam Rules is undesirable. Also, it was shown that the fire exception provision under the Hamburg and Rotterdam Rules are not substantially different from the fire exception under the Hague-Visby Rules. In light of these, the position of the Hamburg and Rotterdam Rules in relation to the exceptions is unjustifiable.

Carriage, exception, fire, liability, carrier, cargo owner, contracts, goods, sea

* **Francis A Okanigbuan Jnr** (LLM PhD University of Manchester) ACI Arb, GradICSA, Post-doctoral Research Fellow. School of Law, University of Leeds. 2016

A Introduction

One of the greatest challenges of contracts for the carriage of goods by sea is the absence of an ‘acceptable’ framework for determining certain liabilities of parties. While different jurisdictions have developed municipal legal frameworks for regulating the carriage of goods by sea, they may not have the capacity to accommodate the growing competing interests in the global market; international commercial transactions may be marred by the challenges of conflicts of laws. In light of this, conventions for contracts for the carriage of goods by sea were established. Differences in the scope of the liability requirements of the conventions have led to a further call for a unification of the carriage regulations to provide certainty and rationality in commercial transactions.¹ Notably, the conventions provide for circumstances where carriers may be exempted from liability for loss or damage to goods.

The Hague² and Hague-Visby Rules³ have two important exceptions that protect carriers from liability even though there may have been negligent conduct by persons in their employment. These include; act, neglect, or default in the navigation or management of the ship and exceptions covering damages caused by fire. This paper examines these exemptions. The aim is to identify the scope of the exceptions as provided in the conventions and more importantly, identify how the carrier and cargo owning interests may be affected.

The paper comprises four sections. In section two, ‘the negligent-conduct exemption’ under the Hague-Visby Rules is examined in relation to; act, neglect or default in the navigation of the ship and management of the ship. Section three identifies and examines the scope of the

¹ M. F. Sturley, ‘Uniformity in the Law Governing the Carriage of Goods by Sea’ (1995) 26/4 *Journal of Maritime Law and Commerce* 553-579, 559.

² International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature of Hague Rules 1924. (Hague Rules).

³ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague-Visby-Rules 1968) (The Hague Rules as amended by the Brussels Protocol)

exemptions covering loss or damage caused by fire under the Hague-Visby Rules, the Merchant Shipping Act, the Limitation of Ship-owner Liability Act, the Hamburg Rules and Rotterdam Rules. The paper is concluded in section four.

B Exclusion of Carriers' Liability for Negligent Conduct in the Navigation and Management of the Ship

The origin of the exceptions covering negligence in the navigation and management of ships⁴ dates back several years. It was suggested to have originated in the nineteenth century, (particularly in the periods 1882-1889) from the Protection and Indemnity Clubs. It required bills of lading issued by ship-owners of the club to include clauses⁵ which relieve the ship-owners from any liability for loss caused by negligent navigation by their employees.⁶ A challenge to the defence of negligence received its first legal support in the United States, with the introduction of the US Harter Act.⁷ The Act, which has been described as; '*a statute which has claims to be regarded as one of the most remarkable statutes ever enacted in the field of shipping*',⁸ was meant to address the issue of allocation of risk for damage to cargo. It sought to protect the United States as a cargo owning nation, rather than a ship-owning nation.⁹

⁴ The Hague-Visby Rules 1968, Article 4 rule 2(a).

⁵ Such clauses as 'accidents of navigation excepted or errors of navigation'.

⁶ J. C. Sweeney, 'UNCITRAL and the Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods' (1991) 22/3 *Journal of Maritime Law and Commerce* 511-538, 515. See also R. G. Bauer, 'Conflicting Liability Regimes: Hague-Visby v Hamburg Rules, A Case by Case Analysis' (1993) 24/1 *Journal of Maritime Law and Commerce*, 53-74, 54.

⁷ The Harter Act, 1893, named after Congressman Michael Harter of Ohio, who lead the passage of the Legislation. The Act makes it unlawful to exclude the negligent liability of vessel owners from losses or damage to cargo, except the owner of the vessel has made the ship sea-worthy and loss or damage occurred as a result of errors in navigation or management of the vessel.

⁸ A. Diamond, 'The Hague-Visby Rules'(1978) 2 *Lloyd's Maritime and Commercial Law Quarterly* 225 – 229, 226.

⁹ It was meant to ensure that vessel owners who sought to be exempted from liability for faults or errors in navigation or management of the vessel, had first exercised due diligence to make the vessel seaworthy in all respect for the voyage. See Harter Act 1893, s 3

Afterwards, national authorities adopted legislations to provide for minimum standards of liability. The differences in the legal regimes necessitated a uniform regulatory mechanism, thus leading to the establishment of the Hague Rules.¹⁰ The review of the Hague Rules led to the emergence of the Hague-Visby Rules. The Hague-Visby Rules contains virtually all of the exceptions that were listed in the Hague Rules. The relevant provisions of the Rules which relate to the exceptions were drawn from the Harter Act.¹¹ However, the Harter Act operates differently, it does not exclude liability for ‘negligent conduct’ (neglect). It only excludes liability from ‘errors’ in the navigation or managements of the vessel if the owner exercised due diligence to make the vessel sea-worthy in all respects.¹² While the negligent exception under the Hague-Visby rules remained largely in force, cargo-owning interests clamoured against its continuous application, until the 1978 Convention¹³ became operational.¹⁴

The objective of the negligent exception is not provided in the Rules; however, attempts have been made to identify the factors which influenced its inclusion in the Hague-Visby rules. First, it was suggested that the efforts by the carrier to make the vessel safe by providing a responsible master and crew at the time of sailing¹⁵ represents a sufficient step taken towards ensuring the

(the Harter Act Compromise). See Sweeney, n6 above, 515, citing J. Hutchins, ‘The American Maritime Industries and Public Policy 1789-1914, An Economic History’ (Cambridge, Mass: Harvard University Press 1941).

¹⁰ 1921. These Rules were largely based on the general principles of the Harter Act. They were originally meant to be incorporated as part of the clauses in a bill of lading voluntarily by carriers. But lack of willingness by carriers to voluntarily include the provisions of the rules led to the conference (Held in Brussels in 1924, with the approval of the International Convention for the Unification of Certain Rules Relating to Bills of Lading) which translated the Rules into International Law.

¹¹ See G. Treitel and F. M. B. Reynolds, *Carver on Bills of Lading* 3rd edn (Sweet and Maxwell, London 2012), 705; J. F. Wilson, *Carriage of Goods by Sea* 7th edn (Pearson Education Limited, Essex, UK 2010), 273.

¹² See the Harter Act 1893, s 192.

¹³ The UN Convention on the Carriage of Goods by Sea (Hamburg Rules) 1978. (came into force 1st November, 1992).

¹⁴ This exception has been omitted in the subsequent Hamburg Rules and ship-owning countries such as the United Kingdom, are yet to ratify the Convention as at 2015.

¹⁵ S. Zamora, ‘Carrier Liability for Damage or Loss to Cargo In international Transport’

safety of the vessel. Secondly, the carrier would have no opportunity to actually supervise the actions of the crew members after the ship sails.¹⁶ Another reason for the exception has been stated to be the nature of the perils of the sea, which may cause damage to goods independent of the carrier's fault.¹⁷ Furthermore, it was suggested that the high costs associated with loss to cargo would lead to increased insurance liability for carriers; hence insurance could be very expensive to be obtained. Thus, it would be more efficient to allocate such risks to cargo owners, who have the option of spreading the attendant risks among various cargo insurers.¹⁸ Despite the above views which seek to justify the negligent exceptions, it was suggested that the perceived sea carriage challenges should be anticipated, since similar challenges exist in other modes of transportation, yet without the same exceptions. It has been further argued that the continuous application of the exceptions in recent times may no longer be sustained since technological developments now provide the ability to largely detect weather conditions that may pose threats to vessels before sea voyage.¹⁹ Although it may appear that challenges caused by contract of carriage are not limited to sea carriage, however, in view of the fact that carriage by sea is the largest means of transportation; it implies that the costs of the goods transported by carriers at any given time would be quite enormous. These include goods of a single cargo owner or multiple cargo owners. Thus, excluding the exception would imply that carriers should be liable for the total costs for loss or damage to goods. This is capable of ensuring that carriers incur enormous liabilities that can actually become threats to business of carriage, since the

(1975) 23/3 *The American Journal of Comparative Law* 391-450, 409.

¹⁶ *Ibid*, citing 'Office Central Des Transports Internationaux par Chemin de Fer (OCTI) 1960 Notes sur les Modifications Apportee a la CIM Par la Ve Conference de Revision de 1952 et Par la Commission de Revision de 1959 358.

¹⁷ See Zamora, n15 above, 409.

¹⁸ See G. Treitel and F. M. B. Reynolds, n11 above, 705; Zamora n15 above, 410.

¹⁹ See Zamora n15 above, 409.

costs may be ‘transferred’ to cargo owners as costs of carriage. Also, while it may be reasonable to suggest that recent technological developments can lead to the detection of weather conditions, apparently to prevent or mitigate risky voyage, it is argued that the existence of sophisticated technology may not completely guarantee safe voyage. Devices for checking weather conditions are subject to margins of errors and are in some instances uncertain. This is the reason that plane crashes still occur despite the high level of sophisticated technology that is used to co-ordinate air transportation. Thus, total exclusion of the negligent exception under the Hamburg and Rotterdam Rules may be undesirable.

ii) Navigation of the Ship

While it has been suggested that little difficulty may be experienced in interpreting the phrase ‘fault in navigation’,²⁰ alternatively, it was observed that the two limbs of exceptions; fault in navigation and fault in management have actually been difficult to interpret.²¹ Navigation ordinarily refers to the movement of ships. Under the rules, the carrier may successfully avoid liability if it can be shown that the loss occurred as a result of fault in the navigation of the ship. Fault in navigation has been construed to apply to those circumstances where the vessel has been grounded or has collided with another vessel due to the negligent act of the master or crew.²² Also, fault in navigation may include situations where, as a result of the negligence of the master or crew, the vessel runs aground.²³ In circumstances where parties to a contract of carriage have incorporated the rules into a charterparty, the exceptions have been held to extend

²⁰ See Wilson, n11 above, 274.

²¹ I. Carr, *International Trade Law* 5th edn (Routledge, Oxon UK 2014) at 232. See also E S Lee and S. O. Kim, ‘A Carrier’s Liability for Commercial Default and Default in Navigation or Management of the Vessel’ (2000) 27 *Transportation Law Journal*, 205-221, 207.

²² See *The Xantho* [1887] 12 AC 503; *The Portland Trader* [1964] 2 Lloyd’s Report 443.

²³ *The Complaint of Grace Line* [1974] AMC 1253.

beyond damage done to cargo which results from negligent collision with the charterer's wharf.²⁴ This exception has also been held to apply where the collision occurs with any vessel to which the chartered ship was rendering litherage services.²⁵

The scope of application of the exception has been held to do with the sailing of the ship with regards to the nature of the vessel as a cargo-carrying ship.²⁶ However, the scope of the exception appears to be restricted in certain circumstances. It has been observed that in the absence of any overriding factor, a contract of carriage which requires a particular route to be followed was a matter of planned voyage and not a matter of navigation. Hence in the event of loss or damage caused by failing to follow a planned route, the exception in relation to navigation may not apply.²⁷ This reasoning sought to prevent an unreasonable extension of the scope of application of the exception in relation to navigation.

Since decisions as to the particular route that a ship is to sail may not be considered as matters of navigation, it may be thought that such decisions relate to matters of management of the ship for which the exception would apply. However, since the decision as to a particular route may also be made in relation to the cargo (e.g. when the duration of the voyage is of the essence by reference to commercial and time-value of money), the objective of the decision may be directed towards the management of the cargo rather than the management of the ship.

²⁴ *The Aliakmon Progress* [1978] 2 Lloyd's Report, 499.

²⁵ *The Satya Kailash* [1984] 1 Lloyd's Report 588.

²⁶ See the dictum of Bowen L. J. In *Canada Shipping Co. v British Ship-owners' Mutual Protection Association* [1889] 23 Queen's Bench Division 342, 344.

²⁷ *Whistler International Ltd. v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1AC, 638, 657 see the dictum of Lord Hobhouse of Woodborough.

iii) Management of Ship Distinguished from Management of Cargo

The phrase 'fault in the management of the ship' has not been easily construed apparently as a result of the subtle difference between management of ship and management of cargo, since both ship and cargo require administrative arrangements.²⁸

Ordinarily, management of the ship may simply refer to acts directed towards the general safety and care of the ship, to ensure that the ship remains seaworthy and serviceable throughout the duration of the voyage. The task of effectively distinguishing instances of management of the ship from management of the cargo arises mainly because of the connection between managing the ship for the safety of the vessel and managing certain sections of the ship with the aim of protecting the cargo. Certain apparatus of the ship may serve as safety features for the cargo. Hence, failure to ensure the proper management of such apparatus, may amount to failure to protect the cargo itself.²⁹ The distinction between management of ship and management of cargo has been attempted; '*the distinction I intend to draw...is one between want of care of cargo and want of care of the vessel indirectly affecting the cargo*'.³⁰ Hence, loss or damage to goods as a result of negligent stowage may be regarded as negligence in management of the cargo for which the exception would not apply.³¹ Also, the exemption covering negligence in the management of the ship would not apply where loss occurs from negligence in handling

²⁸ This is one of the reasons that management of ship has more problems of interpretation than navigation of the ship.

²⁹ '*if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved*'. Greer L. J., in *Goose Milland v Canadian Government Merchant Marine* [1927] 29 Lloyd's Report 190, 200.

³⁰ Sir Francis Jeune in; *The Glenochil* [1896] P 10; 73 LT 416; 8 Asp MLC 218, 279, 19.

³¹ See *The Frances Salman* [1975] 2 Lloyd's Report 355; *The Washington* [1976] 2 Lloyd's Report 453.

any machinery or operative device meant to safeguard the cargo. Accordingly, it was held that failure to properly operate an inert gas system which was designed to avoid contamination between different cargos cannot be categorised as neglect or default in the management of the ship.³²

Meanwhile, the acts of the carrier or its agents in the direct management of the vessel may be construed as acts done pursuant to the management of the vessel for which the exception may apply. An explosion which apparently caused heating of bunker oil that was meant for transfer to the engine room was held to be something done as part of the running of the ship.³³ It was further held that where the safety of the vessel becomes the primary objective, it may be immaterial that harm is done to the cargo for the purpose of protecting the ship.³⁴ The court went on to observe that where an act or omission in management is within the exception as to exist side by side as care to cargo and care to ship, it may be considered that duty to ship as a whole takes precedence over duty to a portion of the cargo.

³² See *Petroleum Oil and Gas Corp of South Africa (Pty) v FR8 Singapore Pte Ltd* [2008] 1 All ER (d) 236 Per Davis Steel J. In a similar contamination claim, the Supreme Court of New South Wales observed succinctly; ‘*it is true that the inert gas systems were installed on tankers fundamentally for the protection of the vessel. However, the purpose of the inert gas system is primarily to manage the cargo, not only for the protection of the cargo but for the ultimate protection of the vessel from adverse consequences associated with that cargo. Thus, essentially, the inert gas system is concerned with the management of the cargo and in my view, damage occasioned to cargo by mismanagement of the inert gas system cannot be categorised as neglect or fault in the management of the ship...*’ See *The Iron Gippsland* [1994] 1 Lloyd’s Report 335, 34 NSWLR 29; *The Eternity* [2009] 1 Lloyd’s Rep 107, 26-27. The carrier must exercise care in handling the cargo because of the relationship between care of cargo and care of vessel.

³³ See *Compania Sud Americana De Vapores SA v Sinochem Tianjin Import and Export corp* [2009] EWHC 1880 Per Christopher Clarke J. (the judgement was affirmed on appeal [2010] EWCA Civ 1403) The heating of the fuel tank was held to have constituted an act, neglect or default in the management of the vessel. The carrier (the plaintiff) was held entitled to the negligent exception, and they were further held to be entitled to indemnity from the shippers (the defendant) from damage done to the vessel under Art 4(6). The shippers apparently failed to inform the carrier about the particular (explosive nature of the goods) and the mere heating was not the cause of the explosion, the nature of the cargo caused the explosion.

³⁴ See the Canadian case of *Kalamazoo Paper Co. v CPR Co.* [1950] 2 DCL 369.

The distinction between management of ship and management of cargo is important because the carrier is obliged to properly manage and care for the cargo subject to the exceptions under *Art 4*.³⁵ Thus, where management of the ship affects the cargo, the carrier may escape liability under the exceptions relating to management of the ship. However, where management of the ship is effectively distinguished from management of the cargo, any loss or damage to the cargo would be considered a breach of *Art 3 (2)* and the negligent exception would not apply. From the plethora of judicial authorities, it appears that each case may be decided on its own merit.

Based on the analyses above, it can be observed that the ‘navigation and management exception’ has been given a narrow interpretation apparently to protect cargo owning interests. First, navigation of ship has been given a strict interpretation. The navigation exception does not extend to failure to follow planned routes in a sea voyage. Also, the application of the ‘management’ exception has been limited by identifying the difference between management of ship and management of cargo. Carriers cannot escape liability when the act of caring for the ship is directly related to protecting the cargo. This means that the court invariably considers the interests of cargo owners in interpreting the exception, to ensure that the exception does not unfairly ‘rob’ cargo owners of their commercial interests in contracts of carriage. The fire exception is examined next.

C Exclusion of Liability for Loss or Damage to Goods Caused by Fire

The immunity of carriers extends to loss or damage to good caused by fire, except if the fire is caused by carriers’ actual fault or privity.³⁶

Before the establishment of the Hague-Visby Rules, national legislation had made provisions for loss or damage caused by fire, which exonerate carriers from liability. The provisions of

³⁵ Hague-Visby Rules, art 3 (2).

³⁶ Hague-Visby Rule, art 4 (2) (b) (*the fire exception*).

these statutes are materially similar to the fire exception under the Rules. As early as the sixteenth century, a fire statute became operation in Britain.³⁷ Also, in the United States, a fire statute was enacted in 1851.³⁸ These statutes provide immunity to carriers for loss or damage to cargo caused by fire.³⁹ They protect ship-owners from liability independently from the protection which they may also claim from the Rules. The provisions relating to the fire exception contained in the Rules were influenced by these statutory exceptions; hence the fire exception in the Hague-Visby Rules owes its origin to these statutes.⁴⁰

Arguably, the exception is meant to aid the hapless crew members in the event of fire during the voyage. As opined; *‘the rationale for the fire exception can be found in the limited means available to a ship’s crew to defend against a ship board fire and in the particularly grave consequences which can result therefrom’*.⁴¹ Also, the creation of the fire exception may have been informed by the fact that when fire occur during sea voyage, it is usually difficult to ascertain its actual cause,⁴² because of the particular nature of fire out-breaks. Further, it has been observed that fire can easily start on board a ship and that the dangers it pose to the cargo, vessel, as well as the crew are usually serious.⁴³ Thus, it may be reasonable to suggest that the

³⁷ The Fire Statute 1786, which was later codified as The Merchant Shipping Act 1894, revised in 1979 (came into force in 1986) and further revised in 1995 as the Merchant Shipping Act 1995.

³⁸ Limitation of Ship-owners’ Liability Act 1851, 46 s 182.
U.S.C App.

³⁹ See Merchant Shipping Act, 1995, s 186, which replaced s 502 of the 1894 Act. See also Limitation of Ship-owners’ Liability Act 1851, s 182.

⁴⁰ See Bauer, n6 above, 65. While the American statute contain such words as ‘unless such fire is caused by the design or neglect of such owner’, the British statute which contains provisions that are similar to the Rules includes words like; ‘actual fault or privity’.

⁴¹ See Zamora, n15 above, 410.

⁴² See G. Treitel and F. M. B. Reynolds n11 above, 709. See also *Nissan Fire and Marine Insurance v M/V Hyundai Explorer (Hyundai Explorer)* 93 F 3d 641[1996], 646.

⁴³ N. J. Margetson, *The System of Liability of Articles III and IV of the Hague(Visby) Rules* (Paris Legal Publishers, Zutphen, the Netherlands 2008), 104.

fire exception was considered for commercial convenience; to enable carriers to freely enter into contracts of carriage as well as to encourage carriers to mitigate the costs (and insurance) of freight so as to indirectly reduce the burden of cargo owners.

i) The Fire Exception under the Hague-Visby Rules

The relevant provision of the rules under which the fire exception appear is clear and unambiguous.⁴⁴ The meaning of ‘fire’ as used in the rules has been subjected to judicial definition. Fire means flame, not merely heat, thus; ‘*mere heating, which has not arrived at the stage of incandescence or ignition is not regarded as fire*’.⁴⁵ While this definition appears to restrict the meaning of ‘fire, it does not actually restrict the scope of damage that can be classified under ‘damage caused by fire’. Accordingly, fire could be the direct or indirect cause of damage done to goods on board a ship. Where fire ignites the cargo, the damage is directly caused by fire. Where there is damage to goods due to smoke and water that is used to put out the fire, the damage occurs by reason of the fire;⁴⁶ hence it is indirectly caused by fire.

It has been stated that; where obligations which ought to be personally performed by carriers are delegated to subordinates, negligent acts of such subordinates which results in damage to cargo caused by fire will not operate to prevent the carrier from relying on the fire exception, provided that due care had been taken in the appointment of such subordinates.⁴⁷ However,

⁴⁴ Hague-Visby Rules art 4 (2) (b); See *Macieo Shipping Ltd v Clipper Shipping Lines Ltd* (The MV Clipper Sao Luis) [2000], 1 Lloyd’s Rep 645.

⁴⁵ See the dictum of Wright J. In *Tempus Shipping Co. v Louis Dreyfus Co.* [1930] 1 KB 699.

⁴⁶ *The Diamond* [1906] at 282 [1906] 10 Asp. M.L.C. 286.

⁴⁷ *Tempus Shipping Co. v Louis Dreyfus* [supra] 335. Consequently, a ship-owner was held liable, because he had noticed the defect in an engine room from a fractured oil line, which lead to excessive vibration leading to fire in the engine and the crew he employed had not been adequately trained and instructed on fire fighting techniques. See *Hasbro v M.S. St. Constantine* 705 F. 2d 339, [1983] AMC 1841 (9th Cir. 1983) Cert. Denied, 464 US. 1013 1984 AMC 2403 (1983).

carriers may be liable for loss caused by fire, where they fail to adequately perform their personal obligations, namely; to supervise their subordinates.⁴⁸ Thus, a ship-owner was held liable for loss to cargo caused by fire which resulted from explosion, caused by the negligent stowage of a cylinder to the knowledge of the managers of the vessel.⁴⁹ However, in another development, a ship-owner escaped liability for damage to cargo caused by fire which started on the coal bunkers, as a result of the negligent act of the Chief Engineer. The reason for the exclusion of liability was because there had been no involvement of top management in the ensuing fire.⁵⁰ The Chief Engineer was not considered to be part of the top management in this regard.

It must be noted that the fire exception does not apply where the carrier had hitherto failed to make the ship seaworthy. Seaworthiness is considered to be a primary obligation of the carrier. Where the fire results from unseaworthiness, the carrier is estopped from relying on the immunity under the rules.⁵¹ Hence, a ship-owner who failed to install a proper type of pipe-fitting on a fuel line and failed to properly train the crew in fire-fighting was held liable for failure to exercise due diligence to make the ship seaworthy.⁵² This exception is applicable to all carriers and it covers the entire carriage operation.⁵³ Failure to make a ship seaworthy; such

⁴⁸ See *The Marion* [1984] 2 Lloyd's Rep 1, [1984] 2 All ER 243.

⁴⁹ *Ta Chi (Complaint of Ta Chi Navigation) Panama Corp.* 677 F. 2d 225, [1982] AMC 1710 (2d Cir. 1982).

⁵⁰ *Earl and Stoddart v Ellermanis Wilson Lines* [1932] 287 US 420.

⁵¹ Consequently, a ship-owner was held liable for damage to cargo because the fire which caused the damage arose from failure of the carrier to exercise due diligence to make the ship sea-worthy before sailing. See *Maxine Footwear Co. Ltd. v Canadian Merchant Marine. (The Maurienne)* [1959] 2 Lloyd's Rep 105 [1959] AC 589.

⁵² Making the ship to be sea-worthy is an overriding duty of the carrier. See *The Sunkist Growers v Adelaide Shipping*, 603, F. 2d 1327, 1976 AMC 2787 9th Cir 1979. Cert. denied; 444 U.S., 1011, 1980 AMC 2102 1980.

⁵³ Including 'tackle to tackle' which operates in the carriers' favour, such as situations where the cargo is damaged by fire on board a lighter during the discharge operation. See *Wilson*, n11 above at 277.

as providing sufficiently trained crew, providing the required equipment and tools to aid the carriage and other related carrier responsibility may prevent the carrier from relying on the exception. However, excluding a carrier from responsibility for negligent acts of the Chief Engineer⁵⁴ on the grounds that the Chief Engineer is not part of the top management team of the carrier introduces a new dimension to carrier liability. It appears to suggest that even though it may be expected that a Chief Engineer should be someone who possesses much authority, as far as the particular carrier is concerned, the Chief Engineer is not a member of its management team. This suggests that each case may be decided on its merit.

The burden of proving actual fault or privity rests with the cargo owner.⁵⁵ This is a difficult task to discharge. Nevertheless, the fire exception under the Hague-Visby Rules has a restricted scope of application; apparently in consideration of the interests of cargo owners. Carriers are required to make the ship seaworthy before the ship sets sail. It can be observed from *The Sunkist Growers* case⁵⁶ that carriers may not likely successfully rely on the fire exception where they hitherto failed to make the ship seaworthy for the voyage. Making a ship sea worthy includes among other things; that the ship is adequately maintained, prepared and serviceable throughout the duration of the voyage. This means that a seaworthy ship would less likely be involved in a fire outbreak, except in extreme circumstances which would reasonably justify the application of the exception. Hence, the fire exception appears justified, and it may be

⁵⁴ *Earl and Stoddart v Ellermanis Wilson Lines* [supra].

⁵⁵ See *The Apostolis*, [1996] 1 Lloyd's Rep 475. The decision of Tuckey J was overruled on other grounds by the Court of Appeal. The Court of Appeal, without discussing the issue of burden of proof appeared to agree that the Claimant had the onus of proving the carrier's actual fault or privity. See also W Tetley, 'Responsibility for Fire in the Carriage of Goods by Sea' (2002) ETL 1-35, III 1 (c).
<http://www.mcgill.ca/maritimelaw/maritime-admiralty/fire/> accessed 18th April 2016.

⁵⁶ *Supra* note 54 above.

commercially unreasonable to further limit the scope of the exception in an attempt to promote cargo owning interests.

ii) The Fire Exception under the Merchant Shipping Act and the Limitation of Ship-owners' Liability Act

The fire exception under the Merchant Shipping Act, served as a model to The Hague-Visby fire exception. The exception under the Act applies alongside the exception under the rules, although with a different scope of application.⁵⁷

The exception applies only to owners of a United Kingdom ship. A ship within the United Kingdom territorial waters would not merely be covered by the exception, unless its owners hold United Kingdom citizenship. This is in sharp contrast to the exception provided under the Rules which applies in any event. Also, the exception under the Act only applies where the goods are lost or damaged as a result of fire on board the ship. It will be inoperative where the goods are destroyed by fire while awaiting loading or while being discharged.⁵⁸ Notwithstanding the apparent restriction of the scope of the exception under the Act, the ship-owner remains protected from liability if the goods are destroyed on board the ship by fire, even when the fire which caused such damage had occurred by reason of the unseaworthiness of the

⁵⁷ See Merchant Shipping Act 1995, s 186.

The continuous application of the Act has been saved by the combined effect of Art 8 of the rules, and s 6 (4) of The Carriage of Goods by Sea Act, 1971 (which incorporated the Hague-Visby Rules into English Law). Under the Act, it is provided that The owner of a United Kingdom Ship shall not be liable for any loss or damage...where any property on board the ship is lost or damaged by reason of fire on board the ship.

⁵⁸ This implies that while the goods are in the possession of the carrier, and loss or damage to goods is caused by fire on shore while awaiting loading or during loading or after the voyage while discharging, s 186 would not apply. See Carr, n23 above, 235; Wilson, n11 above, 277.

ship.⁵⁹ Hence, failure to exercise due diligence to make a ship seaworthy which leads to a fire out-break would not operate to prevent carriers from relying on the exception.⁶⁰

The scope of the fire exception under the Act appears to be more extensive than the exception under the Rules. The exception under the Act operates alongside the exception provided by the rules and the carrier is at liberty to rely on both the rules and the Act. Also, the burden of establishing the damage that is caused by the fault of the carrier rests with the cargo owner. The extensive scope of the combined exceptions available to the carrier and the responsibility of the cargo owner in establishing the fault of the carrier may present enormous challenges to the ability of cargo owners towards a successful claim for damage caused by fire. Also, the application of the fire exception irrespective of whether the fire arose out of the unseaworthiness of the ship suggests that the exception has a wider scope of application. However, cargo owners can be protected from loss or damage to goods and the exception would not apply where it can be proved that the loss or damage was caused by the personal act of the persons responsible for managing the ship whilst the goods are being carried.⁶¹ Also, cargo owners can exclude the application of the Merchant Shipping Act, by stating that they wish their contract of carriage to be governed by the Hague Visby Rules. This can ensure that while ship owners are excluded from liability for loss or damage caused by fire, the exclusion would not apply where they failed to make the ship seaworthy.

Similar fire exception statues apply in the Unites States.

'No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in

⁵⁹ Carr, n23 above, 235.

⁶⁰ Unless it can be proved that the ship-owner personally, wilfully or recklessly acted.

⁶¹ See the Merchant Shipping Act 1995, s 186 (3).

*or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner*⁶²

Under the Limitation of Ship-owners' Liability Act, it is required that cargo owners should be responsible for establishing the fault of the carrier.⁶³ The fire exception applies to only those categories of persons who have control over the ship at the time of the fire incident. These include; ship-owners and / or any other person(s) who have control over the ship. This effectively means that the exception can be beneficial to the ship in *rem*, the ship-owners and the demise charterers, since any one of them may have control over the ship at any particular time.⁶⁴ An important feature of the United States fire statute is that; fire can be regarded as a remote cause of damage done to goods on board a ship. This effectively extends the application of the fire exception. It was observed that damage done to a ship's refrigeration control panels which caused damage to banana-cargo was covered by the fire exception.⁶⁵

Irrespective of the exclusion of liability that may avail the ship owner or persons in control of the ship, the Act does not specifically extend the excluded liability when the ship is unseaworthy. This means that cargo owners can be protected from loss or damage caused by fire if it can be proved that the loss or damage occurred as a result of the unseaworthiness of the ship. Thus, the Limitation of Ship-owner Liability Act applies where the ship-owner or

⁶² Limitation of Ship-owners' Liability Act 1851 s 182

⁶³ It is similarly required under the United Kingdom fire statute and the Hague-Visby Rules that cargo owners should establish the fault of carriers. In *Westinghouse Electric Corp. v M/V Leslie Lykes* 734 F. 2d 199 at 206, 1985 AMC 247, 256 [5Cir 1984] it was observed that once the carrier shows that the loss or damage was caused by fire, the burden of proof shifts back onto cargo owner to identify by a preponderance of the evidence the cause of the fire and also to establish that the fire was caused by the design or neglect of the ship-owner'. See also *Asbestos Corp. v Cyprien Fabre (The Marquette)* 480 F.2d 669 at 673, 1973 AMC 1683 at 1687 [2cir 1973]; J. X. Bassoff, 'Fire Losses and the Statutory fire Exceptions' *Journal of Maritime Law and Commerce* 12/4 (1981) 507-522 at 512-513.

⁶⁴ It excludes voyage charter party and time charter party. See *Venice Maru* 320 US 249, 1943 AMC 1209 [1943]; see Tetley, n 56 above at 3.

⁶⁵ *Banana Services Incorporated v M/V Tasman Star* 68 F.3d 418 at p.421, 1996 AMC 260 at 263 [11 Cir 1995].

carriers have hitherto made the ship seaworthy before and during the commencement of the voyage.

In certain circumstances, the identity of the carrier could provide a further challenge, i.e. where the carrier is a registered company.

iii) Cases Where the Carrier is a Company

It is a difficult task to ascertain the actual fault or privity of carriers. It may be more complicated where the carrier is a public company. Companies usually rely on agents to activate their operations and it is not all negligent acts of company employees that may be attributable to companies. Accordingly, it has been held that the negligent acts of individuals would be ascribed to a company only when they stand in an extremely special relationship to the company.⁶⁶ Such relationship is explained to exist where it could be said that the person acts and speaks as the company,⁶⁷ including the directing mind⁶⁸ of the company, as well as its head or brain.⁶⁹ It should be noted that the directing mind, brain, head or *alter ego* of the company for a particular purpose may not essentially be found in the higher cadre of management. Such directing mind may be located at the lower level, or it could be any person with whom authority resides for any particular purpose.⁷⁰

⁶⁶ *Lennard's Carrying Co. v Asiatic Petroleum* [1915] A C 705.

⁶⁷ As opined, '*The actual fault or privity which is required to exclude the exception is the fault or privity of somebody who is not merely a servant or agent for whom the company is liable...but somebody for whom the company is liable because his action is the very action of the company itself.* See *Lennard's Carrying Co. v Asiatic Petroleum* [supra], 713, Per Viscount Haldane.

⁶⁸ See Denning L. J., in *Bolting (Engineering) Co. v Graham and Sons Ltd* [1957] 1 QB 159 at 172.

⁶⁹ See the dictum of Wright J, in *Tempus Shipping Co. v Louis Dreyfus* [supra], at 710.

⁷⁰ Hence it has been held that the directing mind of a company resides in a Marine Superintendent to whom the Assistant Manager had delegated powers of control with regards to operation of its ships. See the *Lady Gwendolen* [1965] P 294 (CA). Similarly, it

It was observed thus;

*... given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question, by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its context and policy.*⁷¹

The application of *alter ego* appears to have been given an extensive rather than a restricted meaning, which makes it highly likely that the act of a subordinate officer or middle cadre staff may bind their company. As rightly observed, a mere literal application of the *alter ego* doctrine may lead to no one being liable, since the acts of other lower cadre of management which would otherwise bind the company may be excluded. Extending the meaning of the term would encourage senior managements to pay closer supervision to their subordinates.⁷² Also, to conceive of a company's existence contextually rather than absolutely may offer assistance in identifying circumstances in which the court may disregard the company as an entity.⁷³ Such contextualisation may also assist in determining when and how criminal liability may be

was held that; '*...A company is bound by an act done when the person who does it purports thereby to bind the company and that person is authorised to do so or the doing of the act is subsequently ratified...*'. See *Northside Development Pty Ltd. v Registrar-General* [1990] 170 CLR 146, per Brennan J.

⁷¹ Lord Hoffmann, in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 1 WLR 413 at 419. Thus, it was held that a company's Chief Investment Officer, who although did not occupy a position at the very top of the corporate hierarchy, but had full responsibilities for buying and selling shares, a function he performed without direct supervision was said to have the directing mind and will of the company.

⁷² See C. Wells, *Corporations and Criminal Responsibility* 2nd Edn (Oxford University Press, Oxford 2001), 132.

⁷³ R. Grantham, 'Corporate Knowledge: Identification or Attribution?' (1996) 59/5 *Modern Law Review* 732-737, 736, citing M. Radin, 'The Endless Problem of Corporate Personality' (1932) 32/4 *Columbia Law Review* 643-667.

imposed on companies.⁷⁴ This is important because companies as ‘artificial persons’ require natural persons to act on their behalf.

Generally, the fire exception has been considered to be very important, this is explained by its retention in the rules from national legislations as well as its further retention in the Hamburg and Rotterdam Rules.

a) The Hamburg Rules and the Fire Exception

The United Nations Convention on the International Carriage of Goods by Sea (Hamburg Rules) 1978⁷⁵ came into force following a wide clamour against the Hague-Visby Rules by cargo-owning interests.⁷⁶ It introduced a new carrier liability regime which is essentially based on the principle of presumed fault or neglect.⁷⁷ It ultimately aims at a regime for a balanced allocation of risks between the cargo owners and the carriers. Thus, the long lists of exceptions, including the navigation and management exceptions contained in the Hague-Visby Rules have been excluded. The convention appears to have been drafted to favour cargo owning interests;⁷⁸ as argued in this paper, this objective is needless.

Under the Hamburg Rules, the carrier is liable for any loss or damage to the cargo or delay in delivery caused by fire, if the cargo owner can prove that the fire arose from the fault or neglect

⁷⁴ Ibid (Grantham) at 737.

⁷⁵ As of December 2015, the convention has been ratified by 34 countries, excluding the major ship-owning countries such as the UK, US and other European Countries.

⁷⁶ These comprised of developing Countries that are mainly cargo owners. The Hamburg Rules came into force on 1st November, 1992. The concerns raised included burden of proof among others. See S. Mankabady, *The Hamburg Rules and The Carriage of Goods by Sea* (Springer, London 1978), 10; see generally S. Basnayake ‘Origins of the 1978 Hamburg Rules’ (1979) 27/ 2-3 *The American Journal of Comparative Law*, 353-355.

⁷⁷ The Carrier is presumed to be generally liable for loss or damage to cargo except it proves otherwise.

⁷⁸ It has been suggested that the convention may operate against the interests of cargo owning interests. See B. Makins, ‘Uniformity of the Law of the Carriage of Goods by Sea in The 1990s: The Hamburg Rules - A casualty’ (1991) 8 *Australian and New Zealand Maritime Law Journal* 34-47, 43.

of the carrier, his servant or agents.⁷⁹ Carriers may also be liable if it can be proved that either they, their servant or agent were at fault or they neglected in taking all measures that could reasonably be required to put out the fire or to avoid or mitigate the effects of the fire.⁸⁰ This exception⁸¹ appears to have a more restricted scope of application than the fire exception in the Hague-Visby Rules. First, carriers' liability will not be excluded if the negligent conduct arises from persons in their employment.⁸² Secondly, the exception is further restricted by the requirement that the carriers or their servants or agents are expected to take measures that could reasonably be required to put out the fire or avoid or mitigate its effect.⁸³ The exception may generate some form of controversy with respect to the phrase; 'all measures that could reasonable be required'.⁸⁴ It is not clear how the standard for determining 'what could reasonably be required' can be ascertained. However, it appears that each case has to be determined on its own merit with reference to the prevailing circumstances.

It suffices to say that the restriction of the scope of application of the exception limits the exception under the Hague-Visby Rules; however, the restriction does not show any real difference between the fire exception under the Hague-Visby Rules and the Hamburg Rules.

⁷⁹ Hamburg Rules, 1978 art 5(4) (a) (i).

⁸⁰ Ibid, art 5(4) (a) (ii).

⁸¹ It is reported to have grown out of a 'horse trading compromise' proposed by Nigeria, in which the defence of negligent navigation would be excluded and the fire exception retained. See J. C. Sweeney, 'The UNCITRAL Draft Convention on the Carriage of Goods by Sea' (Part 1) (1975-1976) 7 *Journal of Maritime Law and Commerce*, 169-125, 112.

See also J. J. Donovan, 'The Hamburg Rules: Why a New Convention on Carriage of Goods by Sea' (1979) 4 *The Maritime Lawyer* 1-16, 10.

⁸² Thus the carrier may only escape liability when the cargo owner fails to establish the fact that the fire arose out of the neglect or default of the carrier or his employees or that they failed to act decisively to prevent or mitigate the effect of the fire.

⁸³ R. R. Pixa, 'The Hamburg Rules, Fault Concept and Common Carrier Liability Under U.S. Law' (1978-1979) 19 *Virginia Journal of International Law* 433- 471, 447.

⁸⁴ C. C. NICOLL, 'Do the Hamburg Rules Suit a Shipper-Dominated Economy?' (1993) 24/1 *Journal of Maritime Law and Commerce*, 151-179, 156.

The requirement that the ship owning interests are responsible for making the ship seaworthy under the Hague-Visby rules is similar to the requirement of taking measures to avoid the occurrence of fire outbreak on the ship. The major difference is that under the Hamburg rules, the acts of the employees of the ship owner would be attributed to the ship owner, for which they cannot avoid liability. However, even though ship owners appear to be entitled to avoid liability for acts of their employees under the Hague-Visby rules, the requirement that due care must be taken to appoint competent employees and the requirement of supervision of the employees limits the ability of ship owners to be excluded from liability.⁸⁵ It means that ship owners under the Hague-Visby rules can be held liable for acts of their subordinates if they fail to take reasonable steps to appoint competent persons and / or if they fail to supervise their subordinates. In light of these, there is no substantial difference between the fire exception under the Hamburg rules and the Hague-Visby rules.

Although the Hamburg Rules are made to apply on the basis of presumed fault of the carrier, the fire exception may not apply based on presumed fault. The fault of the carrier can only be established after the cargo owner has discharged the burden of proving that the fire arose from the fault or neglect of the carrier or persons in their employment, or that they failed to take all measures that could reasonably be required to put out or mitigate the effect of the fire. This implies that the effect of the fire exception under the Hamburg Rules does not appear to be much different in scope from the Hague-Visby rules; especially in relation to establishing the carrier's liability, since the notion of presumed fault under the Hamburg Rules is not applicable to the fire exception.

⁸⁵ See note 49 and 50 above.

b) The Rotterdam Rules and the Fire Exception

Different interests identified separately with the Hague-Visby Rules and the Rotterdam Rules hence a unified applicable convention became desirable. The UNCITRAL made frantic efforts towards ensuring that a new legal regulatory mechanism was established.⁸⁶ The text of a new Convention was adopted by the United Nations General Assembly through a resolution in December 2008. This led to the establishment of yet another regulatory framework for contracts of carriage of goods, namely; The United Nations Convention on Contracts for the International Carriage of Goods, (wholly or partly) by Sea (Rotterdam Rules) 2009.⁸⁷ The Convention prescribes a new carrier liability regime with reference to carriers' duties and immunities; including a 'fire exception'.

Under the Rules, carriers are relieved of all or part of their liability, if it can be proved that fire caused or contributed to the loss or damage or delay in delivery, and that such was not attributable to their fault or to the fault of any person to whom they are responsible.⁸⁸ The carrier would be responsible for loss or damage caused by fire if the loss is caused by the negligent act of the crew and if proved by the cargo interests.⁸⁹ The Rotterdam Rules appears to have reversed

⁸⁶ At its request, the '*Comite Maritime International*' (CMI) produced a draft instrument on Transport Law which was submitted to the UNCITRAL in 2001. After many deliberations, a new draft instrument in the New Carriage of Goods by Sea was produced and adopted by consensus by the UNCITRAL in New York at its 41st Session in July 2008. See F. Berlingieri, 'The History of the Rotterdam Rules' in M. D. Guner-Ozbek, (eds), *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea; An Appraisal of the Rotterdam Rules* (Berlin Heidelberg Springer-Verlag 2011) , 1-5.

⁸⁷ The Treaty has been signed by 25 Countries as at September 2013. It has been ratified by three (3) Countries; *Spain, Togo* and *Congo*. It will become effective when 20 countries ratify the treaty.

⁸⁸ The Rotterdam Rules art 17 (3) (f).

⁸⁹ The Rotterdam Rules, article 17 (4) (a). See F Berlingieri, *et al* 'Rotterdam Rules; An Attempt to Clarify Certain Concerns that Have Emerged' (2009) 5th August 1-28, 9-10. https://www.mcgill.ca/maritimelaw/files/maritimelaw/Rotterdam_Rules_An_Attempt_To_Clarify_Concerns.pdf accessed 26th May, 2016.

the burden of proof to the effect that carriers are liable except if they can prove otherwise.⁹⁰ Although this appears to be stated in favour of the shipper, it does not make any significant changes to the existing regime on burden of proof. This is because, first, it remains quite a difficult task for the shipper to prove fault on the part of the carrier or its employees. Secondly, the shipper is responsible for rebutting the presumption of absence of fault.⁹¹

It has been suggested that the fire exception under the Rotterdam rules is almost eliminated, since it operates on a fault based liability regime where the carrier is presumed to be liable⁹² except if it proves otherwise.⁹³ However, the apparent restriction of the exception is not generally effective since carriers can rebut the presumption of fault. Also, even though carriers may be liable for acts of other performing parties who may be under their control, they can be excluded from liability. They can be excluded from liability if it can be shown that the loss from fire was not caused by the carrier or any person in its employment, and efforts were made to make the ship seaworthy in all respects.⁹⁴

⁹⁰ See the Rotterdam Rules, art 17 (1) and (2).

⁹¹ Proving carriers' liability remains quite a difficult task. C. F. De Aguirre, 'The Rotterdam Rules from the Perspective of a Country that is a Consumer of Shipping Services' (2009) 14 *Uniform Law Review* 869-884, 877. Carriers can be excluded from liability by proving that the fault did not occur from them or from their employees. This is merely a presumption of absence of fault which may be rebutted by the shipper. To rebut this presumption, the shipper must do one or more of the following;

- (i) Prove that the fault of the carrier caused or contributed to the excepted (*fire*) peril relied on by the carrier.
- (ii) Prove that an event other than (*fire*) an excepted peril caused or contributed to the loss, damage or delay in delivery, or
- (iii) Prove that the loss, damage or delay (*which resulted from the fire*) was caused or probably caused by un seaworthiness of the ship or improper crewing, equipment and supply of the ship (*brackets mine*). See Berlingieri, n 91 above, 9.

⁹² A V Ziegler, 'The Liability of the Contracting Carrier' (2008-2009) 44 *Texas Int'l Law Journal* 329-348, 343.

⁹³ Where the carrier succeeds and the claimant successfully rebuts the presumption of absence of fault then the carrier must again prove otherwise.

⁹⁴ The due diligence obligation of the carrier. See Rotterdam Rules, Art 17 (5) (a).

Meanwhile, it has been suggested that the fire exception under the Rotterdam Rules can be fairly applied, since the phrase ‘actual fault or privity’ has been expunged.⁹⁵ This is apparently because the exclusion of ‘actual fault or privity’ limits the extent to which carriers can be excluded from liability from acts that were done by persons under their control. However, expunging ‘actual fault or privity’ does not necessarily prevent the carrier from relying on the fire exception. Where the claimant successfully establishes a *prima facie* case of loss or damage to cargo caused by fire as a result of the carrier’s act, and if the carrier succeeds in pleading the absence of fault, logically, the cause of such loss or damage would rest on the event of ‘fire on the ship’.⁹⁶ This can entitle the carrier to be excluded from liability for loss or damage to the goods under the Rotterdam rules.⁹⁷ Thus, while the Rotterdam Rules sought to make changes to the liability regime of carriers under the Hague-Visby Rules and Hamburg Rules, it can be observed from the above analyses that the provisions with respect to fire exception does not generally appear to be justified since carriers can be excluded from liability if it can be shown that the fire was not caused by the carriers or its subordinates. Also, the retention and inclusion of fire exception in the Rotterdam Rules is an indication that the fire exception is important, not merely for the interests of the carrier, but it is necessary for commercial convenience in contracts for the carriage of goods by sea.

⁹⁵ P. C. L. Powell and L. I. Ling, ‘The US Signs The Rotterdam Rules: Changes in Cargo Liabilities’, paragraph 5, Sept. 24, 2009.

http://www.lanepowell.com/wp-content/uploads/2009/09/LMN_PDF3.pdf accessed 29th April, 2016.

⁹⁶ See the Rotterdam Rules art 17 (3) (f); S Hodges, ‘Deck Cargo –Exception and Limitation of Liability’ (2009) *Steamship Mutual Publication. Cardiff Business School, Cardiff University* <http://www.simsl.com/Publications/Articles/DeckLiability0909.html> accessed 8th May, 2016.

⁹⁷ Rotterdam Rules, 2008 r 17 (3) (f).

D

Conclusion

The question as to whether or not the ‘navigation and management’ exception and the ‘fire’ exception should be considered a welcome development in sea carriage contracts should be determined by reference to commercial convenience rather than specific interests of carrier or cargo owner. First the exceptions are important because they allow carriers to focus on their professional duties of carriage without fear of fault. Secondly, they make the contract of carriage more flexible by shifting the responsibility of unforeseen losses to insurance.⁹⁸

This paper briefly examined the exemptions covering negligence and loss caused by fire in contracts for the international carriage of goods by sea. While the defence of negligence applies under the Hague-Visby Rules, it has been expunged from subsequent Conventions (Hamburg and Rotterdam Rules).⁹⁹ It was observed that the subsequent conventions sought to provide a balance between the interests of the carriers and the cargo owners. Although the fire exception applies in all the conventions; its scope appears to have been restricted in the Hamburg and Rotterdam Rules, a greater carrier liability regime appears to have emerged.¹⁰⁰

It was argued that; excluding the negligent conduct exception is undesirable because sea carriage is the largest means of transportation, hence carriers would be faced with astronomical financial liability for loss or damage done to cargo. The risk covered by sea transport is

⁹⁸ As argued, it is better to spread the risk of loss among different insurers both of carrier’s liability and cargo. See G. Treitel and F. M. B. Reynolds, n11 above at 605.

⁹⁹ The Hague and The Hague-Visby Rules, such as the navigation and the fire exceptions.

¹⁰⁰ R. Hellawell, ‘Allocation of Risk Between Cargo Owner and Carrier’ (1979) 27(2/3) *The American Journal of Comparative Law* 357-367, 363.

See also J K Hicks, ‘What Should We Do with the Fire Defence Late in the Evening?’ (2004-2005) 83 *Texas Law Review* 1225-1263, 1238;

E S Lee, ‘The Changing Liability System of Sea Carriers and Maritime Insurance: Focusing on the Enforcement of The Hamburg Rules’ (2002) 15 *Transnational Lawyer* 241-255, 247.

enormous. Even though technological advancement may be helpful in detecting bad weather conditions, it cannot provide ultimate guarantees; air plane crashes still occur despite advanced weather radar technology. Further, the paper showed that the navigation exception may not necessarily confer undue advantage to carriers. The exclusion of the exception is needless because navigation of ship has been given a strict interpretation. Navigation exception would not apply in the carrier's favour in certain circumstances, such as failing to follow the planned routes. The difference between managements of ship and management of vessels has also been used to restrict the scope of the exception. Carriers cannot escape liability under the exception by failing to take reasonable care towards ensuring the safety of cargo.

Also, the paper shows that the fire exception has limited application. The responsibility to make the ship sea worthy is a prerequisite for the application of the exception under the Hague-Visby Rules. Seaworthiness includes providing adequate trained personnel. This means that the likelihood of the occurrence of fire outbreak on board the ship would be limited and where there is a fire outbreak, it can be put out by the trained personnel. Thus, the exception is only relevant where fire is caused by circumstances beyond the control of the carrier, in which case it would be unreasonable to make the carrier liable for loss caused by fire. In view of the fact that the requirement to make the ship sea worthy is a necessary condition for the application of the fire exceptions, it was shown that there is no substantial difference between the fire exception under the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules; since the fire exception is retained in the Hamburg and Rotterdam Rules with the sea worthiness requirement of the carrier.

Under the Hamburg Rules, the liability of the carrier can only be successfully established after the cargo owner has discharged the burden of proving that the fire that caused the loss or damage arose from the fault or neglect of the carrier or persons in their employment. Alternatively, cargo owners must prove that carriers or persons in their employment failed to take all measures

that could reasonable be required to put out or mitigate the effect of the fire.¹⁰¹ This responsibility operates to undermine the purpose of limiting the scope of the fire exception in the Hamburg rules, since as shown in the paper, the presumed fault of the carrier is irrelevant in cases of damage caused by fire. This effectively implies that the effect of the fire exception under the Hamburg Rules does not appear to be much different in scope from the Hague-Visby rules.

Under the Hague-Visby Rules, the requirement to ensure that employees and subordinates of carriers are duly appointed and supervised shows that carriers may not exclusively escape liability for acts of their subordinates where they failed to appoint competent persons as well as supervise their employees. Thus, the Hamburg Rules requirement that carriers are liable for acts of their employees is merely a positive statement that ‘qualifies’ the position of the Hague-Visby Rules that carriers can only be excluded from liability for acts of their employees if the employees are duly-appointed competent persons and they are supervised by the carrier.

The Rotterdam Rules appears to further restrict the scope of the fire exception since the carrier is presumed to be liable unless proven otherwise. Cargo owners can successfully establish a *prima facie* case of loss or damage caused by fire as a result of the carrier’s act or act of persons in its employment. However, as argued above, if the carrier succeeds in pleading the absence of fault, the cause of such loss or damage would rest on the event of ‘fire on the ship’ which would effectively exclude the carrier from liability. This means that carriers can escape liability under the Rotterdam Rules if they can show that the loss from fire was not caused by the carrier or any person in its employment and efforts were made to make the ship sea worthy in all respect.

¹⁰¹ See UNCTAD The Economic and Commercial Implications of the Entry into Force of the Hamburg Rules and the Multimodal Transport Conventions (United Nations, New York, 1991) 1-209, 60.

The retention of the fire exception by the Hamburg and Rotterdam Rules is an indication of the importance of the fire exception to contract for the carriage of goods by sea. However, the apparent restriction of the exception under the Hamburg Rules and Rotterdam Rules is undesirable and needless, since the requirement for seaworthiness provides the necessary restriction to the scope of application under the Hague-Visby Rules. Mitigating the effect of the fire exception for the cargo owning interests unfairly increases the commercial liability of carriers. It could make carriers incur more expenses since a higher insurance premium may be required. In light of these, it was rightly observed that parties (carrier interests) to contract of carriage may not be willing to adopt the new Convention.¹⁰² Carriers can be encouraged to implement effective methods of managing and supervising their employees and they should also set out effective risk management practices among other things¹⁰³ to generally mitigate the risks associated with carriage of goods. The cost of insurance can be jointly shared by carriers and the cargo owners to reduce the burden of cost on both carriers and cargo owners. To mitigate the difficulties of cargo owners in determining the extent of carrier's liability, inspectors nominated by the cargo owners can be allowed on board the ship.

Although the new conventions tend to restrict the scope of the exceptions, it is doubtful whether the restrictions will effectively balance the carrier and cargo-owning interests, especially in view of the risk of carriage and the financial burden of carriers. It is hoped that more judicial pronouncements on the new conventions will provide the needed insights into their applicable effects on contracts for the carriage of goods by sea, as it affects the interests of carriers and cargo owners as well as their general implications for international trade transactions.

¹⁰² J. M. A. Gonzalez, 'The Rotterdam Rules, Prelude or Premonition?' (2010) 2/1 *Cuadernos De Derecho Transnacional*, 25-43, 43.

¹⁰³ P. Sooksripaisarnkit, 'Enhancing of Carriers' Liabilities in the Rotterdam Rules – Too Expensive Costs for Navigational Safety?' (2014) 8/2 *The International Journal on Marine Navigation and Safety of Sea Transportation* 309-315, 314.

