بسم الله الرحمن الرحيم

قالوا سبحانك لا علم لنا إلا ما علمتنا إنك

أنت العليم الحكيم

In the name of Allah, Most Gracious, Most Merciful

"Glory be to thee. We have no knowledge save that which Thou hast taught us. Thou art the Knower and the Wise."

SOUTHAMPTON UNIVERSITY LIBRARY

University of Southampton

Faculty of Law

The Exclusions and Limitations of the Liability of the Carrier by Sea:

A Comparative Study of English and U.A.E. Laws

Abdulla Hassan Mohammed

A thesis submitted for the degree of

Doctor of Philosophy

July 1989

University of Southampton

Abstract

Faculty of Law

Doctor of Philosophy

The Exclusions and Limitations of the Liability of the Carrier by Sea: A Comparative Study of English and U.A.E. Laws.

by Abdulla Hassan Mohammed

The legal system of the liability of the carrier, in respect of the carriage of goods by sea, is a most controversial issue which raises many difficulties in solving the problems, whether in National Laws or in the international Convention.

Under English and U.A.E. General Laws the carrier is subjected to a strict liability. He is liable for all loss or damage to goods occurring while they are in his charge even if he is not negligent unless such loss or damage is directly caused by what are known as the 'exceptions *ex lege*.

The Laws, however, also recognise the principle of freedom of contract. Using their superior power, carriers forced more and more exculpatory or "exception" clause into bills of lading even for loss or damage caused by their negligence. English courts upheld these provisions while the U.A.E. courts struck down 'negligence clauses' as against public policy and refuse to recognise any other exception lacks of the three elements of force majeure, viz. the event must be inevitable, unforeseen and irresistible.

Owing to the international nature of maritime commerce the problem was international in character. In 1924 a Convention commonly known as the Hague Rules was concluded in order to unify the rules relating to bills of lading. The carrier is subjected to certain defined responsibilities out of which he cannot contract himself by the use of exceptions clauses. At the same time, the Convention gives him the benefit of specific rights and remedies. Due to the changes in technology, shipping practices and economic influences the Hague Rules were amended by Visby Protocol of 1968. The Convention was introduced in the U.K. by the Carriage of Goods by Sea Act, 1924 which was later repealed by Carriage of Goods by Sea Act, 1979. U.A.E. has not yet ratified the Convention, but the Rules are incorporated as part of the U.A.E. Maritime Code, 1981.

This work studies the principles of exceptions and limitations of the carrier by sea's liability in English and U.A.E. laws, trying to discover the difficulties which surround their application, by examining important authorities on the matter and selecting relevant cases which have taken place together with important decisions.

ACKNOWLEDGEMENTS

My humble praise and thanks be to Allah Subhanahu wa Ta'ala, for giving me the blessings of health and mind to complete this work.

I would like to thank all those who have kindly assisted me, in one way or another and in particular Dr. Charles Debattista for his valuable advice, helpful suggestions and discussions in the preparation of this thesis under whose supervision it was written; my Employer - University of the United Arab Emirates for supporting me during the course of my study ; the Cultural Attache in London - brother Abdul-Rahim ALMarri (Abu-Ahmed) for his sincere help, co-operation and brotherhood; the Staff of the U.A.E. Courts for providing me with the cases required for the study. And most important of all, I wish to express my gratitude to my Family particularly my late Father (rahmatullah alaih) my Mother and my Wife (Um Abd-ur-Rahman) for their sincere dua (prayer) to Allah Subhanahu wa Ta'ala to give me the success where it not for, this work would never come to the existence and to whom I dedicate it.

TABLE OF CASES

[Numbers in bold type indicate cases illustrated in the text]

Accomac, The 241
Acme Transport v. Betts 97
Adam v. Morris 326, 327
Adamastos Shipping Co. v. Anglo-Saxon Petroleum C. 182
Adler v. Dickson (The Himalaya) 468
Aga, The **448**
Agro Co. of Canada v. Richmond Shipping (The Simonburn) 195
Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. **175**, 180, 182
Ajum Goolam Hossen & Co. v. Union Marine Ins. Co. **456**
Akt. Frank v. Namaqua Copper Co. 101, 181
Akt. Ocean v. Harding 89
Albacora S.R.L. v. Westcott & Laurance Line **234**, 237
Albion, The 104
Alderslade v. Hendon Laundry Ltd. **107**, 108
Alexander v. Railway Executive 352
Alexander's Cotton **66**
Alexander Serafimovich, The 336
Alferd Toepfer v. Peter Cremer 194
Aluminios Pozuelo v. S.S. Navigator **271**, 284, 332
American & Far Eastern Co. v. Sea-Land Service **275**
American Legion, The, see *Cameco Inc. v. American Legion*
Amies v. Stevens 65, 66, 450
Amstelslot, The **221**
Andean Trading v. Pacific Shipping 327
Anderson v. Anderson 101
Anderson v. Morice **411**, 454
Anglo-Saxon Petroleum Co. v. Adamastos Shippin Co., see *Adamastos Shipping Co. v. Anglo-Saxon Petroleum.*
Angliss & Co. v. P. & O. Co. **213**
Annefield, The 88
Antares, The 321, **373**, 435, 441, 453
Anticosti Shipping Co. v. Viateur St.-Amand 278, **301**
Apex Oilfield v. Lunham & Moore 466
Apollinaris Co. v. Nord Deutche Ins. Co. 446
Aries, The 195,310
Aries Tanker Corp. v. Total Transport, see *The Aries*
Armco Intern. Co. v. Rederi A/B Disa, 327
Asbestos v. Comp. de Navigation 446
Atlantic Consolidated Foods Ltd. v. The Ship Dorothy 325
Atlantic Mutual Ins. v. King **66**
Atlantic Shipping Co. v. Dreyfus (No.1) 195, 399, 452
Australasian United S.N. Co. v. Hunt 339
Australian Star, The 340
Avimex S.A. v. Dewulf & Cie 194
B.& S.Contracts & Design v. Victor Green Publications 193, 195

Backer, Gray v. London Assurance 192
Ballyatton, The **108**
Barcore, The 67
Barge D.X.E., The 327
Barr v. International Mercantile M.C. 327
Baxter v. Galbraith 192
Berkshire, The 30, **147**
Beswick v. Beswick 489
Bill, The 280
Black Heron, The 230
Blackburn v. Liverpool Brazil & River Plate S.N. Co. 435
Blower v. G.W. Ry. **42**, 66
Board of Trade v. Steel Bros & Co. 195
Bond, Connolly & Woodall v. Federal S.N. Co. 162, 187
Bornely v. Trouts 442
Botany Worsted Mills v. Knott 326
Bouillon v. Lupton 444
Brabant, The 322
Bradley v. Federal S.N. Co. 450
Brauer & Co. v. James Clarke 193, 195
Bristol City, The 331
British and Foreign Marine Ins. v. Sanday & Co. 191
Broken Hill Pty. Co. Ltd. v. P. & O. **148**
Brown v. Nitrate S.S. Co. 160
Brown & Root v. M/V Peisander **305**
Buchanan & Co. v. Babco Forwarding 115, 116, 18
Bulkly v. The Naumkeage S.C. 66
Bumble Bee Seafoods v. S.S. Kiku Maru 403
Bunge A.G. & Fuga A.G. 195
Bunge S.A. v. Deutsche Handelsgesellschaft mbH (No.2) 195
Burton v. English 69, 97
Canada S.S. Lines v. R. 107
Carali v. Xenos **204**
Cargo ex Laertes 162, 187
Carlill v. Carbolic Smoke Ball Co. 491
Carolina, The, see *Virginia Carolina v. Norfolk*
Carron Park, The 435
Carstairs v. Taylor 66
Caterpillar Americas Co. v. Sea Road 333, 335
Caterpillar Overseas S.A. v. Expeditor 180
Chandris v. Isbrandtsen-Moller Co. 101, 352
Chartered Bank of India v. British India S.N. Co. 187
Chasca, The 189
Christel Vinnen, The 162, 187, 193, 319, 404, 447
City of Lincoln v. Smith **448**
Coggs v. Bernard 32
Cohn v. Davidson 445
Colima, The 322
Colonial Import-Export v. Loumidis Sons 260
Colt v. M'Mechan 65
Commonwealth Petrochemical Inc. v. S.S. Puerto Rico 284
Compagnie Primera de Navigaziona de Panama 264
Compania Columbiana de Seguros v. Pacific S.N. Co. 338

Compania Contabrica v. Anglo-American Oil Co. **397**
Companhia Hidro Electrica v. S.S. Loid Honduras **272**
Complaint of Norfolk, B & C Line 335
Concadoro, The 168
Condor, The 447
Connolly Shaw v. Nordenfjeldske S.S. Co. 145, 190
Constantine S.S. Line v. Imperial Smelting Corp. 325, 328
Consumers Distributing v. Dart Comtainer Line **337**
Contracts & Design v. Victor Green Publications 195
Corporacion Argentina v. Royal Mail 323
Corsair v. Spreckiles 326
Cosmoplitan S. Co. v. Hatton & Cookson Ltd. 187
Coventry Sheppard v. Larrinaga 339
Cranfield v. Tatem Shipping 447
Cressington, The 181, 435
Crew Widgery & Co. v. G.W. S.S. Co. 192
Crooks v. Allan 75
Cross v. Pagliano **105**
Cunard S.S. Co. v. Buerger **148**
Cunningham v. Colvils 443, 454
Cushing v. Peter Walker 65
Daniels v. Carmel 439
David Crystal v. Cunard Shipping 324
Davidson v. Gwynne 67
Davis v. Garrett 190
De Carvalh v. Kent Line 230
Deere & Co., Mississipi Shipping Co. **302**
Del Sud, The 327
Diamond, The 453
Diana M.C. of Monrovia v. Southerns 181
Diederichsen v. Farquharson Bros. **85**
Dimitrios N. Rallias, The 160, 163, 447
Dixon v. Sadler 446
Dobell v. Rossmore S.S. Co. **212**, 322
Dreyfus v. Tempus Shipping Co. 328, 329, 393, 440, 449
Dunbeth, The 190
Dunlop v. Selfridge & Co. Ltd. 463, 489, 495
Dupont v. Vance 445
Elder, Dempster v. Paterson, Zochonis 448, 454, **464**
Elderslie S.S. Co. v. Borthwick **98**, **124**, 449
Emmanuel C, The **112**, 180
Emmanuel Colocotronis, The 177, 178
English v. Ocean S.N. Co. 68
Erik Boye, The 446
Establiseements Materne v. Leerdam 327
Etona, The 326
Ettrick, The 68
Eugenia, The 27
Europa, The **390**, 391, 399, 403, 457
Eurymedon, The **469**, 473, 490
Eurythenes, The 320
F.W. Berk v. Style 67
Fairclough Dodd v. Vantol 193, 194

Falconbridge Nickel Mines v. Chimo Shipping 279, 320
Farr v. Admiralty 183
Federal Bulker, The 88
Ferro, The 241
Finlay v. Liverpool S.S. Co. 152, 192
Finska v. Westfield Paper Co. 177
Firestone Tyre Co. v. Vokins 186
Fiumana Societa di Navigazione v. Bunge 447, 456
Ford H & Co. Ltd. v. Compagnie Furness 393
Foreman & Ellams v. Federal S.N. Co. 248
Forshaw v. Chabert 447
Fort Shipping Co. v. Pederson 90
Forward v. Pittard 32, 64, 321
Fothergill v. Monarch Airlines 115, 184
Foy & Gibson v. Holyman 300, 339
Frank v. Keith 66
Freedom, The 41
Frota v. Skibsaktieselskabet 192
Furness Withy & Co. v. Rederiaktiebolaget Banco 191
Gamlen Chemical Co. v. Shipping Corp. of India 324
Gardner v. Trechmann 89
General Electric v. Lady Sophie 307
General Foods Co. v. Mormacsurf 327
General Foods Co. v. Troubadpur 340
General Motors Corp. v. Mormacook 335
George Mitchell v. Finney Lock Seeds Ltd. 180, **360**, 441
Giertsen v. Turnbull & Co. 445
Gilbert Stokes v. Dalgety 490
Gillespie v. Roy Bowles Transport 182, 492
Gladiola, The **228**
Glendarroch, The 325
Glenfruin, The 443
Glenochil, The **242**, 245, 326
Glyn v. Margetson & Co. **142**, 189, 190
Golden Leader, The 111
Goldman v. Thai Intern. Airway **428**
Good Friend, The **232**
Gore v. Van der Lann 492
Gosse Millard v. Canadian Government M.M. 183, **244**, 325, 327
Gould v. Oliver 69
Gould v. S.E.& Co. Ry 68
Government of Gibraltar v. Kenney 439
Grant v. Norway 337
Greenshields v. Stephens & Sons 68
Gulf Italia Co. v. American Lines 285
Gulf Italia Co. v. The Exiria 273
Hadji Ali Akbar v. Anglo-Arabian S.S. Co. 142, 190
Hain S.S. Co. v. Tate & Lyle 176, 189, 194, **349**, 361, 437
Hamburg, The 67
Hamilton v. Mackie & Co. 89
Hamilton Fraser & Co. v. Pandorf & Co. 182, 188, 189
Hancock v. B.W. Brazier 195
Hang Fung Shipping Co. v. Mullion & Co. 446
Hanniving Brothers, The 449

Hansen v. Haywood 326
Harbutt's "Plasticine" v. Wayne Tank and Pump Co. 194, 352, 355
Harris v Poland 329
Harrison v. Bank of Australasia 68
Harrison v. Cage 186
Hart v. Standard Marine Co. 179
Hartford Fire Ins. v. Pacific F.E. Line, see *The Pacific Bear*
Havelock v. Geddes 392
Hayn v. Culliford 435
Hedley v. Pinkney S.S. Co. 381
Heinrich, The 332
Hellenic Dolphine, The 231
Hellenic Lines v. United States 190
Herd & Co. v. Krawill 184
Heskell v. Continental Express 455
Heyman v. Darwins 357, **362**, 436, 440
Heyn v. Ocean S.S. Co. **260**, 480
Hogarth Shipping Co. v. Blythe 86, **90**, 178
Holden v. Kendall Fish 339
Holland Colombo Trading Society v. Alawdeen 340
Hollier v. Rambler Motors **109**
Honeywell & Stein v. Larkin 493
Hong Kong Fir Shipping v. Kawasaki Kisen Kaisha 368, 394, 439, 441, 447, 451, 452
Hopester, The **216**, 218, 321, 456
Horabin v. British Overseas Corp. 426
Hourani v. Harrison 324, 330
Howzani v. Harrison 480
Hudson v. Baxendale 67
Hudson v. L.N.W. Rail 67
Indrani, The 326
Ingram & Royal Ltd., v. Services Maritime Du Treport **128**
Insurance Company of N. America v. Delta Brazil 273
International Packers v. Ocean S.S. Co. 321, 324
Internaionale Guano v. MacAndrew 67, **347**
Ion, The 339, 340
Jones v. Flying Clipper 436
Jordan Inc. v. Mauronne Drilling Services 128
Joseph Thorley v. Orchis, see *Thorley (Joseph) v. Orchis*
Karsales v. Wallis 353, 437
Kendall v. L.& S.W. Ry. 42, **43**
Kish v. Taylor 266, 332, **391**, 392, 454
Knill v. Hooper 449
Knutsford S.S. v. Tillmanns 100, 181
Komatsu v. States S.S. Co. 303
Kopitoff v. Wilson 319, 377
Krawill v. Robert Herd 324
Krell v. Henry 189
Kruse v. Questier & Co. 439
Kulmerland, The 289, 335
L'Estrange v. F. Graucob Ltd. 176
Laveroni v. Drury 189
Leather's Best v. Mormaclynx **296**, 335, 337

Lebeaupin v. Crispin 168, 193
Leduc v. Ward **144**, 176, 190
Leesh River Tea Co v. British India S.N. Co. **211**, 324, 331
Lennard's Carrying Co. v. Asiatic Petroleum Co. **252**, 331
Leo Hess Intern. Corp. v. Isthmian 312
Leval Colonial S.S. 325
Levy v. Costerton 446
Lewis v. G.W. Ry. 180
Lindsay v. Klein 456, 457
Lizzie, The 67
Loggan v. Bassett 442
L.N.W. Ry. v. Neilson 182
L.N.W. Ry v. Richard Hadson 65
London Rangoon Trading Co. v. Ellerman Lines 331
Lord (S.S.) v. Newsum Sons 241
Luria Bros. v. Eastern Transport Co. 326
Lyon v. Mells 319, 337, 446
McCawley v. Furness Ry. 345
McFadden v. Blue Star Line 387, 443, 444, 450
McLean v. Fleming 337
Madeleine, The 446
Makedonia, The 447
Makis, The 69
Manchester Trust Ltd. v. Furness 27, 83
Maori King (Cargo Owners) v. Hughes **446**, 449, 450
Marante Forwarding v. Naviera 272
Marcelino Gonzalez v. Nourse 30, 340
Marifortuna Naviera SA v. Government of Ceylon 168
Marpesia, The 189
Marriott v. Yeoward Bros. 185, 435
Marshalea, The 39
Matsoukis v. Priestman 168
Matsubito Electric v. S.S. Aegis Spirit 335
Maui, The 329
Maving v. Todd 186
Maxine Footwear Co. v. Canadian Government M.M. 184, **207**, 226, 228, 232, 329
Mayhew Food Ltd. v. Overseas Container Ltd. 339
Merak, The 177, 178, 338
Merida, The 326
Mersey Shipping Co v. Rea 183, 489
Metalimex Foreign Trade v. Eugenie Maritime Co. 195
Midland Silicones v. Scrutton 465, **466**, 489
Miller v. Law Accident Ins. Co. 192
Milward v. Hibbert 69
Minister of Food v. Reardon Smith Line 230
Minister of Materials v. Wold S.S. Co. 127, 163, **231**, 321
Miramar, The 88, 177
Mississipi Shipping v. Zander 320
Mitsubishi v. S.S. Palmetto State 333
Modena, The 88
Monarch S.S. Co. v. Karlshamns Oljefabriker 267, 333, **407**, 447
Moore v. Lunn 446

Mooris v. C.W. Martine Sons 493
Mordy v. Jones 67
Morewood v. Pollok 328
Morren v. Swinton 494
Morrison & Co. v. Shaw. Savill & Co. 190, **348**
Mountoswald, The 447
Muncaster Castle, The 115, **204**, 215, **217**, 224, 319, 324
Myers v. Sarl 179
N.E. Ry v. Hastings 176
Nabob Foods Ltd. v. "Cape Corso" (Owners) 339
Navics Corp. v. The Ulysses II 156
Nea Tyhi, The 30
Nelson Line v. Nelson (No.2) 98, **125**, 182, 435, 442
Nemeth v. General S.S. **304**
Nesbitt v. Lunshington 68, 191
Newell v. Canadian Pacific Airlines Ltd. 428
New York, The 327
New York Star, The, 183, 435, 439, 440, **474**, 490
New Zealand S. Line v. Satterthwaite, see *The Eurymedon*
Nichimen Co v. M.V. Farland 272
Nicholas Zafirakis, The 450
Nichols v. Marsland 66
Nicolene v. Simmonds 194
Nitro-Phosphate v. London Dock Co. 66
Njegos, The 176
Nobel's Explosives Co v. Jenkins 154, 332
Nootka, The 326
Nordpol, The 447
Norman v. Binnington 181, 326, 435
Northumbria, The 86, 457
Northumbrian Shipping Co. v. Timm 215, 447, 450
Notara v. Henderson 67, 435
Nugent v. Smith 36, 56, 65, 67
Obey, The 329
Ocean Liberty, The 183
Oceanic Amity, The 183
Ohrloff v. Briscal (The Helene) 67
Omark Industrial Inc. v. Associated Container 276, 285
Oregon Mail, The **254**
Pacific Bear, The 273, 274
Pacific Queen, The 445
Packwood v. Union Castle S.S. Co. 181
Pan Am. v. California Syevedore **306**
Pandorf v. Hamilton, see *Hamilton Fraser & Co. v. Pandorf.*
Pao On v. Lau Yiu Long 491
Parker v. Potts 412
Parker v. South Eastern Ry 74, 176
Paterson S.S. Ltd. v. Canadian Wheat 344, 399, 436, 454
Paterson S.S. v. Robin Hood Mills 202, 253
Pekelis v. Internation Airlines 427
Pendle v. Ellerman Lines 302
Pentecost v. L.D. Auditors 458

Persiana, The 327
Pesquerias v. Beer 191
Petrofina S.A. v. Compagnia Italiana Trasporto 187, 457
Phillips v. Clan Line 331
Philpott v. Swann 67
Photo Production v. Securicor Transport 111, 122, 186,
Pickup v. Thames Ins. Co. 457
Podar & Tagher, Re 193
Point Chico, The 327
Polemis & Furness, Re, see *Re Polemis & Furness*
Port Jackson Stevedoring v. Salmond, see *The New York Star*
Potts v. Union of New Zealand 45, 46
Powell v. Hde 191
Price v. Livingstone 210
Princes Victoria, The 445
Printing and Numerical Reg. v. Samopon 93
Putnam v. Wood 442
Pyrene v. Scindia Navigation Co. 29, 184, 320, 325, 340, 489,
Quebec Mar. Ins. Co. Commercial Bank of Canada 449
Queensland Nat. Bank v. P. & O 449
R. v. Clark 491
R. v. Commers of Servers for Essex 66
Raphael, The 111, 183
Rathbone v. MacIver 187, 447
Re Polemis & Furness 109, 182, 343
Reardon Smith Line v. Black Sea 144, 332
Reed v. London Co. 427
Reed & Co. v. Page 381, 443, 450
Renton v. Palmyra (The Caspiana) 235, 447
Re Pacific Mail S.S. Co. 447
Richardsons & Samuel & Co. Re 181
Rickards v. Forestal Co. 153, 191
Riley v. Horne 32
Rio Tinto, The 449
River Wear v. Adamson 94
Riverstone Meat v. Lancashire S. Co., see *The Muncaster Castle*
Roberta, The 447
Rodney, The 326
Roelandts v. Harrison 210
Rona, The (No.2) 210, 444
Rosenbruch v. American Export 336
Rossetti, The 187
Rowson v. Atlantic Transport Co. 326, 327, 435, 445
Royal Exchange Shipping Co v. Dixon 69
Royal Typewriter Co v. M.V. Kulmerland, see *The Kulmerland*
Russell v. Niemann 66, 83, 84
Rustenburg Platinum v. South African Airways 426
Rutter v. Palmer 108, 110
St. Paul F. & M. Inc. v. Alcoa S.S. Co. 335
SA Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co. 95
Salmond, The 327
Samuel v. West Hartlepool 30

Sandeman v. Scurr 27
Sarnidoc, The 449
Satya Kailash, The 325
Scaramanga v. Stamp 332
Schloss v. Heriot 68
Scruttons v. Midland Silicones, see *Midland Silicones v. Scrutton*
Sea & Land Securities v. William Dickinson 27
Serraino v. Campbell **84**
Seville Sulphur Co v. Colvis 443, 445
Sewaram v. Ellerman Lines 447
Shawinigan Ltd. v. Vokins 428
Shepherd v. Kottgen 69
Short v. Henderson 494
SIAT di del Ferro v. Tradax **20**
Silcock v. Maritime Lighterage 457
Silver v. Ocean S.S. Co. 68
Silver Cypress, The 436
Silvia, The 328
Simonburn, The. See *Agro Co. of Canada v. Richmond Shipping.*
Skodsborg, The **104**
Sleigh v. Tyser 442
Smackman v. General S.N. Co. 435
Smeaton Hanscomb v. Setty 353
Smith v. S.W. Switchgear Ltd. 182
Smith Felmongery v. P. & O. 324
Smith, Hogg & Co. v. Black Sea 189, 203, 329, **404**, 435, 448, 453, 456
Snelling v. J.G. Snelling 492
Snook v. Grand Junction W.W. Co. 435
Societe Belge de Betons v. London & Lancs. Ins. 191
Societe Nouvelle d'Armement v. Spillers and Bakers 68
Southcote v. Bennett 39, 64
Southgate, The 435
Southwark, The 449
Spurling v. Bradshaw 437
Stag Line v. Foscolo Mango 114, 181, **263**, 369, 437, 441
Standale, The 454
Standard Oil Co. v. Clan Line **448**
Stanton v. Richardson 449, **453**
Steel v. State Line 186, 378, 444, 445, 449, 454
Steel Navigator, The 328
Steinman v. Angier Line 182
Stevenson v. Macdonald 482
Strang v. Scott 69
Stranna, The 443, 448
Stuart v. British & African Co. 190
Studebaker v. Charlton S.S. Co. **279**, 333, 334, 340
Suisse Atlantique v. N.V. Rotterdamsche 120, 185, 186, 351, 354
Svenska Traktor Akt. v. Maritime Agencies **317**
Svenssons v. Cliffe S.S. Co. 187, 444, 448
Symington Car v. Union Ins. Socity of Canton 192
Sze Hai Tong Bank v. Rambler Cycle Co. 119
Szumanowski & Co. v. Beck & Co. 195

Tamplin S.S. Co. v. Anglo-Mexican Petroleum Co. 158
Tattersall v. National S.S. Co. 449
Taylor v. Caldwell 169
Tempus S. Co. v. Dreyfus. See *Dreyfus v. Tempus Shipping Co.*
Tentonia, The 332
Thin v. Richards & Co. 332, 446
Thomas v. Portsea S.S. Co. 87
Thomas Borthwick v. Faure Fairclough 193
Thomas Powell v. The Cuba 189
Thompson v. Whitmore 189
Thorley (Joseph) Ltd. v. Orchis S.S. Co. Ltd. 189, **349**, 390,
Thorman v. Dowgate S.S. Co. 181
Tillmanns v. Knutsford 30
Tindenfjell, The 336
Toepfer v. Schwarze 195
Torbryan, The 181, 435
Toronto Elevators v. Colonial 228
Torquay Hotel Co. v. Cousins 194
Touraine, The 326
Tradax Export S.A. v. Cook Indus. Inc. 195
Truculent, The 331
Tsakiroglou v. Noblee & Thorl 194
UGS Finance v. Nat. Mortagage Bank of Greece 367, 438
Union Castle Mail S.S. Co. v. Borderdale Shipping Co. 67
Union of India v. N.V. Reederij Amsterdam, see *The Amstelslot*
United States v. Atlantic Mutual Co. 340
United States v. Palmer 66
United States Shipping Board v. Bunge y Born 145, 189
Valescura, The 327
Varenna, The 86, 88
Varnish v. Kheti 188
Vikfrost, The 30
Virginia Carolina v. Norfolk 328, 384, 400
Vortigern, The 444, 446, 447
W.R. Grace v. Toyo Kaisha 191
W.T. Sargant v. The East Asiatic 150
Waddle v. Wallsend Shipping Co., see *The Hopester*
Wade v. Cockerline 380, 443
Wahlberg v. Youg **161**, 187, 193, 449
Waikato (Cargo Owners) v. New Zealand S.S. Co. **161**,187,193,449
Walthew v. Mavrojani 68
Walton Ltd. v. British Itatian Trading 193
Warkworth, The 328
Waterman S.S. v. U.S. Smelting Co. **280**
Watson v. Clark 457
Watson v. Firemen's Ins. 69
Watts v. Mitsui 154, 191
Westport Coal Co. v. McPhail 325
Whaite v. Lancs and Yorks. Ry 279, 334
Whitecross Wire v. Savill 68
Wichals v. Johns 186
Wiener v. Wilson & Furness 187
Williams v. African S.S. Co. **300**

Wilson v. Bank of Victoria 68
Wilson v. Brett 458
Wilson v. Darling 489
Wilson v. Rankin 446
Wilsons & Clyde v. English 215
Woodar Investment v. Wimpey 495
Worms v. Storey **444**
Wright v. Marwood 69
Xantho, The 182, 188, 189
Yrazu v. Asral Shipping Co. 193
Zinc Corp. v. Hirsch 193

EUROPEAN CONTINENTAL CASES :

Court of Appeals, Aix-en-Provence, France, 29 Sept. 1970 (423)

Court of Appeal, Paris, 17 Nov. 1975 (423)

French Supreme Court, 16 April 1975 (422)

French Supreme Court, 21 December 1976 (423)

Court of Appeal, Milan, 7 May 1974 (**424**)

Belgian Supreme Court, 27 January, 1977 (**424**)

Supreme Court, Germany, 16 February, 1979 (**425**)

Swiss Supreme Court, 11 July, 1972 (**425**)

U.A.E. CASES :

No. 19 (1977) Dubai C.A. <336>

No. 52 (1977) Abu-Dhabi C.A. <69>

No. 93 (1977) Abu-Dhabi C.A. <179, 180>

No. 156 (1977) Abu-Dhabi C.A. <186>

No. 39 (1978) Abu-Dhabi C.A. <336>

No. 7 (1979) Dubai C.A. <195>

No. 20 (1979) Dubai C.A. <185>

No. 36 (1979) Dubai C.A. <185>

No. 52 (1979) Dubai C.A. <196, 340>

No. 90 (1979) Abu-Dhabi C.A. <458>

No. 125 (1979) Dubai C.A. <69>

No. 143 (1979) Dubai C.A. <29>

No. 1390 (1979) Dubai C.A. <334>

No. 34 (1980) Dubai C.A. <195>

No. 74 (1980) Abu-Dhabi C.A. <69>

No. 11 (1980) Dubai C.A. <176>

No. 78 (1981) Dubai C.A. <70>

No. 100 (1981) Dubai C.A. <70>

No. 111 (1981) Dubai C.A. <195>

No. 121 (1981) Dubai C.A. <29, 458>

No. 122 (1981) Dubai C.A. <29>

No. 2, 6th year U.A.E. Supreme Court. <179>

No. 3 (1982) Abu-Dhabi C.A. <29, 70>

No. 6 (1982) Dubai C.A. <327>

No. 56 (1982) Dubai C.A. <329>

No. 72 (1982) Abu-Dhabi C.A. <334>

No. 73 (1982) Dubai C.A. <336, 337>

No. 96 (1982) Dubai C.A. <458>

No. 140 (1982) Abu-Dhabi C.A. <196, 340>

No. 152 (1982) Dubai C.A. <70>

No. 153 (1982) Dubai C.A. <70>

No. 255 (1982) Dubai C.A. <176>

No. 3 (1983) Dubai C.A. <326, 327>

No. 61 (1983) Dubai C.A. <65, 337>

No. 81 (1983) Dubai C.A. <70>

No. 111 (1983) Abu-Dhabi C.A. <340>

No. 157 (1983) Dubai C.A. <70>

No. 379 (1983) Abu-Dhabi C.A. <70, 71, 189>

No. 32 (1984) Dubai C.A. <334>

No. 153 (1984) Dubai C.A. <70>

No. 155 (1984) Dubai C.A. <70>

No. 226 (1985) Dubai C.A. <69>

No. 108 (1989) Dubai Supreme Court <179>

No. 109 (1989) Dubai Supreme Court <179>

ARAB CASES :

Alexandria Court of Appeal, 13th June, 1894. <179>

Alexandria Court of Appeal, 3rd June, 1896. <179>

Alexandria Court of Appeal, 28th November, 1901. <494>

Alexandria Court of Appeal, 19th November, 1902. <185>

Mixed Court of Appeal, 13th Jan. 1917. <185>

Alexandria Court of Appeal, 18th Jan. 1917. <494>

Mixed Court of Appeal, 30th Jan. 1924. <185>

Alexandria Commercial Court, 11th May, 1925. <185>

Egyptian Supreme Court, case no. 280, 1951. <458>

Alexandria Court of Appeal, 25th April 1956. <321>

Egyptian Supreme Court, 9th November, 1961. <458>

Egyptian Supreme Court, 15th year, no. 135, p. 868. <450>

Cairo Court of Appeal, 25th June, 1963. <460>

Egyptian Supreme Court, 31th year, case no. 272, 1966. <189>

Egyptian Supreme Court, case no. 453, 1981. <176>

Egyptian Supreme Court, case no. 633, 1981. <29>

Egyptian Supreme Court, case no. 655, 1981. <29>

Egyptian Supreme Court, case no. 1493, 1982. <69>

Egyptian Supreme Court, case no. 271, 1984. <69>

Egyptian Supreme Court, case no. 557, 1984. <69>

Supreme Court of Kuwait, case no. 46, 1979. <458>

Supreme Court of Kuwait, case no. 85, 1980. <89, 70>

Supreme Court of Kuwait, case no. 26, 1981. <29, 329>

Supreme Court of Kuwait, case no. 27, 1981. <185>

Supreme Court of Kuwait, case no. 118, 1981. <329>

Supreme Court of Kuwait, case no. 23, 1982. <29>

Supreme Court of Kuwait, case no. 99, 1982. <458>

Supreme Court of Kuwait, case no. 155, 1984. <189>

Omani Commercial Arbitration, case no. 173, 1985. <69>

Omani Commercial Arbitration, case no. 178, 1985. <69>

Syrian Supreme Court, case 40, 1971. <70>

Beirut Court of First Instance, [1967] RFDA 107. <423>

TABLE OF ABBREVIATION

A.C. - Appeal Cases

All E.R. - All England Law Report

A.M.C. - American Maritime Cases

Asp M.L.C. - Aspinall's Maritime Law Cases

C.A. - Court of Appeal

Civil Code - Civil Code of the United Arab Emirates

C.L.J. - Cambridge Law Journal

Com. Cas. - Time Reports of Commercial Cases

E.T.L. - European Transport Law

Fed. Rep. - Federal Report of the United States

Fed. Supp. - Federal Supplement of the United States

I.D.M. - Il Diritto Marittimo

J.B.L. - Journal of Business Law

J.M.L.C. - Journal of Maritime Law and Commerce

K.B. - King's Bench

Ll.L.R. - Lloyd's Law List Report

Lloyd's Rep. - Lloyd's Law Report

LMCLQ - Lloyds Maritime and Commerical Law Quarterly

Maritime Code - Maritime Code of the United Arab Emirates, 1981

M.L.R. - Modern Law Review

MSA - Merchant Shipping Act, 1979.

P. - Probate

Q.B. - Queen's Bench

RFDA - Revue francaise de driot aerien, France

T.L.R - Tulane Law Review

U.A.E.- United Arab Emirates

U.C.P. - Uniform Customs and Practice for Documentary Credits, 1984.

U.K. COGSA - Carriage of Goods by Sea Act, 1971

U.S. COGSA - Carriage of Goods by Sea Act, 1936

Warsaw Convention - Warsaw Convention 1929, amended at the Hague in 1955, the Guadalajara Convention 1961, Montreal Protocol 1978.

CONTENTS

Abstracts <1>

Acknowledgements <2>

Table of Cases <3>

Abbreviation <17>

INTRODUCTION (1)

CHAPTER 1. **GENERAL OVERVIEW OF THE U.A.E. MARITIME CODE** (8)

1.1 Charterparties (10)

1.1.1 Three Main Categories of Charterparty (10)

1.1.2 Definitions (11)

1.2 Sub-chartering (13)

1.3 Contract of Carriage of Goods by Sea (14)

1.3.1 Subject-Matter Regulated (15)

1.3.2 Period of Carrier's Responsibility (17)

1.3.3 Area of Application (19)

1.3.4 The Identity of the Carrier (19)

1.3.5 Through Carriage (21)

1.3.6 Delay (22)

1.3.7 Statements in the Bill of Lading (23)

CHAPTER 2. **THE LIABILITY OF THE CARRIER UNDER GENERAL LAWS** (31)

x **2.1 Common Law Liability of the Carrier** (31)

2.2 Common Law Exceptions (34)

2.2.1 *Act of God* (34)

2.2.2 *Act of the Queen's Enemies* (39)

2.2.3 *Inherent Vice of the Goods* (41)

2.2.4 *Defective Packing* (45)

2.2.5 *General Average Sacrifice* (47)

2.3 The Liability of the Carrier under U.A.E. General Law and its Exceptions (50)

2.3.1 Absolute Liability (50)

2.3.2 Natural Events (51)

2.3.3 The Fault of the Plaintiff (53)

2.3.4 The Act of a Third Party (56)

2.4 The Adjustment of Indemnity in English Common Law (57)

2.5 The Basis of the Liability of the Carrier under U.A.E. Maritime Code (59)

CHAPTER 3. EXCEPTIONS OF LIABILITY BY THE EXPRESS TERMS OF THE CONTRACT OF CARRIAGE (72)

3.1 Incorporation of Exclusion Clauses (73)

3.1.1 By Signature (74)

3.1.2 By Notice (75)

3.1.3 A Special Problem Related to Bills of Lading (76)

3.2 Construction of Exclusion Clauses (92)

3.2.1 The Intention of the Parties Prevails (92)

3.2.2 Other Rules of Construction (96)

3.2.2.1 The *contra proferetem* Rule (97)

3.2.2.2 The *ejusdem generis* Rule (100)

3.2.2.3 The Superiority of Written Clauses (104)

3.2.2.3 Inapplicable Words (105)

3.2.3 Interpretation of Exclusion Clauses in the Case of Negligence (106)

3.2.3.1 English Law (106)

3.2.3.2 U.A.E. Law (113)

3.2.4 Interpretation of Conventions (114)

3.2.4.1 International Construction (114)

3.2.4.2 Use of *travaux preparatoires* (114)

3.2.4.3 Looking at Foreign Text of the Convention (115)

3.2.4.4. Foreign Doctrine and Jurisprudence (116)

3.3 Some Common Exclusion Limitation Clauses (117)

3.3.1 Negligence clauses (117)

3.3.1.1 Under U.A.E. General Law (118)

3.3.1.2 Under English Common Law (119)

3.3.1.3 The Position under U.A.E. Maritime Code and U.K. COGSA (123)

3.3.2 Clauses excluding Unseaworthiness (124)

3.3.3 Perils, Dangers and Accidents of the Sea or Other Navigable Water (130)

3.3.3.1 Definition of 'Perils of the Sea' (132)

3.3.3.2 Character of the Loss (134)

3.3.3.3 Perils of the Sea under U.A.E Law (136)

3.3.4 Liberty Clauses (140)

3.3.5 Arrest, Restraints of Princes, Rulers or People or Seizure under Legal Process (152)

3.3.6 Act of War (156)

3.3.7 Clauses excluding Latent Defect (160)

3.3.8 Clauses excluding Force Majeure (165)

3.3.9 Limitation Clauses (171)

3.3.9.1 Time- Bar Clauses (171)

3.3.9.2 Clauses limiting Amounts of Damages (173)

CHAPTER 4. **THE HAGUE AND HAGUE / VISBY RULES EXCEPTIONS AND LIMITATIONS** (197)

4.1 The Basis of the Carrier's Liability (200)

4.2 Article III, Rule 1 [Due Diligence] (201)

4.2.1 The Nature and Meaning of Due Diligence (201)

4.2.2 The Time Element in Due Diligence (206)

4.2.2.1 When must due diligence have been exercised? (206)

4.2.2.2 When does the Carrier's Duty to exercise Due Diligence end? (209)

4.2.3 Due Diligence and Delegation (212)

4.2.3.1 The Muncaster Castle Case (217)

4.2.3.2 Building or Purchasing a Ship (224)

4.2.3.3 The Position under U.A.E. Law (224)

4.2.4 Effect of Breach of Article III, Rule I (226)

4.2.5 Burden of Proof (227)

4.3 Article III, Rule 2 [Care of Cargo] (234)

4.4 Article IV, Rule 2(a) [Fault in the Navigation and Management of the Ship] (240)

4.4.1 *Navigation of the Ship* (241)

4.4.2 *Management of the Ship* (242)

4.4.3 Fault in Navigation or Management of the Ship and Seaworthiness (249)

4.5 Article IV, Rule 2(b) [Fire] (251)

4.6 Article IV, Rule 2 (c)-(p) [Other Excepted Perils] (256)

4.7 Article IV, Rule 2(q) [Catch-all Exceptions] (258)

4.8 Article IV, Rule 4 [Reasonable Deviation](262)

4.9 Article IV, Rule 5 [Limitation of Liability] (268)

4.9.1 The Meaning of 'Package or Unit' (269)

4.9.1.1 The Meaning of 'Package' (270)

4.9.1.2 The Meaning of 'Unit' (277)

4.9.1.3 The Applicability of the Bill of Lading Description as a Test (283)

4.9.2 Weight Limitation (286)

4.9.3 Containerisation (289)

4.9.4 When Limitation of Liability cannot be relied upon (298)

4.9.4.1 Declaration of the Value and Nature of the Goods (298)

(A) The Declaration must be expressed (300)

(B) The Declaration must be inserted in the Bill of Lad (302)

(C) The Declaration must be before Shipment (308)

4.10 Article III, Rule 6 [Time Limitation] (309)

4.11 Article III, Rule 8 [Clauses lessening Carrier's Liability (314)

CHAPTER 5. **WHEN EXCEPTIONS AND LIMITATIONS DO NOT APPLY** (341)

5.1 NEGLIGENCE (342)

5.2 DEVIATION (347)

5.2.1 Common Law Exceptions (347)

5.2.2 Contractual Exceptions (348)

5.2.2.1 The Orthodox Position (348)

5.2.2.2 New Approach (358)

5.2.2.3 The Future of Deviation (360)

5.2.3 The Hague/Visby Rules Exceptions (369)

5.2.3.1 Continued Effect (369)

5.2.3.2 COGSA changed the Law (372)

5.2.4 Deviation under U.A.E. Law (375)

5.3 UNSEAWORTHINESS (377)

5.3.1 Absolute Obligation of Seaworthiness (377)

5.3.2 Meaning of Seaworthiness (380)

5.3.3 Relativity of the Term 'Seaworthiness'(385)

5.3.4 The Nature of Seaworthiness (389)

5.3.5 The Legal Effects of Unseaworthiness (398)

5.3.6 Proof of Unseaworthiness (402)

5.3.7 Seaworthiness under the U.A.E. Law (414)

5.4 Bar To Exceptions Under U.A.E. Law (420)

CHAPTER 6. **EXCEPTION CLAUSES AND THIRD PARTIES** (462)

6.1 The Position under English Common Law (463)

6.1.1 *The Elder Dempster Case* (464)

6.1.2 *Midland Silicones Case* (466)

6.1.3 *The Eurymedon* (469)

6.1.4 *The New York Star* (474)

6.1.5 Other Devices (477)

6.2 The Position under U.K. Carriage of Goods by Sea Act, 1971 (478)

6.3 The Position under the U.A.E. Law (483)

6.3.1 Stipulation for the benefit of a Third Party (484)

6.3.2 Absence of an express Stipulation (487)

CHAPTER 7. SUMMARY AND CONCLUSION (497)

APPENDIX (507)

BIBLIOGRAPHY (529)

LATINE MAXIMS (534)

INTRODUCTION

Damage to cargo is a foreseeable occurrence in international sea carriage. It results in unwanted loss and expense to all participants in the shipping industry. Carriers and cargo-owners both try to avoid the burden of absorbing these costs, either directly or through insurance. Laws of most Countries originally make the carriers of cargo strictly responsible for any loss or damage to cargo entrusted to their care, with few exceptions. However, the laws also respects the freedom of contract. Carriers took advantage of this principle to make arrangements with cargo-owners that relieved them of the severity of responsibility otherwise cast upon them. They, particularly in England, exercised their contractual power very effectively to exempt themselves most generously until, as it has been said, "there seems to be no other obligation on the shipowner than to receive the fright."

In 1924 the Hague Rules were completed in an attempt to establish a balance of commercial risks and legal responsibilities between the carriers and the cargo owners. These international rules were designed to provide a definite measure of protection to the cargo owners, in return for a limitation of liability for the carriers.

The Hague Rules served their purpose reasonable well, but in the course of time, with changes in vessel design and

communication technology, together with economic trends, certain weaknesses became apparent and these were dealt with by the introduction of an amended set of rules under a Protocol signed in 1968. These 1968 Rules are known as the Hague-Visby Rules to distinguish them from the original Rules.

The Hague Rules were introduced in the U.K. by the Carriage of Goods by Sea Act, 1924 which was later repealed by the Carriage of Goods by Sea Act, 1971 which incorporates the Hague-Visby Rules.

(1) AIM OF THE WORK

The present treaties is a comparative study of an area of English and U.A.E. Laws. It is object of two-fold. **First,** to examine the system of the carrier's liability through a comparison of English law and U.A.E. law, trying to discover the difficulties which surround the application of the exceptions and limitations of the carrier's liability, evaluate the arguments which have been advanced and explore a venue which may lead to better solution regarding the situation in U.A.E. **Second,** to lay, what the present writer hope to be, the first step in the 1000 miles journey in the establishment of the U.A.E. Maritime Jurisprudence. Because in spite of the importance of the carriage by sea for the economic of U.A.E. in particular and Gulf States in general as approximately 90% of the import and export of the U.A.E. and other Gulf States arrived and departed by ocean

carriers, nevertheless the subject-matter of the present treaties has not yet been given the intention which it deserves and dealt with rather cursorily and hardly been considered at all in the published writing on Maritime Law and as far as I am aware this work is the first in its kind .

(2) MATERIALS USED AND METHOD OF RESEARCH

This work is a comparative study which compares concepts, technique and received ideals in English and U.A.E. laws. The law is primarily to be found in codes and statutes in U.A.E., whilst it is to be found primarily in the decisions of the courts in England. Consequently, the U.A.E. Maritime Code and the English case law are the first resources of the law in their legal systems. However, the U.A.E. Civil Code is a combination of regulations for both civil affairs and commercial affairs which therefore become general rules for carriage by sea. Therefore, the civil code may also be consulted in shipping cases.

Although a single decision of a Court is not a binding precedent in U.A.E. it is nevertheless of high persuasive authority. This is particularly so in Supreme Court and Appeal Court cases. In the present work, several Supreme and Appeal Court Cases are referred to to support different propositions. There is a striking difference in the form of judgments. Those in U.A.E. are short - those in England not. No doubt English judges, under a system of binding precedent, give full reasons for their holdings so that their successors

may distinguish them. A model of the U.A.E. case starts with the statement of facts, brief reference to the arguments of both parties, then the provisions which the Court think applicable are presented to end the case and very little space is given to explore the logic and policy behind the reasoning.

So far as English law is concerned, the major source of law lies in the cases. English cases are cited in this work where interest arises. This includes not only the case under general maritime law but also under U.K. COGSA.

(3) SCOPE OF THE WORK

In order to give a clear picture of the subject, this work is divided into 7 **Chapters.**

CHAPTER 1 is short and introductory . It is intended to give a general overview of the U.A.E. Maritime Code and to outline the difference between the Code and the Hague-Visby Rules.

CHAPTER 2 deals with the exceptions of liability at general law (English common law and U.A.E. general law). Briefly, the liability regime in the U.A.E. general law resembles that of the common law : both set up a presumption of liability against the carrier and provide substantially the same few exceptions.

CHAPTER 3 deals with contractual exceptions . Although English and U.A.E. general laws know liability that is

similar, this similarity, however, is apparent rather than real. Because in practice there is considerable divergence, the English carriers have used and abused the freedom of contract allowed by English common law, a freedom not accorded so readily to their U.A.E. counterparts, and introduced many contractual exceptions to their basic liability . In spite of the *contra proferentem* rule of construction English carriers were able, by the use of carefully chosen words, to exclude liability for such things as negligence of the crew or even unseaworthiness of the ship. In U.A.E. the exception *ex lege*, that of force majeure, represent the lowest level of the carrier's liability and the highest level of its exclusion.

This Chapter discuss the difficulties arise from incorporation of charterparty clauses into bills of lading; the various technique which the Courts have applied in construction of exclusion clauses; and finally examines the validity and effect of some common exclusion clauses .

CHAPTER 4 examine the exceptions and limitations of the liability of the carrier under the Hague and Hague/ Visby Rules . U.A.E., unlike the U.K., has never ratified the Hague or Hague-Visby Rules but the basis of the U.A.E. Maritime Code regarding the system of the liability of the carrier is the Hague-Visby Rules.

Being rules of Anglo-American Inspiration and made with reference to English or Anglo-Saxon law, e.g., as regards the

vessel ("seaworthiness"- Art. 3 (1)(a), the voyage ("deviation"-Art. 4(4), the absolute common law liability changed into "due diligence" (Art. 3(1), and the effect of freedom of contract ("exceptions clauses," e.g., "Act of God", it is hoped that by comparing and consulting English and to some extent American law, a clear resolution can be found for any ambiguous or doubt in interpreting the provisions of the Code.

CHAPTER 5 discuss the events which render the exceptions to be of no effect in protecting the carrier. Being countries of different legal system, the courts in England and U.A.E. use different tools to defeat the exceptions. In England the courts have established the theory of "overriding obligations". Whereas in U.A.E. the courts have recoursed to the orthodox principle of "wilful misconduct and gross negligence".

CHAPTER 6 deals with the right of the Carrier's employees to rely on the exceptions of the carrier. Under English Common Law the doctrine of 'privity of contract' precludes any person not a party to the contract of carriage from relying on the exception and limitation of liability provisions in the contract. In the past this doctrine enabled the cargo-owner to got around the mandatory regulation of carrier's liability by proceeding in tort directly against the carrier's employee who is responsible for the loss or damage suffered by the goods. The

carriers attempt to avoid this problem through the use of a "Himalaya Clause", whose purpose is to extend to the servants, agents and independent contractors of the carrier his protection under the contract of carriage.

The Hague-Visby Rules, unlike the Hague Rules, have also attempt to solve this lacunae by extending the defences and limits of liability to the servants and agents of the carrier during the period of time in which the Rules govern the contract of carriage. The Rules, however, left unsettled the position of independent contractors, such as stevedores, which remains to be resolved by English law.

CHAPTER 7 is a short concluding section that brings together the legal recommendations of this work.

One further preliminary remark should, however, first be made, viz., that this treaties is a comparative study in English and U.A.E. laws, nevertheless reference also is made to other laws , but it should be emphasised that I do not purport to give a complete picture of the situation in those laws. Those systems are mainly considered only in so far as they can shed light on the relevant approaches to the problems under English and U.A.E. laws.

Finally, throughout the following pages the expression "exceptions clause" and "exclusion clause" will be used interchangeably to describe that clause of a contract which purports to protect the carrier absolutely against liability.

CHAPTER 1

GENERAL OVERVIEW OF THE U.A.E. MARITIME CODE

The U.A.E. Maritime Code, 1981, contains Six Chapters with a total of 422 Articles.

Chapter One (Arts. 11-83) deals with the definition of a ship and her nationality ; Registration; Necessary Documents; Control of Ships; Ownership; and Corporeal Rights over Ships.

A ship is defined as any vessel operating normally or equipped to operate for maritime navigation regardless of its power, tonnage or the purpose for its navigation. Hovercraft which are used for commercial or other purposes are expressly included within the definition of a ship<1>.

Chapter Two (Arts. 84-134) deals with Maritime Liens, Ship Mortgages, Arrest of Ships.

Chapter Three (Arts. 135-215) is entitled "The Ships' Personnel". It deals with the obligations of the Shipowner and the Disponent owner, the duties of the Master, the Crew and the Maritime Contract Employment. The disponent owner is a person who utilises a vessel on his own account in his capacity as an owner or a person chartering the vessel. The Owner will be deemed to be a disponent owner until the contrary is proved.

Arts. 135-145 deal with the obligations of a shipowner. A shipowner is responsible for the faults committed by the master, crew, pilot or any person in the service of the ship while they were acting within the scope of their employment. The owner may limit his total liability to all those who have suffered loss or injury to a sum of money calculated in relation to the tonnage of his ship. No limitation can, however, be claimed by the owner who himself was at fault.

The Code details the duties of the master and the crew. The master is the representative of the owner when the owner or his agent is not on board. He must at all time follow the instruction of the disponent owner. Where it is necessary to do so the master may borrow money on the security of the vessel or its freight or both and if these are insufficient, on the cargo also. In accordance with maritime custom, the master must take all necessary care to protect the interests of the owner, disponent owner, crew, passengers and cargo.

Chapter Four (Arts. 216-317) is entitled "The Running of the Ship". It deals with Charter-Parties, Carriage of goods by sea, Carriage of passengers, Pilotage and Towage.

Chapter Five (Arts. 318-365) deals with Collisions, Salvage and General Average.

Chapter Six (Arts.366-420) deals with Marine Insurance.

1.1 CHARTERPARTIES

Two articles dominate the whole question. These are Art. 219, under the provisions of which the charterparty is governed by the law of the flag. This rule of the conflict of laws will leave the foreign shipowners somewhat indifferent to the provisions of this title. On the other hand, the charterer will be interested insofar as he charters a U.A.E. ship. Again, by express agreement, he can submit his contract to a foreign system of law. This option is but the logical consequence of the principle laid down in Art. 217 of the Code.

Under Art. 217 all the provisions of Title 1 relating to the charter of a ship are merely supplement to the intention of the parties. Indeed it is stated there that the conditions and effects of the charterparty are to be determined by the parties to the contract, and the statutory provisions or rules only apply where the charterparty is silent. There was no wish to depart from the principle of contractual freedom, because it was thought that the parties to the agreement, who are usually experienced people, often professional or businessmen, able to rely on the advice of those specialists known as brokers, could lay down conditions in their contracts as they pleased, particularly if it was made some time before any execution.

1.1.1 The Three Main Categories of Charterparty

The Code defines three main categories of charterparty

in respect of sea-going vessels: Voyage Charters, Time Charters and Bare-Boat Charters. It must be understood that, in view of the principle of contractual freedom, we are faced here with a distinction more or less of a doctrinal character; the Code sets out general classes which are by no means hard and fast, and between which are no watertight compartments. The known standard-forms of Charter fall quite readily into one or the other category, but there is nothing to prevent them from leaving the beaten track and turning from left or right to form a hybrid agreement.

So, both now and in the future, it will be to the contract that the Court must look or as it is in the first place, and which it must apply in accordance with the intention of the parties, without otherwise being led astray by the provisions which Art. 217 has specifically relegated to a secondary plane.

1.1.2 Definitions

Primarily it is the definitions of the three categories of charterparty given by the Code which could lead the Judge to err, should he forget the preponderance of the Charterparty.

Although the definition of the Voyage Charter is acceptable(2), the best that can be said of the definitions of the Time Charter and of the Bare-Boat Charter is that neither has been able to express the genuinely characteristic feature which makes them recognisable and distinguishable from one another.

When Art. 244(1) tells us that a Time Charter is the contract by which the owner undertakes to place the use of a manned and equipped vessel at the disposal of the Charterer for a specific period of time, it sets forth a characteristic which distinguishes such contract from a Voyage Charter, though even this is subject to qualification. This feature, however, cannot distinguish it from a Bare-boat Charter, to which it also is common, as indeed Art. 252 makes plain(3).

If one compares Art. 244(1) to Art. 252, one remains under the impression that the authors of the Code established the distinction on the basis of the degree to which the ship is fitted out, it being essential in a Time Charter that the chartered vessel should be fitted out, whereas a Bare-boat Charter relates to a vessel which is 'not fitted out or provisioned, or is incompletely fitted out or provisioned.'

The genuinely distinctive characteristics of these agreement are to be found in the various duties assumed by the parties, and the more or less extensive rights over the ship which the contract grants to the Charterer. What Art. 244(1) calls a Time Charter is, in fact, a charter which in maritime practice relates to an agreement whereby the Owner not only provides the ship but also undertakes to sail and maintain her, and this places a duty on him to engage a crew and pay its salary. He retains possession of the vessel through the Master, whom he appoints, and conveys, to the Charterer nothing but the commercial use(4).

In Bare-boat Charter the Owner undertakes nothing more than to provide a ship, with or without provisions, but exclusive of the services of a crew(5). Thus it is the Charterer, being responsible for the entire venture, who must provide for navigation and maintenance and to this end by necessity he must sign on the crew and pay its wages.

1.2 SUB-CHARTERING

Art. 221(1) defines a right accruing to the Charterer which exists ipso facto, even without provision in the Charter Party, if the latter does not prohibit same(6).

It follows from the same test that a sub-charter will not necessarily be a contract of the same nature as the principle Charter; the mere fact that this article foresees that the Charterer may use the ship for carriage under bills of lading suffices to put this in evidence. Even if the second contract concluded by the Charterer himself also is a charter, it may happen that it is not of the same sort as the principal charter. It would not be surprising, for example, to see a Bare-boat Charterer or a Time Charterer sub-charter for a voyage.

Since three parties therefore are concerned, it is a question of determining what relationships will arise between them. Each party clearly is bound with regard to the other contracting party within the limits of his contract. This general proposition of law could have been sufficient.

Nevertheless the question might arise in certain cases,

particularly where the sub-charter is of the same nature as the principal charterparty, as to whether the sub-charter does not take effect as a novation by reason of there being a new party to the obligation. Art. 221 (1) rejects this view which would not be in harmony with the principles applicable in questions of novation. It provides that the Charterer remains bound to the Owner, by the obligations arising out of the charterparty.

One also might ask whether a sub-charter would not involve the creation of a direct contractual relationship between the Shipowner and the Sub-charterer. By Art. 221(2) the Owner has a right of action against the Sub-charterer, insofar as such Sub-charterer may still owe freight, to recover the amounts payable to him by the Charterer. The article goes on to add that the Sub-charterer creates no other direct relationship between the Owner and the Sub-charterer.

1.3 CONTRACT OF CARRIAGE OF GOODS BY SEA

It has already been said that U.A.E. is not a party to the Hague Rules, Hague-Visby Rules or Hamburg Rules, as U.A.E. has not to date ratified these international conventions. However, U.A.E. adopted the bulk of the 1968 version of the Hague-Visby Rules into the country's national legislations. The Rules were incorporated as part of the Maritime Code of 1981. The Hague-Visby Rules appear in the Code in Chapter 4 Title II (Articles 256 to 287). A

comparison of the provisions of the U.A.E. Code on the one side and the Hague/Visby Rules on the other shows various modifications.

1.3.1 Subject-matter regulated

Title II regulates only contract of carriage evidence by a bill of lading . A definition of this contract is provided by Art. 256 (1); but it is no better than the definition of a Time Charter or a Bare-boat Charter(7). Indeed it may be applied to a Voyage Charter, and thus give rise to unfortunate confusion. Happily there are other provisions, and in particular Art. 283, which enable one to clarify the position; but all this does not stem from the best of methods.

Two factors will facilitate the drawing of a distinction between these contracts. One is a material factor: Charterparty presupposes the conclusion of a contract which conditions are freely determined by the parties. The Contract of Carriage governed by Arts. 256 et seq., of the Code precludes the existence of a Charter-Party. It is something of a contract 'in rem' and is evidenced by the Bill of Lading which proves the existence of the contract. We are not faced with a freely negotiated agreement, but with a statutory contract subject firstly to the peremptory provisions of the Code, and then to the terms of the Bill of Lading but only in so far as they do not conflict with the statutory regulations.

The second distinguishing factor existing between the Voyage Charter and the Contract of Carriage is to be found in the obligations assumed by the parties. The Shipowner undertakes to place a given vessel at the disposal of the Charterer within the conditions of time and place agreed between the parties. It follows therefrom that he is under an obligation prior to any loading or taking of the goods into his custody. He, moreover, must permit the foreseen cargo to be loaded, and finally he must bring the thus loaded vessel to her port of destination. His obligation may be limited to this, or almost so, as the Charter-Party may provide that it shall be the Charterer's duty to load and discharge the cargo. As for the Carrier, he gives no such undertaking, at least insofar as the ship is concerned. He merely undertakes to carry a given cargo from one port to another. The manner in which he executes his undertaking is left to him; it may be by one ship or by any other. Thus the contract of carriage relates to the cargo whereas the charterparty relates to the ship and the bringing of such ship to her destination. Liability for perils of the sea, and for handling the cargo, is apportioned under the Code in the case of the contract of carriage, whereas in charterparty it is subject to free negotiation.

It is important to note however, that although the Charter-Party is the document which determine the rights and obligations of the parties to it, it follows from Art. 283 of the Code that this is true only of the relations of the

parties inter se. If the Master, under a Charter-Party, issues a negotiable Bill of Lading, and such Bill is transferred to a third party, the Charter will continue to be the contract binding the parties and to which Title II of the Code will not be applicable, but the Bill of Lading will be deemed to constitute the document of title as regards such third party, whose relationship with the Charterer consequently will be governed by the provisions of the Code relating to the carriage of goods. (Art. 283).

1.3.2 Period of Carrier's responsibility

The most important difference between the Code and the Rules may well be their temporal extent. The period of responsibility under the Rules is stated as extending 'from the time when the goods are loaded on to the time when they are discharge from the ship.⟨8⟩' 'Loaded on' is interpreted to mean that period starting at the moment that the loading begins, that is, when the ship's tackle first hooks the cargo. Hence, the Rules are commonly said to apply from tackle to tackle⟨9⟩. As a result, the carrier who has custody of the goods before loading or after discharge is not subject to the Rules, but may contractually limit or exclude his responsibility as he sees fit. The rules themselves expressly confirm this power⟨10⟩.

In practice, carriers often take charge of cargoes in the port of loading before they are put on board, and deliver them ashore at the port of discharge. Indeed, a much higher

proportion of the damage and loss to goods today occurs not at sea, but during dockside moving and storage activities carried out by cargo handlers who are instructed by the carriers. Subject to the peculiarities of local law, carriers are able to exempt themselves from responsibility for loss and damages suffered during these risky activities.

Unlike the Rules, Title II of the Code is intended to cover the entire period of carriage. It is expressed as applying to 'time the goods are taken into the custody of the carrier until the time of their delivery to the consignee.(11)'

In practice the carrier is deemed to be no longer in charge of the goods when he has delivered the goods by one of three methods. The first is where the goods are handed over to the consignee or his servants or agents. The second is by having the goods placed at the disposal of the consignee or his servants or agents in accordance with the contract of carriage or with the law or usage of the particular trade applicable at the port of discharge when the consignee or his servants or agents do not receive the goods from the carrier. The third is by handling the goods over to an authority or other third party to whom, pursuant to the law or regulations applicable at the port of discharge, the goods must be handed over.

The courts in U.A.E., however, refuse to to recognise the last two methods and insist on the actual delivery to the consignee; and that the carrier will continue liable for any

loss or damage until the consignee takes over of the goods(12).

The courts' attitude may cause a widespread sense of injustice among the carriers. Often the carrier has no control over the cargo once discharged at Dubai or Abu-Dhabi ports, nor does he have any practical or legal right of recourse against port authorities for loss or damage occurring while the cargo is in their hand.

1.3.3 Area of application

The general spirit of Title II is to make U.A.E. law compulsorily applicable, more or less as a matter of policy, once the contract of carriage concerns U.A.E.. Thus it will include contracts of carriage to be performed from or to a U.A.E. port. Thus , foreign carriers should note the fact that any clauses in their Bills of Lading which tend to limit their liability in respect of activities fall outside the scope of the Rules, namely before loading and after discharge, run the risk of being declared null and void, at least whenever such acts are performed in a U.A.E. port.

1.3.4 The Identity of the Carrier

Art. I(a) the Hague Visby Rules states that the carrier includes the owner or the charterer, but is not so restricted. The carrier might be a freight agent, forwarding agent, or carriage contractor. Clearly the carrier defined in the Hague Rules is the contractual carrier and not necessarily the actual carrier. However, the use of

"carrier" in the substantive articles, e.g. Arts. III Rule 1 (a) and IV Rule (2), would seem to indicate that it is often synonymous with shipowner.

The shipowner is commonly the defined carrier under the Hague-Visby Rules since the master of the ship who signs the bill of lading is usually an agent for the shipowner and, therefore, binds him(13). Even where a charterer signs the bill of lading for the master, the shipowner is still bound(14) since the master under most voyage and time charterparties remains his employee or agent. Where the charterer issues and signs his own bill of lading then he is the carrier(15). In cases where the charter is by demise, that is for a bare-boat, the master binds the charterer and not the shipowner.

Problems have arisen in identifying the carrier under the Rules where a demise, or identity of carrier, clause is included in the contract of carriage(16). The original purpose of the demise clause was to ensure that cargo liabilities would be subject to the rules of limitation enjoyed by the shipowner. The typical demise clause currently states that

> "If the ship is not owned by or chartered by demise to the company or line by who this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as contract with the owner or demise charterer as the case may be as the principal made through the agency of the said company or line who act as agents only and shall be under no personal liability whatsoever in respect thereof."

The uncertain identity of the carrier under the Rules leaves the cargo-owner unable to determine who is the proper party from who to seek redress.

The Maritime Code explicitly distinguish the contracting carrier from the actual carrier and make the former responsible in principle for performance of the whole carriage. Moreover, one of the requirements under Art. 257 (2) for inclusion in the bill of lading is the name of the carrier. Consequently, cargo-owners will know who to sue and the demise clause becomes unimportant.

1.3.5 Through Carriage

The absence of provisions in the Rules referring to through carriage has contributed to the problems of transhipment, which have greatly increased in frequency with the advent of containerised transportation. Transhipment may occur pursuant to a through bill of lading, perhaps in multi-modal carriage, or under an ocean bill of lading that contains a 'liberty clause' by which the carrier is free to transfer the cargo to others to delivery(17).

In both circumstances, carriers often disclaim all responsibility for cargo outside the time when they actually carry it(18). The freedom to disclaim responsibility appears generally irreproachable under the Rules as they only apply to each carrier while the goods are in water carriage. The consequent problems that may arise for an owner of damaged cargo can be immense. He must first discover, if he can, the

occasion of the damage to his goods in order to sue that appropriate carrier, or possibly a cargo handler at the port of transhipment. Additionally he may not know what contract terms or law apply to his problem because consecutive carriers have issued separate and conflicting bills of lading. These difficulties of proof and of law force the cargo-owner to take suit against all the carriers and cargo handlers in numerous, far flung jurisdictions if he is to recover compensation. Such multiplicity of litigation is a wasteful expense for all involved, but especially to the cargo-owner.

The Maritime Code offers a simple remedy. The Code ensures that the contracting carrier will always remain responsible for the goods until their final delivery. Thus, the contracting carrier is liable for lost cargo during transhipment ashore and during on-carriage by another party, who, naturally, is individually responsible for his part of the transit(19).

1.3.6 Delay

Delay in delivery of the cargo is another incident that is not covered by the Hague- Visby Rules. In this case, however, the courts have not had much difficulty in regarding unreasonable delays as a breach of the carrier's underlying duty of dispatch. Delays, unaccompanied by physical damage or loss of the goods, create purely financial injuries, but since economic losses are compensable in contract, the courts

have applied the ordinary rules for measurement of damages. However, a delay of the goods has a quite a different character from the loss or destruction of the cargo. Physical injury to the property may be traced to an event that occurred at a single time. Proof of this cause is an important element to establishing legal liability. By comparison, delay is not a physical, but a temporal, problem. In particular, it is not an event, but a continuous incident; it does not occur at one time, but is the cumulative effect of the lack of dispatch of the carrier.

For these reasons, the Code expressly include a liability for delay. It defines delay individually and apart from loss or damage. Art. 285 rule 1 read: " The carrier is liable (for loss) resulting from delay in delivery unless he proves that the delay caused by one of the excepted perils provided for in Art. 275." And rule 2 provides: " Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon and, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier having regard to the circumstances of the case."

1.3.7 Statements in the Bill of Lading

The Maritime Code provides a good measure of protection for third parties who have relied, in good faith, on descriptions contained in bills of lading. Under the Code, the bill of lading is conclusive evidence of the taking over

of the goods by the carrier(20). Where the bill of lading has been transferred to a third party who has, in good faith, acted in reliance on the descriptions contained therein, the carrier is estopped from denying the accuracy of statements in the bill in regard to the general nature, leading marks, number of packages or pieces, weight or quantity of the goods(21). The carrier who has suffered a loss as a result of any inaccuracy of such particulars is, of course allowed to recover damages from the shipper if the inaccurate statements were furnished by the shipper. Furthermore, if the bill of lading does not specify the amount of freight due or indicate that freight is payable by the consignee is prima facie evidence that no freight is payable by him

As far as the filling of particulars in the bill of lading is concerned, the Code does creates some difficulties. To begin with, there is a fairly long list of particulars which must be included in every bill of lading. These relates to the following:

(a) The name and the domicile of the carrier, shipper and consignee.

(b) Specification of the goods delivered to the carrier and the date of delivery.

(c) The port of loading and the port of discharge.

(d) The name of the ship and her nationality.

(e) The amount of the freight payable and how to be calculated.

(f) The place of issuance of the bill of lading and the date of issuance.

(g) The number of originals of the bill of lading (if more than one such bill has been issued).

(h) The signature of the master and the shipper.

(i) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading(of such goods starts).

(j) The number of packages or pieces or quantity or weight (of the goods).

(k) The apparent condition of the goods.

A point worth noting is that the number of packages or pieces and the weight of the goods must be recorded. This appears logical since the Code provide that the carrier's liability is to be measured in terms of weight or number of packages or other shipping unit.

What may be a source of problem in regard to contents of bills of lading are the rules on reservations which may be entered by carriers onto such bills. Under Art. 259, the carrier may make reservations in the following circumstances:

(a) if he has reasonable grounds to suspect that the particulars furnished are inaccurate or

(b) he has no ordinary means of checking the accuracy of the particulars furnished

A carrier can be expected to make reservations where necessary. In regard to apparent condition of the goods,

extra care must be taken for the Code provides that if the carrier fails to note on the bill the apparent condition of the goods, he is deemed to have noted on the bill that the goods were in apparent good condition. Conflicts can be expected between shippers and masters as to whether the right to make reservations had been exercised correctly or fairly. There could well be some delays at the port of loading before matters are sorted out.

Of particular difficulty are the rules on 'reasonable grounds' of suspicion and 'ordinary means' of checking. Questions may well be asked as to what constitute 'ordinary grounds', and most important of all, the manner in which reservations should be worded. The truth should, no doubt, be told but an unwarranted harsh wording of a reservation could affect the value of the bill of lading as an instrument of international trade. In similar vein, questions may well be asked in regard to lack of reasonable means of checking. Shippers can legitimately argue that where the carrier lacks reliable men or equipment to conduct the necessary checks, they ought not be prejudiced by reservations.

1 Art. I(d) of the Hague-Visby Rules defines the ship as any vessel used for the carriage of goods by sea. In *Falconbridge Nickel Mines v. Chimo Shipping* [1972] 2 Lloyd's Rep. 469 the Canadian Supreme Court held that a barge was a ship within the meaning of Art.I(d).

Art. I(d) also applies in relation to the carriage by hovercraft. See Scrutton on Charterparties, 19th edn., (1984) p. 430 .

2 Art. 225 defines the voyage charterparty as a contract under which the owners undertakes to place the use of the ship , in whole or in part, at the charterer's disposal, for one or more voyage.

Under English law, a voyage charterparty, in its ordinary form, means a contract to carry specified goods on a defined voyage or voyages. See *The Eugenia* [1964] 2 Q.B. 226 (C.A.).

3 Art.252 defines the bare-boat charter as a contract under which the owner undertakes to place the use of a ship, without any crew, equipment and supplies, or a ship partly manned, equipped and supplied, at the charterer's disposal for period of time. The charterer undertakes to pay the agreed hire.

4 Under English law, a time charter, in its ordinary form, is a contract by which the shipowner agrees with the time charterer to render services for a named period by his master and crew to carry goods put on board his ship by or on behalf of the time charter. See *Sea and Land Securities v. William Dickinson* [1942] 2 K.B. 65, per Mackinnon L.J. at p. 69.

5 English law defines a bare-boat (demise) charter as a contract under which the charterer becomes for a period of time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him. See *Sandeman v. Scurr* (1866) L.R. 2 Q.B. 86 at p. 96; *Manchester Trust v. Furness, Withy & Co.* [1895] 2 Q.B. 539 (C.A.).

6 Art.221 provides:
"(1) The charterer, unless is prevented by the contract of affreightment, may sub-charter the ship and in such case the charterer is bound to fulfil his duties as provided for in the contract of affreightment.

(2) The sub-chartering does not establish a direct relation between the owner and the sub-charterer, but the owner may nevertheless sue the sub-charterer for the freight owed by the charterer to the owner."

7 Art. 256(1) defines the contract of carriage by sea as a contract under which the carrier undertakes to carry determined goods from one port to another in return for a freight payable by the shipper.

Under the Hague-Visby Rules, Art. I(b) the term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

A bill of lading is not defined in the Rules presumably because it was and is so well recognised. In English jurisprudence, it is a three-fold document acting as a receipt, a document of title, and evidence of the contract of carriage. See Wilson, Carriage of Goods by Sea, (1988), p. 6.

The key test as to whether a document is a bill of lading within the meaning of the Hague-Visby Rules is its transferability as a document of title. From the wording of Art. I(b) it has been suggested that the bill of lading is by definition is a document of title, but this may not be so where the bill of lading fixes the identity of the consignee. In such a case, the bill of lading is a 'straight' or 'non-negotiable' bill and may not be deemed a document of title. See Tetley, Marine Cargo Claims (2nd ed. 1978) p. 6 .

The proposition that Art. I(b) provides that a bill of lading must be a document of title was doubted in Third Report of the Secretary-General, UNICTRAL Ybk., Vol. V, 1974, at pp. 157-158.

In English law the phrase 'similar documents of title' has embraced a 'received for shipment' bill of lading as described in Art. III rule 3 of the Hague-Visby Rules, and would probably include a through bill of lading in so far as the document relates to sea-carriage. While a mate's receipt is not a document of title, except in the event of a local

trade usage as such, a ship's delivery order when issued by the carrier in place of a bill of lading, may be. See Carver, Carriage by Sea 13th edn. (1982) pp. 322-325, 347-349.

8 Art.I(e):" 'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."

9 *Pyrenne Co. v. Scindia Navigation Co.* [1952] Q.B. 402.

10 Art. VII:" Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea."

11 Art. 256(2).

12 See *case no. 122 (1981) Dubai C.A.; Case no. 3 (1982) Abu-Dhabi C.A.; Case no 143 (1979) Dubai C.A.*; see to the same effect *Supreme Court of Kuwait*, case no. 118 year 80 (1981); *Suprem Court of Kuwait*, case no. 26, year 80 (1981); *Egyptian Supreme Court*, case no. 655 year 48 (1981) ; *Egyptian Supreme Court*, case no. 633 year 48 (1981).

13 See *Sandeman v. Scurr* (1866) 36 L.J.Q.B. 58 per Cockburn C.J.: " The master of a vessel has, by law, authority to sign bills of lading on behalf of the owners of the vessel."

Even where the charterparty specifically provides that the captain shall be the servant of the charterer and where the bills of lading contain an incorporation clause reading "other conditions as per charterparty", a consignee is entitled to consider that the captain was the agent of the owner: see *Manchester Trust v. Furness Withy* (1895) 2 Q.B. 539; see also *Supreme Court of Kuwait*, case no. 23, year 82 (1982) and case no. 173, year 83 (1984).

The fact that a charterparty provides that the master shall "sign bills of lading as required by charterer" does not make the master the servant of the charterer. The meaning of the stipulation is merely that the shipowner shall, through the master,

contract with shippers for the benefit of the charterers, and not that the master shall do so as agent for the charterer. As Lusk, J. said in *Smidt v. Tiden* (1874) L.R. 9 Q.B. 446, 447, the master signs "not exactly as agent of the charterer, but because he is bound to sign by reason of the charterparty".

14 *Tillmanns v. Knutsford* [1908] 1 K.B. 185; *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606.

15 See *Samuel v. West Hartlepool* (1906) 11 Com.Cas. 115.

16 See *The Berkshire* [1974] 1 Lloyd's Rep. 185; *The Vikfrost* [1980] 1 Lloyd's Rep. 560. See also Tetley, " Identity of the Carrier", 1977 LMCLQ, 519; Jones, P., "Demise Clauses in Bills of Lading", (1976) New Directions in Maritime Law, 81.]

17 See infra p. 140 et seq.

18 *Marcellino Gonzalez v. James Nourse Ltd.* [1936] 1 K.B. 565.

19 Art. 286(1).

20 Art. 257(1).

21 Art. 266(2).

CHAPTER 2

THE LIABILITY OF THE CARRIER UNDER GENERAL LAWS

Although the jurisprudence and terminology are different, the traditional rule of carrier liability under English and U.A.E. general laws are, at least in theory<1>, markedly similar. Both laws impose a strict liability on the carrier with certain exceptions.

2.1 COMMON LAW LIABILITY OF THE CARRIER

It will be appreciated that the liability of a carrier apart from express contract is largely a matter of academic interest only, since in practice his common law status is invariably modified by a number of express terms which may increase but frequently reduce the area of his fundamental obligations as a carrier. Nevertheless it is important to devote some attention to this, since it underlies the carefully worded clauses which are found in modern bills of lading, charterparties, policies of marine insurance and other such commercial documents, for if such express clauses are inadequately drawn or fail to apply to the particular facts of the case, the parties will be forced back upon their common law rights and duties

The liability of the carrier at English common law is strict<2>; it may be characterised as an example of liability

without fault(3), for the carrier may be held liable for any loss of or damage to the goods entrusted to him even though he took all reasonable steps to protected against loss. Once the cargo owner shows that goods left to the carrier have been lost or damaged, the carrier has the burden of proving specifically that one of the common law exceptions caused the loss or damage. If he cannot, the carrier is liable. Even if the carrier can show that an excepted peril caused the injury, the cargo-owner can still prevail by proving that the carrier or his servants contributed to the loss or damage by their own negligence.

The rule of strict liability as it stands today was first formulated in the famous case of *Coggs v. Bernard*(4) in which Lord Holt said in a celebrate judgment:

> "The law charges this person [the carrier], thus entrusted, to carry goods against all events, but acts of God, and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable."(5)

And in *Forward v. Pittard*(6) the rule was put on firm feet. This was an action against a carrier, for not safely carrying and delivering the plaintiff's goods. Speaking of the carrier, Lord Mansfield said(7):

> "...by the common law, a carrier is...liable for every accident, except by the Act of God, or the King's enemies."

The legal justification for the rule of strict liability was given by Best C.J., in *Riley v. Horne*, who said(8):

> "When the goods are delivered to a carrier, they are usually no longer under the eye of

> the owner;...If they should be lost or injured by the gross negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier, which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer."

The origin of the rule of strict liability is obscure and the object of one of the most celebrated controversies in English legal history. Fletcher, having made a through investigation of the carrier's liability, stated that: "The absolute liability of the carrier has variously been ascribed (1) to a Germanic origin which a continuous history from the time of the Conquest (Mr. Justice Holmes); (2) to an Elizabethan innovation applicable to carriers by land, and afterwards extended to carriers by water (Sir William Jones); and (3) as derived from the Pretorian Edict regarding shipmasters, and thence incorporated into the common law regarding carriage by land (Lord Esher)."(9)

The parties may, however, reduce the common law liability to the level of a liability for negligence by means of a special contract. This situations frequently occur in cases of carriage covered by a charterparty or a bill of lading.(10)

The question whether, and to what extent, the carrier's liability in a special contract has been brought down to the

negligence level largely depends upon the interpretation of the contract(11).

2.2 THE COMMON LAW EXCEPTIONS

There are certain grounds on which a carrier, even when he is not protected by any exception clause, can escape liability to the owner of the goods. These are known as the common law exceptions and they are: Act of God; Act of the Queen's Enemies; Inherent Vice in the Goods; Defective Packing and Jettison.

2.2.1 *ACT OF GOD*

The first of the exception to the strict rule of the common law is that the shipowner/carrier is not liable for losses or damage resulting from "acts of God"(12). The meaning of "act of God" in this relation has given rise to difference of opinion , but it is generally said that "act of God" denotes natural accidents, such as lightning, tempest, etc., and not accidents arising from the negligence of man. In the words of Lord Mansfield:

> "What is the act of God? I consider it to mean something in opposition to the act of man; for everything is the act of God that happens by His permission; every thing, by His knowledge."(13)

The interpretation given by Lord Mansfield to the "act of God" received an elaborate and authoritative consideration in the well-known case of *Nugent v. Smith*(14). There, a horse was lost at sea, partly by the violence of a storm,

which is an act of God, and partly by the horse struggling through fright, which was due to vice of the thing carried, and it was held that the carrier was not responsible. On the meaning of "act of God" James L.J., said(15):

> "The 'act of God' is a mere short way of expression this proposition: A common carrier(16) is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively without human intervention..."

From the point of view of a U.A.E. lawyer, the above interpretation is specially interesting because it points to a sharp contrast between act of God and force majeure. In U.A.E. law force majeure must be an event of a certain magnitude and unforeseeability, and, in addition, it must be external to the promisor, which means by implication that the promisor, the carrier, and his servants or agents must not be privy to the occurrence; it does not, however, prevent human intervention from outside this narrow field, viz. the act of a third party, from being associated with force majeure.

What amount and character of intervention by natural agency suffices to bring a loss within the exception of "act of God" has been the subject of considerably difference of opinion. On the one hand, the intervention necessary has been narrowed down to such direct and violent and sudden acts of nature as could not by any amount of ability be foreseen, or if foreseen, averted(17). On the other, a claim has been made to comprehend as well any sudden and entire failure of the wind as any sudden gust of wind working loss to a vessel taken unprepared by it(18).

It was, once, argued that in order to protect himself from a liability arising from "act of God", the carrier must show that the natural act could not be resisted by any amount of care and skill so as to prevent its effect(19). This argument, however, was disapproved by Cockburn C.J., in *Nungent v. Smith*(20) who, adopting the view of Story(21), held that all that can be required of the carrier is that he should do all that is reasonably and practically possible to ensure the safety of the goods. If, despite the resort to all the means known to prudent and experienced carriers, a storm or other natural agency works damage, the carrier is protected; for then the injury may be said to come from the "act of God."(22)

It is, however, not enough for the carrier to show that the loss arose from natural as distinguished from human causes and to leave it to the cargo-owner claimant to show that there was some want of precaution or care on his part; the carrier must himself show affirmatively that the causes were such that no reasonable amount of precaution and care would have enabled him to avoid or guard against them(23).

The following are some occurrences which may or may not constitute an act of God:

a) Loss by high wind. Before wind can amount to an "act of God", it must not merely be exceptionally strong, but must be of such exceptional strength that no-one could reasonably be expected to anticipate it or provide against it(24).

b) Loss by lightning, whirlwind. Lightning is one of the usual illustration of an act of God(25), and although there are no cases in which losses have occurred by these accidents, they are evident example of an "act of God".

c) Loss by high tide. An extraordinary high tide would seem to be not an "act of God". The view of Coleridge C.J., that:

> "As soon as it was shown by experience that a tide of the high of that recorded in March 1874 might occur, the danger of its recurrence was a danger that could be foreseen in the future, and might be guarded against, whether it could have been foreseen in the past or not, and consequently that the owners of the sea-walls were bound to foresee and provide against it."(26)

seems more in accordance with authority than that of Fry J., who said that an event which happened once, when there is nothing to lead to the influence that it is likely to recur, does not, if it happens a second time, cease to be an "act of God"(27).

d) Loss by fire, explosion or collision. Loss by fire, unless it be caused by lightning, does not come within the exception because it can originate in other way so as not to be called by the "act of God". This was decided by Lord Mansfield in *Forward v. Pittard*(28) where a wagoner had received the goods for carriage upon his wagon and had placed them securely, as he thought, under shelters

until the time should arrive for his departure with them. In the meantime a fire originated at a considerable distance from it, but spread so rapidly that before the wagon could be removed it was reached by the flames and burned. In giving judgment in the case Lord Mansfield said(29):

> "The question is whether the...carrier is liable in this case of fire. It appears from all the cases for hundreds of years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract he is liable for all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer...In this case it does not appear but that the fire arose from the act of some man or other. It certainly did arise from the act of man, for it is expressly stated not to have happened by lightning. The carrier therefore in this case is liable for inevitable accident."

Nor will the explosion of a boiler, any more than a fire, be regarded as an "act of God" which will excuse the carrier(30). Nor can a collision be claimed as the "act of God" because in a tempest which made it inevitable, the tempest would be the vis major, and not the collision(31).

By Art. IV, Rule 2(d) of the COGSA 1971 a carrier is not responsible for loss or damage arising or resulting from "act of God". As a general rule, the above interpretation of the term "act of God" under the common law is also to be extended to the exception "act of God" under the Act.

Finally, it may be said that in practice the number of cases where the defence of "act of God" has been successful were very small, because the vast majority of contracts of affreightment contain some clauses excepting perils of a lesser kind, and, therefore, it is easier and more expedient for carriers to allege and prove these lesser exceptions than to have to establish an "act of God".

2.2.2 *ACT OF THE QUEEN'S ENEMIES*

The only other exception early recognised by the law in favour of the carrier is for losses arising from act of "King's enemies" or "Queen's enemies".

Owing to its origin in *The Marshalsea*(32) and *Southcote's* Case(33), it had been continually recognised, but its significance had, however, considerably diminished and is rarely of practical importance to-day.

At common law the exception of "Queen's enemies" refers to the enemies of the sovereign of the carrier, viz.,the acts of powers at war with the nation(34). It includes not merely those who, being the agents of a de facto Government, are engaged in what used to be regarded as the regular operations of war with the State of which the carrier is a member(35), but also every ruffian who, under instructions from such a Government, is engaged in operations for which he would assuredly be dealt with as a pirate by a British Officer who could lay his hands on him. But there is some doubt as to

whether the exception includes the acts of pirates as being the enemies of all nations(36). As piracy being in fact nothing more than robbery upon the sea, it is very doubtful should it fall under this exception(37). Further, it is not certain whether the exception includes the enemies of a foreign carrier's own country, where he appears before the municipal courts. However, if the exception appears as an express contractual terms in the contract of affreightment, the reference is primarily to the enemies of the country whose flag the contracting vessel is flying(38).

The "Queen's enemies" refer to enemies at war and not merely private depredators. Thus, losses which are occasioned by the depredation or the violence of a mob, rioters, strikers, thieves and the like, however much they may be in some sense the common enemy of the country, do not come within the exception. Nevertheless, where hostilities between the people of two sections of the same country become so serious and flagrant as to acquire the character of a war, and the combatants treat each other as enemies with a recognition of blligerant rights, they are public enemies in the meaning of this exception(39). War is considered "either international or civil, foreign or domestic."

It is not necessary to constitute the relation of public enemies between the carrier and his captors, that there should be an open declaration of war between the two countries to which they belongs. The existence of actual hostilities is sufficient to constitute the relation of

public enemies and all persons within the respective hostile territories are each others enemies whether in arms or not.

COGSA 1971, Art. IV Rule 2(e)(f) includes 'Act of War' and 'Act of public Enemies' in the list of the statutory exceptions. The meaning of the latter phrase is not clear, but presumably the two phrases together cover the action of any belligerent, and (quaere) of pirates also(40).

2.2.3 *INHERENT VICE OF THE GOODS*

The undertaking of carriers to deliver in good order and condition is subject to any changes which may have taken place in the thing itself. Consequently, if the goods become deteriorated or wasted owing to the progress of some defect or quality in themselves, the carriers are not responsible for that change or loss, although they may not have expressly excepted those perils. Thus in *The Freedom*(41) where goods were shipped only 'danger of the sea' excepted, Sir Napier said(42):

> "It would be unreasonable to make the ship-owners responsible for deterioration or damage caused by latent imperfection or defects of the oilcake, which could not be supposed to have been known to them at the time of shipment."

From this judgment it follows that the carrier is excused at Common law where a loss or deterioration of the goods arises from inherent quality or vice of the thing carried. The property must be of that sort which "by its

internal development tends to the destruction or the injury or the animal or thing to be carried and which is likely to lead to such a result. If such a cause of destruction exists and produces that result in the course of the journey, the liability of the carrier is necessarily excluded from the contract between the parties."(43)

The law of England with regard to the exception 'inherent defect' was laid down in two almost simultaneous and still today authoritative cases, *Blower v. Great Western Rly.*(44), and *Kendall v. L.S.W. Rly Co*(45). In the former case, a bullock, delivered to the defendants to be carried, escaped from the truck in which it was placed, and was killed without any negligence on the part of the defendants. Willes J., cited with approval the following passage from Story on Bailments(46):

> "...although the rule is thus laid down in general terms as the common law, that the carrier is responsible for all losses not occasioned by the act of God or the King's enemies, yet it is to be understood in all cases that the rule does not cover any losses, not within the exception, which arise from the ordinary wear and tear and chafting of the goods in the course of their transportation, or from their ordinary deterioration in quantity or quality in the course of the voyage, or from their inherent natural infirmity and tendency to damage, or which arise from the personal neglect, or wrong, or misconduct of the owner or shipper thereof. This, for example, the carrier is not liable for any loss or damage from the ordinary decay or deterioration of orange or other fruits in the course of the voyage from their inherent infirmity or nature, or from the ordinary diminution or evaporation of liquids(47), or the ordinary leakage from the casks in which the liquors are put in the course of the

> voyage or from their tendency to effervescence or acidity...for the carrier's implied obligations do not extend to such cases."

In *Kendall v. L.S.W. Rly. Co.*(48) the plaintiff's horse was conveyed by the defendants as carriers and, at the end of the journey, was found to be injured without negligence on the part of the carrier. "There is no doubt in this case," said Bramwell B.,:

> "that the horse was the immediate cause of its own injuries. That is to say, no person got into the box and injured it. It slipped, fell, or kicked, or plunged, or in some way hurt itself. If it did so from no cause other than its inherent propensities, 'its proper vice'- that is to say, from fright, or temper, or struggling to keep its legs- the defendants are not liable....If perishable articles- say, soft fruit- are damaged by their own weight and the inevitable shaking of the carriage, they are injured through their own intrinsic qualities. If through pressure of other goods carried with them, or by an extraordinary shock or shaking, whether through negligence or not, the carrier is liable."(49)

Practically the above two judgments show almost all the possible cases in which 'inherent vice' might be involved. Beside them, there are other judgments in which it was held that the carrier is not liable for the progress of disease in animals, or for injuries induce by their own timidity(50), nor for the results of ordinary processes going on the things themselves, such as decay or deterioration of perishable goods, nor for the ordinary wastage of goods which are liable to waste, unless he (the carrier) has aggravated the damage by any breach of contract(51).

With regard to 'perishable goods' the master of a vessel is bound to take all reasonable care of them, and if they

require to be aired or ventilated, he must apply the usual and proper methods for this purpose(52). So if perishable goods are so damaged by salt water that they cannot be taken forward to the port of discharge so as to earn the freight, it becomes the duty of the master to save and dry the cargo, though the expense of his performing this duty falls upon the cargo saved(53).

For the master it is not merely a power but a duty to take reasonable care of the goods entrusted to him; not only in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction or deterioration by reason of accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of the exception 'inherent vice' in the bill of lading. In case of unforeseen necessity, where the owner of the goods cannot be communicated with within a reasonable time or without considerable cost, delay and inconvenience(54) the master has the character of agent for the goods-owner as a prudent man would himself do for his own interest if he were present.

Under inherent defect may be also included 'ullage', the quantity of fluid which the cask wants of being full in consequence of the oozing of the liquor, or the loss resulting from the goods being in an unsound and unfit condition(55).

2.2.4 *DEFECTIVE PACKING*

A further exception at common law is that the carrier is not liable for losses arising from the defective or insufficient packing of goods. This exception seems to have been inserted *ex abundante cautela*, because such kind of losses are also declared to be losses from inherent vice.

The proviso formerly found in bills of lading that for leakage or breakage the carrier 'shall not be responsible', perhaps comes from the fact that it is possible for a shipper to pack his wares so that there shall be no leakage or breakage in the course of the voyage. But this does not relieve the carrier from due diligence in stowage, which he owes in all circumstances, no matter how imperfectly the things carried may be packed.

The interpretation of this exception has been the subject of consideration since the late 18th century, but the point in fact was settled only later in some cases such as *Gould v. S.E. C. Ry.*(56), and *Potts v. Union S.S. Co. of New Zealand*(57). Lord Atkin ,in th former case, said(58):

> "...the defendants...informed the plaintiff that one of the conditions of the carriage was that they were not responsible for damage if the goods were not properly packed. The goods, which had been lying at a depository, were eventually carried by the defendants' railway, and owing to insufficient packing they were damaged...Whose duty was it to pack? No doubt it was the plaintiff's duty to pack. What caused the damage? Why, it was occasioned by the furniture not being properly packed. No person is entitled to claim compensation from others for damage occasioned

> by his neglect to do something which it was his duty to do. I base my judgment entirely on the finding in the case, that the damage complained of was caused by improper packing."

In *Potts* Case it was held that insufficiency of packing not to mean inability to withstand negligent handling of other goods, even though those other goods are part of the same consignment.

The burden upon the carrier to show that the loss or damage as was sustained arose solely out of the insufficiency and did not arise from or was contributed to by any act or neglect or default on the part of the carrier, his agents or servants. Yet, the fact that the carrier knew of the insufficiency at the time when the goods were received will not of itself stop him from setting up as a defence that the damage was due to insufficient packing(59). His knowledge is relevant only in that he is obliged thereby to take greater care of the goods(60); this duty to carry with reasonable care, as it has been mentioned being applied in all contracts of affreightment. If the carrier fails to meet the heightened standard of care it will be his negligence, and not the defective packing, that caused the the loss or damage. But if the bill of lading provides that the goods have been shipped in 'good order and conditions' this will be considered as an admission by the carrier that the goods were shipped in that way. It follows that with such statement in the bill of lading, although the goods are not properly packed, there is a presumption that they were properly packed

in a fit state for transportation(61), and therefore this stops the carrier, as against a transferee for value of the bill, from setting up as a defence that the damage was due to the insufficient packing(62).

In bills of lading to which the COGSA 1971 applies the carrier is not responsible for loss or damage arising or resulting from 'insufficiency of packing' (Art.IV, Rule 2(n). It has been suggested that this exception applies if the goods are damaged owing to insufficient packing of goods belonging to someone else, but it is submitted that this exception is no more than an expression of the exception of defective packing at common law, and that it could not cover such damage(63).

2.2.5 *GENERAL AVERAGE SACRIFICE*

This defence(64) was laid down by the general maritime law and accepted in the law of England as early as *Mouse*'s case(65). The principle of this exception is simple:

If a vessel is caught in a storm which threatens to destroy the ship and the cargo, and if the master orders some cargo to be thrown overboard and thereby lightens the ship, and if as a result of the jettison the ship and the remainder of the cargo are saved, the owner of the jettisoned cargo has the right to contributions from the owner of the vessel and the owners of the remaining cargo(66). In other words, the carrier will be exonerated from liability for the loss subject to a duty of retable contribution, the extent of

which depends upon the ship's value at the end of the voyage. To this extent, then, his exoneration is not complete; a finding that the cause of the loss was a general average sacrifice amounts in fact to a limitation of the carrier's liability to the amount of his general average contribution.

To justify the application of the rule as to general average contributions the sacrifice must be made in conformity with certain conditions:

i) The danger must not have been produced by the fault of any party concerned. If any one of the participants fails in his duties, and as a result an emergency arises necessitating some sacrifices, there cannot be any claim for general average contribution(67).

ii) The danger must have threatened not a part merely, but the whole adventure(68).

iii) The danger must be apparently inevitable if the sacrifice is not made(69). Some danger must exist in the sense that a mistaken belief on the part of the master that a peril threatens, even if his mistake is reasonable, will not justify a sacrifice made or expenditure incurred to a void a factually non-existent danger(70).

It seems that, provided the danger was real, the English law does not require it to be imminent:

> "It is not necessary that the ship should be actually in the grip, or even nearly in the grip, of the disaster that

> may arise from a danger. It would be a very bad thing if shipmasters had to wait until that state of things arose in order to justify them doing an act which would be a general average act."(71)

iv) The sacrifice must be voluntary(72). In other words, if some cargo is lost overboard because of improper stowage or through negligence, such loss will not justify any general average contribution and the cargo-owner will have a right of action against the shipowner for the whole of his loss(73).

To this rule, however, there is an ancient and well established exception with regard to the jettison of cargo which has been stowed in an unusual or improper place such as on deck. Since the deck is not the proper place for cargo because it hinders the safe navigation of the vessel(74), the jettison of goods which are so stowed does not enable their owner to claim in general average(75), unless the place of stowage was customary in the trade or at the place of loading or was agreed to by all the interested parties(76).

It must be understood that jettison is not the only case where principles of general average are applied, although it certainly is the most common illustration of this exception. There can be found a great number of other instances when a sacrifice is made for the common good, and the ship and cargo are saved through this sacrifice, such as intentional

stranding of a ship by her master, shifting of cargo in order to stabilise a listed vessel. All these and many other contingencies form grounds for application of the general average exception(77).

2.3 THE LIABILITY OF THE CARRIER UNDER U.A.E. GENERAL LAW AND ITS EXCEPTIONS

2.3.1 ABSOLUTE LIABILITY

As with Common Law, the U.A.E. General Law imposes a strict liability on the carrier. The carrier is under an absolute obligation to deliver the goods at destination in the same good order and condition in which they were received by him. He is absolutely liable - independent of any negligence on his part - for any loss or damage occurring in relation to the goods(78). The goods-owner has only to show that the goods has been lost or damaged, that the carrier has therefore failed in his obligation, and the carrier is presumed liable, unless he can prove that the loss or damage resulted solely from causes beyond his control - either force majeure (which U.A.E. courts conveniently divided into two categories : natural events and act of a third party) or the act (usually, fault) of the plaintiff. Unlike, however, his English counterpart, the carrier under U.A.E. general law is not entitled to introduce any contractual exceptions to his basis liability.

2.3.2 *NATURAL EVENTS*

If the loss or damage to the cargo is not due to a human activity it must, to the extent that it may be traceable to any cause, be attributed to a natural event. If this event satisfies some fairly rigid criteria it will be classed as a force majeure and if the carrier can show that it was the cause of the loss or damage, he will be free from all liability(79).

U.A.E. Courts have been very strict when characterising an event as a force majeure, and in particular they would insist that: **i)** the event must be inevitable given any degree of prudence or caution. If the exercise of reasonable diligence could have avoided the accident, it is not force majeure. **ii)** the event must be unforeseen and unexpected, again given the exercise of reasonable diligence. **iii)** the event must be irresistible(80). (i) and (iii) are not interchangeable, for example, goods lying in the way of fire ignited by lightning will be unable to resist it but the fire will be force majeure only if no amount of care could have led to their removal in order to avoid their destruction. Any natural event that satisfies these three requirements will relieve the carrier of his liability.

2.3.2.1 The Degree of Diligence required of Carrier

The standard of duty imposed upon the carrier seems, to be higher in U.A.E. than is in England. The range of events he must guard against, in the words of U.A.E. lawyers, what

he must foresee and avoid, seems to be considerably wider. Occurrences that will exonerate him because of unforeseeability are restricted to highly uncommon natural causes. Act of God, as seen by common law courts in carriage by sea, will not always excuse; nor, a fortiori, will perils of the sea, including the ordinary case of an inroad of sea-water or accidental fall of the cargo into sea(81).

An event which, though not likely to occur, cannot be excluded from the mind of a particularly careful carrier or shipmaster is not unforeseeable(82); and to be unavoidable it is necessary for it to be beyond control in the sense that the occurrence or its consequences cannot be avoided by a very high degree of care and skill(83).

It is indeed not very clear from the express wording of the U.A.E. decisions whether the tests adopted are comparable to either branch of the distinction between 'ordinary' and 'any' care and skill as understood in the English case of *Nugent v. Smith*. But it appears from the cases that what is meant by due diligence or reasonable care is more stringent than the test of reasonable exertions as applied in English special contracts.

2.3.2.2 The Degree of Violence required of the Event

In many cases the violence (tempest,cyclone or otherwise) of the event is taken as the primary test in order to decide whether there is any liability for the ensuing damage. It must be such as to render the event unforeseeable and

unavoidable(84). Though in theory the magnitude of the occurrence is only a presumption of fact as to its unforeseeable and unavoidable character, it seems here to have developed almost into a legal requirement, or condition of exoneration.

As it is obvious from the definition of force majeure, its presence implies that there has been no operative negligence on the part of the ship. The process of putting the emphasis on the violence and the factual structure of the event has led to a situation where, whenever these elements do not reach the prescribed standard, the occurrence cannot be accepted as the cause of loss. In such a case, the finding is necessarily one of fault which may either real (that is connected with blameworthiness) or presumed; the carrier must be held liable.

2.3.3 *THE FAULT OF THE PLAINTIFF*

In U.A.E. the rule is that the plaintiff's fault does not necessary deprive him of compensation. But the fact that the plaintiff was himself at fault involves legal consequences. Sometimes it is considered as the sole cause of the damage, so that the defendant is exonerated. In other cases, and in practice much more frequently, the fault of the plaintiff was only one of the causes of the damage; he will then obtain from the defendant a merely partial reparation, because culpability is divided(85). Occasionally, although in rare instances, the fault attributable to the plaintiff

does not prevent the entire legal responsibility being attributed to the defendant. Let us consider these various situations.

First we will consider the problem of the complete exoneration of the defendant. It is not any and every fault on the plaintiff's part that will necessarily exonerate the defendant. If such a result is to be achieved from a fault imputable to the plaintiff, this fault must have been the sole cause of the damage he has suffered, so that no part in the causation of the damage remains attributable to the defendant(86). Borrowing the language of the Common law for a moment, we may say that for the defendant to escape liability altogether in spite of his fault, the fault or negligence of the plaintiff must be shown to have been not merely a contributing cause, but the sole and exclusive cause, of the damage he has suffered. Thus a carrier by sea will be exempted from responsibility because of the fault of the shipper only in cases where such a fault is the sole cause of the loss of or damage to the goods. For instance, the carrier is not liable for losses which result from the defective manner in which the goods are packed so they become unfit to withstand the ordinary incidents of the voyage, given degree of care which the carrier is required by the contract to exercise in relation to the goods. Also, the carrier is not liable if the goods are insufficiency or inadequacy marked so they become unidentifiable and causing them to be lost, misdelivered, or mixed with other cargo. In

this point, it does not appear there is any difference between U.A.E. and English law. As the rule under both legal systems is that no person is entitled to claim compensation from others for damage occasioned by his neglect to do something which it was his duty to do.

In practice, however, it is rare for the plaintiff's fault to be consider the sole cause of the damage if some fault can be imputed to the defendant. Very frequently, then, the damage is attributed in part to the shipper's want of care and in part to the fault of the carrier, e.g., where the loss resulted from the goods being insufficiently packed and the lack of care in the part of the carrier. In such cases the result is that the plaintiff is entitled to a partial indemnity for the loss he has suffered; the carrier has to compensate only that part of the damage which has resulted from his negligent act. The courts have a discretion in deciding the proportion of loss to be borne by each party, and the Supreme Court , in practice, scarcely exercises any control over the finding of the courts below in this respect. The judges of fact decide the issue of apportionment of loss according to various principles.

One such principle consists in trying to determine whose fault it was that most effectively contributed to the realisation of the damage(87); the respective faults of shipper and carrier are weighed from a causal point of view. Another test involves an analysis of the "moral seriousness" of the faults in question - in other words, it is

culpability, rather than causation, that is taken into account. In this spirit the courts will attribute a heavier liability to the author of damage caused intentionally or as a result of gross negligence, than to someone whose negligence is of a slighter order. When it is impossible to decide whether the defendant or the plaintiff is guilty of the greater fault, each party is held liable for one half of the loss.

As the fault of the plaintiff is an affirmative defence it must be pleaded by the carrier who has the burden of proving that the shipper was negligent as to the safety of the goods and that this negligence caused the loss of which the shipper complains.

2.3.4 *THE ACT OF A THIRD PARTY*

We will now consider the situation that arises when a third party intervenes between the defendant's act and the loss suffered by the plaintiff. If the carrier is able to show that the loss for which he is sued was in fact entirely caused by a third party for whose act or fault he is in no way answerable, then he will escape liability as one of the requisite elements of liability, namely, the link of causality between the carrier's act and the plaintiff's loss is missing(88). This will be the case, for example, where the loss to the goods resulted from an act of war or arrest or restraint of princes.

Where it is alleged that the act of a third party was

the sole cause of the loss or damage, the U.A.E. courts will insist that the act of the third party, on which the defendant relies to exculpate himself, must amount to force majeure, that is to say, it could not be reasonably have been foreseen or avoided by the defendant. Such an allegation will not be an easy one for the defendant to prove, especially when his own fault has been established by the plaintiff. If two or more persons to blame, they are liable solidarity(89). Each is bound to repair the whole damage.

However,if the defendant's fault is comparatively slight but the third party's act is intentional or grossly negligence, then the latter will be held solely responsible for the loss.

2.4 THE ADJUSTMENT OF INDEMNITY IN ENGLISH COMMON LAW

In English law the rules on the carrier's liability for damage resulting partly from the carrier's negligence and partly from causes beyond his control, e.g. act of God or Queen's enemies, seem to differ from the principles adopted in U.A.E., although English law and the law in U.A.E. are not wholly comparable on this point because of the differences in the law of contract and tort between the legal systems. The rule of adjustment of damages in cases where the damage was the combined effect of various causes is not applied to the carrier's liability in English law(90). The point of departure is to be found in the doctrine of the *causa proxima*. According to this principle, developed in the law of

insurance and subsequently extended, inter alia, to the law of the carrier's liability, the decisive matter is to find the immediate or the main cause of the damage. In determining the liability, attention is paid to this immediate, principal cause, while other more remote factors contributory to the damage are considered irrelevant(91).

However, the *causa proxima* rule has not been applied indiscriminately in cases concerning the carrier's liability. If the damage to the goods is to be attributed partly to the carrier's negligence and partly to causes beyond his control, the carrier has as a rule been ordered to indemnify the whole damage(92). Thus the carrier's negligence is considered as a ground entailing the duty to compensate the whole loss, although his negligence was only a contributory cause and to a large extent was attributable to causes beyond his control. The idea of apportioning damages on the basis of the effect of each of the various causes is not taken into consideration.

When comparing the U.A.E. legal system and English law with regard to the indemnification of injury resulting from the combined effect of various causes, we find that different rules are applied. In the U.A.E. the adjustment of liability is considered as the main rule. In English law the tendency is the opposite. The carrier has to indemnify the whole damage wherever the damage was at least partly caused by his negligent act.

2.5 THE BASIS OF THE LIABILITY OF THE CARRIER UNDER THE U.A.E. MARITIME CODE

2.5.1 *LIABILITY BASED ON FAULT*

The Maritime Code, in contrast to the General law, seemed more favourable to the carrier, since the carrier is only liable when he cannot sustain the burden of proving that he or his servants were without fault in producing the damage or loss. This proposition is derived from Arts. 272 and 275 of the Code.

Art. 272 states the broad ground on which the carrier may be held liable:

> 1. The carrier shall be bound , before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy, to properly equip, man and supply her and to prepare the holds, cool chambers and all other parts of the ship to receive, carry and preserve the goods.
>
> 2. The carrier shall exercise due diligence to load, stow, carry, keep, discharge and deliver the goods carried.

Art. 275, Rule 1 enumerate a series of cases where the loss of or damage to cargo caused by perils with no culpa on the part of the carrier. These cases may be divided into three groups:

The first and most comprehensive are the perils which could be described as force majeure perils in the widest

meaning of the term. To this group belong: sub-r. (d) " Perils, dangers and accidents of the sea or other navigable waters", sub-r.(e) "Act of God", sub-r.(f) "Act of war", sub-r. (g) " Act of common enemies", sub-r. (h) as far as regards " Arrest or restraint of government, authority, or people...", and, partly sub-r.(i) "Quarantine restrictions", sub-r.(j) "Strikes or stoppage or any other impediment which might stop the continuation of the work totally or partially", and sub-r.(k) " Riots and civil commotions".

The second group are perils where the damage has been caused by the ship, by the carrier or by his servants, but in a way for which no blame can normally be put on the carrier or his servants. To this group belong: sub-r.(a) "Unseaworthiness", sub-r. (h) as far as regards "...judicial seizure", and partly sub-r.(i) "Quarantine restrictions", sub-r.(k) " Strikes or stoppages..." etc., sub-r.(p) "Saving or attempting to save life or property at sea", sub-r.(q) "Latent defects not discoverable by normal inspection" , and sub-r.(r) "Deviation".

The third group consists of cases where the loss has been caused by the acts of the shipper: namely, sub-r.(l) "Act or omission of the shipper or owner of the goods , his agent or representative", sub-r.(m) "Wastage in bulk or weight or any other wastage arising from inherent defect, quality or vice of the goods", sub-r.(n) "Insufficiency of packing", and sub-r.(o) "Insufficiency or inadequacy of marks".

Sub-r (s) provides a key to the very basis of liability under the Code. It demonstrates that in contrast to General law, the Code base the liability of the carrier on fault . Sub-r.(s) may be formulated as follows:

(1) Liability for loss of or damage to cargo can be imposed on the carrier only if the loss or damage has been caused or contributed to by a negligent act or omission of the carrier, his agents or servants, or for the sake of brevity, by culpa on the part of the carrier, but

(2) the burden of proof as to whether there has been such culpa on the part of the carrier or not rests on the carrier. If the carrier can prove that a loss is caused by act of God, he has at the same time proved that no blame can be put on him or his servants or agents.

Under the principle of negligence the requirement of fault is satisfied if the harmful conduct is either intentional, or negligent. Intention occurs when the protected interest is purposely evaded whilst negligence represents a want of that degree of care which is generally regarded as necessary in ordinary life, unless provided otherwise.

Two questions remain; the first one is whether the perils contained in Art. 275, Rule 1 (a),(d)-(k) must satisfy the elements of force majeure before they can excuse the

carrier, or whether "lesser" perils, subject always to a right in the plaintiff to rebut them by proving fault, will suffice. Very few cases that the U.A.E. courts have had occasion to decide under Art. 275 and the cases deals mainly with the effect of adverse weather conditions, and there it is reasonably clear that the courts tend to demand proof of the same kind of event that would have amounted to a force majeure under the general law(93).

With regard to the other exceptions, it is submitted, however,that the need for, at any rate the pre-Code habit to seek, force majeure before a holding of "not liable" can be reached, is too strong to be easily changed; that these exceptions are not likely to effect more than the reversal of the burden of proof leaving it to the cargo-owner to prove negligence if he has enough evidence as to the real cause of the loss; and that, if the events in question can be shown to fall appreciably below the standard required of a force majeure it is likely that the U.A.E. Courts will be prepared to find fault, that is, a fault in not foreseeing the event and/or in not avoiding its consequences.

The second question concerning the adjustment of liability is how we ought to construe the words of Art. 275 (1)(s): "the carrier shall be responsible for the loss or damage to the goods... unless it is proved that the loss or damage resulted from... cause arising without the fault of the carrier or his subordinates".

The problem cannot be solved by way of a linguistic

interpretation of this expression. The test may be understood as meaning that the carrier shall not be exonerated from liability if one of the causes contributory to the damage was his fault or the fault of his subordinates. In other words, if the negligence of the carrier or someone acting on his responsibility has contributed to the damage, liability is not adjusted, and the carrier has to indemnify the whole damage. Such an interpretation would follow the principle adopted in English law.

One may, however, also attach a more limited meaning to the words " the carrier shall be responsible". It is true that the carrier will not be exonerated from liability if he or someone acting on his responsibility has contributed to the damage through a negligent act. But the question to what extent the carrier will have to compensate the loss or the damage is left open. According to this interpretation the Maritime Code is not incompatible with the general principles of adjustment of liability for damage in the U.A.E. law.

1 Because in practice there is considerable divergence, the English shipowners had used and abused the freedom of contract allowed by English law, a freedom not accorded so readily to their U.A.E. counterparts, and introduced many contractual exceptions to their basic liability to the effect that the position of the English shipowners could almost be described as no liability with certain exceptions.

2 See Carver's Carriage by Sea, 13th edn. (1982) p. 3 et seq (hereinafter cited simply as Carver).

3 See Abbott on Shipping, 14th edn. p. 220.

4 (1703) 2 Ld. Raym. 909. 4 *Southcote v. Bennett* (1601) 76 E.R. 1061.

5 (1703) 2 Ld. Raym. 909, 918.

6 (1785) 1 T.R. 27.

7 Ibid., at p. 33.

8 (1828) 5 Bing. 217, 220. See also O. Kahn-Freund, The Law of Carriage by Inland Transport, (1965) p. 199.

9 Fletcher, The Carrier's Liability, 1932.

10 See for example Clause 13 of the Baltime 1939 which provides that "The Owners only to be responsible for ...loss or damage to goods onboard, if such ...loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager".

11 See infra p. 106 et seq.

12 On this defence, see Fletcher, supra note 9, pp.147-151 and 56-168; Carver, pp. 11-14; Scrutton on Charterparties, 19th edn. (1984) p.219 (hereinafter cited simply as Scrutton).

13 *Forward v. Pittard*(1785) 1 T.R. 27.

14 (1876) 1 C.P.D. 437.

15 Ibid., at p. 444.

16 The common law has traditionally distinguished between common carriers (those who profess a readiness to carry goods for anyone) and private carriers (those who undertake to carry goods only for certain persons). The latter are held to a less strict standard of liability than the former. See Kahn-Freund, supra note 8, at pp. 195-196.

Due to legislation, however, the distinction between common and private carriers has ceased to play major role in British transport law. Kahn-Freund, supra note 8, p. 196. U.A.E. law makes no distinction between public or private carrier, large or small.

17 Per Brett J., *Nugent v. Smith* (1876) 1 C.P.D. 19, 34.

18 *Amies v. Stevens* (1718) 1 Str. 127, where a hoy going through a bridge was driven against a pier by a sudden gust of wind, and sunk.

19 *Nugent v. Smith* (1876) 1 C.P.D. 19, 23 per Lord Esher

20 (1876) 1 C.P.D. 437.

21 Bailment, s. 512 a.

22 (1876) 1 C.P.D. 437, 438.

23 Carver, p. 13.

24 *Cushing v. Peter Walker Son* [1941] 2 All E.R. 693, 695 per Hallet J.; *Colt v. M'Mechen* (1810) 6 Johns. 160, cited Ang. Carr. s. 155. Kent C.J. said:

> "I concur in the general doctrine that the sudden failure of the wind was an act of God. It was an event which could not happen by the intervention of man, nor be prevented by human prudence."

Rain and frost are forces of nature but they constantly occur and must be foreseen and guarded against by the carrier. If the goods are injured by such ordinary forces the carrier is liable, for it is a carrier's duty to protect the goods from such injury. See *L. & N.W.Ry. v. Richard Hudson & Sons, Ltd.*, [1920] A.C. 324 at p. 343, per Lord Buckmaster.

25 *Carstairs v. Taylor* [1871] L.R. 6 Ex. 217; *Nichols v. Marsland* [1875] L.R. 10 Ex. 255, 266, per Bromwell B.

26 *R. v. Commers. of Servers for Essex* [1885] 14 Q.B.D. 561, 574.

27 *Nitro-Phosphate Co. v. London Dock Co.* (1878) 9 Ch.D. 503.

28 [1785] 1 T.R. 27,34.

29 Ibid., at p. 34.

30 *Bulkly v. The Naumkeag S.C. Co.* 24 How. 3866.

31 *Amies v. Stevens* (1718) 1 Str. 127.

32 Y.B. 33 Hen. 6, 1, pl. 3 [1455].

33 [1601] 76 E.R. 1061.

34 Carver, p. 15.

35 See *Atlantic Mutual Ins. Co. v. King* [1919] 1 K.B. 307, in which it was held that the words "hostilities and warlike operations" included the action of a German agent in a netural country who managed to get an explosive machine into the bunkers of a British merchant steamer.

36 See authorities in favour of inclusion in Carver, p. 14 (note 67); against it in Scrutton, p. 220 (note 89).

37 See *Russell v. Niemann* (1864)34 L.J.C.P. 10,14,per Byles J.; 37 Carver, p. 15.

38 *United States v. Palmer*, 3 Wheat 610; *Frank v. Keith*, 2 Bush, 123.

39 *Alexander's Cotton* [1864] 2 Wall. 404.

40 Scrutton, p. 221.

41 [1869] L.R. 3 P.C. 594.

42 Ibid., at p. 600.

43 Per Willes J., *Blower v. G.W. Rail. Co.* [1872] L.R. 7 C.P. 655, at p. 662.

44 [1872] L.R. 7 C.P. 655.

45 [1872] L.R. 7 Ex. 373.

46 S. 492 a.

47 As to an imperfection in a bung resulting in leakage for which the carrier was held not liable, see *Hudson v. Baxendale* (1857) 2 H. & N. 575.

48 [1872] L.R. 7 Ex. 373; In *Ohrloff v. Briscall (The Helene)* (1866) 14 L.T. 873 , ignorance of shipowners as to the latent effect of heat upon a cargo consisting of casks of oil, wool and rags was not held to affect them with liability when oil merchants of great experience were also ignorant.

49 *Union Castle Mail S.S. Co. v. Borderdale S. Co.* [1919] 1 K.B. 613 (chloride of lime shipped in drums, defective but not to knowledge of shippers or shipowners; cargo of other shippers injured by fumes from drums;shipowners not liable).

50 *Nugent v. Smith* [1876] 1 C.P.D. 423.

51 *International Guano v. Macandrew* [1909] 2 K.B. 360; *"The Barcore"* [1896] L.J. Ad. 97, 8 Asp. N.C. 183.

52 *Davidson v. Gwyne* [1810] 12 East, 381; *Notara v. Henderson* [1872] L.R. 7 Q.B. 225.

53 *Mordy v. Jones* [1825] 4 B. & C. 394; *Philpott v. Swann* [1861] 11 C.B. (N.S.) 270, 281.

54 *The Hamburg* [1864] 33 L.J. Admy. 116; *The Lizzie* [1868] L.R. 2 Admy. 254.

55 *Hudson v. L.N.W. Rail* [1920] A.C. 324, 333 per Lord Dunedin.

56 [1920] 2 K.B. 186.

57 [1946] N.Z. L.R. 276.

58 [1920] 2 K.B. 186 at pp. 191-2; see also *F.W. Berk Co. Ltd., v. Style* [1956] 1 Q.B. 180, a cargo was packed in paper bags which burst whilst being transferred from the ship hold to a lighter , Sellers J., held that the paper bags were defective and inadequate to withstand the ordinary incidents of the

insured transit, and that it was this 'inherent vice' in the method of packing that caused the expenditure of re-bagging the cargo.

59 *Gould v. S.E. & C. Ry* [1920] 2 K.B. 186, per Lord Atkin. See also Carver, p. 17.

60 Scrutton, p. 225. But see Wilson, Carriage of Goods by Sea (1988) at p. 250 where it is said that knowledge of the state of packing will not result in a higher degree of care being required of the carrier since 'the shipper cannot cast the burden of extra special stowage on the carrier by simply not packing the shipment properly'.

61 *English v. Ocean S.N. Co.* [1852] 2 Blatchf. 425;

62 *Silver v. Ocean S.S. Co.* [1930] 1 K.B. 416.

63 Carver, p. 381.

64 As to the history and definition see Carver, Chapter 14; Lowndes and Rudolf, The Law of General Average and the York-Antwerp Rules, (10th edn.) 1975.

65 (1608) 12 Co. Rep. 63.

66 Abbott, op.cit p. 753 et seq.

67 *Schloss v. Heriot* (1863) 8 L.T. 246; *The Ettrick* (1881) 6 P.D. 127, 135 per Brett L.J.:

"[The shipowner] has been in fault, and the authorities are decisive that if the general average contribution which he claims is a general average contribution which arose by reason of a default of his, he cannot claim anything."

68 *Nesbitt v. Lushington* (1792) 4 T.R. 783; *Walthew v. Mavrojani* (1870) 22 L.T. 310. There must be a danger, actual or impending, common to both ship and crew: *Whitecross Wire Co v. Savill* (1882) 8 Q.B.D. 653; *Greenshields v. Stephens* [1908] A.C. 431.

69 *Harrison v. Bank of Australasia* (1872) L.R. 7 Ex. 39. As Blackburn J. said in *Wilson v. Bank of Victoria* (1867) L.R. 2 Q.B. 213, there must be "expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature." See *Societe Nouvelle v. Spillers* [1917] 1 K.B. 865.

70 *Watson v. Firemen's Fund Ins. Co.* [1922] 2 K.B. 355.

71 *The 'Makis'* [1929] 1 K.B. 187 at 199.

72 *Shepherd v. Kottgen* (1877) 37 L.T. 618.

73 *Royal Exchange Shipping Co. v. Dixon* (1886) 12 App. Cas. 11; *Strang, Steel & Co. v. Scott* (1889) 14 App Cas 601 (PC).

74 (1889) 14 App. Cas. 601 at p. 609.

75 *Gould v. Oliver* (1837) 4 Bing. N.C. 134; *Milward v. Hibbert* (1842) 3 Q.B. 120. As to a custom to carry deck cargo, *Wright v. Marwood* (1881) 7 Q.B.D. 62; *Burton v. English* (1883) 12 Q.B.D. 218. Goods stowed on deck without the consent of the owner are understood to be at the risk of the master. In the case of loss he cannot exempt either himself or the vessel from liability under a contract within the exception of dangers of the seas, unless the dangers were such as would have occasioned the loss had the goods been safely stowed under deck.

76 *Strang, Steel & Co v. Scott* (1889) 14 App. Cas. 601; *Apollinaris Co v. Nord Deutsche Insur. Co.* [1904] 1 K.B. 250.

77 See Carver, p. 1002 et seq.

78 See *Case no. 125 (1979) Dubai C.A; Case no. 52 (1977) Abu-Dhabi C.A.; Case no. 74 (1980) Abu-Dhabi C.A.; Case no. 226 (1985) Dubai C.A.* The same principle has been applied by other Arab jurisprudence: see for example *Egyptian Supreme Court*, year 50, case no.557, (1984); *Egyptian Supreme Court*, year 50, case no.271, (1984); *Supreme Court of Kuwait*, case no. 85, year 79 (1980); *Omani Commercial Arbitration*, case no. 178 (1985); *Omani Commercial Arbitration*, case no. 247 (1985).

79 Article 287 of U.A.E. Civil Code provides:" If the defendant proves that the loss resulted from a cause not imputable to him such as natural disaster, unavoidable accident...he shall not be bound to make the loss good in the absence of a legal provision or agreement to the contrary."

80 *Case no. 100 (1981) Dubai C.A.; Case no. 379 (1983) Abu-Dhabi C.A.*; see also *Supreme Court of Kuwait*, case no. 85, year 79 (1980); *Egyptian Supreme Court*, year 49, case no. 1493 (1982).

81 *Case no. 78 (1981) Dubai C.A.* Egyptian decisions are to the same effect: see case no. 280 (1951) *Egyptian Supreme Court* .

82 *Cases no. 152 and 153 (1982) Dubai C.A.*

83 *Case no. 379 (1983) Abu-Dhabi C.A.; Case no. 3 (1982) Abu-Dhabi C.A.* See also *Syrian Supreme Court*, case no. 24 (1971); *Supreme Court of Kuwait*, case no. 85, year 79 (1980).

84 *Case no. 153 (1982) Dubai C.A.*

85 See Article 290 of the Civil Code :" It is permissible for the judge to reduce the damages which are to be paid to the plaintiff or to order that no damages are to be paid to him if the plaintiff has participated by his own act in causing the damage or aggravating it."

86 Article 287 of the Civil Code states: "If the defendant proves that the loss resulted from a cause beyond his control in which he played no part such as...act of the person suffering loss, he shall not be bound to make the loss good...."; see also Case *no. 81 (1983) Dubai C.A.; Case no. 157 (1983) Dubai C.A.*

87 *Cases no. 153 and no. 155 (1984) Dubai C.A.*; see also Article 284 of the U.A.E. Civil Code : "If the harm is resulted from two acts one is direct and the other is consequential the direct act shall prevail."

88 See Article 287 of the Civil Code: " If the defendant proves that the loss resulted from a cause beyond his control...such as an act of a third party, he shall not be bound to make the loss good."

89 Article 291 of the Civil Code provides:"If a number of persons are responsible for the harm caused, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liabilities."

90 See Carver, pp. 168-174.

91 See *Pandorf v. Hamilton* (1886) 17 Q.B.D. 670, 682, per Lord Esher.

92 See *Hamilton v. Pandorf* (1887) 12 A.C. 518, 525, per Lord Watson:

> "...when a shipowner, who is bound by the implied terms of his contract to carry with ordinary care, claims the benefit of the exception, the court will, if necessary, go behind the proximate cause of damage for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible."

93 See *Case no 379 (1983) Abu-Dhabi C.A.*

CHAPTER 3

EXCEPTIONS OF LIABILITY BY THE EXPRESS TERMS OF THE CONTRACT OF CARRIAGE

Clauses defining the scope or the extent of the parties' liability are common in contracts of carriage. They offer the advantage of making the consequences of a breach of contract clear to the parties. Such clauses may increase the carrier's liability, making him answerable for the consequences of act of God for instance, whereas under general principles he would not be liable. More often, however, special stipulations are introduce to diminish or even negate the carrier's liability.

Unlike stipulations increasing liability, the question whether a stipulation excluding liability is valid has been answered with some hesitation. One argument in favour of the validity of such stipulations has been based on the general principle of contractual freedom. If parties are free to contract as they wish, they should then be free to stipulate as to the effects of their contractual obligations. Another has been based on policy reasons, a carrier whose liability has been reduced can afford to charge less for the service, which leads to a reduction of rates. Against the validity of the exclusion clauses the argument has been made that total freedom to exclude liability can abusive practices, especially when exclusion clauses are a part of a contract of

adhesion such as a bill of lading. When forced on parties with little or no bargaining power, that kind of stipulation may threaten the overriding obligation of good faith, which is the foundation of contractual relations. Further, a too general use of such clauses may incline carriers towards nonperformance of their contractual duties<1>

It is the purpose of this chapter to examine: first, the methods used to incorporate exclusion clauses into the contract with special reference to bill of lading ; second, the various techniques which the courts have used to interpret the exclusion clauses; and finally, the validity and effect of some common exclusion and limitation clauses.

3.1 INCORPORATION OF EXCLUSION CLAUSES

Exclusion clauses, which are commonly found in standard contracts, present the courts with a difficult situation. On the one hand, it is frequently difficult for the courts to find an acceptable technical reason for holding that a particular exclusion clause has not been incorporated into the contract. On the other hand, the wide and often unreasonable terms of many exclusion clauses make the courts anxious to discover grounds for holding that exclusion clauses do not bind the weaker party to the contract. The tension between the conflicting principles has resulted in the law relating to the incorporation of exclusion clauses becoming very complex.

Hereunder, we discuss briefly the ways in which a clause can become a contractual term and the problems arising from incorporation of charterparty clauses into bill of lading.

There are two methods usually used to incorporate exception clause into a contract. This is done either by the signature of the party to whom a contractual document is presented or by notice given to that(2).

3.1.1. BY SIGNATURE

When an exception clause is incorporated by means of signature, the general rule under U.A.E. and English law, is that in the absence of fraud or misrepresentation on the part of that party presenting the document, a party is bound by a contractual document to which he has put his signature, whether he has read the document or not(3). As Bramwell L.J. put it in *Parker v. South Eastern Railway*(4):

> "If a person who ships goods to be carried on a voyage by sea receives a Bill of Lading signed by the Master, he would be plainly bound by it, although...he might swear that he had never read the Bill of Lading, and that he did not know that it contained the terms of the contract of carriage."

What makes the position of a signer different in U.A.E. from that of his counterpart in England is that under U.A.E. law the party is permitted to show that the clause excluding obligor's liability was not brought to his notice. The question of reasonable notice is irrelevant in the English law when a written agreement is signed(5). Perhaps the English attaches greats sanctity to a signed contract than the U.A.E. law.

3.1.2 BY NOTICE

If there is no signature importing acceptance of the contract with the exempting condition, it must be shown by the party seeking to rely on the exemption that he took reasonably sufficient steps to bring the condition to the knowledge of the other party. If the defendant party did what was reasonably sufficient to bring the condition to the knowledge of the plaintiff, then the conditions are taken to have been sufficiently incorporated. Whether adequate steps have been taken is a question of fact. The remarks of Lush L.J. in *Crooks v. Allan* is worth noting(6):

> "The long list of excepted perils, and the much longer list of exemptions and qualifications, of which the clause in question is one, and which seem designed to exonerate the shipowners from all liability as carriers, and to reduce them substantially to the condition of irresponsible bailees, are printed in type so minute, though clear, as not only not to attract attention to any of the details, but to be only readable by persons of good eyesight. The clause in question comes in about the middle of thirty closely packed small typed lines, without a break sufficient to attract notice. If a shipowner wishes to introduce into his bill of lading so novel a clause as one exempting him from general average contribution--a clause which not only deprives the shipper of an ancient and well understood right, but which might avoid his policy, and deprive him also of recourse to the underwriter--he ought not only to make it clear in words, but also to make it conspicuous by inserting it in such type, and in such a part of the document as that a person of ordinary capacity and care could not fail to see it. A bill of lading is not the contract, but only evidence of the contract; and it does not follow that the person who accepts a bill of lading, which the shipowner hands him necessarily, and without

> regard to circumstances, binds himself to abide by all its stipulations. If a shipper of goods is not aware when he ships them, or is not informed in the course of shipment that the bill of lading which will be tendered to him will contain such a clause, he has a right to suppose that his goods are received on the usual terms. Notwithstanding the concluding sentence of the small typed thirty lines, which says, 'In accepting this bill of lading, the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed,' I should have thought it right, if the stipulation in question bore the meaning contended for, to give the plaintiff an opportunity of supplying, by means of an official inquiry, information as to the circumstances under which the goods were shipped, and the bill of lading was taken, and whether the special clauses of this remarkable document were brought to their notice, or were read by them before they accepted."

3.1.3 A SPECIAL PROBLEM RELATING TO BILLS OF LADING

Exception clauses are often incorporated by reference. Particular difficulties arise when the reference is to another contract. A typical problem of incorporation arises in the area of shipping contracts particularly when a bill of lading refers to a charter party, i.e., when the bill of lading so claused that the terms of a charterparty, or at least some of them, are said to be part, incorporated into, the bill of lading. Before actually dealing with the effect, if any, of such incorporation clauses, something should be said of charter-parties and bills of lading and how this particular interaction between them comes about.

A person may wish to use the whole or a substantial part of a ship. In such a case the most economical means of

carriage is to enter into a charterparty in respect of the whole ship. The contract in such a case is the charterparty. In basic terms, a charterparty is "a contract between the charterer and the shipowner, by which the former hires from the latter the use of the ship, either for a certain length of time- say, twelve months - when it is called a time charter, or for a certain voyage, when it is called a voyage charter...The charter may be an ordinary hire just as the hire of any movable thing...or it may be in the nature of a lease by which the owner grants or demises the entire control and possession of the ship to the charterer (charter by demise)."(7)

A charterer may use the whole cargo area of the ship or, alternatively, he may use part of that area and operate the remainder as a general ship taking cargoes for other merchants. In both cases a bill of lading will be issued in respect of the cargo. To put it broadly, a bill of lading "is a document signed by the master or other agent of the shipowner which states that certain specified goods have been shipped in a particular ship and which purports to set out the terms on which the goods have been delivered to and received by the ship."(8)

The contractual relationship which is brought about in the charterparty between shipowner and charterer is, in general, totally separate from that which arises under the bill of lading between carrier and eventual bill of lading holder. When the bill of lading is negotiated to strangers

to the charterparty, it is prima facie the contract under which the goods are being carried. This has been well put by Lord Esher M.R.,:

> "Where the bill of lading has been endorsed over, as between shipowner and the endorsee (i.e., consignee), the bill of lading must be considered to contain the contract, because the former has given it for the purpose of enabling the charterer to pass it on as the contract of carriage in respect of the goods."(9)

Consequently the carrier has no claim which does not derived in some way from the bill of lading nor has he any defence to a claim from the consignee except so far as this defence is incorporated in the bill of lading contract(10).

The terms of the charterparty may be incorporated in the bill of lading by express reference in which case they may be terms of the contract contained in the bill of lading capable of being enforced by or against the shipper, consignee or endorsee as the case may be. In accordance with this, we find many standard charterparties provide for the incorporation of the charter terms in the bill of lading. This is done by prescribing in the charterparty that the bill of lading shall be issued in a specified form, according to the wording of which form "all terms, conditions and exceptions" of the charterparty are incorporated in the bill of lading.

The text of the relevant bill of lading form may be printed in the charterparty, which will then contain a clause stating that "the bills of lading shall be prepared...in the form enclosed on this charter". For instance Clause 10 of

Nubaltwood states: " The Bill of Lading shall be prepared on the 'Nubaltwood' Bill of Lading form...all terms, conditions, clauses (including clause 30 'Arbitration') and exceptions as per this charter." Or the charterparty may refer to a named Standard bill of lading form, which is drafted for exclusive use in conjunction with the charterparty in question. This is common practice in modern charterparties, as for instance, Polcoalvoy, clause 10 provides: "Bills of lading shall be signed as per "Polcoalbill" form. Or all the terms of the charterparty may be expressly set out in the bill of lading.

Nevertheless, when a bill of lading is issued under a charterparty it may not spell out all the charterparty terms but merely contain a reference to the charter, e.g., "all other conditions and exceptions as per charterparty". If the terms of the charterparty and bill of lading are consistent there will be no problem. However, it is not unusual for them to be inconsistent and in such a situation many difficulties arise primarily from the simple fact that charter-parties by their nature normally contain many more provisions and stipulations than are relevant to the simple contract of bailment between a bill of lading holder and a shipowner. Secondly, that the law governing charterparties is different from that governing bills of lading.

So, what form of notice must be included in the bill of lading in order to fix the holders of bills of lading in due course with notice of the charter terms?

The U.A.E. Court of Appeal(11) has decided that a mere general reference to the charterparty into the bill of lading, e.g., all terms as per charterparty, is sufficient to incorporate the terms of the charterparty into the bill of lading.

Bearing in mind that "as a matter of commercial practice the [Bills of Lading holders] can have no means of knowing the terms even of the bills of lading until the moment when, under their obligation to their sellers, they take up the shipping documents...Even when they take up the shipping documents [they] have no means in practice of acquainting themselves with such terms of the actual charterparty as must be taken to be incorporated by the very terms of the bill of lading by which they are bound"(12), it is submitted that this decision is insupportable. It is also insupportable for the following reasons:

(1) It is very rare for the bill of lading simply to contain a reference to the charterparty. It will usually contain its own terms and an incorporating clause will be inserted at the end. A general reference clause such as "all other terms and conditions as per charterparty" will give rise to difficulties particularly in ascertaining which of the clauses of a length charterparty are incorporated, and then it may be a very heavy task indeed to fix the precise effect of a particular clauses(13). Serious constructional difficulties may arise when a charterparty clause deals with something which is relevant and something which is irrelevant

under the bill of lading, and the same applies where there are clauses in the bill of lading and the charterparty dealing with an identical subject, but with a slightly different wording. This situation becomes even more difficult when the charter-party is not at hand at the time when the bill of lading is concluded, or even later when the bill of lading is transferred(14).

(2) A bill of lading is a negotiable document and it is essential for the holder to be able to ascertain by looking at it the exact extent of his obligations. Any general reference to a charterparty, to which he may not have access, tends to destroy this negotiability(15). Even if the holder is lucky enough to have the charterparty available, it is time-consuming work to compare the terms of the bill of lading with those of the charterparty, and the result of the comparison, as previously said, frequently most doubtful.

(3) A general reference to the charterparty into the bill of lading may raise difficulties for the buyer in international trade(16) particularly in a C.I.F. or C&F(17) sale. In such sales the seller will conclude the charterparty, and if the bill of lading refers to the charterparty, this may be a reference to a document of which the buyer has no knowledge(18). In order to tackle this problem, therefore, INCOTERMS 1980(19) provides in Article 7 of C.I.F. and Article 6 of C&F, respectively:

> "If the bill of lading contains a reference to the charterparty, the seller must also provide a copy of this latter document."(20)

Therefore, a mere general reference clause should not be considered as a sufficient indication of the terms of the charterparty. If it did consider so then it would be hard task not only for ordinary holders of bills of lading but also for more professional holders such as banks to ascertain their rights or obligations under the documents. Hence, it is hardly surprising that the attitude of the UCP 1984 towards an incorporation clause, regulated by Article 26(c)(i) of UCP, is that a bill of lading which is subject to a charterparty should not be accepted unless expressly allowed in the letter of credit:

> "Unless otherwise stipulated in the credit in the case of carriage by sea or by more than one mode of transport but including carriage by sea, banks will reject a transport document which: (i) indicates that it is subject to charterparty...."

It is, therefore, advisable for the U.A.E. Courts either to refuse totally a reference clause in the bill of lading; or ask for a copy of the charterparty to be accompanied with the bill of lading; or at least to follow the approach adopted in England where the courts, in their attempts to solve the difficulties which arise from incorporation clauses, have imposed two requirements which must be satisfied before a charter party clause can be incorporated into a bill of lading. The first requirement is the so-called description requirement, viz., the incorporation clause should, as a matter of construction, cover the clause which is sought to incorporate. The second is the so-called

consistency requirement, that is, the incorporated clause must make sense in the context of the bill of lading and must not be inconsistent with its express terms(21).

3.1.3.1 The Description Requirement

It is submitted that, as far as exception clauses are concerned, the exceptions efficiently incorporated from the charterparty should appear in the bill of lading with explicit wording since a general incorporating clause does not give the bill of lading holder constructive notice of the contents of the charterparty. As Lindley L.J. put it in *Manchester Trust v. Furness, Withy & Co.*(22):

> "What is wanted in this case is to say that by reason of the reference to the charterparty, the holder of the bill of lading and the person who takes it in the ordinary course of business are to be treated as having notice of all the contents of the charterparty. There is no doctrine that goes to anything like that extent; and as regards the extension of the equitable doctrine of constructive notice to commercial transactions, the courts have always set their faces resolutely against it."

This proposition, namely the need for explicit wording, can find support from a series of English cases. In *Russell v. Niemann*(23), for example, an incorporation clause in a bill of lading provided that "[Indorsses] paying freight for the said goods and all other conditions as per charterparty." The court held these words did not incorporate an exception in the charterparty as to "acts of enemies" and " "restraints of princes," but were limited to conditions *ejusdem generis*

with that previously mentioned, viz. payment of freight-conditions to be performed by the receiver of the goods.

> "The second point is," said Willes J., "whether the exception contained in the bill of lading is expanded by the exception in the charterparty. That depends upon whether the words, 'and other conditions as per charterparty,' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions ejusdem generis with that previously mentioned, viz.--payment of freight--conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it is enough to say that the latter is the construction which we put upon these words."(24)

Russell v. Niemann was followed in *Serraion & Sons v. Campbell*(25). There, goods were damaged through the negligent act of the master. The charterparty excluded the liability of the shipowner for damage caused by the negligence of the master. The bill of lading contained several exceptions but no one of them covered the negligence of the master. The shipowner sought to rely on the charterparty exception contending that the incorporation clause in the bill of lading which read "all other conditions as per charterparty" brought into the bill of lading the exception from liability for negligence which was to be found in the charterparty. The Court of Appeal rejected this contention and held that as the bill of lading had a list of exceptions in such a case an incorporating clause would have to expressly mention the charterparty exceptions, as exceptions are not conditions. Lord Esher M.R. said(26):

> "After full consideration I think that the words [all other conditions as per

> charterparty] ought to be construed as meaning all those conditions of the charterparty which are to be performed by the consignee of the goods. If this be so, then the perils of the sea are not conditions which are to be performed by the consignee--indeed, they are not conditions which are to be performed by any one."

Kay L.J. added(27):

> "As the bill of lading has expressed what risks are to be excepted, this express contract could not be altered by such general words of reference, which cannot fairly be construed to incorporate into the bill of lading conditions in the charterparty relating to matters already expressly provided for in the bill of lading."

A few years later the Court of Appeal had the opportunity of again considering the clause in *Diederichsen v. Farquharson Bros*(28). Goods being carried on deck were damaged. The charterparty provided that " deck cargo at merchant's risk". shipowner sought to rely on this clause and asserted that it was incorporated in the bill of lading by reason of the incorporation clause in the bill "all other conditions as per charterparty". The Court of Appeal held that the conditions of the charterparty which were incorporated into the bill of lading were limited to such as were to be performed by the consignee, and did not include the exemption of the shipowner from liability in respect of deck cargo. Collins L.J. put the matter succinctly when he said(29):

> "'Other conditions' excludes all terms of the charterparty which cannot be brought under the category of conditions to be performed by the consignee. Exceptions, whether they are few

> or many, or wanting altogether in the bill of lading, are not thereby turned into conditions to be performed by the consignee; they are merely terms of the bargain between the shipowner and the charterer."

Only in *The Northumbria*<30> has it been held that the meaning of 'condition' has been expanded by the context to include charterparty exceptions. The incorporation clause provided "all other condition as per charterparty". The charterparty contained a list of exceptions, among them perils of the seas and negligence clause, and there was a provision in the charter that the exceptions should be incorporated into the bill. It was held that the whole exceptions clause was, in these circumstances incorporated. Considering the incorporation clause, Sir Gorell Barnes P. said<31>:

> "It seems to me that any reasonable person, reading this bill of lading and having notice of the charterparty, because it is expressly referred to, would undoubtedly infer, and would be right in inferring, that whole of [exceptions clause] was included."

In *Hogarth* Case<32>, however, Scrutton L.J. observed that *The Northumbria* was the "only case where the word 'conditions' has been given a wider meaning"<33> and therefore, it seems more accurate to regard it as "an isolated and exceptional case"<34>. Further, the Court of Appeal in *The Varenna*<35> refused to accept the proposition that where the bill of lading direct the intention towards the charterparty , the consignee is required to look at the

charterparty to ascertain the terms to be incorporated into the bill of lading. In the words of Sir John Donaldson M.R.,:

> "The starting point for the resolution of the dispute must be the contract contained in or evidence by the bill of lading, for this is the only contract to which the shipowners and the consignees are both parties. What the [shipowners] agreed with the charterers, whether in the charterparty or otherwise, is wholly irrelevant, save in so far as the whole or part of any such agreement has become part of the bill of lading contract. Such an incorporation cannot be achieved by agreement between the shipowners and the charterers. It can only be achieved by the agreement of the parties to the bill of lading contract and thus the operative words of incorporation must be found in the bill of lading itself."(36)

Finally, the need for explicit wording to incorporate exception clauses into bills of lading can also find support in the decision of the House of Lords in the leading case of *Thomas v. Portsea*(37). In that case, their Lordships held that for the terms of a charterparty to be incorporated under a general incorporation clause in the bill of lading (in this case "all others terms, conditions and exceptions) , the charterparty conditions must be "directly germane" to the contract contained in the bill of lading,i.e., those terms which should relate to the "shipment or carriage or delivery or the terms upon which delivery is to be made or taken(38); and if "it is sought to introduce into a document like a bill of lading- a negotiable instrument- a clause such as this..., not germane to the receipt, carriage or delivery of the cargo or the payment of freight- the proper subject matter with which the bill of lading holder is conversant- this should be done by distinct and specific words and not by the general

words(39). This case was followed in *The Annefield*(40), *The Varenna*(41), and more recently, in *The "Federal Bulker"*(42). In the first case, Lord Denning, M.R., summed up the law as follow(43):

> "[A]clause which is directly germane to the subject-matter of the bill of lading (that is, to the shipment, carriage and delivery of goods) can and should be incorporated into the bill of lading contract, even though it may involve a degree of manipulation of the words in order to fit exactly the bill of lading. But if the clause is one which is not thus directly germane, it should not be incorporated into the bill of lading contract unless it is done explicitly in clear words."

In *The Miramar*(44), however, the House of Lords disapproved Lord Denning's suggestion of using 'verbal manipulation' in order to have the term of the charterparty to make sense in the context of a bill of lading. Lord Diplock, with whom the other LawLords agreed, said(45):

> "...this House should take this opportunity of stating unequivocably that, where in a bill of lading there is included a clause which purports to incorporate the terms of a specified charterparty, there is not any rule of construction that clauses in that charter-party which directly germane to the shipment, carriage or delivery of goods and impose obligations upon the 'charterer' under that designation, are presumed to be incorporated in the bill of lading with the substitution of (where there is a cesser clause) or inclusion in (where there is no cesser clause), the designation 'charterer', the designation 'consignee of the cargo' or 'bill of lading holder'."

Even if explicit words are used, a reference to exceptions will be restrictively interpreted. In *The Modena*(46) an incorporation clause in the bill of lading

provided "all other conditions and exceptions as per charterparty". An exception clause in the charterparty stated "the steamer to be provided with a deck load...at charterers' risk." Cargo was loaded and stowed on deck suffered damage owing to bad stowage. It was held that the words "at charterer's risk" were not incorporated into the bill of lading, and that the shipowners were liable for the damage caused by bad stowage.

3.1.3.2 Consistency Requirement

Even if express words are used to incorporate exceptions clause, the clause will still be rejected if it conflict with the express terms of the bill of lading. As Scrutton L.J. observed in *Akt. Ocean v. Harding*(47):

> "The present words are very wide, but similar words have been limited to exclude obligations of the charter inconsistent with the express obligations of the bill of lading."

The same observation was made by Lord Esher M.R., in *Hamilton v. Mackie*(48):

> "The conditions of the charter-party must be read verbatim in the bill of lading as though they were there printed in extenso. Then if was found that any of the conditions of the charter-party on being so read were inconsistent with the bill of lading they were insensible, and must be disregarded."

His Lordship reiterated his observation in *Gardner v. Trechmann*(49):

> "The general reference to the charterparty only brought into the bill of lading those clauses of the charterparty which are applicable to the contract in the bill of

> lading; and those clauses of the charterparty cannot be brought in which would alter the express stipulations in the bill of lading."

Thus, in *Hogarth S.S. Co. v. Blyth*(50) a charterparty contained a conclusive evidence clause that the bill of lading shall be conclusive evidence against the shipowner of the quantity of cargo received. The bill of lading was claused "weight, measure, quality, contents and value unknown; freight and all other conditions and exceptions as per charterparty." It was held that the conclusive evidence clause of the charterparty was not incorporated into the bill of lading. Swinfen Eady L.J. referred to the bill of lading incorporating clause and stated(51):

> "This language will suffice to incorporate exceptions which are not inconsistent with the rest of the bill of lading. Is the conclusive evidence clause an exception? ...If...the conclusive evidence clause is an exception then I am of the opinion that it is not incorporated, as it is inconsistent with and repugnant to the clause 'weight, measure, quality, contents and value unknown."

But in *Fort Shipping v. Pedersen*(52) the court held that the words "all the terms and exceptions " were sufficient to incorporate a charterparty conclusive evidence clause. The court distinguished *Hogarth v. Blyth* because, inter alia, in the present case there was no inconsistency between the terms of the charterparty and bill of lading.

The consistency requirement is particularly important where the bill of lading is subjected to COGSA or U.A.E. Maritime Code. A very wide exception clauses such as those contained in the GENCON charterparty which give the carrier

more protection than that provided for under those two Act when sought to be incorporated may fall foul of the Acts and be rendered null and void by reason of COGSA, Art. III Rule (8), - U.A.E. Maritime Code, Art. 278 -, because they would lessen the carrier's liability. Further, a clause calling for claim in less than 12 months would be invalid being contrary to COGSA, Art. III Rules (3) and (8),- U.A.E. Maritime Code, Arts. 287(1) and 278 -.Thus, in *The Ion*(53) a bill of lading to which COGSA 1924 applied , incorporated the CENTROCON arbitration clause which required an arbitrator to be appointed by the claimant within three months of final discharge of the goods. On the questions as to which time limit applied, Brandon J., said(54):

> "I am of opinion that the second sentence of the CENTROCON arbitration clause is in conflict with Art.3(6), to the extent that, after the first sentence has prescribed arbitration of all disputes, it provides that claims by cargo-owners shall be barred if not made in writing and not made by appointing an arbitrator within three months rather than 12 months. To that extent, it is void, but no further."

Also, a stipulation for amount less than provided for in COGSA, Art. IV(5)(a),- U.A.E. Maritime Code 276 - would be invalid by reason of COGSA, Art. III(8), - U.A.E. Maritime Code, Art. 278 -.

3.2 CONSTRUCTION OF EXCLUSION CLAUSES

When one tries to appraise the legal effect or validity of contract of carriage clauses, one must at first correctly construe the clauses in issue. Generally, the purpose of construction of the contract must be to arrive at the real intention of the parties to it and to determine the impact of the clauses on the obligations undertaken by the contract as a whole(55).

The intention of the parties to the contract of carriage, as far as the words of the contract are expressed clearly and unambiguously, should be judged from the expressions themselves in the contract clauses which the parties have given to it, and not by reference to what might or probably or ought in fairness to have been the intention(56).

U.A.E. law, like English law, takes as its starting-point the common intention of the parties as expressed in the contract. Article 265(1) of the Civil Code states: "If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties". So, Where the intention of the parties is clear there is no room for interpretation(57). It is not for the court to vary the contract which the parties have made. it is the duty of the court to enforce the contract as it stands unless it is challengeable upon some legal ground, such as that it is contrary to public policy, or that the party

against whom it is sought to be enforced consented to it in error or in consequence of fraud(58). Where there is no legal ground of challenge the simple duty of the court is to enforce the contract as it stands. The language of Sir G.Jessel in the case of *Printing and Numerical Registering Co. v. Samopson* is equally sound in the U.A.E. law:

> "If there is one thing which more than another, public policy requires, it is, that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice."(59)

3.2.1 The Intention of the Parties Prevails

However, there are sometimes found in the contract of carriage clauses the words or phrases of which meanings are obscure and ambiguous. Further, the materiality of a clause or its effect in relation to other clauses may not be entirely certain. In construing such clauses the court must study the whole document to see whether what is doubtful in one place is not made clear in another(60); for if the parties have themselves supplied an explanation this will be the most authoritative gloss. If, however, no light can be found in this way the court may inquire whether the parties used an expression or a word in some special sense(61). For, although it is to be presumed that the parties intended their language to bear its ordinary meaning and employed words in the sense in which they are commonly understood, this is, after all, merely a presumption. They may have used a term or

a word in a sense peculiar to some business, and, if this is so, it is the duty of the courts to give effect to what they really meant(62). There are many cases in which the courts come to the conclusion that the literal meaning of a word was not the meaning which the parties intended it to bear in their contract(63). And in order to arrive at their true intention it is competent to prove by oral testimony the circumstances in which the contract was made. By knowing the relation in which the parties stood to each other and the nature of their business, and in general, the circumstances attending the contract, the court is in the best position to understand what the parties meant(64). Such evidence is not for the purpose of contradicting or varying the contract but for that of discovering the true intention of the parties. The words of Article 265(2) of U.A.E. Civil Code is worth noting here: "If there is scope for an interpretative construction of the contract, an enquiry shall be made into the mutual intentions of the parties beyond the literal meaning of the words, and guidance may be sought in so doing from the nature of the transaction, and the trust and confidence which should exist between the parties in accordance with the custom current in (such dealing)."

English law is to the same effect. In *River Wear Commissioners v. Adamson*(65), Lord Blackburen said:

> (In construing the documents) "In all cases the object is to see what is the intention expressed by the words used. But from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances

> were with reference to which the words were used and what was the object appearing from those circumstances, which the person using them had in view: for the meaning of words varies according to the circumstances with respect to which they were used."(66)

A good illustration to what has been said above is the case of *S.A. Maritime et Commerciale of Geneva v. Anglo-Iranian Oil Co. Ltd*(67). There, a clause in a time charter-party provided:

> "Owners to have a liberty of substituting a coiled vessel of similar size and position at any time before or during the charter-party and owners undertake to give charterers reasonable notice of such intention."

Before the first voyage, the owners notified the charterer of their intention to substitute an identical vessel for named vessel. The substituted vessel fulfilled the charterparty until compelled to go into dry-dock, and then the owner again proposed to substitute the originally named vessel for the remainder of the charter voyage. The charterer refused to accept the substitution on the grounds that the liberty clause gave the owners liberty to make only one substitution and they had already exercised that liberty.

The point of construction in this case was whether the liberty clause gave a liberty which could be exercised only once or whether it gave a liberty which the owners could exercise from time to time during the course of the charter-party. Deciding the case in favour of the shipowners, Romer,L.J., stated(68):

> "If one looks at the charter-party as a whole and takes into consideration the duration of the charter and the purposes and object which

> the parties had in mind, as disclosed expressly or as a matter of legitimate inference from the charterparty itself, and attributing proper weight to every clause, I think that the original ambiguity (which does exist in the liberty clause if taken by itself) disappears, and the clause accordingly should be construed in the sense which my brethren indicated".

3.2.2 Other Rules of Construction

However, the intention of the parties is not always clear and a large proportion of the cases which occupy the courts will always be questions as to the meaning of a particular term. The U.A.E. Civil Code contains a number of rules intended to guide the courts when interpreting a particular clause whose meaning is obscure. These rules are merely supplement and are not intended to be imperative directions, which the courts bound to follow even against their better judgment, but are meant to be guides of which the courts may make use if they find it expedient.

In England the courts have applied various techniques of interpretation based on traditional doctrines which are said to be 'Semi-covert tools'(69). These techniques may be said to be 'semi-covert' in that they are employed by the courts as a substitute for substantive controls upon the content of exclusion clause; powers which the courts have long desired but only recently acquired by legislation. For as long as the courts possessed no power to control the content of exclusion clause, it was necessary to use techniques of construction in order to achieve indirectly (or

as Llewellyn puts it, "semi-covertly") the same result. Important among them are the principles of *verba chartarum fortius accipiuntur contra proferentem* and *ejusdem generis.*

3.2.2.1 *The Contra Proferentem Rule*

According to this rule where the words of the exclusion clause are ambiguous or indefinite and are not made clear by other parts of the document, or by the circumstances under which the contract is made, they are to be construed and the ambiguity is to be resolved against the party(the carrier) who has created it and now relying on it(70). In *Burton v. English*, Brett, M.R., said(71):

> "The general rule is that where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made."

And in *Acme Transport v. Betts*, Cumming-Bruce L.J. wearily observed(72):

> "The principles of construction applying to exemption clauses are now too well known to make it necessary to refer to authority... [T]he principles are that the language of an exemption clause is prima facie to be construed against the person who drafted it or put it forward...that the language of an exemption clause must be sufficiently explicit to disclose the common intention of the parties without straining the language..."

Freedom of contract between carrier and shipper is "largely fictional in view of the disparate position of the parties, and the superior bargaining position of carriers. Thus in construing ambiguities in bills of lading, the courts favoured adoption of language most favourable to cargo, the

shipowner having prepared the bill of lading, and refused to stretch the language of a bill of lading clause when the party drafting the form of contract had not included a provision it might easily have(73).

A good example of ambiguity is *Elderslie's* Case(74). In this case, frozen meat which was shipped for carriage from Melbourne to London arrived tainted with carbolic acid with which the ship had been disinfected before shipment. The bill of lading in question contained two clauses. The first clause exempted the shipowners from liability for the damage to goods whether arising from a defect existing at the time of the shipment or not, or from the neglect of the master, or crew, or from any other causes whatever. The second clause exempted them from liability for damages from defect "if reasonable means have been taken to provide against such defects and unseaworthiness".

The question involved in this case was whether the wider clause was to be cut down by the narrower, or the narrower extended by the wider. The House of Lords held that upon the true construction of the bill of lading, the generality of the first clause was qualified by the second clause and therefore reasonable care not having been taken in cleaning the ship before the shipment, the shipowners were liable for the damage.

In the well-known case of *Nelson v. Nelson*(75), Lord Halsbury gave expression to his views as to the absurdity of

using forms of contract with prolix, inconsistent and/or complicated clauses:

> "Here is a document into which apparently the draftsman has put every conceivable hypothesis that he could, but he has not been content to put into that document the sort of protective clauses which might have an operative effect he has gone on, as if he were a lawyer and endeavouring to make the document as long as possible, to deal with every part of the subject again. Not unnaturally that the document contradicts itself. At one time it is said that the defendants could not be liable at all; at another time it is said he may be subject to this, that and the other; which shows that the parties intended the defendants should be liable under circumstances. How is it possible for any Court to give a real construction to such a document as that? The known condition of the law is that, unless protected by protecting clauses, the defendants are liable; as a matter of fact, they have only put together, or jumbled together , a number of phrases to which no legal interpretation can be given, and the result is that the state of liability under the law remains what it was, and the defendants are liable."

Although the *contra proferentem* rule applies to all exemption clauses, the courts did not apply it with the same rigour to clauses which merely limit liability as they do to those which purport totally to exclude it(76).

There is no rule named as contra proferentem in U.A.E. law, but the same idea is to be found in Article 266 of the Civil Code . This article provides that any ambiguity or doubt in the contract shall be resolved in favour of the obligor(77). It further provides that ambiguous words in contracts of adhesion must not construe in a manner detrimental to the interests of the adhering party.

3.2.2.2 *The Ejusdem Generis Rule*

This is a rule of construction that where specific words are followed and amplified by the addition of general words, the latter are to be confided in their application to the same kind as the proceeding specific words(78). If one says, for instance, "collier, pekinese, pug, mastiff and other animals", the words "other animals" are limited to dogs, because the proceeding four have all been dogs, and it is impossible to bring in cows, elephants or other kinds of animals(79).

In shipping business, it is quite often indeed that one comes across phrases in bill of lading clauses, namely, "lock-out, strikes or any other extraordinary labour situation"(80); "pilot, master, engineers, seamen, stevedores or others in the service of the company"(81); "the goods may be discharged..on to wharf or quay or other spaces..."(82) and many others.

The application of the rule of construction of these clauses is firmly based on the principle that terms in contract of carriage of goods whereby the carrier excludes or limits his liability are interpreted against the carrier. In *Knutsford & Co. v. Tillmans & Co.*(83), a clause in a bill of lading gave the ship the right to discharge the goods at some other port, "should entry and discharge at a port be deemed by the master unsafe in the consequence of war, disturbance or any other cause". It was held that a delay of three days due to ice did not come within the words "or any other

cause". Disputes often arise as to the scope of the general word when they follow a list of exceptions. Are they to be construed literally and in their widest sense, or are they to be given a more limited meaning? Scrutton(84) said that the principle is whether a particular thing is within the genus that comprises the specified things, and not whether the particular thing is like one or other of the specified things.

But a different view on the point has been suggested in *Aktieselskabet Frank v. Namaqua Co*(85). In that case Greer, J., said that the right test to apply was to ask whether the alleged exceptions were like any other of those specially mentioned.

However, between these two opposite attitudes there is another theory, that of Devlin, J., in *Chandris v. Isbrandtsen-Moller*(86). In this case Devlin, J., following the rule of construction adopted in *Anderson v. Anderson*(87), in which it was clearly laid down that general words were prima facie to be considered as having their natural wider meaning and not to be restricted to things ejusdem generis previously enumerated, said(88) :

> "A rule of construction cannot be more than a guide to enable the court to arrive at the true meaning of the parties. The ejusdem generis rule means that there is implied into the language which the parties have used words of restriction which are not there. It cannot be right to approach a document with the presumption that there should be such an implication. To apply the rule automatically in that way would be to make it the master and not the servant of the purpose for which it

> was designed, namely, to ascertain the meaning of the parties from the words they have used... The so-called rule is, in short, really only a recognition of the fact that the parties with their minds concerned with the particular objects about which they are contracting, are apt to use words, phrases or clauses which, taken literally, are wider than they intend. Under the description of ejusdem generis the principle is applied to words only...If the ejusdem generis principle is a rule of automatic application it becomes of the first importance to determine exactly what the rule is. If it is merely, as I think, an aid to ascertaining the intention of the parties, no point of controversy need arise at all. If there is something to show that the literal meaning of the words is too wide, then they will seem to indicate a genus; in others that the they perform the simpler office of expanding the meaning of each enumerated item."

The intention of the parties to use the words in an unrestricted sense, can be recognised in such words as "whatsoever kind", "or otherwise", or "etc.", and in such cases the rule may not be applicable.

The following are some cases(89) in which it was held that the general words must be construed ejusdem generis with the preceding words:

> Marine insurance policy. "Perils...of the seas,..., fire, ...,barratry..., and of all other perils...."(Held not to include injury to donkey engine.)(90)

> Demurrage; exceptions clause. "The act of God...riots, floods, strikes, lock-outs...or other causes beyond the charterer's control...always excepted." (Held not to include shortage of labour.(91)

> Demurrage; exceptions clause. "Strikes, riots, lock-out, labour disturbances, trade disputes, accidents, or other hindrances beyond charterer's control." (Held not to include control of port appliances by the military.)(92)

Liberty to deviate. "To call at any ports in any order, for bunkering or other purposes." (Held not to include call to land engineer.)(93)

Convenient port clause. Ship likely to be delayed "owing to causes beyond the carrier's control such as blockade, interdict, war, strikes.." (Held, that likelihood of congestion at named port was not included.)(94)

The following are cases(95) in which it was held that the ejusdem generis rule was not applicable , and that the general words must therefore be given a wide meaning unrestricted by the particular words:

Exceptions clause. "Negligence...whether in navigation the ship or otherwise." (Held to include negligently exposing cargo to rain.(96))

Exceptions clause. "Neglect...in providing, dispatching, and navigating the vessel or otherwise." (Held to apply to loss of dog by letting it loose.(97))

Exceptions clause. "The act of God, perils of the seas,...,collisions, strandings, and other accidents of navigation excepted, even when occasioned by the negligence...in the ...master." (Held to include failure by master to stop leak.(98))

Exceptions clause. "Act of God, fire, perils of the seas, barraty, collisions, strandings, and all other accidents excepted, even though caused by negligence...in the management or navigation of the vessel or otherwise." (Held to include reckless treatment of bags by stevedores.(99))

In U.A.E. law ejusdem generis rule is not acknowledged as one of the established rules for the construction of the contract. But there is no reason why the courts should not apply it particularly to documents relating to shipping business.

3.2.2.3 The Superiority of written Clauses

Though it is true that the written and the printed parts of mercantile documents have equal efficacy and are equally binding, yet where there is inconsistency the written clauses will generally prevail, the subject matter thereof having been distinctively considered by the parties at the time of entering into the contract(100). In *The Albion*, Somervell L.J. said(101):

> "We agree that if there is a direct conflict, a written term in a contract will override or prevent the application of general words in a printed condition, or at any rate, will normally do so."

Therefore, a written statement that the cargo was stained at the time of shipment overrides a statement printed in the bill of lading that the cargo was shipped in apparent good order and condition. On the other hand, where a printed clause has been struck out by draftsman in whole or in part, the general rule is that reference may not be made to such clause in order to determine what the parties intended. Thus, in *The Skodsborg*(102) a printed clause in a charterparty provided that the ship should proceed to a "customary crane berth" as ordered at Goole, and there load a cargo of coals. By a clause inserted in writing, time for loading was to begin when the ship was in all respects ready to load and written notice given to charterers. A printed clause setting forth that time should not count until the ship was in berth as ordered was struck out. It was held

that time did not begin to run until the ship was actually in the berth to which she was ordered by charterers, and that the clause struck out could not be referred to in order to determine the intention of the parties.

3.2.2.4 Inapplicable Words

There is a presumption that the parties to a contract do not insert a clause which is quite unnecessary. But it is not uncommon to find in a contract clauses which are entirely unnecessary and do not apply to the case, or which are in conflict with the intention of the parties gathered from other parts of the document, and from a knowledge of the subject and the circumstances(103). In such a case the rule that effect should be given to all the clauses does not apply. It is not necessary to give such meanings to the words used as will make the inapplicable clause operate. Article 260 of the U.A.E. Civil Code states:

> "Words should be given effect to rather than ignored, but if it is impossible to give effect to words, they shall be ignored."

The same rule has been applied in the English case *Cross v. Pagliano*(104). There, a charter for a voyage with cargo from Glasgow to San Francisco provided that the ship should be consigned to the charterer's agents at San Francisco "inwards and outwards, paying the usual commissions," etc., and (in a printed clause) that she should be reported by the charterers " at the custom-house on her return to her port of discharge in the United Kingdom." It was contended that these clauses

together showed an obligation on the shipowner to accept a return cargo for Europe offered by the charterer's agents at San Francisco; but the court refused to adopt that view.

3.2.3 INTERPRETATION OF THE EXCLUSION CLAUSES IN THE CASE OF NEGLIGENCE

3.2.3.1 English Law

Under English law, as a general rule, clear and unambiguous words are required to exclude liability for negligence(105) since the courts regard it as "inherently improbable that one party to a contract should intend absolve the other party from the consequence of his own negligence."

> "The common law imposes upon the carrier of goods definite and well-known liabilities for the protection of owners. These liabilities are frequently modified by the terms of express contracts, but except to the extent to which plain language affects alterations, they still remain and cannot be removed by subtle implications or ambiguous words."(106)

Thus, it has been presumed, unless stated to the contrary, that the shipowner is to continue liable for negligence acts and defaults, committed by himself, or by his servants or agents engaged in performing the contract. "Words of general exemption from liability are only intended (unless the words are clear) to relieve a shipowner from liability where there has been no misconduct or default on his part or that of his servant"(107).

The requirement of clearness is most obviously satisfied where the exemption clause expressly refers to negligence, i.e. uses the word "negligence" or some synonym for it (109).

In case where there is no reference to negligence it is a question of construction whether the terms of contract are sufficiently clear. In *Canada S.S. Lines v. The King*(109) the Privy Council laid down three rules to be applied when considering the exclusion of liability for negligence. Under the first rule an express exclusion of liability for negligence must be given effect and is generally sufficient to exclude liability. Under the second rule, where there is no express reference to negligence, the court must consider whether the 'ordinary' meaning of the words used is wide enough and any doubt resolved contra proferentem. This rule was dealt with above and it is unnecessary to deal with them further, except to emphasise a point made by the House of Lords in *Smith v. South Wales Switchgear Ltd.*,(110). Their Lordships said that as the Privy Council had been concerned to distinguish express exclusion from implied exclusion, a clause cannot be regarded as expressly excluding negligence unless it actually uses that word or employs at very least, some acceptable synonyms.

The third rule, which draws on the decision in *Alderslade v. Hendon Laundry Ltd.*,(111) was stated in the following terms:

> "If the words used are wide enough [to cover liability for negligence] the court must consider whether 'the head of damage may be based on some ground other than that of

> negligence,' to quote...Lord Greene in the Alderslade case. The 'other ground' must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Green's words, the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie enough to cover negligence on the part of his servants."

In *Alderslade*, the plaintiff left ten handkerchiefs with the defendants for laundering. These were not returned and an action for damages was brought based on the negligence of the defendants. A clause in the contract restricted the liability of the defendants to a 'maximum amount allowed for lost or damaged articles' equal to '20 times the charge made for laundering'. The Court said that the defendants could not be held liable in the matter of returning the goods except through negligence on their part, and that the clause must therefore have been intended to cover loss of the handkerchiefs through lack of care on their part.

Care should be taken not to apply the third rule stated in the *Canada S.S.* Case too literally(112). As Scrutton L.J., had explained in *Rutter v. Palmer*(113), the position is simply that the exclusion clause will 'more readily' exclude liability for negligence where the only liability of the defendant is for negligence. This approach was followed in *The Ballyalton*(114). There, liability to the owners of a damaged ship for an unsafe berth could only arise if the defendants were careless in maintaining the berth. A notice disclaiming responsibility in general terms therefore covered

their liability. Karminski J. considered that any other interpretation would render the notice meaningless. But however there are cases in which an exclusion clause has been held not to apply even though negligence is the basis of liability. For example, in *Polemis, Re*(115) a clause in a charterparty provided that liability for fire should be mutually excepted, i.e. that neither shipowner nor charterer should be liable for fire. The shipowner was a common carrier and therefore liable without negligence. Thus the clause would not exempt him from liability for negligence, but only from strict liability. In view of this, it was held that the clause did not exempt the charterer from liability for negligence either, although he was only liable for negligence. Another good illustration is the case of *Hollier v. Rambler Motors(AMC) Ltd.,*(116). In that case the plaintiff sent his car to the defendants' garage for repair, but the car was damaged by a fire caused by the defendants' negligence. The plaintiff brought an action claiming damages in respect of the car; but the defendants argued that a clause in the "invoice" had effectively excluded their liability. The clause read as follows:

> "The Company is not responsible for damage caused by fire to customer's cars on the premises. Customer's cars driven by staff at owner's risk."

The Court of Appeal allowing the appeal held that the clause could not be construed to cover liability in negligence because it was exceedingly improbable that "the ordinary man or woman" would understand this clause to be an

exclusion of negligence. Salmon L.J., declaring the clause to be a mere warning considered that an ordinary man or woman would think the consequences of such a clause to be:

> "Well, what they are telling is that if there is a fire due to any cause other than their own negligence they are not responsible for it. To my mind, if the defendants were seeking to exclude their responsibility for a fire caused by their own negligence, they ought to have done so in far plainer language than the language here used. In my view, the words of the condition would be understood as being meant to be a warning to the customer that if a fire does occur at the garage which damages the car and it is not caused by the negligence of the garage owner then the garage owner is not responsible for damages."(117)

His Lord Justice, dealing with the defendants' argument that the scope of the principle as laid down by Scrutton L.J. in *Rutter v. Palmer*(118) had been extended by Lord Greene M.R.'s judgment in *Alderslade's* Case to the effect that a clause though is ambiguous could be construed to cover liability for negligence where the proferen cannot be liable otherwise than in negligence, said(119):

> "I do not think that Lord Greene M.R. was intending to extend the law in the sense for which the ...defendants contend...If it were so extended, it would make the law entirely artificial."

Latey J. was more explicit(120):

> "It has been argued during this appeal that where A cannot be liable otherwise than in negligence no such sufficiently clear words which are required. In my opinion, that is not the law. In each case one has to look at the words which are claimed to exempt. When in fact A can be liable in negligence only, the law, I believe is that that fact to employ Scrutton, L.J.'s words in Rutter v Palmer "will more readily operate to exempt him, but the law goes no further."

Therefore it can fairly be concluded that the approach of Greene M.R. is not followed in its full force(121). It is submitted that "the question in all cases is whether the intention of one party to exclude liability for negligence has been made sufficiently clear to the other."(122)

> "In seeking," said May L.J. in *The Raphael*, "to apply [Canada S.S.] third test, we should not ask now whether there is or might be a technical alternative head of liability which the relevant exemption clause might cover and, if there is, immediately construe the clause as inapplicable to negligence. We should ask...[to] what potential liabilities did the parties apply their minds, or must be deemed to have done so".(123)

An express reference to negligence is the safest, but not the only, way of achieving this result. In the *Photo Production* Case(124) an exclusion clause provided that the defendants were "under no circumstances" to be liable for "any injurious act or default by any employee". Lord Wilberforce said(125):

> "These words have to be approached with the aid of the cardinal rules of construction that they must be read contra proferentem and that in order to escape from the consequences of one's own wrong doing, or that of one's servant, clear words are necessary. I think these words are clear. Photo Production in fact relied on them for an argument that since they exempted from negligence they must be taken as not exempting from the consequences of deliberate act. But this is a perversion of the rule that a clause in addition to negligence it cover other, e.g. deliberate acts, remains a matter of construction requiring, of course, clear words."

In *The Golden Leader*(126) an exception clause which, without specifying the form of negligence in question was held to cover the liability in negligence. The clause in

SOUTHAMPTON LIBRARY UNIVERSITY

dispute that the shipowner agreed to be liable only for negligent stowage, want of personal diligence in making the ship seaworthy, and personal default. It was held that by accepting liability only for these three causes the shipowners had excluded liability for negligence of the crew resulting in the stranding of the ship.

But in *The Emmanuel C*<127> the court held that an exception clause which read: " The act of God, enemies, fire...and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam... Navigation, and errors of Navigation throughout the Charter Party, always mutually excepted", did not cover loss caused by the failure of the servants to exercise good navigation and seamanship. The court based its decision primarily on the following grounds:

(1) "Error" would not be suggestive of negligence unless there was an express reference to negligence;

(2) On a proper construction of the exemption clause, the wording would not expressly or impliedly be read to cover negligent acts or omissions.

In this case the Judge, Mr. Justice Bingham formulated certain principles to be used in constructing negligence clause and they are worth noting:

> "1. Since it is inherently improbable that one party to a contract should intended to absolve the other party from the consequences of the latter's own negligence, the court will presume a clause not to have the effect unless the contrary is plainly shown by clear words or by implication.

2. Statements made in one case may assist in deciding another but cannot literally determine the decision, since in each case the task is one of construction to ascertain the actual or imputed intention of the parties to the contract in question.

3. In carrying out that task of construction the Court should not treat commercial parties as if they were law students...where a contract is made in a specialised business by two practitioners in that business I think a somewhat different standard is indicated, approximating to that of the reasonably informed practitioner in the field in question.

4. Where the words used are wide enough to cover negligent as well as non-negligent acts or omissions but practically speaking the clause lacks substance if it not construed as covering negligent acts or omissions, the Court may in the circumstances of a given case infer that the parties intended the clause to cover negligence...but it need not do so...All depends on the proper inference to be drawn in the instant case".(128)

3.2.3.2 U.A.E. Law

Whereas in English law the effect of an exception from negligence depends predominantly on issues of construction, the effect of an exception clause in U.A.E. Law is primarily bound up with issues of legality and, often, public order. Clauses purporting to exonerate the perform from liability for his or his subordinate wilful or gross negligence are, as we will see, void because it is opposed to public policy and fundamental principles of the U.A.E. Law of Contract(129).

3.2.4 INTERPRETATION OF CONVENTIONS

It is difficult to establish principles of interpretation of an international Convention because principles of statute interpretation vary greatly in the countries which have adopted the Convention. Some fairly general rules, however, have emerged from English decisions and which it may be worth for the U.A.E. courts to consider.

3.2.4.1 International Construction

One of the most quoted and generally accepted principles of interpretation of the Rules was stated by Lord Macmillan in *Stage Line Ltd. v. Foscolo, Mango & Co.*(130):

> "It is important to remember that the Act of 1924 (the British COGSA) was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation."(131)

The foregoing dictum might be called the first rule of interpretation of the Rules, and has been relied on heavily in many important judgments(132).

3.2.4.2 Use of *Travaux Preparatoires*

In interpreting the international Convention, it is permitted to consider, if any, the minutes of the conference of the negotiations between the parties to ascertain their

intention. In *Riverstone Meat Co. v. Lancashire Shipping Co. (The Muncaster Castle)*, Viscount Simonds stated(133):

> "To ascertain their meaning (the Hague Rules) it is, in my opinion, necessary to pay particular regard to their history, origin and context, and, as I think the court below have not paid sufficient regard to this aspect of the case, I must deal with it at some length."

And in *Fothergill v. Monarch Airlines Ltd.*, Lord Scarman said(134):

> "...Working papers of delegates to the conference, or memoranda submitted by delegates for consideration by the conference, though relevant, will seldom be helpful: but an agreed conference minute of the understanding upon the basis of which the draft of an article of the convention was accepted may well be of great value."

There are, however, tow conditions to be satisfied before the travaux preparatoires can be used: i) the travaux preparatoires in question must be public and accessible and ii) they clearly and indisputably point to a definite legislative intention(135).

3.2.4.3 Looking at Foreign Texts of the Convention

It may be helpful in some cases to look at foreign texts to solve an ambiguity if there be one as to the meaning of a of term or clause in the Convention.

> " If a statute," said Lord Salmon in *Buchanan v. Babco*," which is based on an international convention expressed in two different language there is some doubt as to its meaning in one language, it is permissible to seek help from the way in which it is expressed in the other. I agree therefore, that Roskill and Lawton L.JJ. were entitled to consider the French version of the Convention in question."(136)

3.2.4.4 Foreign Doctrine and Jurisprudence

The commentaries of learned foreign authors or the decisions of foreign courts may be of assistance and it would be useful to consider them. In *Buchanan v. Babco*[137] Lord Scarman expressed the reason for this idea by saying that:

> "I come now to consider to what aids our courts may have recourse in interpreting an international convention....Rules contained in an international convention are the outcome of an international conference; if...they operate within the field of private law, they will come under the consideration of foreign courts; and uniformity is the purpose to be served by most international conventions....It follows that our judges should be able to have recourse to the same aids to interpretation as their brother judges in the other contracting States....
>
> "We know that in the great majority of the contracting States the legislative history, the travaux preparatoires, the international case law ('la jurisprudence') and the writings of jurists (' la doctrine') would be admissible as aids to the interpretation of the Convention. We know also that such sources would be used in the practice of public international law. They should, therefore, also be admissible in our courts: but they are to be used as aids only.
>
> "Aids are not a substitute for the terms of a convention: nor is their use mandatory....
>
> "The decisions of a supreme court, or the opinion of a court of cassation, will carry great weight: the decision of an inferior court will not ordinarily do so. The eminence, the experience and the reputation of a jurist will be of importance in determining whether, and, if so, to what extent, the courts should rely on his opinion."[138]

3.3 SOME COMMON EXCLUSION AND LIMITATION CLAUSES

3.3.1 NEGLIGENCE CLAUSES

It should be pointed first that under U.A.E. law exclusion clauses purporting to exonerate the carrier from liability for his own negligent act are invalid and cannot be invoked where the loss or damage resulted from such act. This rule is based upon public policy. It is submitted that it would be against public policy to let the carrier escape liability by pleading that he had stipulated for immunity. U.A.E. law deals strictly with such stipulation. Article 296 of the Civil Code provides "Any clause purporting to exempt from liability for one's harmful act (delictual liability) is void".

Yet, beside the carrier's negligence, a contract of carriage may contain clause relieving the carrier from liability for loss of or damage caused by the negligence of his subordinates. For example Article 2 of the GENCON Charterparty provides that: 'The Owners responsible for no loss or damage or delay arising from...the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible'.

To what extent is such a clause valid? This question has been the subject of a spectacular conflict. In countries where cargo interests dominated 'negligence' clauses were declared invalid; in other countries, where hull interests

prevailed 'negligence' clauses were given effect under the cover of an almost unlimited freedom of contracting(139).

3.3.1.1 The Position Under U.A.E. General Law

Because the rule of the vicarious liability of masters generally, and of the maritime carrier in particular, is beyond doubt(140), and because the contracting parties cannot normally set it altogether aside by means of contractual terms, the practical consequences of a clause excepting a specific breach of duty are the same, whether the breach has been caused by the promisor himself or by one of his servants or agents. In this sense most duties of masters are, in U.A.E. law, personal. It is, therefore, submitted that clauses purporting to exonerate the carrier from liability for the intentional breach or gross negligence of his subordinates are invalid(141). If it is against public policy to refuse to allow the carrier to exclude his liability for intentional breach or gross negligence, why should he be allowed to do these things by the instrumentality of other? However, when a slight negligence of the subordinates is involved, a clause exempting the carrier from such negligence is, in general terms, valid provided that the shipper has clearly consented to it(142).

Intentional breach is found where a member of the crew steals the goods. Also where the master, in order to secure some financial benefit, delivers the goods to someone who is not entitled to them.

Gross negligence is found where the master delivers the goods to a person not entitled to them without asking him to produce the bill of lading; where a cargo of bundles of paper is put on deck during storm; where oil barrels stowed together with parcels containing fabrics.

3.3.1.2 English Common Law

While under the general law of U.A.E. the validity of 'negligence' clauses is determined upon legality and public policy no such restriction is made under English law. Public policy did not and does not place any limit on the carrier's freedom to impose upon the public conditions by which he excludes his liability(143). The carrier could limit his liability, either for his personal default or for the fault of his servants and agents, as much as he wished(144) provided he used expressed and unambiguous words(145). The situation under English law was clearly summarised in the Report of the Imperial Shipping Committee(1921):

> "There is nothing in English law to stop [a shipowner] from contracting out of the whole of his liability, and, by a practice which has gradually extended since about 1880, British shipowners do habitually in their bills of lading contract themselves out of their common law liability to a large extent."

However, in a number of decisions, the view was expressed that, whereas a negligent breach could be covered by an exemption clause, a wilful or deliberate breach rarely, if ever, could be(146). For example, in *Sze Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd.*(147), sellers in England

agreed to sell a quantity of bicycle parts to buyers in Singapore. The goods were sent by sea and a bill of lading was issued acknowledging that the goods were to be delivered in Singapore containing the following exclusion clause: '[T]he responsibility of the carrier, whether as a carrier or as custodian or bailee of the goods shall be deemed...to cease absolutely after they are discharged' from the ship. On arrival of the goods in Singapore the buyers, who wished to obtain the goods without paying for them, obtained a letter of indemnity from the Sze Hai Tong Bank in favour of the shippers and presented this to the shipping company's agents. A delivery order was then issued and the goods delivered to the buyers even though they did not present the bill of lading as they should have done. In an action by the sellers against the Bank it was conceded that the Bank's liability depended on whether the shipping company was liable for delivering the goods without any bill of lading being presented. Although the shipping company sought to rely on the exclusion clause in the bill of lading the Privy Council held that it did not apply. Lord Denning, delivering the decision of the Board, said that the clause had to be 'modified so as not to permit the shipping company deliberately to disregard its obligations as to delivery'. However, this decision must be seen as based on the construction of the clause, since in *Suisse Atlantique* Case(148) the House of Lords made it clear that the Sze Hai Tong case should not be regarded as laying down the

proposition that exclusion clauses never apply to wilful breaches of contract

> "Some deliberate breaches," said Lord Wilberforce, "...may be, on construction, within an exceptions clause (for example, a deliberate delay for one day in loading). This is not to say that 'deliberateness' may not be a relevant factor: depending on what the party in breach 'deliberately' intended to do, it may be possible to say that the parties never contemplated that such a breach would be excused or limited;...but to create a special rule for deliberate acts is unnecessary and may lead astray."(149)

However, although the principle of freedom of contract is well established under English common law, English courts have not shown any willingness to interpret literally exclusion clauses if that would destroy the contractual intent. For instance, where parties to a contract agree to perform certain acts, but one of them restricts the consequences of his promise so that no damages will be owed in the event of breach, the nature of that party's engagement strikes at the very roots of the principle of mutuality(150). There is no promise at all when no action will lie for its breach If a contract contemplates an absolute exclusion of liability, then there is no mutuality of obligation and therefore no contract.

> "One may safely say," said Lord Wilberforce in the *Suisse Atlantique* case," that the parties cannot, in a contract, have contemplated that the clause should have so wide an ambit as in effect to deprive one party's stipulations of all contractual force: to do so would be to reduce the contract to a mere declaration of intent."(151)

The position of individual liberty to contract at common law has correctly stated by Lord Diplock in *Photo Production* case(152):

> "Parties are free to agree to what exclusion or modification of all three types of obligations-[viz., primary, general secondary or anticipatory secondary](153)- they please within the limits that the agreement must retain the legal characteristics of a contract and must not offend against the equitable rule against penalties, that is to say, it must not impose on the breaker of a primary obligation a general secondary obligation to pay the other party a sum of money that is manifestly intended to be in excess of the amount which would fully compensate the other party for the loss sustained by him in consequence of the breach of the primary obligation."

Thus Lord Diplock would impose two limitations on freedom of contract. One is that the agreement must retain the legal characteristics of a contract and the other is that the equitable rule against penalties must not be offended. In the first limitation Lord Diplock meant, it is submitted, that the exclusion cannot be such as to render obligations enforceable in honour only. Devlin J., thirty years ago, pointed out that it is illusory to say: "We promise to do a thing but we are not liable if we do not do it"(154). That is not in law a contact at all. An agreement which made contractual rights unforceable would be void as ousting the jurisdiction of the courts(155).

The same conclusion obtains at U.A.E. law, though it is reached through a different approach(156). It is submitted that a stipulation relieving a party from all liability for non performance excludes all obligations the contract would

otherwise impose upon that party, negating the contract through the destruction of its binding force. Each of the party's obligation is subject to a purely potestative condition that makes the obligation null. If the contract is bilateral and commutative, the other party also is relieved of all obligation, for the obligation of one party to such a contract is the cause of the other's obligation. In a contract of carriage, the carrier and shipper are reciprocally bound to perform, and if the carrier fails to perform his obligations, the shipper has an action to recover damages. It is this legal tie, backed by the force of the law, which makes the contract binding.

3.3.1.3 The Position Under U.A.E. Maritime Code and U.K. COGSA

Under the U.A.E. Maritime Code and U.K. COGSA the carrier is prevented from inserting in the contract of carriage, to which they are applicable, clauses relieving him from liability for other than the 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, or lessening that liability otherwise than as provided by Maritime Code and COGSA, are null and void by reason of COGSA, Art. III(8) and Maritime Code, Art. 278(1).

3.3.2 CLAUSES EXCLUDING UNSEAWORTHINESS

The harshness of the absolute warranty of seaworthiness(157) led the shipowners from olden times to insert clauses in the contracts of affreightment either to mitigate or to eradicate the harshness of the warranty.

Since the time of Lord Ellenborough(158) it has become recognised in English law that liability for unseaworthiness could be excluded by contract in the same way as other liability. The shipowner may, in the drastic words of Lord Blackburn, say:

> "Will take the goods on board, but we shall not be responsible at all, though our ship is even so unseaworthiness; look out for yourself, if we put them on board a rotten ship, that is your look-out; you shall not have any remedy against us if we do."(159)

However, while the courts have permitted the carriers to avoid the warranty of seaworthiness, they required the shipowner to use clear and unmistakable language(160). Ambiguous words whatever may have been the intention of the parties, cannot be relied upon, and will construed *contra proferentem*. Two cases before the House of Lords gave a good illustration to the ambiguity. The first is the *Elderslie's* Case(161) . There a bill of lading contained two sets of clauses printed in large and small type. The large print read as follows:

> "Neither the ship nor her owners shall be accountable for...any loss or damage...from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of the shipment of the goods or not."

and the small one exempted the owners from liability for loss or damage resulting from:

> "Any accidents to, or defects, latent or otherwise, in hull...or otherwise...if reasonable means have been taken to provide against such defects and unseaworthiness."

A cargo of frozen meat, shipped under the bill of lading was damaged by acid used to disinfect the vessel. Had reasonable care been taken to clean the ship from the taint of acid before the meat was loaded the damage would not have occurred. On these facts, the shipowners had no alternative but to argue that the large print overruled the smaller print, being inconsistent with it. The House of Lords held that the large print clause was a clear exception of unseaworthiness, but that the two clauses must be read together and being read so they were irreconcilable. Such an ambiguous document offered no protection Lord Macnaghten said: " It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words."(162) Lord Lindley remarked that plain words meant terms "sufficiently plain to the shipper for him to understand it".

The second case is *Nelson Line v. Nelson*(163) which came before their Lordships three years later. In that case, a cargo of frozen meat was damaged owing to the unseaworthiness of the ship. The cargo-owners had insured the meat and had been paid by the underwriters. They brought an action against the shipowners for damages. The sole

question before the House of Lords was whether or not the shipowners were freed from liability by certain words in the agreement. The shipowners relied on the following clause:

> "The owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance."

Lord Loreburn with whom the other LawLords concurred, accepted that if the words in the exception were considered by themselves, they appeared to excuse the shipowners not only from the claim in question but from any imaginable liability, except such as by law could not be underwitten. However, his Lordship pointed out that the whole agreement had to be construed, and especially the context of the clause in which this alleged exception occurred. Taking the clause as a whole, his Lordship found it "so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulate. The law imposes on shipowners a duty to provide a seaworthy ship and to use reasonable care. They may contract themselves out of those duties, but unless they prove such, a contract is not proved by producing language which may mean that and may mean something different."<164> Accordingly, the clause failed; so did clauses declaring the goods to be "at shipper's risk" or "at charterer's risk"<165>; or excepting liability for " latent defects on beginning of the voyage or other wise"<166> or "any latent defects "<167>.

Carver, after citing a number of effective and ineffective clauses, comes to the conclusion that "no general

rules can be laid down as to the language which is sufficient to exclude the warranty of seaworthiness. Each contract must be considered as a whole"(168). This is certainly true, but so much can be said in guidance: A clause to be effective should straightforwardly proclaim, and not circumscribe, that seaworthiness in itself at the commencement of the voyage is meant to be excluded. The charterer's or shipper's attention must be drawn to its significance. The clause therefore should stand conspicuously aloof, not just tacked on to other words and sheltered from observation amid an assemblage of innocent-looking exceptions, as it was in *Quebec Marine Ins. v. Comm. N. of Canada*(169) where losses from "rottenness, inherent defects, and other unseaworthiness" were excepted.

> "If it sough to effect a reduction of the overriding obligation to provide a seaworthy ship, (whether that is expressed or implied for this purpose does not matter) that result can be achieved, if perfectly clear, effective and precise words are used, expressly stating that limitation."(170)

The preponderance of the authorities which have held their exception clauses effective bore either a direct reference to the words seaworthiness or unseaworthiness(171) or to defects existing at the commencement of the voyage(172). Sellers J., in *Minister of Materials v. Wold Steamship Co. Ltd.*(173), denied the shipowners the benefit of an exception clause, which merely stated "Ship not answerable for loss, through...any latent defect in the machinery or hull not resulting from want of due diligence" on the ground

that it was inadequate to protect the shipowners for unseaworthiness. His reason was:

> "The clause makes no express reference to seaworthiness itself...it is not clear enough to be invoked as giving exemption for this very and specific obligation expressly undertaken by the shipowners to have his ship seaworthy."(174)

Again, in *Ingram & Royal Ltd. v. Services Maritime Due Treport*(175), a clause in the charterparty provided that :"It is agreed that the maintenance by the shipowners of the vessel's class (or in the alternative, failing a class, the exercise by the shipowners and/or charterers or their agents of reasonable care and diligence in connexion with the unkeep of the ship) shall be construed a fulfilment of every duty, warranty, or obligation and whether before or after the commencement of the said voyage." it was contended that this clause protected the shipowners from liability for unseaworthiness. However, Scrutton J., held that this clause was ambiguous both to lawyers and businessmen and that it did not apply to a case of unseaworthiness through bad stowage. Further, in *Jordan Inc. v. Mauronne Drilling Services*(176) a clause in a charterparty gave the charterer right to inspect the ship and to satisfy himself as to her being clean and fit was found not so clear as would abolish the implied warranty of seaworthiness.

It is possible that a clause exempting the shipowner from liability for unseaworthiness which relates to the safety of the ship for the purposes of Merchant Shipping Act

would not be upheld on the grounds of being contrary to public policy. As argument in favour of this can be found in COGSA, Art. VI, which, in the case of a non-negotiable document for the carriage of particular goods, provides that the carrier may exclude liability as to his obligation for unseaworthiness so far as it is not contrary to public policy. Under Section 18 of the MSA 1979, a shipowner may exclude liability for loss or damage by fire as long as it does not occur as a result of his actual fault or privity. This will apply even if the fire is brought about as a result of unseaworthiness of the ship(177).

The courts in U.A.E. have not yet dealt with the question of the carrier's right to exclude his liability for unseaworthiness. However, as the Maritime Code imposes upon the carrier an obligation to provide a seaworthy ship(178), it seems safe to assume that the carrier is not entitled to exclude liability for his failure to provide a seaworthy ship.

Further, under U.A.E. Maritime Code, as well as under COGSA, the carrier cannot contract out of his statutory obligation to exercise due diligence to make the ship seaworthy.

3.3.3 PERILS, DANGERS AND ACCIDENTS OF THE SEA OR OTHER NAVIGABLE WATER

This, apart from the common law exceptions, is one of the oldest to be found in the bills of lading, and was no doubt inserted on account of the narrow meaning given by the courts to the common law exception of 'act of God'.

Perils of the sea, briefly, is in practice by far the most important exception clauses, and is usually met with in bills of lading as follows:

> "all and every other dangers and accidents of the seas, rivers, land carriage, and navigation of whatever nature or kind soever excepted."

The old clause 'danger of the seas' or 'perils of the seas' are enlarged so that the new formula extends its effect to 'rivers', harbours' and 'docks' as well as in the open water.

This more extensive signification of the exception includes many perils which, according to the construction which has been given to it, would not come within the meaning of the 'act of God'. The exception includes many casualties which the agency of man has concurred in producing, which, as we have seen, would preclude them from being treated as the 'act of God'.

Thus, 'perils of the sea' comprehends losses which have been caused by the acts or neglects of man, and losses by 'act of God', where the effective cause is one peculiar to the sea. It extends, for example, to loss resulting from

vessels running aground in fog or being driven onto rocks in a gale(179).

An 'act of God' is, undoubtedly, a peril of the sea, but a peril of the sea is by no means an 'act of God'. The importance of the distinction is that where a loss occurs through the 'act of God' it is immaterial whether there be a bill of lading or not, since the shipowner is excused by the common law; on the other hand if a loss occurs through 'perils of the sea', the shipowner is liable if he does not show some special contract of carriage, of which the most usual evidence is a bill of lading.

Some accidents may be difficult to identified as perils of the sea or acts of God. The test appears to be whether the accident which occurred was or not one which could have happened on land, so far as its general character was concerned. "Thus frost or lightning, as effective causes of loss, will be act of God but not perils of the sea; damage by swordfish or icebergs would not be a peril of the sea, if the shipowner could not have prevented it by reasonable care."(180)

In this exception clause as drafted there seems to be no difference between the term 'perils of the sea' and 'dangers of the sea', and either phrase must have the same meaning attached to it(181), whether occurring in a policy of marine insurance or a bill of lading. In the words 'peril', danger' and 'accident' there is a meaning of something fortuitous and unexpected.

3.3.3.1 Definition of 'Perils of the sea'

The exact meaning of 'peril of the seas' has given rise to a good deal of legal argument. Lapez, L.J., in *Pandorf v. Hamilton*, gave the following definition of 'perils of the sea'(182):

> "...damage to goods caused by the action of the sea during transit not attributable to the fault of anybody, is ...a danger or accident of the seas, intended to come within the exception and exonerating the shipowners."

But this definition cannot be accepted as exhaustive. Scrutton, criticising it , says:

> "Sea-damage, through the fault of somebody (e.g. another ship), will be a peril of the sea both under a policy of insurance and a contract of affreightment, though by reason of implied undertaking the shipowner, in the case of negligence of the crew, may not be protected under a charter."(183)

Lord Herschell, in another case said(184):

> "'perils of the sea' does not cover every accident or casualty which may happen to the subject-matter (of the carriage) on the sea...not every loss or damage of which the sea is the immediate cause is covered by these words. They do not protect...against that natural and inevitable action of the winds and waves, which result in what may be described as wear and tear. There must be some casually,something which could not be foreseen as one of the necessary incidents of the adventure."

This was an insurance case, but 'peril of the sea' has the same meaning in policies of marine insurance and in bills of lading. The subject of 'perils of the seas' has naturally a great importance in the law of marine insurance, where 'perils of the seas' are the principal risks covered(185).

The most consistent definition among other authorities(186), is certainly that given by Scrutton which is now generally adopted. 'Perils of the sea' includes:

> "any damage to the goods carried caused by sea-water, storms, collision, stranding, or other perils peculiar to the sea or to a ship at sea, which could not be foreseen and guarded against by the shipowner or his servants as necessary or probable incidents of the adventure."(187)

In accordance with these authorities the terms 'perils of the sea' refer only to fortuitous accidents or casualties of the seas. They do not include the ordinary action of the winds and waves(188). It seems that loss caused by wear and tear combined with a peril is, in fact, loss caused by negligence or unseaworthiness. Nor do they cover secondary damage such as deterioration of goods by reason of delay caused by a peril(189). But, for the exception to be applicable the weather conditions do not need to be extreme or unexpected, since storms and high seas are a relatively common occurrence in sea transit(190).

Generally speaking, all loss or damage suffered in the course of the voyage through the direct action of, or contact with, sea water which could not have been avoided by the exercise of ordinary care and skill is covered by the exception 'perils of the sea'. Something fortuitous and out of the ordinary course is involved in both words 'perils' and 'accident'.

3.3.3.2 Character of the Loss:

A loss will not be covered by the clause 'peril of the sea' where it has been caused by the negligence or misconduct of the master or crew of the ship(191), or in consequence of the ship being unseaworthy(192). Negligence and unseaworthiness often leads to a situation in which a ship is particularly vulnerable to the element. If this happens, the carrier is not entitled to the protection of this clause. Further, the loss must be accidental. Although it was said that the exception clause 'peril of the sea' includes only losses which are of an 'irresistible force' or 'inevitable accident'. The general principle of English law is that the losses, in order to be within the exception, need not be extraordinary, it is enough that the damage be done by the fortuitous action of the sea(193).

What amount and character of intervention by natural agency suffices to being a loss within the exception, has been the subject of considerable difference of opinion. The necessary intervention has been narrowed down to such direct and violent and sudden acts of nature as could not by any amount of ability be foreseen, or, if foreseen, averted.

Inevitable accident has been defined as something:

> "done or omitted to done which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."(194)

Thus an inevitable accident in point of law is that in which the party charged with the offence could not possibly

prevent by the exercise of ordinary care, caution and maritime skill(195).

Now we can easily see that the prominent consideration is not the inevitability of the accident, viewed from the point of the actual motive power that caused it, but the question whether the exertion of ordinary care and skill could have prevented it.

To constitute a losses within the exception, the factual situations must be peculiar to the sea, and not such as may equally well take place on land. This limitation would exclude from the ambit of the exception, inter alia, damage due to rates(196), other vermin(197) eating away the cargo or to fire, heating, sweating or to the explosion and other mishaps of machinery, boilers, provided that the damage will be within the exception i) if the loss is due to a sea peril that has been brought about by an accidental cause that would not per se have qualified as a sea peril, for instance, by rates which cause a leak in pipes carrying sea-water(198); or ii) if it can fairly be said that the sea peril was the operative cause of the damage, even though it was not the proximate cause, for instance, when the heating or sweating of the cargo is due to the unavoidable shutting of a ventilator to prevent the entry of the sea-water.

It is for the carrier to prove the existence of the peril and that the loss or damage was result of it. It is unclear whether the carrier must show that reasonable action was taken to protect against the peril as well as demonstrate that no negligence was involved.

3.3.3.3 Perils of the Sea under U.A.E. Law

The exception clause "accidents or peril of the sea" has been very strictly interpreted and it is said that in order to be 'accidents or perils of the sea', the facts must assume the characteristics of unforeseeability and inevitability peculiar to the events of 'force majeure'(199), which render nugatory every precaution or defence provided by a diligent, cautious navigator, as in the case of gale, storm, fog, collision, or wind of extraordinary strength.

Other definitions of this excepted peril have been given, but here it is interesting to analyse particularly the following given by the Court of Appeal of Abu-Dhabi:

> " In order that a carrier is to be relieved from liability by the reason of perils of the sea the event must be of exceptional force and violence beyond the carrier's control and cannot normally be anticipated."(200)

This is the principle laid down by the Court of Appeal of Abu-Dhabi, but now it is worth looking at the reasons given by this Court for its judgement. The Court asserted that it is an element of common experience that 'force majeure', in order to relieve the carrier must be of such exceptional character so as to make impossible for a prudent master to provide any defence whatever. It follows that not all the risks of navigation due to the strength of the elements of nature can be brought within the hypothesis of 'force majeure'. But, on the contrary, a great part of them is within the series of natural facts which the navigator must ordinarily meet with, and against which there are

sufficient means of protection, particularly in the case of modern vessels.

The Court remarked that upon the sea the probability of bad weather and tempest is an event completely normal and foreseeable, for a perpetually calm sea would be unnatural. Thus, in order that there may be the characteristics of 'peril of the sea', [that is an unforeseeable and inevitable fact], there must be tempt and gales of exceptional violence against which there is no possibility of defence.

Such facts are not those events which bring about a rough sea, violent pitching and tossing of the vessel, vibration of the hull, for such circumstances are in the field of those phenomena against which the carrier can and should protect himself.

Therefore, according to the reasoning followed by the Court of Appeal, only a tempest of exceptional violence, an event absolutely uncommon may constitute a 'peril of the sea'.

Consequently,' peril of the sea' cannot be identified, as said the Court ,

> "with a simple abnormal state of the sea, but there must be present the characteristics of an actual and real storm, irresistible for its violence and unavoidable for its consequences on the goods by the precautions provided on board the ship."

Accordingly, 'peril of the sea' means an irresistible, unforeseen, unforeseeable, inevitable and insurmountable event.

In the light of these considerations it is now interesting to analyse the meaning of the clause 'peril of the sea' as it is understood under U.A.E. law in relation to the concept of 'force majeure', and to compare it with the interpretation given to such expression by the English authors. Story in his work on Bailments said(201):

> "The phrase perils of the sea, whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents occurring upon that element, must still, in either case, be understood to include such losses only to the goods on board as are of an extraordinary nature, or arise from some irresistible force, or from inevitable accident, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence."

Carver, confirming the rigour of the above statement adds(202):

> "[I]t must be remarked that by English law the losses need not be extraordinary, in the sense of arising from causes which are uncommon. Rough seas which are characteristically sea perils, are common incidents of a voyage. But damage arising from them, whether by their beating into the ship, or driving her on to rocks, is within the exception, if there has been no want of reasonable care and skill in fitting out the ship and in managing her."

From this position it is possible to understand, that although in the English concept of 'perils of the sea' the elements of 'unforeseeability' and inevitability' are present, they are interpreted and applied with much less rigour than the U.A.E. one. This diminution in the severity of such elements, explains why Carver considers a rough sea as

a 'peril of the sea'. And furthermore, it is enough that the master has used the usual prudence and skill and has not made any mistake, so that the event could be considered inevitable and excluding any liability.

The consequence of such a criterion is that, once the existence of a 'peril of the sea' has been established, if a want of diligence or skill of the carrier does not appear from the facts, the event is considered inevitable and the immunity exception operates without the carrier being obliged to prove specifically the elements of unforeseeability and inevitability of the event, as would be necessary if the U.A.E. concept of 'force majeure' were applied.

Finally, under English COGSA as well as under U.A.E. Maritime Code, if a carrier has failed to exercise due diligence, at the commencement of the voyage, to make his ship seaworthy, or if he has been guilty of neglect, he shall not qualify for exoneration by reason of perils of the sea provided for in the Acts.

3.3.4 LIBERTY CLAUSES

One of the overriding obligations at common law is that the carrier must not deviate from the contract route; any unjustified deviation will thrown him back on his strict common law liability as an insurer(203), unless of course, the cargo-owner waives his right to treat the contract as repudiated. Facing such a very rigorous doctrine, the carrier begun to insert in their contract of carriage clauses giving them permission to depart from the contract route and to allow certain modifications in the contract of carriage. Such clauses are referred to as 'liberty to deviate clauses'. The following liberty clause appears on the Evergreen Line combined transport bill of lading:

"Clause 19. Methods and Routes of Transportation

(1) The Carrier may at any time and without notice to the merchant-...

(c) proceed by any route in his discretion (whether or not the nearest or most directed or customary or advertised route) and proceed to or stay at any place or port whatsoever once or more often and in any order; (d) load and unload the goods at any place or port (whether or not any such port is named overleaf as the port of loading or port of discharge) and store the goods at any such place or port;

(e) comply with any orders or recommendations given by any government or authority or any person or body acting or purporting to act as or on behalf of such government or

authority or having under the terms of the insurance on the conveyance employed by the carrier the right to give orders or directions.

(2) The liberties set out in sub-clause (1) may be invoked by the carrier for any purpose whatsoever including undergoing repairs, towing or being towed, adjusting instruments, dry-docking and assisting vessels in all situations, and anything done in accordance with sub-clause or any delay arising therefrom shall be deemed to be within the contractual carriage and shall not be a deviation."

The danger of such clause which in effect gives an extensive liberty to 'deviate' lies in the fact that it may breed in the shipowner or master an unjustified confidence in its effectiveness which may lead him to use the ship in a manner apparently permitted by the clause yet in fact not permissible in law. The courts have been alive to this problem. Their answer has been to construe these wide liberty clauses so as to make them compatible with the 'main object'〈204〉 or 'governing object'〈205〉 of the contract. This is a principle which is found in other branches of contract law. For example, it is applied in determining when frustration has occurred〈206〉.

With particular regard to deviation, the 'main object' of the contract of carriage as far as the shipowner is concerned is, as has been observed by Branson J.〈207〉, in the earning of freight. Conversely, the shipper is interested in

carriage of goods to destination. As Bigham J., put it in *Hadj Ali Akbar & Sons Ltd. v. Anglo-Arabian And Persian SS Co.Ltd.,*(208):

> "No doubt the object of the bill of lading contract is that the plaintiffs shall have their goods carried to [destination]..."

These being ostensibly the main objects of the contract of carriage, the liberty clause ought to be construed so as not to defeat this intention but rather to give effect to it.

The case which illustrates the position best is *Glyn v. Margetson*(209). Oranges were shipped under a bill of lading which provided that the vessel was 'lying in the port of Malaga, and bound for Liverpool, with liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levante, Black Sea, or Adriatic, or on the coast of Africa, Spain, Portugal, France, Great Britain and Ireland for the purposes of delivering coals, cargo, and/or passengers, or for any other purpose whatsoever'. The vessel went out of her usual route to Burrianna, some 350 miles from Malaga. Owing to delay caused thereby, the oranges were damaged by decay on arrival. Lord Hershel L.C., said(210):

> "The main object and intent...of the charterparty is the carriage of oranges from Malaga to Liverpool.
> That is the matter with which the shipper is concerned, and it seems to me that it would be to defeat the manifest object and intention of a contract to hold that was entered into with the power to the shipowner to proceed anywhere that he please, and to arrive at the port at which the oranges were to be delivered when he please... ."

Referring to the general words in printed form , his Lordship continued:

> "I think you are justified in looking at the main object and intent of the contract and in limiting the general words used, having in view that object and intent."

Lord Halsbury, agreeing with the Lord Chancellor, commented that to apply a literal interpretation to the wide liberty clause would be to defeat the very object which the parties had in mind.

Having established the general principle applicable, it is nevertheless not clear where it will be applied. There will always be a borderline between what is reasonable and unreasonable. Both authors and courts seem to point to the following distinction:

- Either, the ports of call are expressly specified in the bill of lading and accepted by the shipper. In such an event the carrier would have the right to call at the ports specified in the bill of lading without having to justify such calls(211).

- Or else, the ports of call are not specified in the bill of lading and are therefore undetermined; in this event, the matter is more complex and the following further distinction must be made:

(a) The ship calls at ports on the normal commercial route or geographical route of the voyage in question. In this event the carrier shall be authorised to call at these ports and such a clause shall be considered valid.

Thus in *Reardon Smith Line v. Black Sea*(212) a charterparty provided that the 'steamer should be at liberty to call at any port(s) in any order, or places, to bunker, or to deviate for the purposes of saving life or property. After loading at Istanbul the vessel called at Constanza for oil bunkering. On entering that port the vessel stranded and her owners claimed contribution in General Average from the cargo-owners. The House of Lords held that though Constanza was not on the direct sea track, the route via that port was a usual, and therefore justifiable, one in view of the evidence that at that time about 25% of oil-burning vessels sailing from Black Sea ports called there for bunkers.

(b) The ship calls at ports outside the customary, geographical and contracted route. As a rule, under a contract of carriage clause, however broadly construed, the carrier has no right to call at ports outside the usual route of the voyage in question; such a change of route would be considered tantamount to a deviation. Thus in *Leduc v. Ward*(213) the bill of lading gave 'liberty to call at any port in any order and to deviate for the purpose of saving life or property.' The voyage was from Fiume to Dunkirk but instead of going directly to Dunkirk the ship went out of her course and proceeded to Glasgow on the shipowner's private business. She was lost in a storm in the Clyde. The court held the

clause merely gave a right to call at any ports in the ordinary course of voyage and the shipowner was thus liable.

Further, in *U.S. Shipping Board v. Bunge y Born*(214) a charterparty, from River Plate to Malaga and Sevill, provide that the ship should have 'liberty to call at any port or ports in any order for the purpose of taking bunker coals or other supplies'. Oil fuel was taken in at Rio de Janeiro. After discharging cargo at Malaga the ship had enough oil fuel left to take her to Seville but not enough to take her out of that port. Fuel oil could not be obtained at either Malaga or Seville, so she deviated to Lisbon which was the nearest port at which fuel could be obtained but was 300 miles from the direct route. Having bunkered she proceeded to Seville and completed the chartered service. Held, the deviation to Lisbon was not covered by the clause. The words giving a right to call at any ports in any order had acquired a conventional meaning and only covered calls at ports which were in the ordinary course of the voyage. Since Lisbon was not such a port the deviation to that port was an unauthorised.

However, in *Connolly Shaw Ltd. v. Nordenfieldske S.S. Co.*(215), where the contract for carriage of lemons from Palermo to London provided that the vessel had liberty to "proceed to...any ports whatever (although...out of or beyond the route...)", Branson J.,

held that a deviation to Hull, which was outside the usual rout for the agreed voyage and which added three days to the voyage, was allowed under the contract. Indeed, his Lordship pointed out that under the terms of the wide 'liberty to deviate' clause in this case, the ship could be sent anywhere so long as the contract of carriage was not frustrated by the deviation and no measurable harm was caused to the lemons by the delay. This decision, however, may been contested on the grounds that the court ignored the fact that , although the lemons reached London in good condition, their price substantially fell during the time the ship travelled from Hull to London, a rather clear frustration of the contract. It is submitted that where there is delay in carrying goods, the loss to the cargo interest may be divided as follows: **(i)** loss by being deprived of the use of the goods, or their value; **(ii)** loss by their deterioration or wasting, owing to the delay; **(iii)** loss by fall in market value of the goods at their destination; **(iv)** loss of profits, and liabilities incurred upon a sale or contract for the use of the goods which the delay has frustrated; **(v)** loss by being prevented from using other property through want of the delayed goods(216).

Some Liberty clauses are extended to permit carries to carry the goods beyond their destination. For example, Clause 6 of CONLINEBILL provides:

> "The Carrier shall be at liberty...to carry the goods or part of them beyond their port of destination, and to tranship...the goods...at the Carrier's expense but at Merchant's risk

Other clauses give the carrier the freedom to two and assist vessels in all situation.

What is the legal scope of these clauses?

Starting with the first clauses, the courts have admitted the validity of such clauses under certain conditions:

First, that the carrier does not abuse his right, that is to say, he makes legitimate use of it and that the circumstances justify his doing so. Thus in *The Berkshire*(217), a liberty clause provided, inter alia: "Whenever the goods are consigned to a point where the ship does not expect to discharge the carrier or master may without notice forward... the goods...by any vessel...whether operated by the carrier or others...This carrier in making arrangements for any transhipment...shall be...without any responsibility what- soever." The ship left the port of loading for the contracted discharge port but on the charterers' instructions, the goods were discharged at a different port and transhipped to the contracted destination where they were found to be damaged. The Court was of the opinion that the liberty clause did not give the shipowners any right to forward goods, by shipment or otherwise, in a

situation different from that contemplated at the time of shipment. Consequently the carrier was liable for the damaged goods.

The case which illustrates the situation where special circumstances avoided the usual rule is *Broken Hill Co. v. P. & O*<218>. A mail steamer was loaded with a quantity of lead for delivery at Colombo. The bill of lading which issued in respect of the lead gave the ship liberty ' to carry the said goods to their port of destination by the above or other steamer(s)...proceeding either directly or indirectly to such port, and to tranship or land and store the goods either on shore or afloat, and re-ship and forward the same...'. When the ship arrived at Colombo it was found that local riots had dislocated the port facilities and that the vessel would be seriously delayed, if she waited to discharge the lead. In view of the exigencies of the mail service the ship left without discharging the lead and proceeded to Bombay to collect the mail. At Bombay the lead was forwarded in another ship to Colombo. It was held that as the parties must have contemplated that the ship, being a mail steamer, would have to arrive at and leave various ports at fixed times, the shipowners were entitled to act as they had done.

Secondly, that the carrier applies his right reasonably, in other words, that he does not delay the delivery of the goods unduly, taking into account the total duration of the carriage, the nature of the goods, its quality. Thus in *Cunard SS. Co. v. Buerger*<219> a clause in a bill of lading

gave the ship liberty 'before or after proceeding to the port of discharge, to proceed to any port or ports although in a contrary direction, in any order and for any purpose, and if inconvenient for the ship's purposes to deliver during the ship's stay at the port of destination, to forward the bales by any other ship at the carriers' expense but at the Merchants' risk'. The contemplated voyage was to Constantinople and then to the Black Sea ports, including Odessa. On the arrival of the ship at Constantinople it appeared that Odessa was likely to be captured by the Soviet forces, and it was agreed that part of the cargo should be delivered at Batoum and part at Constantinople. The ship proceeded to Batoum and back by Novorossisk to Constantinople, the part of the cargo consigned to Batoum remaining on board after the ship had left that port; and the other part which was to have been brought back to Constantinople was, for no explained reason, landed at Novorssisk and detained by the carriers' agents for two months. It was held that the overcarriage of the part of the cargo and the landing and detention of the other part at Novorossisk constituted a deviation from the contract of carriage, by an abandonment of the voyage or such unreasonable delay as amounted to a deviation, so as to deprive the carriers of the benefit of the exceptions in the bill of lading.

Finally, the carrier cannot over-carry the goods for reasons of his own convenience, for example, where the goods

to be discharged beneath other goods, and the carrier preferred to keep them on board, in order to save the ship considerable delay and expense. In *W.T. Sargant & Son v. The East Asiatic*(220) where the clause gave the carrier 'liberty to carry the goods or part of them beyond their port of destination, and to tranship...and re-ship and forward' Bailhache J., held that it was impossible to read from the clause a right to carry the goods into the port of destination and refuse to delivery them to someone entitled to demand delivery; the clause, he said, was to provide for situations where the steamer failed to put into port of destination in the first place.

Regarding the liberty to tow clause it has been held(221) that this clause would entitle the vessel to tow its charge to a port out of the contract route provided the delay caused thereby would not be substantially greater than if the vessel had been towed to a port on the contract route and the delay must not be such as to frustrate the voyage charterparty.

3.3.4.1 The Situation Under U.K. COGSA

Although there is in principle no specific objection against liberty clauses, difficulties may arise in certain extreme cases where it is arguable that a stipulated alternative way of performing the contract amounts to a complete failure of consideration in contracts governed by the Hague-Visby Rules . The object of the Rules is to define

not the scope of the carrier's undertaking, but merely the way in which it ought to be performed. For instance, it is up to the parties to decide whether the operations of loading and discharge are to be carried out by the carrier or the shipper; to decide that a ship bound from London to Dubai is to go there via Gibraltar and Suez or via some other routes. All that the Rules do, once the scope of the contract has been agreed upon, is to decide that "the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." It is arguable that the parties' freedom to define the scope of their undertaking under the Hague Rules is largely a matter of degree. Even though alternative ways of performing the contract are in principle permissible, there must not be such as to infringe upon, or negative, the carrier's duty "properly and carefully to load, handle...the goods carried." However rare the instances of such offending clauses may be, there may arise a clear situation where a clause purports to afford the carrier a relief from, or to lessen, his liability otherwise than as provided in the Rules, and in such event it must be declared null and void under the Rules〈222〉.

The question whether the U.A.E. carrier will be allowed to extend the scope of his contract by means of "liberty to deviate" and like clauses, may raise important issues of legality. The court would be free to find that some of these terms have been inserted in *fraudem legis* and hold them null and void and of no effect〈223〉.

3.3.5 ARREST OR RESTRAINTS OF PRINCES, RULERS OR PEOPLE, OR SEIZURE UNDER LEGAL PROCESS

This is another exception clause often added in bills of lading. 'It covers any forcible interference with the voyage or adventure at the hands of the constituted government, or ruling power of any country, whether done by it as an enemy of the state to which the ship belongs, or not. For example, orders of government prohibiting or restricting the exportation or landing of goods; quarantine regulations, embargoes, or restrictions on particular ships; blockades; confiscations of goods as contraband and so forth.'(224)

The words 'restraint of princes and rulers' mean the political or executive acts of a State or Government of any country interfering with a strong hand(225).

In *Finlay v. Liverpool and Great Western Steamship Co.*, Martine, B., said(226):

> "The acts or restraints of princes and rulers, mentioned and provided against in the bill of lading have reference to the forcible interference of a State, or of the Government of a country taking possession of the goods 'manu fortis'...."

Actions by undisciplined troops of volunteers war, be regarded as the actions of the ruling authority if the latter was clearly making use of such volunteers in its effort to defend itself(227).

By the word 'people' is meant the ruling power of the country, whatever it may be(228), and not mobs, multitudes of men, emeutes or revolutions. 'Arrest' is a mere temporary

detention(229) which does not include the capture, which is a forcible taking in time of war with a view to appropriation as prise(230).

The word 'restraint' does not necessarily involve the use of force(231), and it need not operate directly on the ship(232). An authoritative prohibition of the part of the governing power is sufficient.

> "There may be," said Lord Wright in *Rickards v. Forrestal*, " a restraint though the physical force of the state concerned is not immediately present. It is enough, I think, that there is an order of the state addressed to a subject of that state, acting with compelling force on him, decisively exacting his obedience and requiring him to do the act which effectively restraints the goods."(233)

But, as said Lord Dunedin, 'restrain of princes', to fall within the words of the exception clause, must be an existing fact and not a mere apprehension. By 'princes' are meant all potentates whether at peace or war.

'Seizure' includes every act of seizing either by a lawful authority, or by overpowering force, whether it be belligerent or not(234). This word covers the seizure of the ship or goods, or a forcible interference with the completion of the voyage, even by the Government of the country to which the ship belongs, or of a friendly State(235), provided it is not in the course of ordinary judicial process.

It is considered within the exception clause even the operation of a municipal law which prevents the delivery of goods at their destination(236).

But, as Martine, B. said(237):

> "The 'acts or restraints of princes and rulers,' mentioned and provided against in the bill of lading,...do not extend to legal proceedings which, it is alleged in the plea, afterwards took place in the courts of New York."

Therefore when the goods have been taken from the ship under process of the tribunal at the request of those who claim to have right on them, it is not an act within the exception clause(238).

To constitute 'restraint' within the meaning of the exception clause, it is not essential that there should be a physical seizure or arrest of the ship or goods. Lord Summer, referring to this problem said(239):

> "There is also authority for saying that if restraint of princes is in being and reasonably likely in the long run to prevent performance of a contract if its further performance is proceeded with, any further performance is forthwith excused, although the direct operation of the restraint has not yet occurred."

In *Nobel's Explosive Co. v. Jenkins*(240) it was accordingly held by Mathew, J., that the delivery of the goods was prevented by 'restraint of princes', and that the exception applied although there had been no direct action upon the goods.

Therefore, to be within the meaning of the exception it is sufficient a reasonable and well founded fear of restraint, but not a mere apprehension

> "If the situation," said Lord Loreburn in *Watts v. Mitsui*, "had been so menacing that a man of sound judgment would think it

> foolhardiness to proceed with the voyage, I should have regarded that as in fact a restraint of princes. It is true that mere apprehension will not suffice, but on the other hand it has never been held that a ship must continue her voyage till physical force is actually exercised."(241)

U.A.E. law has also recognised the validity of the exception 'arrest or restraint of princes' in exonerating the carrier from liability. Yet to have such effect, the arrest or restraint, it is submitted, should satisfy the elements of force majeure, viz. i) inevitable ; ii) unforeseen and iii) irresistible. The restraint must be inevitable in the sense that the carrier cannot rely on the exception if the risk amounts to nothing more than a vague possibility. Further, the carrier cannot invoke the exception if he knew beforehand that the ship might become subject to restraint because, for instance,she is holding a 'foul bill of health'. In this point , it does not appears there is nay different between U.A.E. and English law.

3.3.6 ACT OF WAR

The phrase 'act of war' is wider in scope than the common law exception of 'Queen's enemies'. It includes, for instance, 'act of war' where the carrying ship is neutral.

The carrier is not liable for any loss or damage to the goods which result from act of war. If, for instance, war has broken out between the country to which the ship belongs and another country and the ship and goods were confiscated by the latter country, then the carrier is exempted from responsibility. Again if the ship is bound for foreign port and before arriving there war has been declared between her country and the country of destination then she is excused for not proceeding and the carrier will not be liable to the cargo-owner for any loss or damage suffered by the goods. Also the ship will be excused for not proceeding to a blockaded port(242).

No problem exists under the foregoing cases because they are clearly defined. Where difficulties may arise and involve long and expensive litigation if there are no precedents to guide the Courts, is in such matters as 'undeclared' war, incidents like the Anglo-French invasion of Egypt in 1956. A good illustration to such difficulties is the *Navics Corp. v. The Ulysses II*(243). Here the time charterparty contained a clause stating that 'if war is declared against any present NATO countries...owners or charterers have the right to cancel this charterparty upon completion of that particular voyage the vessel is engaged

upon'. Thomsen, C.J. observed how difficult it was to say when 'war' or a 'state of war' existed in the present era of border incidents, police actions, armed clashes and bush fire wars. However, Thomsen, B.J., held that the speech of November 1st, 1956 and 3rd November of President Nasser constituted declaration of war, even under the technical requirements of international law.

To limit the possibilities of misunderstanding and eventual litigation and to define clearly the course of action to be taken and the rights and responsibilities of parties in the event of actual threatened war, various special War Risk clauses have been devised. The 'Voywar 1950' clauses are commonly used. Their special interest lies in the definitions contained in the first two paragraphs as follows:

'(1) In these Clauses "war risks" shall include any blockade or any action which is announced as a blockade by any Government or by any belligerent or by any organised body, sabotage, piracy and any actual or threatened war, hostilities, warlike operations, civil war, civil commotion or revolution.

(2) If at any time before the vessel commences loading it appears that performance of the contract will subject the vessel or her Master and crew or her cargo to war risks at any stage of the adventure, the Owners shall be entitled by letter or telegram despatched to the Charterers, to cancel this charterparty.'

Under U.A.E. law, war does not of itself relieve the carrier from his obligations. But the state of war may be, according to circumstances, force majeure, provided that the elements of force majeure are satisfied. It is said(244) that the fact that the event of war makes the performance of a contract more dangerous does not release the carrier from his liability in damages for his non-performance although the war has rendered this performance more difficult and more expensive. Nor the carrier excuse himself by pleading war, if, in spite of the war, he could have performed his contract before the war began.

It may be argued, however, that the law with regard to war as force majeure cannot be considered as equitable. it is not in practice possible for the parties to commercial contracts to estimate beforehand the probabilities of an outbreak of war. War, as it is now carried on, interferes in the most violent way even with neutral commerce. The effect of holding that the party must execute his contract, even though it has become more difficult and more expensive owing to the war, may be that this party is ruined. It is therefore, submitted that the approach expressed by Lord Loreburn in *Tamplin SS. Co. v. Anglo-Mexican Petroleum Co.*(245), is more equitable and worth to be considered by U.A.E. courts. His Lordship said(246):

> "When a lawful contract has been made and there is no default, a court of law has no power to discharge either party from the performance of it unless either the rights of

> someone else or some Act of Parliament give the necessary jurisdiction. But a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary it, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will implied, though it be not expressed in the contract... Where the altered conditions such that, had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said 'if that happens, of course, it is all over between us'?"

Applying this approach, a carrier should be relieved from his obligations by reason of war where the war create such a difficulty in the performance that the carrier would not have contracted if he had foreseen it.

3.3.7. CLAUSES EXCLUDING LATENT DEFECT

These clauses are frequently invoked for exoneration of liability for unseaworthiness. It is submitted that a party, who seeks to rely on the exception of latent defect, has first to prove that the unseaworthy defect is of a latent nature. The Master of the Rolls in *The Dimitrios N. Rallias*(247) proposed that "if a defect such as appeared could be discovered by the exercise of ordinary care, it cannot be said to be latent." In *Brown & Co. v. Nitrate Producers S.S. Co.*(248), Porter J., asked the question whether by "latent" it means that you have to use every possible method to discover whether it exists or whether you must use reasonable methods,said: "I cannot myself believe that in every case it is obligatory upon a ship's officer on the commencement of a voyage to go and tap every rivet to find if it has a defect or not. ...I think it means such an examination as a reasonably careful man skilled in that matter would make."

If the defect is not latent, as was the thick accumulation of rust found in the rivet of *The Dimitrious N. Rallias*, the responsibility of the shipowner will have to be decided upon the law relating to breach of the warranty of seaworthiness, absolute or qualified(249).

3.3.7.1 Some Examples of "Latent defect" Clauses

1. "Loss or damage arising from accident s to or defects latent on beginning of voyage or otherwise in hull, tackle, boilers or machinery or their appurtenances"

The above clause was considered in *The Waikato*[250]. Action against the shipowners for delivering cargo of wool in a damaged condition. The wool had been stowed in the ship in a refrigerating hold intended for the carriage of frozen meat, and in consequence of there being no ventilation the wool was damaged. The preliminary question in the action was whether the fact of the insulation of the refrigerating hold, whereby the heated air could not escape, was a defect covered by the above clause. The shipowners contended that the words or otherwise" covered defects of all kinds whether existing at the beginning of the voyage or arising during the voyage. This contention was rejected by the court. Smith L.J., interpreted the words "or otherwise" to include patent defects; as the clause was unclear and capable of a double meaning, it did not absolve the shipowner from liability. Ribby L.J., felt that the words "or otherwise" related to the phrase immediately antecedent to them, referring to "beginning voyage". Thus, on a plain grammatical construction of the clause, it could cover latent, as well as patent defects,existing at the commencement of the voyage and those during the voyage. The meaning of the clause being equivocal and questionable, the shipowners were unable to rely on it to exclude liability for unseaworthiness.

2. "Owners not to be liable for loss...from latent defects in boilers, machinery, or any part of the vessel in which steam is used even existing at time of shipment, provided all reasonable means have been taken to secure efficiency".

In *The Cargo ex Laertes*(251), Butt J., held that this clause accomplished its purpose in freeing the shipowner from liability for unseaworthiness caused by a latent defect.

3. "Defects, latent or otherwise, in hull, machinery, refrigerating or otherwise (whether or not existing at the time of the goods being loaded or at the commencement of the voyage)...".

In *Bond Connolly v. Federal S.N. Co.*, Channell J., said(252):

> "The words, 'before or after the commencement of or during the voyage,' 'defect existing at the commencement of the voyage,' etc., 'defects...whether or not existing at the time of the goods being loaded,' were exceptions to seaworthiness."

4. "Damage occasioned by a latent defect in the hull...even where occasioned by the negligence of the servants of the shipowner."

The Court of Appeal held in *The Christel Vinnen*(253) that this clause did not qualified the warranty of seaworthiness. There, the defective leaky state of the rivet was in existence at the commencement of the voyage and was a condition which affected the seaworthiness of the vessel. Even though the unseaworthiness fell within the class of "latent defect", the Court held the exception ineffectual to protect the shipowner from liability, as it was not so worded as to clearly exclude or vary the implied warranty of seaworthiness. Scrutton L.J., distinguished the exception

clause in question with that in *The Cargo ex Laertes* explaining that:

> "In The Cargo ex Laertes the words which protected the shipowners were 'latent defect in machinery even existing at the time of shipment'. Such words are absent in the present case and latent defects may come into existing during the voyage."<254>

In *Minister of Materials v. Wold S.S. Co. Ltd.*<255>, Sellars J., applied this distinction to defeat an exception clause which stated (inter alia):

> "Ship not answerable for loss, through...any latent defect in the machinery or hull not resulting from want of due diligence by the owners..."

It is evident that to the English judiciary a latent defect could come into existence during the course of a voyage. The possibility of it springing forth at any time during the voyage renders it more acute for the shipowner to be extra precise and specific when he phrases his exception of latent defect if he wishes for it to shield him also from liability for initial unseaworthiness (by reason of latent defects).

5. "But any latent defects in the hull and/or machinery shall not be considered unseaworthiness provided the same do not result from want of due diligence of the owners or any of them, or of the ship's husband or manager."

In *The Dimitrios*<256> the Court of Appeal implicitly ruled the validity of the above clause as being adequately worded to except liability for a latent defect which render a vessel unseaworthy; but as the defect there was considered patent the shipowner was held liable.

No court in U.A.E. has yet considered the exception of latent defect. However, it is very seldom that a carrier will be excused from the consequences of latent defect. Because such defect is deemed to be an event internal to the activity of the carrier - a type of event not traditionally to be allowed to exonerate from under U.A.E. law under the concept of force majeure according to which a promisor could be liable without fault as where the event not external to his activity, for instance, the punctured tyre and also the defective ship, however latent the defect.

Under Article 275 (1) (p) of the U.A.E. Maritime Code as well as under Article IV Rule 2 (p) of the U.K. COGSA, a carrier is not responsible for loss or damage arising or resulting from latent defects not discoverable by due diligence. The purpose of this exception has not yet been established, seeing that so far as the vessel herself is concerned Art. 275(1)(a) of the U.A.E. Maritime Code , Art. IV Rule 1 of COGSA, appears to give full protection. It may be said that as the words used in sub-rule (p) are so wide then there is no reason to suppose that this exception is confined to latent defects in the ship; it may be presumed to apply also to things extraneous to the ship for which a shipowner may be responsible, such as shore appliances used to load or discharge the ship's cargo. It may also include latent defects in other cargo , e.g. cargo stowed in a container.

To take advantage of the statutory exception of the

latent defect the carrier must show that due diligence was exercised in ship inspections and surveys. Unlike the issue of seaworthiness, due diligence must be exercised at all inspections of the vessel whenever they are made, and not just before and at the beginning of the voyage.

3.3.8 CLAUSES EXCLUDING FORCE MAJEURE

Many charterparties contain clause excluding the carrier from liability for loss of or damage to the goods arising from force majeure(257). A topical force majeure clause read: "The Carrier shall be relieved of liability for any loss or damage if and to the extent that such loss or damage was caused by force majeure or any other cause or causes beyond the control of the carrier."

Problems arising regarding this particular concept lie not with the recognition that the force majeure should excuse performance of a contract(258) but in determining what constitutes according to the party's intent, a force majeure which will excuse the carrier from liability. As Donaldson J observed(259):

> "The precise meaning of this term, if it has one, has eluded the lawyers for years."

Governmental acts and regulations by both the national and local authority have been held to constitute force majeure(260); likewise as to actions by foreign powers including governmental decrees and operations of war(261);

natural causes such as abnormal storm or tempest(262), flooding which inhibits shipment from river ports(263); human agencies such as a strike, a riot(264). This breadth of application of the doctrine makes difficult an attempt to formulate a statement of the requisites governing its application. But the difficulty may be largely avoided, as far as U.A.E. law is concerned, if the expressions of the courts are used as a basis of the departure. Generally the rule is stated that, to constitute force majeure, the event must render performance absolutely impossible. This would appear to follow from the wording of Art. 273(1) of the Civil Code which provides that the debtor may be discharged if he is prevented from performing by an event of force majeure. In addition, the event must also arise independently of the will of the party who relies upon it and be not subject to his subsequent control, and it must be of such a nature that its occurrence could not reasonably have been foreseen at the time the contract was formed(265).

In keeping with the foregoing, the fact that performance may be made considerably onerous for one of the parties by governmental acts, natural causes, or human agencies, will generally not operate to excuse such party from the required performance(266). For instance, the requisitioning of the ship will not discharge the shipowner's obligation, provided he has another vessel, where he is not required to deliver this specific ship. Since the event must be shown to be insurmountable in its nature to support an

application of the theory, it has been held that, although a strike may result in a failure of performance by the carrier, he must succeed in avoiding the presumption that it is subject to his control by showing that it is not confined to his crew members. Likewise, if performance may reasonably be completed in some other fashion than that contemplated, but not required, the prevention of the anticipated mode of performance will not justify a failure to perform. The requirement that the event be beyond the control of the obligor borders closely on the requirement of absolute impossibility. If the obligor may be able to control a strike by making the concessions demanded, may it be successfully contended that performance has been rendered impossible by this occurrence(267)? Or if performance can be rendered in some other fashion than that contemplated and which has been prevented, can it be said that impossibility exists? Under such circumstances, however, the courts should apply the test of reasonableness. If it would be unreasonable, under the circumstances, to compel an obligor to resort to some other mode of performance because this would subject him to an undue hardship, then he will not be required to do so. Thus it may be said that, when it is made to appear that the party has been reasonably diligent in attempting to overcome the obstacle, and the court is convinced of his good faith, the requirement that the event be beyond the control of the party bound may be treated as satisfied.

In contrast to the approach adopted in U.A.E., English courts have been unwilling to give 'force majeure' a wide meaning. In *Lebeaupin v. Richard Crispin & Co.*(268), McCardie J, having quoted from Goirand's French Commercial Law the meaning of 'force majeure', said(269):

> "I take it that a 'force majeure' clause should be construed in each case with a close attention to the words which precede or follow it, and with due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument."

Bailhache J. in *Matsouki v. Priestman & Co.*(270) expressly declined to give the words 'force majeure' the same meaning as that of the Continent, or the same meaning as act of God or vis major. In *The Concadoro*(271) 'force majeure' was interpreted by reference to article 2 of the Hague Convention 1907, which was incorporated into the contract, while the court in *Marifortuna Naviera SA v. Government of Ceylon*(272) made it clear that the words 'force majeure' were redundant by virtue of the incorporation into the contract of article IV of the Hague Rules whose meaning is much wider than 'force majeure'. Furthermore, in one case(273) where the contract was made subject to various 'force majeure' conditions the court found that that particular phrase was so obscure as to be incapable of any precise meaning. Because of the obscurity in the meaning of 'force majeure the court reasoned that the parties had not intention to be bound and therefore no agreement was made between the parties with the consequence that no contract was created.

The reasoning behinds the courts' approach is that

English law, has viewed the doctrine of "impossibility of performance" as a rare exception or limitation to the premise that a contractual obligation is an absolute obligation(274).

Since the decision in *Taylor v. Caldwell*(275), which arguably created the English doctrine of impossibility (now subsumed within the familiar generic term of "frustration"), it has become apparent that there are fundamental theoretical distinction between the effect of impossibility in civil law jurisdictions and its effect under the English system of common law. The principal difference is that the entire contract is automatically terminated at common law if a frustrating event occurs subsequent to the formation of the contract(276). Thus, an event which effects a frustration at common law is relevant to termination of the contract, and not to exoneration of a party from liability.

Nevertheless, it is submitted that, despite its mercurial nature in English law it is desirable to contract with rather than without a force majeure clause(277). The reason for this is that English courts, at least, will not apply the doctrine of frustration unless they consider that to hold the parties to further performance would , in view of the changed circumstances, alter the fundamental nature of the contract, and the resultant obligations arising in respect of performance(278). It is this approach which has made it difficult, if not impossible, to predict circumstances in which a contract will be declared to have been frustrated.

Perhaps as a response to the uncertainty of operation of the frustration principle, there has been some judicial encouragement for the practice of using force majeure clauses to define the circumstances in which the parties themselves would require either a termination, suspension or modification of their contractual obligations(279).

'Force majeure' clauses are interpreted strictly and the person relying on them as an excuse for performance bears the burden of proof(280) . He must establish a causal connection between the 'force majeure' and his failure to perform.

3.3.9 LIMITATION CLAUSES

Most contracts of affreightment contain a considerable group of clauses which are more of a procedural than a duty-defining nature. They are designed to limit the damage to the carrier that will flow from a claim by the injured party than to limit the duties undertaken. These procedural clauses seek to limit the time the carrier exposed to liability, the amount which can be claimed or the method of making the claim rather than attempt to provide an exemption from a liability which has arisen. They are limitation rather than exclusion clauses.

3.3.9.1 TIME - BAR CLAUSES

There are a number of objectives of time bar clauses. McNair J.(281), pointed out that international trade disputes arose at ports all over the world, and great difficulty might be anticipated in obtaining facts if some limit was not put on the time within which claims could be presented. The timely presentation and investigation of claims is relevant consideration whenever the alleged breach occurs. Time bar clauses also, as Lord Wilberforce observed(282), meet an obvious commercial need, namely to allow prospective defendants, after the specified period, to clear their books(283).

Unlike English Courts, U.A.E. Courts, prior to the enactment of the Maritime Code, repeatedly refused to allow

the carrier to invoke time-limits clauses either those which imposed by International Conventions such as the Hague Rules or clauses which the carrier inserted in the contract of carriage, on the ground that no such time limit was existed under U.A.E. law within which an action had to be taken to recover damages from a carrier(284).

While under English common law, the courts upheld the time-bar clauses(285), they regarded them as having a draconian effect and treated them as exception clauses and interpreted them restrictively against the proferens(286). They will limit only the precise claim expressed to be barred or extinguished(287).

Time-Bar Under U.A.E. Maritime Code And U.K. COGSA

U.A.E. Maritime Code and U.K. COGSA both impose a one year time limit for taking an action against the carrier to recover damages.

The courts in both countries would refuse, in cases subject to Maritime Code and COGSA, to accept the validity of clauses requiring claims against the carrier for damages to be taken within a period less than one year, on the ground that such clauses are contrary to the provisions of Maritime Code Article 278(1) and Article III Rule 8 of COGSA which forbid the carrier to make any agreement which would lessen his liability otherwise than as provided by the two Acts.

But can the carrier extend the one-year time limit? Article III Rule 6 of COGSA provides that the one year time

limits imposed by the Act may be extended by an agreement between the parties. No such provision appears in U.A.E. Maritime Code. However, according to Article 279(1) the carrier at liberty to assign his rights and immunities or to increase his obligations prescribed in the Law, provided that this embodied in the bill of lading issued to the shipper. This Article means that the carrier may surrender beforehand his right to rely on the one year time limit and agree with the shipper to prolong the prescriptive period. It is true that under U.A.E. Civil Code one can not renounce a prescription not yet acquired(288); that the stipulation for a longer prescriptive period amounts to a waiver of prescription before it has occurred is void; however, if a carrier says that an action against him may be brought within two years of the delivery of the goods, it does not seem that there is any reason of public policy which would exclude an agreement giving the cargo-owner a longer delay. And it does not appear that an agreement like this is such renunciation of prescription as the law intends to prohibit.

3.3.9.2 CLAUSES LIMITING AMOUNTS OF DAMAGES

Most of the contract of carriage have provisions limiting the maximum amount of damages which can be recovered in the event of a claim.

In contrast to the case of stipulations excluding liability, it has never been disputed either in U.A.E. or

England that a conventional limitation of the amount of damages to be recovered is valid. It has been said:

> "The reason for imposing such standards [of a strictness] on [total exclusion clauses] is the inherent improbability that the other party to contract including such a clause intended to release the proferens from a liability that would otherwise fall on him. But there is no such high degree of improbability that he would agree to a limitation of the liability of the proferens, especially when...the potential losses that might be caused by the negligence of the proferens or its servants are so great in proportion to the sums that can reasonably be charged for the service contracted for."(289)

However some exceptions of a general nature have been made by the courts in U.A.E.. A limitation of the amount recovery is inoperative if the cargo-owner can show wilful misconduct by the carrier or his employees. It is likewise inoperative in cases of gross fault, which is assimilated to wilful breach. Public policy is a sufficient reason for those exceptions, as in the case of stipulations purporting to exclude liability where interests of the same kind are at stake. Also by way of exceptions, the courts refuse recognition to a stipulation limiting recovery when the amount is too little that it renders insignificant the reparation owed to the cargo-owner(290).

Under English common law, in contrast, no restrictions are made. The courts would seem likely to uphold clauses limiting the amounts of damages even in cases where the carrier committed wilful breach or where the amount of recovery is well less than the value of the goods. For

example in *Ailsa Craig Fishing Co., Ltd. v. Malvern Fishing Co., Ltd.*(291), the respondents, a security company, undertook to provide continuous security cover in respect of the appellants' fishing vessel in Aberdeen harbour, but by reason of their negligence and breach of contract the vessel fouled the boat berthed next to her and sank. The loss of the vessel cost the appellants £55,000. The House of Lords nevertheless upheld an exception clause in the respondents' standard conditions of contract whereby their liability 'whether under the express or implied terms of the contract, or at common law or in any otherway' for any loss or damage was limited to £1,000.

However, where the Carriage of Goods by Sea Act, 1971 applies the carrier would not be entitled to limit his liability provided for in the Act if the loss of or damage to the goods resulted from his act or omission done with intent to cause damage, or recklessly and with knowledge that damage would probably result(292). Further, clauses limiting the carrier's liability to less amount than that provided for in Article IV Rule 5(a) are invalid by reason of Article III Rule 8.

1 A. Weill, Civil Law - The Obligations (1971), pp. 466-67.

3.1 Incorporation Of Exclusion Clauses

2 Yates, Exclusion Clauses in Contracts, (1982) p.45 et seq. Anson's Law of Contract, pp. 139-143. Treitel, Law of Contract, (1987) p. 167 et seq.

3 Yates, op.cit. p. 54. Treitel, op.cit. p. 167.

4 (1964) 1 All E.R. 430 at p. 437; see also *L'Estrange v. F. Graucob Ltd.*,(1934) 2 K.B. 394,403 per Scrutton L.J.

5 *Parker v. South Eastern Railway Co.*, (1877) 2 C.P.D. 416, 421 per Mellish L.J. :

> "In an ordinary case, where an action is brought on a written agreement which is signed by the defendant, the agreement is proved by proving his signature, and, in the absence of fraud, it is wholly immaterial that he has not read the agreement and does not know its contents."

6 (1879) 5 Q.B.D. 38 at p. 40.

7 Chorley & Giles' Shipping Law (1987) p. 174.

8 Halsbury's Laws of England, 4th edn., p. 328.

9 *Leduc v. Ward* (1888) 20 Q.B.D. 475; see also *Hain S.S. Co. v. Tate & Lyle Ltd.*,(1936) 2 All E.R. 597, 630 per Lord Atkin.

10 See Wilson, Carriage of Goods by Sea (1988) p. 225.

11 *Case no. 11 (1981) Dubai C.A.; Case no. 255 (1982) Dubai C.A.;*see also *Egyptian Supreme Court, case no. 453 (1981).*

12 *The Njegos* (1936) P. 90, at pp. 102-103 per Sir Boyd Merimman.

13 Wilson, supra note 10, p. 225.

14 E.g. where the vessel is chartered for a specified voyage in the charterer's line and a bill of lading with an incorporation clause is issued to the line's agent.

15 *The Merak* (1965) P. 223, per Sellers L.J.

16 Wilson, supra note 10, p. 225.

17 Cost and freight. Under such term the exporter (seller) pays the cost and freight necessary to convey the goods to the specified port of shipment and bears all the risk up to this point. The importer (buyer) responsibilities commence when the goods pass the ship's rail at the port of shipment and bears all the cost and risk from this point onwards.

18 In the case of a FOB Sale where the buyer is to charter a vessel at his own expense, an incorporation clause may not give rise to special problems for such buyer.

19 However, in *Finska Cellulosaforenigen v. Westfield Paper Co. Ltd.* (1940) 4 All E.R. 473, a c.i.f. seller tendered a bill of lading which contained the words "All conditions and exceptions as per charterparty." It was held that the seller was not obliged to tender the charterparty "in the circumstances of this case". These were that there had been a long course of dealing between the parties on the terms of a standard form of charterparty, which was well known to the buyer and which had been used in the present transaction. The case leaves open the possibility that, but for these circumstances, the seller would have been obliged to tender the charterparty. Accordingly, a tender of bills of lading showing the destination to be "as per charterparty" was held to be bad as it did not enable the buyer to tell from the face of the documents whether they contained or evidenced a contract of carriage to the c.i.f. destination. See *S.I.A.T. di del Ferro v. Tradax Overseas S.A.* [1980] 1 Lloyd's Rep. 53, 56.

20 International Rules for Interpretation of Terms frequently used in Foreign Trade (export sale) Contracts. These Rules are drawn by the International Chamber of Commerce.

21 *The Emmanuel Colocotronis (No.2)*[1982] 1 Lloyd's Rep. 286, 289 per Staughton J; see also *The Miramar* [1984] 1 Lloyd's Rep. 283, 287 per Sir John Donaldson M.R.

22 (1895) 2 Q.B.539.

23 (1864) 17 C.B. (N.S.) 163.

24 Ibid., at p. 177,

25 [1891] 1 Q.B. 283.

26 Ibid., at p. 290.

27 Ibid., at p. 296.

28 [1898] 1 Q.B. 150.

29 Ibid., at p. 160.

30 [1906] P. 292.

31 Ibid., at p. 300.

32 *Hogarth Shipping Co. Ltd. v. Blyth, Greene, Jourdain & Co. Ltd.*, [1917] 2 K.B. 534.

33 Ibid., at p. 551.

34 Enid Marshall, "Incorporation of Arbitration Clauses into Bills of Lading", (1982) J.B.L 478, 482.

35 [1983] 2 Lloyd's Rep. 593.

36 Ibid., at p. 594, overruling the contrary view expressed by Staughton J., in *The Emmanuel Colocotronis (No.2)* [1982] 1 Lloyd's Rep. 286 at 292.

37 (1912) A.C. 1

38 Ibid., at p. 6 per Lord Loreburn L.C.

39 Idem.

40 [1971] 1 Lloyd's Rep. 1 ; see also *The Merak* [1964] 2 Lloyd's Rep. 527 at p. 531 per Russell L.J.

41 [1983] 2 Lloyd's Rep. 593.

42 [1989] 1 Lloyd's Rep. 103.

43 [1971] 1 Lloyd's Rep. 1 at p. 4.

44 [1984] 2 Lloyd's Rep. 129.

45 Ibid., at p. 134.

46 (1911) 16 Com.Cas. 292

47 [1928] 2 K.B. 371

48 (1889) 5 T.L.R. 677 at 677.

49 (1884) 15 Q.B.D. 154.

50 [1917] 2 K.B. 534.

51 Ibid., at p. 546.

52 (1924) 19 Ll. L.Rep. 26.

53 [1971] 1 Lloyd's Rep. 541.

54 Ibid., at p. 545.

3.2 Construcing Of Exclusion Clauses

55 Yates, supra note 2, p.123.

56 *N. E. Ry. v. Hastings* [1900] A.C. 260 at p. 263, per Lord Halsbury. See also Carver, p. 615 : "No evidence can be given to show that their real intention was different from that which appears in the writing, so far as that is clearly and unambiguously expressed."

57 *Dubai Supreme Court cases no. 108 and 109 (1989); Case no .93 (1977) Abu-Dhabi C.A.*

58 Carver, p. 61; *Alexandria Court of Appeal 3.6.1896.*

59 (1875) L.R. 19 Eq., at p. 465; *Alexandria Court of Appeal 13.6.1894.*

60 *Case No. 93 (1977) Abu-Dhabi C.A.*; see also Carver, p. 663.

61 *Hart v. Standard Marine Ins. Co.* (1889) 22 Q.B.D. 499. *Myers v. Sarl* (1860) 30 L.J.Q.B. 9 at p. 16 per Blackburn J. See also Carver, p. 656.

62 Article 258(1) of the U.A.E. Civil Code provides: "The criterion in (the construction of) contracts is intentions and meaning and not words and form". See also *case no.93 (1977) Abu-Dhabi C.A.; U.A.E. Supreme case no. 2, year 6 civil.*

63 See Carver, pp. 653-657 and the cases cited therein.

64 See *Lewis v. Great Western Ry* (1877) 3 Q.B.D. 195 at p. 202, per Bramwell L.J.:

> "I think it is a rule of evidence or law that where words are used which would comprehend some other than one necessarily exclusive meaning upon which the judges are to put interpretation, then,..., all the surrounding circumstances "between the parties, not only may, but must, be looked at to ascertain the meaning of those words when used in reference to those surrounding circumstances and that course of dealing."

65 (1877) 2 App. Cas. 742 .

66 Ibid., at p. 763.

67 (1954) 1 W.L.R. 492, C.A.

68 Ibid., at p. 496.

69 Karl Llewellyn in a review of Prausnitz, The Standardisation of Commercial Contracts in English and Continental Law (1937), (1939) 52 Har.L.R. 700 at p. 703. See also Wooldridge, 'Inequality of Bargaining Power in Contract', (1977) J.B.L. 312.

70 See Carver, p. 662. Yates, op.cit. p. 137.

71 (1883) 12 Q.B.D. 218 at p. 220.

72 [1981] 1 Lloyd's Rep. 131 at p. 134.

73 *Caterpillar Overseas S.A. v. Expeditor*, 318 F. 2d 720,723.

74 *Elderslie S.S. Co. v. Borthwick* [1905] A.C. 93.

75 [1908] A.C. 16.

76 See *Ailsa Craig Fishing Co. Ltd.*, [1983] 1 All E.R. 101 at p. 105, per Lord Fraser; *George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd.* [1983] 2 All E.R. 737 at pp. 741, 742, Lord Bridge.

77 See *case no. 93 (1977) Abu-Dhabi C.A.*

78 Carver, p. 657. Yates, op.cit. p. 149.

79 *Knutsford v. Tillmans* [1908] A.C. 406.

80 Nippon Yusen Kaisha B/L clause 3; Polcoalvoy C/P clause 9.

81 Nippon Yusen Kaisha B/L clause 4.

82 The Blue Funnel Line B/L clause 11.

83 [1908] A.C. 16.

84 Scrutton, (18 edn.) p. 216.

85 [1920] 25 Com. Cas. 212.

86 (1951) 1 K.B. 240, 246.

87 [1895] 1 Q.B. 749.

88 (1951) 1 K.B. 240, 246.

89 Quoted from Carver, p. 659.

90 *Thorman v. Dowgate S.S. Co.* [1910] 1 K.B. 410.

91 *Richardsons and Samuel & Co. Re* [1898] 1 Q.B. 261.

92 *Akt. Frank v. Namaqua Copper Co.* (1920) 25 Com.Cas. 212.

93 *Stage Line v. Foscolo, Mango* [1932] A.C. 328.

94 *Diana Maritime Corpn. v. Southerns* [1967] 1 Lloyds Rep. 114.

95 Quoted from Carver, p. 660.

96 *Norman v. Binnington* (1890) 20 Q.B.D. 475.

97 *Packwood v. Union Castle SS. Co.* (1903) 20 T.L.R. 59.

98 *The Cressington* [1891] P. 152.

99 *The Torbryan* [1903] P. 194.

100 Carver, p. 664.

101 [1953] 2 All E.R. 679, at p. 683, C.A.

102 (1899) 17 T.L.R. 571.

103 Carver, p. 664.

104 (1870) L.R. 6 Ex. 9.

105 *Nelson Line v. Nelson* [1908] A.C. 16, 19, per Lord Loreburn L.C.; *Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd.*, [1983] 1 All E.R. 101 at p.102 per Lord Wilberforce:

> "Whether a condition limiting liabilities effective or not is a question of construction of that condition in the context of the contract as whole. If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed...."

106 Per Lord Buckmaster in *L. & N.W. Ry v. Neilson* [1922] 2 A.C. 263 at p. 266; see also the decision of the court of Appeal in *Anglo-Saxon Petroleum Co. v. Adamastos Shipping Co.* [1957] 2 Q.B. 233.

107 Per Bowen L.J. in *Steinman v. Angier Line* [1891] 1 Q.B. 619; see also *The Xantho* (1887) 12 App.Cas. 503, 510, 515; *Hamilton v. Pandorf* (1887) 12 App.Cas. 518, 524, 526, 527; *Re Polemis and Furness, Withy* [1921] 3 K.B. 560.

108 *Smith v. South Wales Switchgear Ltd.*, [1978] 1 All E.R. 18.

109 [1952] A.C. 192 at 208.

110 [1978] 1 All E.R. 18 at 22, 26(disapproving certain statements in *Gillespie Bros & Co. Ltd., v. Roy Bowles Transport Ltd.* [1973] Q.B.D. 400 at 420, 421).

111 [1945] 1 K.B. 189 at 192.

112 Carver, p. 140; Lawson, Exclusion Clauses, (1979) at p. 28.

113 [1922] 2 K.B. 87 at 92.

114 [1961] 1 All E.R. 459.

115 [1921] 3 K.B. 560.

116 [1972] 1 All E.R. 399.

117 Ibid., at p. 406.

118 [1922] 2 K.B. 87 at 92.

119 [1972] 1 All E.R. 399 at p. 406.

120 Ibid., at p. 409.

121 Treitel, Law of Contract, 5th edn., p. 159; cf. Lawson, supra note 112, p. 27.

122 Treitel, supra note 2, p. 173.

123 *The Raphael* [1982] 2 Lloyd's Rep. 42 at 50, per May L.J.

124 [1980] 1 All E.R. 556.

125 Ibid., at p. 564.

126 [1980] 2 Lloyd's Rep. 573; see also *Mersey S.Co. v. Rea* [1925] 21 Ll.L.R. 375, where an exception of "all loss, however caused" was held sufficient to cover loss caused negligently; *Farr v. Admiralty* [1953] 1 W.L.R. 965, an exception "any damage...however caused which can be covered by insurance " was held to cover negligence; see further *The New York Star* [1980] 3 All E.R. 275 (P.C.); *The Oceanic Amity* [1983] 1 All E.R. 672.

127 [1983] 1 Lloyd's Rep. 310.

128 Ibid., at pp. 312-313.

129 See infra pp. 117-118.

130 [1932] A.C. 328 at p. 350.

131 But, however, where a word is used in the Convention in a context in which it had been judicially construed previously, it will be presumed that the word is intended by the Legislature to have the same meaning as previously given by the court. Lord Hailsham explained this in *Gosse Millard v. Canadian Merchant Marine* [1929] A.C. 223, 233 :

> "The words in question (management of the ship") first appear in an English statute in the Act now being considered; but nevertheless they have a long judicial history in this country....I am unable to

find any reason for supporting that the words as used in the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion."

132 *Maxine Footwear Co. v. Canadian Government Merchant Marine* [1959] A.C. 589, 603; *Buchanan v. Babco* [1978] A.C. 141 at p. 152, per Lord Wilberforce.

133 [1961] All E.R. 495 at p. 505. This rule was also followed by United State Supreme Court in *Herd v. Krawill Machinery Co.*, 359 U.S. 297 (1959), at 300:

"The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921 as amended by the Brussels Convention of 1924. The effect of those Rules was to uniform bills of lading to govern the rights and liabilities of carries and shippers inter se in international trade."

134 [1978] A.C. 141 at pp. 289-290.

135 Per Lord Wilberforce in *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251 at p. 278 :

"I think that it would be proper for us, ...to recognise that there may be cases where such travaux preparatoires can profitably be used. These cases should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the travaux preparatoires clearly and indisputably point to a definite legislative intention."

136 [978] A.C. 141 at p. 161; see also *Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd.*, [1954] 1 Lloyd's Rep. 321 at p. 330, per Devlin J.

137 [1978] A.C. 141.

138 Ibid., at pp. 294-295; see also ibid., at pp. 274, 275 per Lord Wilberforce.

3.3 Some Common Exception Clauses

3.3.1 Negligence Clauses

139 See Cole, The Carriage of Goods by Sea Act, (1937) p. 11.

140 See *case no. 36 (1979) Dubai C.A.; Case no. 20 (1979) Dubai C.A.* See also to the same effect *Supreme Court of Kuwait*, case no. 27, year 80 (1981).

141 Egyptian jurisprudence, in contrast, is in favour of the validity of clauses excluding the carrier's liability even for intentional and gross faults of his servants and agents (see *Mix C.A., 30 Jan. 1924)* unless the master commits his act of fault while he is in fact under the control of the carrier, e.g., when the ship is in port and is in charge of the carrier (see *Alexendria C.A., 19 Nov. 1902*); or the fault of the master or crew involves at the same time the fault of the carrier, e.g., where the carrier has employed a master who has no knowledge and capacity in running the ship (see *Alexendria Commercial Court, 11 may 1925; Mix C.A., 13 Jan. 1917).*

142 Ali Awad, Maritime Law, (1987) p. 259.

143 Kahn-Freund, The Law of Carriage by Inland Transport (1965) (1965). 215.

144 Graveson, Bill of Lading and the Unification of Maritime Law in the English Courts, in Conflict of Laws and International Contracts, (1949) pp. 59, 64.

145 If the negligent act is within the exception the carrier is not liable for the damage so caused, even though the act be culpably reckless or felonious (see for example *Marriott v. Yeoward* [1909] 2 K.B. 987 where the court held that the exception of any act, neglect or default whatsoever of the servants protected the shipowners even if their own crew member had stolen a passenger's luggage.

146 Anson's Law of Contract, (1984) p. 158

147 [1959] A.C. 576.

148 *Suisse Atlantique Societe d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

149 [1967] 1 A.C. 361, at p. 435. See also ibid., at pp. 394, 414, 415, 429, and *Photo Production Ltd., v. Securicor Transport Ltd.*, (1980) A.C. 872.

150 See generally Simpson, History of the Common Law of Contract (1975) 445-49; Anson's, supra note 146, pp. 14-16. See also *Harrison v. Cage*, 88 E.R. 1271 (K.B. 1697) and *Wichals v. Johns*, 78 E. R. 938 (Q.B. 1599), both standing for the proposition that " a promise against a promise" is a good consideration and is a basis for an action by either party for nonperformance.

151 *Suisse Atlantique v. Rotterdamsche* [1967] 1 A.C. 361, at p.432 .

152 *Photo Production v. Securicor* [1980] 1 All E.R. 556, at p. 567 G. See also ibid., at p. 570 A, per Lord Salmon.

153 For an explanation of these expressions see infra p. 395 et seq.

154 *Firestone Tyre Co. v. Vokins* [1951] 1 Lloyd's Rep. 32, 39.

155 See Coote, Exception Clauses, (1964) p. 6, where the learned author questioned this approach because he considered that an exclusion clause would not let any contractual duty to arise which has been excluded therefore, no right to call for the performance of that duty or ousting the jurisdiction of the courts would arise.

156 *Case no. 156 (1977) Abu-Dhabi C.A.*

3.3.2 Clauses Excluding Unseaworthiness

157 At Common law it is an implied term of a contract of carriage that the ship shall be seaworthy. This requirement is absolute; the ship must be seaworthy and it is not enough that every effort has been made to make it so. See *Steel v. State Line S.S. Co.*(1877) 3 App. Cas. 72.

158 *Maving v. Todd* (1815) 1 Stark 92, Vol. 171 E.R. 405.

159 *Steel v. State Line S.S. Co.* (1877) 3 App. Cas. 72, at p. 89.

160 *Chartered Bank of India v. British India S.N. Co.*, [1909] A.C. 369 at p. 375.

161 [1905] A.C. 93, H.L.

162 Ibid., at p. 96.

163 [1908] A.C. 16.

164 Ibid., at p. 19. See also *The Rossetti* [1972] 2 Lloyd's Rep. 116 at p. 118, Brandon J:

> "If the true position is that one part of the Bill of Lading says one thing about unseaworthiness and the other part of the Bill of Lading says another thing about seaworthiness then...the result is that there is no clear exception. There are conflicting provisions and conflicting provisions do not produce a clear exception."

165 *Svenssons v. Cliffe S.S. Co.* (1932) 1 K.B. 490, at p. 498.

166 *Waikato (Cargo Owners) v. New Zealand S.S. Co.* [1899] 1 Q.B. 56.

167 *The "Christel Vinnen"* (1924) P. 208.

168 Carver, p. 127.

169 (1870) LR 3 PC 234, at p. 239.

170 *Petrofina S.A. v. Compagnia Italiana Trasporto* (1937) 42 Com. Cas. 286, 293 per Lord Wright.

171 See *Wiener & Co v. Wilsons & Furness-Leyland Line, Ltd.*, (1910) 15 Com. Cas. 294; *Rathbone v. MacIver* [1903] 2 K.B. 378; *Cosmopolitan Shipping Co. (Inc.) v. Hatton & Cookson Ltd. (Liverpool)* (1925) 35 Comm.Cas. 117.

172 *Caro ex Laertes* (1877) 12 P.D. 187; *Bond, Connolly v. Federal S.N. Co.* (1905) 21 T.L.R. 438.

173 [1952] 1 Lloyd's Rep. 485.

174 Ibid., at p. 497. But see in contrast per Pilcher J. in *Varnish v. Kheti* (1949) 82 Ll.L.Rep. 525 where the learned Judge held that a clause exempting the ship from liability for damage to onions "even if such...damage...result from a cause for which but for this special agreement to the contrary, the steamer would have been liable" covered damage due to unseaworthiness. It is, however, submitted that Pilcher was over-generous and liberal in allowing the shipowner the use of the clause. It is difficult to conceive how a clause, couched in such vague and indirect terms which could cover a host of possibilities can qualify as being "plain", clear and unambiguous.

175 [1914] 1 K.B. 541.

176 (1937) 42 Com.Cas.286, 291 per Lord Wright M.R.

177 See *The Carolina* (1912) 1 K.B. 229 p. 240 per Buckley L.J.

178 Articles 227, 245 and 272(1).

3.3.3 Perils Of The Sea...etc

179 Wilson, supra note 10, p. 242.

180 *Hamilton v. Pandorf* (1887) 12 App. Cas. 518, 527.

181 Wilson, supra note 10, p. 243.

182 (1885) 16 Q.B.D. 629 at p. 633; approved by Lord Bramell in *Hamilton v. Pandorf* (1887) 12 App.Cas. 518 at p. 526; and Lord Macnaghten, ibid., at p. 531.

183 Scrutton,(18th edn.) p.228.

184 *The Xantho* (1887) 12 App. Cas. 503, at p. 509.

185 See Chorley & Giles, supra note 7, p. 206.

186 Bailey in his work 'Perils of the sea', defines them 'as all losses caused by the action of wind and water acting on the property insured under extraordinary circumstances, either directly or imediately, without the intervention of other independent active external causes.' (Reported in 'Law relating to Bills of Lading' by Leggett).

187 Scrutton, (18th edn.) p. 226.

188 *The Xantho* (1887) 12 App. Cas. 503.

189 Scrutton, (18th edn.) p. 226.

190 Carver, p. 166; Wilson, supra note 10, p. 243.

191 *The Chasca* (1875) 32 L.T. 836; *Thompson v. Whitmore* (1810) 3 Taunt. 227.

192 Story, on Bailment, s. 512. See also *Smith, Hogg v. Black Sea & Baltic* [1940] A.C. 997.

193 See Carver, p. 166

194 *The Marpesia* (1872) L.R. 4 P.C. 270; *The Europa* (1850) 14 Jur. 629.

195 *The Marpesia* (1872) L.R. 4 P.C. 212, 220; see also *Thomas Powell v. The Cuba* (1886) 2 Mar. L.C. 344.

196 *Laveroni v. Drury* (1852) 8 Ex. 166.

197 *Hamilton v. Pandorf* (1887) 12 App. Cas. 518 at p. 525 per Lord Watson.

198 *Hamilton v. Pandorf* (1887) 17 Q.B.D. 670.

199 *Supreme Court of Kuwait, case no 155, year 83 (1984); Egyptian Supreme Court, case no 272 (1966).*

200 *Case no. 379 (1983) Abu-Dhabi C.A.*

201 Section 512 (a).

202 Carver, p. 166.

3.3.4 Liberty Clauses

203 See *Joseph Thorley Ltd., v. Orchis S.S. Co.* [1907] 1 K.B. 243; *Hain v. Tate & Lyle* (1936) 52 T.L.R. 617.

204 *Glyn v. Margetson* (1893) A.C. 351.

205 *U.S. Shipping Board v. Bunge y Born Ltd.*, (1924) 32 L.T. 323, at p. 355 per Bankes L.J.

206 E.g. *Krell v. Henry* [1903] 2 K.B. 740.

207 In *Connolly Shaw v. Nordenfjeldske* (1934) 50 T.L.R. 418.

208 (1906) 11 Com.Cas. 719.

209 (1893) A.C. 351.

210 Ibid., at p. 355. This reasoning was supported by the dicta of Lord Esher, M.R. in *Leduc v. Ward* (1888) 20 Q.B.D. 475, at pp. 480-481, to the effect that the object of carriage from port to port is that the goods may be sold or dealt with on arrival; to effectuate this it must be possible to estimate the time of arrival in the ordinary course of voyage. Giving excessively wide interpretation to a liberty clause would mean that the business could not be effectively carried on.

211 See *Hadji Ali Akbar v. Anglo-Arabian SS Co.* (1906) 11 Com.Cas.219.

212 [1956] A.C. 266. See also *Connoly Shaw v. A/S Det Nordenfjeldske* (1934) 49 Ll.L.R. 183.

213 (1888) 20 Q.B.D. 475. See also *Davis v. Garrett* (1830) 6 Bing. 716; *Glynn v. Margetson* [1893] A.C. 351; *The Dunbeth* [1897] P. 133; and *Morrison v. Shaw*, Savill [1916] 2 K.B. 783.

214 (1924) 32 L.T. 323.

215 (1934) 49 Ll.L.R. 183.

216 See Carver, p. 1497 et seq.

217 (1974) 1 Lloyd's Rep. 185.

218 [1917] 1 K.B. 688.

219 [1927] A.C. 1.

220 (1915) 21 Com.Cas. 344.

221 See *Stuart v. British and African S.N. Co.* (1875) 32 L.T. 257.

222 The Courts in U.S. also support this view. It was upheld in *Hellenic Lines Ltd., v. United States*, 512 F. 2d 1196 (2d Cir. 1975), that the 'Liberty clause must be construed in light of the carrier's basic

duty, sec. 3(2) to properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried in line with the agreement of the parties.

223 The same view was expressed by the U.S. Court of Appeal (Ninth Circuit) in *W.R. Grace & Co. v. Toyo Kisen Kabushiki Kaisha* , 1925 A.M.C. 1420 when it held that a liberty provision would be given effect only to the extent that it did not conflict with (1) the apparent intent of the shipper and the carrier as incorporated in their contract of carriage, (2) the provisions of the Harter Act, or (3) the purpose and policy of the general maritime law.

3.3.5 Arrest And Restraints Of Princes...etc

224 Carver, p. 175.

225 *Nesbitt v. Lushington* (1792) 4 T.R. 783. See also *Societe Belge de Beton v. London and Lancashire Ins.*, (1938) 158 L.T. 352. A seizure of property by the owner's workmen in the Spanish Civil War, which was later confirmed by the Spanish Government, was held to be a 'restraint of people'.

226 (1870) 23 L.T. 251, at p. 254.

227 *Pesquerias y Secaderos v. Beer* [1949] 82 Ll.L.Rep. 501.

228 *Nesbitt v. Lushington* (1792) 4 T.R. 783.

229 *Rickards v. Forestal* (1942) A.C. 50, the detention of the ship was held to be a 'restraint of princes'.

230 *Powell v. Hde* (1855) 5 E.B. 607; *Watts v. Mitsui* [1917] A.C. 227.

231 See *Sanday & Co. v. British & Foreign Marine Ins. Co.* [1915] 2 K.B., at p. 802, per Lord Reading C.J..

232 *Furness v. Rederiaktiebolaget Banco* [1917] 2 K.B. 873.

233 [1942] A.C. 50 at p. 81

234 Scrutton, (18 edn.) p. 224.

235 See *British & Foreign Marine Ins. Co. v. Sanday & Co.* [1916] A.C. 650; *Symington Car v. Union Insurance Society of Canton* [1928] 34 Com. Cas. 23.

236 *Miller v. Law Accident Ins. Co.*, [1902] 2 K.B. 694.

237 *Finlay v. Liverpool Co.*, [1870] 23 L.T. 251.

238 See *Crew v. G.W.S.S. Co.* [1887] 4 T.L.R. 148.

239 *Backer, Gray v. London Assurence* [1918] A.C. 101, at pp. 114, 115.

240 [1896] 2 Q.B. 326.

241 [1917] A.C. 227, at p. 236. In this case a vessel had been chartered to ship a cargo from a port in the Sea of Azov to Japan, the owner withdrew the vessel from the charter because of a fear that the Turkish government was on the point of closing the Dardanelles with the result that his ship would be trapped in the Black Sea. Although the House of Lords were of the opinion that the shipowner's apprehension was reasonable, they held that the withdrawal was not covered by the exception 'restraint of princes'.

3.3.6 Act Of War

242 See *Baxter , Fell v. Galbraith* (1941) 70 Ll.L.Rep. See also Carver, p. 545 et seq.

243 [1958] 161 F. Supp. 932; see also *Frota Nacional de Petroleitos v. Skibsaktieselskabet* [1957] 1 Lloyd's Rep. 1.

244 See Abd- alRashid Ma'mun, Causation in Civil Liability, (Cairo).

245 [1916] 2 A.C. 397.

246 Ibid., at p. 404.

3.3.7 Clauses Excluding Latent Defect

247 (1922) 13 Ll.L.Rep. 363.

248 (1937) 58 Ll.L.R. 188

249 See *The Christel Vinnen* [1924] P. 208.

250 *Waikato (Cargo Owners) v. New Zealand Shipping Co.*, [1899] 1 Q.B.56.

251 (1887) 12 P.D. 187.

252 (1905) 21 T.L.R. 438, at p. 440.

253 [924] P. 208.

254 Ibid., at p. 212.

255 [1952] 1 Lloyd's Rep. 485.

256 (1922) 13 Ll.L.R. 363.

3.3.8 Clauses Excluding Force Majeure

257 Force majeure is not a term of art in English law (see *Podar and Tagher, Re*[1949] 2 K.B. 277, 286 per Lord Coddard C.J.) and there is some discussion at to whether force majeure clauses are or are not exclusion clauses (see *Fairclough Dodd & Jones Ltd. v. J.H. Vantol Ltd.*, [1956] 3 All E.R. 921, H.L.

258 Article 273 (1) of the U.A.E. Civil Code

259 *Thomas Borthwick (Glasgow) Ltd. v. Faure Fairclough Ltd.*, [1968] 1 Lloyd's Rep. 16 at 28.

260 *Walton (Grain) Ltd. v. British Italian Trading Co.*, [1959] 1 Lloyd's Rep. 223; *Coloniale Import-Export v. Loumidis Sons* [1978] 2 Lloyd's Rep. 560.

261 *Zinc Corporation v. Hirsch* [1916] 1 K.B. 541, 554; *Yrazu v. Astral Shipping Co.*, (1904) 20 T.L.R. 153 (seizure).

262 *Lebeaupin v. Crispin & Co.*, [1920] 2 K.B. 714.

263 *Alferd C. Toepfer v. Peter Cremer* [1975] 2 Lloyd's Rep 18; *Avimex S.A. v. Dewulf & Cie* [1979] 2 Lloyd's Rep. 57.

264 *Matsoukis v. Priestman& Co.*, [1915] 1 K.B. 681; *Torquay Hotel Co.Ltd. v. Cousins* [1969] 2 Ch. 106.

265 *Supreme Court of Kuwait, case no. 118 (1981).*

266 *Brauer & Co. (Great Britain) Ltd. v. James Clarke (Brush Materials) Ltd.*, [1952] 2 All E.R. 497, C.A.; *Tsakiroglou & Co. Ltd., v. Noblee & Thorl GmbH* [1962] A.C. 93, H.L.

267 *B. & S. Contracts and Design v. Victor Green Publictions* [1984] 1 C.R. 419, C.A.

268 [1920] 2 K.B. 714.

269 Ibid., at pp. 719-20.

270 [1915] 1 K.B. 681.

271 [1916] 2 A.C. 199 (PC).

272 [1970] 1 Lloyd's Rep. 247.

273 *Nicolene Ltd. v. Simmonds* [1953] 1 Q.B. 543.

274 See B. Nicholas, "Rules and Terms--Civil and Common Law", (1974) 48 Tul. L. Rev. 946, at 954-955.

275 (1863) 3 B. & S. 826.

276 An analysis of the consequences of termination on the basis of frustration is to be found in *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*, [1970] 1 Q.B. 447.

277 See B. Cartoon, "Drafting an Acceptable Force Majeure Clause", 1978 J.B.L. 230.

278 *Tsakiroglou & Co. v. Noblee Thorl G.m.b.H* [1962] A.C. 93, at p. 115.

279 E.g. *Fairclough Dodd and Jones Ltd., v. J. H. Vantol Ltd.*, [1957] 1 W.L.R. 136, at 143 per Lord Tucker.

280 *Brauer & Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd.*, [1952] 2 All E.R. 497, C.A.; *Tradax Export S.A. v. Cook Industries Inc.*, [1982] 1 Lloyd's Rep. 385, C.A.; *Contracts and Design v. Victor Green Publications* [1984] 1 C.R. 419, C.A. *Avimex S.A. v. Dewulf & Cie* [1979] 2 Lloyd's Rep. 57; *Toepfer v. Schwarze* [1980] 1 Lloyd's Rep. 385, C.A.; *Bunge A.G. v. Fuga A.G.* [1980] 2 Lloyd's Rep. 513.

3.3.9.1 Time-Bar Clauses

281 *Metalimex Foreign Trade Corp. v. Eugenie Maritime Co. Ltd.*, [1962] 1 Lloyd's Rep. 378, at p. 386.

282 *Aries Tanker Corp. v. Total Transport Ltd.*, [1977] 1 W.L.R. 185, H.L.

283 And see *The Simonburn* [1973] 1 Lloyd's Rep. 392 at p. 394, per Lord Denning, M.R.

284 *Case no. 7 (1979) Dubai C.A.; Case no. 34 (1980) Dubai C.A.; Case no. 111 (1981) Dubai C.A.*

285 *Atlantic Shipping v. Louis Dreyfus* [1922] 2 A.C. 250, H.L.

286 See, e.g., *Hancock v. B.W. Brazier (Anerley) Ltd.*, [1966] 2 All E.R. 901, C.A. (faulty defects clause in building contract); *Szymanowski & Co. v. Beck & Co.*, [1923] K.B. 457, C.A. (time bar and non-rejection clause would not cover short delivery, only quality); *Bunge S.A. v. Deutsche Conti Handelsgesellschaft mbH (No. 2)* [1980] 1 Lloyd's Rep. 352 (arbitration clause in GAFTA 100, 125 not covering claims for failure to deliver soya beans following embargo), but cf. *Metalimex Forign Trade Corp. v. Eugenie Maritime Co.*, [1962] 1 Lloyd's Rep. 378 ("any claim...to be made...within 6 months after final discharge," no statement of consequences. Construed as a time bar provisions).

287 See, e.g., *Board of Trade v. Steel Bros. & Co. Ltd.*, [1952] 1 Lloyd's Rep. 87, C.A. (time limit on quality claims not covering defective packing).

288 Article 487 of the Civil Law states:

"(1) It is not permissible to waive a time-bar defence prior to establishment of the right to raise such defence, nor is it permissible to agree that a claim may not be brought after a period differing from the period laid down by law.

(2) It shall be permissible for any person having the competence to make dispositions in respect of his rights to waive the(time bar) defence, even by way of implied waiver, after the right has been established..."

289 Per Lord Fraser in *Ailsa* [1983] WLR 964 p. 970

3.3.9.2 Clauses Limiting Damages

290 *Case no. 140 (1982) Abu-Dhabi C.A.; Case no. 52 (1979) Dubai C.A..*

291 [1983] 1 ALL E.R. 101, H.L.

292 For an explanation of these terms see infra p. 421 et seq.

CHAPTER 4

THE HAGUE AND HAGUE VISBY RULES EXCEPTIONS AND LIMITATIONS

At the beginning of the twentieth century the bill of lading had become one of the valuable instruments in commercial circles. Its importance had been created by the custom of the Merchants and statutory enactments which declared that the bill represented title to the property of the goods in transit. Whoever held the bill of lading had the power to demand and the right to receive the goods therein represented, subject to whatever equities may have attached, when the goods reached their destination. The bill of lading was, as we have seen, subject to express, implied and statutory conditions. Due to these conditions the holder of the bill of lading would often find that when loss or damage occurred to his cargo the carrier or shipowner had absolute immunity for which he had expressly contracted. The obvious answer was that the holder should have acquainted himself with the provisions in the bill before accepting. However this was not always practical in commercial circles where time was usually pressing and transaction quick. In reality the only answer was legislation which would set out the minimum responsibilities which the shipowner or carrier would not be able to reduce and the maximum exemptions which he could not increase. To achieve this aim , an

International Convention was concluded at Brussels in 1924. The contents of the convention are commonly known as the Hague Rules . The object of these Rules was to protect cargo owners from widespread exclusion of liability by the carrier. This objective was achieved by requiring standard clauses to be incorporated into bills of lading, defining the risks which must be borne by the carrier and specifying the maximum protection he could claim from exclusion and limitation of liability clauses. Any attempt further to exclude or lessen such basic liability was declared to be null and void and of no effect.

The Hague Rules served their purpose reasonable well, but in the course of time, with changes in vessel design and communication technology, together with economic trends, certain weaknesses became apparent and these were dealt with by the introduction of an amended set of rules under a Protocol signed in 1968. These 1968 rules are known as the Hague Visby Rules to distinguish them from the original rules.

The Hague Rules were introduced in the U.K. by COGSA 1924 which was later repealed by COGSA 1971 which incorporates the Hague Visby Rules. Unlike U.K., UAE has never ratified Hague Rules or Hague Visby Rules but the basis of the Maritime Code 1981 regarding the carrier's liability is the Hague-Visby Rules.

The aim of this paper is to discuss the provisions of the Hague and Hague-Visby Rules relating to the Carrier's

liability and immunities in the light of the interpretation given by the courts in England and UAE. Reference will also be made to American decisions because, as we have said, that in drafting the Hague Rules the Harter Act, 1893, of the United States was used as a model. At the international conferences during which the Hague Rules were drafted, the Anglo-American representation was strong, and the convention is in its main parts a piece of Anglo-American legal thinking. It contains concepts and expressions peculiar to the Anglo-American legal systems, e.g., as regards the vessel ("seaworthiness"--Art. 3 (1)(a), the voyage ("deviation"--Art. 4(4)), the absolute common law liability changed into "due diligence" (Art. 3(1), the effect of freedom of contract ("exceptions clauses," e.g., "negligence in the management of the ship" Art. 4(2)(a)) and "Act of God" Art. 4(2)(d)). Therefore, if an interpreter of the statute had to base his interpretation of the Bills of Lading Convention on the law of some nations, he would indisputably have to choose the law of England or of the United States.

For the purpose of our work the following heading and Articles will be discussed:

1) The basis of the Carrier's Liability
2) Article III Rule 1 [Due Diligence].
3) Article III Rule 2 [Care of Cargo].
4) Article IV Rule 2(a) [Fault in the Navigation and Management of the Ship].

5) Article IV Rule 2(b) [Fire].

6) Article IV Rule 2(d)-(p) [Other Excepted Perils].

7) Article IV Rule 2(q) [Catch-all Exceptions].

8) Article IV Rule 4 [Reasonable Deviation].

9) Article IV Rule 5 [Limitation of Liability].

10) Article III Rule 6 [Time Limitation].

11) Article III Rule 8 [Clauses Lessening Carrier's Liabilities]

4.1 THE BASIS OF THE CARRIER'S LIABILITY

Art.III Rules 1 and 2 of the Rules state the broad affirmative grounds on which cargo may recover, and impose liability on the carrier only in case of negligence. Art. IV Rule 1 limits a certain sort of liability to a negligence basis(1). Art. IV Rule 2 (a) to (p) confer specific immunities, and (q) nails down the point by providing that the carrier shall not be responsible for loss or damage resulting from 'any other cause arising without the actual fault or privity of the carrier and without the actual fault or neglect of the agents or servants of the carrier...' Thus, these general immunities are now enjoyed as a matter of statute rather than of contract. Therefore, as suggested above, the test of the carrier's liability in contracts to which the Rules apply is negligence, that is, failure to reach the objective standard of reasonable care imposed by the Rules. The duty is of the personal, non-delegable kind,

in the sense that even though its exercise may lawfully be entrusted to others, whether servants of independent contractors, the carrier will remain liable fore any negligent acts or omissions of which his delegates may be guilty(2). Authority for these broad propositions that are nowhere in the Rules is to be found in the judicial interpertation of the domestic enactments.

4.2 ARTICLE III RULE I [DUE DILIGENCE]

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

4.2.1 THE NATURE AND MEANING OF DUE DILIGENCE

The concept of due diligence was apparently adopted in the English law to alleviate the carrier from the severity and harshness which emerge from the strict liability of the common law. As at common law, as we will see, the carrier's obligation to provide a seaworthy ship is an absolute one(3). The effect of this obligation has been that, unless it is excluded or qualified by clear and unambiguous language in the contract of carriage, a carrier, on proof of unseaworthiness, is responsible for all loss and damage resulting therefrom; it is immaterial whether he is at fault or not. His responsibility even extended to latent defects

not discoverable by the exercise of due diligence(4). Art. III, Rule I was specially designed to relieve the carrier of the onerous burden cast upon him by the absolute feature of the common law warranty of seaworthiness. The primary and obvious objective was to segregate(5) from COGSA the absolute warranty and to fill in its place a lower standard of responsibility, viz. 'to exercise due diligence(6) to make the ship seaworthy...etc.'

A neat illustration showing the difference between the absolute warranty of seaworthiness under common law and modified one under COGSA is the faulty compass in *Paterson S.S. Ltd. v. Robin Hood Mills*(7) causing the deviation and stranding of the ship. A ship with a faulty compass being not fit to meet the ordinary perils of the sea, the owners clearly would have been liable for unseaworthiness under the common law. Under the COGSA, however, the Privy Council held that only want of diligence in the compass adjuster, or in the captain who said he checked or verified the adjuster's work, would be material, and a finding adverse to the shipowner could (only) be arrived at upon the ground of want of diligence in these persons:

> "In this action personal fault or privity of the respondents (owners) being essential, both Courts have found that the respondents Company which employed a compass adjuster of repute and proved that before the accident it knew from his account requiring payment for his work that the work had been done, was entitled to be satisfied."(8)

It should be noted, however, that in spite of the abolition of the absolute undertaking by the carrier to

provide a seaworthy vessel, the manner in which the requirement 'to exercise due diligence' has been construed by the English Courts leaves little doubt as to the onerous nature of this duty. Because the courts have in effect ruled that ' exercise due diligence' is not limited to the owner or carrier alone but extends to his servants, agents and others whom he employs or ought reasonably to employ to secure the seaworthiness of the vessel(9) and extends to render her in all respects fit to carry the particular cargo with safety, having regard to the probable circumstances of the particular voyage contemplated. The negligence of any person concerned with the seaworthiness of the ship is to be construed as negligence on the part of the owner or the carrier(10) and, therefore, failure to exercise due diligence.

In the early days of COGSA 1924, Lord Wright in *Smith, Hogg*(11) Case predicted that the qualified exception of unseaworthiness will "only excuse against latent defect." Mackinnon L.J., in the Court of Appeal of the same case prophesised that:

> "The limitation and qualification of the implied warranty of seaworthiness, by cutting down to use 'due diligence on the part of the shipowner to make the ship seaworthy'...is more apparent than real, because the exercise of due diligence involves not merely that the shipowner personally shall exercise due diligence but that all his servants and agents shall exercise due diligence."(12)

Scrutton express doubts of the practical value of the variation as latent defects causing unseaworthiness are 'not likely to occur often(13).'

Having outlined the nature of due diligence the question remains is what does due diligence mean? This question, it is submitted, is a fact question which lies at the root of each case and must be decided in concrete from all the relative circumstances. Some jurists, however, did interpret the words 'due diligence' but their interpretations have not been satisfactory. For instance in *The Muncaster Castle*(14), Willmer L.J., proposed the following definition:

> "An obligation to exercise due diligence is...indistinguishable from an obligation to exercise reasonable care."

Morris L.J., had the same view

> "There is, I think, an analogy between a duty to take reasonable care to provide proper appliances and a duty to exercise due diligence to make a ship seaworthy."(15)

But, however, Lord Radclife in the House of Lords in the same case denied that due diligence could be equated with reasonable care even in general sense(16).

'Due diligence' in Carver's view is equivalent to reasonable diligence, which means 'not doing everything possible, but the doing of that which, under the ordinary circumstances, and having regard to the expense and difficulty can be reasonably required(17).' Yet, and as early as 1862 the Court of Appeal in *Carali v. Xenos*(18) had made reference to the use of 'due and reasonable diligence' in a manner which might lead one to suspect that there was some different between the two terms. In that case a shipowner had contracted to forward goods by foreign steamer, but missed the last steamer of the season; he had discharged

according to the custom of the port, but could by diligence have expedited the discharge of these goods so as to catch the steamer. The court held that he had not used what was due diligence under the circumstances. 'Due' would in fact appear to place a grater burden on the carrier than the use of the term 'reasonable' which so often permits the courts to to look at all the surrounding circumstances of the particular case rather than at what could have been achieved without impossible effort by the prudent carrier(19).

Professor Tetley defines 'due diligence' as 'genuine, competent and reasonable effort of the carrier to fulfil the pre-requisites set out in Art. III, Rule 1 (a), (b) & (c) of the Rules(20).'

The best way in the view of Professor Cadwallader to determine the meaning of the words 'due diligence' is by looking at their ordinary meaning. 'Due' means 'all that which is proper', and 'diligence' may be defined as 'attention to duties.' So that a shipowner exercise due diligence when he pays 'all that attention to his duties to provide a seaworthy ship as is properly to be expected of a carrier of goods by sea(21).'

No court in U.A.E. has yet interpreted the words 'due diligence'; but as the courts there treat the duty of a carrier to exercise due diligence to make the ship seaworthy as an obligation of care, then, according to Art. 383(1) of the U.A.E. Civil Code, the carrier is bound to no more than

to take the measures which a reasonable man would take to achieve the purpose of the contract. Art. 383(1) states:

> "If that which is required of an obligor is the preservation of a thing, or the management thereof, to the exercise of care in the performance of his obligation, he shall have discharged that obligation if, in the performance thereof, he exercise all such care as the reasonable man would exercise, notwithstanding that the intended object is not achieved."

4.2.2 THE TIME ELEMENT IN DUE DILIGENCE

4.2.2.1 *When must due diligence have been exercised?*

'Before and at the beginning of the voyage,' answers the Rules as well as the Maritime Code. These words, viz. 'before and at the beginning of the voyage' have been subject to conflict constructions. Maclachlan thought that the word 'before' would be construed as meaning 'at the commencement of loading,' and the words 'at the beginning of the voyage' as meaning 'when the vessel actually sails(22)'. Gotz expressed a similar view. He believed that 'before and at the beginning of the voyage' does not refer to any moment or period of time before the beginning of loading(23). Zaphirou appears to reach a different conclusion. In his view 'the duty is performed by making in one exhaustive operation the ship seaworthy, in a wide sense, before she receives the cargo and before she is about to sail.'(24)

The Maxine Footwear Case

In *Maxine Footwear Co. v. Canadian Government M.M.*〈25〉, the Privy Council had the opportunity to consider the issue as when a ship must be seaworthy, and consequently when must the carrier exercise due diligence to render her so. In that case, a vessel caught fire after loading had begun because of the negligence of the carrier's servants who were thawing out frozen scupper pipes with an acetylene torch. The vessel was scuttled and her cargo was lost. The cargo-owners claimed for the value of their cargo on the ground that the carrier had failed to exercise due diligence to make the ship seaworthy before and at the commencement of the voyage as required by Art. III, Rule 1 of the Rules, and that the resulting unseaworthiness of the vessel caused the loss of their goods. The carriers contended that as the fire began after the loading had commenced, they were not liable for the loss of the cargo because Art.III, Rule 1 only obliged them to exercise due diligence to make the ship seaworthy at the commencement of the loading and when the voyage began.

Lord Somervell, giving the judgment of the Judicial Committee, pointed out that the words 'before and at the beginning of the voyage' covered the period 'at least from the beginning of the loading until the vessel started on her voyage.' The word 'before' cannot, in his view, "be read as meaning 'at the commencement of the loading'〈26〉." On this view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from

the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period. As a result the ship became unseaworthy and that unseaworthiness caused the damage to and loss of the goods.

The Committee, by using the words 'at least' has conveniently evaded the troublesome task of having to nominate a starting-point for the word 'before' and to pin-point exactly when the period commences. How far astern 'from the beginning of the loading' must one go to make the ship seaworthy is not known; the Committee had deliberately refrained from answering this question as it was not necessary under the circumstances of the case for it to do so.

However, the extension of the Privy Council to the time factor in Art. III, Rule 1, not without argument. If Art.III, Rule 1, were to apply from a moment prior to the beginning of loading, it would conflict with Art. 1(e) as this article defines the scope of the Rules as to cover the 'period from the time the goods are loaded on to the time when they are discharged from the ship.' 'Loaded on' is interpreted to mean that period starting at the moment that the loading begins, that is, when the ship's tackle first hooks the cargo. Hence, the Rules are commonly said to apply from tackle to tackle(27). As a result, the carrier who has custody of the goods before loading or after discharging is not subject to the Rules, but may contractually limit or exclude his responsibilities as he see fit. The Rules

themselves expressly confirm this power(28). If the Privy Council's construction of Art. III, Rule 1 is adopted it would subject the carrier with responsibilities which may not be intended by the Rules.

It is submitted that the wording of Art. III, Rule 1 itself has not made it sufficiently clear that the qualified warranty of seaworthiness is to apply for the whole period from 'at least' the beginning of loading until the ship starts to sail. It is difficult to hazard a guess how far back from the beginning of loading one can go. Judges have from time to time warned that one ought not interpret an Act of Parliament by reference to precedents of the common law, antecedent law or another statute. Such a reference is, however, tolerable if there is a real doubt what the language of the enactment means(29). COGSA has, by virtue of Art.III taken pains to negate the operation of the 'absolute' warranty of seaworthiness. If a time different to that applied by the common law was to be applied under COGSA, it could have made a similar effort to say so(30).

The Courts in United States have refused to expand the scope of Art. III to the scale proposed by the Privy Council; they are content with the Common law rules(31).

4.2.2.2 *When does the carrier's duty to exercise due diligence end?*

'At the beginning of the voyage,' says Art. III, rule 1. But the exact moment of the beginning of the voyage is not

easy to determine. In *The Rona*(32) it was held that a ship commences her voyage when she leaves her moorings. In *Roelandts v. Harrison*, however, Parke B., said(33):

> "According to several cases...the sailing is determined to be that period of time when the vessel breaks ground, being at that time fully fit for sea, having the cargo on board which she intends to carry, with a competent crew, and having permission to leave by having the Custom House clearance on board."

In *Price v. Livingston* Lindley L.J., said that(34):

> "Final sailing...means getting clear of the port for the purpose of proceeding on the voyage."

According to Scrutton " a vessel has finally sailed from her port of loading when she has passed the limits of the port, ready for her voyage with the purpose of proceeding on her voyage and without any intention of coming back.(35)"

In the view of Carver "the beginning of the voyage" is not a point of time, but a period of time comprising the process of entering upon action. This would mean, for instance, that a river stage between the port of loading and the sea is part of the beginning and hence part of the period in which the carrier must exercise due diligence. Carver asserts that the word "beginning" should not be given a wider meaning than that "what is reasonable and in accordance with common usage."(36)

No court in U.A.E. has dealt with the question of the beginning of the voyage but there is an Egyptian decision in which it was held that the words "at the beginning of the voyage" require that the condition of seaworthiness must

exist at the moment on which the ship passes under the command of the master who takes into his charge its guide and direction, according to the rules of the art of the sea and to his own personal experience. On the other hand, the circumstance that the ship has or has not left the port of departure is entirely irrelevant(37).

'Voyage' referred to in Article III, Rule 1, is the contractual voyage from the port of loading to the port of discharge as stated in the bill of lading with the result that a vessel must be seaworthy in relation to each piece of cargo covered by a bill of lading, even where the vessel is loaded far from the first port of loading. However, where the vessel was seaworthy at the beginning of the voyage there is no requirement for the carrier to maintain seaworthiness after the voyage had begun. In *Leesh River Tea Co. v. British India S.N.*(38), a shipment of tea was sent from Calcutta to London. The tea was properly stowed, but after the vessel left Port of Sudan, where a firm of stevedores discharged some of the cargo, she encountered heavy weather. Sea water entered the hold through a storm valve. It was found that the cover plate had been removed probably by the theft. In an action against the shipowners the Court of Appeal held, reserving McNair J.'s decision, that the shipowners were not liable as the damage had not been caused by want of due diligence to make the ship seaworthy.

4.2.3 DUE DILIGENCE AND DELEGATION

Art. III, Rule 1 requires the carrier to exercise due diligence to make the vessel seaworthy. The carrier may, however, employ or engage some other persons, whether servants, agents or independent contractors, to make the ship seaworthy and to do work which calls for special technical knowledge. The question arises is whether the duty is one which the carrier could not effectively delegate in that he would remain liable for the negligence of those to whom he might choose to delegate, or whether it is sufficient that the delegate was chosen with diligence. This question is perhaps the most important of the difficulties to which the Rules have given rise, at any rate in England.

At Common law, the effect of the implied undertaking of seaworthiness was to render it immaterial whether the carrier had done all that he might to ensure a seaworthy ship, thus the fact he had appointed competent persons or organisation to inspect and repair the vessel did not relieve the carrier of liability for cargo loss or damage arising out of unseaworthiness. This rule was laid down in *Dobell v. Rossmore*(39). There, a ship was unseaworthy owing to the negligence of the ship's carpenter; the bill of lading contained a reference to the Harter Act, and included the condition of that Act that the shipowner shall exercise due diligence to make the vessel in all respects seaworthy. All three Lord Justice agreed in rejecting the idea that the

diligence to be exercised is merely that of the owner himself and in insisting that his responsibility extends to the acts of any one who may be his agent for the purpose of putting the ship in order:

> "The essential question", said Kay L.J.," is, was there want of due diligence on the part of the owner? it is said that they did all that they could by providing proper equipment and appointing proper agents. It was the duty of the ship's carpenter to close this porthole, and they appointed a carpenter to whose competence no one makes objection. It is said, therefore, that they personally exercised diligence, and thereby fulfilled the condition. I do not agree with this contention. It seems to me to be plain on the fact of this contract that what was intended was that the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in a seaworthy condition before she left port, and that it is not enough to say that he appointed a proper and competent agent. It is obvious that the shipowner cannot himself with his own hands make the ship seaworthy; he must act through other persons; but I do not read the contract as exempting him from liability in the case of the negligence of the agents whom he employs to act for him in this respect."(40)

Under the COGSA, the leading case for many years was *Angliss v. P.& O.*(41), In this case a shipment of carcasses of lamb was tainted with oil. The damage caused during the voyage through a number of rivets in a bulkhead between an oil bunker and the hold in which the carcasses were stowed becoming losing with the result that the oil leaked through and tainted the meat. The question arose as to whether the carriers had exercised due diligence to make the ship seaworthy within the requirement of Art.III, Rule 1 of the

Australian Sea-Carriage of Goods Act, 1924. Wright, J., (as he then was) held that they had discharged the burden of proof by employing competent naval architects and surveyors, who had surveyed the ship and exercised due care in her building to see that she was seawrothy, and before the cargo was loaded they had surveyed her and found her apparently seaworthy, although in fact bad workmanship in riveting caused a bulkhead to leak. In considering the responsibility of a carrier, the Learned Judge observed(42):

> "He is to be liable for all such duties as appertain to a prudent careful carrier acting as such by the servants and agents in his employment. If he has a new vessel built, he will be liable if he fails to engage builders of repute and to adopt all reasonable precautions. He may be held bound to require, for instance, the builders to satisfy one of the well-known classification societies such as Lloyd's...In the same way, if he buys a ship, he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service in which he puts her. I do not think in any case that the carrier can be held guilty of want of due diligence simply because the builders' employees have put in some bad work which, though concealed, render the vessel unfit."

His Lordship then went to say that, if it could be shown that the inspector employed by the carrier to supervise the work had negligently over looked bad workmanship, or that the carrier order some special kind of construction involving special risks then the carrier would be liable for bad workmanship.

Wright, J., also mentioned the question of the

employment of ship repairers, although the matter was not in issue and said(43):

> "Again the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonable possible, by special advisers for whom he is primarily responsible, that the repairs adequately make good the defects."

However, in subsequent two cases, Lord Wright expressed views which are apparently inconsistent with what he said in *Angliss* Case as to the duty of an employer to appoint competent contractors. In *Wilsons & Clyde Coal v. English* Lord Wright said(44):

> "The shipowner is almost certainly not an expert naval architect, engineer or stevedore. So far as I know it has never been claimed that this obligation is fulfilled by the shipowners taking reasonable care to appoint a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him and not the performance."

And in *Northumbrian Shipping Co. Ltd. v. Timm (E.)* his Lordship said(45):

> "The obligation to make a ship seaworthy is personal to the owner, whether or not they entrust the performance of that obligation to experts, servants or agents. They cannot say that there was a miscalculation merely due to the negligence of their servants."

Mr. Justice McNair in *The Muncaster Castle* Case(46) drew attention to the fact that in neither of the above two cases was the *Angliss* Case cited in argument and said that he could not believe that Lord Wright could have forgotten his decision in that case, or could have intended to throw any doubt on its correctness.

The *Angliss* was followed in *The Hopester* Case(47), where a widow of a member of the crew of a vessel that disappeared without trace brought an action against the owners alleging that her husband's death was due to the owner's failure to provide a seaworthy ship. It was proved that the owners had employed competent ship-builders under the survey of a classification society, although in fact an error of design had caused the loss. In the course of his judgment, Devlin J. observed:

> "But I have held that in fact it was an error of Lloyd's Register surveyor; and if I am wrong in the general view which I have just expressed I should hold that the employer was not under a duty to go behind as it were the Lloyd's Register certificate. I say this on the ground that such an inquiry would involve a retrogression beyond the point to which a reasonable employer can be expected to go."(48)

Although the proceeding in *The Hopester* Case did not involve the Carriage of Goods by Sea Act, 1924, the dictum of Devlin, J., would be considered in the event of a cargo claim under the provisions of the Act(49).

According to *Angliss* and *The Hopester* Cases one can summarise the law relating to due diligence and delegation as follows: the surveyor's certificates issued by a classification society are decisive on two grounds : i) such societies enjoy both a public and a quasi-judicial position; ii) to go into the background of the certificate of such a society might lead to an almost unlimited retrogression.

4.2.3.1 *The Muncaster Castle*

No serious contention to the Angliss rule arose until 1961 when in *The Muncaster Castle*<50>, the carriers again raised the effect of the words 'The carrier shall be bound to exercise due diligence' before the House of Lords. The detailed facts of this important case were: a reputable firm of ship repairers was engaged to open up a vessel's storm valves and inspection covers for survey purposes. The fitter, who was assigned the task of closing the inspection covers and securing them with nuts after completion of the survey, failed to secure the nuts adequately. The vessel was sent to Australia to carry cargo from Sydney to London. After she left Sydney, sea water entered the hold as the nuts had been loosened by bad weather . As a result, the bulk of the cargo was damaged.

The trial judge McNair, J.<51>, held that the shipowners had fulfilled their duty to exercise due diligence to make the ship seaworthy, and thus were not liable to the cargo-owners since (i) they were not liable for the negligence of the fitter employed by independent contractors in the circumstances of the case, viz. where the shipowners had employed a competent superintendent in relation to the loading survey who was not negligent in failing to detect the fault, and (ii) even if the ship had been unseaworthy in design (which the court found she was not), that was not due to any want of 'due diligence' to make her seaworthy within the meaning of Art.III, Rule 1. The learned Judge accepted

and applied the observation of Devlin, J., in *The Hopester* Case(52), that to require a shipowner to go behind the classification society certificate would involve a retrogression beyond the point to which a reasonable shipowner could be expected to go."

Thus, according to McNair, J.'s decision the carrier would successfully discharge his obligation under Art. III, rule 1, if he had been diligence in selecting of his agents. The decision was affirmed by the Court of Appeal(53).

In the House of Lords(54), their Lordships, by a unanimous decision, overturned the decisions of the lower Courts on the ground that, on the true construction of Art. III, Rule 1, considered in the light of its history, the obligation was an obligation that there would be due diligence in the work itself; and consequently the carriers were liable for the damage caused by unseaworthiness which resulted from the negligent conduct of the ship-repairers' fitter. Each Lordship put forth in a most poignant and forceful manner, his view on the notion of 'due diligence' and the extent of the carrier's responsibility under Art. III, Rule 1.

Viscount Simonds held the opinion that(55):

> "...no other solution is possible than to say that the shipowners' obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done."

He emphasised that "the obligation imposed by the Act is not...to exercise due diligence...to provide a seaworthy ship 'but' to make the ship seaworthy(56)." Referring to the

argument that where a shipowner had properly employed an independent contractor, particularly in relation to a matter which called for technical or special knowledge or experience, he was not liable if the cargo-owner suffered loss or damage by the negligence of the independent contractor or his servants provided such negligence was not apparent to him, his Lordship said that it was sufficient to say that in the context of the Hague Rules the shipowner could not escape liability for the negligence of an independent contractor(57). Referring also to the *Angliss* Case he said that it only related to circumstances in which the employees of a ship-builder had been negligent, and was not applicable where the shipowner put his ship in the hands of third parties for repair(58).

Lord Keith pointed out that Art.III, Rule 1, is "an inescapable personal obligation." The carrier could not claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship-repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure." The obligation imposed by the Act required a due diligence in the work itself. His Lordship thought that the effect of the Act is that the carrier would be protected against latent defects in the work done on his ship:

> "(The carrier) will be protected against latent defects, in the strict sense, in work done on his ship, that is to say, defects not due to any negligent workmanship of repairers or others employed by the repairers and, as I

> see it, against defects making for unseaworthiness in the ship, if these could not be discovered by him, or competent experts employed by him, by the exercise of due diligence."(59)

Lord Hodson remarked(60):

> "It could be argued that the Angliss case, in so far as it deals with ship-builders, was dealing with something outside the scope of Art.III, for to make a ship seaworthy is not the same as to make a seaworthy ship, but that the expression 'to make a ship seaworthy' is in my opinion wide enough to cover the work of repair however extensive those repairs may be."

The above speeches of the Lordships made it patently clear that the obligation is that there should be due diligence in the work of the delegate and the carrier will be responsible for the delegate's negligence even if the delegate is an independent contractor(61).

The Muncaster Castle caused quite a stir and considerable unrest among the carrier and provoked criticism. The carrier had expected more of Art. III, Rule 1, than it being just a mere exception of liability for unseaworthiness by reason of latent defects. Art.III, rule 1 has lifted only one aspect of the absolute character of the common law warranty from the shoulders of the carrier. Its only concession is exception of liability for unseaworthiness caused by latent defects. Judicial attitudes, such as that voiced by Lord Keith, have made it plain that the carriers should count their blessings; this relief he said when "weighed in the scales is not inconsiderable when contrasted with his previous common law position."(62)

At the C.M.I Conference at Stockholm in 1963, the British Maritime Law Association proposed to amend Art. III, rule 1 on the following lines:

> "Provided that if in circumstances in which it is proper to employ an independent contractor (including a Classification Society) the carrier has taken care to appoint one of repute as regards competence, the carrier shall not be deemed to have failed to exercise due diligence solely by reason of an act or omission on the part of such an independent contractor, his servants or agents (including any independent sub-contractor and his servants or agents) in respect of the construction, repair or maintenance of the ship or any par thereof or of her equipment. Nothing contained in this provis shall absolve the carrier from taking such precautions by way of supervision or inspection as may be reasonable in relation to any work carried out by such an independent contractor as aforesaid."(63)

There was a good deal of opposition to the British proposal at the Stockholm Conference; a number of delegation voiced the objection that the problem was a domestic one concerning United Kingdom and to a lesser extent the United States. The CMI Conference, however, accepted the above-mentioned proposal by a majority vote but it failed to gain support at the Diplomatic Conference at Brussels in 1968 and the position was not altered by the Brussels Protocol.

In the same year, namely 1963, another case came before the House of Lords : *Union of India v.N.V.Reederij Amsterdam (The Amstelslot)*(64). There, a ship surveyor (Lloyd's Register Surveyor) used what appeared at the time to be the best test for discovering defects in certain machinery. Later it was discovered that the defect which caused the

damage in the ship gear would not in fact come in light by this method. The House of Lords held that due diligence had been exercised. Lord Devlin put the position thus:

> "Where the defendant (the carrier) meets the prima facie case against him by calling...surveyors of unchallenged reputation who are found by the Judge to be impressive and who say what they did and why they did it and why they did not do more, then, unless they can be successfully criticised for their omissions, a Judge is entitled to say that due diligence was exercised. No doubt he must remember that if, in the end, he is unable to make up his mind whether or not the criticisms are weighty enough to disturb the confidence in the surveyor's judgment, he must find for the plaintiff and not for the defendant. But that is not the sort of situation that often arises."(65)

It is difficult to summarise the outcome of the '*Amstelslot*' Case. It may even seem to conflict with the House of Lords earlier decision in the '*Muncaster Castle*' Case. Lord Devlin pointed out that(66):

> "The practical effect of the Muncaster Castle means that article III represents not a compromise, but a slight alleviation of the burden of the absolute warranty in exchange for a complete renunciation of freedom to bargain for exceptions. Due diligence to make the ship seaworthy means that every defect that due diligence can discover should be detected and remedied, and if this obligation is made applicable to everybody who has any part in the work, the result is that the shipowner becomes responsible for making good every discoverable defect. His only excuse can be that the defect was latent and not discoverable by due diligence. It is the old absolute warranty of seaworthiness except for latent defect, that is the only alleviation."

In Tetley's opinion the '*Muncaster Castle*' is a bad decision, and cannot be considered as a precedent. He adds

that in the '*Amstelslot* Case the House of Lords did not refer to the '*Muncaster Castle*'(67).

Astle points out that in the French version of Art. III(1), these words appear 'une diligence raisonnable'. Its exact translation is 'reasonable diligence'. However, instead of these words 'due diligence' appeared in the English and American Acts. He added that the difference in translation accounts for the sever liability the English courts place upon the shipowner(68).

In spite of the criticism, the *Muncaster Castle* is not without significances. First, it is in accord with existing British(69) and even American jurisprudence(70). Second, it is a correct judgment because with any other interpretation the carrier would escape all responsibility for cargo loss or damage arising out of unseaworthiness merely by employing persons of good repute, whether or not those persons did in fact exercise due diligence themselves(71). If the carrier escapes liability for the fault of an independent contractor, the cargo-owner may very well be left without any remedy at all. He might find it difficult to prove that the independent contractor owed him the duty to take care; even if he can prove that, he may have to sue in an unfamiliar country in which he has no business interests. Therefore, less complications are likely to arise if the cargo recovers from the carrier and the carrier recovers from the surveyor or repairer who is responsible for the defect. In both cases there is a contractual link.

4.2.3.2 Building Or Purchasing A Ship

It is submitted that the carrier's responsibilities do not begin until the ship is under his care and control, with the result that the carrier cannot be responsible for defects in building or design in the ship that are not detectable by due diligence, unless the carrier had some part in the construction of the ship. The obligation on the carrier is to exercise due diligence to 'make' the vessel seaworthy. This distinction allows the carrier to avoid liability for undetectable defects in the construction and design of the vessel, although he is responsible for her maintenance and for due diligence in carrying it out. In cases where a vessel has been purchased, a court would be likely to accept a surveyor's certificate. In the '*Muncaster Castle*' Viscount Simonds, by way of obiter dictum, said(72):

> "It is a reasonable construction of the words...'to exercise due diligence to make the ship seaworthy' to say that in the case of a ship built for the carrier, or newly come into his hands by purchase, the carrier fulfils his obligation if he (has engaged builders of repute and has adopted all reasonable precautions). Until the ship is his, he can have no further responsibility."

Lord Keith, in the same case, said(73):

> "(A carrier) cannot...be liable for unseaworthiness in a ship which results from lack of due diligence at a time when the ship was not his to possess and control and which could not be detected by due diligence after the ship came into his possession."

4.2.3.3. The Position Under U.A.E. Law

Under U.A.E. law the obligation of the carrier to provide a seaworthy ship is personal to the carrier. It lies within

his field of activity and within the scope of employment of his servants and agents on shore. Therefore, whenever there is a defect in the ship at the beginning of the voyage, the carrier is always liable, whether he and his servants and agents have been directly concerned with it or not. They may have cause this unseaworthiness, or they may not have cured an existing defect of the ship, or have seen that it be cured; in either case the courts will find a personal fault of the carrier or possibly a fault of the captain and crew. Unseaworthiness arising at a subsequent stage of the journey, however, which is not connected with any breach of the carrier's duty existing at the time of the sailing, constitutes a state of affairs which mush normally be remedied by the master and crew; if they fail to reach the required standard of conduct, the carrier is liable, not directly, but vicariously but he will be able to rely on Art. 275(1)(b) (i.e. the exception faults in the navigation and management of the ship) provided no wilful misconduct or gross negligence has been committed.

On the other hand, the term 'independent contractor' itself is rather unusual in the U.A.E. law. The references here are mainly to the various classification societies and their surveyors and other servants. As the duty to secure seaworthiness being personal to the carrier, it is of no interest to enquire as to which particular person was given the task to carry it out. A fault committed by the surveyor

of the classification society must be imputed to the carrier as his own.

There does not seem to be any evidence of a different standard of duty being applied, depending on whether the person who has purported to satisfy the obligation has been the carrier himself or his surveyor. On this issue the solutions given by the U.A.E. law and English law coincidc. In both systems the carrier is liable for the surveyor's shortcomings as his own, irrespective of whether he has been negligent in his choice or not.

The rule of the carrier's liability for the faults of classification societies is relatively undisputed. Furthermore, the various certificate of seaworthiness issued by these societies are regarded as simple presumptions, that is, as presumptions of fact (of seaworthiness) that are liable to be displaced by evidence to the contrary. Such evidence must show that the defect which caused the unseaworthiness was a patent defect. It must also be shown that due diligence has not been exercised about the specific defect alleged and that if this had been done the defect would have been cured.

4.2.4 EFFECT OF BREACH OF ARTICLE III RULE 1

In *Maxine Footwear* Case(74) Lord Somervell made it clear that a carrier cannot rely on the immunities listed in Art.IV where loss or damage had been caused by non-fulfilment of his obligations under Art. III Rule 1. However, under

English law but not under U.A.E. law, a failure to exercise due diligence does not preclude the carrier from relying on the limits of liability in Art. IV Rule 5 where loss or damage has been caused by unseaworthiness of the vessel. Furthermore a carrier is not precluded from relying on the time bar under Art. III, Rule 6 under such circumstances(75).

4.2.5 BURDEN OF PROOF

Liability for breach of the obligation 'to exercise due diligence to make the ship seaworthy...etc.,' depends upon adequate proof. It is usual in law for the claimant to have to proof his claim before the defendant is called upon to rebut or excuse his alleged default. In cases of carriage under the Rules, the carrier's responsibilities are so dissected with interdependent exceptions that the burden of proof have become quite confused. Once the cargo-owner has shown that his goods were lost in transit, may the carrier immediately claim an exception, such as perils of the sea? Must the carrier first prove he was diligent in preparing the ship for the voyage, or may he leave its proof to the cargo-owner in rebuttable of his exemption?

Tetley contends that Art.III, Rule 1 is an overriding obligation upon the carrier with the result that he must first, on his own initiative, prove that due diligence was exercised to make the ship seaworthy before he may exculpate himself through the use of the exceptions found in Art. IV Rule 2(76). He interprets the dictum of Lord Smervell in

Maxine Footwear Case(77), namely, "Art. III Rule 1 is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Art.IV cannot be relied on", as laying down a wide proposition that the exercise of due diligence is a pre-requisite to proving the exceptions under Art. IV Rule 2(a)to(p). In favour of his view, Tetley cited the Canadian case of *Toronto Elevators v. Colonial S.S*(78), where it was held that "the primary obligation placed upon the carrier before he can take advantage of one of the exceptions provided by article IV, rule 2 is the exercise of due diligence."

There is also an American case of *The Gladiola*(79) which Tetley might also have referred to . In that case the Ninth Circuit, relying on the *Maxine Footwear* Case, held that the availability of the COGSA fire exemption is conditioned upon the carrier first proving that he exercised due diligence to make the vessel seaworthy. In *The Gladiola* a cargo of perishable fruit was loaded on the defendants' ship at California. After loading, the ship proceeded to Ecuador to load another cargo. While she was anchoring there, a fire broke out in the engine room and destroyed the refrigeration equipment and as a result the cargo was lost. The fire occurred through a failure to provide a proper oil ferrule fitting in the low compression fuel joint that separated; this separation permitted the diesel oil to spray upon the hot generator parts, thus causing fire.

The carrier sought a protection under COGSA fire

exemption as well as the Fire Statute contending that the fire was not caused with their 'actual fault or privity'. The Court rejected this contention, holding that the fire exception was not available unless the carrier can first satisfy his overriding obligation 'to exercise due diligence to the vessel seaworthy and which the carrier in the present case failed to meet. The Court found that the defect condition which caused the fire was known to a managerial employee of the corporate carrier, and was therefore 'actual fault or privity of the carrier' within the meaning of COGSA and 'neglect' of the carrier within the meaning of the Fire Statute.

It is submitted, however, that Art. III Rule 1, is an overriding obligation only after unseaworthiness has been proved to have caused the damage. In other words, the carrier would be liable for loss or damage to cargo caused by unseaworthiness only if it was first proved that he had failed to exercise due diligence to make the ship seaworthy and such failure has been a cause of the loss or damage. The cargo-owner must first show that there was unseaworthiness and that the damage resulted from this unseaworthiness and this is what the cargo-owner had done in *Maxine Footwear* Case. He pleaded not only a breach of Art. III Rule 1, but also that unseaworthiness caused the loss. In cases where unseaworthiness is not specifically pleaded or proved it would seem totally pointless to compel the carrier to take first step in adducing evidence on unseaworthiness.

Unseaworthiness per se is irrelevant in a claim, the same rule should be applied under COGSA; a breach of Art.III Rule 1, per se has no legal significance. This is, it is submitted, what Lord Somervell seemed to have intended when he said that "and non-fulfilment caused the damage." Because if he intended that Art. III Rule 1 to be a general overriding obligation to be applied in all cases, it would have been adequate for him merely to state that 'if it is not fulfilled, the immunities of Art. IV cannot be relied on'. The insertion of the words 'and non-fulfilment causes the damage' clearly delimit the ambit of this rule.

The majority of the decisions are in favour of the above proposition. Thus in *Minister of Food v. Reardon Smith Line*, McNair, J., said(80):

> "...the second sentence in Art.IV, r.1, strongly support the submission made...that no onus as to seaworthiness is cast on the shipowner, except after proof has been given by the other party that the damage has resulted from unseaworthiness."

In *De Carvalh v. Kent Line*, Walsh C.J., said(81):

> "...the carrier need give no evidence of his diligence until the claimant has proved the ship unseaworthy at the beginning of the voyage, and that such unseaworthiness caused the loss."

Further, in *The Black Heron* the Court of Appeals for the Second Circuit held that(82):

> "Under the Carriage of Goods by Sea Act...the defence of error in management is not conditioned as it is under Harter Act,...on a showing of seaworthiness or due diligence to make the vessel seaworthy...Therefore, once the carrier has brought forth evidence

> establishing the defence of error in management the burden is on the shipper to show that the ship was unseaworthy and that the damage was caused by such unseaworthiness."

The same view has been expressed by Lloyd, J., in *The Hellenic Dolphin*(83):

> "The cargo-owner can rise a prima facie case against the shipowner by showing that cargo which had been shipped in good order and condition was damaged on arrival. The shipowner can meet that prima facie case by relying on an exception, for example, perils at sea. The position in that respect is exactly the same whether the Hague Rules are incorporated or not. The cargo-owner can seek then to displace the exception by proving that the vessel was unseaworthy at commencement of the voyage and that the unseaworthiness was the cause of the loss. The burden in relation to seaworthiness does not shift."

Unseaworthiness having established, it is necessary for the carrier, in order to plead successfully the exercise of due diligence and escape liability, to show firstly the actual cause of the loss or damage and then prove that such loss or damage was not caused by or contributed to by any negligence, fault or failure on the part of the carrier or his servants or agents in the provision of a seaworthy ship. A case, very illustrative of the burden upon the carrier in this respect is *Minister of Materials v. Wold S.S. Co.*(84), where, in support of their claim that due diligence had been exercised to make the ship seaworthy, the carrier referred to a classification survey shortly before the vessel sailed, at which time it was stated that all air and sounding pipes had been examined by the classification society's surveyor. It

was held that whilst the pipes should have been examined, they could not have been, and that failure to do so was not exercising due diligence. The difficult of discharging this burden is also illustrated by *The Good Friend* Case(85). In this case an action was brought against the carrier in respect of losses suffered when discharge from the ship of cargo of soya bean meal had been prohibited by port authorities because it suffered from insect infestation. It was found that the trunking in which the cargo was loaded contained residues from previous cargoes and those residues were infested before loading with insect. The court held that the carrier had not discharge the onus of proving that due diligence had been exercised to make the vessel seaworthy prior to the commencement of the loading.

The exercise of due diligence is a question of fact, of which the carrier must provide actual proof. This proof goes beyond the carrier and require, as it has been seen, due diligence of the servants, agents and independent contractors employed to make the vessel fit.

In dealing with the burden of proof, it must be stressed that if the plea is one of a want of due diligence on the part of the carrier, it is no use him seeking to rely on the exceptions from liability set out in Art. IV Rule 2. His defence to unseaworthiness is as provided in Art. III Rule 1 and that is he did use diligence. This point was forcibly made by Lord Somervell in *Maxine Footwear* where he said(86):

> "Article III, rule 1, is an overriding obligation. If it not fulfilled and non-

> fulfilment causes the damage the immunities of Article IV cannot be relied on."

The obligation is over-riding in another sense. Thus the carrier cannot by the use of exclusion clauses seek to make the cargo-owner agree that due diligence has been observed when it has not. For example, an attempt to provide that the production of a certificate of survey by a ship's surveyor shall be evidence of due diligence on the part of the carrier has been struck down under Art. III Rule 8 as lessening the duty placed on the carrier. That said, the production of such a certificate would certainly be good evidence of the exercise of due diligence by the carrier personally, which if accompanied by evidence of due diligence of the surveyor in granting the certificate, would be sufficient to fulfil the carrier's duty.

It should be noted, however, that if the cause of the unseaworthiness was such that it could not have been discovered by due diligence, and in fact the carrier did not exercise due diligence, he will nevertheless be covered, at least that would appear to be the opinion of Mr. Justice Branson when he said:

> "If the defect is such that it cannot be discoverable by due diligence it become immaterial to consider whether due diligence was exercised or not, because exhypothesis if it had been exercised it would have been useless."(87)

4.3 ARTICLE III, RULE 2 [CARE OF CARGO]

> "Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Article III, Rule 2, of the Rules imposes upon the carrier 'subject to the provisions of Art.IV'(88) a duty properly and carefully to perform the activities there enumerated, i.e., the loading, handling, carriage, keeping, care and discharge of the goods.

The rule seems to embrace all the activities that are normally imposed on a carrier in relation to the goods that he has undertaken to carry and, unless there is found to exist a distinct branch of "carrier's duties" that is not covered by the words of Art.III, Rule 2, it should be safe to assume that this rule lays down the overriding test that will be applied throughout a contract covered by the Rules.

The word "carefully" does not have an absolute meaning, but relates to the reasonable degree of care that, given the relevant information, ought to display. But the addition of the word "properly" raises the question as to the actual scope of the duty to act 'properly and carefully'. Some might argue that in fact 'properly' did very little when placed alongside 'carefully', others thought differently. In *Albacora v. Westcott & Laurence Line Ltd.*(89), the wholematter came before the House of Lords. In this case, a shipper contended that the carrier was in breach of the

requirement to properly carry the goods, which comprised salted of fish, as they should have been carried in a refrigerated compartment. It was submitted that this is so even though the carriers were unaware that the cargo required special care. The question before the court was whether the goods had been carried 'properly' within the meaning of Art. III. In answering this question in the affirmative, Lord Reid expressed the view that 'properly' meant in accordance with a sound system. His Lordship thought that 'properly' in this context had a meaning slightly different from 'carefully'(90) . Lord Pearce was not to be stampeded into anything too original but was of the opinion that the word 'properly' presumably added something to the word 'carefully'(91). Lord Pearson on the other hand was quite dogmatic that the word 'properly' added something to 'carefully' that is, if 'carefully' was given a narrow meaning of 'merely taking care(92). This left open the need to decide quite what ' properly' therefore meant(93). In this, by looking at an judgment of the House of Lords in *Renton & Co. v. Palmyra Trading*(94) there was some help. The point there was whether or not "properly" (in antithesis to "carefully") seeks to define the scope of the contract voyage and, if so, whether it will, in combination with Art.III Rule 8, nullify a provision for an alternative way of performing the contract in the event of a certain occurrences. It was held that this was not the effect of the word(95); that "properly" must be considered in the light

of the French original of the Hague Rules, *de facon appropriee*(96); that the word refers to the proper conduct of the operations specified in Art. III, Rule 2, rather than to the place at which they are to be conducted(97); that, in antithesis to "carefully", it means "in a proper and careful manner."

Similar to the carrier's obligations under Article III, Rule 1, the obligations under Article III, Rule 2 , are personal to the carrier(98). Undoubtedly the carrier will be liable for the negligence of his servants, agents or others whom he may employ to carry out any of these duties. The only arguable issue is his liability for the negligence of his independent contractors. There is little direct authority on this point presumably due to the facts (i) that various duties of care provided for in Article III, Rule 2, are usually performed with the help of servants rather than independent contractors; and (ii) that, where the duty has been performed with the help of an independent contractor, the plaintiff often chooses to sue the contractor, if solvent, who cannot rely on the statutory exceptions. It has been held, however, that the servants of the independent contractor-stevedore(99), a competent surveyor(100), and an independent contractor-terminal operator on the pier(101) were the servants of the ship within the meaning of the Rules, and the burden of proof to show that there was no fault or neglect on the part of those parties rested with the shipowner or carrier(102).

Under the Rules, as well as under COGSA 1971, but not under U.A.E. Maritime Code, the duty imposed by Article III, Rule 2, is expressly stated as being subject to the provisions of Article IV, in particular to the defences afforded to the carrier under Article IV, Rule 2 . Difficulties have occurred about both the duty owed and the proof of its breach(103). In *Albacora v. Westcott & Laurance Line Ltd.*(104),the phrase "Subject to the provision of Article IV" has been interpreted as subjecting the provision of Rule 2 of Article III to the provision of Rule 2 of Article IV. Lord Pearson said in that case(105):

> "Article III, rule 2, is expressly made subject to the provision of Article IV. The scheme is, therefore, that there is a prim facie obligation under Article III, rule 2, which may be displaced or modified by some provision of Article IV. Article IV contains many and various provisions, which may have different effects on the prima facie obligation arising under Article III, rule 2."

One consequence of the above statement would be to lessen the carrier's duty to care for the cargo, through the immunities and exceptions contained in Article IV, Rule 2(106). However, it is now clear that the availability of an exception under Article IV, Rule 2, does not relieve the carrier from responsibility where he has breached his obligations under Article III, Rule 2. Moreover, it is now clear that the exceptions in Article IV, Rule 2, in no way lessen the degree of skill expected of the carrier, or in any way excuse him from performing his Article III, Rule 2, tasks properly and carefully(107). With any other interpretation, the purpose of Article III, Rule 2, would be defeated(108).

Concerning the burden of proof, the question is still whether the carrier must show compliance with Article III, Rule 2, as well as claiming his exception from liability, or whether, once an exception is asserted, the cargo owner has to show breach of Article. The latter approach has been the practice at common law(109) and is recommended by many commentators(110). Professor Wilson in his work on Carriage by Sea summarises the position regarding the burden of proof as follows(111):

> "The better view appears to be that once the cargo owner has proved that the goods have been lost or damaged in transit (e.g. by the production of a clean bill of lading acknowledging the shipment in apparent good order or condition of a specified quantity) the onus shifts to the carrier to bring the cause of damage within one of the exceptions listed in Art. IV rule 2(a)-(p). If he fails to do so he will be held strictly liable unless he can prove that the damage or loss occurred 'without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier'. Should he succeed in bringing the loss within an exception, the carrier will escape liability unless the cargo owner can then establish a breach of the carrier's duty of care within Art III rule 2."

Although Article III, Rule 2 indicates that the carrier is properly and carefully to load and discharge the cargo, this has been interpreted as permitting him to contract with the cargo owner about these operations. Such contractual arrangements have been held to define the scope of the contract rather than the terms upon which the service is to be performed. The result of this interpretation is that the

carrier can contract out of his obligation to load or discharge(112). Where the carrier is involved in loading or discharging, the operation must be performed properly and carefully, and when the shipper does load the cargo, the carrier is responsible for damage to the goods of third parties.

The obligation to "carry" in Article III, Rule 2, refers only to the contractual voyage. If the carrier off-loads the cargo prior to completion of the contractual voyage at a place that is not an agreed port of discharge and there is no emergency requiring the action, he will breach his duty to carry it properly. The duty to care for and keep the cargo is wholly upon the carrier since the duty exists during the voyage, although the obligations may well apply at other times. It is well to recall that Article III, Rule 2, defines the terms on which the contract is to be performed and not the scope of the contract. The carrier is not obliged to accept a cargo for carriage, but, if he does, he must take reasonable measures to carefully and properly kept and cared for. A lack of reasonable knowledge of the proper requirements for safe passage of the cargo amounts to a failure to care for it(113).

4.4 ARTICLE IV RULE 2 (a) [FAULT IN THE NAVIGATION OR MANAGEMENT OF THE SHIP]

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from, 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."

Art.IV, Rule 2(a), is one of the most controversial exclusions since it allows the carrier to avoid liability for cargo loss caused through the negligence of his employees and places the risk of negligent navigation or management of the vessel on the shoulders of the cargo-owner(114). But this division of liability between carrier and cargo-owner formed part of the balance which was struck between the interests of carriers and cargo-owners in the United States' Harter Act 1893, a balance which was followed in the Hague Rules and in the Hague-Visby Rules.

On its face, Art.IV, Rule 2(a), does not extend to the actual fault or privity of the carrier himself(115),nor that of the managerial authority if the carrier happens to be a limited liability company. On the other hand, it does exclude the negligence of all the servants of the carrier, whether on shore or on board. It is unlikely that the carrier himself, the managerial authority of the carrying company or the servants on shore of the carrier will, in practice, be involved in an error in the navigation or management of the ship, though the issue may arise if the

shipowner or a part-owner is at the same time the master (or one of the other persons enumerated in Art.IV Rule 2(a)) and commits a negligent act in this latter capacity(116).

4.4.1 *'Navigation of the vessel'*

The ambit of the term 'navigation' presents less difficulty than that of the term 'management'. In *The Ferro*(117) Sir Francis Jeune accepted the definition of "navigation" as "something affecting the safe sailing of the ship." Bailhache J., expressed a similar view in *Lord v. Newsum*(118) and held that "navigation" referred to the time when a ship was in motion, or being cast off, and the word consequently did not cover an error by the master whilst in port as to the route he should take to the port of discharge.

In *The Accomac*(119) the Court of Appeal held that the negligent removal of a bilge pump by the crew whilst the ship was discharging was not covered by the exception of negligence of the crew in the navigation of the ship "in the ordinary course of the voyage", because although the negligent act was committed in the course of the contractual voyage, the ship, in ordinary language, was not then being navigated.

4.4.2 *'Management of the vessel'*

The meaning of these words is unfortunately ambiguous and equivocal. Despite many court decisions on the matter, the authorities are not in a very satisfactory condition and it is still very hard to define the meaning of the words clearly and accurately(120).

It is, however, generally admitted that if the negligent act or default relates solely to care of cargo, and no part of the ship's apparatus is concerned, the management of the ship is not in question, and the shipowner is therefore liable. On the other hand, if the act or default has reference to some part of the ship unconnected with the cargo, it is conceded that the management of the ship is clearly in issue, and the shipowner is exempt. Thus, stowage of cargo is not management(121); but measures taken in the course of working some part of the ship unconnected with cargo have almost uniformly been held to be in the nature of management(122).

The difficulty in defining the clear-cut scope arises when Art.III, Rule 2, and Art.IV, Rule 2(a), overlap, and faults or errors in the management and in the navigation might equally well be viewed as failure in the duty to use care with respect to the cargo. A test in this connection was suggested in *The Glenochil*(123) where the distinction was drawn between 'want of care of cargo' and 'want of care of vessel indirectly affecting the cargo', and the carrier was

held liable only for the former fault and not for the latter one. In that case, goods were shipped under a bill of lading incorporating the Harter Act(124), by which the shipowner is not responsible for damage or loss resulting from faults or errors in navigation or in the management of the vessel. After the arrival of the vessel at her port of destination, and during the discharge of the cargo, it became necessary to stiffen the cargo. For this purpose the engineer ran water into a ballast tank, but negligently omitted to ascertain in the condition of the sounding pipe and casing, which had, owing to heavy weather during the voyage, become broken. Consequently water was let into the hold and damaged the goods.

The court decided the case for the carrier on the grounds that the negligence of the engineer was considered to be the fault in the navigation or in the management of the ship and Sir F. Jeune, suggesting the above distinction, said:

> "No doubt, the object of s. 1 is in terms to prevent clauses being inserted in mercantile instruments which would exempt the carrier from want of proper care in regard to the cargo. It is obvious that those words cannot be taken in their largest sense, because in a secondary, though not primary sense, any mismanagement of the ship, in navigation or otherwise, is want of proper care as regards the cargo. But it is clear that it was intended by s.3 to exempt from liability for loss or damage resulting from faults or errors of navigation or in the management of the vessel: and the way in which those two provisions may be reconciled is, I think, first that the Act prevents exemptions in the case of direct want of care in respect of the

> cargo, and secondly, the exemption permitted is in respect of a fault primarily connected with the navigation or the management of the vessel and not with the cargo...the distinction I intended to draw then (in the case of The Ferro) and intended to draw now is one between want of care of cargo and want of care of vessel indirectly affecting the cargo."(125)

The meaning of the words in question was reviewed in *Gosse Millard v. Canadian Government Merchant Marine*(126), a vessel which had been loaded with a cargo of tin plate, had to proceed to Liverpool for repairs. While the repairs were executed, the vessel's hatches were left open for purposes of convenience. Rain water got into the holds and damaged the tin plates. The damage could have been avoided had tarpaulins been used to cover the hatches.

The House of Lords, having reversed the decision of the Court of Appeal (Greer L.J., dissenting), held that this was not negligence 'in the management of the ship', against which the carrier was protected. The dissenting opinion of Greer L.J., in the Court of Appeal appears to explain the law on the point fairly clearly, viz.,:

> "These words (management of the ship) refers to matters affecting the ship as a ship, for instance, its safety, which might incidentally affect the cargo, such as improper opening sea connections, so as to prejudice the ship's safety while also damaging the cargo...The words,...if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such interpretation, if it did completely nullify the provisions of Art.III, rule 2, would certainly take the heart out of those provisions,...In my judgment, the reasonable

> interpretation to put on the Articles is that there is a paramount duty imposed to safety carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act of neglect, which can be described as either (1) negligence in caring for the safety of the cargo; (2) failure to take care to prevent damage to the ship or some part of the ship; or (3) failure in the management of some operation connected with the movement or stability of the ship, or otherwise for the ship's purpose."(127)

The judgment of Greer L.J., was endorsed by Lord Sumner in the House of Lords and the distinction propounded by Sir Jeune in *The Glenochil* was supported by Lord Hailsham, when he said(128):

> "My Lords, in my judgment, the principle laid down in The Glenochil and accepted by the Supreme Court of the United States in cases arising under the American Harter Act, and affirmed and applied by the Court of Appeal in The Hourani Case under the present English Statute, is the correct one to apply. Necessarily, there may be cases on the borderline, depending upon their own particular facts; but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not be very great difficulty in arriving at a proper conclusion."

It may well be said that the law on the meaning of the 'fault in the management of the ship' was made clear by these decisions. The Courts in England appear to have accepted the principle laid down in *The Glenochil*. It is now clear that mismanagement of ship's apparatus which directly affects the safety of the cargo is a failure of taking care of cargo, although it may be deemed to be the management of the ship in the wider sense of the words.

In conclusion, the acts or faults which are excepted by Art.IV Rule 2(a) are, according to English decisions, limited to the faults which directly affect the ship as a ship, i.e., the safety or stability of the ship, but indirectly cause the loss of or damage to the cargo and do not include the matters affecting exclusively or even primarily the cargo, if such matters involve the uses of parts of the ship .

In U.A.E. law almost the same distinction is existed. The carrier is liable for faults which concern the handling or keeping of the cargo, and he is exonerated from faults of the master in so far as the latter conducts the vessel and is in charge of the voyage(129). But it should be remembered that the carrier would be liable in U.A.E. law if the master committed wilful misconduct or gross negligence. He would also be liable for the fault of the master if any personal fault can be attributed to him on the ground of his having order or ratified the act, or even for having derived profit from it.

The following are some examples where the acts of the master and crew were held to be errors in navigation and management of the ship(130): damage by rain owing to a negligent exposure of the goods during the loading(131); failure to close the sea-cock after filling the boiler with water(132); improper selection of an anchorage(133); neglect in ascertaining the condition of tanks before filling them so that the water got into the cargo(134); negligence in

clearing the ship's decks of water so that it got into the cargo(135); neglect in clearing a waste in pipe, resulting in damage to cargo(136); failure to remove water from bilges, resulting in moistening and spoilage of hides(137); careless handling of the refrigerating apparatus of the vessel, resulting in damage to cargo(138); failure to put into a port of refuge to repair damage caused by perils of the sea(139); tipping the ship to examine the propeller, causing damage to cargo(140); leaving port in disregard of weather warning(141); selecting an unsafe anchorage and failing to give signals of distress(142); damage to cargo due to the failure of a seaman to replace the cap of a sounding pipe(143); negligence of master in opening valves to drain the tanks of the barge to put the ship on an even keel(144); failure of master to inspect and repair the damage to the ship after her colliding with the dock(145); negligent of pumping of a ballast tank which led to leakage of the water into the 'tween deck and consequent damage to cargo(146).

The following have been held failures in the duties owed with respect to cargo within the meaning of Art.III Rule 2(147): water entered into the hull through a hole of a bolt being displaced by sea perils and was not got rid of after its discovery, which resulted in cargo damage(148); leaving the hatches unprotected by tarpaulins while raining, in consequence of which the cargo was damaged(149); allowing oil which had leaked from barrels to remain in the bilges and damage other cargo(150); stowage of leaky acetic acid drums

near iron plates(151); tin plates in carton damaged by oil and turpentine that leaked from drums stowed in the same compartment(152); keeping the information of cargo damage back with a view to concealing the cause of damage, which resulted in the consequent aggravation of the loss(153); leaving hatches open for ventilation of cargo in consequence of which water entered and damage cargo(154); use of an improper refrigerant(155); breakdown of the refrigerating machinery with a consequent lack of refrigeration, which caused perishable cargo to spoil(156); inattention to proper ventilation of the cargo by negligent manipulation of the permanent ventilators(157).

It is worth noting here Knauth's comment that 'the line between error in navigation and management of the ship and fault in care and custody of the cargo is not a hard and fast one; the court will consider all the circumstances of each situation. If there is doubt, it is usually resolved against the ship'(158).

Where the permanent appliance of the ship is used for ship's purpose as well as cargo purpose, although a court once had decided that the failure in the management of the ship(159), it was later held that this principle applied only where the appliances were primarily fitted for the ship's, as opposed to cargo, purposes(160).

Wright, J., adopted the same view in *Foreman v. Federal S.N. Co.*(161), where the ship's chamber was almost

negligible in size compared with the refrigerated cargo hold, when he said:

> "It is clearly established that s.3 of the Harter Act is limited in its application to faults 'primarily connected with the management of the vessel and not with the cargo'. It may add that even if the provision of refrigerated foods for the crew is equated with the provision of fuel for the propulsion of the ship's chamber forms part of the management of the ship, and the same refrigerating machinery is used for the crew's food and for the cargo, these facts ought not to be affect the conclusion that, quoad the refrigeration of the cargo hold it is the management of the cargo and not of the ship which is involved."(162)

The normal rule of proof applies. The carrier must show that the loss was caused by nothing but the 'fault in the navigation or management of the ship'(163). The cargo-owner is left with trying to show that the negligence was personal to the carrier(164) or that some other cause of the loss operated concurrently. In the event of concurrent causes for which the carrier is exempt from liability from one, but not the other, the onus appears to be on the carrier to show the extent of damage attributable to the excluded cause at the risk of being held liable for the total loss.

4.4.3 Fault in Navigation or Management of the Ship and Seaworthiness

In the view of the provisions of Art.IV, Rule 2(a), the carrier's duty to exercise due diligence to make the ship seaworthy assumes considerable importance. If the goods are damaged through the negligence of the master and crew, the

question as to whether or not the carrier is liable will turn on the issue as to whether the negligent act was an act of navigation or management of the ship, or whether it rendered the ship unseaworthy.

Cases occur in which the ship sails in such a condition as to be fit to start, but not fit to continue through the voyage unless something is done. For instance, if a port-hole is open and is located in a place where it can readily be reached to shut it, and the person in charge is aware that it is open and may have to be shut, it cannot be considered that it makes the ship unseaworthy at starting but such an omission to do the thing required for safety, at the proper time, is treated as a fault in 'navigation or management'(165). But this rule applies only where the port-hole would ordinarily be closed during the voyage as exigency should require and in analogous cases. If , for instance, a port-hole is open or leaky at the time of sailing and located in an inaccessible place and the person in charge believes it to be shut and tight then such a case will be treated as one which due diligence has not been exercised to make the ship seaworthy by the owner and his subordinates and not as a fault of 'navigation or management'(166).

4.5 ARTICLE IV RULE 2 (b) [FIRE]

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,... fire, unless caused by the actual fault or privity of the carrier."

Art.IV, Rule 2(b), excludes the carrier from responsibility for damage to goods caused by fire unless the fire is caused by his own actual fault and privity. In combination with Art. IV, Rule 2(a), the carrier is relieved of liability in cases where negligent acts of servants or agents cause the fire, provided their acts are not attributable to the corporate carrier as its actual fault. The carrier cannot escape liability for a fire that was his own fault or the fault of those for whom he is responsible and of which he was aware.

Traditionally in English practice fire constitutes an exception. Even before the Merchant Shipping Act, 1894, English courts in several decisions considered fire, if it is not caused by the actual fault or privity of the carrier, a fortuitous event excluding his liability(167). When the Merchant Shipping Act was enacted in 1894, the exception of 'fire' appeared in Section 502. However, the fire exemption under the Rules differs from that under Section 502 of MSA 1894 which has now been replaced by Section 18 of MSA 1979(168):

(a) The exemption of fire as provided in Section 18 applies only to owners of British ships, whereas the Rules'

exception extends to every owner of a ship who carries goods by sea under the Rules.

(b) The exemption of fire in Section 18 can only be relied on where there has been a fire on board a British ship(169), whereas Art. IV Rule 2(a) is applicable to the stage of loading and discharging of cargo. As such, a fire on board a lighter onto which goods from the ship have been discharged would be within the ambit of Art. IV Rule 2(b).

(c) According to the Rules, the carrier must exercise due diligence before the voyage to make the ship seaworthy and he will be liable if the cause of the fire is unseaworthiness. Section 18, which applies even though the ship is unseaworthy(170), does not require the exercise of due diligence.

The words 'actual fault or privity' of the carrier are derived from English law; and their meaning has been authoritatively declared by the Court of Appeal and the House of Lords in *Lennard's Carrying Co. Ltd., v. Astatic Petroleum Co. Ltd*(171). In that case, a ship had been sent to sea in an unseaworthy state, and as a result she stranded and her cargo was destroyed by fire. The ship belonged to a limited company of which Mr. Lennard was an executive director. The Court held that 'the fault or privity' of the shipowner includes culpable acts or omissions on the part of a managing owner. It was also held that if the shipowner is a corporation the 'fault or privity' must be that of the person or persons, who are the very ego and centre of the personality of the corporation.

In *Paterson S.S. v. Robin Hood Mills*, Lord Roche said(172):

> "The words 'actual fault or privity' in my judgment infer something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity such as the fault or privity of his servants or agents...Actual fault negative that liability which arises solely under the rule of respondeat superior. So in the case of a company, it must be...the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself...Another and very important principle is to be derived...that the fault or privity of the owners must be fault or privity in respect of that which causes the loss or damage in question, a proposition which was acted upon and illustrated in Lennard's case."

The loss or damage to the goods must be related to a flame and not just heat, although once there is a flame the damage to cargo from heat and reasonable efforts to extinguish the fire would be included(173). Where the ship catches fire due to a lack of diligence to make her seaworthy, the carrier may not rely on Art. IV Rule2 (b), even though he was not personally to blame for the unseaworthiness(174).

Since it is the carrier who rely on Art. IV, Rule 2 (b), it is for him to prove that the loss or damage happened without his actual fault or privity(175). Under this sub-rule, as is the case with the other exceptions, the carrier has the burden of establishing the cause of the loss or damage to the cargo. Furthermore, if the damage is due both

to the negligence of the carrier and to the fire, the burden is on the carrier to prove exactly what part of the damage actually resulted solely from the excepted cause. This burden is often extremely difficult to sustain. In *Oregon Mail*(176), an officer of a vessel informed the shipowner's representative that a cargo of barley was heating in the holds of the ship, and might well burst into flames spontaneously. The representative did nothing and the fire broke out, causing extensive damage to the wheat. The Court held that while the fire damage to the cargo resulted from the representative's neglect, the heat damage to the wheat resulted from an excepted cause under Section 4(2)(b). However, since part of the wheat damage resulted from the fire, and part of the damage was occasioned by the heating, the shipowner was held liable for the full extent of the damage.

Upon proof by the carrier that the damage to the cargo resulted from a fire that occurred while the goods were aboard his ship without any fault in his part, then he has sustained his burden of proof. The burden then shifts back to the shipper to establish the cause of the fire and also to prove that the 'actual fault or privity of the carrier' was proximately related to the fire.

Although the U.A.E. Maritime Code contains an identical article, viz. Art. 275(1)(c), nevertheless, the carrier will not be exempted from liability for fire if the fire caused by the negligence of persons for whom he is responsible(177).

This approach, it is submitted, is in accordance with the general rule. As the fruit of the collective work (office's staff, crew and port's workmen) leads to a profit for the carrier, so also should the latter bear the risk of possible faults on their part, although such persons as office's staff, crew and port's workmen are extraneous to the various stages of the carriage of goods by sea. Certainly the exoneration of the carrier's liability from damage caused by fire on the goods, brought about by the fault of the crew, has a negative psychological effect; it weakens the incentive to avoid fault in managing goods and damage by fire as its consequence.

4.6 ARTICLE IV, RULE 2 (c)-(p) [OTHER NAMED EXCEPTIONS]

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,... **(c)** perils, danger, and accidents of the sea or other navigable waters; **(d)** act of God;**(e)** act of War; **(f)** act of public enemies; **(g)** arrest or restraint of princes, rulers or people, or seizure under legal process; **(h)** quarantine restrictions; **(i)** act or omission of the shipper or owner of the goods, his agent or representative; **(j)** strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general; **(k)** riots and civil commotions; **(l)** saving or attempting to save life or property at sea; **(m)** wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods; **(n)** insufficiency of packing; **(o)** insufficiency or inadequacy of marks; **(p)** latent defects not discoverable by due diligence."

The exceptions enumerated in Art.IV, Rule 2(c) to (p) of the Rules do not seem to detract from the general principle in Art. III, Rule 2. It is submitted that the wording of sub-rules (c) to (p) does not purport to exempt negligence; where a carrier bring himself under one of these excepted causes, he may nevertheless be held liable if his negligence concurred as a cause in producing the damage or was itself a cause of the peril(178).

Whilst the above statement is true as a general proposition, it is conceivable that there may be exception situations were some of the statutory exceptions in sub-rules (c) to (p) will operate to exempt negligence or even a higher degree of blameworthiness on the part of carrier's servants. For instance, sub-rule (j) the strike clause, which is not a

negligence clause, may be invoked by the carrier for his exemption from liability for a loss or damage to goods caused by his servants in furtherance of a strike, or other stoppage of labour in breach of their contract of service, even where the servants have been negligent vis-a-vis the goods in embarking upon the strike(179). Sub-rule (i) that excludes acts done in order to save life or property at sea may excuse the carrier from vicarious responsibility in respect of acts that might, independently of the Rules,held to have been negligent vis-a-vis the goods carried.

Finally, the statement that sub-rules (c) to (p) do not normally purport to exempt the negligence of the carrier or his servants leaves untouched the question of whether or not the negligence of a third party is excused. This depends on the construction of the particular statutory clause; if the definition of the peril named is wide enough to cover that peril, even when it has been brought about by the negligence of a third party, for instance, 'riots and civil commotions', then that negligence would be exempted; if, on the other hand, the negligent or other act of a third party is by definition outside the scope or incompatible with the existence of the peril named, for instance, an 'act of God'(180), then the carrier would not be able to avail himself of that exception.

It is upon the carrier to prove the existence of the event, that make the exception applicable and that the damage was a consequence of the exception(181). After the carrier

has shown that an exception is applicable, the burden is on the shipper to show that the carrier was negligent. Where the carrier's negligence either caused the exempting act or concurred with it in producing the loss or damage, it is presumed that the exception will not be applicable and the carrier will be liable. Otherwise the carrier would avoid responsibility for his own negligence.

4.7 ARTICLE IV, RULE 2 (q) [CATCH-ALL EXCEPTION]

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,...any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."(182)

This clause is especially important, both because of its broad scope and because it provides a key to the very basis of liability under the Hague Visby-Rules. The "catch-all" clause demonstrates that, in contrast to the Common law, the Rules base the liability of the carrier on fault. This is thus a negligence system, with a reversal of the burden of proof; that is, the carrier may defeat the presumption against him by proving his freedom from negligence.

It is submitted that the following points are relevant to the construction of sub-rule (q) within the framework of the Rules.

First of all, the words 'any other cause' cannot be interpreted as being *ejusdom generis* within the preceding exceptions in sub-rules (a)-(p)(183). There is hardly any genus that will include all these divers perils and, in the circumstances, the wider interpretation of the words is more appropriate. An authoritative pamphlet of 1921 at the Brussels Convention listed 55 excepted perils, acts of negligence or causes of liability actually then in use in bills of lading(184). Of these, 16 items are explicitly authorised by the Rules: Art. IV, Rule 2 (a) to (p), and thus granted by law under COGSA. The other 39 items retain only such validity as is granted by the catch-all exception, viz. Art. IV, Rule (q). It is generally considered that this sub-rule (q) in and of itself gives the ship and carrier at least as much protection as can be obtained by enumerating any or all of the 39 exceptions formerly recited which are not expressly enacted in sub-rules.

Secondly, the exceptions are all conditioned substantively, on their arising "without the fault" of the carrier or his servants(185). The carrier must now shoulder the burden of proving his own freedom from contributing fault in order to enjoy any of the immunities here. The fault or neglect may connote, objectively, a failure to perform one's contractual obligation. In such case the standard of

obligation, i.e., strict duty or duty to exercise reasonable care, can only be ascertained with the help of Art. III, Rule 2. Further, the onus on the carrier to prove that he was not at fault may not be fulfilled if he does not also show the cause of the loss(186). Where the loss is inexplicable, it is disputed whether it is sufficient for the carrier merely to show an absence of negligence. The better view is that it is not sufficient(187). Any other approach would allow the carrier to fail to produce appropriate evidence in his possession which would show the cause of loss. Yet it is quite often impossible to determine whether fault exists unless the cause of the damage is identified.

Servants or agent for whom the carrier must show lack of fault in sub-rule (q) include independent contractors, such as stevedores, and other persons employed by the carrier to care for and handle the goods during the period covered by the Rules. This is evident from *Heyn v. Ocean S.S. Co*(188). In this case, cloth was shipped from Liverpool to Shanghai. At the port of discharge, some of the goods were pilfered and some were damaged although the shipowners had taken precautions to have the goods guarded against pilferage at night. It was held that the thieves were probably confederates of the workmen of the independent stevedore contractors who were the agents or servants of the carrier. In the circumstances , the damage could not be said to have occurred without the fault of the carrier's agents of servants.

Finally, there seems to be no authority defining privity in antithesis to fault or distinguishing between the two words(189). However, it is submitted that "privity" does not purport to add anything to the words "actual fault" and that a similar construction to "privity" in the context of the British Merchant Shipping Act must be applied to sub-rule (q). Privity means privity to the breach of contract or to an actionable wrong, not simply privity to the loss. Privity cannot be followed by liability unless there is a breach of a contract in existence, and whether or not there is such a breach must depend upon the standard of duty laid down in Art. III Rule 2(190).

4.8 ARTICLE IV, RULE 4 [REASONABLE DEVIATION]

> "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

This rule qualifies the carrier's obligation under Art.III, Rule 2, in that it permits the performance of certain acts that may otherwise amount to a breach of the duty 'properly and carefully...(to)...carry...(and) care for... the goods.' Acts that may be negligent vis-a-vis the goods carried will nevertheless be excused i) if they amount to a deviation 'in saving or attempting to save life or property at sea,' or ii) if, looked upon from a wider viewpoint, they amount to a reasonable deviation.

Art.IV, Rule 4 , adds to the exception in Art.IV, Rule 2(i), in that, while sub-rule (i) excludes loss or damage arising or resulting from saving or attempting to save life or property at sea, Art. IV Rule 4 goes on to legalise deviation for the above purposes. Sub-rule (i) by itself can only be applied when the carrier is acting within the scope of his contract and it is on this latter point that Art.IV Rule 4 comes to his assistance(191).

One of the basic question which unfortunately left open, is what the limits within which a deviation is to justified as 'reasonable'? The words 'any reasonable deviation' have

been subject to very little judicial interpretation. The leading case is *Stage Line v. Foscolo Manco*(192). A liberty clause in a charterparty gave the ship liberty to call at any port in any order for bunkering or other purposes. On sailing the ship had on board two engineers who were to test the operation of her superheater under voyage conditions. It was intended that these engineers should be disembarked with the pilot at Lundy, but when Lundy was reached the test was not completed, so they were landed at St. Ives Bay, just five miles off the course of the vessel.

On leaving St. Ives Bay, the ship did not return to her course directly, but proceeded along the Cornish coast, where she struck a rock and was lost with the cargo. The House of Lords held that the deviation was not reasonable therefore the shipowners were liable.

On the meaning of the word 'reasonable' Lords Buckmaster(193) and Warrington(194) both were of the view that what a reasonable deviation is a question of facts for the court, which must be decided in the light of all circumstances of the case. In the words of Lord Warrington:

> "...to decide whether or not a course of action or a particular transaction is reasonable...is a question of fact and has to be answered after giving due consideration to all the relevant circumstances and not on any dictionary meaning of the word."(195)

His Lordship expressed the opinion that the fact that a deviation was in the interest of the ship alone did not by itself make it unreasonable. Lord Macmillan thought that the

absence of the element of joint interest might well be an important indication of unreasonableness without being conclusive(196). Lord Atkin said that the term 'reasonable' could not be confined to deviation to avoid some imminent peril nor to a deviation in the joint interest of cargo-owner and ship or to a deviation "as would be contemplated reasonable by both cargo owner and shipper"(197). A deviation may not be contemplated but may be quite fortuitous, or it may be reasonable even though it be solely in the interest of one of the parties or even of neither, e.g., where a fugitive from justice was on board. His Lordship then formulated his own rule to be applied as the correct test in determining whether or not a deviation is reasonable:

> "The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interest of all parties concerned, but without obligation to consider the interest of any one as conclusive."(198)

Lord Atkin, however, would not express an opinion whether the question of the reasonableness of the deviation was one of fact or law.

Despite the efforts made, reasonableness remain a difficult word to which to give a reasonable meaning in this context(199). As Mackinnon L.J. said *Compagnie Primera de Navigaziona de Panama* Case(200) that the rule as to deviation in the Hague Rules was "utterly unintelligible".

Although the question of reasonableness is incapable of any precise definition, one can say, when it is considered in the light of the purpose of the Rules which defines the obligations of the carriers on the one hand and limits the exceptions or immunities set out for them on the other, so as to bring about the fair basis on which the ocean trades can stand and develop, that a deviation may be reasonable, if and when a prudent and experienced person deemed it as reasonable to deviate having taken into account the interest of all the parties involved in that maritime expedition and the circumstances as a whole at the time of commencement of the deviation.

The courts have admitted the reasonableness of deviation in the following case: deviation to save life or attempt to save life or property ; diversion to the nearest open port where the original port of destination is strike bound(201); deviation to a void danger or war(202); deviation to save the ship from peril at sea(203); deviation for bunkers(204).

Deviation necessitated by Unseaworthiness

In *Kish v. Taylor*(206) the court laid down a rule that is deviation necessary to save the ship from the perils of the sea and to remedy unseaworthiness is permissible and justifiable even though the ship was unseaworthy and though, but for that unseaworthiness, she would not have been in any danger.

Prima facie the rule seems to have no legal basis because deviation, however necessary it may have been in order to save the ship and cargo and the lives of her crew owing to the perilous condition to which the vessel because of unseaworthiness was reduced must be treated as deviation made without any necessity. However, a more indulgent opinion prevailed on this matter and a more reasonable solution has been given explained by Lord Atkinson in *Kish v. Taylor*(206):

> "The master of every ship be left in this dilemma, that whenever, by his own culpable act, or a breach of contract by his owner, he finds his ship in a perilous position he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment? Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to choose between such alternative."

Thus, the necessity for deviation is judged by the existence of the peril and not by the cause of the peril(207)." It is the presence of the peril and not its cause which determine the character of deviation."(208)

The principle established by *Kish v. Taylor* would appear to be applicable to cases governed by the Rules, though, of course, where the carrier has failed to exercise due diligence to make the ship seaworthy he will be liable on that ground under Art.III rule 1 for loss caused by the unseaworthiness.

There is, however, a further complication, which is caused by an obiter dictum of Lord Porter in *Monarch S.S. Co.* Case(209). Lord Porter said there that the common law principle,that is a deviation necessarily made to remedy unseaworthiness was justifiable, did not apply if it was "established that the owners knew of the vessel's state on sailing"(210). But there appears to be nothing, in principle, to justify that limitation. As Carver intimates , a master is not only justified in deviating but bound to do so if the safety of the adventure is threatened(211). On no reasonable view can a deviation which the master is bound to make be considered unjustifiable; it would be still less reasonable to hold that the master's duty , when in peril, depends on the owner's state of mind before the ship sailed(212). This dictum of Lord Porter must, it is submitted, be regarded as having been made *per incuria*(213). Consequently, it has the effect of an obiter dictum and the rule stands as explained above.

4.9 ARTICLE IV RULE 5 [LIMITATION OF LIABILITY]

The effect of Art. IV, Rule 5, upon the general principle of Art.III, Rule 2, is to limit the carrier's liability to a certain amount per package, unit or weight of the cargo, unless there has been a declaration of value. The limitation applies even though the damage has been caused negligently, as indeed, it must have been caused according to the above interpretation of Art.III Rule 2, if there is to be any liability at all. Thus, Art.IV, Rule 5, restricts the operation of Art.III, Rule 2, in the sense that, to the extent that the otherwise actionable damage may exceed the statutory amount per package, unit or weight, it absolves the carrier from liability. Looked at from this angle, Art.IV, Rule 5, is comparable to Art.IV, Rule 2(a), in that both rules operate upon the general principle in Art.III, Rule 2, by way of exception. These rules must be contrasted with the excepted perils in Art.IV, Rule 2(q), that do not in substance affect the carrier's liability for negligence.

The reason for the above construction of Art.IV, Rule 5, is that, as the carrier's only liability under the Rules is for negligence, the rule would be meaningless unless the limitation were allowed to operate in this case.

4.9.1 THE MEANING OF 'PACKAGE OR UNIT'

Neither the Rules nor COGSA nor U.A.E. Maritime Code contain a definition of the words 'package' or 'unit'. As a result, the courts have been left to grapple with the problem of fashioning an intelligible, understandable and rationally acceptable definition of these words.

The concept of 'package', to some extent, can be regarded as unambiguous; it indicate something packed. However, to determine whether the cargo involved is a package may not be easy particularly when a relative large self-contained object or cargo partially covered is being shipped. In *Whaite v. Lancashire and Yorkshire Railway*(214), the oft-cited English case in which the meaning of 'package' as used in the Carriers Act 1830 was considered, it was held that a 'package' referred to goods which have been undergone a sufficient degree of packing. In this case, a wagon which contained some paintings was held to be a 'package', size being held to be of no relevance. However, this case is , by itself, not particularly helpful especially since the size and form of shipping units have changed with technological advances in the transportation industry.

The term 'unit', on the other hand, is ambiguous. It might refer to the physical shipping unit ,i.e. unit of cargo such as an unboxed car or item of machinery; or it may mean the freight unit, i.e. the unit on the basis of which the freight is calculated(215).

4.9.1.1 THE MEANING OF 'PACKAGE'

The term 'package' has never been judicially interpreted in England. This matter led Scrutton to say(216):

> "These words [package or unit] give rise to a number of difficulties...but surprisingly there is no direct English authority as to their meaning. Reference has therefore been made to American, Canadian and Continental decisions where appropriate. These decisions should, however, be regarded with caution when considering how far they are applicable to the English Rules, since they may turn in part on different consideration as to the policy of the Rules."

Most of the decided cases in recent years on the meaning of 'package' hail from the United States.

In United States the decisions indicate that regardless of size, shape or weight, cargo which is fully boxed or crated is a 'package' where the mode of packaging conceals the identity of the goods being shipped(217). Where the goods are not enclosed in a box or crate, but are merely freestanding, they are not to be regarded as 'package'(218).

Where some preparation for transportation has been made which facilitates handling but which does not necessarily conceal or completely enclose the goods, the decisions are at variance. The variation between the courts stems from conflicting views as to the legislative intent of U.S. COGSA. In this context, Wageningen says(219):

> "A determination that COGSA was intended to benefit cargo interests has persuaded some courts to apply a restrictive construction of the word 'package' since the customary freight unit method of computing liability usually favours cargo interests. Conversely, a view

> of COGSA as intending to benefit carriers has encouraged a more expansive interpretation of the word 'package' since the customary freight unit method of computing liability usually works to the benefit of cargo interest."

It is clear that there are at least two opposing approaches with regard to the meaning of 'package'. The first concerns the 'facilitation for transport test and the second the 'plain meaning test'.

[A] Facilitation For Transport Test

According to this test, a distinction should be made between a preparation of cargo which facilitates transport by allowing for easier lifting, loading, storing and which constitutes a 'package' and a preparation which is solely for protection of the cargo, which does not. This test was firstly advances by Judge Moore in *Aluminios Pozuelo v. Navigator*(220) where he defined a COGSA package as a "class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which does not necessarily conceal or completely enclose the goods." In *Aluminios* a skided loggle press was damaged during the voyage. It was some 11 feet in high and weighed over 3 tons. The bill of lading described the press as one (1) skid machinery. The carriers sought to limit his liability to $500. The court held that the machine was a 'package'. Judge Moore found that while the skid provided protection, it was attached essentially to facilitate delivery so as to make the press an article put up in a form suitable for transportation or handling.

According to Judge Moore's definition of 'package', sikds, coils, crates, bundle, all could fall within this definition and this is what has been held. In *Nichimen Co. v. M.V. Farland*(221), the court held that unwrapped rolled steel coils strapped and tied with steel bands were not packages. The court glossed over the cargo-owner's argument that the strapping of the coils was done primarily for purposes of warehouse storage, reasoning that

> "...the fact that the act of rolling and handling facilitates storage does not necessarily negate the possibility that it is also packaging preparation made to facilitate handling in transportation."

In *Companhia Hidro Electrica v. S.S. Loide Honduras*(222) the court found that the language in the *Alumnios* opinion established the standard applicable to partially packaged cargo. The packages involved in *Companhia* were 5 gas circuit breakers. Each measured 239 cubic feet and was unwrapped and fully visible except for wooden crating covering instrument panels. All the machinery were mounted on steel bases. The court held that each machine constituted a package for the purposes of Section 4(5).

The facilitation for transport test has also been applied in *Marante Forwarding v. Naviera De Transport*(224) where the Southern District of Florida held that air conditioning equipment attached by bolts to a wooden skid but not otherwise boxed or crated constituted a package. And in

Insurance Company of N. America v. Delta Brazil[224] where the Eastern District of Louisiana held that a chillier unit, which was prepared for transportation by encasing it in a slatted wooden crate, constituted a package.

It is submitted however that the 'facilitation for transport' test is a vague one and if it was adopted as a test for classifying the goods as packages, would penalise those shippers who protect their shipments against damage[225]. Because in practice any shipping preparation, to the extent that it protects cargo, facilitates handling. Efforts to minimise risk through the use of outside covering reinforcement could be characterised as preparation to facilitates transport. In this instance the shipper would be penalised for his precaution in preparing the cargo for shipment.

The Ninth Circuit has realised the harsh result created by the facilitation for transport test, therefore, it rejected it in *The Pacific Bear* asserting[226]:

> "Any distinction based upon the subjective purpose for which the skid was attached should not be the test for resolving the issue. The skid certainly protected the transformer to some extent...and, the skid could have been utilised to facilitate the transportation of the transformer. Nevertheless, we are unpersuaded that by simply attaching the transformer to a wooden skid, the shipper created a 'package'...to hold that somehow a 'package' evolved from the mere attachment of the machine to a wooden skid seems a highly unreasonable result."

It should be noted that in an early decision of *Gulf Italia Co. v. The Exiria*[227] the same court which decided

the *Aluminios* Case namely the Second Circuit rejected the facilitation for transport test stating that the method of preparing cargo for shipment does not convert the goods into a package. The court emphasised that a contrary holding would place a shipper who attempts to protect his goods in a far "worse position than a shipper who makes no effort to reduce the possibility of loss from inclement weather or pilfering." The court remarked, "Any test dependent upon the extent of external covering would lead to uncertainty and increase litigation."

[B] The Plain Meaning Test

In their efforts to protect the shipper, some American courts headed by the Ninth Circuit, have applied a restrictive construction of the term 'package'. An item of cargo is a 'package' within the meaning of the statute only where the mode of packaging conceals the identity of the goods being shipped.

The Ninth Circuit applied the plain meaning test in *The Pacific Bear* Case(228). There the sole question presented for review was whether or not a large equipped electrical transformer, attached by bolts to a wooden skid, but not otherwise boxed or crated, constituted a 'package' within the meaning of Section 4(5) of COGSA. The carrier contended that since no value for the cargo was expressed in the bill of lading,the cargo-owner should be limited to the $500 per

package limitation. The Court disagreed noting that

> "It was not the purpose of the (COGSA)...to relieve the carrier of its normal responsibility for damage to cargo or to unduly limit its liability for just claims when goods have not been shipped in package."(229)

The Court further assumed that Congress intended the word 'package' to be given its 'plain, ordinary meaning.' It rejected the subjective purpose of the shipping configuration as a criterion, but indicted instead that cargo is shipped in 'package' when "the mode of packaging conceals the identity of the goods being shipped." The Court held that the machine in question was not shipped in a package.

So restrictive is the Ninth Circuit in its use of the 'package' concept that it may be expected to require that a 'package' not easily end itself to inspection of its contents notwithstanding its size(230).

The plain meaning test was also followed by other Circuits. However, in some cases, the definition of the plain meaning test was expanded. In these cases, the primary determining factors is the presence or absence of the carrier's practical ability to visually ascertain the character, condition or quantity of goods. In *American & Far Eastern Trading Co. v. Sea-Land Service*(231), cartons constituting a pallet load were put in a shrink pack polythene bag which substituted for steel strapping. Both shipper and carrier benefited. Finding that the carrier had notice of the character and composition of each pallet load and relying upon the plain meaning test of *The Pacific Bear*,

the Northern District of California held that each carton making up the palletised load was a COGSA package.

In *Omark Industrial Inc. v. Associated Container*(232) Judge Beeks explained that

> "Congress, from all that can be gathered from the statute and its legislative history, never intended the word 'package' to be treated as a sophisticated or esoteric term of art. Giving due recognition to this fact, the analytical framework within which the instant case must be decided becomes clear and uncomplicated. The Court's task, simply stated, is to determine whether the palletised unit or the cartons contained therein best comports with the 'plain meaning' of the word 'package'."

The court held that a COGSA package is the largest individual unit of packaged cargo made up by the shipper and entrusted to the carrier.

English writers seem to be in favour of the 'plain meaning' test. Temperley indicates that the term 'package' properly implies something packed up or made up for portability(233). Diamond suggests that 'package' refers to goods which have undergone a sufficient degree of packing (i.e. a crate of goods)(234).

A 'package' according to U.A.E. decisions, refers to something completely enclosed making it impossible for the carrier to appreciate its nature and value(235).

As a matter of fact, the question of the extent of the required packaging or covering has never been judicially tested. Further, shape, size or weight seem to have little, if any, bearing on the determination of whether an article of

cargo is a package. Thus in a case involved damage to 13 of large and heavy boxes contained the Appeal Court of Abu-Dhabi held that since the nature and value of the goods had not been declared to the carrier then the carrier was entitled to per package limitation. The Court emphasised that size and weight are not to be considered as a criterion in determining whether or not an item of cargo is a package(236).

4.9.1.2 THE MEANING OF 'UNIT'

The term 'unit' has caused difficulty and was labelled 'flagrantly ambiguous'(237). Because it might refer to the physical shipping unit, i.e. the particle unit in which the goods are shipped, for instance, an unboxed car, a bale, a barrel, a sack, etc. Or it may mean the freight unit, i.e. the unit on which the freight for the carriage of the goods is adjusted. The freight unit usually is a weight or volume unit, for instance, tons, cubic, feet, ect. 'Unit' may also refer to the 'commercial unit', i.e. the unit in which the particular commodity is customarily traded in commercial practice, for instance, the standard is the usual measurement for wood.

The distinction between 'package' and 'unit' is of little difference if 'unit' is read to mean shipping unit, what may conceivably be called a package equally constitutes a shipping unit and the total amount of liability will be computed on the same basis in either case. If,

however, 'unit' is interpreted to mean freight unit, then the maximum liability will be greater than that based upon shipping unit, and here the distinction between 'unit' and 'package' is of great importance<238>.

It has been mentioned that no English decision has been given directly on the meaning of 'unit' but a reference may be made to American and Canadian decisions. English authors appear to be in favour of the Canadian jurisprudence<239> because Canadian Water Carriage of Goods Act uses the same word 'unit' whereas U.S. COGSA uses language substantially different from that of the English COGSA. The word 'unit' there is replaced by the expression 'customary freight unit'.

In Canada the meaning of the term 'unit' has been considered by the Supreme Court in *Anticosti Shipping v. Viateur St. Amand*<240>. In this case, the suggestion that the word 'unit' is to mean 'freight unit' was rejected in favour of 'shipping unit':

> "The word 'unit' would...normally apply only to a shipping unit, that is a unit of goods; the word 'package' and the context generally seem so to limit it, but there has been suggested and in some cases the rule specified the unit of the charge of $48 plus $3 wharfage fee; there is no indication for example, of a rate based on tonnage or any other weight quantity. The weight of the truck is shown, but to assume that the charge is calculated on a rate for 100 pounds would bring a fractional figure which is most likely to represent the actual basis. The sum of $500 would scarcely be taken as a fair limitation of the value of the average 100 pounds weight of freight; in this case the amount would be the product of

> 102.16 units at $500 each or $51,000 which seems disproportionate to any policy estimate itself of any reasonable ground for extending the word to that type of measure, with the other considerations, excludes its application here."(241)

The *Anticosti* Case has been treated as an authority in favour of the Shipping unit in *Falconbridge Nickel Mines v. Chimo Shipping*(242) where the Supreme Court refused the principle of a freight unit for unpackaged tractor and generator:

> "The natural interpretation of the word 'unit' in the phrase 'package or unit' appears to be that it has been added in order to cover parts of a cargo similar in a general way to a package, but not strictly included in that term, which properly implies something packed up or made up for portability and would therefore not include such a thing as a log of wood or a bar of metal. The word 'unit' has, it is suggested, been added in order to embarce such things and not to extend the scope of the Rule to bulk cargo or parts thereof."

Interpreting the word 'unit' as to mean 'shipping unit' finds support from English writers. Carver inclines to read 'unit' as meaning a 'shipping unit'(243). The wagon containing goods which was held to be a 'package' in the *Whaite* Case(244) and the unboxed motor-vehicle which was held not to be a 'package'in the *Studebaker* Case(245) are both presumably a 'unit' in Carver's view. Diamond suggests that 'unit' is to be construed as referring to an individual article or piece of goods which is not a 'package'(246).

Scrutton, however, is of the view that the word 'unit' probably means the unit of enumeration or measure shown in

the bill of lading as provided by Art.III, Rule, 3(b)(247). This rule provides that the bill of lading shall show, amongst other things, 'either the number of packages or pieces, or the quantity of weight as the case may be...'

Turning to the American jurisprudence, the word 'unit', as we have said, is replaced in the U.S. COGSA by the expression 'customary freight unit' which was held in *The Bill*(248) to mean "the unit of quantity, weight or measurement of the cargo customarily used as the basis for the calculation of the freight rate to be charged."

The Bill's interpretation of the words 'customary freight unit' was approved in *Waterman S.S. v. U.S. Smelting, Refining & Mining Co.*(249), where 698 pieces of structural steel- the weight somewhat exceeding a ton per piece- where shipped in bulk. The freight being adjusted per 100 lb. 13 pieces were lost on the voyage. The court did not regard each of the pieces as a customary freight unit; and since the freight was charged at 65 cents per 100 lb., that unit of measure was held to be the customary freight unit.

In cases which followed, however, the courts have read the phrase more narrowly, 'customary freight unit' has been read by most courts to mean the freight unit by which the freight was calculated in that particular case, i.e. actual freight unit(250).

The term 'actual freight unit' is also adopted by the U.A.E. Maritime Code. Art. 275(1) read: "The liability of the carrier for the loss of or damage to the goods shall in all events limit to Dh. 10,000 per package or unit used as a basis for the calculation of the freight ..."

It is submitted that the purpose from adding the word 'unit' was to cover all types of goods not being shipped in packages. This proposition can be ascertained by pursuing the negotiations at the Hague Conference 1921.

The preliminary drafts of the Brussels Convention showed that the first proposal of the Maritime Law Committee, appointed to draw up the project of the Convention, was to provide a rule to determine the limitation of liability, to the option of the carrier, alternatively per package or per measurement unit (cubic feet) or per weight unit. The Committee proposed the following rule(251):

> "Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods for an amount greater than £...per package, or £...per cubic foot, or £...per cwt., (as declared by the shipper and inserted in the contract of carriage whichever shall be the least) of the goods carried, unless the nature and value of such goods have been declared by the shipper as to the nature and value of any goods declared shall be prima facie evidence, but shall not be binding or conclusive on the carrier."

This proposal, however, was opposed at the Hague Conference 1921 by Mr. Dor of the French delegation and from other delegations representing the cargo-owners. Mr. Dor

contended that the limitation per package was the only limitation acceptable:

> "I further say that it (the liability) ought to be limited only to a limitation per package, because if you go on copying the bills of lading...and saying so much per package, or so much per cubic foot, or so much per cwt., whichever is the least you always leave the possibility to the shipowner to get out of it. Here you have a case containing something very valuable, but it is very small. In this case you take it by cubic feet. In another case it would again be something very valuable but very light, and there you take it by the weight, and limit the shipowner's liability according to weight. You must make sure, and I think it is perfectly reasonable to say that the owner will not be able to limit his liability to less than £100 per package, and per package only, leaving out the cubic foot and the cwt."(252)

It was then decided to adopt a sole limitation, i.e. per package as suggested by Mr. Dor. However, it was subsequently ascertained that the Rule as set forth was causing some inconveniences and the same Maritime Law Committee was requested to re-examine the text.

The Committee modified the text, adding the words 'per unit' after the word 'package', connecting the two words with the conjunction 'or'.

In the report made by the draftsmen of the new text at the Meeting of the International Law Assembly held from the 20th of August to the 3rd of September 1921, the reason for the modification was found necessary because there were cases in which the rule was not applicable, as there were goods that could not be referred to as a 'package' and therefore, by adding the words 'per unit', the intention of the draftsmen was clarified.

The new text was approved without alteration by the Hague Conference and inserted in the Convention approved on August 24, 1924.

It seems therefore clear that the text of the previous Rule had to be modified because it did not cover all possible types of cargo loaded on vessels, since not all goods are shipped in packages and, as a consequence, the words 'per unit' were added to the term 'package' in order to establish the limitation of liability when goods are not shipped in packages.

4.9.1.3 THE APPLICABILITY OF THE BILL OF LADING DESCRIPTION AS A TEST

Absence of a clear and predictable answer to the question of what constitutes a 'package or unit' led the parties to a contract of carriage to find another solution and that is by describing the cargo in the contract as 'package' or 'unit'. For instance, Clause 17 of the Uniform North Atlantic Bill of Lading 1938, provides that the phrase 'per package or customary unit' used in U.S. COGSA means 'per package or per unit, on which basis the freight is adjusted.' Another Clause read: "It is understood that the meaning of the word 'package' includes pieces and all articles of any description except goods shipped in bulk."

What is the effect of such description on the carrier's liability? No English or U.A.E. court has yet tested this question but American Courts have had the opportunity to consider it and they expressed different views.

In *Aluminios Pozuelo* Case(253) where a bill of lading described the cargo under the headings 'No. of packages' and 'Shipper's description of package and goods' as one (1) skid machinery the Second Circuit held that:

> "Where the term 'package' for maritime shipping purposes has become a word of art and where by statute liability limitation consequences attach thereto, the parties must be presumed to have understood these consequences when they applied it to this Brobdingnagian package' the three-ton press. Their contract states their agreement. Having specified that the press was 'One (1) package', they must abide by its meaning as a word of liability limitation."(254)

The Fourth Circuit has also considered the description of the goods in the shipping documents as an important factor in determining the nature of the goods shipped. Thus in *Commonwealth Petrochemical Inc. v. S.S. Puerto Rico*(255), a transformer was damaged. The bill of lading defined 'package' in a manner which the court construed to include the transformer. The Court pointed out that:

> "The key to determining what is a package or unit for the purposes of limitation is the intention of the parties, particularly as declared on the bill of lading."

Contrary to the above decisions, the Ninth Circuit has stated that the parties cannot define whatever they wish to be the package, since being allowed to do so would permit the carrier to reduce his liability between the minimum liability

established by COGSA sub-section 5. In *Omark v. Associated Container* Judge Beeks concluded that(256):

> "...no legal effect can be given, consistent with COGSA and the Shipping Act, to the parties' private intention or characterisation regarding the COGSA package."

It is submitted that an item of goods should not become a 'package' or 'unit' merely because the parties have chosen to call it one. Allowing a clause in the bill of lading such as the following

> "An article or piece of merchandise which is not crated, boxed or packaged shall nevertheless be considered a separate package or customary freight unit for the purpose of determining the extent of the liability of the carrier under this clause and under S.4(5) of COGSA."(257)

will certainly reduce the carrier's liability below what is statutory permissible on the basis of the carrier's own contract where by use more proper test the unit of cargo would not really be a package(258). This argument was clearly put forward by Judge Cashin in *Gulf Italia Co. v. American Export Lines*(259):

> "To allow the parties themselves to define what a 'package' is would allow a lessening of liability other than by the terms of the Act since a carrier could always limits its liability to $500 be merely extracting a stipulation from the shipper that everything shipped, in no matter what form, would be deemed for the purposes of limitation of liability a 'package'."

To reiterate, the main fault in giving weight to the description on the bill of lading is that, the bills of lading are generally drafted by the carrier(260), who is in a

better position of knowing the consequences of the use of the word 'package' in shipping business, and completed as a matter of course by the shipper who may be not in the business of shipping. Therefore, the carrier is in a position subtly to influence the way in which the cargo is described in the bill of lading merely through the wording of the column headings. When the courts give weight to typed-in figures under the column headed 'No. of packages' as ostensibly evidencing the intent of both parties, they may in fact be enforcing only the intent of the carrier.

A further undesirable side-effect of a test based upon the parties' intentions is its obvious potential for impairing the value and negotiability of ocean bills of lading, due to uncertainty in the allocation of risks with respect to the cargo. The holder of the bill of lading can never be sure what the shipper and carrier 'intended' to treat as a package except to the extent that said intent can be deduced from the four corners of the bill lading itself.

4.9.2 WEIGHT LIMITATION

Beside affording a limitation based on package or unit, Art. IV, Rule 5, of the Hague-Visby Rules, but not the Hague Rules, also affords to the cargo claimant alternative limitation based on weight. It is submitted that the 'per package or unit' limitation is more attractive to cargo weighing 333.3 kilos or less since the weight limitation will result in a lower limit, and that 'weight' limitation is more

attractive to cargo weighing more than 333.3 kilos since it will produce a higher limit. In his work on The Hague Visby Rules, Diamond suggests(261):

> "If a package or unit weighs 333.3 kilos or less, then limit is (666.67 units of account) irrespective of whether all the goods were lost or damaged or only some of them. If a package or unit weighs more than 333.3 kilos and all the goods within it are lost or damaged then the weight alternative will provide a higher limit."

Art.IV, Rule 5(a) of the Visby Rules, however, may produce some difficulties in certain circumstances. Take, for example, the loss or damage to a shipment under one bill of lading of several 'packages' or 'units', some of which are far heavier than others. In such case, it is not clear whether the criteria are available only as alternative to the collective cargo or whether, in order to derive the maximum liability, the cargo-owner can select which of the two alternative - package/unit or weight - is more attractive to each individual item of cargo and thereby classify some items by package or unit and others by weight. Diamond suggests that in such a case reference should be made to the bill of lading. If the bill gives the number of packages or units, the package/unit limit is used and if not, the weight limit is used(262). This suggestion, however, has been contested by the editors of Chorley and Giles' Shipping Law who state, correctly, 'that the plain wording of the Rules dictates an answer which is in terms independent of the bill of lading and based simply on the giving the greater award of

damages to the cargo-owner'(263). They submit that the choice of limitation - package/unit or weight - depends on the mathematical result (whichever is the higher) and not on the type of cargo.

A further difficulty arises in cases where part of the cargo is lost. It is not clear whether the limitation test is applied to the part lost or to the whole of the cargo as being damaged. Diamond suggests:

> "If a package or unit weighs more than 333.3 kilos and only some of the goods within it are lost or damaged, the limit will be (666.67 units of account) unless those goods weigh more than 333.3 kilos."(264)

Under the U.A.E. Maritime Code the weight limitation is applied to the whole of the cargo as being damaged. Art. 276(1) states: " The liability of the carrier for the loss of or damage to the goods shall in all event limit to...Dh 30 per each kilogram of the gross weight of the goods...."

While one can see some injustice in computing limitations by reference to the whole of the cargo, if in fact the cargo-owner merely suffers loss of a divisible part of that cargo, situations could arise where only part of the cargo is damaged but, because of its indivisible nature, the cargo-owner suffers financial loss referable to the whole of the cargo.

4.9.3 CONTAINERISATION

The use of containers has presented a major problem of interpretation of Article IV, Rule 5 of the Hague Rules. The question is whether the container constitutes the package, or whether the packages within the container are to be considered separately for limitation purposes. Two opposing approaches have been developed in case law. The first approach concerns the "**functional package test**" which was adopted by the U.S. Second Circuit in *The Kulmerland*〈265〉 and *The American Legion*〈266〉. This test is one which concerns burden of proof. Under this test, where the shipper's own cartons or crates have been packed in a container, a presumption is created that each of the cartons or creates is a package for the purpose of limitation of liability if the shipper's cartons or crates are functional packages in the sense that they are sturdy enough to withstand the rigours of break bulk carriage. The burden is placed on the carrier to show that both parties intended the container to be the package. However, where the shipper's own individual cartons or crates are not functionable or usable for overseas shipment, the container is presumptively a package for the purpose of limitation of liability and the burden shifts to the shipper to show why the container should not be treated as the package.

The "functional package test" may be criticised from the carrier's point of view in that it is unrealistic in that it forces the carrier to look beyond the description in the bill

of lading or beyond the outer packing to investigate the contents of each container(267). Further, the test fosters economic waste by requiring the shipper to package container shipped goods expensively to avoid the statutory limitation(268).

The second test is the "**intention of the parties**" test which was adopted by the U.S. Ninth Circuit(269), by the Canadian(270) and U.A.E.(271) Courts. According to this test the criterion, in determining whether or not a container is a single entity , is whether the description of the cargo in the shipping documents is such as to indicate that individual packages are within the container. "Where the shipper knows his goods are to be shipped by container and specifies in the contract (of carriage) the type of goods and the number of cartons carried in the container, and where the carrier accepts that description and count, then ...the parties intended that the number of packages for the purpose of limitation of liability should be the number of cartons specified(272)."

It is difficult, of course, to apply the test of intention except where the container holds the goods of a single shipper, or except where the shipper packs the container or request the carrier to do so(273).

Art. IV, Rule 5(c) of the Hague-Visby Rules attempts to solve the problem of containerised goods by providing that:

> "Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph so far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

The above provision makes it clear that a container or pallet will cease to count as a single package if the packages or units within the container are enumerated in the bill of lading. In other words, the number of packages or units within the container must appear on the face of the bill of lading in order to constitute the basis for calculation of the limitation. Accordingly, a carrier, receiving a closed container, is not forced to pay compensation on the traditional package basis when he does not know the contents of the container. Further, a person who acquires a bill of lading can readily ascertain from looking at it the type of cover under which the goods have been shipped. For example, if the contents of the container are itemised in the bill of lading (e.g. 1 container containing 100 cases of machinery), each will qualify as a package. But if the bill of lading describes the shipment merely as '1 container containing machinery', then the container is deemed to be the individual package or unit(274). If, in the other hand, the contents of a

container are partially enumerated in the bill of lading (e.g. 1 container containing 100 cartons of TV sets and general merchandise), then the 100 cartons would form separate packages for the purposes of limitation and the remaining goods would come within the weight limitation.

The legislative background of Art.IV, Rule 5(c), clearly reveals that the intention of the parties has received much intention in the formulation of this sub-rule. The Chairman of the Drafting Committee responsible for the container clause, who was also the Chairman of the British Delegation explained the nature and purpose of clause as follows:

> "It is for the shipper and the carrier to decide whether they want the particular container to be treated as the package for the purpose of limitation of weight, or whether they want the smaller packages or units in it to be so treated, and no doubt when the latter alternative is taken...a higher rate of freight will be payable...what is essential is that into whosoever's hands the bill of lading may come, the hands of the consignee, of the banker who finances the transaction or the insurer, it will appear on the face of the bill of lading whether the package for purposes of maximum liability is the container or the individual packages inside the container...What we want to do is to leave open to the shipping industry, the shippers and the shipowners, to decide as a matter of business whether they want to get 'per container rates', in which case the container will be treated as the package, or the ordinary freight rates in which (case) the traditional packages within it will be treated as individual package...Under this paragraph all you will have to do is to look at the bill of lading and see, does it contain any figures of the number of package other than the containers themselves."〈275〉

The interpretation of the container clauses as allowing

a carrier to charge an additional fee for the shipper's right to enumerate package in the bill of lading was rejected by the American Delegation because it would nullify the benefits of COGSA. 'The shipper should not be required to pay an extra charge for protection that COGSA said the carrier must provided.' The American delegation argued against placing containerised cargo in a less favourable position as to liability limitation than the same cargo before containerisation, stating : 'that such an inequitable and anomalous consequences' could not and should not be intended.(276)'

It is submitted that nothing in the language of Art. IV, rule 5(c) indicates that for the privilege of the enumeration in the bill of lading the number of packages or units loaded into the container the shipper must pay an increased freight rate(277). As the practice of charging higher rates has tended to discourage shippers from declaring the nature and value of their goods in the bill of lading. Instead, they have tended to rely on supplementary cargo insurance as a means of protection against loss, which is for the most part, less expensive than paying a higher freight rate.

Although the purpose of Art.IV Rule 5(c) seems apparent, Art.IV, Rule 5(c), leaves some questions unanswered. For instance, the meaning of the expression 'similar article of transport' and 'used to consolidate goods' is not clear. While a trailer may be regarded as a 'similar article of

transport', a truck which has its own means of propulsion surely cannot be considered as one. Scrutton, however, says that 'roll on-roll off' lorries and trailers do not fall within the expression 'similar article of transport(278). This suggestion has been contested by Carver who finds that roll on- roll off, push on-push off, drive on-drive off, fly on-fly off, are not only similar to but are containers if they consolidate goods(279).

Again, while Scrutton suggesting that the most obvious interpretation of the words 'used to consolidate' is 'used to carry' or 'used to contain'(280), Diamond finds the expression ' used to consolidate goods' refers to the physical placing of goods together inside a container, not to the consolidation of the goods of different shippers or of the goods shipped under different contracts of carriage(281).

Another question left unanswered is in what circumstances is the number of packages 'enumerated in the bill of lading as packed' in the container? Scrutton submits that where the bill is 'said to contain' a certain number of packages, then this is sufficient for the purposes of Art.IV, Rule 5(c), even though it would probably not create an estoppel under Art.III, Rule 3(282). Scrutton also submits that both parties are bound, for limitation purposes, by an incorrect enumeration which is an unsatisfactory result.

Diamond is of the same view regarding the 'said to contain' clause, but to treat the incorrect enumeration as conclusive for limitation purposes while it is not binding

for the liability purpose would be, in his view, a silly result. He submits that both the liability and also the limitation should be based on the accurate figure. For instance, if the bill of lading described the shipment as 'one container said to contain 500 cases' but it is found that the container contains only 475 and that 25 cases were never shipped, than the limitation should be based on the figure 475(283).

The reason for considering the 'said to contain' clause is of no effect on the operation of Art.IV Rule 5(c) is well summarised in Chorley & Giles' Shipping Law(284):

> "The Rules give the carrier the opportunity not to enumerate the quantity of goods shipped where he is in no position so to enumerate. Where this is the position, the carrier ought to exercise that option rather than enumerate (the quantity of goods) and then insist that what was really meant was one container. In so far as the 'said to contain' clause is used as a device to reduce the amount of damages recoverable under Art. IV, the clause can be struck down by Art. III, r. 8, which prohibits clauses lessening liability under the Rules. Moreover it appears that event if the clause alters the evidentiary strength of the representation in the bill of lading, this would not necessarily mean that the lower multiplier is to be preferred to the higher for purposes of limitation: Art. IV(5)(c) speaks simply of 'package or units enumerated in the bill of lading as packed' and not of packages warranted to have been shipped."

It must be noted that under English common law the statement as to quantity of goods shipped which appears in the bill of lading is generally not conclusive that that quantity has actually been shipped. The reason for this is that the person signing the bill of lading in such a case has

in law no authority to sign for goods which are not actually shipped(285). Thus, the shipowner is able to bring evidence to show that although the bill of lading states a certain quantity of goods to have been shipped, yet, in fact some of these goods were never put on board the ship. Consequently, the 'said to contain' clause will not give rise to an estoppel against the shipowner(286).

American(287), Canadian(288) and U.A.E. decisions(289) have not been bothered by the "said to contain" clause and have determined that this shows the intention of the parties to have individual packages used for limitation purposes. Thus, in *Leather's Best* Case(290) bales of leather were shipped in a container furnished by the carrier and loaded by the shipper. The bill of lading described the goods as follows: "Number and kind of packages, description of goods: 1 container s.t.c. 99 bales of leather." Also on the bill of lading was a provision limiting liability to $ 500 per container. Upon arrival in the US, the container was unloaded and placed in the New York terminal from where it was stolen. The carrier sought to limit liability to $ 500 for the entire container. The Second Circuit held , relying mainly on the description of the cargo in the shipping documents, that the container was not a package and that the 99 bales which had been placed inside were to be considered the measure of liability.

Similar deciding can be found in the U.A.E. decisions on the point. In a case before the Dubai Court of Appeal, a bill

of lading described the shipment as "40 Ft. container - STC-20 rolls of carpet". The Court held that each roll was a package for the limitation purposes(291). It is worth noting that in this the container was supplied, stowed and sealed by the shipper without any interference from the carrier who delivered the container to the consignee as he had received it from the shipper.

Another good illustration is a case where a container contained 2001 cartons of electrical tools were carried from Italy to Dubai. 20 cartons were lost. The bill of lading described the shipment as "1 container 'said to contain' 2001 cartons." The Court held, relying on the above description, that the individual cartons and not the container were packages(292).

A further question arises where the cargo is delivered for shipment in container. It is not clear under the container clause whether the liability per kilo applies to the contents alone or both. If both, then the carrier's liability could be well increased beyond proportion where low-priced commodities are stowed in heavily refrigerated container.

4.9.4 WHEN LIMITS OF LIABILITY CANNOT BE RELIED UPON

The carrier cannot rely on the limits of liability under Art. IV, Rule 5, under certain circumstances.

First, where higher limits of liability have been agreed upon, such higher limits prevail over those in the Rules.

Secondly, Art. IV, Rule 5 , cannot be relied upon where the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading(293).

Thirdly, and this is provided for only under the Hague-Visby Rules, where loss or damage has been caused by an act or omission on the part of the carrier, Art.IV, Rule 5 cannot be relied upon if such loss or damage was intentional or if such act or omission was reckless and done with knowledge that the loss or damage would probably result (Art. IV Rule 5(e))(294).

4.9.4.1 DECLARATION OF THE VALUE AND NATURE OF THE GOODS

The shipper can avoid the limitation of liability by declaring the nature and value of the goods prior to shipment and inserting them in the bill of lading. The original draft to Hague Rules Art.IV, Rule 5, contemplated that shippers should always declare the value of the goods. This draft

was, however, severely criticised by some of the members of the Hague Rules Conference:

> "What happens is this, that the shippers very often do not declare the value, because they are afraid of paying the Customs or afraid of paying taxes, the ten per cent tax, or luxury tax, or one of the other taxes; for a good many reasons they do not declare the value; and what you want to do away with is the fact, in bills of lading where no value is declared, that the shipowner is able to limit his liability to 10 francs per package."(295)

By and large the prevailing point of view among representatives for the cargo interest, was that having paid ordinary freight rates, they were entitled to rely on a certain minimum liability of the carrier(296). On the other hand, the shipowners wanted to avoid excessive and unanticipated cargo claims; declaration of the nature of the cargo and its value was considered absolutely necessary in order to enable the carrier to exercise due care for the protection of the cargo, and to ensure that the carrier did not incur a liability wholly disproportionate to the freight charged for the carriage(297). Finally, the conference arrived at a compromise as expressed in Art.IV Rule 5.

The Formal Requirement of Declaration

There are certain formal requirements for the declaration to be effective in avoiding the statutory limitation of liability. It must expressly referring specifically to the particular goods which are the subject of the carriage; the shipper must declare the nature and the value of the goods before shipment and the nature and value must be inserted in the bill of lading.

(A) The Declaration Must Be Express

The declaration must be specific so as to enable the carrier to exercise due care for the protection of the cargo in question. Clauses in bills of lading which do not comply with this condition are generally held ineffective. In *Foy v. Holyman*(289), a clause in bill of lading fixing the value of each package at £5 was held not to have the character of the effective declaration of value:

> "Clause 14 of the bill of lading does not declare 'the nature and the value of such goods' within the meaning of the first paragraph of Art.IV Rule 5. Such a declaration must be specific. It must state the nature as well as the value of the goods. A statement that none of the goods exceeds £5 in value does not declare either the nature or the value of any goods."(299)

Further, in *Williams v. African S.S.Co.*(300), where the bill of lading described the goods as 'one box containing about 248 ounce of gold dust', it was held that that was not

sufficient statement of the value so as to deprive the shipowner from invoking the limitation of liability under British MSA.

The question may, however, be raised whether the shipper is actually required specifically to declare the nature and value of the goods, or whether information on these points otherwise conveyed to the carrier will make a special declaration superfluous. In *Anticosti Shipping v. Viateur St. Amand*(301), a truck worth more than $500.000 was suffered damaged exceeded $4000. No value was declared to the carrier. The District Judge held that the carrier was not entitled to limit his liability to $500 of the Canadian Water Carriage of Goods Act, s. 4(5), because the truck was obviously of a value well in excess of $500.000 and therefore the shipper was not required to declare the value of the truck. This decision was rejected by the Court of Appeal which held that the carrier was entitled to limitation of liability. The Court said that:

> "The responsibility for seeing that the value of the thing shipped is declared and inserted in the bills is on the shipper and any consequential hardship must be charged against his own failure to respect that requirement."(302)

It is therefore submitted that knowledge of the carrier concerning the nature of the goods will not exclude the application of Art.IV Rule 5 although the carrier thereby may be able approximately to estimate the value of the goods, or at least to understand that the value of the goods greatly exceeds the statutory limitation amount.

(B) The Declaration Must Be Inserted In The Bill Of Lading

Art.IV, Rule 5(a), expressly provides that the declaration of nature and value of the goods should be embodied in the bill of lading, implying thereby that declaration not inserted in the bill of lading is of no effect. The effect of the requirement of inserting the declaration in the bill of lading is explained by Mackinon, J., in *Pendle & Rivet Ltd., v. Ellerman Lines Ltd.*,(303):

> "When the plaintiffs sent their shipping instructions to the defendants they did so by document addressed to the Western Laurence Line, Limited (the carrier) and they said as regards case 6,855 that it weighed 3 cwt. I qr. 13 lb., that it contained wool and silk as well as woolen goods, wool and silk containing under 4 per cent of silk, and stated the value of the case as being $256 8s. ld. When, however, the bill of lading was issued it did not include anything about the value of the goods. Therefore, though the plaintiffs did declare the value of the goods before shipment, that was not inserted in the bill of lading; and in those circumstances only one of the conditions on which the defendants could be liable for more than £100 was fulfilled."

Thus the validity of a declaration depends on its incorporation in the bill of lading. Difficult question arises when the goods have suffered damage before the bill of lading has been issued. This interesting situation arose in *Deere & Co. v. Mississippi Shipping Co.*(304) where a boxed tractor dropped forty feet into a hold whilst being loaded. The shipper had made no attempt to declare its value before shipment as required by U.S.COGSA, and no bill of lading was ever issued. The shipper asserted that since the limitation could only be avoided by a declaration of value inserted in

the bill of lading, and since the bill of lading was not to be issued until after the shipment was loaded, he had no opportunity to exercise that option until that time, and was therefore not bound by the limitation. The Court considered that the words of COGSA, Section 4(5) had to be read in the light of Section 3(3), which gave the shipper the right to demand a bill of lading from the carrier at any time after delivery of the goods for shipment. There was nothing to show that the shipper had required the carrier to issue a 'Received for Shipment' bill of lading declaring the full value of the goods at the time of delivery to the wharf, and accordingly his claim was limited to the amount provided by the Act, i.e. $500.

'FAIR OPPORTUNITY'

It is submitted that the carrier must afford the shipper an opportunity to declare a value higher than the package limitation. If the carrier does not afford the shipper such an opportunity, the carrier cannot rely upon per package limitation. No English or U.A.E. case has yet dealt with the question of what constitutes a 'fair opportunity' but American Courts did so.

However, while there is an agreement on the general principle that the carrier should afford the shipper an opportunity to declare a higher value, American Courts are divided over what constitutes a 'fair opportunity'. In *Komatsu v. States S.S. Co.*(305), the Ninth Circuit held that

the carrier can meet his initial burden of proving 'fair opportunity' by showing that the language of section 4(5) of COGSA is on the face of the bill of lading. In other words, the burden on the carrier to prove that the shipper knew it had the opportunity and did not take advantage of it.

The same rational was used in *Nemeth v. General SS*(306). In this case the plaintiff sued the carrier to recover losses he incurred during the transport of his goods. While he, the plaintiff, contended that he provided the carrier with notice that the value of his shipment exceeded $20.000, a value declaration of only $400 was typed on the face of the bill of lading. In opinion by Judge Hug, the Ninth Circuit refined it analysis of the 'fair opportunity' doctrine in a statement of the allocation of burden of proof:

> "The carrier bears the initial burden of proving 'fair opportunity'... Normally, the carrier can meet this initial burden by showing the language of COGSA Section 1304(5) is contained in the bill of lading...Such an express recitation of Section 1304(5) is prima facie evidence that the shipper was given a fair opportunity to choose a higher liability....The burden of disproving 'fair opportunity' is then shifted to the shipper."(307)

Though the Court found that the language of s.4(5) appeared in the bill of lading, it held that the clause insufficient to meet the initial burden of proof the 'fair opportunity' was given to the shipper because the limitation provisions was "microscopic and blurry...(and) was illegible to the unaided eye." The Court also found relevant the fact that the bill of lading contained no designated place for the shipper to make an excess value declaration.

The proposition of the Ninth Circuit was, however, expressly rejected by the Fifth Circuit in *Brown & Root v. M/V Peisander*〈308〉. Goods were damaged as they were being transported from the dock to the ship's side. No bill of lading was issued. It was agreed that the legal relationship of the parties was governed by the carrier's bill of lading and the carrier's tariff. Clause 2 of the carrier's bill of lading contained a typical Clause Paramount which incorporated the provisions of COGSA into the bill of lading. Clause 18 provided that 'in no case' would the carrier's liability exceed the amount of $500 per package or freight unit. The shipper argued, inter alia, that the 'in no case' language of Clause 18 (the limitation clause) effectively foreclosed the shipper from declaring a higher value and obtaining increased carrier liability; and that on the face of the bill of lading there was no prescribed place for the shipper to indicate any increased valuation. The Fifth Circuit held that the $500 package limitation was available to the carrier. In holding so, the Court noted that Clause Paramount made COGSA applicable to the bill of lading thereby bring into play s.4(5); and more significantly, the published tariff which has the effect of law very carefully gave the shipper a choice of valuation by a choice of precisely definable freight rates.

Dealing with the shipper's argument that the bill of

lading did not contain a prescribed space in which to insert an increased valuation, the Fifth Circuit said(309):

> "COGSA s. 4(5) does not prescribe that the face of the bill of lading contains a specific space or blank in which the increased valuation is to be inserted nor does it provide that the carrier rather than the shipper must actually make the notation. The phrase 'unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading' clearly puts the burden on the shipper to make the declaration."

The Court also considered the shipper's argument, namely that the 'in no case' language of Clause 18 imposed an inflexible limitation without opportunity for increased carrier liability, saying that Clause 18 must be read in light of the language of Section 4(5) and that "in the presence of Section 1304(5), which is expressly incorporated in the bill of lading, clause 18 can hardly be read as absolutely prohibiting avoidance of the $500 limitation."

Thus unlike the Ninth Circuit the Fifth Circuit observes that the COGSA gives the shipper the opportunity to declare a higher value, and does not concern itself with whether the shipper knew the law. The Fifth Circuit places the burden on the shipper to prove that he was denied the opportunity to declare a higher value.

It is worth noting that the proposition of the Fifth Circuit was also expressly rejected by the Ninth Circuit in the early decision of *Pan Am v. California Stevedore*(310) which involved a bill of lading substantially identical to the one considered by the Fifth Circuit in *Brown & Root* Case.

In *Pan Am* the carrier, who included a Paramount Clause in the bill of lading incorporating the provisions of COGSA but provided no space for an excess valuation declaration, argued that a sophisticated shipper acting through a sophisticated professional freight forwarding company should be aware that COGSA's limitation applied. The Court rejected this argument and held that the COGSA limitation was void because the bill of lading provided no space for a declaration of excess valuation:

> "The bill of lading is usually a boilerplate form drafted by the carrier, and presented for acceptance as a matter of routine business practice to a relatively low-level shipper employee. We feel that imputing such knowledge of COGSA applicability and provisions to such an employee is an assumption that may well go beyond the bounds of commercial realism."(311)

The question of the 'fair opportunity' has also been considered by the Fourth Circuit in *General Electric v. Lady Sophie*(312). In this case the bill of lading failed to tell the shipper that he could declare a higher value and failed even to mention the package limitation. The bill only referred to the Hague Rules. The Court precluded the carrier from relying on the package limitation because it did not think that the shipper was given an opportunity to declare full value, as the shipper would have to follow the treasure hunt from the bill of lading to the Hague Rules, and finally to U.S.COGSA, to discover the package limit and his right to declare a higher value. The Court also criticised the bill of lading for its lack of a blank in which the shipper could have written the full value.

The above discussion clearly indicates that there is little uniformity in the approach of the Ninth Circuit and Fifth Circuit to the question of what constitutes 'fair opportunity'. While the courts seem to agree that if the shipper had known he had the opportunity, then the shipper would be limited unless he had asked to declare a higher value and the carrier had refused, the courts differ on whether the carrier must educate the shipper or whether the shipper must learn the provisions of COGSA himself when the shipper's knowledge is not known. The Fifth Circuit's observation that the COGSA provides the opportunity, and that the shipper should bear the burden to prove that it was denied the opportunity makes more sense than pretending that experience shippers never heard of their right to declare a higher value. Yet, this observation may lead to difficulty and become harsh when the shipper is not in the business of shipping and has no experience. Here the carrier must invite the shipper to declare a higher value and the burden should be placed upon the carrier to prove that the shipper knew he had the opportunity and did not take advantage of it.

(C) The Declaration Must Be Before Shipment

It is not enough for the purposes of a voiding the limitation of liability to declare the nature and value of the goods expressly in the bill of lading, but that declaration must be 'before shipment'. The words 'before shipment' are very important, as in practice it has been

found that although the value may have been declared and entered in the bill of lading the declaration of value was made after shipment on board the vessel(313).

The reason why the declaration must be 'before shipment' is the same as that why the declaration must be expressed. If no value have been declared before the goods were shipped the carrier will be deprived the opportunity of giving the goods the special care in handling and stowage which the value warranted.

4.10 ARTICLE III, RULE 6 [TIME LIMITATION]

> "...the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen."

According to this rule the carrier is discharge from all liability in respect of loss or damage to goods unless the cargo-owner brought his action for recovery within one year of their delivery or of the date when they should have been delivered.

In the past a doubt had arisen under English law as to whether suit brought within a year in a jurisdiction not the one which the dispute is ultimately decided is sufficient to prevent the time from running. In 1955 the editors of

Scrutton inserted a note in the 16th edition as follows: 'If suit is brought within a year in one jurisdiction it is submitted that this should be sufficient to satisfy the paragraph and would justify the goods-owner's succeeding in a suit started after a year in another jurisdiction.' But this statement was disapproved by Roskill J., in *Compania Colombiana Seguros v. Pacific S.N. Co.(The Salaverry)*(314):

> "...'unless suit is brought within one year' (does not) mean 'unless suit is brought anywhere within one year...(but) it must mean unless the suit before the court is brought within one year."

Thus a writ issued in America within one year will prove useless if the action is now attempted to be commenced by issue of a writ in England outside the one year period.

The word 'suit' in Art.III, Rule 6, is also include arbitration(315). But if the parties agreed to proceed by way of arbitration it would appear that in so far the contract is subject to the Rules then on no account will a party be able to make an application for an extension of the one year period under Section 27 of the English Arbitration Act.

Art.III, Rule 6, is intended to afford the carrier "protection from being subjected to claims for loss of or damage to cargo which have not been promptly made or promptly pursued(316)." In *The Aries*(317), the House of Lords held that the effect of this time bar is that the cargo-owner's claim ceases to exist altogether. As such, after the one-year limitation period, the cargo-owner's claim cannot be

set up as a defence to an action by the shipowner or as a set-off in any way whatsoever. While this Rule inconveniences cargo-owners, there is nothing to prevent the parties to the contract of carriage from agreeing to an extension of the period of limitation or from providing, in the contract of carriage, for a longer limitation period(318).

The question as to when the goods have been delivered by the carrier is not easy of resolution and gave rise to considerable discussion at the meeting of International Maritime Committee and at the Official Diplomatic Conference at Brussels(319).

Scrutton L.J. in his evidence before the Joint Committee in 1923, raised the question : 'Is the delivery to be the discharge from the ship or delivery under a through bill of lading which may be to a warehouse in the interior(320)?'

On this point Sir Norman Hill, in a subsequent statement to the Committee referred to the definition of 'carriage of goods' in Art.I and emphasised the point that the Rules cover only the voyage. What is done before or after the voyage within the territory of a nation is left to be controlled by the laws of that nation(321). Consequently 'the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage' in this Rule relating to notice of claim for loss or damage is the time when the goods are discharged from the ship.

The above proposition is not without difficulty. The goods may be discharged from the ship into lighters and may afterwards be lodge in a warehouse before they come into the hands of their owners. In the port of Dubai, for instance, the practice is that the port Authority on behalf of cargo-owners receive and subsequently warehouse and deliver the goods as required. Hence, the first opportunity for examination of the goods may be when they are landed on the wharf or when they are delivered to the owner. It is submitted therefore that 'delivery' should denote a two-party transaction in which the cargo-receiver would have an opportunity to examine the goods and observe defects<322>.

Another question arises as to what is the position if the goods are delivered later than the date on which they should have been delivered? No guidance is afforded by an English or U.A.E. case, but this was one of the issues in the American case of *Leo Hess International Corp. v. Isthmian S.S.Co.*<323> where the carrier should have delivered the cargo by March 1951 but did not do so until June 1952. Action was brought in January 1953 and the New York Supreme Court held that it was not out of time, for the limitation period began from the date of delivery or the date on which the goods ought to have been delivered, whichever should occur first. The Court said that if this view were adopted, the carrier approaching the end of the non-delivery year had in his power by further withholding to deprive the holder of the bill of lading of any claim for damages to the goods,

even though delivery was made immediately after the expiration of the non-delivery year.

The words 'all liability whatsoever' in Art.III, Rule 6, in the Hague-Visby Rules replace the words 'all liability in respect of loss or damage' in Art.III, Rule 6, in the Hague Rules. The consequences of this change in terminology are not altogether clear. Where the carrier is guilty of an unjustifiable deviation or of the type of misconduct described in Art.IV, Rule 5(e), it is arguable that the right to rely on the time bar is not lost in view of the fact that the Hague-Visby Rules, unlike the Hague Rules, entitle the shipowner to be discharged from all liability whatsoever<324>.

Whether the time bar can now be relied upon in the case of misdelivery of goods is a more difficult question.

One of the purposes<325> for introducing the word 'whatsoever' in the Visby Rules is that the time bar would apply to situations of misdelivery when goods have been handed over without production of bills of lading so as to enable parties such as banks who issue letters of indemnity to regard themselves as discharged from liability after one year. However, whether this purpose has been achieved by the change in terminology is another question altogether. Delivery of goods is still outside the scope of the Hague-Visby Rules and it is suggested that the time bar in the Hague-Visby Rules does not apply to a case on misdelivery of goods<326>.

4.11 ARTICLE III, RULE 8 [CLAUSES LESSENING CARRIER'S LIABILITY

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

As has been indicated above, the Rules, while lessening the standard of the carrier's duty to that of an obligation to exercise reasonable care only, have provided that (subject to the qualification already mentioned) this should also mark the minimum of his liability, and that no clause or other agreement should be allowed to affect the statutory test otherwise than as provided by the Statute itself.

The crucial rule here is Art.III, Rule 8. This rule ensures that the effect of the Rules is not circumvented by private agreement(327).

A term which is clearly repugnant to Art.III, Rule 8, is one which attempts to lessen the limits of liability prescribed by the Rules(328). A clause may lessen the carrier's liability, within the meaning of Art.III, Rule 8, in so far as it may purport to displace the standard imposed in connection with a particular duty by the Rules and to exonerate the carrier wholly or partly for his negligence. A clause of this kind, if valid, would reduce the carrier's

liability to liability for wilful wrongdoing only. In so far as Art.III, 'subject to Art.IV,' already excuses negligence in connection with the performance of a particular duty, a clause will infringe the prohibition of Rule 8, if it purports to excuse wilful wrongdoing.

Other examples of clauses which are nullified by Art.III Rule 8 are those which absolve the carrier from liability if a claim for loss or damage to goods has not been made within a period of time which is shorter than that provided for under the Rules(329), those which limit the amount that the cargo-owner is entitled to recover to a maximum sum that is less than the sum mentioned in Art.IV Rule 5(330), those clauses which provide that certain certificates, provided that they comply with certain specified requirements, are to be 'conclusive evidence that the vessel has been properly prepared in every way for the cargo, and that...(the) goods...have been properly dunnaged and stowed(331).' A 'sweepings' clause was disregarded(332) and the both-to-blame collision clause was declared an invalid effort of the carrier to lessen his liability(333).

Clauses which limit the scope of the carrier's duties and not the terms under which the carrier performs his duties under the Rules are not nullified by Art.III, Rule 8, since the object of the Rules is not to define the scope upon which the carrier performs the agreed services(334). Neither would a clause which gives the ship liberty to tranship offend against Art.III, Rule 8, if such transhipment is reasonable

and consistent with proper carriage of the goods(335). A clause which gives the ship liberty to deviate would also not be nullified(336).

4.11.1 Legal Effect Of Article III, Rule 8 -- How Far It Invalidates An Offending Clause

In relation to this subject, two questions must be raised and answered. **First**, if the bill of lading contains a clause or clauses which offend the Rules does Rule 8 make the whole bill of lading null and void or only strikes out the offending clause? **Secondly**, when there is a clause which may partially offend, or contravene the provisions of the Rules, is the effect to render the whole clause null and void or does it nullify only the offending part of the clause?

As regards the first question, it seems to be well settled that Art.III, Rule 8, dose not make the whole contract of carriage null and of no effect, but only the stipulation or agreement which is debarred by the Rules(337). The contract as such remains in existence, unless every single term of it contravenes the Rules, which is a rather unlikely hypothesis. One difficulty, in practice, is to delimit the offending clause, covenant or agreement and thus to distinguish between the offending part and the remainder of the contract that is unaffected by the penalising rule.

As regards a clause partially offending the Rules, though it has been suggested that the effect of rule 8 may be

to make an offending clause totally void(338), it was later largely answered in *Svensk Traktor v. Maritime Agencies*(339). Here, a bill of lading was issued in respect of the shipment of a consignment of tractors from Southampton to Stockholm and contained a clause 'steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage or claim arising therefrom. One of the tractors came adrift during the voyage and was lost overboard.

It was held that whilst that part of a clause giving the carrier a liberty to carry goods on deck was permissible under the Carriage of Goods by Sea Act, it was not permissible for the carrier to exempt himself from liability for any loss or damage arising therefrom, because a general liberty to carry goods on deck did not amount to a statement that the goods were in fact being carried on deck, and accordingly the goods carried must be subject to the obligation imposed by Art.III, Rule 2.

It was also held that the second part of the clause was repugnant to the provision of the Act, and, nonetheless, the clause was severable and entitled the shipowner to carry goods on deck subject to the obligation under Art.III Rule 2.

It may, therefore, well be said now that provided a clause consists of two parts and can be read disjunctively, it is possible to serve that part which does not offend the Rules and merely strike out the offending part, instead of rendering the whole clause totally invalid(340).

Although there is no direct decision , U.A.E. Courts have in several occasions, held that where the contract of carriage contains null clauses (e.g. clauses exempt the carrier from gross negligence) those clauses are to be regarded as not written; the contract otherwise stands[34].

1 See UNCITRAL Yearbook (1972) Vol. III p. 288.

2 Except when he is expressly excused by the Rules: Art.IV Rule 2(a).

4.2 Article III, Rule I [Due Diligence]

3 *Lyon v. Mells* (1804) 5 East 428, 437; *Kopitoff v. Wilson* (1876) 1 Q.B.D. 377, 381.
Although UAE law does not utilise the concept of "the implied warranty of seaworthiness", nevertheless according to Articles 227 and 245 of the Maritime Code the shipowner under an obligation to provide a seaworthy ship.

4 *The Christel Vinnen* [1924] P. 208.

5 See *Riverstone Meat v. Lancashire Shipping Co. (The Muncaster Castle)* [1961] 1 Lloyd's Rep. 57 at 87, per Lord Keith.

6 "Due diligence" was not a novel concept when the first COGSA came into force in 1924. The phrase appeared frequently under the common law either as a qualification to an express warranty of seaworthiness or as a condition for exemption of liability for unseaworthiness and/or other designated risks. It is used in The American Harter Act of 1893, The Australian Sea-Carriage of Goods Act of 1904 and the Canadian Water Carriage of Goods Act of 1910.

7 (1937) 58 Ll. L.R. 33.

8 Ibid., at p. 40.

9 See *Riverstone Meat Co. v. Lancashire Shipping Co.* [1961] 1 Lloyd's Rep. 57.

10 Ibid., per Lord Keith at p. 87.

11 [1940] A.C. 997 at 1001.

12 (1939) 64 Ll. L.R. 87 at 89.

13 Scrutton, Charterparties and Bills of Lading (19th edn.) 1984 (hereinafter cited simply as Scrutton).

14 [1960] 1 Q.B. 536, 581.

15 Ibid., at p. 559.

16 [1961] A.C. 807 at 862.

17 Carver, p. 351.

18 [1862] 2 F. & F. 740.

19 Cadwallder, Due Diligence At Sea, 74 I.D.M. 1972 p.6.

20 Tetley, Marine Cargo Claims, 3rd ed., (1988), p. 369 (hereinafter cited simply Tetley) .

21 Cadwallder, op.cit., at p.6

22 Maclachlan, Merchant Shipping, 7th edn., (1932), p. 371.

23 Hans Gotz, Case and Comment, 33 C.B.R. (1960) p. 97.

24 Zaphirous, The Hague Rules, 1963 J.B.L. 221, 225.

25 [1959] 2 Lloyd's Rep. 105.

26 Ibid., p.113.

27 *Pyrenne Co. v. Scindia Navigation Co.*, [1952] Q.B. 402; *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*, [1974] S.C.R. 933. See also Wilson, p. 173.

28 Art. VII. The UAE Maritime Code, Art. 282, extends the carrier's responsibility from the time goods are "taken in charge" until "delivery" and prohibits carriers from contracting out of this responsibility. (Article 278 (1)).

29 See *Stag Line Ltd. v. Foscolo, Mango & Co.* [1932] A.C. 328 and *The Eurythenes* [1976] 2 Lloyd's Rep. 177.

30 Ivamy, The Carriage of Goods by Sea Act, 1924, And The Doctrine of 'Stages', 23 M.L.R. p.200.

31 See *Mississippi Shipping Co. v. Zander & Co.*, (1959) 270 F.2d (5th Cir.)

32 (1882) 4 Asp. M.L.C. 250.

33 (1854) 23 L.J.Ex. 169, 173.

34 (1882) 9 Q.B.D. 669, 682.

35 Scrutton (18th edn.) p. 251.

36 Carver, p. 359.

37 *Alexandria Court of Appeal, 25 April 1956.*

38 [1967] 2Q.B. 250. Relying on this case, Professor Wilson in his work on Carriage of Goods by Sea, 1st, edn., (1988), p. 181(hereinafter cited simply as Wilson), expresses the view that the charterparty doctrine of stages, under which the vessel is required to be seaworthy at the commencement of each stage does not apply under COGSA 1971. But see Chorley & Giles' Shipping Law, 8th edn., (1987), (hereinafter cited simply as Chorley & Giles) p.198 where it is said that COGSA 1971 cannot be taken to have abolished the doctrine of stages in connection with the contract to which it applies.

However, insofar as the carrier ought to make adequate provision for the various stages before the actual sailing of the vessel from the port of loading, there may still be a breach of the undertaking in Art. III Rule I.

39 (1895) 2 Q.B. 408.

40 Ibid., at p. 416, per Kay L.J.

41 (1927) 2 K.B. 456.

42 Ibid., at p. 462.

43 Ibid., at p. 462.

44 [1938] A.C. 57 at 81.

45 [1939] A.C. 397 at 40

46 [1958] 2 Lloyd's Rep. 252.

47 *Waddle v. Wallsend Shipping Co. Ltd. (The Hopestar)* [1952] 2 Lloyd's Rep. 105.

48 Ibid., at p. 130.

49 See per Sellers J., in *Minister of Materials v. Wold S.S. Co.* [1952] 1 Ll. L.Rep. 218,236; see also per McNair J., in *International Packers v. Ocean S.S. Co.* [1955] 2 Lloyd's Rep. 218,236.

50 [1961] 1 Lloyd's Rep. 57.

51 [1958] 2 Lloyd's Rep. 252.

52 [1952] 2 Lloyd's Rep. 105.

53 [1959] 2 Lloyd's Rep. 553.

54 [1961] 1 Lloyd's Rep. 57.

55 Ibid., at p. 72.

56 Ibid.

57 Ibid.

58 Ibid.

59 Ibid., at p. 87.

60 Ibid., at p. 90.

61 The ruling in *The Muncaster Castle* does not apply where a charterparty imposes liability on the charterer or his manager in respect of a personal act or omission or default. This was so held by McNair J. in *The Brabant* [1967] 1 Q.B.588 in which clause 13 of the Baltime form was considered and The Muncaster Castle was distinguished.

62 [1961] 1 Lloyd's Rep. 57.

63 CMI-Stockholm Conference, 1963,p. 119.

64 [1963] 2 Lloyd's Rep. 223.

65 Ibid., at p. 235.

66 Report of the General Meeting held in London, May 11, 1967, pp. 9,10.

67 Tetley, p. 169.

68 Astle, Shipowners' Cargo Liabilities and Immunities, 3rd edn. (1967), pp. 9, 53.

69 See *Dobell v. Rossmore* (1895) 2 Q.B. 408

70 See *The Colima* (1897) 82 Fed. Rep. 665.

71 Tetley, p. 390.

72 [1961] 1 Lloyd's Rep. 57, 70.

73 Ibid., at p. 86.

74 [1959] A.C. 589.

75 See *The Antares* [1987] 1 Lloyd's Rep. 424; Wilson, p. 195.

76 Tetley, pp. 372-376.

77 [1959] 2 Lloyd's Rep. 105, at p. 113.

78 [1950] Ex. C.R. 371.

79 157 U.S. 124 (1895)

80 [1951] 2 Lloyd's Rep. 265, 272.

81 [1951] 32 M.P.R. 282, 288.

82 [1964] A.M.C. 42 at p. 44.

83 [1978] 2 Lloyd's Rep. 336, at p. 339.

84 [1952] 1 Lloyd's Rep. 485

85 [1984] 2 Lloyd's Rep. 586.

86 [1959] 2 Lloyd's Rep. 105, at p. 113.

87 *Corporation Argentina v. Royal Mail* (1939) 64 Ll. L.R. 188, at p. 192.

4.3 Article III, Rule 2 [Care of Cargo]

88 No such a phrase appears in UAE Maritime Code.

89 [1966] 2 Lloyd's Rep. 53.

90 Ibid., at p. 58.

91 Ibid., at p. 62.

92 Ibid., at p. 64.

93 See Cadwallader, Care of Cargo Under The Hague Rules, Current Legal Problems (1966).

94 [1956] 1 Q.B. 462.

95 [1957] A.C. 149, per Viscount Kilmuir L.C.

96 [1956] 1 Q.B. 462, per Singleton L.J.

97 Ibid., per Jenkins L.J.

98 *International Packers v. Ocean S.S. Co.* [1955] 2 Lloyd's Rep. 218; *Leesh River Tea Co. v. British India Steam Navigation Co.* [1966] 1 Lloyd's Rep. 450 at p. 457; *Riverstone Meat Co. v. Lancashire Shipping Co.* [1961] A.C. 807. See also Scrutton, p. 424; Carver, p. 365.

99 *Hourani v. Harrison*, 28 Ll. L.Rep. 120.

100 *International Packers v. Ocean S.S. Co.* [1955] 2 Lloyd's Rep. 218.

101 *David Crystal v. Cunard Shipping Co.*, 223 F.Supp. 273.

102 *Krawill Machinery Co. v. Robert Herd & Co.*, 359 U.S. 297 (1959).

103 Mankabady, The duty to care for the Cargo, 10 European Transport Law, p. 2. See also Cadwallader, supra note 93, pp. 25-30.

104 [1966] 2 Lloyd's Rep. 53.

105 Ibid., at p. 63.

106 Mankabady, op.cit., p. 8.

107 Singleton J., said in *Smith & Sons Felmongery v. P. & O. S.S. Navigation Co.* [1938] 60 Ll. L.R. 419 at 432: " The court should not attribute to Article IV, Rule 2 (a) a meaning that will largely nullify the effect of Article III, rule 2..to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act or neglect." In *Gamlen Chemical Co. v. Shipping Corp. of India Ltd.* [1978] 2 N.S.W.L.R. 12 (C.A.) the Court was faced with the plea that Article IV(2)(c), if shown, would relieve the carrier of responsibility even where the

carrier had admitted to a breach of obligation under Article III(2). The Court rejected this, holding that after the carrier had shown that an exception under Article IV(2) was applicable, it was open to the cargo owner to show a breach of Article III(2) obligations (negligence). In *Atlantic Consolidated Foods Ltd., v. The Ship Dorothy* [1979] 1 F.C. 283 (Canadian case) the trial court, at p. 295, confirmed that Article IV(2) does not lessen the carrier's responsibility under Article III(2).

108 Mankabady, supra note 103, p. 9.

109 *The Glendarroch* [1894] P. 226; *Constantine S.S. Co. v. Imperial Smelting Corp.* [1942] A.C. 154 at pp. 164 and 194. Cf. *Gosse Millard v. Canadian Mercantile Marine* [1927] 2 K.B. 432, 436.

110 Carver, pp. 362-36; Scrutton, p.434.

111 Wilson, p. 185.

112 *Pyrene v. Scindia Navigation Co.* [1954] 2 Q.B. 402, at pp.417-18 per Devlin J.; See also Wilson, p. 185.

113 See Cadwallader, supra note 93, pp. 21-25 ; Tetley, pp. 273-275.

4.4 Article IV, Rule 2(a)

114 This exception has been the target of considerable criticism from cargo interests and is regarded as somewhat of an anachronism in many parts of the world; Wilson, p.251.

115 The exception is inapplicable once negligence on the part of the carrier is established, see *The Satya Kailash* [1984] 1 Lloyd's Rep.588; *Leval v. Colonial S.S. Co.* [1961] 1 Lloyd's Rep. 560.

116 There is no direct authority on this point, but *Westport Coal Co. v. McPhail* [1898] 2 Q.B.D. 130 suggests that the carrier will be allowed to avail himself of the statutory exception in respect of negligent acts committed by himself in his capacity of master.

117 [1893] P. 38.

118 [1920] 1 K.B. 846

119 (1890) 63 L.T. 737.

120 Scrutton, p. 275.

121 *Botany Worsted Mills v. Knott* (1900) 179 U.S. 69.

122 *Corsair v. Spreckiles* (1905) 141 Fed. Rep. 260; *The Nootka* (1951) A.M.C. 165 (Canadian Case).

123 (1896) P. 10.

124 Harter Act 1893, s.3.

125 [1896] P. 10, at pp. 14-16.

126 (1929) A.C. 223.

127 (1928) 1 K.B. 717 at pp. 741-744.

128 (1929) A.C. 223, at p. 233.

129 *Case no. 3 (1983) Dubai C.A.*

130 This is by no means exhaustive citation

131 *Norman v. Binnington* (1890) 25 Q.B.D. 475.

132 *Adam v. Morris* [1891] P. 152.

133 *The Etona*, 71 F. 895.

134 *The Glenochil* [1896] P. 10.

135 *The Rodney* [1900] P. 112.

136 *The Touraine* [1928] P. 58.

137 *The Merida*, 107 F. 146 .

138 *Rowson v. Atlantic Transport Co.* [1903] 2 K.B. 666.

139 *Corsair v. Spreckels*, 141 F. 260

140 *The Indrani*, 177 F. 914.

141 *Hansen v. Haywood*, 152 F. 401.

142 *Luria Bros & Co. v. Eastern Transport Co.*, 89 F. 2d 900.

143 *The Point Chico*, 122 F. 2d 1.

144 *The Barge D.X.E.* , 252 F. 2d 386.

145 *The Del Sud*, 171 F. Supp. 184.

146 *General Foods Co. v. Mormacsurf*, 276 F. 2d 722.

147 This is by no means exhaustive citation.

148 *Smith Felmongery v. P. & O. Co.* (1938) 60 Ll. L.Rep. 419.

149 *Gosse Millard v. Canadian Merchant Marine* [1929] A.C. 223.

150 *The Persiana*, 185 F. 396.

151 *Armco International v. Rederi A/B Disa*, 151 F. 2d, 5.

152 *Establiseements Materne v. Leerdam*, 143 F. Supp. 167.

153 *Adam v. Morris* [1891] P. 152.

154 *Andean Trading v. Pacific Shipping Co.*, 263 F. 559.

155 *Barr v. International Mercantile Marine Co.*, 29 F. 2d 26.

156 *The New York*, 29 F. 2d 29; *Case no. 6 (1982) Dubai C.A.; Case no. 3 (1983) Dubai C.A.*

157 *The Valescura*, 293 U.S. 296 (1934).

158 Knauth, Ocean Bills of Lading, 4th edn., (1953), at p.197. See also Wilson, at p. 253.

159 *Rowson v. Atlantic Transport Co.* (1903) 2 K.B. 666. In this case the Court of Appeal held that the careless handling of the refrigerating apparatus of the ship must be regarded as a fault in the management of the ship on the ground that the apparatus was used for ship's provisions as well as for the cargo.

160 *The Salmond*, 7 Fed. Rep. 155 (1925).

161 (1928) 2 K.B. 424.

162 Ibid., at p. 444.

163 Astle, supra note 68, p. 73

164 Carver, at p. 361 ; In *Gosse Millard v. Canadian Mercantile Marine* (1927) 2 K.B. 432, Wright J., held that if the cargo-owner proves that the goods shipped have not been delivered, or have been damaged after shipment, the carrier is liable unless he can prove (i) that he has taken reasonable care of the goods while they were in his custody and (ii) that the loss or damage falls within one of the immunities specified in Art. III, r.2. Carver, disagreeing with this view stated "on Wright J's construction, paragraph (b) to (p) of Art. IV, r.2 would serve little purpose, for if the carrier must in all cases disprove negligence (except para. (a)) he would in any event be protected by para. (p) if he succeeded in doing so". Lord Wright himself said in *Constantine S.S. Line v. Imperial Smelting Corp.*, (1942) A.C.154 at 194, "If the carrier pleads an exception the goods-owner may counter by pleading the fault of the carrier, but the onus of proving that...is...on the goods-owner who makes it."

165 *The Silvia*, 171 U.S. 462 (1898).

166 *The Steel Navigator*, 23 Fed. Rep. 90.

4.5 Article IV, Rule 2(b) [Fire]

167 See *Wahlberg v. Young* (1876) 45 L.J. C.P. 783; *The Warkworth* (1884) 9 P.D. 20, 145.

168 See Wilson, at p. 254.

169 *Morewood v. Pollock* [1853] 22 L.J.Q.B. 250, where goods were destroyed by fire on board a lighter by which they were being conveyed to the ship, it was held that the owners were not entitled to limitation of liability; in *Tempus Shipping Co. v. Louis Dreyfus* [1930] 1 K.B. 699 where goods heated by fire on board the ship were discharged into a lighter and then caught fire, the shipowner was held to be protected.

170 The MSA, 1894 said: "the owner of a British sea-going ship" and not the owner of a british seaworthy sea-going ship: *Virginia Co. v. Norfolk Co.* [1912] 1 K.B. 229.

171 (1915) A.C. 705, per Haldane L.C. at p. 713. See also *The Obey* (1866) L.R. 1 A. & E. 102, where the master, who was also part owner, was on board, but not on deck, at the time of collision, and the ship was properly in charge of the mate and pilot, it was held that there was no fault or privity on the part of the master.

172 (1937) 58 Ll. L.Rep. 33 at p. 36.

173 *Harris v. Polland* [1941] 1 K.B. 462; *Tempus Shipping Co. v. Dreyfus* [1930] 1 K.B. 699.

174 *Maxine Footwear Co. Ltd., v. Canadian Government Merchant Marine* [1959] 2 Lloyd's Rep. 105.

175 Under Section 18 of MSA of 1979, it is the cargo-owner, in order to recover for his loss, who must establish that the fire resulted from the carrier's 'personal act or omission, committed with intent to cause such loss, or recklessly, and with knowledge that such loss would probably result'.

176 270 F.2d 499 (1959).

177 *Case no. 56 (1982) Dubai C.A.*; see to the same effect the decisions of the Supreme Court of Kuwait no. 118 (1981) and no. 26 (1981).

4.6 Article IV, Rule 2(c)-(p)

178 *Smith, Hogg v. Black Sea and Baltic Ins. Co.*, [1940] A.C. 997.

179 *The Maui*, 113 F.2d. 1018 (1940).

180 *Forward v. Pittard* (1785) 1 T.R. 27.

181 See Carver, p. 362, which, after noting some conflict over the authoritative rule, states:

> "[T]he true view is that if the goods have not been delivered, or have been damaged after shipment, the onus shifts onto the carrier to bring the cause of damage specifically within Art. IV, r. 2 [i.e. the exceptions]. If the cargo owner wishes to defeat that plea by proving [that the carrier's negligence contributed to the loss], the onus is on him to do so."

See however Knauth, op.cit. p. 195, stating the view that the carrier must prove not only the excepted peril that caused the damage, but also that the carrier and its servants could not have foreseen the peril or guarded against it. Cadwallader, op.cit. p. 41, appears to take the same view as knauth.

4.7 Article IV, Rule 2(q)

182 This exception not so widely used as its language might indicate. The reasons for his can be summarised as follows:

(a) Carriers tend to use the exceptions in article IV, sub-rules (a) to (p), whenever possible, because when they are used the cargo owner has the burden of proving default or negligence on the part of the carrier; whereas, in order to benefit from the "catch-all" exception, the burden is upon the carrier to show that neither his own default or privity nor neglect by his agents or servants contributed to the loss.

(b) Because of the large number of exceptions listed in article IV, sub-rules (a) to (p), there are, in practice very few "other causes". One such cause is pilferage.

183 See Wilson, at p. 255; Chorley & Giles, at p.288.

184 Knauth, op.cit. at p. 227.

185 Wilson, at p.255. It is worth noting that during the discussions on the Hague Rules before both Houses of Parliament by the Joint Committee, it was pointed out that in the phrase 'or without the fault...of agents', the word 'or' was to read 'and'. Consequently the carrier is liable unless he can prove that neither his own actual fault or privity or the fault or neglect of his agents or servants contributed to the damage. See *Hourani v. Harrison* [1927] 32 Com. Cas. 305.

186 See Colinvaux, The Carriage of Goods by Sea Act, 1924 (1954) p. 45, where it is said that "the carrier is liable unless he can prove affirmatively (I) that he has taken reasonable care of the goods while they were in his custody and (II) that the loss or damage falls within one of the immunities specified in art. IV, r.2".

187 See *Phillips & Co. v. Clan Line Steamers Ltd.*, (1943) 76 Ll. L.Rep. 58 at p. 61 per Atkinson J.:" It is not necessary for the defendants to establish exactly why and how the damage occurred, provided that they can disprove negligence; but, of course, it is not easy to do that unless they can establish some reasonable possible alternative explanation. If the damage is entirely unexplained, it is difficult to see how the onus can be discharged."

188 (1927) 137 L.T. 158; This case must be contrasted with *Leesh River Tea Co. v. British India S.N. Co.* [1967] 2 Q.B. 250., which concerned the stealing of a storm valve cover plate by a stevedore during unloading and loading of cargo at an intermediate port. As a result, part of the vessel's cargo of tea was damaged by sea water. The Court of Appeal accepted that this case was different because that which had been stolen was not cargo but a very small part of the ship and as the theft of the plate could not have been prevented by any reasonable diligence on the part of the shipowners' officers and crew, it was held that Art. IV rule 2 (q) could be relied upon to avoid liability for the loss.

189 The courts generally ask themselves whether the carrier has discharged the burden of showing that the loss or damage has arisen without his "actual fault or privity" and do not distinguish between these terms. *The Bristol City* [1921] P. 444; *London Rangoon Trading Co. v. Ellerman Lines Ltd.*, [1923] 39 T.L.R. 284.

190 A helpful reference to "privity" is to be found in *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, [1915] A.C. 705 and *The Truculent* [1951] 2 All E.R. 968. In the former case the court said that:"It is not enough that the fault should be the fault of a servant in order to exonerate the owner, the fault must also be one which is not the fault of the owner, or a fault to which the owner is privy."
In the latter case, Willmer J., having found that the loss of H.M. Submarine Truculent after collision was partly due to her own fault in exhibiting lights likely to mislead other vessels, added (p.981): "...that fault was one of which the responsible member of the Board of Admiralty was aware, or must be deemed to have been aware, that is, one to which he was privy."

4.8 Article IV, Rule 4 [Deviation]

191 Wilson, p.199.

192 (1932) A.C. 328.

193 Ibid., p. 336.

194 Ibid., pp. 338-339.

195 Ibid., pp. 338-339.

196 Ibid., p. 350.

197 Ibid., pp. 342-345.

198 Ibid., p. 344.

199 [1940] 1 K.B. 362. See also Wilson, p.199; Temperley and Vaughan, Carriage of Goods By Sea Act, 1924, 4th edn. (1932) at 77.

200 *Scaramanga & Co. v. Stamp* (1880) 5 C.P.D. 295. At Common law , a deviation to save property is not justifiable. But if the bona fide purpose of saving life forms part of the motive which leads to a deviation, the privilege to deviate is not lost merely because the saving of property formed a second motive for the deviation. Per Cockburn C.J., ibid., at p. 304.

201 *The Ocean Liberty* [1951] A.M.C. 1464.

202 *The Tentonia* (1872) L.R. 4 P.C. 171.

203 *The Tentonia* (1872) L.R. 4 P.C. 171; *Nobel v. Jenkins* [1896] 2 Q.B. 326; *The Heinrich* (1871) L.R. 3 A. &. E. 424.

204 *Reardon Smith Line v. Black Sea* (1939) A.C. 562.

205 [1912] A.C. 604.

206 Ibid., at pp. 618-19.

207 Scrutton, p. 266.

208 *Kish v. Taylor* [1912] A.C. 604, 618, per Lord Atkinson.

209 *Monarch S.S. Co. v. Karlshamns Oljefabriker (A/B)*, [1949] A.C. 196.

210 Ibid., at pp. 211-212.

211 Carver, p. 872.

212 Colinvaux, op.cit. p. 92.

213 Ibid.

4.9 Article IV, Rule 5 [Limitation]

214 (1874) L.R. 9 Ex. 67. See also *Studebaker v. Charlton S.S. Co.*, [1938] 1 K.B. 459,467 where Goddard, J., held that a missing unboxed automobile was not a package: " I do not feel that I can hold that a motor-car put on a ship without a box, crate or any form of covering is a package, without doing violence to the English language."

215 Selvig, "Unit Limitation of Carrier's Liability", London (1961), p. 42.

216 Scrutton, (18th edn.) pp. 441-442.

217 *Aluminios Pozuelo Ltd., v. S.S. Navigator*, 407 F.2d 152,155; *Mitsubishi International Corp. v. S.S. Palmetto State*, 311 F.2d 382, 384.

218 *Caterpillar Americas Co. v. S.S. Sea Road*, 231 F.Supp. 647.

219 Van Wageningen, "Interpreting COGSA: The Meaning of "package", 30 University of Miami L.R. (1975),p. 169, at p. 171.

220 407 F.2d 152,155.

221 1972 A.M.C. 1523.

222 368 F.Supp. 289.

223 486 F.Supp. 636.

224 1983 A.M.C. 1597.

225 Van Wageningen, op.cit. p.184.

226 [1974] 1 Lloyd's Rep. 359, 363.

227 263 F.2d 135.

228 [1974] 1 Lloyd's Rep. 359.

229 Ibid., p. 361.

230 Van Wageningen, supra note 219, p. 178.

231 493 F.Supp. 125.

232 420 F.Supp. 139.

233 Temperly and Vaughan, op.cit. p.81

234 Diamond, The Hague Visby/Rules, (1978) 2 LMCLQ p. 225 at 240-241.(hereinafter cited Diamond).

235 *Case no. 32 (1984) Dubai C.A.; Case no. 1390 (1979) Dubai C.A.*

236 *Case no. 72 (1982) Abu-Dhabi C.A.*

237 Selvig, supra note 217, p. 42.

238 Van Wageningen, supra note 219, p.171.

239 Diamond, p. 241 (note 44).

240 [1959] 1 Lloyd's Rep. 352.

241 Ibid., p.358.

242 [1973] 2 Lloyd's Rep. 257.

243 Carver, p. 391.

244 *Whaite v. Lancs. & Yorks. Ry* (1874) L.R. 9 Exp. 67.

245 *Studebaker Distributors v. Charlton S.S. Co.* (1938) 1 K.B. 459.

246 Diamond, p. 241.

247 Scrutton, 16th edn.(1955), p. 490.

248 1944 55 F.Supp. 780.

249 1949 86 F.Supp. 487.

250 *Caterpillar Americas Co. v. S.S. Sea Road*, 231 F.Supp. 647; *Bumble Bee Seafoods v. S.S. Kiku Maru*, 1978 A.M.C. 1586; *General Motors Corp. v. S.S. Mormacook*, 327 F.Supp. 666.

251 Quoted from Report 1921, pp. 157-158.

252 Ibid., pp. 159-160.

253 407 F.2d. 152.

254 Ibid., p.156.

255 607 F.2d. 322.

256 Ibid., p. 327.

257 420 F.Supp. 139, at p. 143.

258 See *St. Paul F. & M. Ins. Co. v. Alcoa S.S. Co.*, 1957 A.M.C.

259 (1958) A.M.C. 439, 442.

260 *Matsubito Electric Crop. v. S.S. Aegis Spirit* 1976 AMC 779,793.

261 Diamond, p. 240.

262 Diamond, p. 241.

263 Chorley & Giles, p. 211.

264 Diamond, p. 240.

265 *Royal Typewriters Co. v. M.V. Kulmerland* [1973] 2 Lloyd's Rep. 428.

266 *Cameco Inc. American Legion* [1975] 1 Lloyd's Rep. 295.

267 See De Orchis, "The Container and the Package Limitation. The Search for Predictability", 5 J.M.L.C., 215 (1974); Simon, "The Law of Shipping Containers", 5 J.M.L.C., 507 (1974)

268 *Matsushita Elec. Corp. V. S.S. Ageis Spirit* [1977] 1 Lloyd's Rep. 93; *Complaint of Norfolk, B & C Line*, 478 F.Supp. 383.

269 *Leather's Best v. S.S. Mormaclynx* [1971] 2 Lloyd's Rep. 476.

270 *The "Tindenfjell"* [1973] 2 Lloyd's Rep. 253 (Fed. Ct. T. D.); *The Alexander Serafimovich* [1976] 2 Lloyd's Rep. (Fed. Ct. T.D.)

271 *Case no. 39 (1978) Abu-Dhabi C.A.; Case no. 19 (1977) Dubai C.A.; Case no. 73 (1982) Dubai C.A.*

272 Per Collins, J., in *"The Tindefjell"* [1973] 2 Lloyd's Rep. 253 .

273 *Rosenbruch v. American Export : The "Container Forwarder"*, [1974] 1 Lloyd's Rep. 119.

274 But of course this does not preclude the use of the alternative weight criterion for the contents lost or damage.

275 Report of 1968 Brussels Conference, p. 118.

276 Report of the U.S. Delegation, Brussels, February 19-23, 1968 at 250.

277 J.L.De Gurse, "The 'Container Clause' in Article 4(5) of the 1968 Protocol to the Hague Rules, (1970) 2 JMLC 131.

278 Scrutton, p. 455.

279 Carver, p. 397. See Chorley & Giles, p. 211 where it is suggested that the phrase "or similar article of transport" can, in a proper case, cover LASH (lighter aboard ship) and BACAT (barge aboard catamaran).

280 Scrutton, p. 455 (note. 33).

281 Diamond, p. 243.

282 Scrutton, p. 455 (note. 35).

283 Diamond, p. 243. See also Wilson, p.193.

284 Chorley & Giles, pp. 212-213. Cf. Tetley who seems to be of the view that the carrier should be protected where the bill of lading contains "said to contain" clause. He says that under Art. 3(3) of the Hague and Hague/Visby Rules the carrier may notate the bill of lading if he doubts the declaration appearing on the bill of lading as to the quantity and condition of the goods: see Tetley, supra note 20, p. 648.

285 See *Grant v. Norway* (1851) 10 C.B. 665; *Mclean v. Fleming* (1871) L.R. 2 Sc. & Div. 128. See also Chorley & Giles, p. 246.

286 See *Oricon v. Intergraan* [1967] 2 Lloyd's Rep. 82. Where the bills of lading acknowledged the receipt of 2000 packages of copra cake 'said to weigh gross 105,000 Kgs... for the purposes of calculating freight only.' Roskill, J., was of the opinion that 'while each of the bills of lading, being Hague Rules bills of lading, acknowledged the number of packages shipped, and are prima facie evidence of those numbers, neither bill of lading is any evidence whatever of the weight of the goods shipped'. In these circumstances the burden of proof rested with the consignee to establish the weight of cargo shipped before he could succeed in his action for short delivery. See Wilson, p. 133.

287 *Leather's Best Inc. v. S.S. Mormaclynx* 451 F. 2d. 800.

288 *Consumers Distributing v. Dart Container Line* 31 N.R. 181.

289 *Case no. 61 (1983) Dubai C.A ; Case no. 73 (1982) Dubai C.A.*

290 451 F. 2d. 800.

291 *Case no. 61 (1983) Dubai C.A.*

292 *Case no. 73 (1982) Dubai C.A.*

293 Art. IV Rule 5 (g).

294 Art. IV Rule 5 (e). No such prevention appears in UAE Maritime Code.

295 Report 1921, p. 157-9.

296 Per Rudolf in Report p. 190-1

297 See per Harris in Report p.188.

298 [1946] 79 Ll. L.Rep. 339 (C.A. Australia).

299 Ibid., p. 341-2 per Latham, Ch. J.

300 (1856) 1 H. & N. 300.

301 [1959] 1 Lloyd's Rep. 352 (Canadian S.C.).

302 Ibid., p. 358.

303 [1927] 29 Ll. L.Rep. 133, 136.

304 1959 AMC 480.

305 674 F.2d 806 (9th Cir. 1982).

306 694 F.2d 609 (9th Cir.1982).

307 Ibid., p. 611

308 648 F.2d 415 (5th Cir. 1981).

309 Ibid., p. 424.

310 559 F.2d 1173 (9th Cir. 1977).

311 Ibid., at p.1177.

312 451 F.2d 24 (2d Cir 1971).

313 Astle, op.cit. p.173.

4.10 Article III, Rule 6 [Time Limitation]

314 [1965] 1 Q.B. 101.

315 *The Merak* [1965] P. 223.

316 Per Roskill, J., in *Compania Colombiana de Seguros v. Pacific S.N. Co. (The Salaverry)* [1965] 1 Q.B. 101.

317 [1977] 1 Lloyd's Rep. 334. Under UAE the rights are not extinguished by the lapse of time (Article 473 of the UAE Civil Code).

318 Presumably an agreement reached between the parties at an earlier date will also be effective,under English COGSA since Art.V allows a carrier to increase his obligations by surrendering a right or immunity to which he would otherwise be entitled; see Scrutton, p.441; Wilson, p.198.

319 See Report of British Delegates to the Official Diplomatic Conference at Brussels, p. 20

320 Report p. 97.

321 Report p. 135.

322 See Wilson, p.196 where it is said that some form of constructive delivery to the consignee or his authorised agent will be required before time will begin to run. 13

323 (1958) 170 N.Y. S.2d 705.

324 Scrutton, p. 441, adopts this view. Carver, pp. 370-71, accepts this view with some hesitation.

325 Diamond, p. 256 and see in particular footnote 88.

326 Scrutton, p. 441 adopts this view. For a contrary view, see Diamond, p. 256.

4.11 Article III, Rule 8

327 However, a carrier is entitled to agree to take on additional responsibilities so long as such a promise is embodied in the bill of lading. Art. V specifically provides that a carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or increase his responsibilities and obligations under the Rules.

328 See *Nabob Foods Ltd., v. The Cape Corso* [1954] 2 Lloyd's Rep. 40; *Mayhew Foods Ltd., v. Overseas Containers Ltd.* [1984] 1 Lloyd's Rep. 317.

329 *Coventry Sheppard v. Larrinaga S.S. Co.* (1942) 73 Ll.L.Rep.256; *Australasian United S.N. Co. v. Hunt* [1921] 2 A.C. 351 (P.C.). In *The Ion*, [1971] 1 Lloyd's Rep. 541 Brandon, J., held that the provision in the Centrocon arbitration clause which barred a claim unless an arbitrator was appointed by the claimant within three months of the final discharge of the goods was null and void where the Hague Rules applied because a cargo-owner had one year in which to make a claim under the Hague Rules.

330 *Foy & Gabson v. Holyman* (1946) 79 Ll. L.Rep. 339; *Holden v. Kendall Fish*, 395 F.2d 910.

CHAPTER 5

WHEN EXCEPTIONS AND LIMITATIONS DO NOT APPLY

331 *Studebaker Distributors v. Charlton Shipping Co.* [1938] 1 K.B.459; *The Australian Star* (1940) 67 Ll.L.R. 110.

332 *General Foods Co. v. S.S. Troubadour*, 98 F.Supp. 207.

333 *U.S. v. Atlantic Mutual Co.*, 343 U.S. 236.

334 Per Devlin, J., in *Pyrene Co. Ltd., v. Scindia Steam Navigation Co. Ltd.*, [1954] 2 Q.B. 402, 417; *Renton (G.H.) v. Palmyra Trading Corp.*, [1957] A.C. 149.

335 *Marcelino Gonzalez v. James Nourse Ltd.*,[1936] 1 K.B. 565. If, however, the clause disclaims all liability in the carrier in respect of the goods in the event and as from the time of transhipment, it may well be annulled by the Rules: see *Holland Colombo Trading v. Alawdeen* [1954] 2 Lloyd's Rep. 45 at p. 53 (P.C.).

336 See *Renton (G.H.) v. Palmyra Trading Corp.*, [1957] A.C. 149. See also above page 150 et seq.

337 See Carver, p. 373; Scrutton, p.443; Tetley, p. 844.

338 Colinvaux, op.cit., p. 59.

339 (1953) 2 Q.B. 295. See also *The "Ion"* [1971] 1 Lloyd's Rep. 541, where Brandon J. held that an arbitration clause stipulated for the arbitration to be appointed within three months was invalid being contrary to the one year provision of Art. 3, Rule 6 of the Rules in the light of Art. 3, Rule 8. He invalidated only the part of the arbitration clause in conflict with Art. III, Rule 6 and upheld the remainder of the clause.

340 Scrutton, p. 443, and Tetley, p. 845 are of the same view.

341 *Case no. 52(1979) Dubai C.A.; Case no. 140(1982) Abu-Dhabi C.A.; Case no. 111 (1983) Abu-Dhabi C.A.*

It is admitted that the exception and limitation of liability clauses should not be made available to the carrier where the loss or damage resulted from his fault of a very serious nature. To achieve such prevention, the courts in England and U.A.E. have developed a certain legal technique, the effect and purpose of which are to avoid the application of such clauses to the detriment of the cargo-owner, and to confine as much as possible the coverage of clauses wholly or partly relieving the carrier from responsibility for loss or damage to the cargo.

In England, the courts have established the theory of "overriding obligations." In accordance herewith the carrier is considered to have a special duty to use due diligence and care with respect to the cargo, and to furnish a seaworthy ship. If the damage has been caused by breach of any of these duties, the exception or limitation clause in question is as a matter of interpretation held to be inapplicable, unless it expressly excuses the carrier for loss or damage due to unseaworthiness or to his or his servants' negligence. Further, it has been held that the carrier was not entitled to invoke contractual exonerations if the ship has breached the contract by committing an unjustified deviation. The

prevailing view has been that such deviation abrogates the contract of carriage in question, and that from the deviation onwards, the carrier can no more rely on its provisions.

In U.A.E., the law relating to the construction of clauses exempting the carrier from liability is based on the principle that such clauses are presumed not to cover "wilful misconduct or gross negligence" of the carrier or his servants. Clauses limiting the carrier's liability have been subjected to the same restrictive construction.

5.1 NEGLIGENCE

The first cause which displaces the exceptions under English law is negligence<1>. A carrier who wishes to escape the absolute liability of an insurer by relying on the exceptions, either those permitted by the common law or those expressly incorporated into the contract, he will succeed only if the damage or loss was caused by the exceptions and not by a breach of any of his contractual obligations, in particular, his duty to perform his duties with reasonable care. Willes J, summed up the law as follows<2>:

> "The exception in the bill of lading only exempts the shipowner from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence and care."

The same rule was laid down by Lord Blackburn in *Steel v. State Line Steamship Co.*, who said(3):

> "...if owing to the negligence of the crew, the ship sinks while at sea, although the things perish by a peril of the sea, still inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception.

The carrier is excused from liability in so far as the excepted perils prevent performance of his obligations. Thus negligence enters the enquiry: the question is whether the damage or loss would have arisen but for the breach of the carrier's obligations, again, in this context, his obligation to take reasonable care. If it would not, then it is immaterial that other cause, from whose effect the shipowner is excused, have contributed to the loss(4). Scrutton L.J. said in *Re Polemis and Furness, Withy & Co. Ltd.*,(5):

> "An excepted perils clause, if fully expanded, runs that one of the parties undertakes to do something unless prevented by an excepted peril, in which case he is excused. But where he has an obligation to do some act carefully, if fails in his obligation, and by his negligence an excepted peril comes into operation and does damage, the excepted peril does not prevent him from acting carefully though the breach acts through the medium of an excepted peril. It is a commonplace of mercantile law that if a peril of the sea is brought into operation by the carelessness of the shipowner or his servants, he is liable, though perils of the sea are excepted perils, unless he has also a clause excepting the negligence of his servants."

Lord Wright in *Paterson S.S. Ltd., v. Canadian Wheat*(6) made it clear that any enquiry as to negligence is relevant where the carrier relies on excepted perils; that the implied undertaking to exercise reasonable care in navigation and the carriage of the goods is absorbed by the larger common law liability:

> "At common law, he (a carrier) was called an insurer, that is he was absolutely responsible for delivering in like order and condition the goods bailed to him for carriage. He could avoid liability for loss or damage only by showing that the loss was due to the act of God or the King' enemies. But it became the practice for the carrier to stipulate that for loss due to various specified contingencies or perils he should not be liable: the list of these specific perils grew as time went on. That practice, however, brought into view two separate aspects of the sea carrier's duty which it had not been material to consider when his obligation to deliver was treated as absolute. It was recognised that his overriding obligations might be analysed into a special duty to exercise due care and skill in relation to the carriage of the goods and a special duty to furnish a ship that was fit for the adventure at its inception. These have been described as fundamental undertakings or implied obligations. If the goods were lost, (say) by perils of the seas, there could still remain the enquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier."(7)

A carrier may contract out of his liability for negligence, but he must do so in clear and unambiguous terms(8). If the negligent act is within the exception the shipowner is not liable for the damage so caused, even though

the act be wilful or culpably reckless. Quain J., pointed this out in *McCawley v. Furness Ry. Co.*,(9) :

> "Negligence, even gross, is the very thing which the contract stipulates that the defendant shall not be liable for; and 'wilful' cannot carry the case any further."

Where, however, COGSA applies, the carrier cannot contract out of his liability for his negligence in taking care of the cargo under Art. III, Rule 2. The carrier will be liable despite any exception if the cargo-owner proves that the loss of or damage to cargo resulted from the breach of the carrier of his duty of care within Art. III, Rule 2. Yet, the carrier may be entitled to rely on the time bar (Art. III Rule 6) and per package and unit limitation (Art. IV Rule 5(a)(10).

What amounts to negligence is a question of facts depends on the facts of each particular case and the categories of negligence are never closed. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in different manner or not at all.

> "By negligence is meant substantially the doing by a person of some act which a reasonable and prudent man would not have done under the circumstances of the case in question, or the omission to do everything that could be fairly and reasonably expected of such a man under such circumstances."(11)

The following are some illustrations to acts treated as negligence: leaving a valve in the engine room open, when it ought to have been closed, whereby water got into the holds

and damaged cargo(12); opening by mistake a deep tank instead of opening the valve with the result that water run into the deep tank and damaged cargo of sugar(13); delivering the cargo by the carrier's agents to the wrong people(14); bags of sugar were slit by the servants' reckless use of hooks or their careless use of slings(15); failure to stop the leak caused by perils of the sea whereby water continued to enter and damage the cargo(16); failure to close the sea-cock after filling the boiler with water(17); careless handling of the refrigerating apparatus of the vessel, resulting in damage to cargo(18).

As in the case of unseaworthiness,the burden upon the cargo-owner, in order to make the carrier liable, to prove negligence of the carrier, his servants or agents and that that negligence was a cause of the loss or damage(19).

5.2 DEVIATION

5.2.1 THE COMMON LAW EXCEPTIONS

At Common Law(20), in the absence of an express stipulation to the contrary, the owner of a vessel whether a liner or general ship or ship chartered for a particular voyage, impliedly undertakes to proceed to the final destination by a usual and reasonable route without unjustifiable deviation(21).

The law which is firmly established since the early part of 19th century is that an unjustified deviation deprive the carrier of the protection of the common law exceptions; he becomes liable for any loss which may occur, whether for instance by the act of God, Queen's enemies, inherent vice or from any other cause, unless the carrier prove that the loss was bound to have occurred even if there had not been deviation. Thus in *International Guano v. MacAndrew*(22), the ship deviated and the cargo was damaged because of the action of the sulphuric acid in the superphosphates eating away the bags, owing partly to the deviation and other delay on the voyage and partly to the inherent vice of the cargo. In an action by the charterer the Court held that the shipowner was liable for so much of the damage as was caused by the delay due to the deviation on the ground that he was carrying as a common carrier and that, as the damage was due

to the inherent vice of the cargo, he was not therefore liable for it, except in so far as it was caused by the delay due to the deviation.

Morrison v. Shaw, Savill(23) gave another good illustration of the rule. Cargo was shipped on a liner from London under a bill of lading containing a general liberty clause to call at an intermediate port and an exception of King's enemies. The ship deviated and was torpedoed and sunk by an enemy submarine. It was held that the deviation was unjustifiable and the shipowner, therefore, could not rely on the exception of the King's enemies in the bill of lading, neither could he rely on the Common Law exemption of King's enemies because they could not prove that the cargo must have been lost if there had been no deviation.

It is may be said that in practice the common law exceptions will rarely offer any protection to the deviating carrier except possibly in the case where damage to cargo results from inherent vice(24).

5.2.2 CONTRACTUAL EXCEPTIONS

5.2.2.1 *The Orthodox Position*

Before 1930 the weight of opinion was in favour of the view that a deviation automatically displaced altogether the contract of carriage depriving the carrier of the protection of the exception clauses contained therein. The authority

most frequently cited for this proposition is *Thorley v. Orchis*(25). A bill of lading exempted the carrier from damage caused by the negligence of the stevedores in discharging the ship. The ship deviated from the voyage described in the bill of lading. Damage was caused to the cargo which came within the terms of the exclusion clause. It was held that the shipowners, having deviated from the proper route, were not entitled to set up by way of defence the exception clause. Collins, M.R., said that(26):

> "...undertaking not to deviated has the effect of a condition..., and if that condition is not complied with, the failure to comply with it displaces the contract."

However, in 1936 in *Hain v. Tate*(27) the House of Lords, considering the effect of deviation on the contract of carriage, overruled the proposition set forth in *Thorley* Case, that deviation destroys the contract of carriage *ab initio*, holding that deviation gives the injured party a right to terminate the contract of carriage. There, a ship was chartered to load sugar at two Cuban and San Damingo port. The master of the ship was to be informed by telegram of the San Damingo port which was not at the time of the contract determined. As a result of a breakdown in the telegraph services the master did not receive the charterers' instruction to proceed to the final port to complete the loading. The master therefore set off for home. On discovering the error the charterers contacted the master who altered course for the final port. Having loaded the

rest of the sugar, the vessel went ground as she was leaving the port and some of the cargo was lost. The remainder of the cargo was taken to their destination in another vessel. The shipowners claimed a lien on the cargo for a contribution for the loss from the grounding under the law of general average. On these facts, the House of Lords held that although there was an unjustified deviation it was waived by the charterers; as a result of this waiver the charterparty was still in force.

In considering the effect of deviation, Lord Atkin stated that two views were apparent from the authorities:
i) that a deviation automatically displaces the contract, or
ii) its only effect was to destroy the exceptions clause .
His Lordship continued(28):

> "I venture to think that the true view is that the departure from the voyage contracted to be made is...a breach of such a serious character that however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of its terms."(29)

After suggesting as a possible justification for the rule that deviation from the voyage for which the contract has been made could deprive the cargo-owner of his insurance cover, he continued(30):

> "If this view be correct then the breach by deviation does not automatically cancel the express contract, otherwise the shipowner by his own wrong act can get rid of his own contract. Nor does it affect merely the exception clauses. This would make those clauses alone subject to a condition of no deviation, a construction for which I can find

> no justification. ...The event falls within the ordinary law of contract. The party who is affected by the breach has the right to say, I am not now bound by the contract whether it is expressed in the charterparty or bill of lading or otherwise. ...But on the other hand, as he can elect to treat the contract as ended, so he can elect to treat the contract as subsisting: and if he does this with knowledge of his rights he must in accordance with the general law of contract be held bound."

Lord Wright, M.R., in his speech pointed out(31):

> "An unjustified deviation is a fundamental breach of a contract of affreightment."

This judgment of the House of Lords confirmed the rule that in cases where the shipowner deviates from the contract voyage his act of deviation gives rise to the injured party's right to terminate the contract of carriage. However, if he confirms the contract, the contract remains in force including any exception clause(32). A further point made clear was that the ordinary principles of discharge by breach applied(33). It is to be noted that Lord Wright used the expression 'fundamental breach' to describe the deviation and Lord Atkin ' breach ...going to the root of the contract'.

The identification of deviation with breach of a fundamental term has permeated the more modern cases in which the doctrine of fundamental breach has developed. In the speeches in the *Suisse Atlantique* Case(34) one finds constant reference to *Hain v. Tate* and an acceptance of the fact that the deviation cases represent an application of ordinary principles of contract.

It is submitted that it is the deviation cases which are primarily responsible for the view upheld in *Harbutt's "Plasticine" Ltd., v. Wayne Tank & Pump Co. Ltd.*(35), that where fundamental breach results in the termination of the contract all exemption clauses fall by the wayside irrespective of the terms in which they are drawn.

It is perhaps at this stage for the interest of U.A.E. jurists to examine briefly the doctrine of fundamental breach.

The Doctrine of Fundamental Breach

Although the coining of the term 'fundamental breach' is associated with the case of *Hain v. Tate*, it is present meaning stems from three judgments by Devlin J., in the *Chandris*, *Alexander* and *Smeaton* Cases. In *Chandris*(36) a chareterer had loaded a dangerous cargo in breach of contract. In his judgment , Devlin J., referred to a breach of "some fundamental or basic condition of the contract such as involved, for example, in deviation from the contract voyage"(37). In the passage he referred to deviation as "a fundamental breach going to the root of the contract." In *The Alexander* Case, Devlin J., stated(38):

> "The ordinary law of contract,...as discussed in Hain Steamship Co. v. Tate & Lyle Ltd., involves that, where there has been a breach of a fundamental term of a contract giving the other party the right to rescind it, then, unless and until, with full knowledge of all the facts, he elects to affirm the contract and not to rescind it, the special terms of the contract go and cannot be relied upon by the refaulting party."

Lastly, in the *Smeaton* Case(39), Devlin J., expressed the view that a clause contained in a contract of sale by description limiting the time within which claims might be made was to be regarded as an exception clause. Supporting the general rule of exception clauses stated earlier, he went on to say that the clause was therefore to be construed "...as not being applicable for the protection of those for whose benefit they (were) inserted if the beneficiary has committed a breach of a fundamental term of the contract."(40) On the meaning of fundamental term, Devlin, J. said: "It is, I think, something which underlines the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates."(41)

Devlin, J's statements were interpreted by the Court of Appeal as laid down a rule of law preventing the parties to a contract to contract out of their common law liability for performing obligations which were fundamental to their contracts; thus an exception clause howsoever wide in scope would not avail if the breach was fundamental(42). Denning and Parker L.JJ., can be regarded as the leading advocates of this approach. In his judgment in *Karsales (Harrow) Ltd. v. Wallis*, Denning L.J. said(43):

> "Notwithstanding earlier cases which might suggest the contrary, it is now settled that exemption clauses...no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for mis-conduct or indifference or to

> enable him to turn a blind eye to his obligations. They do not avail him when he is guilty of a breach which goes to the root of the contract."

The learned Judge made it abundantly clear that exclusion clauses are a mere shield to a claim for damages. He said<44>:

> "The thing to do is to look at the contract apart from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses."

Parker L.J., in his judgment in the same case said<45>:

> "...in my judgment, however extensive the exception clause may be, it has no application if there has been a breach of fundamental term."

The substantive law doctrine, however, was not favour by many authorities<46> and was rejected by the House of Lords in *Suisse Atlantique* Case<47>. Explaining the grounds for rejection, Viscount Dilhoren said<48>:

> "In my view, it is not right to say that the law prohibits and nullifies a clause exempting or limiting liability for a fundamental breach or breach of fundamental term. Such a rule of law would involve a restriction on freedom of contract, and in the older cases I find no trace of it. In each case not only have the terms and scope of the exempting clauses to be considered but also the contract as a whole, it is apparent that the exempting clauses were not intended to give exempting from the consequences of the fundamental breach."

Thus the learned Lord rejected the substantive doctrine on the grounds that the general principle that the parties are free to contract would be limited; and secondly there was

no authority to support the substantive doctrine. Another reason for the rejection of this doctrine was explained by Lord Wilberforce. His Lordship found the doctrine unnecessary; and the rule in his opinion was one of construction based on the contractual intention of the parties:

> "The conception, therefore, of 'fundamental breach' as one which through ascertainment of the parties contractual intention, falls outside an exception clause is well recognised and comprehensible. Is there any need, or authority, in relation to exception clauses, for extension of it beyond this? In my opinion there is not."(49)

However, the decision of the House of Lords in *Suisse Atlantique* Case did not seem to have had much effect on the substantive doctrine and the Court of Appeal felt free to consider it again. This opportunity came in *Harbutt's "Plasticine"* Case(50) where the Court affirmed the substantive doctrine. The defendants agreed to install some equipments in the plaintiffs' factory. The installation contract contained an exclusion clause limiting the recovery of damages to the value of the work. Through the defendants' negligence, the factory was burnt to the ground as a result of a fault in the equipment. When the plaintiffs sued for damages which far outstripped the value of the contract, the question arose whether the defendants could hide behind their limitation clause. The Court of Appeal held that they could not, because the breach committed was so fundamental that the

whole contract went, including the exclusion clause(51). Explaining the effect of the fundamental breach, Lord Denning M.R., said that(52) :

> "When the defendant has been guilty of... a fundamental breach that the contract is automatically at an end without the innocent party having an election. The innocent party is entitled to sue for damages for the breach, and the guilty party cannot rely on the exclusion clause or limitation clause: for the simple reason that he, by his own breach has brought the contract to an end; with the result that he cannot rely on the clause to exempt or limit his liability for that breach."

The rule advocated by Lord Denning M.R., in *Harbutt's* Case has been criticised on the grounds that it gives rise to many difficulties:

(i) It is argued that the concept of fundamental breach as it is applied in *Harbutt's* Case is a radical departure from the ordinary law of breach of contract which does not permit automatic termination of the contract but confers a right on the innocent party to treat the contract as terminated. If the election is made by such party opting for termination the contract is to come an end *ex post facto*. But the new rule dispensed with the principle of election. If the breach is fundamental when would the contract be deemed to have terminated?

> "...At what point", said Lord Wilberforce in *Photo Production* Case, "does the doctrine (with what logical justification I have not understood) decide, *ex post facto*, that the breach was (factually) fundamental before going on to ask whether legally it is to be regarded as fundamental? How is the date of 'termination' to be fixed? Is it the date of

> the incident causing the damage, or the date of the innocent party's election, or some other date? All these difficulties arise from the doctrine and are left unsolved by it."(53)

(ii) The rule was guilty of conflicting of two quite separate concept of '*rescission ab initio*' and *termination*'(54). The use of the concept '*rescission ab initio*' in the context of breach of the contract has resulted into unnecessary litigation and confusion. Lord Porter in *Heyman v. Darwin*(55) exposed the difficulties of using the expression '*rescission*':

> "To say that the contract is rescinded or has come to an end or has ceased to exist may in individual cases convey the truth with sufficient accuracy, but the fuller expression that the injured party is thereby absolved from future performance of his obligations under the contract is a more exact description of the position. Strictly speaking, to say that on acceptance of the renuciation of a contract the contract is rescinded is incorrect. In such a case the injured party may accept the renuciation as a breach going to the root of the whole of the consideration. By that acceptance he is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded."

Lord Wilberforce in *Photo Production* Case(56) was particularly critical of the use of the word '*rescission*' to describe the situation where breach committed by one party entitles the other to refuse further performance or as an equivalent to discharge except in few cases. Such exceptions may be cases of fraud, mistake, or lack of consent. Otherwise, rescission is usually used to express the idea that a contract is treated in law as never having come into existence.

(iii) It is further argued that if the party in default cannot rely on the exemption clause because it has been destroyed with the contract on what ground is the innocent party to be allowed to rely on the broken promise and obtain damages?(57)

5.2.2.2 *New Approach*

Since 'the perpetuation of the doctrine of fundamental breach leads only to uncertainty'(58) it is hardly surprising to see the House of Lords overruled *Harbutt's* in *Photo Production* Case(59). In this case, the defendants agreed with the plaintiffs to provide security services at their factory including the night patrol. One night, a patrolman of the defendants, deliberately lit a small fire while carrying out his duties. The fire got beyond control and the factory was razed to the ground causing a loss of £615,000. The plaintiffs claimed damages from the defendant on the ground that they were vicariously liable for the acts of the patrolman. The defendants contended that they had excluded their liability under the contract and pleaded two exclusion clauses, one of which provided that "under no circumstances" were the company (the defendant) to "be responsible for any injurious act or default by any employee...unless such act or default could have been foreseen and avoided by the exercise of due diligence" by the defendants.

Mackenna, J., held that this clause was sufficient to exclude the defendants' responsibility for the security guard's acts.

The Court of Appeal held that the defendants, by doing exactly the opposite what they were employed to do, viz., burning down the factory which they were employed to safeguard from fire, had committed a fundamental breach. Therefore, they were not entitled to rely on the exclusion clause. The rationale for non-availability of the exclusion clause was that with the fundamental breach exclusion clause also came to an end. Therefore, the defendants were not entitled to rely on the clause in respect of the responsibilities incurred after or at the time of the breach.

The House of Lords reversed the Court of Appeal on the grounds that **(i)** the rule of law which favoured the view that the fundamental breach brought the contract and with it the exclusion clause to an end either *ab initio* or from the date of the breach was not good law. Rather , the effect of a breach going to the root of the contract is to discharge the parties from the performance of further obligations under the contract; however, the contract survives and may determine the remedies available to the innocent party. **(ii)** The application of exclusion clauses depends on their construction and will protect the defendant, as in the present case, if construed to cover the events which have occurred:

> "I have no second thoughts," said Lord Wilberforce, "as to the main proposition [in Suisse Atlantique] that the question whether, and to what extent, an exclusion clause is to be applied to a fundamental breach, or a breach of a fundamental term, or indeed to any breach of contracts, is a matter of construction of the contract."(60)

Photo Production has been endorsed by the House of Lords in *George Michell Ltd., v. Finny Seeds Lock Ltd*<61>. Here a seed merchant promised to deliver winter cabbage seeds but delivered autumn ones instead. The defendant sought to rely on a limitation clause in the contract. Parker J., by a strained construction held the clause was inapplicable and allowed the claim of the plaintiff<62>. In the Court of Appeal Oliver and Kerr L.JJ., adopting the same tools of construction dismissed the appeal<63>. Lord Denning M.R. though found the clause clear and unambiguous and yet dismissed the appeal on ground of the clause being unreasonable<64>.

Lord Denning's approach was affirmed by the House of Lords. Lord Bridge's response to the judgements of the trial judge and of Oliver L.J. on the common law issue as "[they] come dangerously near to reintroducing by the back door the doctrine of 'fundamental breach' which this House in the Photo Production case had so forcibly evicted from the front. The judge discusses what I may call the 'Peas and Bean' or 'Chalk or Cheese' cases..."<65>

5.2.2.3 *The Future of Deviation*

Having briefly traced the rise and fall of the doctrine of fundamental breach the question arises whether the so called 'deviation doctrine' as it was understood prior to *Photo Production* Case still exists despite the fall of the doctrine of fundamental breach which the deviation is one facet of it?<66>

The fact that *Photo Production* did not explicitly overrule any of the deviation cases , has given rise to two different views regarding the effect of deviation post *Photo Production*. The first maintains that the decision in *Photo Production* has revived deviation(67). This view finds a support for its proposition in the Lord Wilberforce's observation, namely, that the deviation cases "should be considered as a body of authority *suit generis* with special rules derived from historical and commercial reasons"(68). Then according to this view deviation will continue to have the same effect on the contract of carriage as it was pronounced in *Hain v. Tate*(69), viz., unjustified deviation, however slight, gives the injured party's right either to waive or accept deviation; if he elect the latter, the contract of carriage is terminated including all the exclusion clauses.

The above view, it is submitted, is a hard one particularly in the light of the development which has taken place in English law. We have seen that from case law that at times the courts, where there was deviation, did not concern themselves with finding out whether the breach went to the root of the contract and that the service provided was totally different from that contracted for. The Courts based their decisions on the grounds that deviation terminates the cargo-owner's insurance and that as it is the carrier's act which results in the goods not being insured, he should be liable for any loss to them without the protection of

exemption clauses. But even in *Hain v. Tate* it was recognised that the insurance cover is not always affected as insurers generally hold goods covered in the event of deviation. Nevertheless, the House of Lords in that case did not enquire as to whether the unreasonable straying was a breach which upset the whole basis of the contract.

The tendency nowadays seems to be that the injured party will be entitled to terminate the contract of carriage if the breach which was committed by the carrier is such as to deprive him of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract(70).

Another argument against the deviation rule is that if as the old deviation authorities tell us, a deviation carrier can, with the complicity of a cargo-owner, abrogate the contract of carriage, where the line to be drawn? Once all clauses go, even if *ex nunc* rather *ex tunc*, would we now need to say that time limitation clauses and arbitration clauses go too(71). The House of Lords in *Heyman v. Darwin*(72) answered no. There, an arbitration clause in an international sale contract provided that any dispute arising between the parties in respect of the contract should be referred to arbitration. The appellants (the sellers) claimed that the respondents (the buyers) had repudiated the contract and brought proceeding asking for a declaration to that effect and damages for breach. The buyers applied to have the action stayed in order that it might be dealt with under arbitration clause.

The House of Lords held that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed. All members of the Court were agreed that even on the basis that the appellants had rescinded the contract for a repudiatory breach by the respondents, the arbitration clause still applied.

In reaching this conclusion, the Court stressed the limited nature of the effect which rescission for breach has upon a contract. Lord Macmillan said(73):

> "Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfil his part of it. There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters, why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective? A partial breach leaves the arbitration clause effective. Why should a total breach abrogate it? The repudiation being not of the contract but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation? I do not think that this is the result of what is termed repudiation."

The decision in *Heyman v. Darwins* has been followed in several subsequent cases relating to arbitration clauses(74) and has never in any way been controverted. Its significance, of course, extends beyond arbitration clauses(75). In particular in our present context, it seems to follow from this decision that exception clauses are not affected by rescission for breach. If, as is thought to be the case, the only effect of rescission for breach on a contract is to terminate obligations of future performance under the contract, an exception clause not being a term setting out such obligations but instead being concerned only 'with measuring the claims arising out of a breach' survives rescission and remains binding on the parties(76). If this is correct, it follows that Lord Atkin's observation in *Hain v. Tate*(77) that the effect of deviation, when accepted, on exception clauses is to be explained in terms of the ordinary law of contract cannot stand beside *Heyman v. Darwins*. In reviewing the weight to be attached to that observation, it must be borne in mind that *Heyman v. Darwins* was decided several years after *Hain v. Tate* and that ,furthermore, two judges in the case, Lord Macmillan and Lord Wright, were parties to the earlier decision.

The third argument against the deviation rule is that the Carriage of Goods by Sea Act has relaxed the old deviation concept and gives carriers a reasonable amount of flexibility; this carriers did not have at common law but reserved it for themselves by means of liberty clauses.

Therefore, unjustified geographic deviation themselves no longer automatically implied that a breach going to the root of the contract had occurred. This movements, however, did not seem to have been given much importance and the courts continued to apply the deviation doctrine to all breaches as though the common law notions have been totally unaffected.

In the light of theses arguments, it is submitted that 'it would be against the spirit of the law to argue that deviation has survived the demise of fundamental breach unscathed(78).' This proposition finds support from a modern writer who maintains that the so-called deviation rule have not survived the decision in the *Photo Production* Case and the effect of deviation on the exclusion clauses should be subjected to the general principles of the law of contract(79).

For a support of the above view, a helpful argument may be drawn from the judgment of Lord Diplock in *Photo Production*(80). His Lordship stated there that the parties to a contract are free to undertake whatever legal obligations they wish and these are known as primary legal obligations. They usually consist not only of express terms but also of certain implied terms, the nature of which depends upon the type of contract involved. In a contract of carriage, for instance, those primary obligations would be include the duty to provide a seaworthy ship, the duty to proceed with reasonable dispatch, the duty not to deviate and so on. Where a breach of primary obligations take place, it

gives rise to secondary obligations, those would include, say, arbitration clauses, time bars and limitation clauses. Once a deviation is accepted, the innocent party is discharged from his primary obligations, whilst his secondary obligations would survive and come to the forefront of the relationship. Accordingly, both the common law exceptions and contractual exception clauses would be available to a deviating carrier.

The possible objection against this view is that under it the deviating carrier would find himself in as good as, if not a better position than the carrier who had not deviated, for the non-deviating carrier would be protected only by the contractual clauses(81), while a deviator would also have the common law exceptions protecting him. Moreover, as it was held in *Photo Production* that the court is not entitled to reject the exclusion clause where the words are clear and fairly susceptible of one meaning only, "no matter how unreasonable the court itself may think it is", does it then follow that the carrier can always be exempted from any liability whatsoever as long as it is expressly stipulated for in an exception clause? If the answer is affirmative, would the defendant be over-protected whilst the rule of *contra proferentem* be repealed?

Dr. Charles Debattista in his article "Fundamental Breach and Deviation in the Carriage of Goods by Sea" tackled the above arguments and gave an answer to them.

First, if second view is correct, then a contractual

'perils of the sea' exception would survive a deviation which would be unreasonable indeed. However, as Dr. Debattista suggests, this argument is neutralised if one realise that saying that the clause survives the deviation is not the same as saying that it would necessarily apply to the deviation. The essential factor involved is whether the carrier can contend that with the construction rule of contra proferentem. Thus, where the loss was caused during the deviation by a peril of the sea, the courts would still be likely to interpret that it could not have been the intention of the parties to cover this loss by this clause. Pearson L.J.'s observation in *U.G.S.Finance Ltd. v. National Mortgage Bank of Greece* is worth noting:

> "As to the question of "Fundamental breach" I think there is a rule of construction that normally an exception or exclusion or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the personal intention of the contracting parties. It involves the implication of a term to give the contract that business efficacy which the parties as reasonable men must have intended to have."(82)

With such weapons at the disposal of the court it is doubtful whether there is any need to retain the rule of law approach to the problem raised by deviation(83).

Where, on the other hand, the loss was caused after the deviation by a peril of the sea, the clause should obviously

protect the carrier(84). As Lord Diplock observed in the Photo Production case:

> "Exclusion clauses are to be construed strictly and the strictness appropriate to be applied to their construction may properly depend on the extent to which they involve departure from the implied obligations."

Secondly, Dr. Debattista pointed out that the common law exceptions would not be available unless the carrier could prove that the loss would have occurred even if he had not deviated, which would be a difficult burden to discharge. Moreover, the deviating carrier would probably also loss his right to freight at the contractual rate(85).

Thirdly, Dr. Debattista observes that Lord Diplock who established the rule for the survival of the exclusion clause was also the one who first explained in detail the effects of repudiatory breach in the general law of contract in *The Hong Kong Fir* Case(86) which was also a carriage case. It was further pointed out that in at least two parts of his speech, his Lordship expressly refers to the law of carriage without telling us that is outside the thrust of his speech. Moreover, the House of Lords in *Hain v. Tate*, one of the authorities for the orthodox position, founded their decision that deviation displaced the exclusion clause partly on the ground that this was the position in the general law of contract. Therefore, there is no need to insist on a segregation of general contract from carriage of goods by sea(87).

5.2.3 THE HAGUE / VISBY RULES EXCEPTIONS

Finally, we come to the effect of termination of a contract of carriage through an accepted deviation on the exceptions to liability contained in the Hague/Visby Rules, that is to say in the Carriage of Goods by Sea Act 1979.

The Rules do not define deviation nor do they outline its consequences. Deviation is referred to only in Art. IV Rule 4, where what is not an unreasonable deviation is set out. This article reads:

> "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

The question arises here is what is the effect of unjustifiable deviation on the exclusions and limitations contained in the Rules? There are conflicting views upon the effect of deviation under the Rules. Some views adhere to the old doctrine as though the Rules did not effect it in any way. Others doubt whether a deviation can still have the radical effect it had under previous law in view of the Rules regime and the combined effect of the strictures of members House of Lords in *Photo Production case.*

5.2.3.1 CONTINUED EFFECT

The view which dominates under this heading is expressed by the House of Lords in *Stag Line v. Foscolo (The Ixia)*(88). In this case the House of Lords held that the

Hague Rules, incorporated in COGSA 1924, did not alter the former rule whereby unjustified deviation has the effect of depriving the shipowner of the protection of exceptions from liability contained in the Rules, or in the contract of carriage:

> "I pose here," said Lord Atkin, "to say that I find no substance in the contention faintly made by defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principle of English Law are still applicable to the carriage of goods by sea except as modified by the Act and I can find nothing in the Act which makes it's statutory exceptions apply to a voyage which is not the voyage the subject of 'the contract of carriage by sea' to which the Act applies."(89)

Greer L.J., too, had seized upon the true nature of the Hague Rules and the meaning of a deviation, when he declared in the Court of Appeal(90):

> "The provisions of the Act import into the agreement compulsorily certain exceptions, but there is nothing in the Act to show that these exceptions can be relied upon while the vessel is not pursuing the contract voyage, but is pursuing a voyage, or part of it, which is not covered by the contract at all."

Carver, although does not express a clear opinion, seems to agree with the conclusion of the court in *Stag Line* Case. Carver states(91):

> "In this respect the exceptions in Article IV, rule 2, and, indeed, the whole of the Rules, must be regarded as part of the contract which is abrogated by the deviation...if that contract goes, so go the Rules with it."

Tetley, also, seems to agree with the school of thought that adheres to the old rule, though he does not really express an opinion(92).

It follows from the first view that an unjustified deviation does contravene the Rules and the carrier, therefore, may lose the benefit in the Rules of:

a) the time-bar at Art. III, Rule 6.

b) the package and unit limitation at Art. IV, Rule 5.

c) the exculpatory defences at Art. IV, Rule 2(a)to(q).

In his article " Unreasonable Deviation Under COGSA", Morgan feels that the English approach(93)

> "have the advantage of a degree of simplicity and certainty which is useful in a practical commercial context. More important, there is much to be said for a rule which holds the carrier strictly to account for gross breaches of duty in circumstances where the cargo owner is relatively helpless to ascertain true facts..."

It does not seem there are much objection if the doctrine of deviation is applied to upset the exceptions where the loss would not occurred but for the deviation. But the doctrine was applied by the courts without enquiry as to the effect of the straying of the ship. The courts based their decisions on whether the deviation was negligent, unjustified or unreasonable(94).

Further, as it is well known, the Rules were introduced to regulate bills of lading and they relaxed the old deviation concept and gave shipowners a reasonable amount of flexibility(95); this carriers did not have at common law but reserved it for themselves by means of "liberty" clauses. Henceforth, therefore, unreasonable deviation itself no longer automatically implied that a breach going to the root

of the contract had occurred; The fact that the deviation is unreasonable does not necessarily imply that it is a fundamental breach. The test of the prudent person suggested by Lord Atkin in *Stag Line* Case clearly indicates that negligence will make a deviation unreasonable. That negligence alone is not necessarily a fundamental breach. On the contrary, very probably it is not. In that case it is not clear that the deviation was a fundamental breach, though it was unreasonable.

It has been mentioned above that a party to a contract of carriage would only be allowed to terminate the contract if the breach which was committed by the carrier deprived him 'of substantially the whole benefit which it was intended that he should obtain from the contract(96). As a result deviation should only upset the contract and the Rules if it is a fundamental breach . Otherwise there is no justification for terminating the contract and the Rules.

5.2.3.2 COGSA CHANGED THE LAW

Those who uphold the second view say that a distinction needs to be drawn between the cases where the application of the Rules is contractual in nature, and cases where the Rules apply *ex proprio vigore.*

Where the Rules apply by virtue of contractual incorporation then the survival of the three sets of exclusion will depends, according to Dr. Debattista' view(97), on whether or not we accept the old deviation

cases. If the orthodox position, as stated in *The Ixia*, which regards the provisions of the Rules, when applicable, as little more than compulsory terms of the contract of carriage, is accepted, then the whole of the Rules, including the three sets of exclusion go with the contract which is terminated by the repudiation. But if the doctrine of deviation survives not as a rule of law , but, as the Lord Diplock suggested in *Photo Production*, as a sub-pieces of construction, then the survival of the exceptions in Article IV Rule 2 of the deviation will depends upon whether, on their true construction, it was clear that the parties intended them to apply to the new situation, i.e. the substituted voyage(98). While the time-bar and the package and unit limitation will, in the words of Dr. Debattista, survive the termination of the contract as terms giving rise to secondary obligations, and the words "in any event" would make it clear that they were to apply even in case of an accepted repudiatory breach. Support for this proposition may be found in *The "Antares"*(99). In this case machinery was shipped from Antwerp to Mombasa under a bill of lading subject to the Hague-Visby Rules. On discharge at Mombasa it was discovered that part of the machinery had been stowed and carried on deck and had been seriously damaged. The plaintiff brought an action against the shipowner after one year. The owners contended that the action against them was time barred. The plaintiff sought a declaration that the owners were in fundamental breach of contract by stowing the goods

on deck and that this precluded the owners from relying on the one year time bar in Article III Rule 6 of the Hague-Visby Rules. The Court of Appeal held, relying on *Photo Production*, that while an unauthorised carriage of cargo on deck still constituting a breach of the contract of carriage, nevertheless upon true construction of Art. III Rule 6 the shipowners were not prevent from relying on it. Dealing with the effect of deviation, the Court was inclined to accept Scrutton's suggestion(100) that the addition of the word "whatsoever" makes it clear that Art. III Rule 6 applies even when the carrier has committed a deviation.

Where, on the other hand, the Rules apply by force of law, then it is submitted that, if they are to be effective as rules of law then presumably they will survive any repudiation of contractual obligations by the parties concerned(101). It is said in Scrutton that where the Rules apply by force of law the carrier could still rely on Article III, Rule 6 , and on Article IV Rule 5, in view of the words "in any event"(102). Gilmore & Black in their work on The Law of Admiralty, suggest that the Hague Rules subject a deviation to Article 4(5) regarding limitation of liability and to Article 4(2)(a-q) establishing the excuses from liability. They hold the view that COGSA cannot be ousted by a deviation(103).

It may be add that under the Hague-Visby Rules regime an unreasonable deviation can only causes the carrier to lose the per package limitation if the deviation was "done with

intent to cause damage, or recklessly and with knowledge that damage would probably result"(104). An unreasonable deviation without intent to cause damage, but only with intent to do the act , will not have this effect. And where the change in the route of the vessel occasioned by negligence of the master or an error in the navigation or management of the vessel, the new course taken is not a deviation but a navigational error for which the carrier should be exempted from liability under Article IV Rule 2(a).

5.2.4 DEVIATION UNDER U.A.E. LAW

Deviation in U.A.E. law is dealt with under general exculpatory clauses. Article 275(r) of the U.A.E. Maritime Code provides that the carrier shall not be liable for loss of or damage to the goods resulted from any deviation in the route to save or attempt to save lives or property at sea or any other deviation justified by reasonable cause.

One may infer from the above provisions that the carrier will be liable for an unreasonable deviation. But the Code does not set forth the consequences of an unreasonable deviation and no doctrine similar to the English doctrine of deviation has ever been accepted in U.A.E. Law. However, in cases where the deviation causes the loss or damage and in the absence of any provision in the Maritime Code to be

applied in such cases, the Courts will revert to the orthodox fault principle: liability for an intentional or negligent act. If the deviation committed wilfully or occurred through fault of the carrier or his servants then the carrier is not entitled to rely for protection against a cargo claim on the exceptions or limitations provided by general law or contained in the Maritime Code or contract of carriage but, unlike in English law where an unjustified deviation may displace the contract of carriage altogether, in U.A.E. law the contract of carriage would subsist.

It may, however, be said that as deviation from the course of the voyage resulting mostly from the error or the negligence of the master and because the carrier under the Maritime Code (Article 275(b) is not responsible for loss or damage arising or resulting from act, neglect or default of the master in the navigation of the ship then they are rare the cases where the carrier will be held liable for the deviation unless of course it resulted from intentional or gross negligence of the master or the carrier approved the act of the master in such situation the carrier will be held responsible for the total damage caused by the deviation.

5.3 SEAWORTHINESS

5.3.1 *ABSOLUTE OBLIGATION OF SEAWORTHINESS*

At Common law, a shipowner is, in the absence of any stipulation to the contrary(105), under an absolute obligation to provide a seaworthy ship(106) which is capable of completing the voyage for which she is required and safely preserving the cargo while so doing. Because of the importance of this obligation when the contractual terms are silent, the law intervenes imposing on the shipowner the duty to provide a seaworthy ship and the courts have read this implied obligation in every contract of affreightment. Arising by legal implication from the nature of the contract is a warranty *ex lege* forming a fundamental principle which has been mentioned in many cases and has been developed through the decision of the judges(107). In *Kopitoff v. Wilson* Field J., held that(108):

> " whatever way a contract for the conveyance of merchandise by made, where there is no agreement to the contrary, the shipowner is by the nature of the contract impliedly and necessarily held to warrant that the ship is...seaworthy."

The learned judge went on after alluding to the great authority of Lord Ellenborough in the case of *Lyon v. Mells*(109), to conclude that the same doctrine is followed by the American courts(110). He also held that this implied undertaking arises not from the shipowner's position as a common carrier, but from his acting as a shipowner. The

House of Lords endorsed the application of the implied warranty of seaworthiness in the well-known case *Steel v. State Line*<111> where Lord Blackburn was quite clear that both in England and in Scotland<112>:

> "Where there is a contract to carry goods in a ship whether that contract is in the shape of a bill of lading, or any other form, there is a duty on the part of the person who furnishes or supplies that ship...that the ship be fit for its purpose...not merely that he had loyally, honestly, and bona fide endeavoured to make her fit."<113>

Fit for what? The warranty of seaworthiness has several limbs. First, the ship is warranted to be fit to receive and hold the particular cargo that is to be shipped in the conditions existing at the place of loading and to encounter the ordinary perils during the loading<114>. Secondly, the ship is warranted to be fit to lie in harbour until ready to sail<115>. After these preliminary warranties of seaworthiness, the third and crucial one undertakes that the ship is fit to "encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter". This last and most important warranty is restricted to the commencement of the voyage<116>. It does not take effect before the ship is ready to sail, nor does it continue to take effect after she has sailed:

> "...the warranty of seaworthiness in the ordinary sense of that term...is a warranty only as to the condition of the vessel at a particular time, namely the time of sailing; it is not a continuing warranty, in the sense of a warranty that she shall continue fit during the voyage."<117>

The ratio of this rule can be easily understood if we bear in mind the repeatedly mentioned peculiar and perilous nature of the maritime adventure. The actual and commercial impossibility of the carrier to inspect and control his ship after her departure and to repair the defects during the voyage was taken into account for the establishment of this rule. However, if the vessel becomes unseaworthy during the voyage and there is an opportunity to repair the damage, the shipowner will not be excused if he fails to take necessary steps to repair it(118); the remedy being, however, an action for damages for breach of his fundamental obligation to take care(119) (action for negligence) and not for breach of the warranty of seaworthiness (unless the doctrine of seaworthiness by stages applies)(120). In other words, where the ship is seaworthy at the time of sailing but becomes unseaworthy while at sea, 'the incidence of liability will be determined not by reference to the undertaking (of which, of course, there has been no breach) but by reference to the cause of the loss. If the loss were due to an excepted peril the shipowner will be protected, otherwise he will not'(121). His liability therefore, arises from his position as a carrier and only effective clauses against damage caused by negligence will make such liability negative.

In charterparties, two different positions of the owner may be distinguishable: the usual clause that the ship is to be tight, staunch, etc., refers prima facie to the preliminary voyage to the port of loading, unless stretched

further by the terms of the individual contract. Seaworthiness implied by Common law, on the other hand, refers to the sailing from the port of loading. The contractual warranty therefore need not coincide with the Common law one, so that an exemption from the former in the charterparty may or may not relieve the owner if the particular unseaworthiness remains until the ship sails from the port of loading(122).

Under the Carriage of Goods by Sea Act, 1971, as we have seen, the absolute warranty of seaworthiness is reduced to the requirement that the carrier shall exercise due diligence to make the ship seaworthy 'before and at the beginning of the voyage'(123). But whereas a shipowner may contract out of his absolute duty to provide a seaworthy ship-although only the clearest language will suffice- any attempt to avoid or reduce the duty of due diligence imposed by the Act is null and void(124).

5.3.2 *MEANING OF SEAWORTHINESS*

The concept of seaworthiness has been labelled as being indefinable, and adjectives such as 'elusive', 'elastic', 'relative', 'flexible' and the like have been levied on the term.

The earlier judges seemed to have a mixed feeling of the concept. One judge, Vaughan Williams L.J., in *Wade v. Cockerline*(125) was of the opinion that the warranty of

seaworthiness was "not happily described". But Lord Herschell in *Hedley v. Pinkney & Sons S.S.Co.*(126), on the other hand, felt that the term was a well-known one in shipping law and had a "perfectly definite and ascertained meaning." In *Reed & Co. v. Page* Scrutton L.J., said(127) : "The word 'seaworthiness' is used in two senses: **(1)** Fitness of the ship to enter on the contemplated adventure of navigation. **(2)** Fitness of the ship to receive (and I add to carry) the contemplated cargo, as carrying receptacle". Lord Cairns C., examining the question, what is meant by an 'unseaworthy' ship, said: "By 'unseaworthy' I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind and laden in that way, may be fairly expected to encounter"(128).

It is, therefore, admitted that in order to satisfy the warranty of seaworthiness the ship must be seaworthy as such (seaworthy *stricto sensu*), i.e.: **i)** must be fit in design(129), structure(130) (hull(131), tackle, apparel, machinery), condition (not old and rotten or in a leaky state(132)) and equipment(133), having enough fuel(134) and being properly ballasted to encounter the ordinary perils of the voyage and **ii)** must be fully manned, namely, she must have a competent master(135) and sufficient crew not only in number but also in ability and skill to navigate her, a pilot(136) where there is an establishment of pilots and the nature of the navigation or the law or usage requires one,

unless the master himself has a proper knowledge of the navigation. The ship must also have on board all papers and documents necessary for the protection of the ship and cargo and for the due performance of the voyage, such as a bill of health(137) and manifest. But seaworthiness *lato sensu* includes cargoworthiness and extends not only to the vessel but also to its reasonable and suitable adaptability and fitness to carry the particular cargo(138). The warranty of seaworthiness, in a wider meaning, is not complied with when a ship seaworthy as to navigation is unseaworthy as to the cargo or is seaworthy as to one part of the cargo and unseaworthy as to another. Thus, if the ship is to carry goods of a particular kind the warranty of seaworthiness *stricto sensu* requires her to be fit and strong as an instrument of transport to encounter the perils of the voyage and the warranty of cargoworthiness to be fit to carry the particular cargo, i.e. fit in respect of all those things which appertain to its safe carriage.

Thus, concerning the question of what amounts to unseaworthiness, no answer can be given in a general and abstract way. It is a matter of fact which lies at the root of each case and must be decided in concrete from all the relative circumstances. The courts dealing with such a case have to consider all the individual features of each situation.

The following are some illustrations that amount to unseaworthiness in Common law. The list does not purport to be exhaustive but merely to include a number of representative situations that are thought to be of interest to U.A.E. lawyers. Among the situations that may constitute unseaworthiness are: structural defects of the vessel existing at the beginning of the voyage , whether patent or not discoverable with the exercise of due diligence, for instance, sailing with a defective rivet that allows the inroad of sea-water into the cargo(139), or sailing with a broken or fractured pipe that allows ship's water to enter into holds(140); sailing with defective boilers(141); sailing with defective(142) or insufficient bunkers(143). Sailing with an insufficient or incompetent crew(144), or with a master who is either inadequate(145), or has not properly instructed by his owners as to peculiar characteristics of his vessel that affect her ballasting and stability and endanger her safety at sea(146). Sailing in an unstable condition so as to endanger the safety of the ship(147), and whether this is due to bad stowage(148) or other causes(149) and whether the instability is due to a fault of the owners themselves(150) or not. A defect in the ship's refrigerating apparatus that result in cargo of meat being damaged(151); the absence of a proper ventilating system that results in damage to cargo of wool(152); lack of shifting boards to inhibit the shifting of a cargo of grain(153); the inability of the vessel's pumps to deal with the drainage of a cargo of

wet sugar(154); failure to provide a reasonably fit bullion room for the stowage of boxes containing gold(155); a failure to disinfect and clean the ship after the carriage of cattle suffering from foot and mouth disease with the result that a subsequent consignment of animals caught the disease(156); the existence in the holds of a quantity of carbolic acid that had been used for disinfecting the ship and caused damage to a subsequent shipment of frozen meat(157).

A ship may be seaworthy on sailing, although her appliances are not in such a state of readiness that the voyage can be performed in safety. If, for example, the hatch boards are off or a porthole is open, the vessel will not be unseaworthy since in the ordinary course these matters are capable of being easily remedied after the voyage has begun(158); in such a case "there is negligence on the part of the crew but not unseaworthiness of the ship"(159). On the other hand, if the defect cannot be reached while at sea this defect will render the vessel unseaworthy(160). In the well-known case *Virginia Carolina Co. v. Norfolk*(161), Hamilton, J., dealing with the specific question of a dripping tap is a structural defect rendering the ship unseaworthy and amounting to a breach of the warranty, asked himself: "Could such a tap be described as constituting a structural defect existing in the vessel at the time of sailing?". He answered: "It appears to be impossible so to describe it...I think there was no defect existing in this tap other than the one that can be and is ordinarily remedied

in the course of the voyage. I think therefore, that the vessel sailed with a good tap in her - a tap in a reasonable condition which might properly be left to the daily attention of the engine-room staff - a tap which did not constitute initial unseaworthiness."

5.3.3 *RELATIVITY OF THE TERM "SEAWORTHINESS"*

As it is very difficult to define accurately what constitutes unseaworthiness, it follows that the standard of this warranty is relative(162). Although the warranty of seaworthiness as such is, at Common law, absolute, the required degree for its compliance is relative. Attention must be drawn to this point because a misunderstanding may lead to undesirable confusion between different conceptions: of the absolute character and the relative standard of seaworthiness. The 'absolute' feature of the warranty of seaworthiness impliedly by Common law refers to the degree of the shipowner's liability and not to the standard of fitness or seaworthiness of his ship:

> "The warranty of seaworthiness is an absolute contract, but at the same time, although it is an absolute contract that the ship in question is reasonably fit for the voyage...it is not a contract that the ship is absolutely fir for the voyage."(163)

There is no positive or fixed standard of seaworthiness because like so many other legal standards it is - and must be - always uncertain for the law cannot fix in advance the precautions which will be necessary for ships to meet the manifold dangers of the sea. How far the obligation of

seaworthiness extends neither is, nor even can be settled by positive definition or rules of law "for the reason that improvements and changes in navigation frequently require new implement, or new forms of old ones"(164).

Abbott, mentioning the relativity of the term seaworthiness, said(165): "If a vessels, reasonably sufficient for the voyage, is lost by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril".(166)

Thus, the required degree of seaworthiness varies according to:

a) The nature of the particular voyage to be undertaken. A winter voyage requires a different preparation from a summer voyage. If exceptionally bad weather is expected the standards of seaworthiness required is correspondingly higher.

b) Crossing the Atlantic Ocean it is necessary for the ship to have stronger equipments than sailing across the English Channel(167).

c) The particular stages of the voyage, being different for river and lake or sea navigation(168).

d) The quality and quantity of the cargo contracted to be carried and to the service to be performed by the ship(169).

Of course, the standard of seaworthiness may rise with the improved knowledge, skill and striking progress in shipbuilding. But this, in any case, does not mean that the shipowner has failed to fulfil his duty to supply a seaworthy ship if he has not introduced the best appliances. It would be illogical(170) and unfair to ask the shipowner to provide a perfect ship since "in the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the material time"(171). All that is necessary is that the ship should have that degree of fitness to encounter the perils of the voyage which would be usual and prudent and a matter of course to require at the commencement of the voyage; and if it appears that a prudent owner would never have sent the ship to sea without remedying the defect if he had know of its existence, a ship that puts to sea with the defect unremedied must be regarded as unseaworthy. Channel, J., in the case of *Mcfadden v. Blue Star Line*, said(172):

> "A vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. To that extent the shipowner undertakes absolutely that she is fit and ignorance is no excuse. If the defect existed, the question to be put is: would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking."

This statement appears to give the test and the rules

according to which whether or not a particular defect amounts to a breach of warranty of seaworthiness has to be determined.

With the relativity of the standard of seaworthiness another problem is closely connected, that of the statutory seaworthiness. The perilous nature of navigation induced the legislature of the maritime nations from olden times to enact regulations in order to lessen its inherent dangers and to protect the safety of shipping. With the expansion of trade these perils, in spite of the technical improvements are multiplying. Consequently the relevant regulations are increasing in number and in complexity. Breach of these regulations may have various effects. For instance, a non-compliance of the shipowner with the rule of using shifting boards for the carriage of grain in bulk(173) may prevent his ship from sailing from the port of a country by refusal of clearance certificates or to expose him to a penalty according to the regulations of navigation of this country(174). Now, if and to what extent such a breach of regulations constitutes at the same time breach of the warranty of seaworthiness is a matter of controversy, simply because the meaning and the standard of this warranty are flexible and relative. What is accepted in one country as a satisfactory standard may not be considered so in England. Shipowners differ, in spite of the objective criterion used, to what in concrete is necessary for making a ship seaworthy because the required standard of seaworthiness is derived

from many factors. British courts have always taken the strict view of the shipowners' obligation and it is, according to Lord Chorley's opinion, that 'regulations of this type indicate a standard of seaworthiness which ought to be observed'(175).

5.3.4 *THE NATURE OF THE UNDERTAKING OF SEAWORTHINESS*

English law has for some considerable time recognised a distinction between two classes of contractual terms: conditions and warranty(176). 'Condition' refers and means a term of the contract any breach of which gives the injured party not only a right to claim damages but also a right to rescind the contract(177). A 'warranty' describes a contractual term breach of which does not give the injured party the right to terminate the contract but only gives him a right to damages(178).

In modern time there has emerged yet a third category of intermediate terms: the legal consequences of the breach of such a term (i.e., whether or not the injured party is entitled to rescind the contract) "depend upon the nature and consequences of the breach, and do not follow automatically from a prior classification of the undertaking as a condition or a warranty."(179)

During the course of its legal history, the classification of the undertaking of seaworthiness, expressed or implied, as a contractual term underwent a series of

transformations. In the early days ,and in order to make seaworthiness appeared as a condition precedent, charterers and shippers attempted to get the Courts to agree with them that the shipowner's undertaking to provide a seaworthy ship was of the same calibre as the implied undertaking of non-deviation. The strive obviously was to acquire the same rights and benefits conferred to a cargo-owner in the event of an unjustified deviation(180).

The first case which raised the issue was *The Europa*(181). In that case a ship was under a voyage charterparty. The charter contained a clause exempting the shipowner from any damage caused by 'collision'. When the vessel arrived at the port of discharge, she struck a dock-wall. A water-closet pipe was broken and the cargo in the 'tween decks was damaged. When the vessel started the voyage she was unseaworthy, but the unseaworthiness did not cause the damage. The charterers sought to get the court classed seaworthiness with non-deviation in order to reduce the status of the shipowner to that of a common carrier making him responsible for the damage caused by collision. They relied heavily on the decision of *The Orchis* Case(182), in particular a passage from the judgment of Collins, M.R., in which he said(183):

> "I would only add that I am unable to see any reason why doctrine admittedly applicable in the case of a contract of insurance with respect to the warranty of seaworthiness should not, as regards the undertaking not to deviate apply equally to a contract of affreightment. It seems to me that the same considerations apply to both cases."

The Europa Court ruled that no analogy could be drawn between the two classes of undertakings. It explained that on reading the judgments of the *Orchis* Case as a whole, no proposition such as that made by the charterers was enunciated by the Master of the Rolls nor the other members of the Court of Appeal. As the Court could not find any authority which supported the charterers' plea, they were not allowed recovery for the damage caused by the collision(184).

A few years later, the House of Lords was confronted with basically the same issue but this time from a slightly different angle. In *Kish v. Taylor*(185) charterers contended that the shipowner was disentitled from exercising a lien for dead freight because he had failed to provide a seaworthy ship and was therefore in breach of a condition precedent of the charterparty. They attempted to draw a parallel with the case of an unjustified deviation.

The charterers were compelled by Lord Atkinson to admit that if their contention was sound:

> "...it would be competent for every indorsee of a bill of lading, whose goods had, in fact, been carried safely and with due expedition to the appointed port of discharge, to contend that, by reason of some of those comparatively trifling omissions on the part of master which have been held to render a vessel unseaworthy, such as sailing without two anchors, sailing without an adequate supply of medicines and medical appliance for the crew, he was released from all the obligations imposed upon him by the bill of lading, the argument being that the provision of a seaworthy ship was a condition precedent, and not having been performed the contract of affreightment was entirely displaced."(186)

The House of Lords, citing *The Europa*(187) with approval,

came to the definite conclusion that the shipowners were not debarred from asserting a lien against the cargo-owners.

Lord Atkinson's illustration bears a remarkable resemblance to a statement made by Lord Ellenborough, C.J. in *Havelock v. Geddes*(188) decided in 1809. The dissimilarities between these two cases, it is submitted, are not so material or so great as to detract one from the issue which concerns the classification of the contractual obligation as regards seaworthiness. Lord Ellenborough, C.J., remarked that(189):

> "...if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, etc. would be a breach of the condition, and a defence to the whole of the plaintiff's demand."

The Court declared that the express undertaking pertaining to seaworthiness was not a condition precedent for the recovery of charter freight after a charterer had accepted and employed the vessel. The same rule as in *Kish v. Taylor*(190) was applied to this time charter.

Seaworthiness, then, is not a condition precedent in a contract of affreightment in a sense that if the ship be unseaworthy the shipowner is reduced to the position of a common carrier and is, therefore, liable for all damage occasioned to the cargo (except that, of course, due to the act of God, or of the Queen's enemies or of the inherent vice of the goods- Common law exceptions), even if such damage be solely caused by an excepted peril and not by the unseaworthiness. According to *The Europa* and *Kish v. Taylor*,

breach of the undertaking of seaworthiness does not entitle the charterer to rescind the contract(191); it merely gives him the right to claim damages.

In some subsequent cases, however, the undertaking of seaworthiness continued to be treated as a condition precedent. In *Atlantic Shipping v. Louis Dreyfus*(192), Lord Sumner, as an additional leg to justify his conclusion that the arbitration clause was inoperative, he relied upon the classification of the implied undertaking as to seaworthiness as a condition. He categorised the shipowner's obligation as regards seaworthiness as follows:

> "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability, namely, that the shipowners shall have provided a seaworthy ship... if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowner's protection in such a case."(193)

In *Ford & Co. v. Compagnie Furness*, Bailhache, J., said(194):

> "...when a ship is unseaworthy the whole of the special contract goes, for the reason that the assumption on which the special contract is based had not eventuated... if a seaworthy ship is not provided the foundation of the special contract goes and therefore the superstructure, the special contract goes also."

The learned Judge added(195):

> "...so far as shipowner are concerned, all the stipulations in the charterparty are gone and their position is analogous to that of a common carrier without conditions."

Carver, however, inclines to read the above dicta as

merely judicial observations not binding as a precedent(196). He asserts that the obligation of seaworthiness should never operate as a condition breach of which entitles the party aggrieved, on discovering it, to rescind the contract, but operate only as a warranty, breach of which would entitle the party aggrieved merely to damage(197).

Classifying the undertaking of seaworthiness merely as a warranty, a charterer or shipper would never be in a position to rescind the contract in the event of a breach as his remedy sounds only in damages regardless of the nature and effects the breach has upon the contract. Such a strict and an inflexible division is clearly unsatisfactory and capable of producing inequitable results. The consensus of opinion considered it 'unthinkable' and contrary to good sense to support that the parties contemplated that the charterer should at once be entitled to cancel and repudiate the contract for trifling deficiencies which could in law amount to a breach of the implied warranty of seaworthiness. The same can be said for the converse; to assume that the parties intended that the charterer should not be entitled to rescind the contract for serious breaches would be equally preposterous and contradictory to sound judgement. The need for a health and more flexible method of classification soon became apparent and as to be expected the old pattern was not tolerated for long: The medium was struck in the case of *The Hong Kong Fir*(198). The vessel provided for the defendants (charterers) at the start of a two - year time

charter was unseaworthy in that the engine-room was understaffed and the staff were not trained to cope with the aged engines. On a journey from Liverpool to Osaka the ship was out of commission for five weeks because of engine failure, and after the vessel had been held up in Osaka for a further fifteen weeks the defendants threw up the charter and claimed damages, although there was no reason to believe that the ship would not be seaworthy after the repairs were finished. They argued that the terms as to seaworthiness was a condition of the contract, and that they were therefore entitled as of right to treat themselves as discharged. The shipowners argued that this withdrawal was unjustified and therefore 'breach of contract' and claimed damages for the loss of the charter.

In extended judgments the Court of Appeal held that the plaintiffs shipowners had certainly broken their obligation to provide a seaworthy ship (and thereby made themselves liable to pay damages to the defendants) but that in the circumstances of the case this breach was not serious enough to justify the defendants to withdrawing from the contract.

Both Sellers and Upjohn L.JJ., construed the seaworthiness term as a warranty(199). Diplock L.J., on the other hand, regarded the term as too complex to be accommodated by the condition/warranty distinction(200).

The importance of the case lies in the fact that the Court did not regard the character of the term as determinative of the right of the charterers.

Upjohn L.J., said that although the term 'seaworthiness' was not a condition it would have been "unsound and misleading to conclude that, being a warranty damages is necessarily a sufficient remedy"(201). He went to say:

> "In my judgment the remedies upon to the innocent party for breach of a stipulation which is not a condition strictly so called, depend entirely on the nature of the breach and its foreseeable consequences."(202)

Diplock L.J., stated that the question whether an event which was the result of one party's breach of contract relieved the other party from performing his obligations could not be answered by treating all contractual undertakings as failing into 'condition' and 'warranties' in the meaning given to those terms in the early nineteenth century(203). There were many complex contractual undertakings which could not be so categorised. His Lordship went to say:

> "...of such undertakings all that can be predicated is that some breaches will and other will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty."(204)

In his view, the seaworthiness term had to be treated as a complex term because it could be breached in various ways. Some breaches would be serious(205), and give rise to a right to terminate the performance of the contract as well as a

right to claim damages, whilst others would be minor(206) and sound only in damages. Therefore, merely construing the contract would not give a decisive answer to the question of whether the charterers were justified in terminating the performance of the contract rather than simply claiming damages. On the facts, and in agreement with the other members of the Court, Diplock L.J., held that the event which had resulted from the breach was not sufficiently serious in character: it did not deprive the charterers of substantially the whole benefit which was intended they should obtain from the contract.

Although there is no decision prior to *The Hong Kong Fir* in which the warranty of seaworthiness had been described as an intermediate term, nevertheless, the basic of *The Hong Kong Fir* decision was applied long time ago in *Compania Contabrica v. Anglo-American Oil Co*(207). A ship was under a voyage charter for eight consecutive voyages. During the first two voyages, the ship was undisputedly unseaworthy and the cargo of oil was lost be leakage. At the end of the second voyage, the charterers repudiated the contract even though the owners without delay went ahead and had her repaired within a month. When the charterers declined to load her for the third voyage, the owners sued for wrongful repudiation.

Bailhache J., held, applying principles identical to those in *The Hong Kong Fir*, that the charterers' failure to perform his part of the bargain unjustifiable on the ground

that the delay necessary for repairs was not long enough to frustrate the main object of the charterparty. The shipowners were held liable in damages for breach of contract in failing to provide a seaworthy ship for the first two voyages. There is, therefore, no difference in law between a time and a voyage charter on this issue.

5.3.5 *EFFECT OF UNSEAWORTHINESS UPON THE EXCEPTIONS*

Having acquired a general knowledge of the meaning of seaworthiness and its ramifications and nature we can now proceed to examine its legal effect on the exceptions of liability.

The exceptions, as we have seen, constitute of: **a)** the Common law exceptions; **b)** the statutory exceptions either those provided for in the COGSA , Art. IV Rule 2 or the exception of fire provided for in MSA 1979, Section 18; and **c)** the contractual exceptions.

The question is: How does unseaworthiness fare with this bunch of exceptions: Must it recoil before them, or does it override them? What does prevail? The liability for unseaworthiness or the exception from liability for perils of the sea, fire, etc. as the case may be?

To answer this question we have to distinguish between exceptions afforded by the Common law, the COGSA and contractual exceptions and the exception of fire afforded by Section 18 of MSA, 1979.

The former exceptions do presuppose the seaworthiness of

the ship so that the shipowner, unless the contrary has been provided for, cannot rely on any of these exceptions where the loss or damage has been caused by unseaworthiness. As Lord Sumner put it in *Atlantic Shipping Co. v. Dreyfus*(208):

> "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability, namely, that the shipowner shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

Similar view was stated by Lord Wright in *Paterson S.S. v. Canadian Wheat*(209):

> "If the goods were lost (say) by perils of the seas, there could still remain the inquiry whether or not the loss was also due to negligence or unseaworthiness. If it was, the bare exception did not avail the carrier."

Thus, the carrier cannot allege effectively the excepted perils if he failed to provide a seaworthy ship and loss or damage resulted. But where loss or damage has been caused by an excepted perils which is unrelated to the ship's unseaworthiness, the shipowner will be able to avoid liability. In *The Europa*(210), the court held that a shipowner whose ship was unseaworthy was liable for damages caused directly by the ship's unseaworthiness, and was not liable for injury not caused by unseaworthiness but by an excepted peril, of collision (in this case).

The rule that the exceptions do not come into play unless the undertaking to provide a seaworthy ship, or

eventually to exercise due diligence to make her seaworthy, has complied with, applies to all excepted perils except in the case of loss or damage caused by fire under Section 18 of the Merchant Shipping Act, 1979.

The solitary peculiarly of this statutory excepted peril needs special consideration because it does not presuppose the seaworthiness of the ship.

By Section 18 of the MSA 1979, the owner of a British sea-going ship is not liable for any loss or damage to goods by reason of fire on board(211), if the loss happens without his personal act or omission. The exception under this Section is not conditional upon the fulfilment of the implied warranty of seaworthiness. Therefore, proof that the fire was caused by unseaworthiness will not deprive the shipowner of the statutory protection. This was laid down in the case of *Virginia Carolina Co. v. Norfolk S.S. Co.*(212), in which the bill of lading contained a clause providing that the shipowner was not responsible for any loss or damage to the goods received thereunder for carriage occasioned by, inter alia, fire or unseaworthiness, provided all reasonable means had been taken to provide against unseaworthiness. It was held by Bray J., and by the Court of Appeal that the shipowner was not deprived of the protection of Section 502, of MSA 1894 (now MSA, 1979, Section 18) merely by reason of the fact that the fire was caused by the unseaworthiness of the ship, but the effect of the bill of lading containing the above clause was to preclude the shipowner from setting up

S.502 as an answer to a claim for the loss of goods by reason of fire on board the ship caused by the unseaworthiness of the ship. Buckely L.J., in the Court of Appeal said(213):

> "The statute in the case of fire, if I rightly understand it, relieve the shipowner not only from the liability as an insurer but also from the liability under an implied warranty of seaworthiness, if the fire happens without his actual fault or privity. To express the same thing in other words, the section is not to be read as if it is said 'the owner of a seaworthy British sea-going ship'; it is 'the owner of any British sea-going ship', be it seaworthy or unseaworthy 'shall not be liable' for damage by fire unless it happens with his actual fault or privity. That is the construction which I place upon the statute."

This decision was approved by the House of Lords in *Dreyfus v. Tempus Shipping Co.*(214)

It is submitted, however, that the interpretation given to Section 502 of MSA 1894 by the Court in *The Carolina* Case is too literal and is not in accordance with the spirit of law and the necessities of practice. There is no reason why the exception of fire should not be made conditional upon the fulfilment of the implied warranty of seaworthiness. The shipowner must always be responsible when he breaks the warranty of seaworthiness. The interpretation given to *The Carolina* Case presuppose that the legislature intended the protection of Section 502 to be given to a shipowner who does not fulfil his fundamental and primary duty to provide a seaworthy ship- a proposition which is in disagreement with the general principles and breaks the uniformity of law as to seaworthiness in relation to excepted perils. Its legalistic

character brings confusion and uncertainty in practice. Simplicity, uniformity, certainty, conformity with what practice require are the best advantages of a legal system. On the other hand, support is afforded for the proposed interpretation by Lord Dunedin, who considering the position in the *Dreyfus* Case, admitted: "No doubt the point (s.c. that s. 502 does not apply to unseaworthy ships) was very arguable."

The rule, however, as the law now stands is that unseaworthiness if not due to the personal act or omission of the owner, does not deprive of the statutory exception of S.18 of MSA 1979, from liability for fire; but a contractual exception from this liability is, in principle, still subject to the condition that he has not only done his best to make the ship seaworthy but that she actual is seaworthy - unless we have before us a contract under the Carriage of Goods by Sea Act, 1971, where a contractual exception of liability for fire would only be subject to the condition that the owner has used due diligence to make the ship seaworthy.

5.3.6 *PROOF AND EVIDENCE OF UNSEAWORTHINESS*

While it is true that the implied warranty of seaworthiness is the most important and far reaching of all the implied warranties, it is equally true that it is more difficult to prove a breach of this warranty than it is to prove a breach of others. Some cases readily demonstrate a condition of unseaworthiness, and when a vessel, shortly

after leaving port, founders in clear weather and a calm sea, an inference arises that she was not seaworthy when she sailed<215>. But in the vast majority of cases some disturbed conditions of the sea or of the elements exists at the time the vessel is lost and not solely to the unusual action of the forces of nature on a seaworthy vessel is a matter of no little difficulty.

According to the general rule of evidence it is for the person who is alleging unseaworthiness to prove that the ship was unseaworthy<216>. In other words, it is for the cargo-interest, alleging loss or damage, to make out a prima facie case that this was caused by the vessel being unseaworthy as it is understood at Common law. In *Baumwoll v. Gilchrest*, Lord Esher M.R. explained<217>:

> "It is not sufficient breach of a bill of lading that the ship went to sea in an unseaworthy condition; but it must be shown that the unseaworthiness was the cause of the loss."

The legal requirement that the unseaworthiness must cause the damage or loss was reiterated by Bucknill J., in *The Europa*<218>:

> "...whenever a cargo-owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo-owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and therefore that he was entitled to recover the loss, although there was no relation between the unseaworthiness and the damage."

It is a matter of great difficulty, however, to assess in a particular case whether and to what extent unseaworthiness has caused loss. The question of causation is one of principle and practice having great importance and legal significance. A remote connection between unseaworthiness and damage is not sufficient to establish the legal link breach of which will result in the granting of damages. Unseaworthiness must be something more than a mere *causa sin qua non* of the loss<219>.

Various tests had been proposed to determine the question of causation in relation to unseaworthiness in a contract of affreightment. In *The Christel Vinnen*<220>, Scrutton L.J., who had to decide whether unseaworthiness or negligence of the master in not detecting and pumping water out of the ship or both were responsible for the loss of the cargo, applied the 'dominant cause' theory. He said that as the shipowner could not show any exception to protect him<221>, and could not show that the 'dominant' cause of the loss was not the unseaworthiness (which admitted the water into the ship), then the owner was liable for all the damage instead of the moiety.

In *Smith, Hogg & Co.* Case<222>, however, Scrutton L.J.'s theory of the 'dominant cause' was overruled. In that case Lord Wright criticised Scrutton L.J.'s employment of the word 'dominant'<223>. He submitted that it is not necessary for unseaworthiness to have been the proximate cause nor even the

'dominant cause' of the loss as long as it be 'a cause' in the sense of a real cause(224). His Lordship thought that the law of causation was correctly stated by Carver in his work on Carriage of Goods by Sea(225):

> "And further the shipowner remains responsible for loss or damage to the goods, however caused, if the ship was not in a seaworthy condition when she commenced her voyage and if the loss could not have arisen but for that unseaworthiness...if her unfitness becomes a real cause of loss or damage to the cargo, the owner is responsible, although other causes from whose effect he is excused either at common law or express contract have contributed to cause the loss."

In *Smith, Hogg & Co.*, a charterparty provided that the shipowners should not be liable for loss resulting (i) from unseaworthiness unless caused by want of due diligence on their part to make the ship seaworthy, and (ii) act, neglect or default of the master in the navigation or management of the ship. When the ship started on her voyage she was unseaworthy, as her cargo was so loaded as to give her a list, and she also had an insufficient supply of bunker to take her to her port of destination. The master, therefore, put in at an intermediate port to take in more coal, but owing to a serious of error in the method of loading, the unstable ship took a list to port and turned over on her beam ends. The owners claimed general average contribution. Branson J., decided in favour of the owners. Though he held that the vessel was unseaworthy and the warranty had been broken, the unseaworthiness did not, in his opinion, cause

the loss. He said that the accident took place not by reason of unseaworthiness of the ship but by virtue of the exception of liability for the 'act, neglect or default of the master'. This decision was reversed by the Court of Appeal(226) which found that the ship's unseaworthiness was the cause of the disaster. The shipowners could not recover on the ground that unseaworthiness was the cause of the loss, and having failed to exercise due diligence to make the vessel seaworthy, they did not qualify for exemption of liability. This decision was upheld by the House of Lords(227). Lord Wright (with whom Lords Maugham and Atkin concurred), having reviewed the former cases, came to the conclusion that where a shipowner is liable on his warranty of seaworthiness and the ship is unseaworthy when she commences her voyage, he remains liable for the loss or damage to the cargo, however caused, provided that the loss of or damage to the cargo could not have arisen, but for that unseaworthiness. If her unfitness becomes a real cause of loss or damage to the cargo, the shipowner is responsible, although other causes from whose effect he is excused either at Common law or by express contract have contributed to cause the loss:

> "Was that breach of contract (unseaworthiness) 'a' cause of the damage. It may be preferred to describe it as an effective or real or actual cause though the adjectives in my opinion add nothing. If the question is answered in the affirmative the shipowner is liable though there were other co-operative causes as perils of the seas, fire and similar matters, or causes due to human action..."(228)

Thus, liability for unseaworthiness under Lord Wright's 'a cause' theory is determined whenever unseaworthiness is perceived as 'a' cause of loss. So long as it has caused a loss in a manner which is more than superficial, in the sense that but for the unseaworthiness the loss would not have happened, the shipowner will be liable for the whole loss. Once classified as 'a' cause, the court has arrived at the end of the road, so to speak, in its investigation on causation. It is unnecessary to go further to ascertain whether another cause is more effective or more dominant than unseaworthiness as a cause of loss〈229〉.

Eight years later Lord Wright had a further opportunity to elaborate his 'a cause' theory of causation in *Monarch S.S. Co*, Case〈230〉. There, however, the majority of the House of Lords adopted a different test; they said that the question of whether unseaworthiness caused the particular loss should be decided by applying the 'reasonable foresight' test. A vessel was chartered to carry a cargo from Korea to Sweden. The ship should have completed the voyage by July 1939, but being unseaworthy, the voyage was delayed and the ship had to put at Port Said for repairs and was not ready to leave there till September 24. War had broken out on September 3 and the ship was ordered by British Admiralty to go to Glasgow and discharge her cargo. The cargo was later transhipped to Sweden. The plaintiffs claimed the cost of the transhipment, alleging that this was suffered as a result of the initial unseaworthiness of the ship. The defendants

shipowners sought reliance on the war-risk clause in the charterparty contending, further, that they had fulfilled their obligations since, after the outbreak of war, the ship was under obligation to obey the orders of the British Admiralty. They said that after repairs had been effected at Port Said there was nothing in the physical condition of the ship to prevent her from proceeding to or reaching Sweden; therefore, unseaworthiness no longer existed as a mingling or competing cause of loss at the time of the casualty.

The House of Lords held that the expense suffered was recoverable from the defendants. The outbreak of war was not a very unlikely event at the date when the contract of carriage was made, and did not negative causal connection between the breach of the contract and the added expense.

Lord Porter (with whom Lords Uthwatt and Morton agreed) in the course of his judgment distinguished the present case from *Smith, Hogg & Co.*, on the ground that in that case there were two concurrent and simutaneous causes of loss whereas here the unseaworthiness had ceased to operate and the sole reason preventing the continuance of the voyage to Sweden was the order of the British Admiralty(231). His Lordship went on, however, to ask was not the effective cause which necessitated those orders and made obedience compulsory not the delay in the voyage brought about by the ship's unseaworthiness on sailing?(232) This question, said Lord Porter, should be answered in the affirmative because, in the conditions existing in April 1939, when the ship was

chartered, the shipowners should have foreseen that war might break out and that, as a consequence, if the ship were delayed because of unseaworthiness such delay might result in diversion of the ship. Hence, the transhipment from Glasgow to Sweden was not too remote a consequence of the unseaworthy state of the ship.

Lord Wright reached the same conclusion but by applying his 'a cause' test. He said that if the vessel was seaworthy she could arrived at Sweden in July and could not have been exposed to the risk of restraint of princes, but as she was not so the voyage was delayed and the vessel was exposed to that risk. But what his Lordship has not made clear in *Smith, Hogg & Co.* Case and has done so in the *Monarch S.S. Co.* is that the initial unseaworthiness must still be in existence and operating at the time of the causality:

> "From one point of view unseaworthiness must generally, perhaps always in a sense, be a 'remote' cause. To satisfy the definition of unseaworthiness it must exist at the commencement of the voyage. It must, however, still be in effective operation at the time of the casualty if it is to be a cause of the casualty..."〈233〉

In a later passage, he stated that "unseaworthiness as a cause operates immediately whenever it comes into effect; it has until then only been dormant"〈234〉. The inference is that if the initial unseaworthiness had been remedied before the loss or casualty, it can no longer be in effective operation at the time of the loss to constitute as a cause. Lord Wright's decision of the *Monarch S.S. Co.* Case, however, does not appear to conform with a strict application

of his theory on causation. There does not seem to be a correlation between the facts of the case and his rule.

The crux of the matter now descends - which test principle of causation governs the law in relation to unseaworthiness in a contract of affreightment. The salient question is: Has the Porter criterion of foreseeability set aside and supplanted Wright's theory? Are the theories confined to the peculiar facts to each case, namely, *The Monarch S.S. Co.* ruling is to be applied exclusively to economic loss incurred as a consequence of delay and the 'a' cause concept of *Smith, Hogg & Co.*, to be applied when there is physical damage or loss of cargo caused by harm occasioned by the shipowner's breach of the warranty of seaworthiness. Coote is of the opinion that the two cases have to be distinguished on the basis that the *Monarch* Case dealt with delay, whereas the *Smith, Hogg & Co.*, with loss of or damage to goods(235).

It is submitted that the various tests described are alternative devices applied either as rules of causation in the strict sense of the word, or as principle of liability. It cannot be denied that the Wright and Porter tests are irreconcilable in a situation where the outbreak of war is unforeseeable(236). Under the Wright 'a' cause principle, the shipowner would not be able to escape from responsibility; on the other hand, a strict application of the foreseeability test would free him. I am inclined to the

view expressed by Hart and Honore of treating the notion of foreseeability 'not as an interpretation of or a supplement to that of causation but as an alternative<237>.' Where the intervening event is foreseeable, (e.g., war, act of public enemies, quarantine restriction, arrest or restraint of princes, rulers or people or seizure under legal process, strikes or lock-outs are conditions which parties could appraise as likely to occur), the application of the doctrine of foreseeability is convenient and purposeful to support or justify a judgment of liability.

Presumption Of Unseaworthiness As The Cause Of Loss

Although the burden of proving unseaworthiness is in principle upon the cargo-interest, he will generally have little difficulty in discharging this burden in situation where the *res ipsa loquiture* rule applies. If, for instance, a vessel should breakdown or sink shortly after leaving port without having encountered any heavy weather, or other known cause sufficient to account for the casualty, the mere facts afford prima facie evidence of unseaworthiness which the shipowner must rebut<238>. In *Anderson v. Morice*<239>, a marine insurance case which mainly turned on the point of insurable interest, a ship at anchor in the Rangoon River in smooth weather suddenly sank while loading, although she was perfectly tight and dry when she left the last port. Brett J., held that "where the only evidence of fact...is, that the ship sank in smooth water very soon after the attaching of

the policy, that fact amounted to a presumption of unseaworthiness and a shifting of the burden of proof"(240).

But where there were other facts in evidence (not 'mere speculative suggestions') such as a large amount of repairs recently done, careful surveys recently made, excellent conduct of the ship up to a time immediately preceding the loss, or otherwise", then there was no presumption of unseaworthiness(241).

In this case(242) the Court speaks of a presumption of unseaworthiness. It might be more adroit to call it an inference of fact. So did Lord Eldon in *Parker v. Potts*(243), where he held that the question whether a ship was or was not seaworthy must be deduced by inference from the circumstances:

> "If without adequate cause by stress of weather, or otherwise intervening it was found that she was not so sound, then the rational inference was that,notwithstanding her appearance, she had not been seaworthy."

The same inference was drawn when a few hours after sailing three pumps, all asserted to have been in good condition at the commencement of the voyage, failed to do their duty. "I am satisfied," said Lord Loreburn , L.C., " that the shipowner has not met the strong prima facie case of unseaworthiness that is made against him by these facts."(244)

In cases where the cargo-owner has managed to establish prima facie evidence of unseaworthiness, the shipowner must prove that the vessel was in fact seaworthy(245). This is

not, however, enough to absolve him from liability because he still has to prove that the loss or damage was caused by one of the excepted perils(246). Thus, if it is clear that the damage must have arisen either from bad stowage or from 'perils of the sea' and the latter are excepted, the shipowner, in order to escape liability, must show that the damage arose from 'perils of the sea'. If the shipowner proves prima facie that the cause of the loss was excepted or the loss apparently falls within an exception the burden of showing that the shipowner is not entitled to the benefit of the exception because of the real cause of the damage was something not excepted, e.g., unseaworthiness, shifts to the cargo-owner:

> "If a prima facie case of perils of the sea is made out, and the plaintiffs (charterers) allege unseaworthiness, it is upon the plaintiffs that the burden of proving unseaworthiness rests."(247)

Finally, the shipowner can escape liability by proving that although the ship was unseaworthy, the loss or damage was neither caused nor contributed (which, however, is very difficult) by such unseaworthiness and even if she was unseaworthy the damage would in any case, have occurred. This alternative arises from the general rule that the shipowner is liable only for damage actually caused by unseaworthiness(248).

5.3.7 SEAWORTHINESS UNDER U.A.E. LAW

It has been said that under the U.A.E. general law a carrier was under a strict obligation to deliver the goods at destination in the same good order and condition in which they were received by him. He was liable for any loss or damage occurring in relation to such goods unless he brought himself within a narrow range of exonerating circumstances that amount to forces majeure. Thus, Courts and carriers both became very much concerned with the care and custody of the goods on the ship; the seaworthiness of the ship was no more than one of the factors relevant to this concern. If the goods arrived damaged as a result of the ship's unseaworthiness, the carrier is liable, not for breach of the warranty of seaworthiness as such, but for failure to bring the goods safely to destination. The claimant cargo-owner had only to prove the contract and his loss, he need not prove the cause of the loss. As a duty, the warranty of seaworthiness, was therefore, lost in the carrier's obligation to carry the goods safe and sound to the destination.

When, however, the Maritime Code came into existence the question of seaworthiness of a ship is given more intention. Under Article 227 the shipowner under a voyage charterparty is obliged to provide a ship in seaworthy condition and equipped with what is required to execute the voyage or voyages provided for in the charterparty. He is also obliged, unlike the position under English law,to keep the

vessel in seaworthy condition throughout the voyage or voyages which have been agreed upon. If the shipowner fails in his duties referred to in Art. 227 then he will be liable, according to Art. 228, for any loss of or damage to cargo unless he proves that the damage did not result from his failure to fulfil his obligations. Article 245 imposes the same obligations on a shipowner under a time charterparty. Further, under Article 272 the carrier is obliged to exercise due diligence to make the ship seaworthy and to properly man, equip and supply her and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit for their reception, carriage and preservation. However, unlike the position under COGSA, unseaworthiness is enunciated with the other exceptions in Art. 275(1)(a). If loss or damage is caused by unseaworthiness intervening during the voyage, Art. 275(1)(a) permits the carrier to plead this fact as a defence, provided that he can prove that he has exercised due diligence before and at the beginning of the voyage to make the ship seaworthy, i.e. that he has performed the duty prescribed by Art. 272(1).

Unfortunately, the Maritime Code does not state the effect of the shipowner' failure to provide a seaworthy ship on the exceptions in particular and on the contract of carriage in general and no court in U.A.E. has yet dealt with such issue. However, as far as the exceptions are concerned, it may be said that if the loss of or damage to

the cargo caused by unseaworthiness, and as the obligation is strict one, any failure in the part of the carrier to provide a seaworthy ship will render the carrier liable irrespective of any exception.

Regarding the effect of unseaworthiness on the contract of carriage, reference may be made to the general principles of the law of contract set out in the Civil Code which also apply equally to contract of carriage.

The standard remedy for breach of a contractual obligation under U.A.E. law is an action for damages permitting the creditor to obtain a sum of money as an equivalent satisfaction. But he may also be able to have the contract rescind, the theory of the law being that each of the parties has contracted subject to a resolutive condition that the other will not fail to fulfil his part of the contract. Such rescission may be either with or without a claim for damages.

RESCISSION

It is a fundamental principle of the U.A.E. law of contract that when there is a bilateral contract and one part fails to perform his duties under it, the other is entitled to have the contract rescinded by court judgment without prejudice to any claim for damages.

In a contract of carriage, for instance, if the carrier is in breach of his obligation to supply a seaworthy ship and the shipper wishes to obtain a definitive release from his obligation he must obtain rescission.

The general rules on this subject are thus given in the Civil Code:

Art. 271: " The parties may agree that the contract shall be automatically rescinded without the need for a court order where there is a complete failure to perform the undertakings arise under it. But such agreement, however, does not dispense the creditor from notifying the debtor of his intention to rescind the contract unless the contract expressly provide that such notification is not required.

Art. 272 : "1. In synallagmatic or bilalteral contracts, if one parties does not fulfil his obligation, the other party have the choice after notifying the debtor either of demanding the performance of the contract or of the rescission of the contract.

"2. The Court may order the debtor to perform the contract forthwith or may defer (performance) to a specified time, and it may also order that the contract be rescinded with damages ."

According to the above provisions, the contract is not dissolved ipso jure upon breach, but a creditor who wishes to withdraw from the contract must sue for a judgment of rescission, unless a right to rescind has been expressly stipulated in the contract.

In a claim for rescission it must be shown that the defendant has failed to perform his contractual obligations. This includes not only total non-performance(249), but also late or incomplete performance. In each case the judge

decides in his discretion whether in view of the purpose of the contract the breach is sufficient to justify immediate rescission. In so doing he takes account of all the circumstances of the case, including whether and how much the defendant is to blame for the non-performance(250), how much harm the plaintiff has already suffered as a result of the non-performance, and whether it would be fair to hold him to the contract and restrict to a claim for damages.

U.A.E. law also allows the judge to set a period in which the defendant must render the promised performance(251) and if he does so, he normally issues a simultaneous order that the contract be rescinded if the period of grace expires without performance. If performance was due on a specified date which had already passed when the claim for rescission was brought, no such period of grace can be allowed.

Should the defendant make a late tender of performance during the trial, the judge must determine whether to rescind the contract even so. Once again it is a matter of all the circumstances of the case, whether the court sees the debtor's original failure to perform as simply an attempt to delay performance or whether the plaintiff has a justifiable interest in rejecting the late performance, possibly because the market situation has altered.

A contract can also be rescinded for non-performance without intervention of the courts if the contract includes a clause which expressly stipulates the possibility of rescinding the contract as of right in the case of certain

events<252>. Even where there is such an express clause, the courts refuse to recognise the rescission as of right if the clause merely stipulates in general terms rescission in the event of non-performance. In order to be fully effective, such a clause must state that the party is entitled to rescind if no performance occurs by a certain date, or that the contract is deemed rescinded automatically and without notice to perform, if not performed within a certain time or under certain circumstances.

The Effect Of Rescission

The judgment of rescission puts an end to the contract between the parties with retroactive effect; the contract is dissolved as if it had never existed. After rescission, therefore, things have to be put back into the same state as if the contract had never existed<253>. The parties are under the duty to restore the status quo ante and to return to each other what has been received under the contract<254> This principle is , however, not exclusive, that is, the possibility of such restitution is not a pre-requisite to rescission.

It is not always possible to restore things as they were before the formation of the contract because they have been consumed or service rendered cannot be restored. In such cases, the court will made orders in regard to payment of damages, repayment of expenses incurred, and otherwise as will satisfy the equities of the particular case<255>.

5.4 BAR TO EXCEPTIONS UNDER U.A.E. LAW

It is settled rule under U.A.E. law that the exceptions or limitations either those provided by the general law or by special contract or by the Maritime Code, are of no effect and can not be invoked if the carrier or his subordinates commit wilful misconduct(256). This rule is based on a principle which is not peculiar to the U.A.E. law, although its technical explanation and implication may vary from one system to another.

A further restriction in the scope and effect of the exclusion and limitations, which is not obvious as wilful misconduct and which is essentially "civil law" arises in the case of certain serious breaches of duty which are being qualified as gross negligence(257) . If the loss of or damage to goods resulted from the gross negligence of the carrier or his servants or agents then the exceptions and limitations do not apply(258) . The rule as to gross negligence is frequently embodied in the maxim gross negligence is equivalent to *culpa lata dolo aequiparature.*

But it is perhaps unfortunate that when one looks at the cases one finds that there is not a single case in which the U.A.E. courts have gone to the trouble of formulating a definition of wilful misconduct or gross negligence. All we have is a number of statements to the effect that wilful misconduct and gross negligence are bar to exclusions and limitations .

However, in the matter of carriage of goods, wilful

misconduct has defined as " every act or omission done by the carrier or his subordinates with the intent to cause damage". And gross negligence means "every act or omission done recklessly by the carrier or his subordinates with knowledge that damage would probably result" (Art. 266 of the U.A.E. draft Commercial Code).

The burden of proof is upon the plaintiff to establish one of the mental states. The act or omission must have been done either "with intent to cause damage" or "recklessly and with knowledge that damage would probably result".

As 'wilful misconduct' involves an element of intent or will to do harms and as this difficult to establish, attention will more often focus on "gross negligence" and this is also not without difficulty. The difficulty arises in determining whether an objective or subjective test should be applied to the appreciation of the act or omission 'done recklessly and with knowledge that damage would probably result'.

It is worth noting that both categories of misconducts are included within the definition of "wilful misconduct" used in Warsaw Convention, Article 25(259) and Hague-Visby Rules, Article IV, Rule 5(e) and Article IV bis (4) relating to certain types of misconduct deprive the carrier and his servants and agents of the benefit of the per package limitation(260). But the phrase ' wilful misconduct' was much discussed in cases on carriage by air.

As we have said no court in U.A.E. has yet dealt with

this issue and therefore, it may be interest for the sake of U.A.E. jurists to look at other civil law jurisdictions to see how the words "wilful misconduct" have been construed.

In France the courts are in favour of the objective test taking account of the facts and not of the person. French courts do not ask whether the person in question actually knew that damage would probably result, but they hold the carrier liable without limitation of liability if that person could not be unaware of the probable risk to which he exposed himself and the persons on board; or if he must have been aware that under these circumstances his acts and omissions were reckless and that damage would probably result(261) .

French courts go even so far as to 'presume' that the person concerned knew of the probable damage and to apply the common law doctrine of *res ipsa loguiture*, otherwise unheard of in French judgments(262).

Some illustrative Cases:

i) French Supreme Court, 16 April 1975, 1976 RFDA 105. The court held :

> "The navigational error which caused the accident was the consequence of a series of mistake committed by an experienced flight crew, which must have known that under these circumstances their acts and omissions were reckless and that damage would probably result."

ii) Court of Appeals, Aix-en-Provence, France, 29 September 1970, 1972 RFDA 162. The court held that the limitation of liability did not apply because:

> "the pilot who commits one careless negligence after another and deliberately violates the air navigation rules, particularly be failing to request information on atmospheric conditions before take-off, cannot have been unaware of the probability of damage which he accepted recklessly and without valid reasons."

iii) French Supreme Court, 21 December 1976, 1977 RFDA 415. The court said:

> "When the weather conditions did not allow a landing because the aircraft had no radio altimeter and the two altimeters on board gave the altitude with a marginal error of 65 meters, the Court was justified to hold that the pilot had acted recklessly and with the conscience of the damage which would probably result."

iv) Court of Appeal, Paris, 17 Nov. 1975, 1976 RFDA 109. In this case the carrier was held liable without limitation for stolen cargo because 'his agent could not have been unaware of the risk involved in placing valuable goods in a safe which was in a place that was not properly closed(the key to that place also being not properly safeguarded), and he must therefore have been conscious that his acts and omissions were reckless and likely to cause damage'.

The Courts in Egypt(263) and Lebanon have followed the same approach taken by French Courts. Thus the Court of first instance of Beirut said(264):

> "The existence of 'faute lourde' is not conditioned by the intention of its perpetrator to cause harm. It is

> characterised by gross negligence which a person with normal aptitudes ought not to be guilty of. It constitutes an obligation by which he is bound by the contractual or extra-contractual duty which is incumbent upon him."

However, other countries of the civil law system such as Belgium, Italy , Germany Fed.R. and Switzerland prefer to apply a subjective test to the fault in question.

Some illustrative Cases:

i) Court of Appeal, Milan, 7 May 1974, 1975 ETL. A pilot attempted to land in fog, below the visibility minima recommended (but not made mandatory) by the airline, and with the permission of the airport control tower; the aircraft crashed while he attempted to recover after a missed approach. It was held that the pilot's conduct was not reckless; that recklessness implied conscious acceptance of a risk with almost certain consequential damage; the evidence as to the data provided to the pilot did not enable the court to conclude that the pilot's decisions were taken with the appropriate degree of knowledge.

ii) Belgian Supreme Court, 27 January 1977, (1976) II E.T.L. 907. In this case a pilot misunderstood a message giving his position and crashed into a mountain-top; as he could not be said to have had full consciousness of the risk of damage resulting from his acts he was not guilty of intentional or reckless misconduct.

iii) Supreme Court, Germany, 16 February 1979, (1980) 15 E.T.L. 229. An official handed over two parcels of bank-notes to a chiefstewardess, despite his knowing that she was not authorised to accept goods for carriage, and instead of stowing them in the goods compartment of the aircraft or delivering them to the pilot; he also failed to obtain a receipt and failed to notify the pilot. The chiefstewardess put them in an unlocked and unattended cupboard in the passenger cabin; she had not retrieved them at destination and they were lost. The Court held that the defendant airline was liable without limitation because the stewardess knew that she violated the defendant's established procedures and 'under the circumstances, could not have been unaware that her acts were more likely to cause than to prevent damage'.

iv) Swiss Supreme Court, 11 July 1972, (1974) 28 RFDA 75. Two packages of bank notes were shipped from Switzerland to Nicaragua via New York, the first leg of the carriage to be performed by Swissair, the second, from New York to Mexico City, by Eastern Airlines and the third, from Mexico City to Managua, by Taco International Airlines. The cargo and air waybill were received by Eastern Airlines in New York. The air waybill arrived in Mexico City, but not the packages. The reason for the loss of the package has remained obscure but it was established that it was most likely due either to a misunderstanding between two employees of Eastern Airlines

or to an error by one of them. The Swiss Supreme Court held that:

> "as it is impossible to establish with certainty where and why the packages were lost, it is impossible to identify the person whose fault had caused the loss and it is therefore also impossible to prove that he had actual knowledge of the probability of the damage as required by Article 25."

Defining the subjective test required, the Court declared:

> "It is not required that, if damage actually results, the carrier or his servant or agent had mentally approved it. To that extent, the subjective conditions of liability under Article 25 are less stringent than those of dolus eventualis of the criminal law. However, they are more stringent than the latter because the person who caused the damage must have knowledge of the probability of the damage."

The subjective appreciation has also been applied by Common law courts. In *Horabin v. British Overseas Corpor.*(265), Barry J., in his direction to the jury, defined wilful misconduct as follows:

> "Wilful misconduct is conduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be(266)....To be guilty of wilful misconduct, the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be."(267)

Similarly, in *Rustenburg Platinum Mines Ltd. v. South African Airways*, Ackner J. said(268):

> "It is common ground that 'wilful misconduct' goes far beyond negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only

> negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be."

Similar statements can be found in the United States decisions on the point. In *Pekelis v. Transcontinental and Western Airlines*, the Court of Appeal, Second Circuit said(269):

> "Wilful misconduct is the intentional performance of an act with knowledge that the performance of that act will probably result in injury or damage, or it may be intentional performance of an act in such a manner as to imply reckless disregard of the probable consequences of the act...Likewise, the intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission, would also be wilful misconduct."

As specified in these definitions, wilful misconduct applies to two different types of acts or omissions, namely: **(1)** an intentional act or omission to act, and **(2)** an act or omission to act with reckless indifference or disregard as to the probable consequences of the act or omission.

In *Reed v. London & Rochester Co.*(270), a case on the London Lighterage Clause, Devlin J. described the word "recklessly" as involving a subjective criterion:

> "It [the term "recklessly"] means something more than mere negligence or inadvertence. I think it means deliberately running an unjustifiable risk."(271)

But in *Shawiningan Ltd. v. Vokins & Co. Ltd.*, Megaw J. in contrast, adopted an objective connotation to define 'recklessly'(272):

> "Recklessness is gross carelessness - the doing of something which in fact involves a risk, whether the does realises it or not; and the risk being such having regard to all circumstances, that the taking of that risk would be described as " reckless". The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually realised the likelihood."

In the Canadian case of *Newell v Canadian Pacific Airlines Ltd.*(273), the court approved the objective appreciation adopted by Megaw J. in *Shawinigan* Case as to the meaning of 'recklessly' accepting that 'recklessly' means 'grossly careless'. The court did, however, stress the subjective nature of the requirement of knowledge that damage would probably result.

The word "probably" seems to set an unreasonable high standard of proof for the shipper who will accordingly be unfairly affected. This particularly apparent in the English air case of *Goldman v. Thai International Airway*(274). Dr. Goldman, a passenger from London to Bangkok, suffered serious injury in the course of his flight, which caused a cracked vertebrae in his back. The point, inter alia, that the judges were confronted with was whether, under Art. 25 of the Warsaw Convention as amended at The Hague, 1955, Dr. Goldman was entitled to break the limits of liability because the captain of the aircraft had acted "recklessly and with knowledge that damage would probably result".

In the first instance, Chapman J. found that the crew's failure to ensure that Dr. Goldman had fastened his seat belt, or at least to order to warn him to do so for his own safety, amounted to wilful misconduct, which was sufficient to deprive the airline of the limit of liability, in accordance with Art. 25 of the Warsaw Convention amended at the Hague, 1955. This decision, however, was reversed in the Court of Appeal which found that the captain had no knowledge that injury would probably result. Eveleigh L.J. observed that in art 25

> "the doing of the act or omission is not only qualified by the adverb "recklessly", but also by the adverbial phrase "with knowledge would probably result from his omission. I cannot see that we are entitled to attribute to him knowledge which another pilot might have possessed or which he himself should have possessed."

He also noted that while recklessness was related to the existence of a risk, even of a mere possibility, art 25 speaks of probability, that something is likely to happen.

It may be said that the qualification of fault according to objective appreciation taking account of the facts and not of the person is more favourable to the plaintiff because if the acts of the carrier could be regarded as sufficiently serious to be inexcusable per se a court would hold the conduct to be equivalent to "wilful misconduct" without any reference to the carrier's attitude of mind, real or implied. The misdeeds spoke for themselves and the absence of intent would not protect the carrier from unlimited liability.

There is, however, a serious criticism which can be lodged against objective appreciation. If the cause of the damage is unknown or undetermined, then any proof that the damage is attributable to the fault of the carrier is impossible. It remains to be seen how the courts in U.A.E. will interpret the provisions of Article 266.

The following are some acts which may amount to wilful misconduct or gross negligence:

a) The theft of a cargo by the carrier's servants.

b) Violation of statutory regulations relating to seaworthiness of the ship.

c) The delivery of goods by the master to a person not entitle to receive them without asking him to produce the bill of lading.

d) Where the shipowner employs as master of the ship a person who has not reasonable knowledge, skill and capacity.

e) Stowaging a cargo on deck contrary to the terms of the bill of lading.

f) Putting a cargo of bundles of paper on deck during a storm.

The provisions of Art. 266 of the Commercial Code stress the element of causation. The conduct of the carrier, his servants and agents, however blameworthy it may have been, is irrelevant if it did not cause the damage in question.

U.A.E. Codes do not help in elucidating what is meant by

a casual relation. Arab jurists, however, espoused various theories, from the theory of the equivalence of conditions at one extreme to that of adequacy of cause at other as an attempt to define with some degree of precision the notion of legal cause<275> ; and it is worth throw light upon them.

1. The Equivalence Theory

According to this theory every event which plays a part in the production of an accident is equally its cause. Every event, therefore, is equivalent from the point of view of responsibility.

This very simple explanation suggests two observations. In the first place, each casual event is related to the whole of the damage realised, because if any one of these events removed it is the whole of the damage that disappears. In the second place, each antecedent event played an equivalent role in the causation of the damage, since the disappearance of any one of these antecedent conditions produces exactly the same effect- the disappearance of the damage.

In legal language, clear and simple conclusion can be drawn from these observations:

First, if among all acts which combined to produce the damage there is a fault, and only one fault, then the party at fault must be held liable for all the damage. In effect, his fault is causally related to all the damage suffered by the plaintiff, because if we remove the fault we do away with the damage .

Secondly, if several faults contributed to the harm, the plaintiff can claim damages in full from any one of the persons at fault. In this case, each fault is tied to the realisation of the entire damage, because if we suppress one of these faults then the damage cannot occur; and so a defendant cannot successfully raise the defence of act of a third party (or fault of a third party) if he is himself guilty of a fault causally related to the damage.

Thirdly, if one of the parties at fault has been held liable in damages for the whole damage suffered by the plaintiff, the former can seek contribution from the other persons whose faults also contributed to the realisation of the damage. Each of the guilty parties must in the end bear a part of the burden of compensation, since each contributed to the causation of the harm. Now because these various circumstances played equivalent roles in the realisation of the harm (because each was essential to its "total" occurrence-to its taking place as a whole) it follows that co-defendants whose faults caused the harm suffered must, in the end, contribute equal shares to the damages awarded the plaintiff. In short, when harm is the result of several faults, each co-defendants is legally liable to the plaintiff for the full amount of damages, and has in fact to pay a share of that amount equal to that paid by each of the other co-defendants.

Fourthly, if among the events which caused the damage is a fault of the victim (or, as common lawyers would say, contributory negligence of the plaintiff), then legal responsibility will be shared.

The theory of the equivalent of conditions has been criticised both because tends to extend excessively the implication of individual responsibility and because it does not assist in practice in determining when a casual relationship exists.

2. The Direct Consequence Theory

This theory postulates that the defendant should be liable for all the direct consequences of his act or the defined event for which he is responsible. This could be taken to mean either that indirect harm is not recoverable on policy grounds or that its connection with the defendant's conduct is merely that of condition (not legal cause) and consequence. Taken literally this theory is excessively restrictive and unacceptably favourable to the defendant in so far as it suggests that there will be no recovery if, in addition to his conduct, there is also another condition of the plaintiff's harm.

3. The Theory of Adequacy of Cause

This theory says that all the innumerable antecedent events which play a part in the occurrence of a subsequent one are not its 'cause' from the point of view of responsibility. Only those antecedent events which in the normal course of things are likely to produce the damage may

be consider its cause. The "adequate" is the cause which will normally produce the damage as distinct from that which may do so fortuitously.

The defendant must pay for damage of which his wrongful act is the "adequate" cause, but no more. Now the defendant's conduct (or specified event for which he is responsible), which must be a condition of the plaintiff's harm, will further qualify as an "adequate" cause of that harm if it is such that it changes or increases the risk of the type of harm which actually occurs.

The adequate cause theory has been criticised because it gives rise to a difficulty in assessing the increase probability of harm. How is to be assessed: on the basis of the information and knowledge which the defendant had (or, according to a variant, ought to have had) at the time of his act; or on the basis of knowledge available to a most prudent or exceptionally perceptive man?

The U.A.E. courts, however, are as reluctant as those in England to commit themselves to any theory of causation. Their approach is an empirical one. They demand more than mere temporal coincidence. While they do not neglect logical connexion, they appreciate that the causes of events are usually complex and tend to ask themselves what was the effective cause. Though the question of fault is logically independent of the existence of a causal relationship, the court emphasise, however, that the cause must be certain and must not be too indirect.

5.1 Negligence

1 See Carver, p. 19; Wilson, Carriage of Goods by Sea (1988) p. 257.

2 *Notara v. Henderson* (1872) L.R. 7 Q.B. 225 at p. 235.

3 (1877) 3 App. Cas. 72, 88.

4 *Smith, Hogg & Co. v. Black Sea & Baltic General Ins. Co.* [1940] A.C. 997 (HL).

5 (1921) 3 K.B. 560 at p. 576.

6 [1934] A.C. 538 (HL).

7 Ibid., at p. 545.

8 See Lord Loreburn L.C. in *Nelson Line v. Nelson (NO.2)* [1908] A.C. 16,19.

9 (1872) L.R. 8 Q.B. 60; see also *The Torbryan* [1903] P. 194, 201, per Collins M.R.; *Marriott v. Yeoward Bros.* [1909] 2 K.B. 987

10 See *The New York Star* [1980] 2 Lloyd's Rep. 317; *The Antares* [1987] 1 Lloyd's Rep. 424. See also Wilson, supra note 1, p. 195.

11 *Snook v. Grand Junction Waterworks Co. Ltd.*, (1886), 2 T.L.R. 308, per Huddleston, B., at p. 309.

12 *The Carron Park* (1890) 15 P.D. 203 ; *The Southgate* [1893] P. 329.; *Hayn v. Culliford* (1878) 3 C.P.D. 410

13 *Blackburn v. Liverpool, etc., Co.* [1902] 1 K.B. 290.

14 *Smackman v. General Steam Navigation Co.* (1908) 13 Com. Cas. 196.

15 *The Torbryan* [1903] P. 194.

16 *The Cressington* [1891] P. 152.

17 *Norman v. Binnington* (1890) 25 Q.B.D. 475.

18 *Rowson v. Atlantic Transport Co.* [1903] 2 K.B. 666.

5.2 DEVIATION

5.2.1 Common Law Exceptions

19 Carver, p. 132. See the discussion on the burden of proof in the case of unseaworthiness.

20 See *Paterson S.S. Ltd., v. Canadian Wheat* (1934) All E.R. 480, 485, per Lord Wright; Carver, pp.19-20 and pp.100-105.

21 Deviation has been defined as ' an intentional change in the geographical route of the voyage as contracted' see Tetley, Marine Cargo Claims (1978) p. 350.

While English courts have restricted the concept of deviation to geographical deviations, U.S. courts have extended it to other departures from the terms of the contract which materially increase the risk to cargo such an unauthorised deck carriage (*Jones v.Flying Clipper* (1954) 116 Fed. Supp 386) or over-carriage (*The Silver Cypress*[1944] A.M.C. 895; see Wilson, p. 18 (note 51).

22 (1909) 2 K.B. 360.

23 [1916] 2 K.B. 783.

24 Wilson, supra note 1, p. 25.

5.2.2 Contractual Exceptions

25 [1907] 1 K.B. 660.

26 Ibid., at p. 668.

27 [1936] 2 All E.R. 597.

28 Ibid., at p. 601.

29 This has been held to go too far, see *Heyman v. Darwins Ltd.*, [1942] A.C. 356.

30 [1936] 2 All E.R. 579, 601.

31 Ibid., at p. 607.

32 3 See Coote, "Breach and Exception Clauses", (1970) 33 C.L.J. 221, 235.

33 *Suisse Atlantique v. N.V. Rotterdamsche* [1967] A.C. 361, 399G per Lord Reid.

34 [1967] A.C. 361.

35 [1970] 1 Q.B. 447.

36 [1951] 1 K.B. 240.

37 Ibid., at p. 248.

38 [1951] 2 K.B. 882, 889.

39 [1953] 2 All E.R. 1471

40 Ibid., at p. 1473.

41 Ibid.,

42 See *Spurling v. Bradshaw* [1956] 1 W.L.R. 461; *Karsales (Harrow) Ltd., v. Wallis* [1956] 1 W.L.R. 936;

43 [1956] 1 W.L.R. 936, 940.

44 Ibid., This statement directly contradict the view of the law held by their Lordships in the *Hain S.S.v. Tate* Case where it was said that in the event of a deviation occurring, the owner of the cargo could, if he so chose, repudiate the whole bill of lading. If he did not so chose then the contract there evidenced remained in force together with any limitations on the carrier's liability.

45 Ibid., 943.

46 Guest, "Fundamental Breach of Contract", (1961) 77 L.Q.R. 98; Coote, Exception Clauses, (1964) at p. 115.

47 [1967] 1 A.C. 361; [1966] 2 All E.R. 61 (H.L.). *U.G.S. Finance Ltd., v. National Mortgage Bank of Greece* [1964] 1 Lloyd's Rep. 446. was the first case where judicial opposition to the substantive law doctrine was expressed. In this case Pearson L.J. said at p.453:

> "As to the question of "Fundamental breach" I think there is a rule of construction that normally an exception or exclusion or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the "contract. This is not an independent rule of law imposed by the court on the parties willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the personal intention of the contracting parties. It involves the implication of a term to give to the contract that business efficacy which the parties as reasonable men must have intended it to have. This rule of construction is not new in principle but it has become prominent in recent years in consequence of the tendency to have standard forms of contract containing exception clauses drawn in extravagantly wide terms, which would produce absurd results if applied literally..."

48 [1967] 1 A.C. 361, at p. 403.

49 Ibid., at p. 434.

50 [1970] 1 Q.B. 447.

51 The Court of Appeal distinguished *Suisse Atlantique* on the ground that in *Harbutt's "Plasticine"*, no election was possible since the subject matter of the contract and the factory in which it was constructed was destroyed by the breach.

52 [1970] 1 Q.B. 447, 466.

53 [1980] 2 Lloyd's Rep. 545, 549.

54 Debattista, "Fundamental Breach and Deviation in the Carriage of Goods By Sea", (1989) J.B.L. 22, 25.

55 [1942] A.C. 356.

56 [1980] A.C. 827 at 844 A-E.

57 See Debattista, supra p. 26 ; Clarke, "Fundamental Breach of Charterparty", [1978] 3 LMCLQ 472 at 474.

58 Editorial in (1982) J.B.L. 447.

59 (1980) A.C. 827.

60 Ibid, at p.

61 [1983] 3 W.L.R. 163.

62 [1981] 131 New L.J. 480.

63 [1983] 1 All E.R. 108

64 Ibid., at p. 112-113.

65 [1983] 3 W.L.R. 163, 167.

66 Wilson, supra note 1, p. 24.

67 See Mills, "The Future of Deviation in the Law of Carriage of Goods", [1983] 4 LMCLQ 587, 596.

68 [1980] A.C. 827, 845.

69 [1936] All E.R. 597 and see supra n. 8.

70 See *The Hong Kong Fir* [1961] 2 Lloyd's Rep. 478.

71 Debattista, supra note 54, p. 28.

72 [1942] A.C. 356.

73 Ibid., at p. 374. 7

74 *Kruse v. Questier* [1953] 1 Q.B. 669; *Daniels v. Carmel* [1953] 2 Q.B. 242; *Government of Gibraltar v. Kenney* [1956] 2 Q.B. 410.

75 It has recently been applied to time-limitation clauses (*The New York Star* [1980] 2 Lloyd's Rep. 317. (P.C.) and to exemption clause (*Photo Production v. Securicor* [1980] 1 Lloyd's Rep. 545 (H.L.)).

76 In *The New York Star* [1980] 2 Lloyd's Rep. 317 the Privy Council held, relying on *Heyman v. Darwins* Case, that time bar clauses-though such clauses have been considered as exemption clauses and subjected to the general rules of interpretation of exemption clauses (see *Atlantic Shipping & Trading Co. Ltd., v. Dreyfus & Co.*,[1922] 2 A.C. 250, H.L.) were not be equate with executive obligations; that they came into operation when contractual performance had become impossible or had been given up and it regulated the manner in which liability for breach of contract had to be established. See also Debattista, note 54 supra, p. 29.

77 [1936] All E.R. 597, 601.

78 Mills, supra note 67, p. 595.

79 Supra, note 54. See also Wilson,supra note 1, p. 24.

80 (1980) A.C. 827 at 850.

81 In English law, the idea of absolute contractual liability did not logically admit of any exceptions ex leg, and, although it is disputed ,it is arguable that none of the common law exceptions recognised in the context of bailment survived when there was a contract, unless expressly stipulated for. Later, another reason could be offered for this conclusion: since the parties to a contract for the carriage of goods by sea normally expressed all relevant exceptions in the contract, their absence from the contract implied strongly that the parties did not intend the omitted exceptions to be operative: see Carver, p. 98 et seq.

82 [1961] 1 Loyd's Rep. 446, at p. 450

83 Wilson, supra note 1, p. 25.

84 Debattisat, supra note 54, p. 30.

85 Ibid., 31.

86 [1961] 2 Lloyd's Rep. 478. This is a case where a vessel under time charterparty for twenty-four months was held up for repairs lasting four months. It was held that the charterers could not treat themselves as discharged from any further obligations under the charterparty on the ground that delay did not go to the root of the contract.

87 Debattista, supra note 54, p. 31. In *The Antares* [1987] 1 Lloyd's Rep. 424, 430, Lloyed L.J. was of the opinion that deviation cases 'should now be assimilated into the ordinary law of contract.'

88 [1931] A.C. 328.

89 Ibid., at p. 340.

5.2.3 The Hague/Visby Rule Exceptions

90 [1931] 2 K.B. 48 at p. 69.

91 Carver, p. 389.

92 Tetley, Marine Cargo Claims (1978), at 350 et seq.

93 (1977-78), 9 JMLC 481, 493.

94 *Stag Line v. Foscolo, Mong & Co.*, [1932] A.C. 328.

95 Chorley & Giles, Shipping Law (6th edn. 1970) 186.

96 See The Hong Kong Fir [1962] 2 Q.B. 26; See also Chorley & Giles' Shipping Law (8th edn.) p. 42.

97 Debattista, supra note 54, at p. 35

98 See Kerr L.J. in *George Mitchell v. Finney Lock Seeds* [1983] All E.R. 108 at p. 123.

99 [1987] 1 Lloyd's Rep. 424.

100 Scrutton, p. 440.

101 Chorley & Giles (8th ed.) at p. 277; Wilson, supra note 1, p. 26; Debattista, supra note 54, at p. 36.

102 Scrutton, pp. 263, 456. See *The Antares* (No. 2) [1986] 2 Lloyd's Rep. 633.

103 Gilmore & Black, The Law of Admiralty (1975) at 183.

104 Article IV Rule 5(e). See infra p.

5.3 SEAWORTHINESS

5.3.1 Absolute Obligation Of Seaworthiness

105 The carrier may contract out of his obligation to provide a seaworthy ship provided he uses express, pertinent and apposite words: see *Sleigh v. Tyser* [1900] 2 Q.B. 333, at p. 337, per Bigham J.; *Nelson Line (Liverpool) Ltd. v. James Nelson & Sons Ltd.*, [1908] A.C. 16. See also supra p. 124 et seq .

106 *Lyon v. Mells* (1804) 5 East 428.

107 Traces of such an obligation may be pursued to ancient times. Fletcher in his work on 'The Carrier's Liability', mentions a charge of unseaworthiness in England as 'not infrequent in the Sixteenth Century', citing the cases of *Loggan v. Bassett* (1573) and *Borneley v. Trouts* (1585). Scrutton, (14th ed. 1939) at p. 103 cited a charterparty dated July 3, 1531 containing the following passage: 'And the sayed owner shall warrant the said shypp strong stanche well and sufficiently vitalled and apparellyd, etc.'

108 (1876) 1 Q.B.D. 377, 381.

109 (1804) 5 East 428, per Lord Ellenborough:

> "In every contract for the carriage of goods between a person holding himself as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so; and the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it to be so."

110 See *Putnam v. Wood*, 3 Mass. 481 (1807) decided by the Supreme Judicial Court of Massachusetts.

111 (1877) 3 App.Cas 72.

112 See *Seville v. Colvils* (1888) 15 R.Sess.Cas. (4th) 616 and *Cunningham v. Colvils* (1888) 16 R. (Ct. of Sess,) 295, the Scottish authorities for the implied warranty of seaworthiness in charterparties. In the latter case Lord Shand at p. 314 said:

> "...that in every case where there is a provision for taking cargo on board, even on such a charterparty as we have her, it is an implied term of that contract that the ship at the time she leaves with her cargo shall be seaworthy."

113 (1877) 3 App. Cas 72 at p. 86. There is no defence for the shipowner in an action for breach of the warranty of seaworthiness that the unfitness is due to some defect in her machinery or equipment which is not discoverable even by the most careful examination and that there has been no negligence on his part or by his servants in doing all possible to provide a truly seaworthy ship: see *The Glenfruin*, 52 L.T. 769.

114 *McFadden v. Blue Star Line* (1905) 1 K.B. 697, at p. 704 per Channel J. In this case, goods were damaged as a result of a failure by the ship's crew to close the sluice door properly. It was pointed out by Channel J., that as the state of affairs in regard to the sluice door came into being only after the commencement of loading, the undertaking to provide a cargoworthy ship had not been breached.

Temporary instability of the ship during, and in consequence of, the loading is not unseaworthiness but negligence, see *The 'Stranna* (1938) P. 69, at pp. 75, 84.

115 *Reed v. Page* (1927) 1 K.B. 743 , at p. 757 per Scrutton L.J. In this case, a barge was loaded with 190 tons of wood plup when her carrying capacity was only 170 tons. As a result of overloading, she sank while awaiting a tug to tow her to her destination. It was held that the barge was unseaworthy for one of the stages of her employment, which was to lie in the river while waiting for the tug. See also *Wade v. Cockerline* (1905) 10 Com. Cas 115, 120 where Vaughan Williams L.J. suggested that there may be a warranty that the ship is in a condition to safely hold and keep the goods which have been stowed.

But, however, the warranty of fitness in regard to the lying stage does not arise until after completion of loading operations : see *Svenssons v. Cliffe S.S. Co.* In this case, cargo was lost before loading operations had been completed. It was held that the undertaking in regard to cargoworthiness had not been breached because the ship had been cargoworthy at the beginning of loading operations and the loss of the cargo had occurred before loading of cargo had been completed.

116 In *The Rona (No.2)* (1884) 51 L.T. 28 it was held that a ship commences on her voyage when she leaves her moorings. See also p. supra.

117 Per Channel J. in *McFadden v. Blue Star Line* (1905) 1 K.B. 697 at p. 706. See also *Steel v. State Line S.S.Co.*(1877) 3 App.Cas. 72, 77, per Lord Caitns L.C.

118 *Worms v. Storey* (1855) 11 Ex. 427. Even where the unseaworthiness is caused by an excepted peril, it is the duty of the master to remedy it by every reasonable means in his power, see *The Rona* (1884) 51 T.L. 28.

119 *Worms v. Storey* (1855) 11 Ex. 427. In this case a ship was chartered for a voyage with a cargo of coal. The vessel was seaworthy at the beginning of the voyage, but damage was done which might have been repaired during the transport. No repairs were effected and thereby part of the cargo was lost. The shipowner was held to be negligent and liable to the cargo-owner in damages. See also Scrutton, p. 86.

120 The doctrine of seaworthiness by stages should not be confused with the time of seaworthiness; it is an exception to it and grew up to mitigate the harshness of the absolute undertaking of seaworthiness. It is based on the relativity of requisite standard of seaworthiness which is determined by changing circumstances during the performance of the contract of affreightment.

Where a voyage is divided into stages, the absolute obligation in regard to seaworthiness extends to the beginning of each stages although the ship need only be seaworthy for the purpose of completing the next stage of the voyage, see *The Vortigern* [1899] P. 140; *Bouillon v. Lupton* (1863) 33 L.J. C.P 37.

121 Payne, Carriage of Goods by Sea, 1954, at p. 57.

122 See *Seville Co.* v. *Colvils* (1888) 15 R. 616; cf. *Giertsen v. Turnbull* (1908) SC 1101; Scrutton, p. 85.

123 Art. III, Rule 1. See supra p. 201 et seq.

124 Art. III, Rule 8.

5.3.2 Meaning Of Seaworthiness

125 (1905) 10 Com. Cas. 115, 120. In *Rowson v. Atlantic Transport Co.*, (1903) 1 K.B. 114, Kennedy J., in similar vein remarked that it was "not a happy term".

126 70 L.T.R. 630; see also *Cohn v. Davidson*, (1877)2 Q.B.D. 455.

127 (1927) 1 K.B. 743, at p. 754.

128 *Steel v. State Line S.S.* (1877) 3 App. Cas. 72 at p. 77.

129 The structural design of a ship is, in the vast majority of cases, determined and controlled by the rules and requirements established by Classification Societies the oldest of which is Lloyd's Register of Shipping founded in 1760. The others are The American Bureau of Shipping and the French Society is Bureau Veritas.

130 See *The Pacific Queen* [1963] 2 Lloyd's Rep. 201, where the vessel was held unseaworthy by reason of the hazardous condition of the vessel caused by an increase in her gasoline carrying capacity; see also *The Princes Victoria* [1953] 2 Lloyd's Rep. 619.

131 In the early case of *Dupont v. Vance*, 60 U.S. (19 How.) 162, 15 L.E.D. 564 (1856), the U.S. Supreme Court said:

> "To constitute seaworthiness of the hull of a vessel in respect of cargo, the hull must be so tight, staunch, and strong, as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo."

132 See *Lyon v. Mells* (1804) 5 East 428.

133 In *Hang Fong Shipping v. Mullion & Co. Ltd.*, (1966) 1 Lloyd's Rep. 511, the court held that the shipowner's duty to provide a seaworthy ship comprises a duty to have her loading and discharging tackle available for the ordinary purposes of loading and unloading. See also *Asbestos v. Comp. de Navigation*, 480 F.2d 669, where a vessel was held unseaworthy because her owners had failed to exercise to due diligence in providing her with an adequate fire fighting equipment.

134 See *The Vortigern* (1899) P. 140; *Thin v. Richards* (1892) 2 Q.B. 141.

135 In *Moore v. Lunn* (1922) 38 T.L.R. 649, it was held that the drunken state of the captain and the chief officer when she started the voyage rendered the ship unseaworthy.

136 *Dixon v. Sadler* (1841) 5 M.& W. 405 at pp. 414-415.

137 *Levy v. Costerton* (1816) 4 Camp 389; *The Madeleine* [1967] 2 Lloyd's Rep. 244. Cf *Wilson v.Rankin* (1865) 1 L.R. Q.B. 162. in which a ship was held to be seaworthy even though she lacked a document which she was required to have in accordance with the law at the place of loading because this defect did not have any bearing upon the voyage in that it did not prevent her from carrying the goods to the port of discharge. See also *Apex (Trinidad) Oilfield Ltd., v. Lunham and Moore S. Ltd.* [1962] 2 Lloyd's Rep. 203, absence of a certificate of stowage given at the port of loading or a foreign measurement certificate which is not shown to be a usual documnet does not render the vessel unseaworthy.

138 See *Maori King (Cargo Owners) v. Hughes* (1895) 2 Q.B. 550. In this case frozen meat was shipped at Melbourne for delivery at London. Due to a breakdown in the refrigerating machinery, the meat had to be landed and sold at Sydney. Although there was an exception in regard to breakdown of machinery, the Court of Appeal held that the shipowner were liable for mishap as they had, in the first place, failed to provide refrigeration machinery that was fit enough for the voyage. See also *Erik Boye* 18 Asp. M.L.C. 66, where a ship was held unseaworthy because her ventilation equipment was not sufficient to deal with a cargo of flour.

139 *The Dimitrios N. Rallias* (1922) 13 Ll.L.R. 363; *The Christel Vinnen* (1924) 1 All.E.R. 197; *Cranfield Bros. v. Tatem Shipping Co.*, (1939) 64 Ll.L.R. 264.

140 *Sewaram v. Ellerman Lines Ltd.*, (1930) 37 Ll.L.R 97; *Rathbone v. McIver* (1903) 2 K.B. 378 (C.A.).

141 *Quebec Marine Ins. Co. v. Commercial Bank of Canada* (1870) L.R. 3 P.C. 234.

142 *Monarch Shipping Co. v. A/B Karlshamns* (H.L.) (1949) A.C. 196; *Fiumana Societa di Navigazione v. Bunge & Co.* (1930) 2 K.B. 47.

143 *The Vortigern* (1899) P. 140; *Northumbrian Shipping Co. v. Timm* (1939) A.C. 397.

144 *Forshaw v. Chabert* (1821) 3 B & B. 158; *The Roberta* (1938) 60 Ll.L.R. 84; *The Makedonia* (1962) 1 Lloyd's Rep. 316; *The Hong Kong Fir* [1962] 2 Q.B. 26; *Re Pacific Mail S.S. Co.* 130 Fed. 76 (9th Cir. 1904). The crew in this case, which was sufficient in number, were mainly Chinese. Only two of them were able to understand the order of their superiors. Under normal conditions, the crew, by means of sign and signals, seemed to have worked well. But in an emergency they were wholly insufficent and incompetent. The American Court held:

> "We have no hesitation in holding that the ship was insufficiently manned, for the reason that the sailors were unable to understand and execute the orders made imperative by the the exigency that unhappily arose, and resulted so disastrously to life,as well as to property."

See also *The Condor, The Nordpol* 84 F. 2d 3 where two vessels were found unseaworthy becuase their helmsmen were ignorant of English in which the watch officers gave their orders.

145 See *The Mountoswald* (1923) 15 Ll.L.R. 155, where the master was of good experience and did hold a license for many years, but the ship was held unseaworthy because it was established that he was often intoxicated and that his weakness in this regard was widely known.

146 *Standard Oil of N.Y. v. Clan Line Steamers* (1924) A.C. 100 (H.L.). In this case a vessel was held to be unseaworthy because the master had not been furnished with instructions as to special dangers which her design involved. The ship was lost because the master, being unistructed, made a manoeuvre which caused her to capsize. He would not have done si if he had been instructed as he ought to have been.

147 *The Aga* (1968) 1 Lloyd's Rep. 431. A vessel sailed at 3 p.m. and took on a list to port at 8.40 p.m. The list continued until it reached 38 degrees when the master breached the ship to remedy the list. In an action for a general average contribution, Donaldson J., held that the ship was insufficiently stable where she left port and that this was dut to lack of diligence on the part of the shipowners who therefore were not entitled to a general average contribution. There is, however, no implied warranty that the vessel shall not become unstable during the currency of the loading stage: *The Stranna* (1938) P. 69 (C.A.). This, however, may amount to negligence in the loading and/or management of the ship's ballast tanks. See also *Svenssons Travaruaktiebolag v. Cliffs Shipping Co.* (1931) 1 All.E.R. 37.

148 *Smith, Hogg & Co. v. Black Sea* (1940) A.C. 997 (H.L.). However, a distinction must be drawn between bad stowage which causes unseaworthiness and bad stowage which does not do so. In *Elder Dempster & Co. Ltd. v. Paterson Zochonis & Co. Ltd.*, [1924] A.C. 522, Lord Sumner explained:

> "Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness, of course, but bad stowage,which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo."

149 *City of Lincoln S.S. Co. v. Smith* (1904) A.C. 250. In this case, a vessel, although seaworthy in all respects, was so laden as to become top-heavy and unstable from the outset, as the result of which part of her deck cargo was jettisoned. The House of Lords held that the ship was unseaworthy and the owner could not rely on a clause exempting unseaworthiness.

150 Ibid., at 259.

151 *Maori King (Cargo Owners) v. Hughes* (1895) 2 Q.B.D. 56 (C.A.).

152 *Waikato (Cargo Owners) v. N.Z. Shipping Co.* (1899) 1 Q.B.D. (C.A.).

153 *The Sarniadoc* (1934) A.C. 538.

154 *Stanton v. Richardson* (1874) L.R. 9 C.P. 390.

155 *Queensland National Bank v. P. &. O. S.N. Co.* [1898] 1 Q.B. 567 (C.A.).

156 *Tattersal v. Nat. S.S. Co.* (1884) 12 Q.B.D. 297.

157 *Elderslie S.S. Co. v. Borthwick* (1905) A.C. 93 (H.L.).

158 See *Steel v. State Line S.S. Co.* (1877) 3 App. Cas. 72, where the House of Lords ruled that if the port-hole that had been left open can be closed at a moment's notice by a simple process which does not involve a great deal of time and trouble the vessel is not unseaworthy.

159 Ibid., at p. 91, per Lord Blackburn.

160 See *Dobell & Co. v. S.S. Rossmore Co.* (1895) 2 Q.B. 408, where the ship was held to be unseaworthy on account of the fact that the port-hole could only be made accessible by shifting her cargo, a process which would involve considerable expenditure of time and labour.

161 (1909) A.C. 450.

5.3.3. Relativity Of Seawrothiness

162 *Knill v. Hooper* (1857) 2 H.& N. 277 at p. 283, per Watson B.

163 Per Roche J., in *Rio Tinto Co. Ltd., v. Seed Shipping Co. Ltd.*, (1926) 24 Ll.L.R. 316, at p. 320.

164 *The Southwark* 191 U.S. 1. In *The 'Hanniving Brothers'* (1927) 28 Ll.L.R. 354, 357, Lord Merrivale observed: " The question of what is and is not unseaworthy advances with the development of ships."

165 Abbott, Merchant Ships and Seamen, (1st ed., 1802) p. 240.

166 In the old case *Amies v. Stevens* (1718) 93 E.R. 428, where a hoy driven by a sudden gust of wind against the pier of the bridge, through which it attempted to pass and thereby sank in consequence of the shock, the plea that a stronger vessel might have sustained without sinking was rejected.

167 This illustrative example is used by Lord Chorley, Shipping Law (3rd ed. 1952) p. 108. In the case of *The Nicholas Zafirakis*, Ll.L.R. 72, the vessel encountered what is known as a 'Pamjero', a type of tornado, resulting in damage to the cargo. The judge held that the 'Pamjero' being a local weather condition frequently encountered in that particular quarter, precautions should have been taken to guard the vessel against its effect.

168 *McFadden v. Blue Star Line* (1905) 1 K.B. 697; *Reed v. Page* (1927) 1 K.B. 743.

169 *Maori King (Cargo Owners) v. Hughes* (1895) 2 Q.B.D. 550 (C.A.) (refrigerating machinery).

170 Law and especially commercial law does not, and must not , lead to illogical requests, since, sometimes, even logic is sacrificed to accommodate commercial life. "Commercial law has always been ready, so far as possible, to sacrifice pedantic logical consistency in favour of the convenience of the business.", said Lord Wright in *Northumbrian v. Timm* (1939) A.C. 397 , at p. 409.

171 Per Lord Sumner in *Bradley v. Federal S.N. Co.* (1927) 27 Ll.L.R. 395 at p. 396.

172 (1905) 1 K.B. 697, at p. 706.

173 Merchant Shipping (Safety Convention) Act 1949, s. 24.

174 The Load Line Convention , London, 1930, and other Statutes which prescribe formulas according to which the depth of loading of vessels is regulated, have provided a method for preventing overladen vessels from leaving port, by denying to grant Load Line certificates. This Convention affords another example of statutory seaworthiness, since, if an overload vessel gets into difficulties because of her

overloading, this fact obviously, is decisive as to her unseaworthiness. To this, International Convention was brought into effect by the Merchant Shipping (Safety and Load Line Convention) Act, 1932. 2 Geo., 5, c.9. Part I of this Act implements the Safety Convention and Part II, the Load Line Convention, s.49. (1),(2). Penalty on master for breach is not exceeding £100. S.49(4).

175 Chorley and Giles, supra note 101, p. 192.

5.3.4 The Nature of Seaworthiness

176 An exhaustive analysis on classification of contractual terms would be out of place here; a thesis on its own could be written on this interesting subject.

177 Anson, Law of Contract, (26th ed., 1984) at pp. 116-117.

178 Anson, op.cit., p. 119.

179 Per Diplock L.J., in *The Hong Kong Fir* (1962) 2 Q.B. 26, at p. 70.

180 An unjustified deviation, as its established by *The Orchis* Case (1907) 1 K.B. 660, displaces the contract altogether rendering it void *ab initio*. See supra p. et seq.

181 (1908) P. 84.

182 *Joseph Thorley Ltd., v. Orchis S.S. Co.* (1907) 1 K.B. 660.

183 Ibid., at p. 668.

184 They were allowed recovery only for such damage as was directly caused by unseaworthiness.

185 (1912) A.C. 604.

186 Ibid., at p. 615.

187 (1908) P. 84.

188 (1809) 10 East 555.

189 Ibid., at p. 563.

190 (1912) A.C. 604.

191 However, if the charterer or the shipper discovers that the ship is unseaworthy before the voyage begins and the defect cannot be remedied within a reasonable time he may refuse to load the goods. See *Stanton v. Richardson* (1875) 45 L.J. Q.B. 78. In this case a vessel was found to be unfit for the carriage of wet sugar. The shipowner offered to have the vessel made suitable for the carriage of the wet sugar but the charterer would have had to wait several months for this to be effected. It was thus held that the charterer was entitled to reject the vessel, send the sugar to its destination on board another vessel and claim damages from the shipowner. See also *The Hong Kong Fir* (1961) 1 All. E.R. 257, at p. 263, per Salmon J.

192 (1922) 2 A.C. 250.

193 Ibid., at p. 260. The majority of the House of Lords in *The Atlantic* Case (1922) 2 A.C. 250, however, based their judgment solely upon the rules of construction of exemption clauses. Lord Dunedin, as if to guard against any misunderstanding that may arise from his judgment, made a special effort to make this comment (p. 257):

> "It is quite true that the fact of unseaworthiness does not destroy the contract of affreightment in toto. Such a doctrine would lead to absurd consequences; the goods might be safely delivered and yet no freight due under the contract, but only a quantum meruit for services rendered."

194 (1922) 2 K.B. 797, at p. 802.

195 Ibid., at p. 804.

196 Carver, p. 107.

197 Carver, p. 106.

198 (1962) 1 All.E.R. 474.

199 Ibid., at pp. 481 and 482 respectively.

200 Ibid., at p. 488.

201 Ibid., at p. 484.

202 Ibid.

203 Ibid., at p. 487.

204 Ibid.

205 E.g., a breach causing the vessel to sink.

206 E.g., one making repair work of a single day's duration ncessary.

207 (1933) 16 Ll. L.R. 235.

5.3.5 Effect Of Unseaworthiness

208 (1922) 2 A.C. 250, at p. 260.

209 (1933) A.C. 538, 545. See also *Smith, Hogg & Co v. Black Sea and Baltic General Ins. Co.*, [1940] A.C. 997, 1001, 1007; Chorley & Giles ,p. 205. It is, however, submitted that the time limitation (Art.III, rule 6 of COGSA) would be available in the event of damage resulting from a breach of the carrier's obligation to exercise due diligence to provide a seaworthy ship under Art.III, Rule I: see *The Antares* [1987] 1 Lloyd's Rep. 424. Wilson, p.197. The per package and unit limitation (COGSA, Art. IV, Rule 5(a)) would also be available unless the carrier's breach of his duty to exercise due diligence comes under Art. IV, Rule 5(e): see Wilson, p. 195.

210 (1908) P. 84.

211 The words "by reason of fire" have been held to cover damage caused by water used to put out the fire and damage caused by smoke resulting from fire, as well as by the fire itself; see *The Diamond* (1906) P. 282.

212 (1912) 1 K.B. 229. This case was decided under s. 502 of the MSA 1894 which did not differ materially from the s. 18 of MSA 1979 save that the latter omits the requirement of happening without the owner's actual fault or privity and replaces it by the owner's personal act or omission.

213 (1912) 1 K.B. 229, 240.

214 (1931) A.C. 229, at p. 240.

5.3.6 Proof Of Unseaworthiness

215 *Anderson v. Morice* (1874) L.R. 10 C.P. 58, 609.

216 *The Standale* (1938) 61 Ll.L.R. 223, at p. 224.

217 (1893) 1 Q.B. 253, at p. 258, approved in *Kish v. Taylor* (1921) A.C. 604, 617.

218 (1908) P. 84. The need for a causal link between unseaworthiness and ensuing loss was also established in *Steel v. State Line S.S. Co.* (1877) 3 App. Cas. 72 (H.L.). per Lord Blackbur; and in *Cunningham v. Colvis* (1888) 16 R. (Ct. of Sess.).

219 See per Lord Sumner in *Elder, Dempster v. Paterson, Zochonis* (1924) A.C. 522, 549.

220 (1924) P. 208.

221 The exception clause in the contract read: 'damage occasioned by a latent defect in the hull...even where occasioned by the negligence of the servants of the shipowner' was held not to be clear enough to exclude or vary the implied warranty of seaworthiness. It did not protect the owner for damage caused by unseaworthiness: per Scrutton L.J. (1924) P. 208, at p. 213. See supra p.

222 19 Asp. M.L.C. 382.

223 Per Lord Wright , Ibid., at p. 385: " If I may venture to criticise the language of the learned Lord Justice, I should prefer to avoid the word 'dominant' which he takes from the marine insurance cases cited by him, in which it is necessary to find the cause proxima or dominant cause."

224 19 Asp. M.L.C. 382, 384. In the earlier decision of *Paterson S.S. Ltd., v. Canadian Co-operative Wheat Producer Ltd.*, (1934) 18 Asp. M.C. 524, 2528 in the Privy Council, Lord Wright had also showed his fondness for the 'a' and 'real' cause expression. The appellants in that case were not granted the privilege of the exception 'dangers of the sea' even though these dangers were a cause of the loss. As unseaworthiness was also "a cause of loss and indeed the real cause of loss" the appellants were held liable.

225 (4th ed. 1905), s. 17, quoted by Lord Wright in his judgment at p. 384. The current edition of Carver (13th edn.1982) has amended the passage which Lord Wright has quoted to read:

> "The test is not was unseaworthiness the dominant cause but was it a cause, or real, effective or actual cause, of the loss? It is immaterial that other causes contributed to occasion it. Seaworthiness must, however, be something more than a mere cause sin qua non of the loss. The damage must follow, from the unseaworthiness 'according to the usual course of things'."

This amendment was apparently made to conform with Lord Wrigh's proclamation in the *Smith,Hogg Co.* Case, 19 Asp. M.L.C. 382.

226 (1939) 55 T.L.R. 766.

227 19 Asp. M.L.C. 382.

228 Ibid., at p. 385.

229 In *Heskell v. Continental Express* (1950) 83 Ll.L.R. 438, Devlin J., offered his interpretation of Lord Wright's theory of causation. Oddly enough, Devlin J., confined the 'a' cause test only to concurrent causes of equal strength. To quote Devlin J., (at p. 458):

> "It may be that the term 'a cause' is whether in tort or in contract, not rightly used as a term of legal significance unless it denotes a cause of equal efficacy with one or more other causes. Whatever the true rule of causation may be, I am satisfied that if a breach of contract is one of two causes, both co-operating and both of equal efficacy, as I find in this case, it is sufficient judgment in damages."

Devlin J 's construction would demand admeasurement of causes to discover whether they are of uniform strength. No where in Lord Wright's judgment in case of *Smith, Hogg & Co*, did he qualify his 'a' cause rule with the requirement that the causes have to be of equal efficacy. With due respect, it is submitted that Devlin's interpretation cannot be substantiated.

230 (1948) 82 Ll.L.R. 137.

231 Ibid., at p. 147.

232 Ibid.

233 Ibid., at p. 155.

234 Ibid., at p. 156.

235 Coote, Exception Clauses, (1964), p. 25.

236 The same applies to an act of God, storms, unexpected weather condition and any occurrence which cannot be objectively assessed as likely or unlikely to happen at any given point to time or place, but could occur any time or any place.

237 Hart and Honoure, Causation in the Law' (1959), p. 229.

238 Scrutton, p. 86 and the cases cited therein.

239 (1875) L.R. 10 C.P. 58. See also *Lindsay v. Klein* [1911] A.C. 194; *Fiumana Societa di Navigazione v. Bunge & Co. Ltd.*, [1930] 2 K.B. 47. In this case a fire broke out on board the ship as a result of spontaneous combustion in her bunker coal which had been on board for two and a half months. It was held by Wright J., that the unexplained occurrence of the fire gave rise to a reasonable presumption that the bunker coal was unfit or defective when the cargo was loaded and as such the ship was unseaworthy.

240 Ibid., at p. 68.

241 See *Ajum Goolam Hossen & Co. v. Union Marine Insurance Co. Ltd.*, [1901] A.C. 362. A ship capsized and sank within twenty-four hours after leaving port. Heavy weather had not been encountered and there were no other known cause to explain the loss. Nonetheless, after considering all the available evidence, the Judicial Committee of the Privy Council held that the loss was attributale to mistakes in the management of the vessel rather than to unseaworthiness. See also *Waddle v. Wallsend Shipping Co. Ltd.(The Hopestar)* [1952] 2 Lloyd's Rep. 105.

242 And in *Ajum Goolam Hossen & Co. v. Union Marine Insurance Co. Ltd.*, [1901] A.C. 362 at p. 366.

243 (1815) 3 Dow HLC 23, at p. 31

244 *Lindsay v. Klein* [1911] A.C. 194 (H.L.) at pp. 199, 204; see also *Pickup v. Thames & Mersey* (1878) 3 Q.B.D. 594 C.A. at p. 600; *Watson v. Clark* (1815) 1 Dow HLC 336.

245 *Silcock v. Maritime Lighterage Co.* (1937) 57 Ll.L.R. 78 (C.A.).

246 A general exception clause, however, is not sufficient to exclude the express warranty of seaworthiness in a charterparty: *The Petrofina* (1937) 53 T.L.R. 222. See supra p.

247 Per Gerell Barnes P.,in *The Northumbria* (1906) P. 292 at p. 298.

248 *The Europa* (1908) P. 84.

5.3.7 Seaworthiness Under U.A.E. Law

249 Where the shipowner has, for example, failed to supply the chartered vessel.

250 The judge may order rescission of the contract, even though the breach committed by the defendant is slight, if it is found to be intentional, a wilful refusal to perform, thus punishing the defendant's bad faith.

251 Civil Code, Art. 272(2).

252 Civil Code, Art. 271.

253 Civil Code, Art. 274: "If the contract is rescinded automatically or by the act of the parties, the two contracting parties shall be restored to the position they were in before the contract was made, and if that is not possible, damages shall be ordered."

254 Civil Code, Art. 275: "If the contract is dissolved by reason of voidness or rescission or through any other cause and each of the parties is obliged to return that which he has obtained, it shall be permissible for each of them to detain what he received so long as the other party has not returned what he has received from the former, or provided security for such return."

255 Civil Code, Art. 274.

5.4 Bar To Exceptions Under U.A.E. Law

256 See *case no. 121 (1981) Dubai C.A.; Case no. 96 (1982) Dubai C.A.; Case no. 90 (1979) Abu-Dhabi C.A.* To the same effect see *Supreme Court of Kuwait*, case 99, year 83 (1984) and case no 46, year 76 (1979).

257 The degrees of 'slight', 'ordinary' and 'gross' negligence are unknown to the common law. In *Pentecost v. London District Auditors* [1951] 2 K.B. 759, Lynskey J said:

> "Epithets applied to negligence, so far as the common law is concerned, are meaningless...a man is either guilty of negligence or he is not."

and in *Wilson v. Brett* (1843), 11 M. & W. 113 (152 E.R. 737) Lord Cransworth "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet."

258 The Supreme Court of Egypt has taken a different view. It held that only the wilful misconduct of the carrier himself, as opposed to that of his servants or agents, has the effect of breaking the statutory limit of article 4 (5) of the Hague Rules; whereas gross negligence committed by the carrier or his servants or agents does not have this effect in the view of the absolute words "in any event":

> "Since the phrase 'in any event' is an absolute by itself and does not leave room for any exception, it covers all kinds of liability whatever be the type of fault committed by the carrier or his servants or agents, even if the fault is amounting to gross negligence. This is so except in the case of wilful misconduct committed personally by the carrier in which he loses the right to limit his liability which in turn must be subject to the general rule [established in the Civil Code]. This is the only exception that the legislature can be taken to have excluded from article 4 (5) of the Hague Rules." *Supreme Court, November 9, 1961, DDECC, 12th year p 672.*

This decision, however, was criticised by several

Egyptian writers on the following grounds:

i) It is a fundamental principle to fulfil contracts in goods faith according to article 148 of the Egyptian Civil Code.

ii) It is difficult to distinguish between the two kinds of faults, where both have the same degree of seriousness and have the same result. The only difference is in the element of intention, which is difficult, if not impossible, for the creditor to prove. See Awad, The Limitation of the Maritime Carrier's Liability according to the Brussels Convention, The Advocacy Journal, 35th year, no. 7, p.1416; Dasooqi, The Assessment of the Damages, (1987) pp. 414-15.

259 The unamended provision of Art.25 of the Warsaw Convention provided that:

"1. The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability,if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

"2. Similarly the carrier shall not be entitled to avail himself of the said provisions if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment".

The above provisions were amended by the Hague Protocol, 1955 as follows:

> "The limits of liability specified in article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is proved that he was acting within the scope of his employment."

260 Article IV, Rule 5(e) provides:

"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."

Article IV bis(4) provides:

> "Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

261 See Miller, Liability in International Air Transport: The Warsaw System in Municipal Courts, 1977; Browning, Warsaw from the French Perspective: A Comparative Study on Liability Limits under the Warsaw Convention, (1978), 11 Vanderbilt Journal of Transnational Law 118; McGilchrist, Wilful Misconduct and the Warsaw Convention, (1977) 4 LMCLQ 539.

262 Miller, supra note , at pp 206-216; Verplaetse, "From Warsaw to the French Cour de Cassation: Article 25 of the Warsaw Convention" (1970), 36 JALC 50.

263 *Supreme Court, 15th year, no. 135 p. 868; Cairo Court of Appeal, 25 June 1963*, published in the Advocacy Journal, 44th year, no. 375, p. 460 et seq.

264 [1967] RFDA 107.

265 [1952] 2 All E.R.1016. In this case a pilot failed to land when given permission to do so, changed course without full communication with air traffic control, and eventually tried to return from France to England when low on fuel.

266 Ibid., at 1019.

267 Ibid., at 1022.

268 [1977] 1 Lloyd's Rep. 564 at 569; affd [1979] 1 Ll.L.Rep. 19, CA (theft of platinum by carrier's loader).

269 187 F.2d 122 (2 Circ. 1965)

270 [1954] 2 Lloyd's Rep. 463.

271 Ibid., at p. 475.

272 [1961] 3 All E.R. 396 at 403.

273 (1976) 74 DLR (3d) 574.

274 [1983] 3 All E.R. 693.

275 Al-Sanhoury, 2 Treaties on Egyptian Thoery of Obligations (1952); Abd-alRashid Ma'mun, Causation in Civil Liability, (Cairo).

CHAPTER 6

EXCEPTION CLAUSES AND THIRD PARTIES

When a carrier undertakes to carry goods to a certain of destination this does not mean that he himself will perform all the duties resting on him due to the contract of carriage. There are the master, crew, stevedores and many others employed by the carrier to perform all or part of his contractual obligations. Therefore, when the goods are lost or damaged, the loss or damage might not have been caused by the carrier himself, but it might have been caused by one or several of his agents or servants. Generally speaking, the carrier is liable for the fault of his agents and servants acting in the course of their employment. However, the carrier may be protected by exception clauses in the contract of carriage; therefore, the cargo-owner may choose to sue instead of the carrier his agents, servant or independent contractor who actually caused the loss or damage complained of. In this situation the question arises whether such agent, servant or independent contractor, who is not a party to nor bound by the contract of carriage, when sued separately by the cargo-owner, may claim the benefit of the exceptions of the carrier.

It is intended in this chapter to discuss the position of the third parties under English and U.A.E. laws; to see whether they are entitled to rely on the carrier's exceptions.

6.1 THE POSITION UNDER ENGLISH COMMON LAW

The Common law stands alone among modern systems of law in its strict adherence to the view that a contract should not confer any rights on a stranger to the contract, even though the sole object may be to benefit him(1). As Viscount Haldane observed in *Dunlop v. Selfridge* (2):

> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *ius quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."

Accordingly, if the goods are lost or damaged while being carried by the negligence of the servants of the carrier or an independent contractor, the position seems as follows:

i) The servants are liable for the loss of or damage to the goods in an action by the cargo-owner, in tort and not in contract.

ii) They are not entitled to rely on the provisions of the contract of carriage because they are not parties to it.

English Courts seek to justify this rule by reference to two basic principles of the English law of contract: the doctrine of consideration and the doctrine of 'privity of contract'(3).

The doctrine of 'privity of contract' means that a contract can generate rights and obligations only for and against the parties to it.

The doctrine of consideration states that promises are only legally enforceable if they are given in return for some counterprestation from the promisee, that is a 'consideration'. It is the promisee who must give the consideration: 'Consideration must move from the promisee'.

It is quite clear that the strict application of the doctrine of 'privity of contract' leaves intermediate contractors with risks which are considerably greater than those undertaken by the principal contracting parties. It is also obvious that the principal contracting parties can calculate their respective legal liabilities and effect insurance cover accordingly. The possibility of actions for unlimited amounts outside the ambit of the contract, i.e. in tort, against third persons, is something of a windfall for the insurers, especially since the actions will be brought against defendants who are only involved because of some form of contractual chain and contractual activity.

6.1.1 THE ELDER DEMPSTER CASE.

In *Elder, Dempster & Co. Ltd. v. Paterson, Zochonis & Co. Ltd.*(4), the House of Lords first indicated the willingness of waiving the doctrine of 'privity of contract', in the interests of commercial expediency. There, charterers had agreed to carry oil from West Africa to England. They chartered a vessel for this purpose. The bill of lading made between the plaintiffs (the shipper) and the charterers, contained a term purporting to protect both

charterers and shipowners from claims arising out of bad stowage. The plaintiffs lost the oil on account of bad stowage, and sued both charterers and shipowners. It was admitted that the charterers were protected by the bill of lading, but it was contended that the shipowners who were not parties to the bill of lading, were not. The House of Lords unanimously held that the exception in the bill of lading did act to protect the shipowners(5). Although the *ratio decidendi* of this case has considerably been disputed(6). Three possible reasons can be deducted from the speeches of their Lordships(7). First, that the charterers acted as agents of the shipowners for the purpose of making a contract with the plaintiffs(8). Second, that when the plaintiffs entrusted the oil to the shipowners a contract between them could be implied from their conduct, incorporating the terms of the contract of carriage by tacit reference(9). Third, the so-called principle of 'vicarious immunity; according to this principle when a person employs an agent to perform a contract, the agent is entitled, in performing the contract to any immunity from liability which the contract confers on the principal(10).

The doctrine of 'vicarious immunity' was approved by Lord Denning in his dissenting judgment in *Scruttons v. Midland Silicones*(11), but in the same case, however, Lord Reid, while agreeing that the doctrine of 'vicarious immunity' should be the law, held that it was not the law and that it was much too late to amend the law judicially to

reach that result. He regarded the *Elder Dempster* decision as an anomalous and unexplained exception to the doctrine of 'privity of contract'(12) and he and the majority of the House of Lords refused to extend it to protect stevedores. Thus in the *Midland Silicones* Case the doctrine of 'privity' was firmly upheld.

Although the *Elder Dempster* Case was 'reduce to shadow'(13) in *Midland Silicones*, nevertheless, one of its reasons, namely agency, has been relied on and supported in the later authorities(14) in spite of its artificial character(15). The argument for it is briefly put thus - when one party enters into a contract with another, he does so, not only on his own behalf, but on behalf of all those whom he employs to perform the contract. This line of argument provides a way of reconciling the immunity of the third party with the doctrine of 'privity of contract', since it brings the non-party to the contract into a direct contractual relationship with the defendant. In *Midland Silicones* itself the House of Lords left open the question whether the stevedores could have been protected if the carrier had contracted as agents on their behalf.

6.1.2 MIDLAND SILICONES CASE.

In *Midland Silicones v. Scruttons*(16), a drum containing chemicals was shipped from United States to London. The defendants, who were stevedores engaged by the carrier, while loading the drum onto a lorry after it had

been duly discharged from the ship, negligently dropped and damaged the drum. The bill of lading in respect of the drum incorporated the U.S. COGSA 1936 which limited the liability of the carrier to $500 per package. It is also contained a clause stating: "In this bill of lading...the word 'carrier' shall...include the ship...her owners, operator and demise charterer, and also any time charterer or person to the extent bound by this bill of lading whether acting as a carrier or bailee."

The consignees could have sued the carrier but if they had done so the liability of the carrier would be limited to $500; accordingly they sued the stevedores in tort, claiming £593. The stevedoring contract with the shipowner provided, among other things, that the stevedores were to have such protection as was afforded by the terms, conditions and exceptions of the bill of lading. The question therefore arose whether the stevedores could take advantage of the limitation of liability of the bill of lading. The House of Lords(17) held that they could not for the following reasons(18):

i) They were not party to the bill of lading, thus under the doctrine of 'privity of contract' one who was not a party to a contract can derive no benefit from it.

ii) The carrier did not contract as agent for the stevedores(19).

iii) There was no implied contract by which the stevedores could have the benefit of the limitation.

Lord Reid, in his judgment in *Midland Silicones*, however, did provide some hope for servants, agents and independent contractors. Referring to the argument raised by the stevedores that the carrier had contracted for them as an agent in the bill of lading, his Lordship envisaged that such an argument might be effective if four conditions were satisfied:

> "I can see," said Lord Reid, "a possibility of the agency if *(first)* the bill of lading makes it clear that the stevedore is intended to be protected by the provisions in it which limit liability *(secondly)* the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore *(thirdly)* the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and *(fourthly)* that any difficulties about consideration moving from the stevedore were overcome."(20)

The sort of clause that Lord Reid had in mind is commonly known as a 'Himalaya Clause', so called after the ship involved in the case of *Adler v. Dickson*(21). There, the plaintiff was prevented by a clause in her ticket from suing the carrier for injuries sustained as a result of the crew's negligence, but that clause did not prevent her succeeding in an action against the crew members personally(22).

Following the court decision in *Adler v. Dickson*, it became common practice to insert in bills of lading a clause by which the carrier purports to contract not only on his behalf but also on behalf of other persons, such as master,

crew members and stevedores , and thereby to make them parties to the contract and to confer on them the benefit of exclusion clauses.

6.1.3 THE 'EURYMEDON'.

In *The Eurymedon*(23), the Himalaya Clause and the four conditions put forth by Lord Reid for its success were examined by the Privy Council. A drilling machine was dispatched from Liverpool to Wellington. The shippers signed a bill of lading which contained the following Himalaya Clause :

> "It is hereby expressly agreed that no servant of agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any holder of this Bill of Lading for any loss or damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, without prejudice to the generality of the foregoing provisions of this clause, every exemption, limitation condition and liability, defence and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is himself entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or who might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or deemed to be parties to this contract in or evidenced in this Bill of Lading."

In addition the bill incorporated Hague Rules requiring, inter alia, that actions in respect of damage to the goods to be brought within one year.

The machine was damaged while being unloaded, allegedly as a result of the negligence of the stevedore. The carrier was a wholly owned subsidiary of the stevedore; and the stevedore generally acted as the carrier's general agent in New Zealand, so that the stevedores were well aware of the particular terms of the exemption clause in the bill of lading . The question arose was was the stevedore also entitled to the benefit of the time bar clause? The majority of the Privy Council found that the stevedores were entitled to rely on the time limitation.

That Lord Reid's first two requirements were satisfied is apparent from the facts of the case because it was clear that the stevedores were intended to be protected and the carrier had purported to act as their agent. No difficulty in regard to the third condition arose. The majority in the Privy Council accepted that "the carrier was, indisputably, authorised by the (stevedore) to contract at its agent."

The fourth and most difficult of Lord Reid's requirements was the need for the stevedore to show consideration in return for the exemptions which stevedore claimed to have obtained from the shipper evidenced by the bill of lading. However, there were two contracts relevant for the purpose of consideration. The first is the stevedoring contract between the carrier and the stevedore.

The existence of this contract was inferred from the fact that the stevedores were obliged to unload goods including those of the shipper (or consignee) from the ship. The second contract was one made between the consignee and stevedore through the agency of the carrier and evidenced by the exclusion clauses contained in the bill of lading. Beattie J., in the New Zealand Supreme Court(24) rejected the argument that the consideration for this second contract is the performance by the stevedore of part of the carrier's obligation, namely the discharge of the plaintiff's goods at Wellington. The difficulty here was that Lord Reid's requirement would not be satisfied inasmuch as he contemplated a contract between the shipper and the stevedore being completed at the time of the agreement between the shipper and the carrier. The stevedore did not undertake any obligation to the shipper at that time and there was nothing in the bill of lading to imply that the contract which it had made with the carrier because the agency relationship had referred only to the exclusion clause which purported to create a benefit only and no detriment or liability was imposed on the stevedore.

The material time for making the contract between the shipper and stevedores was not when the bill of lading was entered into but when the stevedore commenced unloading. In other words, the shipper through the agency of carrier made an offer to the world at large(25) in the form of those exclusion clauses contained in the bill of lading. This

offer was accepted and the contract completed when the servants or agents of the carrier performed their functions in respect of the goods being carrier. Lord Wilberforce said(26):

> "That the bill of lading brought into existence a bargain initially unilateral but capable of becoming mutual, between the shippers and the stevedore, made through the carrier as agent. This became a full contract when the stevedore performed services by discharging the goods. The performance of these services for the benefit of the shipper was the consideration for the agreement by the shipper that the stevedore should have the benefit of the exemptions and limitations contained in the bill of lading."

The dissentients, Viscount Dilhorne and Lord Simon , accepted that a third party could be protected by a clause appropriately framed.

It is submitted that " the significance of *The Eurymedon* case lay not so much in the establishment of any new legal principle, as in the finding that in the normal situation involving the employment of stevedores by carriers, accepted principles enable and require the stevedore to enjoy the benefit of contractual provisions in the bill of lading"(27). In the words of Mason and Jacobs L.JJ.,(28):

> "When the circumstances described by Lord Reid (sc. in Midland Silicones) exist, the stevedore will on the generally accepted principles of the law of contract be entitled to his personal contractual immunity. The importance of the Eurymedon is the manner in which on the bare facts of the case their Lordships were able to discern a contract between the shipper and the stevedore, and, we would add, to do so in a manner which limited

> the approach to those commercial contexts in which immunity of the stevedore was clearly intended in form and almost certainly known by both the shipper and the stevedore to be intended."

In spite of its realistic and commonsense approach *The Eurymedon* has been criticised(29). One point of criticism lies in the fact that the stevedores won their appeal in the teeth of strong opposition by a bare majority of three to two(30). Secondly, it has been suggested that unilateral contract analysis is dealt with ambiguously because the fact that it envisages a subsequent ratification clearly opens the way to a more general application, to the extent that no prior agency relationship needs to exist. A doubt arises as to whether the third party must know of the existence of the offer of exemptions at or before the time he performs his part of the contract. General principles of contract require that the performance should be in response to the offer(31). A difficult and novel question would be whether it is sufficient compliance with this requirement that an agent's receipt of the offer has been ratified by the third party after he has completed his performance and loss or damage has occurred(32)? A second objection is that Lord Wilberforce's approach moves very close(33) to the now discredited doctrine of 'vicarious immunity' once regarded as the ratio of *Elder Dempster* Case(34).

6.1.4 THE NEW YORK STAR.

However, in *The New York Star*(35) the Judicial Committee of the Privy Council unanimously approved the decision in *The Eurymedon.* In this case, the stevedores who handled the unloading of cargo of razor bladed at Sydney were negligent in allowing a fraudulent third party to make away with the goods while they were still under their control. As the plaintiffs consignees sued the stevedore company after one year had passed since the date of discharge of the goods, the stevedores relied on the Himalaya clause in the bill of lading, which was identical to the one relied on in *The Eurymedon*, and claimed to be entitled to the defence of limitation of action under the Hague Rules. The carriers and stevedores in this case were also related companies in that the carrier owned 40% of the capital of the stevedore company and had given that company a monopoly of their operations for several years. The Judicial Committee held that the stevedores were entitled to rely on the said defence. Their Lordships explained *The Eurymedon* and also considered the *Midland Silicones* Case.

The emphasis was placed on two factors in addition to the acceptance of the argument that the plea of agency was available. First, again it was emphasised and held that in the normal situation involving the employment of stevedores by carriers, accepted principles enable and require the stevedores to enjoy the benefit of contractual provisions of the bill of lading. Second, the immunity was extended to the

stevedores because it was "clearly intended in form and almost certainly known by both the shipper and the stevedore to be intended". Further, the Judicial Committee considered that the decision in *The Eurymedon* does not support and the Committee itself would not encourage, a search for fine distinctions which would diminish the general applicability in the light of established commercial practice, of the principle(36).

As to the argument based upon agency, the Judicial Committee found that each relevant ingredient has been present in this case(37). The provision of consideration by the stevedores was held to follow him from the decision of *The Eurymedon* Case.

As to the approach of the Judicial Committee, it would be realised by a comparative study of *The Eurymedon* and *New York Star* that there is a definite shift favouring the simple approach, namely, that to confer such an immunity on the stevedores is consistent with the commercial realities, and that the intentions of the parties as expressed in the contractual documents should be given effect(38), rather than analysing the transactions into technical categories of offer, acceptance and consideration. The Committee in *The New York Star*, unlike *The Eurymedon* did not deal in sophisticated details with the question of offer, acceptance and consideration. In fact, at one place it discourages any attempt to doubt the validity of such clauses on the

technical grounds(39). These decisions should therefore be evaluated, not in terms of such analysis, but by asking two questions(40): **(1)** was there any objection on grounds of policy to extending the protection of the clause to third parties? and **(2)** did such extension give effect to the intention of the parties? There should not be any objection to the first since sometimes the policy of the law was against rules of law requires to be followed in order to adapt the law to justice. Even in legal theory no objection will arise in following this policy. As Dworkin said(41):

> "When, then, is a judge permitted to change an existing rule of law? Principles figure in the answer in two ways. First, it is necessary though not sufficient that the judge find that the change would advance some policy or serve some principle, which policy or principle thus justifies the change... Second, any judge who proposes to change existing doctrine must take account of some important standards that argue against departure from established doctrine...They include the doctrine of 'legislative supremacy and precedent..."

The second question is harder to answer but it is unlikely that the shipper at the time of contract made any distinction between rights against the carrier and against persona employed by the carrier in the performance of the contract(42). It is submitted that in all the above cases the interpretation of clauses did give effect to the intentions and commercial expectations of the parties; and the trend is therefore to be welcomed(43).

The Eurymedon and *The New York Star* were decided by the Judicial Committee of the Privy Council and are not therefore

binding on the House of Lords. The question of the application of the doctrine of 'privity' as envisaged by the House of Lords in the *Midland Silicones* Case may still be regarded as an open question in England. However, and because the doctrine of 'privity' has never been effective as an instrument to control the exclusion clauses(44), it is submitted that the decision of the Judicial Committee in *The Eurymedon* and *The New York Star* should be followed in England, and 'should not be confined to their admittedly special facts. That is, the necessary agency relationship should not be restricted to cases in which carriers and stevedores are associated companies, or in which there is some other previous connection between them. The third party will of course, only be protected while he is engaged in the performance of the contract in which the exemption clause is contained, and not while he is acting in some other capacity'(45).

6.1.5 OTHER DEVICES

The third party could also be protected by a form of words other than that used in *The Eurymedon*. The carrier may insert in the contract of carriage between him and the cargo-owner an express promise that the cargo-owner will not sue the servants and agents of the carrier. If the cargo-owner sues them in spite of the promise, the carrier can enforce the promise by getting a stay of any action by the cargo-owner(46) particularly if there is a bound to indemnify them

against liability incurred in the performance of their duties under the contract to outsiders(47). Alternatively, the contract might provide that the cargo-owner should be liable to pay over to the carrier any sum that the owner might recover from the servants or agents(48).

6.2 THE POSITION UNDER CARRIAGE OF GOODS BY SEA ACT, 1971

Having adopted the Hague-Visby Rules, the right of the carrier's servants and agents to the limits of liability is now statutory in England. Article IV bis, Rule 2 states:

> "If such action (in respect of loss or damage to goods) is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under these Rules".

The immediate question arises is 'Why the independent contractor is excluded from the protection? The answer to this question is to be found in the history background of Article IV bis(49).

In the meeting pre the Stockholm Conference 1963, a proposal was submitted to extend the carrier's defences to persons other than the carrier. The intention was to cover only servants or agents. But the British Maritime Law Association propounded a proposal providing firstly, that the conditions and limits specified in the Hague Rules should apply to any action against the carrier, whether in contract or tort, and secondly, that any action brought against a

servant, agent or independent contractor, the later should be entitled to avail himself of the defences and limits of liability to which the carrier should be entitled. This solution was accepted by the majority of the Sub-Committee on Bills of Lading Clauses. But at the Stockholm Conference, however, some delegations opposed the proposed test as far as independent contractors were concerned on the ground that

> "In their view a contractor who is independent of the carrier should not, by the mere fact that he performs duties which might have been performed by the carrier himself, become entitled to avail himself of the limitations and exceptions of the Convention. A distinction should be drawn between, on the one hand, the carrier, his servants and agents, and, on the other, the independent contractor. The servants and agents should be protected for social reasons and should have the benefits of the Convention whereas,... these reasons do not apply to the independent contractor who should thus not have this benefits."(50)

This reasoning was accepted at the Brussels Conference in 1968 and independent contractors were not afforded the protection of the Rules.

Article IV bis, Rule 2 has already been the subject of many comments from several English writers(51) and it is worth repeating some of the points that have been made.

(a) The protection is to be extended to the servants and agents of the carrier during the period of time in which the Rules govern the contract of carriage.

(b) The servant or agent must be acting in the course of his employment to be able to benefit from the defences and limits(52).

(c) The servants and agents shall be entitled to the same but not less no further defences and limits which the carrier has under the Rules.

(d) The protection is only given to servants or agents of the carrier, i.e., of whoever has entered into the contract of carriage with the shipper. Thus if for example it is evident that the charterer is the carrier then the shipowner's servants or agents would obtain no protection from the Rules.

It is generally admitted that the exclusion of independent contractors from the protection of Rule 2 may well cause many problems. The difficulty lies in the phrase 'agent not being independent contract'. Who is an independent contractor? What is the criterion for the distinction between 'agent' and 'independent contractor'?

Scrutton says that the intention of the words 'not being an independent contractor' was to exclude from the protection of the Rules persons such as 'stevedore'(53). This view, however, seems inconsistent with the view taken by MackinnonJ., in *Heyn v. Ocean S.S. Co.*(54):

> "Both by common law and Rule 2 of Article III the carrier's duty was to 'discharge' the goods which he had carried, and if he chose to employ an independent contractor to carry out that duty for him the independent contractor became his agent or servant within the meaning of the subsection."

Further, in *Howzani v. Harrison*(55) the Court held that the servants of the stevedore were the servants or agents of the carrier within the meaning of the Hague Rules. Therefore, it is difficult to see that the servants or agents of the

stevedore could avail themselves of the benefit of the statutory limitation, because they are considered as the carrier's servants or agents, whereas their employer the stevedore could not.

Diamond suggest this test for the distinction between servants and agents in one hand and between the independent contractors:

> "is the servant or agent one for whom, if acting in the course of his employment, the carrier would incur vicarious liability in tort?"

He suggests that if the answer is yes, then Rule 2 will apply. This is, it is submitted, very restrictive; only the carrier's employees and a few others in a similar position would be protected by the Rule, and Mr. Diamond records his view that ship's agents and managing agents will usually be independent contractors.

Stevedores would almost invariably be independent contractor(56). If this is right, then we have again the same strange result discussed above.

This uncertainty led Mustill (now Lord Justice Mustill) to say that : "It seems that in order to give some effect to Rule 2, the Court will have to depart from the well recognised meaning of 'independent contractor': but what alternative interpretation will be adopted is very difficult to predict."(57)

The difficult of the interpretation of Art. IV bis, Rule 2, as it is clear, consists in the distinction between the three categories: servants, agents and independent

contractors. Much has been said about this distinction and there is no single test is now applied by the English Courts(58), but one approach which is often appropriate is to consider whether the work of the person concerned is an integral part of the business or only accessory to it(59). If it is an integral part of the business, he is a servant. If it is only accessory to it, he is an agent or independent contractor. This approach is based on the concepts of ' a contract of service' and 'a contract for service' explained by Lord Denning in *Stevenson, Jordan & Harrison Ltd., v. Macdonald*(60):

> "A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi man, and newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as a part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it".

By Rule 4 of Article VI bis, the servant or agent of the carrier cannot avail himself 'of the provisions of this Article' if the damage resulted from the servant's or agent's act or omission 'done with intent to cause damage or recklessly' etc. Scrutton points out that a servant or agent whose act or omission is in that category is theoretically in a worse position than the carrier who indulges in a similar act. The carrier only loses his right to limit; the servant or agent also loses most if not all of the defences available under the Hague-Visby Rules(61).

6.3 THE POSITION UNDER THE U.A.E. LAW

The general rule under U.A.E. law is that where goods are lost or damaged through the negligence of the carrier's servants or agents their owner may proceed against the carrier and also against the servant or agent who caused the damage. But while the Maritime Code enables the carrier to exclude or limit his liability (Arts. 275 and 276), no such right is given to his servants and agents. The question, thus, arises is whether the carrier's employees , when action in negligence are brought directly against them, can rely on the exceptions and limitations of liability provided for in Arts. No Court in U.A.E. has yet tested this question.

The general rule in relation to the effect of the contract is found in Art. 250 of the Civil Code which provides that:

> "The effect of the contract shall extend to the contracting parties and their general successor without prejudice to the rules relating to inheritance..."

In shipping terms this article means that the carrier's employee who is not a party to the contract of carriage cannot rely upon the immunities in this contract when he has been sued for his own negligence by the cargo-owner. However, U.A.E. law does not rigorously uphold the principle of relative effect of contract. There are many exceptions to this principle. The main exception is set out in Arts. 254

to 256 of the Civil Code. Article 254 provides:

> "1. A person may contract in his own name for the benefit of a third party if he has a personal right, whether materialistic or moral, for so doing.
>
> 2. Such a stipulation shall, unless there is a contrary agreement, confer upon the third party a direct right against the promisor enabling him to demand the performance thereof subject to any of the defences arising out under the contract which the promisor could invoke against the stipulator.

Article 256 read:

> "It is permissible that the stipulation for a tired party is to be made for the benefit of a future or an undetermined person or organisation if such beneficiary is determinable at the moment when the contract for their benefit becomes effective."

Thus, the carrier, according to the above articles, may validly insert in the contract of carriage a special clause expressly state that the exceptions and limitations of the contract shall inure to the benefit of his servants and agents; the U.A.E. Courts would hold valid such a clause and allow the servants and agents of the carrier to invoke the immunities of the carrier.

6.3.1 STIPULATION FOR THE BENEFIT OF A THIRD PARTY

A contract for the benefit of a third party(62) is unknown to the Common law(63), it is perhaps appropriate to examine briefly its conditions, nature and effects as adopted in the U.A.E. Civil Code.

6.3.1.1 The Elements Of A Valid Third Party Stipulation

Other than the usual requirements of contract validity, there are three conditions precedent to the validity of a third party stipulation:

i) The stipulator (the carrier) must act in his own name and not as a representative of the beneficiary (servants or agents). This element distinguishes the stipulator from the agent, who acts on behalf of his principal to bind him contractually. The carrier binds only himself not the beneficiary.

ii) The stipulation must confer a direct benefit upon the beneficiary. No third party rights are created where the promisee stipulates for a personal right which brings incidental benefit to a third party. Thus, a liability insurance policy cannot be characterised as a third party stipulation, although the insurance company indemnifies the injured third person. The insured therein stipulated for his own benefit - to provide against a possible crippling liability in damages(64).

Since the beneficiary of a valid stipulation receives his rights directly from the contract between the stipulator and the promisor, there is no need for him to contract anew with the promisor.

iii) The stipulator must have a personal interest in the stipulation(65). The stipulator must have a valid reason, materialistic or at least moral, for obtaining benefit for the third party(66). This ensure that the

stipulator, like any other party, will have an interest worthy of judicial protection.

6.3.1.2 The Beneficiary Of The Stipulation

Art. 256 of the Civil Code requires only that the beneficiary be specifically ascertainable on the day that the agreement is to take effect, and explicitly allows the beneficiary to be future and undetermined(67) at the time of stipulation. Thus, the carrier may validly stipulate not only for the benefit of his ordinary employees such as the master and the crew but also for the benefit of any future persons such lighterers, wharfingers and stevedores helping him to perform his contractual obligations.

6.3.1.3 The Juridicial Relationship Arising From The Stipulation

The third party stipulation is a complex transaction which creates three distinct juridical relationships: between the stipulator and promisor; between the promisor and third person beneficiary; and between the stipulator and beneficiary.

(A) ***The Stipulator - Promisor relationship.*** The validity of this relationship depends upon general contract law, as well as the factors mentioned in part [A] above. There must be mutuality of obligation, and if the stipulation is valid, the stipulator may obtain specific performance of the promisor's obligations(68) unless the contract expressly negates such right.

(B) ***The Promisor - Beneficiary relationship.*** The true third party beneficiary is never a party to the contract. The promise runs not to him but to the stipulator. The third party acquires his right direct from the contract, but such rights is inchoate in U.A.E. law during the period between the date of the contract and the communication of acceptance by such third party, and it is only when the latter has notified his acceptance of the benefits of the contract that he acquires an irrevocable, independent and enforceable right; this right, however, is subject to any of the defences which the promisor could have raised against the stipulator and which arise out of the contract itself(69).

(C) ***The Stipulator - Beneficiary relationship.*** This relationship is the least important of the three: U.A.E. law recognises the difference between the donee and the creditor beneficiary, dependent upon whether the stipulator intended to confer a gift or extinguish an obligation.

6.3.2 ABSENCE OF AN EXPRESS STIPULATION

When there is no express stipulation for the benefit of a third party, the question arises whether it will be accepted under U.A.E. law that the carrier's exceptions and limitations in the Maritime Code or in a contract of carriage shall nevertheless inure to the benefit of the carrier's employees participating in the performance of the contract. It may be difficult to prove before the court that this was the intention of the parties when making the contract, when

there is nothing in the context of the contract to support that contention. Generally speaking, the parties to a contract do not intend to cover by a limitation clause also the liability of others; the party limiting his liability covers himself, and this is probably likewise the understanding of the other contracting party. Having regard to the very strict interpretation applied by the courts when considering exception and limitation clauses in contracts where their validity is in issue, it appears to be a daring proposition to argue that the courts should allow a person not a party to a contract to rely on such an exception or limitation clause even where there is nothing in the context of the contract indicating that this was the intention of the parties.

6.1 English Common Law

1 Sixth Interim Report of the Law Revision Committee, Cmd. 5449, p. 25.

2 [1915] A.C. 847 at p.853.

3 See *Dunlop v. Selfridge* [1915] A.C. 847; *Scruttons Ltd., v. Midland Silicones Ltd.*, [1962] A.C. 446; *Beswick v. Beswick* [1968] A.C. 58.

4 [1924] A.C. 522.

5 The House of Lords was divided on the issue of whether the loss was the result of bad stowage or unseaworthiness of the ship, but on the point in issue the opinion of the House was unanimous.

6 Dworkin, "Stare Decisis in the House of Lords" (1962) 25 M.L.R. 163 at 171,173. *Scrutton Ltd., v. Midland Silicones Ltd.*, [1962] A.C. 446, 469 per Viscount Simonds; at pp. 476-477 per Lord Reid. Coote, Exception Clauses (1964) at p. 123. Hamson, "Contract - Third Party - Benefit of Exemption Clauses" (1959) C.L.J. 150 at pp. 150-151.

7 Treitel, "Exemption Clauses and Third Parties" (1955) 18 M.L.R. 172 at pp. 173-174; Furmston, "Return to Dunlop v. Selfridge?" (1960) 23 M.L.R. 373.

8 [1924] A.C. 522, 534 first sentence. See also per Fullagar J., in *Wilson v. Darling* [1956] 1 Ll.L.Rep. 346: "The charterer in entering into the contract of carriage acted on behalf of, and for, the benefit of those others who might be given duties to perform under it."

9 [1924] A.C. 522, at p. 564 "bailment on terms". See also per Devlin J., in *Pyrene Co. Ltd., v. Scindia Navigation Co. Ltd.*, (2954) 2 Q.B. 402 at 421: "...the master having signed the bill of lading...the shipowner, when he receives the goods into his possession receives them on the terms of the bill of lading."

10 [1924] A.C. 534. Cf. *Mersey Shipping & Transport Co. Ltd., v. Rea* (1925) 21 Ll.L.R. at 378.

11 [1962] A.C. 446, at pp. 486-487.

12 Ibid., at pp. 478-479.

13 Palmer, "The Stevedore's Dilemma: Exemption Clauses and Third Parties" (1974) J.B.L. 101 at 102.

14 For example, *Gilbert Stokes v. Dalgety* (1948) 81 Ll.L.R. 337, 339 per Owen J. *The Eurymedon* [1975] A.C. 154, 167; *The New York Star* [1980] 3 All E.R. 257 (P.C.).

15 Treitel, Law of Contract, 1987 (7th edn.)at p. 477.

16 [1962] A.C. 446.

17 Lord Denning Dissenting.

18 The case was distinguished from *Elder Dempster* Case on two grounds. The first was that the third parties seeking to avail themselves of the bill of lading in *Elder Dempster* were not stevedores but shipowners, the bill of lading having been concluded between the owners of the goods and the charterers of the ship. The shipowners were in fact bailees of the damaged goods, and bailees, it seems can occupy a special direct contractual relations with them or not. Secondly, the House of Lords pointed out that in *Elder Dempster* the bill of lading had been signed by the master of the ship.

19 Contrast *Pyrene Co. Ltd., v. Scindia Navigation Co.*, [1954] 2 Q.B. 402, which was said in *Midland Silicones* Case [1962] A.C. 446, 471 to be supportable only on the ground of an implied contract between the party seeking to rely on the exemption and the third party.

20 [1962] A.C. 446 at p. 474.

21 [1954] 2 Lloyd's Rep. 267.

22 The clause provided, inter alia, that: "The company will not be responsible for and shall be exempt from all liability in respect of any...injury whatsoever of or to the person of any passenger...whether such injury of or to the person or any passenger...shall occur on land, on shipboard, or elsewhere...and whether the same shall arise from or be occasioned by the negligence of the company's servants on board the ship or land in the discharge of their duties,...or by accidents...or any acts, defaults or negligence of the...master, mariners...company's agents or servants of any kind under any circumstances whatsoever."

23 [1970] A.C. 154.

24 [1972] N.Z.L.R. 385, 397 (S.C.).

25 Ibid.; see also *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256 (C.A.).

26 [1975] A.C. 154, at pp. 167-168.

27 [1980] 2 Lloyd's Rep. 317, at p. 321, per Lord Wilberforce.

28 [1979] 1 Lloyd's Rep. 298, at 321. It is also said that the effect of *The Eurymedon* Case may well be to have introduce the "third party beneficiary" into English law, for certainly it is virtually impossible to justify the finding of the relevant contract. This would not be undesriable, especially if it leads to a more realistic statement of the policy behind the implied trust artifice which is used to circumvent the doctrine of 'privity': see F.D. Rose, " Return to Elder Dempster?" (1975) Anglo-American L.R., 7 at 38.

29 See F. Reynolds, "Note", 90 L.Q.R. 301; S.M. Waddams, "Comment", 55 Canadian Bar Rev. 327 (1977); Coote, "Vicarious Immunity by an Alternative Route - II (1974) 37 M.L.R. 453; F. Dawson, "Himalaya Clauses, Consideration and Privity of Contract" (1974-5) 6 N.Z.U.L.R. 161; D.G. Powles, "The Himalaya Clause" (1979) L.M.C.L.Q. 331 at 331-336.

30 Cf. *Pao On v. Lau Yiu Long* [1980] A.C. 614.

31 *R v. Clark* (1927) 40 C.L.R. 227.

32 Coote, "Vicarious Immunity by an Alternative Route" (1972) 35 M.L.R. 176, 178 ; (1979) 42 M.L.R. 453, 455.

33 [1975] A.C. 154, 167G ("The exemption is designed to cover the whole carriage..." per Lord Wilberforce).

34 Palmer, supra note 13, at p. 110.

35 [1980] 3 All E.R. 257.

36 Ibid., at p. 261.

37 Ibid.

38 [1975] A.C. 154, at p.164, per Lord Wilberforce:

> "In the opinion of their Lordships, to give the appellant the benefit of the exemptions and limitations contained in the bill of lading is to give effect to the clear intentions of a commercial document, and can be given within existing principles. They see no reason to strain the law or the facts in order to defeat these intentions. It should not be overlooked that the effect of denying validity to the clause would be to encourage actions against servants, agents and independent contractors in order to get round the exemptions (which are almost invariable and often compulsory) accepted by shippers against carriers, the existence and presumed efficacy, of which is reflected in the rates of freight. They see no attraction in this consequence."

39 [1980] 3 All E.R. 257 at p. 261d.

40 Treitel, supra note 15, at p. 480.

41 Dworkin, The Philosophy of Law, (1977) at p. 58.

42 Treitel, supra, note 15, at p. 480.

43 Ibid.

44 Ibid., at p. 479.

45 Ibid., at pp. 480-481.

46 See *Snelling v. John G.Snelling Ltd.*,[1973] 1 Q.B.87.

47 See *Gore v. Van der Lann* [1967] 2 Q.B. 31.

48 See *Gillespi Brother & Co. Ltd., v. Roy Bowles Transport Ltd.,* [1973] 1 Q.B. 400 (C.A.). where Lord Denning , at pp. 412-413, stated that the indemnity device is used as a way of avoiding the decision in *Midland Silicones.*

6.2 The Position Under U.K. COGSA

49 See Kurt Gronfors, "Why not Independent Contractors?" (1964) J.B.L. 25.

50 Quoted from Gronfors, supra, p. 26.

51 See Mustill, "Carriage of Goods By Sea Act 1971", (1972) 11 Arkiv for Sjorett, at pp. 708-710; Diamond, "The Hague- Visby Rules", (1978) 2 L.M.C.L.Q. at pp. 248-253.

52 Diamond, op.cit., at 252. Contrast Mustill, op.cit., at 709-710: "This Rule...does not stipulate that a servant or agent who wishes to avail himself of the Hague Rules defences and limits must prove that he was acting in the course of his employment at the time in question".

It seems from the decision of the court in *Morris v. C.W. Martin & Sons Ltd.*, (1966) 1 Q.B. 716, that English Courts would hold that a servant who, for his own benefit and in fraud of his employer, steals goods entrusted to him or to his employer is nevertheless acting within the scope of his employment. See Donaldson, J. "Servants and Agents", (1983) I.D.M. 210.

53 Scrutton, at pp. 458-459.

54 (1927) 43 T.L.R. 358, at p. 359.

55 (1927) 27 Ll.L.R. 415.

56 Chorley & Giles' Shipping Law (8th edn.), p. 358.

57 Mustill, supra note 51, at p. 709

58 Donaldson, J. supra note 52, at 210.

59 Another approach is the so-called the control test. In *Honeywell & Stein v. Larkin* (1934) 1 K.B. 191, 196, Slesser, L.J. said:

> "The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be

> done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor."

The control test probably a good deal of importance in cases to which it can be applied. But certain modern works require the employee to have high qualifications that the employer himself does not possess, and is not, therefore, competent to control in detail the employee's actual act. Therefore the courts have taken a view that the test of control is inadequate: see *Morren v. Swinton* (1965) 1 W.L.R. 576, 582, per Lord Parker C.J.; *Short v. J. & W. Henderson Ltd.*, 1946 S.C. (H.L.) 24, 33.

60 [1952] 1 T.L.R. 101 at p. 111.

61 Scrutton, at p. 458.

6.3 The Position Under U.A.E. Law

62 Various theories had been found to justify the principle of third party contract:

(i) Theory of *negotiorum gestio* (the management of affairs):

It is maintained that if A makes a contract with B for the benefit of C without C's authority, A is acting as a *negotiorum gestio* for C. C is,therefore, in a position by ratifying A's act to acquire retrospectively a right against B.

(ii) Theory of Offer: According to this theory, A must be taken to contract with B and that the offer to C of the benefit of A's contract with B and that the effect of C's acceptance of that offer is to substitute him for A.

(iii) Theory of Unilateral Juridicial Act:

According to this theory there would be a contract between A and B and a unilateral act of B's will which binds him to confer the benefit on C. Egyptian Courts have accepted the third theory: see *C.A. Alexandria 28 November 1901; C.A. Alexandria 18 Jan. 1917.* It is submitted, however, that the

attempts to fit the stipulation for a third party into traditional framework of law are unnecessary and misleading and that it is an independent institution resting on its own foundations: see Al-Sanhoury, 2 Treaties on Egyptian Theory of Obligations, (1952) 566.

63 See *Dunlop v. Selfridge Co.* [1915] A.C. 847, at p. 853, per Lord Haldane.

It is true that the doctrine of 'privity of contract' in English Common law is applied with certain reservation, notably where one of the parties to a contract acts as agent for an undisclosed principal, nevertheless, the general rule as stated by Lord Halden (see supra, note 3) still applies: see *Woodar Investment Development Ltd., v. Wimpey Construction U.K. Ltd.*, (1980) 1 W.L.R. 277, at pp. 284, 293, 297, 300.

64 Al-Sanhoury, supra note , at p. 575.

65 A carrier will have such an interest where he is under an obligation to indemnify the third party against liability incurred in the performance of his duty under the contract to the cargo-owner.

66 The late Professor Bahgat Badaowi, reasoning that a sane person always has some good reason for his acts, conclusively presumed the existence of a personal interest by the stipulator in all third party stipulations - thus removing the personal interest element as a serious obstacle to enforcement thereof: see Badaowi, Origins of Obligations, (1945) p. 342.

67 By 'indeterminate persons' we mean those persons who are not actually named or designated in the contract, but who, nevertheless, can be determined at the date when the contract is to take effect for their benefit. The Mixed Court in Egypt (*C.A. Alex. 28* November 1901), recognised that under the marine policy the assurer is bound not only to the present owner of the goods but also to any future owner. The person in right of the bill of lading is entitled to claim the benefit of the policy. A stipulation in favour of persons who can never be identified is of no effect.

68 The rights of the stipulator vary according as to whether the benefit of the third party is the sole aim of the contract or not. If the sole aim is to benefit the third party, i.e., in a life insurance, the only right which the stipulator generally possesses is to sue for performance of the contract. On the other hand, if the contract is both for his benefit and for that of the third party, e.g., where the cargo-owner (the promisor)undertakes as a term of the contract between himself and the carrier (the stipulator), that he will not sue the carrier's employees, the carrier can use all his rights of action arising out of the contract to prevent the cargo-owner from proceeding against his employees.

69 The promisor cannot raise any defences against the third party which are personal to the stipulator, Nor he can set off against the third party claim which he may have acquired against the stipulator before or after the conclusion of the contract. The promisor,however, can plead:

(i) All defences of nullity, either due to the incapacity of the promisor himself or to mutual mistake. He can also raise the defence of fraud, misrepresentation, etc., on the part of the stipulator;

(ii) That the contract is contrary to public policy.

CHAPTER 7

SUMMARY AND CONCLUSION

This work has attempted to set down the U.A.E. law of exclusion and limitation of the carrier's liability, and to set against it the comparable English law. Three set of exclusions have been discussed , viz. General Law Exclusions, Contractual Exclusions and the Hgue and Hague/Visby Rules Exclusions or in other words the Statutory Exclusions, as well as the right of third parties to invoke the carrier's defences and limits. The aim of this work, as we have said, of two folds: **first**, to explore a venue which may lead to better solution regarding the situation in U.A.E.; **second**, to draw conclusions of interest to the comparative lawyer particularly the U.A.E. lawyer and to provide the material from which he could draw his own.

Beside the discussion which has already been made some final comments may be appropriate.

1. The Common law test of liability seems to be more servers for the carrier than the U.A.E. general law test , because of the range of defence available to him under the former is narrower. Whereas, under English system, acts due to human agency (other than those of king's enemies) cannot amount to a defence, there are no such a priori limitations

in the U.A.E. law. With force majeure being a defence *ex lege* under the general rule, the conclusion would seem to be that whereas the English test is one of strict liability, the U.A.E. test is based upon a duty to show a high degree of skill and care : every care, rather than the ordinary, reasonable care as this is understood by the common law lawyers.

In details, however, there may be points where the U.A.E. system is more sever. For instance, in so far as the factual contents of act of God and force majeure overlap, it may well be that the kind of natural calamity required to satisfy the rule of force majeure is of a more pronounced and violent kind than that which will constitute an act of God in carriage by sea.

2. On the issue of the freedom of contractual exoneration by means of exception clauses the Common law test is more lenient: the parties can except almost anything (e.g., negligence and unseaworthiness); and English courts try to emphasis on the interpretation of clauses and give some reasonable meaning to them, while U.A.E. counterpart usually looks into legality of the clauses. The negligence of the carrier cannot be excepted nor the wilful or gross negligence of his employees but the carrier's vicarious liability for the slight fault of his master and crew may be set aside .

With regards to other exceptions (e.g., perils of the sea or act of war) the courts in U.A.E. would be reluctant to

recognise any exception lacks of the elements of force majeure , namely the event must be inevitable, unforeseen and irresistible. In other words the exception *ex lege* that of force majeure represents the lowest level of the carrier's liability and the highest level of its exclusion.

3. It has been mentioned that the regime of the carrier's liability in the U.A.E. Maritime Code is based on the Hague/Visby Rules . The main question arise here is whether the exceptions provided for in the Article 275 of the Code which in turn are identical to those contained in Article IV, Rule 2 of the Hague/Visby Rules should posses the elements of force majeure in order for the them to be able to protect the carrier.

We have said that the Brussels Convention are based on the principles of English shipping law, which itself is the outcome of the general practice in regard to the bills of lading drafted by English shipowners. Since in England there did not exist a written law to regulate the contract of carriage of goods by sea it can be said that the law was developed by the shipowners themselves in the exemption clauses included in the bills of lading in regard to liability for specified facts peculiar to and characteristic of such a form of transport. English judges, on the other hand, developed general rules for interpreting these clauses. They gave an exact legal meaning to the terms commonly used; and since England in 1924, the year in which the Convention

approved had the greatest tonnage in the world, it was a logical sequence that the terms of the English clauses were incorporated in an International Convention.

However, while the list of the excepted perils laid down in the Rules conforms to the English inductive system, it contrasts strongly with the attitude of the U.A.E. jurists, who prefer the synthesis of definitions and of concepts, and who consider the particular case deductively from the abstract principle.

Furthermore, in the Common Law system the contractual obligation is absolute and complete, and he who wants to profit by exonerating clauses, even concerning what in the U.A.E. system is called 'force majeure', must expressly insert them in the contract.

In the U.A.E. legal system there is the stark alternative 'force majeure' or 'liability' and the process is always the systematic reduction of each peril to these two categories: where the one ends, the other begins. The line drawn between liability and non liability in English law does not correspond with U.A.E. law; and a number of events which are not included in the 'force majeure' of U.A.E. law , relieve the carrier from liability under the Common law.

Therefore it is easy to understand the difficulties in U.A.E. law of departing from traditional and innate principles in order to follow the Rules, and, on the other hand, the constant tendency to fit the 'excepted perils' within the framework of 'force majeure'.

In effect the theory of the 'excepted perils' is the result of terms unilaterally imposed by the shipowner on the other party because of his economic superiority. This naturally led to a strong opposition by shipowners and insurers. So the history of the law of the carriage of goods by sea in this country is, to a certain extent, nothing else than the history of the struggle by the shippers and insurers to limit the advantageous position of carriers who drafted bills of lading containing too numerous clauses exonerating them from liability.

The U.A.E. method of interpretation, being more restrictive than the English, affords a less favourable position to the carrier. But two ways are open to the U.A.E. legislature to resolve the problem. **First** by extending the scope of the immunities in order to cover all the limits of immunities as provided by the English and American system and accepted by the Brussels Convention. The **other** way is by keeping the restrictive interpretation, but then allowing some departures from it.

The conclusion is, from the technical juridical point of view, that the U.A.E. national interest suggests a system of responsibility of the carrier by sea approximately equivalent to, and, above all, not more rigorous than that of England and other countries.

4. Exceptions and limitations of liability are of no effect where, under English law, the carrier commits negligence, deviation, or fails to provide a seaworthy ship provided that these acts are not expressly excluded by the terms of the contract of carriage, and where , under U.A.E. law, he or his servants commit wilful misconduct or gross negligence.

While the position in regard to negligence and unseaworthiness seems to be clear there is now some doubt as to whether the strict view of the concept of deviation - that is when the carrier commits a deviation no matter however slight is he could no longer rely on any of the contractual exceptions if the cargo-owner accepts deviation - could still survive the combined effect of the strictures of members of the House of Lords in Photo Production case.

it is submitted, following the discussion on this point, that the doctrine of deviation as it was existed prior to *Photo Production* Case [1980] 1 Lloyd's Rep. 545, could survive not as a rule of law, but as a sub-pecies of construction. The courts should take into consideration the entire of the contract with a view to discovering whether, on their true construction it was clear that the parties intended them to apply after deviation.

On the other hand, it may be argued that in assimilating the gross negligence of the subordinates with the gross negligence of the carrier himself, the U.A.E. law

goes further than is reasonable. There are cases no doubt in which the gross negligence of the servant or agent involves at the same time the gross negligence of the carrier. There may have been gross negligence in the choice of the servant or agent such as employing master of the ship a person who has no reasonable knowledge, skill and capacity. But there are other cases in which the gross negligence on the part of the servant is consistent with merely slight negligence or no negligence at all on the part of the carrier. The carrier may have taken every reasonable care in the choice of his servant, and he may have exercised every reasonable supervision over his conduct. It may, therefore, be reasonable to say that the carrier shall be necessarily liable for the wilful breach of his subordinate in order to prevent the possibility of connivance between the two. But the reason for extending the same principle to the gross negligence of the servants and agents are far from conclusive.

5. In theory '*privity of contract*' is a fundamental principle of English Common law which does not depend upon the intention of the parties to a contract. In the past this principle has been used to prevent a third party not being a party to the contract from relying on the provisions of the contract. But the decision in *The Eurymedon* [1974] 1 Lloyd's Rep. 534, seemed at last to provide a means by which a third party could be protected by the terms of a contract of

carriage although he is not a party to it. The Gordian knot created by the doctrine of '*privity of contract*' and the lack of direct dealing between the cargo-owners and stevedores was cut by the Privy Council preparing to concentrate on what it considered to be the commercial reality of the situation before it rather than the technical rules that had previously dominated this ares of the law. A well-drafted exemption clauses, such as the Himalaya Clause in *The Eurymedon* will often be effective to protect third parties. It should not be assumed that they always work, however. A lot will depend on the exact facts, which may not be known until after the damage had occurred.

Where the COGSA 1971 governs the contract of carriage, the right of the carrier's servants and agents to invoke the carrier's defences and limits becomes a statutory right provided that they are acting within the scope of their employment. This is of course a great improvement but as the Act left the status of independent contractors obscure it may incidentally encourage litigious claims to protection as a servant or an agent. We shall have to wait and see what courts decide, whether 'servant or agent' is given a wide or a restricted meaning, and whether the new category of independent contractor envisaged by Mr. Mustill in his article is discovered by the courts among the many people who take part in the carriage of any given cargo.

On the other hand, although the U.A.E. Maritime Code is silent on the question of the right of the carrier's employees to invoke the carrier's defences and limits; nevertheless, this question unlikely to create much difficulties particularly with the presence of the principle of 'stipulation for the benefit of a third party'. Under this principle, as we have seen, the carrier may validly insert in the contract of carriage an express stipulation extending the protection of the contract to a third party. Where there is such stipulation the third party will have a direct right against the cargo-owner entitles him to rely on the provisions of the contract of carriage. But in the absence of express stipulation, the servants and agents of the carrier have little chance to evade an unlimited tortuous or quasi-contractual negligence liability. This rule, although to be welcomed by a country such the U.A.E. where the cargo-interests dominate, is not without hardness in that the economically stronger (the carrier) is entitled to limit his liability, but that his servants or agents have to pay even the amount by which the actual damages exceed the statutory limitation amount.

It is submitted, therefore, that the protection provided by Art. 276 of the U.A.E. Maritime Code should be extended to cover the servants of the carrier (master and crew) when sued separately by the cargo-owner. There are many good reasons, beside the social reasons, to allow the servants to

invoke the limitations of the carrier. When doing their work the servants are participating in the performance of the contract of carriage between the carrier and the shipper, carrying out part of the obligations resting on the carrier. Even though they are not in a contractual relationship to the cargo-owner, it seems fair that they should have the same liability for damage to the goods as the carrier. When doing their work they only stepping into the shoes of the carrier. There is no real reason to confer on the servants a more comprehensive liability to the cargo-owner than that of the carrier himself. When the shipper is contracting with the carrier he is aware of the extent of the carrier's liability and of his risks. Therefore, he is able at that time to protect himself by insurance. He is contracting with the carrier on the assumption that the latter will have only a limited liability for damages to the goods when performing the contract of carriage. This does not, however, mean that he expects to recover in full from anyone else who is rendering services to the carrier.

APPENDIX

MARITIME CODE OF U.A.E

Chapter Four: Running of the Ship

Title I

CONTRACT OF AFFREIGHTMENT

Section 1 General Provisions

Article 216

A contract of affreightment is a contract whereby the disponent owner undertakes, in return for freight, to place the the vessel , in whole or in part at the charterer's disposal for a specified period or to carry out a specified voyage or voyages.

Article 217

The provisions of this Title shall apply unless the parties agree to the contrary. Nevertheless, it shall not be permissible to agree on any provision which is contrary to the nature of the charterparty.

Article 218

The charter of the ship should be evidenced by written document called a charterparty.

Article 219

The law of the flag of the ship shall apply to the charterparty without prejudice to the Islamic Shari'ah or public order.

Article 220

The sale of the ship shall not result in the termination of the charterparty, but the purchaser may request that the same be terminated if he proves that he was unaware of the charterparty at the time of the sale and could not have known it.

Article 221

1. The charterer may sub-charter the ship unless there is a stipulation to the contrary, and in such case, the original original charterer shall remain liable towards the disponent owner for the obligations arising out of the contract of affreightment.

2. The sub-chartering does not establish any direct relation between the disponent owner and the sub-charterer, but nevertheless, the disponent owner may sue the sub-charterer for the freight he still owes to the original charterer.

Section 2 *Voyage Chartering*

Article 225

A voyage charterparty is a contract whereby the disponent owner undertakes to place a specified vessel, in whole or in part, at the charterer's disposal, for one or more specified voyages.

Article 227

The disponent owner shall be obliged to place the vessel at the charterer's disposal at the time and place agreed upon in a seaworthy state and equipped as necessary to undertake the voyage or voyages provided for in the charterparty. He shall also be obliged to keep the vessel in seaworthy state throughout the voyage or voyages which have been agreed upon.

Article 228

The disponent owner shall be responsible for any damage suffered by the goods which the master receives on board the ship within the limits set out in the charterparty unless it is proved that he has fulfilled his duties referred to in the preceding Article or that the damage did not arise from his failure to fulfil his duties.

Article 229

The disponent owner shall retain the right as to the navigational and commercial management of the vessel.

Article 236

A voyage charterparty shall to be terminated without damages to any party by reason of force majeure which renders the execution of the voyage impossible.

Section 3 *Time Chartering*

Article 244

1. A time charter is a contract whereby the disponent owner undertakes to place an equipped ship at the charterer's disposal for an agreed period of time.

Article 245

The disponent owner shall be obliged to place at the charterer's disposal, at the time and place agreed upon, the vessel specified in seaworthy state and equipped as necessary to carry out the operations provided for in the charterparty. He shall also be obliged to keep the vessel seaworthy throughout the period of the contract.

Article 246

1. The disponent owner shall retain the navigational management of the ship and shall be responsible for equipping and maintaining the vessel as well as appointing, feeding and paying the wages of the crew.

2. It shall be permissible to agree that the navigational management shall be transferred to the charterer.

3. If the navigational management of the vessel is transferred to the charterer, he shall be responsible for the loss of the ship and for the general average unless he can prove that the loss resulted from a navigational hazard or fault of the disponent owner. If the navigational management

of the vessel is not transferred to the charterer the disponent owner shall be responsible for the loss of the vessel unless he can prove that the loss resulted from the fault of the charterer.

Article 247

1. The charterer shall have the commercial management of the vessel and shall bear the costs thereof and in particular he shall supply the vessel with fuel, oil, lubricants and fresh water, and shall pay customs, pilotage, towage and other expenses necessitated by the commercial use of the vessel.

2. The master must follow the instructions given to him by the charterer in all matters connected with the commercial use of the vessel within the limits specified in the charter.

Article 248

1. The disponent owner shall be responsible for damage suffered by the goods if it results from his failure to fulfil his obligations.

2. The charterer shall be responsible for damage resulting from the commercial use of the vessel having regard to wear and tear arising out of the ordinary use.

Section 4 *Bareboat Chartering*

Article 252

A bareboat charter is a contract whereby the disponent owner undertake to place, in return for freight, for a specified period a specified vessel without any crew and equipment or partly equipped.

Article 253

1. The disponent owner is obliged to place the vessel specified at the charterer's disposal at the time and place agreed upon in a seaworthy state and fit for the service designated for it, and likewise he shall be obliged to make good any damage resulting from a defect in the vessel.

Title II

THE CONTRACT OF CARRIAGE OF GOODS BY SEA

Article 256

1. A contract of carriage by sea, is a contract whereby the carrier undertakes to carry goods from one port to another in return for freight payable by the shipper.

2. The provisions of this Title apply from the time the carrier or his representative take over the goods until such time as they are delivered to the consignee.

Article 257

1. A contract of carriage by sea shall be evidenced by a bill of lading and the carrier or his representative shall, on demand of the shipper, issue a bill of lading.

2. The bill of lading must include the following particulars:

(a) The name and domicile of the carrier, shipper and consignee.

(b) Specification of the goods delivered to the carrier and the date of delivery thereof.

(c) Port of loading and the port of discharge.

(d) The name and nationality of the vessel.

(e) The amount of the freight payable and the method of calculating it.

(f) The place and date of issuance of the bill of lading.

(g) The number of copies of the bill of lading which have been made.

(h) The signature of the master and shipper.

Article 258

The specification of the goods delivered to the carrier must include the following particulars in the bill of lading:

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods are starts, provided such marks are shown clearly upon the goods and remain legible until the end of the voyage.

(b) Either the number of package or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent condition of the goods.

Article 259

1. The carrier or his representative may express reservations against the particulars given by the shipper in connection with the marks, number of packages or pieces, quantity or weight of the goods, if the carrier has reasonable grounds to suspect their accuracy or if he has no ordinary means of checking such particulars.

2. The reasons for the reservation on the particulars must be stated in the bill of lading.

3. The shipper or the person who receive the goods may prove the accuracy of those particulars.

4. The shipper shall be responsible to the carrier for the inaccuracy of the particulars given by him concerning the goods and which have been inserted in the bill of lading. It shall not be permissible for the carrier to rely on any inaccuracy in the said particulars in the bill of lading as against any person other than the shipper.

Article 260

Any letter of guarantee or agreement by which the shipper is undertakes to indemnify the carrier against losses resulting from the issuance of the bill of lading free of any reservations may not be relied on as against third parties, but nevertheless a third party may rely on the said agreement as against the shipper.

Article 261

The carrier may give the shipper a receipt for the delivery of the goods before they are loaded on board the vessel which shall be substituted for the bill of lading upon the request of the shipper after the goods have been placed ion board the ship and the receipt shall have the same effects as the bill of lading if it contains the particulars prescribed in Article 257 and is endorsed with the word "shipped".

Article 262

1. The bill of lading shall be made out in two original copies which one shall be given to the shipper and the other shall remain with the carrier and mention shall be made on it that it is not negotiable. The shipper or his representative shall sign the original copy retained by the carrier, and the carrier or his representative shall sign the original copy delivered to the shipper and that copy shall give the person in lawful possession thereof the right to take delivery of the goods and to dispose the same.

2. It is permissible to make out a number of similar copies to the original copy handed to the shipper. Each copy must be numbered and the number of copies made must stated therein. Each copy shall be able to take the place of the other copies and if one of them is used the other copies shall be deemed to have no effect as against the carrier.

Article 263

1. If a discrepancy is found between the copy of the bill of lading signed by the shipper or his representative and the copy signed by the carrier or his representative, each original copy shall valid as against the person who signed the same.

2. If a discrepancy is found between the charterparty and the bill of lading the charterparty shall be relied on in relations between the disponent owner and the charterer. But with regard to the relations between the charterer and the shipper the bill of lading alone shall be referred to unless it explicitly refers to the charterparty.

Article 264

1. The bill of lading shall be made out in the name of a specified person or to his order or the holder.

2. It shall be permissible to assign a named bill of lading by following the legal procedures in force regarding the transfer of rights.

3. A bill of lading made out to order shall be negotiable by endorsement.

4. A bill of lading made out to the holder shall be negotiable by delivery and the same provision shall apply to a bill of lading made out to order and endorsed in blank.

5. In the event that a bill of lading made out to order is being negotiated it shall be permissible to agree to limit the warranty to the existence of the goods and the validity of the contract of carriage at the time of endorsement.

6. It shall be permissible to stipulate in the bill of lading that its assignment or negotiation is prohibited.

Article 265

1. If the master finds on board the vessel and prior to sailing any goods not mentioned in the bill of lading or in respect of which the particulars given are contrary to the truth it shall be permissible for him to unload those goods off the ship at the place of lading or to allow them to remain on the ship upon payment of freight equivalent to the highest freight payable on goods of that type at the said place without prejudice to any compensation which may become due.

2. If the said goods are found during the voyage it shall be permissible for the master to order that they be thrown into the sea if they are such as to cause damage to the vessel or to goods loaded thereon or if the carriage thereof will necessitate the payment of fines or the payment of costs in excess of the value thereof or if the sale or export thereof are prohibited by law.

Article 266

1. The bill of lading shall be deemed to be an authoritative document in proving the particulars it contains between the carrier and the shipper and with regard to third parties.

2. In the relationship between the carrier and the shipper, the contrary may be proved to what is stated in the bill of

lading. However, proof to the contrary by the carrier shall not be admissible when the bill of lading has been transferred to a third party acting in good faith, nevertheless, the third party may prove so . The consignee in whose name or to whose order the bill of lading was issued shall be deemed to be a third party within the meaning of this Article unless he is the shipper himself.

Article 267

1. The master must deliver the goods to the consignee or his representative; and the consignee is the person whose name is stated in a named bill of lading , the last endorsee on a bill of lading to order, and the person presenting the bill on arrival if the bill is made out for the bearer.

2. If a number of persons holding copies of negotiable bills of lading apply to take delivery of the goods, preference must be given to the holder of the copy bearing the earliest date of endorsement, and if all endorsement are of the same date the master must deposit the goods with a person agreed upon by the rival claimants , if they fail to agree the competent civil court shall appoint him.

3. An undated endorsement shall be deemed to have been made on the day the bill of lading was presented.

4. If the goods are delivered to a bona fide holder of one of the negotiable copies of the bill of lading, this holder must be preferred over the other holders of the other copies even though the same may bear earlier dates of endorsement.

Article 268

1. Any person who is entitled to receive the goods by virtue of a bill of lading may request authorisation from the carrier to deliver specific quantity thereof on condition that the contract of carriage so provides. Delivery orders shall be issued in the name of a specific person or to his order or to the holder and shall be signed by the carrier and the person seeking the order.

2. If the bill of lading is negotiable the carrier must state therein the delivery orders which he had given and the goods entered therein. If the goods have been distributed over several delivery orders, the carriers must recall the bill of lading.

Article 269

If the person who is entitled to receive the goods does not attend or if he refuses to take delivery of the same , the carrier may request a permission from the competent court to deposit the goods with a custodian to be appointed by the court. The carrier may request permission to sell all or part of the goods to pay the freight.

Article 270

The delivery of the original copy of the bill of lading to the carrier or his representative shall be proof of the delivery of the goods to the person who is entitled to receive them in the condition set out in the bill of lading unless there is evidence to the contrary.

Article 271

1. If the vessel is loaded with dangerous, inflammable or explosive goods it is permissible for the carrier at any time to remove them from the ship, destroy them or neutralise their danger without any compensation, if he proves that he would not consent to their being loaded if he was aware of their type and nature. In addition, the shipper shall be responsible for loss and costs arising directly or indirectly from such goods being loaded on the vessel.

2. If goods of this type are loaded on the vessel with the knowledge and consent of the carrier and they become hazard to the vessel or the cargo, they may be off-loaded from the vessel, destroyed of neutralised by the carrier without any responsibility upon him, provided that the provisions relating to the general average are observed, if necessary.

Article 272

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy; to properly equip, man and supply the ship; to make the holds and cool chambers and other parts of the ship fit for the reception, carriage and preservation of the goods.

2. The carrier shall also exercise due diligence to load, handle, stow, carry, keep, care for, discharge, and deliver of the goods.

Article 273

With the exception of coastal shipping, the carrier or his representative shall not carry the goods on deck unless the shipper has given him permission in writing or it is customary at the port of loading to do this.

Article 274

The provisions of Article 220, 221, 228 and 240 of this Code shall apply to a contract of carriage by sea.

Article 275

1. The carrier shall be responsible for the loss of or damage to the goods from the time he has taken over the goods at the port of loading until the time he has delivered them to the person entitled to them at the port of discharge, unless he proves that the loss or damage resulted from the following occurrences:

(a) Unseaworthiness of the ship provided that the carrier must prove that he has fulfilled the obligations prescribed under Article 272.

(b) Errors of the master, mariner, pilots or others maritime subordinates (of the carrier) in the navigation or management of the ship.

(c) Fire, unless caused by the act or fault of the carrier.

(d) Perils, dangers and accidents of the sea or other navigable waters.

(e) Act of God.

(f) Acts of war.

(g) Acts of public enemies.

(h) Any arrest or restraint of government, authority or people, or legal seizure.

(i) Quarantine restrictions.

(j) Any strike or stoppage of labour or any other lock-out which might prevent the continuance of the work wholly or in part.

(k) Riots and civil commotions.

(l) Act or omission of the shipper or owner of the goods, his agent or representative.

(m) Wastage in bulk or weight or any other wastage arising from inherent defect, nature or vice of the goods.

(n) Insufficiency of packing.

(o) Insufficiency or inadequacy of marks of the goods.

(p) Saving or attempting to save lives or properties at sea.

(q) Latent defects not discoverable by due diligence.

(r) Any deviation to save or attempt to save lives or properties at sea or any reasonable deviation.

(s) Any other cause arising without the error of the carrier, his subordinates or representative. Any person pleading this defence must prove that the errors of the such persons did not contribute to the loss or damage.

2. It is permissible for the shipper in the circumstances

set out above to prove that the loss or damage resulted from the fault of the carrier or his subordinates in a manner unconnected with the navigation or management of the ship.

Article 276

1. The responsibility of the carrier for the loss of or damage to the goods shall in all events be limited to a sum not exceeding Dh.10,000 per package or unit taken as a basis in calculating the freight, or a sum not exceeding Dh. 30 per kilogram of the gross weight of the goods, whichever is the higher.

2. If the packages or unit are staffed in boxes, containers or other receptacles and the number of the packages or units contained in the receptacles is stated in the bill of lading, then each one shall be deemed to be a package or unit in determining the maximum rate for responsibility; and if the container is not owned or supplied by the carrier and is lost or damaged, the container shall be considered one separate package or unit.

3. The carrier may not invoke the limitation of responsibility if the shipper declares before shipment the nature and value of the goods and any particular importance attached to their preservation, and such declaration was inserted in the bill of lading. The said declaration shall be deemed as an evidence of the true value of the goods but the carrier may prove the contrary.

4. It is permissible by a special agreement between the shipper and the carrier or his representative to specify an

upper limit of liability of the carrier different from the limit set out in this Article provided that it is not less than it.

5. The carrier shall not be responsible in any event for loss of or damage to goods if their nature or value has been knowingly mis-stated by the shipper in the bill of lading.

Article 277

The carrier and the person taking the delivery of the goods must in the event that they are lost or damaged provide facilities for the other to inspect the goods and verify the number of packages.

Article 278

1. Any stipulation in a bill of lading or any other similar document relieving the carrier from liability for loss or damage to goods arising from failure in the duties and obligations provided in this Title or lessening such liability otherwise than as provided in this Title, shall be void.

2. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Article 279

1. The carrier may surrender in whole or in part all or any of his rights and immunities or to increase his obligations under this Title, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

2. It is permissible to insert in the bill of lading any stipulations regarding general average provided that such stipulations do not conflict with the internationally recognised rules in respect of general average.

Article 280

1. It shall be permissible to agree on provisions for liability contrary to those set out in the foregoing Articles in connection with coastal navigation and likewise in other type of navigation if the nature of the goods required to be carried or the circumstances of the shipment or the exceptional conditions under which the carriage is required to be carried out are such as to justify making a special agreement with regard thereto.

2. The validity of the agreement referred to in the above subparagraph is dependent upon the following:

(a) It must not contrary to public policy.

(b) It must not be related to the care or diligence which must be exercised by the servants or agents of the carrier in regard to the loading , handling, stowage, carriage, custody, care and discharge of the goods carried by sea.

(c) No bill of lading shall be issued.

(d) The agreement should be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Article 281

1. In the event that part of the goods is lost or damaged the person taking delivery of the same must give written notice of loss or damage to the carrier or his agent at the port of discharge before or at the time of delivery, failing which it will be presumed that they have been delivered to him as described in the bill of lading until the contrary is proved. However, if the loss or damage are not apparent, the said notice may be given within three days following the delivery of the goods. Public holidays shall not be counted as part of this period.

2. The notice need not be given if the goods have, at the time of delivery, been inspected in the presence of the carrier or his representative and the person taking delivery of the goods.

Article 282

The provisions relating to the responsibility in this Title shall be applicable to the carriage by sea covered by a bill of lading from the time the carrier or his representative has taken over the goods until the time they have been delivered to the consignee and no stipulation to the contrary shall be valid.

Article 283

The provisions relating to the responsibility in this Title shall not apply to the charterparty, but if bills of lading are issued in the event of a vessel being subject to a charterparty, such provisions shall apply to the said

documents from the time when the bill of lading governs the relations between the carrier and the holder of the bill of lading.

Article 284

The provisions relating to the liability provided for in this Title shall not be applicable to the carriage of live animals or goods which by the contract of carriage is stated as being carried on deck and is so carried.

Article 285

1. The carrier is responsible for delay in delivery of the goods, unless he proves that the delay resulted from any of the occurrence stated in Article 275.

2. The carrier is deemed to have been delayed in delivery if he fails to deliver the goods at the time agreed upon and, in the absence of such an agreement, if he fails to deliver them at the time when an ordinary carrier would deliver them in similar circumstances.

Article 286

1. The carrier may issue a straight bill of lading whereby he undertakes to carry the goods to a specified place in successive stages; and in such case, the carrier shall be responsible for all obligations arising out of the bill until the end of the carriage and shall be responsible for the acts of subsequent carriers who take delivery of the goods.

2. Any successive carrier shall only be responsible for damage which occurs while he is carrying the goods.

Article 287

The following claims shall not be heard if opposed and in the absence of lawful excuse:

(a) Claims arising from a contract of carriage by sea after one year has elapsed from the date when the goods were delivered or the date when they should have been delivered.

(b) Claims of restitution against a third party who has been claimed against after ninety days have elapsed from the date of the claim being made against him or from the date when

(c) Unentitled cases of reclamation after one year has elapsed from the day when the claimant learns of his right to reclaim.

BIBLIOGRAPHY

BOOKS:

Abbott, Merchant Ships and Seamen (1st ed) London, 1802.

Abd-alRashid Ma'mun, Causation in Civil Liability, Cairo

Al-Sanhoury, A., 2 Treaties on Egyptian Thoery of Obligations, (Cairo 1952) (in Arabic).

Ali Awad, Maritime Law , Cairo , 1987 (in Arabic).

Anson's Law of Contract (26th ed) London, 1984.

Astle, Shipowners' Cargo Liabilities and Immunities (3rd ed) London, 1967.

Badaowi, B., Origins of Obligations , Cairo, 1945.

Carver,s Carriage by Sea (13th ed.) London, 1982.

Chorley and Giles' Shipping Law (8th ed) London, 1987.

C.M.I. Stockholm Conference, 1963.

Cole, S., The Carriage of Goods by Sea Act, London, 1937.

Colinvaux, R., The Carriage of Goods by Sea Act, 1924 , London, 1954.

Coote, B., Exception Clauses, London, 1964.

Dasooqi, The Assessment of Damages, Cairo, 1987 (in Arabic).

Dworkin, The Philosophy of Law, London, 1977.

Fletcher, The Carrier's Liability, London, 1932.

Gilmore & Black, The Law of Admiralty (2nd ed) 1975.

Graveson, Bill of Lading and the Unification of Maritime Law in the English Courts, in Conflict of Laws and International Contracts, London, 1949.

Hart and Honoure, Causation in the Law, London, 1959.

Halsbury's Laws of England, (4th edn, 1973-1843), Vol. 43.

Khan-Freund, O., The Law of Carriage by Land Transport, London, 1965.

Knauth, Ocean Bills of Lading (4th edn.) 1953.

Lawson, Exclusion Clauses, London, 1974.

Lowndes and Rudolf, The Law of General Average and the York-Antwerp Rules (10th ed) London, 1975.

Machachlan, Merchant Shipping (7th ed) London, 1932.

Miller, Liability of International Air Transport, 1977.

Payne, Carriage of Goods by Sea, London, 1954.

Scrutton, Charterparties and Bills of Lading (18th ed) London, 1974.

Scrutton, Charterparties and Bills of Lading (17th ed) London, 1984.

Selvig, E., Unit Limitation of Carrier's Liability, London, 1961.

Simpson, History of the Common Law of Contract, London, 1975.

Story, Bailment (9th ed) 1878.

Temperely and Vaughan, Carriage of Goods by Sea Act, 1924, (4th ed) 1932.

Tetley, W., Marine Cargo Claims (2nd ed) Toronto, 1978.

Tetley, W., Marine Cargo Claims (3rd ed) 1988.

Treitel, The Law of Contract (7th ed) London, 1987.

Weill, A., Civil Law - The Obligations , 1971.

Wilson, F.J., Carriage of Goods by Sea (1st ed) London, 1988.

Yates, D., Exclusion Clauses in Contracts (2nd ed) 1982.

Yearbook of the United Nations Commission on International Trade Law, 1972, Vol. III.

JOURNALS:

Ali Awad, " The Limitation of the Maritime Carrier's Liability according to the Brussels Convention" The Advocacy Journal, 35th year, no. 7 at p. 1416 (in Arabic).

Bailey, "Perils of the Sea" , Reported in Law relating to Bills of Lading by Leggett E, London, 1893.

Browing, " Warsaw System from the French Perspective" (1978) 11 Vanderbill Journal of Transnational Law, 118.

Cadwallder, F.J.J., "Care of Cargo under the Hague Rules" Current Legal Problem (1966).

Cadwallder, F.J.J., "Due Diligence at Sea" 74 I.D.M. 1972

Cartoon, B.J., "Drafting an acceptable Force Majeure Clause" (1978) J.B.L. 230.

Clarke, M., "Fundamental Breach of Charterparty" (1978) 3 LMCLQ 427.

Coote, B., "Breach and Exception Clause" (1970) 3 C.L.J. 221.

Coote, B., "Vicarious Immunity by an Alternative Route" (1972) 35 M.L.R. 176.

Coote, B., "Vicarious Immunity by an Alternative Route - II" (1974) 37 M.L.R. 453.

Coote, B., "Vicarious Immunity by an Alternative Route" (1979) 42 M.L.R. 453.

Dawson, "Himalaya Clauses, Consideration and Privity of Contract" (1974-5) 6 N.Z.U.L.R. 161.

Debattista, C., "Fundamental Breach and Deviation in the Carriage of Goods by Sea" (1989) J.B.L. 447.

De Orchic, "The Container and the Package Limitation" 5 J.M.L.C. 215 (1974).

Diamond, A., "The Hague-Visby Rules" (1978) 2 LMCLQ 225.

Donaldson, J., "Servants and Agents" (1983) I.D.M. 210.

Dworkin, "Stare Decisis in the House of Lords" (1962) 25 M.L.R. 163.

Editorial, "The Test of Reasonableness; Exemption Clauses; the Cabbage Seed Case" (1982) J.B.L. 447.

Gotze, H., "Case and Comment" 33 C.B.R. (1960)

Gronfors, K., "Why not Independent Contractors?" (1964) J.B.L. 25.

Guest, "Fundamental Breach of Contract" (1961) 77 L.Q.R. 98.

Hanson, "Contract - Third Party - Benefit of Exemption Clauses" (1959) C.L.J. 150.

Ivamy, H., "The Carriage of Goods by Sea Act, 1924, and The Doctrine of 'Stages'" 23 M.L.R. 200.

Jones, P., "Demise Clauses in Bills of Lading" (1976) New Directions in Maritime Law, 81.

Llewellyn, K., "Review of Prausnitz, The Standardisation of Commercial Contracts in English and Continental Law (1937)" (1939) 52 Harv. L.R. 700.

Mankabady, S., "The duty to Care for the Cargo" 10 E.T.L. 2.

Marshall, E., "Incorporation of Arbitration Clauses into Charterparty Bill of Lading" (1982) J.B.L. 478.

Mc Gilchrist, "Wilful Misconduct and the Warsaw Convention" (1977) 4 LMCLQ 539.

Mills, C.P., "The Future of Deviation in the Law of Carriage of Goods" (1983) 4 LMCLQ 587.

Mustill, M., "Carriage of Goods by Sea Act 1971" (1972) Arkiv for Sjorett, 708.

Nicholas, B., "Rules and Terms - Civil and Common Law" (1974) 48 Tul.L.R. 946.

Palmer, "The Stevedore's Dilemma: Exemption Clauses and Third Parties" (1974) J.B.L. 101.

Powles, D.G., "The Himalaya Clause" (1979) LMCLQ 331.

Reynolds, F., "Note" 90 L.Q.R. 301.

Rose, F.D., "Return to Elder Dempster" (1975) Anglo-American L.R. 7.

Simon, "The Law of Shipping Containers" 5 J.M.L.C. 507 (1974).

Tetley, W., "Identity of the Carrier - The Hague Rules, Hague-Visby Rules, UNCITRAL" (1977) LMCLQ 519.

Trietel, "Exemption Clauses and Third Parties" (1955) 18 M.L.R. 172.

Verplaetse, "From Warsaw to the French Cour de Cassation" (1970) 36 J.A.L.C. 50.

Waddams, S.M., "Comment" 55 C.B.R. 327 (1977).

Wageningen, V, "Interpreting COGSA: The Meaning of 'package'" 30 University of Miami L. Rev. (1975) p. 169.

Wooldridge, "Inequality of Bargaining Power in Contract" (1977) J.B.L. 312.

Zaphirous, "The Hague Rules" (1963) J.B.L. 221.

LATINE MAXIMS USED IN THE TEXT

abundate cautela a bundant or extemre caution.
ab initio from the beginning.
causa causans the immediate cause; the nearst cause of an event.
causa proxima the proximate or immediate cause.
causa promixa non remota spectatur the proximate cause and not the remote one must be regarded.
causa sine qua non the cause without which the occurrence would not have happened.
ejusdem generis of the same kind, class or nature.
ex lege by the law- as a matter of law.
ex nunc from now.
ex post facto after the fact; by subsequent fact.
ex proprio vigore by their or its own force.
ex tunc from that time; from then.
fraudem legis fraud upon law.
inter alia among others.
lata culpa dolo aequiparature gross negligence is equivalent to fraud.
lato sensu in a broad sense.
obiter dictum an opinion of a judge not essential for the decision in the case before the court .
per incuriam through inadvertence or through want of care.
prima facie at first view, from the appearance.
ratio decidendi the grounds or the reasons for a decision.
res ipsa loquitur the thing speaks for itself.
stricto sensu (to interpret words) in their strict sense.
suit generis its own right. Constituting a class of its own.
verba chartarum fortuis accipiuntur contra proferentem the words of a deed are to be received more strongly against the grantor.