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SHIPPER LIABILITY FOR CARGO

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A thesis submitted for the degree of Doctor of Philosophy

The City Law School

City, University of London

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DECLARATION

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ABSTRACT

This research is important for the determination of the basis of shipper liability, in particular whether the fault of the shipper is taken into account or whether the shipper's liability is strict.

The research question asks to what extent the mental element of the shipper is relevant to the determination of the shipper's liability for cargo.

The researcher seeks to prove that although the rules seek to distinguish between liabilities which are fault-based and those which attract strict liability, considerations made in the determination of liability results in an unclear line being drawn between the two. The minimal application and the limited existence of fault-based rules would be consistent with the overall nature of the strict contractual liabilities of the shipper.

CHAPTER 1 Introduction

Rationale for study

In practical terms, it is useful to determine shipper liability by inclusion of the mental element to distinguish between innocent, negligent, reckless or intentional acts. Certainty in the law on the mental element will relieve the burden on shippers of not knowing with what mindset they should conduct their business. It also assists judges in determining liability of the shipper for cargo.

Research Questions

Shipper liability for cargo seems to be premised on the requirement of the mental element. The objective of this research is to explore how this is consistent with the theory of imposing liability on the shipper. It involves evaluating the requirement for the mental element, comparing and analysing the different frameworks such as among others, the national law, the Hague regime, the Hamburg and Rotterdam Rules. It involves considering the liability of the shipper in the wider context such as contract, tort and third parties as well as the debate as to why and to what extent shippers should be liable for cargo.

What the researcher is trying to theorize

Shipper liability rules include both fault as a pre-requirement for liability as well as strict liability. The strict liability approach in contractual liability in general focuses on the finding of liability by taking into account the effects of the breach as part of the wider question of whether the commercial purpose of the adventure had been fulfilled in accordance with the intention of the parties, as opposed to a consideration simply of whether the shipper has failed to perform. This means that although it does not directly address the issue of the fault of the shipper in determining liability, it is argued that the underlying reasons for the breach is indirectly taken into account. At the same time the rules based on fault are very limited and applied very minimally. This would be consistent with overall nature of the strict contractual liabilities of the shipper. For these reasons the distinction between strict liability and fault-based liabilities of the shipper becomes blurred.

Gaps in the Literature

Academic works on shipper liability focus on general provisions and duties of the shipper primarily in international conventions on the carriage of goods by sea. They compare the latest convention with the earlier ones and analyse the changes and developments which have taken place as well as the effect on the scope of shipper liability.

A number of leading works on shipper liability appeared after work on the Rotterdam Rules commenced. This in part is due to the significant attention given to shipper liabilities in its provisions.¹ Simon Baughen in ‘Obligations of the Shipper to the Carrier’² discussed the English law position on shipper liability followed by an address of the provisions on obligations of the shipper in the Rotterdam Rules. His work explains the changes made to the existing law.

Johan Schelin’s commentary entitled ‘Obligations of the Shipper to the Carrier’³ explained each of the articles in the Rotterdam Rules on shipper liability and the kind of liability that they cover. Filippo Lorenzon wrote a chapter also called ‘Obligations of the Shipper to the Carrier’⁴ in which he noted the obligations imposed by each article in the Rotterdam Rules concerning shipper liability and explained in detail the scope of each obligation. Finally Frank Stevens wrote ‘Duties of shippers and dangerous cargoes’.⁵

These works explain the content and scope of the shipper liability mainly in international conventions and in particular the Rotterdam Rules. They do not discuss the role of the mental element in establishing shipper liability in general and how it affects the issue of the imposition of liability on the shipper.

¹ This will be discussed further in Chapter 4 on Shipper Liability for Cargo under International Conventions.

² Simon Baughen, ‘Obligations of the Shipper to the Carrier’ (2008) 14 JIML 555.

³ Johan Schelin, ‘Obligations of the Shipper to the Carrier’ in Alexander Von Ziegler, Johan Schelin and Stefano Zunarelli (eds), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Wolters Kluwer 2010) 151.

⁴ Filippo Lorenzon, ‘Obligations of the Shipper to the Carrier’ in Yvonne Baatz, Charles Debattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland and Michael N Tsimplis (eds), *The Rotterdam Rules: A Practical Annotation* (5th edn, Informa 2009) 79.

⁵ Frank Stevens, ‘Duties of Shippers and Dangerous Cargoes’ in Rhidian Thomas, *Carriage of Goods under the Rotterdam Rules* (Informa 2010).

Scope of study

This research encompasses the determination of shipper liability for cargo towards the carrier and third parties by studying the existing legal frameworks in national and international laws on the carriage of goods by sea.

Methodology

The research methodology employed is doctrinal, and the sources of research materials are from library, database and internet research. The research question is answered by firstly identifying the laws on shipper liability and the requirements for the mental element. The second stage is the analysis of the development and application of the rules to distill the actual basis for the determination of shipper liability.

Chapter-by-chapter outline

Chapter 1

Introduction

This chapter contains the rationale for the study of this topic and states the research questions being asked. It then explains what the researcher is trying to theorize and identifies gaps in the literature. This is followed by a setting out of the scope of the study and the methodology employed to achieve the objectives. Finally a brief description of each chapter is then made in the chapter-by-chapter outline.

Chapter 2

The concept or definition of the shipper in the context of the carriage of goods by sea

The researcher has written an introduction, objective of chapter, and the importance of the definition of the shipper. The researcher then wrote on general definitions, followed by a section on the definition in law which contains the legal construct of the shipper. This section contains an introduction, definition in international conventions, an analysis of the travaux préparatoires of the conventions, the history of the conventions, and a country-by-country case law and statutory definition of shipper in the top 20 countries with the highest total value of overall exports. The chapter has a section each on the contractual perspective, the charterparty perspective, the documentary perspective, the bailment perspective, analogies with the voyage charterer and owner, the multimodal

perspective, the industry perspective, and a definition of the shipper from shipper associations in the top 20 countries with the highest total value of overall exports. Finally it contains a conclusion.

Chapter 3

Shipper Liability under National or Domestic Law

In this chapter the researcher has done an introduction, objective of chapter, a section on the common law on shipper liability with its own objective and methodology, which contains a section on each duty of the shipper under English Common Law, and in other countries which adopt the common law. This is followed by a section on shipper liability under civil law legal systems, with its own introduction, objective, and methodology. This chapter then goes on to cover each type of duty according to each stage of the shipping operation namely pre-carriage liabilities, liabilities during transit and post-carriage liabilities. The researcher also wrote on the nature of shipper's liability under civil law. This is followed by a section on concepts from religious and customary law with its own objective and scope. Within this there is a discussion on the Islamic Law concerning shipping and all the relevant shipper duties as well as the requirement of fault for the contractual liability of the shipper under this sub-heading.

Chapter 4

Shipper Liability for Cargo under International Conventions

In this chapter the researcher has written an introduction, objective and stated the research questions for the chapter. This chapter explains the methodology before going on into the International Conventions on the Carriage of Goods by Sea. It gives a background of each of the four international conventions, the Hague Rules, the Hague-Visby Rules, the Hamburg Rules, and the Rotterdam Rules. The chapter then goes into the provisions on shipper liability in all four international conventions by grouping various duties under five main classifications of duties and comparing similar provisions in each international convention. It discusses the nature of the liabilities and the requirement of fault. There is also a section on the theory of liability under the conventions. This is followed by a section on burden of proof, category of loss or damage and limitation. After concluding this section, the researcher starts another section on other non-carriage of goods by sea international conventions relating to shipper liability. Here there is a further four international conventions which may create or affect the

liability of the shipper. The researcher goes through various forms of public law obligations before making concluding remarks.

Chapter 5

Conclusion

Rules on shipper liability incorporate both the requirement of fault and strict liability. Even if there are rules which make liability of the shipper deemed to be strict, decisions made on issues of shipper liability however indicate that the finding of liability is not simply on the basis of deciding whether the shipper's obligations have been performed in accordance with what was agreed by the parties, but goes on to assess the effects of the breach on the innocent party. This shows that indirectly, the fault of the shipper is taken into account. These rules must as a matter of principle be provided as being strict in order to provide certainty to the parties as to the consequences of a breach. This is in line with the needs of the shipping industry to have rules which are economically and commercially efficient. For this reason, it is very important to be clear and consistent as to the meaning given to the shipper, and also the basis for which their liability is determined. There are also fault-based rules alongside the strict liability rules but they are very limited and considered very minimally. This would be consistent with the overall strict nature of the contractual liability of the shipper.

CHAPTER 2

The concept or definition of the shipper in the context of the carriage of goods by sea

Introduction

From the outset, the shipper appears to be an oft-cited word in any shipping or legal materials and sources. However in this research, the term has turned out to be a term that seems to have been taken for granted to be understood in ordinary parlance.

Objective of section

In this chapter, the meaning of the term “shipper” in the context of the law of the carriage of goods by sea will be defined and conceptualised. There does not seem to be any formalised and standardised definition of the shipper in written law, nor a consistent definition by the courts, but rather the term is shaped by the various roles it plays and the obligations imposed upon and rights afforded to it. Furthermore it appears that on the international landscape, a wide range of different labels have been used for similar roles which further add to the complication. This results in a wide variety of definitions and ultimately, culminates in uncertainties. This research will demonstrate and argue that there is a need to have a clear, consistent and comprehensive definition of the shipper in the law as this will have a tremendous impact on the practice of shipping.

The importance of the definition of the shipper

It is important to determine who is to be defined as the shipper because the shipper is afforded a unique position in the law of carriage of goods by sea which is not accorded to other parties even though they may be imposed with rights and liabilities as though they were in the shipper’s position. For instance the reference to the shipper in various places in the Hague-Visby Rules has been held to refer only to the original shipper as the original contracting party and not to those who are imposed with the liabilities of the shipper under the bill of lading by virtue of section 3 of the Carriage of Goods by Sea Act 1992.⁶ These references include the exceptions from liability for the shipper in art. IV r. 3 for loss or damage sustained by the carrier or the ship which are not caused by the shipper, his servants or agents’ act, fault or neglect; the provision in art. III r. V on

⁶ *Aegean Sea Traders Corporation v Repsol Petroleo S.A. and Another (The Aegean Sea)* [1998] 2 Lloyd’s Rep 39, 69-70.

the shipper's guarantee of the marks, number, quantity and weight of the goods to the carrier; and also the provision in art. IV r. 6 on the duty of the shipper not to ship dangerous goods.⁷ The shipper in these rules refers only to the original shipper and deal with the obligations of the shipper in his capacity as the shipper and not the person on whom liability is imposed by s.3(1).

The concept of who the shipper is is important to the thesis because in order to study the requirement of the mental element of the behaviour of a person, in this case the shipper, which will be used to determine shipper liability for cargo, it must first be clear, who the shipper is, because it is the shipper whose mental element is being discussed. Otherwise, the whole discussion will be skewed, unclear and distorted. The availability of a definition will clearly distinguish those who should be subject to the requirement of certain mental elements and those who should not. It would also be possible to tailor the discussion on the requirement of the mental element according to the nature of the person and his activities. For instance the distinction between a natural person and an artificial person such as a company requires a separate discussion as to the form of mental element required.

With the emergence of the Rotterdam Rules,⁸ a convention which explicitly spells out shipper liability for specific obligations, the need to identify the shipper becomes even more pertinent notwithstanding the rate at which that convention is receiving ratifications.⁹ This demonstrates that there is a growing recognition or proposal for the formal acceptance of shipper liability whether or not the maritime world, particularly the parties affected and stakeholders agree with this.

It will thus become extremely important in the eyes of the law, to determine the definition of who the shipper is. This is because there is a need to clarify which persons are subject to shipper liabilities, not only due to the requirement of the mental element being fulfilled, but more importantly because the person falls within the definition of the shipper. This enables persons to avoid the trap of being liable as shippers simply because of their failure to recognise and realise that they are indeed shippers under the law. This

⁷ Thomas Edward Scrutton, *Scrutton on Charterparties and Bills of Lading* (first published 1886, Sweet & Maxwell 1984) 433.

⁸ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted in Rotterdam, 11 December, 2008.

⁹ To date, only four states are parties to it – Spain, Togo, Congo and Cameroon. However, the number of other countries which are signatories to it has grown to 25. For the latest status, refer to <http://treaties.un.org/> as the UN website is updated on a daily basis; it is last checked on the 4/1/18.

leads to the need to discover also whether there is a comparison to be made if any as to the legal conception of the shipper and the practical conception of the shipper as understood in the commercial sense. If there is a large gap or discrepancy between the legal definition of the shipper and the commercially understood definition of the shipper, needless to say, this is bound to lead to difficulties especially when disputes arise. For this reason the importance of the term “shipper” being used and understood in a consistent manner from the commercial perspective becomes an understatement.

Shipper liability will not only be important to the shipper but also to other parties who may consequently be affected, as some liabilities may be transferred from the shipper to for instance, the consignee.

General definitions

It is natural to think that the term “shipper” is confined exclusively to persons connected to the use of ships, when the word actually refers to a person who sends goods by any form of conveyance.¹⁰ Since the root word for shipper is “ship”, the word “shipper” could also give the impression that it is connected to the person who provides the shipping services, i.e. the shipowner or the charterer.¹¹ The simplest way in which the shipper can be defined is someone who ships goods.¹² Various definitions of the shipper may be found in the dictionaries. In one,¹³ it is defined in the ordinary context as one that consigns or receives goods for transportation. In a more business or professional context a shipper has been defined as a person or company in the business of shipping freight.¹⁴ In a business dictionary,¹⁵ the shipper is defined as the consignor, seller or exporter who may all be the same or each be different parties, who are named in the shipping documents as the party responsible for initiating a shipment, and who may also be the one to bear the freight cost. It is interesting to note that from a business definition, a shipper can also refer to the shipping container.¹⁶ An old definition of the shipper is one who ships or puts goods on board of a vessel, and these goods are to be carried to another place during the vessel’s voyage. This definition also refers to the general idea

¹⁰ <http://www.merriam-webster.com/dictionary/shipper>

¹¹ This was actually thought of by a prominent consultant shipping analyst, Richard Scott, Managing Director of Bulk Shipping Analysis (October 2013).

¹² WordNet 3.0, Princeton University, 2012.

¹³ *The American Heritage Dictionary of the English Language* (4th ed. 2000, Houghton Mifflin Company, updated 2009).

¹⁴ *Collins English Dictionary – Complete and Unabridged* (HarperCollins Publisher 2003).

¹⁵ BusinessDictionary.com

¹⁶ *ibid.*

that the shipper is bound to pay for the hire of the vessel or the freight of the goods.¹⁷ What is even more interesting, is a definition which not only states that the shipper is the owner of the goods put on board the vessel, but that the shipper intrusts them for delivery abroad, and the arrangement for this may be by charterparty or otherwise.¹⁸ It appears as a form of acknowledgement or acceptance that a shipper may not only exist under a bill of lading as is commonly expressed. Another definition where the shipper is a person or company who takes on the organising of sending goods from one place to another conveys the definition of the shipper in a perspective with more responsibility involved than just delivering the goods.¹⁹

From these general definitions above, it is already apparent that there are inconsistencies and discrepancies as to what a shipper can or cannot be. Among others, not only can a shipper be a person who sends goods in any mode of transport, he could be the person who sends *or* receives the goods. The shipper could be used to refer to the role of consignor, seller and exporter even though they are three different people. This cannot be practical if they were parties in the same transaction as there would certainly be confusion and a mishap is bound to occur. A shipper is also understood as referring to a container which again will create problems. The shipper may not be thought to be distinguished from a shipowner or charterer since they can all ship goods since that is the focus of the definition. These definitions show that in the practical sense, there could be many cases of misunderstandings and disagreements as to who the shipper is.

In philosophical studies of identity, it is argued that one way of identifying something is by comparing it with something else and explaining what their differences are.²⁰ Thus identifying a shipper could be done by comparing it with some other similar or connected entity for instance consignees, freight forwarders, manufacturers, carriers and etc. In this chapter, there are indeed sections which require a discussion of the shipper in the context of its relationship or similarity to such other entities.

¹⁷ John Bouvier, *Law Dictionary, Adapted to the Constitution and Laws of the United States*, (1856).

¹⁸ Black's Law Dictionary Free Online 2nd Ed. <http://thelawdictionary.org/shipper/>

¹⁹ *Cambridge Advanced Learner's Dictionary & Thesaurus*, Cambridge University Press.

²⁰ David Morley and Kevin Robins, *Spaces of Identity: Global Media, Electronic Landscapes and Cultural Boundaries* (Routledge 1995).

Definition in Law - The Legal Construct of the Shipper

Introduction

In order to determine the current legal construction of the shipper, it is important to find the existing, if any, legal constructs in its various forms and integrate and reconcile the fragments where possible, and to develop a working legal definition of the shipper. In the various sources of law which follow, two aspects of the legal construction of the shipper will be considered; the conceptual form and the substantive scope.

International Conventions

It is apt that the definition of the shipper be provided by the various international conventions which have been passed in order to seek and regulate a better relationship between the shipper and the carrier. There are four currently in existence; the earliest being the Hague Rules signed in 1924, followed by the Hague-Visby Rules signed in 1968, the Hamburg Rules signed in 1978 and the latest one being the Rotterdam Rules adopted in 2008. In the Hague²¹ and Hague-Visby Rules,²² the shipper is not directly defined, but is stated in the definition of the carrier, the latter defined as including “the owner or the charterer who enters into a contract of carriage with a shipper”.²³ In the Hamburg Rules,²⁴ the indirect definition of the shipper remains,²⁵ although the carrier in these rules may be any person, not just the owner or the charterer. However, in the Hamburg Rules the shipper is also more directly defined in its own provision²⁶ albeit in a rather ambiguous way, as “any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea”.²⁷ This definition has been criticised as displaying a certain level of incertitude due to the (over) use of the conjunction “or”.²⁸

²¹ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels, August 25, 1924.

²² The Hague Rules 1924 as amended by the “Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading”, adopted at Brussels, February 23, 1968.

²³ Art. 1(a) is similar in both the Hague and Hague-Visby Rules.

²⁴ United Nations Convention on the Carriage of Goods by Sea, signed at Hamburg on March 31, 1978.

²⁵ *ibid* Art. 1(1).

²⁶ This convention is said to be more pro-shipper.

²⁷ Hamburg Rules, Art. 1(3).

²⁸ Stefano Zunarelli, ‘The Liability of the Shipper’ [2002] LMCLQ 350.

As the seller of goods, the shipper generally complements the carrier contractually. However, the shipper under the Hamburg Rules would include the supplier.²⁹

In the Rotterdam Rules³⁰ again the indirect definition of the shipper is to be found in the definition of the carrier along similar lines to the Hamburg Rules.³¹ However, the Rotterdam Rules do also provide a separate definition of the shipper. In fact, the rules distinguish between two types of shippers. The first is the shipper³², who is “a person that enters into a contract of carriage with a carrier”. The second is the documentary shipper, who is “a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.”³³ Since there may arise situations where the name was inadvertently or for some other cause inserted in the document as “shipper”, the provision has been considered as a situation where there is a presumption that, unless the name was inserted without authority or by mistake, the person named ‘accepts’ to be named as the shipper.³⁴ However, the original wordings used in the draft article 33 were “accepts the transport document or electronic record”³⁵ and this was used as the condition upon which such person assumes the contractual shipper’s rights and obligations. This was changed to the current form in order to better convey the requirement that an FOB seller who is named as the shipper in the transport document accepts to assume the rights and obligations of the contractual shipper.³⁶ The subject matter of acceptance being the name of the FOB seller being put down as the shipper in the transport document instead of merely accepting the transport document reinforces this perspective. The provision is then split into two where firstly the act of acceptance to be named as the shipper defines the documentary shipper in article 1(9) and secondly by default, a separate provision, now article 33 provides for the assumption by the documentary shipper of the rights and obligations of the contractual shipper. Moreover, another writer’s view is that the possibility of freight forwarders or forwarding agents having their names put down in the transport document and not knowing this means consenting to acting as principal is rather unlikely.³⁷ The rules

²⁹ Report of the First Meeting of the International Sub-Committee on Issues of Transport Law, CMI Yearbook 2000, p 190.

³⁰ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, signed at Rotterdam, 20-23 September, 2009.

³¹ *ibid* Art. 1(5).

³² *ibid* Art. 1(8).

³³ *ibid* Art. 1(9).

³⁴ “*The Rotterdam Rules*”, A. Diamond [2009] LMCLQ 445.

³⁵ (A/CN.9/WG.III/WP 21, Art 7.7).

³⁶ Francesco Berlingieri, ‘Revisiting the Rotterdam Rules’ [2010] LMCLQ 583, 618.

³⁷ Berlingieri (n 36) 617-618.

impose upon the documentary shipper with obligations and liabilities towards the carrier in the same way and to the same extent as the shipper under the rules. This means that the rules make no distinction between the actual shipper and the contractual shipper in relation to obligations of the shipper to the carrier. Likewise, the rules afford both with the same rights and defences.³⁸

The purpose of the provision on the documentary shipper is to impose upon the FOB seller, who is not in a contractual relationship with the carrier, with the shipper's obligations. It also applies to freight forwarders and forwarding agents whose name may be filled in the box with the label "shipper".³⁹ Although this may be a matter of concern for FOB sellers,⁴⁰ an optimistic view of this is that the provision was actually created in order to accommodate sellers who, not being a party to the contract of carriage, need to have possession of the original negotiable transport documents in order to secure payment.⁴¹ According to Berlingieri, when the original article 35 was drafted, the term "consignor" which was defined as "a person that delivers the goods to the carrier or a performing party for carriage" was used. However, the "consignor" was only able to obtain a receipt from the carrier for delivering the goods to him whereas the "shipper" was entitled to obtain a negotiable transport document. Since an FOB seller could also come under the definition of the "consignor", there was concern that the FOB seller would not be adequately protected. This is why the term "consignor" was changed to "documentary shipper", and changes were made to the provisions of article 35 which enables the FOB seller to obtain the negotiable transport document. Thus it would be a case of the FOB seller actually wanting to be named as "shipper" in the transport document and requiring consent for this from the buyer.⁴²

Article 1(10) of the Rotterdam Rules also makes reference to the identity of the shipper in its definition of "holder", which includes a person in possession of a negotiable transport document which is an order document and identifies him as the shipper or consignee or is the person to which the document is endorsed.⁴³

There is another group of people mentioned in the Rotterdam Rules who are not referred to as the shipper but who may perform the same tasks and obligations as the shipper due

³⁸ Art. 33.

³⁹ Anthony Diamond 'The Rotterdam Rules' [2009] LMCLQ 445.

⁴⁰ *ibid* 445.

⁴¹ Berlingieri (n 36) 617.

⁴² *ibid* 617.

⁴³ Art. 1(10)(a)(i).

to the shipper delegating or entrusting them with those tasks and obligations. These involve any persons including, but not limited to employees, agents and subcontractors. The rules make the shipper answerable for the acts of all these persons to whom the shipper has delegated his obligations.⁴⁴ Thus it is quite important to whom the label of shipper or documentary shipper is given, rather than who actually are the persons performing the obligations of the shipper.

Travaux Préparatoires to the United Nations Convention on the Carriage of Goods by Sea - the Hamburg Rules 1978

The Hamburg Rules is considered to be the birthplace of the statutory definition of the shipper⁴⁵ due to the lack of such definition in the previous two conventions on carriage by sea.⁴⁶ Although the term ‘shipper’ may be equated with ‘cargo owner’, this may not necessarily be the case. A discussion on whether the shipper or the consignee will be the cargo owner was made in the third session of the Working Group III.⁴⁷ For their purpose the shipper is deemed to be the seller and the consignee the buyer. The cargo owner is considered to be the party which will commence action against the carrier as claimant for loss or damage of the goods. Whether the shipper or the consignee becomes the claimant and thus the cargo owner depends on the international terms of shipping used in the contract of sale for example CIF, FOB, C&F and FAS, as this determines when property passes and the risk is transferred to the buyer. It is said that where maritime shipment is used in sales transactions the risk of loss of the goods in transit is usually borne by the buyer, since damage or loss of the goods could only have had been identified and ascertained at the delivery end.

The History of the Rotterdam Rules Relevant to Shippers

It is not here intended to explain the complete history of the Rotterdam Rules as it is rather lengthy and complicated due to the rather ambitious nature of the project reflected in the painstaking efforts made at getting as many stakeholders involved as possible and producing something that could possibly satisfy as many interests in maritime transport in as balanced a way as possible. The historical perspectives of the rules may be found

⁴⁴ Art. 34.

⁴⁵ Yao-Hongxiu and Lin-Hui, ‘On the Identity of the “Shipper” under the Maritime Code of the People’s Republic of China’, (1998) 6 International Maritime Law Vol 5 1.

⁴⁶ The Hague and Hague-Visby Rules.

⁴⁷ A/CN.9/63/Add.1-Report of the Working Group on International Legislation on Shipping on the work of the third session, paragraph 82.

in various other sources⁴⁸ in more detail, but suffice here that the gist of what took place be laid out, in order to appreciate where the rules are coming from, in order to better understand the nature of the relevant provisions on the shipper and shipper liability for cargo for the purposes of this research.

The Rules are a result of cooperation between two leading international bodies involved in commercial transport; the Comité Maritime International (CMI) and the United Nations Commission on International Trade Law (UNCITRAL). The CMI started work on it as early as the 12th April 1988 by authorising Professor Francesco Berlingieri to find out whether the issue of uniformity of the law of the carriage of goods by sea was pertinent enough to be placed on the agenda of their 1990 Paris Conference as well as to come up with the proposed solutions.⁴⁹ This led to the publication of a report in 1991 by the professor⁵⁰ and the establishment of a Working Group by the CMI Executive Council in 1994 to look at the various regimes on carriage of goods by sea which were then in existence as to whether they were still satisfactory or viable. The Working Group was also asked to prepare a questionnaire to be put to the various National Maritime Law Associations (MLAs) worldwide. An international sub-committee was set up which looked at the uniformity aspects of the law of carriage of goods by sea in particular, led by Professor Berlingieri (the Uniformity Sub-Committee), followed by the creation of a steering committee.

On the part of UNCITRAL, at its 29th Session in 1996, it was proposed that a review of the current practices and law of the international carriage of goods by sea be made part of its work programme. When CMI found out, a meeting was held between representatives of the two to initiate possible cooperation in a common agenda. Thereafter in 1998-99 the CMI Assembly appointed a Working Group on Issues of

⁴⁸http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_travaux.html;
<http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook+2000.pdf>;
http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2001.pdf; CMI Yearbook 2009, *A Brief History of The Involvement of CMI from the initial stages to the preparation of the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* 252; Michael F. Sturley, 'Transport Law for the Twenty-First Century: An Introduction to the preparation, philosophy and potential impact of the Rotterdam Rules' JIML (2008) 14:6 461-483; Stuart Beare, 'Liability Regimes: Where We Are, How We Got There and Where We Are Going' [2002] LMCLQ 306-315; Kate Lannan, 'The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: a general overview' (2009) Uniform Law Review (Roma) 14:1/2 290-323; Kate Lannan, 'The Launch of the Rotterdam Rules' (2009) www.shhsfy.gov.cn/hsinfoplat/platformData/infoplat/pub/.../20.doc

⁴⁹ CMI Yearbook 2009, *A Brief History of The Involvement of CMI from the initial stages to the preparation of the UNCITRAL Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* 252.

⁵⁰ CMI Yearbook 1991 Paris II (1991) 104-176.

Transport Law which drew up another questionnaire for National MLAs followed by analysis of the responses. These became the basis for discussion by a new international sub-committee established by the CMI, which also prepared a draft Instrument. Although at first issues of liability were not included as part of the Working Group's consideration; although they did form part of the work done by the Uniformity Sub-Committee, following request from representatives of the industry at the "Round Table" set up by the Executive Council and submission of the report by the Uniformity Sub-Committee, the CMI proposed to UNCITRAL that the issues of liability be included.⁵¹ Following consideration, amendments and approval by the Executive Council, that draft Instrument was submitted to UNCITRAL in 2001.

In the CMI Draft Outline Instrument to be considered at the CMI Conference in Singapore in 2001, there were two categories of shipper; one is the shipper and the other, the contracting shipper. In the Draft Outline Instrument (the Draft) a shipper is a broad term which includes both the different types of shippers that are defined in the Draft and these different shippers are not mutually exclusive.⁵² It was also acknowledged there that a contractual shipper is often the consignor. The Draft also considered the definition of the shipper used in the Hamburg Rules⁵³ and noted the similar inclusive nature of the definition there but distinguished its incapability of separating the two categories or "possibilities" of shipper, the term used in the Draft. It also talked about considering a third possibility where the party identified in the transport document as the shipper could also be a part of the shipper definition. It was proposed there that this shipper be labelled the documentary shipper. However in the Draft that category was not included within the definition of the shipper but instead was made part of the provisions on the holder of the bill of lading, namely the first holder.⁵⁴

The two possibilities of shipper in the Draft were that a shipper was either a contracting shipper or a consignor. A contracting shipper was proposed to mean the person who enters into the contract of carriage with the contracting carrier,⁵⁵ whereas a consignor was the person from whom a carrier receives the goods.⁵⁶ Both the definitions of the

⁵¹The Travaux Préparatoires, CMI Project on Issues of Transport Law, p 1 <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/THE%20TRAVAUX%20PR%C3%89PARATOIRES.pdf>

⁵² CMI Yearbook 2000 Article 1.5, Draft Outline Instrument 124.

⁵³ Article 1.3, Hamburg Rules.

⁵⁴ CMI Yearbook (n 52) Article 1.9, Draft Outline Instrument 125.

⁵⁵ CMI Yearbook (n 52) Article 1.6, Draft Outline Instrument 124.

⁵⁶ *ibid* Article 1.7, Draft Outline Instrument 124.

contracting shipper and the consignor in part was imported from the definition of the shipper in the Hamburg Rules⁵⁷; the beginning part of Article 1.3 for the former and the end part of that Article for the latter; combined with ideas from the CMI International Sub-Committee on Issues of Transport Law. It was recommended in the Draft that when referring to a type of shipper, the term “shipper” alone should not be used. Rather, in order to clearly distinguish it from another type of shipper, it should be labelled with an identifiable type of shipper from the role that it plays or the manner in which the role was assumed, and this is the justification how the label “contracting shipper” came about, since such a shipper enters into the contract of carriage. It was much in the same way parallel to the way the reference to different types of carriers was proposed in the same Draft. Also, the approach used in the Hamburg Rules where the phrase “in whose name or on whose behalf” was referred to and dismissed as superfluous since a shipper who enters into the contract in his own name is thus the contracting shipper, as also is a shipper who enters into the contract through an agent on his behalf.

As for the other possible type of shipper, the consignor, again it was thought that it should be labelled as a particular type of shipper in order to be clearly distinguished as opposed to just using the label “shipper”. “Delivering shipper” or “consigning shipper” was what was thought could aptly describe their role of delivering the goods to the carrier, however there was concern that such terms were rather queer and unconventional in particular to the industry never having accustomed to such labels. Thus it was thought best in keeping with the commercial practice of referring to such a shipper as just consignor. Recognition nonetheless was made by the Working Group that such a consignor could consist of not only the seller of the goods whether or not he has delivered the goods to the carrier himself or has required an agent to deliver the goods on his behalf, for instance freight forwarders or trucking companies; it could also include the freight forwarders and trucking companies themselves since they are indeed the ones who have physically delivered the goods to the carrier.⁵⁸ The UNCITRAL also established its own Working Group on Transport Law to come up with its own draft instrument.

The dominant underlying objective of the Rotterdam Rules appear to be achieving uniformity above all else in the currently fragmented situation concerning the law of international carriage of goods by sea. This was specifically the view of UNCITRAL

⁵⁷ Hamburg Rules, Art 1.3.

⁵⁸ CMI Yearbook (n 52) Article 1.7, Draft Outline Instrument 125.

when in 1996⁵⁹ it requested CMI and other organisations to look into the current state of the law on carriage of goods by sea. At the time when the Rotterdam Rules were being drafted not only were there already in existence three different conventions on carriage of goods by sea emerging over the years; each of which has achieved its own level of acceptance but all have failed to achieve the required level of global acceptance by the shipping community worldwide needed for a single, strong, international uniform law; they have each not even been universally applied in a uniform way. This problem is further aggravated by states resorting to producing its own version of regional solutions and passing national laws to suit their own needs. Thus, although the thorough process of getting views from as many sectors and interested parties to carriage of goods by sea were in effort during the drafting of the Rotterdam Rules were emphasised, the main objective of achieving uniformity would mean that as much as a win-win situation was sought after, ultimately some sacrifices almost certainly had to be made.

The three conventions were also considered to be outdated, the latest one being more than 30 years old, created at a time when so many technological advances so integral to efficient commercial activity today were not in existence that significant gaps have become evidently clear. Thus the other background against which the Rotterdam Rules must be understood is the reflection of the usage of modern, high technology shipping equipment as well as information and communication technology which marks the feature of shipping practice today.

The other significant feature of the Rotterdam Rules is the widening of the ambit of the Rules to accommodate multimodal transportation of goods, another feature of today's international carriage of goods. The Rules thus not only deal with the sea leg of the carriage but also covers the complete regime from door-to-door. Therefore the characteristics of the Rules would not be peculiar to only activities identifiable with carriage of goods by sea but encompasses carriage by road and rail as well.

⁵⁹ The Travaux Préparatoires, CMI Project on Issues of Transport Law 1 <http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/THE%20TRAVAUX%20PR%C3%89PARATOIRES.pdf>

Travaux Préparatoires to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea - the “Rotterdam Rules” 2008

The discussions in the preliminary work to the session of the Working Group III⁶⁰ regarding the two different types of freight forwarders in international transport led to the meaning of the shipper. Although generally freight forwarders are not regarded as shippers being only regarded instead as the shipper’s agent, apparently a distinction can be made between two basic types of freight forwarders, which led to an exception to this principle. The first is the description of the former type mentioned above, where the freight forwarder is an agent and strictly an agent, usually of the shipper but occasionally for the carrier. Such freight forwarders arrange transportation of the goods and handle the administrative process on behalf of the shipper in relation to the transport. They do not issue the transport document neither are they responsible for the proper performance of the transport. From the carrier’s perspective, the carriage contract is between the carrier and the actual shipper, and not the freight forwarder in this context, being purely the agent and thus subject to the usual agency principles.

The second type of freight forwarder is one which is the complete opposite of the first type and functions instead as a principal. Such a freight forwarder consolidates goods from smaller shipments from various shippers and takes on responsibility for their transport. It may also perform part of the carriage which may involve various modes and issues its own transport document. For the purposes of the contract of carriage, from the carrier’s perspective, this freight forwarder is the shipper with whom it contracts.⁶¹

This document also talked about the issue of the freight forwarder acting as the multimodal transport operator but it does not discuss whether in this context the freight forwarder is also considered to be the shipper.⁶²

In the thirty-fourth session of the UNCITRAL,⁶³ the discussion on the possible scope of work of the Commission regarding the issue of transport documents when demanded by the shipper was included. It raised the issue regarding the lack of clarity as to who may be described as “the shipper” having the right to make the demand. It makes a distinction

⁶⁰ V. Transport Law, A. Report of the Secretary-General: survey of the work of international organizations in the field of transport law (A/CN.9/172), paras 54-59.

⁶¹ *ibid* paras 54-59.

⁶² *ibid* paras 60.

⁶³ United Nations Commission on International Trade Law.

between the contracting shipper, who is the party against whom the contract of carriage is binding, and the consignor, who is the party that delivered the goods to the carrier for carriage, possibly on the contracting shipper's behalf, and some other party, all of whom might be defined as the shipper for this purpose.⁶⁴

The commentary to the draft provisions made in the 9th session of Working Group III, in particular the definition of consignor is relevant. At that stage the definition referred only to a "person" that delivers goods to a carrier as well as has the right to demand a receipt for goods delivered to the carrier. The consignor may be distinguished from the shipper since the provisions on the shipper responsibilities would only fall on the consignor if they were identified as the same person.⁶⁵ The definition of shipper was commented upon as not expressly including the party on whose behalf the contract of carriage is entered into.⁶⁶

The draft provisions on the obligations of the shipper provided for the extension of the obligations and rights of the contracting shipper to a party in the contract who is identified as the shipper and who accepts the transport document or electronic record.⁶⁷ This is different to the final version which requires the party to only accept to be named as "shipper" in the transport document or electronic transport record. The commentary on this is that if the person is identified in the contract particulars as the shipper, this would allow standard clauses to be drafted which define and identify who is to be a shipper including the consignee. It refers to the similar approach taken in some standard bills of lading which use the term "merchant" to encompass the shipper, consignor, consignee and holder. It is then provided in those bills that the merchant takes on the responsibilities of the shipper.⁶⁸

The use of standard international sale terms for instance FOB or CIF will also determine who the shipper is. This was referred to in the commentary on the evidentiary value of a freight prepaid document which may be relied on by a party who is an extended services buyer because when the sale is on FOB terms the consignor may be the seller but the

⁶⁴ Possible future work on transport law, Report of the Secretary-General, A/CN.9/497, para 35, 2 May 2001.

⁶⁵ UNCITRAL, Working Group III (Transport Law), Ninth Session, New York, 15-26 April 2002, Preliminary Draft Instrument on the Carriage of Goods by Sea, A/CN.9/WG.III/WP.21/Add.1, 11 para 13.

⁶⁶ *ibid* 14 para 26.

⁶⁷ *ibid* 31 para 96.

⁶⁸ UNCITRAL, Working Group III (n 65) 32 para 97.

shipper is the buyer and consignee. If the sale is CIF then the seller becomes the shipper and consignor.⁶⁹

Under the commentary on the right of control, the shipper is the controlling party when a non-negotiable document is issued or no transport document is issued, unless a different party was agreed by the shipper and consignee.⁷⁰ According to Article 1 (12) of the Rotterdam Rules, the “right of control” of the goods refers to the right of the party under the contract of carriage to give instructions to the carrier in relation to the goods as provided in Chapter 10 of the Rules.⁷¹ Further details as to the kind of instructions which the shipper is entitled to give is discussed further in Chapter 3.⁷²

What follows is an account of what the courts of selected countries in various parts of the world have described, defined or referred to as the shipper. The selection of countries is on the basis of statistics on the top twenty countries⁷³ with the highest total value of overall exports in 2015 in US dollars.⁷⁴ Not all twenty countries can be included as there is difficulty in gaining access to laws in some of them. This would give the basis for the legal construct of the shipper, together with the statutory definitions provided in the Hamburg Rules and Rotterdam Rules, as well as the statutory definition found in certain jurisdictions such as the Maritime Code of China. These countries represent a sampling of civil and common law jurisdictions as examples of the variation which exists globally in order to give a more holistic and comprehensive perspective to the meaning of the term “shipper”.

⁶⁹ *ibid* 36-37 para 114.

⁷⁰ *ibid* 41 para 124(1).

⁷¹ Chapter 10 of the Rotterdam Rules deals with Rights of the controlling party.

⁷² Refer to Chapter 3 in the sub-heading “Duty regarding provision of information and instructions”.

⁷³ Top of the list is China with \$2,281,855,922,483, followed by USA \$1,503,870,438,318, Germany\$1,331,193,671,434, then a sharp gap with Japan \$625,024,823,418, France\$573,055,548,853, China, Hong Kong SAR\$498,557,619,612 , Netherlands \$471,957,653,246, United Kingdom \$465,921,608,951, Italy \$458,751,239,136, Canada \$407,140,010,563, Belgium \$397,739,156,690, Mexico\$380,749,925,476, Singapore \$346,806,797,091, Russian Federation \$343,907,651,828, Switzerland \$291,959,193,895, Other Asia\$280,019,266,828, Spain \$278,122,010,154, India \$264,381,003,631, Thailand \$210,883,382,473, and Saudi Arabia \$201,491,759,864.

⁷⁴ (UN) 2015 *International Trade Statistics Yearbook, Volume I - Trade by Country*, Part 1 World Trade Tables - 1st table in list: total imports and exports by regions and countries or areas in US dollars (Table A), <http://comtrade.un.org/pb/> The value of export trade however is not confined to seaborne trade as it includes carriage by rail and air. Nevertheless, it would normally be the case that seaborne trade dominates the figures, being the most convenient and efficient mode of international transportation of goods.

China

According to maritime law scholars in China,⁷⁵ The Chinese Maritime Code employs the definition of “shipper” taken from the Hamburg Rules only omitting the word “or” between the two categories of persons defined as “shipper”. Hence, as the writer rightly pointed out, in practice the issue remains as to who between the two ought to be the shipper if both requirements are fulfilled each by different persons, particularly in FOB contracts of sale.

In an unnamed case in 1993, the plaintiff seller entered into an FOB contract of sale with the buyer consignee and the defendant was the carrier. The letter of credit required the bill of lading to name the buyer as the “shipper” which the seller duly complied and requested from the defendant’s agent. The letter of credit eventually expired which caused the order bill of lading to be no longer negotiable. When the goods arrived at the port of destination, naturally the carrier followed the instruction of the “shipper” and delivered to the receiver without presentation of the original bill of lading, hence the claim filed by the plaintiff against the carrier. It was held that the plaintiff, not being party to the bill of lading did not have the right to sue the carrier.

Another similar circumstance occurred in another unnamed case at more or less the same time. The only difference is that this time it was a sale contract on C&F terms and so the seller’s name would normally have been put in the “shipper” column. However again, the letter of credit requirements forced the seller to name the buyer as “shipper” in not only the bill of lading but also the shipping order and booking note. The bill of lading issued by the carrier was “to order of bank” but unfortunately the bank refused to negotiate it due to the non-compliance of the bill of lading with the “sea-sea transport” in the letter of credit. When the goods arrived, the buyer took delivery without presentation of the original bill of lading resulting in the seller suing the carrier. In contrast the court in this case⁷⁶ held that the seller was the shipper under Article 42(3)(b) of the Chinese Maritime Code because the judge relied on the physical act of the delivery of the goods to the carrier by the seller and that the sale contract was on the basis of C&F terms.

⁷⁵ Yao-Hongxiu and Lin-Hui, ‘On the Identity of the “Shipper” under the Maritime Code of the People’s Republic of China’, (1998) 6 International Maritime Law Vol 5 1.

⁷⁶ Apparently a different court from the first case.

United States

In the United States a commercial shipper is defined as

“any person who is named as the consignor or consignee in a bill of lading contract who is not the owner of the goods being transported but who assumes the responsibility for payment of the transportation and other tariff charges for the account of the beneficial owner of the goods. The beneficial owner of the goods is normally an employee of the consignor and/or consignee. A freight forwarder tendering a shipment to a carrier in furtherance of freight forwarder operations is also a commercial shipper. The Federal government is a government bill of lading shipper, not a commercial shipper.”⁷⁷

A few cases decided by the courts in the United States provide some guidance as to the meaning of the term “shipper”. One such case is *APL Co Pte Ltd v. UK Aerosols Ltd*⁷⁸ where in the bill of lading, UK Aerosol was named “shipper” whilst two others, Kamdar Global LLC and UG Co Inc were named “notify party” and “also notify party” respectively. Under the bill of lading, the “merchant”; defined as including the shipper, consignee, receiver, holder of the bill of lading, owner of the cargo or person entitled to possession of the cargo or having a present or future interest in the goods; was required to indemnify the carrier if the cargo caused loss as a result of improper packaging or if they were unsuitable for carriage. The issue in this case was whether a notify party is a shipper. The court, in holding that all three were liable, referred to several provisions of the US Carriage of Goods by Sea Act.⁷⁹ The first was section 4(3)⁸⁰ which provides that the “shipper” of goods shall not be responsible for loss or damage sustained by the carrier without fault on the part of the “shipper”. However the Act itself does not define “shipper” and the court held that the two notify parties were not “shippers” for these purposes. The court also referred to section 1(b) of the same Act which defines “contract of carriage” and makes a distinction between a “shipper” and a “holder” of a bill of lading. The third section referred to is section 3(3) which requires an original bill of lading to be issued by the carrier to the “shipper” upon demand by the “shipper”. Hence

⁷⁷ 49 CFR 375.103 [Title 49 – Transportation; Subtitle B Other Regulations Relating to Transportation; Chapter III Federal Motor Carrier Safety Administration, Department of Transportation; Subchapter B Federal Motor Carrier Safety Regulations; Part 375 Transportation of Household Goods in Interstate Commerce; Consumer Protection Regulations; Subpart A General Requirements].

⁷⁸ (2009) 582 F 3d 947; 2009 AMC 2113 (2d Cir).

⁷⁹ Carriage of Goods by Sea Act 1936 Title 46 United States Code SS 1300-1315.

⁸⁰ Section 4(3) is equivalent to Art IV, r 3 of the Hague Rules.

the court views that if consignees, who are what notify parties are, are “shippers” there would be a burden on carriers to issue original bills of lading to multiple parties, which would lead to commercial inefficiency. Likewise the guarantee by the shipper under section 3(5) regarding information provided to the carrier as well as the responsibility to indemnify the carrier in case of inaccuracies was held by the court as making it unlikely that the “shipper” could be anyone but the person who delivers the goods to the carrier. The reason why UG and Kamdar were liable to indemnify the carrier was because they fell within the definition of “merchant” under the bill of lading.⁸¹

Another instructive decision from the United States is *Re M/V Rickmers Genoa Litigation*⁸² where the buyer was a parent company located in the United States while the seller was its subsidiary located in China. The purchase was made under a CIF contract and so the necessary arrangements to transport the cargo of chemicals were performed by the Chinese corporation. When the cargo exploded following the collision of the ship carrying it with another, the carrying ship and its other cargo were damaged. The carrier sought to sue the parent company as buyer-consignee. This is following the bill of lading clause which again defines the “merchant” broadly as encompassing the buyer-consignee. The carrier argued that this, together with the broad definition of “shipper” in the Shipping Act⁸³ should be used to determine who the shipper is. The court held that the Carriage of Goods by Sea Act imposes liability on the shipper towards the carrier for the goods shipped but does not impose any duty on the receiver, as a purchaser is clearly not within the scope of its application for these purposes. The duty to warn the carrier about the dangerous nature of the goods comes about as a result of placing the goods for shipment. This act was done by the seller as the shipper and not the purchaser.⁸⁴

Although this is correct in principle, however in a case such as this, the shipment was instigated by the purchaser who is also a parent company. As a parent company it holds control over its subsidiary and arguably makes all the decisions including whether to warn the carrier regarding the dangerous nature of the goods. It may even, in some cases,

⁸¹ R. Force and M. Davies, ‘US Maritime Law’ [2010] LMCLQ I. M. C. L Y. SS 301-325 214, 216-217.

⁸² (2009) 622 F Supp 2d 56; 2009 AMC 609 (SDNY); clarified on reconsideration (2009) 643 F Supp 2d 553 (SDNY).

⁸³ Section 3(21)(B) of the Shipping Act 1984 as amended by the Ocean Shipping Reform Act 1998 includes in its definition of shipper, “the person for whose account the ocean transportation is provided”; while section 3(21)(C) includes “the person to whom delivery is to be made”.

⁸⁴ Force and Davies (n 81) 228.

have better knowledge regarding the goods than the sender itself, who is merely following instructions.

Another case which dealt with the identity of the shipper is *Nippon Yusen Kaisha v FIL Lines*⁸⁵ where the defendant, FIL was named as consignee and notify party whereas LCL or Freight India was named as shipper in the 24 bills of lading. The plaintiff, NYK claimed against FIL for the freight charges. FIL denied on the basis that they were only acting as agents of the shipper. Clause 23(6) makes all parties defined as the Merchant jointly and severally liable to the carrier for freight charges. The definition of the Merchant in Clause 1 includes among others the shipper, consignee and any other person acting on their behalf. This is a very common clause in bills of lading. Although FIL did not take actual delivery of the cargo, the ultimate consignee being LCL and Freight India, they were invoiced by the plaintiff for the freight. FIL was held liable for the shipper on the basis that it was not clear in the bill of lading that they were acting as agents for the shipper.

In the case of *MSC Mediterranean v Metal Worldwide*,⁸⁶ the term shipper was not used. Instead, throughout the judgement the term “Merchant” as used in the bill of lading referred to Metal Worldwide, the person who contracted with the carrier to transport a cargo of shredded steel in containers that were purportedly loaded and sealed by the supplier of the shredded steel scrap.

From these cases, it can be seen that there are many reasons why a party can be liable as a shipper. It may depend on whether it would lead to convenience or commercial inefficiency, the construction of the terms of the contract as evidenced by the bill of lading, the act of placing goods for shipment, the relationship between the shipper and the nominal consignee, and the person who enters into the contract of carriage with the carrier.

⁸⁵ *Nippon Yusen Kaisha v. FIL Lines USA Inc.*, 977 F. Supp. 2d 343, 2014 AMC 553 (S.D.N.Y. 2013).

⁸⁶ *MSC Mediterranean Shipping Co. v. Metal Worldwide, Inc.*, 884 F. Supp. 2d 1269, 1273–74, 2012 AMC 2815 (S.D. Fla. 2012).

Germany

Section 513⁸⁷ of Book 5⁸⁸ of the Handelsgesetzbutch⁸⁹ deals with the entitlement to the issuance of a bill of lading. In subsection(2) The “Ablader” shall be defined as the party which delivers the goods to the carrier for carriage and which has been designated as Ablader by the shipper so as to be recorded as such in the bill of lading. If a party other than the Ablader delivers the goods for carriage, or if no party has been designated as Ablader, then the shipper shall be deemed to be the Ablader.”

This provision makes the shipper involved in the procedure since the basis for determining the Ablader is delivery of the goods plus nomination by the shipper. Otherwise the shipper will be the Ablader by default if he does not nominate the person who delivers the goods or, if someone apart from the nominated Ablader delivers the goods. Either way the shipper has to be involved in the process which requires proper consideration by the shipper.

The Nordic Countries

Under Article 13:1 of the new Swedish Maritime Code,⁹⁰ a distinction is made between the shipper and the sender. The sender is the one who enters into the contract for carriage of general cargo with the carrier whereas the shipper is the one who delivers the goods to the carrier for carriage. The terminology in the Scandinavian maritime law is quite peculiar in itself as even the parties to a charter party are not the owner and charterer as in English law but are rather referred to as the carrier and the charterer. The Nordic Maritime Codes go back a long way to the late 19th century and drafted as common Nordic legislation.⁹¹ This is probably why in the bills of lading the term merchant is used and it encompasses all the different terms used in different countries including shipper, sender and consignor or consignee.

⁸⁷ Chapter 2 Transport Contracts, Subchapter 1 Contracts for the carriage of goods by sea, Title 1 Contract for carriage of general cargo, Subtitle 3 Accompanying documents, Section 513 Entitlement to issuance of a bill of lading.

⁸⁸ Book 5 (Maritime Trade) of the German Commercial Code.

⁸⁹ Hereafter HGB.

⁹⁰ (1994:1009).

⁹¹ Lars Gorton, ‘The Liability for Freight’ (Stockholm Institute for Scandinavian Law 1957-2009) 481, <http://www.scandinavianlaw.se/pdf/38-18.pdf>, this was raised by Professor Gorton when discussing the liability of the shipper issue, in the Report of the First Meeting of the International Sub-Committee on Issues of Transport Law, CMI Yearbook 2000, 192.

The Norwegian Maritime Code⁹² also employs the same distinction. Section 251⁹³ provides that the sender is the person who enters into a contract of carriage with the carrier for the carriage of general cargo by sea, while the shipper is the person who delivers the cargo for carriage. The Code uses the same definition for the shipper whether the carriage is made under a bill of lading or a charterparty. Section 321 provides that the shipper is the person who delivers the cargo for loading.⁹⁴ It is noted that although this section sits in the chapter on chartering of ships, there is no definition given to charterers. This may give the impression that the charterer is the shipper since the meaning given to it resembles in part to charterers and there is no other definition of charterer. The term “charterer” is however, used in the subsequent provisions instead of the term “shipper”. Also, the definition of the carrier in this section makes reference to the charterer as the person the carrier contracts with in chartering out a ship. In section 251 the carrier is also the person with whom the sender enters into a contract for the carriage of general cargo by sea.⁹⁵

The code also speaks of the “cargo owner” in its provisions but it is not defined.⁹⁶ A clear and careful understanding of each of these persons is thus required since although they are seemingly similar, the roles and duties which each one is subject to is quite different from the other.⁹⁷ This however takes into account the likelihood that the shipper, sender, charterer and cargo owner could well be different people and makes clear each of their responsibilities.

In Denmark the position is slightly different. The Danish Merchant Shipping Act (Consolidation),⁹⁸ section 251⁹⁹ provides the definition of the shipper and the consignor.

⁹² Act No. 39 of 1994.

⁹³ This section is on definitions. It can be found under Part IV. Contracts of Carriage, Chapter 13. Carriage of General Cargo.

⁹⁴ Section 321 deals with the Scope of application and Definitions. It sits under Chapter 14 on Chartering of Ships, I. General Provisions.

⁹⁵ The Code makes no distinction between the person whom the shipper (sender) contracts with and the person whom the charterer contracts with, but it is noted in the Preface to the Code that In Norwegian Maritime Law, there exists the term *reder* or *rederi* which basically means the person or a company who runs the ship for its own account whether as a shipowner or a demise charterer. There is apparently no equivalent term for it in English which perhaps explains the use of carrier for both types of contract of affreightment.

⁹⁶ Section 266 of the Norwegian Maritime Code provides for measures taken by the carrier to protect the cargo and the interests of the cargo owner. The cargo owner should first be contacted. Authority is given to the carrier when the cargo owner cannot be contacted for obtaining specific instructions on how to deal with the cargo should it become necessary. Section 267 then requires the cargo owner to be liable for those measures taken.

⁹⁷ This will be discussed in the following chapter on Shipper Liability under National Law, Chapter 3.

⁹⁸ Consolidation act no. 75 of 17 January 2014.

⁹⁹ This section sits under IV Contracts, Part 13 Regarding Carriage of Goods.

The shipper is the person who enters into a contract of carriage¹⁰⁰ with the carrier whereas the consignor is the person who delivers the goods for carriage.¹⁰¹ The Act however also makes mention of the cargo owner¹⁰² much in the same way as the Norwegian Maritime Code.¹⁰³

In the Finnish Maritime Code,¹⁰⁴ they have the contracting shipper and the actual shipper.¹⁰⁵ The contracting shipper is considered as the sender and this is the person who concludes the contract for the carriage of goods by sea with the carrier.¹⁰⁶ The actual shipper is the person who delivers the goods to the carrier for carriage.¹⁰⁷ Again the term cargo owner is used but not defined. Presumably it is literally what it is described to be. The provisions relating to the cargo owner are similar to the ones in the Norwegian Maritime Code as well as the Danish Merchant Shipping Act (Consolidation), where in there are two sections that deal with cargo owners. The first section¹⁰⁸ deals with situations where necessity arises to take special measures to protect the cargo and the cargo owner's interests, the carrier should attempt to obtain instructions from the cargo owner first. If this is not possible, then the carrier is authorised to act on behalf of the cargo owner to take those special measures. The second section¹⁰⁹ will create liability on the cargo owner to reimburse the carrier for the special measures taken by the latter.

From the above it can be observed that, even within the same region, there can be multiple ways in which the shipper can be defined or other terms used to describe the characteristics of the shipper, but yet not put together as part of the meaning given to the

¹⁰⁰ Danish Merchant Shipping Act (Consolidation) 2014, s 251(3).

¹⁰¹ *ibid* s 251(4).

¹⁰² *ibid* s 266 and 267.

¹⁰³ Section 266 of the Danish Merchant Shipping Act (Consolidation) is similar to section 266 of the Norwegian Maritime Code where the carrier shall obtain instructions from the cargo owner regarding special measures to be taken to preserve or carry the cargo when the need arises but empowers him to act on behalf of the cargo owner should communication not be possible in order to protect the cargo owner's interests. Section 267 likewise, then makes the cargo owner liable for the commitments and disbursements made by the carrier on his behalf.

¹⁰⁴ No. 674 of 1994.

¹⁰⁵ This can be found in Chapter 13 Carriage of Goods, Introductory provisions concerning carriage of goods, Section 1 on Definitions.

¹⁰⁶ Finnish Maritime Code 1994, s 1(3).

¹⁰⁷ *ibid* s 1(4).

¹⁰⁸ Section 16 of the Finnish Maritime Code deals with the carrier's authority to act on behalf of the cargo owner.

¹⁰⁹ Section 17 of the Finnish Maritime Code deals with the cargo owner's responsibility for the carrier's measures.

term “shipper”. This naturally raises the concern for the likely chances of dispute if the terms are not properly understood especially by parties unfamiliar with the system.¹¹⁰

Netherlands

In the Dutch Civil Code,¹¹¹ the definition of the shipper can be found in the definition of a ‘time or voyage charter’. According to article 8:373 paragraph 1:

“1. A time or voyage charter in the sense of the present Section (Section 8.5.2) is a contract of carriage of goods under which the carrier has engaged himself to transport goods on board of a ship, which he, other than by way of bareboat chartering, places in its entirety or in part, and whether or not on a time base (time charter or voyage charter), at the disposal of the consignor (shipper).”

Then paragraph 2 goes on to say:

“2. In the present Section (Section 8.5.2) the term ‘lessor’ shall mean ‘carrier’ as mentioned in paragraph 1, and the term ‘charterer’ shall mean ‘consignor’ (‘shipper’) as mentioned in paragraph 1.”

This would mean that in this jurisdiction, a voyage charterer or a time charterer is expressly within the definition of the “shipper”. This is contrary to the common understanding given to the term “shipper” under a charterparty as the charterer, even if sending goods himself, is governed by the charterparty and referred to as the charterer, whilst the shipper is someone other than the charterer who sends goods within the same arrangement but is governed by the bill of lading. Charterers are normally taken out of the ambit of the definition of “shipper” in international conventions and left to national law to regulate its liability.

¹¹⁰ This is despite the high degree of harmonization within Nordic Maritime Law as claimed by Lars Gorton, ‘Regional Harmonization of Maritime Law in Scandinavia’ in Jürgen Basedow, Ulrich Magnus, Rudiger Wolfrum (eds), *The Hamburg Lectures on Maritime Affairs 2009 & 2010* (Springer 2012) 36.

¹¹¹ Book 8 Dutch Civil Code, Transport Law and Means of Transport, Part II Maritime Law, Title 8.5 (Commercial) Operation, Section 8.5.2 Contract of Carriage of Goods by Sea.

United Kingdom

S.3(3) of the Carriage of Goods by Sea Act 1992 preserves the liability of the shipper as the original party to the contract of carriage notwithstanding the imposition of the same liabilities on other persons subsequent to shipment by the Act. There is no direct definition to be found within the Merchant Shipping Act 1995¹¹² nor in the Carriage of Goods by Sea Act 1971 since it applies the Hague-Visby Rules.

Leggatt J in the English case of *MSC Mediterranean v Cottonex*¹¹³ referred to Clause 1 in the bill of lading which referred to the shipper as one of the persons included within the term “Merchant”. This is a common term found in bills of lading. Since Clause 2 made all the persons defined as merchant jointly and severally liable to the carrier for all the liabilities of the merchant, the shipper could therefore take on all of the liability of the merchant.

It is interesting to note that even a party which is only technically responsible for loading the cargo onto the ship for the FOB seller has also been referred to as the actual shipper. In another English court decision of *The Crudesky*,¹¹⁴ the FOB seller of crude oil, Vitol had failed to comply with procedures of loading at a Nigerian port due to the act of the terminal operator, Total, in loading the cargo without compliance with the Procedure Guides. Teare J referred to Total as the actual shipper through which Vito’s obligation as FOB seller to ship the cargo could be performed.¹¹⁵ Here the words ‘to ship’ and ‘actual shipper’ apparently refer to the act of delivering cargo to the carrier and loading the cargo onto the ship.

Canada

In the case of *Boutique Jacob Inc. v Pantainer Ltd.*,¹¹⁶ the plaintiff, Boutique Jacob Inc purchased textile pieces from a Hong Kong supplier. In order to transport the cargo from Hong Kong to Montreal, the plaintiff through Panalpina Inc, contracted with Pantainer Ltd, a non-vessel operating carrier and was issued bills of lading by the latter. Pantainer Ltd then contracted with Orient Overseas Container Line Ltd which in turn contracted with the Canadian Pacific Railway to carry the cargo from Vancouver to Montreal by

¹¹² Merchant Shipping Act 1995.

¹¹³ *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283, para 30.

¹¹⁴ *Great Elephant Corporation v Trafigura Beheer BV (The Crudesky)* [2012] EWHC 1745, [2012] 2 Lloyd’s Rep 503.

¹¹⁵ *ibid* 519.

¹¹⁶ 2008 FCA 85.

rail. A train derailment caused the loss of all the cargoes. Boutique Jacob brought claims against all of them and all but one were able to rely on limitation of liability clauses directly or indirectly.

At trial, the Canadian Pacific Railway was prevented by section 137 of the Canada Transportation Act¹¹⁷ from limiting its liability against the shipper if there was no written agreement signed by the shipper, which there clearly was not between Boutique Jacob and the Canadian Pacific Railway. The latter then appealed to the Federal Court of Appeal which referred to section 6 of the Canada Transportation Act for the definition of the “shipper”. It held that “shipper” within section 137 of the Canada Transportation Act means the “one that, given the possibilities available, made a concrete decision to call on a rail carrier rather than another carrier” and has a direct connection and real control over the negotiations made with the carrier in coming to an agreement. The shipper in this case therefore, is the entity that contracted directly with the rail carrier; Orient not Boutique Jacob. Since there was a written agreement between Canadian Pacific Railway and Orient, the former could limit its liability.

This definition of the shipper relies solely on whether the party directly entered into a contract of carriage with the carrier, much like the definition in the Rotterdam Rules.

Hong Kong

An interesting case which offers guidance in determining the identity of the shipper is *Foshan Sundry Trade Co Ltd v Air Sea Transport (HK) Ltd*.¹¹⁸ The plaintiff seller sued the defendant carrier for misdelivery of the cargo to the buyer, BSL without presentation of the bill of lading nor taking instructions from the plaintiff. The defendant had done so because BSL informed them that they had lost the bill of lading and provided the carrier with a letter of indemnity and guarantee in exchange for the release of the cargo. The defendant claimed that they regarded BSL as the shipper because they dealt only with BSL. They took instructions from the latter since it was BSL who placed the shipping order and informed them that one Ms. L would collect the bill of lading and pay the freight charges. Ms. L was actually the plaintiff’s representative who had come to the defendant’s office for the above purposes, but the defendant claimed to not know this. In the bill of lading the plaintiff is named as the shipper whereas BSL is the notify party. Nevertheless, the defendant asserted that since it had followed the instructions of the

¹¹⁷ S.C. 1996, c. 10.

¹¹⁸ [2006] HKCU 1904.

‘shipper’, even though it had released the goods without presentation of the bill of lading, it was not in breach of its obligations in the contract of carriage.

The court held that the identity of the shipper is indisputable since the plaintiff is named in the bill of lading as the shipper and it is the defendant who issued the bill of lading as carrier. Whether or not Ms L had properly identified herself as a representative of the plaintiff is immaterial. The bill of lading is also consistent with other communication by fax from BSL to the defendant which indicated that the plaintiff is the shipper. The court thus made its decision based on all the documentary evidence as to whom the ‘shipper’ label was given rather than the conduct of the parties and how the business was conducted.

In an unreported judgment of the case *Kind Respect Ltd v Apex Logistics Ltd*,¹¹⁹ the defendant was a freight forwarder whereas the plaintiff was an associated company of PH, the supplier of the goods, in charge of sales transactions. A sales transaction was entered between the plaintiff and PE on FOB terms. PE then through the freight forwarder on the receiving side, S, engaged the defendant to transport the goods and so the plaintiff handed the goods to the defendant for shipment. The defendant issued the bills of lading to the plaintiff which named the plaintiff as the shipper and signed by the defendant as agent of the carrier. However since the amount of cargo shipped was small, it had to share the space in the container with goods belonging to someone else. In this situation, the carrier issued the defendant with a master bill of lading wherein the defendant is named as ‘shipper’ and S is named the ‘consignee’. It can be observed here that the term ‘shipper’ refers to different parties in different documents even though it is for the shipment of the same goods. That would mean that in this circumstance a person is regarded as a ‘shipper’ only by the person to whom the goods were directly delivered to. When the latter delivers the goods to the next person, he in turn becomes the ‘shipper’.

In *BDP Asia Pacific Limited v Longtex Apparel Group (HK) Company Limited*¹²⁰, the defendant agent was found liable despite claiming it was not the contracting party and that its name did not appear as “shipper” on the shipping documents. The defendant was a trader who procured shipping services of the plaintiff for the manufacturer of the goods shipped. The practice of putting the manufacturer’s name in the shipping order as the “shipper” was said to be common.

¹¹⁹ [2006] HKCU 1730.

¹²⁰ [2011] HKCU 2350, para 8(e).

The case of *Red Chamber Co. v Lau Siu Man*¹²¹ described the shipper in relation to one of the purposes of the bill of lading as a document of title and an important safeguard to the interest of the seller in being paid for the goods sold in the context of international trade where payment is made against delivery of documents. Upon receiving the goods the carrier issues the bill of lading to the seller or the shipper who then sends it to the buyer after the purchase price has been paid. The defendant, a cargo delivery service provider, was held to owe the shipper a duty of care to deliver the cargo to the person who can produce the bill of lading.¹²² There are many similar cases such as this where the shipper is identified by the parties as the owner of the goods, the seller of the goods or the manufacturer of the goods.

A freight forwarder defendant was held liable as “shipper” in the case of *Italia Marittima v Translink Shipping*¹²³ even though it was not named as shipper in the bill of lading because it was bound by the corresponding antecedent contracts contained in or evidenced by the respective shipping order and corresponding booking confirmation made on behalf of its customers, the named shipper in the bill of lading. The court held that ‘if the defendant does not fall within the definition of “shipper” in the “Merchant” definition, it would be against commercial reality to infer that the plaintiffs intended that the guarantee by the defendant in the antecedent contracts should be discharged and replaced only by an indemnity from a party (the named shipper) with whom the plaintiffs as carriers had no direct dealing.’¹²⁴ The defendant was held to have contracted with the plaintiffs as a principal and not the named shipper’s agent in the antecedent contracts. The shipping order contained a guarantee by the “shipper” to indemnify the carrier against any claims by any other party as a result of inaccurate information provided by the “shipper” in the shipping order. Since the defendant freight forwarder was liable as a principal, this implies that it is deemed to be the shipper in the shipping order. The bill of lading also contained similar clauses but in there it was the “merchant” who has to indemnify the carrier. The carrier relied on the inclusive definition of “merchant” which included among others, the shipper. Here also the freight forwarder was deemed the

¹²¹ *Red Chamber Co. v Lau Siu Man T/A Professional Cargo Deliver Services Company* [2011] HKCU 1833

¹²² *ibid* para 31.

¹²³ *Italia Marittima S.p.A. (formerly known as Lloyd Triestino Di Na Vigazione Societa Per Azioni) & Anor v Translink Shipping (Hong Kong) Limited* [2009] HKCU 1817.

¹²⁴ *ibid* para 27.

shipper as the court held that no supersession of the antecedent contracts was intended due to the reasons stated above.

The Contractual Perspective

The shipper is one of the persons with whom the carrier, whether it be the shipowner or the charterer, may enter into a contract of carriage. This is often concluded before loading commences and in the absence of express agreement may be implied from the acts of the shipper in surrendering the goods for carriage.¹²⁵ Where the ship is under charter, the shipper may be a third party from the shipowner-charterer relationship or the charterer himself. If the charterer himself is the shipper, the charterparty governs his rights and obligations regarding the goods he ships, and not the bill of lading, so long as the bill of lading remains in his hands. The shipper may be the head time charterer who voyage charters the ship, or even the sub-charterer or sub-sub-charterer. However, if the shipper is a third party to the charterparty, the bill of lading governs the relationship between the shipper and the carrier, regardless of the terms of the charterparty, unless properly incorporated otherwise, and that the terms of the charterparty are not repugnant or contradictory to the terms of the bill of lading; otherwise the terms of the bill of lading will prevail.¹²⁶

Where the ship is not under charter, the shipper and the carrier are usually considered to be the original parties to the bill of lading contract. The shipper is named in the bill of lading. However, since the bill of lading is only evidence of the contract of carriage which is concluded before the bill of lading is issued, the named shipper may not be privy to the bill of lading contract.¹²⁷ The shipper may contract instead with a third party who then contracted with the carrier as principal, for example a freight forwarder. The shipper, as the original party to the contract evidenced by a bill of lading, is entitled to all the rights contained in the contract until he transfers them to another lawful holder of the bill.¹²⁸ Upon transfer the shipper loses his rights under the bill of lading contract¹²⁹ apart from those which are not evidenced by the bill of lading itself, for example if he is also a charterer, his rights under the charterparty remain. However, a shipper under a sea waybill or a ship's delivery order does not lose his contractual rights and these become

¹²⁵ Julian Cooke and others, *Voyage Charters* (Informa Law from Routledge 2014) para 18.45.

¹²⁶ *Hogarth Shipping Co. Ltd. v. Blyth Greene Jourdain & Co. Ltd.*, [1917] 2 K.B. 534.

¹²⁷ *Cho Yang Shipping v. Coral (UK) Ltd* [1997] 2 Lloyd's Rep. 641.

¹²⁸ Cooke (n 125) para 18.82.

¹²⁹ Carriage of Goods by Sea Act 1992, s 2(5) (COGSA).

additional to the rights of the person named or identified in the sea waybill or delivery order.¹³⁰ A person who is not the shipper but becomes a holder of the bill of lading would succeed to the rights and obligations of the shipper.¹³¹

Although the Carriage of Goods by Sea Act 1924 created a mechanism for the transfer of contractual rights and liabilities under bills of lading, it does not change the rule in *The Giannis N.K.*,¹³² where the House of Lords held that the shipper is not divested of his liability for shipment of dangerous goods, even after transfer of the bill of lading. Neither is the shipper, as the original contracting party, freed from his other liabilities under the contract after the bill of lading is transferred.¹³³

Since the shipper is the contracting party, he is the person with the right to sue for breach of contract, until he transfers the bill of lading. The shipper may also be liable to pay freight.

The Charterparty Perspective

The bill of lading names the shipper but the charterparty does not. This is because although both are documents relating to the carriage of goods, the former deals specifically with the contract to carry cargo whereas the latter deals specifically with the hire of the vessel. Nevertheless, by reference to the general meaning given to the shipper of goods as one who delivers the cargo to the shipowner¹³⁴ for carriage, then although the term ‘shipper’ is not used in the charterparty to refer to the charterer specifically, the charterer who leases a vessel for the carriage of their own cargo would also qualify as a shipper. Even though there is a charterparty agreement between the charterer and the shipowner, a bill of lading would still be issued to the charterer for the receipt of the goods and in the bill of lading the charterer would be referred to as the shipper. However, this does not mean that there is a shipper only when there is a bill of lading. The issue then is whether the charterer will be imposed with dual obligations as both the charterer and the shipper, or only one or the other at one time depending on different considerations. It has been held that the bill of lading, when in the hands of the charterer acts merely as a receipt, and that the relationship between the charterer and the shipowner

¹³⁰ *ibid.*

¹³¹ *Siboti K/S v. BP France S.A.* [2003] 2 Lloyd’s Rep 364, 367.

¹³² *Effort Shipping v. Linden Management (The Giannis N.K.)* [1998] 1 Lloyd’s Rep. 137.

¹³³ COGSA, s 3(3).

¹³⁴ *Homburg Houtimport B.V. v. Agrosin Private Ltd. And Others (“The Starsin”)* [2001] 1 Lloyd’s Rep 85, 101.

is governed by the terms of the charterparty.¹³⁵ This however, does not preclude the fact that the charterer remains to be the shipper. Since the terms of the charterparty and the bill of lading are not identical in entirety, and since they govern different aspects of the parties' rights and duties, whenever issues are raised in relation to the shipper, although some of the charterparty terms may be referred to in order to resolve the issue as to their applicability, judges tend to deal with the role, rights and duties of the shipper separately from the position between the charterer and the shipowner, even though they may be the same person.¹³⁶ For instance in *The "Mata K"*,¹³⁷ the plaintiffs were the charterers of the defendants' vessel under a voyage charter who also shipped cargo under bills of lading. The effect of terms in the bill of lading was dealt with by the judge from the aspect of the relationship between the plaintiffs and defendants as shippers and shipowners whereas the relationship between them as charterers and shipowners was expressly sidelined. However, when a time charterer instructs the master to receive certain cargo on board and the cargo is loaded at the charterer's expense, then the cargo is loaded by or on behalf of the charterer for the purposes of the charter-party and the third party shipper is to be regarded as the charterer's agent.¹³⁸

The Documentary Perspective

The issue of the bill of lading

The shipper is the person to whom the bill of lading is issued by a carrier by sea for goods shipped. In the *Jordan II* it was held at first instance that where the contracts are contained in or evidenced by bills of lading the reference to shippers is obvious since the person to whom the bill of lading is issued at the port of loading is the shipper, and that if the shipper was also the charterer the relationship between the shipper and the shipowner would be governed by the charterparty.¹³⁹

The shipper of goods can demand an issue of a bill of lading to record or evidence the contract of carriage.¹⁴⁰ In the bill of lading the shipper may sometimes be referred to as 'the merchant'.¹⁴¹ Under article III rule 3 of the Hague and Hague-Visby Rules, the

¹³⁵ *President of India v. Metcalfe Shipping Company Ltd ("The Dunelmia")* [1969] 2 Lloyd's Rep 476 CA.

¹³⁶ *Agrosin Pte. Ltd. v. Highway Shipping Co. Ltd. (The "Mata K")* [1998] 2 Lloyd's Rep 614, 616.

¹³⁷ *ibid.*

¹³⁸ *The Arctic Trader* [1996] 2 Lloyd's Rep 449, 459.

¹³⁹ *Jindal Iron & Steel Co. Ltd and others v. Islamic Solidarity Shipping Co. Jordan Inc. and another (The Jordan II)* [2003] 2 Lloyd's Rep 87, 94.

¹⁴⁰ *The "Rafaela S"* [2005] 1 Lloyd's Rep 347.

¹⁴¹ *ibid* 350.

shipper is the person to whom a carrier is imposed a contractual duty to issue on demand a bill of lading which shows certain specified information such as the goods' apparent order and condition. One of the roles being played by the bill of lading at this stage is to fulfil the need for a receipt since an acknowledgement of receipt of the goods into custody is required. Deriving from this, it may be said that the shipper is defined as the person who presents the goods into the custody of the carrier for loading and carriage. The shipper may sometimes also be the seller of the goods.¹⁴²

The shipper may also be the person to whom the carrier will deliver the goods when they arrive at the place of delivery, if the shipment was specifically consigned to the former, or if the shipper never transferred the bill of lading to another person, for example where the goods were simply sent abroad by the shipper to its own factory. In practice the shipper decides whether to put the words "to order" in the "consignee" box,¹⁴³ only after which it becomes transferable.¹⁴⁴ Thus from here it can be seen that the shipper wears many hats according to the different roles that it plays.

It is now common that in modern trade, details required by an underlying letter of credit are frequently set out in the bill of lading, since shippers are also the persons who fill in the bill of lading forms and present them to the master or carrier's agent for signing and issuing.¹⁴⁵ The shipper proposes the draft statement of the description and the apparent order and condition of the cargo in the draft bill of lading and mate's receipt and submits them to the master and ship's mate respectively for signing. The description is given by the charterer or the shipper on the charterer's behalf under the charterparty.¹⁴⁶

In a voyage charter, the shipper acts jointly with the shipowner in the process of loading. The shipper must bring the cargo alongside the ship and lift it to the ship's rail.¹⁴⁷ The shipper is one of the persons to whom notice of readiness to load at the loadport must be given if the charter provides as such.¹⁴⁸ A shipper may also be the charterer's agent for the purpose of designating and procuring a loading or discharge place.¹⁴⁹ The shipper is one of the persons to whom the master must give notice of inaccessibility to the port of

¹⁴² *Nima S.A.R.L. v. The Deves Insurance Public Co. Ltd. (The "Prestrioka")* [2003] 2 Lloyd's Rep 327, 336.

¹⁴³ *The "Rafaela S"* [2005] 1 Lloyd's Rep 347, 357.

¹⁴⁴ *The "Rafaela S"* (n 140) 361.

¹⁴⁵ Cooke (n 125) para 18.7.

¹⁴⁶ *Sea Success Maritime v. African Maritime Carriers* [2005] 2 Lloyd's Rep 692, 698.

¹⁴⁷ *Harris v. Best* (1892) 68 L. T. 76, 77.

¹⁴⁸ Gencon 1976 form, Clause 6.

¹⁴⁹ Cooke (n 125) para 59.5.

loading or discharge due to ice and the shipper is obliged to give fresh orders to an ice-free port.¹⁵⁰

Where a straight bill of lading is used, delivery of the goods under this type of bill of lading is to the named consignee only and it is not transferable. Under such bills of lading, there may be an inference that the shipper is only acting as the agent of the consignee and that the named consignee is actually the shipper.¹⁵¹ This would be the case where goods are consigned with the agreement that property and risk passes upon shipment and not when the bill of lading is transferred.

Definition in Bills of Lading

In *The Starsin* the shipper was defined in one of the Makros Hout bills of lading as including the consignees, the receiver, and the owner of the goods, also the endorser and holder of the bill of lading, as well as the endorsee and holder of the bill of lading.¹⁵² This shows that there is no one particular meaning given to the term ‘shipper’ as understood in the commercial sense since it can refer to any one of those persons.

Likewise, many bills of lading employ the term “Merchant” to include the shipper and a combination of consignor, consignee, holder of the bill of lading, receiver of the goods, owner of the goods among others, and provide that they are all jointly and severally liable.¹⁵³ This has the potential of making the shipper liable for the failings of others named as merchant and vice versa.¹⁵⁴

Reference in standard charter forms

In clause 33(5) of the Shellvoy form, the charterer is treated as though it were the shipper for the purposes of the rules in Article III rule 3 and 5 of the Hague-Visby Rules which are incorporated into the charterparty so as to make them applicable to particulars of the bills of lading issued under the charterparty, with regard to the rule on guarantee and indemnity applicable to the description of the cargo furnished by or on behalf of the

¹⁵⁰ Gencon (n 148), Clause 14a).

¹⁵¹ *The Albazero* [1974] 2 Lloyd’s Rep. 38, 44; [1977] A.C. 774, 786; *The Berge Sisar* [2001] 1 Lloyd’s Rep. 663 per Lord Hobhouse at para. 19.

¹⁵² *Homburg Houtimport B.V. v. Agrosin Private Ltd. And Others (“The Starsin”)* [2003] 1 Lloyd’s Rep 571, 576.

¹⁵³ For example in *The “Rafaela S”* [2005] 1 Lloyd’s Rep 347, *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283, and *Nippon Yusen Kaisha v. FIL Lines USA Inc.*, 977 F. Supp. 2d 343, 2014 AMC 553 (S.D.N.Y. 2013).

¹⁵⁴ The consignee was liable for the shipper in *Nippon Yusen Kaisha v. FIL Lines USA Inc.*, 977 F. Supp. 2d 343, 2014 AMC 553 (S.D.N.Y. 2013). In *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2015] EWHC 283, “the Shipper has all the liabilities of the “Merchant””, per Leggatt J at para 30.

charterer.¹⁵⁵ Perhaps the term ‘shipper’ is not used directly here possibly in order to avoid the Rules from applying comprehensively as opposed to selectively. However, this should not be the case since the Rules do not apply to charterparties unless specifically incorporated by the parties voluntarily.

Mate’s Receipt

The mate’s receipt also identifies who the shipper is in the document.¹⁵⁶ However, notwithstanding the statements in contemporary documents including the mate’s receipt, where there is a conflict with the bill of lading, the conclusive evidence is to be found in the contract of affreightment evidenced by the bill of lading.¹⁵⁷

Shipper under a Sea Waybill

In a sea waybill, there is also a shipper but the shipper is not defined exclusively. The term ‘shipper’ however, may be found in the definition of the term ‘merchant’. This term in the sea waybill encompasses not only the shipper but also the “consignee, receiver of the goods, any person owning or entitled to the possession of the goods or of this sea waybill and anyone acting on behalf of any such person”.¹⁵⁸ This is then followed by a clause on the merchant’s obligations and liabilities jointly and severally to the carrier.¹⁵⁹ However there are other clauses providing defences and limits for the carrier where the term ‘shipper’ is used separately from the other persons defined as ‘merchant’.¹⁶⁰ This makes the term ‘shipper’ an important term to be exclusively defined.

In the CMI Uniform Rules for Sea Waybills, the term ‘shipper’ is only defined together with the ‘carrier’ as “parties named in or identifiable as such from the contract of carriage. It thus seems to leave the definition of the shipper to the contracting parties themselves.

Documentary Credit

The meaning given to the term “shipper” is very important not only in the shipping documents but also in the letters of credit since these accompany or complement the shipping documents for the international sale of goods. The discrepancies in the

¹⁵⁵ Shellvoy 6 2005.

¹⁵⁶ *The “David Agmashenebeli”* [2003] 1 Lloyd’s Rep 93, 97.

¹⁵⁷ *ibid* 116.

¹⁵⁸ Team Lines Sea Waybill, Clause 1.

¹⁵⁹ *ibid* Clause 14.

¹⁶⁰ *ibid* Clause 9.

reference to the shipper between these documents could cause much confusion and hinder commercial efficiency. There may also be a huge risk of losing the credit and insurance covering the goods. The operation of letters of credit is governed by the Uniform Customs and Practice for Documentary Credits 600 (UCP 600).¹⁶¹ The standard for the examination of documents under the UCP 600 provides that “the shipper or consignor of the goods indicated on any document need not be the beneficiary of the credit.”¹⁶² This is understood by the industry to mean that there is no real difference between a shipper and a consignor, because both can be an entity other than the beneficiary under the letter of credit, the person understood as the exporter. However, this will depend on the nature of their activity or role at the time of shipping. The person who arranges shipping with the carrier is considered the shipper or consignor, whether it be an agent of the beneficiary or the beneficiary itself.¹⁶³

This shows that the reference to the meaning given to the shipper from traders in international sale of goods’ point of view refers to the type of shipper which enters into a contract of carriage with the shipper i.e. the contractual shipper. At the same time they equate “shipper” with “consignor” which in certain cases may be reflective of the actual situation since the person entering into the contract of carriage with the carrier may also be the one delivering goods to the carrier. However, as already been mentioned, this may not be the case when the sale contract is on f.o.b. terms. Also, if the beneficiary i.e. the exporter can be someone else other than the shipper and consignor, then the term exporter does not necessarily equate with the shipper, although membership of shipper associations, which will be discussed in the section on the industry perspective below, are also made up of exporters. This shows that there is clearly a need to define exactly what or who a shipper is in contrast with a consignor or an exporter, because all three can be different persons. This is especially so when the juxtaposing of shipper and consignor is quite common even for others in the trade, who work by the definition given to the shipper as the person or company who supplies or owns the commodities shipped, which is reflective of the actual shipper rather than the contractual shipper.¹⁶⁴

As for insurance, coverage depends on who has insurable interest. This usually follows the person who has technical ownership over the goods, rather than the label “shipper”.

¹⁶¹ UCP 600 came into effect 1 July 2007.

¹⁶² Article 14k.

¹⁶³ <http://besttradesolution.com/forum/viewtopic.php?f=2&t=1970>

¹⁶⁴ <http://www.kkfreight.com/consignee-notify-party-shipper.html>

Depending on the terms of the contract of sale, if the goods were lost or damaged in transit, the shipper can recover from the insurer the cost of the goods if it were considered to still be or have become the owner of the goods.

The Bailment Perspective

A shipper is also a bailor since he entrusted the possession, whether physical or otherwise, of the goods to another, the bailee, who may be the charterer or the shipowner, to be delivered to the shipper or to his order or assigns. The bailment and contractual relationship can co-exist side-by-side.¹⁶⁵ They are compatible with the shipper-carrier relationship because of the basic principles of the English law on bailment which are neatly summarised as follows by Sir Richard Aiken:

“1) A bailment arises when a person, the bailee, takes exclusive possession of a chattel which is either the property of another, the bailor, or to the possession of which that other has the immediate right.

2) The relationship and its consequent obligations arise because the taking of possession in the circumstances involves an assumption of responsibility for the safekeeping of the goods.

3) A bailment can be for reward or gratuitous.

4) Reservation by the bailor of the right to require that the chattel be ultimately restored to his own possession or his order is not necessary in either a contractual or a gratuitous bailment.”¹⁶⁶

The basic principles of bailment summarised above resembles very much the relationship between the shipper and the carrier. A shipper may also have a sub-bailment relationship with a third person so called the sub-bailee if the bailee delivers possession of the goods to the third person with consent from the shipper as the bailor, for instance a subsequent holder of the bill of lading or the consignee. Lord Hobhouse in *The Starsin*¹⁶⁷ stated that a contract of carriage was a contract of bailment. Thus if the shipper makes a claim in bailment under the bill of lading contract, the law that applies to the

¹⁶⁵ Cooke (n 125) para 18.117.

¹⁶⁶ ‘Which way to Rome for Cargo Claims in Bailment when Goods are Carried by Sea?’ Sir Richard Aikens, [2011] LMCLQ 482, 483.

¹⁶⁷ [2003] UKHL 12; [2004] 1 AC 715, [132].

contract contained in or evidenced by the bill of lading also governs the claim in bailment.¹⁶⁸

Analogy with voyage charterer

A voyage charterer has also been described as having a likeness to a shipper, wherein both have no involvement in the management or operation of the vessel in any sense and merely pays the freight to the shipowner for carriage of his own goods or that of others in a defined voyage.¹⁶⁹ A voyage charter is also generally defined as a contract where the owner agrees to proceed to a certain loading port where he will collect cargo provided by the charterer, and then deliver them to the port which the charterer nominates. In this sense, the charterer's function of entering into a contract to ship cargo and providing the cargo is identical to that of the shipper. In fact, if this basic straightforward relationship is seen in the modern day commercial context, the needs of the charterer which takes into account the fact that he is also working in parallel to an international sale of goods contract, requires flexibility in the charterparty in order to accommodate his obligations under the sale contract. The charterer is likely to also be the buyer or seller of the goods who has also taken on the responsibility of delivering them.¹⁷⁰ This further enhances the identity of the charterer in such a context to be seen as the shipper.

Analogy with owner

In the "*Chevron North America*"¹⁷¹ Lord Clyde referred to section 3 of the Zetland County Council Act which defined "owner" "when used in relation to goods" and extended its ordinary meaning to include among others, the shipper. This may suggest that the term 'shipper' has a proprietary connotation to it.

The Multimodal Perspective

In the United Nations Convention on International Multimodal Transport of Goods¹⁷², there is no definition for the term 'shipper', but a definition similar to that of the shipper may be found in the definition of the 'consignor'. In art. 1(5), the consignor is defined

¹⁶⁸ Aikens (n 166) 491.

¹⁶⁹ *CMA CGM S.A. v. Classica Shipping Co. Ltd.* [2003] 2 Lloyd's Rep 50, 54.

¹⁷⁰ D. Rhidian Thomas, 'The Evolving Flexibility of Voyage Charterparties' in D. Rhidian Thomas (ed) *The Evolving Law and Practice of Voyage Charterparties* (Informa 2009) 1.

¹⁷¹ *BP Exploration Operating Co. Ltd. v. Chevron Shipping Co., Same v. Chevron Tankers (Bermuda) Ltd., Same v. Chevron Transport Corporation (The "Chevron North America")* [2002] 1 Lloyd's Rep 77, 89.

¹⁷² Signed at Geneva, 24 May 1980.

as “any person by whom or in whose name or on whose behalf a multimodal transport contract has been concluded with the multimodal transport operator, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the multimodal transport operator in relation to the multimodal transport contract”. This definition resembles that of the shipper in the Hamburg Rules.¹⁷³

There are also provisions in the Multimodal Convention which impose an obligation on the consignor towards the multimodal transport operator in much the similar way as the provisions in the conventions on the carriage of goods by sea impose obligations on the shipper towards the carrier. In the Multimodal Convention the consignor is “deemed to have guaranteed to the multimodal transport operator the accuracy, at the time the goods were taken in charge by the multimodal transport operator, of particulars relating to the general nature of the goods, their marks, number, weight and quantity and, if applicable, to the dangerous character of the goods, as furnished by him for insertion in the multimodal transport document”.¹⁷⁴ This is followed by an indemnity provision in the second paragraph of that article which covers inaccuracies and inadequacies of the consignor’s guarantee which is imposed on the consignor towards the multimodal transport operator. The combination of the first and second paragraphs of this article is also similar to the provision in the carriage of goods by sea conventions on the shipper’s guarantee towards the carrier of the marks, number, quantity and weight and the corresponding duty of the shipper to indemnify the carrier.¹⁷⁵

Apart from this, the provision of the Multimodal Convention on the liability of the consignor to the multimodal transport operator for loss caused by the fault or neglect of the consignor his servants or agents again bears a striking resemblance to the provisions of the Hague and Hague-Visby Rules on the same issue imposed on the shipper towards the carrier,¹⁷⁶ although the former is worded in a more positive way.¹⁷⁷ Finally, the other similarity is to be found in the provision concerning dangerous goods delivered for carriage. Both the Multimodal Convention¹⁷⁸ and the Hague and Hague-Visby Rules¹⁷⁹ as well as the Rotterdam Rules¹⁸⁰ provide for the duty of the consignor/shipper to inform

¹⁷³ Hamburg Rules, art 1(3).

¹⁷⁴ Multimodal Convention, art 12(1).

¹⁷⁵ Hague and Hague-Visby Rules, art III r 5.

¹⁷⁶ *ibid* art IV r 3.

¹⁷⁷ Multimodal Convention, art. 22.

¹⁷⁸ *ibid* art 23.

¹⁷⁹ Hague and Hague-Visby Rules art IV r 6.

¹⁸⁰ Rotterdam Rules art 32.

the multimodal transport operator/carrier respectively, regarding the shipment of dangerous goods and for the consignor/shipper to be liable to the multimodal transport operator/carrier for any loss or damage and expenses resulting from such shipment, albeit to a different extent and manner.

Thus, it is arguable that the concept of the consignor in the Multimodal Convention is equivalent to the concept of the shipper in the carriage of goods by sea conventions. Furthermore, during the drafting stage of the Rotterdam Rules, the word ‘consignor’ appeared in the Draft Instrument¹⁸¹ and is defined as the “person that delivers the goods to a carrier for a carriage”. However in the adopted final draft, the term was dropped, and the duty to deliver the goods ready for carriage is borne by the shipper. This shows that the shipper and the consignor’s roles have been assimilated.

The Industry Perspective

This section relies on information provided by various organisations as found in their published websites. Specific questions were also posed to representatives of a shipper council in order to gauge the industry’s perspective as to the term “shipper” and how this has affected them in practice. As mentioned in the section on documentary credit above, there are many conflicting views coming from the industry as to who is defined as a shipper. Various individual sources in the trade, transport and logistics industry offer their own version of what the term means. One example is that the shipper is the entity which owns the goods and initiates the shipment of goods process by means of issuing a shipping instruction to either a freight forwarder or dealing direct with the carrier. The name of the shipper will appear on the ocean bill of lading. If the owner of the goods is the consignee, then the consignee can also be the shipper on the bill of lading. However, even if the shipping instruction was issued by the consignee to the freight forwarder, under Federal Regulations of the United States, where ocean shipments are concerned the shipper is the person responsible for payment of freight to the carrier because the freight forwarder acts as an agent of the shipper. This shows that the “shipper” on the bill of lading and the actual shipper are considered as two different persons.¹⁸² From this definition it seems that the identity of the shipper is linked to ownership of the goods, status as well as contractual relationship with the carrier rather than mere delivery of the goods to the carrier.

¹⁸¹ Draft Instrument of the Rotterdam Rules, art 1(3).

¹⁸² <http://www.inter-cargo.com/faq.html>

International bodies which have been formed for the purpose of advising and providing resources which guide the industry would perhaps offer a more reliable definition because they were created for the purpose of universal acceptance and achieve uniformity within the international trade community and also because they represent a cross section of the shipping community compared to individual companies and persons. The International Chamber of Commerce (ICC) publishes various publications for the use of the international trade community including the latest Incoterms 2010, a standard set of commercial terms for contracts in international sale of goods. In the guidance notes and general interpretations of common issues within Incoterms 2010, when it comes to the question of who should be the shipper in the transport document in a particular type of contract of sale under the Incoterms 2010, the view from ICC is that the contract of sale does not usually govern this issue. Rather, it is governed by the transport law regime relevant to the mode of transport selected. It also refers to the two commonly known types of shipper; the contractual shipper, the person who enters into a contract of carriage with the carrier and the actual shipper, the person who hands the goods over to the carrier. These two categories are not mutually exclusive and a shipper can be both the contractual and the actual shipper.

It clearly establishes that the issue of definition is not to be determined within the contract of sale but to be found only within the realm of transport law and regulations. However, it also acknowledges the difficulty of finding consistency within these rules. Nevertheless, generally for the ICC where the FCA¹⁸³ Incoterms 2010 is concerned, it is the actual shipper who is affected. The same situation would occur when the goods involved are dangerous.¹⁸⁴

Shipper Councils are created to unite shippers and provide them with the bargaining strength against carriers especially in the liner services where comparable or higher bargaining power is wielded by the act of liner operators forming liner conferences.¹⁸⁵

The Asian Shippers' Council acts for cargo owners and exporters in 18 Asian countries except Japan, whereas the Global Shippers' Forum is an international organisation which

¹⁸³ Free Carrier (...named place of destination). The Seller delivers the goods, cleared for export, to the carrier selected by the Buyer. The Seller loads the goods if the carrier pickup is at the Seller's premises. From that point, the Buyer bears the costs and risks of moving the goods to destination. <http://www.burhilllogistics.com/content/pdf/Incoterms.pdf>

¹⁸⁴ <http://www.iccwbo.org/Products-and-Services/Trade-facilitation/Incoterms-2010/QandA-March-2012/>

¹⁸⁵ UN Conference on Trade and Development, 'Protection of Shipper Interests', Guideline for developing countries, UN, New York, 1978, Report by the UNCTAD Secretariat, Part Two, Shippers' Councils, p 15.

represents retailers, manufacturers and wholesalers from more than 50 countries all over the globe being the largest trade group.¹⁸⁶

The European Shippers' Council (ESC) is the voice, "eyes and ears" for freight transport interests in Europe¹⁸⁷ covering a broad scope including import from and export to Europe as well as intra-continental. It also speaks for not only the sea transport but also all other forms of transportation. For the ESC's purposes, a shipper is an all encompassing term that includes wholesalers, manufacturers and retailers. Membership of ESC comprises of national transport user organisations, national shipper councils, key European commodity trade associations and corporate members. It opens membership not just to anyone who is directly or indirectly involved in the movement of freight, but also those who procure freight transport and logistics services. The ESC has quite a strong voice as it represents more than 100,000 freight transport interests.¹⁸⁸

The existence of Shippers Associations is said to have begun in various forms in the mid-1970s¹⁸⁹ and now there is a multitude of them across the globe representing national, regional, as well as specific trade business interests. It is useful to refer to their membership requirements as they give an idea of how the shipper industry perceives and defines itself. Comparisons can then be made between them which can be used to determine whether there is uniformity in how shippers regard themselves in the industry, as well as further to compare whether that practical self-definition reconciles with the legal construct of the shipper, as discussed in the earlier part of this chapter. Nevertheless the membership of shipper associations is not limited by law and so this allows membership to be opened to non-shippers, depending on the memorandum of the individual shippers' association. In such a case, careful sifting has to be done to pick out potential shippers from among the broad categories of diversified membership. Since membership can range from as little as two to as many as thousands,¹⁹⁰ this is also an indication of how well they truly represent shippers.

A Shippers' Association is defined by section 3(23) of the Shipping Act 1984¹⁹¹ as "a group of shippers that consolidates or distributes freight on a non-profit basis for the

¹⁸⁶ <http://www.asianshippers.org/The-2007-GSF-Meeting-Press-Coverage/bloomberg-18-september-2007>

¹⁸⁷ Europeanshippers.eu/about/

¹⁸⁸ <http://www.europeanshippers.com/>

¹⁸⁹ <http://www.medamericashipper.com/index.php?page=medamerica&lang=it&id=11>

¹⁹⁰ <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3008261>, p 3

¹⁹¹ United States.

members of the group to obtain carload, truckload or other volume rates or service contracts.” The American Institute of Shippers’ Associations defines it as “Non-profit membership cooperatives which make domestic or international arrangements for the movement of members’ cargo. They are a means by which the small and medium sized shipper, and even the large shipper, can obtain economies of scale without the mark-ups charged by other transportation intermediaries who perform consolidation services in order to obtain volume discounts.”¹⁹²

Under the law, shipper associations are separate legal entities in international trade and hence are able to negotiate and enter into volume service contracts. However shipper associations are not subject to regulation or licensing,¹⁹³ neither are they common carriers. Since they only serve their members and not the general public, they enjoy a great deal of confidentiality about their business information and protection from publishing requirements. They themselves are considered as shippers under the law and thus enjoy all the rights and subject to all the liabilities of the shipper.¹⁹⁴

What follows is a brief outline of the definition of the “shipper” found in selected Shippers’ Associations formed in various regions, countries and some specific trades all over the world. The selection of these countries again, as was done in the section on the legal construct of the shipper above, is based on the top 20 countries with the highest total value of overall exports in 2011 in US dollar. Again for some countries in the top twenty, it is not possible to gain insight due to many of them employing their national language to document the activities of their shipper associations. The inclusion of Malaysia is merely as a comparison with the top twenty countries.

China

The China Shippers’ Association is a social organization with a corporate legal status. It maintains and promotes the rights and interests of various import and export corporations and enterprises of foreign trade all over China.¹⁹⁵

While it might seem antithetical with the inclusion of import interests, this loose definition allows the inclusion of the possibilities that the importer could be the

¹⁹² <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3008261>, p 1

¹⁹³ <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3008261>, p 2

¹⁹⁴ <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3008261>, p 3

¹⁹⁵ <http://www.maxtie.com/en/4028801416137da501161dedb565030a.htm>

contractual shipper, the one who actually enters into the contract of carriage with the carrier. This would be the case where the sale contract was concluded on FOB terms.

United States

The United States International Shippers Association¹⁹⁶ relies on the legal definition of the shipper as provided by section 3, paragraph (21) of the Shipping Act of 1984¹⁹⁷ as amended by the Ocean Shipping Reform Act 1998¹⁹⁸ for the purpose of membership. Section 3/SS 40102 (22) provides that there are five persons who are within the definition of a shipper and they are ‘a cargo owner’;¹⁹⁹ ‘the person for whose account the ocean transportation is provided’;²⁰⁰ ‘the person to whom delivery is to be made’;²⁰¹ ‘a shippers’ association’;²⁰² ‘or an ocean transportation intermediary, as defined in paragraph (17)(B) of this section, that accepts responsibility for payment of all charges applicable under the tariff or service contract’.²⁰³

Paragraph (22) of section 3 goes on to define a shippers’ association as ‘a group of shippers that consolidates or distributes freight on a non-profit basis for the members of the group in order to secure carload, truckload or other volume rates or service contracts.’ Whereas paragraph (17) of section 3 provides the definition of an ocean transportation intermediary to be either of two things; ‘an ocean freight forwarder or a non-vessel-operating common carrier’. To be an ocean freight forwarder, is to be a person that (i) ‘in the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers’;²⁰⁴ and (ii) ‘processes the documentation or performs related activities incident to those shipments’.²⁰⁵ A non-vessel-operating common carrier is ‘a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.’²⁰⁶

According to Med America, a shippers’ association corporation established to obtain and distribute beneficial ocean and inland transportation freight rates, the Federal Maritime

¹⁹⁶ Founded in April 1999 and headquarters in Alexandria, Virginia.

¹⁹⁷ United States.

¹⁹⁸ 46 App. U.S.C. 1701.

¹⁹⁹ Shipping Act 1984 s 3(21)(A).

²⁰⁰ *ibid* s 3(21)(B).

²⁰¹ *ibid* s 3(21)(C).

²⁰² *ibid* s 3(21)(D).

²⁰³ *ibid* s 3(21)(E).

²⁰⁴ *ibid* s 3(17)(A)(i).

²⁰⁵ *ibid* s 3(17)(A)(ii).

²⁰⁶ *ibid* s 3(17)(B).

Commission has established, under the Shipping Act 1984²⁰⁷ certain purposes for which “shipper” includes ‘individuals, corporations, partnerships, and associations existing under or authorized by the laws of the United States or of a foreign country.’²⁰⁸

Other shippers’ association such as Gemini Shippers Association and Fashion Accessories Shippers Association offer membership to importers and exporters of all kinds of products in the United States.²⁰⁹ Likewise the American Import Shippers Association serve small and medium sized U.S. importers and overseas exporters.²¹⁰

It appears that as far as the United States is concerned, the factual concept is not self-defined but is reliant on an external definition by the law. A search into the United Kingdom contemporary²¹¹ reveals no equivalent provisions. It is also interesting to note that the writers of the *US Maritime Law* case commentary described the issue of the shipper definition as arcane.²¹² This reaffirms the argument that the term “shipper” has been neglected of a proper and formalised definition which is needful and commonly understood.

United Kingdom

In the British Maritime Law Association’s paper,²¹³ the term ‘shipper’ is used interchangeably with ‘cargo-owner’ and is identifiable with two possible capacities; as cargo owner or as party to the contract of carriage. Thus the two classes of shippers employed by them rely on the basis of ownership and contractual relationship but leaves out the class of persons who deliver the goods to the carrier.

Hong Kong

The Hong Kong Shippers’ Council protect and promote the interests of Hong Kong importers and exporters, traders and manufacturers regarding transportation of cargo issues whether by sea, land or air.²¹⁴ Founder and ordinary members comprise of trade associations while associate members comprise of individual companies.²¹⁵

²⁰⁷ As amended by the Ocean Shipping Reform Act 1998.

²⁰⁸ <http://www.medamericashipper.com/index.php?page=medamerica&lang=it&id=17>

²⁰⁹ <http://www.geminishippers.com/default.asp?page=About&ID=2>

²¹⁰ <http://www.aisaship.com/page11.php>

²¹¹ British International Freight Association

²¹² R. Force and M. Davies, ‘US Maritime Law’ [2010] LMCLQ I. M. C. L. Y. SS 301-325, 214, 217.

²¹³ ‘*The Role of Cargo Owners/Shippers and Marine Insurers in the Quality Shipping Campaign*’, www.bmla.org.uk/documents/the_role_of_cargo_owners.doc

²¹⁴ <http://www.asianshippers.org/hongkong>

²¹⁵ <http://www.hkshippers.org.hk/MemFounders.aspx>

India

The Western India Shippers Association is made up of two classes of members; institution members and ordinary members. The former comprises of corporate and other organisations, trade, commerce or industry institutions or associations located in Western India which are engaged in import and export trade. Ordinary members may be any person, firm, joint Hindu family, company, society, or association involved in trade, commerce or industry in Western India or has a head office located there.²¹⁶

Malaysia

A trade body known as Malaysia National Shippers' Council which galvanizes commodity and trade associations with several government ministries and shipping-related agencies, opens ordinary membership to individuals, associations and organizations of importers and exporters, producers and manufacturers which are established in Malaysia and have interest in international trade.²¹⁷ Associate members are made up of other companies, associations, societies and individuals who subscribe to the council's objectives but do not qualify for becoming ordinary members. It has a wide membership not exclusively to shippers due to its functions and objectives and thus does not enable a solid meaning given to the term 'shipper' to be found within its memorandum of membership.

Africa

Four states in the east of Africa²¹⁸ are members to a regional organisation called the Intergovernmental Standing Committee on Shipping (ISCS), a body to safeguard the common interests of the member states in keeping transport costs imposed by liner shipping operators within reasonable bounds. The stakeholders of ISCS include shippers which are understood as importers and exporters.

In concluding this part, although the various memorandum of membership may not be limited to just shippers, it may be deduced that where the possible "shipper" member is concerned, it is simply defined by way of status as buyer or seller, importer and exporter etc.

²¹⁶ <http://www.wisaindia.org/>

²¹⁷ <http://www.asianshippers.org/malaysia>

²¹⁸ Kenya, Uganda, Tanzania and Zambia.

Conclusion

It seems that there are various terms used in different contexts to refer to persons who perform the same tasks as the shipper. Due to the diversity and scattered definitions found in various sources, there is no one definition of the shipper. As for legal sources, again it is difficult to say that there is one single legal construct of the shipper. There is a mixture of both functional definitions as well as proprietary based definitions since there are plenty discussions both on the roles and obligations of the shipper which shape the meaning given to it as well as discussions attached to the ownership of the goods. It depends entirely upon the issue being adjudicated and the context in which the decision was made. The latest statutory definition in the Rotterdam Rules, on the other hand go for the status, label and relationship definition as does the industry perspective. This would mean that there is a tendency for conflict to arise due to the difference between the legal definition and the industry's definition.

Even if the term 'shipper' is not used, it does not mean that the person may not be imposed by the law with the obligations and liabilities of the shipper and vice versa. Thus it is very important for a person to know whether he is or is not a shipper in order to avoid being inadvertently liable by failing to fulfil duties imposed upon the shipper without the shipper realising it. This makes the definition and conception of shipper very important whether in the law or in commercial usage. A clear and consistent definition of the shipper needs to be available to both the persons who may be characterised as such, as well as the other parties dealing with them as this will facilitate better and more efficient working relationships and assist in the avoidance of pitfalls, especially costly ones. It is also important for judges to develop a consistent definition of the shipper in the law especially in specific legal contexts which is reflective of the realities in the industry in order to accommodate and promote the efficiency in commerce which the industry so desperately relies on.

CHAPTER 3

Shipper Liability under National or Domestic Law

Introduction

Shipper liability for cargo is not a novel concept in law. Even so, by the look of the way the international conventions on carriage of goods by sea is expanding, in terms of not merely widening the nature and scope of the liability of the shipper, but in making express provisions in positive terms which enable and empower carriers to bring causes of action against them, it seems as though the idea of shipper liability for cargo is now being brought sharper into focus and being looked at under a new light. This growing phenomenon may be a notion that is perceived with distaste by those who view shippers²¹⁹ as infinitely being the underdogs without a level playing field. How far ahead this phenomenon can develop in the future depends upon how far back the seeds for this phenomenon has been sown and how deeply entrenched it is in the legal background which makes up the bedrock for the relationship between the shipper and carrier, as well as so many other parties intertwined in the network of international sale and carriage of goods. Before looking at the progress this phenomenon has made in the international conventions, it is useful to look at the national arena as it is reflective of what goes on in the international arena, being a meeting point where all domestic concepts converge. This makes the question of shipper liability under domestic law an issue of utmost critical importance.

In chapter 2 the concept or definition of the shipper in the context of the carriage of goods by sea had been discussed. The discussion in this chapter and the following chapters are made on the basis of all the different ways in which the concept of the shipper has been understood in the legal construct of the shipper. It was recognised in chapter 2 that there is no one single definition of the shipper and that it depends on the context in which it is used. Bearing this in mind, it is therefore very important to recognise the context in which the shipper is being discussed when considering the laws regarding liability of the shipper in this chapter and the following chapters.

²¹⁹ There can be a wide range of meanings given to the term “shipper”. In the previous chapter on The Concept or Definition of the Shipper, the shipper can be understood to mean various different things depending on who or what is defining it and the context in which it is used.

Objective of chapter

There are two general objectives of this chapter. The first is to look at the recognition of shipper liability in various categories of national or domestic law. It is proposed in this chapter to determine the premise of shipper liability under national law as to whether it is on the basis of contractual, bailment, tortious, fiduciary, criminal or other form of liability structure. The thematic approach of this chapter is to look at the broad legal systems of common law, civil law, customary and religious law, and how they deal with each of the premise of shipper liability. The approach taken in researching each legal system will naturally be different as the source of the laws for the respective systems are different in nature. The specific objectives and methodology for each one will be discussed below in their respective sub-headings.

There will definitely be differences between these legal systems but the broader purpose of researching this is to determine whether there are similarities, common themes and approaches within them which could then be integrated and thus arguably become more acceptable by the same community. The discussion will also revolve around the question of whether shipper liability if not recognised, should then be recognised by these different legal systems.

The second objective would be to discuss what should in fact be the content of shipper liability. Having looked at the various forms, degree and structure of shipper liability in the different legal systems, a proposition will be made as to what should be the most appropriate form and substance of shipper liability that could be supported by the law as well as the industry.

Although the chapter is concerned with the duties of the shipper, reference to persons included within the meaning of the shipper in the first chapter will be made, including voyage charterers so as not to lump together all the duties as being common to all types of shippers, since certainly this is not the case. Where possible the distinction between the role and status of the parties will be noted. Another reason why it is important to keep them clearly distinguished is that each type of shipper has its own particular economic strength or rather the lack of it.²²⁰ This makes the analysis on why the law has

²²⁰ For example, a shipper under a bill of lading is considered to have less bargaining power in comparison to a shipper who is a charterer under a voyage charterparty. The former usually has less room to negotiate the terms of the contract of carriage as opposed to a charterer who would be able to assert certain special requirements when a fixture is concluded.

developed in such a way for each different category of shipper to be better understood and the proposal for what should be the content of shipper liability more justifiable.

The Common Law on Shipper Liability

Objective

The objective of this section is to identify and analyse the various forms of shipper liability found in common law jurisdictions. Although some of the liabilities may have been codified in various statutes, most of the liabilities remain embodied in the decisions of the courts for more than three centuries. Even the provisions in the statutes themselves are subject to application and thus interpretation by the judges in solving disputes regarding the application of the statutory provision. It is then a requirement in this section to extract the principles from the judgements and categorize them before they can be put into the classification of the different premises of liability. In order to extract the principles and perhaps more importantly, to comprehend the justification and purpose of the law, these judgements need to be analysed in the light of all the underlying factors and paradigms which influence as well as are affected by the decisions, for example the needs, practice and usage of the industry, commercial efficiency, commercial certainty, commercial fairness, flexibility as well as social fairness.

Methodology

The study of common law decisions requires an intricate analysis of judgements on various aspects of the shipper's duties. While the facts of the case may provide the basis for the outcome of the case, there is a further underlying reasoning of the judges which need to be brought to the surface to justify not only the decision, but the impact it will have on and how it will be useful for, the industry and the legal construct of shipper liability.

English Common Law

Pre-carriage liabilities

The duty to provide cargo

The voyage charterer has the duty to provide the agreed type and amount of cargo to be loaded on the vessel. It does not matter to the shipowner as to how or where the charterer has to procure the type and amount of cargo agreed to be carried or how they are to be

transported to the place of loading, so long as the cargo will be ready to be loaded at the place and time agreed. This duty to provide cargo is absolute and the charterer will not be absolved from breach of contract even if the cause of delay was beyond his control.

In *The Aello*²²¹ the charterer had agreed to provide a cargo of maize from Buenos Aires port. At the charterparty date, vessels were not permitted to enter the dock area until a 'giro' or permit was received by the ship from the customs authority. For this purpose the shipper has to obtain a certificate from the Grain Board which certifies that cargo has been allocated. Later on, when the movement of maize to the port slackens and results in congestion, the traffic control system was changed which added a further requirement that there has to be an availability of cargo ready to be loaded before the permit could be issued. The shipper was able to obtain the certificate from the Grain Board but there was no cargo of maize ready to be loaded. In this case, the named shipper under the contract is a different person from the charterer, but the charterer is the buyer of the cargo FOB. The non-availability of the maize resulted in the inability of the ship to obtain permit to enter the dock area and hence could not become an arrived ship. The House of Lords, following the case of *Ardan Steamship Co. Ltd v. Andrew Weir & Co.*²²² held that the charterers were under an absolute obligation to provide the cargo or part of it in time where the failure of performing such an obligation would prevent the ship from performing the obligation of becoming an arrived ship. This absolute obligation could not be relieved by showing that the charterer had taken all reasonable steps to provide the cargo. The House of Lords in *Ardan's* case distinguished the case of *Little v. Stevenson & Co.*²²³ where it was held that the shipper's or charterer's obligation is to have the cargo ready when the vessel is prepared to receive them in the ordinary course of things but not to the extent that the shipper must be prepared for every contingency or fortuitous circumstance which were not contemplated by both parties. It was also distinguished in *Krog & Co. vs Burns and Lindemann*²²⁴ where the Lord Ordinary stated that the duty of the charterer is to do his part which is necessary to enable the vessel to get in berth according to what is custom in that port, the only exception being when the contingency is only remote and improbable. Thus even when the reason for the failure to provide cargo on the part of the charterer was caused by the port authority imposing

²²¹ *Sociedad Financiera De Bienes Raices S.A. Appellants; and Agrimpex Hungarian Trading Company for Agricultural Products, et e contra respondents* [1961] A.C. 135.

²²² [1905] A.C. 501.

²²³ [1896] A.C. 108.

²²⁴ (1903) 5 F. 1189.

certain traffic rules, this will not absolve the charterer of his breach of an absolute contractual duty.

Ardan's case was about an appeal for damages for detention of a ship, the *Ardandearg* which was chartered to load "in the usual and customary manner a full and complete cargo of Australian coal as ordered by charterers" from Newcastle, New South Wales. The exception to this in the charterparty was for "riot,... strike,... or any other accidents or causes beyond the control of the charterers, which may delay her loading." Although the vessel could have arrived earlier if the master had not delayed, it had arrived before the cancelling date. However by the time it arrived there were two other vessels which had arrived before her and thus she could not be berthed to load the cargo. The custom of the port was such that a vessel was not allowed to berth unless she had received a loading order from the colliery which supplied the coal. The colliery selected by the charterer was a small one and had a small output with no storage facilities at the port. The coaling of vessels thus had to be done in turns. Being third in line, the *Ardandearg* thus had to wait and be removed twice before she could be berthed and fully loaded, there not being sufficient coal ready to be loaded. The charterparty did not fix the time within which the cargo had to be loaded. The shipowners claimed damages for the detention of the vessel from the charterer arising from the delay in providing the cargo.

The House of Lords in deciding that the charterers were liable for damages for the detention, restored the decision of the Lord Ordinary that it was their primary duty as charterers to provide the stipulated cargo and that nothing in the charterparty or the evidence put forth provided for an exception from their absolute obligation. The delay in loading was caused by a failure of the charterer to perform this absolute duty rather than the congestion in shipping at the port. The words "as ordered by charterers" in the charterparty were construed by the courts in such a way that the charterers could not escape this absolute obligation merely by showing that they had ordered the cargo to be provided for loading; the cargo has to actually be ready for loading. The words "to load in the customary and usual manner" was also narrowly construed as referring only to the custom of the port system in requiring a loading order before berthing is allowed as opposed to or as well as including the custom of the colliery in issuing coaling orders in turn. If the charterer wanted it to be construed as such it must be provided expressly for, even if the colliery turn formed part of the custom of the port. The risk that the cargo is not ready to be supplied to the charterer, the court held, was to be borne by the charterer rather than the shipowners.

There are two possible strands of theory intertwined within the courts' construction of the charterparty being very much in favour of the shipowners rather than the charterer. The first is what has just been pointed out above, in that the law places this absolute obligation on the charterer on the basis that when the charterer enters into the charterparty and agrees to provide cargo, he voluntarily assumes the risk of the cargo not being available regardless of fault on his part or those under his control, unless he brings it to the attention of the shipowner. Although it is true that the charterer did expressly agree to provide the cargo, the manner in which this duty was construed was strict. The absolute obligation on the charterer places a heavy burden on the charterer who bears the risk of the cargo not being ready although its cause was not through the fault of the charterer nor anyone who the charterer is able to control. In this case the House of Lords did point out that the charterer had the freedom to choose a more efficient supplier of coal or a bigger colliery which could coal the ship within a matter of days or to select more than one colliery in order to speed up the process of providing the cargo, but instead had left it to chance that the colliery they had selected would be able to do the job. Although this is all implying or subtly pointing to the fault of the charterer in not making proper and adequate inquiries, it only further demonstrates that the burden of fulfilling the obligation of providing cargo rests squarely on the shoulders of the charterer with no room for recourse from the shipowners save in very limited clearly expressed circumstances. This is supported by the way the judges interpreted the exception to the absolute obligation narrowly as being irrelevant in this case since it was said to only apply to the actual loading process and not the process of getting the cargo from wherever it is stored or produced to the side of the ship.²²⁵

Secondly, the smooth running of shipping operations stand to benefit from such a strict construction of the charterparty would be the shipowners in the way that no matter what it takes, the law ensures that the vessel must be loaded and it must be loaded within the lay-days if such was agreed or otherwise, within a reasonable time. The earliest authority for this may be traced back to the case of *Postlethwaite v Freeland*²²⁶ where it was said by Lord Blackburn that he was not aware of any case which contradicted the doctrine that the merchant is under an absolute obligation to furnish the cargo unless there was something to qualify it. What would be the justification for having such a strict rule? It is true that an idle vessel is a cost to the shipowners who have to continue paying the

²²⁵ [1905] A.C. 501, 512 per Lord Davey.

²²⁶ (1880) 5 App. Cas 599, 619 per Lord Blackburn.

debt owed for purchasing or mortgaging the vessel regardless of its activity or lack of it. Without being in service there would be no income from which the shipowners could pay off the debt and they then incur the risk of losing the ship or worse, go bankrupt. It is fair to say that the domino effect of this is that it will affect the economic and commercial efficiency of the shipping industry. The only case where there was an expression by the courts that the duty of the charterer to provide cargo was of a lesser than absolute one was in the case of *Little v Stevenson* above, but it has been quickly isolated as an exceptional decision restricted to the facts of that particular case, the potential interpretations and effects to the observations made in that case by the Earl of Halsbury L.C.²²⁷ and Lord Herschell²²⁸ being played down by later cases and have not been followed since. By consistently staying within the course of this pattern of decisions, the law ensures that the economic and commercial efficiency is secured because the law is clear and certain about the expectations of the industry towards the shipper.

In *Bunge y Born Ltda v Brightman*²²⁹, it was emphasised that a charterer in a charter party has prima facie an absolute obligation to provide cargo and bring it ready to the loading site. Exceptions in relation to laydays may not be invoked unless it was expressly and distinctly provided or may be necessarily implied. In this case, the vessel had already arrived at the port of loading but the charterer's cargo of wheat had not fully arrived by rail due to the strike held by the railway workers. This was followed by a government ban on the export of wheat which resulted in the charterer having to stop loading wheat and load maize instead. Ultimately the laydays were exceeded and the charterers sought to rely on an exception clause worded to cover workmen strike and obstruction or stoppages on the railway or loading places. The House of Lords held that for an obstruction to trigger the exception clause, it must be an obstruction which prevented the loading and not the conveying of the cargo to the place where loading is to take place. This case shows also that there is no excuse for the charterer in not having the cargo ready for loading even when an extraneous strike which was beyond their contemplation occurred. The case of *Hudson v Ede*²³⁰ was distinguished since in the latter case there was no other way in which the cargo could have been brought to the ship as the river

²²⁷ *Little* (n 223) 116.

²²⁸ *Ibid* 118.

²²⁹ *Bunge y Born Ltda Sociedad Anonima Commercial Financiera y Industrial of Buenos Aires v H A Brightman & Co* [1925] A.C. 799.

²³⁰ (1868) L.R. 3 Q.B. 412.

through which the lighters brought the cargo had frozen over, and there were no storehouses at the port itself, and thus there was no other place from which the cargo can be brought. The grain were carried by lighters which would come down the river from places higher up the river, go alongside the chartered ship waiting in sufficient depth of water to load, and empty the grain directly into it. It was held that the exception of detention by ice in the charterparty covered the situation. The legal principle here is that if the location from where the cargo is taken is not specified, the charterer has to exhaust every practical mode of loading before being excused from his obligation of bringing the cargo to where it can be loaded onto the particular ship.

The case of *Grant v Coverdale*²³¹ is the most commonly referred to authority for the duty of the charterer to provide cargo regardless of fault on the charterer's part. In this case the cargo was transported to the loading dock by lighters from a wharf where the cargo was stored upriver. Upon arrival of the chartered ship, part of the cargo was loaded. Unfortunately frost set in rendering the canal impassable and this impeded the loading of the remainder of the cargo. It was impractical for the charterer to bring the cargo to the specified ship by other modes such as carting due to unreasonable cost, although the dock itself was not frozen and if all the cargo were already at the dock, loading would not have been prevented. The charterer sought to rely on an exception covering among others, frost and unavoidable accidents preventing loading. Naturally the House of Lords held that the charterer was not entitled to do so. Furthermore an important principle derived from this case is that the operation of loading may be separated into two parts; the actual physical loading of cargo onto the ship, and the process of bringing the cargo from the place where it is stored to the place of loading. The two can only be seen as one overall process of loading if there was an inevitable necessity that a certain process of bringing the cargo from the only place where it can be stored had to precede the actual physical loading in order for it to be possible for the physical loading to take place at the location where the parties have agreed, and there was no other way in which this could be done, even though there may be a great distance between the place where the cargo is stored and the agreed loading place. This was the situation that occurred in *Hudson v Ede* above and in that case although such a system was unknown to the shipowner, it was a well-known custom within the grain trade, and thus it was held that it must have been contemplated as the basis of the contract.²³² If there was another way but it would

²³¹ (1884) 9 App Cas 470.

²³² *Hudson* (n 230).

incur unreasonable costs on the charterer, it would be a failure of the charterer's obligation to bring the cargo to its loading place alongside the ship if the charterer chooses not to do so, and the charterer would not be able to seek protection from a clause which exempted delay in loading, even for causes beyond the charterer's powers or control to avoid.

Clearly here the obligation of the charterer is absolute and the only way in which the gravity of the duty could be mitigated especially where such a need is highly anticipated, is that it would be best if the charterer ensures that clearly worded express terms which excludes his liability in the event of delay in procuring the cargo are inserted in the charterparty. An example is the labour clause relied on by the charterer in the case of *Gordon Steamship v Moxey Savon*²³³ where there was a national coal strike which impeded the conveyance of coal to the loading dock for several days. The charterer sought to rely on a condition which covered strikes and stoppage of hands connected with the delivery of the coal. If such a situation should occur and prevent loading from commencing, the charterparty would become null and void. The court upheld the arbitrator's decision that the condition was triggered rendering the charterparty void.

The duty to provide cargo is a general duty which encompasses the various other sub-duties which requires to be fulfilled by the shipper before the general duty to provide cargo can be said to have been fulfilled. For instance, it is not enough to have the cargo physically present on the side of the ship within the time agreed if the cargo has not been properly marked with the required identification as specified, or properly and safely packed in a way that makes it fit for loading and the voyage. In providing the cargo, the shipper also needs to provide the accompanying documents and any important and relevant information to the master regarding the safe handling and carriage of the goods to ensure the safety of the goods themselves as well as the safety of other cargo, the ship itself and the crew. This is particularly important in relation to the shipment of dangerous goods which will be discussed in more detail in a separate sub heading below dedicated specifically to liability for dangerous goods.

²³³ *Gordon Steamship Co Ltd v Moxey Savon & Co Ltd* (1913) 12 Asp MLC 339, 18 Com Cas 170.

The duty to load

The duty to load encompasses several aspects of the shipper's duties including participating in the loading operation, the duty to load a full and complete cargo and the duty to load alternative cargo. These are discussed below.

The loading operation

The duties to load, stow and discharge are actually the duties of the shipowner under the common law, however by agreement the parties may displace these duties onto the charterer by inserting clearly expressed words.²³⁴ Otherwise at the beginning of shipment, it is the duty of the charterer in a voyage charter party to bring the cargo alongside the ship and within reach of the ship's tackle. The shipowner then has the duty to load the cargo onto the ship. This is the traditional rule regarding division of responsibility for the loading operation under the common law between the shipowner and the charterer and is known as the 'alongside rule'. Similarly at the end of shipment, there is a division of responsibility between the consignee and the shipowner regarding the discharge operation. It is the duty of the consignee to receive the cargo after the shipowner has put the cargo over the side of the ship and released it from the ship's tackle. In some circumstances, it may be implied in the bill of lading that the shipper has the duty to perform the discharge operation.²³⁵

This is a very neat and tidy division of physical boundaries of location, labour and ultimately cost which clearly outlines the duties of each party involved in the operation of loading. However in practical terms, things are usually a little bit messier than the ideal theoretical picture. Much of course depends on the agreement between the shipowner and the charterer, but the practical reality is also inclusive not only of other parties who may take part in the operation of loading on a professional level, for instance stevedores contracted by shipbrokers who serve both the shipowner and the charterer, but also the fact that loading and discharge do not rely solely on the ship's tackle as its tool. The mark of modern day shipping is identified by the use of all kinds of-land based mechanical equipment such as cranes, elevators and grabs which usually belong to the charterer or controlled by it rather than the shipowner. The shipowner and charterer may therefore agree that the charterer is to undertake and bear the cost of the whole operation

²³⁴ *Jindal Iron & Steel Co Ltd v Islamic Solidarity Co Jordan Inc* [2003] EWCA Civ 144; [2003] 2 Lloyd's Rep 87.

²³⁵ *Tradigrain SA v King Diamond Shipping SA, The Spiros C* [2002] 2 Lloyd's Rep 315.

of loading and discharge. This kind of agreement is commonly known as a contract on FIO terms. This or any other kind of agreement which stipulates the respective duties of both parties involved in loading must be expressly agreed upon, otherwise the common law ‘alongside rule’ will apply. This includes the duty of the charterer to employ and bear the cost of the use of lighters to bring the cargo alongside the shipowner’s vessel where the vessel is unable to come to berth in port²³⁶ for whatever reason. The case of *Grant v Coverdale*²³⁷ discussed above has established that if there was a delay by the charterer in bringing the cargo alongside the vessel, even though the delay was caused by matters which are covered by an exclusion clause which was worded to cover delay in loading, the charterer is not protected since the operation of loading does not include the process of bringing the cargo from another location where it was stored to the area alongside the ship.

This does not mean however, that the obligations for performing, paying and taking responsibility for loading and discharge must all fall on the same person. The case of *Jindal Iron*²³⁸ is authority for the principle that if the charterer agreed to pay for the loading, it does not follow that he is also the person to bear the responsibility of performing the loading or of any damage which ensue as a result of loading.

If the charterer does decide to take on the loading and discharge operation as well as bear the expenses for them and a clause to such effect is inserted into the charterparty, the charterer then has a duty to load, stow and trim the cargo and discharge with due care. Problems of construction may arise when the terms of the charterparty stipulate that although the loading and discharge operation is to be carried out by the charterer, by appointing stevedores and labourers, the process is still to be supervised and is the responsibility of the captain, thus reverting liability back to the shipowner. Even where there is no clause to such effect, the master of the vessel has the legal right and corresponding duty to intervene in the process of loading since not only is he, as agent of the shipowner, responsible to ensure the safety and stability of the ship and cargo, and hence ensure its seaworthiness and cargoworthiness, but also because as the person intimately aware about the special technicalities and needs of the ship whilst the stevedores being strangers to it, he is assumed to know better and they would not, about

²³⁶ John Wilson, *Carriage of Goods by Sea* (7th edn, Pearson Education 2010) 68.

²³⁷ (1884) 9 App Cas 470.

²³⁸ *Jindal Iron & Steel Co Ltd v Islamic Solidarity Co Jordan Inc* [2003] EWCA Civ 144; [2003] 2 Lloyd’s Rep 87.

what to do and what not to do. Furthermore, it enables the ship to avoid inefficient use of space leading to wastage and loss of freight due to bad stowage. So if he does not intervene when he can clearly see that something is not quite right, the shipowner will be answerable. However, if the master does intervene and this results in damage, again the shipowner has to bear the loss. Even to be neutral and neither intervening nor omitting to intervene when clearly needed is no guarantee, as the shipowner takes on liability even if the master merely agrees with the particular stow.²³⁹ Unfortunately there is no sure place where the master can stand where it can safely be said that liability is or is not incurred on the shipowner and apparently neither is the charterer safe. Everything turns on how the terms of the charter is construed.

In the case of *The Argonaut*²⁴⁰ a cargo of granite was to be carried by trip charter from Durban to Marina di Carrara (MDC) and Sete. The New York Produce Exchange form was used which provided in clause 8 that the ‘charterers are to load, stow and... discharge at their own expense under the supervision and responsibility of the Captain.’ Upon discharge at MDC and Sete, the vessel was found to be damaged. In the course of unloading, tank tops were pierced by falling granite blocks caused by the stevedores, engaged by the charterers dropping the blocks.

The court held that although the charterer’s obligation to load, stow and trim the cargo, and discharge requires him to perform such obligation with due care, the primary responsibility for stowage remains with the master. Clause 8 creates a primary duty on the shipowner and only an actual intervention by the charterers rather than the act of the stevedores engaged by them could displace this liability. For there to be liability on the part of the charterers, there has to be an officious intervention by them. Leggatt J also raised the question of what would be the result if the charterer had directly caused the damage which was not within the power of the shipowners to prevent unless unusual precaution were taken. He surmises that perhaps the doctrine of estoppel could be relied on by the shipowners to avoid liability.

In the *The Santamana*²⁴¹ a cargo of onion was damaged by being placed in stacks of 15 to 16 tiers high without sufficient dunnage with the leave and licence of the shipper. It

²³⁹ Martin Dockray and Katherine Reece Thomas, *Cases & Materials on the Carriage of Goods by Sea* (3rd edition, Cavendish Publishing 2004) 222.

²⁴⁰ *MSC Mediterranean Shipping Co SA v Alianca Bay Shipping Co Ltd, The Argonaut* [1985] 2 Lloyd’s Rep 216.

²⁴¹ *Upper Egypt Produce Exporters and Others v. “Santamana”* (1923) 14 LIL Rep 159.

was clear that that was bad stowage and that the ship was unseaworthy in not providing for proper stowage and lacking in proper equipment such as dunnage and temporary decks to support the heavy weight of the upper tiers. However, the court held that if a shipper takes an active interest in the stowage and only complains of some defects but not others which are patent to him, he cannot later complain about them since he made no objections to the way they were stowed. The shipowner cannot be liable for that which the shipper allowed to occur.

The charter may transfer responsibility to the charterers for lashing the cargo in such a way as to make sure seaworthiness is attained. This was held in *The Imvros*²⁴² when the charterparty provided that the charterers would load, stow and lash at their expense under the master's supervision and to his satisfaction, some of the cargo were lost overboard due to lashing which did not conform to the IMO requirements, and caused damage to the vessel.

The duty to load a full and complete cargo

The voyage charterer has the duty to fill the chartered vessel with as much cargo as she can possibly carry safely in order to allow the shipowner to earn as much freight as he possibly can for every ton of cargo loaded. The tonnage of the ship is not an indication of how much cargo can be loaded and loading cargo of equivalent amount to the registered tonnage of the ship as described in the charterparty would be a failure of the charterer to perform his duty to load a full and complete cargo. The registered tonnage of the ship is only material to an allegation of fraud in the description of the vessel in the charterparty. This was held in the case of *Hunter v Fry*²⁴³ where the shipper had loaded cargo equivalent to the tonnage of the ship mentioned in the charterparty. The shipper was held liable to pay the difference between the freight he had actually paid and the amount which he would have paid if a full and complete cargo had been loaded. In this case the voyage charterer was referred to as the shipper and freighter by the court.

The duty to load alternative cargo

Under the charterparty, the charterer may be given a few options of the type of cargo to load. When the word 'option' is used in the charterparty however, it expressly gives the charterer the right of choice in loading the type of cargo which are the subject of an

²⁴² *Transocean Liners Reederei GmbH v Euxine Shipping Co Ltd, The Imvros* [1999] 1 Lloyd's Rep 848.

²⁴³ (1819) 2B & A 421, KB.

option, and it is a choice for the charterer to take or to leave. Vice versa if the word ‘option’ is not used for any or a particular type of cargo, that cargo becomes the basic cargo which must be loaded. In *Reardon Smith v Ministry of Agriculture*²⁴⁴, the court also referred to the charterer as the shipper when laying down the principles from the *Bunge y Born*²⁴⁵ case. The charterparty in the *Reardon Smith* case allowed to charterer to choose whether to load ‘a full and complete cargo...of wheat in bulk...and/or barley in bulk, and/or flour in sacks as below...’ The words ‘as below’ were typed and following this there were also typed words inserted into the print stating that ‘the charterer has the option of loading up to one-third cargo of barley in bulk.....one-third cargo of flour in sacks’, both subject to an increased freight rate. When the vessel arrived, the charterer was not able to load a full and complete cargo of wheat due to an elevator strike which was an excepted cause in the charterparty, but did not choose to load the other types of cargo which were not affected by the strike. The House of Lords held that the charterer was not obliged to exercise the option of loading a full and complete cargo consisting of a mixture of the different types of alternative cargo even though that would have meant a full and complete cargo could have been loaded without delay, the real promise of the charterer in the opening words of the charterparty being only the obligation to load a full and complete cargo of wheat, unless the charterer makes an affirmative decision to vary the load content.

In contrast, in the Court of Appeal case of *Bunge y Born Ltda v Brightman* discussed above, the charterparty provided that the charterer was to provide ‘a full and complete cargo of wheat and/or maize and/or rye.’²⁴⁶ The court held that the shipper was bound to have ready at the port of shipment a full and complete cargo consisting of cargo within the range of the alternative commodities if the shipper has undertaken to ship a full and complete cargo of such alternative commodities. If one of the types of commodity was unavailable for loading due to an excepted cause, he may not invoke the exception covering the cause of the delay unless each of the other commodities was also covered by the exceptions clause. The primary duty to provide a full and complete cargo in one form or another cannot be converted into a simple duty to provide a cargo of a single type chosen by the shipper by the act of the shipper choosing from the variety provided for in the charterparty. A choice to load a particular type of cargo from the range agreed

²⁴⁴ [1963] AC 691.

²⁴⁵ *Bunge y Born* (n 229).

²⁴⁶ *ibid.*

is not carved in stone and the shipper may opt to change his mind until a full and complete cargo has been loaded. However the Court of Appeal is of the view that if an excepted cause has prevented the shipper from completing loading, the delay consequent upon this cause may fall within the exception so as to afford the charterer a reasonable time to either reconsider his position and change cargo²⁴⁷ or deal with the conditions which have changed²⁴⁸ or to just change over.²⁴⁹

The House of Lords²⁵⁰ in *Reardon Smith* above however is of the view that the time for adjustment should come from the general position of the charterer under the charterparty terms rather than stemming from the exceptions clause. The case was distinguished on the basis that the charterer in *Reardon Smith* did not have a primary obligation to ship a mixed cargo as in *Bunge y Born*.²⁵¹ The primary obligation was to ship wheat only as the basic cargo with an option to ship a proportion of other cargo. The exceptions clause thus covers delay in loading wheat and will not be lost simply because the charterer does exercise his option to load other cargo. The charterer has no duty to switch to other cargo even though they may be available for loading a full and complete mixture of cargo as an overriding obligation. The word ‘option’ clearly requires a positive exercise on the charterer’s part before the option is deemed to have been taken.

Liability for dangerous goods

There is no question that if the shipper ships cargo which is of such a dangerous nature that they are capable of causing physical damage²⁵² to the vessel and other cargo, or cause delay or detention, he will be answerable if he failed to disclose the dangerous nature of the cargo to the shipowner. The duty of the shipper is to not ship dangerous cargo without first notifying the carrier of the dangerous nature of the cargo, and the only time when the shipper is relieved from this duty is when the carrier or his crew knows or ought reasonably to be aware of the cargo’s dangerous character.

As Tetley pointed out, the shipper’s rights and liabilities as well as that of the carrier may vary depending upon this. The warranty that the shipper is sending only goods which are suitable for carriage will be influenced by whether the carrier knew or should

²⁴⁷ *Bunge y Born* (n 229) (Scrutton LJ).

²⁴⁸ *ibid* (Banks LJ).

²⁴⁹ *ibid* (Atkin LJ).

²⁵⁰ *Reardon Smith* (n 244) (Viscount Radcliffe).

²⁵¹ *Bunge y Born* (n 229).

²⁵² The concept has been extended to include risk of seizure and delay but no physical damage to the vessel in *Mitchell, Cotts v Steel* [1916] 2 KB 610.

have known that the shipper is sending dangerous goods.²⁵³ If both the carrier and the shipper were not aware or should have been aware of the dangerous nature of the cargo, the common law provides that regardless of this, the shipper is deemed to have knowledge that the cargo is dangerous. The warranty of the shipper that the goods are safe for carriage is absolute as held by the majority in *Brass v Maitland*.²⁵⁴

Once the shipper has notified the carrier, he is no longer liable under common law unless there is a provision in the charterparty or bill of lading which provides to the contrary.²⁵⁵ This undertaking by the shipper is implied by common law and does not depend on the knowledge and means of obtaining knowledge that the goods were dangerous. The modern authority for this principle is the case of *The Giannis NK*²⁵⁶ which endorsed the majority decision in *Brass v Maitland*.²⁵⁷

This implied obligation of the shipper arises regardless of whether the shipment was made under a charterparty or a bill of lading, but may be reinforced by express terms to that effect especially in the charterparty. Dangerous cargo includes those goods which are inherently dangerous and are commonly regarded as such to the extent that official lists have been drawn up in statutes, regulations and codes to categorize them. Cargo can also be regarded as dangerous if the danger emanates from the placing of the cargo in its surrounding circumstances rather than the nature of the cargo in itself, for instance how packing or different temperatures or contact with other substance affect the nature of the cargo.

The nature of this liability is strict as it does not depend on whether the shipper has knowledge or otherwise of the dangerous nature of his cargo or the means of obtaining that knowledge, for instance when cargo was received from a third party without intermediate inspection.²⁵⁸ Apart from this form of liability, there is also a possibility for liability in tort for negligence, breach of statutory duty under the Merchant Shipping Acts²⁵⁹ and Regulations²⁶⁰ which contain a list of goods which are considered to be

²⁵³ William Tetley, *Marine Cargo Claims* (3rd edition, International Shipping Publications 1988) 463, where he relies on the following cases (*Williams v. The East India Company* (1802) 3 East 192, 200-01, 102 E.R. 571, 574; *Bamfield v. Goole and Sheffield Transport Co* [1910] 2 K.B. 94 (C.A.); *Ionmar Compania Naviera S.A. v. Olin Corp.*, 666 F.2d 897, 904, 1982 AMC 1489, 1498 (11 Cir. 1982); *Ente Nazionale v. Baliwag Navigation*, 605 F. Supp. 355, 365, 1984 AMC 2858 at p. 2873 (E.D. Va 1984).

²⁵⁴ (1856) 6 El. & Bl. 470, 119 E.R. 940, 26 L.J.Q.B. 49.

²⁵⁵ *Chandris v Isbrandtsen-Moller* [1951] 1 KB 240.

²⁵⁶ *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK* [1998] AC 605.

²⁵⁷ *Brass* (n 254).

²⁵⁸ *ibid.*

²⁵⁹ Merchant Shipping Act 1894, s 446.

²⁶⁰ Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997.

dangerous. Apart from that the contractual duty to ship goods which conform to the contractual description is also a possible basis for liability.²⁶¹ Other forms of liability include breach of an implied warranty to ship only safe goods or a collateral contract to reveal the identity and nature of goods shipped, or to pack goods properly. There could also be liability in the form of express, implied or statutory agreement to indemnify the carrier should the dangerous cargo cause damage to the vessel or other cargo.²⁶²

Liability for container demurrage

The post-transit duties of the shipper include collecting the goods from the discharge port. The shipper remains liable under the bill of lading as an original party to it, but the obligation would be performed by the consignee. If the good were containerised, the shipper also has the obligation to unpack the containers and return them to the carrier in its original state within the free time allowed by the carrier. Failure to do this within the timeframe given will cause the shipper to incur liability for container demurrage.²⁶³

This was what happened in the recent Court of Appeal decision of *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*²⁶⁴ where the shipper as buyer had a dispute with the consignee buyer when the price of the goods, being raw cotton collapsed. The consignee refused to pay for the goods and take delivery but the shipper had already presented the documents to the confirming bank and received payment. For this reason the shipper believes that it no longer has title to deal with the goods. The cargo thus remained at the port since the customs authorities would not allow the carrier to unpack and dispose the goods without permission of the court.

The bills of lading contained a clause which provided for a period of free time which may be used at the discharge port beyond which a daily rate of demurrage is payable. Since neither the shipper nor the consignee could or would deal with the goods, the free time came and went without the container being returned. The carrier of course wanted the demurrage for as long as they were not returned and they never were. The questions among others, for the court were whether demurrage was incurred²⁶⁵, and for how long before the contract is frustrated and brought to an end.

²⁶¹ *Islamic Investment Co SA v Transorient Shipping Ltd, The Nour* [1999] 1 Lloyd's Rep 1, CA.

²⁶² Dockray and Thomas (n 239) 229.

²⁶³ This is similar to the concept of laytime and demurrage used in charterparties.

²⁶⁴ [2016] EWCA Civ 789.

²⁶⁵ This became contentious because the relevant clause provided for certain conditions before the demurrage accrues.

In the Court of Appeal, Lord Justice Moore-Bick agreed that the demurrage clause was triggered upon discharge of the goods on the plain language of the clause. The demurrage continued to run until the delay was not only long enough to constitute a repudiatory breach by the shipper, but in refusing to take the offer by the carrier to purchase the containers, the consequent indefinite deadlock meant the performance of the contract became something radically different from what the parties originally undertook, the test essentially of frustration. This was much later than the point in time when the shipper had written to the carrier to inform them of their inability to deal with the goods once they had obtained payment, as held by the trial judge, Leggatt J.

What is clear here is that the basis for the decision on the extent of the shipper's liability was the point of time at which the commercial purpose of the adventure was frustrated, and this involves an assessment of the effect of the delay in the circumstances rather than a consideration of any fault on the part of the shipper. For this reason, the lack of such an assessment by the trial judge in coming to his decision on the earlier date for when the right to be paid demurrage ended was deemed unjustifiable.²⁶⁶

This would be consistent with the strict liability nature of contractual obligations. The relevant clauses which stipulated the shipper's obligations indicate the strict nature of the requirement for performance in definitive terms.²⁶⁷ In such a case there would not be a need to discuss the fault of the shipper but rather to focus on the construction and interpretation of the terms to give effect to what was promised.

Shipper liability in other countries which adopt the common law

Liability for dangerous goods

Countries which adopt the common law system such as the United States, Canada, Australia, New Zealand, and Malaysia have adopted similar rules on the liability of the shipper for dangerous goods. Many statutory laws in common law countries have codified provisions which similarly provide that the warranty of the shipper that the

²⁶⁶ Per Moore-Bick LJ in *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789, at para. 27.

²⁶⁷ In the *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* case there were three clauses in the bills of lading which were the subject-matter of dispute. All of them indicate strict liability. Clause 14.8 provides that "the Merchant *is required and has the responsibility* to return to a place nominated by the Carrier the Container...Demurrage...*will be levied and payable* by the Merchant..." Likewise in clause 14.9, "the Merchant *shall redeliver...the Containers... The Merchant shall be liable to indemnify* the Carrier." Clause 20.2 provides that "the Merchant *shall take delivery* of the Goods..." (emphasis added).

goods delivered to the carrier is suitable for carriage is absolute.²⁶⁸ Where third parties such as seamen, stevedores and owners of other cargo are concerned, liability of the shipper is to be found in tort or delict rather than the application of article 4(6) of the Hague-Visby Rules.²⁶⁹

The shipper's warranty to the carrier that the goods are suitable for carriage was in the United States also an absolute one in the 19th century²⁷⁰ but later in the 20th century was considered to be only qualified.²⁷¹ The shipper is now only liable if he has actual or constructive knowledge that the goods he sends is dangerous.²⁷²

Liability towards third parties

It appears from Tetley's work that although in dealing with liabilities of the shipper to third parties, reference would be made to article 4(6) of the Hague-Visby Rules when it involves the necessity to land the goods due to its dangerous nature, liabilities towards third parties would in general be dealt with by the law of tort and delict. Therefore principles in tort such as the duty to use reasonable care is applied against shippers to take reasonable care to those who would be affected by his acts and omissions, for instance a failure to give proper warning of the dangerous nature of his goods to the stevedores, the carrier, the crew and any other third party who may be involved in handling and transporting the goods.²⁷³

This was what happened in *Harrison v. Flota mercante*²⁷⁴ where there was danger of inhalation of industrial chemical from the shipper's cargo which the shipper was in fact aware of but had failed to place adequate labels on them in order to warn of the danger. During loading some of the containers ruptured but the stevedore's personnel had actually noticed the warning label but had failed to provide proper masks and other safety

²⁶⁸ Merchant Shipping Act 1894 (57 & 58) Vict. C. 60 sect. 446 and the Canada Shipping Act, R.S.C. 1985, C 5-9, section 391(2) and (3).

²⁶⁹ Tetley (n 253) 462.

²⁷⁰ *ibid* 464 where he referred to *Pierce v. Winsor*, 19 Fed. Cas. 646 at p. 651 (No. 11, 150) (C.C.D. Mass. 1861).

²⁷¹ *ibid* 464 where he referred to the cases of *The William J. Quillan*, 180 F. 681 at pp. 682-684 (2 Cir. 1910), cert. den. 218 U.S. 682; *Aktieselskabet Fido v. Lloyd Brasileiro*, 267 F. 733 at pp. 736-37 (S.D.N.Y. 1919), affirmed 283 F. 62 (2 Cir. 1919), cert. denied 260 U.S. 737 (1922).

²⁷² *ibid* 464 where he referred to *Sucrest Corporation v. M/V Jennifer*, 455 F. Supp. 371 at pp. 384-85, 1978 AMC 2520 at pp. 2538-39 (D. Me. 1978) (a c/p case), *Ionmar Cia. Nav. V. Central of Ga.*, 471 F. Supp. 942 at p. 952, 1979 AMC 1747 at p. 1761 (S.D. Ga. 1979) (a b/l case).

²⁷³ Tetley (n 253) 468.

²⁷⁴ 577 F.2d 968, 1979 AMC 824 (5 Cir. 1978).

equipment to those clearing up the spill. Both shipper and stevedore were held liable in this case as was the carrier of the cargo.

Conversely in *Pitria Star Nav. v. Monsanto*²⁷⁵ since the shipper had properly labelled the containers of chemicals and provided proper documentation to identify the dangerous nature of the cargo as poison and holding an IMCO status, it was held not liable for the three seamen who were killed.

Liability for defective cargo

In the United States, the shipper may also be liable for cargo which causes damage due to being defective rather than dangerous.²⁷⁶ In *S.W. Sugar & Molasses Co. v. E.J. Nicholson*²⁷⁷ the cargo of defective molasses had contaminated other molasses and this caused the carrier to be held liable to the consignee. The carrier sued the shipper in turn and the shipper was held liable under the general maritime law as well as implied under the Carriage of Goods by Sea Act to indemnify the carrier for the defective cargo.

Liability for personal injury and damage to property

Crew members and third parties may be injured or suffer property damage caused by the shipper's act but the requirement for liability of the shipper for this type of damage in the US comes under delict or tort.²⁷⁸ Article 4(3) of the Hague-Visby Rules would only apply if the crew member or the third party had a valid claim against the carrier which the carrier in turn could bring against the shipper.²⁷⁹ However, section 4(3) of the Carriage of Goods by Sea Act requires the plaintiff to prove negligence of the shipper. In *Williamson v. Cia. Anon. Venezolana de Navigacion*²⁸⁰ a longshoreman was injured when he walked on a defective crate belonging to the shipper. Since no fault of the shipper could be proven, the plaintiff lost his case. Thus it is likely that the shipper would just be directly sued in delict or tort while at the same time the crew member or third party would be suing the carrier in contract.²⁸¹

²⁷⁵ 1986 AMC 2966 (E.D. La. 1984).

²⁷⁶ Tetley (n 253) 459.

²⁷⁷ 138 F. Supp. 1, 1956 AMC 1146 (S.D.N.Y. 1956).

²⁷⁸ Tetley (n 253) 459.

²⁷⁹ Tetley (n 253) 460.

²⁸⁰ 446 f.2d 1339, 1971 AMC 2083 (2. Cir. 1971).

²⁸¹ Tetley (n 253) 460.

In *N.V. Stoomvaart Maatschappij "Nederlands" v. GTE*²⁸², another longshoreman had fallen through the top of the crate and the Second Circuit judge held that the liability of the shipper is determined under the common law principles of tort and agency. There was no need to rely on section 4(3) of the Carriage of Goods by Sea Act and furthermore, section 4(3) requires the proof of fault of the shipper.²⁸³

Demurrage

The case of *Leeds Shipping v. Duncan, Fox*²⁸⁴, a charterparty incorporated the Australian Sea Carriage of Goods Act of 1924, even though the delay in the discharge of the cargo at the port of arrival was caused by the deliberate idleness of the stevedore rather employed by the shipowner than through any fault of the shipper, the shipper was still held liable for demurrage since article 4(3) does not affect the demurrage clause agreed in the charterparty or bill of lading for excess laydays.²⁸⁵ This indicates that the contractual liability of the shipper under national law supersedes the immunity afforded to it under the Hague-Visby Rules.

This is supported by the case of *Hellenic Lines Limited v. The Embassy of Pakistan*²⁸⁶ where there was a clause which imposed liability on the consignee in the event of non-continuous discharge of the cargo, it was held that carriers and shippers are free to agree on matters concerning delay in discharging cargo by themselves, and that they are not violating section 4(3) of the Carriage of Goods by Sea Act should liability be imposed on the shipper in this matter.²⁸⁷

Shipper liability under Civil Law Legal Systems

Introduction

Civil law legal systems are observed and applied by many countries in the world, notably countries in continental Europe excluding United Kingdom, countries in South America and some countries in Africa and Asia.²⁸⁸ It is a system of law which originated and

²⁸² 531 F.2d 1143, (Summary) (2 Cir. 1976).

²⁸³ Tetley (n 253) 460.

²⁸⁴ (1932), 42 Ll. L. Rep. 123.

²⁸⁵ Tetley (n 253) 460.

²⁸⁶ 467 F.2d 1150 at p. 1156, 1972 AMC 2216 at p. 2224 (2 Cir. 1972).

²⁸⁷ Tetley (n 253) 461.

²⁸⁸ According to https://www.law.cornell.edu/wex/legal_systems, Continental Europe adopted the Roman version of the Civil law. From there it spread to the New World and parts of Africa by way of colonization. The French version became a model for the German version which was then taken by countries in the Far East such as Thailand, Japan and Taiwan. Greece, Portugal and Brazil also follow the German version

evolved from Roman law and the main feature of this system is that all the laws are written and codified as opposed to being determined by the decision of judges²⁸⁹ in cases before them by applying or changing a judicial precedent or by interpreting a provision of statute as they think appropriate. The latter situation is what is being practised in common law systems or also known as Anglo-Saxon law.

In contrast, the judges in a civil law jurisdiction do not create new laws by their decisions but merely follow whatever has been provided in the written collection of laws, so called civil codes, which have been published to the people at large so that it is assumed fairness is achieved since the law is publicised before being enforced. Certainty is thus very much identified with civil law systems as compared to common law systems where there is a certain level of uncertainty as far as the ability of the judges to change the application of the law in the future is concerned. This may be a manifestation of the public interest element in civil law systems. The interest of the public at large in being able to rely on certainty of the law outweighs any consideration of the judge in making radical changes to the way the law is understood as being applicable.

Nevertheless, in common law countries there are also written laws such as statutes but they are subject to interpretation by the judges in its application to particular cases. That is not to say that there is no interpretation of statutes being done by judges in the civil law systems when applying the law to the case before them. In fact this is where similarities lie as between the judicial functions of both systems, although in the civil law system the principal source of authority are the codes whereas in the common law system it is the judicial precedent.²⁹⁰ In the civil law judicial functions however, interpretation is not merely of a judicial nature but also doctrinal and authentic, the former being the work of scholars and the latter coming from the legislature.²⁹¹

Although there are codes in force in the civil law jurisdictions, it is said that where the European code jurisdictions are concerned, the proportion of the main codes themselves are minute compared to what makes up the so-called non-codified legislation. Out of these non-codified legislation much of which are considered fragmentary and on an ad-hoc basis, those termed “special legislation” make up for the expansion of the codes and

whereas the French version has influenced the Middle Eastern countries such as Egypt, Algeria, Tunisia, Morocco and Sub-Saharan Africa.

²⁸⁹ <http://www.duhaime.org/LegalDictionary/C/CivilLaw.aspx>

²⁹⁰ Mauro Cappelletti, John Henry Merryman, and Joseph M. Perillo, *The Italian Legal System: An Introduction* (Stanford University Press 1967) 240.

²⁹¹ *ibid* 241.

supplement their basic provisions.²⁹² Having said that, these legislations are not the only composition of the civil law system. Much of the law is said to be uncodified.²⁹³ Where Codes do exist, there are usually several in every legal system, each one encompassing a broad classification of law. The Italian Code of Navigation²⁹⁴ for example, is one of five codes in force in Italy.²⁹⁵

Objective

The objective of this section is to identify some of the various forms of shipper liability spelt out in the codes of various jurisdictions which apply the civil law system. Some of the codes offer clearly expressed provisions on shipper liability whether or not by using the specific term ‘shipper’, but as discussed above, the difference will be noted but still included as part of the wider notion of shipper used in the first Chapter. Other civil jurisdictions may not have specifically expressed provisions on shipper liability but the concepts akin to some form of shipper liability may be found between the lines of provisions directed at other forms of commercial liability or even public laws.

The issue then becomes a question of whether these jurisdictions then, actually deal with shipper liability since they do not spell it out specifically, or that the issue of shipper liability is dealt with by using general provisions which apply to all forms of commercial contracts, tort, bailment, fiduciary, crime or other premise of liability.

The approach used in this section will naturally be different than that used in the section on the common law concepts on shipper liability as the main source of the law are the Codes. It is therefore very important to look at the legislative intent and purpose of passing the Codes and so whatever materials that can be found which contain the debates and discussion on the proposal of the Codes will be relevant, as are materials which document the outcome of the Codes. These will be indicators of whether the Codes reflect the legislative intent and in their application have achieved their purpose. To this extent it is useful to look at some of the way the Codes have been applied by the respective local tribunals in resolving disputes concerning shipper liability.

²⁹² *ibid* 214.

²⁹³ *ibid* 215.

²⁹⁴ *Codice della navigazione*, approved by Royal Decree on the 30th March 1942, no. 327 and in force from 31 April 1942

²⁹⁵ Cappelletti (n 290) 214.

What follows is a study of various examples of the law in civil law systems on shipper liability in order to unearth how the domestic law deals with shipper liability in these legal systems. The purpose of doing this is not merely to compare the laws in different countries on shipper liability but to study on a wider perspective, the concepts used in the civil law legal systems to determine shipper liability for cargo. The approach taken in this section is to look at jurisdictions which are considered as progenitors in the civil law system for example France, Germany, Italy, Netherlands, and Spain in order to obtain the overall picture of how traditional civil law systems treat shipper liability. There are other civil law countries which are considered as being traditional maritime nations but are not selected because they are not considered to represent the progenitors of the civil system. The focus as the section suggests, is to project the civil law position rather than the civil maritime nation position. Latvia is included in order to compare a recently modernised civil law system which emerged from a socialist background.²⁹⁶

Germany for example, is a signatory to the Hague Rules 1924 but nevertheless implements and applies the Visby protocols in German law except where the bill was issued by a state also applying the Hague Rules. Being a civil law state, Germany's maritime trade law is embodied in a code known as the Commercial Code. The provisions of the code on maritime trade law has not undergone any major changes for the past 150 years but recently there have been moves to significantly reform it to suit the needs of modern shipping practices as well as to simplify the bulky old maritime law. The bill had been approved by the German parliament²⁹⁷ and The Act on the Reform of Maritime Trade Law was published in the German *Official Journal* and entered into force on 25 April 2013.²⁹⁸ There are many important aspects of German maritime law which have been revamped under the new maritime trade law including among others, the law on ship arrests, owner's liability for damages, provisions on time and bareboat charterparties, abolition of the liability exclusions for damage due to fire and navigational fault, and most importantly for the purposes of this research, shipper liability.

²⁹⁶ The selection was also made in consideration of the fact that there is ease of access to materials from these jurisdictions relative to others.

²⁹⁷ Stefan Buurma and Olaf Hartenstein, Shipping & Transport-Germany, International Law Office, <http://www.internationallawoffice.com/newsletters/detail.aspx?g=9b244e11-baaa-43e1-a33e-5c7b88b10b69>

²⁹⁸ Olaf Hartenstein, Shipping & Transport-Germany, International Law Office, <http://www.internationallawoffice.com/newsletters/detail.aspx?g=2e867fc2-db35-44d6-9482-cb7e9b0b52f8&redir=1>

The aspect of shipper liability concerned which has been reformed is regarding damages arising as a result of false cargo declarations. Liability for damage which occur as a consequence of giving false declarations on dangerous goods and improper packaging is now no longer based on the fault of the shipper. The shipper is therefore now directly liable regardless of fault if he has made a false declaration on those matters.²⁹⁹ Nevertheless the German code balances this by imposing the same no-fault based liability on the owner of the ship for damage caused by his crew or other persons on board his ship. However, there must also be a corresponding claim for damages against the crew member by the plaintiff before the owner can be liable without fault for the damage caused by the former.³⁰⁰

The Reform of Maritime Trade Law Act revamps Book 5 (Maritime Trade)³⁰¹ in *Handelsgesetzbuch*, the German Commercial Code and reduces the bulk of its provisions.³⁰² The Fifth Book now begins with §476 which deals with the definition of the ‘reeder’ or shipowner in German, and ends with §619 which deals with service of documents such as notices of legal action against or court orders for arrest of a ship. As a consequence, a number of provisions relevant to shipper liability have either disappeared, been moved elsewhere, or merged with other provisions. These include provisions on liability for distance freightage³⁰³ and how it is computed,³⁰⁴ loss of ship or goods before the voyage,³⁰⁵ shipper liability when the consignee refuses delivery,³⁰⁶ liability of the shipper after the goods are sold³⁰⁷ and claims of the carrier against the shipper after delivery.³⁰⁸ There is a reshuffling of the arrangements of all the sections including those dealing with shipper liability.

²⁹⁹ Dr Eckehard Volz and Anna-Sophie Spiess, The Recent Reform of German Maritime Law, <http://incelaw.com/ourknowledge/publications/the-recent-reform-of-german-maritime-law>; Borden Ladner Gervais LLP, Darren McGuire, Mari-times newsletter: Canadian maritime law from coast-to-coast, Dec 21 2013, p 19, www.lexology.com

³⁰⁰ Dr Eckehard Volz and Anna-Sophie Spiess, The Recent Reform of German Maritime Law, <http://incelaw.com/ourknowledge/publications/the-recent-reform-of-german-maritime-law>

³⁰¹ Commercial Code in the revised version published in the Federal Law Gazette (BGBl, Federal Law Gazette), Part III, Section 4100-1, as amended by Article 1 of the Act of 20 April 2013 (Federal Law Gazette I p 831st).

³⁰² Before the revision, Book 5 used to range from §474- §905.

³⁰³ The previous Book 5 of *Handelsgesetzbuch*, §630.

³⁰⁴ *ibid* §631.

³⁰⁵ *ibid* §628.

³⁰⁶ *ibid* §627.

³⁰⁷ *ibid* §626.

³⁰⁸ *ibid* §625.

The relevant provisions to shipper liability in the Italian Code of Navigation may be found in Title V Charter and Carriage, Chapter III Carriage, Section II Carriage of goods in general.

Under the Dutch Civil Code, provisions may be found in Book 8 in particular Title 8.2 which covers general provisions relating to transport and Part II Maritime Law.

The French law on shipper liability may be found in the Transport Code created by the Ordinance No. 2010-1307 of 28 October 2010.

The Maritime Code of Latvia for example, regulates the private and administrative legal relations between legal entities in their legal relations which are connected to maritime matters.³⁰⁹ The law regarding carriage of goods is provided by Part E Carriage of Cargo and Passengers, from Chapter XIX on General Provisions for Carriage of Cargo to Chapter XXVI on Carriage of Passengers and Their Luggage. There are quite extensive provisions on the rights and duties of each party and in particular those relevant in considering shipper liability that may be found scattered all over this Part and they cover various aspects of the shipper's duty. Some are not very obvious and need to be combed out of intertwining duties of the carrier.

The first point to be noted is that the legal relations between the parties to a contract for the carriage of goods by sea is determined by agreement between the parties subject to the provisions of this Code.³¹⁰ Even if a bill of lading is not issued, the provisions in this part of the Code are applicable to all such relations.³¹¹ The form in which legal relations between three specifically mentioned parties, namely the carrier, consignor and receiver of cargo are to take is the bill of lading other similar document of transport. However where a receiver is concerned there are mandatory conditions of the contract of carriage if those conditions are found outside of the bill of lading or other similar transport document and it is indicated as such in the latter documents.³¹²

The provisions of this code mention two common types of shippers, the cargo-owner and the consignor, and make a distinction between them. For instance in section 123, if the cargo is lost, damaged or is delayed, or if the carriage cannot be completed, the carrier has to inform the person indicated by the consignor, but if the carrier is unable to do so,

³⁰⁹ Maritime Code of Latvia, s 1.

³¹⁰ *ibid* s 112(1).

³¹¹ Maritime Code of Latvia, s 112(2).

³¹² *ibid* s 112(3).

he may then notify the cargo-owner. However, if the latter is unknown to the carrier, he may then notify the consignor. There is also reference to the receiver and the voyage charterer, both of whom may be included within the definition of shipper in the first chapter and provisions regarding their respective duties will be discussed below. The voyage charterer is also distinguished from the consignor in this Code. For example in section 176(3), the carrier is to submit the notification of readiness of the ship to load to the consignor but if he is not available, then to the voyage charterer.

Pre-carriage liabilities

The duty to provide cargo

Provisions in the civil law systems focus on the shipper's duty to provide cargo within the time set by the carrier as well as the accompanying documents and necessary information. The following are some examples of such provisions.

Under Book 5 of the German Commercial Code, §486(1) focuses on the duty of the shipper to ensure timeliness in effecting delivery of the cargo to the carrier. The shipper must do so within the time agreed in the contract. This indicates that the duty is of a contractual nature. Prior to delivery of the cargo to the carrier, the shipper must also provide the accompanying documents and information which would be required for customs clearance and any other official processing.³¹³

In relation to the duty of the shipper to deliver the cargo, under §482(1) the shipper is to provide written information on the goods which is required for carriage, before the goods are delivered to the carrier for carriage, specifically information on the quantity, number, weight, the leading marks and the nature of the goods. However, if delivery of the goods to the carrier was done by a third party named by the shipper, the carrier may demand that such information be provided by the third party instead.³¹⁴

Under the Dutch Civil Code, article 8:26 provides generally that the consignor has the duty to provide all the information about the cargo and its handling which the consignor is able to provide or ought to be able to provide, and the importance of the information to the carrier of which the consignor knows or ought to know. The consignor is released

³¹³ The new Book 5 of *Handelsgesetzbuch*, §487(1).

³¹⁴ *ibid* §482(2).

from this duty only if there is an assumption that the carrier already has this information.³¹⁵

The consignor also has the general duty under article 8:27 to provide the necessary documents which are required in order to perform the transport. If the required documents are not adequately available and as a consequence the carrier suffers damage, the consignor must compensate the carrier regardless of the reasons for the inadequacy.³¹⁶

Article 8:394 provides specifically for the shipper's duty which is similar to the general provision in article 8:26. The shipper has the duty to provide all indications about the goods and information on the handling of the goods that he is able to provide or ought to be able to provide. Both the indications and information which the shipper has to provide are those which he knows or ought to know will be of importance to the carrier, unless they are the kind of information which the shipper may assume the carrier already knows.³¹⁷

Under the Italian Code of Navigation, in the section on carriage of specific goods³¹⁸, section 452 provides that the shipper has the duty to present the goods for loading within the customary time after the ship is ready to receive the cargo. After the expiry of the time within which the shipper must deliver the cargo, the consequences would be that the Master has the option to set the ship to sail without waiting for the cargo any longer but the shipper will nevertheless still be required to pay the full freight.

Where carriage of goods in general is concerned,³¹⁹ Section 434 of the Italian Code of Navigation provides for the situation when the shipper delivers a lesser amount of goods than what was actually agreed. The shipper would still be required to pay the full freight but the expenses saved by the carrier in not completing loading will be deducted from it. If the contract had provided that the shipper was to deliver a full and complete cargo, if the shipper consents, the Master may now be able to load other cargo since the space was not taken up by the shipper. However the shipper may collect the profit which is due as a result of freight being paid on the goods which complete the cargo loading to the

³¹⁵ Book 8 of the Dutch Civil Code, art 8:26.

³¹⁶ *ibid* art 8:27.

³¹⁷ *ibid* art 8:394(1).

³¹⁸ Italian Code of Navigation, Section IV.

³¹⁹ *ibid* Section III.

extent that it was due by him. If the same situation occurs on the return voyage, the same provisions apply to the shipper.

Under the Maritime Code of Latvia, in section 116 the consignor has a duty to deliver the cargo at the time and place indicated by the carrier and the cargo must be delivered in such a way and condition which enables it to be loaded, carried and unloaded conveniently and safely. If the consignor is late in delivering the cargo at the specified time and the delay affects the performance of the contract to a significant extent, the carrier may withdraw from performing the contract. However if the consignor still wants to continue with the contract, the consignor has the right to request from carrier a confirmation as to whether he is withdrawing from the contract or not. The carrier has to exercise this option by notifying the consignor promptly. If the carrier withdraws according to this procedure, the consignor is liable for the freight not acquired plus compensation for the carrier's losses.³²⁰

If the charterer does not deliver the cargo which was agreed in the contract, the charterer has to pay compensation for the losses or provide security within a reasonable period of time which may be set by the carrier failing which the carrier may withdraw from the contract and be compensated for losses by the charterer in accordance with section 196 unless the charterer was not liable for the cargo not being delivered.³²¹ Likewise the provisions of section 196 and 197 creates liability on the charterer if there was an agreement regarding demurrage and after expiry of the loading time period, the charterer has failed to deliver the cargo or did not deliver the complete cargo.³²² However, if there was no agreement on demurrage, the liability of the charterer under section 196 and 197 will depend on whether the carrier suffered substantial losses or inconvenience as a result of the delay and may wish to withdraw from the contract even though he has been compensated for the demurrage, or where the cargo has not been fully delivered, to give notification that loading is completed.³²³

Under Book 8 of the Dutch Civil Code, in the general provisions relating to transport³²⁴ article 8:24 provides that if the agreed cargo was not placed at the disposal of the carrier at the agreed time and place, the consignor has the obligation to pay compensation to the

³²⁰ Maritime Code of Latvia, s 122(2).

³²¹ *ibid* s 197(2).

³²² Maritime Code of Latvia, s 198(1).

³²³ *ibid* s 198(2).

³²⁴ Book 8 of the Dutch Civil Code, Title 8.2.

carrier for the damage suffered by the carrier as a consequence. This obligation to compensate arises regardless of the reason for the consignor in not delivering the cargo as agreed.

Article 8:25 then goes on to provide that so long as the consignor does not place the cargo at the carrier's disposal, the consignor has the right to terminate the contract but must then compensate the carrier for the damage accruing to the carrier as a result of termination.³²⁵

For liabilities specific to the shipper in maritime law, the Dutch Civil Code echoes the earlier general provisions relating to transport and provides similarly in article 8:391 that the shipper has the duty to place the cargo at the carrier's disposal at the agreed time and place, failing which the shipper has to compensate the carrier for the damage suffered by the carrier as a consequence of not fulfilling the duty to provide cargo in time. This liability accrues regardless of the reason for the shipper's non fulfilment of this duty.³²⁶

Similar to the general provision in article 8:25 above, the shipper is entitled to terminate the contract as long as he has not placed the cargo at the disposal of the carrier.³²⁷ The carrier is likewise entitled to terminate the contract without giving any formal notice if, after the end of the period of time during which the cargo should have been placed at his disposal plus an extended time for demurrage, no cargo whatsoever has actually been placed at the carrier's disposal, regardless of the reasons why this has occurred.³²⁸

If, again for whatever reason, a part of the cargo has been delivered at the end of this period, the carrier has the option of either to terminate the contract without giving formal notice or to accept and continue with the voyage.³²⁹ If the carrier opts to terminate, the shipper then has to compensate the carrier for the damage suffered by the carrier as a result of termination of the voyage or the carrier partially accepting the voyage, subject to article 8:383 paragraph 3.³³⁰

Other liabilities of the charterer in relation to delay are connected to the period of time after loading and during the voyage. For example under the Maritime Code of Latvia, if the delay was due to the fault on the part of the voyage charterer or persons he is

³²⁵ *ibid* art 8:25.

³²⁶ *ibid* art 8:391.

³²⁷ *ibid* art 8:392(1).

³²⁸ *ibid* art 8:392(2).

³²⁹ *ibid* art 8:392(3).

³³⁰ *ibid* art 8:392(5).

responsible for, again compensation is due to the carrier for losses. Similarly where the ship's delay during unloading is caused by the carrier's inability to deliver the cargo for storage in a warehouse according to the provisions in section 190 on the right of the carrier to storage of cargo, he is to be compensated by the charterer.³³¹ Another liability of the charterer to compensate for losses which is based on his fault or the fault of persons for whom he is responsible is the liability for damage to the carrier or other cargo caused by the cargo.³³²

Under Chapter XXIV on Carriage of Cargo Quantity, the charterer has a duty under section 206(1) to prepare and submit in due time a schedule for the carriage of cargo to the carrier which takes into account the relationship between the specific voyage to the total operative period of the contract. The charterer also has a duty to use care in ensuring that the cargo provided for is divided proportionately over the whole contract duration by taking into account the parameters of the ship.³³³ This duty appears to resemble the tort duty of care although it does not deal with foreseeability of damage.

There is also a duty on the charterer to give a notice of loading which is a notice that specifies the period of time within which the cargo will be prepared for loading in good time to the carrier.³³⁴ If this is not done in good time, the carrier may set a specific time for the charterer to submit it. If it is still not submitted, the carrier may choose either to issue a notice of the ship's particulars or to withdraw from that specific voyage.³³⁵ This option may be exercised by the carrier for subsequent voyages if this delay provides a basis to believe that further delays in giving the notice of loading are likely.³³⁶ For all these delays the charterer has to pay compensation for losses unless the delay was caused by the circumstances provided in section 196(3) above.³³⁷ If the cargo carriage schedule is not submitted by the charterer in good time, again the carrier may set a specific time in which it has to be submitted. If the charterer fails to submit after the specified time, the carrier may withdraw from the remaining voyages, and claim for compensation as provided in section 210(3) above.³³⁸

³³¹ Maritime Code of Latvia, s 199.

³³² *ibid* s 200.

³³³ *ibid* s 206(2).

³³⁴ *ibid* s 207.

³³⁵ *ibid* s 210(1).

³³⁶ *ibid* s 210(2).

³³⁷ *ibid* s 210(3).

³³⁸ *ibid* s 210(4).

Further duties which may be considered to be connected as sub-requirements to fulfil the duty to provide cargo are the corresponding duty to mark the cargo, the duty to notify the shipment of dangerous goods as well as the duty to provide adequate instructions to deal with the cargo and these are discussed below.

The duty to mark and pack the cargo

The packing and marking of the cargo is an area of shipper liability which is also covered by the provisions in civil law systems. For example in the Italian Code of Navigation, Section 422 actually provides for the carrier's responsibility, but in detailing the process in which liability is determined it is mentioned therein the possibility of the shipper being blamed by the consignee for insufficiency of packing or insufficiency or imperfection of the marks on the cargo or any act or omission in general of the shipper, his servants or managers which resulted in the damage or loss to the goods carried or the delay.³³⁹ Section 425 provides for the duty of the shipper to place marks of countersign on the goods or its packaging which are delivered to the carrier, which will remain the same and visible until the end of the voyage. Otherwise the shipper will be liable for damage caused to the carrier as a result of imperfectly placing the marks.³⁴⁰

Under Book 5 of the German Commercial Code, where packaging of the goods is needed, the shipper has the duty to pack the goods properly according to its nature and the type of carriage required, so as to protect the goods from physical damage or loss as well as to prevent detriment towards the carrier.³⁴¹ Here we see encouragement of an active participatory role to be played by the shipper to ensure the safety of its own goods from physical damage and loss without relying solely on the carrier, bearing in mind that it is the shipper who knows its own goods and what they need to be protected against damage or loss. This is done not only to protect the shipper's interest but also that of the carrier. The new law clearly expresses the reciprocal duty of the shipper to protect the carrier.

This is reminiscent of the current trend in the Rotterdam Rules where the shipper is given a more active role, a seemingly bigger responsibility or rather, taking on more of the share of responsibility in the safety of its own cargo, the ship and other cargo on board to minimise the risks and ensure the success in the venture for all.

³³⁹ Italian Code of Navigation, s 422.

³⁴⁰ *ibid* s 425.

³⁴¹ The new Book 5 of *Handelsgesetzbuch*, §484.

This is further reiterated in the second line of §484 of Book 5 of the German Commercial Code where the section further emphasises that where any article of transport is used to consolidate cargo units such as containers and pallets before they are delivered for carriage, the shipper has to ensure that the cargo is properly and carefully stowed and secured in or on the article of transport in such a way that ensures the cargo does not cause harm to persons and property. This indicates that the shipper owes a duty of care towards other persons and property to not cause harm to them whether they may be the carrier, other cargo owners, or third parties. In as far as the shipper may be contractually required to handle the cargo, this section also provides that the shipper has the duty to ensure that the cargo is properly identified with leading marks.³⁴²

Liability for dangerous goods

There are usually very specific and focused provisions on liability of the shipper for dangerous goods in civil law systems. For example under the German Commercial Code, there is a separate provision in §483(1) which specifically imposes a duty on the shipper to inform the carrier if the shipper intends to ship dangerous goods. The shipper must provide information regarding the precise dangerous nature of the goods and this must be done in a timely manner and in writing. The shipper should also include any necessary precautionary measures to be taken. If the shipper had named a third party to deliver the goods, this duty is imposed on the third party as well. However, if when taking over the goods the danger was unknown to the carrier or it was not informed, and neither were the master nor the ship's agent, the goods may be unloaded, stored, returned, destroyed or made harmless by the carrier to the extent necessary without incurring any liability towards the shipper.³⁴³ It is interesting to note that although the shipper has the duty to inform the carrier regarding the dangerous nature of the goods under §483(1), the consequences of §483(2) may be avoided if the information was given to the master or the ship's agent. It may be implied here that since the master and the ship's agent are clearly the carrier's agents, information provided to them, is equivalent to informing the carrier.

Nevertheless, even if the carrier, master or ship's agent were informed or knew about the dangerous nature of the goods, the measures in §483(2) may still be taken if, without any fault or neglect of the carrier, the goods were likely to become a danger to the ship

³⁴² *ibid* §484.

³⁴³ The new Book 5 of *Handelsgesetzbuch*. §483(2).

or cargo, which was not a requirement for when the shipper does not inform the carrier, master or ship's agent about the danger, or if the danger was unknown to them. Another way therefore in which this may be construed is that in the latter situation, the carrier may take action in the various forms provided in the first part of §483(2) whether or not the cargo presented or was likely to become a danger to either or both the ship and cargo. In both situations where the reactive measures for safety were taken, the carrier would not be liable to the shipper. Another point to note is that the provision makes a distinction between situations where the carrier, master or ship's agent is informed, and where the carrier, master or ship's agent knows about the danger. The carrier's knowledge about the dangerous nature of the goods may thus come from another source apart from information provided by the shipper.

Not only is the carrier absolved from liability to the shipper if such reactive measures were taken in the circumstances where the carrier, master or ship's agent were not informed or knew about the dangerous nature of the goods, the shipper and the third party may also have to reimburse the carrier for any expenses which the carrier may have incurred in taking the necessary measures to ensure the safety of the ship and other cargo on board, if the third party delivering the cargo did not providing accurate and complete information about the goods when they were handed over to the carrier.³⁴⁴ It is not clear however what the consequences are if it was the shipper who did not provide accurate and complete information about the goods.

According to section 118(2) of the Maritime Code of Latvia, the consignor has a duty to label dangerous goods appropriately and to inform the carrier in good time about the dangerous nature of the goods being delivered as well as the safety measures in which they are to be handled by the carrier. For the purpose of the Latvian Maritime Code, dangerous goods refer to those which comply with the definition of dangerous cargo as specified by the Law on Circulation of Dangerous Cargo.³⁴⁵ However, according to section 118(3) if the consignor has other reasons to believe that carriage of the cargo may give rise to danger or significant inconvenience to persons, the ship or cargo due to the characteristics of the cargo, there is a duty upon the consignor to inform the carrier. This shows that what amounts to dangerous cargo does not solely rely on the list specified above but also on the judgement of the consignor's beliefs. If the cargo needs special provisions for its carriage, the consignor must notify the carrier in good time this

³⁴⁴ The new Book 5 of *Handelsgesetzbuch*, §483(3).

³⁴⁵ Maritime Code of Latvia, s 118(1).

fact as well as the necessary measures to be taken, and if necessary to label the goods as such.³⁴⁶

Provisions on the general liability of the consignor, his employee or representative is provided by section 150 which is worded in the negative sense whereby these parties are not liable if the loss or damage to the cargo was caused by the fault of the carrier. In relation to liability for hazardous cargo provided in section 118 above, the consignor would be liable for the losses and expenditure incurred by the carrier if the consignor had failed to observe the rules in section 118. In this case, the carrier is also able to dispose of the hazardous cargo by unloading it, rendering it harmless or destroying it and the carrier would not need to compensate for the losses.³⁴⁷ However, if the carrier was aware at the time he accepted the cargo that he will be carrying is dangerous, the liability of the consignor for the hazardous cargo provided above is no longer applicable.³⁴⁸

Tetley³⁴⁹ wrote that where French maritime law is concerned a shipper is required to declare the nature of all dangerous, inflammable and explosive cargo which is delivered to the carrier for carriage. This is not expressly provided for, rather the implied obligation stems from the right of the carrier to dispose of cargo for which the shipper did not declare to the carrier its dangerous nature.³⁵⁰ The provision in the French law resembles the provision in Article 4(6) of the Hague-Visby Rules. The shipper's liability for this has been held to include damages and expenses incurred against and by not only the ship, but also other cargo on board the ship, and injury which may have been inflicted upon the crew and third parties, as a result of the failure of the shipper to make disclosure.³⁵¹

Just as in the common law principles, the law in France adopts the rule that the determination of whether the carrier knew or should have known about the dangerous nature of the goods will influence the rights and liabilities of both the shipper and the carrier. According to Tetley,³⁵² the obligation of the shipper stems from the duty to provide security to the carrier which is implied in the contract of carriage. This is provided by art. 1135 c.c.³⁵³ Again, the warranty of the shipper that the goods are suitable

³⁴⁶ *ibid* s 119.

³⁴⁷ Maritime Code of Latvia, s 151(1).

³⁴⁸ *ibid* s 151(2).

³⁴⁹ Tetley (n 253) 469.

³⁵⁰ 44 of Decree No. 66-1078 of December 31, 1966.

³⁵¹ *Cour d'Appel d'Aix*, October 30, 1974, DMF 1975, 334; *Cour d'Appel de Rouen*, November 6, 1970, DMF 1971, 403, as quoted by Tetley (n 253) 469.

³⁵² Tetley (n 253) 463.

³⁵³ In France or art. 1024 c.c. (Que'bec).

for carriage will vary depending on whether the carrier knew or should have known that the shipper is sending dangerous goods.³⁵⁴ Art 1135 c.c. also raises an implied contractual duty upon the shipper to inform the carrier that the goods are dangerous.³⁵⁵

From this, Tetley concludes that where the carrier is concerned, the nature of the shipper's liability for dangerous goods in civil law is absolute and the basis of liability is contractual.³⁵⁶ However, where third parties are concerned, the basis of liability is delict or tort, and because of this article 1383 and 1384 c.c. of France requires that fault of the shipper be established. Apart from this, the liability of the shipper is also dependent upon the experience and knowledge of the shipper relative to the manufacturer of the goods.³⁵⁷

Tetley also believes that France has a regulatory scheme for dealing with issues of packing, marking and stowing of dangerous goods which is intricate and detailed.³⁵⁸ One of them is by way of reliance on article 4(5) of the Hague-Visby Rules³⁵⁹ which governs any misstatements which was done knowingly by the shipper regarding the nature and value of the cargo and its own provisions in art. 31 of Law No. 66-420 of June 18, 1966 which is used to deal with cases concerning dangerous goods which was not disclosed by the shipper.³⁶⁰

The duty to load

Section 180(1) of the Maritime Code of Latvia provides for the duties of loading and stowage wherein the charterer is only to deliver the cargo along the ship's side and that loading is to be performed by the carrier unless they have agreed otherwise in the charter³⁶¹ or if it is not stated in the contract, that there are relevant customs of the port to be applied.³⁶² The charterer has to ensure the delivery of the cargo to the ship is without delay and in such a way that it may be safely and easily loaded, stowed, carried, and unloaded in accordance with the provisions above in section 117-120 of the Code

³⁵⁴ Tetley (n 253) 463 where he referred to Mazeaud, *Lecons de Droit Civil*, 6 Ed., 1978, t.2, vol. 1, para. 402.

³⁵⁵ Rodie're, *Traite', Affre'tements & Transports*, t. 2, para. 428 as quoted by Tetley (n 253) 463.

³⁵⁶ Tetley (n 253) 464.

³⁵⁷ Tetley (n 253) 464.

³⁵⁸ Decree No. 79-703 of August 7, 1979 (J.O. August 22, p. 2077). See also *Cour d'Appel de Rouen*, April 18, 1972, DMF 1972, 467, as quoted in Tetley (n 253) 469.

³⁵⁹ The Hague-Visby Rules, Article IV(5)(h).

³⁶⁰ Tetley (n253) 469.

³⁶¹ Maritime Code of Latvia, s 180(1)(1).

³⁶² *ibid* s 180(1)(2).

regarding dangerous goods and cargo for which special provisions for carriage are necessary.³⁶³

As far as unloading is concerned. The charterer has the duty to pay for the increase in costs if such an increase was due to the cargo being damaged or the cost of disposal of the damaged cargo, and that this damage to the cargo was due to the hazardous nature of the cargo or that the charterer was at fault.³⁶⁴

In relation to unloading, if there were increased costs as a result of the cargo being damaged or that as a consequence, costs had to be incurred to dispose of the damaged cargo, this has to be borne by the charterer if the damage was caused by the hazardous nature of the cargo or if the voyage charterer was at fault.³⁶⁵ There is no liability for freight for goods which no longer exist at the end of the journey unless it was due to the nature of the goods or the fault of the voyage charterer, inappropriate packaging of the cargo, or where the carrier has disposed of the cargo by selling it at the owner's expense, unloading or rendering it harmless or destroying it in accordance with provisions on carriage of hazardous cargo in section 186.³⁶⁶ Liability of the receiver for freight as well as fulfilment of the requirements in section 130 which deals with the duty of the receiver to pay freight arises upon the receiver accepting the cargo.³⁶⁷

Under the Italian Code of Navigation, the shipper has a duty to deliver to the carrier during loading and before sailing, the bills of entry and will be liable to the carrier for damage occurring as a result of non-delivery.³⁶⁸ If after loading impediments to sailing due to force majeure arise resulting in cancellation of the contract, or the option to cancel arises due to delay as a result of the same impediments, the shipper has to bear the costs of unloading.³⁶⁹ If the impediment to sailing is only temporary and was not caused by the fault of the carrier, the contract remains intact. During this time, the shipper may unload the goods at his expense but will be obliged to reload the same or to indemnify the damages. If the temporary impediment occurs after the ship has set sail, the shipper must provide a guarantee for the fulfilment of the abovementioned duties.³⁷⁰

³⁶³ *ibid* s 181.

³⁶⁴ *ibid* s 187.

³⁶⁵ Maritime Code of Latvia, s 187(4).

³⁶⁶ *ibid* s 188.

³⁶⁷ *ibid* s 189(1).

³⁶⁸ Italian Code of Navigation, s 426.

³⁶⁹ *ibid* s 427.

³⁷⁰ *ibid* s 428.

Another duty connected to the duty to load is the duty to nominate the loading port and this is discussed below.

Liabilities during transit

The duty to provide instructions to deal with cargo

The cargo-owner has the duty under the Maritime Code of Latvia to give relevant instructions to the carrier if his cargo requires special measures in carrying, preserving or otherwise protecting the interests of the cargo-owner.³⁷¹ The carrier may take the necessary measures on behalf of the cargo-owner and where there are issues in relation to the cargo, the carrier may represent the cargo-owner if the instructions were not received by the carrier in ample time or there were obstacles in delivering the instructions to the carrier. These measures are binding on the cargo owner where third parties have acted in good faith even though the measures were not necessary.³⁷² If the carrier has undertaken the measures as well as incurred expenditures for the cargo, the cargo-owner is liable for these. However where the measures were taken without instructions from the cargo-owner, there is a limit to the cargo-owner's liability to the value of the cargo at the commencement of the voyage.³⁷³

The duty to nominate the loading port

The voyage charterer may be given the right under the Maritime Code of Latvia to choose the port of loading and unloading, and if so the charterer has a duty to direct the ship to a port which is freely accessible in order that the ship may safely lie afloat, enter the port of loading, and depart on its voyage with cargo. The notification by the charterer of where unloading will take place has to be done before loading is completed.³⁷⁴ If the port which the charterer had instructed the ship to be taken to, turned out to be an unsafe port, there is liability on the part of the charterer for any losses which were caused by this reason unless those losses were not caused by the fault of the charterer or persons he is responsible for.³⁷⁵ Where the right to choose the voyages in consecutive voyage charters is concerned, the charterer has the duty to ensure that in using the right, the length of the voyages for carrying cargo in total and the length of ballast voyage do not

³⁷¹ Maritime Code of Latvia, s 127(1).

³⁷² *ibid* s 127(2).

³⁷³ *ibid* s 128.

³⁷⁴ *ibid* s 172(1).

³⁷⁵ *ibid* s 172(2).

differ too significantly. Otherwise the voyage charterer will not earn freight and has to be liable for losses which are incurred as a result.³⁷⁶ Section 179(1) provides for the liability of the charterer to pay special compensation for demurrage time to the carrier. The amount to be paid is to be agreed by the parties, otherwise it is provided by this section that it is equivalent to the charter time the carrier would have received if it was not lost due to the occurrence of the demurrage. The special compensation must be paid on demand,³⁷⁷ and is likewise imposed on the receiver upon unloading of the goods.³⁷⁸

Post-carriage liabilities

Liability for freight

The liability of the shipper to pay freight is another common area which is focused upon by provisions in the civil law system. For example under the German Commercial Code, the general liability of the shipper to pay the agreed freight as a primary duty is now provided by §481.³⁷⁹

Under the Dutch Civil Code, a general provision under article 8:29 provides for the payment of freightage is due and may be demanded only after the goods have been delivered at their destination.³⁸⁰

Where liability for freight is concerned, section 121(2) of the Maritime Code of Latvia provides that there is no liability for freight if the cargo no longer exists at the end of the carriage unless the cause of this was the nature of the cargo itself, packaging defects or error or carelessness on the consignor's part, or that the carrier had taken steps to sell the cargo on the owner's expense or unloaded or rendered it harmless or destroyed the cargo in accordance with section 151. Section 122(1) deals with the liability of the consignor to pay freight otherwise acquired as well as compensation where the carriage contract was not performed due to the withdrawal of the consignor from the contract before the carriage commences. Where the right of withdrawal was exercised by the carrier in accordance with the procedure discussed above³⁸¹ as a result of the failure of the consignor to deliver the cargo at the time and place stipulated by the carrier, the consignor is nonetheless liable for freight not acquired and compensation for other

³⁷⁶ Maritime Code of Latvia, s 172(3).

³⁷⁷ *ibid* s 179(2).

³⁷⁸ *ibid* s 187(1).

³⁷⁹ The new Book 5 of *Handelsgesetzbuch*, §481.

³⁸⁰ Book 8 of the Dutch Civil Code, art 8:29.

³⁸¹ Maritime Code of Latvia (n 320), discussed in the paragraph preceding the note.

losses.³⁸² This duty to pay otherwise acquired freight also arises if the carriage was interrupted or the place of delivery of the cargo was changed at the request of the consignor.³⁸³ If part of the carriage has already been performed before the carrier exercises his right of withdrawal, or the contract is no longer in effect, or for some other reason the cargo was taken off the vessel at a port other than the one at which it was contracted to be unloaded, freight is due to the carrier in proportion³⁸⁴ to the distance which has already been performed, but not more than the value of the cargo itself.³⁸⁵ Where the interruption of the carriage was due to a *force majeure*, and the ship then is unable to enter the port of unloading, the carrier has to immediately inform the consignor and the consignor must not significantly delay in giving instructions as to the action to be taken with the cargo, otherwise the carrier has the right to exercise his discretion to unload the cargo at the nearest port or to return the cargo to the port of loading.³⁸⁶

In Chapter XXIII on Voyage Chartering, there are detailed provisions on the duty of the voyage charterer. Section 170(1) provides that the charterer has a duty to pay freight as set on the day the charter agreement was entered into if the freight was not specified in the contract itself. If the cargo loaded is in excess of or of a different type than what was agreed, the charterer has to pay freight at the tariff rate specified by the carrier which must not be lower than the contracted rate.³⁸⁷ There is a liability on the charterer to pay distance freight in proportion to the distance already covered to the carrier even though the journey was not completed due to withdrawal from the charter contract or unloading is done at the place not contracted for due to some other reason.³⁸⁸ Distance freight includes the actual duration covered by the journey and special costs incurred by the voyage, however the total must not be in excess of the value of the cargo.³⁸⁹

The charterer has the duty to pay the freight, compensation for demurrage time or other payments stipulated in the contract in good time, otherwise the carrier may set a specific time within which it must be paid. Failing payment within this time will allow the carrier to suspend performance of the contract or to withdraw from the contract if substantial breach results from the delay.³⁹⁰ Section 212(2) provides that the holders of bills of

³⁸² Maritime Code of Latvia, s 122(2).

³⁸³ *ibid* s 122(3).

³⁸⁴ *ibid* s 126(4).

³⁸⁵ *ibid* s 185(2).

³⁸⁶ *ibid* s 126(2).

³⁸⁷ *ibid* s 170(2).

³⁸⁸ *ibid* s 185(1).

³⁸⁹ *ibid* s 185(2).

³⁹⁰ *ibid* s 212(1).

lading who are not the charterer are also bound by the provisions of this section regarding the payments above if the duty to pay was provided for in the bill of lading in accordance with section 169. So if the shipper is not the charterer, but the cargo owner, this liability to pay may still arise.

Under the Italian Code of Navigation, interruption of the voyage may occur after commencement of the sailing due to force majeure and if the repairs to the vessel cannot be done or requires excessive time or the voyage excessively delayed, the shipper has a liability to pay freight for the proportion of the voyage which was usefully covered, if the Master had done everything possible to forward the goods to its destination by means of another ship.³⁹¹

The duty to receive cargo

Where the meaning of shipper includes the consignee or receiver, the provision in section 129 of the Maritime Code of Latvia regarding the duty of the receiver to collect the cargo at the port of destination is relevant. Reception of the cargo by the receiver must be at the time and place indicated by the carrier. Where delivery of cargo is against production of the bill of lading, the receiver has the duty to pay freight and other claims by the carrier arising from the bill of lading.³⁹² If another form of carriage contract is used, liability of the receiver for such payments still arises if the receiver was aware of the claims at the time of delivery or that such payments had not been made.³⁹³

Liability for withdrawal

If the shipper was a voyage charterer, the provision in section 196(1) of the Maritime Code of Latvia which deals with withdrawal from the charter contract before the loading of cargo commences is a useful provision. If withdrawal was due to the fault of the charterer or if upon loading it turns out the charterer had not provided sufficient cargo as was agreed in the contract, the charterer is liable for the freight otherwise acquired as well as compensation for losses incurred by the carrier. The measure of the carrier's losses takes into account any mitigating steps taken by the carrier when carrying other cargo.³⁹⁴ However, if the inability to load, carry or deliver the cargo to the receiver was due to circumstances unforeseeable by the voyage charterer on the day the charter was

³⁹¹ Italian Code of Navigation, s 429.

³⁹² Maritime Code of Latvia, s 130(1).

³⁹³ *ibid* s 130(2).

³⁹⁴ *ibid* s 196(2).

entered into, the carrier may not claim compensation for his losses. Examples of unforeseeable circumstances which hinder performance of the various stages of the contract of affreightment are provided in the section as ranging from restrictions on import, export or other restrictions imposed by state institutions, to destruction of the whole subject matter of the contracted cargo by accident, or anything similar to these examples. Compensation claims by the carrier against the charterer is not only lost when destruction of all of the cargo occurs since accidental destruction of cargo specified individually is also covered here.³⁹⁵ However to benefit from this the charterer has a duty to notify the carrier without delay, otherwise the immunity will be lost and the charterer then will be liable to compensate the carrier.³⁹⁶ This provision appears to be a tortious-like liability where liability of the charterer is dependent upon foreseeability of the fortuitous events resulting in losses to the carrier.

Section 201 provides for the duty of both the charterer and the carrier to give notice without delay if they wish to withdraw from the contract without having to cover the losses even though the voyage has commenced due to substantial danger arising from a war or similar risk if they choose to do so. If there is delay in giving appropriate notice, the party seeking to withdraw will be liable for the losses.

Section 213 is a similar provision to section 201 above regarding the ability to withdraw from the contract without being liable for losses if a war risk emerged during the execution of the contract which significantly affects the performance of the contract subject to the withdrawing party giving adequate notice without which he will be liable for losses.

Nature of shipper's liability under civil law

Under the civil law, the provisions clearly separate those liabilities which require fault and those which are strict. For example under Book 5 of the German Commercial Code, the various types of liabilities of the shipper which require compensation to be due to the carrier for damages and expenditures incurred by the latter are reiterated and consolidated in §488 together with third parties' liabilities. These include liability for inaccurate or incomplete information provided about the goods that were required of the shipper,³⁹⁷ or if the shipper failed to disclose the dangerous nature of the goods to the

³⁹⁵ *ibid* s 196(3).

³⁹⁶ *ibid* s 196(4).

³⁹⁷ The new Book 5 of *Handelsgesetzbuch*, §488(1)(1).

carrier,³⁹⁸ or if the packing or the marking of the goods were insufficient,³⁹⁹ or if the shipper failed to provide the documents or information needed for official processing or had provided those which were insufficient or inaccurate.⁴⁰⁰ There is however, a proviso in this section that if the shipper was not responsible for the breach of duties enumerated, there will be no liability on the shipper. This provision clearly prescribes that the nature of liability of the shipper for these failings is fault-based.

This position however, is only true if a bill of lading was not issued. Where such a bill was issued, the liability of the shipper becomes a little bit more complicated. The nature of the shipper's liability is strict as the shipper will be liable regardless of fault for two matters; incomplete or inaccurate provision of information in the bill of lading regarding the cargo's quantity, number or weight, or the leading marks provided for identification;⁴⁰¹ or if the shipper had failed to inform the carrier regarding the dangerous nature of the goods.⁴⁰² The nature of the shipper's liability in relation to the first matter in the new German maritime law is viewed by a writer⁴⁰³ as reflecting that of the Hague-Visby Rules in article III (5) where the shipper is deemed to have guaranteed to the carrier that the marks, number, quantity and weight in the bill of lading are accurate, failing which the shipper has to indemnify the carrier for any resulting losses, damages and expenses.

What is interesting in the Code is the concept of the *Ablader* which is somewhat similar to the "documentary shipper" in the Rotterdam Rules, but with a very important distinction. The *Ablader* is now defined in the new Book 5 as the person who delivers the goods to the carrier for carriage and designated by the shipper to be recorded as the *Ablader* in the bill of lading. If someone else other than the *Ablader* delivers the goods, or if the shipper does not nominate anyone to be the *Ablader*, then the shipper becomes the *Ablader*.⁴⁰⁴ The rules in the Code regarding the *Ablader*'s liability however, are not similar to the rules regarding the documentary shipper in the Rotterdam Rules. Where the service of an *Ablader* is utilized, the shipper is not liable for inaccurate or incomplete information provided by the *Ablader* or the failure by the *Ablader* to inform the carrier

³⁹⁸ *ibid* §488(1)(2).

³⁹⁹ *ibid* §488(1)(3).

⁴⁰⁰ *ibid* §488(1)(4).

⁴⁰¹ *ibid* §488(3)(1).

⁴⁰² *ibid* §488(3)(2).

⁴⁰³ Beate Czerwenka, 'The Proposal for a Reform of German Maritime Law' in Jürgen Basedow, Ulrich Magnus, Rüdiger Wolfrum (eds), *The Hamburg Lectures on Maritime Affairs, 2009 & 2010* (Springer 2012) 61.

⁴⁰⁴ The new Book 5 of *Handelsgesetzbuch*, §513(2).

regarding the dangerous nature of the goods, and vice versa. They are each responsible for the failures on their own part, although both perform almost similar obligations.⁴⁰⁵ The *Ablader* would be liable to the carrier if it was the one delivering the goods to the carrier for carriage if the information it provided was inaccurate or if it failed to inform the carrier about the dangerous nature of the goods.⁴⁰⁶ Liability of the *Ablader* here is also subject to fault,⁴⁰⁷ but likewise if a bill of lading was issued, this will turn into strict liability.⁴⁰⁸

Furthermore, if the carrier had contributed to his own loss, the liability of the shipper and the *Ablader* to compensate for the will be adjusted according to the extent the carrier's conduct had contributed to the damages and expenditures.⁴⁰⁹

What is interesting though, is that all these provisions in §488 on liability of the shipper except in relation to contribution to the damage by the carrier, may be excluded by way of a clearly worded agreement which was negotiated in detail. This has to be done on the basis of each individual contract regardless of it being similar to another previous agreement between the same parties which allowed for this to happen. Similarly, the liability of the shipper here may be limited.⁴¹⁰

Although the shipper may terminate the carriage contract for general cargo anytime,⁴¹¹ he will be liable to the carrier for one of two things. The shipper has to either pay the agreed freight, a refund of expenditures incurred by the carrier which have been offset by expenses which were saved by the termination or anything which was acquired or in bad faith, was not acquired;⁴¹² or to simply pay one third of the agreed freight which is called dead freight or *Fautfracht*.⁴¹³ However if the termination was made due to reasons within the scope of risks which were to be borne by the carrier, then he cannot claim for *Fautfracht*. In fact if this was the case, the carrier may not even claim under the first option.

⁴⁰⁵ The new Book 5 of *Handelsgesetzbuch*, §488(3).

⁴⁰⁶ *ibid* §488(3).

⁴⁰⁷ *ibid* §488(2), although this section mentions only the "third party" named by the shipper to deliver the goods to the carrier which is referred to in §482(2).

⁴⁰⁸ *ibid* §488(3).

⁴⁰⁹ *ibid* §488(4).

⁴¹⁰ *ibid*, §488(5).

⁴¹¹ *ibid* §489(1).

⁴¹² *ibid* §489(2)(1).

⁴¹³ *ibid* §489(2)(2).

The goods may have already been loaded and stowed before the shipper opt to terminate and if this was the case, the carrier shall be entitled to take measures set out in §492(3) and the cost of this must be borne by the shipper.⁴¹⁴ These measures include discharging the goods from the ship and storing them, entrusting the goods to a third party for storage, returning the goods, sell the goods if they are perishable or their condition warrants this or if to do otherwise would incur costs which would be out of proportion to the value of the goods, or if they cannot be sold to even destroy them.⁴¹⁵ Again, if the termination came about as a result of reasons within the scope of risks to be borne by the carrier, then the carrier must bear the cost as a result of the termination by the shipper.⁴¹⁶

As mentioned above, under Book 8 of the Dutch Civil Code, article 8:24 provides that the consignor is liable to pay compensation to the carrier if as a result of the consignor failing to deliver the cargo at the agreed time and place, the carrier suffers damage. The nature of the shipper's liability here is strict as the shipper is liable to the carrier regardless of the reason for which he was unable to deliver the cargo as agreed.⁴¹⁷

Article 8:27 also provides for strict liability of the consignor where the consignor does not provide adequate documents required for the transport and as a consequence the carrier suffers damage. The consignor has to compensate the carrier regardless of the reasons for the inadequacy of the documents.⁴¹⁸

Another strict liability provision in the Dutch Civil Code is in article 8:391 which resembles article 8:24 where the shipper has to compensate the carrier if it fails to deliver the cargo at the agreed time and place and this results in damage being suffered by the carrier. The reason for the failure of shipper in delivering the cargo is irrelevant and the shipper is strictly liable regardless of fault.⁴¹⁹

In concluding this part, it is observed that there is a mixture of contractual and tortious duties in the civil law on shipper liability. For example, the duty in §486(1) of Book 5 of the German Commercial Code resembles the contractual duty to effect delivery of the cargo to the carrier within the time stipulated in the contract. Another example is the nature of the liability of the shipper for dangerous goods in §483 which resembles that

⁴¹⁴ The new Book 5 of *Handelsgesetzbuch*, §489(3).

⁴¹⁵ *ibid*, §492(3).

⁴¹⁶ *ibid*, §489(3).

⁴¹⁷ Book 8 of the Dutch Civil Code, art 8:24.

⁴¹⁸ *ibid* art 8:27.

⁴¹⁹ *ibid* art 8:391.

of a warranty in a contractual relationship. It is arguable that this provision creates a warranty by the shipper to not ship dangerous goods without first informing the carrier, master or ship's agent. If this warranty is breached, the shipper is then required to reimburse the carrier as a result of the expenditures incurred by the carrier for measures taken by the carrier to rectify the breach as provided by §483(2). The section on reimbursement in §483(3) however, only covers the situation where the incorrect or incomplete statement was made by the third party handing over the goods. The provision for compensation to be provided by the shipper for the shipper's own breach in not providing accurate and complete information regarding the goods or a failure to disclose its dangerous nature is found in a separate section namely §488. It is also arguable that under §483 it is agreed that the carrier may take certain actions if the shipper breaches its warranty towards the carrier to not ship dangerous goods without giving notice.

There are also duties which resemble those found in tort for example the duty of care of the shipper found in §484 of the same Code to not cause harm towards other persons and property when packing the goods in or on an article of transport such as a container.

It would be interesting to look at how the courts apply these rules in resolving disputes and shed more light on whether it can be classified as contractual, tortious or merely a statutory offence. What is also interesting is that there is an enormous amount of provisions in certain Codes such as the Maritime Code of Latvia dealing with a wide area of almost all aspects of liabilities and specific duties which can be argued to regulate shipper liability, and this reveals that there already are in some national law, rules which expressly create causes of action against the shipper for failure to fulfil their obligations.

Concepts from religious and customary law

Objective

The objective of this section is to identify principles and derive concepts from religious and customary law which may be relevant in conceptualizing shipper liability for cargo and providing it with a more holistic and complete picture, since religious and customary laws have been recognized to be an important aspect of acceptance of laws created in modern civilisations. Religious laws may have influenced and helped shape the making of civil laws⁴²⁰ on shipper liability and so it is important to discover how and to what

⁴²⁰ Civil law in the sense used here refers to laws created by society based on societal needs, logic and debate rather than religion or other divine sources.

extent religion has influenced civil laws. There may also have been cases influenced by religious or customary laws which have come before tribunals or have been decided based on religious or customary laws.

Scope

It is not intended in this research to delve into the detailed intricacies of the principles and authority for various concepts within the religious and customary laws. However a basic explanation of the basis for the rules will be made in order to appreciate the nature of the rules. The research in this section is limited to looking at only those concepts and principles which have a more direct bearing over, relevance to or applicability on shipper liability for example those concepts dealing with shipping, commerce, trading and bailment where private transactions are concerned, and certain crimes where public interference is concerned. The existence of rules within religious laws which relate to shipper liability also indicate a certain level of morality that can be found within shipper liability rules. Reference is made primarily to Islam because it has a structure and established legal principles.

Although Islam has the fundamental provisions in its first primary source of law, the Quran, and supplemented by the second primary source, the prophetic traditions or *hadith*,⁴²¹ the gaps in these provisions were later further developed by the Muslim scholars and jurists' study and interpretation of the primary sources during the period of the spread of the Islamic civilisation across the world between the 7th and 13th century and in themselves have become important sources of law, known as *fiqh* or Islamic jurisprudence, consisting of reasoning by analogy with the primary sources or known as *qiya'* and consensus of the jurists on rules derived from the primary sources or *ijma'*. Collectively, these four sources make up the *shar'iah*.⁴²² Another important source where commercial transactions are concerned is custom or *'urf*.⁴²³ Islam thus covers all

⁴²¹ This is a record of the words, acts and omissions of the Prophet Muhammad (s.a.w.) to the smallest detail as narrated and compiled by his most trusted companions. It complements the Quran because the latter contains the general framework from which the details and its application require further explanation; much like primary legislation such as statutes that have general provisions which require the enactment of rules and regulations to further deal with the details of its requirements. Also the Quran being of divine source, the language employed could be somewhat more complex and poetic than the ordinary Arabic utilized by the common people, especially the metaphors and innuendos weaved in. In order to be fully understood, it requires a more humanistic touch, perhaps just as statutes are subject to interpretation by the courts to discover their true meaning and purpose.

⁴²² Nevertheless opinions differ as to the inclusion of the latter two sources of law within the meaning of *shari'ah*.

⁴²³ Nicholas H.D. Foster, 'Islamic Commercial Law: An Overview (I)', *InDret Revista Para El Analisis Del Derecho*, 2006, SOAS), < www.raco.cat/index.php/InDret/article/download/122208/169328>, 5

aspects of life from the simplest act of having a meal or visiting the lavatory to the etiquettes of engaging one's enemy in battle. Concepts in commercial, contract or even maritime law are therefore definitely to be found within the realm of Islam, although it may not be spelt out specifically as such.

The development of commercial concepts emerged probably as a result of the expansion of the Islamic civilisation across a vast expanse of the area under its conquest across the world wherein trading took place and prospered. As Islam deals with every aspect of human life, it must then recognize the needs of traders and merchants alike and provide rules for their guidance and to solve disputes between them.⁴²⁴ During this time, and while they lasted, the Islamic commercial laws in place were considered to fulfil the needs of commerce in order for it to be able to function properly and efficiently, and it is commented by Mallat as quoted by Foster⁴²⁵ to consist of three elements which are considered to be fundamental requirements for a robust commercial law regime; "certainty, flexibility and pragmatism".

Panzac argues that since there were historical accounts of Muslim traders contracting with European merchants to charter the latter's ships during the Ottoman empire, the agreement entered into implies the consistency between rules in Islam and the charter terms employed by the European counterpart, and that possibly also there was influence from the Islamic law over the 'Christian' maritime law which made acceptance of the terms of the charter for the Muslim traders more likely.⁴²⁶ Therefore consistency between different sources is another important feature of any law which need to be commercially viable and easier to be accepted by the industry players.

Another important aspect of *shar'iah* is that as stated above, it takes into account the custom or '*urf*' and usages of mankind, and for the shipping community, custom of the trade is definitely an important source in resolving disputes and many if not most of the laws in shipping are derived from customs practised by mariners and merchants from long ago which have been recognised and adopted as law. In fact according to Mallat as quoted by Foster,⁴²⁷ there were times when the '*urf*' preceded the strict provisions of *fiqh*

⁴²⁴ *ibid* 6.

⁴²⁵ *ibid* 11.

⁴²⁶ Daniel Panzac, 'Le Contrat D'affretement Maritime En Méditerranée: Droit Maritime Et Pratique Commerciale Entre Islam Et Chrétienté (XVIIe]-XVIIIe Siècles)' (2002) 45 (3) *Journal of the Economic & Social History of the Orient* 342-362. 21p

⁴²⁷ Nicholas HD Foster, 'Islamic Commercial Law: An Overview (I)' (2006) *InDret Revista Para El Analisis Del Derecho SOAS* 12, www.raco.cat/index.php/InDret/article/download/122208/169328

‘in favor of the merchants’ customs’. Therefore an important concept that can be extracted is the importance and priority of custom of the trade over the substantive law, and this shows how important conformity of law to business practice is to the participants in commerce.

As stated above, Islam governs the life of a Muslim from the moment he wakes up in the morning, applies to everything that he does during the course of the day whether at home or outside, and whether it concerns a private or public course of dealing, until he goes to bed at night. In this sense, Islam does not categorize and separate its rules from those which are personal, private or public, and regardless of the location or relationship of the persons in the same way Western law prescribes a different rule for persons dealing in a business relationship and those in a domestic relationship. In Islam, the same standards of morality and ethical behaviour apply to all situations. Nevertheless there is some form of categorization of the *sharia*’ by the jurists in clustering specific rules on transactions or *mu’amalat*. The rules mainly deal with finance, sale of goods, contracts and economics.

The general principle in *mu’amalat* is permissibility or *ibahah*, in that everything is permissible unless it has been specifically prohibited by the divine rules. This was the first *fatwa* or resolution of the First Albaraka Seminar 1981⁴²⁸ as referred to by Ahmed.⁴²⁹ The *shar’iah* clearly provides a list of prohibitions but neither should it be expanded. The most important of these prohibitions are *riba*’ which is usury or the taking of interest over a debt (preserving the value of the thing from beginning to end), *maysir* which is gambling (one person win-everyone else loses) and *gharar* which is ambiguities in a contract (uncertainties in value). While the prohibitions are clearly stated by *shar’iah*, according to Kamali, as quoted by Ahmed,⁴³⁰ the interpretation of those provisions may differ according to the needs of different time and place through a process known as *ijtihad*. The rules therefore are not rigid and may be adapted in accordance with its suitability with the changing needs of the people over time. Kamali, as quoted by Ahmed stated that the principles used in practising *ijtihad* are by considering the effective cause or *illah*, rationale or hikmah and benefit or *maslahah* that such a rule would confer.⁴³¹ Another important factor that is also taken into account

⁴²⁸ Dallah Albaraka 1994, 75-76.

⁴²⁹ Habib Ahmed, ‘Islamic Law, Adaptability, and Financial Development’, [2006] 13 No.2 Islamic Economic Studies 86.

⁴³⁰ *ibid.*

⁴³¹ *ibid.*

is the custom of the locality.⁴³² Where custom is concerned, there is therefore consistency in the concept used in applying the rules of the general overall principle of *shariah*' discussed above with the specific rules on a particular section within the *shariah*'.

Another concept in Islamic law which may be relevant in discussing shipper liability is the concept of *Al-Wadi'ah*. This is a concept used in Islamic banking and denotes the idea of entrusting one's assets or wealth in another's custody. Its principle is used in Islamic banking obviously refer to the safekeeping of deposits made by customers to the bank but it is arguable that since the root word for *Al-Wadi'ah* is *wada'a* which means to deposit, lodge or leave, this concept can be also used in shipping where the shipper delivers its goods to the carrier, in the same way perhaps the concept of bailment can be used for the shipper-carrier relationship.

The relevant authorities from the Quran about *wada'a* are Surah An-Nisa verse 58 which provides that God commands the human to entrust their belongings to whom they are due, and Surah Al-Baqarah verse 283 which provides that when a person makes a security deposit and trusts the other person with it, the depositor should let the person entrusted with the item discharge the trust faithfully by reason of the fear of God. It goes on to say that testimony must not be concealed because doing so would be sinful and God is Knowing of all that we do.

These are a few very interesting concepts within these authorities which could be applied to shipper liability since it conveys the basic rules that firstly, the shipper must deliver its goods to a carrier to whom it has agreed or promised to deliver to whether in terms of time, space and amount. Secondly, the shipper should allow the carrier to properly carry out its responsibility of taking care of the cargo because it has been entrusted with it and this can only be done if the shipper cooperates by taking all the necessary steps required for the smooth transit of its cargo including proper packaging, labelling and that carrier is provided with all the necessary information about the goods, which is a point connected to the third rule. The third rule provides that the shipper must therefore not conceal any information which is relevant or even vital in ensuring that the carrier will be able to transport the cargo safely and properly without delay, danger or other complications which could be caused by the shipper in not fulfilling certain duties towards the carrier and other third parties.

⁴³² *ibid* 87.

Islamic Law concerning shipping

As mentioned above, the first primary source of Islamic Law is the Quran. Where shipping is concerned, there is no specific verse in the Quran which prohibits against participation in maritime activities, although during the rule of certain Muslim caliphs, maritime expeditions were prohibited.⁴³³ In fact there are many verses in the Quran which may be interpreted as depicting sea voyages as a necessity for human beings without which we would be left disadvantaged.⁴³⁴ This can be deduced from the verses in the Quran which relate that the ability to traverse the sea is actually considered as a favour given by God to mankind, as well as a sign of His existence. For example in Surah Yunus, the Quran mentions the ability to board ships is by way of God enabling humankind to traverse the sea through His permission,⁴³⁵ and also in Surah Ibrahim, where the power of man to control ships on the sea is also due to God allowing this to happen,⁴³⁶ whereas in Surah Al-Baqarah, the fact of ships sailing on the seas is specifically included in a list of God's wondrous creations as a sign of His existence indicated to mankind to ponder upon.⁴³⁷ In Surah Al-Fatir, it is stated that the ships we see cleaving the seas in order that we may search from God's bounty, is a gift from God and this indicates a divine encouragement for man to engage in international commercial trade by means of carriage of goods by sea and also sea-related activities of import and export for the benefit of mankind.⁴³⁸

An analogy can also be drawn from one of five compulsory obligations of a Muslim which is the pilgrimage to Mecca or *Hajj*. In order to perform this obligation, each year Muslims from all over the world need to travel to Mecca in whatever mode of travel necessary to arrive at this destination. That would mean that those who are not connected by land to Saudi Arabia would need to travel by sea or by air. By implication of this obligation, sea travel is definitely allowed and encouraged in order to facilitate

⁴³³ In particular during the reign of 'Umar Ibn al-Khattab, the second Muslim Caliph between 634-644, as written by Hassan S. Khalilieh in the introduction of *Islamic Maritime Law An Introduction*, Brill, 1998.

⁴³⁴ For instance in Surah Al-Baqarah, Chapter 2, Verse 164; Surah Yunus, Chapter 10, Verse 22; Surah Ibrahim, Chapter 14, Verse 32; Surah Al-Hajj, Chapter 22, Verse 65; Surah Ar-Rum, Chapter 30, Verse 46, Surah Luqman, Chapter 31, Verse 31, Surah Al-Jathiyah, Chapter 45, Verse 12; Surah Ar-Rahman, Chapter 55, Verse 24; Surah An-Nahl, Chapter 16, Verse 14; Surah Al-Mukminun, Chapter 23, Verse 22; Surah Al-Fatir, Chapter 35, Verse 12; Surah Al-Ghafir, Chapter 40, Verse 80; Surah Ash-Shura, Chapter 42, Verse 32; Surah Az-Zukhruf, Chapter 43, Verse 12; Surah Adz-Dzariyat, Chapter 51, Verse 3 of the Quran.

⁴³⁵ Quran, Chapter 10, Verse 22.

⁴³⁶ *ibid*, Chapter 14, Verse 32.

⁴³⁷ *ibid*, Chapter 2, Verse 164.

⁴³⁸ *ibid* Chapter 35, Verse 12.

performance of this obligation. Although the period of Hajj is mainly to fulfil a spiritual obligation, it does not prevent the Muslims from engaging in trade and commerce. In fact, during a period in history when the Muslims restrained themselves from conducting business during the Hajj period for fear that the intention to perform their spiritual compulsory obligation is tainted by desires to make profits, a verse was revealed to assure the Muslims that it would not be wrong for them to do so alongside their pilgrimage.⁴³⁹ Therefore the international trade which is thus created out of the compulsory obligation makes the travel by sea for that purpose impliedly an act that is endorsed by the religion.⁴⁴⁰

From the second primary source of law in Islam, the hadith and prophetic traditions of Prophet Muhammad s.a.w.,⁴⁴¹ there are various hadiths which promote commercial activities in particular trades. Among them are “An honest and trustworthy merchant will be with the martyrs on the Day of Resurrection”,⁴⁴² and “An honest and trustworthy merchant will be with the prophets, the truthful and the martyrs.”⁴⁴³ Equating a merchant with a prophet or even a martyr is considered exalting a person to the highest level possible in the eyes of God. Undoubtedly, this indicates that engaging in trading is very much approved and encouraged, as long as it is performed with sincerity and honesty, and that the merchant does not allow greed to prevent him from fulfilling his spiritual obligations as well. In fact Islam discourages its followers from being a recluse or a hermit who resign themselves to only going to the mosque and performing spiritual obligations without having any interaction with the worldly matters. What more, a merchant who is able to contain his greed and is able to release himself from the temptation of endless profits simply to fulfil his spiritual obligations at the assigned times is revered with a higher status than a recluse who simply spends his day and night praying at the mosque, even though the latter person appears holier to society.

There is however a hadith narrated by Abdullah ibn Amr ibn al-‘As⁴⁴⁴ which states that

⁴³⁹ *ibid*, Chapter 2, Verse 198

⁴⁴⁰ http://web.youngmuslims.ca/online_library/books/the_lawful_and_prohibition_in_islam/ch2s4p6-pre.htm

⁴⁴¹ Peace be upon him

⁴⁴² Narrated by Ibn Majah and and Al-Hakim

⁴⁴³ Narrated by Ibn Majah and Tirmidzi

⁴⁴⁴ *Sunan Abu Dawud*, Book 14(8?) Number 2483; Khalilieh referred to Abu Dawud Sulayman Ibn Al-Ash’ath , *Sunan Abu Dawud* (Beirut: Dar Ihya al-Sunna al-Nabawiyya, 197?) vol. 3, p. 6 in *Islamic Maritime Law, An Introduction*, Brill 1998.

“No one should sail on the sea except the one who is going to perform *hajj* (pilgrimage) or *‘umra* (minor pilgrimage) or the one fighting in Allah’s path, for under the sea there is a fire, and under the fire there is a sea.”

Although this hadith clearly prohibits sea travel for purposes other than performing the pilgrimage or military expeditions, which would exclude commercial purposes, this is contrary to everything that has been revealed in the Quran regarding sailing being described as a favour endowed upon humans. Furthermore there are those who view that the hadith above may probably be a weak⁴⁴⁵ hadith which thus should not be taken as an authoritative principle.⁴⁴⁶

Khalilieh wrote⁴⁴⁷ that according to Ibn Taymiyyah, who is a notable Muslim scholar, a merchant who dies at sea is considered a martyr if his death occurred during a voyage which the merchant had undertaken at an appropriate time. An appropriate time may refer to a time when it is considered safe to commence the journey because otherwise, a person who disregards the signs of danger and commences sailing without a valid reason which necessitates him to do so, is obviously embarking on a suicidal mission which is prohibited in Islam.⁴⁴⁸ Ibn Taymiyyah had also affirmed this when he continued to state that sea travel is only permitted when all the safety measures have been taken and that it is prohibited to sail when conditions do not permit it.

This emphasis on safety measures may reconcile the contradicting hadith discussed above⁴⁴⁹ which limited sea travel, and the encouragement to sail in the Quran, in that the reason for the prohibition being mentioned in the hadith is in connection with dangers in the sea. If safety measures have been taken, the danger element would have been eliminated as far as possible and this technically lifts the prohibition from applying. The requirement for safety also applies to sea journeys made for the purpose of pilgrimage or military expeditions.

An interesting point to note from this is that the Islamic rule for the requirement for safety in any shipping expedition is consistent with the non-religious or civil rules on safety in shipping. Where the shipper is concerned, this would surely involve the duties

⁴⁴⁵ Due to two of the narrators in the chain of transmission of the hadith not being properly documented

⁴⁴⁶ *Da’eef Abi Dawud*, Sheikh Al-Albanee

⁴⁴⁷ Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction*, Brill 1998, p. 3

⁴⁴⁸ Quran chapter 2, verse 195 which states “And make not your own hands contribute to your destruction.”

⁴⁴⁹ Supra footnote 129

of the shipper which involve and ensure the safety of its cargo, other cargo, the ship and the crew on board.

Again an important thing to note at this point is that the reference often used in the Islamic law on shipper liability is to both the shipper as well the “merchant”. To some extent it is not often clear whether the “merchant” always means the shipper in the narrow sense i.e. the person who delivers the cargo to the carrier for carriage but since in the chapter on the definition of the shipper, all the various possible meanings given to a shipper had been included in the discussion of the meaning the term “shipper”, and it is clear that a shipper may not only be the person delivering the goods to the carrier. Therefore any reference to the “merchant” will be included in this section and retained as such so as to keep the context from where it was taken to enable a wider scope of discussion to be made.

According to Khalilieh, the primary sources of Islamic law i.e. the Quran and Prophetic Traditions, as well as the jurisprudential literature which followed in the centuries following the publication of the former two sources, there are expressly specified rules regulating commerce and trade, but there is no mention of maritime law in particular.⁴⁵⁰ This is hardly surprising since the first Arab Muslims, to whom the Quran and Prophetic Traditions were first revealed, being from the inlands and deserts, were not habitually a seafaring nation. It was only upon the spread of Islam and the Muslim Empire into the Mediterranean that existing seafaring nations in the Mediterranean who had become Muslims or were ruled under Islamic rule imparted their established maritime laws. Khalilieh further alludes to the possibility that the practice of the Muslim jurists were simply to continue with the pre-Islamic maritime laws already in use in the Mediterranean as a source of law in the form of custom.⁴⁵¹ It was not until the 8th century when the first treatise in Islamic law of the sea was compiled by a Maliki jurist.⁴⁵² This may indicate that Islam endorses the pre-existing maritime laws established in the former Persian and Byzantine territories which apply the Rhodian Sea Law. Khalilieh refers to various other sources⁴⁵³ as data to support the Islamic jurisprudence. All of this is collectively referred to reflect on the principles and application of Islamic law.

⁴⁵⁰ Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction* (Brill 1998) 11

⁴⁵¹ *ibid*, 12

⁴⁵² *ibid*, the compilation is called the *Treatise Concerning the Leasing of Ships and the Claims between Their Passengers*, Muhammad Ibn ‘Umar Ibn ‘Amir al-Kinani al-Andalusi al-Iskandarani.

⁴⁵³ Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction*, Brill 1998, p. 13. Apart from jurisprudential queries, the author relied on the Cairo Geniza documents which largely documented the

The duty to provide information and pack properly

In general, when the shipper leases space on a ship under Islamic law, the shipper has the duty to specify the nature of the transported shipment.⁴⁵⁴ Both the carrier and the shipper have mutual duties towards each other in order to safeguard their own and the other's interests. A shipper has the duty to protect his cargo by adequately packing his cargo using appropriate materials and containers depending on the type of cargo being transported.⁴⁵⁵ The merchant has the duty to properly pack his goods to prevent them from being damaged in transit whether due to handling or natural phenomenon. For this purpose, during the days when Islamic law governed merchants, different types of material were used to wrap the cargo depending on the type of cargo.⁴⁵⁶

What is interesting here is the similarity to be found here to the duties found in the section above on the civil law of shipper liabilities in particular the German Commercial Code where the shipper is required to play a more active participatory role in ensuring the prevention of loss or damage to its own cargo as well as damage to other cargo and the vessel.

The duty to load and unload

Where loading is concerned, since the carrier has to ensure that the ship is not overloaded, which may not only cause the sinking of the ship but also strain the manpower used in those days to power the ship, the shipper consequently has a duty to comply with the instructions given in preventing overloading of the vessel. If there was a known loading sequence, the rule used is known as "first in last out" which basically means that the last shipper who had loaded his cargo would be required to unload it if the ship was overloaded, followed by the second-last to load and so on until the master is satisfied that the vessel is no longer overloaded. This is done by looking at the waterline mark along the outer hull of the ship which must not sink below a certain level below the water, which is a method resembling that used by the Byzantines.⁴⁵⁷ If the

maritime activities of the Jewish immigrants into Egypt, travel accounts and navigational literature of Muslim travellers and seafarers, and international commercial and diplomatic treaties concluded between the Mamluks and the European states between the 13th and 15th centuries.

⁴⁵⁴ Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction*, Brill 1998, p. 60

⁴⁵⁵ Goitein, *A Mediterranean Society*, vol. 1, pp. 332-333 as referred to by Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction*, Brill 1998, p. 78

⁴⁵⁶ Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction*, Brill 1998, p. 79

⁴⁵⁷ Ibn Bassam, *Nihayat al-Rutba*, p. 157 and Ashburner, *The Rhodian Sea-Law*, p. clviii as referred to by Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction*, Brill 1998, p. 32

sequence of loading was unknown, shippers would each be required to unload in an equal proportion to the total amount required to unload.⁴⁵⁸

Where the rule not to overload is broken by the shipper, there are three possible liabilities which the shipper may incur. The first is the shipper responsible would have to be liable for the loss and damage to cargo and therefore be required to indemnify the cargo-owners. The second alternative is to share out the liability among all the shippers in proportion according to the rules of general average. The third alternative is for the wrongdoing shipper to indemnify the other innocent shippers half the actual value of their cargo in damages.⁴⁵⁹

The rules on unloading were again similar to the Byzantine maritime law where the shipmaster is not required to discharge the cargo unless it was stipulated as such by the lessor in the ship-leasing contract or required by custom since in general the shipowner's duty towards the cargo ceases upon the vessel arriving at the destination agreed,⁴⁶⁰ but this varies depending on the custom of the locality.⁴⁶¹ The merchant would be the one usually to discharge the cargo. The merchant or his agent has the duty to unload and store the cargo in the warehouse, what more other further tasks such as dealing with repackaging, transshipment or paying custom duties.⁴⁶² The merchant would have to pay the freight to the shipowner if negligence on its part occurred or it did something which could cause damage to the shipment, unless there was bad weather or the goods were damaged.⁴⁶³

If the ship was wrecked, and some of the cargo was damaged at the time of unloading, a distinction is made between a merchant whose cargo was saved and those whose cargo was not. The former has to pay freight while the latter was exempted since his goods were damaged. Khalilieh argues that due to this, the liability for the cargo rests with the lessee since he is involved in the preparation of the cargo for the voyage and in the unloading of the cargo upon arrival at its destination. This is supported by the

⁴⁵⁸ Wansharisi, *Al-Mi'yar*, vol. 8, p. 307 as referred to by Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction* (Brill 1998) 32.

⁴⁵⁹ Abu Zakariyya Yahya Ibn Sharaf al-Dimashqi al-Nawawi, *Rawdat al-Talibin* (Beirut: Dar al-Kuttub al-Ilmiyya, 1992), vol. 7, p. 190 as referred to by Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction* (Brill 1998) 32.

⁴⁶⁰ Wansharisi, *Al-Mi'yar*, vol. 8, p. 301 as referred to by Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction* (Brill 1998) 81.

⁴⁶¹ Ibn 'Abdun, *Le Traite d'Ibn 'Abdun*, p. 63; Makhzumi, *Kharaj Misr*, p. 25; Abd al-Fattah, *Al-Mawani' wal-Thugur*, p. 160 as referred to by Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction* (Brill 1998) 81.

⁴⁶² Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction* (Brill 1998) 82.

⁴⁶³ *ibid* 81.

authority that Muslim jurists have held that where sellers attempted to propose provisions which purport to assure purchasers that the cargo would arrive safely at the destination as illegal since the seller cannot guarantee this risk.⁴⁶⁴

The requirement of fault for the contractual liability of the shipper

Under the common law of contract fault is a non-issue and is hardly to be found in literature on the common law of contract in the discussions on whether liability is established. This is largely due to the fact that performance of a contractual obligation is considered strict and the contracting parties are required to perform their part of the bargain as promised. Failure to do so would be a breach regardless of the reasons behind the failure and regardless of the fact that the parties may have exerted their best to try to comply with their obligations under the contract or have taken reasonable care. The parties' failure may have been due to external factors which are beyond their control such the acts of third parties, natural phenomenon or a change of circumstance. In general, all these reasons are not considered to be any excuse or a defence for the party in breach to not be liable for failure to perform its obligation under the contract.

This fundamental approach has its basis on a long established principle enunciated in the old case of *Paradine v Jane*⁴⁶⁵ where a party is bound to make good an obligation he has assumed,⁴⁶⁶ right up to the modern day case of *Raineri v Miles*⁴⁶⁷ where Lord Edmund-Davies reiterated the immateriality of the reasons for the breach in determining liability as well as the defence that the best efforts had been made to avoid them.⁴⁶⁸

This is the same approach taken by Islamic law on contractual obligations. The approach taken by Islamic law as provided by the primary sources being the Quran and Hadith is that of a residual nature, in that so long as there is nothing which is expressly forbidden to be practised clearly stated in these primary sources, it is taken then that the rule on that subject is that it is therefore permissible. This is because the arrival of both scriptures did not impose a whole new system to replace the existing one.⁴⁶⁹ Rather it was meant to accommodate existing customary commercial practices which are already

⁴⁶⁴ Hassan S. Khalilieh, *Islamic Maritime Law, An Introduction*, Brill 1998, p. 82

⁴⁶⁵ (1647) Aley 26; 82 ER 897

⁴⁶⁶ *ibid* 27

⁴⁶⁷ [1981] AC 1050

⁴⁶⁸ *ibid* 1086

⁴⁶⁹ Muhammad Yusuf Saleem, *Islamic Commercial Law*, John Wiley & Sons Singapore, 2013, at 1

functional and operational except where they are considered oppressive or unfair. Such wrongful practices would be removed only to the extent necessary as the rest of the ordinary commercial practices have been approved by *Shariah*⁴⁷⁰ and continue to operate and allow trade to take place without the negative aspects which have many harmful consequences on the society and economy as a whole. In fact it is forbidden to enter into contracts which deny what is permissible.

There are no provisions to be found neither in the primary sources nor the secondary ones to support the idea that as far as contract law is concerned, there must be fault in the sense above on the part of the party breaching the contract before liability can be imposed. There are only four main rules which any contractual transaction must not be imbued with. They are called *riba*’ which is usury, *gharar* meaning ambiguities in the contract, *maysir* which means that there must not be any element of gambling, and finally in general the contract must not deal with matters which are *haram* or objects or activities forbidden to Muslims.

There is in fact an express provision in the Quran which commands Muslims to fulfil their contractual obligations. In Surah Al-Maidah⁴⁷¹ it is provided in the first line, “O you who have believed, fulfill all contracts.”⁴⁷² This verse is understood to mean that Muslims are commanded to fulfil both their covenants towards God and all permissible contracts with other people. The latter affects the former as a broken promise made to another person to perform an obligation would be a breach of the covenant made to God to do what He commands and leave what He prohibits. This has been further interpreted by Ibn Abbas⁴⁷³ to mean that obligations must be fulfilled without excuses or violations.⁴⁷⁴ There is a duty to commit to the promises made with other people unless it was a contract which contained the forbidden elements or denies the permissible as stated above. Contracts are therefore seen as a pledge,⁴⁷⁵ a promise to be fulfilled, and disappointments therefore to be made good.

The rationale for such rules would appear to be in the interest of fairness and justice for the parties since the injured would have also committed to the promise by

⁴⁷⁰ Rules in Islamic Law

⁴⁷¹ Al-Quran, Surah Al-Maidah, Verse 1 (5:1)

⁴⁷² Or all your promises or undertakings

⁴⁷³ Abd Allah Ibn Abbas is one of the companions of the Prophet Muhammad s.a.w. and who was one of the early scholars of the Quran.

⁴⁷⁴ Tafsir Ibn Abbas

⁴⁷⁵ *Tanwir al-Miqbas min Tafsir Ibn ‘Abbas*

perhaps incurring expenses, employing staff, used time and effort to travel to the required location, purchased raw materials or even enter into sub-contracts. It would be unfair to this party if his commitment was sacrificed without redemption. The rules also ensure certainty in contracts made which would contribute to commercial efficiency as parties need to know that the contracts they enter into will be enforced, since a breaching party will not be let off the hook.

In some civil law jurisdictions such as in the Middle East,⁴⁷⁶ the term ‘fault’ as used in the codes refers to the act of breach of the contract rather than the meaning used in the preceding paragraph. In the latter fault was meant to connote blameworthiness, wrongful act or guilt. In other words, the codes use the term ‘fault’ in the same sense as ‘default’, which may not be wrongful in the moral sense. For example in the United Arab Emirates, the Dubai Court of Cassation held that in order for contractual liability to be established under the code,⁴⁷⁷ one of the elements to be fulfilled is that there must have been fault of one of the contracting parties in the sense that his obligation under the contract was not fulfilled.

This meaning given to fault is similar to the one taken in both UK statutes and cases.⁴⁷⁸ For example the definition given by section 61 of the Sale of Goods Act 1979 for the term found in sections 7, 9(2) and 20(2) of the Act. Courts of law have also used this meaning for the term as in the case of *Poussard v Spiers*.⁴⁷⁹

It has been observed⁴⁸⁰ however that there have been changes in the trend in which the English courts have taken their approach in enforcing the absolute obligation of contract. Although in the beginning, as stated above, the courts had taken an absolutist approach where no excuse may be accepted for breach, this rule was later relaxed with the advent of cases such as *Taylor v Caldwell*⁴⁸¹ and its successors. Such approach displayed the courts’ willingness to take into account change of circumstances and supervening events which may render the contract frustrated, thus expanding the scope of the doctrine. This modern day the courts appear however to have come full circle by

⁴⁷⁶ *Dubai Court of Cassation, petition no 41/2007, 15/04/2007; Dubai Court of Cassation, petition no 37/2004, 18/09/2004.*

⁴⁷⁷ UAE Civil Transactions Law No 5 of 1985 (the Civil Code), art 124.

⁴⁷⁸ Barry Nicholas, ‘Fault and Breach of Contract’ in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (1997), Oxford Scholarship Online, March 2012, 1.

⁴⁷⁹ (1876) 1 QBD 410.

⁴⁸⁰ Ewan McKendrick, ‘*Contract Law*’, Palgrave Macmillan, 10th edition 2013, at 257.

⁴⁸¹ (1863) 3 B & S 826.

returning to their restrictive approach in allowing relief to the party who will suffer hardship due to the change in circumstance.

The way in which parties today overcome this is by including ‘hardship’ or force majeure clauses which enable them to renegotiate the terms upon the occurrence of triggering events which they have agreed upon without having to depend on the courts to decide the fate of the contract, which if held to be frustrated would only result in the death of the contract altogether. This is may not be an altogether favourable decision and something which the parties themselves would want to avoid. The inclusion of such clauses in the contract from the outset therefore allows some degree of flexibility to the parties for such contingencies. McKendrick⁴⁸² has also made an interesting point regarding the finer point regarding the rule that the courts will not make adjustments for the parties or make the contract fairer or better for them, but they would not stop the parties from making such adjustments themselves. This view is interesting and viable because it seems to reconcile the sanctity of contract principle with that of the freedom of contract.

In the literature on theories on contractual liability in the civil law systems however, there is a distinction made between three categories of liabilities. For example under French law there is first a category for obligations which only require the use of reasonable care to perform his contractual obligations,⁴⁸³ which would mean that even if that party fails to achieve them he would not be liable because he is only required to do the best he can. The second one is known as strict liability⁴⁸⁴ where reasonable care would not be sufficient to excuse the performing party from liability and he would be liable for failure to fulfil his obligation unless this failure is attributed to something which was beyond his control and beyond what is foreseeable like a *force majeure*. The third is liability which is absolute.⁴⁸⁵ Here is where fault absolutely plays no part to excuse the failure in performance nor does the occurrence of a *force majeure*.

The second and the third form may be nominally described in common law as indistinguishable, but in civil law theory the former is a form of liability where the obligation on the party to perform his part of the bargain is strict subject to very limited situations where he may be excused to the reasons he was not responsible for or was not

⁴⁸² Ewan McKendrick, *Contract Law* (10th edn Palgrave Macmillan 2013) 258.

⁴⁸³ *Obligation de moyens*.

⁴⁸⁴ *Obligation de résultat*.

⁴⁸⁵ *Obligation de garantie*.

able to overcome, whereas for the latter there is no excuse available whatsoever for failure to perform.⁴⁸⁶

According to Nicholas⁴⁸⁷ a similarity can be found within the common law system of these different fault requirements in establishing liability even though superficially it does not convey such as appearance.

Conclusion

Even if the dominant view regarding the nature of contractual liabilities as far as the common law is concerned is that liability is strict, it has been argued⁴⁸⁸ that fault does play a role in the determination of breach as well as the assessment of remedies. In relation to the issue of breach, the idea that the nature of a promise to contract is either a promise to perform the contract or pay damages for breach of contract goes against the expectations of parties that promises are meant to be kept. To some extent the lack of morality affects the confidence to the contract institution that parties rely on. There is expectation that reasonable efforts should be made to deliver what was promised rather than to simply opt for breach of contract as an alternative. In other words, what would be the point of entering into a contract if the intention to be bound from beginning to end is non-committal. Commitments are certainly needed for good working relationships of commercial parties.⁴⁸⁹

It is therefore argued that the pervading element in all systems seems to be that of fairness and efficiency. The fairness argument supports the idea that different kinds of obligation require different levels of strictness in imposing liability depending on the seriousness of the consequences as a whole. The efficiency argument supports the idea that what is already in place that is already consistent and works should not be displaced with a whole new system that is alien to the industry. Furthermore parties are now more inclined to and could include within the contract itself, what they would do in cases of changed circumstances.

If these different categories are acceptable in both the civil and common law systems, it is also possible to apply them to shippers' contractual liabilities. The next

⁴⁸⁶ Barry Nicholas, 'Fault and Breach of Contract' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon 1997), (Oxford Scholarship Online, March 2012).

⁴⁸⁷ *ibid*

⁴⁸⁸ Robert A. Hillman, "The Importance of Fault in Contract Law" (2012), *Cornell Law Faculty Working Papers*, Paper 111, 8

⁴⁸⁹ *Ibid*

question now is to determine how they may be applied for each type of duty imposed on the shipper.

CHAPTER 4

Shipper Liability for Cargo under International Conventions

Introduction

The law on shipper liability under international conventions has experienced a revolutionary change in both content as well as structure. There are currently four competing international conventions on the carriage of goods by sea, and other international conventions which relate to, affect or are relevant to this industry, in particular to the shipper. While the focus of the three preceding international conventions on carriage of goods by sea have focused more on the liability of the carrier towards the shipper, the focus on shipper liability has been dramatically changed by the emergence of the Rotterdam Rules, the latest convention on the carriage of goods by sea. This chapter covers an area which has been more widely discussed and published on compared to the topic of shipper liability under national law, perhaps due to the widespread effect of international conventions, and therefore the interest as well as concern are generated at a more collective level.

Objective of chapter

The objective of this chapter is firstly to identify the principal provisions on shipper liability in the four international conventions on the carriage of goods by sea as well as other international conventions which contain provisions on shipper liability. The second objective is to analyse critically the content of these provisions in order to study the extent, development and evolution of the content and structure of shipper liability provisions in international conventions from the first one until the most recent one today, in particular by focusing on the nature of the liability and the mental element required if any. The purpose of doing this is to determine what role fault plays in the determination of shipper liability. This will be followed by looking at whether the objectives of the creation of these provisions have been achieved in their application by the courts, again by focusing on whether and how the mental element affected the finding of liability or otherwise. Another objective is to consider the practical effects of these provisions in decided cases where disputes have arisen in relation to their interpretation which would be useful in the determination of whether fault is actually used to determine shipper liability. This entails looking at consistency and also the method of their application, and how the mental element should therefore be formulated. Finally a conclusion would be

made on the requirements for shipper liability in international conventions based on the findings made in this chapter, in particular where no such provisions have been made for them.

Research Questions

The research in this chapter focuses on two main questions. The first is looking at to what extent the mental element forms a prerequisite in the establishment of shipper liability as provided under international conventions. This will entail looking at the role the mental element plays in the determination of shipper liability under international convention provisions. Where provisions on the mental element of the shipper in determining liability are identified, research will be made as to whether they are actually used in the determination of shipper liability. A corresponding question would be where the mental element varies from case to case, if there is a connecting factor. A further related question to be asked is if the mental element is relied on to determine shipper liability, what would be the reasons for relying on such mental elements. If they are not, the question is would they even be needed at all? What would warrant a need for the mental element in establishing shipper liability?

The second main question to be asked in this chapter is if it is not the mental element, what actually is being relied on to determine shipper liability? This involves looking at the ways which have been used to impose liability apart from relying on the mental element of the shipper. The corresponding question then is should there be other ways to impose liability and should these other ways be used to impose liability on the shipper? If it is not the mental element which determines liability, then the question would be what is? If the mental element is not used to determine shipper liability, what would be the justification for relying on strict liability as opposed to requiring a mental element?

Methodology

The starting point for this chapter is the first international convention on the carriage of goods by sea, the Hague Rules 1924, followed by the other three in chronological order in order to first identify provisions which create liability on the shipper, and secondly to make observations on the development of shipper liability. The reason why the Hague Rules are chosen as the starting point of discussion is because the rules were the first international attempt to govern contractual relations between the

shipper and the carrier, and so it has affected shipper liability towards the carrier. Prior to the Hague Rules, each individual state passed their own laws in order to deal with the rising ability of the carrier to insert clauses which limit or exclude their liabilities towards the shipper, and this resulted in the proliferation of varying laws around the world on resolution of disputes between the shipper and the carrier. This inevitably led to non-uniformity in the law of cargo claims and was the basis for the promulgation of the Hague Rules. Since the position before the Hague Rules dealt with national and regional laws on shipper liability, their discussion would be located in chapter 2 on Shipper Liability under National Law.

The research on the shipper's duties under international conventions in this chapter will rely on and is dependent upon the meaning given to the term "shipper". The liability of the shipper can only be fully understood when the correct definition of the shipper is used and the context in which the shipper is placed, since as seen in Chapter 2, there is no one particular definition of the shipper. As such, reference to the definitions of the shipper as discussed in Chapter 2 is an important part of the discussion made here.

Other international conventions which provide for the liability of the shipper such as the HNS Convention, the Multimodal Convention and MARPOL will then be looked at in order to study other forms of the duty of the shipper. Non-maritime conventions which deal with the environment or public safety which impose duties on the shipper will also be included.

The nature of the provisions will then be classified according to its premise of liability whether tortious, contractual, fiduciary or criminal in order to assist the discussion of the required mental element for each form of liability in the following chapters. Provisions with existing mental element requirement will be noted as well as those without and the particular mental element required will be critically analysed.

The travaux préparatoires for each convention will then be studied to understand the purpose of the creation of the provisions on shipper liability and to establish the original objectives for which the provisions were meant to achieve, in particular whether the mental element was considered. The provisions on shipper liability identified in the conventions will then be analysed by studying their application by the courts in decided cases. The next stage is therefore to determine whether the purposes of the provisions' creation have been achieved by comparing them with the application of the provisions

by the courts in the decided cases, again in particular by focusing on whether the mental element played any part.

Academic discussions on the application of the shipper liability provisions in the convention will also be looked at. Finally proposals on the appropriate mental element will be made.

Carriage of Goods by Sea Conventions

The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 25 August 1924 (The Hague Rules)

Background

The Hague Rules was the result of the culmination of years of accumulating pressure on shippers worldwide and their claims that the carriers were imposing oppressive and unfair terms on them as the party with the higher bargaining power in concluding carriage of goods by sea contracts. This in turn, led to individual countries promulgating their own unique versions of amendments to the national law to curtail the excessive power of the carriers to insert such terms. What followed was the creation of piecemeal legislation which differs from jurisdiction to jurisdiction which consequently resulted in disuniformity at the international level of laws applied to cargo claims made by shippers against carriers for loss of or damage to their cargo.

The international community in particular the International Law Association and the Comité Maritime International led the discussions on the proposal of implementing a uniform system of rules which parties to a contract of carriage by sea could rely on to govern their relationship allowing a clear set of guidelines which applies across the board in the industry.

The Hague Rules were passed in Brussels on the 25th of August 1924 and were signed by 27 countries and was considered a breakthrough in the step towards achieving international uniformity in the international laws of carriage of goods by sea.

Bearing in mind the background to the Hague Rules, it follows that the rules thus primarily concern the duties and liabilities of the carrier towards the shipper. Very few provisions actually concern the shipper's duties towards the shipper and they are not even placed together as a separate and distinct group of articles. In fact the consequence of a failure on the part of the shipper to fulfil certain obligations may result in the shipper

losing certain rights against the carrier rather than creating a positive cause of action which the carrier may bring against the shipper. For example there is possibly a link between the last sentence in article III rule 5 which implies the ability of the carrier to limit his responsibility and liability under the contract of carriage to the shipper as a result of inaccuracies in the information provided by the shipper which is discussed in detail later in this chapter, and the provision in article IV rule 2(i). Article IV states that the carrier will not be liable and neither will the ship, for loss or damage if such was caused by a list of causes one of which is sub-paragraph (i). This sub-paragraph refers to the act or omission of the shipper or owner of the goods, his agent or representative.

The Protocols of 23 February 1968 and 21 December 1979 (The Hague-Visby Rules)

These rules came about as a result of problems which arose out of the Hague Rules from the carriers' point of view and proposals were brought from their interests to close a number of gaps⁴⁹⁰ that were discovered from the 40 odd years of applying the Hague Rules. A draft was produced by a CMI⁴⁹¹ Conference at Stockholm and signed at Visby. The rules were adopted as a protocol to the 1924 Hague Rules. But for some small but important amendments to the Hague Rules, the main part remains exactly the same. As far as shipper liability provisions, these have not been changed and are identical to the original rules.

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

The Hamburg Rules 1978 only came into force in 1 November 1992 and were ratified mostly by developing and so called Third World countries, which are estimated to represent only 5 percent of world trade by sea, but no major maritime country has ratified it.⁴⁹² This research looks at cases with application of the relevant provisions by courts in the member states and the UK and US courts of law which apply the Hamburg Rules by way of the applicable law of the contract agreed by the parties. Research so far have found either of these to be a scarce resource and this reflects the lack of support oft cited

⁴⁹⁰ According to Francis Reynolds, 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules' (1990) 7 *MLAANZ* 16, there are 5 defects in the Hague Rules which the carriers were unhappy with. First is the *Vita Food* gap on clause paramounts, second is the *Scruttons v Midlands Silicones* case on Himalaya clause, third is *The Muncaster Castle* on due diligence, fourth is the probative effect of bills of lading, and lastly the problem with the package or unit limitation.

⁴⁹¹ Comité Maritime International.

⁴⁹² Wilson, J.F., *Carriage of Goods by Sea* (Pearson Education 2008) 214.

regarding the Rules by the industry and the avoidance for the provisions of these Rules to be applied to it wherever possible.

In the case of *Caresse Navigation Ltd v Office National De L'Electricite and others*,⁴⁹³ although it was argued that article 13 of the Hamburg Rules is substantially the same as article IV rule 6, Males J pointed that the Hamburg Rules differ from the Hague-Visby Rules since as a whole the former was more favourable to cargo interests and thus not in the owners' interest in this case. This case concerned a time charter trip for bulk cargo from Rotterdam to Nador, Morocco where there was a delay for days in the discharge of the cargo. This resulted in overheating of the coal and the subsequent dousing with salt water due to shortage of fresh water resulted in the cargo being no longer suitable for its purpose, namely for use in industrial boilers to produce electricity. The issue was about the governing law of the bill of lading as the claim was made under the Hamburg Rules which applies in Morocco although the exclusive jurisdiction clause in the charterparty provided for English law and court jurisdiction.

Under the Hamburg Rules there is a dedicated section for shipper liability under Part III but it contains only 2 articles, article 12 and 13. In article 12 again the residual approach is used to describe the shipper's liability. There is another provision in a separate Part of the Rules which deal with shipper liability, namely Article 17. It is interesting to note that despite the claim that the reason why the Hamburg Rules came into existence was due to the dissatisfaction of shippers with the provisions of the Hague Rules and the Hamburg Rules which were said to be biased against them, there is actually a Part III in the Hamburg Rules which is entitled and specifically deals with 'Liability of the shipper'.⁴⁹⁴ On the other hand, a clearer and dedicated part⁴⁹⁵ to shipper liability acknowledges the significant and reciprocal role played by shipper as recognised by the Hamburg Rules.

⁴⁹³ [2013] EWHC 3081 (Comm), 2011 Folio 668, (Transcript).

⁴⁹⁴ There is no counterpart in existence within the framework of neither the Hague Rules nor the Hague-Visby Rules.

⁴⁹⁵ Part III is not exactly complete as Article 17 which also deals with shipper liability sits in Part IV which covers Transport Documents. This nonetheless is the starting point of increasing recognition given to the duties of shippers.

United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The Rotterdam Rules) 2008

The issue of shipper liability was considered to be one of the particularly important items to be considered by the Committee and so was included in the Agenda Paper prepared by the Working Group for discussion by the Committee at the Singapore meeting of the CMI's 37th Conference in 2001.⁴⁹⁶ In general, the issue of whether liability should be imposed on the basis of fault or on a more stringent basis, the former received overwhelming support.⁴⁹⁷ Where shipper liability specifically was concerned, a number of issues were considered. These are whether there should be a distinction between the liability for damage which was caused by goods which are inherently dangerous and that which was caused by other types of cargo; whether there should be a corresponding provision for limitation of the shipper's liability as well as a creation of a time bar against bringing claims against the shipper.

Support was again received for liability of the shipper based on fault and for there to be the same liability for both inherently dangerous goods and other goods, even though there were some delegates who argued for more stringent liability for the former, as well as for a failure to comply with special rules on dangerous goods. It was in this forum also that the distinction between the liability of the shipper for a failure to provide accurate information and liability of the shipper for damage caused by the goods was drawn, from which it was concluded that liability for the former should be more stringent. There was also general support for there not to be a limitation of liability provision for the shipper but that there would be provision for a time bar to claims against the shipper.⁴⁹⁸

After three years of consultations within the international shipping community, the CMI began work on drafting a new convention for sea carriage in 1999. Their outline instrument was passed on in 2001 to a working group of UNCITRAL to be further worked on and finally in 2008 the draft convention was approved by UNCITRAL. The Legal Committee of the General Assembly adopted the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea in November 2008. It was opened for signing from September 2009 in Rotterdam, and is now commonly referred to as the Rotterdam Rules. Since then, it has been signed by 25 countries, including the

⁴⁹⁶ CMI Yearbook 2001 Annuaire, 182.

⁴⁹⁷ *ibid* 184.

⁴⁹⁸ *ibid* 186.

United States of America, representing 25% of the world trade. However, only 3 countries have ratified it.⁴⁹⁹ It almost is a complete overhaul in terms of form and substance from the three previous international conventions on sea carriage which it was intended to replace, but its fate yet remains to be seen. It contains a whopping 96 article provision but obviously this chapter will only focus on the obligations of the shipper to the carrier; a relatively new area dealt with by the convention.

Scope of liability

The obligations of the shipper towards the carrier in the Rotterdam Rules are embodied in Chapter 7 which encompasses 8 articles, article 27-34. They are quite extensively described in detail and are divided into numerous obligations regarding delivery of the goods for carriage, cooperation to provide information and instructions, obligation to provide information, instructions and documents, the basis of the shipper's liability to the carrier, information for compilation of contract particulars, special rules on dangerous goods, assumption of shipper's rights and obligations by the documentary shipper, and liability of the shipper for other persons. It is quite clear from the title of chapter 7 that the liability of the shipper under this chapter is concerning only with its obligations towards the carrier.⁵⁰⁰ Since the Rotterdam Rules has a specific chapter dedicated to provisions on shipper liability, and that the provisions are structured and laid down in a detailed manner, there is more certainty and clarity of the regulation of shipper liability to the benefit of the industry.

Provisions on shipper liability

Duty to deliver cargo ready for carriage

The duty here is an extension of the duty under the common law to provide cargo. The cargo must not only be physically present and ready to be loaded, but also prepared in every way required for carriage. According to Schelin⁵⁰¹, this is the most important obligation that could be imposed on the shipper, apart from the duty to pay freight. Indeed this area is of utmost importance for the shipper to be giving attention to, since it is at the very beginning of a series of events which, depending on how well or badly it

⁴⁹⁹ Those countries being Spain, Togo and Congo.

⁵⁰⁰ The title of Chapter 7 is "Obligations of the shipper to the carrier".

⁵⁰¹ Johan Schelin, 'Obligations of the Shipper to the Carrier' in Von Ziegler and others (eds), *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (Kluwer 2010) 152.

is executed, could very well affect the whole chain of causation down the line of processes involved in carrying the goods from point of departure to point of destination. Unfortunately, it has not been an area largely focused on in or even be a feature of, the earlier international conventions on carriage of goods by sea.

The Hague and Hague-Visby Rules do not have anything expressed or specified on cargo preparation but surely this is clearly part of the shipper's duties since it is a very important aspect of the shipper's obligation as stated above and also as viewed by Berlingieri.⁵⁰² It is only that the way it is incorporated in the Hague and Hague-Visby Rules that make it seem as though it is not given the emphasis and attention that it should deserve. There is arguably a detailed description of the obligation of the shipper to be found albeit in a passive manner in article III Rule 3(a) even though article III Rule 3(a) actually provides for the obligation of the carrier rather than the shipper.

According to article III Rule 3:

“After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

- (a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.
- (b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.”

This is because although article III Rule 3(a) requires the carrier to issue a bill of lading to the shipper containing certain information, the manner in which that information is obtained implies the obligation there of the shipper to provide to the carrier, in writing prior to the loading, information regarding certain things.

⁵⁰² Francesco Berlingieri, “A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules”, paper delivered at the General Assembly of the AMD, Marrakesh, 5 - 6 November 2009, p 19. Berlingieri argues that even though the Hague-Visby as well as the Hamburg Rules do not specifically mention which obligations are regarded as part of the shipper's duty for cargo preparation unlike the Rotterdam Rules, it is clear that the shipper's obligation to prepare cargo does exist.

These include the leading marks necessary for the identification of the goods, which should be stamped or shown clearly on the goods when uncovered, or remain legible on the coverings or cases in which the goods are contained throughout the journey. Likewise, article III Rule 3(b) also implies in the same manner as above, the duty of the shipper to provide to the carrier in writing, either the number of packages or pieces, or the quantity or weight depending on the method of numerical description chosen by the shipper. This would mean that in terms of cargo preparation, the shipper would have the duty to mark or stamp the goods or, its coverings or cases in which the goods are contained, in order to be able to provide the identification marks to the carrier. Likewise, the shipper has to determine the numerical description and measure the value to be submitted to the carrier.

In relation to the weight of the goods, where containers are used to transport cargo, there are requirements that the gross mass of a container containing cargo be weighed and verified by the shipper before loading. A recent amendment to the International Convention for the Safety of Life at Sea (SOLAS) 1974 adopted by the Maritime Safety Committee of the International Maritime Organization affects the duty of the shipper in this respect. SOLAS regulation VI/2 now provides for a mandatory requirement for the verification of the gross mass of packed containers.⁵⁰³ This is discussed in further details in the section on other non-carriage of goods by sea conventions below. The point here is that weighing the cargo is part of the duty of the shipper in preparation for carriage.

This is because the verified mass of each container will determine its location on the vessel, as well as the arrangement and sequence of stowage on the vessel. In making stowage decisions which will ensure safety of the vessel, crew and stevedores, as well as making use of laytime efficiently, the mass of the cargo is critical knowledge. It would prevent inaccurate vessel stowage decisions which could lead to collapse of container stacks,⁵⁰⁴ tipping of the vessel and potential loss of containers overboard. Therefore before loading, the shipper has the duty to prepare its cargo for loading by ensuring that the verified weight submitted to the master reflects the actual weight of the containerized cargo.

⁵⁰³ Resolution MSC.380(94)

⁵⁰⁴ <http://www.imo.org/en/OurWork/Safety/Cargoes/Containers/Pages/Verification-of-the-gross-mass.aspx>

Having said that, it is an obligation for the carrier to issue a bill of lading which contains such information, only if they have been provided as such by the shipper. This is because if the carrier, master or agent of the carrier has reasonable grounds for suspecting that the information provided does not accurately represent the goods, they do not have to state such information in the bill of lading, as the proviso in the last paragraph of article III rule 3 provides. Furthermore, the carrier is only required to issue a bill of lading when demanded by the shipper after receiving the goods.⁵⁰⁵ This therefore could imply that there is no obligation imposed on the shipper to provide such identification marks, number of packages or pieces, quantity or weight of the goods, except as a result of the shipper requiring a bill of lading from the carrier. It is only in the interest of the shipper himself that such information is given because the shipper has to ultimately satisfy the requirements of the buyer and the banks involved in the financing of the trade.

If the shipper chooses to provide this information, the provision which then makes the shipper liable in relation to the matters above is article III rule 5. This article provides that the shipper is deemed to have guaranteed at the time of shipment the accuracy of the information on the above which he has furnished and requires the shipper to indemnify the carrier where the information has proved inaccurate and thereby causing loss, damages and expenses to the carrier.

Although the requirements in article III rule 3 of the Hague and Hague-Visby Rules indirectly deal with some aspects of cargo preparation, since after demanding for a bill of lading the shipper would now have to mark the goods with the appropriate form of identification, as well as determine the number, weight or quantity of the goods, the liability of the shipper in article III rule 5 is strict. According to article III rule 5:

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars...

This provision does not provide for any mental element of the shipper before the shipper is required to indemnify the carrier for the losses resulting from inaccuracies in the details provided by the shipper. However the provision also employs the term “shall”

⁵⁰⁵ Article III rule 3

in requiring the shipper to indemnify the carrier. This automatic indemnification duty imposed on the shipper without any fault required results in a strict liability duty on the shipper.

The strictness of this duty can probably be justified by the objective it seeks to achieve. The purpose of the rule relates more to certainty in firstly, the identification of goods for the purpose of commercial efficiency in transferring the goods from one party to another. Secondly the rule allows the carrier to carry on with issuing a bill of lading with all the details required for it to have any commercial value at a commercially efficient pace but without the carrier incurring irredeemable liability in the process of providing transit. Likewise at the other end of the transit, the guarantee which the shipper is deemed to have made ensures that the transferee can be sure that the item described is exactly what he is trading for, and that it arrives without delay.

This is because the information in the bill of lading in practice depends on what is provided by the shipper. For the purpose of commercial efficiency, the carrier needs assurance that if the details regarding the goods on the bill of lading issued by it turn out to be inaccurate, the carrier's back is covered. The shipper is therefore liable to indemnify the carrier regardless of fault if the information on the bill of lading supplied by it turns out to be wrong, and the recipient of the goods sues the carrier. Commercial efficiency is attained by not requiring the carrier to have to actually inspect the contents of the cargo to verify the identity of the goods as described in the bill of lading, but merely by acquiring a guarantee from the shipper. The rules therefore ensure that the process of shipping flows smoothly without delay.

The utmost importance given to ensure this result is achieved may have resulted in the liability under article III rule 5 be made established without fault being required on the part of the shipper. The strictness of this rule supports the need of the industry to have and sustain an efficient mechanism which allows transit to be made without delay due to the trust and reliance on information and documents provided, and for there to be a safety net in the event that mistakes or even fraud of the shipper falls on the carrier to face the consequences of.

The industry's need to have such a commercially efficient system would therefore be supported by having such a strict liability rule in relation to the guarantee by the shipper that the details provided by him to the carrier for the purpose of issuing the bill of lading is accurate. It would not be in the interest of the commercially efficient

running of the shipping industry, if the carrier is required to check for himself the details provided by the shipper against the goods. At the same time, if the carrier were to simply issue a bill of lading without a guarantee by the shipper that the details provided were accurate, he is exposing himself to crippling liability by various recipients of cargo should the details prove incorrect. This leads to the need for a strict liability of the shipper to indemnify the carrier for such contingencies. If fault in any form is required before the shipper can be required to indemnify the carrier, the guarantee deemed to have been given by the shipper would be worthless. The carrier would always be in an insecure position because there is a chance that he will not be able to prove negligence of the shipper for example, in providing accurate details. This will ultimately result in the carrier being reluctant to issue a clean bill of lading along with the details as would be required by the shipper.

Apart from this, another indirect duty of the shipper regarding preparation of goods is by reference to the excepted perils of insufficiency of packing under article IV rule 2(n) where the carrier would not be liable to the shipper for damage or loss of cargo due to the shipper not packing its cargo sufficiently.⁵⁰⁶ Likewise in article IV rule 2(o), insufficiency or inadequacy of marks will also allow the carrier to be excluded from liability for cargo claims arising from such lack of performance in the shipper's duty. In this way, indirectly the Hague and Hague-Visby Rules do impose on the shipper, duties regarding preparation of the cargo which otherwise would create a defence for the carrier against the shipper for loss or damage to the cargo. However, unlike the Rotterdam Rules which will be discussed below, it is only a shield and not a sword. It does not create a cause of action for the carrier to bring against the shipper if the shipper fails to prepare the cargo adequately in terms of packing of the goods. For marking of the goods, unless it results in the inaccuracy of information in the bill of lading, by itself it too does not raise a cause of action for the carrier against the shipper. It creates a liability only if it triggers article III rule 5 on the guarantee of the shipper for accuracy of information for the purpose of issuing the bill of lading.

Under the Hamburg Rules again the duty of the shipper to deliver the cargo ready for carriage is indirect. Article 15 rule 1 provides for the details which the carrier has to

⁵⁰⁶ This, according to Berlingieri in his paper, Francesco Berlingieri, "A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules", paper delivered at the General Assembly of the AMD, Marrakesh, 5 - 6 November 2009, p 19, is confirmation that a duty to prepare goods ready for carriage exists within the framework of the Hague and Hague-Visby Rules even though it is not expressly specified nor described as such.

include in the bill of lading issued to the shipper. Article 15 rule 1(a) states that the following information must be included in the bill of lading:

(a) the general nature of the goods, the leading marks necessary for identification of the goods, an express statement, if applicable, as to the dangerous character of the goods, the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed, all such particulars as furnished by the shipper;

The shipper impliedly therefore has the duty provide all these details in order for the carrier to be able to carry out his duty to issue a bill of lading containing them.

Another duty relevant to preparation of cargo is connected to its duty regarding dangerous goods. Article 13 requires the shipper to mark or label dangerous goods which indicates its danger in a manner which is suitable. If this was not done by the shipper and the carrier either contractual or actual does not have knowledge about the dangerous character of the goods, the shipper is liable to both for the losses resulting⁵⁰⁷ from such shipment and the carriers may unload, destroy or render innocuous, whatever the circumstances require for safety to be restored, without being liable for compensation to the shipper.⁵⁰⁸

It can be observed here that the provision relating to the shipper's duty in cargo preparation has started to change its focus from generally all cargo specifically to that of dangerous goods. This is probably due to increasing casualties occurring in the time leading to the passing of this convention which have resulted from a lack of focus on safety, and so explaining the inclusion of provisions which relate to matters of safety in particular where dangerous goods are concerned. The approach taken is however similar in the sense that the shipper is liable regardless of fault, but simply by the act of shipment unless it can be shown that the carrier knew about the dangerous nature of the goods. The carrier's knowledge is deemed to arise simply by the shipper fulfilling its obligation to mark or label the dangerous goods.

The rules do not specifically mention the consequences of not properly marking or labelling dangerous goods as such but this may be viewed in two ways. The first is since the words 'must' is used, it implies that this is a strict liability provision for the shipper. Secondly the marking or labelling would be connected to the following duty in

⁵⁰⁷ Hamburg Rules, art 13(2)(a).

⁵⁰⁸ *ibid* art 13(2)(b).

paragraph 2 to inform the carrier of the dangerous character of the goods and the precautions to be taken. The duty of the shipper regarding dangerous goods has always been regarded as a strict one. If the marking or labelling is seen as one of the ways in which the carrier is informed, this would imply that both duties are bound as strict.

The most direct and express provision on the duty of the shipper to prepare cargo ready for carriage is made by Article 27 of the Rotterdam Rules (RR) which provides that if the parties have not agreed otherwise:

(1)...the shipper shall deliver the goods ready for carriage...

The goods must be ready for the carriage and in a condition which is able to withstand the intended carriage, loading, handling, stowage, lashing and securing and discharge. This provision seems to be broad, wide ranging and covers all aspects of the operation. The goods must not cause injury or damage to persons or property, but harm is not defined, and so may include non-physical damage for example delay in the discharge of the cargo. This obligation also applies where the goods are in or on a container or trailer packed by the shipper.⁵⁰⁹ The shipper has to ensure that the goods are properly and carefully stowed, lashed and secured in or on the container or trailer. Under ‘FIOS’ contracts, both the shipper and the documentary shipper’s obligations must be performed properly and carefully, failing which the shipper may be liable for detention.⁵¹⁰ This means that if the carrier has agreed with the shipper that the responsibility for loading, handling, stowing or unloading of the goods is conferred on the shipper, the shipper must perform the obligation assumed under this agreement properly and carefully. Nevertheless, since article 27 (1) opens with “unless otherwise agreed in the contract of carriage”, the provision in this article is not mandatory and the parties are free to contract out of it, perhaps in terms of who may take on the responsibilities and to what extent that person may be responsible.⁵¹¹ The carrier could take advantage of this by incorporating clauses in the bill of lading which causes the shipper to take on all the risks of damage or loss caused by the cargo not being fit for the intended carriage. However, an alternative view⁵¹² is that the freedom to contract out is

⁵⁰⁹ Paragraph (3) of Article 27.

⁵¹⁰ Paragraph (2) of Article 27. This paragraph refers to an obligation assumed under an agreement.

⁵¹¹ See Asariotis, *Main obligations and liabilities of the shipper*, Proceedings from the International Symposium on UNCITRAL’s Attempt towards Global Unification of Transport Law - The CMI Draft Convention on the Carriage of Goods by Sea and its Impact on Multimodal Transport, German Association for Transport Law, 1 April 2004 Hamburg, p 284 at 288.

⁵¹² See Fujita, *Shipper’s Obligations and Liabilities under the Rotterdam Rules*, February 2011, www.gcoe.j.u-tokyo.ac.jp/pdf/GCOESOFTLAW-2010-3.pdf, p 6.

only in relation to the first line of article 27 (1) since that line stops before a new sentence begins with ‘in any event’, and goes on to describe the specific things which the shipper needs to do in order to fulfil its obligations to prepare the goods, should it have been agreed that the shipper should be the one in charge of preparing the goods ready for carriage.

Another interpretation to the first line of Article 27⁵¹³ goes in the way that the phrase “ready for carriage” itself is something which the carrier and the shipper can even decide for themselves if they so wish. This includes delivering the cargo readily packed in a container. Now the container could be supplied by the carrier, or they could though rarely, be the shipper’s own containers, or containers supplied by third parties; essentially containers which were not supplied by or on behalf of the carrier. According to Article 1 paragraph 24, the latter kinds of containers are also defined as “goods”. The question is, to what extent are shippers then required to ensure the containers are fit to carry the cargo they intend to send?

The view adopted by Schelin is that because the definition of goods employed above in the Rules, coupled with the requirement in paragraph 1 of Article 27 that the shipper must deliver the goods in such a condition that they will not cause harm to persons and property, the shipper has an obligation not only to ensure that the actual goods contained in the container or on the vehicle are properly stowed, lashed and secured, but that the container or vehicle themselves can withstand the intended carriage, in the sense that they are in good condition and suitable for transport.⁵¹⁴ However Berlingieri is of the view that since most of the time the containers belong to the carrier, it is questionable to interpret this article as imposing a blanket duty on the shipper to inspect all kinds of containers involved with their goods and ensure their suitability for transport. Rather, he prefers a co-operative duty between the carrier and the shipper where, if the carrier agrees to provide the container, the carrier then has a duty to provide a container that is fit for the goods intended for carriage subject to what information the shipper has provided him. The shipper then should have a corresponding duty to inspect the container to ensure that it is suitable for his goods, and to inform the carrier if it was otherwise.⁵¹⁵ The general duty of the shipper to co-operate with the carrier in providing

⁵¹³ Schelin (n 501) 152.

⁵¹⁴ *ibid* 153.

⁵¹⁵ Francesco Berlingieri, *An Analysis of Two Recent Commentaries of the Rotterdam Rules*, *Il Diritto Marittimo*, Fasc. I-2012, p 28.

information and instructions is an existing duty in Article 28 which is stated separately from Article 27. Berlingieri's argument is therefore extending the principles in Article 28 to also cover specific situations such as those covered by Article 27.

A co-operation between the shipper and cargo is perhaps more reflective of the evolving nature of shipper carrier relationship today which appears to be translated into the increasing role of the shipper in the latest international convention on carriage of goods by sea. There seems to be more room for the shipper to be involved in the process of shipment, which although comes with responsibility, does entail some benefits to the shipper in ensuring a higher level of assurance of safe delivery of its cargo to its destination. Nevertheless it may have been better if the Article provision was clearly worded to include this implied obligation of co-operation in order for the industry to be clearer of what the expectations are of them.

These two writers however, both agree⁵¹⁶ on the interpretation to the rule in paragraph 3 of Article 27 which provides that where there is a container or vehicle which is used to contain the goods, and the shipper was the person who packed the container or loaded the vehicle, the shipper is required to ensure that the contents of the container or vehicle is properly and carefully stowed, lashed and secured in the container or on the trailer in such a way that they will not cause harm to persons and property. This provisions appears to give the impression that any persons who have been injured or whose property have been damaged by the failure of the shipper in fulfilling this duty, was owed an obligation by the shipper to not harm them such that this rule allows them to claim from the shipper directly. However, since Article 30 which deals with the basis of the shipper's liability only provides for the liability towards the carrier, both writers agree that there is therefore no basis for a cause of action to any other persons who were harmed by a breach of the obligations imposed on the shipper under the Rules. A third party would only have recourse under the law of tort under the applicable national law, although Berlingieri is of the view that Article 27(3) may be used by the third party in arguing his claim under tort. If the third party was in a contractual relationship with the carrier, such as a member of crew who was injured in the course of employment due to a breach of the obligations imposed on the shipper, the carrier who has had to pay compensation to its employee may be indemnified by the shipper on the basis of Article 27(3).

⁵¹⁶ *ibid*; Schelin (n 501) 153.

The rules on cargo preparation have obviously become more detailed and clearly expressed and encompass a wider range of activities compared to merely providing a description or labelling the goods. The word ‘must’ as used in the Rotterdam Rules indicate a sense of an obligation on the shipper rather than an option. However, it does allow the parties to contract out of this obligation. The obligation on the shipper is clearly evolving into something more than just about protecting the carrier’s interests in being indemnified in case it was sued by the transferee if the goods do not conform to its description in the bill of lading but goes further beyond to ensure safety of the cargo by requiring the shipper to participate in the preparation of the cargo for the voyage which will actually ensure a higher survival rate since the shipper is more familiar with the needs of the cargo it is sending. The safety approach has also evolved to deal with not only dangerous cargo but all cargo in general. This is a more preventive measure since it seeks to prevent physical damage to the cargo itself as well as other cargo, the ship and the crew on board the ship, not to mention other forms of damage such as delay.

The issue of damage in the form of delay is an interesting area, which seems to have taken first priority above indemnity for the carrier as well as even safety of the cargo for the shipper. This is because although the preventive measures imposed on the shipper to protect the cargo, obviously benefits the shipper, this would therefore result in the rules on shipper’s duties to be predominantly for the shipper’s own self-interest.

Self-interest as a basis arguably, cannot be sufficient to create a duty, much less a reason to expect the duty to be complied with as a rule of law.⁵¹⁷ If this provision results in the safety of the cargo for the benefit of the shipper, this is more of a positive overall side effect of the hopefully probable consequence of abiding by the rules. Why should it then be worded as a duty imposed against the shipper? After all, if it is solely for the shipper’s own benefit, should it not therefore be made voluntary as an agreement in the contract of carriage? There should be something more than the appearance of simply paternalism to explain the imposition of such duties which goes against the grain of the underlying balance of benefits and burdens which such international conventions usually

⁵¹⁷ One of the features of a rights theory is that persons are by nature solitary and independent. According to Thomas Hobbes, a rights theorist, this character gives them the right to pursue their own self-interest without having any duty imposed. This is in contrast to natural law theories which state that persons are subject to moral law which is basically about abiding by duties. See further Steven, Forde, *John Locke and the Natural Law and Natural Rights Tradition*, Natural Law, Natural Rights and American Constitutionalism, <http://www.nlnrac.org>).

seek to achieve. What could be the possible underlying purpose of or theory for creating these duties? In particular, does it affect the carrier and if so, how?

Delay as a form of damage therefore appears to be a more appealing theory to explain to basis for the introduction of such a robust system of preparation and checking of cargo, as well as the following rules imposed on the shipper. All these rules point towards a more efficient system of cargo handling which demands a higher level competency on the part of the shipper yet not only benefits the shipper alone but as a preparation stage for an almost flawless system of transporting goods which involve no mishaps, problems, setbacks which all sums up to one most costly thing which the carrier wishes to avoid, and that is delay.

How can proper preparation and delivery of goods ready for carriage prevent delay? In this age of modern shipping where containerisation dominates all if not most general cargo shipping, there is no possibility of discovering if the cargo has fallen off the position it was stowed and has shattered into pieces, until the container reaches its destination and opened by a disappointed receiver. Branch believes that 90 percent of major deep-sea trades are containerized and that the future is looking at long term containerization as the sole method of general cargo sea carriage.⁵¹⁸

There are however, still ways in which bad cargo preparation can be discovered before or during the journey and cause delay to the carrier. One example is the discovery by the crew of a container which is leaking liquid upon inspection before the next container is placed above or next to it, perhaps due the carton in which the liquid is contained having collapsed to insufficient dunnage. Furthermore, the container may not have been sealed properly by the shipper hence explaining the leakage. Upon this discovery, the loading process would have to be suspended while the leaking container is removed, which is not a simple matter of taking that one container off the vessel. Before loading can resume, damage control has to be done in order to clean up as well as assess the extent of the damage, for example if the liquid has dispersed and contaminated other cargo. Further the carrier has to communicate with the shipper or its agents in order to get further instruction. All of these consequences result in delay to the carrier which is translated into loss of turnaround time and ultimately profit maximisation, time being the most valuable thing in a carrier's business.

⁵¹⁸ Alan Branch, *Export Practice and Management* (5th edition, Thomson Learning 2006) 80.

Another more real example is illustrated by the case of *Transoceanica Societa Italiana Di Navigazione v H.S. Shipton & Sons*⁵¹⁹ where a defective cargo of barley which was loaded onto the vessel was of inferior quality and was mixed with sand, dust, stones and other rubbish. This had caused delay during the discharge as the pneumatic suction that was used to discharge the cargo became choked and caused the machinery to disfunction. The carrier suffered not only delay in this case but also had to pay out to the port authority the extra payment for the stevedores who demanded extra pay due to the condition of the cargo as well as extra costs due to the discharge being retarded.

As Schelin pointed out,⁵²⁰ Article 27 does not directly deal with delay in terms of being late in delivering the cargo to the carrier. There are already mechanisms in place within the system in practice to deal with delay. Where the cargo was meant for delivery to a liner ship, if it were late, the cargo would simply be left behind and literally miss the boat, although freight is still due from the shipper. The shipper would simply have to wait for the next available trip. A fixture under a voyage charter party would entail demurrage penalties while the risk of delay in a time charter fixture would fall on the charterer. However, where the bad cargo preparation does cause delay as envisaged above, Schelin is of the view that the carrier would not be denied compensation merely because the specific term “delay” was taken out of the text in Article 30 during the drafting process.⁵²¹

This is in contrast to the view held by Baughen, who doubts that the shipper could be liable for delay as a result of a failure in carrying out its obligations under the Rules since that kind of liability was omitted from Article 30. Such form of liability may instead be governed by national law.⁵²² There is some weight in this argument particularly since the provision was specifically removed during the negotiation process of the Rules, and where it is meant to be covered, there are specific places in the Rules where provision for delay is made in addition to “loss” or “damage”.⁵²³ Further as already mentioned, there are already built-in remedies for such contingencies in charterparties. Nevertheless, as pointed out above, time is a valuable commodity for the carrier and for general cargo where there is no charter party between the shipper and the

⁵¹⁹ [1923] 1 K.B. 31.

⁵²⁰ Schelin (n 501) 154.

⁵²¹ *ibid.*

⁵²² Simon Baughen, ‘Obligations of the shipper to the carrier’ (2008) 14 JIML 559.

⁵²³ *ibid* 562.

carrier, the theory that explains the existence of such an elaborate duty can only be supported by the argument that delay was meant to be penalised against the shipper.

Duty regarding provision of information and instructions

Out of 8 articles on shipper liability, there are three distinct articles in the Rotterdam Rules which deal with the shipper's obligation to provide information and instructions under Chapter 7. These are articles 28, 29 and 31. This seems to indicate the level of recognition given to the importance and growing emphasis on this aspect of the shipper's obligations in modern shipping. Article 28 of the Rotterdam Rules deals with requests for information and instructions required for proper handling and carriage of the goods which may be made by the carrier and shipper towards each other. This provision requires that such requests shall be responded to, subject to the availability of the information being in the requested party's possession or reasonable ability to provide, and that the information is also not reasonably available to the requesting party. The duty in this article focuses generally on the requirement to cooperate with the carrier when there is a request for information and instructions for the proper handling and carriage of the goods. The specific kind of information and instructions required is provided for separately in article 29 and 31.

Although article 29 is similar to article 28, it deals not only with specific information and instructions but also documents which the shipper is obliged to provide and it encompasses two things. First, are those information, instructions and documents which are reasonably necessary for the proper handling and carriage of the cargo, including precautions which the carrier or performing carrier need to be aware of and take.⁵²⁴ Secondly are those information, instructions and documents which are reasonably necessary for compliance by the carrier with rules, regulations or other requirements of public authorities for the carriage of the cargo to which they relate.⁵²⁵ The second requirement is however, subject to the carrier giving notice in a timely manner the information, instruction and document it requires from the shipper. This article also maintains whatever legal requirement there may be in existence as to specific obligations of the shipper to provide information, instructions and documents related to

⁵²⁴ Paragraph (1)(a) of Article 29.

⁵²⁵ Paragraph (1)(b) of Article 29.

the goods in connection with the carriage.⁵²⁶ Therefore information, instructions and documents for both aspects must be supplied by the shipper regardless of any request made by the carrier if the law requires the shipper to do so.

The third provision relating to the duty of the shipper under the Rotterdam Rules to provide information is in article 31. According to article 31 of the Rotterdam Rules, the shipper must supply to the carrier accurate information for the compilation of the contract particulars and the issuance of transport documents or electronic transport records, and this information must be provided in a timely manner. The purpose of the duty in this article is quite different from the duties in the preceding articles. The particulars identified in this article are, but not limited to; the name of the party to be identified as the shipper in the contract particulars, the name of the consignee, if there is any, and the name of the person to whose order the transport document or the electronic transport record is to be issued, if there is any. The shipper also has to provide contract particulars described in paragraph 1 of article 36 which are; a description of the goods, leading marks necessary for the identification of the goods, number of packages or pieces or the quantity of goods, and the weight of the goods, if this is available.

The important part of article 31 is the second paragraph which provides for a guarantee by the shipper. According to article 31 rule 2, the information in the first paragraph is deemed to be guaranteed by the shipper to be accurate at the time they are issued to the carrier and the shipper has to indemnify the carrier in case of loss or damage resulting from inaccuracy of the information. An example for this could be sanctions imposed for misdescription of containerised cargo exercised by certain ports, such as the US 24 Hours Advanced Manifest Rule.⁵²⁷

It appears from the existence of these articles that it is not sufficient on the part of the shipper to merely have the physical fitness of the cargo for the carriage; the cargo must also have documentary fitness enabling it clear passage all the way through to its final destination. The provision is also flexible in that it may be that the shipper may avoid liability if it can show that the information, instructions and documents which it failed to provide, are not reasonably necessary to be given to the carrier⁵²⁸ for neither the

⁵²⁶ Paragraph (2) of Article 29 reserves the duty of the shipper under any law, regulations or other requirements of public authorities to provide information, instructions and documents for the goods intended for carriage.

⁵²⁷ Simon Baughen, *Shipping Law* (Routledge-Cavendish 2009) 162.

⁵²⁸ Stefano Zunarelli, 'The Liability of the Shipper' [2002] LMCLQ 350, 353.

proper handling and carriage of the cargo, nor for compliance by the carrier with the rules on its carriage.

In the Hamburg Rules there is no specific provision on the general duty to provide information. There are however, provisions which name the particular circumstances in which there are duties on the shipper to provide information. The first is in relation to carriage of dangerous goods. If the nature of goods which the shipper send is dangerous, under article 13 the shipper has the duty to inform the carrier or the actual carrier at the time the goods are handed over, the dangerous character of the goods as well as the necessary precautions to be taken. If this was not done by the shipper and, the carrier, either contractual or actual does not have knowledge about the dangerous character of the goods, two consequences follow. Firstly, the shipper is liable to both for the losses resulting⁵²⁹ from such shipment and secondly, the carriers may unload, destroy or render innocuous, whatever the circumstances require for safety to be restored, without being liable for compensation to the shipper.⁵³⁰ However, in contrast if knowledge of the dangerous character is known, such measures may not be taken by anyone who has during the carriage taken the goods under his charge with such knowledge.⁵³¹

The duty of the shipper under the Hague and Hague-Visby Rules regarding the provision of information is not expressed directly, just as the duty to prepare cargo ready for carriage above. The duty of the shipper to provide information may be extracted from the provision on the obligation of the carrier under article III rule 3(a). This duty requires the carrier to issue a bill of lading to the shipper containing certain information, but the manner in which that information is obtained implies the obligation there of the shipper to provide to the carrier, in writing prior to the loading, information regarding certain things. These include the leading marks necessary for the identification of the goods, which should be stamped or shown clearly on the goods when uncovered, or remain legible on the coverings or cases in which the goods are contained throughout the journey. Secondly, the shipper under article III Rule 3(b) has to furnish in writing either the number of packages or pieces, or the quantity, or weight of the goods depending on how the shipper has packed them or had them packed.

⁵²⁹ Hamburg Rules, art 13(2)(a).

⁵³⁰ *ibid* art 13(2)(b).

⁵³¹ *ibid* art 13(3).

The provision which then makes the shipper liable for failing to fulfil the obligations mentioned above is article III rule 5. This article provides that the shipper is deemed to have guaranteed at the time of shipment the accuracy of the information on the above which he has furnished and requires the shipper to indemnify the carrier where the information has proved inaccurate and thereby causing loss, damages and expenses to the carrier.

As discussed in the previous section on the duty of the shipper to prepare the cargo ready for carriage, there is a rule in the SOLAS convention which requires verification of the gross mass of packed containers. The shipper has a mandatory duty to submit information on the verified weight to the master, prior to loading.⁵³² Further details on the provision of the SOLAS convention on this matter is discussed in the section on non-carriage of goods by sea conventions below.

Duty regarding dangerous goods

The meaning of dangerous goods is not defined in any of the carriage of goods Conventions. A list of goods of a certain nature is included in the Hague and Hague-Visby Rules under t of goods which have a dangerous nature. Article 32 of the Rotterdam Rules deals specifically with goods which are, or reasonably likely to become, dangerous to persons, property or the environment by their nature or character. The shipper has two obligations under this article. The first is the duty to inform the carrier of the dangerous nature or character of the goods in a timely manner before delivering the goods to the carrier or performing party. Failure to do this will result in the shipper being liable to the carrier for any damage or loss resulting from such failure to inform. However, if the carrier or performing party has knowledge of the dangerous nature or character of the goods, the shipper is not liable. Secondly is the duty to mark or label the goods as dangerous in accordance with any rules or regulations which may be required at any stage of the carriage, and not merely at the port of discharge. Again, if any loss or damage ensues as a result of failure to perform this obligation, the shipper has to be liable to the carrier. However, ‘danger’ is not specifically described or defined, and so may include non-physical danger such as liability incurred as a result of breaching laws on carriage of goods which creates a threat to the environment. It has been argued⁵³³ however, that article 32 does not include liability for inability to unload the goods at the port of

⁵³² SOLAS Regulation VI/2 as amended by resolution MSC.380(94).

⁵³³ *ibid* 162.

discharge due to non-fulfilment of certain legal requirements. This would be covered by the general provision in article 29.

Under the Hamburg Rules Article 13 provides for special rules on dangerous goods and there are a few duties imposed on the shipper. The first duty in paragraph 1 of this article is the duty to mark or label dangerous goods which indicates its danger in a manner which is suitable. Secondly in paragraph 2 the shipper has the duty to inform the carrier or the actual carrier at the time the goods are handed over, the dangerous character of the goods as well as the necessary precautions to be taken. If this was not done by the shipper and the carrier either contractual or actual do not have knowledge about the dangerous character of the goods, the shipper is liable to both for the losses resulting⁵³⁴ from such shipment and the carriers may unload, destroy or render innocuous, whatever the circumstances require for safety to be restored, without being liable for compensation to the shipper.⁵³⁵ However, in contrast if knowledge of the dangerous character is known, such measures may not be taken by anyone who has during the carriage taken the goods under his charge with such knowledge.⁵³⁶ Finally, notwithstanding any knowledge about the dangerous character of the goods or precautions to be taken or any other situation where sub paragraph (b) of article 13(2) does not apply, if the goods become an actual danger to life or property, they may still be unloaded, destroyed or rendered innocuous, whichever one may be necessary, without the carrier being liable for compensation except to general average contributions or the carrier's liability for cargo under article 5.

In this article there is no mention of the mental element required. It may be presumed therefore that the liability here should be strict due to the nature of the risk and potential damage caused to the carrier and third parties. This would be consistent with the position taken with the previous conventions.

Under the Hague and Hague-Visby Rules article IV rule 6 provides for the duty of the shipper to not ship dangerous goods without first informing the carrier and obtaining the latter's consent. If the shipper ships goods which are inflammable, explosive or dangerous in nature without the informed consent of the carrier, his master or agent as to their nature and character, the carrier has the right to land, destroy or render innocuous

⁵³⁴ Hamburg Rules art 13(2)(a).

⁵³⁵ *ibid* art 13(2)(b).

⁵³⁶ *ibid* art 13(3).

those goods prior to actual discharge without compensating the shipper. If as a result of this remedial action the carrier incurs expenses or suffers damage, the shipper shall further be liable to compensate the carrier for these losses whether they were directly or indirectly caused by the shipment. Even if the shipper did inform the carrier and obtained his consent to carry the dangerous goods, the carrier may still retain the right to take those remedial actions if the dangerous goods then posed a danger to the ship and cargo without incurring any liability to the carrier except to general average, however the shipper would not be required to compensate the carrier for any consequent expenses or loss incurred.

Judging by the type of cases more often brought about in the area of shipper liability, article IV rule 6 appears to be the provision which carriers have relied on the most in order to bring a cause of action against shippers. The cause of action brought about by the carrier may be in the form of a claim against the shipper for causing physical damage to the ship, or it may be in the form of an indemnity to the carrier for claims brought against it by others. This may include innocent cargo owners who claim for damage to or loss of their cargo, personal injury claims by the crew or dependants in the case of death of the crew, state authorities which suffered damage to the environment due to pollution or waste, or third persons who suffer loss caused by delay or detention of the vessel due to it carrying the dangerous cargo.⁵³⁷

An example is the case of *The Atlantic Duchess*⁵³⁸ where the charterer had contracted with the shipowner under a charterparty which provided for the loading of, among other types of oil, crude oil. The cargo was loaded onto the ship, carried to the discharge port where it was delivered, and then underwent the ballasting process. Unfortunately during the ballasting of the tanks, an explosion and fire occurred killing several crew members, injuring some others and damaging the ship and surrounding property.

The shipowner alleged that the charterer had breached the contract by loading a cargo not within the range which was agreed under the charterparty. One of the reasons for the alleged breach was that the cargo was a completely different type of cargo than those which were allowed to be carried under the charterparty, since what was loaded was, as described in the bill of lading by the charterer, butanized crude oil; a mixture of crude oil and butane. Butanized crude oil was not specifically described in the charterparty,

⁵³⁷ Maritime Risk International, 'Risks in Shipping Dangerous Cargo' (1 Sept 2003).

⁵³⁸ *Atlantic Oil Carriers, Ltd. v British Petroleum Company, Ltd.* [1957] 2 Lloyd's Rep 55.

although crude oil was. The other argument for a breach of contract was that butanized crude oil was more dangerous than crude oil alone or any of the other type of cargo allowed under the charterparty. Therefore the master ought to have been warned about the extra precautions to be taken. This would be a breach of a term implied by common law, or of an implied warranty that it is safe to carry and deliver the cargo, or a breach of article IV rule 6 of the Hague Rules which the shipowner argued was incorporated into the charterparty by way of a clause in the charterparty. In essence, the type of cargo loaded was arguably different from what was agreed, and this therefore affected the level of knowledge about the risk of danger the cargo presented.

The other issue in this case was whether the nature of the cargo of butanized crude oil fell within the meaning of “inflammable, explosive and dangerous” as required by Article IV rule 6 of the Hague Rules.⁵³⁹ The court however did not decide on this since the argument that the Hague Rules applied was rejected.

The shipper charterer on the other hand defended the allegations by arguing that the cargo shipped was one of those allowed under the charterparty or that the constitution of the cargo at the end of the day is a product which composed of a combination of the categories of cargo which were technically allowed under the charterparty on a proper construction. Furthermore it was a customarily accepted cargo by shipowners albeit normally simply named as crude oil. Also the defendant contended that there was negligence by the crew in igniting the inflammable mixture of gas and air produced during ballasting and which collected due to negligence again in not closing the ullage plug holes, by their act of smoking and using non-flame-proof torches.

Pearson MJ held that there was no breach of contract by the charterer since the shipowners failed to prove that the cargo shipped fell outside the range of authorised cargo as described in the charterparty, nor did they successfully prove that the butanized crude oil presented a special risk as compared to crude oil for which the master should have been informed, because they could not prove that the vapours from butanized crude oil were more persistent than that of crude oil. The learned judge took the view that butanized crude oil was basically crude oil since he held that otherwise it would fall outside the contractually authorized cargo altogether, as it could not possibly pass as any of the other types of oil described in the charterparty. More importantly, it presented the

⁵³⁹ *Atlantic Oil Carriers, Ltd. v British Petroleum Company, Ltd.* [1957] 2 Lloyd's Rep 55, 57 para 2.

same risk as crude oil and that the additional butane did not cause the explosion. Accordingly the charterer did not breach the implied term as regards dangerous goods.

As regards the clause which purportedly incorporates article IV rule 6 of the Hague Rules into the charterparty, this was held to be merely a clause which identifies the scope of the respective charterparty and bill of lading terms, and therefore article IV rule 6 does not apply to the contract of carriage which as between a shipowner and charterer, is to be found only in the charterparty, the bill of lading acting only as a receipt. In any case, the judge held that the effect would be equivalent regardless of that since the obligation regarding dangerous goods which arose under both article IV rule 6 and under the common law are substantially the same.

There are a few important principles that could be derived from this case in relation to shipper liability under article IV rule 6 of the Hague Rules. The first is that although the basic principle is that the shipper has a duty to not ship dangerous goods without first informing the carrier of the danger and obtaining consent, the shipper is not obliged to inform the carrier if the carrier knew or should have known about the danger. This obligation therefore only arises to the extent that the danger from the particular cargo is not common knowledge. The extension to this principle from this case seems to be that where the carrier is unaware of the danger due to the extra special risk created by that cargo, which would not normally arise for a usual cargo of that kind, for the shipper to be liable, the cargo has to actually be different in kind. Whether there is an extra special risk which requires special precautions to be given by the shipper appears to be premised on the basis of whether that cargo is effectively of a different kind than a regular cargo of that type. It appears therefore that the underlying theory at work revolves around the issue of the risk involved. If the cargo is of the same kind, the risk is the same, and there is no liability on the shipper. However if the cargo is of a different kind, the risk is increased or is different, and so there may be liability depending on the circumstances.

In the case of *Brass v Maitland* [1856] 6 E & B 470 the shipper shipped a consignment of chloride of lime or commonly known as bleaching powder on board a general ship owned by the plaintiffs. This is a substance which is corrosive and could potentially damage other cargo if it leaks and comes into contact with other cargo. The nature of the cargo was not known to the plaintiff shipowners and they claimed from the defendant shippers who defended themselves by arguing that they had received the cargo from a

third party in a ready-packed condition. Therefore the shippers do not have knowledge that the cargo had insufficient packing, nor a way to find out whether packing was sufficient. In other words, the shippers pleaded no negligence.

This defence was met with disapproval by the majority which held that where the owners have undertaken to receive, carry and deliver goods safely, there is a reciprocal duty on the shipper to undertake to not deliver packages of goods the dangerous nature of which those working on behalf of the shipowners may not reasonably be able to discover on inspection of the goods, unless the shippers had prior to delivery expressly informed the shipowner the nature of such goods. If the shipper did not give such notice due to lack of knowledge on its part as to the dangerous nature of the cargo, the loss that ensues must be borne by the shipper. The loss has to be borne by either the shipowner or the shipper and since this loss resulted from the lack of notice given to the shipowners which they are entitled to receive and arose from the ignorance of the shipper, it should be the shipper who bears the brunt.

However there is an important dissenting view given by Crompton J which deals with the knowledge of the shipper as well as its negligence. Crompton J doubted that liability can attach to the shipper before there is knowledge or means of obtaining knowledge of the dangerous nature of the cargo when it was shipped, or it can be proven that the shipper was negligent in not informing the shipowner the dangerous nature of the cargo when he had the means of finding out and should have informed the shipowner.⁵⁴⁰ Where no such negligence can be proven, Crompton J was of the view that there should not be liability on the shipper.⁵⁴¹

Even if the degree of risk is increased, that alone may not be enough to trigger liability, if the type of cargo is still considered to be the same. Only a different kind of cargo would produce a different kind of risk sufficient to require special notice to be given by the shipper. In the case of *The Athanasia Comminos*⁵⁴², some cargo of coal were shipped by the seller f.o.b. two time-chartered ships on which the shipping space for consecutive voyages were contracted for by the buyer, C.E.G.B. with the charterer. Notwithstanding, the seller was named as shippers on the bills of lading whereas the buyer was named as consignees.

⁵⁴⁰ *Brass v Maitland* (1856) E & B 470, 492.

⁵⁴¹ *ibid* 493.

⁵⁴² *The Athanasia Comminos and Georges Chr. Lemos* [1990] 1 Lloyd's Rep 277.

The casualties occurred on voyages subsequent to uneventful ones, after the cargo was loaded and the ship was heading for her destination. Some crew members were injured in the first incident but in the second incident on the other ship, damage was restricted only to the ship. The first important issue relevant to this thesis is whether the shipper had a contractual relationship with the plaintiff shipowner and therefore may incur contractual liability, in particular regarding the suitability of the cargo for safe carriage.

Mustill MJ held that as shippers of the goods and by being named as such in the bill of lading, their contractual liability under it was quite clear, despite the consignee being the contractual party to the contract of affreightment. The only exception is if the shippers were named as such in the bill of lading without their consent. The buyer consignee's contractual relationship on the other hand, was governed by the voyage charterparty they entered into with the time charterers, and the bill of lading therefore only acts as a receipt in their hands.

Another important issue discussed in this case is whether the consignee takes on any of the liability for the dangerous goods by way of an implied contract when the consignee presents the bill of lading for collection of the goods. The learned judge by applying the case of *Brandt v Liverpool*⁵⁴³ agreed that an implied contract may be found but that not all of the obligations thereunder are taken on by the consignee, in particular those which do not concern carriage, delivery and payment. A warranty for the fitness of the goods for carriage cannot be extended to the consignee since he has nothing to do with the goods when they were shipped.

Further, according to Mustill MJ, although the transfer of the bill of lading under the requirements of section 1 of the Bills of Lading Act 1855 may transfer away some of the shipper's contractual obligations, the Act was not intended to divest the shipper from responsibility for the loss resulting from the act of shipping, in particular dangerous cargo.

Although article IV rule 3 provides in general that the shipper is only liable for loss or damage sustained by the carrier or the ship which arose or resulted from the shipper's act, fault or neglect or that of the shipper's agents or servants, article IV rule 6 has been held by the House of Lords case of *Effort Shipping Co Ltd v Linden*

⁵⁴³ *Brandt v. Liverpool Brazil and River Plate Navigation Co.* (1923) 17 L.L.Rep. 142; [1924] 1 K.B. 575.

*Management SA*⁵⁴⁴ to not be subject to the rule in article IV rule 3. This is due to the fact that the liability in article IV rule 6 is considered absolute without proof of fault. There is no justification for this to be found in the *travaux préparatoires* of the Hague Rules but Lord Steyn gathered this to be the case since the prevalent view at the time the Hague Rules were drafted was largely reflective of the decision in *Brass v Maitland*,⁵⁴⁵ where the term implied by law to not ship dangerous goods was held to be absolute. This probably had been adopted by countries in the then British Empire as well as the United States⁵⁴⁶ before the Hague Rules was passed. Both countries were major maritime powers with trading countries which made up much of the maritime trade. The absolute obligation of the shipper to not ship dangerous goods was probably therefore the dominant theory at the time the Hague Rules were adopted, and if a contrary view was to be taken, it should have been clearly set out in the rules themselves.⁵⁴⁷ Lord Steyn's view is that article IV rule 6 is a free-standing provision whereas Lord Cooke, who viewed that all rules should be integrated preferred to view article IV rule 6 as taking priority over article IV rule 3.⁵⁴⁸ By being subject to the fault requirement in article IV rule 3, the strictness of the rule in article IV rule 6 would be diluted. The mental element required of the shipper for liability for shipping dangerous goods without the carrier's consent due to this ruling of the court is therefore dispensed with.

Reference may be found in the interpretation of an equivalent provision to article 4 rule 6 in the case of *Chem One Ltd v MV Rickmers Genoa*⁵⁴⁹. In this case a collision between the ship *Rickmers Genoa* which was carrying a cargo of 600 tons of a magnesium-based desulphurisation reagent known as Super-Sul Mg-89 from China to the United States and the ship *Sun Cross* resulted in a breach of the former's hull. When seawater flooded the holds of the *Rickmers Genoa* and came into contact with the Super-Sul Mg-89, it caused a reaction which produced hydrogen which accumulated and got ignited whereby an explosion occurred destroying the ship and killing one crew member. The shipowner and charterer of the *Rickmers Genoa* claimed against the owner of Super-Sul MG-89 which moved for dismissal of the claim and won at the US District Court. The shipowner and charterer appealed to the US Court of Appeals for the Second Circuit which affirmed the decision. According to the Court of Appeal the shipper was not strictly liable under

⁵⁴⁴ [1998] 2 WLR 206.

⁵⁴⁵ (n 540).

⁵⁴⁶ *Pierce v Winsor*.

⁵⁴⁷ *Effort Shipping Co Ltd v Linden Management SA* [1998] 2 WLR 206, at 221-223.

⁵⁴⁸ International Trade Law 267.

⁵⁴⁹ (2012) 502 Fed Appx 66; 2012 AMC 2986 (2d Cir).

section 4(6) US Carriage of Goods by Sea Act.⁵⁵⁰ The shipper was required to inform the carrier regarding the dangerous nature of the cargo but the manner in which this is conveyed does not have to be in any specific way.

In the case of *DG Harmony*,⁵⁵¹ the defendant shipper PPG manufactured and shipped a cargo of calcium hypochlorite hydrated (cal-hypo) contained in drums carried in containers aboard the vessel *DG Harmony*. The vessel caught fire at sea and became a constructive total loss. It was allegedly the cargo of cal-hypo decomposed, self-heated, exploded and started the fire. Claims were made by the plaintiff shipowner and cargo interests that the shippers were strictly liable under section 4(6) of the Carriage of Goods by Sea Act 46 USC (hereafter US COGSA). The provision of this section mirrors article 4 rule 6 of the Hague Rules as the US COGSA is an enactment⁵⁵² of the latter and so provides insight to its interpretation.

In *Senator Linie GMBH* (2d Cir. 2002)⁵⁵³ it was held by the Second Circuit that section 4(6) US COGSA⁵⁵⁴ created a strict liability for the shipper for direct and indirect damage that is triggered by the shipment of dangerous goods the nature of which both the carrier and shipper do not have actual or constructive knowledge before shipment. The court's reasoning was that:

“.....a strict-liability construction of § 1304(6) will foster fairness and efficiency in the dealings of commercial maritime actors. In contrast to a carrier, which typically is in the position of taking aboard its vessel a large quantity and variety of cargoes, a shipper can be expected to have greater access to and familiarity with goods and their manufacturers before those goods are placed in maritime commerce. If an unwitting party must suffer, it should be the one that is in a better position to ascertain ahead of time the dangerous nature of the shipped goods. That party in many cases will be the shipper.”⁵⁵⁵

The District Court in *DG Harmony*⁵⁵⁶ held that the former case applied even though the vessel interests consented to carrying the cargo because the consent was given without full knowledge of the dangers and risks involved. There was a lack of

⁵⁵⁰ Which is the equivalent to article 4 rule 6 of the Hague Rules.

⁵⁵¹ *In re M/V DG Harmony* 394 F. Supp. 2d 649, *2005 U.S. Dist.

⁵⁵² Title 46 United States Code §§ 1300-1315.

⁵⁵³ *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145 (2d Cir. 2002).

⁵⁵⁴ 46 U.S.C. § 1304(6).

⁵⁵⁵ *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145 (2d Cir. 2002) 169.

⁵⁵⁶ *In re M/V DG Harmony* 394 F. Supp. 2d 649, 2005 U.S. Dist. 672.

information and lack of proper warning. The basis of liability in the latter case were both from theories of negligent failure to warn and strict liability. Chin D.J. stated that the defendant shipper has an advantage over the carrier in their ability make enquiries as to the actual nature of the cargo well before it was shipped especially since they were not only the shipper but also the manufacturer of the cargo. This also gives a stronger reason to hold the shipper strictly liable.⁵⁵⁷

It is interesting to note that in this case, the court provided a safety net where it held that even if the finding of strict liability failed, the defendant shipper could be still be liable on the basis of a failure to warn and of negligence, by fault being established on the part of the shipper. The court however, did not go further to discuss the sense of fault being used here except that it conforms to the concept used in negligence for product liability. The judge did also refer to 46 U.S.C. § 1304(3) which is the US enactment of article IV rule 3 of the Hague and Hague-Visby Rules. This provision requires an act, fault or neglect on the part of the shipper, his servants or agents before the shipper can be liable to the carrier or the ship for any loss or damage. This case is an example where fault in the convention is simply equated with the tort of negligence where the question then accordingly revolves around issues of foreseeability of damage, the failure to take reasonable care and causation.

That decision seems to be discussing the failure to warn and negligence as two separate liabilities as claimed by the plaintiffs. It is not clear however, how the finding of failure to warn was made and whether it was on the basis of negligence, or if negligence was a separate liability, for which act or omission. On appeal this is a point echoed by the appeal court as it stated that although the defendant was found solely liable for the loss of the vessel on the basis of strict liability and negligent failure to warn, it was unclear whether the latter judgement was on the basis of general negligence. Although there were two separate claims advanced by the plaintiffs being the failure to warn and negligence, the district court had relied on one single test to determine both claims.⁵⁵⁸ Because of the lack of clarity in the district court's reasoning of the finding of negligence, the appeal court allowed the appeal made by the defendant shipper on its liability on the basis of general negligence.

⁵⁵⁷ *ibid* 671.

⁵⁵⁸ *In re M/V DG Harmony* 518 F.3d 106, 2008 U.S. App. 114.

This case demonstrates how the determination of the mental element is an important feature of shipper liability. It is not enough to generally refer to fault or negligence as being required for there to be liability without actually going into the discussion of what is required for there to be such fault or negligence. The appeal court also reversed the finding of strict liability for the defendant shipper as although the ship-owning interest did not have knowledge of the precise characteristics of the cargo, they knew that it was vulnerable to heat which could cause combustion. They had allowed it to be exposed to general conditions which includes heat and so could not therefore rely on strict liability but only negligence.⁵⁵⁹ In coming to this decision, they had relied on the case of *Contship Containerlines, Ltd. v. PPG Indus., Inc.*⁵⁶⁰ where despite general awareness of a cargo's potential danger which requires proper handling, the carrier exposed the cargo to general conditions which could trigger combustion. This defeated a claim on the basis of strict liability for loss or damage caused by dangerous goods, even though the carrier did not have knowledge of the precise characteristics of the cargo.

In the case of *The Kapitan Sakharov*⁵⁶¹ a feeder vessel carried containers belonging mostly to DSR and CYL from Khor Fakkan to other ports in the Gulf. A container carried on deck exploded and caused a fire which spread below deck. The vessel sank and two seamen were killed in this incident. The plaintiff shipowner claimed against both shippers while the shippers counterclaimed against the shipowner as well as claimed against each other. The reason was because both the shippers had shipped dangerous cargo and each was trying to blame the other for the cause of the explosion and subsequent fire. Apart from suffering its own losses, the plaintiff was also trying to get an indemnity from DSR and CYL for claims made against it by the shippers, the dependants of the deceased crew and the Iranian authorities for pollution. Likewise DSR and CYL had their own losses but needed indemnification for claims by other cargo and container owners.

It was held by Clarke J at first instance that DSR's container of undeclared dangerous cargo was responsible for the initial explosion. This container was stowed on deck which results in the ship becoming unseaworthy. This however, was held to not be due to the lack of due diligence by the plaintiff shipowner. The explosion and resulting fire were

⁵⁵⁹ *ibid* 116.

⁵⁶⁰ *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, 442 F.3d 74, 2006 U.S. App.

⁵⁶¹ *Northern Shipping Co. v Deutsche Seereederei G.m.b.H. and others (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep 255.

the causes of damage to part of the ship and cargo and instrumental in bringing about the sinking of the ship and loss of cargo.

However, something happened in between the initial explosion and subsequent fire, and the sinking of the ship and loss of cargo. The plaintiff shipowner was held to have not exercised due diligence in stowing CYL's container below deck. CYL's container contained isopentane which required proper ventilation having a low boiling point of 28 degrees celcius. It was also highly flammable. The initial explosion had cracked open the hatch of the hold in which the isopentane were stowed. The fire from above then spread down into the hold. The temperature in the Gulf would cause the isopentane to be under pressure and escape as vapours. The lack of mechaical ventilation down there increased the risk that the vapours would combust and catch fire.

Duty to indemnify for guarantees made by shipper

According to article 31 of the Rotterdam Rules, the shipper must supply to the carrier accurate information for the compilation of the contract particulars and the issuance of transport documents or electronic transport records, and this information must be provided in a timely manner. The particulars identified in this article are, but not limited to; the name of the party to be identified as the shipper in the contract particulars, the name of the consignee, if there is any, and the name of the person to whose order the transport document or the electronic transport record is to be issued, if there is any. The shipper also has to provide contract particulars described in paragraph 1 of article 36 which are; a description of the goods, leading marks necessary for the identification of the goods, number of packages or pieces or the quantity of goods, and the weight of the goods, if this is available. This information is deemed to be guaranteed by the shipper to be accurate at the time they are issued to the carrier and the shipper has to indemnify the carrier in case of loss or damage resulting from inaccuracy of the information, for example sanctions imposed for misdescription of containerised cargo exercised by certain ports, such as the US 24 Hours Advanced Manifest Rule.⁵⁶²

⁵⁶² Simon Baughen, *Shipping Law* (4th edn, Routledge-Cavendish 2009), 162. This rule requires carriers to submit a cargo declaration electronically to the U.S. Customs and Border Protection (CBP) minimum 24 hours before departing on a vessel destined for or transiting at ports in the United States. This will allow them to assess container cargo contents and decide whether to authorize entry into the United States. The carrier will normally ask for this to be submitted 24 hours before loading in order to determine whether loading should be allowed or otherwise. If the shipper does not provide the information required, the cargo may not be loaded and this may cause disruption to the flow of cargo as well as delay. The carrier can also be fined by the CBP for failure to submit information on the cargo contents. For further reading on the implementation of the rule, see Khalid Bichou, Michael G.H. Bell, and Andrew Evans, *Risk Management*

Under the Hamburg Rules the provision for this shipper liability is article 17 which deals with guarantees made by the shipper. Under article 17(1) the shipper is deemed to have guaranteed the accuracy of the general nature of the goods, their marks, number, weight and quantity which he has supplied to the carrier to be inserted in the bill of lading. If these particulars prove to be incorrect the shipper must indemnify the carrier for the resulting losses, and remains liable to the carrier even though the bill of lading has been transferred. If the shipper provides a letter of guarantee or agreement wherein the shipper undertakes to indemnify for the loss resulting from the carrier issuing a bill of lading with inaccurate particulars without reservation as to the particulars, this letter of guarantee or agreement is void and of no effect against a third party or consignee who took the bill of lading transfer.⁵⁶³ It is valid though against the shipper unless the carrier used it to defraud a third party or consignee who would be relying on the description of the goods in the bill of lading by the carrier omitting the reservation mentioned above. The carrier would also not be able to claim indemnity from the shipper if the reservation is regarding the particulars furnished by the shipper to be inserted in the bill of lading.⁵⁶⁴

Again here there is no mention of the mental element required, so arguably the liability should be strict due the severity of the consequences should the shipper fail in his duty as well as the way in which it is worded.

Under the Hague and Hague-Visby Rules, article III Rule 3(a) requires the carrier to issue a bill of lading to the shipper containing certain information, the manner in which that information is obtained implies the obligation there of the shipper to provide to the carrier, in writing prior to the loading, information regarding certain things. These include the leading marks necessary for the identification of the goods, which should be stamped or shown clearly on the goods when uncovered, or remain legible on the coverings or cases in which the goods are contained throughout the journey. Secondly, the shipper under article III Rule 3(b) has to furnish in writing either the number of packages or pieces, or the quantity, or weight of the goods depending on how the shipper has packed them or had them packed.

on Port Operations, Logistics and Supply Chain Security (Informa Law from Routledge 2014), Chapter 14- Managing Security Through Quality Management: A Case Study to Implement the 24-Hour Rule in a Liner Shipping Company.

⁵⁶³ Article 17(2) of the Hamburg Rules.

⁵⁶⁴ Hamburg Rules, art 17(3).

The provision which then makes the shipper liable for failing to fulfil the obligations mentioned above is article III rule 5. This article provides that the shipper is deemed to have guaranteed at the time of shipment the accuracy of the information on the above which he has furnished and requires the shipper to indemnify the carrier where the information has proved inaccurate and thereby causing loss, damages and expenses to the carrier.

The case of *DG Harmony*⁵⁶⁵ concerned a ship which caught fire due to a shipment of calcium hypochlorite hydrated (cal-hypo) and became a constructive total loss. The carrier defendants had already settled outside the court with the plaintiff vessel owners and other cargo interests before the trial and did not become a party to the trial. When the decision from the trial held the defendant shipper of the dangerous cargo 100% liable for the loss and the carrier defendants 0% liable, the latter tried to claim indemnity from the shipper for the settlement it had paid. It was held by the that the carrier defendant could not do so as they had decided to settle instead of taking the risk of going to trial and being liable for more. Here there was a contractual obligation by the shipper to indemnify the carrier for losses but it could not be enforced since the indemnity claims had been dismissed in *Harmony II*.⁵⁶⁶ The defendants were trying to reinstate their indemnity claims but did not have any basis to do so. By allowing such a claim it would make the defendant shipper more than 100% liable because it had already been found 100% liable in the trial. There was no discussion regarding the fault of the shipper as to whether the contractual obligation imposed a strict liability to indemnify the carrier. Rather the court focused on the sensibility or otherwise of allowing such a claim.

Liability of the shipper for other persons

Under the Rotterdam Rules article 34 makes the shipper liable even if the breach of any of its obligations under the convention's provisions was caused by acts or omissions of any other persons including his employees, agents or subcontractors to which it has delegated the performance of its obligations; but the shipper is not liable if its obligations were delegated to the carrier or performing party. The Rotterdam Rules

⁵⁶⁵ US District Court (SDNY) 2009.

⁵⁶⁶ In the prior decision of the *Harmony II*, the District Court had dismissed the carrier's claims for indemnity against the shipper. The other cargo interests had pursued their claims against the shipper of cal-hypo but the carrier did not become a party to this trial. The carrier in this case was trying to reinstate their indemnity claims against the shipper but could not show any basis for it.

has a provision for vicarious liability separate from the shipper's own liability unlike the Hague, Hague-Visby and Hamburg Rules.

Article 12 of the Hamburg Rules talks about the loss sustained by the carrier, actual carrier or damage to the ship for which the shipper will not be liable for unless the loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Even the shipper's servant or agent's liability for the loss or damage is dependent on there being fault or neglect on their part. This liability therefore clearly requires fault or negligence as the mental element in establishing liability under the Hamburg Rules but only for the liability of each respective party's own acts or omissions.

Article IV rule 3 of the Hague and Hague-Visby Rules speaks of the general provision for in what circumstances the shipper may be liable to the carrier or the ship. The shipper is only liable for the loss or damage caused to the carrier or the ship due to the act, fault or neglect of the shipper, his servants or agents. This is similar to article 12 of the Hamburg Rules except that it also covers acts of the shipper, his servants or agents.

Although the liability of the shipper's servants or agents depend on fault, the vicarious liability of the shipper for the persons under the shipper's control seems to be strict since it does not depend on the fault of the shipper but simply on the basis that there is a relationship of master and servant.

Nature of liability

Generally, all the liabilities incurred by the shipper under chapter 7 of the Rotterdam Rules are fault-based except for loss or damage caused by the shipper as a result of a breach of its obligations under article 31 (2) and article 32. For all other liabilities, article 30 relieves the shipper if the loss or damage was not caused by the shipper's fault or the fault of persons mentioned in article 34 to whom the shipper has delegated its obligations under the convention.⁵⁶⁷ So if the shipper fails to prepare its goods ready for carriage as required by the convention, it will be liable if the loss or damage sustained by the carrier as a result of a breach of its obligation to deliver the goods ready for carriage, was caused by the fault of the shipper or persons to whom it has entrusted the task of preparing the goods for carriage. For example, the shipper more often than not would engage a freight forwarder who would arrange everything from packing, labelling and loading to stowing the goods. If the freight forwarder improperly

⁵⁶⁷ Art 30 Para (2).

packed the goods causing them to leak, the shipper bears the burden of any loss which may be caused to the carrier as a result of this.

Similarly, a failure of the shipper to supply the necessary documents, information and instructions which causes loss or damage to the carrier, will result in the shipper being liable for the loss or damage sustained by the carrier if such loss or damage was caused by the fault of the shipper or persons it entrusted to prepare and provide all the necessary information, instruction and documents. For example, if the goods required certain health certificates before it can be landed at a particular port, the shipper would be liable even if it had delegated the task of procuring and supplying to the carrier the appropriate health certificates to an agent, if the agent had been negligent in doing so.

However, for the shipper's obligations in article 31 to supply information for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, liability of the shipper is strict, not only because it is excluded from the general fault-based liability in article 30, but perhaps also because the provision in article 31 employs the phrase 'the shipper *shall*⁵⁶⁸ indemnify the carrier against loss or damage'.⁵⁶⁹ The shipper is absolutely liable if the information it provided to the carrier turned out to be inaccurate and such inaccuracy causes the carrier to suffer loss or damage. For example if there was a miscalculation of the number of packages in the shipment, or if the goods were misdescribed, the shipper would be liable even though it had communicated misinformation which any other reasonable person would also have done with the data available to him. The shipper would equally be liable if the inaccuracy of the information provided to the carrier was through the fault of other persons to whom it has delegated the task of preparing and providing the information for the compilation of the contract particulars.⁵⁷⁰ For a failure of this obligation, whose nature and standard is in the form of a guarantee by the shipper, the shape of liability of the shipper takes the form of indemnification rather than payment of damages for losses incurred by the carrier as a result of being provided with inaccurate information.

The same basis of liability applies where the shipper breaches its obligation to the shipper regarding dangerous goods as provided by article 32. If the shipper fails to

⁵⁶⁸ Emphasis added.

⁵⁶⁹ Jose Vicente Guzman, 'The Rotterdam Rules – Shipper's Obligations and Liability' (2010) www.comitemaritime.org/Uploads/Rotterdam Rules/Rotterdam Rules - Shipper's Obligations and Liability – CMI, 2010 – Jose Vicente Guzman.pdf, 9.

⁵⁷⁰ Information which could be misstated includes the description of the goods and its general nature, its quantity or number of pieces, weight, or leading marks necessary for identification.

inform the carrier in a timely manner before the goods are delivered for carriage that what the carrier will be carrying is something which has the potential of becoming dangerous to persons, property or the environment, the shipper is strictly liable to the carrier regardless of any fault on the part of the shipper, if the failure to inform causes the carrier to sustain any loss or damage. For example, if the shipper ships a container of chemicals whose dangerous nature if informed would have allowed the carrier's crew to be aware of the hazards should the chemical come into contact with water, the shipper would be absolutely liable if the crew was exposed to noxious gases as a result of hosing down the box thinking that it was on fire when smoke starts seeping out of the container seals, even though the shipper had exercised every care in ensuring that the carrier is informed of the nature of the goods.

Similarly, if the shipper fails to label or mark dangerous goods in accordance with the law, regulations or other requirements of public authorities, the shipper is strictly liable to the carrier for any loss or damage the latter sustains as a result of the omission to label the dangerous goods. For example, if the shipper entrusted an agent to prepare the goods for carriage, the shipper would still be absolutely liable if the agent omitted to or made a mistake in placing the label of the dangerous goods as required by the law.

The Hague and Hague-Visby provides generally for the carrier to prove fault on the part of the shipper, its servants or agents under article IV rule 3 without which the shipper cannot be found liable. Special rules however are reserved for the liability for shipping dangerous goods without the knowing consent of the carrier as governed by article IV rule 6, as well as the guarantee of the shipper as to the accuracy of the particulars supplied by it regarding the goods and the obligation to indemnify the carrier in case of damage caused by such discrepancies. These obligations have been held to be of absolute liability where no mental element of the shipper is required to be proven by the carrier to establish liability.

Under the Hamburg Rules Article 12, the shipper is also generally liable to the carrier, actual carrier and to the ship if it can be proven to be at fault or neglect on its part or on the part of its servants or agents. The only exception to this is where it concerns shipping of dangerous goods without the carrier's knowing consent and the shipper's guarantee of accuracy of the particulars supplied by the shipper regarding the goods for

the purpose of issuing the bill of lading. The liability for these two obligations remains strict and so no mental element of the shipper is required to be proven.

This would mean that for the rest of the obligations enlisted above, fault of the shipper is required to be proven. The question now is in what form would fault liability take or be required for each kind of duty since fault can amount to negligence, intention or malice? In fact, what would be the basis for fault and why is fault required in some regimes and not the others? The basis would also be different depending on whether the liability in issue is of a contractual, tortious or criminal nature.

The requirement of fault

Where liability is based on fault, technically under the law fault is understood to mean either an intentional act to cause harm which is better known as malice, an intentional act in the sense of voluntariness to perform the act which eventually causes the harm, negligence in the sense of efforts made in taking care was inadequate to a reasonable standard to prevent the harm from occurring, or recklessness in the sense of not caring or indifferent as to whether harm occurs or not despite knowing the likelihood that harm will occur. In contractual relationships this could be equivalent to fault of two kinds.

The first kind is an intentional or wilful breach in order to grab a better deal elsewhere or release oneself from an unprofitable bargain or to refuse performance unless the other party agrees additional terms. For the second type of fault, the party in breach did not take sufficient reasonable care to ensure performance of his part of the contract with the consequence that performance either does not happen or can no longer take place due to the defaulting party now becoming disabled.⁵⁷¹ The notion of fault as a basis for liability was created partly as a result of attempts to prevent possibilities of increasing numbers of tort claims in the industrial world if strict liability were the sole basis.⁵⁷² The concept of fault is appealing since it conforms to the logical mind that when a person wrongs another intentionally or by failing to take care, he should be responsible for the resulting harm. This idea is acceptable as the morally right approach hence the widespread practice in modern society although whether or not strict liability was the predominant approach before the industrial revolution is unclear. In fact the supposedly moral

⁵⁷¹ Robert A. Hillman, "The Importance of Fault in Contract Law" (2012), *Cornell Law Faculty Working Papers*, Paper 111, 2.

⁵⁷² Mark Lunney and Ken Oliphant, *Tort Law Text and Materials* (5th edn OUP 2013) 952.

standard there has itself been doubted.⁵⁷³ This development resulted in the different classifications of liabilities in tort.⁵⁷⁴

In contract law however the position is different. One view is that a breach of contract may be due to reasons which have nothing to do with the fault of the contracting party, yet it attracts liability as a matter of course. Liability depends solely on the determination of what was agreed and whether what was agreed was performed regardless of the reasons why they were not and regardless of the reasonable efforts made by the breaching party in striving to fulfil his promise.⁵⁷⁵ The other view is that the fault of the party in breach does not affect the assessment for the remedy of damages obtainable for breach of contract, the objective of which is simply to compensate the innocent party.⁵⁷⁶

The conventions refer to both ideas in promulgating shipper liabilities, fault as well as strict liabilities depending on different duties imposed on the shipper. There are more fault based liabilities in the Rotterdam Rules than there are strict liability ones. This is probably reflective of the modern approach for preferring the fault-based regime as the basis of liability as discussed in the preceding paragraph. In the Hague and Hague-Visby Rules the limited provisions on shipper liability has effectively divided specific obligations expressed in the Rules which use strict liability as its basis and those which require fault since there are only two clear duties in the Rules which work on the basis of strict liability; one on dangerous goods and the other on providing information and the indemnity guarantee. For everything else not specifically mentioned, the shipper is only liable if at fault.⁵⁷⁷ This again is reflective of the theorised evolution from strict liability to fault based regimes as the acceptable approach in modern society.

Specific duties where fault is the basis are clearly identified and expressed in the Rotterdam Rules and this allows an analysis of why fault would be required for those kinds of duties. The idea of fault as the basis of the shipper's liability in duties concerning the supply of necessary documents, information and instructions, may be a way of

⁵⁷³ P. Cane, *Atiyah's Accidents, Compensation and the Law*, 8th edition, Cambridge University Press 2013, pp. 174-181 as referred to by Mark Lunney and Ken Oliphant, *Tort Law Text and Materials*, Fifth Edition 2013, Oxford University Press, p 953.

⁵⁷⁴ Tort liabilities may be classified into intentional torts, negligence-based torts, and strict liability torts.

⁵⁷⁵ Richard A. Posner, 'Let us Never Blame a Contract Breaker' (2009) 107 Mich. L. Rev. 1349, 1351 as referred to by Robert A. Hillman, "The Importance of Fault in Contract Law" (2012), *Cornell Law Faculty Working Papers*, Paper 111, 1 and 3.

⁵⁷⁶ A position refuted by George M. Cohen, 'The Fault that Lies Within Our Contract Law' (2009) 107 Mich. L. Rev. 1445, 1446 as referred to by Robert A. Hillman, "The Importance of Fault in Contract Law" (2012), *Cornell Law Faculty Working Papers*, Paper 111, 1 and 3.

⁵⁷⁷ Art IV r 3.

allocating responsibility to the shipper in areas where access to the documents, information and instructions are limited to the shipper. Likewise preparing the goods ready for carriage is an act which only the shipper or persons appointed by the shipper to carry it out are accessible to. The Rotterdam Rules recognises this limited access and thus confers upon the shipper accordingly the responsibility for ensuring it is performed.

Fault may also be seen as an indication of a lack of good faith that may be implied in the reciprocal duties of the parties. Although good faith is a concept that is not commonly understood in the same manner in every kind of legal system, in particular the stark contrast in how the concept is utilised in the civil law system as opposed to the common law, it has been included in one form or another and has some value in explaining the rationale behind certain laws and case decisions especially in the light of recent decisions made by Leggatt J in the *Yam Seng* case.⁵⁷⁸ Whilst the civil law system in general embraces the concept of good faith expressly in almost every aspect of a contract from pre-negotiations, formation, to the interpretation of contracts,⁵⁷⁹ it is not taken as an integral requirement or even part of the common law structure of contracts in the form of an overall general duty. However it is somewhat recognised there that it does have a role to play especially where it has been incorporated as an express term in the agreement, or in particular types of contract such as that of employment or those involving fiduciary duties.⁵⁸⁰

In the recent Court of Appeal decision on shipper liability for container demurrage in the case of *MSC Mediterranean Shipping Co SA v Cottonex Anstalt*⁵⁸¹ however, Moore-Bick LJ agreed with the earlier Court of Appeal decision in *Mid Essex Hospital Services v Compass Group*⁵⁸² that the general duty of good faith is not recognised in English law of contract. He acknowledged the reflections of broad concepts of fair dealing in construction and implication of terms but prefers caution by developing along established lines. Relying on a “general organising principle” drawn

⁵⁷⁸ *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111(QB).

⁵⁷⁹ Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 *International Lawyer* (1989) 443-483.

⁵⁸⁰ Joseph Hale, ‘All in good faith’

<http://www.addleshawgoddard.com/view.asp?content_id=7049&parent_id=3865>

⁵⁸¹ [2016] EWCA Civ 789.

⁵⁸² *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)*[2013] EWCA Civ 200.

from a variety of cases may be dangerous as it may undermine the terms agreed by the parties.⁵⁸³

By looking at the history of the United Nations Convention on Contracts for the International Sale of Goods (the CISG), in particular Article 7 which dealt with good faith, notwithstanding the differing and opposing views during the drafting negotiations on whether and to what extent good faith as a concept should be incorporated in the convention, a compromise was finally made where a general reference to good faith in international trade has to be observed in interpreting the convention.⁵⁸⁴ Despite the varying views as to whether the provision is harmless⁵⁸⁵ or has potential in creating positive duties on the contracting parties,⁵⁸⁶ it is one of a few potentially useful concepts in explaining the character of obligations imposed on parties to the contract.

How does good faith explain the requirement of fault in the four carriage of goods by sea conventions? When Leggatt J decided that a duty of good faith could be implied between parties, the idea for his lordship was that there was an expectation of honesty underlying almost all contractual relationships in general, which does not have to spelt out explicitly as doing so could backfire and have the reverse effect of damaging the trust in the business relationship. The content of the good faith duty is said to be a matter of construction. This is done by employing an objective test⁵⁸⁷ to determine the presumed intention of the parties by asking the question what purposes and values would reasonable people in their shoes would have intended when concluding such contracts. Perhaps the same approach could be made for the fault requirement in the conventions for the various duties imposed on the shipper. The expectation is that whatever processes including preparing the goods ready for carriage or provision of necessary items such as documents, information or instructions which are required in order to facilitate the smooth process of the transit and avoid harm whether physically or financially to the carrier, the shipper ought to make reasonable efforts to perform them. It is arguably fair for the carrier to expect that certain obligations which are within the control of the

⁵⁸³ *MSC Mediterranean Shipping Co SA v Cottonex Anstalt* [2016] EWCA Civ 789 para 45.

⁵⁸⁴ Article 7(1) of the CISG.

⁵⁸⁵ Farnsworth, 'The Convention on the International Sale of Goods from the Perspective of the Common Law Countries' *La Vendita Internazionale*, Milan: Giuffrè (1981) 3-21, as referred to by Alejandro M. Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods' 23 *International Lawyer* (1989) 443-483, fn 111.

⁵⁸⁶ Bonell, 'Methodology in Applying Uniform Law for International Sales Under the U.N. Convention (Wien 1980)' in *Italian National Reports to the XII International Congress of Comparative Law* 43, 62 (1986) as referred to by Alejandro M. Garro, 'Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods' 23 *International Lawyer* (1989) 443-483, fn 111.

⁵⁸⁷ A method employed under English law for construction of contracts.

shipper which could facilitate the transit process should be performed by the shipper as a party with interest in ensuring that there are no obstacles in getting his cargo to the other side. This is an interest that is shared by both the carrier and the shipper and so presumably the intention of the parties is that both sides should do what each respective party can, for matters which are under his or her control, to ensure nothing will create a problem for the contract to be performed.

It is as Leggatt J pointed out, not just in terms of purpose but also in terms of value to the parties that the performance of the contract is discharged. Certainly this is true for both the shipper and the carrier as such a contract of carriage would not have been entered into if there was no substantial value in getting was agreed in the contract done. To this end, the shipper would need to make reasonable efforts in ensuring that his interest in the contract is not jeopardised by providing what is within his ability, access and control.

The shipper is also the person instigating the relationship between himself and the carrier, as he is the person with the goods which need carrying. The shipper chooses the method of carriage and ultimately the specific carrier. It would not be wrong to say that if the shipper does not part with relevant documents or information, or prepare the goods accordingly in readiness for the carriage, it is only the shipper to blame as no one is forcing the shipper to choose that method of carriage or the carrier.

The theory of liability under the conventions

The evolution of the nature of shipper liability from the Hague and Hague-Visby Rules to the Rotterdam Rules may be traced by studying the *travaux preparatoires* of the conventions in order to understand and explain the theory for the basis of shipper liability as it stands today. According to the Working Group presiding over the issue of shipper liability at the outset, by observations made on national laws and business practices regarding shipper liability, there are generally only 2 main obligations of the shipper. The first is the duty of the shipper to pay freight and this is the primary duty of the shipper. The secondary duty is to take the cargo and deliver them to the carrier. This basic duty is not a duty to merely provide the cargo but to also to prepare them. The shipper needs to make sure that the goods are ready in such a way that they are able to withstand the intended carriage. Only then come other obligations such as the duty to

inform the carrier regarding the nature of the cargo specifically in the case of dangerous cargoes.⁵⁸⁸

What is interesting here is that although the general perception would normally be that the most important duty for the shipper should be regarding dangerous cargo whether in terms of informing the carrier of its nature or the handling and proper stowage for them, this does not seem to be the case, even though it is reflected by the making of specific provisions in the Hague and Hague-Visby Rules regarding dangerous goods as an absolute liability, which in turn reflects the policy of promoting the direct physical safety of the vessel, its crew and other cargo, as well as more generally the ports, stevedore and the environment. When the primary and secondary obligations of the shipper are put in this way physical safety now seems to be of a lesser priority as compared to the business aspect of the shipper carrier relationship which as far as payment of freight and providing cargo is concerned, seems to be the emphasis. Even cases dealing with dangerous cargo have demonstrated that judges are willing to extend the scope of the meaning of dangerous cargo in order to include situations where the cargo was not in itself dangerous or posing threat of physical danger to others but simply causing delay to the vessel or causing the vessel be unable to properly do its work.⁵⁸⁹ Both of these consequences have implications of a financial nature and ultimately impact the business of the carrier. From this observation, it may be useful as a starting point for making sense of the rules in a practical way to see whether the theory behind the requirement of fault and strict liability for the shippers duties take into account how they serve to accommodate the proper running of the shipping business in avoiding the same financial implications to the carrier.

This points to the possibility that the focus of the rules is not so much about fault but more about severity of effect. Fault in general is seen more like doing something blameworthy, but when it is placed in the context of shipper liability and all the background that the shipper shares in the relationship with the carrier, it seems like the liability of the shipper has more to do with the commercial responsibility that the shippers have due to the severe consequences they may implicate on the carrier if they were not to perform these duties.

⁵⁸⁸ United Nations Commission on International Trade Law Thirty-fifth Session, New York, 17-28 June 2002: Report of the Working Group on Transport Law on the work of its ninth session (New York, 15-26 April 2002), A/CN.9/510, 17.

⁵⁸⁹ *The Giannis NK* [1998] 1 Lloyd's Rep 337.

The issue is also whether the requirement of fault in the conventions is not merely about negligence of the shipper in failing to perform its duties but goes beyond that to indicate a lack of good faith. The fault of the shipper relates to not about a lack of reasonable effort to perform a duty but rather in not having the right kind of spirit or attitude in carrying it out. Therefore from this observation, it appears there is a tension in the convention between the requirement of fault and the severity of the effects if the shipper fails to perform its duty. There is also tension between the contractual nature of the shipper-carrier relationship and the fault requirement in the convention.

It could be argued that the requirement of fault within the convention is a rhetorical one since although the conventions requires fault in establishing liability of the shipper, the courts almost always decide the issue on the basis of how severe the effects of the breach were. Hardly any discussion is made on the issue of what the fault of the shipper was apart from the description of the act or omission of the shipper within the sequence of events which led to the loss complained off. The actual meaning given to fault itself is not dealt with by the courts. Occasionally, the shipper would be described as negligent in its failures in performing its duties. This is unsatisfactory since fault is a concept is wider than that and could encompass intentional acts, recklessness, malice and etc.

A lack of a clear guidance as to what amounts to fault makes it difficult for both the legal practice and the industry to determine what should or should not be done in terms of the fault requirement in order to avoid liability. It also becomes unclear when fault should be applied since fault is sometimes not even referred to in coming to the decision on liability of the shipper. Instead how severe the consequences were for the carrier or third party becomes the basis for determining liability. Conversely there are many models on contractual liability which do not require fault, but in the decisions of the court about the contract, judges do in fact discuss issues of fault. These incoherent approaches obviously cause confusion in construing the requirement of fault in the conventions.

So the question now is, if the starting point for shipper liability is a contractual one which requires no fault, when should fault then be required? It may be argued that fault should be seen as applying only in exceptional circumstances. The first and primary reference should be made to the contractual obligations which must be performed regardless of fault. However, exceptions could be said to exist in several situations.

The first is the long accepted stance that the shipper is almost always considered to be the party with a weaker bargaining position as compared to the carrier. The discussion earlier on the historical relationship between the shipper and the carrier as well as the basis on which the Hague, Hague-Visby Rules and the Hamburg Rules were drafted provide much evidence for this. It could be argued therefore that although the requirement that the contract is performed is strict without any requirement of fault, concessions should be made to require that something more be proven before any finding of liability. This could be in the form of fault of the shipper, his servants or agents as required in the conventions.

Notwithstanding this the Working Group thought that the draft provisions particularly supported the issue of protecting the safety of vessels, to the extent that it was suggested that reference be made to the HNS convention in relation to the distinction between dangerous and non-dangerous goods.

Another important point that was mentioned in the preparation of the Rotterdam Rules is that the purpose of the rules is partly to balance out the rights and duties between the shipper and the carrier which is considered to be an improvement from the status of the Hague and Hague-Visby Rules, and an expansion from the approach taken in the Hamburg Rules. The draft text of the Rotterdam Rules on the shipper's duty to enable the carrier to carry the goods safely provided that it attracted liability that was strict. The background of attempting to balance the shipper and carrier's rights and duties appeared to be the basis for the concern that since the carrier had a duty in the draft provisions to provide information, the shipper's duty to deliver the goods in a state ready for carriage should not be left to the parties' will as originally drafted. The shipper should therefore also have a reciprocal duty since this complemented the carrier's duty and allows the final result of safety and security of the vessel to be produced.

The focus on the non-balanced rights and duties of the shipper and carrier was further raised when reference was made to the draft provisions on when the shipper may avoid liability. According to the draft article 7.6, the shipper would not be liable by showing that due diligence could not prevent the events which caused the goods to inflict damage or loss, nor the consequences themselves. The carrier on the other hand had only to disprove fault on its part to avoid liability.

This concern to balance out the rights and duties of the shipper and carrier may have contributed to the final increase in the provisions of specific duties imposed on the

shipper since that carrier has always been bearing the brunt of liabilities in the previous conventions. In principle it was agreed that there should be a balance of their rights and obligations on an overall perspective rather than on detailed corresponding article provisions. This was probably the justification for the lack of limitation and defences provisions for the shipper unlike that for the carrier.

Burden of proof

Under the Rotterdam Rules, it is quite clear that the burden of proof is on the carrier to prove that the cause of the loss or damage was the breach of the shipper's obligations under the convention.⁵⁹⁰ The carrier has to prove that the shipper breached its obligation under the convention and that that breach caused the carrier to suffer loss or damage. Thus the hurdle for the carrier in terms of causation of damage is not direct but twofold. Even after this, for the general liabilities, the shipper still has a chance at defending itself by proving that the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of persons to whom it has delegated the task of carrying out its obligations under the convention. It can do this by proving that the loss or damage sustained by the carrier was caused or contributed to by someone or something else. If it succeeds in doing this, it may be relieved of all or part of its liability to the carrier.⁵⁹¹ The convention provides for an apportionment mechanism in that if the shipper is relieved of part of its liability as provided by the convention, it is only liable for that part of the loss or damage suffered by the carrier for which the shipper is at fault or which is attributable to the persons it has entrusted performance of its obligations, and for whom the shipper is vicariously liable.⁵⁹² What remains unclear is perhaps the situation where the contributory cause of the carrier's loss or damage is the carrier's own breach of duty. There is nothing in the convention which hints at whether the carrier would lose the right to an indemnity if the cause of the loss or damage is a combination of both a breach of the shipper's obligations as well as the carrier's duties, and where the carrier is unable to prove the proportion of loss attributable to the shipper's breach.⁵⁹³

For the obligation of the shipper to the carrier to provide information, instructions and documents relating to the goods for the purposes of proper handling and carriage of the goods as well as for the purpose of compliance by the carrier with rules and

⁵⁹⁰ Art 30 para (1).

⁵⁹¹ *ibid* para (2).

⁵⁹² *ibid* para (3).

⁵⁹³ Such a provision is available in the Hague-Visby Rules.

regulations in connection with the carriage under article 29, the shipper may also be able to avoid liability by proving that the information, instructions and documents were reasonably available to the carrier. In particular, the shipper may avoid liability in relation to its obligation to fulfil the need of the carrier to comply with carriage law if it can adduce evidence to show that the carrier did not notify the shipper in a timely manner, that it required such information, instructions and documents. Likewise, the shipper may avoid liability for the obligation in article 28 regarding the duty of the shipper to provide information and instructions requested by the carrier, if the shipper can show that the information and instructions are not in his possession or reasonable ability to provide, or that they are reasonably available to the carrier without having to procure them from the shipper.

Unlike the Rotterdam Rules, neither the Hague Rules, the Hague-Visby Rules nor the Hamburg Rules make express provisions for the burden of proof in establishing shipper liability. However Berlingieri is of the view that the burden of proof is likewise on the carrier from the way the relevant provisions are worded.⁵⁹⁴

Category of loss or damage

The title of article 30 only refers to liability of the shipper to the carrier, and not any other party such as other cargo owners or even the performing parties. In fact, the chapter itself is entitled ‘obligations of the shipper to the carrier’. The words employed by article 30 that the ‘shipper is liable for loss or damage *suffered by the carrier*’⁵⁹⁵ connotes that the convention probably does not deal with loss or damage that is caused to other parties involved in the carriage, for instance interests of other cargo and the crew on board the ship, at least not directly.⁵⁹⁶ The words ‘loss or damage’ are also general in that they do not specify the type of loss or damage which the carrier incurs for which the shipper may be liable. However, since this article spells out the basis of liability of the shipper to the carrier under the convention, the type of loss or damage would only encompass those which are caused by a breach of the obligations spelt out in the convention itself. In fact, article 30 makes it a requirement for the carrier to prove that the loss or damage it suffers is as a result of a breach of the shipper’s obligations under

⁵⁹⁴ Francesco Berlingieri, “A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules”, paper delivered at the General Assembly of the AMD, Marrakesh, 5 - 6 November 2009, 19.

⁵⁹⁵ Emphasis added.

⁵⁹⁶ Fujita (n 512) 4.

the convention, before the shipper can be liable for it. By looking at the provisions on obligations of the shipper to the carrier in articles 27, 28, 29, 31 and 32, some categories of loss or damage may be gathered, at least by way of who or what could be harmed. For instance, in article 27 the shipper's goods must not cause harm to persons or property, whereas article 32 speaks of danger to persons, property or the environment. Presumably this loss or damage would encompass physical damage such as damage to or detention of the vessel, as well as third-party liability.

However, the convention does not specifically deal with delay as a form of damage caused by the shipper as a result of breaching its obligations under the convention, or delay in actually carrying out its obligations as provided by the convention towards the carrier for instance, delay in delivering the goods or delay in providing the information or instructions requested by the carrier. However the provisions on the obligations of the shipper regarding provision of information, instructions and documents for the purpose of proper handling and carriage of the goods, as well as for the purpose of compliance with the law by the carrier do stipulate that the obligations of the shipper must be performed 'in a timely manner'. The same wording is found in the provision imposing upon the shipper the duty to provide information for the compilation of contract particulars, as well as in the provision regarding the obligation of the shipper to inform the carrier of the dangerous nature or character of the goods before they are delivered to the carrier or performing party. It may be that this issue is meant to be left for determination by national law.⁵⁹⁷ Moreover, it has also been argued⁵⁹⁸ that the words 'loss or damage' does not cover delay because it was purposely left out by the drafters of the convention even though it was discussed at great length and proposed by Working Group III of the UNCITRAL.⁵⁹⁹ Moreover, article 79 of the convention stipulates that any attempt to place a term in the contract of carriage which increases the liability of the shipper for breach of any of its obligations under the convention whether directly or indirectly is fruitless as the term will be deemed void by the convention.⁶⁰⁰

Looking at article 27 and the conjunction used, the goods delivered by the shipper must 'withstand the intended carriage.....*and* that they will not cause harm to persons

⁵⁹⁷ Guzman (n 569) 9.

⁵⁹⁸ Baughen (n 562) 163.

⁵⁹⁹ According to reports of Working Group III.

⁶⁰⁰ Paragraph (2)(b) of Article 79.

and property'.⁶⁰¹ There may be a concern that the interpretation given to this provision is that the two are different and separate types of damage or loss to the carrier, since if they are not, clearly the shipper is liable only for damage or loss suffered by the carrier *as a result of* the goods not being able to withstand the intended carriage, which is the normal kind of risk borne by a shipper. However, if they are meant to be different and separate, then this creates a different risk altogether. As a stand-alone phrase, a disability to withstand the intended carriage would mean a kind of damage to the cargo itself. This would normally be the basis of a claim by the shipper against the carrier, but since this article provides for liability of the shipper *towards* the carrier, it may seem as though the risk of damage or loss to the cargo caused by inability of the goods to withstand the intended carriage is to be borne by the shipper itself. However, a commentary on this⁶⁰² suggests that this would only be the case if the provision on the basis of the shipper's liability and burden of proof was worded in such a way as to reverse the burden of proof upon the shipper, and if article 30 specifically worded the liability of the shipper for breaching its obligations under the convention separately from the liability of the shipper for loss or damage sustained by the carrier.⁶⁰³ However, since article 30 is worded as 'the *shipper is liable* for loss or damage *sustained by the carrier* if the *carrier* proves that such *loss or damage was caused by a breach of the shipper's obligations* under this convention', it not only sets out the shipper's liability in positive terms, it also clearly singles out liability of the shipper for the carrier's loss or damage, it is the carrier who has the burden of proof, and that such loss or damage are those which was caused by a breach of the shipper's obligations. Furthermore, it would be difficult to reconcile the former interpretation of article 30 with the obligations of the carrier towards the shipper contained in the convention.

The provision of the convention also does not deal with other primary obligations of the shipper towards the carrier, for instance the payment of freight. Although during the discussions of the draft convention there were some articles proposed which deal with this, in the end they were abandoned altogether. It would seem thus that the liability of the shipper to pay freight is left to national law and the terms of the contract between the parties.

⁶⁰¹ Emphasis added.

⁶⁰² Asariotis (n 511) 289.

⁶⁰³ During the draft stage, there were a few versions of the provision of liability of the shipper which were worded in such a way.

Liability of the shipper is also no longer confined to merely loss or damage as a result of dangerous goods since the convention creates a general scheme of liability for all goods across the board. Although there still remains the specific provision on dangerous goods, this has also been expanded to include contemporary issues of danger to the environment. Therefore, the convention has greatly relieved the burden in the past of making a distinction between dangerous and non-dangerous goods, and the determination of the proper definition of dangerous goods. The liability of the shipper may be broadened since the scope of article 32 does not limit the meaning given to dangerous goods by giving a list of homogenous danger. Further, since the article employs the phrase 'reasonably appear likely to become, a danger', liability of the shipper under this provision is not only limited to situations where the cargo already is a danger, but also extends to situations where there is potential danger. Nevertheless, the shipper may avoid liability if it can show that the carrier or performing party was aware of the dangerous nature or character of the goods.

Limitation

Article 62 provides for a time bar against which the carrier has to beat in order to pursue the liability of the shipper. Just as any other provision in the past on time bars, it acts as an effective tool to limit the shipper from liability for breach of any of its obligations under the convention should the carrier delay in commencing a course of action against the shipper. The time bar set by the Rotterdam Rules is 2 years which is a relatively long window of opportunity for the carrier to act, since some of the previous carriage by sea conventions only provided for a time bar of one year, albeit available only in the context of causes of action commenced against the carrier.

There is however, no provision on limitation of liability for the shipper akin to provisions available to the carrier's benefit in the preceding sea carriage conventions. This paves a potentially dangerous path into the extent of shipper liability as it leaves the possibility of crushing liability against the shipper from devastating amounts of damages claimed by the carrier. To what extent this may in reality be a thorn in the shipper's side may be mitigated by the likelihood that damages for pure economic loss caused by delay could well be a floodgate which by far the law has not been willing to open, and it may be that it will take a longer time still before it ever will.

Conclusion

The Rotterdam Rules is an ambitious attempt at clearly setting and detailing out the liability of the shipper in specific provisions dedicated just for this. Although not comprehensive, they do spell out what probably may already be a custom practice of the trade and thus galvanise the obligations which a shipper is expected to perform. To what extent it changes the sum of the shipper's liabilities has been the subject of many commentaries, but the real practical effect will only be felt when the convention comes into force, one year after the 20th ratification by a UN Member state. With only three ratifications in 7 years so far, there is still a lot of waiting to do.

Non-carriage of goods by sea international conventions

Maritime conventions on carriage of goods by sea which were discussed above take effect in one of two ways. They could be either incorporated by way of contract whether as an express or implied term, or applicable by the force of law as a statutory provision.⁶⁰⁴ International conventions which provide for public law duties which will be discussed below, on the other hand apply more directly to individual persons.

International Convention for the Safety of Life at Sea (SOLAS) 1974

The SOLAS Convention was first created in 1914 as a result of the *Titanic* disaster and is regarded as the most important international treaty relating to safety of ships.⁶⁰⁵ Four versions have been adopted before the latest one in 1974. Since then the concept of 'tacit acceptance procedure' is used in order to allow amendments and entry into force to be made more speedily. This procedure basically allows amendments to enter into force on a specified date⁶⁰⁶ rather than waiting for a specified majority of Parties to accept the amendments.

The SOLAS Convention specifies minimum standards in the construction, equipment and operation of ships for the purpose of safety. There are thirteen chapters

⁶⁰⁴ Cooke (n 125) para 85.24.

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<http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Documents/SOLAS%201974%20-%20Brief%20History%20-%20List%20of%20amendments%20to%20date%20and%20how%20to%20find%20them.html>

⁶⁰⁶ The amendment will enter into force on the date specified unless there are objections from an agreed number of Parties.

in the Annex but for the purpose of shipper liability, the relevant ones are chapter VI on Carriage of Cargoes and chapter VII on Carriage of Dangerous Goods.

Chapter VI on Carriage of Cargoes

This chapter is concerned with general requirements for stowage and securing of all kinds of cargo except bulk liquids and gases which require special precautions due to their hazardous nature. The most recent amendment involved adding three new paragraphs in Regulation 2 on Cargo Information. Paragraph 4 provides that the gross mass of cargo carried in a container shall be verified by the shipper. This may be done either by one of two ways which are specified in the two sub paragraphs which follow.

The first is by weighing the packed container using calibrated and certified equipment.⁶⁰⁷ The second method is by weighing separately all the cargo and package items including pallets, dunnage and any other materials used to secure the cargo in the container. The tare mass of the container is then added to the sum of masses using a certified method approved by a competent authority of the State where the container was packed.⁶⁰⁸

The United Kingdom has adopted the first method by the use of weighbridges or lifting equipment fitted with load cells, or other approved weighing equipment. The second method allows shippers to use existing procedures but with minimum bureaucracies. It was developed with the aid of an industry working group. In the United Kingdom the shipper has to apply to the Maritime and Coastguard Agency (MCA) to get approval for Method 2.⁶⁰⁹ Method 1 does not require registration with the MCA but the shipper must be able to provide to the MCA if and when required, two things. The first is evidence that the weighing equipment has been supplied and maintained for the purpose of weight verification so that the shipper is able to fulfil its duty to verify gross mass of containerised cargo.⁶¹⁰ The second is that the shipper must be able to show a

⁶⁰⁷ SOLAS 1974, Reg 2.4.1 Chp VI as amended.

⁶⁰⁸ *ibid* Reg 2.4.2.

⁶⁰⁹ This is in line with the requirement of Regulation 2.4.2 in Chapter VI SOLAS 1974 where the certified method must be approved by the competent authority of the State where packing of the container was completed.

⁶¹⁰ The implementation of Method 1 in the United Kingdom requires that the data produced by the equipment be recordable such as by production of a ticket which gives details of the container number, verified gross mass of the container as well as any calculations made. Any information stored electronically must be capable of itemization and printable for audit purposes.

record of maintenance and verification procedures, including any necessary corrective or remedial measures taken.⁶¹¹

The amendment to Regulation 2 of Chapter VI does not introduce the duty of the shipper to submit the gross mass of cargo carried in a container. This is an existing duty under SOLAS Chapter VI Regulation 2 on cargo information.⁶¹² The amendment requires shippers to verify the gross mass as accurate by way of one of two specified methods which the shipper has the option to choose.

The second amendment in Regulation 2 is paragraph 5 which deals with the duty of the shipper to ensure that the verified gross mass is stated in the shipping document. The shipping document then shall be signed by a person authorized by the shipper⁶¹³ and then submitted to the master or his representative, and the terminal representative. Submission has to be made in advance of loading in order for the stowage plan to be prepared.⁶¹⁴

The provisions in these particular regulations use the word “shall” in requiring the shipper to fulfil its obligations under SOLAS. This indicates that the liability is strict and that it does not matter what the mental state of the shipper is when he conforms or rather, lacks in conformity with the regulations. The mandatory nature of the regulations is obvious from the purpose they were adopted by the International Maritime Organisation (IMO). Safety issues and recognised problems from incidents associated with among others freight containers, structural issues, packing, mis-declared cargo weights and securing of the cargo onto the ship have brought about discussions between stakeholders and the adoption of these changes.

The amendments to SOLAS Chapter VI Regulation 2 will enter into force on 1 July 2016. Already the shipping industry is predicting that by adding one extra regulated step in the process of shipping, many unwarranted consequences would follow. These would no doubt include delays not only due to another process in the operational chain being added, but also if problems arose in the process itself. This is because the Regulation provides that the cargo cannot be loaded if the shipper fails to provide the

⁶¹¹ <https://www.gov.uk/government/publications/verification-of-the-gross-mass-of-packed-containers-by-sea>

⁶¹² SOLAS, (n 607) Reg 2.2.1.

⁶¹³ *ibid* Reg 2.5.1.

⁶¹⁴ *ibid* Reg 2.5.2.

verified gross mass of the containerised cargo. This information must be in the shipping document and submitted to the master or his representative.⁶¹⁵

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (The HNS Convention) and the 2010 Protocol

The shipper is not directly liable under the HNS Convention as such since the main parties liable under the convention are the shipowner, followed by the companies and entities who are receivers of HNS by way of a collective fund under a 2-tier system of liability. This is also made clear by article 20 which provides that the owner of the HNS cargo involved in the incident will not be made liable by the convention. The shipowner however, may be able to escape strict liability under the Convention for four reasons, one of which is connected to the shipper. Under article 18(d) of the HNS 2010 protocol, if the shipper fails to inform the shipowner regarding the hazardous and noxious nature of the cargo and has either caused the damage which ensues,⁶¹⁶ or lead to the carrier to not obtain the appropriate insurance cover,⁶¹⁷ the shipowner is exempt from liability under the HNS Convention. This comes with a proviso that the shipowner, his servants or agents must not have known or ought reasonably to have known that the cargo was hazardous or noxious.

This would mean that the shipowner at risk of being liable under this convention will have interest in trying to prove that the shipper had failed in this aspect. From this it can be derived that a duty is imposed on the shipper to inform the shipowner the hazardous or noxious nature of the cargo it ships. The provision on the shipper's duty does not mention anything regarding the mental element. It simply states the fact of non-disclosure of the hazardous or noxious nature of the cargo to the shipowner automatically allows the shipowner to be exempted from liability.

The 1996 convention makes the titleholder of LNG contribute to the fund. Under the 2010 protocol it burden is shifted to the receiver unless the titleholder agrees to take responsibility.

During the drafting stage, one of the proposals was that there should be shared liability between the carrier and the owner of the HNS cargo. The role of the shipper's liability

⁶¹⁵ *ibid* Reg 2.6.

⁶¹⁶ HNS 2010, art 18(d)(i).

⁶¹⁷ *ibid*, art 18(d)(ii).

was to supplement that of the carrier where compensation from the latter's liability was inadequate to fully cover the damage. However, the problem was that a wider definition of the shipper could also include the charterer and this would therefore allow the latter to invoke the provisions of the LLMC 1976 in the same way that a shipowner could, defeating the objective of such a scheme. Although theoretically the contribution of the shipper would ensure that the damage could be fully compensated, the idea of making the shipper jointly liable with the carrier was abandoned.⁶¹⁸

UN Convention on International Multimodal Transport of Goods 1980 and UNCTAD/ICC Rules for Multimodal Transport Documents

The provisions of the Multimodal Convention may create liabilities for the shipper if the shipper falls within the definition of consignor as discussed in Chapter 1 of this thesis.⁶¹⁹ The Multimodal Convention's provisions on consignor liability mirrors the provisions on shipper liability which are found in carriage of goods by sea conventions.

There are three provisions which deal with consignor liability namely Article 12,⁶²⁰ article 22 and article 23. They are not placed together nor sit within the same Part. Article 12 deals with the guarantee by the consignor to the multimodal transport operator as to the accuracy of particulars furnished by the consignor for insertion into the multimodal transport document.⁶²¹ The particulars concerned relate to the general nature of the goods, their marks, number, weight and quantity. If the goods were dangerous, this article also provides for the duty of the consignor to provide particulars of such dangerous character of the goods. The consignor is deemed to guarantee the accuracy of all these particulars at the time the goods are were taken in charge by the multimodal transport operator.

If the particulars furnished by the consignor turn out to be inaccurate or inadequate and this causes the multimodal transport operator to suffer loss, the consignor shall indemnify the multimodal transport operator.⁶²²

⁶¹⁸ Magnus Göransson, 'The HNS Convention' (1997) 2 Issue 2 Uniform Law Review 249 at 250.

⁶¹⁹ The Multimodal Convention employs the term "consignor" rather than the "shipper". However, the consignor's role as described in the Convention resembles the role played by the shipper, the term used in all four of the carriage of goods by sea conventions, namely the Hague Rules, the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules.

⁶²⁰ Article 12 is found under Part II which deals with Documentation.

⁶²¹ Multimodal Convention 1980, art 12(1).

⁶²² *ibid*, art 12(2). Paragraph 2 also maintains the liability of the consignor to indemnify despite any transfer of the multimodal transport document.

The other two provisions on consignor liability sits in Part IV which deals exclusively and is in fact entitled ‘Liability of the Consignor’.⁶²³ Article 22 provides for the general rule that the liability of the consignor towards the multimodal transport operator is based on the fault or neglect of the consignor, his servants or agents.⁶²⁴ However, this article also provides for the liability of the servant or agent of the consignor for their fault or neglect which causes loss to the multimodal transport operator.

Article 23 provides for special rules on dangerous goods. The first duty of the consignor under this article is the duty to mark or label the goods as dangerous in a suitable manner to indicate the dangerous nature of the goods. The second duty is for the consignor to inform the multimodal transport operator or any person acting on his behalf, the dangerous character of the goods as well as the precautions to be taken. This must be done at the time the goods are handed over to the multimodal transport operator or the person acting on his behalf. There are two consequences which follow if the consignor fails to inform, unless the multimodal transport operator has knowledge of the dangerous character of the goods.

The first is that the consignor will bear the liability for all the losses incurred by the multimodal transport operator which results from the shipment of the dangerous goods.⁶²⁵ Secondly, the dangerous goods can be unloaded, destroyed or rendered innocuous, whichever is required, and the consignor will not be compensated if this happens.⁶²⁶ Article 23(3) then extends the provision made in article 2(2) that if the multimodal transport operator has knowledge about the dangerous character of the goods, none of the two consequences may be invoked, to other persons.⁶²⁷

The final paragraph of article 23⁶²⁸ provides for a situation when article 23(2)(b) does not apply or may not be invoked. This indirectly refers to a situation where the consignor

⁶²³ Glass is of the view that these provisions are in addition to the one in Article 12. David Glass, *Freight Forwarding and Multi Modal Transport Contracts* (Informa 2013) 330.

⁶²⁴ The fault or neglect of the consignor’s servants or agents can only be relied on by the multimodal transport operator if the fault or neglect occurred when the servants or agents were acting within the scope of their employment.

⁶²⁵ Multimodal Convention 1980, art 23(2)(a) (MC).

⁶²⁶ *ibid* art 23(2)(b).

⁶²⁷ Article 23(3) of the Multimodal Convention 1980 prevents anyone else from invoking the two consequences of Article 23(2)(a) and (b) if they have knowledge about the dangerous character of the goods. ‘Any person’ in article 23(3) could include the multimodal transport operator himself or the person acting on his behalf, to whom the consignor had handed over the goods. The residual meaning of ‘does not otherwise have knowledge’ in Article 23(2) indicates that if the multimodal transport does have knowledge about the dangerous character of the goods, he is not entitled to invoke the two consequences of article 23(2)(a) and (b).

⁶²⁸ MC, art 23(4).

had informed the multimodal transport operator or the person acting on his behalf, or that they have knowledge about the dangerous character of the goods. In such a situation, if the goods do become an actual danger to life or property, they may nevertheless be unloaded, destroyed or rendered innocuous. The consignor would similarly not be compensated except under general average,⁶²⁹ but he would not be liable for losses suffered by the multimodal transport operator.

Liability of the shipper towards forwarding agent

The shipper shall be responsible to the forwarding agent for the accuracy and adequacy of the particulars given in the transport document that are mentioned in article 10, paragraph 1, of convention when responsibility for the goods is transferred to the forwarding agent.

Period of responsibility

The responsibility of the forwarding agent for the goods shall start at the time when he or the performing party has received the goods from the shipper and shall end at the time when the forwarding agent delivers the goods to the consignee.

Liability of the Shipper and Consignee

The shipper shall be liable for paying the freight charge and other fees incidental to the transport of the goods, unless otherwise agreed in the transport contract.

Conclusion

The international conventions make the mental element a distinguishing factor within certain types of duties. In general the shipper would not be liable if there was no fault on the part of the shipper, its servants or agents. This has been expressly provided by the rules. However there are some specific duties where strict liability is imposed. It is notable that that being the case, no such express provisions are made to say that the shipper is strictly liable for any particular duty. It is only derived by way of interpretation of the words used in the rules or by the decision of the courts as to how the certain rules should be applied. Notwithstanding the application of strict liability for certain specific duties of the shipper, it appears from the reasoning given that liability of the shipper is

⁶²⁹ The multimodal transport operator would still incur liability for cargo loss or damage if the provisions of article 16 was fulfilled.

found not on the basis of the duty carrying with it an inherent strict liability or requirement of fault as interpreted, but liability is found on other grounds.

One of the reasons seems to be that the shipper has the greater level of access to the goods in terms of having the first encounter whether physically or documentation. Therefore the assumption is that the shipper would have better opportunities to find out about the nature of the goods, preparation of the goods and information on the care which the goods require. The shipper could be said to have access to the primary sources being the seller or manufacturer, or the third party from whom the goods were obtained. This is in contrast to the carrier's position who relies on the shipper to provide the necessary details together with general awareness of goods known and listed to be dangerous, all of which would be secondary sources. Furthermore, in some cases, the carrier has to deal with multiple shippers having a multitude of variety in the type of goods which they ship. It would be too onerous to place the risk on the carrier to be responsible for unwarranted consequences resulting from the nature, packing or stowing of goods which the carrier could have inspected beforehand. This is connected to the following reasoning.

Another plausible explanation relates to commercial efficacy and severity of consequence. When liability is strict, parties can straightaway know if there is liability when the duties are not fulfilled. This allows them to make decisions and move on. The strict liability provisions in the international conventions have something in common and that is they apply to duties the breach of which has the severest consequence to the carrier and third party. The consequences could result in casualties, delays and many other costly consequences which interrupt the flow of shipping operations. When these duties are expressed as strict, it shows that that nothing less than full performance of the shipper is required.

CHAPTER 5

Conclusion

Introduction

In this concluding chapter, the theoretical findings made during the course of the research as presented in the preceding chapters will be laid down. This involves referring to each chapter and summing up the findings that were made there and making the connection between each chapter as it flows from start to finish. The theoretical findings will indicate possible areas for reform which will be indicated in the following section. This will also be presented in sequential reflection of each chapter as it flows from the preceding theoretical findings outlined.

Further, a summary of all the findings will be made in order to tie up and explain the essence of what has been found in this research. The goes to the very core of the findings of this research which explains the answer to the research questions asked at the beginning of the thesis. This will be then used to explain whether what was set out to be proved by this research has been so achieved. Along with this, the constraints in seeking to make that achievable will be highlighted in order to serve as a signpost for future research in the same area so that a different way around the constraints or a different approach could better deal with those constraints.

In coming to that point this naturally brings into discussion the possible areas for future research which is connected to this area of the law, but was beyond the scope of this research. There were certain areas in the research which gave rise to other research questions which could form the basis of a whole new research on its own, that builds onto the findings made here, and identifies further gaps in the knowledge which could be filled in the future by studies related to the subject of shipper liability for cargo.

Finally some mention must be made on the success or otherwise of the methodology employed in this research in order to shed some light on the viability of further research using the same methodology.

Theoretical Findings

From chapter 2 on the concept or definition of the shipper in the context of the carriage of goods by sea, it appears that the legal definition of shipper does not always correspond with the meaning given to the term “shipper” in practice.⁶³⁰ This is partly also due to the problem that even within the legal definition itself, the meaning given to the term is not always consistent.⁶³¹ It follows from there that the difficulty in giving it a consistent legal definition stems from the fact that there are various contexts and roles within which the shipper plays. This seems to create a vicious circle within which the problem subsists. In order to put a stop to this or rather, to make changes, a good place to start is to make the legal definitions of the shipper more certain and consistent. When the law is certain, practice will follow through since they would want to avoid disputes and disputes being inevitable, they would want to be on the correct side of the law. A consistent legal definition is thus crucial in ensuring certainty and ultimately commercial efficiency. This would be consistent with the objectives behind the very rules on shipper liability for cargo as demonstrated in the findings of this research.

In chapter 3 on shipper liability under national or domestic law, this research explains the existence of both fault-based rules as well as strict liability rules on shipper liability. In the civil law system, fault has a role to play in the determination of contractual liability whereas the common law does not recognize it. The strictness of the common law on the obligation of the shipper is justified by two possible theories. The first is the assumption of risk by the shipper as a charterer in a charterparty fixture, to ensure performance of his obligations.⁶³² Despite any fault on the shipper’s part, the law makes him bear the burden of the cargo not being arrived and ready for loading. Secondly, in order to ensure the smooth running of shipping operations, certain obligations of the shipper is made strict. This allows focusing on whether performance of the shipper’s duty is complete and the consequences if there is a breach. Such certainty in consequences ensures efficiency in economic and commercial efficiency of the shipping operation.

Chapter 4 on shipper liability for cargo under international conventions explores further express provisions on shipper liability, some of which require fault before the finding of

⁶³⁰ Even within the practical side the term has not been used consistently, see chapter 2, pg 12-13.

⁶³¹ Chapter 2 page 44.

⁶³² Chapter 3 page 62.

liability and some which do not. This reflects the convergence of national law systems which offer both concepts in the determination of liability.

The mental element of the shipper seems to be part of the requirements of certain liabilities of the shipper in the international conventions. There are both fault-based as well as strict liability duties of the shipper. This is a reflection of what is found at the national level which also employs the two different approaches. The common law systems adopt the strict liability approach to contractual obligations of the shipper whereas the civil law systems adopt the fault-based approach.

In the strict liability approach, liability of the shipper appears to not have been found on the basis of the fault of the shipper, but by looking at the construction of the contract and determining whether the shipper has performed his obligations as what was agreed, for the purpose of giving effect to what the intention of the parties were. If the shipper has failed to perform, the extent of his liability will depend on an assessment of the effects of the breach, much like the approach taken with innominate terms. This gives an outward appearance of the strict nature of contractual liability, leaving no room for the consideration of the underlying reasons for causing the breach which point to the fault of the shipper in the form of which could be malicious, intentional, negligent or reckless. The remedies awarded also reflect the reluctance of the courts to consider whether the shipper who breached his obligations should be penalized for either willfully committing the breach or failing to adequately take action to prevent performance from being unfulfilled.

It is often advocated that the civil law systems incorporate both the fault-based and the strict liability concepts in the determination of contractual liability whereas the common law system rejects the idea of fault in determining breach of contract. The view that concepts used in the common law such as frustration and implied terms are ways in which fault of the party in breach is actually taken into account⁶³³ can also be used to support the idea of an indirect application of fault for the determination of the liability of the shipper.

However, it has been argued that where the perception given is that the contractual liability of the shipper seems to manifest strict liability, the concept behind the breach and the award of remedies actually takes into consideration the issue of fault. This would

⁶³³ Barry Nicholas, 'Fault and Breach of Contract' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon 1997) (Oxford Scholarship Online 2012).

mean that fault always has a role to play in the determination of the shipper's liability, whether as an express provision, as the nature of contractual liability in civil law systems, or as the underlying factor in common law contractual liability.

As a conclusion even if there are rules which make liability of the shipper deemed to be strict, decisions made on issues of shipper liability however indicate that the finding of liability is not simply on the basis of deciding whether the shipper's obligations have been performed in accordance with what was agreed by the parties, but goes on to assess the effects of the breach on the innocent party. This shows that indirectly, the fault of the shipper is taken into account. These rules must as a matter of principle be provided as being strict in order to provide certainty to the parties as to the consequences of a breach. This also explains the minimal existence of laws which expressly provide for the liability of the shipper to be based on fault. Most of the rules whether at national level or in the international conventions rely on the strict liability of the shipper. This would be consistent with the contractual liability of the shipper and is in line with the needs of the shipping industry to have rules which are economically and commercially efficient. For this reason, it is very important to be clear and consistent as to the meaning given to the shipper, and also the basis for which their liability is determined.

Areas for reform

In relation to the first theoretical finding above, a possible area for reform would be to have a more consistent legal definition given to shippers according to the context and role it is in, which gives recognition to what extent and in what form their liability should take. This is needed not just for the sake of having a consistent definition.⁶³⁴ There has to be consistency between the law and practice as a mismatch would lead to economic inefficiency. When there is a common understanding as to the legal meaning given to the term "shipper", parties could conduct their business with more expediency.

Clarity in the meaning given to the term also gives guidance to enable relations which people respect. There would be less room for dispute in the law and parties can focus on their business because they have confidence that the law will support their course of conduct. In order to achieve economic efficiency, the law needs to reflect the reality and the facts. A legal definition which reflects the reality and the facts would achieve better

⁶³⁴ Chapter 2 on The Concept or Definition of the Shipper in the Carriage of Goods by Sea, page 44.

economic efficiency. Also, the parties have a sense of fairness⁶³⁵ because the law reflects what they believe in.

Secondly, if there are other elements which have been used to determine the liability of the shipper, these must be made clear. Otherwise it would be unfair to carry on assuming that when liability is said to be strict, the breach is the only other part of the determining factor. It would also lead to uncertainty in the law.

Although the laws on shipper liability seem to be reliant on some form of mental element or the other, the application of these laws seem to indicate that there are other reasons in play which affect the final finding of whether there is liability or otherwise of the shipper. Decisions of the courts when applying the rules seem to rely on rationales such as severity of the effects of not performing certain duties, or an implied undertaking to do what was impliedly part of the deal or assumed expectations based on the position of the shipper being more likely to be in the know of their own cargo which was in their possession first before being passed on to the carrier.

Whether successful at what was set out to be proven and constraints

At the beginning of the research, it was acknowledged that the mental element seem to play a role in the determination of shipper liability from the very fact of its existence within shipper liability provisions. However the objective of this research was to test whether it actually does determine the shipper's liability by being one of the elements to be proven. This has been successfully done to some extent, however a more holistic research would require looking at certain civil law provisions as well as court decisions which were unfortunately, not available in languages which the researcher is fluent in. This is a constraint which the researcher has tried to overcome by looking at secondary sources, but whether this is adequate remains to be seen.

The methodology used for this research requires a comprehensive study of various legal systems and so access to the substantive law of these systems becomes a crucial issue. Although there have been numerous efforts made in making the required materials more accessible, there are still many which are beyond reach during the course of the research due not just to language barriers but also geographical and technical limitations.

⁶³⁵ Unfair in the sense that if the law expressly provides certain requirements which when fulfilled creates liability, persons would act in reliance of those requirements in order to avoid liability. When liability is then found by way of other criterias or reasons not mentioned in the law, it catches people off-guard and allows liability to be created through the back door.

Areas for further research related to subject of study but fall outside scope

As mentioned in Chapter 4 on shipper liability for cargo under international conventions, there are several duties which have been expressly provided for in the most recent international convention relating to the carriage of goods by sea, the Rotterdam Rules. Although these specific duties were not expressly provided in the preceding conventions on the carriage of goods by sea, it has been argued that those duties nonetheless exist whether by custom of the trade or by implication from existing rules. It is a possible area of research that could be done to determine whether in the likelihood that the coming into force of the Rotterdam Rules is further delayed or never takes place, these duties could be enforced under the existing conventions which already are in force.⁶³⁶

Since there are many duties of the shipper which are not documented or provided for, it is possible that there are further duties which have not been codified in any national law or convention. The question is, should they be?

Customary shipping practices established over the years can become a source of authority of its own. It could be worth looking into the extent to which customs of the trade in relation to obligations of the shipper is aligned with the doctrinal rules of shipper liability, in particular the rising expectations of the industry towards the shipper's roles and obligations.

Finally, it is said that the Rotterdam Rules were drafted on the basis of the modern practice of shipping. It remains to be seen however, whether by laying out the express provisions on shipper liability, and all the kinds of obligations which the shipper is expected to fulfil, that it actually makes the practice of shipping more efficient, or actually places more obstacles on the shipper, and ultimately the efficiency of shipping.

If the Rotterdam Rules never come into force, it may be worthwhile considering whether a new convention which is more acceptable generally could also take on board the areas for reform suggested above as far as shipper liability is concerned.

⁶³⁶ This was suggested by Francesco Berlingieri, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules' (General Assembly of the AMD, Marrakesh, 5-6 November 2009).

Success of methodology

This research is doctrinal and so focuses on looking at the place of relevant laws in existing contexts and legal systems. By starting with the study of what the term “shipper” could mean in the law as compared to practice, the research is more appreciative of the need to address different duties in different contexts and that not all duties apply to all shippers equally, since there are different kinds of shippers.

Following this, the study of national laws provisions gives a good foundation for understanding the background from where the law on shipper liability originated. The next step was to build on this knowledge by studying the formulation of international conventions. Conventions provisions which expressly and also impliedly reflect ideas injected from nations all over the world are a reflection of national laws. Most of the theoretical questions can be answered by using this method.

The practical effects of the rules however, can only be fully understood by looking at the practice of the industry players and their understanding of how it works.

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