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THE EVOLUTION OF THE OBLIGATION OF SEAWORTHINESS FROM THE HAGUE RULES TO THE ROTTERDAM RULES

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Abstract

Carrier's duty to provide a seaworthy vessel has been one of the most fundamental principles in maritime law and hereby a core element of every contract of carriage of goods by sea throughout maritime history. Notwithstanding the duty was initially appraised to be absolute obligation under common law, it has been then boiled down to whether exercising due diligence by the carrier as a result of several attempts to find the balance between the commercial interests of carriers and shippers. The obligation of exercising due diligence was introduced in the Harter Act for the first time though, it has, in essence, gained international recognition through the Hague Rules. This paper hereby will comparatively scrutinize how the obligation of seaworthiness has been interpreted by courts, and whether there is a remarkable difference amongst the Hague/Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules in the sense of the nature of the carrier's duty to provide a seaworthy vessel.

Key Words

Seaworthiness • Due Diligence • International Conventions • Basis of Liability • Burden of Proof

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LAHEY KURALLARI'NDAN ROTTERDAM KURALLARI'NA TAŞIYANIN GEMİYİ SEFERE ELVERİŞLİ HALDE BULUNDURMA YÜKÜMLÜLÜĞÜ

Özet

Taşıyanın gemiyi sefere elverişli halde bulundurma yükümlülüğü deniz ticaret hukukunun en temel prensiplerinden biridir ve nitekim denizcilik tarihi boyunca da her deniz yoluyla mal taşıma sözleşmesinin temel unsurlarından biri haline gelmiştir. Bu yükümlülük, başlangıçta İngiliz Hukuku'nda mutlak bir garanti sorumluluğu olarak değerlendirilmiş olsa da gemi sahiplerinin ve kargo sahiplerinin ticari çıkarları arasında bir denge bulmaya ilişkin çeşitli girişimlerin akabinde, taşıyanın sadece gerekli özeni gösterip göstermeği olgusuna indirgenmiştir. Gerekli özeni gösterme yükümlülüğü ise, ilk kez esasen Harter Yasası ile benimsenmiş olup, Lahey Kuralları ile uluslararası tanınırlık kazanmıştır. İşbu makalede, taşıyanın sefere elverişli bir gemi bulundurmak borcunun genel anlamda mahkemeler tarafından nasıl yorumlandığı ve sorumluluğun esası bakımından, Lahey/Lahey-Visby Kuralları, Hamburg Kuralları ve Rotterdam Kuralları arasındaki farklar incelenecek olup, buna ilişkin karşılaştırmalı bir değerlendirme sunulacaktır.

Anahtar Kelimeler

Sefere Elverişlilik • Gerekli Özen • Uluslararası Sözleşmeler • Sorumluluğun Esası • İspat Yükü

I. INTRODUCTION

Seaworthiness is conceived to be one of the most pivotal concepts in maritime law and hereby has become a core component of every contract in respect of maritime freight transport throughout the history of shipping[1]. The doctrine of seaworthiness had initially been constituted to safeguard the diverse interests of parties exposed to the possible perils of the marine adventure, and then it has been enhanced in response to the current needs of marine adventure[2]. The definition of seaworthi-

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1 SÖZER Bülent, Deniz Ticareti Hukuku: Gemi-Donatan-Taşıyan ve Deniz Ticareti Hukuku'nda Sorumluluk Rejimi, 1st ed., İstanbul, 2011, p. 573; GIRVIN, Stephen, "The Obligation of Seaworthiness: Shipowner and Charterer", CML Working Paper Series, No. 17/11, 2017, p. 1; GIRVIN, Stephen, "The Carrier's Fundamental Duties to Cargo under the Hague and Hague-Visby Rules", JIML, V. 25, pp. 443-462, 2019, p. 444.

2 FOSTER, Nicolas R., "The Seaworthiness Trilogy: Carriage of Goods, Insurance, and Personal Injury", Santa Clara Law Review, V. 40, N. 2, pp. 473-510, 2000, p. 509; ZHANG, Pengfei/PHILLIPS, Edward, "Safety First: Reconstructing the Concept of

ness has been subjected to many discussions within time, yet there is still no consensus in this regard; nevertheless, seaworthiness is generally accepted as a relative and comprehensive term[3].

In hindsight, the standard of seaworthiness had been interpreted in the grip of national laws of different countries. However, after the maritime transport of goods had turned out to be a universal activity, the concept of seaworthiness was required to have been enshrined within international carriage of goods conventions in order to unify certain rules and to make sure that the parties to any maritime activity are considerably wary of the severe consequences of breach of the obligation[4]. In essence, the first regulation[5] regarding seaworthiness was introduced

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Seaworthiness under the Maritime Labour Convention", Marine Policy, V. 67, pp. 54-59, 2016, p. 54; SOYER Baris, Warranties in Marine Insurance, 1st ed., London, 2001, p. 56-57.

3 WILSON John F., Carriage of Goods by Sea, 7th ed., London, 2010, p. 11; WHITE, Roger, "The Human Factor in Unseaworthiness Claims", LMCLQ, pp. 221-239, 1995, p. 222; KASSEM, Ahmad H., *The Legal Aspects of Seaworthiness: Current Law and Development*, Doctoral Dissertation, Swansea University, Swansea, 2006, p. 22; CHACÓN Víctor H., The Due Diligence in Maritime Transportation in the Technological Era, New York, 2017, p. 118; SOYER Baris, Warranties in Marine Insurance, 3rd ed., Abingdon, 2017, p. 63-64; SÖZER Bülent, Taşıyanın Gemiyi Sefere Elverişli Halde Bulundurmak Borcu, Ankara, 1975, p. 28; SÖZER, Deniz Ticareti, p. 583; TAŞDELEN Nihat, Deniz Yoluyla Yapılan Taşımalarda Taşıyanın Başlangıçtaki Elverişsizlikten Doğan Sorumluluğu, Bilgi Toplumunda Hukuk Ünal Tekinalp'e Armağan, V. I, İstanbul, 2003, p. 946; ÇAĞA Tahir/KENDER Rayegan, Deniz Ticareti Hukuku II: Navlun Sözleşmesi, 10th ed., İstanbul, 2010, p. 19; YETİŞ-ŞAMLI, Kübra, "Lahey-Lahey/Visby, Hamburg ve Rotterdam Kuralları'nda Sefere Elverişlilik", İÜHFM, V. LXXI, I. 2, 2013, p. 483.

4 KARAN Hakan, The Carrier's Liability Under International Maritime Conventions The Hague, Hague-Visby, and Hamburg Rules, New York, 2004, p. 43; KASSEM, p. 3; BAATZ Yvonne, "Charterparties" In *Maritime Law*, edited by BAATZ Yvonne, pp. 117-177, 3rd ed., Abingdon, 2014, p. 121; KENDER Rayegân/ÇETİNGİL Ergon/YAZICIOĞLU Emine, Deniz Ticareti Hukuku –Temel Bilgiler, Volume 1, Istanbul, 2019, p. 203; CHACÓN, p. 174.

5 Even though those given regulations are regarded as the first implications of seaworthiness in the context of the contemporary maritime law, the concept of seaworthiness dates back to hundreds of years ago. To exemplify, the Sea Law of Rhodes, which did not impose explicitly the obligation of seaworthiness on ship owner though, established three particular elements as "*the condition of the vessel itself, the tackle and the mariners*", which the carrier was to check out before loading. These elements might be considered to correspond with the modern seaworthiness standard in some respects. *See* CHACÓN, p. 35. Likewise, the Laws of Oleron of about 1150 AD, which is conceived to be the foundation of all the European Maritime

by U.S. Harter Act in 1893[6]. Afterwards, the principles established in the Harter Act became in many respects the basis of liability and then followed by the Hague Rules (HR, 1924)[7], the Hague-Visby Rules (HVR, 1968)[8], the Hamburg Rules (1978)[9], and the Rotterdam Rules (2009)[10] consecutively[11].

It must be above all borne in mind that the term of seaworthiness encompasses not only worthiness as regards physical state of the ship (*denize elverişlilik*) but also voyage-worthiness (*yola elverişlilik*) and cargo

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codes, encompassed several provisions in respect of seaworthiness in the sense that the master was obliged to provide the vessel with sufficient crew in order for the ship owner to be able to exculpate himself from liability in the case of damage or loss. Even so, the term of seaworthiness was not explicitly enunciated. Ultimately, it is suggested that the concept of seaworthiness initially began as a recommendation to the merchants who were to make an inspection as to whether particular aspects of the vessel's structure are in sound condition. This understanding has been evolved and maintained as an obligation upon the shipowner over time. *See* SOYER, Warranties, p. 58; KARAN, Liability, p. 7-12.

6 The significance of the Harter Act of 1893stems from the fact that the first introduction of the duty to exercise due diligence, instead of absolute warranty, in making a vessel seaworthy has been laid down in Sec. 191 of the Act. *See* KASSEM, p. 74; KARAN, Liability, p. 19-20; DJADJEV Ilian, The Obligations of the Carrier Regarding the Cargo-The Hague-Visby Rules, Cham, 2017, p. 41; CHACÓN, p. 70; ZHANG/PHILLIPS, p. 55; SÖZER, Deniz Ticareti, p. 566.

7 International Convention for the Unification of Certain Rules Relating to Bills of Lading was adopted on 25 August, 51 Stat. 233, 120 L.N.T.S. 155. (in force 2 June 1931) (hereinafter the HR).

8 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments), Feb. 23, 1968, 1412 U.N.T.S. 127. (in force 23 June 1977) (hereinafter the HVR). The Visby Protocol introduced slight changes and did not amend the seaworthiness provisions of HR.

9 United Nations Convention on the Carriage of Goods by Sea was adopted on 31 March 1978, 1695 U.N.T.S. 3. (in force 1 November 1992) (hereinafter the Hamburg Rules).

10 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was adopted on 11 December 2008, G.A. Res. 63/122, U.N. Doc. A/RES/63/122, Annex (Feb. 2, 2009) (hereinafter the Rotterdam Rules) As of January 2021, the rules are not yet in force. *See* UNCITRAL, "Text and Status", <https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status> (accessed, on 10 January, 2021).

11 THOMMEN, T. Kochu, "Carriage of Goods by Sea: The Hague Rules and Hamburg Rules", JILI, V. 32, N. 3, 1990, p. 285; KASSEM, p. 14; KARAN, Liability, p. 7; ZHANG/PHILLIPS, p. 55.

worthiness (*yüke elverişlilik*) in the light of both international conventions on maritime transport of goods and Common Law[12].

The aim of this paper is to make a comparative analysis of the obligation of seaworthiness in the scope of the HR/HVR, the Hamburg Rules and the Rotterdam Rules. Considering these, the evolving character of the obligation of seaworthiness under the involved conventions will be scrutinized in the sense of the nature of the carrier's duty to provide a seaworthy vessel, basis of liability, burden of proof and order of proof. The comparative analysis will also be submitted in the light of the jurisprudence of several states parties to the HR/HVR, in particular Common Law.

II. THE CARRIER'S DUTY UNDER THE HAGUE/HAGUE-VISBY RULES

2.1. Background

The genesis of the HR was, in essence, to find the balance between the commercial interests of the carriers and cargo-owners, which were regarded disproportionate to cargo interests[13]. This is because the UK, which had dominated over the shipping industry with a considerable number of sailing vessels and steamships of over 100 tons accounting for over a half of the world's whole tonnage at the beginning of the 20th century[14], had favoured the carriers[15]. In contrast, other countries such as USA, Canada, Australia appeared to be favouring cargo owners by enacting accordingly legislations[16]. In the wake of these fragmentations, discussions about a necessity for an international regulation were stirred

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12 AIKENS Richard/ LORD Richard/ BOOLS Michael, Bills of Lading, 2nd ed., Abingdon, 2016, p. 316-318; WILSON, p. 12; CHACÓN, p. 144;SÖZER, Taşıyanın, p. 3-4; KASSEM, p. 24; DJADJEV, p. 45.

13 REYNOLDS, Francis, "The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules", MLAANZ Journal, V. 7, pp. 16-34, 1990, p. 18; SÖZER, Deniz Ticareti, p. 559; YAZICIOĞLU Emine, Hamburg Kuralları'na Göre Taşıyanın Sorumluluğu: Lahey/Visby Kuralları ile Karşılaştırmalı Olarak, 1. ed., İstanbul, 2000, p. 1; CHACÓN, p. 73; DJADJEV, p. 33.

14 CHACÓN, p. 73.

15 REYNOLDS, p. 18; CHACÓN, p. 73; DJADJEV, p. 33.

16 YAZICIOĞLU, Hamburg Kuralları, p. 1-2; SÖZER, Deniz Ticaret, p. 563-564; REYNOLDS, p. 18; CHACÓN, p. 73; DJADJEV, p. 33.

dramatically[17]. Eventually, the HR were opened for signature in 1924, came into effect in certain states in 1931 and turned out to be the first international mandatory rules constituting uniform international maritime law[18] by enacting to be a general code under bills of lading[19]. Nevertheless, the convention was designed to implement merely to the relations deriving from bills of lading (Art I-b) or any similar document of title (Art I-b). That is to say, only certain aspects of the contract of carriage have been encompassed by the HR. Afterwards, the HVR, which adopted in 1968, introduced a few subtle changes on the grounds that the questions raising owing to the shortcomings such as vagueness, insufficient language, obsolescence of the HR became more conspicuous[20]. However, the HVR did not succeed in fulfilling the real necessities that the new global economy went through even at time of its enactment[21].

The HR/HVR[22] are by far the most significant and leading convention on maritime cargo transport, inasmuch as the convention is current-

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17 FREDERICK, David C., "The Political Participation and Legal Reform in the International Maritime Rulemaking Process: from the HR to the Hamburg Rules", JMLC, V. 22, pp. 81-117, 1991, p. 84; YAZICIOĞLU, Hamburg Kuralları, p. 3.

18 KARAN, Liability, p. 27; SOYER, Baris/ NIKAKI, Theodora, "A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?", BJIL, V. 30:2, pp. 303-348, 2012, p. 303.

19 TETLEY, William, "Interpretation and Construction of the Hague, Hague/Visby and Hamburg Rules", JIML, V. 10, 2004, p. 37; SOYER /NIKAKI, p. 304.

20 SÖZER, Deniz Ticaret, p. 567; YAZICIOĞLU, Hamburg Kuralları, p. 2-3; KARAN, Liability, p. 27; CHACÓN, p. 86.

21 KARAN, Liability, p. 27; CHACÓN, p. 86.

22 The Hague Rules of 1924 ratified by Turkey on 14 February 1955 entered into force on 4 January 1956 (RG. 22.02.1955, S. 8936), whereas the Visby Protocol was neither ratified nor transposed into domestic law. Moreover, different views are put forward in respect of the way in which the Hague Rules were transposed in Turkish Commercial Code No. 6762. At this point, some argue that the Hague Rules were introduced into the obsolete code No. 6762 by making some changes and therefore the provisions of the convention can be applied as enacted. *See* YAZICIOĞLU, Emine, "Uluslararası Deniz Taşımalarında Uygulanacak Kural Sorunu", Deniz Hukuku Dergisi, V. 5, I. 1-4, pp. 45-56, 2002, p. 55. In contrast, others suggest that the Hague Rules have been put into effect as is and hence the Rules apply in all cases where the conditions of application adhere. *See* KARAN, Hakan, "Yargıtay'ın Konişmentolu Taşımalar Hakkındaki 1924 Tarihli La Haye Kaideleri'ni Uygulaması Gereği", Ticaret Hukuku ve Yargıtay Kararları Sempozyumu XVII: Bildiriler-Tartışmalar, pp. 223-243, Ankara, 2000, p. 227; ATAMER, Kerim, "Parça Başı Sınırlı Sorumlulukve 1924 Brüksel Sözleşmesi", Deniz Hukuku Dergisi, V. 5, I. 1-4, pp. 57-94, 2002, p. 80. With regards to the new Turkish commercial Code No. 6102, it is

ly applied through either contractually or statutory[23] and thereby covers 90%of the global shipping tonnage[24]. The striking feature which distinguishes the HR from the other conventions lies on the fact that an impressively broad jurisprudence has accumulated over ninety years upon the meaning of the seaworthiness provisions in the HR[25].

2.2. Nature of the Duty

Under the HR/HVR, the concept of seaworthiness has been defined particularly by providing rather far-reaching articles in respect of which elements may be necessitated in order for the ship to be considered seaworthy in Article III (1)[26]. Hereby, the carrier is compelled to provide a seaworthy vessel in the sense that she must be equipped, properly manned with competent and sufficient crew, supplied and ultimately must be within a fit state to receive the contractual cargo[27]. In accordance with Article III (1), the ship owner must exercise due diligence in making the ship seaworthy, which indeed differentiates the convention from common law against the backdrop of the principle of due diligence[28].

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submitted that the new code has been utterly harmonised with the Hague Rules so as to remove discrepancies and to solve the involved issues. The Hague-Visby Rules and the 1979 SDR Protocol as well as the Hamburg Rules have also been taken as a basis while establishing provision for carrier's liability. *See* ATAMER Kerim/ SÜZEL Cüneyt, Yeni Deniz Ticareti Hukuku'nun Kaynakları, Vol. 1, 1st ed., İstanbul, 2013, p. 129-130; KARA Hacı, Rotterdam Kuralları'na Göre Taşıyanın Zıya, Hasar veya Gecikmeden Kaynaklanan Zararlardan Sorumluluğu, İstanbul, 2014, p. 134.

23 TREITEL Guenter/ REYNOLDS Francis, Carver on Bills of Lading, 2nd ed., London, 2005, p. 530.

24 MARITIME CONNECTOR, "International Maritime Organization & Conventions: Hague-Visby Rules", <http://maritime-connector.com/wiki/hague-rules/> (accessed, on 24 February, 2021); DJADJEV, p. 36.

25 REYNOLDS, p. 33.

26 The probable reason why the concept of seaworthiness was laid down in detail is that the Rules were drafted in a common law fashion. *See* TETLEY, William, "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)", Louisiana Law Review, V. 60, N. 3, 677-738, 2000, p. 704.

27 AIKENS/LORD/BOOLS, p. 316-318; WILSON, p. 12; CHACÓN, p. 144;KASSEM, p. 24; DJADJEV, p. 45.

28 TETLEY William, Marine Cargo Claims, 3rd ed., Montreal, 1988, p. 180; DJADJEV, p. 46.

From this point of view, unseaworthy vessel would set the scene for liability of the carrier. To illustrate, any sorts of deficiencies or defects in the structure or equipment of the vessel would render the vessel unseaworthy, e.g. a leaky valve caused by missing a vital nut or missing or unfitting spare parts[29], leaking of hatch covers[30], defective boilers[31], corrosion of bottom plates[32]. So far as incompetent or insufficient crew or master is concerned, bereft of adequate fire-fighting training[33], an indisposition to carry out the job properly[34], mental or physical incapacity[35], a shortcoming of knowledge as regards a particular vessel or its system[36] may pave the way for unseaworthiness. A vessel which is not capable to take delivery of cargo and to hand over it safely and accordingly to its final destination would be conceived to be unseaworthy, e.g. the residues of previous cargo[37], improper stowage[38] or overloading[39]. Consequently, the utmost significance of the concept of due diligence emerges in the event of any deficiency endangering the state of seaworthiness. In other words, even if a vessel was held unseaworthy, the carrier would exculpate himself from the accountability, unless caused by lack of due diligence.

2.2.1. Definition of Due Diligence

It is noteworthy to dwell upon what forms due diligence as well. Due diligence may be described as "*genuine, competent and reasonable effort of the carrier to fulfil the obligations set out in subparagraph (a), (b) and (c) of Art III (1) of the Hague or Hague-Visby Rules*"[40]. Based on the formal version of the HR, which is in French, the due diligence is articulated as "*diligence raisonable*", that is to say, this term does not allude to an abso-

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29 *The Kamsar Voyager* (2002) 2 Lloyd's Rep. 57.

30 *The Sea Maas* (1999) 2 Lloyd's Rep. 281.

31 *The Hong Kong Fir* (1962) 2 QB 26.

32 *Jerneh Insurance Corp SdnBhd v Hai Heng Enterprise SdnBhd*(2002) 4 MLJ 332; (2002) 4 AMR 4199.

33 *The Star Sea*(1997) 1 Lloyd's Rep. 360.

34 *The Makedonia* (1962) 1 Lloyd's Rep. 316.

35 *The Eurasian Dream* (2002) EWHC 118 (Comm).

36 *The Farrandoc* (1967) 2 Lloyd's Rep 276.

37 *The Good Friend* (1984) 2 Lloyd's Rep. 586.

38 *The Aconcagua* (2010) EWCA Civ 1403.

39 *The Aga* (1968) 1 Lloyd's Rep. 431.

40 TETLEY William, Marine Cargo Claims, Vol. 1, 4th ed., Toronto, 2008, p. 876.

lute commitment but solely one of reasonableness[41]. Nonetheless, the concept of due diligence also has been interpreted by the courts through revealing a connection with reasonable care, and thereby the due diligence is conceived to be "*indistinguishable from an obligation to exercise reasonable care*"[42]. Eventually, the concept of due diligence succinctly may be boiled down to whether being performed of reasonable care and skill by the carrier when making the ship seaworthy[43].

Viscount Sumner, in *The Bradley*[44], shed light on one of the most significant points in the sense of actual concept of both due diligence and seaworthiness. It was highlighted that both seaworthiness and due diligence have a great deal of evolving character and thus should not be appraised as an absolute concept, namely immobile or static.[45] It can be hence submitted that due diligence hints at the exercise of reasonable care and skill in the sense that it relies on numerous factors from the provisions of regulatory codes to the nature of the vessel and the existing state of knowledge at the time of voyage[46].

Last but not least, a contract of carriage will be null and void, should it provide clauses that relieves the carrier from liability for the loss or damage springing from failure in exercising due diligence in virtue of Article III (8). Namely, the obligation of exercising due dilige cannot be excluded or lessened by a contract of carriage[47]. It is submitted that as the carrier is not allowed to contract out of a liability concerning

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41 BARCLAY, Cedric, "Technical Aspects of Unseaworthiness", L.M.C.L.Q., 1975, p. 292; TETLEY, Marine Cargo Claims (1988), p. 370. Moreover, So far as the concept of reasonableness is concerned, one notable illustration of this may be the case of *The Kapitan Sakharov,* in which it was held that in order to measure the "*reasonability*" of the obligation, it must be tested that "*Whether it had shown that the carrier, its servants, agents or independent contractors, had exercised all reasonable skill and care to ensure that the vessel was seaworthy at the commencement of its voyage, namely, reasonably fit to encounter the ordinary incidents of the voyage*". (2000) EWCA Civ 400. Likewise, in the case of *The Eurasian Dream*, it was stated that "*The exercise of due diligence is equivalent to the exercise of reasonable care and skill*." para. 131.

42 *The Muncaster Castle* (1960) 1 QB 536, 581 (per Willmer L.J.)

43 *The Eurasian Dream* (2002).

44 *The Bradley v Federal Steam Navigation Co.* (1927) 27 Lloyd's Rep. 395.

45 It was held that "*In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the material time*". *Bradley v Federal*, p. 396.

46 AIKENS/LORD/BOOLS, p. 328.

47 TETLEY, Marine Cargo Claims (2008), p. 881.

due diligence, in return for that, the Rules exonerate the carrier from liability for negligence stemming from navigation and management of the vessel, also referred to "*nautical fault*", by virtue of Article IV (2) (a)[48].

2.3. Period of Time When the Seaworthiness Obligation Attaches

Based on the wording of Article III (1), the carrier is obliged to exercise due diligence in making the vessel seaworthy before and at the commencement of the voyage. This is why the article does not indicate the time in which the vessel must be seaworthy, but to specify the time the obligation of exercising due diligence attaches[49]. Nonetheless, a question which inevitably arises is: How could the commencement of the voyage be exactly determined having regard to arduousness of this concept?

At this point, it would be worthwhile to indicate the exposition of *Lord Somervell* in *The Maxine Footwear*[50], in which it was held that the beginning of voyage[51] hintsat the period from the commencement of the loading of goods until the vessel embarks on her voyage, that is to say, until the vessel lifts anchor or leaves her berth put[52].

The carrier's duty set out in Article III (1) does not attach, unless the vessel in question is in the orbit of carrier[53]. In other words, the fact that the vessel must be in the possession, ownership, or control of the carrier is imperative to attach the duty of exercising due diligence laidown under the aforementioned provision[54]. Moreover, in the event that a new ship is chartered, purchased or commissioned from another person, the present defects leading the vessel to be unseaworthy neither

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48 REYNOLDS, p. 17.

49 AIKENS/LORD/BOOLS, p. 330-31; CHACÓN, p. 144; TETLEY, Marine Cargo Claims (2008), p. 893.

50 *The Maxine Footwear Co. Ltd. v. Can. Government Merchant Marine* (1959) AC 589, at 602.

51 Likewise, *Tetley* defines the moment of commencement of the voyage by forming some elements in the light of case law and suggests that the obligation of carrier begins when "*all hatches are battened down, visitors ashore and orders from the bridge given so that the ship actually moves under its own power or by tugs or both*". TETLEY, Marine Cargo Claims (2008), p. 893-894.

52 Also see WILSON, p.187; BAATZ, p. 121; BARCLAY, p. 289; KARAN, Liability, pp. 106-107; KASSEM, p. 120; GIRVIN, Fundamental Duties, p. 447.

53 *The Happy Ranger* (2006) EWHC 122 (Comm), para. 18.

54 DJADJEV, p. 47; AIKENS/LORD/BOOLS, p. 329; GIRVIN, Fundamental Duties, p. 448.

are attachable to the carrier nor make him liable, unless the defects in question were reasonably discoverable by performing due diligence in the course of takeover[55].

The case of *The Happy Ranger* is a prime example, in which it was addressed that the ship owner shall not be accountable due to any defects in the construction of the vessel, namely defaults of the builders in the course of building. Otherwise, this might turn out to be "*an almost unlimited retrogression*" in the sense of the carrier's duty which is regarded as non-delegable[56]. However, it is also submitted that when a carrier gets involved remarkably in a design or construction of the particular aspect of the vessel, he might be under the obligation of due diligence at least in the sense of supervision associated with that aspect, which he involved, prior to delivery[57].

It is also of paramount importance to be taken into consideration that different cargoes might have different voyages. On this point, the carrier's obligation of exercising due diligence in accordance with Article III (1) of the HR/HVR should be regarded separately where the vessel calls at a series of ports to gather different cargoes[58]. That is to say, in the event that a ship loads cargo X in Istanbul and then sails to Southampton where cargo Y is loaded, then proceed to New York where it loads cargo Z, there is indeed three various voyages in this sense. Therefore, whether or not the requirement of exercising due diligence is fulfilled should be evaluated individually for each voyage[59]. From this example, if the carrier fails to fulfil his obligation while loading cargo Z, this is by no means lead to the lack of due diligence in the sense of cargo X and Y[60]. However, if the vessel is unseaworthy owing to deficiency in due diligence on the part of carrier or its servants or agents when the vessel loads cargo X in Istanbul, which brings about damage or loss to cargo Y

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55 GIRVIN, Fundamental Duties, p. 448.

56 *The Happy Ranger*, para. 19.

57 AIKENS/LORD/BOOLS, p. 331.

58 EDER Bernard/ BENNETT Howard/ BERRY Steven/ FOXTON David/ SMITH Christopher, Scrutton on Charterparties and Bills of Lading, 23rd ed., London, 2015, para. 7-020; TETLEY, Marine Cargo Claims (2008), p. 895; AIKENS/LORD/BOOLS, p. 330; KARAN, Liability, p. 107; YETİŞ-ŞAMLI, p. 486.

59 TETLEY, Marine Cargo Claims (2008), p. 895; AIKENS/LORD/BOOLS, p. 330; also see *The Fjord Wind* (2000) EWCA Civ 184, para. 6.

60 TETLEY, Marine Cargo Claims (2008), p. 895; AIKENS/LORD/BOOLS, p. 330.

or Z, the carrier will be accountable on the grounds that actual or imputed knowledge of the defects or harmful condition or failure while exercising due diligence proceeds to the date relevant to the particular, Y and Z, contract of carriage[61].

2.4. Causation and Unseaworthiness

There must be a causal connection between the loss or damage and unseaworthiness in order for the carrier to be liable under Article III (1)[62].It is therefore submitted that the carrier will not be responsible associated with failure arising from the requirement of due diligence, unless the failure was causative of the loss which was contended to have been incurred and suffered[63]. What's more, if the unseaworthiness has not been prevented by exercising due diligence on the part of carrier, the carrier is not liable as stated explicitly in Article IV (1)[64].

2.5. Basis of Liability and Burden of Proof

It is crystal clear that under the HR/HVR, the basis of liability puts an unduly heavy burden on the cargo-owner considering that the cargo owner is at a disadvantage as to access to information about condition of the vessel[65]. By contrast, the carrier is able to inherently hold the information in respect of the condition of the vessel throughout the voyage and therefore has control of the evidence at the commencement of any conflict[66]. As far as Article IV (1) of HR/HVR is concerned, the carrier is

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61 TETLEY, Marine Cargo Claims (2008), p. 895; GIRVIN, Seaworthiness, p. 39; AIKENS/LORD/BOOLS, p. 330; GIRVIN, Fundamental Duties, p. 447.

62 SÖZER, Taşıyanın, p. 72-73; EDER/BENNETT/BERRY/FOXTON/SMITH, para. 7-031; TETLEY, Marine Cargo Claims (2008), p. 895-896.

63 AIKENS/LORD/BOOLS, p. 332.

64 TETLEY, Marine Cargo Claims (2008), p. 898; SÖZER, Taşıyanın, p. 73-74.

65 At this point, the recent developments in the shipping industry represented by mainly the introduction of the ISM Code may pave the way for the cargo-owner to access information as to the condition of the vessel in the course of the voyage. This because the carrier is obliged to keep documentary records of all the accidents, the competency of the crew, hazardous situation or non-conformity, and the actions taken onboard the ship by the company as well as established procedures for the implementation of corrective action in accordance with Article 9, and 10 and 11 of the ISM Code. *See* TETLEY, Marine Cargo Claims (2008), p. 887; CHACÓN, p. 82; KASSEM, p. 154; KARAN, Liability, p. 32; MANDARAKA-SHEPPARD Aleka, Modern Maritime Law-Managing Risks and Liabilities, Volume 2, 3rd ed., Abingdon, 2013, p. 107.

66 WHITE, p. 237; KASSEM, p. 152; TONG-JIANG, Su/ PENG, Wang, "Carrier's Liability under International Maritime Conventions and the UNCITRAL Draft Con-

exempted from the liability for loss or damage deriving merely from unseaworthiness of the vessel, unless it results from lack of due diligence[67]. Article IV (2) provides a wide-ranging enumeration of exonerating conditions that enable the carrier to exculpate himself from liability in the event of a damage or loss invoking upon these events set forth[68].

On the other hand, there is an ongoing debate associated with evaluation of types of basis of liability, that is to say, whether it should be appraised as the fault-based liability or presumed fault or neither under HR/HVR is nebulous. Some scholars contend that there is an example of proved fault-based liability system based upon Article IV (1) and therefore the burden of proof as to unseaworthiness is explicitly upon the cargo interest[69], whereas others[70] consider that the basis of liability pertinent to the carrier under HR/HVR falls into an accountability for presumed fault or neglect plus exceptions. It is hence suggested that the carrier firstly, namely prior to the issue of being proven unseaworthiness of the vessel by the claimant, must demonstrate that he exercised due diligence in making the ship seaworthy.

Those who stand by the view of fault-based liability suggest that no burden is cast upon the carrier associated with proving due diligence until the cargo interests have initially established that the vessel was unseaworthy and that the loss or damage was attributable to the fact of unseaworthiness[71]. All in all, even though Article IV provides the onus

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vention on Contracts for the International Carriage of Goods Wholly or Partly by Sea", Transport, V. 24(4), pp. 345-351, 2009, p. 347; TETLEY, William, "The Burden and Order of Proof in Marine Cargo Claims, Chambre Arbitrale Maritime de Paris, p. 16, <https://www.arbitrage-maritime.org/fr/Gazette/G37complement/burden.pdf>, (accessed, on 25 November, 2020); WILSON, p. 191.

67 KARAN, Liability, p. 105

68 KARAN, Liability, p. 105; BARCLAY, p. 289.

69 GIRVIN Stephen, Carriage of Goods by Sea, 2nd ed., Oxford, 2011, p. 428; WHITE, p. 237; MANDARAKA-SHEPPARD, p. 106; KASSEM, p. 143;GIRVIN,Fundamental Duties, p. 448; EDER/BENNETT/BERRY/FOXTON/SMITH, para. 7-031.

70 TETLEY, Marine Cargo Claims (2008), p. 888; BARCLAY, p. 289; TONG-JIANG/PENG, p. 347.

71 One notable illustration of this is *The Makedonia*, in which it was held that "*The burden of proof lay on the defendants to show, if unseaworthiness in any respect was proved, that they had exercised all normal and reasonable care to prevent that unseaworthiness.*" (1962) 1 Lloyd's Rep. 316, p. 326 (Hewson J.); also see WILSON, p. 190; WHITE, p. 237; SÖZER, Taşıyanın, p. 76-77.

of proof for the carrier's liability, particularly in the sense that the burden of proving due diligence casts upon the carrier when the loss or damage results from unseaworthiness (IV-1), it can be said that the provisions mostly fail to put forth who exactly must bear the burden of proof[72]. In other words, the process for determination of who endures the onus of proof is merely alluded to some elements under the convention and thus not straightforward[73]. Therefore, this ambiguity has led to scholars to put different approaches forward in the context of the burden of proof. In addition, this uncertainty has led the litigation and arbitration to turn out to be more complicated[74].

2.5.1. Order of Proof

The HR/HVR do not lay down obviously a concept for the order of proof in the sense of marine cargo claim and its defence as well. It appears that the courts are to engage in this issue case-by-case basis[75]. This is why the consensus is partially unclear as to how the order of proof should carry on. However, it could be noteworthy to indicate firstly the order of proof provided by *Noël J.* in the Canadian case of *The Farrandoc*, which is indeed both the most widely accepted order of proof[76] and the established position as regards burden and order of proof under Article

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72 KARAN, Liability, p. 122; AIKENS/LORD/BOOLS, p. 335; BERLINGIERI, Francesco, "A Comparative Analysis of the Hague-Visby Rules, The Hamburg Rules and the Rotterdam Rules", The General Assembly of the AMD, Marrakesh, 2009, p. 8; TETLEY, Marine Cargo Claims (1988), p. 133; MARGETSON N.J., "Some Remarks on the Allocation of the Burden of Proof under the Rotterdam Rules as compared to the Hague (Visby) Rules" In The Carriage of Goods by Sea under the Rotterdam Rules, edited by THOMAS Rhidian, 191-214, New York, 2014, p. 191.

73 BERLINGIERI, A Comparative Analysis, p. 8; KARAN, Liability, p. 122; AIKENS/LORD/BOOLS, p. 335; TETLEY, Marine Cargo Claims (1988), p. 133.

74 KARAN, Liability, p. 122.

75 KASSEM, p. 152; AIKENS/LORD/BOOLS, p. 335; TETLEY, The Burden and Order of Proof, p. 43.

76 For interpretations in the same manner as Noël J.'s order of proof *see* CLARKE Malcolm A., Aspects of the Hague Rules: A comparative Study in English and French Law, The Hague 1976, p. 139-140; CLARK Julian/ THOMSON Jeffrey, "Exclusions of Lability" In The Carriage of Goods by Sea under the Rotterdam Rules, edited by THOMAS Rhidian, 141-162, New York, 2014, p. 144; WHITE, p. 237; AIKENS/LORD/BOOLS, p. 335; MANDARAKA-SHEPPARD, p. 106; KASSEM, p. 143; GIRVIN, Carriage, p. 428; GIRVIN, Fundamental Duties, p. 448; EDER/BENNETT/BERRY/FOXTON/SMITH, para. 7-031-2; MARGETSON, p. 196-197.

III (1) at Common Law[77], followed by a different interpretation of the relevant issue made by *Tetley* and ultimately an overview of how the issue is handled in practise.

As far as the order of proof provided by *Noël J.* in the case of *The Farrandoc*[78] is concerned, according to his dictum, which is known as the "*orthodox view*"[79], the cargo interest firstly must prove that the cargo arrived either in damaged situation or that it did arrive by no means[80]. Following that, the carrier needs to prove that the cause of the loss or damage is encompassed by one of the exceptions set out in Article IV(2). If he does so, thereafter, the cargo-owner must demonstrate a different cause of loss that is not encompassed by the exceptions in question and at this stage the cargo owner can invoke the loss or damage on unseaworthiness. In the wake of allegation put forward by the cargo-owner as to unseaworthiness of the vessel, he must also adduce evidence in support of the claim that the vessel was unseaworthy before and at the commencement of the voyage. If the cargo owner achieves that, given this circumstance, the carrier has two optimal way outs. First of which is that he must demonstrate that he exercised due diligence before and at the onset of the voyage. Secondly, he could also rely on the argument of that even if the vessel was unseaworthy, this unseaworthiness would not have been attributed to the loss or damage of the cargo[81]. This is how the burden of proof should be aligned according to the orthodox view.

In the simplest terms, *Tetley's* approach to the order of proof, which has been widely applied by mainly the courts of Canada, differs from the orthodox view and accordingly the exposition of *Noël J.* in the

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77 AIKENS/LORD/BOOLS, p. 335 citing *Minister of Food v Reardon Line* (1951) 2 Lloyd's Rep. 265; *Walker v Dover Navigation* (1950) 83 Ll. L. Rep. 84; *The Hellenic Dolphin* (1978) 2 Lloyd's Rep. 336; *The Theodegmon* (1990) 1 Lloyd's Rep. 52; WILSON, p. 190 citing *The Fjord Wind* (2000) EWCA Civ 184; *The Kamsar Voyager* (2002) 2 Lloyd's Rep. 57.

78 (1967) 2 Lloyd's Rep 276, at p. 284.

79 AIKENS/LORD/BOOLS, p. 335.

80 The cargo-owner can prove this by means of a bill of lading, which is considered *prima facie* evidence. *See* STEVENS Frank, The Bill of Lading-Holder Rights and Liabilities, Abingdon, 2018, p. 13; KASSEM, p. 153; KARAN, Liability, p. 123.

81 *Also see* CLARKE, p. 128; MANDARAKA-SHEPPARD, p. 106; WHITE, p. 237; AIKENS/LORD/BOOLS, p. 335; KASSEM, p. 143; GIRVIN, Carriage, p. 428; GIRVIN, Fundamental Duties, p. 448; CLARK/THOMSON, p. 144; SÖZER, Taşıyanın, p. 76-77; MARGETSON, p. 196-197.

sense of whether unseaworthiness should firstly be proven by the cargo owner or due diligence by the carrier[82]. According to *Tetley*, it is firstly the cargo interest who is to bear the onus of proof and hereby he must prove that his loss or damage occurred is at the hands of the carrier. Then, the carrier must prove respectively "*i) the cause of the loss, ii) that due diligence to make the vessel seaworthy...iii) that the cause of the loss or damage falls into Article IV (2) (a) to (q) of the HR/HVR*"[83]. Afterwards, the onus of proof switches back to the cargo interests and then they must take steps to rebut evidences, including the evidences as to seaworthiness and due diligence, adduced by the carrier. Last but not least, it is possible for the both parties to resort to other various arguments available them, that is to say, the latest is considered "*middle ground*", where both the carrier and the cargo interest are enabled to put forward their supplementary proofs[84].

In a nutshell, *Tetley* argues the carrier must firstly endure the burden of proving due diligence in making the vessel seaworthy before he relies on an exception under Article IV (2)[85], whilst many authors disagree[86] and suggest that the carrier must first prove one of the exculpatory exceptions and then the cargo claimant must prove unseaworthiness, ultimately due diligence in making the vessel seaworthy must be proved by the carrier under the HR/HVR. Furthermore, considering the obliga-

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82 TETLEY, Marine Cargo Claims (2008), p. 889; TETLEY, The Burden and Order of Proof, p. 34.

83 TETLEY, The Burden and Order of Proof, p. 31.

84 Tetley constructs his order of proof based on the dictum of Lord Somervell in *The Maxine Footwear Co. Ltd V. Canadian Merchant Marine Ltd.*, in which it was held that "*Article III, Rule I, is an overriding obligation. If it is not fulfilled and the non-fulfilment causes the damage, the immunities of Article IV cannot be relied on. This is the natural construction apart from the opening words of Article IV, rule 2. The fact that that Rule is made subject to the provision of Article IV and Rule 1 is not so conditioned makes the point clear beyond argument.*" (1959) AC 589 (PC).

85 Wilson, based on the facts of *The Hellenic Dolphin*, argues that Tetley's thesis appears to be sensible, considering it is fairly arduous for the cargo owner to discharge the burden of proof of unseaworthiness. WILSON, p. 191.

86 Clarke disagrees with *Tetley* in this regard and states that "*Tetley cites Canadian authority; but not all Canadian courts are of the same mind. He also cites a dictum of Lord Somervell, but a dictum which, seen in its wider context, does not support his contention.*" *See* CLARKE, p. 140. *Also see* MARGETSON, p. 201; AIKENS/LORD/BOOLS, p. 335; MANDARAKA-SHEPPARD, p. 106; GIRVIN, Carriage, p. 428; GIRVIN, Fundamental Duties, p. 448.

tion set forth in Article III (1) has been regarded as an "*overriding obligation*"[87] in *The Maxine Footwear*, the carrier cannot avail himself of the defences set out in Article IV, if he breaches the overriding obligation by providing an unseaworthy ship.

When it comes to how the courts have dealt with this dilemma, it must be borne in mind that most courts issue a call for both parties in order to gather all available evidences which the parties keep[88]. Perhaps most importantly, in cases where there is any sort of incursion of seawater in a vessel's hold, the courts frequently regard it as a *prima facie* evidence of unseaworthiness by inference[89]. Under this circumstance, it is regarded that the carrier failed to exercise due diligence. The courts then put the onus of proof as to whether due diligence is exercised on the carrier by virtue of Article IV (1) of the HR/HVR[90]. From now on, it turns out to be the duty of the carrier to rebut the inference of unseaworthiness established by the court so that he can exculpate himself from the liability[91].

2.6. Delegation of the Obligation

The obligation of due diligence is indeed peculiar to the carrier, namely, the duty must be exercised by the carrier and therefore it is conceived that the liability is non-delegable[92]. However, taking into consideration the arduousness of large maritime operations, the shipowners appear to count on third parties as regards readiness, maintenance or inspection of the vessel for the intended voyage[93]. From this point on, if the duty of providing a seaworthy vessel is delegated to the agent or servants of the carrier or even to an independent contractor, it is of capi-

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87 Also see DJADJEV, p. 48-49; TETLEY, Marine Cargo Claims (2008), p. 886; CHACÓN, p. 120; AIKENS/LORD/BOOLS, p. 328; GIRVIN, Fundamental Duties, p. 447; MARGETSON, p. 193.

88 TETLEY, Marine Cargo Claims (2008), p. 892; On the other hand, AIKENS/LORD/BOOLS, p. 335, argue this issue and point out that the possible reason for not being sorted conclusively out of this intricacy despite its paramount importance may be associated with the fact that cases in practise barely rely upon the burden or order of proof in this respect.

89 WILSON, p. 191; TETLEY, Marine Cargo Claims (2008), p. 892.

90 TETLEY, Marine Cargo Claims (2008), p. 888.

91 TETLEY, Marine Cargo Claims (2008), p. 892.

92 WHITE, p. 229-230; DJADJEV, p. 49; BARCLAY, p. 289; MANDARAKA-SHEPPARD, p. 106; KASSEM, p. 81.

93 CHACÓN, p. 121.

tal importance that the delegate must be chosen with due diligence and must be a diligent and conscientious person himself[94]. Therefore, if the delegate fails to abide by the obligation, namely he is not diligent, the carrier will remainliable for the loss or damage[95].

III. THE CARRIER'S DUTY UNDER THE HAMBURG RULES

3.1. Background

The genesis of the Hamburg Rules, in essence, was a consequence of several discrepancies and ambiguities found under the HR and HVR, in particular, the language of the HR has been found intricate and therefore has led to confusion in terms of several issues[96]. Furthermore, the Hague Rules has given rise to an imbalance between the ship owners and cargo-owners by imposing an unduly heavy burden of proof on the cargo interests and has not encompassed the loss resulting from delay[97]. The Visby Amendments was also regarded as not fulfilling the necessities arising from incapacity and several shortcomings of the HR and as constituting solely provisional expedient[98]. It was thus considered that it would be more remarkable to start afresh rather than to make further amendment of Hague-Visby Regime[99].

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94 BARCLAY, p. 289; AIKENS/LORD/BOOLS, p. 328-329; BAATZ, p. 127; KASSEM, p. 81; DJADJEV, p. 48.

95 In contrast, in the case of *The Muncaster Castle*, the court arrived at the decision that even if the delegate was reputable one, the carrier could not have such excuses to exculpate himself from the liability. This is because the failure of the delegates as to the exercising due diligence to make the ship seaworthy is fundamentally the failure of the carrier. Based on the exposition of that the carrier should not be allowed to avoid his responsibility in respect of his vessel by transferring his fairly vital obligation to others, it can be deemed that the carrier is expected to have an active role rather than a passive when delegating his obligation to another person. (1961) 1 Lloyd's Rep 57, p. 87 (Lord Keith of Avonholm). Moreover, the non-delegable nature of the carrier's obligation also most recently has been pointed out in *The CMA CGM Libra*, in which it was held that "*...as the duty is non-delegable, the ship owner cannot avoid liability by delegating responsibility for making the vessel seaworthy to the master and officers.*" (2020) EWCA Civ 293, para. 99. For further information *see* AIKENS/LORD/BOOLS, p. 328-329; GIRVIN, Fundamental Duties, p. 447-448; TETLEY, Marine Cargo Claims (1988), p. 391; WHITE, p. 230; WILSON, p. 188.

96 YAZICIOĞLU, Hamburg Kuralları, p. 5; CHACÓN, p. 83; WILSON; 217; KARAN, Liability, p. 32.

97 CHACÓN, p. 83; WILSON; 217; KARAN, Liability, p. 32.

98 WILSON, p. 215.

99 AIKENS/LORD/BOOLS, p. 411; CHACÓN, p. 86; WILSON, p. 215; FREDERICK, p. 94; SOYER /NIKAKI, p. 304.

Eventually, the Hamburg Rules, which were devised to replace the rather outdated HR and HVR, was introduced in 1978 and then entered into force in 1992. Even so, the convention has been ratified[100]fundamentally by only a few states, particularly developing countries, and an important number of the endorsing members of the convention are even landlocked countries[101]. That's why the Hamburg Rules indeed failed to succeed in the intention of creating worldwide uniformity and hence does not have a large role to play in international shipping nowadays. The figure of the total volume of goods carried by sea subjected to the Hamburg Rules is predicted to have accounted for approximately 5%[102].

3.2. Nature of the Duty

Under the Hamburg Rules, the obligation to exercise due diligence in making the ship seaworthy is neither set out as an explicit provision nor referred to the obligation. However, the Hamburg Rules indeed carries on the same approach and adopts the very essence of the duty of carrier set forth in Article III (1) of HR and HVR, by virtue of Article V (1)[103].

3.3. Period of Time When the Seaworthiness Obligation Attaches

Under the Hamburg Rules, the duty of the carrier to make the ship seaworthy before and at the beginning of the voyage is turned into an obligation continuing in the course of voyage. Hereby, the period of time at which the carrier is responsible under this convention extends from the moment the carrier is in charge of the goods at the port of loading to during the carriage and at the port of discharge in accordance with Article IV (1).

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100 Turkey neither ratified nor transposed the Hamburg Rules into domestic law. *See* YETİŞ-ŞAMLI, p. 479.

101 UNCITRAL, Text and Status, United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978), <https://uncitral.un.org/en/texts/transportgoods/conventions/hamburg_rules/status> (accessed, on 5 November, 2020).

102 AIKENS/LORD/BOOLS, p. 411; DJADJEV, p. 37-38; WILSON, p. 215; SOYER/NIKAKI, p. 304.

103 TETLEY, Marine Cargo Claims (2008), p. 923; WILSON, p. 217; KARAN, Liability, p. 112; KASSEM, p. 74, LUDDEKE Christof/ JOHNSON Andrew, The Hamburg Rules from Hague to Hamburg Via Visby, 2nd Edition, London, 1995, p. 12; CHACÓN, p. 89; YETİŞ-ŞAMLI, p. 491.

3.4. Basis of Liability

Firstly, the presumed fault-based liability system has been adopted in accordance with Article V (1) and Annex II[104]. This is why the carrier is always regarded to be at fault, unless he substantiates his innocence under this liability system[105]. The carrier is thus conceived to be liable for any loss of or damage to cargo or for delay, provided that it occurred when the carrier took in charge of the cargo pursuant to Article V (1). Nonetheless, should the carrier want to exculpate himself from liability, he must demonstrate that he and his servants and agents took all reasonable measures that could be taken properly so as to abstain from the cause of the loss, damage or delay and its consequences by the virtue of Article V (1)[106].

Perhaps most importantly, there is no exclusive distinction made amongst the causes of loss, damage or delay (except for fire caused loss) associated with whether or not being attributed to the lack of seaworthiness of the vessel[107]. To summarize briefly the basis of liability under the Hamburg Rules, there is a two-fold stage associated with the carrier's liability; the first of which is to demonstrate that the occurrence causing the loss or damage took place while the goods were in charge of the carrier, the second one is reliance on the carrier who must demonstrate that he took all measures that could reasonably be necessitated to ward off the occurrence and its results[108]. Furthermore, one of the principal distinctions between the HR/HVR and the Hamburg Rules is that the defence of negligence in navigation and management is not laid down under the Hamburg Rules as opposed to that of HR/HVR[109].

3.4.1. Burden and Order of Proof

It is submitted that one of the reasons why the Hamburg Rules was introduced is to clarify the concept of burden of proof, which is, indeed, in some respects nebulous and needs for careful interpretation

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104 The Annex II of the Hamburg Rules explicitly addresses that: "*It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect.*" For further information *see* WILSON, p. 216-217.

105 KASSEM, p. 141; FREDERICK, p. 92; YAZICIOĞLU, Hamburg Kuralları, p. 72.

106 YAZICIOĞLU, Hamburg Kuralları, p. 70-71; TETLEY, Marine Cargo Claims (2008), p. 924; CLARK/THOMSON, p. 143-144.

107 SÖZER, Deniz Ticaret, p. 596; WILSON, p. 217.

108 AIKENS/LORD/BOOLS, p. 412.

109 KARAN, Liability, p. 112; REYNOLDS, p. 30; KARA, p. 151; BAATZ, p. 121-122.

under the HR/HVR[110]. Hence, the Hamburg Rules intend to remove this confusion by instituting a uniform burden of proof upon the carrier on the grounds that the carrier is considered to be the most likely to access to factual information on board the vessel throughout the voyage[111]. As a rule, the burden of proof lays on the carrier under the convention[112]. However, the carrier is responsible for any loss and delay, unless he demonstrates that he and his servants and agents took all reasonable measures to avoid the cause of the loss or damage and its consequences pursuant to Article V (1) and Annex II of Hamburg Rules[113].

So far as loss or damage resulted from fire is concerned, the principle of presumed fault is switched back to the fault-based liability system, which the claimant must endure the onus of proof in accordance with Article V (4) (a)[114]. The probable reason why the Rules prefers to make a distinction in this sense is that establishment of the exact origin of a fire at sea is a matter of difficulty to be dealt with having regard to the fact that the majority of cases involved in a fire are considered to originate in the cargo carried[115].

IV. THE CARRIER'S DUTY UNDER THE ROTTERDAM RULES

4.1. Background

There was a great deal of failure in ratification of the Hamburg Rules, which has been approved by mainly developing countries that are not the major seafaring nations and the ratifying countries is estimated to have accounted for approximately 5% of the world maritime

110 TETLEY, Interpretation and Construction, p. 41; KARAN, Liability, p. 122; WILSON, p. 217.

111 TETLEY, Interpretation and Construction, p. 41; KARAN, Liability, p. 122; WILSON, p. 217.

112 YAZICIOĞLU, Hamburg Kuralları, p. 131; AIKENS/LORD/BOOLS, p. 412; TETLEY, Interpretation and Construction, p. 41; WILSON, p. 218; CLARK/THOMSON, p. 144.

113 AIKENS/LORD/BOOLS, p. 412; TETLEY, Interpretation and Construction, p. 41; CLARK/THOMSON, p. 144.

114 AIKENS/LORD/BOOLS, p. 412; YAZICIOĞLU, Hamburg Kuralları, p.131; TETLEY, Interpretation and Construction, p. 41.

115 WILSON, p. 218.

trade[116]. The Hamburg Rules also failed to fulfil its function, which was to provide the harmonization of national regimes of sea carriage in accordance with the technological developments in shipping industry[117].

On the other hand, there has been an upward trend amongst a number of states, such as the Scandinavian countries, China, France, India, Australia, to adopt a hybrid HR/HVR and Hamburg Rules, leading to a grave fragmentation in the sense of international maritime transport regime[118]. The CMI, in conjunction with UNCITRAL, thus launched a new international initiative so that the confusion and ambiguity in international trade originated in particularly ubiquitous national regimes would be abolished or at least further fragmentation would be prevented through providing an international uniformity[119].

Ultimately, the Rotterdam Rules was formally adopted by the U.N. General Assembly in 2008, and opened for signature on 23 September 2009. However, the convention is not entered into force owing to the fact that merely five states have ratified the convention so far, yet the convention must be conceded by at least twenty countries. In addition, the ratifying states are obliged to denounce any other maritime freight transport conventions that they are parties pursuant to Article 96 of the convention. One of the main goals of the convention is to succeed in modernizing and harmonizing of the rules dominating over the international maritime freight transport[120]. The motivation behind the convention lies on the fact that technological and commercial developments have soared since the adoption of the HR/HVR and Hamburg Rules[121].

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116 DJADJEV, p. 37; CHACÓN, p. 92; WILSON, p. 217; NIKAKI, Theodora, "The Carrier's Duties Under the Rotterdam Rules: Better the Devil You Know?", Tulane Maritime Law Journal, V. 35, I. 1, 1-44, 2010, p. 3; SOYER/NIKAKI, p. 304.

117 DJADJEV, p. 37; WILSON, p. 226-227; SOYER/NIKAKI, p. 304.

118 WILSON, p. 228-230; SOYER/NIKAKI, p. 307; BERLINGIERI Francesco, "The History of the Rotterdam Rules" In The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea- An Appraisal of the "Rotterdam Rules", edited by GÜNER M. Deniz, 1-62, Berlin, 2011, p. 1; NIKAKI, p. 2; TETLEY, William, "Reform of Carriage of Goods-The UNCITRAL Draft and Senate COGSA'99, Tulane Maritime Law Journal, V. 28, N. 1, pp. 1-44, 2003, p. 6.

119 WILSON, p. 228-230; SOYER/NIKAKI, p. 307; BERLINGIERI, The History of the Rotterdam Rules, p. 1; NIKAKI, p. 2; TETLEY, Reform of Carriage, p. 6.

120 NIKAKI, p. 5; CHACÓN, p. 92-93; DJADJEV, p. 74; SOYER/NIKAKI, p. 319-320.

121 NIKAKI, p. 5; CHACÓN, p. 92-93; DJADJEV, p. 74; SOYER/NIKAKI, p. 319-320.

4.2. Nature of the Duty

The Rotterdam Rules, in essence, proceed to embrace more or less the same principle pertaining to the concept of seaworthiness as laid down in HR/HVR, which are the vessel seaworthiness and cargo worthiness[122]. Moreover, the obligation to provide a seaworthy vessel under the Rotterdam Rules is boiled down to the exercise due diligence in accordance with Article 14 of the Rotterdam Rules in the same manner as adopted under the HR/HVR. However, the container-worthiness is also incorporated into the carrier's duty to exercise due diligence in virtue of Article 14 (c) as opposed to the HR/HVR. Ultimately, it has been explicitly stated that the provisions concerning the seaworthiness of ship, in this sense the seaworthiness hints at Article 14 (a) and Article 14 (b), are compulsory and hereby cannot be contracted out of in accordance with Article 80 (4) of the Rules[123]. Perhaps more importantly, the Rotterdam Rules differ from the HR/HVR by excluding Article 14 (4), which is concerning cargo worthiness, from the scope of Article 80 (4)[124].

4.3. Period of Time When the Seaworthiness Obligation Attaches

It is submitted that the most conspicuous distinction between the Rotterdam Rules and the HR/HVR in the sense of the obligation of seaworthiness is associated with the period of time in which the duty to exercise due diligence attaches[125]. That is to say, the obligation of the carrier to exercise due diligence is not restricted to before and at the onset of the voyage. In contrast, it has turned out to be a continuing obligation and hence the carrier is compelled to maintain exercising due diligence before, at the commencement of, and throughout the voyage pursuant to Article 14. Moreover, Article 14 (a) of the Rotterdam Rules sets forth "*make and keep the ship seaworthy*"as opposed to that of the HR/HVR where it is stated as "*make the ship seaworthy*" in Article III (1) (a).

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122 MARGETSON, p. 206-207; CLARK/THOMSON, p. 144; NIKAKI, p. 7; CHACÓN, p. 95.

123 ÜLGENER M. Fehmi, "Obligations and Liabilities of the Carrier." In The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea- An Appraisal of the "Rotterdam Rules", edited by GÜNER M. Deniz, 139-153, Berlin, 2011, p. 142.

124 ÜLGENER, p. 142.

125 MARGETSON, p. 207; NIKAKI, p. 7-8; CLARK/THOMSON, p. 144; WILSON, p. 232; SOYER/NIKAKI, p. 329; ÜLGENER, p. 145.

4.4. Basis of Liability

So far as the basis of liability under the Rotterdam Rules is concerned, based on Article 17 of the Rules, it can be clearly enunciated that the Rotterdam Rules take a similar approach concerning the basis of liability, as stated in the context of HR/HVR[126]. In other words, the carrier's liability is predicated on fault-based system[127]. It is hence deemed that the carrier shall solely be accountable, if the cargo interest demonstrates the loss of or damage to the goods, in addition to for delay in delivery occurred throughout the period in which the carrier is in charge pursuant to Article 17 (1). Ultimately, the exoneration from liability for negligence resulting from navigation and management of the vessel, also referred to "*nautical fault*", in Article IV (2) (a) of the HR/HVR is not laid down under the Rotterdam Rules[128].

4.4.1. Burden and Order of Proof

Under the Rotterdam Rules, the first onus of proof lays on cargo interests. Therefore, if the claimant can establish that the loss, damage or delay took place in the course of the carrier's responsibility, the burden of proof switches to the carrier. The carrier then has two options. He could either rely on Article 17 (2), which enables the carrier to avoid liability provided that he demonstrates that the cause of the loss or delay is not imputable to his fault or to the fault of any person for whom he is liable, or count on Article 17 (3), which provides a set of exceptional causes[129].

From this point on, the claimant is given three alternatives so as to make the carrier responsible for all or part of the loss or delay by means of Article 17 (4) and (5). Accordingly, the claimant can either resort to Article 17 (4)(a), which the excepted peril was caused or contributed by

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126 ÜLGENER, p. 145; FUJITA Tomotaka, "Obligations and Liabilities of the Shipper" In The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea- An Appraisal of the "Rotterdam Rules", edited by GÜNER M. Deniz, 211-228, Berlin, 2011, p. 222; DJADJEV, p. 92; WILSON, p. 232; NIKAKI, p. 9; MARGETSON, p. 206-207.

127 MØLLMANN Anders, "Compensation for Damage" In The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea- An Appraisal of the "Rotterdam Rules", edited by GÜNER M. Deniz, 201-209, Berlin, 2011, p. 202; NIKAKI, p. 8-9.

128 Also see KARA, p. 133; CLARK/THOMSON, p. 147.

129 BERLINGIERI, The History of the Rotterdam Rules p.16; ÜLGENER, p. 145; NIKAKI, p. 8-9; MARGETSON, p. 209; KARA, p. 152.

the carrier or any person for whom the carrier is liable, or invoke on Article 17 (4)(b) that the event or circumstance in question not fallen into the list of the exceptional perils contributed to the loss. What's more, the claimant can invoke the loss or delay upon the unseaworthiness of vessel in accordance with Article 17 (5)(a).

To sum up, the Rotterdam Rules appear to adopt relatively same provisions in respect of the concept of seaworthiness except for the period of exercising due diligence, which has been turned into a continuing obligation under the Rules[130]. It appears that the concept of onus and order of proof has become a bit more sophisticated compared to that of HR/HVR. Nevertheless, in essence, the Rotterdam Rules follow the HR/HVR framework and the principles that have been constituted and shaped by jurisprudence[131]. Therefore, the Rotterdam Rules are indeed perceived as not a revolutionary instrument but an evolutionary one[132].

V. CONCLUDING REMARKS

It has been revealed earlier that the duty to provide a seaworthy vessel on the part of the carrier appears to undergo some fundamental changes from the HR to the Rotterdam Rules. Nevertheless, the main breakthrough in the sense of the duty can be conceived as the radical transition from an absolute warranty under common law to a reasonable care. For the first time on an international scale, the HR have adopted the requirement of exercising due diligence by the carrier as an indispensable principle of shipping. It has then been embraced in both the Hamburg Rules and the Rotterdam Rules. Even though neither the wording of due diligence nor the duty of seaworthiness is laid down in the Hamburg Rules, the obligation is considered to be continued in virtue of the requirement of that the carrier is bound to take all reasonable measures so as not to occur any sort of loss or damage to cargo as well as delay in delivery. What's more, the Hamburg Rules appraise the carrier to be always at fault based on the principle of presumed fault or neglect adopted as opposed to that of both the HR/HVR and the Rotterdam Rules. Perhaps most importantly, both the Hamburg Rules and the

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130 Margetson also argues that the duty of the carrier to provide a seaworthy vessel is no longer an overriding obligation under the Rotterdam Rules on the grounds that "*none of the duties are made subject to the carrier's immunities.*" *See* MARGETSON, p. 207.

131 DJADJEV, p. 93.

132 SOYER/NIKAKI, p. 308.

Rotterdam Rules make the carrier be accountable in the course of the whole voyage in contrast to the HR/HVR in which the carrier is merely necessitated to exercise due diligence before and at the commencement of the voyage.

So far as burden and order of proof is concerned, the carrier is always obliged to bear the burden of proof apart from the occurrence of the loss or damage caused by fire under the Hamburg Rules. By contrast, except for the fact that the carrier must prove whether due diligence is exercised, the demonstration on the issue of seaworthiness is controversial under the HR/HVR. That is to say, under the HR/HVR, those who stand by the orthodox view argue that unseaworthiness must be proven by the cargo interests before the carrier proves that he exercised due diligence to make the vessel seaworthy, whilst others suggest that the cargo interests are naturally not capable to access the facts and it is therefore the carrier who must endure firstly the onus of proving due diligence. Even so, it is argued that the probable reason for not being sorted conclusively out of this intricacy despite its paramount importance may be associated with the fact that cases in practise barely rely upon the burden or order of proof in this respect. Moreover, in practise, it is highly probable that the carrier is regarded to fail in exercising due diligence by inference in the event that there is any sort of incursion of seawater in a vessel's hold. The courts therefore put the burden of proof as to whether exercising due diligence on the carrier pursuant to Article IV (1) of the Hague/Hague-Visby Rules on the grounds that such occurrence is conceived to be *prima facie* evidence of unseaworthiness. Eventually, even if the Rotterdam Rules are not into force yet, it can be envisaged that the expositions and interpretations made over the meaning of the concerning provisions of the HR/HVR could be conceivably appropriate for the purpose of the Rotterdam Rules in the sense of obligation of seaworthiness.

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