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The consequences of a deletion of the nautical fault

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2 SUMMARY

When a vessel is involved in an accident like grounding or collision there is often some sort of damage to the ship or even the total loss of the ship. Let us say the ship is damaged and there is a seawater leakage or similar, then it is likely that the cargo will also be damaged. In most cases where the cargo is lost or damaged the claimant will generally present the plausible argument that the carrier would have been able to reduce the damage by having made a different navigational decision. In most courts, the Swedish for example, this would be to dig your own grave. The reason for this is that a *navigational error* performed by almost anyone on board, except by the carrier himself, would free the carrier from liability according to law. Furthermore a *fault in the management of the ship* that by mistake damages the cargo can also lead to the freedom of liability for the carrier. These two grounds, available for the carrier's defence against liability for cargo, are together called the *nautical fault*.

The purpose of the nautical fault has a long history in shipping industry and is rather created to entail a reasonable allocation of risk than to favour the carriers (even though, yes, there have been some carrier friendly provisions in shipping over the years) as it might seem at a first glance to someone not familiar with maritime law. The way things are going, more and more support is shown for the proposal to delete the nautical fault defence from the regulations of maritime transport. Some nations have already deleted it, but Sweden, among many others, is perhaps yet to come?

With the intention to achieve international uniformity on the law of carriage of goods by sea the ten year work on a new convention is coming towards an end. Notwithstanding the important goal of uniformity the long debated issue of the nautical fault has now resulted in the removal of the exoneration from the draft. As soon as the draft is signed, its ratification will be considered by a majority of states all around the world. For Sweden it is an important question since the nautical fault would then no longer prevail for the carrier's liability defence after around 80 years of application. Therefore this thesis is summarizing and discussing the consequences that the deletion of the nautical fault would have on shipping industry, hopefully for the reader to get an idea and maybe make up hers/his own opinion.

3 PREFACE

When I first thought of the idea to write about the nautical fault I did not know much about it other than I thought it was an interesting rule, so obviously different from the logical law I felt used to. I did as a matter of fact not at all anticipate exactly *how* current the debate was. However, that has added a lot of interesting aspects during the work.

I have had the opportunity to explain my thesis to many laymen during the time while I have worked with it. Without exception, the reaction to the nautical fault defence is that it seems very unreasonable to anyone not familiar with the shipping industry. To a layman it is of course easy to compare carriage by sea with carriage by road since trucks are part of life on an everyday-basis. It seems obvious a truck company would not have the opportunity to avoid risk towards the cargo owner through defending themselves with the argument that the truck driver made a mistake and took the wrong highway or caused a collision against a bridge pillar through his negligent manoeuvring of the truck. Logical conclusions seem easy to draw. The laymen with whom I have talked were all surprised by the unique characteristics of the nautical fault which in my view is understandable. However, this thesis shows that there is so much more to it and to me, law has returned to its logic.

I would like to sincerely thank my supervisor, Professor Svante Johansson for his patience and support throughout the work of this thesis. Although tough and demanding, undoubtedly the most sympathetic teacher I have met at The Department of law at Göteborg University.

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Göteborg, May 2007,

Madeleine Jansson

4 ABBREVIATIONS

CMI	Comité Maritime International
CMR	Convention on the Contract for the International Carriage of Goods by Road 1956
EEC	European Economic Community
EU	European Union
ISC	International Sub Committee
MLAANZ	Maritime Law Association of Australia and New Zealand
OECD	Organisation for Economic Co-operation and Development
SMC	Swedish Maritime Code
UN	United Nations
UNCITRAL	United Nations Commission on the International Trade Law
UNCTAD	United Nations Conference on Trade and Development
YAR	York Antwerp Rules

5 INTRODUCTION

5.1 General

The transport of goods over navigable waters has some individual characteristics resulting in a system of allocation of risk not found in the legislations of any other transport mode; the *nautical fault* being the element in the legislation of sea carriage which is most diverse. The most distinguishing and important characteristic of sea transport is the great value possible to carry onboard each ship. Imagine the total loss of a large vessel fully loaded with goods compared to the value of a loaded truck! Nevertheless, the transport mode of sea carriage is the very dominant in international transit of goods. In the European Union 90 % of the international commerce is using carriage of goods by sea, while 30 % of the trade within the EU is shipped by this transport mode.¹ A change in the liability of the sea carriage would therefore have larger impact on the pattern of modern shipping business and international trade in general than a change of liability system of any other means of transport.

Shipping is probably the most international of all great businesses in the world today. A ship can be registered in one country, owned by a shipping company in a second country, have a master from a third country, a crew from a fourth country, and sail between a fifth and a sixth country. The circumstances of carriage of goods by sea lead to that only one carriage itself can be covered by various national legislations. At least it usually falls under the scope of more than one domestic law. It is of great importance that merchants who sell or buy goods carried by sea in international trade, as well as those who give credit or insure them are aware of the possible risks. Otherwise, costs to trade and, consequently, freight, interest and profit rates cannot be calculated, which would obviously be destructive to international maritime commerce. Thus the demand for a certain uniformity of maritime legislations is decisive.

In maritime trade, the carrier who obliges himself to take cargo from one place to another by sea is one of the most important players. After the goods are delivered to him cargo interests lose physical control over them and only the carrier is in a position to prevent loss or damage to the goods. It is therefore fair to, under reasonable conditions, shift liability for breach of the contract of carriage onto the carrier. But those “reasonable conditions”, what are they? Is it reasonable that the carrier is responsible for any damage to the goods while in his custody? If the liability appears to be too strict there is of course a risk that the carrier will spend his money on insurance instead of optimizing the care for the cargo. Or is it reasonable that he can escape liability for the goods when his servants have made a mistake and caused the ship’s sinking? Under applicable law in Sweden this would probably be considered a *nautical fault* which means that the carrier does not bear the risk and the cargo owner (or his insurer) must compensate his own loss. This may seem like a weak liability imposed on the carrier and if it is too easy to escape liability the carrier might, again, relax in his due diligence for the cargo. However, the system is built on an *allocation of risk*. One must have in mind the incredible value of cargo that can be carried on only one ship. The exposed position of the carrier in case of a total loss is very serious and a clear reason for why the limitation of liability has emerged.² Depending on the type of goods, sometimes the value of the cargo is

¹ Katiforis, <http://www.europarl.europa.eu/press/sdp/journ/sv/1997/n9703112.htm>.

² SMC Chapter 9.

greater than the value of the entire ship. Would it then be fair to obligate the carrier to compensate for the cargo when his ship has also been lost?

This thesis will show the importance of the nautical fault defence in allocation of risk, as well as why it is so controversial and the attempts to compromise it away. Carriers still make large investments in maritime transport and failure in the navigation or management of the ship may even today ruin their business. Moreover, as a result of advancements in the construction of bulk cargo carriers or tankers capable of carrying large amount of cargo, carriers' income and risk have increased. However, owing to developments in the hull and liability insurance industry, carriers have gained more opportunity to protect themselves against risks endangering their marine assets. Calls paid by them have been added to freight and, consequently, passed onto customers. Cargo carried onboard a ship in international transit is however normally insured by different insurers in various different countries. With the liability system of today one could say that the cargo owner bears the risk of a total loss of his goods. Whether acceptable or not it does without question lead to a good spread of the risk and further reduces the economical consequences of total loss.

The *nautical fault* has been one of the most urgent matters with reference to the liability issue over the last decades. While some nations have already deleted it, others still support the retention of it. Secondly it is a very present topic since the drafting of what might become a new convention is proceeding in the UN. As consequence of a new convention all states, including Sweden would have to decide upon ratification.

5.2 Purpose

The purpose of this thesis is to illuminate all the aspects of the nautical fault; from the historical purpose and invention; through the spreading and application; to the heavy arguments for deletion and the drafting of a future law not including the nautical fault to finally reach the main purpose to find and consider all the possible consequences a deletion could have.

Firstly I shall study the nature and the characteristics of the rule. How is it applied in Sweden and what prerequisites must be fulfilled in order to apply the rule? It is further my purpose to give a thorough review of the legislations since the nautical fault was invented up until today. Are the historical purposes of the nautical fault defence still valid today and what is the general opinion in the shipping industry? I have found it important to manage to understand the purpose of the rule and why it was created. However, it is also important to apply those purposes on the conditions of shipping today. It is important to understand that most arguments and opinions concerning the nautical fault, as in any other debate, come from people or organizations whom are parties to the issue.

Since the possibility of a new convention, excluding the nautical fault defence, is so immediate it is my absolute purpose to evaluate the consequences of such a deletion of the rule. What might happen in the legal sense? In an economical view, what will be effective and less expensive and how can it generate more costs? Are there any practical consequences to the shipping industry? Hopefully, by the end of the thesis, I will have examined most of the features, positive and negative, and the reader will experience a deeper understanding of the rule.

5.3 Method and Procedure

The purpose is as stated above to illuminate all the aspects of the nautical fault. Therefore the thesis consists of five main chapters/”parts” which each systematically, and in some ways also chronologically, deals with all the different characters of the rule. PART I is focusing on the actual rule of the nautical fault as it is framed in The Swedish Maritime Code. Even with Sweden in the focus it is impossible, and would be fatal for the result, to not illustrate the international application of law. This might, for some, give a divided experience of the thesis. Therefore it is important to keep in mind that the connecting thought throughout this study is the nautical fault, and consequently that is introduced firstly. The scope and basis of liability of the carrier are presented before the details of the nautical fault defence are described, thereby the separation between navigational error and management of the ship. This chapter also brings up the difficulties in applying the rule and the close relation to the requirement of seaworthiness and care for the cargo where further some case law is exemplified.

PART II chronologically calls the three current legislations on international carriage of goods by sea. To start with though there is a short presentation of the initial lawmaking of bills of lading clauses resulting in the Harter Act. The Hamburg Convention is treated with some special attention since this is the only current legislation where the nautical fault cannot be invoked by the carrier and the preceding work of the deletion is studied. Thereafter the adoption of convention rules in Sweden and the Nordic countries is presented. Since there has been a co-operation between these countries even long before the nautical fault provision, they are here presented together, although I have tried to ascertain some special Swedish characters. Before leaving the current legislations there is a quick survey of the international choice of adoptions and a few practical examples of the consequences of applying the nautical fault defence.

In PART III the focus is on the future, from today on. For the understanding of the debate and the delay in legislation the legislators are shortly introduced and the importance of uniformity is brought up. This gives an understanding of the difficulty of lawmaking in such an international area as shipping. The main purpose of this chapter is the presentation of the draft instrument that is contemplated and the work of the deletion of the nautical fault within the draft. Since it is likely that the draft convention will in a near future be subject for ratification the consequences and analysis in this thesis are very much drawn from the conditions given in the draft.

PART IV is finally devoted to the consequences of a deletion of the nautical fault. Since the controversial debate has been going on for some years most consequences have been predicted by many before me. Conversely, most of them sharing their opinions have been parties to the argumentation and few reports are presented with consequences from an undisturbed point of view. However, most ideas in this chapter are borrowed from other sources; some though were born in my own head. The consequences shall be discussed starting with the legal view, discussing the possible changes to the law and the application of law. The General average here gets a thorough presentation since some fear it runs the risk of complete abolition. Thereafter the economical consequences are discussed with the absolute concentration to the insurances and the influence on the freight rates. Further I will bring up some practical consequences of less importance for a decision on the matter of nautical fault and lastly a view of how the environment can possibly be affected.

Finally PART V brings all the aspects of the nautical fault defence to a close, with some final analysis of the arguments for and against a deletion and the evaluations of advantages and disadvantages of a deletion.

5.4 Delimitation

This thesis is primarily concentrated to the Swedish jurisdiction. Therefore there will be a clear focus on the applicability of the rule in the Swedish legislation. However, the Nordic Maritime Code is identical and the Nordic countries are co-operating on this matter with a joint committee overlooking the legislation. Consequently with the equality of these countries regarding jurisdiction and culture, the results of this thesis should be applicable also on the Nordic countries. Nevertheless in PART II and III there are more general presentations of the conventions and some international comparisons followed by a description of the international work in progress. The international perspective is though very limited for the reason of time and space. Further the historical background is extensively described only from the time when the conventions started to develop, since this is enough for the purpose of comparing maritime trade with the defence of the nautical fault for the carrier and the consequences of maritime trade without the defence.

When dealing with the nautical fault it becomes obvious how this is a vital part of the system of the carrier's liability. The carrier's liability though, is an extensive subject and could easily be an entire thesis on its own. I have had to limit this thesis to only handle the parts of the liability system which concern the nautical fault. Either by being very closely related or by being subject for compromise in legislative discussions regarding the deletion of the nautical fault.

When investigating the main concern of the thesis, the consequences of a deletion of nautical fault, I have consequently brought up the issues I assume would change. This study does probably not provide an exhaustive list of consequences although it has been my intention to locate and deal with as many as I could possibly find or think of.

5.5 Terminology

The term *carrier* is frequently used in this thesis. This term is always referring to the definition of carrier in SMC Chapter 13 Section 1, i.e. the person who enters into a contract with the sender. The *cargo owner* is obviously on the opposite contractual side throughout this thesis. When the term *cargo interest* is used it includes also the cargo insurer.

Whenever the word "deletion" is used on its own in this thesis, it refers to the deletion of the nautical fault defence. The word "draft" on its own refers to the UNCITRAL Draft Convention which is presented under chapter 8.2 "The Draft Instrument".

The "Nordic" countries-term is used for Sweden, Denmark and Norway, and since Finland's adoption of the Nordic Maritime Code of 1994, the term also covers Finland. Iceland is normally considered as one of the Nordic countries but is not included in this thesis since they have not accepted the Nordic Maritime Code.

6 PART I – THE NAUTICAL FAULT

6.1 Background

This thesis concerns one of the most important exculpatory exceptions in history of maritime law. It is also, at least over the last decades, doubtlessly one of the most argued. The nautical fault exemption from liability is completely unique to shipping business. Not air, nor railway, nor road transport has any corresponding rule of this kind. In air law, which earlier used the same pattern, the exemption was abolished by the Hague Protocol in 1955.³

Why is then the law of shipping so unique? The basic concept in Roman law was to hold the carrier liable for loss or damage to the goods unless caused by force majeure. The system of liability is therefore only an innovation, historically young.⁴ At the end of the nineteenth century, error in navigation and management of the ship was simply a contractual exception used in bills of lading.⁵ The clause used in bills of lading, which later was accepted under a provision, was constructed during a time when the conditions in shipping business were quite unlike from what we have today. Those were the days when seafarers relied more on sextants and stars and when computers and satellites were not even contemplated. At that time the shipping was carried out in old steel ships or even wooden ships with large crew handling complicated machinery and vulnerable sails. Any slight failure in navigation or management of the ship could lead to grounding, collision and sinking. In that case, the lost the shipowner suffered was often much higher compared to the cargo owner's loss of his cargo. Hence there was at this time a clear and justifiable reason to share the liability between carrier and cargo owner through the exemption of the *nautical fault*. If the carrier had been made liable for loss arising from nautical fault, his economic future could have been put in danger.⁶ However, cargo owners were also willing to bear the risk for loss of cargo in case of the carrier's loss of ship and therefore a compromise like the nautical fault exemption was possible.

Since then there has been an incredible development in technology as well as progress in insurance industry. Many of the risks a ship must face can be predicted and avoided with radars, satellites and warning systems in the machinery. Carriers are further less vulnerable nowadays since insurances can cover almost any losses. Nevertheless, carriers continue to defend themselves with the nautical fault, but can the purposes for the nautical fault really be justified today in the light of how shipping is performed?

6.2 Liability and Nautical Fault in the SMC

6.2.1 Basis of liability

The rule of the nautical fault was a result and a part of the famous compromise under the Hague Rules 1924 holding the carrier compulsory liable for so-called commercial fault of his

³ Rolf Herber, p. 40, *The Hamburg rules: A Choice for the E.E.C.?*

⁴ Pineus/Sandström, p.163.

⁵ Tetley, p. 2, and *Hayn v. Culliford* (1878) 3 C.P.D. 410, aff'd (1879) 4 C.P.D. 182 (C.A.) the bill of lading included a clause which excluded liability for error in navigation.

⁶ Karan, p. 88.

servants on the one hand and discharging him from so-called nautical fault on the other hand. The basis for the carrier's liability according to Swedish regulations, which is not very unlike the Hamburg Rules as I will come back to later in this thesis, is found in SMC Ch 13 Sec 25. Liability is imposed for damage, loss or delay caused by the fault or neglect of the carrier or someone for whom he is responsible. This main rule is followed by exemptions such as the nautical fault, fire, deck cargo and live animals⁷, which may indemnify the carrier from liability. Thus the risk of unexplained damage falls upon the carrier.⁸ A practical result is that it is in the interest of the carrier to organize surveys, inspection etc. in order to safeguard his legal position and the evidence.

The rule imposes a reversed burden of proof on the carrier. Thus so long as nothing to the contrary is proved, the carrier is presumed to be liable on the basis of negligence. The reversed burden of proof results in a more stringent liability for the carrier which should lie somewhere between the ordinary liability for negligence and strict liability in terms of severity.⁹ The reason the burden of proof is reversed is that after all, the goods have been in his custody and he is, or ought to be, the party with access to the relevant information. However, as mentioned above, the carrier may be liable when there has not been any fault due to failure in proving what actually happened.¹⁰

The nautical fault is one of the most important exonerations from the main rule of the carrier's liability. The rule, which is mandatory on all carriage of goods by sea, is stipulated in SMC Chapter 13 Section 26 item 1. According to the rule the carrier is not liable if he can prove that the loss or damage was caused by the fault or neglect of his servants and committed in the navigation or management of the vessel. The expression *management of the vessel* was initially added to cover measures taken to a ship in port.¹¹ Further Section 26 exonerates the carrier from loss or damage caused by fire, unless the fire was caused by the carrier's own fault or neglect. For the carrier to have the advantage of invoking these defences and relieve himself from liability he must firstly prove that he and his servants have exercised due diligence to make the ship seaworthy before the beginning of the voyage.

It should be noted that the error has to be on the part of the carrier's servants or more exactly the *master, any member of the crew, pilot or other person performing work in the ship's service*. This is a result of the so-called identification or privity connected to the carrier's liability, meaning that the neglect of a servant is considered the fault of the carrier. Obviously this kind of vicarious liability must be imposed on the carrier since he can not perform the carriage himself. The developments in maritime commerce have evolved to include loading, handling, stowage, carriage, custody and discharge by experts. Nowadays almost all segments of carriage are carried out by third parties rather than by the contracting carrier.¹² Despite that, the cargo is considered to be in the custody of the carrier during all times from the receipt to the delivery of the goods.¹³ However, the vicarious liability is applied correspondingly when the carrier is exculpated from liability due to nautical fault. On the other hand, if the error is

⁷ SMC Chapter 13 Sections 26, 27 and 34.

⁸ Honka, p. 47.

⁹ Falkanger/Bull/Brautaset, p. 265.

¹⁰ This is true to a certain extent; "A burden of proof assumes the availability of evidence. Thus if the ship disappears without a trace and the carrier has established that it was seaworthy at the commencement of the voyage, he must be free of liability" report of the Maritime Law Committee (1936) p. 47, preparatory works when the Hague Rules were made part of Norwegian Law, see also Falkanger/Bull/Brautaset p. 268.

¹¹ Grönfors, p. 159.

¹² Karan, p. 85.

¹³ SMC Chapter 13 Section 24.

on the part of the owner himself or that of senior management personnel, the protection of the rule is denied to the carrier (owner's privity). Furthermore he may also find himself precluded from using the global limitation.¹⁴

Error in the navigation or the management of the vessel is in Nordic law deemed to exist if liability is connected with the interests of the vessel and her safety. When applying the nautical fault exception the court must first separate nautical fault from commercial fault and from fault in the ship's seaworthiness. I will further describe this distinction under 6.2.3 and 6.2.4 The purpose behind the exemption is that after leaving port the carrier cannot completely supervise and overlook the navigation and managing of the vessel. A ship's command must regularly take instant decisions in critical situations and work on his own independent judgement. However, the carrier is liable for everything he can control.

6.2.2 Navigational error

No maritime Act attempts defining the meaning of the words "navigation or management".¹⁵ Nevertheless, since they have been subject of considerable discussion in numbers of cases over the years their meaning is rather clear. The prerequisite of fault in navigation covers for example the work of steering and manoeuvring the ship, use of navigational equipment, lanterns, signals (giving signals as well as responding to others), determination of her location and route, berthing, anchorage, the evaluation of meteorological news, adjustment of speed, abandonment, taking refuge in a port, obeying navigational rules, forcing the ship through a storm and ascertaining what time to proceed.¹⁶ As a result of navigational error we normally see a ship stranding, grounding, taking a list, colliding with another ship, or striking a quay.¹⁷



In the case where grounding causes the damage to the cargo there is often no third party involved. Hence the cargo interest may present a claim directly against the carrier who can defend himself using the exemption of the navigational fault. This scenario does normally not imply any big problem. In the case of collision on the other hand, it is not unusual that it occurs due to joint fault in the navigation of the ship. This scenario implies a bit of a complicated situation when the cargo interest cannot claim damages from the contracted

¹⁴ SMC Ch 9, Section 4.

¹⁵ Scrutton, p. 239.

¹⁶ Karan, p. 291-292, Falkanger/Bull/Brautaset, p. 272.

¹⁷ Karan, p. 292, see cases in notes 941, 942, 943.

¹⁸ Picture from authors own archive.

carrier whose servants negligently contributed to the collision because of nautical fault. Nevertheless the other carrier can be held liable through tort. The claim through tort can not exceed the ship's proportional degree of fault according to Swedish law since in a collision where both ships are to blame each ship is only liable for damages in proportion to its own degree of fault.¹⁹ For the sake of comparison, under US law the liability for collision is joint and several. Hence there is a situation where the cargo interest can claim the whole amount of damage from the non contracted carrier through tort and thus avoid e.g. limitations.²⁰

6.2.3 Management of the ship

The exemption for fault in the management of the ship concerns the ship's condition, manning and equipment. Any time after the ship has commenced her voyage until goods are discharged this fault may occur. Examples of fault in management of the ship (as long as they influence the safety of the vessel more than that of cargo) are: fault in providing and maintaining seaworthiness (after the commencement of the voyage) of the ship in regard of the hull, valves, (bilge) pipes, pumps, ballast tanks, machines by checking and clearing them; manning equipping, supplying and stabilizing the ship by ballasting, closing port holes, pumping bilges and bunkering.²¹ It is rather pointless to endeavour a further description of the difference between navigation and management of the ship since the outcome remains the same because the rule operates in either case. Nevertheless it is of great relevance to distinguish between nautical fault and commercial fault, i.e. to find whether the management concerns handling of the ship or handling of the cargo.

The importance of this distinction is obvious when fault in management of the ship results in liability for the cargo interest since it falls under the nautical fault. While fault in management of the cargo, so called commercial fault, falls on the carrier's behalf. Improper care for the goods prevails when equipment of the ship is misused or neglected which exclusively or primarily serves the purpose of proper care for the goods. It can often be difficult to distinguish between nautical and commercial fault. A simple rule is to consider whether the fault was an act taken for the safety of the vessel or for that of the cargo. A good example is the Norwegian case *Trinidad*²² where, at the time of discharge, some of the grain was found charred and the court had to decide whether the act of turning on the wrong switch constituted a fault in the management of the ship or of the cargo. The Norwegian Supreme Court found that since the light switch was probably touched during the operation of the work lights for the longshoremen at the port of discharge this constituted a fault in the management of the cargo. Had the light been switched on by mistake during the voyage when the purpose had been to turn the deck lights on, there would have been typical fault in management of the ship.²³ Another example is *Malevik*²⁴ from the Swedish Supreme Court where two bilge valves in the cargo holds were not properly closed after drainage. This caused water to enter the holds and damage the cargo. The carrier was exempted from liability since the actual omission to close the valves properly was best considered a fault in the management of the cargo. The Swedish Supreme Court came to this conclusion after stating that the valves must be for the benefit of both the cargo and the ship. However, they continued, the emphasis of

¹⁹ The Collision Convention and the SMC Ch 8, Section 1.

²⁰ Falkanger/Bull/Brautaset, p. 217.

²¹ Karan, p. 294.

²² ND 1957.30 NSC TRINIDAD.

²³ Falkanger/Bull/Brautaset, p. 273.

²⁴ ND 1961.282. SSC MALEVIK.

the failure to close them properly must be placed on the function the valves play with respect to the safety of the vessel.

Since, obviously, the criterion of benefit separating nautical fault from commercial fault is relative rather than objective it has been envisaged that the exemption could be so broadly interpreted as to cover almost everything that could happen onboard.²⁵ In the Nordic jurisdiction though, it seems case law has given a rather clear pattern of the interpretation. This is of course of large importance for the contracting parties when predicting the risks of the carriage of goods by sea.

Making sure the ship is seaworthy is almost the same thing as care for the cargo since only a safe ship can provide for a safe delivery. Doctrine and jurisprudence have, however, developed a general criteria creating a pathway clear enough to resolve larger issues and have the majority of the cases decided.²⁶

So far we have found that the carrier is liable when there is fault in the management of the cargo but exculpated from liability when the fault is in the management of the ship or in the navigation of the ship.

6.2.4 Initial Seaworthiness

The principle of seaworthiness provides a rule with the obligation imposed on the carrier to exercise due diligence for the ship's seaworthiness before the voyage. This rule prevails over the nautical fault exception. Thus any negligent navigation resulting from lack of due diligence for the ship's seaworthiness does no longer exempt the carrier from liability. Nor is he exempted when a neglect or default in the vessel's management amounts to or is caused by non-compliance with the obligation to provide for initial seaworthiness.²⁷ An example to distinguish initial seaworthiness from navigational error is the mate who is incompetent to operate the radar (initial unseaworthiness) and the mate who is competent but simply makes a mistake in operating the radar (navigational error).²⁸ So unless a default in navigation or management of the ship has occurred because of the human factor of one of the carrier's master, mariner, pilots or servants the exemption of nautical fault might not be applicable since it can fall under the initial unseaworthiness and impose liability on the carrier.

²⁵ Karan, p. 94 (C. W. O'Hare, "Uncitral Convention", p. 134).

²⁶ Japikse, p. 185, *The Hamburg Rules: A choice for the EEC?*

²⁷ Falkanger/Bull/Brautaset, p. 266.

²⁸ *Ibid*, p. 286.

7 PART II – CURRENT LEGISLATIONS

7.1 Introduction

All transport legislations have developed in more or less international environments and particularly the rules on the liability of the carrier are characterized by international co-operation through conventions. Concerning the carriage of goods by sea the co-operation has led to three international conventions; The Hague Rules 1924, The Visby Amendment 1968 (Hague-Visby Rules²⁹) and The Hamburg Rules which were adopted at a diplomatic conference in 1978. Since 2002 there is work in progress on the draft instrument for a possible fourth convention on the carriage of goods by sea.

The function of an international convention is summarized and expressed by the Australian shipping lawyer Brian Makins:

“The function of a marine cargo liability regime is to allocate risk between ship and cargo, in a way that is economically efficient and that promotes the predictability, certainty and stability that come from uniformity of application, and thereby protect the integrity of the bill of lading as the instrument of currency in international trade.”³⁰

This quote generally summarizes the most fundamental functions of the regulations governing maritime transport. The nautical fault is an instrument for allocation of risk between the parties involved and a keystone of the carrier’s liability. The discussion in this thesis is whether this instrument is still necessary or if risk is nowadays best allocated without the nautical fault defence and therefore these functions shall be comprehensively examined as consequences of a deletion of the nautical fault. To uphold the function of economical efficiency and predictability it is required that the attitude towards the applicable convention is quite harmonized internationally and therefore co-operation between states when drafting the conventions is crucial. However, to reach an international agreement regarding the debated nautical fault is complicated. The importance of uniformity will be further considered later while henceforth follows a presentation of the historical convention work.

7.2 The Harter Act and development towards the Conventions

Historically, the lawmaking was carried out in a fully commercial manner between the commercial interests. Whoever “owned” the market could choose the rules. The parties composing the clauses in the bills of lading were invariably shipowners/carriers. Therefore the regulations imposed on the cargo owners became more and more carrier friendly and a threat to the legal position of cargo owners. Eventually the courts even refused to uphold some of the more extreme clauses and tended to interpret the contracts in the cargo interest’s favour. However, new clauses were frequently drawn by the carriers, trying to close any loopholes. With American cargo interests in a rather dominant position, this was where the struggle for a

²⁹ Hague-Visby Rules includes the SDR Protocol.

³⁰ Makins, p. 10.

fair legislation started. While American courts introduced clauses based on negligence the dominant English liner companies did what they could to avoid this by inserting English choice of law clauses in the bills of lading.³¹ That, in its turn, led to legislative intervention, first in the United States of America where the Harter Act was adopted in 1893. It cut down the freedom of contract by invalidating any bill of lading clause that gave the carrier less responsibility than that in the Harter Act, irrespectively of whether the ship was United States-owned or trading to or from ports in the United States.³² The compromise which was reached implied that liability would be based on negligence, but the carrier would not be liable if his servants or agents had been negligent in navigation or managing the ship.³³

7.3 The three international conventions

7.3.1 The Hague Rules

European cargo owners also demanded protection from exemption clauses in bills of lading and proposed imperial legislation based on the Harter Act. In 1921 the CMI was appointed to prepare a private legislation and later that year it was presented to a conference at the Hague. The proposal, which was based on the Harter Act, recommended a set of rules for voluntary inclusion in bills of lading. After further revisions they were to become of statutory form when adopted at a conference in Brussels as the “International Convention for the Unification of Certain Rules relating to Bills of Lading 1924”, commonly known as the Hague Rules.³⁴ The great industrial countries were of course overrepresented in the preparatory work.³⁵ However, the Hague Rules established some balance between the parties, the way it was resting on a compromise developed from the shipping business itself.

7.3.2 The Hague-Visby Rules

In practice, the Hague Rules proved to contain substantive, procedural and technical weaknesses. The need to revise and improve the rules became obvious. In 1968 revisions were ratified at Brussels under the name of “the Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to bills of lading signed at Brussels on 25th of August 1924”. The Hague Rules as revised by the Visby Protocol are known as the Hague-Visby Rules.³⁶ Few things were actually changed; concerning the liability of the carrier the amendment protocol was almost identical to the Hague Rules.

The Hague-Visby Rules define the carrier’s responsibilities narrowly. They refer specifically to the requirement of seaworthiness, manning equipment and provisioning of the ship, to the fitness and safety of the cargo spaces and to the proper care of the cargo. The carrier is provided with a list of 17 separate defences, also known as “the catalogue”³⁷; whenever the carrier has exercised due diligence to make the ship seaworthy, he can meet claims for loss or

³¹ Falkanger/Bull/Brautaset, p. 260-261.

³² Broadmore, p. 4.

³³ Falkanger/Bull/Brautaset, p. 261.

³⁴ Falkanger/Bull/Brautaset, p. 261 and Broadmore, p. 4.

³⁵ Prop 1993/94:195 p 134.

³⁶ The SDR Protocol 1979 is also considered a part of the Hague-Visby Rules.

³⁷ Hague/Visby Rules, Article IV, Section 2, items (a)-(q).

damage by invoking the exceptions of the catalogue. The burden of proving the exercise of due diligence is on the carrier or any other person claiming an exemption under the article. Among the exemptions in the catalogue, the nautical fault in Article IV is the most controversial. According to the rule *neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.*

One must then keep in mind the large technology development to ships between the years of the Hague Rules and the Visby Amendments. Inventions such as internal combustion engines and electric motors placed on bigger and faster steel ships were suddenly available to the carriers.³⁸ Among the developing countries dissatisfaction with the Hague-Visby Rules grew. They complained that the Hague-Visby Rules did nothing but to preserve the old legislation and that their positions as cargo interests were not improved. Further they wanted the entire system questioned and they wanted to take part in the process of legislation from the very beginning.³⁹

7.3.3 Hamburg Rules

After the Second World War, economic and political conditions in the world changed. Many newly independent countries in Asia and Africa entered into international trade. Indeed, these new entrants became principally carriers, responsible for some 65% of the shipments in maritime commerce. However, 93% of the trading fleet was still owned by industrialized countries.⁴⁰ Thus the carriage itself was still in the hands of the powerful nations and the developing countries as cargo interests were partly left to utilize the sea carriage performed by the industrialized shipping nations which had also had large impact on the legislation of the rules. But things were about to change, at least it looked like that.

The draft preceding the third international convention, worked out by the UNCITRAL Working Group, was accepted under the name of “the Convention on the Carriage of Goods by Sea” on March 31, 1978. However, the convention, known as the Hamburg Rules 1978⁴¹, became effective only 24 years later, on November 1 1992, after 20 states had ratified the rules as required in accordance with Art 30 of the same convention. However, there was no requirement as to their role in maritime traffic, the size of their fleet or their commercial traffic of goods. Therefore, the very unfortunate result is that none of the states adhering to the Hamburg Rules is a major trading or maritime nation.⁴² Instead most of them are the developing countries which fought for a new convention, but a convention only ratified by cargo interests is not much of a maritime law.

The nautical fault and fire exemptions were one of the main causes of the pressure for reform which led to the Hamburg Rules.⁴³ The carrier’s liability under the Hamburg Rules is based on a principle of presumed fault. Compared to the Hague-Visby Rules the liability is wider and more general. The list of exemptions is abolished and replaced by 3 instead of 17, the main one being that “*the carrier proves that he, his servants or agents took all measures that*

³⁸ Karan, p. 27.

³⁹ Prop 1993/94:195 p 134.

⁴⁰ Andreani, p. 11, 21.

⁴¹ According to the recommendation under Annex III of the Hamburg rules.

⁴² Makins, p. 45.

⁴³ Falkanger/Bull/Brautaset, p. 271.

could reasonably be required to avoid the occurrence and its consequences".⁴⁴ Since the eliminated exceptions in Article 4(2)(c)-(p) of the Hague-Visby Rules are all identical to force majeure situations they may still be presented as *prima facie* evidence of unavoidable occurrence.⁴⁵ Hence the legal situation would not change much in this area of the Hamburg Rules since the carrier continues to be exculpated from unavoidable occurrences.⁴⁶ If the carrier has not taken reasonable measures to avoid the occurrence or its consequences, he is at fault. Fault in the legal meaning is described as a conduct which can be blamed in legal respects. With the purpose of law, naturally it can not protect the carrier who did not exercise necessary measures to prevent the loss or damage when he would have been able to avoid it. Neither would it be right to hold a carrier, taking reasonable care of the cargo, liable. Either way there were doubts and hesitation for the replacement of the terms "fault and negligence" and the future interpretation of "reasonable required measures".⁴⁷

7.3.4 Deletion of the Nautical Fault in the Hamburg Rules

In modern shipping business ships are in nearly everyday-contact with its owner/charterer and nautical risks are reduced considerably thanks to new technology providing safer ships and navigation equipment as well as more precise weather forecasts. Developments have been so conclusive that the shipping industry should be prepared to receive a new system of liability. Nevertheless it is obvious that accidents due to navigational error cannot be avoided completely, no matter how safe shipping becomes.⁴⁸ During the Conference where the UNCITRAL Draft Conventions was discussed preceding the Hamburg Rules it was obvious that the nautical fault was one of the keystones, only very few Delegations wanted to maintain the exception. The opposition came mostly from some EEC states and Scandinavian countries while other powerful nations like the USA, France and Canada wanted an even higher degree of liability for carriers than was finally agreed.⁴⁹ As a result of lawmaking becoming a more internationally governed negotiation, with state representatives involved, this main features of the Hamburg Rules was born out of political agreement rather than being a commercial compromise.⁵⁰

The intention with the rules was to strike a fairer balance in the allocation of risks, rights and obligations on liability between carriers and shippers.⁵¹ Instead of voting on the item and end up in a situation where compromising was an impossible task, a group of ten Delegations was asked to work out a package solution containing some certain elements.⁵² The package which was presented had a solution without the Nautical Fault defence and hence with a significantly increased liability for the carrier. "Equity" and "fairness" were some heavy arguments for the deletion.⁵³ The increase of the limitation figures was limited to 25 % as a part of the package deal, only slightly above the amount of the Visby-Rules. The low increase of limitations was to some extent intended to make up for the increased liability of the

⁴⁴ Article 5:1.

⁴⁵ Karan, p. 324.

⁴⁶ The burden of proof is on the person claiming the benefit of the exemption, i.e. the carrier, according to Annex II of the Hamburg Rules and Article 4(2)(q) of the Hague and Hague-Visby Rules.

⁴⁷ Pinéus/Sandström, p. 167, Selvig, Marius 31, p. 14.

⁴⁸ Oral source: Fredrik Kruse, telling me about the figures on accidents.

⁴⁹ Roland, Herber, *The Hamburg Rules: A Choice for the E.E.C.?* p. 17, 41.

⁵⁰ Makins, p. 43.

⁵¹ Huybrechts, *The Hamburg Rules: A Choice for the E.E.C.?*

⁵² Rolf Herber, p. 41, *The Hamburg rules: A Choice for the E.E.C.?*

⁵³ Makins, p. 43.

carrier.⁵⁴ Another element of the compromise was to create an exception to the “presumed fault” basis on the carrier’s liability by requiring the claimant to prove the carrier’s fault or neglect in the case of loss, damage or delay in delivery caused by fire.⁵⁵

The opinions of the outcome of the Hamburg Rules and the deletion of the nautical fault continued to be inconsistent. There were voices expressing that the deletion was a “fatal flaw” and a mistake since it has become increasingly understood that that nautical fault is a vital part of the mechanism for allocation of risk. And that the system under the Hague-Visby Rules is economically more efficient than that provided by the Hamburg Rules.⁵⁶ On the other hand there is the view that the Hamburg Rules only slightly shifts the balance of liability from the shipper to the carrier, but without radically changing the established liability system.⁵⁷ However, it is now very clear that the Hamburg Rules have not been accepted by the international community as a marine cargo liability regime. Notwithstanding that all the Nordic countries and several European states considered a ratification of the Hamburg Rules the result came out weak. Only Austria⁵⁸ and the Czech Republic⁵⁹ have adopted the rules in Europe and with their geographic position it is obvious they have not applied the rules often. All over the world no more than 31 states⁶⁰ have found it worth implementing which is rather unfortunate for the sake of evaluation and obviously for the harmonization of maritime law. Anyway, the biggest failure must be that those states are not representing the important shipping industries with the result that the Rules have not had the slightest impact on the liability of the carrier. The 17 countries which had ratified the Hamburg Rules in September 1990 represented less than 2 per cent of world’s total tonnage and about 2 per cent of world’s total trade.⁶¹ It is therefore difficult to draw any conclusions from the result of the deletion of the nautical fault.

The developing countries and UNCTAD are eager to eliminate the nautical fault. According to them the Hague and Hague-Visby Rules implies significant disadvantages for nations which do not have their own marine shipping industry since they are therefore reduced to turn to other nations’ shipping industry for their international trade. Their criticism has been particularly hard on the nautical fault and fire exemptions.⁶² Obviously in their opinion, the risk allocation between the carrier and the cargo interest is not fair with the nautical fault exemption still applicable. However, many of the industrial countries and dominant shipping nations have also expressed their request for a maritime regime which is more updated and corresponds with the development in maritime trade and shipping industry.⁶³

⁵⁴ Pinéus/Sandström, p. 165.

⁵⁵ Lüddecke/Johnson, p 8-9.

⁵⁶ Makins, p. 43.

⁵⁷ Huybrechts, *The Hamburg Rules: A Choice for the E.E.C.?* p. 24, and UNCTAD report, T.D./B/C.4/315.

⁵⁸ Ratified 29.VII.1993, the CMI Yearbook 2005-2006, p. 515.

⁵⁹ Ratified 23.VI.1995, the CMI Yearbook 2005-2006, p. 515.

⁶⁰ States having signed the Hamburg Rules according to the CMI Yearbook 2005-2006: Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syrian Arab Republic, Tanzania, Tunisia, Uganda, Zambia.

⁶¹ Makins, p. 42.

⁶² Proposition to the SMC 1993/94:195, p. 139.

⁶³ Ibid.

7.4 Adoption in Sweden and the Nordic countries

7.4.1 A legislation of our own

In general, the Scandinavian countries have tried to improve the international systems of the law of carriage of goods by sea rather than working out alternative solutions of national law.⁶⁴ A traditional technique for adoption of rules has been to transform the rules into Nordic style.⁶⁵ Sweden, Norway and Denmark have enacted a revised Nordic Maritime Code with effect from 1 October 1994. Eventually Finland also adopted similar legislation.⁶⁶ The Hamburg Rules have not been ratified in any of the Nordic countries. Instead the Rules in the Maritime Code are aligned with the Hamburg Rules as far as possible without having to derogate from the Hague-Visby Convention.⁶⁷ The British risk analyst John Richardson's way of looking at it is; "*Even if the Scandinavians are Hague-Visby in word they clearly are not in spirit and lean heavily towards Hamburg and UNCTAD/ICC Rules, under the considerable influence of their academics.*"⁶⁸ The Nordic co-operation between Sweden, Norway, Denmark, working out the new Maritime Code⁶⁹ made the judgement that majority of the Hamburg Rules could be incorporated in Nordic legislation without having to cancel the Hague-Visby Rules.⁷⁰ The Nordic Maritime Code therefore follows Hamburg in placing the wide general liability on the carrier and substitutes for most of the detailed defences of the Hague-Visby catalogue with an opportunity for the carrier to show that the loss was not due to his fault or neglect.⁷¹ Only on 4 important issues the legislations were decided to be conflicting;

1. The liability for nautical fault and fire
2. The limitations
3. The period of limitation
4. The geographic area of applicability⁷²

In the Swedish Maritime Code the catalogue was considered unnecessary with the retention of the defence for nautical fault and fire.⁷³ The Nordic countries have earlier been mentioned as opponents to the deletion of the political exemptions from liability, namely the nautical fault and the fire exemption.⁷⁴

7.4.2 The Swedish approach to the nautical fault deletion

The Swedish Maritime Code originates from 1891. The Hague Rules were implemented in the Swedish Maritime Code in 1936 while the Hague-Visby Rules only came into force in 1985.⁷⁵ During the legislation of the new Maritime Code in Sweden in the 1990's the Swedish

⁶⁴ Selvig (NTF).

⁶⁵ Prop 1993/94:195 p. 145.

⁶⁶ Honka, p. 17.

⁶⁷ Falkanger/Bull/Brautaset, p. 264.

⁶⁸ Richardson p. 66.

⁶⁹ Maritime Code of 24 June 1994, the previous version of the Code dated 20 July 1893.

⁷⁰ Prop 1993/94:195 p. 145.

⁷¹ SMC Chapter 13, Section 25.

⁷² Prop 1993/94:195 p. 145.

⁷³ Karnov, Information on SFS 1994:1009 The SMC, note 344.

⁷⁴ Roger Roland p.17, *The Hamburg rules a choice for the E.E.C?*, and Selvig in the CMI Newsletter no 1-2000.

⁷⁵ Karnov, Information on SFS 1994:1009 The SMC, note 318.

Maritime Code Committee⁷⁶ came to the conclusion that Sweden should ratify the Hamburg Rules at a suitable point of time. According to the Committee the Hamburg Rules are well acquainted with the progress of the shipping industry in maritime trade and both politically and technically right in terms of law. The majority of the Hamburg rules agree well with the Nordic legal conception and the Committee even emphasizes that the Nordic legislation has in many respects been a model in the work of framing the Hamburg Rules.⁷⁷

The insurance consequence is an important issue which the Committee brought up and to which I shall get back again under 9.3.3 of this thesis. For the Committee certain insurance companies (P&I Clubs) expressed their firm belief that the displacement of the liability following the Hamburg Rules would increase insurance expenditure and that this could have an indirect impact on individual consumers. Since the part of the risk born by cargo insurance due to the nautical fault, would shift to the liability insurance, i.e. the P&I Clubs, the P&I calls would be expected to increase. A corresponding decrease of the cargo insurance premium can, according to Swedish insurers, not be anticipated because of, among other things, expected increase of costs for recourse claims and damage management at the insurers. Also the Committee estimates increased expenses. New rules demand new administrative systems and handling methods for liability insurers as well as cargo insurers and according to the Committee the recourse claims must be expected to increase, as well as the costs for litigation, until the international shipping industry has adjusted to the rules and the practice and case law has developed from the legislation. The Committee, however, points out that the cargo owners themselves find increased expenses in the initial stage of less importance compared to the advantage of better compensation possibilities that the Hamburg Rules would bring. Therefore the Committee came to the conclusion that it would be desirable for Sweden to ratify the Hamburg Rules even if it would imply some negative economical effects on the system.⁷⁸

Regarding the time perspective the Committee was of the opinion that the ratification of the Hamburg Rules in Sweden should, for cost and competition considerations, wait until the rules were rather widely spread among Sweden's trading partners.⁷⁹ All the Nordic Law Committees agreed to postpone the decision until the international progress would have given a motivation for ratification. The attitude was further that the uniformity between the Nordic countries is of great importance. Norway however, pointed out that since the jurisdiction depends on the zone where the ship is navigating rather than its nationality there would not be any significant imbalance of advantages for foreign carriers.⁸⁰ Norway has eliminated the nautical fault in their domestic legislation⁸¹ on sea carriage, further indicating their attitude for the deletion of the nautical fault.

The proposal by the Committee was referred to entrusted parties for consideration and the response was positive. One of the few which had a negative approach was the P&I Club, Swedish Club. They referred to the many changes in trade pattern and loading management that would take place, as motives to delay a change of legislation.⁸² We are aware of the result of the Hamburg Rules and today carriers and P&I Clubs are still negative to a deletion of the

⁷⁶ "Sjölagsutredningen".

⁷⁷ Prop 1993/94:195 p. 142.

⁷⁸ Ibid, p. 142ff.

⁷⁹ Essentially the Nordic countries, the EU-states and the US.

⁸⁰ Prop 1993/94:195 p. 143.

⁸¹ Norwegian Maritime Code § 276 third paragraph.

⁸² Prop 1993/94:195 p. 143.

nautical fault.⁸³ However, many of the Hamburg Rules are applied in Sweden through the SMC. Hence an adoption of legislation like the Hamburg Rules would not cause much work for adjustment in Sweden, except concerning the liability of the carrier if the nautical fault would have been deleted.

7.4.3 Domestic trade in Norway

A few years after the Nordic Maritime Code was revised in the 1994 Norway departed from the principle that international rules should also be made applicable to domestic carriage by sea. With the intention to bring the rules for sea carriage in line with the other areas of transportation the question of the carrier's liability was made subject to separate regulation. Thus the defence of nautical fault and fire should not apply to domestic carriage in Norway. Furthermore the limitation of liability for cargo damages was set at a much higher level in conformity with the surface carriage. Although the exemptions of nautical fault and fire are deleted, the fundamental principle of negligence is still retained. Hence, it is however not as strict as the road carriage liability system which is more or less strict and only subject to force majeure exemptions.⁸⁴

It is obviously interesting to get a view of how the deletion of the nautical fault defence on national sea carriage in Norway has affected the shipping industry in the country. According to the Norwegian P&I Club called Gard the calls within the club have not yet been increased with any significant numbers as a result of the deletion.⁸⁵ This could be an indication that the raise in claims for loss or damage due to nautical fault against the carrier would not be as direct as some would argue, although this source shall not be enough for any conclusions. Neither have they, at Gard, experienced that the market nor the business of shipping in Norway has suffered any consequences of the deletion, as for example an increase in freight rates could imply.⁸⁶

7.5 International legislations

7.5.1 General

The situation has changed since the time before the conventions when the United States of America was primarily representing cargo interests and English carrier interests were on the opposite side. The Hague Rules became widely spread and had an important international role as a liability regime, particularly after the Second World War.⁸⁷ If one should divide the interests among the states today there would be the industrial countries, primarily the traditional shipping nations, as the carrier interest and the developing countries as the cargo interest. However, this is not exactly true. As a matter of fact when the Hamburg rules were compromised the USA, Canada and France were demanding even higher degree of liability for carriers.⁸⁸ It seems as well, the nautical fault is of different importance in different parts of

⁸³ Oral source: Fredrik Kruse.

⁸⁴ Falkanger/Bull/Brautaset, p. 285-286 and Selvig in the CMI Newsletter no 1-2000.

⁸⁵ Oral source; Bjørn Fremmerlid.

⁸⁶ Ibid.

⁸⁷ Karnov, Information on SFS 1994:1009 The SMC, note 318.

⁸⁸ Herber, *The Hamburg Rules: A Choice for the E.E.C.?*, p. 41.

the world. According to the Swedish Club (P&I) error in navigation is frequently used⁸⁹ while according to a report from New Zealand the nautical fault is in fact seldom encountered in practice.⁹⁰

7.5.2 The USA

The Carriage of Goods by Sea Act - COGSA - which repealed the Harter Act was adopted by Congress in 1936. It was modelled after the Hague Rules and thus included the nautical fault exemption. In 1999 there was an attempt to revise the COGSA to a somewhat more modern shape through following the Hague Rules but with the removal of the nautical fault defence.⁹¹

The Ocean Transportation Committee of the National Industrial Transportation League in the USA is a nationwide organization representing shippers and many are users of ocean transportation services. To illustrate how the nautical fault defence has been applied by ocean carriers in order to convince the Senate of a deletion, a summary of court decisions was presented.⁹² For the sake of understanding how the nautical fault can be applied I have chosen to mention a few of those examples used in the attempt to revise the COGSA. In one of the cases presented from 1975 the master's decision to head into a storm was considered nautical fault, even though number one hatch was damaged and twisted open causing flooding in that hole, resulted in the vessel sinking.⁹³ In another case the failure to have the up-to-date List of Radiobeacons was an unseaworthy condition, but the said unseaworthiness was not the proximate cause to the grounding. The proximate cause of the grounding was the failure of the vessel's officers to make full use of the *out-of-date* List of Radiobeacons on board the vessel. Thus the carrier was exonerated from liability due to navigational error.⁹⁴ A third example was a pilot causing the vessel's port bow to strike the wall on entering a lock with sufficient force to cause a crack to develop in the ballast tank plating, thus allowing the ballast water to leak into number one cargo hold. Since the pilot is considered an agent to the carrier according to the nautical fault the carrier was exempted from liability.⁹⁵

7.5.3 A practical example

In South America, the Parana River, the Paraguay River, the Uruguay River and the Rio de la Plata River have extensive shipping transit, national as well as international. Products through the Paraguay and Parana Rivers are generally transported using barges aligned in convoys. These lines of barges are either pulled or pushed by a tug ship to the local ports where they are being transhipped or delivered. Due to the geography of the zone these rivers present some particular conditions for navigation. It is a fact that collisions against bridge pillars take place more or less every day due to seasonal swellings, floods and heavy waters running from an affluent river. Claims for damages and losses as a consequence of accidents and collisions are rather usual, most of them under Argentine jurisdiction.

⁸⁹ Oral source: Fredrik Kruse.

⁹⁰ Broadmore, p. 12.

⁹¹ Section 9 (a-d, g).

⁹² Augello, p. 10.

⁹³ *Yawata Iron & Steel v. Anthony Shipping*, 396 F. Supp. 619, 1975 A.M.C. 1602 (S.D.N.Y. 1975).

⁹⁴ *American Smelting & Refining Company v. S/S Irish Spruce*, 548 F.2d 56 (2d Cir. 1977).

⁹⁵ *Insurance Co. of N.A. v. G.A. Georgilas*, 1983 A.M.C. 1916 (S.D.N.Y. 1983).

Argentine law, which substantially follows the Hague Rules, is applied to these cases and the defence of nautical fault arises frequently. Usually the ship owner or the Club argues that the accident was due to the fault of the master and in this way they try to avoid liability. The Argentine courts though, are of the opinion that a convoy pushed by a tug can not receive the kind of protection that the nautical fault provides. Since the essence of the contract between the barge owner and the tug owner is to provide and receive the traction or pulling power through the river, the judges argue that this nature of transportation should not have the right of alleging the nautical fault.⁹⁶



⁹⁶ http://www.ferder-toporovsky.com/search_art.php?cod=8 2007-03-23.

8 PART III – FUTURE LEGISLATION

8.1 Legislators

Comité Maritime International, CMI, as a non-governmental organization has a surprisingly important role as international lawmaker in the area of shipping. This is possible due to its thorough knowledge and extensive expertise and particularly its close connection with governments. Together with the Belgian government CMI has over the years called to necessary diplomatic conferences, the last one in 1968. Since then, CMI has worked mainly through the International Maritime Organization (IMO) in London which is part of the United Nations organization. However, a need for governmental involvement also in the preparatory work has been pointed out in the aim and development for an internationally uniform shipping law. IMO now fulfils that role, but the starting-point of the discussions in the Legal Committee is nearly always a draft convention prepared by the CMI.

It was the entrance into the field in the 1970's of the UNCTAD and UNCITRAL which led to the Hamburg Rules 1978. UNCITRAL was established by the General Assembly in 1966 with the aim that the United Nations could play a more active role in reducing and removing obstacles to the flow of trade. The obstacles were created through disparities in national laws governing international trade. The commission was given a general mandate to further the progressive harmonization and unification of the law of international trade. The commission, which has six working groups of different subject-matters where Working Group III covers transport law, carries out its work at annual sessions. At the sessions, all member-states are invited⁹⁷ as well as interested international organisations such as the International Group of P&I Clubs, CMI and ELSA⁹⁸. Observers are permitted to participate in discussions to the same extent as members.⁹⁹ The Nordic countries have one mandate together which belongs to one country at the time; in the meanwhile the other three are observers.¹⁰⁰

8.2 The importance of uniformity

8.2.1 Introduction

What role does uniformity play in the legal and political discussion regarding a deletion of the nautical fault? There is not really any question as to the importance of uniformity of law. Especially in an area as international as sea carriage it is obvious that all harmony of law can only facilitate the business. Uniformity on its own will reduce the cost of sea transport and bring more certainty to those taking part in it in terms of that they will have a better idea of where they stand in terms of what obligations they ought to fulfil and what risks they take.¹⁰¹ Therefore, uniformity is the goal no matter if a party is for or against a deletion of the nautical fault.

⁹⁷ All states are not members to the commission.

⁹⁸ The European Law Students' Association International.

⁹⁹ www.uncitral.org.

¹⁰⁰ Oral source: Johan Schelin.

¹⁰¹ Makins, p. 35-36.

8.2.2 The unpredictable shipping world

It is true that the Hague Rules created some degree of uniformity of maritime law. However, the situation today is no longer anything close to uniform, but instead; the variety is perhaps bigger than ever. For the sake of uniformity it seems rationale “no states”¹⁰² actually ratified the Hamburg Rules. Approximately 70% of the world’s ocean trade moves under the Hague-Visby amendments whereas only 2% operates under the Hamburg Rules.¹⁰³ Furthermore uniformity is strongly affected by the interpretation. The rules are construed in different ways in different countries and identical facts tend to produce different results in different jurisdictions.¹⁰⁴ Of course complete uniformity is the prime goal and an ideal solution but also pretty much impossible to achieve.¹⁰⁵ However, it is always necessary to work towards it. The lack of uniformity imposes real economical inefficiency on the commercial system governed by the Hague and Hague-Visby Rules according to Michael F Sturley, Professor at the University of Texas Law School.¹⁰⁶ He points out the number of countries that may be involved in every transaction in international sea carriage governed by the Rules since there are so many possible parties. The shipper, the consignee and the carrier may be from different countries, as well as the P&I club, the cargo underwriter and the financing bank. All of these parties may participate in further related transactions involving more countries and finally may any of the transactions become subject of litigation in any of the countries involved.¹⁰⁷ It is obvious that an international uniformity would provide better predictability and create a more certain base for rational decisions regarding the shipment. Most probably with the result of decreased costs since the risks can be calculated on beforehand.

During UNCITRAL’s 29th session with the absolute topic of increasing uniformity of law it was found that the continued coexistence of different treaties governing the liability of the carrier and the slow process of adherence to the Hamburg Rules made it unlikely that adding a new treaty to the existing ones would lead to any greater harmony of law.¹⁰⁸ Could a 4th treaty in fact become just another convention taking the maritime trade further away from uniformity? From this point, the UNCITRAL invited to an investigation which was not going to cover the liability regime but would rather provide modern solutions to issues that either were not adequately dealt with or were not dealt with at all in treaties.¹⁰⁹

8.2.3 The nautical fault as an obstacle in the work for uniformity

¹⁰² With “no states” I mean states that have significant shipping industry and hence would make the rules applicable on sea carriage. States having signed the Hamburg Rules according to the CMI Yearbook 2005-2006: Austria, Barbados, Botswana, Burkina Faso, Burundi, Cameroon, Chile, Czech Republic, Egypt, Gambia, Georgia, Guinea, Hungary, Jordan, Kenya, Lebanon, Lesotho, Liberia, Malawi, Morocco, Nigeria, Paraguay, Romania, Saint Vincent and the Grenadines, Senegal, Sierra Leone, Syrian Arab Republic, Tanzania, Tunisia, Uganda, Zambia.

¹⁰³ Augello, p. 4.

¹⁰⁴ Makins, p. 37, quoted that “the advantages of uniformity require more than a uniform text: the various courts that apply the texts must do so uniformly before all of the promised benefits can be fully realised”. Further see for example the studies by Sturley, <http://cisgw3.law.pace.edu/cisg/biblio/sturley.html> 2007-05-03.

¹⁰⁵ Lord Diplock, CMI Report 1979.

¹⁰⁶ Makins, p. 39-40.

¹⁰⁷ Ibid, p. 40.

¹⁰⁸ Karan, p. 38.

¹⁰⁹ Ibid.

The exemption of the nautical fault covers a risk that the carrier would otherwise not be able to control completely. The carrier is indeed responsible to make sure that the ship is seaworthy for the voyage, that the crew has the right education and training for their individual responsibilities and that the ship is provided with necessary equipment for the transport. These are areas he can, and must, control. However, when the ship goes to sea it also goes out of control of the carrier. It can be argued that modern shipping is provided with fast vessels and advanced technical equipment and hence the period of risk is shortened, weather can be predicted and instructions can easily be communicated. On the other hand it is a fact that the shortened voyage is long enough for serious risk involvement. Since year 2000 between 114-128 accidents every year, have been reported to the National Administration of Shipping and Navigation in Sweden.¹¹⁰ Furthermore, certain perils of the sea can never be completely foreseen and despite knowledge and experience, human error is the most common cause to collisions and groundings.¹¹¹ It is understandable with the statistics of accidents that the nautical fault is essential to the carrier and the P&I Clubs and that they defend it as far as possible. It has been a controversial debate ever since the drafting of the Hamburg Rules.¹¹² However, most other parties, including the lawmakers, seem to have come to the opinion that in order to create a modern liability regime the nautical fault must be eliminated. As far as the representatives of the states can reach consensus, harmonization of rules is conceivable regardless of the absence of the nautical fault.

After the 10th session of the Working Group in 2002 the following was written by Susan Downing; “*The member and observer States of the Working Group appear to be highly motivated to develop a new international instrument that will modernise and harmonise the international law regarding the carriage of goods by sea. The draft text, which was prepared by the Comité Maritime International, enjoys wide support from participating States as a basis for discussion on such a new instrument.*”¹¹³

8.3 The draft instrument

8.3.1 General

After years without uniformity of law and the last fatal mistake in trying to create harmony of law through the Hamburg regime there is high demand on quality and success of the next international instrument on the carriage of goods by sea. It must not only have the prospect of a uniform implementation worldwide, especially of the world’s main trading and ship owning nations, but there are several expectations to live up to and demands to fulfil. Preferably it should have an early acceptance by those nations implementing the rules. The text should be as clear and certain in its interpretation as possible. Further it should be conducive to the public policy aims of i.e. maritime safety, trade facilitation, environment, etc. The economical consequences, which are regularly used as an argument for the retention of the nautical fault,

¹¹⁰ Statistics come from e.g. the National Administration of Shipping and Navigation in Sweden, “Sjöolyckor med svenska fartyg år 2005”, p. 6.

¹¹¹ Statistics come from e.g. the National Administration of Shipping and Navigation in Sweden, “Sjöolyckor med svenska fartyg år 2005”, p. 25.

¹¹² Huybrechts, *The Hamburg Rules: A Choice for the E.E.C.?*

¹¹³ Downing’s article.

should provide for an efficient distribution of insured risk and it should also be rather convergent with the cargo liability regimes in force for other transport modes.¹¹⁴

In 1996 the UNCITRAL requested CMI (as well as other organisations) to gather information about current practices in the area of international carriage of goods by sea.¹¹⁵ The issues of liability were actually not included in the initial brief, but were introduced to the project in year 2000.¹¹⁶ A process of consultation and debate led to the endorsement of a provisional draft convention at the CMI conference in Singapore, February 2001. A final draft was adopted in November 2001 and transmitted to UNCITRAL for considerations on a diplomatic level. The article-by-article reading of the draft instrument started in April 2002 at session 9 of the UNCITRAL Working Group III and has proceeded until today.

8.3.2 Options

The CMI subcommittee¹¹⁷ in their work¹¹⁸ identified four main options for the future liability regime. The gradations of possible liability regimes from Hague-Visby as the most lenient option to the very strictest are innumerable. However these four options represented a rational selection of the main alternatives for the purpose of discussion.

1. The first option was to leave the Hague and Hague-Visby Rules unaltered. An option strongly opposed by the shippers but still favoured by the carriers and P&I Clubs.
2. The second option was a very simple compromise and contained of the idea to closely follow the Hague and Hague-Visby Rules but to remove the controversial nautical fault defence from there.
3. The third option was more similar in effect with that of the Hamburg Rules and with the Maritime Code of our Nordic regime with that the carrier would be held liable unless he could prove that the loss or damage did not result from any fault or neglect of his part.
4. The fourth option was an even stricter regime under which the carrier would be liable unless he could prove that the cause of the loss or damage was outside of his control. Such a regime could have been modelled on that in the CMR Convention for road transport^{119 120}.

The first option, retaining the nautical fault, is argued to be least corresponding with the demands set up for a new regime. It does not meet with the liability regimes for other modes of transport, nor does it offer a firm basis for uniformity since the opposition is strong and governments are moving away from Hague-Visby towards Hamburg as pointed out above. The radical fourth option of strict liability was not chosen which I will assume is a fair

¹¹⁴ The criteria are discussed by R. Clarke, p. 25.

¹¹⁵ CMI Draft Convention on Carriage of Goods [wholly or partly] [by Sea].

¹¹⁶ At the third meeting of the ISC.

¹¹⁷ ISC was set up in November 1999.

¹¹⁸ Outline instrument 4; 5.1 of the CMI sub committee.

¹¹⁹ CMR Article 17.

¹²⁰ Outline instrument 4; 5.1 of the CMI sub committee.

decision since it appears that the opposition from carriers and insurers interests is for a good reason considering the exceptional characteristics of sea carriage.

8.3.3 Various draft issues

In the progress of constituting a new regime the work on the draft convention has not been focused only upon the nautical fault defence. Although it is such a debated and controversial issue in maritime trade law it only takes part as a subject under the liability of the carrier. When the Working Group first met in 2002 to consider the draft text, 7 themes were identified as in need of particular focus.¹²¹ These were; the sphere of application (draft Article 3); electronic communication (draft Articles 2, 8 and 12); the liability of the carrier (draft Articles 4, 5 and 6); the rights and obligations of parties to the contract of carriage (draft Articles 7, 9 and 10); the right of control (draft Article 11); the transfer of contractual rights (draft Article 12); and the judicial exercise of those rights emanating from the contract (draft Articles 13 and 14). To these, the issue of freedom of contract was also added.

8.3.4 The deletion of the nautical fault defence

At the 10th session¹²² of the UNCITRAL Working Group III, the proposal to abolish the nautical fault¹²³ defence was favoured by the overwhelming majority of states. However, there were half a dozen or so States strongly opposing the deletion. The debate on this point alone consumed nearly two hours of precious meeting time.¹²⁴ Especially for the “management” element there was little support since it simply is known to produce disputes concerning the difference between management of the ship and the carrier’s normal duties to care of the goods. The deletion of the similar exception of the carrier’s liability from the Warsaw Convention in 1955 due to technical progress in navigational techniques was also pointed out.¹²⁵ It was also emphasized that such a step as deleting the nautical fault might be necessary in the context of establishing international rules for door-to-door transport¹²⁶. The opponents against the deletion of the nautical fault, in particular the navigational error, held that should it be removed, the existing position regarding the allocation of risks would change. It was very likely that such a considerable change would have economic impact on the insurance practice. A related view was that the nautical fault, however, should be maintained in the draft text within square brackets for a final decision later on regarding the entire “liability package”¹²⁷. Somehow, after discussions the Working Group finally decided to have the subparagraph 6.1.2(a), i.e. the nautical fault, deleted.¹²⁸

The work proceeded, about one year later, at session 12 where there was still support for the deletion of the nautical fault defence.¹²⁹ However, the fear of an unintended effect was expressed regarding the burden of proof. Unless it would be accordingly adjusted, the carrier

¹²¹ A/CN.9/510.

¹²² September 2002.

¹²³ Draft Article 6.1.2(a) of A/CN.9/WG.III/WP.21.

¹²⁴ Downing’s article.

¹²⁵ A/CN.9/525, para. 35, p. 14.

¹²⁶ The same thing as multimodal transport.

¹²⁷ The various aspects of the liability regime applicable to the various parties involved.

¹²⁸ A/CN.9/525, para. 36, p. 15.

¹²⁹ A/CN.9/544, para. 117, p. 38.

would have to prove the apportionment of the cause of the loss, which was considered to be virtually an “insuperable burden”.¹³⁰ Hence the practical result could be that the carrier would be fully liable in most cases for all the damage when there was any navigational fault. The decision to delete the nautical fault defence seems to have been considered all over again. However, again the final compromise between the parties in the Working Group was to delete the nautical fault.¹³¹

According to the sources I have been in contact with during the work of this thesis it seems as carriers and P&I clubs are still reluctant to the deletion of the nautical fault.¹³² For the carrier it is a question of being able to foresee the risk and of fulfilling the general principle that the liability imposed should not go beyond what can be insured at a reasonable cost.¹³³ It is a fact that maritime transport will always remain particularly exposed to perils. During the years 1987-1997 one of the main P&I clubs reported that 40 % of all major claims were cargo claims and that the principal cause of 25 % of them was nautical fault.¹³⁴ It seems no matter how much safety and technology develops vessels on open water or even in rivers and archipelago will always have collisions and groundings. It is simply not possible to prevent.¹³⁵

8.3.5 Compromising the law

Australia is an active supporter to a widespread adoption of a modernised cargo liability regime. Concerning the nautical fault they, providing there is clear international support among their trading partners, support abolition or partial abolition of the nautical fault defence. The partial abolition would in their meaning be that of act, neglect or default in the management of the ship as basis for exemption from liability.¹³⁶

When the carrier’s liability was drafted for the Hamburg Rules a compromise was to delete the nautical fault exception but to set the limits of liability of the carrier at relatively low amounts (only slightly above those of the Visby Protocol) and to allow the limits of liability to be broken only in case of the carrier’s serious misconduct. Another element of the compromise was to create an exception to the “presumed fault” basis on the carrier’s liability by requiring the claimant to prove the carrier’s fault or neglect in the case of loss, damage or delay in delivery caused by fire.¹³⁷ The burden of proving fault in cases of fire is imposed on the cargo interest in return for the removal of the nautical fault exemption, despite the fact that all the details relating to fire on board the ship are available to the carrier.¹³⁸

If carriers are prepared to accept full responsibility in principle for seaworthiness, navigation and management of the ship, then it might not be unreasonable to allow them the defence of proving that the occurrence leading to the loss or damage was not due to their fault or neglect, even in the navigation or management of the ship or in maintaining its seaworthiness.

¹³⁰ A/CN.9/544, para. 89, p. 28-29.

¹³¹ The uncertainty in the Working Group of whether to retain or delete the nautical fault is expressed in paragraphs 89, 127 and 129, A/CN.9/544.

¹³² Phone calls with Maria Berndtsson and Johan Schelin.

¹³³ Selvig, p. 9, in CMI Newsletter no 1-2000.

¹³⁴ Tetley, p. 3.

¹³⁵ Oral source: Fredrik Kruse.

¹³⁶ Richardson, p. 62.

¹³⁷ Lüddeke/Johnson, p 8-9.

¹³⁸ Karan, p. 324.

At one stage of the work on the draft convention *pilot error* was suggested to be reintroduced into the list of excepted perils by the following wording: “act, neglect or default of the pilot in the navigation of the ship”. However, after discussion the Working Group decided that pilot error would not be added to the draft.¹³⁹ This was a typical compromise suggestion, which would have relieved the carrier from at least a small part of what the nautical fault does nowadays.

8.3.6 Future

During the final stages of this thesis, the 19th Session of UNCITRAL’s Working Group III was held in New York where the third reading was accomplished.¹⁴⁰ During the 18th Session it was agreed that the aim was to have the third and final reading completed by the end of 2007.¹⁴¹ Since not much work on the liability of the carrier has been carried out during the last sessions it is possible to assume that the final basis of liability in the convention will be quite alike Chapter 6 of the last draft instrument¹⁴² where the nautical fault is deleted. When the next international convention is being signed the turn will come to the states to estimate its advantages and disadvantages and make up the minds about their own ratification, so also for Sweden and the Nordic countries. Nobody is perfectly sure of the consequences an elimination of the nautical fault would bring, though many have evaluated them in their urge or oppose of their opinion.

¹³⁹ A/CN.9/572, paragraphs 65-66, p. 18.

¹⁴⁰ 16-27 April, 2007.

¹⁴¹ A/CN.9/616, para. 281, p. 67.

¹⁴² A/CN.9/WG.III/WP.81.

9 PART IV – CONSEQUENCES

9.1 General

Like mentioned above the function of a maritime cargo liability regime is to allocate the risk between ship and cargo. To optimize the function of the liability there are several things to consider. First it must be economically efficient. Then it should be a rule promoting the predictability, certainty and stability that come from uniformity of application around the world of business. Further this should result the protection of the integrity of the bill of lading as instrument of currency in international trade.¹⁴³

Whether the nautical fault contributes to optimizing the liability system or not is widely debated. When the nautical fault was first deleted from the Hamburg Rules, Australian Lawyer Brian Makins called it a “fatal flaw”. According to him it was in 1991 increasingly understood that the defence was a vital part of the mechanism for allocating risk and that it formed an economically more efficient system than one lacking the nautical fault defence.¹⁴⁴

The main question within this thesis; the consequences of a deletion of the nautical fault, is now what we are going to concentrate on. Since the Hamburg rules are not really applicable anywhere we can unfortunately not find much guidance there. The Hamburg Rules may be a fatal flaw, but does the nautical fault in itself really constitute such a vital part in allocation of risk these days that a deletion would be a fatal flaw?

9.2 Legal consequences

9.2.1 Liability

The most obvious and direct consequence if the nautical fault defence is deleted is of course the change in allocation of risk for the parties. Even though the scope of the basis of the carrier’s liability would not be changed, the carrier would however loose one of his most important exculpations from liability. In this meaning a deletion would lead to considerable extended liability. The risk of navigational error causing loss or damage to the cargo would then be borne by the carrier, as would the risk of fault in management of the ship causing loss or damage to cargo. Courts would no more need to separate between nautical fault and commercial fault because they would both fall within the liability of the carrier. With other words there would no longer be any difference in whether the act is taken in the management of the cargo or the ship. In cases where the distinction has been very hard to determine, this might lead to better predictability. On the other hand the case law is rather clear on this matter, at least in Sweden, and this would certainly not be one of the most important consequences of a deletion.

¹⁴³ Makins, p. 43.

¹⁴⁴ Ibid.

The importance to allocate risk has direct impact on the shipping industry. It might be that this was even more important with an historical view of the matter, before the great developments of the insurance industry. A liability that is too strict on the carrier may result in his indifference for the protection since he would be liable anyway and is better off spending a fortune on insurance. On the other hand it is fair to believe that if no due diligence was imposed on the carrier the cargo would not receive the same level of care. The same theory applies to the shipper. The most favourable degree of liability is thus where the carrier as well as the cargo interest is encouraged to exercise and maintain an optimal level of care.¹⁴⁵ This theory proposes that it would be possible for the carrier to offer a service that would not satisfy his clients and continue his business nonetheless. The theory probably still holds a bit of realism even though in modern shipping there are far more reasons for the carrier to perform efficiently and professionally. Except all the demands and general marine rules¹⁴⁶ imposed on the carrier there is also greater competition between the shipping companies. This might be one of the reasons why it is now possible for maritime trade to be politically governed, while historically there was a commercial work of compromising between the parties.

Limitations of liability will probably be more frequently resorted to by carriers and his P&I underwriters when extended liability emerges combined with world inflation.¹⁴⁷

9.2.2 Burden of proof

The burden of proof is not really an issue that would have any real consequence of a deletion of the nautical fault. However, it is one of the important prerequisites in the legislation that can be used for compromising when a deletion is being considered. When the nautical fault was deleted in the Hamburg Rules it was unclear whether the burden of proof had become more stringent or not since the interpretation was not obvious. The new uncertain expressions in the liability rule through; “*all measures that could reasonably be required*”; were feared to impose a stronger liability than intended when deleting the terms fault and negligence.¹⁴⁸ However the ambiguities in the text of the convention were expected to lead to more claims and litigations.¹⁴⁹ Unfortunately, since the Hamburg Rules is not applied in any big shipping nations I have not been able to find any statistics on whether that is the case. In the current UNCITRAL draft instrument¹⁵⁰ the burden of proof is shifted to the cargo interest with the result that the carrier will no longer be liable for unexplained damage as a sort of compromise to the deletion of the nautical fault defence.

¹⁴⁵ Karan, p. 83.

¹⁴⁶ It is becoming more and more difficult for carriers whom are not serious to stay in the business. More and more rules are set up to simplify the trade between countries and for environmental issues.

¹⁴⁷ Pinéus/Sandström, p.165.

¹⁴⁸ Selvig, Marius 31, p. 14.

¹⁴⁹ CMI Report 1979, p. 10.

¹⁵⁰ The last draft instrument at the time of writing: A/CN.9/WG.III/WP.81, distributed 13 February 2007.

9.2.3 Delay

Delay in delivery in maritime trade is often equal to loss or damage for the shipper or cargo owner.¹⁵¹ If the draft convention will ever be applied, delay in delivery is within the carrier's scope of liability.¹⁵² Sometimes a delay is the result of the master's decision to stay in port due to a bad weather forecast or to take another route in order to avoid a peril. As mentioned earlier in this thesis the determination of route and evaluation of meteorological news qualifies as navigational duties. That means that whatever decision the master has taken, right or wrong, regarding the navigational duties any damage caused by delay can be defended with navigational error and the carrier is then no longer responsible. With other words there is no pressure (in this regard) on the master to go to sea if he fears problem. What happens if the nautical fault is then deleted and the carrier can no longer defend a navigational decision?¹⁵³ Whenever there is a true storm and the ship is not intended to go out, the force majeure principle is available for defence.¹⁵⁴ But when the master's decision to stay in port or take a longer route turns out to be completely unnecessary and causes delay in delivery for no reason, then what happens without the nautical fault defence? Probably the carrier will be liable for the fault by the master which caused the delay. Unless the exculpation under the Draft Convention¹⁵⁵ Chapter 6, Article 17, Section 3, item (m) "Reasonable measures to save or attempt to save property at sea" is applicable. The prerequisite "reasonable measures" is not determined though and it should be rather reasonable to assume that until it is distinguished in case law, which may take some time, there is a risk that ships will be set to upset seas for the sake of delivery on time. However, it is often difficult in a stressed situation or a crisis to determine what is "reasonable". Above all it is desirable that neither a new Convention nor a deletion of the navigational error will create a conflict with the master's first priority, which must always be the safety of his ship and its crew.

9.2.4 General Average

General average is a method of sharing risks between ship, freight and cargo that are involved in a common maritime adventure. It has been described as a special system of insurance for the carrier, back at times when marine insurance was not yet developed the way we know of it today.¹⁵⁶ The principle of general average is simple. If the common venture is in danger during the voyage – for instance, because of grounding it springs leak – then extra sacrifices and expenditure necessary to prevent the loss of the venture must be apportioned according to the value of each respective interest. The rule has become modern and developed to include the *principle of common benefit*. This means that expenses incurred for the benefit of the venture, even where it is not necessary to avoid the danger, are included.

The requirements for a general average act according to YAR are that there is a general average act when any *extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property*

¹⁵¹ Falkanger/Bull/Brautaset, p. 292.

¹⁵² A/CN.9/WG.III/WP.81, Chapter 6, Article 17, Section 1.

¹⁵³ The idea of this complex of problems was given to me in a conversation with the oral source Johan Schelin.

¹⁵⁴ A/CN.9/WG.III/WP.81, Chapter 6, Article 17, Section 3, item (a) "Act of God" or (b) "Perils, dangers and accidents of the sea or other navigable waters".

¹⁵⁵ A/CN.9/WG.III/WP.81.

¹⁵⁶ Pinéus/Sandström, p. 165.

*involved in a common maritime adventure.*¹⁵⁷ The rules of YAR are adopted and followed practically everywhere and no convention or law has technically any say in respect of general average.¹⁵⁸ From the Draft Convention Chapter 17, Article 82¹⁵⁹ follows that; “*Nothing in this Convention prevents the application of terms in the contract of carriage or provisions pursuant to national law regarding the adjustment of general average.*” Hence, at least in the legislation, there is an expectation that the general average will continue to exist.

General average most of the time arises out of situations caused by navigational error, i.e. groundings or collisions.¹⁶⁰ Other than that general average can also arise out of e.g. engine damage or fire. However, the basis of liability will be the basis for deciding whether or not the consignee may refuse to contribute in general average. Under the Hague/Visby Rules the cargo interest may invoke alleged unseaworthiness of the vessel in order to refuse to contribute to general average. The carrier has to prove that the vessel was seaworthy at the commencement of the voyage or that he exercised due diligence to make her seaworthy. Under the Hamburg Rules, showing that he exercised due diligence to make the vessel seaworthy is not enough. To use the nautical fault defence is even less possible under the Hamburg Rules. Instead the carrier has to prove that he, his servants and agents took all measures that could “reasonably” be required to avoid the occurrence and its consequences.¹⁶¹ Where the carrier is liable, he can not obtain any contribution from the consignee. Since we do not know what would have happened to the general average under the Hamburg Rules there is not much help to predict the result of the deletion of the nautical fault. What we do know is that a result of the widening of the carrier’s liability under the Hamburg Rules is that cases where he is not able to ask for security in general average exceeded those in the Hague-Visby Rules.¹⁶² However, the carrier may still declare general average in the case of unavoidable occurrences. If the Draft Instrument becomes operative, cases where the carrier cannot receive contribution through general average will still exceed those in the Hague/Visby due to the deletion of the nautical fault. On the other hand the unpredictable and criticised prerequisite “reasonably” is abolished and it is enough for the carrier to prove that the cause of the loss/damage was not attributable to its fault.¹⁶³ However, this should be heavy enough and opinions are shown which fear the abolition of the general average. The main reason for a possible abolition seems to be the deletion of the nautical fault defence since grounding, collision and taking a list, altogether represent the majority of the events necessitating general average.¹⁶⁴

It is understandable that carriers will have some difficult practical decisions to take in deciding whether or not it is worth declaring general average and collecting general average deposits, since these decisions many times have to take place long before the issue of liability is determined.¹⁶⁵ The concept has been criticised for being unnecessary since most of the interests involved are, or can easily be, insured and that money more or less only changes

¹⁵⁷ YAR, Rule A.

¹⁵⁸ Pinéus/Sandström, p. 166.

¹⁵⁹ A/CN.9/WG.III/WP.81.

¹⁶⁰ Pinéus/Sandström, p. 167.

¹⁶¹ Hamburg Rules Article 5:1.

¹⁶² Karan, p. 60.

¹⁶³ A/CN.9/WG.III/WP.81, Chapter 6, Article 17, Section 2.

¹⁶⁴ CMI Report 1979, p. 11 and Pinéus/Sandström; the statistics of general average is quite old, however, it seems fair to presume that the relation between the numbers have stayed pretty much the same since progress have succeeded in all the areas the last 30 years. Having discussed this with my oral source in this thesis; Anders Leissner, I am at least convinced that general average still exists.

¹⁶⁵ CMI Report 1979, p. 11.

hands between different sets of underwriters. However, the money distributed in general average ultimately comes from the assured and there seems to be an opinion fearing that the abolition of general average would cause insufficiency in the apportionment of risk in maritime commerce.¹⁶⁶

9.3 Economical consequences

9.3.1 Law and Economics

The ordinary market theory communicating supply and demand can be used to describe the relation between risk and liability. There are tendencies that the demanders/cargo owners want the suppliers/carriers to bear as much risk as possible while the carriers are interested in the cargo owners bearing the risk. Through law and economics theory it has been shown that inefficient relation between risk and liability is a disadvantage to both parties and not solely the one who initially has the greater burden. Therefore both parties should aim at achieving the optimal settlement of risk allocation.¹⁶⁷ According to the market theory the best settlement for both parties is to minimize the joint costs of risk and liability, e.g. insurance premiums and compensations. Regulations that realize this optimal relation between risk and liability will also reduce transaction expenses.¹⁶⁸ Obviously, it is not certain how this favourable risk allocation should be constructed practically in law but it is preferably one thing to have in mind. A deletion of the nautical fault would doubtlessly have *some* economical consequences since the cargo insurer more often can turn to the P&I Club for recourse. At least this seems to lead to that money will change hands somewhat more often. Whether the joint costs will increase or not is yet to see.

9.3.2 Cargo Insurance

Several parties can have an interest in the cargo like the shipper, cargo owner or buyer, or a financial creditor. Somehow the main interest for the cargo is the party bearing the risk who often has insured the cargo for the transportation. The cargo insurance may cover for the case the loss or damage can not be compensated due to the carrier's liability limits. It is important to note here, that the compensation from the cargo insurance is not relying on whether the carrier is actually liable or not.¹⁶⁹ Further it can not be guaranteed that the carrier will acquire insurance or keep up with the premium payments or that the extended liability insurance will cover all the risks that would have been covered by the cargo insurance. Another reason for cargo insurance is to get immediate recovery in case of loss or damage or to obtain a specifically required coverage which might have the advantage of lower premium. Cargo insurance may further cover the case of carrier's bankruptcy.¹⁷⁰ Like mentioned above in this thesis the interpretation may also differ between states and since the cargo will often travel through different jurisdictions there are many reasons for the cargo interest to have insurance coverage for almost all uncertain risks. Cargo insurances have played a very important role

¹⁶⁶ Pinéus/Sandström, p. 166, 169.

¹⁶⁷ Eide, p. 1.

¹⁶⁸ Eide, p. 15.

¹⁶⁹ Selvig (NTF), p. 124.

¹⁷⁰ Karan, p. 84.

because of the nautical fault since the cargo underwriter bears the risk for any claim won by the carrier who has invoked the nautical fault defence. However, the deletion of the nautical fault would significantly widen the scope of the carrier's liability and correspondingly decrease the risk for the cargo interest. It is possible that as a consequence of this risk transfer, the cargo insurers would lose some business. For the cargo owner it could be tempting to refrain from insuring their goods in transit and rely only upon the carrier to bear liability. However, the carrier can refrain from liability by proving that neither he or his servants have been negligent therefore as long as the liability is not strict and the limitation cannot always be calculated beforehand there is a very strong reason for the cargo owner to insure his cargo.

9.3.3 P&I Insurance

While cargo insurance is a part of the ordinary insurance companies worldwide, the liability insurance within maritime commerce is organised in the carrier's mutual P&I¹⁷¹ Clubs, mainly existing in the industrial countries with Great Britain¹⁷² in the definite top, followed by the Nordic countries¹⁷³ in second.¹⁷⁴ Under normal circumstances, most cargo litigation is brought by the cargo underwriter against the carrier's P&I Club. If the nautical fault exemption is deleted the carrier will most probably include the extension of his liability to be covered under the P&I insurance. The carrier would, if he could not invoke nautical fault, have to get an insurance covering the highest possible risk. This, while the cargo owner only used to insure the value of the particular cargo transported. In the P&I Club, the risk and hence the payments of compensation would spread among the members through increased calls. Therefore in the end, the widened liability for the carrier would reflect on the freight rates.¹⁷⁵ However, should this not mean that the cargo interest would no longer need additional insurance coverage for nautical fault since the carrier is liable?

The cost argument is probably the most invoked argument in the debate of the nautical fault deletion. Insurance premiums demonstrate the cost of liability much better than any estimations of future liability. The problem is often that relevant insurers so do not operate with public or general tariffs but each premium is individually negotiated. Thus the cost argument often lacks statistics in numbers.¹⁷⁶ In 1977 the British insurance market made a study of values of cargoes which became a total loss during that year. According to the study, four hundred million British Pounds was paid in compensation for total losses of non-oil cargoes. A little more than 40 per cent of that amount represented claims where the loss was due to error in navigation.¹⁷⁷ One would think that the freight rate should increase with more or less the same amount the cargo insurance premium would decrease. Thus the result would be for the cargo interest that they could maintain the same cost for carriage by sea. It has been argued though, that the rise in P&I calls would be proportionally higher than the fall in cargo insurance premiums.¹⁷⁸ The cargo insurers would have more opportunities to claim recourse from the P&I Clubs. Though it is fair to assume that the cargo insurer would receive a little

¹⁷¹ Protection and Indemnity, "non-profit"-based insurance.

¹⁷² UK Mutual 16% market share, Britannia 11% market share, West of England, North of England, London, Liverpool and London etc. Market share source from 2000: Røsæg, p.6.

¹⁷³ Gard 10% market share, Skuld 8% market share, Swedish Club 2% market share. Market share source from 2000: Røsæg, p.6.

¹⁷⁴ Selvig (NTF), p. 126.

¹⁷⁵ Karan, p. 84, 91.

¹⁷⁶ Røsæg, p. 4.

¹⁷⁷ CMI Report 1979, p. 22.

¹⁷⁸ CMI Report 1979 and Selvig (NTF), p. 128.

less net amount in litigation than the payment from the P&I Club would actually be. On the other hand the increase of payment from the P&I Club would fully and directly have affect on the freight with the result that it might not be possible to lower premiums even when the risk is more on the liability insurer.¹⁷⁹ As well as there is the argument that often the cost of litigation falls on the cargo insurer even if he has been the successful party. It seems all in all, that shipping is going to become a more expensive form of transportation as a consequence of the deletion of the nautical fault.

Perhaps after a period, when the market has adjusted to the new rules and the insurance systems do not need to overlap each other as much anymore, the premium for the cargo insurance and shipping costs will be able to decrease. After all, cargo insurance is a commercial business and competition for the customers is everything. Would the P&I Clubs really have to raise the call? The carrier normally has a P&I insurance policy at least up to the fair market value of the ship since his liability is proportionally limited to her value. Consequently, rates of call on each P&I member have varied with the gross registered tonnage of the vessel rather than the amount of goods carried therein.¹⁸⁰

9.3.4 Strict liability bill of lading

It is possible that the increase in liability may lead to the carrier accepting absolute liability for the goods entrusted to him. This means that to all intents and purposes he is the insurer of the goods, i.e. the cargo insurer. There would only be the exception of force majeure to this strict liability. In most cases with these circumstances there would not be separate cargo insurance. However, there will inevitably be numerous cases where the cargo owner fails to recover the full value of his goods. Such is not the case with cargo insurance where, providing there is evidence that the loss was due to a risk covered by the insurance policy, the insurer will automatically pay. Should the deletion of the nautical fault lead to the introduction of strict liability bills of lading the carrier's P&I calls would have to be increased which would lead to higher freight rates. The shipper would then, without having any choice, have to bear the cost of cover as well as he might have the overlapping cargo insurance for the case the recovery from the carrier will not be enough. However, some overlapping is inevitable. This kind of apportionment of risk, which is as a matter of fact hardly any apportionment at all, must be the most inefficient system of all from an economical perspective.¹⁸¹

9.3.5 Freight

Any drop in the amount of indemnity without consideration of the anticipated increase in freight could be criticized on moral and economic grounds. This is a result of the theory that the more risks are shifted onto the carrier by adopting the reasonable fault principle, the more freight is payable by the cargo interest because P&I insurance calls are normally higher than cargo insurance premiums. The carrier could avoid increasing the freight in proportion to the increase of transport costs owing to the competitive nature of carriage industry. As a result, the limitation of liability protects both parties against bad economic results of the fault principle and over insurance.¹⁸²

¹⁷⁹ CMI Report 1979, p. 23 and Selvig (NTF).

¹⁸⁰ Karan, p. 91.

¹⁸¹ CMI Report 1979, p. 16, 22.

¹⁸² Karan, p. 99-100.

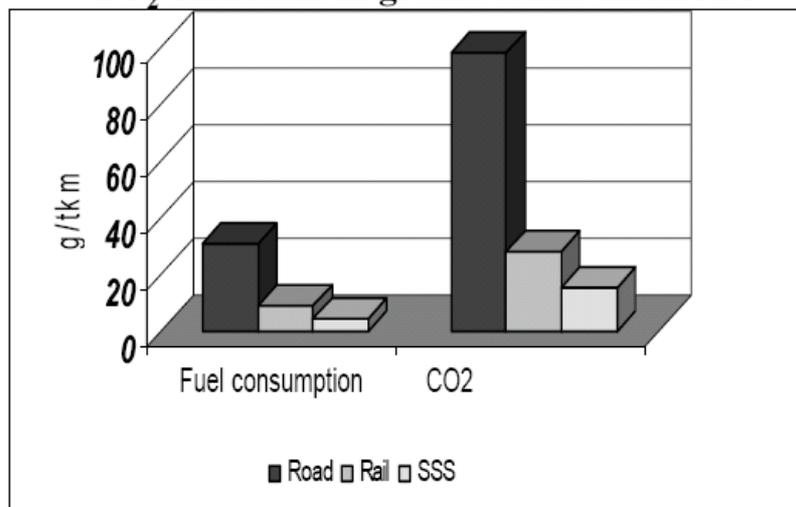
9.3.6 Environment

In the last decade and particularly in the last couple of years the issues of environmental effects and climatic changes have clearly become an intensively discussed topic. For politicians it is a side issue that must be considered in every decision concerning almost anything and transport in particular. Obviously the competition from other means of transport regarding overseas transportation is quite limited since air carriage is the only available option and that is of course considerably more expensive than sea carriage. Therefore it is possible to assume that it is the local trade and shipping business that should be in danger of competition from other means of transport. Since road carriage can be used in the Nordic countries and in fact all over Europe the biggest fear for the shipping industry is that transport by road would become more attractive to the cargo owners. That would as well be a bad scenario for the environment. From my research I have found some different figures for environmental damage of transport.



European Commission
Directorate-General for Energy and Transport

Estimated average fuel consumption and CO₂ emissions in grams/tonne-kilometre



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According to the carrier association in Sweden, road carriage by trucks generally affects the environment 7 times as much as sea carriage, measured in “per ton km”¹⁸⁴.¹⁸⁵ Though according to the Swedish political party the let outs of climate affecting gases are three times higher in road carriage than in sea carriage.¹⁸⁶ For carbon dioxide the figures are 0,15

¹⁸³ The diagram is provided to me from Sweship, Per Marzeilus.

¹⁸⁴ The environmental effluent can be measured in for example kilogram of CO₂ per 10 kilometre and ton cargo.

¹⁸⁵ Oral source: Per Marzeilus.

¹⁸⁶ http://mp.se/templates/Mct_77.aspx?avdnr=12099&number=128678 2007-05-02.

kilogram per 10 kilometre and ton goods for a ship compared to the 0,43 for a truck.¹⁸⁷ Since the environmental affects are so much lower in sea carriage compared to road carriage this must be the preferred transport for the future. Hence it must be an important political aspect to keep the freight rates down in order to make shipping competitive. However, it is the cargo owners whom are in the position to choose transport mode in the end and to them the deletion of the nautical fault is desirable in terms of liability while obviously freight rates are to their disadvantage.

9.4 Practical consequences

9.4.1 Claims

As the core elements of the liability regime have been applicable for such a long time (in Sweden since the Hague rules were implement in 1936), the principles governing the adjustment of liability are well known and most such claims are quickly and pragmatically settled between experienced claim handlers. Therefore it is nowadays not common for a cargo claim to go to trial.¹⁸⁸

The situation after a deletion would be very different for the cargo owner. His natural argument that the damage could have been avoided, had the fault in navigation (or management of the ship) not been made is no longer plausible. Any argument proving any sort of fault or negligence causing damage to the goods while in the custody of the carrier is decisive. It appears relatively few recourse actions are initiated when goods have suffered total loss due to error in navigation or management of the ship.¹⁸⁹ This indicates that the costs from dealing with recoveries are rather low for cargo insurers as well as carriers and liability insurers as the situation is today. If the increase of recourse action would be as large as some argue the cargo insurers might have to develop legal departments at to cope with the new work load. Perhaps the increase in litigation would lead to the need of more personnel for both the cargo insurers and the P&I Clubs.¹⁹⁰ Whether this is an advantage or a disadvantage is not sure. For states I suppose more job opportunities are a positive result, while more personnel for the insurers definitely results in increased administrative costs for litigation.

9.4.2 Recourse against the carrier's servants

Under the Hague-Visby rules the carrier is not liable for fault on the side of his crew. Hence the vicarious liability is somewhat limited and the money to compensate for the fault of nautical fault comes from the cargo insurers with nobody to present recourse against. If fault in navigation and management of the ship will become part of the liability of the carrier; is his insurer, the P&I club, the last in the paying chain? There is a possible risk that there will be recourse presented against the person in the crew having made the mistake. Not that there is a big chance of finding much money there but I assume that this would feel like sort of a change, and maybe a threat, for the crew performing the transport for the carrier.

¹⁸⁷ http://mp.se/templates/Mct_77.aspx?avdnr=12099&number=128785 2007-04-23.

¹⁸⁸ Broadmore, p. 6.

¹⁸⁹ CMI Report 1979 p. 21.

¹⁹⁰ CMI Report 1979, p. 23.

10 PART V – CONCLUSIONS

10.1 Arguments for and against deletion of the nautical fault

Because this thesis has such a clear question considered throughout the study I tried to create a list of paragraphs to summarize the arguments and separate the *for-and-against*-deletion opinions. This proved to be an impossible task. They are in each other's pocket! It is important that the cargo interest continues to choose sea carriage, for the shipping industry as well as for the environment. Therefore the costs for the shipping should be kept at a minimum. Then cargo owners will continue to choose this transport mode to keep his expenses down and to stay competitive.

The effect on insurances and freight is undoubtedly the most frequently discussed consequence regarding the deletion. I find it hard to believe that they will not be affected even though the effect is yet not seen on the domestic sea carriage in Norway according to my research. There must be a strong increase in payment coming from the P&I clubs if the carrier becomes liable for nautical faults. Since the clubs are mutual this would automatically lead to an increase of the calls. And it is fair to assume that the carrier will then have to raise the freight in order to continue the economical profits. I find it much more difficult to predict the economical consequences for the cargo insurer. It is likely that the cargo interest will continue to have a cargo insurance for the case the carrier is not liable and it is likely that the insurances will overlap. It is further quite possible that the number of claims and litigations will increase, at least initially, but will it stay like that? It should be possible to decrease the costs of claims as the industry adjusts to the new system. However, how the decrease in costs for the cargo insurer will be compared to the increase in costs for the P&I clubs I am unfortunately unable to predict. The consequences of deleting the nautical fault can never be accurately determined. All estimations made are from insufficient basis. I must say in my opinion though, it does not really make sense that shipping would become more expensive in the whole, although it is of course possible. It would in that case only be for the administration of more claims in that case, or possibly even for the cargo insurers making money on the overlap of insurances, but they should actually loose market when the risk is borne by the carrier. In the end of the chain there is the P&I clubs taking over insurance market with the shift to the extended carrier's liability. But P&I clubs are working on non-profit-basis and their calls are depending on the yearly member expenditures. Therefore I find it possible that the increase in cost might not be more than initially unless the number of accidents would increase.

Speaking clearly against a deletion is the event of a total loss. In the event of total loss of the vessel the risk is not concentrated on the carrier if he can defend himself with the nautical fault. Instead it is spread amongst the various cargo underwriters insuring individual consignments since there are often more than one cargo owner transporting cargo on a vessel at a time. Even if there is only one cargo owner the risk is still spread on both the cargo interest and the carrier. The allocation of risk is the main argument among the spokesmen for the nautical fault.

When the ship is only damaged, but not sunken, and the cargo is for example damaged from a leakage of sea water, the value of the spoilt cargo may be really much higher than the cost to repair the vessel. That means that the nautical fault in this case jeopardizes more value for the

cargo owner than for the carrier. I presume that this is not a purpose of the nautical fault and in such a case the carrier should contribute to the loss of the cargo owner.

The defence was undoubtedly easier justified in the early stages of shipping on the high seas when the carrier had no means of communicating with or maintaining control over their captain and the crew for long periods of time. Nowadays though, the question is if the nautical fault serves a valid purpose since today we have developed a high level of electronic communication systems, improved navigation devices and advanced in marine technology such as engines. Therefore, one of the strongest arguments against the nautical fault is that it does not serve its own purpose any longer. The carrier has all the equipment in the world to prevent mistakes and accidents. And still they happen. The statistics presented in this study show that the number of accidents is rather unvarying from year to year and it is also confirmed from the P&I clubs that they are rather frequent. These statistics strongly speaks against the argument that accidents can be avoided since the shipping technology has improved. Although it is of course true that accidents must be far less common now compared to a century ago when all ships were expected to end up on the bottom of the sea some day. However, with the perils of the sea being the same today as one hundred years ago and the responsibility left to the crew on board as well as the difficulties in seeking a port of refuge (compared to e.g. a truck which can just stop by a parking place if there is trouble) the nautical fault *can* still be justified.

It is an interesting perspective that the commercial compromise is now overtaken by politician's decisions in the UNCITRAL. The nautical fault is a sort of commercial compromise still alive. Is there a risk with the government's involvement that they can manipulate the shipping industry with their own particular reasons? In a purely commercial compromise the parties themselves must compromise with their opinions to reach a final decision. However historically, when the bills of lading clauses were constructed before the conventions the carriers had a great advantage. As a result of that the court started interpreting the clauses in the favour of the cargo interest. This result is nothing worth aiming for today talking about the importance of uniformity. Suppose today, the industrial countries were the cargo interests and the other way around, i.e. the rich countries represented the cargo interests. Would we then have the nautical fault? I am afraid not. Hence there is a necessity to bring the legislation to another level, where compromises between unequal competitors can be made. Perhaps the nautical fault is not an obstacle to the shipping industry in general, but to poor export nations not provided with their own shipping industry it has obviously been considered an obstacle.

The multimodal transport system is becoming more and more important and maritime law is expected and demanded to become more harmonized with the other transport conventions. Nevertheless, sea transport is a category of its own and therefore should be treated like that. It is misleading in my opinion to be too strict when comparing sea transport to other modes of transport. If the strict liability of e.g. CMI were to be applicable on the sea carrier it is possible to assume that the consequences for the liability insurers would be enormous. Now strict liability is not proposed through the Draft Convention but the question is how the new liability according to the draft would be interpreted. The nautical fault has been around for very long and the interpretation is easy to manage. If the courts shall start to evaluate what is required for the carrier to prove that the damage was not caused by his fault or neglect a new practice will start to develop. In SMC Chapter 13 Section 25 the liability is already constructed this way. Although I wonder how often it is applied when the nautical fault is available.

The most favourable degree of liability is thus where the carrier as well as the cargo interest is encouraged to exercise and maintain an optimal level of care. Will the deletion of the nautical fault lead to less damage? There are arguments for this. I would assume that the risks involved in sea carriage are already enormous as it is and the competition also plays an important role. For the crew handling the vessel I believe the worrying for not making mistakes is big enough considering the possible effects of making mistakes on board a ship. Therefore a deletion of the nautical fault should not in my opinion change the due diligence for the cargo, nor change the care in navigation or management of the ship.

The threat against the General Average institute seems reasonable. Since general average contributions are mostly asked for in the event of grounding, collision, engine damage, fire, taking a list or otherwise springing a leak and all those events often are results of navigational error or fault in management of the ship the possible occasions for the carrier to ask for general average contribution will considerably decrease. The only actual occasions when general average would be accessible would be unavoidable occurrence, fire on the ship or by proving the absence of fault. This might be the fair apportion of costs though; that when the carrier is not at fault there is a right to contribution from the common venture of general average. While as long as there is any fault, as nautical fault or fault in the due diligence the carrier may only seek compensation from his insurer.

10.2 Final analysis

With the fatal flaw of the Hamburg Rules in the history and all the years of intense work spent on the draft convention and its predecessor it is possible to assume that the draft convention in UNCITRAL will become the fourth international convention on the carriage of goods by sea. It looks as though it could be enacted in a rather short period of time. However, one thing that is sure is that nothing will be left to chance. The lesson is already learnt from the desperate Hamburg compromise. At this point everything looks as if a new convention, eliminating the nautical fault defence, will be available in not long at all. Sweden has been part of the progress of the draft but will however have to consider its own ratification in the end and it is of course possible that there is not complete agreement with the rest of the shipping world. In my opinion though, Sweden should not hesitate to ratify because of the deletion of the nautical fault. At least not if the ratification of the convention will be considerable among our trade partners. Uniformity should prevail over the importance of the deletion of the nautical fault. The results of harmonized legislation could easily lead to less cost because of the possibility to foresee risk. Maybe this cost efficiency can make up for lost expenditures within the insurance issue. For the costs otherwise, I refer to my argumentation about the P&I calls stated above. Regarding the liability issue in general it seems fair to keep the fault criterion for some distribution of risk.

The nautical fault has proven to be a justifiable rule, even with the technology developments made. However, in my opinion it gives shipping a special, or say different characteristic which might not be necessary anymore. Somewhat for the reason that it lies in the nature of transport that the carrier should be liable for the service he performs. The common venture-argument is rather conservative nowadays. The cargo interest actually buys a service as a consumer and the commercial competition should be reason enough for the carrier to perform his best and keep costs down.

11 SOURCES

Law, convention and proposition

Hague rules 1924

Hague-Visby Rules (Visby Amendment 1968)

Hamburg Rules 1978 (United Nations Convention on the Carriage of Goods by Sea)

Norwegian Maritime Code 1994

Swedish Maritime Code, Sjölag 1994:1009

York-Antwerp Rules, 2004

Proposition 1993/94:195 p 134

Bibliography

Falkanger/Bull/Brautaset:

Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, “*Scandinavian maritime law, The Norwegian perspective*”, Universitetsforlaget, second edition, 2004

Grönfors:

Kurt Grönfors, “*Sjölagens bestämmelser om godsbefordran*”, P A Norstedts & Söners förlag Stockholm, 1982

Honka:

Hannu Honka, “New carriage of goods by sea, The Nordic approach including comparisons with some other jurisdictions”, Institute of Maritime and Commercial Law, Åbo Akademi University, 1997

Karan:

Hakan Karan, “*The carrier’s liability under international maritime conventions, the Hague, Hague-Visby, and Hamburg rules*”, The Edwin Mellen Press, 2004

Lüddeke/Johnson:

Christof F. Lüddeke, Andrew Johnson, “*A guide to the Hamburg rules*”, Lloyd’s of London Press Ltd, 1991

Richardson:

John Richardson, “*The Hague and Hague-Visby Rules*”, Lloyd’s practical shipping guides, fourth edition, 1998

Scrutton:

T. E. Scrutton, “*Charterparties and bills of lading*”, Sweet and Maxwell, twentieth edition by Stewart Boyd, Andrew Burrows, David Foxton, 1996

Sturley:

Michael F Sturley, Professor of Law, Texas, “*International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*” (1987) Virginia Journal of International Law 729, <http://cisgw3.law.pace.edu/cisg/biblio/sturley.html> 2007-05-03

Tetley:

William Tetley, Chapter 16, *Error in navigation or management*, <http://www.mcgill.ca/files/maritimelaw/ch16.pdf> 2007-05-03

The Hamburg Rules: A Choice for the E.E.C.?:

International Colloquium 18 and 19 November, 1993, European Institute of Maritime and Transport Law, Authors used: R. Herber, M. Huybrechts, R.E. Japikse, R. Roland

Articles

Andreani:

L. Andreani, “*Revision of the Hague Rules, Activities of UNCTAD and UNCITRAL and the Developing Countries, Studies on the Revision of the Brussels Convention on the Bills of Lading*”, Genoa 1974,

Clarke:

Roger Clarke, “*Cargo Liability Regimes*”, Prepared for the OECD Maritime Transport Committee, Directorate for science, technology and industry, January 2001

Downing:

Susan Downing, Attorney General’s Department, “*The UNCITRAL Draft Preliminary Instrument on the Carriage of Goods by Sea*”, <http://www.mlaanz.org/docs/Susan%20Downing.doc>, 2007-03-07

Eide:

Erling Eide, “*Rettsøkonomiske analyser av forslaget til ny sjøtransportkonvensjon*” during the seminar “*Nye ansvarsregler for lasteskader. UNCITRALs forslag til ny konvensjon om stykkegodstransport*”, 2003

Makins:

Brian Makins, “*Uniformity of the law of the carriage of goods by sea in the 1990s: The Hamburg Rules – a casualty*”, 1991, 8 MLAANZ Journal – Part 1

The article is also found as PDF at:

https://maritimejournal.murdoch.edu.au/archive/vol_8/1991vol8part1makins.pdf (2007-03-09)

Pinéus/Sandström:

Kaj Pinéus/ Inger Sandström, “*The Hamburg Rules from the Average Adjuster’s point of view*”, Nordisk Försäkringstidskrift (NTF) 3, 1978

Røsæg:

Erik Røsæg, “*The impact of insurance practices on liability conventions*”, Originally published in: Legislative approaches in maritime law, Proceedings from the European Colloquium on maritime law: Lysebu, Oslo, 7-8 December 2000, MarLus No 283

Selvig (NTF):

Erling Selvig, ”*Haag-regler, Hamburg-regler og sjøforsikringspraksis*”, Nordisk Försäkringstidskrift (NTF) 2, 1979

Selvig, Marius 31:

Erling Selvig, ”*The Hamburg Rules, Konvensjonen om sjøtransport av gods, 1978*”, Marius nr 31, Nordisk Institutt for Sjørett, 1978

Selvig in CMI Newsletter no 1-2000:

Article by Erling Selvig, CMI Newsletter no 1-2000, www.comitemaritime.org/news/pdffiles/nl00_1.pdf 2007-03-09

Reports

Augello:

William J Augello, “*Before the subcommittee on surface transportation and merchant marine of the senate committee on commerce, science and transportation/ Testimony of William J Augello, ESQ. on behalf of the national industrial transportation league on the revisions to the carriage of goods by sea act*”, 1998

Broadmore:

Tom Broadmore, “*International convention on transport law*”, NZ Institute of Economic Research (INC), NZIER, 2002

The report is also found as PDF at:

<http://www.transport.govt.nz/assets/NewPDFs/MaritimeLiabilityReport2.pdf> 2007-05-01

CMI Draft Convention on Carriage of Goods [wholly or partly] [by Sea], <http://comitemaritime.org/draft/draft.html> 2007-05-03

CMI Report 1979:

CMI Report 1979, “*Colloquium of the Hamburg Rules*”, Vienna 1979

CMI Yearbook 2005-2006, http://comitemaritime.org/year/2005_6/pdffiles/YBK05_06.pdf

Katiforis:

Report by Giorgos Katiforis - A4-0036/97- kom(96)0084 -C4-0211/96. Committee for economics, currencies and industrial politics (Utskottet för ekonomi, valutafrågor och industripolitik),

<http://www.europarl.europa.eu/press/sdp/journ/sv/1997/n9703112.htm> 2007-05-23

National Administration of Shipping and Navigation in Sweden, “*Sjöolyckor med svenska fartyg år 2005*”, (Sea accidents with Swedish vessels year 2005)

UNCITRAL

http://www.uncitral.org/uncitral/en/commission/working_groups/3Transport.html

A/CN.9/WG.III/WP.21 – Prel. Draft 2002

A/CN.9/510 – Report of the 9th session

A/CN.9/525 – Report of the 10th session

A/CN.9/544 – Report of the 12th session

A/CN.9/572 – Report of the 14th session

A/CN.9/616 – Report of the 18th session

A/CN.9/WG.III/WP.81 – Last Prel. Draft, 13 February 2007

Case Law

ND 1961.282. SSC MALEVIK

ND 1957.30 NSC TRINIDAD

Hayn v. Culliford (1878) 3 C.P.D. 410, aff'd (1879) 4 C.P.D. 182 (C.A.)

Yawata Iron & Steel v. Anthony Shipping, 396 F. Supp. 619, 1975 A.M.C. 1602 (S.D.N.Y. 1975)

American Smelting & Refining Company v. S/S Irish Spruce, 548 F.2d 56 (2d Cir. 1977)

Insurance Co. of N.A. v. G.A. Georgilas, 1983 A.M.C. 1916 (S.D.N.Y. 1983)

Oral Sources

Included as oral sources are only people with whom I have talked personally, misunderstandings are not impossible

Bjørn Fremmerlid, Gard, Arendal, Norway, 2007-04-23

Fredrik Kruse, Swedish Club, Gothenburg, Sweden, 2007-04-23

Anders Leissner, Swedish Club, Gothenburg, Sweden, 2007-04-30

Per Marzelius, Sweship (“Sveriges Redareförening”), Göteborg, Sweden, 2007-04-23

Johan Schelin, Ministry of Justice, Sweden, 2007-03-08