The Liability of the Contracting Carrier

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SUMMARY

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I. THE LIABILITY OF THE CARRIER: INTRODUCTION

A. From The Hague to Vienna, via Hamburg

Lawyers, practitioners, or academics who are involved in the law of carriage of goods by sea are used to working with a very particular liability regime based on the Brussels Convention of 1924 (commonly known as the "Hague Rules")[1] as later amended by the so-called Visby Amendment, the Hague-Visby Rules of 1968.[2] Most nations have ratified this Convention and have also adopted national legislation based on that regime.[3] In the United States we have the U.S. Carriage of Goods by Sea Act ("COGSA") dating back to 1936,[4] a body of law that has remained unchanged for over 70 years.

It is only after having studied the historical background that one understands the very particular style and format of the Hague Rules and of the national legislation based on that convention. The codification by the Hague Rules more closely resembles a "model bill of lading"—a format reflecting the purpose for which the rules were initially drafted—than it does a proper piece of legislation or a legal instrument on contractual liabilities. The result of this is that the Hague Rules have a very complex legal structure based on how the liability of the carrier is defined. One can only reach the correct conclusions by reading the first paragraphs of both its articles 3 and 4 in conjunction with one another. The result is the well-known and well-covered conceptualization of the interplay as a "ping-pong game" created by a maritime cargo case which defines the burden of proof and the respective steps in the allocation of liability and exemption.[5]

Almost 100 years of very successful global application of the Hague Rules have almost overcome those structural deficiencies. This success cannot change the fact that the system and some of the principles of the Hague Rules are outdated and remain barely adequate in the modern environment of international trade and transportation. This is particularly true for question beyond the scope of liability. It also remains true for the nucleus of any transportation legislation: the issue of the liability of the carrier.

Almost a century later, we look at a new draft Convention by the U.N. Commission on International Law ("UNCITRAL")[6] that attempts to restructure the

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1. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading and Protocol of Signature, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 [hereinafter Hague Rules].

2. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 2 U.S.T. 430, 1412 U.N.T.S. 128 [hereinafter Visby Amendments]. A further Protocol later introduced the special drawing right ("SDR") as "currency" for the calculation of the limitation amounts of the Hague-Visby Rules. Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197) (entered into force Feb. 14, 1984).

3. *See* Hague Rules, *supra* note 1, Protocol of Signature ("The High Contracting Parties may give effect to this Convention either by giving it the force of law or by including in their national legislation in a form appropriate to that legislation the rules adopted under this Convention.").

4. Carriage of Goods by Sea Act, 46 U.S.C. app. §§ 1300–1315 (1936) [hereinafter COGSA].

5. Nitram, Inc. v. Cretan Life, 599 F.2d 1359, 1373 (5th Cir. 1979).

6. The numbering of the Articles refers to the last UNCITRAL version as finalized during the 41st session of UNCITRAL. For the entire text of the report, *see* U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Report of the United Nations Commission on International Trade Law*, Annex I, U.N. Doc. A/63/17 (June 16–July 3, 2008) [hereinafter UNCITRAL Convention].

basic principles of the preexisting laws and jurisprudence on the liability of the carrier for maritime cargo claims. In doing that, the UNCITRAL Convention has entirely restructured the different legal principles known under the Hague Rules without, for the most part, attempting to alter either the substance of the Hague Rules or the principles that were carefully developed over the years by the international legal community in the application of the Hague Rules.

The Hamburg Rules of 1978 were a similar attempt made by the U.N. Conference on Trade and Development ("UNCTAD") and UNCITRAL, but at that time a stronger iteration of the carrier's liability system was sought. However, the Hague Rules proved to be unacceptable to the shipping and insurance industries and has therefore received only limited support. Nevertheless, the Hamburg Rules had already undergone a process of systematic rearrangements of its different legal principles, a process that facilitated the new harmonization process undertaken by the Working Group III of UNCITRAL.

The new Convention is, as it relates to liability issues, a revision, a modernization, a reorganization, and a clarification of the current and well-known principles. With the exception of very few well-chosen deletions or amendments, the change in substance is minimal. The revolution lies in its reworked format. This change in the drafting and legislating technique is in line with a number of important changes concerning the general approach and philosophy of this instrument, which have also had an impact on the liability system of the new UNCITRAL Convention.

B. Broadening the Scope: From a Liability Convention to a Convention on the Contract of Carriage

The UNCITRAL Convention has taken the step from a liability-driven convention—as all current transportation law Conventions are[7]—to a harmonizing instrument regulating nearly the entire contractual relationship between parties to a contract of carriage. This change of focus has a great bearing on the way the liability issue is addressed in the new UNCITRAL Convention.

7. *See, e.g.*, Hague Rules, *supra* note 1; United Nations Convention on the Carriage of Goods by Sea, G.A. Res. 48/34, U.N. Doc. A/RES/48/34 (Dec. 9, 1993) [hereinafter Hamburg Rules]; Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]; Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, as amended by the Protocol Done at The Hague on September 8, 1955, S. EXEC. REP. NO. 105-20 (1998) [hereinafter Montreal Protocol]; Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 [hereinafter CMR]; Protocol to the Convention on the Contract for the International Carriage of Goods by Road, Jul. 5, 1978, 1208 U.N.T.S. 427 [hereinafter SDR-CMR]; Convention concerning International Carriage by Rail, May 9, 1980, U.K.T.S. 1987 No. 1 [hereinafter COTIF]; Convention of the Contract for the Carriage of Goods by Inland Waterways, Feb. 6, 1959, 1961 Unidroit 399, 1 Int'l Transp. Treaties II-1 Budapest, June 22, 2001 [hereinafter CMNI].

C. Broadening the Scope: From Tackle-to-Tackle to Door-to-Door

Early on in the harmonization and revision process, UNCITRAL decided to embark on this exercise, without stopping at the (artificial) boundaries of the pier[8] or the harbor fences,[9] but instead allowing the application of the new Convention to cover the entire period of actual custody by the contractual carrier, by itself or through its performing contractors, door-to-door from the inland point of taking delivery to the inland point of destination.[10] This sound decision has lead to a very complex regulation in relation to the principles on the application of the Convention and its relationship to other conventions which would otherwise be applicable for this land leg only.[11]

Additionally, the liability provisions of the new Convention have to mirror this extended (non-maritime) scope of its application beyond the pure maritime leg and also adapt the liability regime to adequately cover all legs and modes of transportation used to perform the contract of (door-to-door) carriage. This explains why some of the provisions of the instrument, which are particular to only one form or mode of transportation and for only one particular stage of carriage, are being dealt with in a separate chapter.[12]

D. Dichotomy: Obligations and Liabilities

The UNCITRAL Convention makes a distinction between the definitions of 1) the basic obligations of the carriers (chapter 4),[13] which once breached may lead to 2) a liability of the carrier (chapter 5).[14] It is the similar relationship between articles 3(1)–(2) and 4(1)–(2). Both obligations and liabilities are closely interrelated and cannot operate independently. Thus, when embarking on the voyage through the liability provisions of the new UNCITRAL Convention, one first has to understand the obligations of the carrier.

II. THE OBLIGATIONS OF THE CARRIER

A. The Obligation to Deliver the Goods at Destination

One of the basic obligations is for the carrier to carry the goods to their destination and to deliver the goods to the party entitled to delivery, consignee.[15]

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8. Hague Rules, *supra* note 1, art. 1(e); *see also* Pyrene Co. v. Scindia Steam Navigation Co., [1954] 1 Lloyd's Rep. 321 (Q.B.) (holding that the shipowners' rights and immunities extended to the "part of the loading operation before the goods had crossed the ship's rail").

9. Hamburg Rules, *supra* note 7, art. 4(1) ("At the port of loading, during the carriage and at the port of discharge . . . .").

10. UNCITRAL Convention, *supra* note 1, Annex 1, art. 5, para. 5, art. 12, para. 1.

11. *See infra* Part II (describing the various obligations of the carrier).

12. *See* UNCITRAL Convention, *supra* note 1, Annex 1, arts. 25–27 (introducing the maritime issues of "deviation" and "deck cargo" and establishing rules relating to the "land-side" of the door-to-door transportation contract).

13. *Id.* Annex 1, arts. 11–16.

14. *Id.* Annex 1, arts. 17–23.

15. *Id.* Annex 1, art. 11; *see also id.* Annex 1, art. 1, para. 12 (defining consignee as "a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record").

While this was never spelled out in the existent conventions, the drafters implied such a duty.[16] The failure to deliver the cargo, complete and undamaged, previously created the presumption that the carrier was liable.[17] If the carrier failed to deliver the goods to their destination, a loss was presumed; where the cargo arrived in a damaged condition, a damage was presumed. Both cases led to the so called "prima facie case" that triggered a marine cargo liability case.[18] The laws of some nations state that the carrier's obligation of sound delivery was one of "result" (*obligation de résultat*) and not merely one of care.[19] The Roman law principle of *receptum nautarum* is the basis of today's concept of the carrier's strict responsibility towards the shipper.[20] In practice, however, the obligations of the carrier are hardly as strict and unconditional because the carrier can rely on statutory exceptions (*e.g.*, *force majeure*) and, at least to a certain degree, contractual special exceptions (sometimes referred to as "negligence clauses").[21]

Much has been written on the development of the basic principles of the carrier's liability from general maritime law (*lex maritima*) to the U.S. Harter Act of 1893, to the Hague Rules of 1921, to the Brussels Convention of 1924 ("Hague Rules"), and to the Hamburg Rules of 1978.[22] They are all stops on the voyage of the international community towards a balanced and workable legal regime for the contract of carriage of goods by sea. They are all evidences of the different forms of compromises between freedom of contract and protection of shippers and consignees, between strict liabilities and commercially motivated exceptions.

The new UNCITRAL Convention is an important step forward in this quest: article 11 of the UNCITRAL Convention now clarifies that delivery of the goods to the destination is a crucial obligation of the contractual carrier,[23] but at the same time subjects the carrier's obligation to the general test of fault and diligence formerly known both as "care for cargo"[24] and as "due diligence with regards to seaworthiness."[25]

The new Convention also legislates on the way such delivery must be made, while the obligation of the carrier is mirrored by the basic obligation of cargo interests to take delivery at destination.[26] The novelty of article 11, therefore, lies not just in the mentioning of the obligation of delivery in the Convention, but in offering—in an entirely new chapter—rules and obligations relating to delivery of the goods at destination for both sides of the contract of carriage.[27]

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16. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW §§ 8–13, at 553 (3d ed. 2001).
17. *Id.*
18. *Id.* §§ 8–22, at 584.
19. Saul Litvinoff, *Contract, Delict, Morals, and Law*, 45 LOY. L. REV. 1, 35 (1999).
20. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 514–15 (1996).
21. *E.g.*, ALEXANDER VON ZIEGLER, HAFTUNGSGRUNDLAGE IM INTERNATIONALEN SEEFRACHTRECHT 13–14 (2002).
22. *See, e.g.*, *id.* at 16 (discussing the evolution of shipping law); MICHAEL STURLEY, LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE TRAVAUX PREPARATOIRES OF THE HAGUE RULES, 335–41, 343–505 (vol. 1 1990) (discussing the history of the Hague Rules of 1921 and the Brussels Convention of 1924).
23. UNCITRAL Convention, *supra* note 1, Annex 1, art. 11.
24. *Id.* Annex 1, art. 13, para. 1.
25. *Id.* Annex 1, art. 14, paras. (a)–(c).
26. *Id.* Annex 1, arts. 27, 43.
27. *Id.* Annex 1, arts. 43–49.

A new element of the Convention adds a time aspect to this duty of delivery, as now it is made clear that the carrier is liable under the Convention, when the cargo has not been delivered within the time agreed in the contract of carriage.[28]

B. Period of Responsibility of the Carrier

The new Convention is based on a "contractual" approach.[29] From this it follows, that the carrier remains responsible for the cargo entrusted to it by the shipper during the entire time of the custody of the carrier over the goods.[30] The period of responsibility of the carrier for the goods under the UNCITRAL Convention begins when the carrier[31] receives the goods for carriage and ends when the goods are delivered.[32] Due to the extension of the scope of application in the new Convention to the actual inland points of shipment and delivery—as compared to both the Hague Rules and Hamburg Rules, which were restricted to the pure maritime operation[33]—the period of responsibility is now synchronized with the scope of application.[34] Thus, the same rules and laws will, as a rule, govern the entire period of responsibility.[35]

The criterion for identifying the scope or period of the carrier's responsibility is its actual custody, the actual and factual sphere of control of the carrier. Within this period of control and effective custody the carrier shall remain fully responsible based on the liability regime of the new Convention. However, where the carrier has in fact no effective control over the goods due to reasons beyond his control, the definition of the period of responsibility must be adjusted accordingly.[36]

Mandatory deliveries at official authorities: In line with the above general principle, article 12(2) of the UNCITRAL Convention provides that if the law or regulation of the place of receipt or the place of destination requires that the goods be handed over to an authority or other third party, the period of responsibility shall only begin and end with the actual custody of the carrier.[37] Therefore, the risk during the compulsory periods in which the goods remain in the custody of those authorities lies with the cargo interests.

Scope for a certain freedom of contract: As the custody period is defined by the contract of carriage,[38] the parties may agree on the time and location of receipt and delivery of the goods, and thereby define the beginning and end of the period of responsibility.[39] In order to protect cargo interests from exhaustive bill of lading clauses, the new Convention makes clear that the parties are not allowed to contractually limit the time of receipt of goods to a moment subsequent to the

28. *Id.* Annex 1, art. 17, para. 1, art. 21.

29. This is in contrast to the "documentary" approach of the Hague Rules of 1924.

30. *See* UNCITRAL Convention, *supra* note 1, Annex 1, art. 12, para. 1 (stating that the period of responsibility of the carrier begins when the goods are received and ends when the good are delivered).

31. *Id.* (allowing inclusion of a "performing party").

32. *Id.*

33. Hague Rules, *supra* note 12, art. I; Hamburg Rules, *supra* note 711, art. II.

34. UNCITRAL Convention, *supra* note 1, Annex 1, art. 5, para. 1.

35. *But see id.* Annex 1, art. 26 (discussing carriage preceding or subsequent to sea carriage).

36. *See, e.g.*, Hamburg Rules, *supra* note 7, art. 4(2)(a)(ii), (b)(ii), (b)(iii). (limiting responsibility to periods of time when the carrier is in charge of the goods).

37. UNCITRAL Convention, *supra* note 1, Annex 1, art. 12, para. 2.

38. *Id.* Annex 1, art. 12, para. 3.

39. *Id.*

beginning of the initial loading, or prior to the completion of the final unloading.[40] For this time span between loading and unloading, the period of responsibility (and with this the principles of liability) is mandatory.[41]

"Through B/L": A variation of this general principle was for a long time foreseen in the draft of the Convention and relates to a widespread practice based on which the cargo interest's—mostly cost insurance and freight ("CIF") and cost and freight sellers ("CFR")[42]—request to the carrier to issue a transport document. This transport document would not only evidence the transportation from the contractual point of shipment to the contractual point of destination defined in the contract of carriage, but would also show its dispatch to a further final destination for which the carrier had not been contracted but merely undertook to have the goods shipped by a third party carrier.[43] This phenomenon is usually referred to as "through transport" and the document as a "Through B/L." The issuance of such a document is a pure service requested by shippers and cargo interests (and their trade-financing banks) and subsequently offered by the carrier for the purpose of allowing the shipper, a CIF/CFR seller, to show to its buyer and consignee or its trade financing bank that the seller lived up to its obligation under the sales contract to ship the goods to the destination defined in the sales contract.[44] The contractual obligations of the carrier to carry and to deliver—and therefore the applicable period of responsibility—end with the completion of the contractual voyage at the contractual intermediate destination. The subsequent shipment to the final destination as provided by the sales contract is made under an independent carriage arrangement for which the carrier is merely acting like a freight forwarder arranging for the on-shipment to the final destination on behalf of the shipper and CIF seller.

This practice in international trade and shipping has been acknowledged by Working Group III of UNCITRAL. Working Group III's report on the Draft Convention states that "[o]n the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport that is not covered by the contract of carriage and in respect of which it does not assume the obligation to carry the goods."[45] The Draft Convention also clarified that "[i]f the carrier arranges the transport that is not covered by the contract of carriage as provided in such transport document, the carrier did so on

40. *Id.* Annex 1, art. 12, para. 3.

41. *Id.* Annex 1, art. 12, para. 1. At least in its ultimate function and effect, this situation corresponds to the "tackle-to-tackle" provision of the Hague Rules. Hague Rules, *supra* note 1, art. 1(b).

42. This applies to all sales which are based on any of the C-terms of the Incoterms of 2000, by which it is the seller who provides (and pays for) transportation and consequently will be the contractual party towards the carrier. In those situations it is the seller who has to prove with an adequate transport document (here a door-to-door or though-document) that it had arranged and paid for such transportation to the agreed C-destination. INT'L CHAMBER OF COMMERCE, INCOTERMS 2000: ICC OFFICIAL RULES FOR THE INTERPRETATION OF TRADE TERMS (2000) [hereinafter INCOTERMS 2000].

43. *Id*.

44. *See, e.g.*, United Nations Convention on Contracts for the International Sale of Goods, art. 32(2) Apr. 10, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]; INCOTERMS 2000, *supra* note 42, at A(4), A(8); UNCITRAL Convention, *supra* note 1, Annex 1, arts. 35–36.

45. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III on Transport Law, *Report of Working Group III (Transport Law) on the Work of its 21st Session*, para. 43, U.N. Doc. A/CN.9/645 (Jan. 14–25, 2008) [hereinafter Working Group III Report].

behalf of the shipper."[46] That part was later deleted, but its substance remains even if not specifically spelled out by the Rotterdam Rules.[47]

This article was, and may still be, sometimes misunderstood to suggest that it gives the carriers (and thereby the shipping industry) an undue advantage as they could in theory abuse this provision by generally stating in their bills of lading that they act as carriers only for a very limited leg and that for all of the remaining voyage third parties are employed as carriers for the shipper.[48] This fear is unfounded, as the practice has existed for many decades and could have lead to abuses since the existence of the Hague Rules in 1924. The carrier will be measured by the scope of the contract between it and the shipper. Thus, if in the initial transport-sales discussion the transportation service offered by the carrier's sale office was for the entire geographical voyage, then it will be difficult for the carrier later to issue a transport document merely referring to a limited contract of carriage and subsequent "through" carriage (*i.e.*, a third-party shipment). The argument would then be that the carrier did not issue a proper transport document reflecting the contract particulars as agreed between the carrier and the shipper.

C. The Obligation to Properly Care for the Cargo

The basic and fundamental obligation of the carrier is, as under the Hague Rules,[49] the duty to properly care for the cargo.[50] This duty's existence remains subject to the period of responsibility.[51] Whenever the carrier has actual custody over the cargo, he remains responsible to use proper care as defined in article 13 of the UNCITRAL Convention.[52] The particular activities mentioned by the Convention are the receiving, loading, handling, stowing, carriage, keeping, caring for, unloading, and delivering of the goods.[53] As such, the obligation of article 13 very much resembles article 3(1) of the Hague Rules.

However, in the context of the new Convention, this obligation exists throughout the entire custody period. Therefore, it applies in cases of door-to-door shipments for all legs and stages equally, whether or not they are performed by sea.[54]

FIO(S) clauses: The Convention acknowledges particular practices based on which the parties to a contract of carriage may agree that the loading, handling, stowing, or unloading of the goods is to be performed by cargo interests (either a shipper or a consignee).[55] Those cases are typically found in a bulk and tramp trade

46. U.N. Comm'n on Int'l Trade Law [UNCITRAL], Working Group III on Transport Law, *Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea]*, art. 13, U.N. Doc. A/CN.9/WG.III/WP.101 (Jan. 14–15, 2008) [hereinafter Draft Convention].

47. Article 13 of the UNCITRAL Convention as foreseen in U.N. Doc. A/CN.9/645 (Jan. 30, 2008) was deleted at the UNCITRAL Session in 2008, but it was made clear that this deletion was not intended to change or affect the current long-lasting practice of this type of through-transport documents. UNCITRAL Convention, *supra* note 1, paras. 51–53.

48. Working Group III Report, *supra* note45, paras. 40–42.

49. Hague Rules, *supra* note 1, art. 3(1).

50. UNCITRAL Convention, *supra* note 1, Annex 1, art. 13, para. 1.

51. *Id.*

52. *Id.*

53. *Id.* Annex 1, art. 13, para. 1

54. *See id.* Annex 1, art. 12 ("The period of responsibility of the carrier for goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.").

55. *Id.* Annex 1, art. 13, para. 2.

where the CIF seller contracts for a contract of carriage (mostly in the form of charterparties, based on which later bills of ladings are issued) on FIOS terms ("free-in-and-out" or "free-in-and-out-stowed").[56] In such a case it is the shipper who loads the vessel and it is the consignee who discharges the vessel, without the involvement of the carrier. To the extent that such an agreement is actually entered into and is referred to in the contract particulars of the respective contract of carriage—and not merely by way of negligence clauses introduced in bills of lading—the carrier is dispensed of the obligation under article 14 of the UNCITRAL Convention insofar as they concern the loading, stowing, and discharging that was contractually taken over by cargo interests.[57]

This was a highly debated provision, as again it was feared that this principle could be abused by the shipping industry.[58] However the provision is limited to cases where the parties have effectively agreed to have the particular loading and discharging operations performed by cargo interests. The FIOS provision of article 13(2) of the Convention has, therefore, been supported by a majority at UNCITRAL because it reflects a widespread demand of trade, *i.e.*, of shippers. Where shippers opt for a true FIOS option, it would be odd that through the mandatory scope of the Convention the carrier would find itself responsible despite the contract stating otherwise. A purely "financial" FIOS clause that merely defines what was and was not covered by the freight would not be sufficient to restrict the carrier's obligation, as in such cases the carrier still had the obligation to load and discharge.[59]

D. The Obligation of Due Diligence to Provide a Seaworthy Vessel

For the period of the voyage by sea, the general duty to care for cargo pursuant to article 13 of the UNCITRAL Convention is joined by the obligation of the carrier to use due diligence to provide a seaworthy vessel.[60] This duty is almost pleonastic in maritime law and has, therefore, received particular attention in the new Convention. It has received the same scope and position already provided for by the Hague Rules in article 3(2).

The major change relates to the deletion of the time element of this obligation. The Hague Rules restricted the obligation to use due diligence in relation to seaworthiness to the time up to the beginning of the voyage.[61] Much litigation has followed and much was written on this.[62] In general, however, it became quite clear that this was compatible neither with the general and unrestricted duty to care for cargo throughout the voyage, nor with the developments in telecommunications. These developments make it absolutely possible for the shore operation of a carrier to communicate with the vessel and supervise its status throughout the voyage. Thus,

56. Working Group III Report, *supra* note 45, para. 46.

57. *Id.* para. 47.

58. *Id.* para. 44. This discussion was again opened at the UNCITRAL General Assembly in May 2008, but the session decided that this provision should remain unchanged in the draft convention. *Id.*, paras. 56–58.

59. *See id.* para. 47 (explaining that under a FIO(S) clause, a carrier is only released from liability for damage during loading or unloading if it was not the carrier itself performing those functions).

60. UNCITRAL Convention, *supra* note 1, Annex 1, art. 14.

61. Hague Rules, *supra* note 1, art. 4(1).

62. *See* VON ZIEGLER, *supra* note 21, at 129–41 (detailing the evolution of temporal limitations on the due diligence obligation).

article 14 of the UNCITRAL Convention prescribes a "continuous obligation" of due diligence relating to seaworthiness of the ship used for the performance of the contract of carriage.[63]

As the duty of due diligence is relative,[64] it remains clear that the level of due diligence and the level of control over the seaworthiness of the vessel is different when sailing as compared to the time when the vessel is still at berth or even in a dry dock.[65]

The new Convention suggests this change is adequate. To a certain degree the same result was achieved in maritime cargo cases by using the obligation of the carrier—in article 3(1) of the Hague Rules—to care for cargo to fill the gap once the due diligence obligation of article 3(2) became inoperative after the beginning of the voyage.[66] The carrier, and its master and crew, then had to continue to oversee the seaworthiness status of the moving vessel as per article 3(1).[67] This artificial readjustment sought by some courts is no longer necessary, as article 15 of the UNCITRAL Convention provides essential elements for this aspect of the carrier's obligations.[68]

Similar to the seaworthiness provision of article 3(2) of the Hague Rules, the new Convention provides for the three (traditional) aspects of seaworthiness. The carrier must exercise due diligence to: 1) make and keep the ship seaworthy (seaworthiness in the strict sense); 2) properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage (seaworthiness in the sense of proper crewing); and 3) make and keep the holds and all other parts of the ship in which the goods are carried, including any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation (fitness or suitability of the vessel and their holds for cargo).[69]

E. Dispensation of Carrier Obligations in Specific Circumstances

Dangerous cargo: The carrier must be allowed to act when the goods he has received for transportation become a danger to persons, the ship, other property or the environment. Consequently, the new UNCITRAL Convention allows the carrier to "decline to receive or to load," and to "take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless if the goods are, or reasonably appear likely to become during the carrier's period of responsibility an actual danger to persons, property or the environment."[70]

Sacrifices in perils: "The carrier or performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of

63. UNCITRAL Convention, *supra* note 1, Annex 1, art. 14 para. (a).

64. *See* VON ZIEGLER, *supra* note 21, at 106–10 (discussing the use and durability of the reasonable or ordinary care standard in due-diligence analysis).

65. *See id.* at 137–38 (discussing the release of liability for those cases where the violation of duty of care in regards to seaworthiness was developed after the start of the voyage, under article 3 of the Hague Rules).

66. *Id.* at 138.

67. *Id.*

68. UNCITRAL Convention, *supra* note 1, Annex 1, art. 15.

69. *Id.* Annex 1, art. 14.

70. *Id.* Annex 1, art. 15.

preserving from peril human life or other property involved in the common adventure."[71] This provision mirrors the general average principles,[72] which require the surviving interests to contribute to the compensation for interests, sacrificed in a time of peril.[73] The new convention makes clear that a carrier that acts under those principles is not in violation of its general duty to care for the cargo, but is exempt—within this defined scope—from this duty.[74]

The special dispensation of article 16 of the UNCITRAL Convention only operates at sea; it therefore does not operate for similar general average principles which may apply on inland waterways.[75]

III. LIABILITY OF THE CONTRACTUAL CARRIER FOR LOSS, DAMAGE, OR DELAY

A. Basis of Liability: The "Prima Facie Case"

Every marine cargo case for lost or damaged goods starts with the so-called "prima facie case."[76] Under this rule, if the shipper can prove both that the carrier received the goods undamaged and in full and that the goods were subsequently damaged en route, the carrier's liability is presumed.[77] The tools for such proof are: 1) the "clean bill of lading" stating that the goods were shipped clean on board; and 2) notice of loss, restricting the timeframe in which the damages could have occurred.[78]

The "prima facie case" and the different aspects of this proof by cargo interest did not originate in maritime transport conventions. Nevertheless, the prima facie case is an established principle in international maritime law, outlined in the Hague Rules of 1924, which serves as the starting point for the complex burden-of-proof structure.[79] Consistent with industry practice over the last century, this principle is

71. *Id.*

72. *See generally*, Comité Mar. Int'l [CMI], *York-Antwerp Rules*, June 4, 2004 (regulating the adjustment of general average), *available at* http://www.comitemaritime.org/cmidocs/yar.html.

73. *See also* UNCITRAL Convention, *supra* note 1, Annex 1, art. 84 ("nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.").

74. *See id.* Annex 1, art. 16 (stating that a carrier may reasonably sacrifice goods at sea for the common safety of people or other property).

75. *See* Working Group III Report, *supra* note 45, para. 53 (explaining the reference to "inland waterways" was suggested but not supported by the draft convention).

76. *See* VON ZIEGLER, *supra* note 21, at 386–94 (providing an overview of the prima facie case).

77. *Id.* at 386.

78. *Id.*; *see* UNCITRAL Convention, *supra* note 1, Annex 1, art. 23, para. 1 (explaining that the carrier is presumed to deliver the goods according to the contract description unless notice of loss was given to the carrier prior to or at the time of delivery). Since the Hague-Visby Rules of 1968, it is established that in this respect "proof to the contrary shall not be permissible when the bill of lading has been transferred to a third party in good faith." *See* Visby Amendments, *supra* note 7, art. 3(4). This in order to protect third parties (in particular a *bona fide* consignee claiming under a clean bill of lading). VON ZEIGLER, *supra* note 21, at 435. This principle is now further developed in article 41 of the new Convention. *See* UNCITRAL Convention, *supra* note 1, Annex 1, art. 41 (giving evidentiary effect of the contract particulars).

79. *See generally* VON ZIEGLER, *supra* note 21, at 377–454 (discussing the burden of proof under the Hague Rules in various countries).

now spelled out by the new Convention. Article 17(1) of the new UNCITRAL Convention sets out that the carrier shall be liable if the "claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4."

B. Basis of Liability: Proof of Lack of Fault

As mentioned before, the Hague Rules of 1921 were initially written in the form of a model bill of lading and were later transferred, without relevant adaptation, as an International Convention in Brussels in 1924 (the Hague Rules 1924).[80] This historical particularity may explain why article 4(2) of the Hague Rules had listed a "catalogue" of different exceptions, which had been traditionally listed as exclusions in the terms of bills of lading in the late 19th century.[81] Sixteen of them were exemplarily listed causes of damages for which the carrier claimed exemption or excuse from liability.[82] The seventeenth exception, the so called "q-clause," was added particularly upon request of the delegates of the civil law countries.[83] Those lawyers from civil law countries were not used to the legislators' technique of listing and enumerating different reasons for exoneration of liability, where most of them could easily be covered in the general umbrella test used for the exoneration of a contractual party. This test permitted exoneration upon a general proof that the contractual party had used all reasonable care and that the damage was not caused by its fault.

When ratifying the Hague Rules of 1924, many delegations envisioned making use of the reservation provided for at the end of the Hague Convention in the Protocol of Signature, enabling them to transform the Hague Rules into an appropriate national legislation.[84] The contracting states were allowed to change the formal content of the Convention.[85] In many of those national Hague Rules codifications, the q-clause was moved up the list and upgraded to an overriding umbrella provision providing for exoneration, and the carrier who insisted on his lack of responsibility and liability had the burden to prove no fault as per the test provided in article 4(2)(q) of the Hague Rules of 1924.

In those civil law codifications where the q-clause was "upgraded," the content of the Hague Rules catalogue served as specific examples of carrier exoneration. National maritime legislations of Germany (*Handelsgesetzbuch*), France (the French Maritime Law of 1966) and Switzerland (*Seeschifffahrtsgesetz*) are only a few examples of those maritime codes which still today incorporate such readjustments.[86] This issue justified the Protocol allowing for national adaptation; these country-

80. *See supra* Part I.A.

81. Hague Rules, *supra* note 1, art. 4(2); Hakan Karan, *The Carrier's Liability For Breach of The Contract of Carriage of Goods by Sea Under Turkish Law*, 33 J. Mar. L. & Com. 91, 101 (2002).

82. *Id.* art. 4(2).

83. *Id.*

84. Hague Rules, *supra* note 1, Protocol of Signature.

85. *Id.*

86. *See generally* VON ZIEGLER, *supra* note 21, at 324–27 (discussing the role of the "q-clause" in national laws), 333–38 (discussing the adoption of article 4 of the Hague Rules by various countries).

specific adaptations resulted in a litany of versions of the Hague Rules, even before the Hague Rules entered into force.[87]

Article 17(2) of the new Convention acknowledges this by folding the content of the q-clause into the general umbrella protection.[88]

This systematic change in the order of the exceptions was not intended to depart from the principles established under the application of the Hague Rules of 1924 and their national equivalents. It is clear that carrier liability is based on fault.[89] The new Convention makes clear that the path via the general proof of lack of fault under article 17(2) of the UNCITRAL Convention is only one alternative for the carrier because in its rebuttal of the presumed liability, which arises after a prima facie case, the carrier can also choose the route of proving a specific exception under article 17 (3)(a)–(o).

A close reading of article 17(2) of the UNCITRAL Convention suggests that this burden of proof is easier to meet by the carrier than the equivalent burden under the q-clause. Under article 4(2)(q) of the Hague Rules, the carrier had to prove that no fault of the carrier "contributed to the loss or damage." The slightest contribution by the carrier would render the q-clause exception inapplicable. Under article 17(2) of the UNCITRAL Convention, the carrier must only prove that "the cause or one of the causes of the loss . . . is not attributable to its fault." This difference is particularly important as the new Convention seems to allow the application of the so-called "Vallescura" principle,[90] whereas the high burden of proof required by the q-clause in the Hague Rules excludes this loose standard.[91]

C. *Basis of Liability: Proof by the Carrier of Any One of the Specific Exceptions as a Presumption of Non-Fault of the Carrier (List of Exceptions)*

To list or not to list, this is the question: The question of whether the new Convention should provide for a list of presumed cases of exceptions was debated at length throughout the drafting process.[92] This is not a surprise to us, as we know of the similar, if not identical, discussion some 80 years ago.[93] UNCITRAL could have gone either way on this issue. However, the major advantage of keeping at least the

87. An obvious further source of proliferation was the discretion of the signatory states to the Hague Rules to specify the limitation amounts in the national currency in relation to the determination of the unit for the purpose of calculating the limits of liability pursuant to article 4(5) of the Hague Rules 1924.

88. UNCITRAL Convention, *supra* note 1, Annex 1, art. 17, para. 2 ("the carrier is relieved of all or part of its liability . . . if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person" for whom the carrier is responsible).

89. *Id.* Annex 1, art. 17, para. 2.

90. Schnell v. Vallescura, 293 U.S. 296, 306 (1934); *see* UNCITRAL Convention, *supra* note 1, Annex 1, art. 17, para. 2 (stating that it is the burden of the carrier to "show that the damage is due either to an excepted peril or to the carrier's negligent care").

91. "[T]he COGSA q-clause contains the most stringent test for exoneration from liability for cargo loss . . . ." EAC Timberlane v. Pisces, Ltd., 745 F.2d 715, 718 (1st Cir. 1984); *see* GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 167–68 (2d ed. 1975) (stating that the carrier needs to show freedom from contributing fault in not just one but all of the causes).

92. *See* UNCITRAL Convention, *supra* note 1, paras. 68–70 (discussing arguments for and against including a list of circumstances where a carrier's liability might be relieved).

93. *See generally* Stephen Zamora, *Carrier Liability for Damage or Loss to Cargo in International Transport*, 23 AM. J. COMP. L. 391, 405–06 (1975) (discussing Hague Rules of 1921 as a compromise between carriers and cargo interests).

main content and structure of the list of exceptions is that the international community applying the new Convention in the future could potentially rely on established and dense jurisprudence. It is not just a benefit to lawyers and judges but also to the numerous case handlers in shipping lines and insurance companies for whom the list had always provided a very effective tool for handling and solving the marine cargo cases without involvement of lawyers and courts. This benefit had to be preserved. The "catalogue" is now also provided for in the form of the list in article 17(3) of the UNCITRAL Convention.

The "catalog" and the "error in navigation": While the Hague Rules of 1924 had 17 exceptions, the new Convention lists merely 15 specific exceptions. The numeric comparison is flawed, however, as 16 exceptions "survived" the modernization process undergone with this new Convention. However, one important exception was deleted and no equivalent is provided for in the new Convention: the traditional exception of "error in navigation" pursuant to article 4(2)(a) of the Hague Rules. Much has been written on the pros and cons of the deletion of the exception for error in navigation of master and crew.[94] This issue was heavily debated during the first stages of the harmonizing process at Comité Maritime International ("CMI") and later at UNCITRAL. However, the arguments for retaining this special exemption were outweighed by the counterarguments that a modern liability regime for international transportation cannot exonerate the carrier for negligence in areas of performance which are typical to its own key service, namely transportation and navigation. Furthermore, modern telecommunication techniques no longer allow the fiction that, once the ship has sailed, the shore-based carrier has lost control over ship and cargo and has left them in the hands of the master and crew and cannot be made responsible for misjudgments and mistakes of the master and crew in the navigation of the ship. Much like air carriers have had to fully account for the errors in navigation of their pilots since 1955, maritime carriers will have to do the same under the new Convention.[95]

It is suggested that the deletion of the "error in navigation" exception should not have major effect, as it was already detectable in international court cases under the Hague Rules. Courts would increasingly question the status of crewing under the seaworthiness provision of article 3(2) of the Hague Rules in cases in which the error in navigation exception was invoked and proven by the carrier.[96] Yet, particularly in collision cases, the deletion may still change the situation for carriers and their insurers, as any negligence of the crew and the master would now fall on the carrier and form a basis for liability.

The new catalog: Although the 17 exceptions under the Hague Rules of 1924 have undergone some changes, this was done, for the most part, without an intent to alter the system which operated under the Hague Rules of 1924. Many of the 17 provisions have either moved, *i.e.*, the q-clause, or were merged with familiar exceptions. [97] Therefore, the traditional exceptions (except for the q-clause and the

94. *See* VON ZIEGLER, *supra* note 21, at 221–329 (discussing exceptions under the Hague Rules), 339–41 (summarizing the results and ramifications of the exceptions), 347–71 (discussing the adopted exceptions and deleted exceptions under the Hamburg Rules).

95. *See* Warsaw Convention, *supra* note 7, art. 20(2) (providing for an "error of pilot defense"); *see also* Hague Protocol, *supra* note 7, art. X (abolishing this defense).

96. VON ZIEGLER, *supra* note 21, at 417–19 (emphasizing the effect of article 3 of the Hague Rules on liability and what needs to be proven to escape liability).

97. The q-clause is the only provision that has been moved out of the catalog. It can now be found in Article 17(2). UNCITRAL Convention, *supra* note 1, Annex 1, art. 17, para. 2.

"error in navigation" exception) can be found in the list of the 13 exceptions of article 17(3)(a)–(m) of the UNCITRAL Convention.

In maritime law, fire on the ship was always a special phenomenon that called for exemption from liability of the carrier and ship owner.[98] Thus, the Hague Rules contained a specific exoneration in cases of fire in article 4(2)(b).[99] Although deleting the reference to fire was discussed in the preparations at CMI and UNCITRAL, it became clear that this exemption was too important for some delegations and had to remain.[100] Article 17(3) of the UNCITRAL Convention therefore lists fire on the ship as one of the presumed cases of non-fault by the carrier. The reference to the proof of actual fault in the fire exception in the Hague Rules of 1924 is now deleted. Much litigation is reported on the issue of burden of proof relating to fault. Many authors have delivered opinions on the relevance of that reference in the Hague Rules of 1924, particularly in relation to the apportionment of the burden of proof in cases of fire.[101] Now it is clear that all the carrier has to prove in relying on this fire exception is that fire indeed existed and caused or contributed to the loss.

Under the new Convention, it suffices for the carrier to prove the existence of fire and that the fire caused the loss, damage or delay. The exception only works as a presumption, and the Convention has limited the application of that exception to the maritime leg and only in cases where the fire was on the ship.[102] The ship must be the one on which the goods were carried or were intended to be carried.[103] A fire on an unrelated third vessel cannot trigger this exception.[104] Fire situations during the inland legs (except inland navigation) will be dealt with under other exceptions (*e.g.*, inherent vice) or more likely under the catch-all provision of article 17(2) of the UNCITRAL Convention.[105]

Once proof of a fire on the ship is successfully established by the carrier, the cargo interests[106] must prove that the fault of the carrier (by acts or omissions) or the unseaworthiness of the ship contributed to the cause of the fire or to cargo damage.[107] It is here where a further particularity of the new Convention comes into play: whereas the Hague Rules restricted the personal scope of fault to the "actual" fault and privity of the carrier, the new Convention will recognize faults of all persons involved in the performance of the contract of carriage.

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98. *E.g.*, U.S. "Fire Statute," 46 U.S.C. § 182 (2000) (repealed 2006); GRANT GILMORE & CHARLES L. BLACK, J.R., THE LAW OF ADMIRALTY 834, 879 (2d ed. 1975).

99. Hague Rules, *supra* note 1, art. 4(2)(b).

100. *See* CORNELIS CAREL ALBERT VOSKUIL ET AL., HAGUE-ZAGREB ESSAYS 3, 79 (1980).

101. VON ZIEGLER, *supra* note 21, at 425–32 (outlining the special rules in regards to the burden of proof in cases of fire).

102. *See* UNCITRAL Convention, *supra* note 1, para. 70 (stating that the exonerations listed in Article 17(3) reverse the burden of proof and create a rebuttable presumption).

103. *Id.* Annex 1, art. 17, para. 1.

104. *Id.*

105. *See id.* Annex 1, art. 17, para. 3 (lacking a restriction of the operation of the section to maritime stage of transportation as dealt with in chapter 6 of the UNCITRAL Convention).

106. It is normally either the shipper or the consignee who will have the title to sue. The identity of such a person will have to be deduced in applying principles already existing under the scope of the Hague Rules. Earlier drafts had foreseen a specific provision on title to sue which was later deleted from the scope of the new Convention. *See* Comité Mar. Int'l [CMI], *Uniform Rules for Sea Waybills*, R. 3 (1990), *available at* http://www.comitemaritime.org/cmidocs/rulessaway.html.

107. UNCITRAL Convention, *supra* note 1, Annex 1, art. 17, para. 5.

Loading, handling, stowing by the Shipper: As previously discussed, the carrier is not obligated to properly care for the cargo in cases where the shipper has agreed with the carrier that some loading, stowing or discharging operations should be done by the shipper or consignee themselves.[108] Consequently, if damages occur during those operations the carrier can invoke the new clause (i) of article 17(3).[109] This possibility is however not a free-ride for carriers to cut out responsibilities they should normally bear; it only operates in the typical FIOS cases where the agreement by the parties has been chosen to reflect their operational and commercial choice and where the carrier is not—contrary to the contractual wording—performing such activity on behalf of the shipper or the consignee.[110]

Additions to the list: The list of the Hague Rules is first amended by the "saving of property" exception, as it was introduced already in the Hamburg Rules of 1978. The new Convention has taken over this amendment. Additionally, three new exceptions were added to the list to complement the examples of non-fault and expand the liability regime: 1) an exception relating to environmental damage measures;[111] 2) an exception for acts of the carriers in relation to goods that may become a danger;[112] and 3) the "FIOS" exception of article 17(3)(i), limiting flexibility of the obligation to care for the cargo.[113]

Exceptions and delay: An additional novelty of the new Convention is the fact that all exceptions are drafted in a way that they operate also in cases of (financial) damage as a result of delay.[114] While some of the exceptions of the article 17(3) are better suited to fit also in cases of delay damages, other are less suited to do so.[115] However, no actual problems of interpretation can be detected in this relation as it is clear that the carrier, in order to discharge its burden of proof in cases of delay, will either (1) have to prove directly that it is not at fault,[116] or (2) prove the cause of the delay and the fact that such cause falls under one of the specific exception to its presumed liability listed in article 17(3)(a)–(o) UNCITRAL Convention.

D. Basis of Liability: Proof by Shipper of Fault of the Carrier or Contributing Cause to the Damage

In cases where there is a successful proof by the carrier of one of the presumed defenses under article 17(3)(a)–(o) of the UNCITRAL Convention, the "ping pong game" has only just started as – very much like under the Hague Rules – the burden then shifts back to cargo claimants to prove that the fault of the carrier was the cause

108. *See supra* Part II.C.

109. *See* UNCITRAL Convention, *supra* note 1, Annex 1, art. 17, para. 3(i) (stating that a carrier is relieved of liability for loading, stowing or discharging when an agreement has been made with the shipper).

110. *Id.*

111. *Id.* Annex 1, art. 17, para. 3(n).

112. *Id.* Annex 1, art. 17, para. 3(o).

113. *Id.* Annex 1, art. 17, para. 3(i).

114. *Id.* Annex 1, art. 17, para. 1; *see id.* Annex 1, art. 21 (defining delay).

115. *See, e.g.*, *id.* Annex 1, art. 17, para. 3(j) (stating wastage and inherent vice exceptions). The entire area of "delay" is new for the international law on maritime transport and, therefore, much of those issues will have to be clarified in the future. *See* Working Group III Report, *supra* note 45, paras. 64–65.

116. UNCITRAL Convention, *supra* note 1, Annex 1, art. 17, para. 2.

of the damage or that such fault contributed to the damage.[117] It is technically the rebuttal of the presumption. It is not the counterproof,[118] as such a counterproof would attempt to defeat the proof of the carrier under article 17(3) of the Convention.[119] While a counterproof pushes back the burden of the proof back to the carrier to overcome the prima facie case, the proof of fault that is requested by article 17(4) of the Convention neutralizes the effect of the presumption, leading, if the cargo claimant succeeds, to a liability of the carrier.

The new Convention carefully makes the distinction between two different lines of proof by the cargo claimants: One avenue would be to prove that the fault of the carrier contributed to the (otherwise excepted peril) cause (as is permitted under article 17(4)(a) of the UNCITRAL Convention).[120] The other path leads the cargo claimant to the proof of yet another cause which contributed to the damage. In such a case the burden shifts back to the carrier, insofar as the carrier must now prove that this event or circumstance is not attributable to its fault.[121]

While the first option is the direct proof of fault or negligence, the second is the proof of causation establishing a separate cause (without any reference to fault at this stage of the structure of the burden of proof). For the first option, the carrier is stuck with liability while in the other the carrier still has the possibility to obtain freedom from liability by proving lack of fault relating to this new cause. In this second possible path the carrier would find himself in a similar position as if the carrier had chosen the "short route" over article 17(2) UNCITRAL Convention.

E. Basis of Liability: Proof by Shipper of Unseaworthiness of the Vessel and Carrier's Proof of Due Diligence

The cargo claimants have yet another (third) alternative to counter the successful proof of a case under article 17(3)(a)–(o) of the UNCITRAL Convention. Pursuant to article 17(5) of the Convention they can prove that the damage, loss or delay was probably caused or contributed by the unseaworthiness of the ship. All aspects of seaworthiness are relevant including: the ship itself; the crewing; and the fitness of the ship to carry the cargo.[122]

This avenue is only available for causes set during sea voyage. This is not spelled out specifically but it follows from the restriction of the application of the seaworthiness obligation to the sea voyage in article 14 of the Convention.[123] Issues relating to the fitness of crew and cargo on the inland stages of the transportation

117. *See id.* Annex 1, art. 17, para. 3–4 (describing situations that provide a presumption of no fault on behalf of the carrier but stating these can be overcome by circumstances proved by the claimant).

118. A counterproof should always be possible.

119. For example, the proof that the cause of the damage had nothing to do with a fire, or that the fire never existed.

120. For example, the fire was caused by events or circumstances for which the carrier is responsible. UNCITRAL Convention, *supra* note 1, Annex 1, art. 17, para. 4(a).

121. For example, the proof that the damage was not (only) caused by fire fighting measures in course of a fire, but by earlier undue exposure of the cargo to rain water. *See id.* Annex 1, art. 17, paras. 3–4 (describing situations that provide a presumption of no fault on behalf of the carrier, but stating these can be overcome by circumstances proved by the claimant).

122. *Id.* Annex 1, art. 17, para. 5(a), art. 14.

123. *See id.* (showing that article 17 delineates liabilities regarding the obligations set out in article 14).

under the contract of carriage must be dealt with by applying the general proof of fault or different causation provided for in article 17(4) of the Convention.

Also interesting is the qualification made by the new Convention in relation to the level of proof of such an unseaworthiness: here the cargo claimants must prove merely the probability of the causation of an aspect of unseaworthiness.[124] This could become a welcome privilege for cargo claimants who defend the carrier's attempt to prove, for example, a peril of the sea or a fire on a ship, as both exceptions (like many others to different degrees) inherently stand in logical polarity with the standard of unseaworthiness.[125]

Evidence and proof are concepts which have different meanings and importance in various jurisdictions. First, it will to a great extent depend on the procedural laws applicable in the respective jurisdictions. Thus, the burden of proof does not have the same strategic and operational consequence where the parties are involved in extensive pre-trial and discovery proceedings compared to where the parties are left to themselves and have to present the court with all the facts and allegations in their first statement of claim. Secondly, the burden of proof and the laws on evidence are usually a mixture between substantive laws (determined by the rules of conflicts of law) and procedural principles of the forum. It is, therefore, not clear how and to what extent this "probability" level in article 17(5)(a) of the Convention will offer better relief for cargo claimants. What is clear is that the new Convention has relieved the cargo claimants in a proof of causation related to unseaworthiness from any concept of strict proof. In doing this, the new Convention acknowledges court practices that had already relieved the cargo claimants of a level of persuasion too difficult to satisfy in relation to seaworthiness. This acknowledgement is due to the recognition that it is usually quite difficult for cargo claimants to obtain access to all relevant facts, which are needed to form an allegation of causal relevance of unseaworthiness and subsequently meet the burden of proof as these facts.[126] This addition may lead to a "quasi"-presumed unseaworthiness, at least where the damage could have something to do with the state (*Zustand*) of the ship, the crew or the holds. This effect, which can be derived from the new wording of the Convention in article 17(5)(a), should not be overestimated, as the "probability" privilege only operates as to the proof of causation related to unseaworthiness and not to the proof of unseaworthiness itself.

The successful proof of a probability of a causation of unseaworthiness shifts the matter back to the carrier, as the carrier may now: either rebut the proof of causation by proving that 1) none of the aspects of unseaworthiness initially proved by the cargo claimant following Article 17(5)(a) of the UNCITRAL Convention caused the damage, loss or delay (*i.e.*, a proof of lack of causation), or that 2) the carrier complied with its obligation to exercise due diligence regarding seaworthiness (*i.e.*, a proof of due diligence).[127]

If successful in this last possibility of proof, the carrier will not be liable. If unsuccessful, then liability is established and can only be limited: 1) by the concepts

124. *See id.* Annex 1, art. 17, para. 5(a) (establishing that the claimant must prove that the loss, damage, or delay was "probably caused" by one of several factors, including unseaworthiness).

125. VON ZIEGLER, *supra* note 21, at 419–22 (giving an example of a showing of due diligence in cases of perils of the sea), 425–32 (outlining the special rules in regards to the burden of proof in cases of fire).

126. *Id.* at 446.

127. UNCITRAL Convention, *supra* note 1, para. 71.

of apportionment of damage,[128] 2) by a degree of limitation based the compensation levels,[129] 3) or by way of the general limitation of liability.[130]

F. Apportionment of Liability and Concurrent Causes

Even where the cargo claimant succeeded in establishing liability on the route through the different "pings" and "pongs" of the structure of the different proofs and rebuttals,[131] the carrier can still attempt to limit its exposure by proving to what extent other causes for which it is not responsible coexist with causes for whom the carrier remains liable.[132] This important "Vallescura" principle[133] is also foreseen in the new Convention, which states that the carrier is liable only for that part of the damage that is attributable to the event or circumstance for which the carrier is liable.[134] Consequently, the carrier has to attribute each aspect of the damage to either excepted causes or the causes for which it remains responsible.[135] The result is a ratio, which if applied to the damage, will result in a reduction *pro rata* of its liability.[136]

The starting point of this "Vallescura" principle is the cargo claimant's proof of either article 17(4) or article 17(5) of the UNCITRAL Convention. In contrast to the situation under the Hague Rules, it can now even operate in cases of the "short route," *i.e.*, where the carrier chooses the general proof of non-fault pursuant to the new "q-clause" article.[137]

Furthermore, compared to either existing U.S. law on the issue of concurrent causes based on the "Vallescura" principle or to article 5(7) of the Hamburg Rules, the mechanisms and the criteria of the new Convention are more flexible, less harsh, and will be less likely to lead to an "either-or" situation. This will favor not only adequate judgments, but also, more importantly, better settlements.

G. Burden of Proof as the Golden Thread Through the Liability System

For every practitioner—whether insurance claims handler, claimant, or defense lawyer—and for every judge used to working with the Hague Rules, it is almost pleonastic that the liability system is structured around the very detailed system governing the burden of proof, shifting it back and forth from claimant to carrier.

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128. *Id.* Annex 1, art. 17, para. 6.

129. *Id.* Annex 1, art. 22.

130. *Id.* Annex 1, arts. 59–61.

131. "The central aspect of that framework is a 'ping pong game' of burden-shifting in which the burden of proof shifts back and forth between the parties. . . ." T.J. Stevenson & Co., Inc. v. 81,193 Bags of Flour, 629 F.2d 338, 381 (5th Cir. 1980).

132. Vallescura, 293 U.S. at 303–04.

133. *Id.* The principle is named after the case that had established such a defense of the carriers in very restricted situations.

134. UNCITRAL Convention, *supra* note 1, Annex 1, art. 17, para. 6.

135. *Id.* Annex 1, art. 17, paras. 2–3.

136. *See id.* Annex 1, art. 17, paras. 2, 6 (explaining that if the carrier is proportionally responsible for the event or circumstances which caused the damage, then the carrier is proportionally liable).

137. The strict test of non-responsibility of Article 4(2)(g) of the Hague Rules did not allow an application of the "Vallescura" principle as their exoneration only was granted where no fault contributed to the damage. Hague Rules, *supra* note 1, art. 4(2)(g).

The liability system was not articulated in the Hague Rules. But it is articulated in the new Convention, which provides in article 17 careful and detailed provisions containing all the alternatives available to the parties in preparing their cargo claim or defense.[138] This achievement in transportation law will greatly assist in harmonizing international application of the liability system.

Novices might criticize article 17 as too complicated and too detailed. However, the choice made by CMI and adopted by UNCITRAL might be a sound one, as the disputed issues regarding how the burden of proof operates within the liability regime are addressed by the new Convention, which provides a clear road-map for lawyers and judges involved in maritime cargo cases.

H. Liability for Delay

Delay: Another interesting development is the fact that the new liability system under article 21 of the UNCITRAL Convention also covers damages due to delay in delivery. This ends the international debate as to what extent damages due to delay were covered by the Hague Rules and respective national legislation or whether the applicable national laws provided a separate liability rule. Delay is now mentioned in one breath when listing loss or damages; this also relates to the prima facie case. Consequently, the cargo claimant has to prove that delay occurred during the period of responsibility, *i.e.*, during the custody of the carrier. It will be interesting to see how the liability system of article 17 will affect article 21 liability for delay in practice.

If time for delivery is agreed upon, then the carrier will be liable for the (financial) damages resulting from not meeting this time for the delivery.[139] Whether or not the parties have agreed to any time for delivery, the Convention in its article 22 is leaving the decision on this issue to the interpretation of the contract.[140] Where exact times were agreed upon—something that is probably quite rare in maritime transportation—this will be quite easy. It will be more difficult where the time element found only in relation to publicized time tables, common expectations, usages and practices, practices of competitors, or averages of transit times known to the particular trade and voyage.

138. UNCITRAL Convention, *supra* note 1, Annex 1, art. 17.
139. *Id.* Annex 1, arts. 17, 21.
140. *Id.* Annex 1, art. 21.