A Carrier's Liability for Commercial Default and Default in Navigation or Management of the Vessel

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I. INTRODUCTION

Intractable problems in applying the Hague Rules arise from conflicts between two seemingly independent provisions: (1) *immunity* under the Hague Rules for negligence "in the navigation or in the management of the ship," and (2) *responsibility* under Hague Rules to "carefully . . . keep, care for, and discharge" the goods.[1] Both negligent care of cargo (hereinafter "Commercial Default") and defective navigation or management of the vessel (hereinafter "Vessel Management Default") help determine whether a carrier has responsibility. If a ship owner is found responsible for Commercial Default he is generally liable to the cargo owner but if his negligence is due to Vessel Management Default, he may be immune to a suit by the cargo owner. Often there is a compromise between carrier interests and cargo interests, as shown by exception clauses in contracts of affreightment that help create a legal distinction

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1. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 157.

between the two defaults.[2] However, it is often difficult to separate the two defaults, since the same careless conduct often involves both "care for" cargo and navigation or management of the ship. Therefore, the compromise in the contract of affreightment is not sufficient to solve legal problems related to a carrier's responsibility for cargo damages.

Today, many scholars disagree with existing opinions and present their own theories to test Commercial Default and Vessel Management Default. Since Korea has a shorter history of commercial laws than other developed countries, few cases related to standards of distinction between Commercial Default and Vessel Management Default exist. As such, analogizing Korean cases does not allow for the construction of organizational principles or standards. Still, it is proper to use internationally accepted interpretations of cases of Commercial Default and Vessel Management Default. Thus, Korea's acceptance of the Hague-Visby Rules[3] and the distinction between the two defaults has served to legalize the Korean Commercial Code.[4]

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2. *See* Stephen Zamora, *Carrier Liability For Damage or Loss to Cargo In International Transport*, 23 AM. J. COMP. L. 391, 406 (1975); Joseph C. Sweeney, *Happy Birthday Harter: A Reappraisal of the Harter Act on its 100th Anniversary*, 24 J. MAR. L. COM. 32 (1993); R. Glenn Bauer, *Conflicting Liability Regimes: Hague-Visby v. Hamburg Rule-A Case by Case Analysis*, 24 J. MAR. L. COM. 55 (1993) (stating that "[t]he compromise consists in that the carrier is unable to exonerate himself from liability for negligence other than in the navigation or management of the vessel, while he had exercised due diligence to make the vessel seaworthy.").

3. *See* Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Brussels, Feb. 23, 1968, entered into force June 23, 1977). Korea has neither ratified nor approved to the Hague Rules 1924 or the Visby Rules 1968. In 1991, however, Korea enacted the Commercial Code consisting of five books. Book II concerned itself with Korean shipping law in which the principal provision of the 1924 Hague Rules, the 1968 Visby Rules, and two provisions (Art. 6 and Art. 8) of the 1978 Hamburg Rules were embodied. Korean shipping law found in the Commercial Code applies to both domestic and foreign trade were applicable.

In foreign trade, for example, where the port of loading or discharge is located in a foreign state, or the bill of lading is issued in a foreign state, the contracting parties may designate the applicable law pursuant to Art. 9 of the Korean Private International Law. Where the contracting parties to the carriage by sea designate the Hague Rules, the Visby Rules or the Hamburg, those Rules are applicable. In domestic trade, however, Korean law applies. *See* WILLIAM TETLEY, MARINE CARGO CLAIMS 1056 (1988).

4. Korean commercial laws are mainly incorporated in the Commercial Code, Law No.1000 (1962), amended by Law No. 5591 (1998) and its various supplementary laws and provisions. The Korean Commercial Code supplemented by the Civil Code, Article 1, corresponds to the United States (hereinafter "U.S.") Uniform Commercial Code (hereinafter "UCC"). The Korean Commercial Code, which is based on the merchant status of the participants and not on the nature of the transaction, RUDOLF B. SCHLESINGER, ET AL. COMPARATIVE LAW 542 n.2 (5th ed. 1988), is not as complete and sophisticated in dealing with complicated or strategic commercial issues, nor is it as flexible and responsive to the perceived needs of the commercial and legal communities, when compared with the U.S. UCC. *See* Jae Yeol Kwon, *An Isolation in Systems of Law; Differences Between The Commercial Code of U.S. and Korea*, 29 LOY. L.A. L. REV. 1095, 1100 (1996). The Korean Commercial Code includes provisions about commercial transactions (Book II), corporations (Book III), insurance (Book IV) and maritime commerce (Book

This paper attempts to define a distinguishing standard for Commercial Default and Vessel Management Default by analyzing the theories and the precedents of the United States[5] and the United Kingdom,[6] both of which have adopted the Hague Rules or Hague-Visby Rules. Considering the many reasons for damage or loss to cargo, it is worthwhile to analyze the relationships of various facts to clarify a standard of Commercial Default and Vessel Management Default. Although the two defaults appear independent, intractable problems arise in separating the defaults in actual cases, primarily because the two-default concept is general, abstract and ambiguous. Often the same careless conduct involves both "care for" cargo and "management of the vessel." As a result, it is difficult to apply the concept in a standard manner. The facts of a case may produce divergent interpretations and conclusions in different countries. These differences lead to complex and unpredictable problems of conflict of laws and more grounds for forum shopping. Furthermore, when the two defaults concurrently cause damage or loss, the Hague Rules and Hague-Visby Rules have no direct provisions, resulting in difficulty constructing a clear standard regarding the two defaults.[7] Thus, the Hague Rules and Hague-Visby Rules cause uncertainty and confusion as to exactly where to draw the line between what does and does not constitute error in the navigation or management of the vessel within the meaning of the exception. As such, this article proposes a standard based on the concept of the "purpose of an act" as it relates to cargo or navigation and management of the vessel. Establishing a standard to distinguish the two defaults is desirable both for risk management of the shipping companies, as well and clarifying whether the carrier or the cargo insurer has liability.

V), but does not include provisions about international trade, which is left to be subject to international trade laws and practices. Nor does it include provisions about the negotiable instruments, which are governed separately by the Bills Act (Law No. 1001 (1962)) and the Checks Act (Law No. 1002 (1962)). The U.S. UCC provides for the sale and lease of goods, negotiable instruments, bank deposits and collections, funds transfers, letters of credit, bulk sales, warehouse receipts, bills of lading and other documents of title, investment securities, and secured transactions.

5. In 1936, the United States enacted its Carriage of Goods by Sea Act ("COGSA"), which is substantially the same as the international convention. The United States ratified the Hague Rules in 1937.

6. The British government enacted domestic legislation putting the Hague Rules in force even before the conclusion of the diplomatic conference, a clear precedent for what the United States would do in 1936 to formulate the treaty language in its own image. The Hague-Visby Rules were adopted by the UK legislature through the enactment of the Carriage of Goods by Sea Act of 1971, replacing the Hague Rules, which had been adopted by the 1924 Act of the same name.

7. The Hague Rules were not a comprehensive code and were silent on some matters.

II. LEGITIMACY OF EXEMPTION CLAUSES IN BILL OF LADING

Early maritime law usually placed strict liability upon common carriers,[8] making the carrier liable for loss or damage to the cargo, even when the carrier was not negligent.[9] The result is that apart from the express contract and with certain exceptions, the carrier is absolutely responsible[10] for the safety of the goods entrusted to the carrier. Exceptions include loss or damage to goods caused by acts of God, the King's enemies, the inherent vice of the goods themselves, or their having been properly made the subject of a general average sacrifice.[11] At common law, all ship owners who contract to carry goods undertake absolutely, in the absence of express provisions negating such undertaking, that their ship is seaworthy at the beginning of the voyage, and that they will proceed on the voyage with reasonable dispatch and without unnecessary deviation.[12]

Although carriers have strict liability for the safe arrival of cargo under common law in England,[13] they have protected themselves by using exemption clauses, available under the principle of freedom of contract since the seventeenth century.[14] However, concerning the carriage

8. It is agreed that ship owners incur this absolute liability when they are a common carrier. While the exact meaning of 'common carrier' is not entirely clear, a ship owner is probably a common carrier when his ship operates as a general ship, but not when it is under charter. In the latter situation, the basic liability of the ship owner is the subject of controversy. This controversy that has yet to be finally resolved because the carriage is usually governed by the charter-party and thus by the general law of contract rather than by the common law with its seat in bailment. *See* MALCOLM A. CLARKE, ASPECTS OF THE HAGUE RULES 113-14 (1976).

9. *See* THOMAS G. CARVER, CARVER'S CARRIAGE BY SEA 3-20 (1982); G. GILMORE & C. BLACK, LAW OF ADMIRALTY 139-140 (1975); THOMAS SCHOENBAUM, ADMIRALTY AND MARITIME LAW 293 (1987); 2A MICHAEL F. STURLEY, BENEDICT ON ADMIRALTY §11 (1992); TETLEY, *supra* note 4; Robert Hellawell, *Allocation of Risk Between Cargo Owner and Carrier*, 27 AM. J. COMP. L. 357, 357 (1979).

10. *See* Nugent v. Smith, 33 L.T.R. 731, 736 (C.P. 1876); Liver Alkali Co. v. Johnson, 9 L.R.-Ex. 338, 338 (1874); Pandorf v. Hamilton, 17 Q.B.D. 670, 685 (1886). This liability is not removed by a practice of the ship owner to insure at the cost of the goods owner and by his direction. *See* Hill v. Scott, 2. Q.B. 371, 375 (1895). The liability is not assumed by a warehouseman who undertakes to have goods brought by barge from the ship to his warehouse and carries out that arrangement by sub-contract with a lighterman. *See* THOMAS SCRUTTON, CHARTERPARTIES AND BILL OF LADING 103 n.4 (1984) (citing Consolidated Tea Co. v. Oliver's Wharf, 2 K.B. 395, 399 (1910)).

11. *See* Carver, *supra* note 9, 19-20; E.R. IVAMY, PAYNE & IVAMY'S CARRIAGE OF GOODS BY SEA, 178-80 (1989); GILMORE & BLACK, *supra* note 9, 139-40; SCHOENBAUM, *supra* note 9, at 293; SCRUTTON, *supra* note 10, at 201-05; STURLEY, *supra* note 9, at § 11 (1992); TETLEY, *supra* note 4, at 531.

12. *See* Steel v. State Line, [1874 – 80] All E.R. Rep. 145, 147 (H.L. 1878).

13. This rule responded to practical considerations: Usually only the carrier had detailed knowledge of what happened to the shipment; consequently, the shipper found it difficult or impossible to prove that the carrier or its agents were negligent. *See* John O. Honnold, *Ocean Carriers and Cargo; Clarity and Fairness-Hague or Hamburg*, 24 J. MAR. L. COM, 76 (1993).

14. *See* CARVER, *supra* note 9, at 630; PAUL TODD, CASES AND MATERIALS ON BILLS OF LADING 287 (1987).

of goods at sea, exemption clauses simply stated, "dangers of the sea only excepted. . .the act of God excepted, or the King's enemies and dangers of the sea excepted." The decision of *Smith v. Shephard* in 1795,[15] which strictly interpreted the exemption clause "the dangers of the sea excepted," began to give way to more diverse and complex opinions.[16] In the nineteenth century many sea carriers included all-embracing exclusion clauses in bills of lading. This was particularly true of English carriers, who had a virtual monopoly on much of the world's shipping. The hostility of cargo-owning countries led to the passage of legislation attempting to defeat unfair exclusion clauses. The most famous example of this is the United States' "Harter Act" of 1890. However, the exclusion clause was further extended, until, as has been said, "there seems to be no other obligation on a ship owner than to receive the freight."[17] The carriers' bargaining power prevailed until the end of the nineteenth century, when a shortage of shipping space developed. Then, the Hague Rules of 1924 changed the situation.[18]

Under the Hague Rules - based on the general principles of the Harter Act,[19] the carrier's defaults were classified into Commercial Default and Vessel Management Default. Carriers were liable for loss or damage to goods caused by Commercial Default, but were not liable for Vessel Management Default.

The Harter Act was the world's first legislative attempt to allocate the risk of loss in sea carriage between carrier and cargo interests.[20] By clearly distinguishing between Commercial Default and Vessel Management Default, the statute, not exemption clauses, settled liability for Commercial Default. Even though a prohibition of exemption clauses in cases of Commercial Default had been formerly applied in case law, the importance of the Harter Act is that it prohibited the exemption clause for Commercial Default, dividing defaults incident to sea carriage between a ship owner and the cargo interest.[21] Treatment of the two cate-

15. CARVER, *supra* note 9, at 161.

16. CARVER, *supra* note 9, at 161; SCRUTTON, *supra* note 10, at 210.

17. SCRUTTON, *supra* note 10, at 210.

18. *See* ARNOLD W. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 127-28 (1953).

19. *See* An Act relating to Navigation of Vessels, Bills of Lading and Certain Obligations, Duties, and Rights in Connection with the Carriage of Property 1893, Feb. 13, 1893, sec. 3, 27 Stat. 445.

20. *See* Michael F. Sturley, *Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments About Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence*, 24 J. MAR. L. COM. 119 (1993).

21. To satisfy cargo interests, the Act made unlawful any form of negligence clause in bills of lading covering shipments between U.S. and foreign ports. On the other hand, it drastically altered the implied warranty of seaworthiness. Although theoretically leaving the warranty intact, the Act in practice held the ship owner to a duty of "due diligence" to make the vessel

gories separately became internationally recognized.[22] In the early years, the legislation of certain British dominions that were large exporters of raw materials followed the example of the Harter Act. These countries believed that carrier interests in the mother country did not treat shippers fairly. In 1903, New Zealand, then a colony, enacted the first statute modeled on the Harter Act.[23] Similarly, the new nation of Australia[24] enacted its own Sea Carriage of Goods Act in 1904,[25] followed by Canada in the Water Carriage of Goods Act of 1910.

Carriers who objected to the compromise affecting their exemption clauses and the then rudimentary organizations representing shippers opposed the Hague Rules from the outset.[26] However, the crucial need for international uniformity stimulated legislative activity that led to widespread adoption of the Hague Rules.[27]

The Hague Rules[28] have been the only international convention to regulate contracts of carriage of goods by sea for some time, but after three decades of practical experience, discontent surfaced. Since the mid-1950s, businessmen and lawyers in the major maritime states that had ratified or acceded to the Hague Rules began to press for modest reforms to prevent small defects from eventually rupturing the entire scheme. This trend was due to enlargements and diversification in international commodity transactions and to changes in social and economic environments, commercial needs and shipping technology. The Hague Rules compromised the concerned parties' interests. Further, difficulty in legal and technical interpretation led to revision and supplementation of the contents by new case law or usages in trade.

Under these circumstances the 1963 Committee Maritime International Conference, which had played an active role in the adoption of the Hague Rules in Stockholm, adopted an amendment draft to the Hague

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seaworthy. Furthermore, if the carrier could prove that it had fulfilled the duty, it could not be held liable for faults or errors in the navigation or management of the vessel. *See* Zamora, *supra* note 2, at 402 n.55.

22. *See* Hellawell, *supra* note 9, at 358.

23. Act No. 96. 1903 (N.Z.). The 1903 legislation was superseded by the New Zealand Shipping and Seaman Act, 1908 (N.Z.). New Zealand had advanced from the status of "colony" to "dominion" in 1907.

24. The Commonwealth of Australia, comprising the British colonies of New South Wales, Tasmania, Victoria, Western Australia, South Australia, and Queensland, came into existence on January 1, 1901, following twenty years of discussion of federation.

25. The Commonwealth Act, 37. The 1904 legislation was superseded in 1924 by domestic legislation adopting the Hague Rules.

26. *See* Honnald, *supra* note 13, at 77-78.

27. United States and other major countries enacted nearly all of the provisions of the Hague Rules in Carriage of Goods by Sea Act.

28. The original French text of the mandatory Hague Rules was adopted on August 25, 1924, and signed, subject to ratification, by fourteen nations, including the United States.

Rules, called the Visby Rules or Visby Convention.[29] Most significantly, the Visby Amendment leaves intact the limited carrier duties and the laundry list of defenses under the Hague Rules, including Vessel Management Default. Thus, the amendment is not the significant overall revision demanded by critics of the Hague Rules.

III. Exemption for Vessel Management Default

The exemption clause for default[30] in navigation or management[31] of a ship originated in the Nineteenth Century subsequent to the advent of steamships and the handling of complicated machinery. Before the Harter Act,[32] United States public policy[33] invalidated fault-clauses,[34] partly because cargo interests were relatively powerful. On the other hand, ship-owning nations such as Britain and France continued to allow carriers full freedom to set their own liability terms. The differences between these countries reflects the fact that the United Kingdom dominated the Atlantic (as sailing vessels gave way to steamships) while the United States' acute shortage of shipping space forced the United States to depend heavily on the United Kingdom's ships. As a result, a negligence clause inserted in an international bill of lading could be valid in one country and invalid in another, the liability of the carrier depending upon the chosen forum.[35] Whereas charterers and ship owners tend to be in a roughly equal bargaining position, carriers generally are in a much stronger position than shippers under bill of lading. Thus, the terms in the carriage contract tended, especially towards the end of the last century, to favor the ship owners as against holders of bills of lading. Ex-

29. The Visby Recommendations were later amended at the Maritime Law Diplomatic Conference in Brussels during 1967 and 1968, and finally entered into force June 23, 1977. *See* Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. Mar. L. & Com. 553 (1995).

30. The original initiative for attempting to modify the old Hague Rules was a reaction against the view taken by the House of Lords in the Muncaster Castle, on the definition of unseaworthiness. The main principles of the Hague Rules and the Hague-Visby Rules have not changed since the original Hague Rules were brought into force in 1924, and many of the old cases are still authoritative. *See* Todd, *supra* note 14, at 288

31. Management was construed to mean activities in connection with the operation of the ship, other than strictly navigational activities. *See* Bauer, *supra* note 2, at 55; Schoenbaum, *supra* note 9, at 347.

32. The Harter Act, Feb. 13, 1893, ch. 105, § 3, 27 Stat. 445-46 (stating that "neither the vessels, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . . .").

33. *See generally* Gosse Millard v. Canadian Gov't Merchant Marine, 1 K.B. 717 (1926) (discussing damage sustained by a steamship carrying cargo under a bill of lading under Carriage by Sea Act, 1924).

34. Liverpool Steam Nav. Co. v. Phenix Ins. Co., 129 U.S.397, 439-40 (1889).

35. *See* Zamora, *supra* note 2, at 404.

emption clauses became so encompassing as to effectively exclude virtually all liability for loss or damage to goods.[36]

The Harter Act of 1893 (the first national law designed to provide uniformity of liability by contractually restricting the bargaining power of carriers) made illegal the clauses in bills of lading that exempted carriers' liability from default arising from making a ship seaworthy or from caring for the cargo. Nevertheless, the Harter Act stipulated that for a carrier to be exempt from liability for Vessel Management Default, the carrier must exercise due diligence to make the vessel seaworthy. This stipulation of the Harter Act[37] also appeared in the Hague-Visby Rules, which stated that neither the carrier nor the ship shall be responsible for the loss or damage arising or resulting from "acts, neglect, or fault of the master, mariner, pilot, or the servants of the carrier in the navigation or management of the ship."[38]

It may seem irrational to exempt a carrier from responsibility, although the loss or damage resulted from the fault or neglect of a carrier's servants. A plausible reason for exempting a carrier from liability is the maritime situation at the end of the nineteenth century where navigation was specialized work, not under the same control possible by a carrier on land. A small mistake could cause significant problems, like crashing into another vessel. At that time, wooden sailing ships carried cargo, and there were few reliable marine charts and navigational aids. Ship owners could not even communicate with their ships at sea.[39]

In those days of wooden ships, overseas trading was a dangerous joint venture between the ship and cargo owners. Ship owners risked the ship, the captain and crew risked their lives, and shippers risked their goods.[40] Under the circumstances, Vessel Management Default was one of the exemptions from liability for the carrier. A mariner or a servant of a ship escaped liability under maritime laws if he did not intend to commit the default. However, there was no exemption if the mariner or ship servant did not exercise due diligence to make the vessel seaworthy, or if he committed Commercial Default. This was the case even though there was Vessel Management Default.

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36. *See* TODD, *supra* note 14, at 287.

37. The Harter Act provided that if the owner of a vessel exercised due diligence to make her seaworthy he should not be liable "for damage or loss resulting from fault or errors in navigation or in the management of the vessel." The Harter Act, Feb. 13, ch. 105, § 3, 27 Stat. 445-46.

38. Hague-Visby Rules, art. IV(2).

39. *See* Joseph C. Sweeney, *UNCITRAL and The Hamburg Rules-The Risk Allocation Problem in Maritime Transport of Goods*, 22 J. MAR. L. & COM. 511, 511-13 (1991).

40. *See id.* at 512 ; Honnold, *supra* note 13, at 104.

IV. Establishing a Baseline for Distinguishing Between Vessel Management Default and the Commercial Default

Under the Hague Rules,[41] a carrier shall not be responsible for loss or damage arising from an act, neglect, or default[42] of the carrier in the navigation or the management of a ship.[43] The carrier is responsible for the default, when the carrier causes loss or damage arising from loading, handling, stowing, carrying, keeping, caring for, and discharging the goods carried.[44] Treating the two kinds of defaults differently, without clearly specifying their definitions, results in a conflict concerning their distinction. This article now examines the standard for distinguishing Commercial Default from Vessel Management Default by analyzing the precedents in the United States and in the United Kingdom.

A. Precedents in the United States

There are two definitions of management of a vessel in United States case law. The first one defines management as control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas.[45] The second one defines management of the modern steamship as keeping, checking and using machinery to operate navigation to deliver and diligently care for the carriage.[46] Case law, however, did not clearly distinguish Vessel Management Default from Commercial Default.

Two important precedents concern definitions of management of the vessel. The first is the decision in *Knott v. Botany Worsted Mills*.[47] Here, the plaintiff's cargo of wool bales was loaded in between deck spaces at Buenos Aires. After the cargo was loaded the vessel was trimmed down by the stern. Wet sugar was later loaded onto the vessel at Pernambuco. The wet sugar was put in the space adjoining the wool, separated only by a wooden non-watertight bulkhead - watertight bulkheads not being per-

41. Hague-Visby Rules, art. VI(2).

42. Normally, of course, negligence is a ground of liability. Not every form of negligence, however, is included. Thus the negligence of the ship owner or his agents as opposed to the master, etc., is not included. Note also that it is not all negligence of the master that is expected, but only neglect or fault in the navigation or management of the ship. *See* David A. Glass & Chris Cashmore, Introduction to the Law of Carriage of Goods 181 (1989).

43. It was stated "faults or errors in navigation or in the management of said ship . . ." in the Harter Act. The Harter Act, Feb. 13, 1893, ch. 105, § 3, 27 Stat. 445-46. This exemption clause is also accepted by Korea. *See* Commercial Code of Korea, art. 788(2).

44. *See* Hague Rules, art. III (2)

45. *See* Poor, On Charterparties and Bill of Lading 138 (2d ed. 1930).

46. *See* The Wildcroft, 124 F. 631 (E.D. Penn. 1903); W.J. McCahan Sugar Refining Co. v. The Steamship Wildcroft, 201 U.S. 378 (1906).

47. Knott v. Botany Worsted Mills, 179 U.S. 69 (1900).

mitted or required in these spaces. After the sugar was loaded, the vessel was trimmed down by the bow. After the change in trim, the wet sugar drained onto the wool. The Supreme Court agreed that negligent stowage, rather than negligent navigation or management, caused the damage.[48] In so holding, the Court adopted the reasoning of the district court, affirmed by the court of appeals, to the effect that the essential cause of the damage was the negligent stowage. The change of trim was merely incidental to the result of the changes in the loading of cargo, as no attention was given to the effect on the ship's trim when the cargo was loaded. Thus, the carrier should have anticipated that the trim of the vessel would become unbalanced in loading.

The second precedent is a judgment in *The Germanic Case*.[49] Here, a heavy snowfall occurred in New York after the arrival of a vessel heavily coated with ice. In order to meet the ship's sailing schedule, all five hatches of the vessel were discharged at the same time the coalbunkers were loaded. Swift action averted listing of the vessel, but five hours later a second list developed. The ship then rolled over so that her coal ports were below the waterline, resulting in the ship sinking, and causing water damage to the plaintiff's cargo. If the overturning or sinking of the vessel had been due to a failure in controlling the trim, it would have been Vessel Management Default. However, the carrier was responsible for the loss, because discharging a cargo was not part of management of the vessel. The court found that "careless and premature removal of cargo," made the vessel "top-heavy," and "instability brought about by the improper unloading, care, and custody of the cargo, is not Vessel Management Default."[50] Thus, unloading cargo was the primary objective, not the ballasting of the vessel. The hurried and imprudent unloading caused the sinking, so that obligation to care for cargo rather than management of the vessel governed the outcome. This case shows that the primary nature and objective of the acts which cause the loss govern the conflict between duty to cargo and the defense of negligent management.[51] Discharging cargo is not a deed affecting the vessel but is considered to only affect the cargo itself. Even though the result of the deed affected the ship's security, it is not Vessel Management Default.

Consequently, the two cases show that intent is a distinguishing standard between Commercial Fault and Vessel Management Default. In practical terms, the purpose of the act can affect either the case for cargo or for the vessel. For example, in the second case, the purpose of the act

48. *See id.*

49. The Germanic, 107 F. 294 (S.D.N.Y. 1901); The Germanic, 124 F. 1 (2d Cir. 1903); Oceanic Steam Navigation Co. v. Aitken, 196 U.S. 589 (1905).

50. The Germanic, 124 F. 1, 5 (2d Cir. 1903).

51. *See* Sweeney, *supra* note 2, at 2.

might be for the discharge of cargo. The fact that the carrier is liable for the loss does not flow naturally from the fact that the direct purpose of the act was the discharge. Rather, the cause of cargo loss is negligent discharge that put the vessel in peril. In this case, during discharge, the carrier recognized a need to trim and attempted to correct. However, if an idle or negligent deed sunk the vessel, then Vessel Management Default would have exempted the carrier from responsibility. Nevertheless, the carrier did not do anything about controlling the trim of the vessel during the discharge of the cargo and thus, no exemption from the liability for Commercial Default is appropriate.

B. Precedents in the United Kingdom

Two leading cases debated the application of the Harter Act before the United Kingdom adopted the Hague Rules. These cases help distinguish between the two defaults.

The Court in the *Ferro* case[52] was the first to construct the term "management and navigation" of the vessel. A bill of lading had an exemption clause for any "damage from any act, neglect, or fault of the pilot, master, or mariners in the navigation or management of the vessel." Some decayed oranges in the shipment damaged the shipped goods. The Court found that negligent loading caused the damage. The judgment recognized that the exemption clause did not cover the stevedore's negligence. Negligent stowage of the cargo was held not neglect or fault in "the navigation or management of the vessel." A number of other cases, determined before the passing of the Carriage of Goods by Sea Act of 1924,[53] also considered the meaning of this phrase.

The second case is the *Glenochil* case,[54] which also defined the term "navigation and management." An engineer pumped water into a ballast tank to secure the vessel's stability, without inspecting the pipes. The cargo was damaged by water leaking from the broken pipes. The Divisional Court held that this default was in the "management," even if not made in the "navigation" of the vessel. The *Ferro* Court judged this case, and established a clear distinction between "want of care of cargo and want of care of vessel indirectly affecting the cargo."[55] Other courts have repeatedly cited the principles enunciated in this case[56] both in the United Kingdom and in the United States.[57]

52. The Ferro, 68 L.T.R. 418 (Adm. 1893).

53. *See* Scrutton, *supra* note 10, at 246.

54. The Glenochil, 73 L.T.R. 416 (Adm. 1896).

55. *Id.*

56. *See* The Rodney, 82 L.T.R. 27 (Adm. 1900).

57. *See* Martin Dockray, Cases and Materials on the Carriage of Goods by Sea 651 (1987).

The United Kingdom has more clearly interpreted the term "management and navigation" in many cases since adoption of the Hague Rules as domestic law.[58] One leading English case is *Gosse Millard Ltd. v. Canadian Government Merchant Marine Ltd.*[59] This case that was litigated under the Carriage of Goods by Sea Act of 1924. In *Gosse*, a bill of lading made under the Carriage of Goods by Sea Act 1924 was applied to a cargo of shipped tinplates. Workmen left the vessel's hatches open so that they could go in and out of the hold to remove the tail shaft liner. The workmen negligently failed to protect the open hatches from rain. Rain came through the hatches and damaged the cargo. The House of Lords held that this was neglect of the cargo rather than neglect of the ship, and held the ship-owner liable for the ensuing rain damage. The Court reasoned that if the carrier were not liable in these circumstances then Article III(2)[60] would be valueless to cargo owners. If the same error affects both ship and cargo, the error implicates the whole venture. These may seem to exculpate the carrier, but the facts of each case are determinative.[61] Perhaps the leading opinion in this area is the dissenting judgement of Justice Greer, in a Court of Appeal's case that was later upheld by the House of Lords.[62] In the case Justice Greer stated,

> "If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved."[63]

It appears, that the *Gosse* situation, in the words of Justice Greer, was a case of "failure to use the apparatus of the ship for the protection of the cargo."[64]

The Court in *Gosse* ruled that the carrier was not responsible for the

58. Introducing a new Carriage of Goods by Sea Act in 1924, the British government, which had been the driving force behind the Hague Rules, put the rules into the statute books before the rest of the world had completed the diplomatic formalities regarding the complete legislation. Other countries in the British Empire soon followed the mother country's lead. Australia enacted its new Sea Carriage of Goods Act later the same year. India enacted its COGSA in 1928. Outside of the British Empire, however, the response to the Hague Rules was less enthusiastic. Before the United States acted in 1936, only Belgium and the Netherlands had recognized the Hague Rules with national legislation. *See* Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. COM. 35-36 (1991).

59. Gosse Millard v. Canadian Gov't Merchant Marine, All E.R. Rep. 97, 98 (H.L. 1928).

60. *See id.* (noting that a carrier shall properly and carefully load, handle, show, carry, keep, care for, and discharge the goods carried).

61. *See* TETLEY, *supra* note 4, at 398.

62. *See Gosse Millard*, All E.R. Rep. at 103.

63. *Id.*

64. *Id.*

damage to the cargo since the decision to leave the hatches open was part of the management of the ship. The House of Lords upheld the dissent of Justice Greer. It recognized that the test was whether there was error in handling of the cargo that was not an error in management of the vessel. Lord Chancellor Hailsham accepted the decisions of *The Ferro* and *The Glenochil* cases and, adopting the *Hourani v. Harrison*[65] and *Brown & Co. v. Harrison* cases,[66] judged in a similar manner. In short, the standard to distinguish the two types of fault is whether there is *primarily* neglect of the management of the ship,[67] or *primarily* an erroneous act directed toward the care of cargo.

An interesting point with regard to the standard of distinction between the two defaults in the above cases involves handling permanent appliances of the vessel, such as a refrigerator. For a long time, precedents about the two types of fault in the United Kingdom recognized a default in management of the vessel when the damage arose from improperly maintaining a permanent appliance used for both a ship purpose and a cargo purpose. Presently however, some limitations apply to this view.[68] The Court in *Foreman & Ellams Ltd. v. Federal Steam Navigation Co.*[69] did not rule a loss of frozen cargo due to improperly operating a refrigerator to be Vessel Management Default. In this case, Justice Wright relied on the dissent in *Gosse*, and held that management of the ship did not include the responsibility for the breakdown or improper functioning of refrigerating equipment.[70] Thus the court created a limitation on the interpretation of the errors in management of the vessel. Justice Wright therefore, courageously and correctly took the same position as the House of Lords had taken in reversing *Gosse*.[71]

Samland[72] is a similar case that dealt with a fault in vessel equipment used for both the vessel and the cargo. *Samland* reversed the Court of Appeal's decision in *Rowson v. Atlantic Transport Co.*,[73] and held that

65. Hourani v. Harrison, All E.R. Rep. 195 (C.A. 1927).

66. Brown & Co. v. Harrison, All E.R. Rep. (C.A. 1927).

67. *See* The British King, 89 F. 872, 875 (S.D.N.Y. 1898) (holding that negligent failure of the crew to maintain the ship's pumps was negligence in the management of the ship and the ship owner was not liable).

68. *See* Foreman & Ellams Ltd. v. Blackburn, 30 Lloyd's List L. Rep. 52, 62 (K.B. 1928).

69. *Id.*

70. *See* International Packers London, Ltd. v. Ocean S.S. Co., 2 Lloyd's Rep. 218 (Q.B. 1955) (holding that negligent failure to use the apparatus of the ship for the protection of the cargo was decided not to be negligence in the management of the ship).

71. *See* TETLEY, *supra* note 4, at 398.

72. The Samland, 7 F.2d 155 (S.D.N.Y. 1925).

73. Rowson v. Atlantic Transp. Co., 1 K.B. 114 (1903) (holding that carelessness in handling the refrigerating apparatus of the vessel, resulting in damage to the cargo, must be regarded as falling within the expression, "management of the ship," on the ground that the refrigerating

liability applies only where the use of the appliance is primarily for the purpose of the ship, as opposed to the cargo.

In the case of *Leesh River Tea Co. v. British India Steam Navigation Co.*,[74] a stevedore stole the cover of a storm valve on a sanitary pipe. The Court held that the damage did not occur in the navigation or management of the vessel.

The principle applied in the dissent in *Gosse* has been a universally accepted standard in later cases. It is clear that Western countries have usually followed the United Kingdom's precedents concerning the notion of Commercial Default and Vessel Management Default.

The words of Commercial Default and Vessel Management Default are now defined in the following manner:

> Vessel Management Default is fault basically affecting only the vessel. Fault in the navigation or management of the ship might be defined as an erroneous act or omission, the original purpose of which was primarily directed towards the ship, her safety and well-being and towards the common venture generally.[75]

These can be acts of fault or mistake where the main purpose is to secure the navigation or the safety of the vessel. If, however, the negligence is not negligence towards the ship but negligence or failure to use the apparatus of the ship for the protection of the cargo, the ship does not receive the relief provided by the exemption.[76]

In comparison, Commercial Default is fault in actions only directed toward the cargo. Examples are faults or mistakes in acts that are carried out to care for and protect the cargo. Generally, these faults or mistakes include fault in loading, keeping, carrying, stowing, handling or unloading cargo. As such, even though repairing a hatch cover is an act on the vessel, the fault is Commercial Default, because the effect of the act is mainly on the cargo.

V. Responsibility of the Carrier in Conflicts between Commercial Default and Vessel Management Default

The problem in trying to distinguish between Commercial Default and Vessel Management Default is how to determine purpose or nature of an act. How can you judge an act that has dual purposes, one for the

apparatus was used for the ship's provisions as well as for the cargo, and therefore that negligence in managing it was negligence in management of the ship.

74. Leesh River Tea Co. v. British India Steam Navigation Co., 1 Lloyd's Rep. 450 (Q.B. 1966).

75. Tetley, *supra* note 4, at 398.

76. *See* The Farrandoc, 2 Lloyd's Rep. 276 (Ex. C.R. 1967).

cargo and the other for the ship? The following two cases address this conflict. The cases are similar in content, but different in outcome.

In a 1959 case a vessels cargo was damaged by seawater leakage. In this case, the Court ruled that flooding a cargo compartment, instead of the vessels ballast tanks, was not Vessel Management Default.[77] The negligence was in handling of the cargo as the ballast tanks were properly watertight and cargo would not have been damaged if the ballasting had been carried out correctly. However, in a 1980 case a master ordered twenty tons of water to be moved from the back tank to the front tank of his vessel in order to correctly ballast the ship. In the transfer water, leaked from a defective connecting part damaging the cargo. The Court held that the damage was due to fault in navigation.[78] The Court reasoned that although ballasting is essentially a navigational operation this does not mean that an error in ballasting necessarily constitutes negligence in navigation. A ballasting error would constitute negligence in navigation only when the ballasting operation is intended for the equilibrium and safety of the vessel.[79] Generally, an error in ballasting is negligence in navigation or management, since the operation is for the safety of the vessel and does not primarily concern the cargo *per se* or the ship's facilities for handling the cargo. However, ballasting can in some circumstances, concerns both the stability of the vessel and also the safety of the cargo.

In determining the purpose or nature of an act, one of the most widely used methods of interpretation is to apply the supplementary terms, such as "primary" or "sole" purpose. Was the primary or sole purpose of the act concerned with the cargo or the vessel? Another method is to refuse to recognize that Commercial Default and Vessel Management Default can occur simultaneously. For example, even though an act has the dual purpose of securing both the vessel and the cargo: default in navigation results when the primary purpose of the act is for the security of the vessel. Inquiry into this view reveals that Commercial Default creates liability, but Vessel Management Default does not. In reality there is an overlap of the two defaults resulting in the loss. The purpose of the ballasting operation, for example, is to secure navigation. If the ship's hold is used as a ballast tank, however, the purpose of the ballasting operation is to secure the safety of the vessel and an attempt to save the cargo.

The Hague Rules or the Hague-Visby Rules and the carriage of goods by sea acts all require due diligence in the management and operation of vessels. In contrast, only the carriage of goods by sea acts requires

77. *See* Cour de Cassation, DMF 274, 276 (Fr. 1959).

78. *See id.*

79. *See* Cour de Cassation, DMF 198, 209 (Fr. 1980); Firestone Synthetic Fibers Co. v. M/S Black Heron, 324 F.2d 835 (2d Cir. 1963).

due diligence in the care of the cargo. Thus, these two duties could be separate considerations from the viewpoints of law and concept. Acts that concern both navigation and cargo at the same time may violate both due diligence in navigation and in cargo at the same time. Presently, there is no rule to gauge the effect of an act on either navigation or cargo and to assign the responsibility for the loss.

The Hague Rules and the Hague-Visby Rules simply look at each act in the light of either Commercial Default or Vessel Management Default. However, it is unrealistic to forcibly apportion the effect of an act with simultaneous purposes. Acts taken for the management and navigation of the vessel might also affect the cargo. Since the Hague-Visby Rules do not directly address the concurrence of two kinds of defaults, this article now interprets these acts in accordance with the drafters' intention.

First, it is a principle that the carrier is liable for loss or damage to cargo arising from a carrier's default. Exemptions for Vessel Management Default should be interpreted strictly, because the Hague and Hague-Visby Rules, only allow an exemption from liability arising from negligence in an exceptional case. The purpose of strictly construing the exception provisions is to preserve the careful balance between carrier and shipper interests in the Hague Rules and Hague-Visby Rules.[80] Second, the Hague Rules and the Hague-Visby Rules provide for exemption from Vessel Management Default only when the default directly causes the loss. Third, the purpose of legislation to exempt the carrier from liability in the case of Vessel Management Default does not exempt the carrier from liability if the same careless conduct affects both ship and cargo. Two of the reasons for exemption for Vessel Management Default: (1) that the compensation for the loss caused by fault could cost a carrier considerable amounts of money and be too harsh; and (2) Vessel Management Default may endanger the whole voyage. For example, sinking of the vessel may also result in a loss of all or almost all of the cargo. In such a case, an exemption for the carrier is reasonable, because the compensation for damages may be too large and too harsh. An error in the navigation or management fundamentally affects the ship. This might be defined as an erroneous act or omission primarily directed towards the ship, her safety and well being, or towards the venture generally. Conversely, an error in the care of the cargo is an erroneous act or omission directed principally towards the cargo. On the other hand, when a negligent act in navigation or management directly causes damage to the cargo

80. *See, e.g.*, Foreman & Ellams Ltd. v. Blackburn, 30 Lioyd's List L. Rep. 52, 59 (K.B. 1928) (finding that "[a] negligence or exception clause in a statute, as in a contract, ought, I think, to be strictly construed."); TETLEY, *supra* note 4, at 85.

it should be recognized as an act having a direct effect on the cargo. In such a case, liability of the carrier should not be exempt.

VI. CONCLUSION

Even if Commercial Default and Vessel Management Default are addressed independently under the Hague Rules or Hague-Visby Rules, the Hague Rules do not address the problems that result from the interplay of its complex lists of carrier immunities and responsibility with these defaults. Generally, the purpose or nature of the act causing the fault allows the drawing of fine lines between Commercial Default and Vessel Management Default. As such, in distinguishing between two kinds of fault, the key criteria include determining: (1) Whether a negligent act was essential to navigation or directly effects the cargo? (2) Whether or not the act's initial purpose was concerned with the vessel or the cargo? (3) Whether or not the act was in the interest of the vessel or of the cargo? and (4) Whether or not the act was only or primarily in the interests of the cargo or of the ship.

These standards, however, might have several interpretations. When the purpose of an act is for the navigation of the vessel or for the safety of the vessel, the negligence should be considered Vessel Management Default. In this case, however, a carrier should still attempt to take reasonable care to protect the cargo from the act whose purpose is only for the safety of the vessel, when the act might cause damage to the cargo at the same time.[81] Otherwise, the negligence is not in the management of the ship, but in not securing the safety of the cargo. In such circumstances the carrier should be responsible. In other words, an act relating to navigation or management without thought to the cargo is negligence in the management of the cargo. The carrier should check cargo holds periodically when checking the vessel, to ensure that cargo is not lost or damaged. Otherwise, the negligence is in the care of cargo.[82]

81. *See* The Germanic, 196 U.S. 589 (1903); United States Indus. Alcohol Co. v. Calmar S.S. Corp., 53 F.2d 1023 (S.D.N.Y.1931); Hampton Roads Carriers, Inc. v. Allied Chem. Corp., 329 F.2d 387 (4th Cir.), *cert. denied*, 379 U.S. 839 (1964); United States v. Ultramar Shipping Co., 685 F. Supp. 887 (S.D.N.Y. 1987), *aff'd without opinion*, 854 F.2d 1315 (2d Cir. 1988).

82. *See* TETLEY, *supra* note 4, at 405.