

## Chapter 2

# The Origin of the Obligation of Practicing Due Diligence in Maritime Transportation

The first part of this work presents an overview of the sea carrier's duties and liabilities during the centuries before the enactment of the Hague/Hague Visby rules, and addresses the historical origin of the current sea carrier duties to practice due diligence in making the ship seaworthy and to care the cargo. Maritime transportation, as a cornerstone of the commerce, development and civilization, has been subject of regulations since ancient times. Rules governing the carrier's duties are found back in history. A review from the ancient sources of regulation for carriage of goods by sea law, including those during the middle ages and in the modern era, reveals a constant application of an absolute liability standard on sea carriers. Such standard changed during the XIX century under English law, when the global trade increased, along with the advent of new philosophical ideas that prompted some carrier's practices that required later urgent attention from the international community. Such efforts ended on the existing standards contained in the Hague/Hague-Visby Rules. After that, attempts for more modern regulation have been tried, but without success. From the standards of liability demanded to maritime carriers for centuries before the current era, this part provides and aid to a better understanding of the duties required to them, in what we now call the technological era.

## 2.1 The Evolution of the Standard of Carrier's Liability in Maritime Transportation

### 2.1.1 Introduction

#### 2.1.1.1 The Shift of the Standard of Liability

Long before the adoption of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 1924 (HR), the common carriers liability was absolute. They were obliged to restore the carried goods in

every case, with few exceptions made such as damages or losses resulted from acts of God or Enemies of the King. Accordingly, the implied obligation to provide a seaworthy vessel was absolute as well. This condition held the common carriers as insurers of the cargo. Liability was enforced regardless of his diligent activity or careful actions in performing the carriage. Hence, it was irrelevant whether or not the carriers applied new technologies to prevent and avoid risks and to provide a better care of the cargo. With such a standard, there was no place for any discussion on this subject, and that, certainly, would have made this work completely meaningless. But at a certain point in history, shipowners absolutely refused to continue working under such a heavy burden, and introduced some contractual provisions to release themselves from such a strict standard. These provisions became in time so extreme that prompted international statutory regulation.

As a result, after long years of discussions, the international community adopted the Hague Rules, which shifted dramatically the absolute obligation to a standard based on negligence in the performance of some minimum duties. The convention has been ratified by some 80 sovereign States and is included as applicable law in the bills of lading of the largest cargo liners of the world. Nowadays, most movement of goods by common sea carriers across the planet is governed by these rules. The liability of common sea carriers for damages or losses is decided according to their performance of these duties. What due diligence is and how it is practiced, has become the core of courts discussions when deciding cargo claims. And here is where the application of new technologies, as a measure of due diligence in making the ship seaworthy and for the care of the cargo, plays doubtless an important role at the present.

But before going into the analysis on the implementation of new technologies as part of the due diligence obligation, an understanding of the origin of the standard of liability and content of these duties in itself is needed. To provide a more holistic approach to the problem, we find it necessary to understand, first, where this duty of practicing due diligence in maritime transportation is coming from; and secondly, how and why it became the current standard to assess liability. For this purpose, a review of historical sources of maritime law is required. There we find the previous standard applied to sea common carriers and the reasons supporting it. That will lead us to an understanding of the causes for its evolution to the current liability system.

### **2.1.1.2 The Historical Maritime Law**

Looking back in history, maritime navigation is perhaps the oldest means of transportation developed by humankind. Since ancient times, the necessity of employing vessels to carry passengers and goods resulted in early maritime law.<sup>1</sup> Therefore, it is possible to find historical maritime law going back hundreds of

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<sup>1</sup>Schoenbaum, 3.

years ago. One example of that is the Hammurabi's Code, the oldest codification containing rules relating to the carriage of goods by sea. Maritime law was the consequence of the international exchange of goods. International trade is not a new practice at all. It is possible to find some signs of international trade after the First Punic War (268–241 B.C.), when the Carthaginian Hamilca Barca founded commercial colonies in Spain.<sup>2</sup> The development of the trade around the Mediterranean Sea, especially during the late Roman Empire and the Middle Ages, gave rise to some international systems of maritime law.<sup>3</sup> Rhodian and Roman law are usually referred to as the first sources of maritime law and contractual law, respectively. They are still subject of attention in legal studies and jurisdictional decisions that confirm the value of their historical review.<sup>4</sup>

Much later, in the eleventh century, the Crusades stimulated again international trade. The Christian control of ports in coastal countries such as Syria, Egypt, Lebanon and Turkey, opened a stable trade connection with the Italian cities of Venice, Genoa and Pisa, all of which highly profited from this exchange.<sup>5</sup> During this same time, there was also an outstanding commercial growth of the Hansa towns of Lübeck, Hamburg, Bremen, Visby, etc. All these maritime commercial activities in different points of history demanded regulations. In the middle ages, cities involved in international trade started writing down the customs and statutes to be observed by merchants which were then enforced by court systems created by the local governments.<sup>6</sup> The states at a certain point came to supervise and partially control the commercial activity because of its contribution to the national economy.<sup>7</sup> By the beginning of the thirteenth century, the trade grew so much in all

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<sup>2</sup>S. S. Jados, *Consulate of the sea, and related documents* (University, Ala: University of Alabama Press 1975), vii.

<sup>3</sup>Schoenbaum, 3.

<sup>4</sup>H. E. Anderson, III, 'Risk, Shipping, and Roman Law' (2009) 34, *Tulane Maritime Law Journal*, 183–210, at 183: "Of course, since there are modern legal equivalents to the well established procedure for general average, some courts have argued they need not actually rely on Roman law. In reality, many U.S. courts have mentioned the Rhodian maritime laws in their opinions. Still, in the English case of *Taylor et al. v. Curtis (The Hibernia)*, Chief Justice Gibbs remarked: 'It seems totally unnecessary to go to the Rhodian or Roman law for what common sense and common justice must suggest to everyone; and though it be pleasing to learned curiosity to perceive the custom of our own times confirmed by such ancient precedents, we should be satisfied with finding the analogy, without grounding ourselves upon it as the reason.' With deference to the learned judge, the real relevance of the Roman law, or any historical legal device for that matter, is not so much the actual rules established, but that such law informs us of the historical legal and customary practices and guides us with respect to the prevailing commercial or political situations that were the origins of such rule... Furthermore, it is important to understand and realize the context of the origins of these maritime legal principles in order to assess the relevance of modern practices. Only through a careful review of the historical context can future improvements be made to the current law, which originated from older law that contemplated similar physical risks through different commercial and legal arrangements."

<sup>5</sup>Jados, vii.

<sup>6</sup>*Ibid.*, viii.

<sup>7</sup>*Ibid.*, x. It seems to have happened especially after the 15th century.

commercial cities that their national pride was associated with the volume of commerce they handled.<sup>8</sup> Along with this salient commercial growth, unethical practices arose among merchants.<sup>9</sup> This, among other reasons, demanded the enactment of legal codes with uniform regulations to be strictly observed by the people involved in the commerce.<sup>10</sup> This gave rise to some other bodies of maritime law such as the Consulate of the Sea, the Laws of Visby and the Rules of Oleron. Despite the larger number of historical codes containing maritime legislation,<sup>11</sup> these three are considered the leading historical sources of European codification of maritime laws.<sup>12</sup> They contributed consequently to the formation of an internationally accepted maritime law.<sup>13</sup>

This commercial maritime activity and the regulations built upon it, was developed during times when maritime navigation was still very rudimentary. Carriers were exposed to the catastrophic risks; pirates and privateers, unpredictable rough weather conditions; lack of proper knowledge and navigational techniques; and absence of the technological improvement available nowadays.<sup>14</sup>

As human society has experienced an evolution in all aspects, maritime law, in the same way, has faced changes through the centuries, along with the development and improvement of international trade and navigation practices. Our contemporary

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<sup>8</sup>Ibid., at x: "By the beginning of the thirteenth century in all large commercial cities there appeared a new class of people eager to share in the profits of trade. The concentration of money in commercial cities provided new opportunities for investment of surplus capital in new industries producing a variety of merchandise for new and expanding markets. New trade routes were opened, better merchandising methods were devised, and the first sign of modern capitalism appeared. The rise of nationalistic feeling became associated with commercialism."

<sup>9</sup>Ibid., at xi: "Religious convictions appeared to have no restraining influence in the merchant class...When commerce developed to the level of controlling national economies, whatever position the Church might have taken on the moral and ethical aspects of commercialism was completely ignored by the merchant princes, and the papacy no longer had the military to enforce its dicta."

<sup>10</sup>Ibid., xii.

<sup>11</sup>E.C. Benedict and A.W. Knauth, *Benedict on admiralty*, 7th edn. (New York, NY: Matthew Bender, 1969, i.e. 1958]; v. 1, 1974), vol. 1 Chapter 1. E.g. The Maritime Laws of the Kingdom of Jerusalem; Le Guidon de la Mer; The Laws of Hansa Towns; Ordinance de la Marine of 1681; etc.; Jados., at xiii: "Customs of the city of Amalfi, Ordinances of Trani..."

<sup>12</sup>F. R. Sanborn, *Origins of the early English maritime and commercial law* (New York: The Century Co., 1930), 63. See Holdsworth; G.J. Mangone, *United States admiralty law* (The Hague; Boston: Kluwer Law International, 1997), 7

<sup>13</sup>Jados., xiii.

<sup>14</sup>Ibid., at vii: "On the seas the merchants were exposed to pirates, and privateers, to shipwreck and death. Meager knowledge of navigation, lack of proper navigational instruments, the nonexistence of lighthouses and beacon lights, dependence upon favorable winds, and the inability of vessels to withstand severe storms often ended in aimless sailing until the depletions of water and food resulted in the death of all aboard."

maritime law is the result of the evolution of principles contained in those ancient maritime laws and customs of the antiquity.<sup>15</sup> The legal and commercial reasoning of jurist and merchants in past times, in the solution of juridical problems emerged from the maritime trade, are worthy to be confronted with the interpretation and application of our contemporary maritime law.<sup>16</sup> It is more interesting when it seems they were more concerned in observing the values of justice, fairness and equity in creating and applying law. Hence, legal history deserves attention for a better understanding of the reasoning and elements that prompted its evolution, and how they were motivated by their time and the external social forces that worked on them.<sup>17</sup>

The study of old legal regimes governing this contract has the potential to produce risky results. It may be subject to speculation regarding their exact content, its interpretation, and the real commercial practices that surrounded them. The attempt is more problematic considering the access to the data as well as dealing with different legal cultures.<sup>18</sup> However, a detailed historical analysis is not the main objective of this work. We try to provide at least an introductory and general overview of the main historic bodies of maritime law, addressing concretely the sea carrier's duties and liability rules. Some scholars in the maritime law field have already written about the historical sources of maritime law,<sup>19</sup> but with a few exceptions,<sup>20</sup> in a general way and not with specific emphasis on the liability rules set out in those legal bodies. This specific issue has been more commonly addressed by authors writing on the origin of the Hague Rules, but mostly departing from the

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<sup>15</sup>Schoenbaum, 3.

<sup>16</sup>Benedict and Knauth, Vol. 1, at § 1: "In adverting to the precedents and rules of practice of a bygone age, it should be our task to take account of the times and circumstances in which they were set and to use them not as shackles to bind but as guides to lead us in our attempts to find a solution for our legal problems. History will also teach us a certain humility; for, in this field of maritime law, we shall find that the forces of nature which our ancestor had to contend with and to provide legal solution for their ravages, have scant respect for the sophisticated handiwork of our times, that we rely much on the systems devised in the past to alleviate the hardships wrought by maritime casualties and disasters, that to this day we have not been able to make a reasonable codification of our laws and private litigants have to bear a enormous legal cost of establishing legal principles which ought to be the responsibility of the lawgivers to establish."

<sup>17</sup>D. Ibbetson, 'The Challenges of Comparative Legal History' (2013) 1, *Comparative Legal History*, 1–11., 11; O. W. Holmes, *The common law* (London: MacMillan, 1968), Ed. by Mark De Wolfe Howe, at 5: "The Law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation."

<sup>18</sup>Ibbetson, 11.

<sup>19</sup>J. Kent, *Commentaries on American Law*, 14. ed. by John M. Gould (Boston: Little, Brown, and Company, 1896); Sanborn; Mangone; Schoenbaum, among others.

<sup>20</sup>E.G.M. Fletcher, *The Carrier's Liability* (London: Stevens, 1932); K.F. Krieger, *Ursprung und Wurzeln der Rôles d'Oléron*, Quellen und Darstellungen zur Hansischen Geschichte, n. F. (Köln: Böhlau, 1970), vol. 15; A. J. M. Meyer-Termeer, 'Die Haftung der Schiffer im griechischen und römischen Recht'.

absolute standard applied by the British judges of the common law<sup>21</sup>; with short references to previous systems.<sup>22</sup>

Why was the common carrier's liability strict under Anglo-American law prior to the Hague Rules? Why did it change to a system based on negligence? The answer must be found in legal history. A research on the topic shows that the enforcement of strict liability can be traced far back to the time when the English judges applied it to common carriers. That standard governed the business even in times when the technologies used by the shipping industry nowadays, and that substantially improve it, were simple unimaginable. The revision of the ocean carrier liability in these historical legal bodies provides an important source of reference and comparison to assess the duties assigned now to them by the Hague Rules. To understand the radical change in the liability standard for common sea carriers posited in the Hague Rules, the legislative history and the events that prompted its adoption must be addressed as well.<sup>23</sup> The understanding of the reasons for change and their surrounding historical facts enable us to have a more critic view and to nourish the further analysis of the reasonableness and convenience of maintaining, replacing, amend or abolish the regulations resulting from this evolution.

There have been some more recent attempts to update the liability rules set in the HR, with the adoption of two protocols amending part of the original Convention. As these protocols were still insufficient, the international Community organized through the UNCITRAL and UCTAD, the redaction and adoption of two new conventions, proposing the Hamburg Rules and the Rotterdam Rules as new regulations to govern this contract. They have similar, but not identical, liability regimes, meant to replace the HR. Although none of these conventions are significantly applied, they are worthy to be at least briefly revised. They show the legal thinking post-Hague Rules, as well as, the awareness and concern of the international community about the need for an update in the liability regime.

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<sup>21</sup>A.W. Knauth, *The American Law of ocean bills of lading*, 4th edn. (Baltimore: American Maritime Cases, 1953); M.A. Clarke, *Aspects of the Hague Rules: A comparative study in English and French law* (The Hague: Nijhoff, 1976); M. F. Sturley, *The Legislative History of the Carriage of Good by Sea Act and the Travaux préparatoires of the Hague Rules*, 3 vols. (Littleton, Colorado: Rothman, 1990).

<sup>22</sup>A. v. Ziegler, *Haftungsgrundlage im internationalen Seefrachtrecht: Evolution der Haftungsgrundlage von den Haager Regeln zu den Hamburger Regeln unter Berücksichtigung des nationalen und internationalen Seerechts von Grossbritannien, den Vereinigten Staaten von Amerika, Kanada, Frankreich, Deutschland und der Schweiz* (Zürich, Baden-Baden: Schulthess; Nomos, 2002); H. Karan, *The carrier's liability under international maritime conventions: The Hague, Hague-Visby, and Hamburg rules* (Lewiston, NY [u.a.]: E. Mellen Press, 2004).

<sup>23</sup>W. Tetley, 'Interpretation and Construction of the Hague, Hague/Visby and Hamburg Rules' (2004) 10. *The Journal of International Maritime Law*, 30–70, 58. Viscount Simonds on this regard stated in *The Muncaster Castle* [1961] AC 807 at 836, [1961] 1 Lloyd's Rep. 57, at 67: "To ascertain [the] meaning [of the Hague Rules] it is, in my opinion, necessary to pay particular regard to their history, origin and context, and, as I think the courts below have not paid sufficient regard to this aspect of the case, I must deal with it at some length."

## 2.1.2 *Historical Sources of Maritime Law*

### 2.1.2.1 *Hammurabi's Code of Laws*

The oldest records of maritime law are found in the code of Hammurabi, written in the ancient Babylon between 2000 B.C. and 1600 B.C.<sup>24</sup> The code is a compilation of much older Sumerian customary law containing, among others, rules for marine collisions and ship leasing.<sup>25</sup> Concrete regulations for maritime navigation, including shipbuilding, the payment of shipbuilders and shipmen, hire of ships and responsibility for the cargo shipped are found in rules 234 to 240.<sup>26</sup> The rule 237 establishes an obligation of care and liability for the loss of a vessel and her cargo:

237. If a man has hired a boatman and boat, and laden her with corn, wool, oil, dates, or any other kind of freight, and if the boatman is careless and sinks the boat, and her cargo is lost; then the boatman shall replace the boat he has sink [sic] and all her cargo that he has lost.<sup>27</sup>

The expression of a loss caused by the “careless” conduct of the boatman suggests his liability for negligence. However, Driver and Miles affirm that there is no case in this code where liability is undoubtedly based on negligence.<sup>28</sup> The Babylonian law, as expected, did not establish general principles or general theories on liability, or negligence, etc.<sup>29</sup> The Babylonians legislated on specific and concrete acts; and, in some cases where negligence or “carelessness” was stated, proof was required.<sup>30</sup> For this case, it was not required to prove negligence, or that the shipman had taken reasonable care, to escape liability.<sup>31</sup> The shipman simple had to replace everything (cargo and boat), independently of what his careless act or omission was.<sup>32</sup> He could not rebut his liability before the court.<sup>33</sup> Same authors point out that the liability of the shipman was contractual and comparable to that of the “common calling”, found later in English Law, which obliges the carriers to restate the lost goods, without any concerns for negligence or due care.<sup>34</sup> Though not totally clear, the standard then seems to have been absolute. Because of its

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<sup>24</sup>Benedict and Knauth, Vol. 1. §2.; Jados, xii.

<sup>25</sup>Schoenbaum, 3.

<sup>26</sup>C. Edwards, *The Hammurabi Code: and the Sinaitic Legislation* (London: Watts & Co., 1904), 66–67. Also on boatman liability: “Rule 236. If a man has given his boat on hire to a boatman, and the boatman is careless, and the boat is sunk and lost; then the boatman shall replace the boat to the boat owner.”

<sup>27</sup>*Ibid.*, 66.

<sup>28</sup>G. R. Driver and J. C. Miles, *The Babylonian Laws*, 2 vols. (Oxford: Clarendon Press, 1952), Vol. 1, 465.

<sup>29</sup>*Ibid.*, 462.

<sup>30</sup>*Ibid.*, 462.

<sup>31</sup>*Ibid.*, 465.

<sup>32</sup>*Ibid.*, 464.

<sup>33</sup>*Ibid.*, 466.

<sup>34</sup>*Ibid.*, 464.

antiquity and imprecision, the influence of the Hammurabi code in later bodies of laws cannot be easily, or clearly traced. But it works as a reference of the oldest standard applied to sea carriers.

### 2.1.2.2 The Roman Law

#### 2.1.2.2.1 Historical Context

Given the power and expansion of the Roman Empire and the outstanding development of their legal system; many, if not most of the modern legal theories ground their principles on the legal reasoning of Roman jurists. Their main laws are found in the Digest of Justinian; a compilation of analyzes, opinions and decisions of the Roman jurists, completed around 533 A.D.<sup>35</sup> Despite the impressive development of the Roman law, maritime law was not a subject of great attention by Roman jurists. Rather, it is said, it was borrowed from the Rhodian Law, where the Romans considered the maritime law to have originated.<sup>36</sup> Such a conclusion comes from the frequently cited answer of Emperor Antonius Pius to a Nicomedian merchant who claimed jurisdiction on a maritime dispute. The emperor Antonius Pius answered with this famous sentence: “I am the lord of the world, it is true, but the law is the lord of the sea. Let the maritime law of Rhodes be applied to any question where no law of ours is inconsistent with it.”<sup>37</sup>

The absence of their own maritime laws is attributed to the fact that Rome was more a military than a commercial or maritime power.<sup>38</sup> Agriculture had a bigger importance for their economy<sup>39</sup> and therefore, there were initially more regulations on the use of land.<sup>40</sup> Trade was even conceived as an indecorous matter and, in some cases, discouraged.<sup>41</sup> However, after the Punic wars, (ca. 246–146 BC), the Romans started to develop their navy.<sup>42</sup> During the last two centuries of the Roman Republic (ca. 509 B.C.–26 B.C.), the carriage of goods by sea increased due to the trading of slaves, the need to secure the supply of food, and the importation of

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<sup>35</sup>Schoenbaum, 5.

<sup>36</sup>Anderson, III, 195.

<sup>37</sup>T. E. Dönges, *The Liability for Safe Carriage of Good in Roman-Dutch Law* (Cape Town: Juta & Co. Ltd., 1928), 4.

<sup>38</sup>A. C. Schomberg, *A treatise on the maritime laws of Rhodes: By Alexander C. Schomberg* (Oxford: sold by D. Prince and J. Cooke. J. F. and C. Rivington, P. Elmsly, and T. Payne and Son, London, 1786), 7; Kent, Vol. III, 5.

<sup>39</sup>Anderson, III, 195.

<sup>40</sup>Meyer-Termeer, 147.

<sup>41</sup>Schomberg, 15; Kent, Vol. III, 5–6; Dönges, 2. An example of this is a law introduced by the Emperor Claudius forbidding men of noble or illustrious families and members of the Senate to own ships larger than necessary to carry their own corn and fruits.

<sup>42</sup>Sanborn, 7; Anderson, III, 184.



luxury goods.<sup>43</sup> Some engagement in commerce is reported with vessels carrying up to 400 tons of cargo calling on ports in the Mediterranean, Black Sea and some Atlantic ports.<sup>44</sup>

Notwithstanding, their maritime legislation was not in an independent body, but included in their civil law, and had no separate maritime tribunals.<sup>45</sup> Paulus and Ulpian are two of the most cited jurists in the provisions of the Digest of Justinian, relating to maritime law.<sup>46</sup> Despite the lack of an extensively developed maritime legislation, there were, among others, rules regarding the ownership of a vessel, the danger of pirates and collisions, general average, the charter of a vessel, salvage, maritime loans and liability for freight.<sup>47</sup>

#### 2.1.2.2.2 The Concept of Diligence

As mentioned, the carrier activity was originally within the scope of the civil law. There was not an exclusive jurisdiction for shipping law in a separate branch. The carrier's liability was judged according to the degree of diligence demanded by the type of contract they subscribed. Carriage was practiced as a *depositum* or a *locatio operis*. Both contracts imposed on the debtor a special duty of diligence or care of the goods entrusted on him. There we find the first sources of the concept of diligence as used today in the Hague Rules.

##### (1) Diligence and the Relation with *Culpa*

Roman jurists analyzed the concept of *diligentia* in conjunction to the concept of *culpa*. According to the classical jurisprudence, *culpa* was defined as the lack of due diligence in the compliance of an obligation.<sup>48</sup> The concept was applied to obligations *ex delicto* as well.<sup>49</sup> To differentiate it from the *aquilian culpa*, it was referred to as contractual *culpa*.<sup>50</sup> Diligence was primarily documented as a positive duty of Roman officials and guardianship of minors, and then used to extend

<sup>43</sup>Meyer-Termeer, 147; R. Zimmermann, *The law of obligations: Roman foundations of the civilian tradition*, 1st edn. (Cape Town: Juta & Co. Ltd., 1990), 406.

<sup>44</sup>Anderson, III, 184–185. See Lionel Casson, “*Ships and Seamanhip in the Ancient World 369*” (1971).

<sup>45</sup>Schoenbaum, 4.

<sup>46</sup>Anderson, III, 196.

<sup>47</sup>Schoenbaum, 5.

<sup>48</sup>A. Torrent, *Manual de derecho privado romano* (Madrid: Edisofer, 2002), 360; M. J. García Garrido, *Derecho privado romano: Casos, acciones, instituciones*, Derecho/ ediciones académicas, 13th edn. (Madrid: Ediciones académicas, DL 2004), 419.

<sup>49</sup>W. L. Burdick, *The Principles of Roman law and their relation to modern law*, (Repr.) (Holmes Beach, Florida: Gaunt & Sons, Inc., 1989), 415–416.

<sup>50</sup>García Garrido, 419.

liability not only for contractual *dolus*, but also for contractual *culpa*.<sup>51</sup> *Culpa* or negligence was differentiated from *dolus* through the absence of a conscious intention to produce damage to the creditor.<sup>52</sup> Diligence was especially required in contract of *negotiorum gestio*, but later was extended to all *bona fides* contracts, including partnership, sale, hire, loan, mandate and deposit.<sup>53</sup> In these contracts, the debtor was liable not only for *dolus*, but if he did not manage the creditor's goods or business with the expected due diligence, he was liable also for *culpa* for any damage caused.<sup>54</sup>

Though it is not certain that the Romans developed a classification for three degrees of *culpa*, later commentators distinguished in the Roman texts some nuances or different degrees of this concept.<sup>55</sup> The first is the *culpa lata* or gross negligence: "not realizing what everyone realizes", understood as excessive negligence, even comparable to *dolus*.<sup>56</sup> The second is *culpa levis* or ordinary negligence, which depending on the standard of diligence to be confronted, is subdivided in *culpa levis in abstracto* and *culpa levis in concreto*.<sup>57</sup> The third is *culpa levis-sima*, or the lack of fulfillment of a special attention or diligence for a specific obligation.<sup>58</sup> The problem of determining the type of *culpa* to be attributed to a specific debtor was then solved by the determination of different standards or degrees of diligence.<sup>59</sup> In consequence, they distinguished three degrees: *diligentia bonus pater familias*, *diligentia quam suam in rebus* and *custodia*. The liability of a wrongdoer was determined precisely attending to the degree of diligence he was required to practice in the performance of the obligation contracted.

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<sup>51</sup>H. Hausmaninger, 'Diligentia Quam In Suis: A Standard of Contractual Liability from Ancient Roman to Modern Soviet Law' (1985) 18, Cornell Int'l L.J., 179–202, 185.

<sup>52</sup>García Garrido, 418.

<sup>53</sup>Ibid., 418–419.

<sup>54</sup>Ibid., 419.

<sup>55</sup>Note, 'Three Degrees of Negligence, The' (1873) 8, Am. L. Rev., 649–68, at 665: "Since the publication of Sir William Jones essay, and within the present century, it has been demonstrated, almost beyond cavil, that there does not exist in the Roman law a uniform division of negligence into degrees. It is generally admitted that the Florentine manuscript of the Digest is the oldest and the most valuable of the manuscripts; that its reading of the text of the law Contractus is the correct reading; ... that Pothier was wrong; and that the symmetrical scheme of a threefold division of negligence is not supported by the texts of the Roman law, but was the work of the commentators". Zimmermann at, 192 suggest also that it was the medieval lawyer who came to distinguish different degrees of negligence. Torrent, 361.

<sup>56</sup>García Garrido, 420; Dig. 50.16.213; Dig. 16.3.32.

<sup>57</sup>Torrent, 361; García Garrido, 420.

<sup>58</sup>Torrent, 361; García Garrido, 420.

<sup>59</sup>Notwithstanding, it has been argued that the Romans described these different types of negligence, but did not clearly define the associated degrees of diligence needed. See W. W. Buckland, *A Manual of Roman private law* (Cambridge: University Press, 1925), 337.

## (2) Degrees of Diligence in Roman Law

### aa) *Diligentia Bonus Paterfamilias*

This degree of diligence is also called *exacta diligentia* or *exactissima diligentia*. The debtor was compelled to exercise the most rigorous level of care, taking all the measures that a *bonus paterfamilias* would take. The *paterfamilias*, as known, placed such a fundamental importance on Roman private law that his actions were taken as a standard of conduct. Under this degree, liability was attributed according to an objective criterion, regardless of negligence.<sup>60</sup> Failing to accomplish this degree of diligence made the debtor responsible for *culpa levis* in *abstracto*,<sup>61</sup> but also for *culpa levissima*.<sup>62</sup> According to Gaius, this degree was required in contracts of consumption such as *mutuum*, where the debtor was bound even if the object loaned became lost or damaged by accident.<sup>63</sup> The same degree was required to debtors in the quasi contract of *negotiorum gestio* (management of other business); *commodatum*, (gratuitous loan to a person for his personal use); *deponens* (gratuitous deposit); and some others.<sup>64</sup>

### bb) *Diligentia quam suis rebus*

This is a lower standard of care than the *diligentia exactissima*. The debtor was not obliged to practice such an extreme level of care. His liability was not measured attending to the abstract standard for the diligent *paterfamilias*.<sup>65</sup> *Diligentia quam in suis rebus* was the diligence that an ordinary person would show in his own interest, when regularly managing his own affairs or business.<sup>66</sup> Damages caused by the failure in the fulfillment of this standard, made the debtor liable for *culpa levis in concreto*.<sup>67</sup> The first mention of this degree of diligence was made by Celsus,<sup>68</sup> referring to the contract of deposit.<sup>69</sup> It was then developed later by Gaius, as a special and independent standard of *culpa*-liability separate from the

<sup>60</sup>Zimmermann, 192, at 193, on the reason for this high standard Zimmermann says that: “[T]he answer to this question lies in Justinian’s tendency, originating in Greek philosophy and reinforced by Christian religion, to make fault the central element of the law relating to liability.”

<sup>61</sup>Torrent, 361; García Garrido, 420.

<sup>62</sup>Zimmermann, 192.

<sup>63</sup>Dig. 44.7.1.4: “[The debtor] is obliged to observe the most exact diligence in guarding the property, and it is no sufficient for him to practice the diligence which applies to his own affairs, if someone could have guarded the property in a more diligent manner.”

<sup>64</sup>Note, ‘Three Degrees of Negligence’, at 667: “...the pledgor and the pledgee; the vendor and the vendee.”

<sup>65</sup>Zimmermann, 210.

<sup>66</sup>Torrent, 361.

<sup>67</sup>Ibid., 361.

<sup>68</sup>Hausmaninger, 183.

<sup>69</sup>Dig. 16.3.32: “The statement made by Nerva that gross fault is equivalent to fraud was not accepted by Proculus but seems to me to be very true. For even if a person is not careful in the degree required by the nature of man, still, unless he shows in the deposit the care customary with him, he is not free from fraud; for good faith is not maintained if he shows less care than in relation to his own affairs.”

*exactissima diligentia* rule.<sup>70</sup> It was required to be exercised in contracts of partnership, joint ownership, tutors, curators, and by the husband in relation to his wife's properties.<sup>71</sup>

### cc) *Custodia*

Finally, we have the special type of diligence called *custodia*, applied to specific contracts and related to the care and preservation of tangible goods.<sup>72</sup> In the early Roman law, the carriers were liable only for *custodia*,<sup>73</sup> meaning the act of guarding, watching, caring or keeping goods safely. Under Justinian law, responsibility for *custodia* appears within the standard of *diligentia exactissima*.<sup>74</sup> *Custodian prestare* was the behavior required to debtors to keep the object safe during the time it was under their tenancy; and to give it back in the same condition they had received it.<sup>75</sup> This standard implies an absolute obligation of the debtor to restore the goods that are under his *custodia*, even when the goods are damaged or lost for any cause, and regardless of his diligent or negligent activity.<sup>76</sup>

## 2.1.2.2.3 Standard of Care for Sea Common Carriers

### (1) The Original Standard

In Roman times, the carriage of goods was originally performed under two categories of contracts: *Depositum*, executed for free; and, *Locatio operis*, in the special form of *Locatio conductio*, which required payment.<sup>77</sup> In the first case, the depositary was compelled to practice *diligentia cuiusvis hominis*<sup>78</sup> or *diligentia quam in sua*, holding him liable only for *dolus* (fraud and malice). The owner of goods could file an action *in depositum* for damages or loss of his property. In the second, the *Locatio operis*, the debtor was required to practice *omnis diligentia* or *bonus pater familias*.<sup>79</sup>

The contract of carriage of goods was mostly performed under the contract of *locatio conductio*, entered into with an *exercitor* or *magister navis*.<sup>80</sup> The *exercitor* was the person who received the profits of the ship, be it the shipowner or bareboat

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<sup>70</sup>Ibid., 200.

<sup>71</sup>Note, 'Three Degrees of Negligence', 667–668.

<sup>72</sup>Ibid., 665.

<sup>73</sup>Karan, 8.

<sup>74</sup>Torrent, 363.

<sup>75</sup>Zimmermann, 194.

<sup>76</sup>Torrent, 362.

<sup>77</sup>Dönges, 20.

<sup>78</sup>Ibid, 29.

<sup>79</sup>Ibid, 30.

<sup>80</sup>Meyer-Termeer, 177.

charter.<sup>81</sup> The contract was for the hire of the whole ship or part of the ship.<sup>82</sup> It was in the second case, the hire of space on the ship, were an obligation with the *exercitor* to perform the carriage came about. Thus, the carrier was responsible for damages or losses caused by *dolus* or for *culpa* of himself or his servants.<sup>83</sup> The liability was even for “*culpa levis*”, and the affected creditor had an *actio ex locatio* or *actio ex conductio* to claim his losses or damages.<sup>84</sup> Under this system, the *exercitor* was exonerated from liability when damages or losses were caused by theft, or caused by third parties, or by *force majeure* such as robbery, trap of pirates, shipwreck, fire, and unusual water levels.<sup>85</sup>

## (2) The Praetor's Edict

Besides the regulation and the actions granted to the cargo owner under the two aforementioned contracts, another more specific and stricter regulation for the common carriers was later introduced by a *Praetorian* Edict. The exact date of its introduction is unknown, but for sure, it was after the enactment of the *locatio conductio*, which already existed by the second half of the 2nd century B.C.<sup>86</sup> Labe commented on this about the year 10 or 11 A.D.<sup>87</sup> Some authors have tried to figure out the date of its enactment, determining that it was probably around or after the 1st century B.C.<sup>88</sup> Interestingly, this concurred with the expansion of the maritime commerce in Rome.

The common carriers activity came to be regulated by a *Praetorian* Edict. The same granted an *actio de recepto*, dogmatically considered as one of the most interesting and historically significant of the *pacta praetoria*.<sup>89</sup> *Receptum*, in this case, was the undertaking by a sea carrier, who warrants that the customer's goods are to be kept safe while on the ship or in his premises.<sup>90</sup> That made that the carriers liability was not based on *culpa* but on *receptum*.<sup>91</sup>

<sup>81</sup>Sanborn, 10; Meyer-Termeer, 150.

<sup>82</sup>Meyer-Termeer, 177.

<sup>83</sup>Ibid., 177.

<sup>84</sup>Dig. 4.9.3.1.

<sup>85</sup>Meyer-Termeer, 177.

<sup>86</sup>Ibid., 185, at 177: „Daraus ist zu schliessen, dass es die *location conductio* schon in der ersten Hälfte des 2. Jahrhunderts v. Chr. gab.“

<sup>87</sup>Ibid., 185.

<sup>88</sup>Ibid., at 185–186: “Sehr viele Autoren sind der Ansicht, das *receptum nautarum* sei vor oder spätestens im 1. Jahrhundert v. Chr. entstanden; als argumentführen sie vor allen an, dass in dem Edikt das Wort “*nautae*” und nicht “*exercitores*” verwendet wird, woraus sie schliessen, dass das Edikt über das *receptum nautarum* in einer Zeit erlassen worden sei, in der das Wort *exercitor* noch nicht bestanden habe, so dass es älteren Ursprung sei als die *actio exercitoria*”.

<sup>89</sup>Zimmermann, 515.

<sup>90</sup>Ibid., 515.

<sup>91</sup>Dönges, 28.

### aa) Content of the Edict

The *Praetor Edict* establishes that “*Nautae, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos iudicium dabo.*”<sup>92</sup> Ulpian explains that shipmasters (*nautae*), innkeepers (*caupones*) and stablers (*stabularii*) must restore the property, luggage or traveler’s effects entrusted on them. Although this edict makes references to cases not related to shipping (innkeepers and stablers), Ulpian makes it clear that the edict has primarily a maritime character.<sup>93</sup> It relates mainly to the *nautae* activity; the other two cases being extensions to this edict.<sup>94</sup> This is the main instrument of liability in Roman law for those who regularly practiced the carriage of goods by sea, establishing an absolute obligation to restore the goods, regardless of whether the carriage was gratuitously or under payment.<sup>95</sup> The carrier warrants the goods will be *res salva fore*.<sup>96</sup> This *receptum* makes public carriers liable for *custodia*.<sup>97</sup> It demands a more active duty on the vigilance of the cargo that falls also into the category of *exactissima diligentia o diligentia diligentissimi paterfamilias*.<sup>98</sup> The obligation was not limited to protecting the cargo against theft, but according to Gaius and Paul, also against damages.<sup>99</sup> That implies liability for *culpa in non-faciendo*, for omission incurred by the carrier or his servants in preventing theft and damages caused by third parties.<sup>100</sup>

However, even if the carrier practiced such a high level of diligence, in the end it was irrelevant. The edict established an absolute obligation for the *nautae* to restore the goods,<sup>101</sup> regardless of whether the goods were destroyed, lost or damaged without the sea carriers own fault, or the fault of his employees; or by other incidents not considered as *vis maior*.<sup>102</sup> The edict established a special regime of absolute or strict liability<sup>103</sup> that required sea common carriers to act as insurers of the goods.<sup>104</sup>

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<sup>92</sup>Dig. 4.9.1.

<sup>93</sup>Dönges, 9.

<sup>94</sup>Ibid., 9: “In Dig. IV, 9.1. 1–4, where Ulpian treats of such important matters as the reason for the introduction of the Edict (§1), the person liable under the Edict (§§2 and 3), and the extension, in practice, of this liability to “*exercitores rarium et lintrarii*,” (§ 4), he always speaks of, or at any rate, implies ‘*nautae*.’ In §5 ‘*caupones et stabularii*’ are mentioned for the first time. Just as in §4 I suggest, he is here referring to an extension, beyond *nautae*, of the person to whom the Edict applied”.

<sup>95</sup>Ibid., 9, 22.

<sup>96</sup>Meyer-Termeer, 197.

<sup>97</sup>Dönges, 24; Zimmermann, 515; Dig. 4.9.5.

<sup>98</sup>Dönges, 32.

<sup>99</sup>Dig. 4.9.5.1; 4.9.6.4.

<sup>100</sup>Dönges, 31.

<sup>101</sup>Ibid., 32; Zimmermann, 515.

<sup>102</sup>Zimmermann, 1121.

<sup>103</sup>G. C. J. J. van Den Bergh, ‘*Custodiam Praestare: Custodia-Liability or Liability for Failing Custodia?*’ (1975) 43, *Tijdschrift voor rechtsgeschiedenis - The Legal History Review*, 61–72, 62; Torrent, 362.

<sup>104</sup>Zimmermann, 515.

### bb) The Reasons for the Edict

Ulpian comments on the reasons for the enactment of this special and stricter regulation. He argues that the obligation was not too strict because, in contrast to the later conception of common carrier, the carrier was not obliged to take everyone's goods; it was up to the carrier's own discretion which goods he undertook for transportation.<sup>105</sup> He describes it as *maxima utilitas huius edicti*, to preserve good faith, to insure the safety of the goods delivered, and to prevent fraud and robbery.<sup>106</sup> On preventing fraud and robbery he additionally says:

[...] it is necessary to confide largely in the honesty of such men; and if they were not held very strictly to their duty, they might yield to the temptation to commit a breach of contract, and even into secret leagues with thieves.<sup>107</sup>

The strict standard was necessary to prevent collusion between carriers and thieves in stealing the goods; a situation that seemed to occur often during that time.<sup>108</sup> Sea carriers and innkeepers did not enjoy a good reputation and Rome was full of robbers.<sup>109</sup> Pomponios also suggests that this was a measure taken by the *Praetor* to make known that he had an interest in protecting people against dishonesty.<sup>110</sup>

On the other hand, cargo owners already possessed possible actions against the carrier, who under the *locatio operis* were liable for *custodia*.<sup>111</sup> In addition, also available were the *actiones furti* and the *action* and *damni in factum aversus nautae*, for claims of theft and damage respectively.<sup>112</sup> Zimmerman says that the introduction of this action was because it was based in a general provision of care of the goods, a more sophisticated creation than the older restrictive remedies.<sup>113</sup> Another explanation is found in the interest to remove difficulties regarding evidence, as shipper might not have been able to determine how their cargo was damaged or lost and who might have been responsible for said damages.<sup>114</sup>

<sup>105</sup>Dig. 4.9.1.1.

<sup>106</sup>Fletcher, 96.

<sup>107</sup>T. M. Mackenzie and J. Kirkpatrick, *Studies in Roman law: With comparative views of the laws of France, England and Scotland*, 7th edn. (Holmes Beach, FL: Wm. W. Gaunt, 1991), 222–223; Dig. 4.9.1.1.

<sup>108</sup>Dig. 4.9.1, Ulpian further says: "Let no one think that the obligation placed on them is too strict; for it is in their own discretion whether to receive anyone; and unless this provision were laid down, there would be given the means for conspiring with thieves against those whom they receive, since even now they do not refrain from mischief of this kind."

<sup>109</sup>Fletcher, 96.

<sup>110</sup>Zimmermann, 516. Dig. 4. 9. 3. 1.

<sup>111</sup>Ibid., 517.

<sup>112</sup>Ibid., 517.

<sup>113</sup>Ibid., 517.

<sup>114</sup>Fletcher, at 96, Fletcher quotes the explanation provided by J.B.C. Stephen in (1896) L.Q.R. XII. 119: "It was, therefore, better that the carrier should be held liable for all loss or damage (since he could best take precautions against such loss) than that the freighter should be deprived of his remedy".

### cc) To Whom it Applies

Specifically referring to the *nautae*, the action could be brought against the “seaman”, a term that might include all the crew people on the ship. Ulpian clarifies that it does not mean all the crew members. *Nautae* means the person who managed the ship and must answer for the actions of the master’s and those ordinary sailors acting under his orders.<sup>115</sup> The seaman’s or carrier’s liability was extended to wrongful or negligent acts performed by all his sailors, be free men or slaves. Gaius further states that a man who runs a ship must be responsible for the wrongful acts caused not only by him, but also by the crew members, because he is using the services of such bad men for running his vessel, and in consequence he is liable, not on the basis of contract but in *quasi-delict*.<sup>116</sup>

In cases where slaves caused damages to the property of his own master, while they were employed on the ship, the carrier was also liable. This was explained by Paul: if the cargo owner had his slave working in the vessel where his goods were carried, and this slave stole or caused damaged to his own master’s cargo, the cargo owner still had an *actio in factum* against the carrier.<sup>117</sup> The liability is also extended to acts performed by some other persons on the ship holding some level of authority over her, such as ship’s guards or cabin stewards, who received goods on behalf of the shipowner.<sup>118</sup> Ulpian further states that the carrier is liable also for damage or losses resulting from acts of passengers.<sup>119</sup>

Similar liability is for the transport of columns, where the *conductor operis* was liable for his fault and for the fault of his employees.<sup>120</sup> Roman law established carrier’s liability for wrong or negligent actions of his crew or servants, in contraposition of what we have today as an exclusion of liability for nautical fault, listed in the Hague Rules. This provision shows the rigorous standard of care they were compelled to apply in the course of their business.

### dd) Goods Covered

The rule applies to cargo received by the *exercitor* or by the master,<sup>121</sup> including goods received by agents especially appointed by the carrier; or by other servants in his service with an implied position to receive goods.<sup>122</sup> The rule is even extended to passenger’s personal baggage, and provisions shipped on board for the

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<sup>115</sup>Dig. 4.9.2.

<sup>116</sup>Dig. 44.7.5.6.

<sup>117</sup>Dig. 4.9.6. Ulpian further states in Dig. 4.9.7.4, that the person in charge of the ship is liable for losses caused by another’s slaves because when employing them on the ship “he ought to investigate their reliability and integrity.”

<sup>118</sup>Dig. 4.9.3.

<sup>119</sup>Dig. 4.9.8.

<sup>120</sup>Zimmermann, at 1121: “Again we are dealing with vicarious liability *stricto sensu*, albeit in a contractual context” See Dig. 19. 2. 25. 7.

<sup>121</sup>Dig. 4.9.1.3.

<sup>122</sup>Dig. 4.9.1.2; Dig. 4.9.1.3.



voyage.<sup>123</sup> It even applied to goods that did not belong to the person who put them on board, but who had a real interest in their safe arrival at the destination.<sup>124</sup> But the carrier was liable only for losses occurred to goods while on board the ship.<sup>125</sup> In any case, it applies to the transport of goods of private persons. There is no reference in the Digest about transport of goods for the State subject to this regulation.<sup>126</sup>

### ee) Possible Exceptions

Originally, this guaranty was absolute and comprised all forms of *vis maior*.<sup>127</sup> Later some exceptions were granted in cases of the damages or losses resulted from shipwreck or piracy, and to other forms of *vis maior* or *damnum fatale*.<sup>128</sup> Carriers however, could not rely on these exceptions when they were responsible for exposing the goods to those risks.<sup>129</sup> In addition to these exceptions, it is worth noting that carriers were not deprived of the right to contractually negotiate this strict rule. Ulpian listed some causes which relieve the carriers of liability.<sup>130</sup> Among them, the carrier had the possibility to exclude his liability by declaring that each passenger must take care of his own goods and that he will not be responsible for any loss. If the passenger agreed with that, the carrier was relieved from liability.<sup>131</sup> This contractual exclusion, however, applied only for passenger's property, as they could take care of their own goods during the voyage. Nothing is said about property of people not traveling on the ship.

### ff) Impact in Future Legislation

During the first centuries of the Christian era, the Romans held control over the, then considered center of the world, including the Mediterranean Sea; from Syria and Egypt to Britain; including the Atlantic coast of Spain, Portugal, France and England.<sup>132</sup> Their maritime law became so uniform and universal that many of its principles remain today.<sup>133</sup> Such uniformity responded to the needs of the sea-born

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<sup>123</sup>Dig. 4.9.1.6.

<sup>124</sup>Sanborn, 11; Dig. 4. 9.1.7.

<sup>125</sup>Dig. 4.9.7.

<sup>126</sup>Meyer-Termeeer, 190.

<sup>127</sup>Zimmermann, 515.

<sup>128</sup>Ibid. 515; Introduced by Labeo in Digest 4.9.3.1.

<sup>129</sup>Dönges, 33.

<sup>130</sup>Ibid., at 102: "...Ulpian, in his eighteenth book on the Edict, where he enumerates the circumstances under which the carrier will not be liable, distinctly affirms this right in the following words: 'Item si praedixerit, ut unusquisque vectorum res suas servet neque damnun se praestaturum, et consenserint vectores praedictione, non convenitur'. ...This right of modifying the strictness of the liability under the Edict is affirmed by Lauterbach, Glück, Windscheid and Heineccius."

<sup>131</sup>Dig. 4.9.7.

<sup>132</sup>Mangone, 5.

<sup>133</sup>Sanborn, 19.

trade, which changed little during that time.<sup>134</sup> Though the Roman Empire had mostly disintegrated by the fifth century in much of Western Europe, they kept control of commercial cities such as Naples, Amalfi, Gaeta, and the eastern part of Sicily until the eleventh century.<sup>135</sup> The maritime law of the late Roman Empire was applied in these port cities of Italy,<sup>136</sup> where the growth of medieval commerce started, and subsequently provided some codes of maritime law.<sup>137</sup> Sanborn says that the laws of the late Empire were later collected in separate centuries into two codes: The Rhodian Sea Law and the Basilica.<sup>138</sup> Then, these laws spread to France, Spain, England, the Low Countries and Visby in the Baltic, and were described as a “*Law common to all Nations*.”<sup>139</sup> Indeed, its principles are found in the *Lex Mercatoria*, as well as in concrete bodies of maritime laws, such as the Consolato del Mare; the Laws of Oleron; The Laws of Visby and the Ordinance de la Marine of Luis XIV.<sup>140</sup> The success of its adoption and application in all these European trade centers is attributed, among other reasons, to “its respected history and sophistication in the settlement of shipping disputes”.<sup>141</sup>

Today the influence of the Roman law in our contemporary law is indisputable. It exists not only in countries with a civil law system. It has influenced the legal system of the common law countries as well, where many of their legal institutions are based in Roman laws principles.<sup>142</sup> Kent points out that these laws reflected the wisdom of the philosophy of the great Roman Jurists, and especially “the spirit of equity, in all its purity and simplicity seems to have pervaded those ancient institutions”.<sup>143</sup> Indeed, the vast impact of the Roman law is attributed also to its philosophical content, also influenced by Greek philosophy.<sup>144</sup> Hence, the standard of liability set in the *Praetors* edict became part of the European *ius commune*.<sup>145</sup> It strongly underlined the maritime policy of modern Europe and North America, as we will see later.<sup>146</sup>

<sup>134</sup>Ibid., 19. See Desjarding, Arthur, “*Introduction Historique à l’Etude du Droit Commercial Maritime*” (Paris, 1890), 2; Mangone, 5.

<sup>135</sup>Mangone, 5.

<sup>136</sup>Ibid., 5.

<sup>137</sup>Sanborn, 35. E.g. Trani, Amalfi, etc., at 26: “We need not wonder, therefore, nor consider it to be the flowering of some incomprehensible seed, when we see codes of maritime law and commercial courts springing up in Italy in the XI and XII Centuries almost immediately, as historical time goes after the official of the Empire had left the peninsula forever.”

<sup>138</sup>Ibid., 35, 39.

<sup>139</sup>Ibid., 27, 41.

<sup>140</sup>Burdick, 76.

<sup>141</sup>Mangone, 6.

<sup>142</sup>C. P. Sherman, *Roman Law in the modern world*, 2nd edn., 3 vols. (New York: Baker, Voorhis & Co., 1924), Vol. 1, 321.

<sup>143</sup>Kent, Vol. III, 7–8, note (a). Papinian, Paul, Julian, Labeo, Ulpian and Scaevola.

<sup>144</sup>J. Gordley, *The philosophical origins of modern contract doctrine*, Clarendon law series (Oxford [England], New York: Clarendon Press; Oxford University Press, 1991), 30.

<sup>145</sup>Zimmermann, 520.

<sup>146</sup>Mackenzie and Kirkpatrick, 222.

### 2.1.2.3 The Sea Law of Rhodes

#### 2.1.2.3.1 Historical Context

Rhodes is an island in the South Aegean Sea, a few hundred kilometers from Greece and some twenty kilometers from modern Turkey. It is considered the origin of the early maritime law.<sup>147</sup> Rhodes was a maritime center whose citizens are held as the earliest people that created, digested and promulgated a maritime legislation.<sup>148</sup> They had a strong commercial power that gave great authority to their law.<sup>149</sup> It was a sort of *lex mercatoria* common for the states bordering on the Mediterranean Sea.<sup>150</sup> Its principles were accepted and applied by Greeks and Romans.<sup>151</sup> Today it is not possible to set an exact date when these laws started to be compiled. There is only a general presumption that it was probably about nine centuries before the Christian era; or perhaps later, when Rhodes began to have superiority on the seas, some two centuries before the foundation of Rome.<sup>152</sup> Sanborn states its date around the 3rd or 2nd century B.C.<sup>153</sup>; concurring also with the expansion of the Roman maritime commerce.<sup>154</sup> However, there is no convincing and precise historical evidence of the exact content of such law, with the exception of two references made in the Digest of Justinian; and comments made by authors such as Cicero and Strabo.<sup>155</sup> None of them refers to the liability for carriage of goods.

There is a code entitled the Sea Law of Rhodes (*Homos Rodion Nautikos*), compiled hundreds of years after the possible original law.<sup>156</sup> The accuracy of this

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<sup>147</sup>Anderson, III, 195; B. Farthing, *International shipping: An introduction to the policies politics and institutions of the maritime world*, 2nd edn. (London [etc.]: Lloyd's of London Press, 1993), 2.

<sup>148</sup>Kent, Vol. III, 4. However, it is also said that they have adopted many of the previous Phoenician statutes. See Jados, at xii: "The Phoenicians, a great seafaring people, promulgated other laws that governed sea commerce in the Mediterranean, about 2000 B.C....The island of Rhodes, a commercial center, adopted many of these Phoenician statutes, later referred to erroneously as the Rhodian Laws."

<sup>149</sup>Sanborn, 5.

<sup>150</sup>Zimmermann, 407–408.

<sup>151</sup>Sanborn, 5.

<sup>152</sup>Schomberg, 37–38.

<sup>153</sup>Sanborn, 5.

<sup>154</sup>*Ibid.*, 7; Meyer-Termeeer, 147–148; Anderson, III, 184.

<sup>155</sup>R. D. Benedict, 'The Historical Position of the Rhodian Law' (1909) 18, *The Yale Law Journal*, 223–42, at 230: "The maritime power of Rhodes is stated to have been prominent during the three or four centuries preceding the Christian Era, and this, therefore, would naturally be the period during which the Rhodian Maritime Law, if any existed, would have taken form and substance. But these two references by Cicero and Strabo, both made not far from the time the Christian Era, seem to be the only references to Rhodian Law which either Greek or Roman literature can furnish us."

<sup>156</sup>Jados, at xii: "It is claimed that the Byzantine emperor, Leo the Isaurian (714–741), issued a code of laws called in Greek, *Nomos Rodion Nautikos*, named after the Rhodian Laws. However, upon close examination, the Isaurian statutes have actually no relation to the earlier Rhodian Laws."

compilation is subject to doubt regarding its original content, as changes may have been introduced over the years. Such a code is held as the first collection of maritime laws of the later Roman Empire.<sup>157</sup> Ashburner wrote the most accurate work on the “Nautical Law of Rhodes” in 1909.<sup>158</sup> He affirms that the code was put together probably between 600 A.D. and 800 A.D., from different materials and different epochs.<sup>159</sup> The provisions found there correspond mainly to maritime regulations in the Byzantine period, which governed the maritime industry in the eastern Mediterranean during that time.<sup>160</sup> Sanborn also points out that it was in use in the south of Italy for some six or seven hundred years.<sup>161</sup> Therefore, we cannot consider it as the law governing the maritime commerce before or during the Roman Empire, but as the regulation after the same, during the first part of the Middle Ages.

### 2.1.2.3.2 The Standard of Carrier’s Liability

This code does not provide a specific rule with the obligation of restoring the cargo, or the carrier’s liability for not restoring goods. An important point remarked by Ashburner and echoed by Schoenbaum, is that the Part III of this code, in conjunction with the book LIII of the Basilica, constituted a more complete body of maritime laws for the Byzantine period, around the IX century A.D., and even before.<sup>162</sup> The book LIII of the Basilica did not contain new regulations but reproduced the provisions relating to nautical law of the Justinian Digest.<sup>163</sup> The strict rule of liability of the *Praetor’s* edict found in the Digest 4.9.1 was included in the Basilica.<sup>164</sup> Hence, this absolute standard was maintained during the Byzantine period. Ashburner also confirms that, pointing out that “some statutes speak as if the shipowner’s obligation was absolute provided that the goods have been written by the *scribanus* in his *quaternus* or *cartularium*”.<sup>165</sup> Liability could also be incurred in the process of loading and unloading the goods to and from the ship.<sup>166</sup>

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<sup>157</sup>Sanborn, 35.

<sup>158</sup>Schoenbaum, 7.

<sup>159</sup>W. Ashburner, *Homos Rodion Nautikos*, The Rhodian Sea-Law, Repr. of the ed. Oxford 1909 (Aalen: Scintia, 1976)., 112–113.

<sup>160</sup>Schoenbaum, 7.

<sup>161</sup>Sanborn, 37. See Wagner, Dr. Rudolf and Pappenheim, Dr. Max: “*Handbuch des Seerechts*” (Leibzig, 1884, 1906) *Systematischen Handbuch der deutschen Rechtswissenschaft*, edige by K. Binding, 60.

<sup>162</sup>Schoenbaum, 7.

<sup>163</sup>Ashburner, civ, cxcviii.

<sup>164</sup>*Ibid.*, cv.

<sup>165</sup>*Ibid.*, at cxcviii. He cites some statutes such as: “St. Ragus. VII, 6; St. Phara, V, 1; St. Pera, V, 14; St. Massil. IV, 26., 127; C. Tortosaq, IX, 27, 9. The Ordin. Trani, 16, speak as if the scrivano was personally liable.”

<sup>166</sup>*Ibid.*, cc.

However, this absolute standard is not limited to a general rule to restore the goods. Unlike the very general provisions contained in the Justinian Digest, this code introduces some more specific regulation on technical issues of the maritime navigation, which had to be regarded by both carriers and shippers. The standard is more evident when dealing with cargo damage, and refers concretely to damages arising from a lack of seaworthiness and improper care of the cargo.

### (1) The Duty to Provide a Seaworthy Ship

The code did not explicitly establish an obligation on the shipowner to provide a vessel in proper condition for navigation. But, though it is not expressly stated, from this period and these statutes comes the obligation of the carrier to provide a seaworthy ship. Perhaps not in all its aspects but at least in one of the most important: water-tightness. Some statutes of the same period state that the vessel must be well *calcata*, meaning watertight.<sup>167</sup> Liability for bad *calcatura* was set statutorily. If goods were damaged by water, because the vessel was not watertight, the shipowner was absolutely liable, and must restore the goods in the same quality and quantity.<sup>168</sup> As in Roman law, exceptions to liability are given if the carrier can prove that the damages were caused by a storm or became wet during the extinguishing of a fire.<sup>169</sup>

In addition, Chapter 11 grants merchants, willing to hire a vessel, the right to inquire and check before loading their cargo that she was well prepared, properly equipped and manned.<sup>170</sup> Chapter 11, it is said, might have been established by a later Emperor, but most of its content comes from customs of the middle Ages.<sup>171</sup> It seems more like an advice for merchants than a proper legal provision.<sup>172</sup> However, it presents three specific aspects of the ship that the merchant is supposed to inspect before loading: (1) the condition of the vessel itself; (2) the tackle; and, (3) the mariners.<sup>173</sup> These three elements correspond to the modern concepts of: seaworthiness, equipment worthiness and human worthiness. Since that time, these elements have been a subject of statutory attention as part of the proper integrity of a ship and for the correct performance of the carriage. Nevertheless, it does not

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<sup>167</sup>Ibid., clxxxii.

<sup>168</sup>Ibid., cc.

<sup>169</sup>Ibid., cc.

<sup>170</sup>Ibid., at 92. "Chapter 11: The merchant and the passengers are not to load heavy and valuable cargoes on an old ship. If they load them, if while the ship is on its voyage it is damaged or destroyed, he who loaded an old ship has himself to thank for what has happened. When merchants are hiring ships, let them make precise inquiry from the other merchants who sailed before them putting in their cargoes, if the ship is completely prepared, with a strong sail yard, sails, skins, anchors, ropes of hemp of the first quality, boats in perfect order, suitable tillers, sailors fit for their work, good seamen, brisk and smart, the ship's side staunch. In a word let the merchant make inquiry into everything and then proceed to load."

<sup>171</sup>Sanborn, 38; Ashburner, cxiii.

<sup>172</sup>Ibid., lxxvi.

<sup>173</sup>Ibid., clxxxiii.

establish whether the merchant assumes part of the risk when he decides to load his cargo into a vessel that is not in her optimal condition.

On equipment worthiness, the code orders the carrier to furnish proper equipment for the carriage of specific goods commonly carried in those times. The carrier had to foresee possible risks to occur during the voyage, such as storms, which doubtless have always been one of the main and most common risks faced in maritime navigation. The code contains some provisions assigning as a duty of the carrier, to be prepared for the possible occurrence of such risks. Chapter 34, for example, outlines the case of the carriage of linen and silk. For its proper carriage, the captain must “supply good skins, in order that in a storm no harm may be done to the freight by the dashing of the waves.”<sup>174</sup>

## (2) The Duty of Care of the Cargo

Further duties are set regarding the obligation of care of the cargo. Here, the duty of care is partially shared with the merchant who was supposed to travel with his cargo. The liability for water-damaged cargo is allocated depending on who discovers the water in the ship and reports it to the other party. The captain and the crew are liable if the passengers warn them about the water in the ship, and they do nothing about it. Alternately, if the crew informs the passengers and cargo owners of the situation but they do nothing, then the former are freed from liability.<sup>175</sup>

Chapter 38, regarding the carriage of corn, provides additional obligations in the case of water-damaged cargo. Under a gale, the captain must “provide skins and the sailor work the pumps.”<sup>176</sup> During such meteorological events, the sailors have to prevent the corn from being spoiled by water from the bilge. If they are negligent in doing so, they have to pay a penalty. If the cargo suffers water damage due to a gale, the captain, sailors and the merchant, share the losses. In this case, even during acts of God, such as a gale, the captain must still bear part of the merchant’s loss.<sup>177</sup> As it is understood that the general standard of liability for damages was strict, this rule may have been intended to establish a fine against negligent sailors. The punishment was more severe for sailors who stole, who had “to make it good twofold and lose his whole gain.”<sup>178</sup> In any case, according to Chapter 44, there is an express obligation to make up the deficiencies in quality and quantity of the goods, when they are injured by water from the bilge.<sup>179</sup> In this case, the captain had to restitute the goods as he had received them.

In general, the Sea law of Rhodes is mostly remembered for its provisions on jettison and general average. Regarding the contract of carriage of goods, it

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<sup>174</sup>Ibid, 109.

<sup>175</sup>Ibid., cxcix.

<sup>176</sup>Ibid, 112.

<sup>177</sup>Ibid, cxcix.

<sup>178</sup>Ibid., 112.

<sup>179</sup>Ibid., cxcix, at 117: “...But if the cargo is hurt more from the bilge and not from the gale, let the captain take the freight and hand the goods dry in quantity as he took them”.

provides the first outlines of the concept of seaworthiness and the adoption of measures regarding the proper care of the cargo during voyage.

## 2.1.2.4 The Rules of Oleron

### 2.1.2.4.1 Historical Context

Oleron was an island and trading center located in the Atlantic, in the Aquitaine bay of France, not far from Bordeaux, once under the control of the English Crown.<sup>180</sup> In the middle of the 12th century, these rules were introduced in England either by Eleanor, Duchess of Guienne and wife of Henry II, or by their son Richard I (Coeur de Lion).<sup>181</sup> Their exact origin is still obscure, being disputed by France and England.<sup>182</sup> The Rules originally consisted of twenty-four judgments copied later into the Black Book of English Admiralty.<sup>183</sup> These judgments were not exactly ordinances; neither law properly promulgated, but a compilation of judgments showing how the maritime court of Oleron would decide some cases.<sup>184</sup> Pronounced by the “*prud’ hommes*” or merchants, it became a part of what was then known as the law merchant, also derived from Roman law tradition and Italian sources.<sup>185</sup> They were applied as the general maritime law in the North Sea and Atlantic Ocean, becoming the main source of the later maritime laws of Visby and the Hansa Towns.<sup>186</sup> They passed into the English law through the adoption into their customs by the English ports of London and Bristol at the beginning of the 13th century.<sup>187</sup> Later, they were applied in the courts of Admiralty in England.<sup>188</sup> Its application during the Middle Ages outlined the basements of the English maritime law.<sup>189</sup> Highly praised by its equity and wisdom,<sup>190</sup> they are unanimously considered to be the direct foundation of modern European maritime law.<sup>191</sup> But not only in Europe, even in the 19th century they were still being cited in some decisions of the Supreme Courts of the United States.<sup>192</sup>

<sup>180</sup>Schoenbaum and Yiannopoulos, 7.

<sup>181</sup>Sherman, Vol.1, 353.

<sup>182</sup>Benedict and Knauth, Vol. 1. §6; Schoenbaum, 10.

<sup>183</sup>Mangone, 7.

<sup>184</sup>Schoenbaum, 10, at note 10.

<sup>185</sup>G. Miller, *The legal and economic basis of international trade* (Westport, Conn: Quorum Books, 1996), 100; Schoenbaum, 10.

<sup>186</sup>Schoenbaum, 11.

<sup>187</sup>Fletcher, 43; Schoenbaum, 11.

<sup>188</sup>Miller, 100.

<sup>189</sup>*Ibid.*, 46.

<sup>190</sup>Schomberg, 88, 90.

<sup>191</sup>Benedict and Knauth, Vol. 1. §6; Schoenbaum, 10; Schomberg, 88.

<sup>192</sup>*See New Jersey Steam Navigation Co. v. Merchants' Bank of Boston*, 47 U.S. 6 How. 344, 12 L. Ed. 465 (1848).

### 2.1.2.4.2 The Standard of Liability

As mentioned, these rules were not an exact legal code,<sup>193</sup> and like the previous commented historic sources, these rules did not explicitly state what the carrier's standard of liability was. Fletcher points out that the Oleron's rules were not made by lawyers and were not derived from any theoretical reasoning.<sup>194</sup> Hence, he affirms, it is not possible to determine a general principle of liability, nor is it possible to affirm that the master was liable for negligence.<sup>195</sup> But if Roman law still influenced the maritime practices of the people of this area at that time, consequently, it is possible to expect that their judgments may have considered the standard set in the *Praetors' edict*. One thing that is quite clear is the possibility for the shipowner to be relieved from liability for damage caused by *damnum fatale*, such as shipwreck and piracy,<sup>196</sup> as it was in Roman law.<sup>197</sup> But the liability standard in itself requires further and more detailed analysis to reach a more accurate conclusion.

The Rules X and XI, regarding breach of contract by damage or loss of cargo can shed some light on finding the standard of liability.<sup>198</sup> These two provisions made the master liable for damages to or loss of the cargo caused by two specific events.<sup>199</sup> The first regards defective gears (cordage, robes and slings); which in

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<sup>193</sup>Miller, 100.

<sup>194</sup>Fletcher, 45.

<sup>195</sup>Ibid., 45.

<sup>196</sup>Schoenbaum, 10, at note 11.

<sup>197</sup>Introduced by Labe in Digest 4.9.3.1.

<sup>198</sup>E. Cleirac, *The ancient sea-laws of Oleron, Wisby, and the Hanse-towns, still in force. Taken out of a French book, intituled, Les us & coutumes de la mer*, 31686th edn. (Abingdon, Oxon: Professional Books, 1981), 6. "Rule X. When the master freight [sic] a ship, he ought to shew his merchant the cordage that belong to her. And, if they see any Thing [sic] amiss or wanting, he must rectifie [sic] it. For, if for want of good cordage any pipe, hogshead, or other vessel, should happen to be spoiled or lost, the master and mariners ought to make it good to the merchants. So also, if the ropes or sling break, the master not having shewed to the merchants, he must make satisfaction for the damage. But if the merchant say, that the cordage is good & sufficient, and rest satisfied therewith, and afterwards it happens that they break; in that case each of them shall share the damage, viz. the merchant to whom the goods belongs, and the said master with his mariners.

Rule XI. A vessel being laden with wines, or other goods, and hoysing [sic] sail at Bourdeaux, or any other place, if the master and his marines have not trimmed their sails as they ought to have done, and it happens that ill weather overtakes them at sea, so that the main yard shakes, or breaks one of the pipes or hogsheads; the ship being arrived at her port of discharge, the merchant says to the master, that by reason of his yard his wine was lost. In that case, if the master replies, it was not so, both he and his marines (be it four or six, or such of them as the merchant shall think best) must take their Oath, that the wine was not destroyed by them, nor by the main yard, or thought their default, as the merchant charge them: and then the said master and his mariners shall be acquitted thereof. But, if they refuse to make oath to that effect, they are then obliged to make satisfaction for the same. For they ought to have ordered their sails aright, before they sailed from the port where they took in their lading."

<sup>199</sup>Krieger, Vol. 15, 79.



modern maritime law corresponds to a want of equipment worthiness. The second relates to the want of proper trimming of the main yard and sails on the vessel which relates to the obligation of care of the cargo. Both cases demanded actions of the master and his mariners prior to the beginning of the voyage in order to assure the safe carriage of the goods, even in case of "ill weather", as stated in rule XI. The difference between them is in the possibilities for the master to ameliorate or exclude his liability.

Rule X covers the carrier's obligation to furnish good equipment (cordage). It is possible to reduce his liability if he shows the cordages to the merchant before the voyage. The merchant assumes solidarity in the damage by giving his approval for it, and damage caused by defect in the cordages. However, even when the master shows the merchant the cordage, he remains at least partially liable. It might be the case of what we now call an exception of contributory negligence on the part of the cargo owner.

The case described in Rule XI relates to damages caused by the movement or shake of the main yard during ill weather. The master may avoid liability by an oath made by him and his mariners, denying the cause of damage was the shake of the main yard, alleged by the merchant. Ill weather is an "act of God" that normally releases the carrier from liability, but does not release him if the lack of proper trim exposed the cargo to the harmful effects of the storm on the vessel. Therefore, the occurrence of an exculpatory cause did not free the carrier immediately from liability, because he was expected to have prepared his vessel even to face the consequences in the case of ill weather. The carrier cannot escape liability for damages caused due to lack of proper trim. Here the influence of the Roman's logic is noteworthy. The carrier will not be relieved from liability for a *vis major*, if he exposed the cargo to that risk; or, knowing it, did not take measures to overcome them, nor in the occurrence of an exculpatory cause, where he negligently contributed to the loss or damage. This concept still remains in the HR.<sup>200</sup>

But the mere reading of the liabilities described in these two rules do not allow to clearly identifying what standard was applied to carriers. Krieger is recognized for carrying out the most detailed and accurate research on the Rules of Oleron.<sup>201</sup> He affirms that the criteria exposed in the commented rules is based on the German law principle which states that the person who caused the damage must respond for it, independently of the existence of *culpa* or not, or of any obligation of diligence.<sup>202</sup>

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<sup>200</sup>HR Article 4(q).

<sup>201</sup>Schoenbaum, 10, note10.

<sup>202</sup>Krieger, Vol. 15, at 80: "Es handelt sich hierbei um nicht anderes als um die Anwendung des germanischen Rechtsgrundsatzes: „Wer Schaden tut, muß Schaden besern“, wonach die Haftung für nicht vorsätzlich zugefügte Schäden allein danach beurteilt wird, wer den Schaden verursacht hat, ohne das Merkmal der „culpa“ im Sinne einer moderner Fahrlässigkeit zu berücksichtigen. In diesem Sinne ist auch die komplizierte Regelung des Kapitels X der Rôles d'Oléron zu verstehen. Ausgehend von dem genannten Grundsatz gibt sie dem Kapitän die Möglichkeit, die Kaufleute zur Mitwirkung und damit zur Mitverantwortung für die Auswahl des Arbeitsgerätes heranzuziehen und somit die Härte dieser Erfolgschaftung zu mildern".

If the elements of negligence or diligence are indifferent to assign liability, then the standard is closer to the strict one. This again, is not surprising keeping in mind the spread of the Roman concepts still in vogue during that time.

An important point is that these rules assume, just like in the Rhodian Sea Law, that the merchants are traveling in the ships with their cargo and that they can personally take care of their property while on board.<sup>203</sup> Thus, the cargo is not completely left under total *custodia* of the carrier. The presence of the merchant on the ship was of such importance, that they had to be consulted in all decisions on cargo handling in case of perils at sea.<sup>204</sup> In this case, carriers' duties are partially shared with the merchant, and apparently, the liability as well, depending on the case.

### 2.1.2.5 The Consulate of the Sea

#### 2.1.2.5.1 Historical Context

The exact origin of these regulations is again not clear. Azuni affirms the Pisans compiled it<sup>205</sup>; while Grotius and Marquardus say it was compiled from the maritime ordinances of Greek emperors, emperors of Germany and some others.<sup>206</sup> However, it is mostly accepted that its origin is found in Catalonia, Spain.<sup>207</sup> Barcelona became one of the most important and richest trading centers of Europe in the 12th century, trading with the Mediterranean cities of Pisa, Genoa, Sicily, Greece and Egypt.<sup>208</sup> King James I of Aragon in 1258 established 21 regulations for navigation prepared by the "prudent men" of the maritime guild of Barcelona.<sup>209</sup> A public maritime court was created by 1347, chaired by consuls responsible for the administration of the maritime law.<sup>210</sup> Ashburner sets the date of the *Consolato* at the end of the 14th century, although he admits that it contains "large masses of much earlier material."<sup>211</sup> The compilation is estimated to have been completed by 1370.<sup>212</sup> The earliest printed edition dates from the 14th of July

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<sup>203</sup>Knauth, 115.

<sup>204</sup>Miller, 100.

<sup>205</sup>Jados, xv.

<sup>206</sup>Kent, Vol. III, at 9: "... it was a collection made in the time of the crusades, from the maritime ordinances of the Greek emperors, of the emperors of Germany, the kings of France, Spain, Syria, Cyprus, the Baleares, and from those of the republics of Venice and Genoa."

<sup>207</sup>Jados, v, at xv: "Pardessus, refuting Azuni's contention, ascribed it to a collection made in Barcelona, written in a Romance dialect, under the title *Consulat de la Mar*, and published in the fourteenth century". See Pardessus, Collection, Vol. V, 367.

<sup>208</sup>Ibid., v; Mangone, 10.

<sup>209</sup>Mangone, 10.

<sup>210</sup>Ibid.

<sup>211</sup>Dönges, 14.

<sup>212</sup>Ibid., 11.

of 1494, divided into three parts with 334 articles.<sup>213</sup> It is frequently accepted as the earliest general code of maritime laws in modern Europe that is still in preservation.<sup>214</sup> Its importance was such that it was referred to by Azuni as a legislation “whose authority is above all others.”<sup>215</sup> The provisions were observed not only in Spanish ports, but also in other Mediterranean cities of Italy and France.<sup>216</sup> Its second part states, among others matters, the responsibilities of the shipowners for cargo carriage.

### 2.1.2.5.2 The Standard of Liability

The code first presents, in Chapter 61, a general obligation of the patron to protect and care for the life and property of the passengers and merchants. The term “patron” means the person in command of the vessel, and is used indistinguishably for captain, master of the vessel or commander.<sup>217</sup> The obligation to protect the cargo from damages is developed with detailed provisions relating to two main aspects: the vessel's seaworthiness and the care of the cargo.

#### (1) The Vessel's Seaworthiness

On the ship's seaworthiness, the Consulate pays also particular attention to the vessel's water-tightness. The code establishes liability for damages caused by water coming from the deck, ships sides, from the bilge or other part of the vessel, where the cargo has contact with water, or for lack of proper caulk. In these cases, Chapter 63 establishes that the carrier must compensate the merchants for all the damage caused by water seepage.<sup>218</sup> The strictness of the provision was such that if the carrier is not able to pay back the damages to the merchant, the ship must be sold for that purpose. The carrier's obligation to provide a watertight seaworthy ship seems to be absolute, but still allowed for two exceptions. The first relates to cargo damage caused by water entering into the ship due to rough weather or storm.<sup>219</sup> It is the common example of act of God, largely admitted as an exception. The second exception may challenge our understanding of the absoluteness of the obligation. Chapter 66 relieves the carrier for damages caused by water leaking through the vessel's bottom, though being well caulked.<sup>220</sup> However, the same Chapter 66

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<sup>213</sup>Ibid; Mangone, 11.

<sup>214</sup>Dönges, 14.

<sup>215</sup>Jados, xiii. See D. A. Azuni, *Droit Maritime de L'Europe* (Paris, 1805) Vol. I, 392.

<sup>216</sup>Mangone, 11.

<sup>217</sup>Jados, at xvi: “This often leads into confusion since a patron may have been an able-bodied seaman who merely leased the vessel from its owner in order to engage in trade, or he may have been hired by the owner of the vessel to command it for a predetermined fee or a share on the profit the vessel would earn.”

<sup>218</sup>Ibid., 36.

<sup>219</sup>Ibid, Ch. 65.

<sup>220</sup>Ibid, 37, Ch. 66.

clarifies that the exception is based in the assumption that the merchant has checked the vessel previously to hire her, and confirmed for himself that she is watertight. When he notices a want of proper caulk, but does not report it to the master, he therefore assumes part of the risk. Notwithstanding, if the merchant reports the leak to the “patron”, he is responsible to accomplish any promise he made to the merchant in this regard.<sup>221</sup> This condition to assign liability demands that the merchant be familiar with the structural or technical condition of the vessel. Probably most of the merchants during that time were familiar with the condition of the ship, or perhaps, it applied more to charterers. But, for those merchants who did not have proper skills to determine whether the vessel was well caulked or not, the code provides an explanation of what was considered to be well caulked:

Chapter 66: ...In order to avoid all disputes between the patron and the merchants over these matters, our ancestors, in order to explain what they meant by proper pitching and tarring of the vessel, stated the following: If the deck of the vessel was tarred up to the deck rail or above it, and also up to or above the openings for anchor chains, the patron of the vessel cannot be held responsible for the damage or waterlogging of the cargo, even if the water seeped through the deck.<sup>222</sup>

It was a technical description based in the custom for making the ship watertight. This aspect of the seaworthiness condition was statutorily stated. Its mere compliance relieved the carrier for damages caused by water seepage.

Another interesting and quaint provision of these rules regards the equipment worthiness. Damages caused to cargo by rats on the ships were common in that time. To prevent them, the code ordered shipowners to have cats on the ships. The code provides that if the cargo reported damages by rats and there was not a cat on the vessel, the shipowner was liable for not having such “equipment” on board.<sup>223</sup> The matter was serious. The code clarifies that if the shipowner had cats before the voyage began, and they died after the departure, he was not liable for damages caused by rats before the arrival to a port where he could buy a new cat. In this case, he was not liable to compensate because it was not his fault.<sup>224</sup> This last reference suggests that the liability here is based on *culpa* from the part of the shipowner when the expression so stated. It must be noticed however, that the cat’s death might fall into the concept of act of God or of *vis mayor*, when the shipowner could not have total control over the cat’s life. One wonders what might have happened in case of damages caused by those same cats. The code is silent on this possible issue.

## (2) The Care of the Cargo

The Consulate of the Sea presents a special concern on cargo stowage. It provides detailed rules indicating where to place the goods and the order of storage into the ship. There was an express prohibition for a shipowner or helmsman to place the

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<sup>221</sup>Ibid.

<sup>222</sup>Ibid., 37.

<sup>223</sup>Ibid., Ch. 67.

<sup>224</sup>Ibid., 38, Ch. 68.

goods on the ships in damp places, near to the mast, or the steering wheel, or in the bottom of the vessel, or in the prow, or in any other place where it can suffer damage.<sup>225</sup> In addition, the carrier was not allowed to place cargo at the bottom without flooring it; neither to use cargo to make basement or flooring for other cargo, unless they are all of the same weight.<sup>226</sup> If the cargo at the bottom suffers damages because of this improper stowage, the shipowner was responsible and must make good the damage.<sup>227</sup> It even goes further into detailed explanations on cargo stowage: the heavier cargo should be placed underneath those that are lighter as a matter of preventing damage to the lighter cargo.<sup>228</sup> The carrier was also liable for damages to or losses of cargo carried on upper open deck without consent of the merchant.<sup>229</sup> The processes of loading and unloading had to be undertaken by the “patron”, if so was agreed with the merchant,<sup>230</sup> but without liability if the cargo gets waterlogged during these operations.<sup>231</sup> An absolute obligation to restore the carried goods is made clear not for damages but for losses. Chapter 67 provides that:

Any goods or possessions loaded aboard the vessel and entered in the ship's register, which are subsequently lost, will be the responsibility of the patron of the vessel and its owners must be compensated by him for their loss.<sup>232</sup>

No mention to the cause of the loss or any specific exclusion or exception for this obligation is stated. The code follows the ancient tradition of holding the shipowner strictly liable for the loss of the cargo. The “patron”, whom we understand to be the shipowner or carrier, as well as any other shareholder, must pay them but according to the participation or share they have in the vessel. The ship itself was responsible for all damages.<sup>233</sup> This is perhaps one of the first mentions of the limitation of liability to the value of the vessel. When the selling of the ship was necessary to pay off merchants for their cargo losses, it deprived even other creditors and shareholders, with the sole exception of sailors' wages who had a privilege over all other debts.<sup>234</sup> In some cases, such as the carriage of cargo on deck without consent of the merchant, Chapter 185 establishes that if the result of the sale of the vessel is not enough to compensate the loss, and the patron still has additional goods, these goods shall also be sold to pay the merchant.

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<sup>225</sup>De Capmany y de Monpalau, D. Antonio. Translator of “*Código de las Costumbres Marítimas de Barcelona, hasta aquí vulgarmente llamado Libro del Consulado*.” Vo. 1. Madrid, 1791, 130, Ch. 62.

<sup>226</sup>Ibid., 134–135, Chapters 68–70.

<sup>227</sup>Ibid., 134, Ch. 69.

<sup>228</sup>Ibid., 135, Ch. 70.

<sup>229</sup>Ibid., 138, Ch. 185.

<sup>230</sup>Ibid., 136, Ch. 72. The merchant could make such an arrangement directly with the sailors.

<sup>231</sup>Ibid., 136, Ch. 71.

<sup>232</sup>Ibid., 133, Ch. 66.

<sup>233</sup>Ibid., 136, Ch. 71.

<sup>234</sup>Ibid., 130 and 138, Ch. 62 and 185.

In general, the Consulate shows a more protectionist regulation for the cargo interest. For its time, the Consulate is perhaps the most complete set of rules for the maritime commerce and navigation. As seen, it is not restricted to rules establishing compensation for cargo damages or losses. It provides the perhaps first technical descriptions, or objective rules to be followed in making the ship water-tight and how to perform the stowage of the cargo. There is not a unique and general rule establishing carrier's liability for cargo damages or losses. They are dispersed along the code depending on the cause of the damage. First, damages caused by water-logged cargo for want of water tightness; secondly, those damages caused for want of proper stowage or due care. The standard of liability might offer some doubts regarding the cargo damage caused by other reasons. But it is clear, however, that it was strict in cases of cargo loss.

### **2.1.3 *Anglo-American Maritime Law***

#### **2.1.3.1 The Maritime Law of England**

English Law has been the most influential and direct reference of the modern maritime law. It took special preponderance since the industrial revolution when England became the major ship owning nation of the world. There have been discussions about the original liability standard of the common carrier in English Law.<sup>235</sup> Most of the available decisions issued by English judges on the matter show that the common carriers were subject to strict liability. It is evident since the end of the 17th century and beginning of the 18th. Previous to that period, this standard is not so clear. However, it was the enforcement of this strict standard during the 18th and 19th centuries that catalyzed the change for the current regulation contained in the Hague Rules. We try here to present the sources and reasons of this absolute regime applied in England to common carriers and the reasons that motivated its evolution through the adoption of international regulation.

##### **2.1.3.1.1 The Influence of Roman Law on the Admiralty Courts**

By the 13th Century, the courts of the Mediterranean cities of Pisa, Trani and Amalfi, were popular forums of maritime justice.<sup>236</sup> There, civil law was applied for the resolution of conflicts relating to freight, damage to goods shipped, marine wages, and maritime contracts in general.<sup>237</sup> The model was followed by England,

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<sup>235</sup>The doctoral thesis of E.G.M. Fletcher, *see supra* note 20, challenges the historical continuity of an absolute liability for common carrier under English law.

<sup>236</sup>G. a. J. C. F. Bruce, *A treatise on the jurisdiction and practice of the English Courts in Admiralty actions and appeals*, 3rd edn. (London: Maxwell, 1902), 4.

<sup>237</sup>*Ibid.*, 4.

through the Admiral, a state officer entrusted to solve maritime conflicts.<sup>238</sup> Though the origin of the English Court of Admiralty is uncertain,<sup>239</sup> according to the records, it was formally established by Edward III.<sup>240</sup> It gained greater importance from the 14th century, following the Battle of Sluys in 1340 when England took command of the sea.<sup>241</sup> This court was highly influenced by Roman law, introduced, as mentioned before, through the adoption of the Rules of Oleron.<sup>242</sup>

But the influence of Roman law on English law was not only due to the application of the Rules of Oleron.<sup>243</sup> Before that, following the Norman invasion in 1066, there were other concrete events that prompted the study and application of Roman legal institutions in England.<sup>244</sup> The Roman influence on English Law during the 12th and 13th centuries was such, that it is remembered as the “Roman epoch of English legal history”.<sup>245</sup> Thus, the maritime law of England grew from the customs of merchants of the Mediterranean and Atlantic sea which was originally based on the principles of equity and justice derived, in much of its completeness, from the Roman law.<sup>246</sup> Therefore, the primary body of English maritime law was a collection of prior laws from Rhodes and the Rolls of Oleron, among

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<sup>238</sup>Ibid., at 3: “Whether judicial functions were originally conferred upon him or not may be matter of doubt, but as soon as maritime affairs began to assume importance, matters happening at sea, and not within any county from whence a jury could be summoned, requiring judicial investigation, were referred to him for adjudication.”

<sup>239</sup>Ibid., 3.

<sup>240</sup>Sherman, Vol. 1, 3.

<sup>241</sup>R. C. Fitzgerald, ‘Admiralty and prize jurisdiction in the British commonwealth of nations’ (1948) 60, *The Juridical Review*, 106–22, 106.

<sup>242</sup>Sherman, Vol. 1, at 364–365: “The Court of Admiralty, established in the 14th century during the reign of Edward III, owing to its necessary relations with foreign countries gradually adopted procedure and rules based on the roman civil law, the Court of Admiralty came to observe the partially Romanized rules of Oléron. The Court of Admiralty retained its importance, name jurisdiction, and roman law tendencies until very modern times, when in the 19th century it became a part of the consolidated English High Court of Judicature”.

<sup>243</sup>Burdick, 76.

<sup>244</sup>Ibid., at 65–67, 70–71. Burdick lists some of the other sources: 1) the designation by King William of the Italian scholar very well versed in Roman Law, Lanfranc as prime minister, chief adviser and in 1070, Archbishop of Canterbury; 2) The existence of the ecclesiastical courts applying the Canon Law of the Continent, highly influenced by Roman law; and, 3) The designation of Vacarius, circa 1143, a learned teacher of Roman Law at Bologna, as first professor and founder of the school of law at the University of Oxford. Furthermore, two books on the law and customs of England, one of the jurists Ranulph de Glanville between 1180 and 1190, and the other of Bracton, between 1250 and 1258, show the influence of Roman law in the legal reasoning of English jurists.

<sup>245</sup>Ibid., 74.

<sup>246</sup>Ibid., 76.

others, called the *Black Book of Admiralty*, compiled in the early fourteenth century in the reign of Edward II.<sup>247</sup> With Roman law as an important source, the rule set in the *Praetors Edict* was observed, as indeed was later confirmed.

### 2.1.3.1.2 The Sea Carrier as a Bailee

Although, the Rules of Oleron were applied in the admiralty court of England, in the development of English maritime law, the first analyses of the carrier's liability were not made exactly on transport law, but under the law of bailment.<sup>248</sup> The carrier was held as a bailee and his liabilities were firstly analyzed in such a context. Since the origin of the law of bailment in England, the bailee's liability was subject to the general principle of strict liability.<sup>249</sup> Holmes says that the English law of bailment was of German origin, which in turn, was developed by German philosophers who were also professors of Roman law.<sup>250</sup> Fletcher acknowledges further that the source of the absolute liability, in force since that period, could have been a consequence of Germanic introduction from the time of the Conquest, in addition to the influence of Roman law.<sup>251</sup> The Germanic common law of the Norman Conquest made bailees of all sources absolutely responsible for goods delivered, even when lost by theft and regardless of negligence.<sup>252</sup> The strict liability was based on the possessory remedies granted to the bailees, which allowed them to claim against third parties; and in consequence, remained strictly liable before the bailor for the lost goods.<sup>253</sup> This standard, according to Holmes and Holdsworth, remained throughout the middle ages.<sup>254</sup> Fletcher disagrees with this conclusion arguing the lack of proper evidence to support the carrier's absolute liability had been in fact continuous and steady.<sup>255</sup>

During the 13th century, this strict rule was subject of doctrinal analysis in the works of Bracton (ca. 1250), and Britton (1287). Bracton tried to introduce the

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<sup>247</sup>E. Gold, *Maritime transport: The evolution of international marine policy and shipping law* (Lexington, Mass: Lexington Books, 1981), 39, citing C. John Colombos, *International Law of the Sea*, 6th ed. (London: Longmans, 1960) pp. 34–35.

<sup>248</sup>Fletcher, 1.

<sup>249</sup>T. A. Street, *The Foundation of legal liability*, A presentation of the theory and development of the common law, 3 vols. (Northport, Long Island, N.Y.: Thompson, 1906), Vol. 2, 255.

<sup>250</sup>Holmes, Ed. by Mark De Wolfe Howe, 133, 138; Gorton, vol. 43, at 62 says that Holdsworth shares Holme's opinion on the German origin.

<sup>251</sup>Fletcher, xi. He also suggests that the absolute liability of the carrier could have been an Elizabethan innovation applicable to carrier by land or due to application of the Praetor Edict.

<sup>252</sup>*Ibid.*, 2.

<sup>253</sup>Gorton, vol. 43, 62. See Holmes, Ed. by Mark De Wolfe Howe, 138; Holdsworth, *A History of*, vol. 3, 337; J. Basedow, 'Common Carriers Continuity and Disintegration in U.S transportation law' (1983) 13, *Transportation Law Journal*, 1–42, 5.

<sup>254</sup>*Ibid.*, 63.

<sup>255</sup>Fletcher, xiii, 11; Gorton, Vol. 43, 63.



Roman concepts of different degrees of diligence, but he did not succeed.<sup>256</sup> Following Bracton, Britton suggested releasing the bailee from liability when the item borrowed was lost or damaged by fire, water, robbery or larceny, unless these cases occurred through their own fault or negligence.<sup>257</sup> His suggestion however, does not seem to have been largely adopted by the courts, but by the 14th century, the strict rule was moderated in certain cases.<sup>258</sup> In this period is where Fletcher points out that the "liability of a bailee was something substantially less than an absolute liability".<sup>259</sup> However, by the 15th century, a case against the *Marshal of the Marshalsea* (1455) about the escape of a prisoner, demonstrates the application of the original strict standard.<sup>260</sup> The court held the Marshal absolutely liable because he had the possibility, as a bailee, to recover the goods or compensation from the wrongdoer who caused the damage or loss.<sup>261</sup>

In the 16th century, Story reports that during the time of Henry VIII (1509–1547), the carriers were subject to liability for robbery, only if the carrier had exposed the cargo to risks such as traveling by dangerous roads, inconvenient hours, or at night.<sup>262</sup> But later, under the Elizabeth commercial reign (1558–1603), the common carrier was held again responsible for all losses, excluding only acts of God or enemies of the King.<sup>263</sup> Thus, in the 16th century we find the first reported cases analyzing the carrier's liability.<sup>264</sup> In *Woodlife's Case* (1596),<sup>265</sup> a factor was sued to restore goods entrusted to him. The defendant alleged that such goods, along with his own goods, were the subjects of robbery. Popham C. J. stated that:

[...] It is a good plea before auditors, and there is a difference between carriers and other servants and factors, for carriers are paid for their carriage and take upon them safely to carry and deliver the things received.<sup>266</sup>

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<sup>256</sup>Street, Vol. 2, 254.

<sup>257</sup>*Ibid.*, 256.

<sup>258</sup>*Ibid.*, 259. He refers to the *Bonion's Case* (1315).

<sup>259</sup>Fletcher, 18.

<sup>260</sup>Holmes, Ed. by Mark De Wolfe Howe, 140. Jailers were held as bailees in charge of cattle (the prisoners). A prisoner escaped by the action of subjects of the king who broke the prison and released the prisoner. The court stated that if the prisoner were released by king's enemies, then it would be a cause of exclusion of liability as there were not any to claim, but as the Marshal had an action against the subjects of the king, then he was answerable to the bailor.

<sup>261</sup>*Ibid.*, 140.

<sup>262</sup>J. Story, *Commentaries on the law of Bailments: with illustrations*, 9th edn. (Boston: Little, Brown, 1878), 460. See *Jones on Bailm.* 103; *Saint Germain Doctor and Student*, Dial. 2 ch. 38.

<sup>263</sup>*Ibid.*; Fletcher, at xi also points that the strict standard may have been an innovation in the time of Elizabeth applicable to land carriers, then extended to sea carriers.

<sup>264</sup>Holmes, Ed. by Mark De Wolfe Howe, 143.

<sup>265</sup>(1596) Moore 462.

<sup>266</sup>As cited by Street, Vol. 2, 263.

The strict liability seems to be based on the payment they receive for the service of carriage.<sup>267</sup> This reasoning is said to be characteristic of the 16th and 17th centuries when the doctrine of consideration appeared for the first time.<sup>268</sup> Still, the rights and duties of carriers were set in the law of bailment, in which bailment may or may not have been for payment.<sup>269</sup> This is evident in *Southcott v. Bennett* (1601).<sup>270</sup> This was an action on detainue against an ordinary bailee who pleaded robbery of the goods without his negligence.<sup>271</sup> The court held strictly liable all bailees, even those who accepted the possession of goods from others as a favor.<sup>272</sup> Sir Edward Coke in his report on this case stated that “[a]n obligation to keep is the same as an obligation to keep safely; in either case the bailee is liable if the goods are stolen.”<sup>273</sup> The case confirmed the absolute liability of the bailee, and was held up as the leading case for the next hundred years.<sup>274</sup>

Notwithstanding, Street reports two cases where a plea of robbery was accepted as an exception of liability.<sup>275</sup> After them, in *Morse v. Slew* (1671),<sup>276</sup> another sea carrier alleged to have been robbed. Sir Mathew Hale held the defendant liable, despite having had enough number of watchmen for the protection of the ship. The argument of the decision was based again on the reward the carrier receives for his work.<sup>277</sup> What appears here is that during these centuries, the standard was not totally clear to have been completely absolute, or at least, robbery was admitted as an exculpatory cause in some cases.

### 2.1.3.1.3 The Distinction of Common Carrier

Since the 14th century and prior to the appearance of the modern bill of lading and the charter party, the English law took into consideration some general obligations

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<sup>267</sup>Street, Vol. 2, 299.

<sup>268</sup>Gorton, Vol. 43, 53.

<sup>269</sup>Ibid.

<sup>270</sup>(1601) 4 Co. Rep. 83b; 76 E.R. 1061.

<sup>271</sup>Street, Vol. 2, 263; Gorton, vol. 43, 65.

<sup>272</sup>Holmes, Ed. by Mark De Wolfe Howe, 142. But in the gratuitous bailment, the bailee could evade liability if prior to taking possession of the goods, he had expressly rejected responsibility for them; Fletcher, 27.

<sup>273</sup>Fletcher, 32.

<sup>274</sup>Holmes, Ed. by Mark De Wolfe Howe, 142.

<sup>275</sup>Street, Vol. 2, 265–266. In two cases in 17th century robbery was accepted as a good plea: *Williams v. Hide* (1628) and *Vere v. Smith* (1661).

<sup>276</sup>86 E.R. 129.

<sup>277</sup>Street, Vol. 2, 269.

of the carriers with independence of the contract.<sup>278</sup> However, proper distinction of the character and duties of common carriers came centuries after in *Coggs v. Bernard* (1703).<sup>279</sup> The reasoning expressed therein made this case one of the most important for determining the liability of the common carrier.<sup>280</sup> Lord Holt C. J. overturned previous decisions on the strict liability for all kind of carriers, and established a differentiation between general bailees and common callings; and specifically, between private and common carriers.<sup>281</sup> Different liability standards were assigned to each one. The first were liable for negligence; while all bailees for reward, practicing a public employment, expressly mentioning common hoymen, master of ships and common carriers, were strictly liable.<sup>282</sup> Lord Holt C. J. explained the reasons supporting the assignation of this demanding standard for common carriers as follow:

A common carrier by custom or usage may lawfully claim a reward: and where a man carrying goods is of a public employment, as a carrier, hoyman, & c. he must answer for all events, excepting the acts of God, and the enemies of the King; and this is a political establishment, for the safety of all persons concerned, and whose affairs necessitate them to intrust [sic] such carriers. For by this means all private combinations between them and highwaymen and other robbers, are prevented, which cannot easily be discovered.<sup>283</sup>

Those persons practicing business that fell into the category of common callings (innkeepers, farriers, tailors, ferrymen, gaelors, etc.) were expected to avoid losses by unskillfulness or through improper preparation of the business.<sup>284</sup> Among them, common carriers were those who exercised carriage as a public employment, open to undertake carriage of goods for every person in general, holding themselves out as ready to perform transportation from place to place for a reward and as a regular business, not just a casual occupation.<sup>285</sup> This special category was coupled with special duties to serve every shipper without discrimination and with care, in an implied assumption on their part.<sup>286</sup> Their liability arose not only for damages or losses caused by their unskillfulness or the improper preparation of the business, but for every damage to or loss of the cargo regardless of their negligence, with the

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<sup>278</sup> A. D. Hughes, *Casebook on carriage of goods by sea*, 2nd edn. (London: Blackstone, 1999), at 4: "In the *Bukton v Tounesende (the Humber Ferryman)* YB 22 Liber Assisarum No. 41, f.94 (1348), there were some rules protecting the customers and would-be customers of those who performed the 'common callings', including innkeepers and common carriers."

<sup>279</sup> (1703) 2 Lord Raymond 909, 92 E.R. 107, 90 E.R. 971 (1703).

<sup>280</sup> Gorton, vol. 43, 59.

<sup>281</sup> *Ibid.*, 66.

<sup>282</sup> Holmes, Ed. by Mark De Wolfe Howe, 149.

<sup>283</sup> 90 E.R. 971 (1703).

<sup>284</sup> J. H. Beale, JR., 'The Carrier's Liability: Its History' (1897) 11, *Harvard Law Review*, 158–68, 163.

<sup>285</sup> Story, 465.

<sup>286</sup> Basedow, at 5: "Perhaps the better view is that the special obligations of the common callings were worked out during and not before the development of *assumpsit*, subsequent to the introduction of the action *sur le case* in 1285."

exception of those caused by acts of God or King's enemies. The reasons for assigning strict liability to common carriers were not only based on receiving a reward for the employment.<sup>287</sup> Lord Holt cited Roman law to ground this decision. Holmes noted that, but added that the mention to the exceptions of acts of God and enemies of the King were characteristic of English Law.<sup>288</sup>

Indeed, Lord Holt was well learned in Roman law and introduced some of its concepts in some of his judicial decisions.<sup>289</sup> He cited as authority the work of Bracton, who in turn, adopted the divisions, language and reasoning of the Roman texts.<sup>290</sup> It is evident in the arguments in support of this decision. He invokes practically the same reasons given by Ulpian in Digest 4.9.1, for the *Praetor's edict*; regarding the prevention of possible collusion between carriers and thieves.<sup>291</sup> In a later case, *Lane v. Cotton* (1706),<sup>292</sup> he expressly acknowledged that the principles of the English law are based on those of the Roman law, and added a more detailed explanation upholding the standard:

[...] for what is the reason that a carrier or innkeeper is bound to keep such goods as he receives at his peril? It is grounded upon great equity and justice; for if they were not chargeable for loss of goods, without assigning any particular default in them, they having such opportunity as they have by the trust reposed in them to cheat all people, they would be so apt to play the rogue and cheat people, without almost a possibility of redress, by reason of the difficulty of proving a default particularly in them, that the inconveniency would be very great. And though one may think it a hard case that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes; yet the inconveniency would be far more intolerable if it were not so, for it would be in his power to combine with robbers, or to pretend a robbery or some other accident, without a possibility of remedy to the party; and the law will not expose him to so great temptation, but he must be honest at his peril. And this is the reason of the civil law in this case, which though I am loth to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law, as all Governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law, therefore grounded upon the same reason in many things.<sup>293</sup>

Concern for equity and justice, and the observation of the reality of the transport industry in that time, made to Lord Holt to apply this standard as a measure of public policy. His decisions undoubtedly, settled with more clarity the common carriers liability since the beginning of the 18th century.

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<sup>287</sup>Story, 461 See Jones on Bailment at 103–104.

<sup>288</sup>Holmes, Ed. by Mark De Wolfe Howe, 155, 157.

<sup>289</sup>R. Zimmermann, 'Europa und das römische Recht' (2002) 202, Archiv für die civilistische Praxis, 243–316., 291–292; Gorton, Vol. 43, 60.

<sup>290</sup>*Nugent v. Smith* (1875) 1 C.P.D. 19, Brett J., at 28–29.

<sup>291</sup>Dig. 4.9.1.1, See *supra* bb) The reason for the Edict.

<sup>292</sup>12 Modern 472(1706); 88 ER 1458.

<sup>293</sup>*Ibid.*, 481–481.

### 2.1.3.1.4 The Common Sea Carrier as an Insurer of the Cargo

Although the term “insurer” was not expressly mentioned in *Coggs v. Bernard* or in *Lane v. Cotton*, in these cases (as well in some others),<sup>294</sup> the common sea carrier was already treated as such.<sup>295</sup> It was in *Forward v. Pittard* (1785),<sup>296</sup> where Lord Mansfield used for the first time this term to describe the common carrier's obligation.<sup>297</sup>

Lord Mansfield, as well as Lord Holt, was well learned in Roman civil law.<sup>298</sup> He regarded the law merchant as convenient for the regulation of maritime matters, especially for its principles of equity and usages of trade on which it was based.<sup>299</sup> He had previously introduced into the English bar in the case *Luke v. Lyde*—(1759),<sup>300</sup> concepts of the Rhodian Laws, the Consolato del Mare, the laws of Oleron, among others.<sup>301</sup> It is in this case where he called the maritime law “not a law of a particular country, but the general law of nations”, quoting Cicero to support this statement.<sup>302</sup> With this background, the arguments supporting his decision in *Forward v. Pittard* on the common carrier's liability are not surprising:

By the nature of his contract, he [the common carrier] is liable for all due care and diligence, and for any negligence he is suable on his contract. But there is a further degree of responsibility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer. It is laid down that he is liable for every accident, except by the act of God, or the King's enemies. ...But to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unraveled, the law presumes against the carrier, unless he shows it was done by the King's enemies or by such act as could not happen by the intervention of man, as storms, lightning, and tempests.<sup>303</sup>

<sup>294</sup>See *Gibbon v. Paynton* 98 E.R. 199; (1769) 4 Burrow 2298. “...a common carrier, in respect of the premium he is to receive, runs the risk of them, and must make good the loss, though it happen without any fault in him; the reward making him answerable for their safe delivery.”

<sup>295</sup>Street, Vol. 2, 301.

<sup>296</sup>99 E.R. 953, (1785) 1 Term Reports 27.

<sup>297</sup>Street, Vol. 2, 302.

<sup>298</sup>J. C. B. Campbell, *The lives of the chief justices of England: from the Norman conquest till the death of Mansfield*, 2 vols. (Philadelphia, 1851), vol. 2, at 258: “While at Oxford he attended lectures on the Pandects of Justinian, and during his working life he maintained that Roman civil law to be the foundation of jurisprudence.”; Street, Vol. 2., 141; Burdick., at 76–77: “Mansfield was accused by his enemies of introducing into English Law principles unknown to its courts. ‘The Roman code, the law of nations, and the opinions of foreign civilians are your perpetual theme,’ said one of the letters of ‘Junius’.”

<sup>299</sup>Kent, II, 1–2.

<sup>300</sup>(1759) 2 Burr. 882, 889–890.

<sup>301</sup>Kent, Vol. III, at 17: “...the treatises of Roccus, the laws of Wisby the maritime ordinances of Louis XIV, and the commentary of Valin.”; Campbell, Vol. 2., at 258: “He thoroughly grounded himself in ancient and modern history by a perusal of the most eminent original historians.”

<sup>302</sup>(1759) 2 Burr 887; Kent, II. Vol. III, 1; Street, Vol. 2, 331; Campbell, Vol. 2, at 249: “Cicero indeed was his favorite, whose work Lord Mansfield translated into English while studying at Oxford.”

<sup>303</sup>See *supra* note 296, at 956 or 33.

When referring to custom of the realm, he clarifies it means the common law.<sup>304</sup> His decision echoes the same reasons given by Lord Holt, which in turn, as seen, were the same as Ulpian on the necessity to prevent collusion, but adding the need to prevent litigation and the impossibility in most cases to prove the cause of damage or loss. Further explanations for holding common carriers as insurers were later largely presented in *Riley v. Horne* (1828).<sup>305</sup> In addition to fraud prevention, Judge Best also pointed in more detail to the difficulties for the cargo owner of proving the cause of damage or loss.

This character of an “insurer”<sup>306</sup> held the carrier liable for his own actions, as well as for those of the master, his agents and servants.<sup>307</sup> This liability covered the entire voyage until delivery of the goods. In *Hyde v. Trent and Mersey Navigation Company* (1793), the opinion of the majority of the court was that the carrier holds the risk for the goods until a personal delivery at the house or place of deposit of the consignee.<sup>308</sup> The shipowner could exclude his liability as aforementioned, when the damages or losses occurred through an act of God or enemies of the Queen. Lightning fell within the exception of an act of God.<sup>309</sup> Kent also explained that if the location of a rock or a sand bar was generally known, and the ship crashes or strands upon it without action of adverse winds, the loss or damages is imputed to the master negligence and not to an act of God or peril of the sea.<sup>310</sup> Another example presented by Story regarded the barge master who, under tempestuous weather, shoots a bridge; he is liable for his temerity and imprudence.<sup>311</sup> The general rule was that the carrier was responsible for every loss not occasioned by

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<sup>304</sup>Custom of the realm was used as a synonym of common law. See *Nugent v. Smith* (1875) 1 C.P. D. 19, at 23; Gorton, vol. 43, 101.

<sup>305</sup>130 E.R. 1044; (1828) 5 Bingham 217. Best C.J. said at 220: “When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows, or sends any servants with them, to the place of their destinations. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier’s servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, the act of God, and the King’s enemies.”

<sup>306</sup>Beale, JR., 168.

<sup>307</sup>Kent, Vol. II, 600. *Boucher v. Lawson* (1815) Cas T H 194; Story, 482.

<sup>308</sup>(1793) 5 T.R. 389, at 399 judge Grose said: “The law, which makes carriers answerable as insurers, is indeed a hard law: but it is founded on wisdom, and was established to prevent fraud. But it seems to me, that it would be of little importance to determine that carriers were liable as insurers, unless they were also bound to see that the goods were carried home to their place of destination; since as many frauds may be practised [sic] in the delivery as in the carriage of them.”

<sup>309</sup>Kent, Vol. III, 350.

<sup>310</sup>*Ibid.* Vol. III, 351–353; also in Story, 496.

<sup>311</sup>Story, 462. See *Jones on Bailm.*, at 107; *Amies v. Stevens*, 1 Str. 128.

the act of God, or of the King's enemies.<sup>312</sup> But of course it did not include damages caused by the inherent deterioration of quality or quantity of the goods, or for the ordinary wear, tear and chafing of the goods in their course of transportation, or for acts attributable to the shipper.<sup>313</sup> Being judged under an absolute standard, considerations on the duties of providing a seaworthy vessel and the care of the cargo were not so relevant. They became more important later. This rule governed the activity of common carrier not only in England but also in all nations of Europe under civil law.<sup>314</sup> Notwithstanding, the standard was much more rigid in English law than in the continental countries. In France for example, there was exclusion of liability for losses coming from superior force during robbery, considered within the scope of *dannun fatale*.<sup>315</sup>

### 2.1.3.1.5 Additional Reasons for the Absolute Standards

Under the absolute standard, the common sea carriers were held liable in a stricter manner than other businesses also exercising public callings. Why was this standard more rigorous in England? Primarily, it was, as we have stated above, the consequence of the historical sources of the English maritime law, clearly acknowledged in the reasons given by Lord Holt and Lord Mansfield in the aforementioned cases. Decades later, in *Nugent v. Smith* (1875), it was expressly recognized by Brett J., that this standard was directly taken from the *Praetor's* edict of the Roman law.<sup>316</sup> Public policy was pointed out as the main reason for its assignation on common carrier. He said that this exceptional liability rule was adopted in the common law as measure of public policy because the conditions of this trade in that time in England were similar to those in the ancient Rome that led to the Roman *Praetor* to adopt this special regulation for sea carriers.<sup>317</sup> But beyond the historical antecedents of this standard, there were some considerations of morality and political and commercial reasons inherent to that time as well, that supported its applications.

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<sup>312</sup>Ibid., 463.

<sup>313</sup>Ibid., 463.

<sup>314</sup>Kent, Vol. II, 598, 604.

<sup>315</sup>Ibid.

<sup>316</sup>(1875) 1 C.P.D. 19, at 24: "The reason of the implied promise, given by Lord Holt in *Coggs v. Bernard*, and by Best, C. J., in *Riley v. Horne*, founded on the reason on which the *Praetor* allowed the exceptional liability of ship-masters, inn-keepers, &c., applies at least quite as strongly to the part of the carriage by sea beyond the realm as to the part within it."; See also Story, 461; Gorton, vol. 43., 64.

<sup>317</sup>Ibid., at 29–30: "...but the exception [of common carriers liability], both in the Roman Empire and in England, was no natural exception, but one depending entirely on public policy, arising from the manner in which some particular kinds of business were carried on in both places... The two trades, therefore, carried on in England under the same conditions as the three enumerated in the edict, were, the ship-masters and innkeepers. The conditions which had induced the *Praetor* as matter of policy to hold them to a strict liability in Rome were the same conditions as existed in the mode of carrying on the same business in England."

### (1) Consideration of Morality

It is said that early historical English law contained no contemporary philosophy but was rather elastic and practical.<sup>318</sup> This seems to have later changed. Reflections on morality, policy and concern for the social interest reflected the philosophical thinking of the epoch. During the middle ages the medieval state pursued a moral ideal where commerce and industry were regarded as relations between persons, not only as an exchange of goods or services.<sup>319</sup> Economic relations were conceived “as part of an eternal order inspired by God”, and pricing and service were moral issues and not mere methods of profit maximization.<sup>320</sup> Honesty and fairness were highly regarded, and to take advantage of special situations in detriment of the community was frowned upon.<sup>321</sup>

Graveson points out that English law observed during its formation the general principles of natural law or natural justice, whether in their medieval conception of eternal law, or in the secularized version of the 17th and 18th century.<sup>322</sup> Judges and legislator accepted them consciously as they were considered a higher law that must be complied with.<sup>323</sup> The principles based in such theories became afterward part of the substantive law, remaining as fundamental postulates also reflected in the constitution and the tradition of English law.<sup>324</sup>

On this regard, James Gordley points out that the natural laws created by the late scholastics became the basis for the modern contract doctrine. During the sixteenth and early seventeenth centuries, they developed a contractual theory based on a synthesis of Roman law with the Aristotelian and Thomistic moral philosophy.<sup>325</sup> Later, in the seventeenth century, Grotius, the founder of the northern school of natural law, took over and propagated almost in the same terms such contractual doctrines, but without its Aristotelian and Thomistic philosophical content.<sup>326</sup> His successors followed the same path.<sup>327</sup> However, though these principles were not

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<sup>318</sup>Fletcher, 3.

<sup>319</sup>W. Holdsworth, *A History of English Law*, 4th. reprint. (London: Mathuen & Co. Ltd., 1936), vol. 2, 468.

<sup>320</sup>Basedow, 6, note 20, *See*. Holdsworth, Vol. 2, 468–69.

<sup>321</sup>Holdsworth, Vol. 2, 469.

<sup>322</sup>R. H. Graveson, ‘The Spirit of English Law’ (1948) Vol. 60, *The Juridical Review*, 83–105, 100.

<sup>323</sup>*Ibid.*, 89.

<sup>324</sup>*Ibid.*, 89–90.

<sup>325</sup>Gordley, 69–70. The works of the scholastics in unifying the Greek philosophy, Thomistic morality and Roman law, started at the beginning of the sixteenth century with the founder of the Spanish natural law school, the Dominican Francisco de Vitoria and his pupils Diego Covarruvias (1512–1577) and Domingo de Soto (1494–1560), and were completed by the end of the same century with the work of the Jesuits Francisco Suarez (1548–1617), Luis de Molina (1535–1600) and Leonard Lessius (1554–1623).

<sup>326</sup>*Ibid.*, 71.

<sup>327</sup>*Ibid.*, at 71: “Indeed, the doctrines remained much the same in the work of his successors, Samuel Pufendorf (1632–1694) and Jean Barbeyrac (1674–1744), and in that of the French jurists Jean Domat (1625–1695) and Robert Pothier (1699–1772), who were to have a great influence both on the drafters of the French Civil Code and on the nineteenth-century common lawyers.”



explained in philosophical or moral terms, its content was still based in the same grounds. This is what Graveson refers to as the secular version of the natural laws. If the English judges followed such principles, as Graveson notes, it is quite evident in Lord Mansfield, who came to confirm more forcefully the character of insurer of the common carriers.

For Lord Mansfield, recognized as the “most accomplished judge who ever presided over the courts of King’s Bench,” and whose decisions shaped the commercial law of England, the observation of ethic and morality seems to have been particularly important.<sup>328</sup> With this in mind, when Lord Mansfield decided maritime claims, it would be expected that his decisions were not only based on the judicial precedents of English law, but also on his direct study of the Roman sources, and the principles of natural laws, which intrinsically contained philosophical and moral considerations.

Therefore, the maritime law “created” by the judicial decisions during this period is recognized, in words of Kent, to be “reasoned at large and practically applied.”<sup>329</sup> He further says, that the arguments of the bar as well as the opinions of the bench were “intermingled with the gravest reflections, the most scrupulous morality, the soundest policy, and a thorough acquaintance with all the various topics that concern the great social interest of mankind.”<sup>330</sup>

Concretely with regards to the strict liability assigned to common carriers, it was applied not merely because the *Praetor’s* edict said so, but also because, under further analysis, it was considered to be a “great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation in succeeding generations.”<sup>331</sup> This conclusion was during a time when the common good was, perhaps, more valued as a main purpose of law, preferring the protection of the public by requiring more efforts on individuals offering a service on a commercial basis. The observation of morality demanded the prevention of collusions. It was also more reasonable to assign more responsibilities to the party who had more control on the shipping operation. Similarly, it was seen as fair to avoid having the weakest party bear the burden of proof for the causes of damage or loss of the cargo. It was clear that the shipper was at real disadvantage in gathering the evidence of such events. Considering these arguments, the application of the strict liability rule on common carriers sounds quite logical.

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<sup>328</sup>Campbell, Vol. 2, 235, 253, 254, 258. He is remembered for applying ethics diligently and recommending the philosophical works of Cicero. On international law, he gave full recognition to the ideas of Hugo Grotius. Besides knowing his legal theories, he had a special interest in reading the juridical writers of France, probably Domat and Pothier, successors of Grotius in the northern school of law; Street, Vol. 2. 143–44. He even observed moral obligation as a source of consideration, giving origin to the theory of moral consideration, which he held as enough in itself to support a promise. Though this theory did not last longer, it was recognized for many years after his death, but apparently not exactly in maritime cases.

<sup>329</sup>Kent, Vol. III, 17.

<sup>330</sup>Ibid.

<sup>331</sup>Ibid., Vol. II, 602.

## (2) Political and Commercial Reasons

At the end of the 18th century the strict standard of liability was only assigned to common carriers and innkeepers, excluding other types of common callings.<sup>332</sup> The mere public policy concern showed in the courts' decisions might be insufficient in explaining the reasons for applying a heavier burden exclusively on common carriers and not to all types of similar professions. Basedow noted that and presented three additional hypotheses. The first was the possibility for monopolistic practices in the transport sector. But this is immediately discarded due to the lack of sufficient evidence of any monopolistic power on the part of the carriers.<sup>333</sup>

The second refers to two legal reasons. On one side, Basedow points that with the advent of the concept of general assumpsit, it became the legal instrument to require common carrier to serve to every customer and with care.<sup>334</sup> With the evolution of contract theory, assumpsit adopted later a more specific meaning in contractual law and was not applicable as the basis of common carriers' obligation. Their obligations became based on the "custom of the realm", that was explained in the aforementioned cases, but without regards to its historical reasons.<sup>335</sup> The other legal reason was the confusion between accidents and act of God as an exception for carrier's liability.<sup>336</sup> The cases provided a vague meaning of acts of God that created some ambiguities on the concept.<sup>337</sup> That made more difficult to distinguish them from mere accidents.

A third political reason, and perhaps more convincing, was constructed by Oliver Wendell Holmes.<sup>338</sup> The English feudal society depended strongly in the carriage of commodities and goods, a task that could not be entrusted to dishonest people that might enter into collusion to rob the goods.<sup>339</sup> Since the 17th century, and particularly after second half of the 18th century, the industrial production prompted the commercial expansion of England. The creation of wealth for the

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<sup>332</sup>Basedow, 6.

<sup>333</sup>*Ibid.*, 7. See Asterburn, *The Origin and First Test of Public Callings*, 75 U. Pa. L. Rev. 411, 420 (1926).

<sup>334</sup>*Ibid.*, at 5: "The special duties of the common callings were based on an implied assumpsit on their part. The 'holding out' to the general public was regarded as a general or universal assumpsit of both serving the public without discrimination and carrying out this service carefully."

<sup>335</sup>*Ibid.*, 7.

<sup>336</sup>*Ibid.*, 7.

<sup>337</sup>*Ibid.*, 8.

<sup>338</sup>*Ibid.*, 8. See Holmes, *Common Carriers and the Common Law*, 13 Am. L. Rev. 611 (1879).

<sup>339</sup>*Ibid.*, at 8: "The English feudal society, during the 17th and 18th centuries, spent only part of the year on the land from which it derived its income. For much of the year the nobility lived in towns supported by income from the surrounding estates. Hence, the aristocracy depended heavily upon both the availability and the safety of the carriage for passenger and goods. The movement of commodities could not be entrusted to the arbitrary, profit-oriented decisions of those engaged in the industry. The liability of the carrier had to be tightened to forestall collusion with thieves. Although the same danger existed with respect to other bailees, they were less important to the nobility. The professions which survived as common callings into the 19th century can be easily linked to the infrastructure of transportation."

country depended also on a reliable public transportation for such industrial production, and that demanded a higher standard of liability on common carriers. This thesis, however, reflects again the concern of the courts to prevent dishonest acts on the part of the carriers, in a commercial activity that was fundamental for the economic growth of England. This situation is probably, what Brett J. identifies as the similar conditions to those that motivated the Roman regulation contained in the *Praetor's* edict.<sup>340</sup> Indeed, and as aforementioned, it is estimated that the *Praetor's* edict appeared around the 1st century B.C., during the expansion of the maritime commerce of Rome.<sup>341</sup> The carriage of goods in the Roman society of that time, and in England of the 17 and 18th century, were under similar circumstances. In both cases, demanded safe carriage. English judges confirmed the value, fairness and convenience of the application of the strict standard created by the Romans. And, though the rule was very demanding, its application during those centuries does not seem to have discouraged the shipping industry.

### 2.1.3.1.6 The Decline of the Absolute Standard

The English courts seem to be consistent, at least since the 18th century, in the application of the rule holding common carriers strictly liable.<sup>342</sup> However, in the 19th century, a new ideological current and new commercial events, made this strict rule to lose application. Through the introduction of contractual clauses, carriers found the way to release themselves from this heavy standard.

#### (1) The Liberalism Theory

This absolute standard began to lose application at the beginning of the 19th century as a result of the new philosophical ideas in vogue in England. The philosophical thinking of Bentham and Austin eclipsed the general principles of natural justice that had oriented the English law during the previous centuries.<sup>343</sup> It gave rise to the will theories, supported in the preaching of freedom by metaphysical and political philosophers.<sup>344</sup> Austin's ideas of liberalism, which enjoyed extended acceptance in the English society of the 19th century, were based in an analysis restricted to concrete rules and principles of law, but did not take into account the large legal tradition and history of the English law.<sup>345</sup> Therefore, as the

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<sup>340</sup>See *supra* note 317.

<sup>341</sup>See *supra* note 88 and accompanying text.

<sup>342</sup>Kent, Vol. II, 602.

<sup>343</sup>Graveson, 100.

<sup>344</sup>Gordley, 214.

<sup>345</sup>Graveson, at 84: "It was that Austin's analytical approach was in itself restricted to concrete rules and principles of law rather than the deeper cohesive and synthetic force lying equally behind the legislative command and its judicial execution. Austin's strong, beneficial and lasting influence on the development of jurisprudential thought in England lay within the bounds of his self-imposed limitations."

common law legal system responded to the national character of the English society, it was strongly influenced by the ideas of individual liberty, which had become more than just a principle of law but a way of life.<sup>346</sup> Prominent economists of the epoch such as Smith, Ricardo and Mills remarked on the “freedom of bargaining as a fundamental and indispensable requisite for progress.”<sup>347</sup> The philosophy of freedom and individualism had to be supported by the law which must recognize the will of the parties and allow them to agree to whatever terms they desire by contract.<sup>348</sup> Such theories on individualism allowed some excesses in the use of the contractual liberty.<sup>349</sup>

This was also the time of the *Pax Victoriana*, when “free enterprise was at its highest, little tolerance for regulations, fewer rules and even less interference” were part of the Protestant ethic.<sup>350</sup> In addition, by the second half of the 19th century, the governments of the maritime states had more concern with “promoting the commercial interest of shipowners than with enforcing their obligation to the general community.”<sup>351</sup> Hence, the concern for public policy showed by the courts in the previous centuries lost its strength.

## (2) The Second Industrial Revolution

The second industrial revolution took place in the second half of the 19th century and brought one of the largest economic booms in history, boosting international trade. The opening of the Suez Canal in 1869 caused a commercial revolution.<sup>352</sup> Although the development of the steamship occurred in the beginning of the 19th century, creating a safer and faster means of transport, its impact was not felt until the second part of the century.<sup>353</sup> The introduction of the iron hull and screw propeller as technological advances for the shipping industry also favored its expansion.<sup>354</sup> British carriers gained a prominent position in intercontinental trade. At the same time, others challenges arose as a result of this massive shipping expansion. Among others, shipbuilding became more important, with ever increasing costs to build ships, as they became larger and more sophisticated.<sup>355</sup> It was then necessary to encourage the investment in shipbuilding, but the absolute

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<sup>346</sup>Ibid., 85–86.

<sup>347</sup>Gordley, 214. See Williston, ‘Freedom of Contract’, *Cornell Law Quarterly*, 6 (1921), 365, at 366–369.

<sup>348</sup>Ibid., 214.

<sup>349</sup>Graveson, 92.

<sup>350</sup>Gold, 119.

<sup>351</sup>Ibid., 119.

<sup>352</sup>Ibid., 95.

<sup>353</sup>Ibid., 91–92.

<sup>354</sup>Ibid., 91–92.

<sup>355</sup>E. P. Wheeler, *The modern law of carriers: The limitation of the common-law liability of common carriers under the law merchant, statutes and special contracts*. (New York: Baker, Voorhis & Co., 1890), 2.

standard was seen as an obstacle for investors to buy ships.<sup>356</sup> In addition, with more ships calling to ports, the danger of collision increased, and the long-standing strict liability was considered an unbearable burden.<sup>357</sup> But this increase in the sophistication of the new vessels resulted also in less safety. Shipowners did not have to sail themselves their vessels, like in the past when both, owner and merchant, usually sailed together. Vessel and cargo were insured, even in some cases, over insured, pursuing to have the possibility to make profits from an eventual total loss.<sup>358</sup> As competition in shipping was very high, shipowners cut also some expenses, being the safety standards the easiest one.<sup>359</sup>

### (3) The Excesses in the Principle of Freedom of Contract

With liberalism in mind and new business opportunities provided by the second industrial revolution, the strict liability became a kind of shackle for shipowner's business growth projections. Although the conception of the common carrier as an insurer of cargo remained for the rest of the 18th and 19th century, carriers found a method to elude the burden of this standard by the inclusion of clauses excluding liability for certain risks in the contract.

The principle of freedom of contract allowed parties to bargain their own conditions in the bills of lading, including clauses excepting some perils of the sea.<sup>360</sup> The existence of such clauses in the bills of lading is reported as early as the 16th century in English law.<sup>361</sup> The practice was increasingly adopted and the validity of such clauses was not subject of dispute.<sup>362</sup> Notwithstanding, Kent says that it was not properly known until the same case of *Forward v. Pittard* (1785).<sup>363</sup> At the beginning of the 19th century, courts were gradually accepting the economic pressures for a more flexible legal framework for the development of an international trade allowing self-determination and freedom of contract.<sup>364</sup> In 1804 the exclusion of liability by notice was largely recognized and settled by judicial decision in the case *Nicholson v. William*.<sup>365</sup> However, the exclusion of liability

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<sup>356</sup>Ibid., 2.

<sup>357</sup>D. Rabe, *Seehandelsrecht: Fünftes Buch des Handelsgesetzbuches: mit Nebenvorschriften und Internationalen Übereinkommen*, 4th edn. (München: C. H. Beck, 2000), 299.

<sup>358</sup>Gold, 118.

<sup>359</sup>Ibid., 118–119.

<sup>360</sup>Story, 489; Fletcher, 52.

<sup>361</sup>Fletcher, 52, at 86: "The earliest reference to an exception expressly exempting the master from liability occurs in 1545 in the record of *Holderness v. Elderness*."

<sup>362</sup>Ibid. Concretely about carriers, Fletcher mentions two cases from the 17th Century where these clauses were accepted, at 179: "...such a right was recognized by Lord Coke as available to any bailee; it was judicially confirmed in *Kenrig v. Eggleston*, (1648) and later by Sir Matthew Hale in *Morse v. Slue*, (1671)"; Colinvaux., at 627 also cites *Paradine v. Jane* (1647).

<sup>363</sup>Kent, Vol. II, 607.

<sup>364</sup>Basedow, 18; Also Wheeler, 75, See *Covington v. Willan*, Gow 115 (1819) and *Peek v. North Staffordshire R. Co.*, 10 House of Lords Ca. 473 (1863).

<sup>365</sup>Kent, Vol. II, 607.

was limited to protect the carrier from extraordinary events, but neither for the consequences resulting from the lack of ordinary personal care and diligence,<sup>366</sup> nor for gross negligence.<sup>367</sup>

Problems arose around 1880 when British shipowners went so far as to contract out liability in a larger extension, excluding the liability for their own negligence.<sup>368</sup> By that time, the principle of freedom of contract became almost sacred.<sup>369</sup> Under this principle, any carrier accepted goods to be carried “when he liked, as he liked and whenever he liked”.<sup>370</sup> They included in their general form of bills of lading, among other conditions: (1) clauses excluding liability even for their own negligence, known as “negligence clauses”; (2) a lien on the cargo for indebtedness of the cargo owner; and, (3) the appointment of the British courts and British law as the exclusive forum and applicable law for cases in all trades and in all places.<sup>371</sup> A report issued by the Imperial Shipping Committee in 1921 summarized the situation as follows:

There is nothing in English law to stop [shipowners] from contracting out of the whole or any part of his liability, and, by a practice which has gradually extended since about 1880, British shipowners do habitually in their bills of lading contract themselves out their common law liability to a large extent.<sup>372</sup>

The original strict allocation of risk on the common carrier was viewed by the British courts as a default principle applicable only in the absence of stipulations to the contrary.<sup>373</sup> The same conception was accepted by other European courts.<sup>374</sup> Some English judges considered that the doctrine of exempting carriers from liability by notice had been carried too far, even lamenting its introduction into the Westminster Hall.<sup>375</sup> However, the English courts continued accepting as valid such practices. The stipulations introduced by the British shipowners in their contracts, lead to a state of practically no liability at all for any damage to or loss of the cargo carried, resulting in the obvious discontent of the cargo owners. The general principle of strict liability for common carriers, historically applied under

<sup>366</sup>Ibid. It is concluded from the language of the courts in the cases *Bodenham v. Bennet* 4 Price Exch. 31, and *Garnett v. Willan*, 5 B. & Ald. 53.

<sup>367</sup>*Riley v. Horne* 130 E.R. 1044; (1828) 5 Bingham 217, 225.

<sup>368</sup>Report of the Imperial Shipping Committee on the Limitation of Shipowner's Liability by Clauses in Bills of Lading and on Certain Other Matters Relating to Bill of Ladings (1921), 7, reprinted by Sturley in *The Legislative History...*, Vol. 2, 135.

<sup>369</sup>R. P. Colinvaux, *The Carriage of Goods by Sea Act, 1924* (London: Stevens & Sons Limited, 1954), 1.

<sup>370</sup>Knauth, 116.

<sup>371</sup>Ibid., 120.

<sup>372</sup>As cited by Colinvaux, 1.

<sup>373</sup>M. F. Sturley, ‘The History of COGSA and the Hague Rules’” (1991) 22, *Journal of Maritime Law and Commerce*, 1–57, 5.

<sup>374</sup>Ibid., 5; Knauth, 119.

<sup>375</sup>Kent, Vol. II, 607–608. *Smith v. Horne*, 8 Taunt. 144.

English law, became in reality a dead letter. And with no liability at all, carriers showed less interest in ensuring the seaworthiness of the vessels and in providing a proper care of the cargo. Hence, by the middle of the 1880's, "badly built, ill-found, grossly overload and often over insured vessels" were put on the sea, becoming frequently "coffin ships" that took the cargo and the crew's life's to the depths of the seas.<sup>376</sup>

### 2.1.3.2 International Attempts for Regulation and Unification

Doubtless, freedom of contract has been one of the cornerstones of the fast commercial growth reported since the 19th century. But when such a freedom is extended to the point of breaking with basic ethical principles, an important legal institution, as contractual freedom is, can be used to support and legitimize practices that are, in reality, unfair and abusive. Such practices, rather than promoting commerce, hamper and discourage it. Given this situation, the international community undertook the discussion, redaction and adoption of special regulations for this contract, as an attempt to stop the practices developed in that time by the shipowners.

#### 2.1.3.2.1 The Liverpool Conference of 1882

Attempting to find a solution to the practices carried out by British shipowners, the International Law Association<sup>377</sup> held a meeting in Liverpool in August 1882, where a model of bill of lading known as the "Conference form" was proposed.<sup>378</sup> The main idea behind this "form" was to change the long applied strict liability rule, into a liability based on negligence in "all matters relating to the ordinary course of the voyage."<sup>379</sup> The discussions revolved around the duties of the carriers in the performance of the carriage, and the assignation of liability for breach of those duties. This proposal, introduced for the first time the concept of practicing "due diligence" to make the ship seaworthy, as the basis for liability, instead of the warranty of seaworthiness.<sup>380</sup> The ship was not held responsible for losses caused

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<sup>376</sup>Gold, 119, at 121: "For some reason, the shipping industry has always taken an almost perverse pride in maintaining that cruel discipline, inhuman conditions, and inadequate compensation provided the only environment in which sailors could adequately perform their work. It was in a time when there was not international safety regulation, and few national rules, where only some tacit rules stated mostly for the benefit of by underwriters that seek to reduce their risks." See Fayle, *History of World's Shipping Industry*, pp. 286–287.

<sup>377</sup>The International Law Association was founded in 1873 with the original name of Association for the Reform and Codification of the Law of Nations. In 1895, it changed to the present name.

<sup>378</sup>Knauth, 119.

<sup>379</sup>Sturley, *The History of COGSA*..., 7.

<sup>380</sup>*Ibid.*, 7.

by some events, unless they result from want of due diligence of the shipowner or her manager.<sup>381</sup> This provision implied the practice of due diligence to prevent occurrence of such events.

The model included liability for negligent acts of the servants in the stowage or delivery of cargo and similar operations. The necessity of a fast, accurate and careful stowage of cargo and its proper delivery were taken for granted. Shipowners had assumed such responsibility for centuries, all over the world, and the problems surrounding adaptation to early steam navigation were estimated to have been already overcome.<sup>382</sup> On the other hand, it upheld the exoneration of liability for accidents of navigation, even those caused by “negligence, default or errors in judgments of the Pilot, Master, Mariners, or other Servants of the Shipowner.”<sup>383</sup> By that time, steam navigation had increased substantially and rapidly, but was still a novelty for many masters and seamen who now had to deal with this new technology and with larger numbers of vessels calling at traditional ports. Therefore, errors in navigation were the main cause of maritime casualties that ended in cargo loss or damage with subsequent cargo claims.<sup>384</sup> This was the reason for the shipowner’s rejection to assume liability for nautical faults.

In the end, the “Conference form” was not generally accepted.<sup>385</sup> The New York Produce Exchange adopted similar conceptions contained in that model in 1883 and 1884, but both of them were not subject to major application.<sup>386</sup>

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<sup>381</sup>Int’l Law Association, Report of the Tenth Annual Conference held at Liverpool August 8th–11th, 1882, at 104, reprinted in *The Legislative History...*, Vol. 2, 62. The Conference form stated: “...Ship not answerable for losses through *Explosion, bursting of Boilers, breakage of Shafts, or any latent defect in the Machinery or Hull*, not resulting from want of due diligence by the Owner of the Ship, or any of them, or by the Ship’s Husband or Manager;...”

<sup>382</sup>*Ibid.*, 77 reprinted in *The Legislative History...*, Vol. 2, 35.

<sup>383</sup>*Ibid.*, 104, reprinted in *The Legislative History...*, Vol. 2, 62.

<sup>384</sup>*Ibid.*, 77 reprinted in *The Legislative History...*, Vol. 2, 35. Mr. Richard Lownders, President of the Liverpool Chamber of Commerce and Deputy-Chairman of the Committee and Chairman of the Liverpool Committee, presented an interesting exposition on this issue: “...Every year harbours and roadsteads and particular ocean-tracks are more and more crowded, the pace of steamship is more rapid, and, perhaps not least formidable, Board of Trade inquiries grow more penetrating and ingenious. If an unfortunate captain or officer, however well certificated, in the course of a long voyage makes one mistake, the chances of its doing damage, and the chances of its being found out, are vastly more that they used to be; and, what a shipowner naturally does not like, the chances of his being called upon to pay for a valuable cargo are in the same proportion more that they ever used to be. Nor can it even be said that a shipowner has had time in the course of centuries to get to this infliction, and hardened against it, for, in truth, it is only of late years – only since two decisions of our Courts not more that twenty years old –that this liability for sea perils, occasioned by the faults of seaman, has been brought home to the shipowners.”

<sup>385</sup>Sturley, *The History of COGSA...*, 7.

<sup>386</sup>*Ibid.*, 7–8.



### 2.1.3.2.2 The Hamburg Conference of 1885

In the 12th Conference of the International Law Association held in Hamburg in 1885, further discussions on the subject were reassumed with the final adoption of the “*Hamburg Rules of Affreightment*”.<sup>387</sup> The Hamburg Chamber of Commerce proposed a set of rules that in the first provision declared unlawful any clause or covenant lessening or avoiding the carrier's liability, but this proposal did not prosper. A second proposal of modification of the former Liverpool bill of lading was also submitted. The discussion revolved mostly around setting the responsibility for negligence. The rule I stated a general obligation to make the ship in all respects seaworthy and fit for the stowage and proper delivery at destination:

The shipowner shall be responsible, that his vessel is properly equipped, manned, provisioned, and fitted out, and in all respects seaworthy and capable of performing her intended voyage, and for the stowage and right delivery of the goods. He shall also be responsible for the barratry, faults, and negligence, but not for errors in judgment, of the master, officers and crew.<sup>388</sup>

The same rule kept the exclusion liability for nautical fault but restricted to errors of judgment, not for fault or negligence of the master and crewmembers, as the previous “Conference form” did. The reason for this differentiation respond to the argument that most of the casualties resulting in cargo damage or loss, were caused by acts of negligence or default by the master, officers or crewmembers, that were avoidable by practicing due diligence.<sup>389</sup> In addition, it included liability for unreasonable delay.<sup>390</sup> Another difference is that this proposal was not a model bill of lading, but a set of rules to be inserted in the bills of lading.<sup>391</sup> These rules at the end suffered the same fate as the former Liverpool form.<sup>392</sup>

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<sup>387</sup>International Law Association, Report of the Tenth Annual Conference held at Hamburg August 18th–21th, 1885, reprinted in *The Legislative History...*, Vol. 2, 73.

<sup>388</sup>*Ibid.*, 165, reprinted in *The Legislative History...*, Vol. 2, 122.

<sup>389</sup>*Ibid.*, 76, reprinted in *The Legislative History...*, Vol. 2, at 90. In this regard, the proposal of the chairman of the committee gives some reasoning for such an amendment: “Dr. Wendt proposed that the words ‘the act, neglect, or default’, in the phrase ‘act, neglect, or default of the master or crew in navigating the vessels,’ be omitted, and replaced by the words ‘error of judgment.’” Although he did not think it necessary to give all his reasons for doing so, he might state that the experience he had gained by his investigations into maritime casualties for many years past, enabled him to assure the Conference that at least nine-tenth of all such disasters as stranding, collisions at sea, and so forth, were due to some neglect or other of the crew which might be prevented if due diligence were exercised. He therefore thought that such ‘neglect or default’ the shipowner ought to be made answerable, but not for mere ‘error of judgment’.”

<sup>390</sup>*Ibid.*, 165, Rule II, reprinted in *The Legislative History...*, Vol. 2, 122.

<sup>391</sup>Sturley, *The History of COGSA...*, 8.

<sup>392</sup>*Ibid.*, at 8: “A few German companies adopted the rules but elsewhere they had little immediate impact. In 1887, the Association “rescinded” them and reaffirmed the principles of the Conference form. The format of the Hamburg Rules nevertheless remained persuasive, and future efforts at achieving uniformity did so through uniform rules rather than a model bill of lading.”

### 2.1.3.2.3 Results of These Conferences

Although these attempts did not enjoy major success, the surrounding discussion presented some reasoning that laid the foundation of the future statutory regulations. For example, they presented a fragmentation of the carrier's duties and the allocation of liability in accordance to those failures in the specific duty that caused the damage to or loss of the cargo. If the cause was errors of judgment in navigation as well as other *vis major*, there was no liability at all. If the cause was lack of seaworthiness, the carrier was liable if he did not practice due diligence in making the ship seaworthy. Finally, if the cause was negligence in stowage and proper delivery, total liability was assigned.

Despite the efforts of the International Law Association, the situation remained practically the same. Strongly criticized by cargo interests, the Glasgow Corn Trade Association issued a series of resolutions in 1890 condemning the practices of the sea carriers, which were described as having "surpassed all bounds of reasons and fairness."<sup>393</sup> However, the British shipowners had a strong influence in the English Parliament and the complaints of the cargo owners were not attended.<sup>394</sup> The "negligence clauses", certainly considered unethical and an unfair practice, became the catalyst for statutory regulations, not in England but in the United States, both countries representing at that time, the main interests of both sides of the industry.

### 2.1.3.3 The Maritime Law of the United States of America

#### 2.1.3.3.1 The Standard of Liability for Sea Carriers

The maritime law of the United States of America was, at least since its independence in 1776, the same as the maritime law of Europe.<sup>395</sup> The Article III of the American Constitution conferred upon the Supreme Court and the Federal Courts of the United States jurisdiction on admiralty and maritime matters.<sup>396</sup> The power vested in the Supreme Court enables her to underline some substantive rules that have binding effect upon all the lower federal, district, and circuit courts.<sup>397</sup> Kent affirms that the decisions of the Federal Courts on commercial cases reflected the moral and intellectual character of the United States, especially in the admiralty courts, which particularly showed great research and familiarity with the maritime law principles of Europe.<sup>398</sup> Therefore, the absolute liability of the sea common

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<sup>393</sup>Knauth, 120.

<sup>394</sup>Ibid., 120.

<sup>395</sup>Kent, Vol. III, 1; Wheeler, 1.

<sup>396</sup>Wheeler, 1; Tetley, *Interpretation and Construction*..., 42; See 28 US Code s. 1333.

<sup>397</sup>Tetley, *Interpretation and Construction*..., 42, 46. They are bound under the principle of *stare decisis*.

<sup>398</sup>Kent, Vol. III, 17.

carrier in England was generally understood to be the same in the United States.<sup>399</sup> Whether the carrier was at fault or not, it was immaterial for the setting of his liability for cargo damage or loss.<sup>400</sup> The common sea carrier was a warrantor of safe arrival, unless one of the common law exceptions was invoked.<sup>401</sup> The cases *Schiefflen v. Harvey* (1810)<sup>402</sup> and *Elliot v. Russell* (1813)<sup>403</sup> were the first actions against common carriers reported in New York.<sup>404</sup> In the second case, the strict principle of liability was applied. It confirmed the common carrier as warrantor of the safe delivery of goods in all, but the excepted cases of an act of God and public enemies, with no distinction between carriers neither by land nor by water.<sup>405</sup> Chief Justice Kent affirmed that this principle appeared to be sound and wise and generally accepted among nations.<sup>406</sup> By the middle of the 19th century, the standard was still in force. In 1848, in the case *New Jersey Steam Nav. Co. v. Merchant's Bank of Boston*,<sup>407</sup> the U.S. Supreme Court said:

The general liability of the carrier, independently of any special agreement, is familiar. He is chargeable as an insurer of the goods and accountable for any damage or loss that may happen to them in the course of the conveyance, unless arising from inevitable accident – in other words, the act of God or the public enemy.<sup>408</sup>

Ten years later, such absoluteness was again confirmed in the *Propeller Niagara v. Cordes* (1858).<sup>409</sup> In this case, the U.S. Supreme Court provided a more detailed description of the concept of common carrier,<sup>410</sup> with additional remarks on the extension of its obligation relating not only to the seaworthiness but also to the duty of care. The shipowner was held liable even for the damage to cargo resulting from a stranded ship. The court made some statements that reaffirmed explicitly the carrier's implied obligation of providing a seaworthy ship, which include a proper and skillful master and crew. The master in this case, after the vessel's stranding did not do anything to protect the cargo, when there were many possibilities to reduce the losses. Such inactivity from the part of the carrier, (among other circumstances

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<sup>399</sup>Story, 470; Wheeler, 1.

<sup>400</sup>Gilmore and Black, JR., 140.

<sup>401</sup>Wheeler, 1; Gilmore and Black, JR., 140.

<sup>402</sup>6 John. 1709.

<sup>403</sup>10 John 1.

<sup>404</sup>C. Warren, *History of the Harvard Law School and of early legal conditions in America* (Union, N.J: Lawbook Exchange, 1999), 248.

<sup>405</sup>Kent, Vol. II, 608–609. Contractual exclusion of peril for the sea was allowed, but not for negligence.

<sup>406</sup>*Ibid.*, 609: "It was further shown that the marine law of Europe went to the same extent, as did also the civil law, and the law of those nations in Europe which have made the civil law the basis of their municipal jurisprudence.

<sup>407</sup>47 U.S. (6 How.) 344, 12 L.Ed. 465 (1848).

<sup>408</sup>*Ibid.*, 381.

<sup>409</sup>62 U.S. (21 How.) 7.

<sup>410</sup>Gorton, vol. 43, 20.

evidenced in the trial), made the court to conclude that the master was not properly qualified for the type of vessel he was sailing. Regarding the obligation of care of the goods, the remarks were even more significant. It stated first, that even if the carrier had not received the payment in advance for the carriage, he is subject to the same strict liability; second, he is obliged to make a proper stowage; and third, that a stranded vessel did not release the master of his duty to care for the cargo, which remained throughout the time in his charge and accordingly, all possible measures must be taken to save it.<sup>411</sup> Anything shorter than this—affirmed the judge—would be inconsistent with to the nature of the undertaking and the contract, as it is “universally understood in courts of justice”.<sup>412</sup> Mr. Justice Clifford also pointed out that this rule was of centurial existence and as time and experience had showed its convenience and fairness, he esteemed it not reasonable to change it by judicial power, but only by statutory regulation.<sup>413</sup> In the decision, it was accepted that the right and obligations of the parties are set and regulated by the contract and some references were made to the possibility of exclusion of liability in the bill of lading for some other events that may have occurred without the fault or negligence of the carrier. It made clear, however, that this right did not include any exoneration of liability for fault or negligence. The absolute warranty of providing a seaworthy vessel at the beginning of the voyage was well established and recognized by the American Courts.<sup>414</sup> The enforcement of this standard continued until the increasingly insertion in the bills of ladings of the clauses excepting liability, forced the enactment of special legislation.

### 2.1.3.3.2 Restrictions to the Principle of Freedom of Contract

The principle of freedom of contract was also accepted in the United States but under some restrictions. The first decision analyzing exclusion of common carrier's

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<sup>411</sup>See *supra* note 409, at 26: “[The] Duties remain to be performed by the owner, or the master as the agent of the owner, after the vessel is wrecked or disabled and after he has ascertained that he can neither procure another vessel nor repair his own, and those too of a very important character, arising immediately out of his original undertaking to carry the goods safely to their place of destination. His obligation to take all possible care of the goods still continues, and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck, and certainly not where, as in this case, the vessel is only stranded on the beach.”

<sup>412</sup>*Ibid.*, 27.

<sup>413</sup>*Ibid.*, at 25: “Most of the rules of law prescribing the duties of a carrier for hire, and regulating the manner of their exercise, have existed for centuries, and they cannot be modified or relaxed except by the interposition of the legislative power of the Constitution. Time and experience have shown their value and demonstrated their utility and justice, and they ought not and cannot be changed by the judiciary.”

<sup>414</sup>See *Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. 934 (1890); *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823 (1894); *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537. (1895); *The Irrawaddy*, 171 U. S. 192, 193, *sub nom. Flint v. Christall*, 43 L.Ed. 132, 18 Sup. Ct. Rep. 833 (1898).

liability was the *Cole v. Goodwin and Story* (1838),<sup>415</sup> decided by the New York State Court. A stage coach gave a general notice that the carriage of “the baggage of passengers is at the risk of the owners.” The court denied the exoneration of liability in the argument that the defendant was a common carrier in respect to the passenger’s baggage, and relieved for loss only if caused through acts of God or public enemies. The Federal Courts allowed the exoneration of liability for certain circumstances, but, differing from the Common law and European courts, not for the effects of negligence or for not providing a seaworthy ship.<sup>416</sup> In *Dorr v. The New Jersey Steam Navigation Company* (1850),<sup>417</sup> Judge Campbell made a distinction of the two different liabilities arising for common carriers from the contract of carriage. The first is for losses by accident or mistakes that make him liable as an insurer. The second is for losses caused by negligence or default of himself or his servants that make him liable as an ordinary bailee. He found reasonable the exclusion of liability as an insurer by express agreement in the contract, to protect himself for misfortune, but not for losses caused by his negligence.

Citing this case, the negligence clauses were largely analyzed and rejected by the Supreme Court of the United States in *Railroad Co. v. Lockwood* (1873).<sup>418</sup> The case was about the carriage of goods by train, but the arguments presented apply for every type of common carriers. Justice Bradley made a thorough revision of the case law existing on the subject, finding that in most of the cases, the judges denied the recognition of such clauses. He explained that the policy holding common carriers as insurer of the cargo, responded to the need of secure the “utmost care and diligence” in the compliance of those duties, as they were fundamental for the “welfare of every civilized society”.<sup>419</sup> The carriers, being few powerful corporations, were in a clear commercial superiority that impeded shippers to negotiate any of the contractual terms of the bills of lading. It was also acknowledged that the improvement of society reduced the possibilities of collusion and bad faith from the part of the carriers and that make reasonable to ameliorate the strict rule. Hence, it was acceptable to exclude liability for damages caused by certain inevitable accidents or any superior force, as it was allowed in the civil law. But allowing such an extreme exoneration for their own negligence or misconduct, beside it was “unfair and unreasonable”, would produce the carriers’ disinterest in the compliance the most essential duties of the contract. The Supreme Court concluded that the conditions stated in a contract of carriage “ought not to be adverse to the dictates of public policy and morality,”<sup>420</sup> and that such prohibition was based not only in the

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<sup>415</sup>19 Wend. 251, 32 Am. Dec. 470.

<sup>416</sup>Sturley, *The History of COGSA*..., 5–6.

<sup>417</sup>4 Sandford, 136.

<sup>418</sup>17 Wall. 357 (1873).

<sup>419</sup>*Ibid.*, 377.

<sup>420</sup>*Ibid.*, 380.

public policy but also in “sound principles of law”.<sup>421</sup> Therefore, the public interest had to be protected and such clauses rejected.<sup>422</sup>

By 1880, when the British carriers increased the use the negligence clauses, most of the State and Federal Courts refused to enforce these “unreasonable” stipulations inserted in the domestic and international bills of lading.<sup>423</sup> When the US courts accepted the application of English law to a case, they were aware of the recognition given by English courts to the negligence clauses. However, they refused to enforce them. Even the other clauses containing special exceptions were construed against the shipowners and in favor of the shipper, and in no case were they accepted to extend such exceptions for the shipowners own negligence.<sup>424</sup> Such rejection became “settled law” and “elementary doctrine”.<sup>425</sup> In the maritime case, *Liverpool and Great Western Steam Company v. Phoenix Insurance Co.* (1889),<sup>426</sup> the U.S. Supreme Court provided again a deeper analysis of the negligence clauses, now in the context of the carriage of goods by sea. The decision quoted extensively and applied the reasoning of *Railroad Co. v. Lockwood*. Such clauses were declared again as “unreasonable, contrary to the public policy and consequently void.”<sup>427</sup> Under this rule, followed by almost all the Federal Courts,<sup>428</sup> the common sea carrier could not contract out his liability for his negligence. Only a few Federal Courts, particularly in New York, had accepted the British practice of excluding

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<sup>421</sup>*Ibid.*, 368.

<sup>422</sup>*Ibid.*, at 381: “Conceding, therefore, that special contracts, made by common carriers with their customer, limiting their liability, are good and valid so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence – an excuse so repugnant to the law of their foundation and to the public good – they have no longer any plea of justice or reason to support such a stipulation, but the contrary.” *Citing also: Express Co. v. Caldwell*, 21 Wall. 264, 268 (1874); *Railroad Co. v. Pratt*, 22 Wall. 123, 134 (1874); *Bank v. Express Co.*, 93 U. S. 174, 183 (1876); *Railway Co. v. Stevens*, 95 U. S. 655 (1877); *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 338, 5 Sup. Ct. Rep. 151 (1884); *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U. S. 312, 322, 6 Sup. Ct. Rep. 750, 1176, 29 L.Ed. 873 (U.S. Wis. 1886); *Inman v. South Carolina Ry. Co.*, 129 U. S. 128, ante, 249 (1889).

<sup>423</sup>Colinvaux, at 1: “... since 1870’s, the courts resolutely refused to enforce unreasonable conditions in bills of lading.”; Schoenbaum and Yiannopoulos, 365.

<sup>424</sup>In *The Titania* 1883 19 F. 101 (D.C.N.Y.), at 103–104 Judge Brown said: “But although, under the English decisions, it seems to be settled that ship-owners may exempt themselves from damages caused even by their own negligence, provided this intention be unequivocally expressed, yet such causes of special exemption, being inserted for the benefit of the ship-owner, are construed most favorably to the shipper and most strongly against the ship-owner, and will not be held to embrace the latter’s own negligence, unless that be specially excepted in connection with the actual cause of the loss.”

<sup>425</sup>Schoenbaum and Yiannopoulos, 365.

<sup>426</sup>129 U.S. 397, 9 S.Ct. 469, 32 L.Ed. 788.

<sup>427</sup>129 U.S. 397, 441–442. Similar statement was made later in: *The Kensington*, 183 U.S. 263, 268 (1902). See also Wheeler, 77; Colinvaux, 1.

<sup>428</sup>Wheeler, 82.

total liability in some specific cases.<sup>429</sup> Clauses limiting their liability had to be reasonable, and excluding liability for their own negligence was not considered so.<sup>430</sup> Hence, those clauses had no effect when inserted in contracts governed by the law of the United States, or when the carriage was performed entirely or partially within the United States.<sup>431</sup> It had neither effect in a contract made abroad or through an express clause establishing the application of another law.<sup>432</sup>

### 2.1.3.3.3 The Enactment of the Harter Act of 1893

#### (1) Historical Context

Despite the non-recognition by most American courts of the clauses imposed by British carriers excluding liability for their own negligence, such a practice continued. By that time, there existed a monopoly of some 20 British liner companies, owning the most suitable ships and moving the majority of the American exportations.<sup>433</sup> Because of the jurisdiction clauses included in their bills of lading, cargo owners of the United States were obliged to file their claims in the English courts and under English law, where the negligence clauses were recognized.<sup>434</sup> The situation pushed the powerful cargo interest in the United States to demand statutory regulation to prevent shipowners from such abusive practices.<sup>435</sup> It drove shippers of cargo, underwriters and bankers in the United States to force the settlement of a statutory solution. For this same purpose, the House of Representatives of the United States passed a bill in 1885 where the clauses of exoneration of liability were prohibited.<sup>436</sup> However, this bill never passed the Senate Commerce Committee approval,<sup>437</sup> leaving the problem still pending a solution.

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<sup>429</sup>Knauth, at 119 cites: "*Rubens vs. Ludgate Hill S.S.Co.* (1892), 1st Dept., 65 Hun 625, 20 N.Y. Supp. 481 at 185–186, affirmed without opinion (1894), 143 N.Y. 629. See *Robertson vs. National S.S.Co.* (1891), 139 N.Y. 416 and *Gleadhill vs. Thompson* (1874), 56 N.Y. 194."

<sup>430</sup>Colinvaux, 2.

<sup>431</sup>*Ibid.*, 2.

<sup>432</sup>*Ibid.*, 2.

<sup>433</sup>Knauth, 119.

<sup>434</sup>D. C. Frederick, 'The Political participation and legal reform in the international maritime rulemaking process: from the HR to the Hamburg rules' (1991) 22, *Journal of Maritime Law and Commerce*, 81–117, 84, citing S. Dor, *Bill of Lading Clauses and the Brussels International Convention of 1924 (Hague Rules)* 17 (2d ed. 1960); Sturley, *The History of COGSA...*, 10–11.

<sup>435</sup>Knauth, 119.

<sup>436</sup>Sturley, *The History of COGSA...*, 12.

<sup>437</sup>*Ibid.*, 12.

## (2) The Original Project

As response to the aforementioned problem, the U.S. Congressman Michael R. Harter of Ohio presented a new project in 1892.<sup>438</sup> The first two sections of the original project expressly prohibited clauses of exoneration of liability for loss or damages arising for fault or negligence. For the third section, the original draft showed an absolute obligation to provide a seaworthy ship:

Section 3. That if any vessel transporting merchandise or property between ports in the United States of America and foreign ports shall, on starting her voyage, be in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or master shall become or be held responsible for damage or loss resulting from error of judgment in navigation or in the management of said vessel, if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery.<sup>439</sup>

According to the original proposal, the carrier was exempted of liability for damage or loss occurring from error of judgment or management of the vessel, subject to two conditions: (1) if the vessel was previously in “all respect seaworthy, properly manned, equipped and supplied”; and, (2) “if navigated with ordinary skill and care”. This original project was subject to large discussions in the Senate Committee on Commerce, and later presented to the Senate with extensive amendments.<sup>440</sup> The reasons for such amendments are not documented or at least not available because the report of the committee was never printed.<sup>441</sup>

## (3) The Final Version

The final version, instead of the absolute warranty of providing a seaworthy vessel, reduced the obligation to the practice of due diligence in making the ship seaworthy before the beginning of the voyage. It is similar to the proposed model in the Liverpool Conference Form of 1882. With this formula, if the carrier showed that he practiced due diligence for such a purpose, he was relieved from liability for any loss of or damage to the cargo. The carrier is also relieved of liability for faults or errors in navigation or in the management of the vessels. The obligation to navigate with skill and care was also suppressed and some additional exculpatory causes were included.<sup>442</sup> This version of the Harter Act became Law in the United States, with the presidential signature on the 13th of February of 1893, applying for carriage within national as well as foreign ports.

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<sup>438</sup>Knauth, 120.

<sup>439</sup>As cited by Knauth at 121.

<sup>440</sup>*Ibid.*, 121.

<sup>441</sup>*Ibid.*, 121.

<sup>442</sup>Harter Act 1893 section §192: “...danger of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficient package, or seizures under legal process, or for losses resulting from any act or omission of the shipper or owner of the goods, his agent or representative or attempting to save life or property at sea, or from any deviation in rendering such service.”



As one of the main objectives of the Act was to regulate the practices developed by British shipowners of excluding contractually all kinds of liability, it introduced for the first time a statutory limitation to the generally accepted principle of freedom of contract. Sections 1 and 2 expressly prohibit any “clause, covenant or agreement” that relieved carriers of liability for their own negligence in the execution of the contract.<sup>443</sup> This was the main purpose for the enactment of this statute, as explained in *The Delaware* (1896),<sup>444</sup> the first case where the Supreme Court of the United States analyzed the Harter Act. Although a collision case, the US Supreme Court paid special attention to the Act and interestingly quoted large paragraphs of the aforementioned petition of the Glasgow Corn Trade Association to the Marquis of Salisbury,<sup>445</sup> to explain the reasons for its enactment.

The effect, however, was not to completely relieve the shipowners from their obligation to provide a seaworthy ship, but to limit it to the practice of due diligence.<sup>446</sup> The common carriers liability was to be judged on negligence. In *The Irrawaddy* (1898),<sup>447</sup> the Supreme Court stated that the main purpose of the Act was to relieve the shipowners from liability for lack of seaworthiness caused by latent defects not discoverable by the utmost diligence.<sup>448</sup>

Other than the mentioned restrictions, the Act did not place major or heavier obligations on the carrier in favor of cargo interest as in the original project. The exception for faults or error in navigations was a special concession to shipowners attending to the novelty of steamships intercontinental navigation, as exposed in the International Law Association meeting in Liverpool of 1882.<sup>449</sup>

It has to be observed that the exclusion of liability, subject to the practice of due diligence, is for “faults or errors in navigation or in the management of the vessels”, and not for faults in the fulfillment of other duties. On this matter, the description and separation of duties concerning the cargo and vessel are very important. With regards to the cargo, the carrier is responsible for “proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property

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<sup>443</sup>Harter Act of 1893 at 46 U.S.C. §§190–191.

<sup>444</sup>161 U.S. 459, 16 S.Ct. 516, 2010 A.M.C. 1803, 40 L.Ed. 771, at 471 or 1813: “It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair, and outfit of the vessel, and the care and delivery of the cargo.”

<sup>445</sup>See *supra* c) Results of these Conferences.

<sup>446</sup>See *The Carib Prince*, 170 U. S. 655, 42 L. Ed. 1181, 18 Sup. Ct. Rep. 753. (1898).

<sup>447</sup>171 U. S. 192, 193, *sub nom. Flint v. Christall*, 43 L. Ed. 132, 18 Sup. Ct. Rep. 833.

<sup>448</sup>At 192–193 the Court said: “Plainly, the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the vessel.”

<sup>449</sup>See *supra* note 384.

committed to its or their charge...”, and must “carefully handle and stow her cargo and to care for and properly deliver same”. Regarding the vessel itself, the carrier must “properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage...”<sup>450</sup>

With the enactment of this Act, the long-standing and sometimes praised absolute standard of liability for common carrier was finally abolished by statute.<sup>451</sup> The common sea carrier’s liability is based on its diligence in the fulfillment of these duties. The Harter Act was judged as “fair and practical in operation”.<sup>452</sup> But the absence, or rather, the impossibility of a dogmatic definition for due diligence to be provided by the courts, created uncertainty and frequently shipowners failed in fulfilling this duty, depending on the specific analysis of each case.<sup>453</sup>

#### (4) International Impact

The solution found in the United States and set out in the Harter Act initially had little impact abroad. At the beginning of the 20th century, only three countries followed the model proposed by the act: Australia (1904), New Zealand (1908) and Canada (1910).<sup>454</sup> With England still the major shipping nation, the situation did not change much. The Act faced a problem of international private law: although the negligence clauses were not enforceable in the United States, they were still so in England, where the act had no major validity.<sup>455</sup> Bills of lading governed by English law, containing negligence clauses, were accepted and enforced by the courts, regardless of the “the American principle of public policy against unreasonable conditions.”<sup>456</sup> The English courts interpreted “the Harter Act clauses” included in the American bills of lading, with no further relevance over the other clauses on them stated, and continued the full recognition of the unlimited freedom of contract.<sup>457</sup> Even in cases where not negligence clause was stated in the contract, but the Harter Act applied, the English courts continued to recognize warranty of

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<sup>450</sup>Harter Act of 1893 at 46 U.S.C. §§190–191.

<sup>451</sup>In the *Martin v. Southwark* 191 U.S. 1, 24 S.Ct. 1, at 2 or 7: “Section 3 must be read with §2 to effectuate the purpose of the act, and shows an intention upon the part of Congress to relax, in certain respects, the harshness of the previous rules of obligation upon shipowners...”.

<sup>452</sup>Knauth, 122.

<sup>453</sup>*Ibid.*, 122.

<sup>454</sup>*Ibid.*, 122.

<sup>455</sup>Colinvaux, 4.

<sup>456</sup>*Ibid.*, 4. See *RE Missouri S.S. Co.* (1889) 42 Ch. D. 321; *Jones v. Oceanic S.N. Co.* [1924] 2 K. B. 730.

<sup>457</sup>Knauth, at 122: “The situation in England, where much of the damage litigation naturally centered because the preponderant marine insurance and ship-owning interest, did not, however, develop in a manner equally satisfactory to the owners and underwriters of cargo.”

seaworthiness as absolute.<sup>458</sup> Nevertheless, the Harter Act formula was the model used in further attempts for international unification, which concluded in the adoption of the Hague Rules.

### ***2.1.4 International Regulations for the Carriage of Goods by Sea***

#### **2.1.4.1 The Hague Rules—1924**

##### **2.1.4.1.1 History of Its Adoption**

By the end of the 19th century, Great Britain was doubtless a commercial and colonial empire and the dominant power of the sea.<sup>459</sup> In 1897, the British Register listed 2453 sailing vessels of over 100 tons, and 6665 steamships over 100 tons, which, together with other vessels, and vessels owned in British colonies, meant that Britain alone owned just over a half of the world's tonnage, measured in that year at 26.5 million grt.<sup>460</sup> At the beginning of the 20th century shipowners were still politically powerful in the British Empire, but the cargo interest remained more influential in the United States, Canada, Australia and New Zealand, where legislation favoring cargo owners were enacted.<sup>461</sup> Notwithstanding, such legislation did not have widespread international impact as it only regulated the domestic and outbound bills of lading. Importers were still subject to bills of lading issued in countries that continued favoring carriers,<sup>462</sup> particularly in England, where such foreign legislation had no major impact.<sup>463</sup> The cargo interests of the overseas British dominions pressed the Imperial Government for regulation on the subject.<sup>464</sup>

Given the success of the rules on Collision and Salvage adopted in 1910 by the Comité Maritime International, there were also discussions on risk allocation for the

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<sup>458</sup>In *McFadden v. Blue Star Line* (1905) 1 K.B. 697, Judge Chanell said at 706–707: “Therefore, it seems to me that I must hold that the defect was a substantial one, and that as it existed before and at the time of the loading of the goods it amounted to a breach of the warranty, unless the incorporation of the Harter Act in the bill of lading makes any difference. Then does the incorporation of that Act make any difference? For the purposes of this question I will assume that there was no negligence in the packing of the valve-chest, though I do not decide that point one way or the other. Is the absence of negligence material? In other words, does the incorporation of the Harter Act have the effect of cutting down the absolute warranty of fitness to an undertaking to exercise due diligence to make the ship fit? In my opinion it does not.”

<sup>459</sup>Gold, 96.

<sup>460</sup>*Ibid.*, 96. See Zimmerman, E. W., *Ocean Shipping*, New York: Prentice-Hall, 1922, 220 ff.

<sup>461</sup>Sturley, *The History of COGSA*..., 18.

<sup>462</sup>*Ibid.*, 18.

<sup>463</sup>Frederick, 85.

<sup>464</sup>Sturley, *The History of COGSA*..., 19.

carriage of goods by sea under bills of lading. These discussions were suspended at the outbreak of the First World War (1914–1918). During the war, commercial progress experienced a decline.<sup>465</sup> The shipping industry was severally affected by the submarine warfare, blockades and nationalizations.<sup>466</sup> The power of the British Empire, though victorious, was diminished, and the British carriers suffered a weakened financial situation that pushed them to make certain concessions.<sup>467</sup> On the other side, the lack of tonnage in ocean shipping pushed the US government to reconsider their position on defending cargo interests.<sup>468</sup> There was a need to make the shipping business more attractive for private investors and increase tonnage.

Still at the beginning of the 1920s, the British shipowners owned the largest merchant fleet of the world and consequently, lead a very influential lobby.<sup>469</sup> They were very powerful in the Parliament<sup>470</sup> and had a strong influence also in the judiciary system.<sup>471</sup> They radically refused to change their 19th century policy of averting Parliamentary interference in the practices they developed under the principle of contractual freedom.<sup>472</sup> As aforementioned, since the 19th century they had interpreted this principle as “freedom for powerful carriers” to impose terms on the commercially disadvantaged shippers.<sup>473</sup> But by this time, it was recognized that such practices were not really concordant to the concept of freedom of contract, as the shipowners dictated unilaterally all the conditions of the bill of lading.<sup>474</sup> Shipowners continued to impose unilaterally these clauses, without any possibility for negotiation by the part of shippers, who were practically obliged to take it or leave it.<sup>475</sup> Shippers complained, arguing over the high insurance premiums they had to pay because of the carrier’s immunities, as well as that the inflated premiums for bearing the risk of carrier negligence.<sup>476</sup> However, until the 1920s, neither the

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<sup>465</sup>Knauth, 124.

<sup>466</sup>J. C. Sweeney, ‘The UNCITRAL Draft Convention on Carriage of Good by Sea (Part I)’ (1975–1976) 7, *Journal of Maritime Law and Commerce*, 69–125, 71.

<sup>467</sup>Frederick, 86, 107. This situation was used by the cargo owners of Canada, Australia and New Zealand “to press for equity in commercial maritime transactions.”

<sup>468</sup>Basedow, 41.

<sup>469</sup>A. Q. Diamond, ‘The Hague-Visby Rules’ ([1978]) 2, *Lloyd’s Maritime and Commercial Law Quarterly*, 225–66, 227.

<sup>470</sup>Knauth, 120.

<sup>471</sup>Frederick, 85.

<sup>472</sup>Diamond, 227; Frederick, at 90: Sir Norman Hill who represented the Liverpool Steamshipowners Association and was the leader spokesman during various of the discussions that preceded the HR, expressed “his personal conviction” that the ‘mutual rights [of the parties] to make their bargains without legislative interference’ served the best interest of all.” See Report of the Thirtieth Conference of the International Law Association at xxxix, reprinted in *The Legislative History...*, Vol. 1, 94.

<sup>473</sup>Clarke, 3.

<sup>474</sup>Diamond, at 227: “The only freedom of the shipper was to take the bill of lading or to leave it. And in view of the Conference system even the latter freedom was often illusory”.

<sup>475</sup>*Ibid.*, 227.

<sup>476</sup>Clarke, 4. *citing* Markianos, 22–23, Cole, 11, Guyon no. 5.

English Parliament nor the judges attended to those complaints.<sup>477</sup> Another reason that contributed to the debate was the creation of the CIF and CF terms in the contract of sales of goods. Such terms required the endorsee of the bill of lading to absolutely bear the consequences of the bill of lading clauses without having any previous opportunity to negotiate them, because they were simply accepted by, or imposed on the shipper.<sup>478</sup> Over this point, a new lobby was created integrating insurers and bankers to support shippers.<sup>479</sup> This lobby introduced into the debate their concern for keeping and assuring the value of the bills of lading as commercial documents.<sup>480</sup>

In 1921, due in part to the aforementioned events, the Imperial Shipping Committee issued a recommendation for the unification of laws in the British dominions, based primarily on the Canadian Water Carriage of Goods Act of 1910, to be then introduced also in the British legislation.<sup>481</sup> The British government led the unification of laws through the revival of the work of the International Law Association. Shipowners came to support the idea of a uniform international regulation. They preferred to have the same regulation worldwide, rather than facing different national laws in every port of call.<sup>482</sup> But the interest of the United Kingdom government was not limited to a unified regulation for the territories that composed the British Empire. Additionally, they sought such regulation “that British shipowners would not be at a disadvantage as compared with those of the rest of the world.”<sup>483</sup> Diamond even affirms that it was the main objective of the British Government to get involved in the discussion for the enactment of an international convention on the subject.<sup>484</sup> In fact, carriers claimed that the enactment of domestic regulation enforcing higher liabilities on them would require an increase of freights, and this would force shippers to turn to foreign carriers to save freight costs.<sup>485</sup> That is why carriers were only willing to accept an international regulation, one which would level the playing field.<sup>486</sup>

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<sup>477</sup>Knauth, 120; Frederick., 83. See Report of the Thirtieth Conference of the International Law Association, 52–53, reprinted in *The Legislative History...*, Vol. 1, 158–159.

<sup>478</sup>Diamond, 227.

<sup>479</sup>Clarke, 4.

<sup>480</sup>*Ibid.*, 4.

<sup>481</sup>Sturley, *The History of COGSA...*, 19.

<sup>482</sup>*Ibid.*, 19.

<sup>483</sup>Colinvaux, 7; Diamond, 227.

<sup>484</sup>Diamond, at 227: “It was this later objective which motivated the attempts made by the British Government both through the International Law Association and at a diplomatic level to secure an international treaty whereby as many contracting States as possible would bind themselves to introduce uniform legislation acceptable to all of them. It was the judgment of many people in the mid-1950s that, in securing the Brussels Convention of 1924, the U.K. Government had managed to combine self-interest with the implementation of the greatest good for the greatest number.”

<sup>485</sup>Clarke, 4.

<sup>486</sup>*Ibid.*, 4.

The discussions were reassumed in 1921 by the Maritime Law Committee of the International Law Association, which held a conference in London in May of that year. There, a set of rules was proposed following the same model of the Canadian Water Carriage of Goods Act of 1910 and the Harter Act. In October 1922, the Comité Maritime International, during its conference in London, reviewed the topic adopting some changes and proposed the final set of rules for the adoption at a diplomatic conference.<sup>487</sup> The fifth Diplomatic Conference on Maritime Law took place in Brussels that same year, and the rules were discussed but not formally adopted. In 1923, an additional meeting took place of the subcommittee of Bills of Lading of the Diplomatic Conference and further discussions were held to clarify the text adopted the year before. In all these pre-Brussels conferences it was expressly accepted that the delegates there did not represent countries, but economic interests.<sup>488</sup> These delegates, representing the interests of the key sectors of the maritime shipping industry, and producing rules according to their economic needs, facilitated the decision making process to reach an agreement.<sup>489</sup> The formal adoption of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading came finally on the 25th of August, 1924, when the document was opened for its signature,<sup>490</sup> coming into effect the 2nd of June, 1931.<sup>491</sup> In the end, it was a “compromise invoking some new laws” to reach a consensual agreement between the different interests of carriers and shippers of that specific time,<sup>492</sup> a kind of *Lex Mercatoria* at the dawn of the twentieth century.

#### 2.1.4.1.2 Scope of Application

The scope of application of the Rules is set out in Article 10 of the Convention. With a very short and concise statement, the Convention establishes that the rules apply to every bill of lading issued in any of the contracting States. The carriage of goods, according to Article 1, paragraph (e), comprises the period that runs from “the time when the goods are loaded on to the time they are discharged from the ship”. It is the period called “tackle to tackle”.

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<sup>487</sup>Sturley, *The History of COGSA*..., 30.

<sup>488</sup>Frederick, 88.

<sup>489</sup>*Ibid.*, 93. The chairman of the 1921 Hague meeting, Sir Henry Duke said on this regards: “In any Convention in which nations were represented they would vote by nations. We represent interests. In any context or in any discussion in which they were represented they would express their views by interests. But the usage of the Association, as I have learned, and the usage of the Committee is, that the votes are given by individuals.” See Hague Conference Report at 9, reprinted in 1 *Legislative History*, at. 115.

<sup>490</sup>Sturley, *The History of COGSA*..., 31–32.

<sup>491</sup>Karan, 27. See CMI Yearbook (1992), 40.

<sup>492</sup>Tetley, *Interpretation and Construction*..., 37.

### 2.1.4.1.3 The Standard of Liability

It is clear that under the previous strict standard, the carriers had an absolute obligation to restore the goods carried. The obligation implied a warranty to provide an absolutely seaworthy ship to assure such a result; but in reality, under that standard, whether the carrier fulfilled this duty or not, was irrelevant. Doubtless, it is a fundamental part of it for the efficacy of the contract, but seaworthiness was obviously not the end in itself of the contract, but just a part of it.<sup>493</sup> The carriers were obliged to restore the goods in every case, or to compensate the cargo owner if they were damaged or lost, whatever the cause of damage or loss was, and unseaworthiness may have been only one cause. A breach of this warranty created liability not for the want of seaworthiness in itself, but only if that was the case of the carrier's failure to restore the goods in proper condition.<sup>494</sup>

But as the carriers began using numerous contractual exceptions of liability, the original and basic contractual undertaking was weakening. Then, the concept of seaworthiness became more relevant. The courts tried to keep the essence of the contract by dividing the absolute obligation to deliver safely into specific and essential duties.<sup>495</sup> If those duties were duly accomplished, the result should be the same; it means the cargo should arrive in proper condition at destination. The courts then defined two main obligations or duties. The first was the duty to provide a seaworthy ship, ensuring thus a minimum level of protection to the cargo from external perils similar to the level provided by the absolute standard.<sup>496</sup> The second duty was to exercise care and skill in the stowage and carriage of the cargo. As pointed before, these duties were not new. They were already established in the historical sources of maritime law to which we referred above. The carrier was not supposed to exclude his liability for the lack of fulfilment of these duties, and for this reason they were categorized as overriding duties.<sup>497</sup> With this distinction of specific and fundamental duties, the courts prompted a redefinition of the basis for liability.<sup>498</sup> This was the formula originally proposed in the "Conference form", discussed in the International Law Association in their meeting of Liverpool of 1882. As aforementioned, it was also later included in the US Harter Act of 1893. The difference was that the first duty, to provide a seaworthy ship, was not kept in its absoluteness, but reduced to a practice of due diligence to make the ship seaworthy.

The redactors of the HR took into account the duties defined previously by the courts, which in turn, came from the older legal bodies of maritime law, but as appeared in the Harter Act. To set a statutory prohibition of the negligence clauses,

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<sup>493</sup>Clarke, at 124: "The warranty was, in fact, superfluous as Ripert observes."

<sup>494</sup>*Ibid.*, 124.

<sup>495</sup>*Ibid.*, 124. See *Propeller Niagara v. Cordes* (1858) 62 U.S. (21 How) 7, 23.

<sup>496</sup>*Ibid.*, 125. See *Steel v. State Line* (1877) 3 App. Cas. 72, 76.

<sup>497</sup>*Ibid.*, 124.

<sup>498</sup>*Ibid.*, 124.

the HR lawmakers replaced the old absolute standard of liability historically applied to common carriers, for an intermediate formula that fulfilled the interests of the negotiating parties. This intermediate formula was: first, the establishment of a minimum of liability based on the negligence incurred by the carrier in the fulfillment of the two aforementioned basic duties; and, second, releasing the carrier for damages caused by fault or negligence in the navigation and management of the vessel, while still holding those liable for want of care of the goods.<sup>499</sup> The minimum duties that the carrier must perform are set in the Article III as follow:

Article III.

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to –

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provision of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

...

The provision stated in the first section obliges the carrier to take, adopt and develop preparatory measures to make the ship capable to accomplish successfully the contracted carriage, specifying three main areas of concern:

- The physical condition of the vessel itself;
- The quality, quantity and capability of the crew and the equipment; and,
- The cargo worthiness of the vessel.<sup>500</sup>

Carriers are liable for cargo damages or losses only if they cannot prove that they have exercised due diligence before and at the beginning of the voyage; unless, of course, they warranted a seaworthy vessel.<sup>501</sup> Thus, if the cargo damage or loss occurs because a pre-existing unseaworthy condition in the vessel not discoverable by practicing a reasonable degree of due diligence; or, if the unseaworthiness condition appeared after the beginning of the voyage, the carriers are totally released from liability.<sup>502</sup>

The second provision does not orders expressly to practice due diligence. It states, instead, an obligation of care related to the direct handling of the cargo, from

<sup>499</sup>M. F. Sturley, T. Fujita and G. J. d. van Ziel, *The Rotterdam rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (London: Sweet & Maxwell, 2010), 78.

<sup>500</sup>Wilson, 187.

<sup>501</sup>R. Force, 'A comparison of the Hague, Hague-Visby and the Hamburg Rules: Much Ado About (?)' (1996) 70, *Tulane Law Review*, 2051–89, 2061.

<sup>502</sup>*Ibid.*, 2061.



the moment of its loading until its discharge. Notwithstanding, the concept of due diligence has been held as equivalent to that of due care and used as synonyms.

A third duty expected from the carrier is the proper and careful navigation and management of the ship during the voyage. But the impossibility in that time of the shipowners to control the decisions and actions of the master, crewmembers and others servants once the ship had left the port, was considered a good argument to exonerate them from liability, when errors of navigation were the cause of damage or loss. An exception of liability in this regard was stated in the Convention.<sup>503</sup> With this exception, 16 other events were also established in a detailed list of defenses to exclude their liability.<sup>504</sup> This long catalog of exceptions of liability listed in Article 4.2 contains many of the exceptions that the British shipowners had commonly inserted in the British liner bill of lading.<sup>505</sup> They can be grouped in natural incidents, acts of third parties, acts of the cargo owner or inherent defects of the goods and certain reasonable acts of the shipowners or his employees.<sup>506</sup> It has been said that it was the endeavor of the British carriers to keep, as much as possible, the liability system they created through the bills of lading.<sup>507</sup>

In addition, if the carrier was found liable for negligence, they could still limit their liability to a certain minimum amount, of the £100 originally stated, to the current 666.67 units of account per package or unit, or 2 units of account per kilogram, established in the 1979 S.D.R. Protocol.<sup>508</sup> Evident in all these provisions is the influence of lawyers representing the British shipowner's interests, which explains why the HR seems to be more focused on establishing the least amount of liability possible, as a counterpart to the prohibition of the negligence clauses.

#### 2.1.4.1.4 Consequences

##### (1) International Standardization

The Hague Rules were not enacted to be a general and thorough code for the regulation of maritime transportation under bills of lading.<sup>509</sup> They neither codified the previous or current laws of that time, but they are instead, a mix of civil and common law style statute, called by Tetley as a "codifying statute".<sup>510</sup> The

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<sup>503</sup>The HR, Article 4, paragraph 2, literal (a): "2. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, of the servants of the carrier in the navigation or in the management of the ship."

<sup>504</sup>Sweeney, 72; The HR, Article 4, paragraph 2.

<sup>505</sup>Diamond, 227.

<sup>506</sup>Billah, M. M., *Effects of insurance on maritime liability law: A legal and economic analysis* (Cham: Springer, 2014), 11.

<sup>507</sup>J. O. Honnold, 'Ocean Carriers and Cargo; Clarity and Fairness –Hague or Hamburg?' (1993) 24, *Journal of Maritime Law and Commerce*, 75–109, 101.

<sup>508</sup>The HR, Article 4, paragraph 5(a).

<sup>509</sup>Tetley, *Interpretation and Construction...*, 37.

<sup>510</sup>*Ibid.*, 37.

Convention mostly attempted to unify certain rules relating to the transport by sea under bills of lading as its title states.<sup>511</sup> In fact, the HR became the first statutory instrument of international standardization of rules to govern the carriage of goods by sea under bills of lading.<sup>512</sup> Several cases reported the intention of standardization of the Hague Rules. One of them was *The Muncaster Castle* (1961) where Viscount Simonds stated that:

The Hague Rules, as is well known, were the result of the Conference on Maritime Law held at Brussels in 1922 and 1923. Their aim was broadly to standardize within certain limits the rights of every holder of a bill of lading against the shipowner, prescribing an irreducible minimum of the responsibilities and liabilities to be undertaken by the latter.<sup>513</sup>

On a first assessment, it would be said that this purpose was mainly achieved, as these rules have been widely ratified or accessed and applied in the shipping industry to the present. Most of the courts in the world, when dealing with cargo claims, are deciding them according to the rights and duties of the parties established in the HR. This international standardization is without any doubt very positive result. Notwithstanding, the success of this unification has been challenged. Professor Sturley, in a comparative study of the national interpretation of the rules, comes to state that the HR are an “extreme case of international disharmony.”<sup>514</sup>

## (2) Compromise for a Fairer Balance

The second objective of the HR was the statutory prohibition of insertion of negligence clauses. They tried to create a fairer balance between the obligations and risks to be assumed by carriers and cargo owners,<sup>515</sup> by restricting carriers from excluding contractually liability for their own negligence; while, at the same time, replacing statutorily the traditional common law strict liability standard, for a minimum of liabilities.<sup>516</sup> Lord Steyn exposed this purpose in *Effort Shipping Co. Ltd. v. Linden Management, S.A.* (1998):

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<sup>511</sup>Wilson, 187.

<sup>512</sup>Karan, 27.

<sup>513</sup>[1961] AC 807 at 836, [1961] 1 Lloyd's Rep. 57 at, 67. In the United States *See also The Asturias* 40 F. Supp. 168, 169, 1941 A.M.C. 761, 762 (S.D.N.Y. 1941): “The purpose of the Act is to create international uniformity”; *Senator Linie GmbH v. Sunway Line, Inc.* 291 F.3d 145 at 158, 2002 A.M.C. 1217 at 1232 (2nd Cir. 2002): “One important aspect of the international agreement [The Brussels Convention 1924] and its United States counterpart [COGSA 1936] is the standardization of liability expectations.”, as quoted by Tetley, *Interpretation and Construction...*, 57–58.

<sup>514</sup>Honnold, 101; *See* Sturley, “International Uniform Laws in National Courts” 27 Va. J. Int'l L. 729, 774–796 (1987).

<sup>515</sup>Frederick, 96.

<sup>516</sup>Diamond, Anthony QC. “Responsibility for Loss of, or Damage to, Cargo on a Sea Transit: the Hague or Hamburg Convention?” in P. S. K. Koh, *Carriage of goods by sea* (Singapore: Butterworths, 1986), 110.

This much we know about the broad objective of the Hague Rules: it was intended to reign in the unbridled freedom of contract of owners to impose terms which were 'so unreasonable and unjust in their terms as to exempt from almost every conceivable risk and responsibility'; it aimed to achieve this by a pragmatic compromise between interests of owners and shippers; and the Hague Rules were designed to achieve a part harmonization on the diverse laws of trading nations at least in the areas which the Convention covered.<sup>517</sup>

The abolition of the negligence clauses was reached through a "pragmatic compromise", as described by Lord Steyn, attempting to reach a fairer balance between the parties. American jurisprudence has reported also this intention in *Encyclopedia Britannica v. Hong Kong Producer* (1969):

The purpose behind Harter, the Hague Rules and COGSA were to achieve a fair balancing of the interest of the carrier, on the one hand, and the shipper, on the other, and also to effectuate a standard and uniform set of provisions for ocean bills of lading.<sup>518</sup>

On this objective, it must be said that the Convention also succeeded.<sup>519</sup> The rules expressly prohibit clauses exonerating the carriers of liability, or reducing their duties in the performance of the contract. Article 3.8 states the express prohibition of clauses releasing or diminishing the carrier's liabilities set in the Convention:

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligation provided in this article or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

Certainly, the "pragmatic compromise" reflected in the Convention sets a balance,<sup>520</sup> or, better said, a more or less balanced distribution of risks between the shippers and carriers.<sup>521</sup> Such balance, however, may be considered fair, only when it is compared to the former practices based on the unrestricted freedom of contract. Doubtless, a minimum of liability is by far better than no liability at all. But this compromise required shippers to make greater concessions. Under the liability formula stated, if the ship is unseaworthy the carrier will be exonerated simply by proving that he practiced due diligence in making her seaworthy before and at the beginning of the voyage. Such a minimum requirement on the part of the carrier

<sup>517</sup>[1998] AC 605 at 621, [1998] 1 Lloyd's Rep. 337, 346, 1998 A.M.C. 1050 at 1065 (HL), as quoted by Tetley, *Interpretation and Construction*..., 62.

<sup>518</sup>422 F.2d. 7, 11, 1969 A.M.C. 1741, 1746(2nd Cir. 1969), [1969] 2 Lloyd's Rep. 536, cert. denied, 397 US 964, 1971 A.M.C. 813 (1970), as quoted by Tetley, *Interpretation and Construction*..., 63. See also *Senator Linie GmbH v. Sunway Line, Inc.*, see *supra* note 513, at 158: "In essence, the purpose of these laws is to allow international maritime actors to operate with greater efficiency under a mantle of fairness."

<sup>519</sup>Diamond, 226, 231–232.

<sup>520</sup>Karan, 27; Tetley, *Interpretation and Construction*..., 62.

<sup>521</sup>Diamond, 226.

means the shipper must bear a higher burden of risk, when his cargo is exposed to danger out of his radius of action, and more in the sphere which only the carrier can properly organize and control.<sup>522</sup> It is clear that shippers will have fewer chances to exercise the control that the carriers have over the vessel's seaworthiness as well as the cargo care during the time it is under the custody of the carrier. This situation is not commonly seen in other types of contracts.

This compromise between carriers and shippers to reach a fairer balance has been suggested by Tetley to be regarded as a principle to orientate the interpretation and construction of the Hague Rules.<sup>523</sup> Paradoxically, in spite of the criticized imbalance disfavoring cargo owners, in the cases referred by the same author, where this "principle of fair balance" has been invoked by some American judges, it has operated against the shippers.<sup>524</sup>

For these and other reasons, the Convention has been criticized as favoring too much the shipowners, who enjoyed strong support from the United Kingdom in the discussions in Brussels.<sup>525</sup> Specifically on the allocation of risks, plus the limitation of liability rules, it is evident that it was tipped in favor of carrier's interests.<sup>526</sup> This criticism of the unfair imbalance was reported in 1971 by Secretariat of the UNCTAD on Bill of lading.<sup>527</sup> In this report, it was affirmed that due to specific provisions and omissions, the shipowners had *excessive* legal opportunities to elude liability for cargo damages or losses.<sup>528</sup> Others criticized that the low degree of liability assigned to carriers for negligent cargo loss had the added effect of discouraging them to make more investments on safe carriage.<sup>529</sup>

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<sup>522</sup>Zimmermann, 521.

<sup>523</sup>Tetley, *Interpretation and Construction*..., 62.

<sup>524</sup>*Ibid.*, 62. quoting *Senator Linie GmbH v. Sunway Line, Inc.* See *supra* note 513. It is about the liability for dangerous goods, and *Caemint Food v. Lloyd's Brasileiro* 647 F. 2d 347, 1981 A.M.C. 1801 (2nd Cir. 1981), on defective packages.

<sup>525</sup>Diamond, at 227: "It was the judgment of many people in the mid-1950s that, in securing the Brussels Convention of 1924, the U.K. Government had managed to combine self-interest with the implementation of the greatest good for the greatest number. The Convention seemed, on the one hand, a diplomatic coup of the first order; on the other hand, the beneficial instrument which had finally brought about the desirable aim of the standardization of bill of lading clauses."

<sup>526</sup>Sweeney, 74. It was even part of the developed countries objections. Such balance in favor of shipowners "must necessarily have affected the cost of insurance, although no compensation is given by way of lower rates for shippers."

<sup>527</sup>UNCTAD, *Bills of Lading: Report by the Secretariat of UNCTAD* (1971).

<sup>528</sup>*Ibid.*, 18, at para. 80: "In part, this arises from the fact that through both specific provisions and omissions, the Hague Rules provide what appears to be an excessive number of opportunities for the shipowner to avoid, legally, liability for loss of cargo and so to reject the claim made by the cargo owner."

<sup>529</sup>Honnold, 107. See Kindred, at 613–614; O'Hare, *Allocating Risk*, 143–144, 152. Hellawel at 363–365; M. F. Sturley, 'Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence' (1993) 24, *Journal of Maritime Law and Commerce*, 119–49.

### (3) Lack of Clarity

In addition, a more global defect pointed out in the HR is its lack of clarity in many aspects. The reason for this lack of clarity is mainly attributed to a specific fact: to reach an agreement between opposite political and commercial interests, “clarity and consistence of purpose” were, to a considerable extent, sacrificed.<sup>530</sup> Indeed, it is said that the draftsmen of the Convention were more motivated, or perhaps, limited, by the political and commercial interests they represented, that they were more concerned in the economic implications of the rules, than in the language itself.<sup>531</sup> The language of the Convention was conditioned to what the draftsmen were able to concede in order to reach a satisfactory agreement for both parties. Consequently, it seems they preferred wider concepts and imprecise terminology that allow or require further constructions by the courts. The result was an ambiguous Convention that left many aspects undefined and subject to constant confusions.<sup>532</sup> Hence, the rules have been criticized for being poorly drafted<sup>533</sup>; or that they “do not meet the most elementary standards of legal technique, readability and good statutory language.”<sup>534</sup>

Although Diamond argues the HR has not raised many problems of interpretation<sup>535</sup>; that is possible to be affirmed only after some decades of vast litigation on the subject and many courts constructions. The reality is that the concept of practicing due diligence can be so vague, wide and imprecise that many controversies on the subject have frequently required litigation. Such ambiguities in the language, plus its incapacity to anticipate the advances made through technology have driven carriers and shippers to long and expensive litigation or arbitration to resolve disputes.<sup>536</sup> These shortcomings and particularly the failure to anticipate economic and technological changes have been pointed out as the most problematic

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<sup>530</sup>Diamond, 228.

<sup>531</sup>Frederick, 104. Indeed, something that has been noticed by some authors is the great influence of English shipowners in the adoption of this Convention. Diamond reported the concern of the British Government in defending the carriers' interests during the negotiations, *See supra* note 575; Knauth pointed out the influence of the British shipowner in the British Parliament, *See supra* note 561.

<sup>532</sup>Colinvaux, at v, commenting on the incorporation of the HR language into the English COGSA of 1924, he criticizes its ambiguity as follow: “No document gives more scope for ingenuity in its interpretation than a statute which attempts to incorporate into English law the terms of an International Convention. A well drafted enactment like the Sale of Goods Act, 1893, has the effect of crystallizing the law within a few decades; one such as the Carriage of Goods by Sea Act, 1924 puts it into confusion indefinitely. Now, nearly thirty years later, every month sees some new and insoluble problem arising under it.”

<sup>533</sup>Honnold, 101. *See* Gröforns, *The Hamburg Rules* 1978 J. Bus. L. 334, 335.

<sup>534</sup>*Ibid.*, 101. Quoting a Norwegian Ministry of Justice. *See* Selvig, *The Hamburg Rules, the Hague Rules and Maritime Insurance Practice*, 12 J. Mar. L. & Com. 299, 302 (1981).

<sup>535</sup>Diamond, 228.

<sup>536</sup>Frederick, 99. *See* Andreani, Revision of the Hague Rules, Activities of UNCTAD and UNCITRAL and Developing Countries, in *Studies on the Revision of the Brussels Convention on Bills of lading* (F. Berlingeri ed. 1974), 45.

issues that have prompted further attempts for new legislation.<sup>537</sup> Practicing due diligence in making a ship seaworthy is such a complex task, that the issue must be submitted most of the time to judges to determine whether carriers were diligent or not. Therefore, it has required large amounts of litigation to clarify, through court decisions, the many ambiguities contained in this Convention.

These uncertainties generate conflicting results mostly in favor of the carriers, who have taken advantage of them “to delay or defeat claims through tenuous legal technicalities.”<sup>538</sup> Due to the jurisdiction clauses that the British carriers continued inserting in their bills of lading, such construction had to be provided by the English Courts, where most of the cargo claims were supposed to be filed.<sup>539</sup> The Convention did not regulate on jurisdiction clauses.

But this is not the only economic consequence of its lack of clarity. In addition, the uncertainties of the Convention relating to some “ill-defined risks” created the need for both, the owner of goods as well as the carriers, to buy insurance against those risks.<sup>540</sup> The legal uncertainty of the rules, as in any other regulation, is recognized as wasteful, responsible for the increase of cost in the delay of settlements and payments of costly legal services, double insurance to cover the same risks and “unnecessary casualty losses when immunity is given to the only party who could guard against those losses.”<sup>541</sup>

Despite the criticism to its imbalance, its ambiguity and the obsolescence of its provisions to regulate the new issues of the shipping industry, the HR continue to be the governing regime for the contract of carriage of goods by sea under bills of lading.

#### 2.1.4.1.5 Amendments

The need for an update of the HR has resulted from the demands of a growing global market and technological advances, both of which have created major changes in the industry. Decades after the adoption of the HR, the interpretations and constructions made in court decisions were not enough to fulfill this need. The results were the adoption of two protocols amending some few and very specific provisions of the original Convention.

##### (1) The Visby Amendment—The Brussels Protocol of 1968

The shortcomings of the original convention became more notorious by the middle of the 20th century. Diamond reports that during the period previous to the adoption of the Visby Protocol, between 1955 and 1963, the HR experienced the greatest

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<sup>537</sup>Frederick, 105.

<sup>538</sup>Honnold, 101.

<sup>539</sup>Frederick, 85. This author reports that the influence of British Shipowners existed even in the English judiciary.

<sup>540</sup>Frederick, 99.

<sup>541</sup>Honnold, 107.

success.<sup>542</sup> He pointed out that the number of accessions to or ratification of the Convention rose from 17 to a total of 27, and that the number of cases was relatively low.<sup>543</sup> However, in the middle of the 1950s businessmen and lawyers of major maritime member States of the Convention pushed for reforms.<sup>544</sup> This prompted further discussions in the *Comité Maritime International* (CMI) to pursue an update of the rules as a response to many questions arisen due to the vague and incomplete language of the HR. The result of those discussions was the Brussels Protocol of Amendments to the HR, adopted in a Diplomatic Conference on the 23rd of February 1968.<sup>545</sup> One of the main changes introduced was regarding the scope of application of the rules, which was modified by the introduction of a new Article X. Originally, the rules applied exclusively to every bill of lading issued in a contracting party. Now, they also apply in two more situations: (1) when the carriage departs from a port in the contracting State; and, (2) when the contract contained or evidenced in the bill of lading provides that the rules of the Convention or the legislation of a state party applies to the carriage. This new article also clarifies that the application of the rules in the cases listed is regardless of the nationality of the ship, the parties, or any interested person.<sup>546</sup>

One of the controversial proposals presented by the British delegation intended to overrule the construction made in the famous case *The Muncaster Castle*.<sup>547</sup> The court held the carrier liable for the negligence in making the ship seaworthy when this duty was carried out by their subcontractors, or the subcontractor's servants. This decision established the non delegability of the obligation. Such a proposal, however, did not garner international support and was not incorporated into the protocol.<sup>548</sup>

The Visby amendment decreased some carrier's responsibilities<sup>549</sup> and increased others, especially in terms of the limitation of liability. The balance established in the HR was updated here "with a slight list towards shippers".<sup>550</sup> However, the amendments did not affect Article 3, sections 1 and 2 of the original Convention. It did not affect directly nor substantially the original carrier's duties established in

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<sup>542</sup>Diamond, 232.

<sup>543</sup>Ibid., at 232: "The greatest test cases on the Rules had mostly been determined and were seen to be very few in number, as compared with the great volumes of cargo claims where the Rules could be satisfactorily applied without the need for litigation."

<sup>544</sup>Frederick, 94.

<sup>545</sup>Sweeney, 73. Since 1959 the amendment to the rules were discussed in the Plenary Conference of the CMI in Rijeka. The process took 4 year of discussion until the adoption of the final draft in the CMI conference of 1967 in Stockholm.

<sup>546</sup>The Visby Protocol Article V(b) and (c).

<sup>547</sup>[1961] A.C. 807, [1961] 1 Lloyd's Rep. 57; Diamond, 231.

<sup>548</sup>Ibid., 231.

<sup>549</sup>It expands the time bar limitation of one year for claims based in deviation, fraud or fundamental breach; the total amount to be recoverable is based in the value of the goods in the port of destination; extension of the carrier's rights to agent and servants, etc.

<sup>550</sup>Tetley, *Interpretation and Construction...*, 62.

those provisions. The original Hague Rules with the amendments made by this protocol are observed as a second regime known as the Hague-Visby Rules. Some 28 States, including The United Kingdom and its Overseas Territories, have ratified this amendment.<sup>551</sup> Though intended as an attempt to update the HR, this amendment did not introduce the necessary changes required by the new global economy even at the time of its enactment. As a consequence, it was later required the adoption of the Hamburg Rules.<sup>552</sup>

## (2) The S.D.R. Protocol—The Brussels Protocol of 1979

By 1979, another amendment was introduced to the Convention. This time, the currency used to calculate the limitation of liability was changed. The former Visby protocol established a limitation of liability to be estimated in French Francs. The new protocol changed this to “units of account”, establishing a general limitation of liability to 666.67 units of account per package or unit or 2 units of account per kilogram of gross weight of the goods lost or damaged. Each units of account is calculated using the Special Drawing Right, a value set by the International Monetary Fund and exchangeable with any national currency on which the cargo is valued. Once again, the carriers obligations regarding the ship and the cargo stated in Article 3 remained intact. The protocol has been ratified or accessed by some 24 States.<sup>553</sup>

### 2.1.4.2 The Hamburg Rules—1978

#### 2.1.4.2.1 Adoption and Generalities

As a consequence of the fast growth in international trade, the shortcomings of the Hague/Hague-Visby Rules came to be more obvious during the second part of the 20th century. The rules were (are) not suitable for the new realities of a modern carriage of goods. This has prompted the necessity to introduce the amendments that we briefly mentioned above. As those amendments did not go far enough, by 1970, a new movement pursued further regulation on the matter through the discussion of a totally new convention.<sup>554</sup> One of the matters of concern on the HR reported by the Secretariat of the UNCTAD in 1971 was precisely the uncertainty created in the interpretation of the terms “due diligence” and “properly and carefully”, among others.<sup>555</sup> In addition to the language problems of the HR, criticism was further raised on the incapacity of those rules to “anticipate economic and

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<sup>551</sup>CMI Yearbook 2013, 605–606. Including also the Special Administrative Region of Hong Kong.

<sup>552</sup>Tetley, *Interpretation and Construction...*, 62.

<sup>553</sup>CMI Yearbook 2013, 607.

<sup>554</sup>Diamond, 234.

<sup>555</sup>UNCTAD, *Bills of Lading: Report by the Secretariat...*, 17, para. 73 (d).



technological developments.”<sup>556</sup> By the 1960s, the use of containers was increasingly popular; the shipping industry already knew and applied steel ships powered by steam or oil, precise and complete marine charts, radio beams or satellite communication, and navigation aids such as radars or sonar, and weather stations at the carrier's offices.<sup>557</sup> An additional problem involved the conflictive exceptions of the governing regime over nautical fault, established far before the introduction of the aforementioned technological developments.<sup>558</sup> Such technological advances created doubts around the convenience and fairness of keeping this exception. New technological aids allow shipowners to have uninterrupted communication with the vessel while on the sea, and significantly reduce the associated risks of the operation.

Therefore, a process was lead pursuing the enactment of a more complete regulation for carriage of good by sea under bill of lading, and the adjoining liability rules. Some of the participants in the discussions went further to challenge the financial or economic aspect of the HR, demanding the allocation of much higher liabilities on shipowners.<sup>559</sup> A key role for the adoption of a new Convention was played by developing countries, which claimed participation in the creation of an international regime that at that time affected them in a higher extension.<sup>560</sup> The claims of the developing countries made the discussion, led by UNCITRAL, more politically oriented than economic or commercially oriented in contrast to the Hague Convention.<sup>561</sup> Governments, in general, had a much more active role in the drafting of this Convention, although their participation was sometime seen as an attempt to introduce “irrelevant, badly defined and often ill-informed notions of public interest into commercial affairs.”<sup>562</sup> Some bodies representing shipowners, shippers and underwriters expected from this Diplomatic Conference to merely put into legal terms their commercial agreements regarding the risks distribution between the parties involved in the maritime adventure.<sup>563</sup> Such an approach put aside that the carriage of goods by sea has an impact that goes beyond the mere interests of the parties involved. Therefore, governments were obliged to intervene also as a response to the frequent ill-conceived notions of freedom of contract implemented in the past.

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<sup>556</sup>Frederick, 105.

<sup>557</sup>Honnold, 78.

<sup>558</sup>Ibid., 78.

<sup>559</sup>Diamond, 234.

<sup>560</sup>Sweeney, at 73: “Dissatisfaction of the developing world stems essentially from the belief that the operation of traditional maritime law (along with other aspects of international trade law) impairs the balance of payments position of developing states so as to insure continued poverty and perpetual under-development in an industrial age.”; Diamond, at 234: “The Hague Rules, it was so said, were a device of the colonialist powers designed to impoverish the developing world.” See also UNCTAD, *Bills of Lading: Report by the Secretariat*..., 30 para. 172–175.

<sup>561</sup>Frederick, 117.

<sup>562</sup>Diamond, 232.

<sup>563</sup>Ibid., 232.

After almost ten years of discussion carried out by the UNCTAD and UNCITRAL, the United Nations Convention on the Carriage of Goods by Sea was adopted through a diplomatic conference held in Hamburg, Germany on the 30th of March in 1978.<sup>564</sup> It created a mandatory frame of liability for carriers based again on negligence, similar to that of the previous Brussels Convention.<sup>565</sup> Known as the Hamburg Rules, this Convention is a kind of “mini-code” with regulations not only covering the main “problem areas” addressed in the HR, but also a more extensive regulation for other issues surrounding the carriage of goods by sea.<sup>566</sup> The attempt was made in these rules to overcome some of the inconsistencies and ambiguities of the H/H-VR.<sup>567</sup> It came into force on the 1st of November of 1992, following the adherence of 20 States.<sup>568</sup>

#### 2.1.4.2.2 Scope of Application

This Convention, as well as the H-HVR applies exclusively for carriage of goods by sea under bills of lading. The scope of application is provided in Article 2(1). The rules apply to carriages performed: a) from port of loading; or b) to port of discharge; or c) to an optional port of discharge contractually agreed upon where discharge is actually performed; if they are located in one of the Contracting States. It also applies to, d) bill of ladings issued in one of those States; or, e) when the parties agree to the application of the rules or the legislation of any State giving effect to them and such an agreement is provided in the bill of lading or any other document evidencing the contract of carriage.

#### 2.1.4.2.3 Period of Responsibility

The period of responsibility for the carrier differs from the H/H-VR. While the former regime covers “from tackle to the tackle”<sup>569</sup>; the Hamburg rules provide a more extensive coverage. In the time when the HR was adopted, it was possible for shippers to deliver the cargo up to the side of the ship and the carrier could immediately upload it.<sup>570</sup> The same procedure happened at the port of discharge. But with the increase of international trade, ports became crowded and ships bigger; the shipper must consequently leave their cargo at the carrier’s warehouses until the

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<sup>564</sup>Honnold, 80.

<sup>565</sup>Koh, 116.

<sup>566</sup>Force, 2055.

<sup>567</sup>Wilson, 217.

<sup>568</sup>Honnold, 80.

<sup>569</sup>The HR Art.1(e) “Carriage of goods covers the period from the time when the goods are loaded on to the time they are discharge from the ship.”

<sup>570</sup>Honnold, 81.

vessel is ready for loading; the same happens to consignees who must wait until the cargo is ready to be delivered.<sup>571</sup> That can take many hours or even days, and these periods, as well as the time while in an intermediary port, are excluded from the “tackle to tackle” rule set out in the HR.<sup>572</sup> Because of this new situation, the goal of international unification was lost. Carriers were subject to the national laws of every port for these specific periods, when, typically, most of the losses from weather or theft occur.<sup>573</sup> The situation moved to the adoption of a more extensive rule. The period of responsibility of the carrier “covers the period during which the carrier is in charge of the goods at the port of loading during the carriage and at the port of discharge”.<sup>574</sup> This rule makes the carrier responsible for the entire period under which he has the custody of the goods, regardless of whether they are on board the vessel or not. It solves the problem in the determining of when “before or after” is, as set out in the H/H-VR.<sup>575</sup> The provision also mirrors the Harter Act which similarly establishes responsibility from the time the carrier receives the cargo until its delivery.<sup>576</sup> On this aspect, the introduction of a more extensive period of responsibility is doubtless very positive.<sup>577</sup>

#### 2.1.4.2.4 Liability Rule

The liability regime is stated in an affirmative rule of responsibility stated within Article 5.1, as follows:

The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage, or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

The rule is based on the principle of “presumed fault”.<sup>578</sup> It does not make any reference to an obligation to provide seaworthiness or any differentiation of the specific duties. They are implied in the rule as the general obligation is not to cause

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<sup>571</sup>Ibid., 82.

<sup>572</sup>Ibid., 82.

<sup>573</sup>Ibid., 81–82. See Kindred, From Hague to Hamburg: International Regulation for the Carriage of Goods by Sea, 7 *Dalhousie L.J.* 585, 595.

<sup>574</sup>The Hamburg Rules Art. 4.1.

<sup>575</sup>Wilson, 216.

<sup>576</sup>Force, 2059.

<sup>577</sup>Honnold, 83.

<sup>578</sup>The Annex II of the same Hamburg Rules clearly states 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. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.”

loss of or damage to cargo due to negligence.<sup>579</sup> The previous test of practicing due diligence in making the ship seaworthy before and at the beginning of the voyage and properly caring for the cargo is reduced to a uniform test of liability based on fault. This formula simplifies the long-standing problem of identifying the origin or character of the cause of damage or loss to assign liability.

Now, it is irrelevant whether the cause of damage or loss was due to lack of seaworthiness or want of care; both are judged under the same principle, regardless of when negligence occurred.<sup>580</sup> The carrier now has an obligation to exercise due diligence and care during the entire period when he is responsible for the goods.<sup>581</sup> Although it is not specifically expressed, because the carrier, as well as his servants, is under a duty to take all reasonable measures required to prevent the occurrence of damages or losses, this automatically obliges him to make and keep the ship seaworthy during the whole period of the voyage for each cargo concerned.<sup>582</sup> Hence, the carrier's obligation has increased. A new problem will be the interpretation by the courts of the expression "all measures that could reasonably be required to avoid the occurrence and its consequences", included in the last part of the transcribed article.<sup>583</sup> The ambiguousness of the term will certainly warrant more litigation.<sup>584</sup>

Another consequence of this presumed fault rule is the abolition of the list of exceptions contained in the Article 4.2 (d) to (q) of the Hague/Hague-Visby Rules. As none of them involves fault on the part of the carrier, it was not necessary to include them. Carriers, of course, can still allege these causes as such in trials.<sup>585</sup> Particularly clear is that the same principle stated in the exception contained in paragraph 4.2 (q) of the HR, requiring proof of the lack of negligence on the part of the carrier, remains in the Hamburg Rules.<sup>586</sup> However, the US courts ruled that in regards to the immunity set out in this paragraph of the HR, the carrier must prove not only the absence of his negligence, but also the cause of the damage, resulting in the fact that the Hamburg Rules may be more favorable to the carrier on this subject as they must prove only lack of negligence.<sup>587</sup>

One of the major differences introduced by these rules was the upholding of liability for error or negligence in navigation and management of the ship. The long discussion regarding the fairness of such an exception brought finally to its abolition in this Convention. The technological advances applied in navigation today render occurrences of real errors in navigations and management of the ship very

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<sup>579</sup>Force, 2063.

<sup>580</sup>Wilson, 217.

<sup>581</sup>Force, 2064.

<sup>582</sup>Tetley, *Marine Cargo Claims*, Vol. 1, 896.

<sup>583</sup>Wilson, 217.

<sup>584</sup>Frederick, 113. See Hellawell, Allocation Risk Between Cargo Owner and Carrier, 27 Am. J. Comp. L. 363 (1979).

<sup>585</sup>Force, 2066.

<sup>586</sup>Ibid., 2067.

<sup>587</sup>Ibid., 2067.

uncommon.<sup>588</sup> As expected, the carrier's interest complained against it, alleging the possible consequence of freight rates increasing if they were held liable for negligence of their servants.<sup>589</sup> This change, doubtless, facilitates the determination of liability for want of cargo care, which has been frequently hard to determine whether it is a violation of the duty of care or a fault or negligence of master and the crew in managing the vessel. On this point, the system proposed by these rules for one single standard of liability based on the "fault or neglect that cause the loss or damage of the goods", instead of the H/H-VR system based in the interplay of duties and immunities, has made the assignation of liability simpler.<sup>590</sup> The rules however, state some causes of exceptions in case of damage caused by fire;<sup>591</sup> or carriage of live animals and transport on deck, leaving in both cases the opportunity for the parties to contract their own terms.<sup>592</sup>

The order of proof in the Hamburg rules is also simpler than in the H/H-VR. The cargo claimant must submit *prima facie* evidence that the damage or loss occurred while the goods were under the custody of the carrier, and the latter must then show that the proximate cause of loss or damage falls within the general provision of Article 5(1).<sup>593</sup>

In general, and from a practical point of view, it could be said that the regimes in the H/H-VR and in the Hamburg Rules are practically the same. Beside the differences noted, the rest of the provisions are quite similar in content.<sup>594</sup> Under the Hague system the carrier is obliged to practice due diligence before and at the commencement of the voyage, but if a unseaworthiness condition arises after the voyage begins, the cargo interest may still allege that there was a lack of continuous duty in caring for the cargo. The carrier, in such a case, might be held liable unless he proves that he and his servants were diligent enough to solve the problem in a timely manner.<sup>595</sup> This condition is similar to the Hamburg regime where the carrier will be presumed at fault when the damage or loss occurred during the time of his custody.

#### 2.1.4.2.5 Objections

The main objections for the ratification of these Rules are based mostly on the argument that the increase of liability in favor of the cargo interest may bring consequently higher insurance premiums and freight rates.<sup>596</sup> Nevertheless, Sturley

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<sup>588</sup>Honnold, 105.

<sup>589</sup>Wilson, 217.

<sup>590</sup>Honnold, 98.

<sup>591</sup>The Hamburg Rules 5.4.

<sup>592</sup>The Hamburg Rules Articles 5.5 and 9.

<sup>593</sup>Tetley, *Marine Cargo Claims*, Vol. 1, 936.

<sup>594</sup>Force, 2085.

<sup>595</sup>Sturley, Fujita and van Ziel, 8.

<sup>596</sup>Force, 2087.

points out that there is not yet any real evidence of such a consequence, and there is no possibility for an accurate assessment without empirical evidence.<sup>597</sup> In its absence, he suggests that such an argument should be abandoned and other approaches should be used to evaluate the carrier's liability.<sup>598</sup>

Other critics have pointed out that the introduction of a new regime will produce additional "litigation, confusion and expense", against the almost "well-established" international regime contained in the HR, especially given the voluminous case law created since its inception.<sup>599</sup> The carrier's interests have objected that the introduction of this new convention will cast aside the "expensive litigation" arisen from the Hague Rules.<sup>600</sup> Honnold contends that perhaps the carriers do not want to abandon the large case law revolving around their immunity for negligence in navigation, management of the ship and fire; that the value of this case law does not lie in its clarity, but in its "ambiguity as a basis for plausible but questionable resistance to cargo claims."<sup>601</sup> Though there are advantages offered by this new regime, since coming into force, they have not reached yet significant application.

### 2.1.4.3 The Rotterdam Rules—2009

#### 2.1.4.3.1 Adoption and Generalities

After the failure in ratification of the Hamburg Rules, the Comité Maritime International undertook the discussions of a new set of rules in 1998. Later, in 2002, the UNCITRAL Working Group in Transport Law continued the discussions and drafted the final project of a new Convention on the topic.<sup>602</sup> The result was "The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea", also known as the Rotterdam Rules, opened for signature on the 23rd of September 2009.<sup>603</sup> At the preset, these rules have been ratified only by Spain and Togo.

One of the main objectives of these rules is to "modernize and harmonize" the rules governing the international carriage of goods by sea, addressing specifically the "technological and commercial development since the adoption of The Hague,

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<sup>597</sup>Sturley, *Changing Liability Rules...*, 149.

<sup>598</sup>*Ibid.*, 149.

<sup>599</sup>Honnold, 81.

<sup>600</sup>*Ibid.*, 101. See a 1998 Bulletin of the Baltic and International Maritime Conference (BIMCO), where in addition it was stated that the Hamburg Rules "must be resisted at every opportunity". Quoted by Waldron in *The Hamburg Rules*, 1991 J.B.L. 305, 318.

<sup>601</sup>*Ibid.*, 102.

<sup>602</sup>T. Nikaki, 'The Carrier's Duties Under the Rotterdam Rules: Better the Devil You Know?' (2010) 35, *Tulane Maritime Law Journal*, 1–44, 3.

<sup>603</sup>*United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Vienna: United Nations, 2009).

Hague-Visby and Hamburg Rules.<sup>604</sup> This Convention applies almost the same obligations already stated in the HR in relation to the duties of seaworthiness and due care. It repeats most of the same wording of many provisions of the HR, as an effort to maintain the large jurisprudence developed on the H/H-VR,<sup>605</sup> yet introducing some slight changes that make considerable differences with the previous Hague Rules regime.

The Convention introduces in Article 1 some basic definitions that are worthy of examination. First, the “contract of carriage” is defined using the classic description of the activity of a carrier who for the payment of freight, undertakes to carry goods from one place to another. But the definition is not limited to that; it adopts a wider extension to include the land legs of a multimodal carriage, which these rules are also intended to regulate.<sup>606</sup> The rules introduce also the distinction between the mere contractual carrier and the actual carrier, described under the terms of performing party<sup>607</sup> and maritime performing party,<sup>608</sup> which is a person other than the carrier assigned to perform some of the carriers’ obligations.<sup>609</sup>

#### 2.1.4.3.2 Period of Responsibility

The period of responsibility also differs from the current H/H-VR. Taking distance of the “tackle to tackle” formula, it is closer to the Hamburg Rules. It establishes in Article 12 that the period of carrier responsibility covers the time from when “the carrier or the performing party receives the goods for carriage and ends when the goods are delivered”. The carrier is responsible during the entire period he is in possession of the goods, as the Hamburg Rules state. But it intends to cover also the multimodal transport, in accordance with Article 11, which expressly states the main obligation of the contract, which is to “carry the goods to the place of destination and deliver them to the consignee.” The rule was made contemplating the carriage in the door-to-door modality, using the expression “place of

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<sup>604</sup>Nikaki, 5.

<sup>605</sup>Sturley, Fujita and van Ziel, 82.

<sup>606</sup>Article 1.1.

<sup>607</sup>Article 1.6(a) “‘Performing Party’ means a person other than the carrier that perform or undertakes to perform any of the carrier’s obligation under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.”

<sup>608</sup>Article 1.7 “‘Maritime performing party’ means a performing party to the extent that it perform or undertakes to perform any of the carrier’s obligation during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.”

<sup>609</sup>Articles 1.5; 1.6 (a) and 1.7.

destination” instead of “port of destination”.<sup>610</sup> Notwithstanding, paragraph 2 of the same article clarifies the exclusion of the carrier’s responsibility during the period the goods are under the custody of an authority or third party appointed thereto by law or regulation of the place of reception or delivery. This is the time, for example, when the goods are at the customs clearance or quarantine services, frequently located at the ports facilities to make inspections on inbound/outbound cargo, and where the carrier is obliged to collect or deliver the cargo, in compliance with certain local regulations.

### 2.1.4.3.3 Liability Rules

The main duties for the carriers are established in articles number 13 and 14. It changes the order of the HR by stating first the specific obligations for protecting the cargo, the duty of care. This foresees that the carrier has responsibility from the reception of the goods, which occurs before to its upload onto the vessel. Second, it states the specific obligations of practicing due diligence to make the ship seaworthy.

#### (1) Duty of Care

The duty of care of the cargo is stated in Article 13 and reads as follows:

Article 13: Specific obligations

1. The carrier shall during the period of its responsibility as defined in Article 12, and subject to Article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.
2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provision in chapter 4 and to chapter 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper or the consignee. Such an agreement shall be referred to in the contract particular.”

The provision makes clear that the obligation is to be exercised during the entire period of the carrier’s responsibility. The provision excludes its enforcement when the carrier is not undertaking different legs of transport. The clarification is for cases of multimodal transport, or for the period before they receive the goods or after its delivery.<sup>611</sup> Article 26, thereon referred to, covers the period before loading onto and after discharge from the ship, and the liabilities based in local laws or regulation that covers such periods. The convention also grants to the carriers the possibility to be released from liability for damage or loss during such periods when the shippers partially undertake these functions.<sup>612</sup>

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<sup>610</sup>Girvin, 445.

<sup>611</sup>Sturley, Fujita and van Ziel, 82.

<sup>612</sup>Article 23 paragraph 2: “Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.”



The rest of the provision states practically the same obligations as the HR with the inclusion of two new points: the carrier must now properly and carefully *receive* and *deliver* the goods. The same responds to the new period of responsibility that covers these two operations. It replaces the term “discharge” for “unload”, but this is purely a stylistic change. The latter refers to any means of transport, while the former is more commonly used for maritime transportation.<sup>613</sup> Again it provides that the carrier must perform these actions “properly and carefully”. The invariability of these terms responds to the interest in preserving the long-standing jurisprudence related to the H/H-VR where both terms were analyzed.<sup>614</sup>

The second paragraph of the article resolves the problem raised by the FIO's clauses that grant the opportunity to the carrier to contract out the performance of the tasks described in paragraph 1, and the shipper to assume those tasks. It expressly admits the possibility that is recognized in English law but not in other jurisdictions.<sup>615</sup>

## (2) Seaworthiness

On the obligation to provide a seaworthy ship, the rules state the follow:

Article 14: Specific obligations applicable to the voyage by sea

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.”

The Convention repeats the same obligation stated in the HR, but introduces two details that make some significant changes. The obligation of practicing due diligence in making the ship seaworthy is not limited to before and at the beginning of the voyage, it is a continuous one. The carrier is obliged to continue exercising it to avoid any cause of unseaworthiness before and during the voyage. The obligation is not limited *to make*, but now also *to keep* the vessel in proper condition. The provision brought great concern and was objected to under the argument that it would alter the overall risk allocations between the carrier and cargo interest.<sup>616</sup> It places a major burden on the carrier that could be translated into higher freight rates.<sup>617</sup> However, this is simply another argument, and as Sturley argued with

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<sup>613</sup>Ibid., 82.

<sup>614</sup>Ibid., 82. He suggests the reading of the 9th Session Report para 117, 119.

<sup>615</sup>Girvin, 445–446.

<sup>616</sup>Ibid., 446.

<sup>617</sup>Ibid., 446.

respect to the Hamburg Rules, there is not empirical evidence to justify such a hypothesis.<sup>618</sup>

The obligation of due diligence remains the same as in the HR. Carriers must do what is reasonably possible under the circumstances.<sup>619</sup> The exercise of this obligation depends on where the vessel is and when the unseaworthiness condition is discovered. If it is discovered while the vessel is at port, it may more easily facilitate the carrier in its repair, whereas the same problem will present much more difficulties while at sea.<sup>620</sup> It is obvious that for a carrier it would be more difficult to carry out reparations on the ship during the voyage in high seas as opposed to while in port or at a shipyard. It is not expected that the carrier performs the same activities or actions that would be possible on shore. The carrier therefore, must keep the vessel specially equipped to avoid any possible unseaworthiness condition during the voyage. On this point, technology can and will play a very important role.

An uncertainty in the convention that may bring difficulties regards the extension of the obligation of due diligence in making and keeping the vessel seaworthy, throughout the voyage at sea. When is the voyage at sea over? Is there liability for damages due to lack of seaworthiness during the unloading process?<sup>621</sup> These are new questions to be clarified by the Courts. Another innovation of these rules is the inclusion of provisions on containers. The continuity of the obligation also includes the obligation to make and keep fit and safe every place where the goods are carried, including the holds, but also the containers supplied by the carrier.<sup>622</sup>

The Rotterdam Rules are another effort to update the H/H-VR regime and to create uniform rules for some other areas of the modern carriage of good by sea. Unfortunately, at the moment of this writing, they do not enjoy much acceptance for ratification.

## 2.2 Conclusion

A reappraisal of historical maritime law shows that since ancient times, and for almost 20 centuries, the standard of liability for the sea carrier has been strict. If not absolute in all systems at all times, at least it was far stricter than the current standard set by the Hague Rules. Since Roman times, public policy appears to have

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<sup>618</sup>See *supra* note 597.

<sup>619</sup>Sturley, Fujita and van Ziel, 85.

<sup>620</sup>*Ibid.* "However, at sea, whether the due diligence obligation requires the carrier to instruct the ship to effect repairs or not would depend on several factors, including the extent of the leakage, the possibility of causing damage to the cargo, the delay that may be caused, the weather condition and the availability of skills within the crew to effect such repairs."

<sup>621</sup>Y. Baatz, *The Rotterdam Rules: A practical annotation* (London: Informa Maritime Law, 2009) Michael Tsimplis "Obligation of the Carrier", 39.

<sup>622</sup>Sturley, Fujita and van Ziel, 84.

been the main reason supporting this heavy standard. It is known that Roman legislators grounded their decision on their philosophical thinking while pondering the principles of equity, fairness and justice. With the expansion of the Roman Empire, this strict standard spread throughout Europe and lasted for several centuries.

Despite the implications of such a demanding standard, carriers were able to develop their industry. That happened during a time when maritime transportation was still rudimentary; when carriers were exposed to many risks; when aids to navigation were scarce<sup>623</sup>; and without the benefit of the technological advances that we have now. In some cases, they carried out their business without limitation of liability or marine insurance. Ancient and medieval shipowners were surely under extreme pressure to use all resources available to prevent and avoid risks, and to make the voyage as safe as possible. The flourishing of maritime commerce reported by historians in cities of the Mediterranean Sea and North Sea during the ancient times, the Middle Ages and the modern era, was due, among other factors, to the availability and improvement of maritime transport during those times. Such availability suggests that the business of carriage of goods by sea was still attractive and profitable in spite of the burden of the strict standard.

The possibility to exclude liability for passenger's goods as stated under Roman law could also have played a role in defining the carrier's liability during that and subsequent times. However, any practice of this kind was not documented. Besides the provision on the Digest for the possibility to reduce or exclude liability, in the subsequent bodies of maritime law studied, whether statutes or codification of the law merchant, there is no exact references to such a possibility. This lack of evidence favors the theory that the strict liability was continually enforced. It was not until the 19th century that the issue became evident and subject to judicial attention in England. Previous to that century, the English courts' decisions show the prevalence of the absolute standard. English judges of the 17th and 18th century, adopted same reasoning of the Roman jurists to assign strict liability to common carriers, as a measure of public policy to protect a commercial activity that was essential for the development of the English society.

The evolution of liability to a negligence base standard was the consequence of the converging circumstances surrounding the exploding growth of international trade at the end of the 19th century. The predominant position gained by the British shipowners during this commercial boom, based on the necessity of merchants for carriage, allowed them extreme advantages, where they engaged in strongly criticized abusive practices. In addition to these economic and commercial facts, the new philosophical ideas of liberalism, in vogue at that time, did not exactly favor the values and public policy observed by the Romans, nor those held by Lord Hold and Lord Mansfield. On the contrary, this new philosophy claimed greater individual freedom in business, which became the foundational basis to allow freedom of contract in greater extension. This scenario prompted the introduction of clauses

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<sup>623</sup>Mangone, 12.

excluding liability even for their own negligence. The delay in any statutory regulation is attributed, among other reasons, and according to the cited authors, to the shipowners' influences in the British parliament. It took almost half a century to adopt an international convention to create and unify international rules governing the contract of carriage of good by sea under bill of lading, not to mention specifically preventing the imposition of "negligence clauses".

It is understandable that the solution to such a long dispute was also created by the specific needs of the time. The Brussels Convention was obviously not the result of deep legal reasoning based in the leading values and sound principles of law, but a pragmatic solution for a commercial problem and serving the temporal commercial interests of the parties involved. Instead of the distinguished jurists of ancient Rome who shaped the strict standard, or the English judges of the 18th century who applied it, the Hague Rules were created mostly by businessmen. Doubtless, law has to respond and give solutions to business needs, as it is a fundamental part of society. Therefore, one must be careful when judging the lawmakers of the Convention for not doing more. It is obvious that the negotiations between the two main parties of the shipping industry were not, and never have been, an easy task. It is also obvious that many of the current issues resulting from technological change, that today demand statutory attention, could not have been foreseen in that time. It is perhaps more appropriate to raise concern for what we are failing to do today. Once those commercial needs are overcome, as well as many obstacles of that time through the application of technology, why to keep in force a legal instrument that does not reflect the main purposes of law and does not fit the current reality? There is no convincing justification. Of course, the solution is not to go back to the strict liability standard. It would be certainly unfair to hold carriers liable for something that is completely out of their control to prevent. In addition, the situations or risks that motivated to hold carriers as insurers are not a major threat at the present. However, the current reality of the carriage of goods by sea requires something more than the minimum duties established in the Convention.

Because of the insufficiency of the current governing regime and considering the relevance of this contract for the world's economy, the international community, through the UNCITRAL, proposed two new sets of regulations contained in the Hamburg Rules and the Rotterdam Rules. They come as a response to the new necessities of contemporary navigation and trade, especially the impact of technological development. This response to the existence of new technological advances has been precisely an increase in carrier's liabilities. The changes proposed are an attempt to introduce a new and fairer balance of risks between the parties; knowing that these risks can be assumed by the carriers thanks to the new technologies that enable better, safer, and more efficient navigation. The new regimes clearly demand a higher degree of diligence, which is possible through the access to new technological advances that facilitate more control over the maritime adventure, to prevent and avoid risks, and improve their performance and efficiency. Hence, taking into account the special circumstances that drove the adoption of the HR, the way in which it was redacted, and considering that many of the difficulties and hardships faced by shipowners when this Convention was discussed

have been long ago overcome, the logic indicates that the “fair balance of risks” must be updated to make it actually fair. The results, however, has been unsuccessful as these Conventions have not, as of yet, achieved extensive approval and the international carriage of goods by sea continues to be governed by the almost century-old and outdated Hague Rules.

To reach a fairer balance, it requires the allocation of more responsibilities on the carriers, and this is where application of new technologies may play a key role. Thanks to the modern technologies, carriers are capable of having more control of the maritime adventure. In the 21st Century the idea of a “risky adventure”, does not have the same meaning as it once did in the 19th century.<sup>624</sup> Technology has improved in such a way that many risks at sea simply do not exist anymore. Therefore, the review of historic maritime law suggests that if carriers since ancient times were able to develop their business under such a heavy standard, then, contemporary carriers should be able to assume the additional duties and responsibilities set in the Hamburg and Rotterdam rules. They have more technical resources to foresee, prevent and avoid risks, and given that their liability is still limited to negligence in the compliance of some minimum duties.

But history seems to repeat itself. Ninety years after the adoption of the Hague Rules, the adoption of new conventions show the awareness of the international community of the need for new regulations. Because of the expansion of the global market, countries’ economies are strongly dependent on the exchange of products in foreign markets. Their success requires an efficient and safe maritime transportation, to prevent cargo loss, damage and delay as much as possible. At the same time, there is a need to reduce international litigation resulting from cargo claims. Trial between carriers and shippers in foreign courts has become increasingly complicate, lengthy and especially expensive. Hence, we may say it is time for a new evolution in the sea carrier’s liability standard. Working with the current normative, the enforcement of new technologies as part of the due diligence duty, may help to reach higher efficiency. In this regard, today’s lawmakers must assure a better equilibrium, such as lawmakers during ancient times seem to have achieved in a more efficient way. Perhaps the more expedient approach is not through legislative actions, but through the judiciary. Keeping the same standard based on the practice of due diligence, the courts could and should require the application of certain new and specific technologies as part of this duty. To promote efficiency and achieve the reduction of cargo losses and damages, certain technologies should be enforced. Which technologies are those? This is a question to be answered in the next parts.

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<sup>624</sup>J.M. Alcantara, “*The Grand Liability Unified Theory*”, Scritti in Onore di Francesco Berlingieri, *Il Diritto Marittimo*, 2 Vols. (Genova, 2010) Vol. 1, 30.

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