

# Seaworthiness: The adequacy of the Rotterdam Rules approach

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## 1. Abstract

This Article examines four regimes that regulate the carriage of goods by sea with regard to seaworthiness: Common law, the Hague/ Hague-Visby Rules, The Hamburg Rules and finally the Rotterdam Rules. It does not only compare the texts but it also explains why the Rotterdam Rules approach is the most in line with current trade.

## 2. Introduction

Seaworthiness is one of the most discussed principles and influences various fields of law, such as insurance, liability, etc. This principle enables to attach liability and distribute risks<sup>1</sup>. Distribution of risks is done either by contract or by law. The doctrine of seaworthiness allocates liability on the shipowner for certain consequences<sup>2</sup>. The duty varies depending of the nature of the contract<sup>3</sup>.

Seaworthiness is not limited to the physical capacity of the vessel, it is extended to other aspects affecting her ability to navigate safely, such as maps, or allowing her to enter/ depart from a specific port. The concept is also of utmost importance with regard to marine

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<sup>1</sup> Ridgway K. Foley, 'A Survey Of The Maritime Doctrine Of Seaworthiness', (1966) 46 Or. L. Rev. 369, p.396

<sup>2</sup> Robert B. Fisher, 'The Warranty of Seaworthiness in Charter Parties: Legal Methods of Amelioration', (1975) 1 Mar. Law. 1, p.2

<sup>3</sup> For instance: some charterparties require the ship to be seaworthy at the time of the contract, others on delivery of the ship, etc. See: Fisher (n 2), p.5

insurance. Indeed, the Marine Insurance Act contains a warranty that the ship is seaworthy, Article 39.

Seaworthiness clauses or provisions can be found in most charterparties and laws. The seaworthiness obligation influences the stability of the shipping industry. Furthermore, it is the best way to reduce marine casualties. Four tests exist: Common law, the Hague/Hague-Visby, Hamburg Rules and the Rotterdam Rules. These tests will be examined alternatively to then be compared.

Seaworthiness is relevant in two types of relationships: shipowner-charterer and carrier-consignee. The focus will be on the latter, as the former creates less problems. In the three tests, the carrier is vicariously liable for acts of his agents and servants. The concept of seaworthiness is nebulous. No fit-all definition exists; individual facts greatly influence the outcome of a case. However, it always includes more than the ship itself, e.g the crew, cargoworthiness, etc<sup>4</sup> and each stages of the voyage, for voyages exercised in stages. The ship needs to be able to undergo the perils of the sea that she is expected to be exposed to during the voyage<sup>5</sup>.

This article aims to analyse the current legal framework of the obligation of seaworthiness under the carriage of goods by sea. In order to achieve the main aim, this article will be divided in two parts. First, the three different test will be discussed; and then, through a comparison, it will explain, why in the view of the author, the extension of the obligation of seaworthiness in the Rotterdam Rules is beneficial to the industry.

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<sup>4</sup> Foley (n 1), p. 371; Fisher (n 2), p.3

<sup>5</sup> Field J in *Kopitoff v Wilson* (1876) 1 QBD 377 at p 380

### 3. Common law

Seaworthiness is an absolute, non-continuous<sup>6</sup> and non-delegable duty under both English<sup>7</sup> and American law<sup>8</sup>, based on the presumption that the carriage by sea is risky and that the shipowner should control the risks<sup>9</sup>. It is not uncommon for charterers and owners to dilute this duty by adjusting the risks in charterparties<sup>10</sup>. While any ship should be seaworthy, it is thought to be unreasonable to require shipowners to supply perfect ships. The standard is the one of a reasonable shipowner. The question that the courts ask is whether a reasonable shipowner would have started the voyage had he known the defect<sup>11</sup>. When the voyage is exercised in stages, the ship needs to comply with the seaworthy requirement at the beginning of each stage.

For the carrier to be liable, the claimant has to prove that the damage were, entirely or partially, caused by the unseaworthiness of the ship. In order for the carrier to be held liable, unseaworthiness only needs to be a contributory cause. As Dixon J said in *James Patrick & Co Ltd v Union Steamship Co of New Zealand Ltd*, ‘It is not necessary that it [seaworthiness]

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<sup>6</sup> Even if there is an undertaking in the contract. See: Fisher (n 2), p.2; Robert Force and others, *Admiralty and Maritime Law* (volume 1, Beardbook, 2007), p.145

<sup>7</sup> *Steel v The State Line SS* (1877) 3 App Cas 72

<sup>8</sup> *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 327 (1960); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 427 (1959); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944)

<sup>9</sup> Foley (n 1), p. 370; Michael Rutledge, ‘*Mobil Shipping & Transportation Co. v. Wonsild Liquid Carriers, Ltd.*: Seaworthiness Adapts to a New Environment’, (2000) Tul. Mar. L.J 25, 409, p.410; Wallace D. Macaulay, ‘The Liability of a Carrier by Sea’ (1952) 5 U.N.B.L.J. 26, p.27; Benjamin W. Yancey, ‘The Carriage of Goods: Hague, COGSA, Visby and Hamburg’, (1982) 57 Tul. L. Rev. 1238, p.1241

<sup>10</sup> Fisher (n 2), p.8; Foley (n 1), p. 370

<sup>11</sup> As Channel J stated in *McFadden v. Blue Star Line*, [1905] 1 K.B. 697, at 708 ‘degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it’

Section 2 of the Harter Act is to be read as follows: ‘That it shall not be lawful for any vessel transporting merchandise or property from or between the ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of the said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage ... shall in anywise be lessened, weakened, or avoided’

should be positively found<sup>12</sup>. The standard of seaworthiness is the one of a professional mariner or merchant seaman<sup>13</sup>.

Under American law, seaworthiness was defined in *The Silvia*<sup>14</sup>, and a fairly similar test to the English one was established, but with a higher standard of care<sup>15</sup>. The definition was further clarified by the Supreme Court in *Southwark*. ‘According to the Court, the changing conditions and expectations of industry should be reflected by the ship-owner's duty to provide a vessel that is seaworthy for the cargo carried’<sup>16</sup>. The ability to remedy an unseaworthy condition after the start of a voyage is irrelevant, as held in *McAllister Lighterage Line v. Insurance Co. of North America*<sup>17</sup>. The Reasonable fit test was developed in *Doucette v. Vincent* referring to the purpose of the trip<sup>18</sup>. The doctrine is embodied in the Harter Act 1893.

The objective of this Act, like the Hague Rules later, was to protect the cargo owner interest against widespread exclusion of liability by shipowners<sup>19</sup>. Indeed, before the introduction of the Act, shipowners would incorporate in bills of lading long list of exemptions, including

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<sup>12</sup> As Dixon J said in *James Patrick & Co Ltd v Union Steamship Co of New Zealand Ltd* (1938) 60 CLR 650 at 654 ‘Unless discharge the burden of excluding actual fault or privity on their part, they cannot obtain a decree for the limitation of their liability, and, if a given fact or state of facts would stand in the way of their doing so, it is enough that its existence appears probable or even to be a reasonable supposition. It is not necessary that it should be positively found.’ See also: DW Batson, ‘Taming The Perilous Seas: Conflicting Interpretations of the “Perils of The Sea” Defense to Shipowner Liability and Signs of Reconciliation’ (2008) 6 Loy. Mar. L.J. 133, p.142; John D. Kimball, ‘Shipowner's Liability and the Proposed Revision of the Hague Rules’ (1975) 7 J. Mar. L. & Com. 217, p.226; Hon Mr Justice Peter Heerey, ‘Limitation of Maritime Claims’ (1994) 10 Austl. & N.Z. Mar. L.J. 1, p.6

<sup>13</sup> Fisher (n 2), p.2

<sup>14</sup> 171 U.S 462 (1898). The definition was further clarified by the Supreme Court in *Southwark*: ‘According to the Court, the changing conditions and expectations of industry should be reflected by the shipowner's duty to provide a vessel that is seaworthy for the cargo carried’ 191 U.S 1 (1903)

<sup>15</sup> Rand R. Pika, ‘The Hamburg Rules Fault Concept and Common Carrier Liability Under U. S. Law’, (1978) 19 Va. J. Int'l L. 433, p.434

<sup>16</sup> cp.412

<sup>17</sup> *McAllister Lighterage Line v. Insurance Co. of North America* 244 F.2d 867; Foley (n 1), p. 371

<sup>18</sup> Foley (n 1), p. 371

<sup>19</sup>M. L. Hendrikse and N. H. Margetson, *Aspects of Maritime Law: Claims Under Bills of Lading* (2008 Kluwer), p.64

their own fault. The Act was a compromise between the interest of the shipowners and the cargo owners. The two main obligations of the carrier were made clear; to furnish a seaworthy ship and to exercise due care of the cargo. However, the obligations were not absolute and could be escaped by proving due diligence.

The requirement of due diligence is the main difference between the English test and the American test, i.e the Harter Act 1893 and now section 1304(1) of COGSA 1936<sup>20</sup>. Due diligence was not made an obligation in the Harter Act but a minimum requirement. This minimum requirement leads to the requirement of seaworthiness to be a condition preceding the use of a defence under the Harter Act<sup>21</sup>. The main reason for this reduced warranty of seaworthiness in the Harter Act was that the US Congress wanted to exclude fault based liability of shipowners if they exercised due care. This reduced warranty, as found in the Harter Act, was used in the Hague Rules. The first step toward the increase of carrier's liability was with the Harter Act. A further step was taken by the Hague/ Hague-Visby Rules.

#### 4. Hague/ Hague-Visby Rules<sup>22</sup> (HR/HVR)

The Hague was a compromise between the stakeholders, as highlighted by the rejection by the UK and US of the exclusion of owners' liability for damages caused by the negligence of

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<sup>20</sup> Dewey R. Villareal, 'The Concept of Due Diligence in Maritime law', (1971) 2 J. Mar. L. & Com. 763, p.764; Sandra A. Larkin, 'The Allocation of The Burden of Proof Under the Fire Statute and The Fire Exemption Clause of The Carriage of Goods By Sea Act', (1995) 20 Tul. Mar. L.J. 403, p.411; George H. Chamlee, 'The Absolute Warranty of Seaworthiness: A History and Comparative Study', (1973) 24 Mercer L. Rev. 519, p. 525; C. W O'Hare, 'Cargo Dispute Resolution and the Hamburg Rules', (1980) 29 Int'l & Comp. L.Q. 219, p.220; Jose Angelo Estrella Faria, 'Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules', (2008) 44 Tex. Int'l L. J. 277, p.282; Zuo Haicong, 'A Call for the Restoration of Contractual Freedom in Cargo Shipping' (2003) 8 Unif. L. Rev. n.s.309, p.311; Armand M. Pare, 'The Burden of Proof in Cases of Cargo Loss and Damage Where the U.S. Carriage of Goods By Sea Act Has Been Incorporated into a Charter Party' (2000) 25 Tul. Mar. L.J. 491, p.495

<sup>21</sup> Haicong (n 20), p.311; Force and others (n 5), p.36

<sup>22</sup> International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, 25 August 1924 (the 'Hague Rules') and its subsequent Protocol in 1968 (the 'Hague-Visby Rules').

the shipyard, if the owners selected the shipyard with due diligence<sup>23</sup>. The exclusion of liability of the owner for damages caused by the negligence of the shipyard, if selected with due diligence, was to answer the ruling in the *Muncarter castle* case<sup>24</sup>. The burden of proof is less onerous than under the Harter Act<sup>25</sup>. The test of due diligence, which here means reasonable<sup>26</sup>, is only relevant at the time of the loss, *Lendoudis Evangelos IP*<sup>27</sup>.

Unlike the Harter Act, the Hague and Hague-Visby Rules possess a definition of seaworthy with the criteria to take into consideration in Article III rule 1. Article III rule 1 in both Hague and Hague-Visby Rules imposes on the carrier a duty to exercise due diligence before and at the beginning of the voyage. The test is fault-based only requiring negligence, *The Amstelstot*<sup>28</sup>. In the *Eurasian Dream*<sup>29</sup>, Cresswell J. explained that '[t]he exercise of due diligence is equivalent to the exercise of reasonable care and skill'<sup>30</sup>. The unseaworthiness of the vessel needs to cause the damages<sup>31</sup>. However, latent defects are excluded if due diligence is proved<sup>32</sup>. To escape liability, the carrier can rely on the defence in Article IV (1).

The delimitation of the 'before' has been largely discussed. Case law gives a fairly similar answer: due diligence should be exercised from the start of the loading until the ship leaves

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<sup>23</sup> This was proposed after the outcome of the case *Riverstone Meat Co Pty v Lancashire Shipping Co* [1961] AC 807. See: Fisher (n 2), p.15

<sup>24</sup> Fisher (n 2), p.15

<sup>25</sup> G. van Slooten, 'Les Règles De La Haye : vers une Convention Internationale', (1923) Grotius Annuaire Int'l 47 ; James J. Donovan, 'The Hamburg Rules: Why A New Convention on Carriage of Goods By Sea' (1979) 4 Mar. Law. 1, p. 2; Villareal (n 20), p.764

<sup>26</sup> Villareal (n 20), p.764 and 766

<sup>27</sup> [1997] 1 Lloyd's Rep 404

<sup>28</sup> *Union of India v NV Reederij Amsterdam (The Amstelstot)* [1963] 2 Lloyd's Rep 223

<sup>29</sup> *Papera Traders Co Ltd and Others v Hyundai Merchant Marine Co. Ltd and Another (The "Eurasian Dream")* [2002] EWHC 118 (Comm)

<sup>30</sup> Para 131, He went on and said "Lack of due diligence is negligence; and what is in issue in this case is whether there was an error of judgment that amounted to professional negligence"

<sup>31</sup> Sarah C Derrington, 'Due Diligence, Causation and Article 4(2) of the Hague-Visby Rules' (1997) 3 Int'l. Trade & Bus. L. Ann. 175, p.175

<sup>32</sup> Rutledge (n 9), p.414

the harbour<sup>33</sup> and at any stages of the voyage<sup>34</sup>. However, the facts of the case will influence its interpretation<sup>35</sup>. Preliminary voyages, in a voyage charterparties, are normally excluded<sup>36</sup>.

## 5. Hamburg Rules<sup>37</sup>

One of the main critics of Article III rule 1 of the Hague/ Hague-Visby Rules was that the definition did not leave any room of manoeuvre to the courts. The strict wording makes it harder for the courts to expand the definition to the new developments of the industry.<sup>38</sup> This complaint was partly resolved by the wording of Article 5 of the Hamburg Rules.

The Hamburg Rules do not possess a specific article dealing with seaworthiness. Article 5 is a general article for shipowners' liability. On the one hand, such a broad wording makes it easier for the courts to interpret and extend the obligation of seaworthiness to new developments. On the other hands, such a broad wording puts legal certainty at stake.

The Hamburg Rules further increased the shipowner's liability. The shipowner is responsible unless he proves that he or his agents were not privy to the defect. Additionally, the period of responsibility is expanded; the Rules apply during the period in which the goods are under the carrier's custody, as well as throughout the voyage and at the ports of loading/ discharge.

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<sup>33</sup> *Maxine Footwear v. Canadian Government Merchant Marine* 1959] A.C. 589 (P.C.); *The Makadonia* [1962] 1 Lloyd's Rep. 316; *Leesh River Tea Company Ltd., and others v. British India Steam Navigation Company Ltd., (The 'Chyebassa')* [1966] Vol. 1 Lloyd's Rep. 450  
A similar approach was taken by the New York Court of Appeals in *Zander & Co. v. Mississippi S. N. Co.* [1961] 2 Fed. R. 511.

<sup>34</sup> Claudiu Iulian Lesni, 'The Ship Owner's Obligation to Ensure Seaworthiness of the Ship- Implicit Obligation of the Ship Owner in the Charter Party' (2012) 4 Contemp. Readings L. & Soc. Just. 563, p.564

<sup>35</sup> For instance in *The Kriti Rex*, [1996] 2 Lloyd's Rep. 171, 185 (QBD). See also: N.J. Margetson, 'The system of liability of articles III and IV of the Hague (Visby) Rules' (PhD Thesis, Universiteit van Amsterdam, 2008), p.39-41

<sup>36</sup> BS Shah, 'Seaworthiness- A Comparative Survey' (1966) 8 Malaya L. Rev. 95, p.109

<sup>37</sup> United Nations Convention on the Carriage of Goods by Sea, Hamburg, 1978 (the 'Hamburg Rules')

<sup>38</sup> Ahmad Hussam Kassem; 'The Legal Aspects of Seaworthiness: Current Law and Development', (PhD, Swansea University, 2006), p.18

However, the Hamburg Rules model was not kept in the Rotterdam Rules, which went back to the clear and specific obligations.

## 6. Rotterdam Rules (RR)

The Rotterdam Rules<sup>39</sup>, if adopted, will modify quite substantially the period of the obligation of the carrier. For the first time seaworthiness is drafted as a continuous duty<sup>40</sup>. Article 14 obliges carriers to make but also maintain their vessel seaworthy<sup>41</sup>. On deck carriage is covered which is not the case with the Hague (HR)/ Hague-Visby Rules (HVR)<sup>42</sup>. The period of responsibility is extended to “door-to-door”. Article 18 provides the basis of liability. Carriers are liable for loss or damage which happened during their period of responsibility, Article 18 (1)<sup>43</sup>. The burden of proof in establishing that Article 18(1) is fulfilled is on the claimant, similar to the HR/HVR, by establishing that the damages or loss occurred during the carrier period of responsibility. Then the carrier can dismiss the claim by showing due diligence from him or his agents<sup>44</sup>. The risk shifts from cargo owners to shipowners<sup>45</sup>.

The changes brought by the Rotterdam Rules are reflecting the current reality. Indeed, most charterparties require the ship-owner to keep the vessel seaworthy throughout the voyage, even without the Rotterdam Rules. The continuous duty could already be found in the Hamburg Rules. Consequently, even though on paper the changes look radical, in reality it they do not add any demands to shipowners.

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<sup>39</sup> The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the ‘Rotterdam Rules’) adopted by the General Assembly of the United Nations on 11 December 2008

<sup>40</sup> John F Wilson, carriage of goods by sea, (7<sup>th</sup> edition, Longman, 2010), p.232; F. Berlingieri, *International Maritime Conventions Volume One: The Carriage of Goods and Passengers by Sea* (Routledge, 2014)

<sup>41</sup> A. Diamond QC, ‘The next sea carriage Convention?’, (2008) LMAQ 135, p.150

<sup>42</sup> Jane Andrewartha, ‘English Maritime Law Update: 2008’ (2009) 40 J. Mar. L. & Com. 395, p.397

<sup>43</sup> On deck carriage is also covered. See: Andrewartha (n 42), p.397

<sup>44</sup> Wilson (n 40), p.232

<sup>45</sup> Diamond (n 41), p.150



Nevertheless, the duty should be less onerous during the sea stage. Even though shipowners have a large network of agents and could easily require a ship to be fixed at any port, it would still be unfair to hold the same standard. During the sea stage, shipowners should be held liable only for their decisions or the ones they should have made<sup>46</sup>.

## 7. Comparison

Seaworthiness is not a new concept, but originates from the unwritten law of the sea<sup>47</sup>. Already in ancient times, i.e Roman and Medieval, a ship had to be seaworthy and the risks were mitigated between the merchant and the shipowner<sup>48</sup>. The duty of seaworthiness arose from the relationship between the owner and different actors. The owner's duty varied depending of the nature of the contract<sup>49</sup>. Carriers took, for a long time, advantages of their bargaining power to restrict their liability<sup>50</sup>. Consequently, the duty has always been more favourable to them. But it is time to change the approach and re-establish a better balance between the parties. By comparing the three tests, I will explain why the Rotterdam Rules are the most adequate.

Imposing a continuous duty is no more unreasonable for several reasons: it is in line with the practice in the industry, will achieve a more balanced allocation of risks and finally, the technology allows for permanent communication between the owner and his vessel. It moreover will enhance safety at sea and might lower environmental damages. Lastly, it is not

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<sup>46</sup> M. Fehmi Ülgener, 'Obligations and Liabilities of the Carrier' in M.D. Güner-Özbeck (ed.) *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules* (Springer, 2011, p.139-153) p. 139

<sup>47</sup> Foley (n 1), p. 372; Shah (n 36), p. 521

<sup>48</sup> Samuel Robert Mandelbaum, 'International Ocean Shipping and Risk Allocation for Cargo Loss, Damage and Delay: A U.S. Approach to COGSA, Hague-Visby, Hamburg and the Multimodal Rules' (1995) 5 J. Transnat'l L. & Pol'y 1, p.3

<sup>49</sup> Fisher (n 2), p.5

<sup>50</sup> Theodora Nikaki and Baris Soyer, 'A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?', (2012) 30 Berkeley J. Int'l L. 303, p.303

inconsistent with ISM Code<sup>51</sup>, Article 6 and 10. Indeed, the liabilities under the Rotterdam Rules are similar to the responsibility the shipowners have under Article 10 of the ISM Code.

Seaworthiness clauses, in most charterparties, are designed as a continuous obligation<sup>52</sup>. If these clauses were too burdensome, by now they would have disappeared. Two interesting points to note: the concept of due diligence was already discussed in 1882<sup>53</sup>, and a continuous duty of seaworthiness was suggested during the Diplomatic Conference for the Hague Rules in 1922 by the Dutch delegate, Mr. van Slooten<sup>54</sup>. However, it was considered unreasonable and therefore rejected. Needless to say that nowadays many technologies were inexistent in 1922 and still a continuous duty was proposed. Furthermore, in Roman time and during the Middle Age, the risk of loss was mitigated between the merchant and the ship-owner<sup>55</sup>. Therefore, there are no reasons in 2015, with all the modern means at shipowners' disposal, for the risks of the voyage not to be entirely borne by them.

The idea that carriers or shipowners have no means to control the ship once at sea, resembled in both the Hague Rules and Common law rules, clearly do not reflect reality of modern trade and should be abandoned<sup>56</sup>. This was the reality in the early 1900. However, nowadays with all the means of communication, a ship is as controllable as a truck or train. The law should

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<sup>51</sup> Adopted by the International Maritime Organisation (IMO) on the 4<sup>th</sup> of November 1993, and incorporated into the International Convention for the Safety of Life at Sea Convention (SOLAS) 1974

<sup>52</sup> NYPE 1946 Line 36-38, NYPE 93 Clause 6, BALTIME 1939 Clause 3, GENTIME Clause 11. See: Talal Aladwani, 'Effect of Shipping Standards on the Charterparty Obligation of Seaworthiness- The Example of SOLAS', (2013) *Scandinavian Inst. Mar. L. Y.B.* 265, p.270; Kassem (n 38), p.243

<sup>53</sup> Even though this was in relation with bill of lading, it is interesting that the concept was already considered. See: Michael F. Sturley, 'The History of COGSA and the Hague Rules', (1991) 22 *J. Mar. L. & Com.* 1, p.6

<sup>54</sup> Mister Norman Draper argued for a similar approach in the US Congress when the Hague Rules were discussed. See: Sturley (n 53), p. 50; van Slooten (n 25)

<sup>55</sup> Mandelbaum (n 48), p.3

<sup>56</sup> Samuel Robert Mandelbaum, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods Under the Hague, COGSA, Visby and Hamburg Conventions', (1995) 23 *Transp. L.J.* 471, p.476; Mary Brooks and Jason Mackey, 'Will the Rotterdam Rules be Accepted? A Liner Cargo Interest Perspective', (2012) 35 *Dalhousie L.J.* 267, p.269; Margetson (n 35), p.42

reflect this reality. Even though the Hague Rules created a new doctrine different from the Common law, by imposing due diligence, it does not anymore reflect today's reality<sup>57</sup>.

The main difference between on the one hand Common Law and on the other Hague/Hague-Visby and Rotterdam Rules is the defence of due diligence available to carriers<sup>58</sup>. This sets Common law at a disadvantage. Indeed, liability is strict and therefore hard to escape. Additionally, ships are complex instruments and hardly free from latent defects. To impose a strict duty on carriers may be perceived as partially unfair. At Common law, shipowners are liable for breakdown of fatigued metals. Moreover, holding shipowners liable for unseaworthiness of ships repaired or maintained by experts, is unfair<sup>59</sup>. The test of due diligence seems more adequate than the Common law test. Of course the absolute duty at Common law can be partially contracted out but as it stands in the law, the duty is less adequate than due diligence. Due diligence does not only concern shipowners but also their employees after the ship entered their orbit, *Paterson S. S. v. Robin Hood Mills*<sup>60</sup>.

The seaworthy obligation under the Rotterdam Rules might become burdensome and be bad for business, as it requires shipowners to spend money they might not be willing to spend on their ships and requires ships to go through regular surveys<sup>61</sup>. However, similar clauses are already in charterparties. Furthermore, it is a wrong assumption to treat carriers as weak parties which need protection. Carriers will be able to pass these risks on by augmenting the

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<sup>57</sup> Stephen Zamora, 'Carrier Liability For Damage or Loss to Cargo In International Transport' (1975) 23 Am. J. Comp. L. 391, p.412

<sup>58</sup> Rutledge (n 9), p.410-411 ; Francis Reynolds, 'The Hague Rules, the Hague-Visby Rules, and the Hamburg Rules' (1990) 7 Austl. & N.Z. Mar. L.J. 16, p.17

<sup>59</sup> Shah (n 36), p.95 and 104

<sup>60</sup> (1937) 58 Ll. L.R. 33, 40

<sup>61</sup> Paula Bäckdén, 'Will Himalaya Bring Class Down from Mount Olympus? - Impact of the Rotterdam Rules' (2011) 42 J. Mar. L. & Com. 115, p.119

freight or subscribe specific insurance coverages<sup>62</sup>. From the shipper's point of view the Rotterdam Rules are more advantageous.<sup>63</sup> For the cargo's owner as well, as the premium of their insurance will decrease but the amount of freight payable might rise. The reasons for damage are irrelevant for cargo owners: they sustained loss and want reimbursement. Be it due to bad stowage or unseaworthiness, it does not change the fact that his cargo is damaged and he sustains economic losses. The continuous duty makes it easier for cargo owners to be reimbursed, similar to the approach in the Hamburg Rules<sup>64</sup>.

One of the main benefits from the Hamburg Rules are its clarity and the deletion of the artificial categorization between immunity and responsibility of the carrier, which created uncertainty. The Hamburg Rules are only referring to negligence or fault of the carrier<sup>65</sup> and in a sense, the continuous duty of seaworthiness is falling this path: either the carrier exercised due diligence or he was negligent in not exercising it. At the end of the day, carrier negligence will be determined by the courts. In my opinion, the test is easier and will provide legal certainty.

The Hague system was mainly criticized for its unequal and favoured position towards carriers to the detriment of shippers. Economically speaking, few changes for carriers will occur, as the industry, through clauses in charterparties, already imposed a continuous duty. The duty,

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<sup>62</sup> Theodora Nikaki, 'The Carrier's Duties Under the Rotterdam Rules: Better the Devil You Know?' (2010) 35 Tul. Mar. L.J. 1, p.14; Liang Zhao, 'Liability Regime of the Carrier Under the Rotterdam Rules' in Xiaowen Fu and others (eds), *Proceedings of the International Forum on Shipping, Ports and Airports (IFSPA) 2013: Trade, Supply Chain Activities and Transport: Contemporary Logistics and Maritime Issues* (C.Y. Tung International Centre for Maritime Studies, Department of Logistics and Maritime Studies, Hong Kong Polytechnic University, 2013), p.460-472, p.462

<sup>63</sup> Kofi Mbiah, 'Updating the Rules on International Carriage of Goods by Sea: the Rotterdam Rules', (Comite Maritime, 2009)

<<http://www.comitemaritime.org/Uploads/Rotterdam%20Rules/Paper%20of%20Kofi%20Mbiah.pdf>>  
accessed 23 October 2015

<sup>64</sup> Pika (n 15), p.444.

<sup>65</sup> John O. Honnold, 'Ocean Carriers and Cargo; Clarity and Fairness-Hague or Hamburg?' (1993) 24 J. Mar. L. & Com. 75, p.98

therefore, does not exceed what carriers already accept to bear<sup>66</sup>. Carriers will be deterred from pursuing their activities carelessly, as higher the likelihood to compensate will be, more careful carriers will be, enhancing the safety at sea at the same time<sup>67</sup>. Additionally, a more balanced allocation of risks will offer cargo owners of developing countries more protection and increase trade, as their fear of unrecoverable damages will be diminished<sup>68</sup>.

For business to run smoothly, allocation of risks is essential. Shipowners have control over their ships, except in a demise charterparty, and therefore should bear the risks of any deficiency. Only they are able to diminish the risks of failure, by carefully contracting with the manufacturer while buying the ship, and for the maintenance, selection of the crew, etc. While any ship should be seaworthy, supplying perfect ships is not required. New technologies enable constant communication with the ship throughout the voyage<sup>69</sup>. Consequently, it is not unreasonable to require shipowners to keep their ships seaworthy throughout the voyage. Moreover, the rebalancing of risks started with the Harter Act, was integrated in the Hague/Hague Visby Rules, and greatly expanded in the Rotterdam Rules.

The idea that carriers or shipowners have no means to control their ship once at sea, resembled in both Hague Rules and Common law, clearly do not reflect reality of modern trade and should be abandoned<sup>70</sup>. Indeed, with all the actual means of communication, a ship is as controllable as a truck or a train. Even though the due diligence test of the Hague Rules was a step forward, it does not anymore reflect today's reality<sup>71</sup>.

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<sup>66</sup> Talal Aladwani, 'The Supply of Containers and "Seaworthiness"-The Rotterdam Rules Perspective', (2011) 42 J. Mar. L. & Com. 185, p.202

<sup>67</sup> Kate Lannan, 'Behind the Numbers: the Limitation on Carrier Liability in the Rotterdam Rules', (2009) 14 Unif. L. Rev. 901, p.904

<sup>68</sup> Nikaki & Soyer (n 50), p.347

<sup>69</sup> Alexander von Ziegler, 'The Liability of the Contracting Carrier', (2008) 44 Tex. Int'l L. J. 329, p.337

<sup>70</sup> Mandelbaum (n 56), p.476; Brooks and Mackey (n 56) , p.269; Margetson (n 35), p.42

<sup>71</sup> Zamora (n 57), p.412

The reversed burden of proof, i.e that the carrier has to disprove negligence, is regarded as heresy by certain English judges<sup>72</sup> and I would agree. The approach in the Rotterdam Rules is more suitable: a presumption that the ship was unseaworthy which may be rebutted by proving due diligence<sup>73</sup>. However, the test is not easily established, which helps rebalancing between cargo interest and carrier's interest<sup>74</sup>. Through this approach, the carrier bears the risks for the ship and the cargo owner insures the cargo<sup>75</sup>. It is an improvement considering that in the HR/HVR the person bearing the burden of proof was not mentioned<sup>76</sup>.

The Rotterdam Rules will achieve fairer outcomes: For instance, two cargoes going to New York, one loaded in Hamburg and one in Antwerp. By the time the ship leaves Antwerp, new regulations are out. Due to the lack of the new certificates, the New York's port authority detains the ship, causing damages to the cargos. Under the Hague /Hague Visby Rules, the shipowner will only incur liability for the cargo from Antwerp, as the ship was not unseaworthy before. Under the Rotterdam Rules, both cargo owners will be able to claim damages. Additionally, at Common law, when damage or loss is caused by multiple causes, among them unseaworthiness, unless the owner can show the part of damage or loss not caused by the unseaworthiness of the ship, he will be liable for the totality of the loss or damage, even if he has a defence for the other cause(s), as held in *Smith Hogg v Black Sea*<sup>77</sup>

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<sup>72</sup> Derrington (n 31), p.178

<sup>73</sup> Dennis Minichello, 'The Coming Sea Change in the Handling of Ocean Cargo Claims for Loss, Damage or Delay', (2009) 36 Transp. L.J. 229, p.243

<sup>74</sup> Marel Katsivela, 'Overview of Ocean Carrier Liability Exceptions Under the Rotterdam Rules and the Hague-Hague/Visby Rules', (2010) 40 Rev. Gen. 413, p.426

<sup>75</sup> Reynolds (n 58), p.29; Joseph C. Sweeney, 'UNCITRAL and The Hamburg Rules-The Risk Allocation Problem in Maritime Transport of Goods', (1991) 22 J. Mar. L. & Com. 511; Nazery Khalid and Rakish Suppiah, 'The Rotterdam Rules: Catalyst for trade or cumbersome convention?' (2010) 37 MARIT. POL. MGMT. 447-450, p.449

<sup>76</sup> Si Yuzhou and Henry Hai Li, 'The New Structure of the Basis of the Carrier's Liability under the Rotterdam Rules' (2009) 14 Unif. L. Rev. 931, p.934

<sup>77</sup> *Smith, Hogg & Co v Black Sea and Baltic General Insurance Co* [1940] AC 997

and *Kapitan Sakharov*<sup>78</sup>. Under RR and HR/HVR, the owner will still be entitled to prove due diligence.

To some extent, the way English courts constructs the duty, brings Common law and the Rotterdam Rules closer. Indeed, the doctrine of stages at Common law gives rise to a similar obligation as in the Rotterdam Rules. The ship should be seaworthy at all stages<sup>79</sup>. Additionally, at Common law the carrier remains liable for latent defects not revealed by a thorough inspection and this extends throughout the voyage. The length of the duty is therefore similar. However, unlike at Common law, under RR, the defence of due diligence is available for the owner to escape liability<sup>80</sup>. The following example will illustrate this point, a ship going from Hong Kong to Antwerp has an engine breakdown near India due to a latent defect in a pipe. The pipes were carefully examined in Hong Kong before the ship left. Under Common law, the owner will be liable. Under Rotterdam Rules, if he can show that he exercised due diligence in the examination and after the ship left, he will be able to escape liability. Therefore, on the issue of latent defects, the Rotterdam Rules are more favourable to owners than Common law, but the length of the duty is fairly similar.

Article 14 Rotterdam Rules adopts a similar wording and structure as Article III(1) of the Hague/Hague-Visby Rules. Therefore, the questions about the word 'before' remains. The structure was kept mostly for interpretation purposes but also because the HR have served as a guideline for a long time<sup>81</sup>. The main difference is Article 14(1) (b) which requires owners to keep their ship equipped and crewed. Problems might arise: for instance, if one of the crew

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<sup>78</sup> [2000] 2 Lloyd's Rep. 255 (C.A.)

<sup>79</sup> Aladwani (n 52), p.289

<sup>80</sup> Francesco Berlingieri, 'Revisiting the Rotterdam Rules' (2010) LLOYD'S MAR. & COM. L.Q. 585, p.599; Nikaki (n 62), p.14

<sup>81</sup> R. Lagoni and others, *Recent Developments in the Law of the Sea* (LIT, 2010), p.199

members dies, the owner was not directly informed and damage occurred as a result of the missing member. The owner will not be able to prove due diligence and will be liable. Divergent views exist on whether it will be the expected perils or unseaworthiness of the ship that is the cause<sup>82</sup>.

Even though it is not an absolute duty, it will be hard to prove that the owner exercised a continuous due diligence at all stages. That makes the Hague/Hague-Visby Rules test easier, only requiring to prove due diligence before and at the beginning of the voyage.

A further major difference is that the seaworthiness principle is extended to the containers supplied by the carrier<sup>83</sup>. This in turns supresses the debate whether containers are part of the ship, leading to liability of carriers if they are not fit and rendered the ship unseaworthy<sup>84</sup>.

One of the major problems of the Rotterdam Rules, is the remaining ambiguities in the burden of proof provisions<sup>85</sup>. Courts will have to give some interpretation to this provision, meaning time consuming and costly litigations<sup>86</sup>. Contributory causes and their allocation of the burden of proof are not dealt within the RR, leading to some uncertainty<sup>87</sup>. One shortcoming of the

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<sup>82</sup> The argument of Diamond about the expected perils and unseaworthiness of the ship, sounds to me unreal. I agree more with Berlingieri, that damage cannot be caused by both peril of the sea and unseaworthiness of the ship caused by such peril. See: Berlingieri (n 80), p.599

<sup>83</sup> Simon Baughen, *Shipping Law*, (5th edition, Routledge, 2012), p.142; Aladwani (n 66), p.194

<sup>84</sup> For instance, the Dutch Supreme Court in *NDS Provider* SCN 1 February 2008, C06/082HR, held that the duty of due diligence extended to containers provided by the carrier. However, this path is not followed by the courts around the world. See: P. Bugden, *The Supply of Containers and Seaworthiness*. (2002) < [http://www.forwarderlaw.com/library/view.php?article\\_id=139](http://www.forwarderlaw.com/library/view.php?article_id=139) > accessed 29 September 2015; Aladwani (n 66), p.188.

The opposite view is advocated by: Margetson (n 35), p.48; N. J. Margetson, 'Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers,' (2008) *JIML*, p. 153-161

<sup>85</sup> Diamond (n 41), p.152

<sup>86</sup> For instance in Article 17 (5) unseaworthy is not explicitly mentioned at the beginning of the voyage. See: Sabena Hashmi, 'The Rotterdam Rules: A Blessing?' (2011) 10 *Loy. Mar. L.J.* 227, p.248

But with regard to the core provision, most jurisdiction have adopted a fairly similar approach. See: Nikaki & Soyer (n 50), p.320

<sup>87</sup> Nikaki & Soyer (n 50), p.318



RR is its failure to answer whether environmental considerations are part of the seaworthy test or not, as argued in the *Mobil Shipping & Transportation Co. v. Wonsild Liquid Carriers, Ltd.*<sup>88</sup>.

Arguably the Rotterdam Rules provide the best test. However, courts should make the degree of due diligence needed less strict when the ship is at sea than at port, as the circumstances are different<sup>89</sup>.

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<sup>88</sup> 190 F.3d 64, 1999. See the discussion about the case in Susan Hodges, 'Seaworthiness: A New Calculus Factors In Environmental Friendliness: *Mobil Shipping & Transportation Co. v. Wonsild Liquid Carriers, Ltd.*, 190 F.3d 64, 1999 AMC 2705 (2d Cir. 1999)' (2003) 34 J. Mar. L. & Com. 497

<sup>89</sup> von Ziegler (n 69), p.338

## 8. Conclusion

With the Rotterdam Rules, the risks have slightly shifted to the carrier by extending the duty owed, and the position of the cargo owner has improved<sup>90</sup>. But the Rotterdam Rules rebalance the relationship by placing the burden of proof on the cargo owner<sup>91</sup>. As was shown, the carrier cannot be seen as a weak party; the weak party, deserving protection, is the cargo owner. Furthermore, only the shipowner is in control of the risk, therefore, it seems fair for him to bear the risks. Legal obstacles to trade will be reduced. However, the Rotterdam Rules also lack clarity regarding Article 17(5), as unseaworthy is not explicitly mentioned at the beginning of the voyage.

The Rotterdam Rules attempted to address the concerns of both the shippers and carriers, while at the same time, trying to rectify the weakness of the Hague/ Hague-Visby Rules. It also promotes equality of the parties by allocating the risks in a fairer way. This in turn will help to increase the equality in international trade and will enhance legal certainty as the parties know exactly where they stand<sup>92</sup>.

The duty in the Rotterdam Rules cannot be contracted out<sup>93</sup>. Since the Rotterdam Rules kept the structure of the HR/HVR, it means that a large amount of case law will still be relevant. Common law will still be important in helping analyse the international conventions. The Rotterdam Rules only adopt what was already a reality in most charterparties.

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<sup>90</sup> Aladwani (n 52), p.290

<sup>91</sup> Katsivela (n 74), p.425

<sup>92</sup> Sara B. Cannon, 'Navigating The Uncharted Waters of Liability Apportionment: The Rotterdam Rules and American Cargo Damage Claims', (2013) 66 Rutgers L. Rev. 463, p.475

<sup>93</sup> Nikaki (n 62), p.13; Proshanto K. Mukherjee and Abhinayan Basu Bal, 'Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective' (2009) 40 J. Mar. L. & Com. 579, p.598