The carrier's fundamental duties to cargo under the Hague and Hague-Visby Rules

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The carrier's fundamental duties under the Hague and Hague-Visby Rules are twofold – a duty to provide a seaworthy ship and a duty to take care of the cargo. This article reviews the historical background and considers the decided principles in relation to each of these duties. Particular attention is paid to recent case law, including *The CMA CGM Libra* (passage planning and unseaworthiness), *Volcafe* (a 'sound system' and the burden of proof), and *The Santa Isabella* (whether a failure to change or alter course is negligent).

Introduction

Most cargo claims are directly affected by the application or incorporation of the Hague or Hague-Visby Rules, which in a few years will celebrate the centenary of their original enactment.[1] The purpose of this article is twofold. First, it analyses and examines the historical background of the provisions detailing with carriers' two fundamental duties;[2] the 'first base' obligation to provide a seaworthy ship[3] and the 'second base' obligation to take care of the cargo.[4] Secondly, it considers the scope and extent of those two duties as analysed in recent cases.

Some of what follows is well-travelled ground in the carriage of goods by sea. Nevertheless, the restatement of the common ground and its (re)consideration in recent case law has raised interesting issues about the fundamental duties owed by the carrier arising under the Hague or Hague-Visby Rules. Those cases demonstrate that it is far from true that there is nothing more to be said about this area of the law.[5]

[1] The International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules) was adopted on 25 August 1924 (in force 2 June 1931) and the Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading (the Hague-Visby Rules) on 23 February 1968 (in force 23 June 1977). For detailed consideration of the development of these Rules, see particularly Michael F Sturley 'The development of cargo liability regimes' in *Cargo Liability in Future Maritime Carriage* (Swedish Maritime Law Association 1998) 10.

[2] There is a third obligation in art III rule 3, to issue a bill of lading containing certain information, but that is not considered in this article.

[3] See Stephen Girvin 'The obligation of seaworthiness: shipowner and charterer' CML Working Paper Series 17/11 https://law.nus.edu.sg/cml/wps.html, where seaworthiness is discussed in detail in the context of charterparties.

[4] See eg John Hare *Shipping Law and Admiralty Jurisdiction in South Africa* (2nd edn Juta 2009) 657–58.

[5] And not one of the 'obscurer corners of the law', as it was described by Lord Sumption JSC in his judgment summary in *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* [2018] UKSC 61, [2019] AC 358 https://www.supremecourt.uk/watch/uksc-2016-0219/judgment.html. See the recent judgments in *Deep Sea Maritime Ltd v Monjasa A/S*

Provision of a seaworthy ship: historical background

It is trite law that the carrier's obligation to provide a seaworthy vessel is a core obligation in contracts for the carriage of goods by sea, as it is also in other maritime contexts, such as policies of marine insurance.[6] In England, such an undertaking is found in an early charterparty, the *Charter party of the Cheritie* (1531), which warranted that the shipowner undertook to provide a vessel that was:

> stronge stanche well and sufficyentlye vitalled and apparellyd with mastys sayles sayle yerds ancors cables ropes and all other thyngs nedefull and necessarie to and for the sayd shype during this presentt viage And the sayd owner shall ffynd in the sayd shippe xj good and able maryners …[7]

Thirty-five years later, a judgment of Sir Julius Caesar, Judge of the High Court of Admiralty,[8] noted the 'unseaworthiness' of a vessel, *The Edward* of Faversham, causing goods to be 'spoiled, rotted, wetted, and damaged, or deteriorated'.[9] An early treatise on maritime law in English, by William Welwod[10] of St Andrews, stated that:

> No ship should be fraughted without a charter-partie written and subscribed, containing both the Master and Merchant, and the name of the Ship … and likewise that the Master shall find a sufficient Steirman, Timberman, Shipman, and Mariners conuenient, Shippetycht, masts, sayles, tewes, strong anchors, and boat fit for the shippe, with fire, water, and salt, on his own expenses.[11]

During the next two centuries, similar wording, supplemented by the word 'tight'[12] and by the phrase 'tight staunch and strong' are commonly found. Charles Abbott, writing in 1802, noted that 'in a charter-party the person who lets the ship covenants, that it is tight, staunch and sufficient …'.[13] He added that the 'ship, and her furniture, [must] be sufficient for the voyage … [and] also be furnished with a sufficient number of persons of competent skill and ability to navigate her'.[14] Abbott cited the famous case of *Coggs v Bernard*[15] alongside continental maritime treatises mostly not part of the armoury of authorities known to modern-day practitioners.[16] In *Lyon v Mells*,[17] which concerned an action in assumpsit for the recovery of damages to a quantity of yarn, Lord Ellenborough CJ stated that, in relation to the carrier:

(The Alhani) [2018] EWHC 1495 (Comm), [2018] 2 Lloyd's Rep 563; *Glencore Energy UK Ltd v Freeport Holdings Ltd (The Lady M)* [2019] EWCA Civ 388, [2019] 2 Lloyd's Rep 109; *Kyokuyo Co Ltd v AP Møller-Maersk A/S (t/a Maersk Line) (The Maersk Tangier)* [2018] EWCA Civ 778, [2018] 2 Lloyd's Rep 59; *Vinnlustodin HF v Sea Tank Shipping AS (The Aqasia)* [2018] EWCA Civ 276, [2018] 1 Lloyd's Rep 530.

[6] See eg *Goram v Sweeting* (1669) 2 Saund 200; *Cook v Greenock Marine Insurance Company* (1843) 5 D 1379; Jonathan Gilman QC *Arnould: Law of Marine Insurance and Average* (Sweet & Maxwell 2019) ch 20.

[7] Reginald G Marsden (ed) *Select Pleas in the Court of Admiralty, vol 1* (Selden Society 1892) 35. An older example, the charterparty of *Our Lady of Lyme* (1323) contains no such statements: see Robin Ward 'A surviving charterparty of 1323' (1995) 81 *The Mariner's Mirror* 387.

[8] See eg William Senior 'The judges of the High Court of Admiralty' (1927) 13(4) *The Mariner's Mirror* 333, 337.

[9] *Borneley v Troute* (1586). See Reginald G Marsden (ed) *Select Pleas in the Court of Admiralty, vol 2* (Seldon Society 1897) 163.

[10] Also written 'Welwood'. See John W Cairns 'Academic feud, bloodfeud, and William Welwood: legal education in St Andrews, 1560–1611' (1998) 2 *Edinburgh Law Review* 158, 255.

[11] William Welwod *An Abridgement of All Sea-Lawes* (Humfrey Lownes 1613) Tit 7 ('The fraughting of Ships') 22. This wording is more elaborate than the original wording in Welwod's *The Sea-Law of Scotland* (Robert Waldegrave 1590) Tit 2 ('Of fraughting of Schips'). See J D Ford 'William Welwod's treatises on maritime law' (2013) 34 *Journal of Legal History* 172, 179.

[12] That is, in the sense of having such construction as to be impervious to fluid, hence 'watertight'.

[13] Charles Abbott *Treatise of the Law Relative to Ships and Seamen* (E & R Brooke and J Rider 1802) 180.

[14] ibid 181.

[15] (1703) 2 Ld Raym 909. See David Ibbetson '*Coggs v Barnard* (1703)' in Charles Mitchell and Paul Mitchell *Landmark Cases in the Law of Contract* (Hart Publishing 2008) ch 1.

[16] These included James Park *A System of the Law of Marine Insurances* (1789); Balthazard-Marie Émérigon *Traité des assurances et des contrats à la grosse* (1783); Charles Molloy *De Jure Maritimo et Navali* (1676); Francesco Rocco *Notabilia de Navibus et Naulo* (1708); and Ordonnance de la Marine (1681). See Bernard Allaire 'Between Oléron and Colbert: the evolution of French maritime law until the seventeenth century' in Maria Fusaro and others *Law, Labour and Empire: Comparative Perspectives on Seafarers c. 1500–1800* (Palgrave Macmillan 2015) 79, 88.

[17] (1804) 5 East 428, 437.

> [i]t is a term of the contract … implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate substratum of the contract that it is so: The law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so …

Many reported cases also referred to such phrases,[18] as did new treatises on merchant shipping and the carriage of goods by sea, such as those by MacLachlan[19] and, 25 years later, Carver[20] and Scrutton.[21]

In due course, a further requirement was introduced to the core requirement of the vessel being 'tight, staunch and sufficient': the vessel must also be cargoworthy, in the sense explained by Brett J in *Stanton v Richardson*:[22]

> It is found that the cargo offered was a reasonable cargo, and that the ship was not fit to carry a reasonable cargo … It seems to me that the obligation of the shipowner is to supply a ship that is seaworthy in relation to the cargo which he has undertaken to carry.[23]

Further dimensions of the carrier's seaworthiness obligation were developed. Thus, the obligation to provide such a seaworthy vessel was held to be relative to the nature of the vessel,[24] the particular voyage,[25] the time of year,[26] the stages of that voyage,[27] the cargoes which the carrier contracted to carry[28] and the relevant standards for the carrying of cargoes at the applicable time.[29] The required standard was not an accident-free ship, nor a ship or gear that might withstand all conceivable hazards.[30] Reflecting the importance of the concept, the shipowner's obligation was unconditional: it was absolutely liable, irrespective of fault:

> [The] warranty is an absolute warranty; that is to say, if the ship is in fact unfit at the time when the warranty begins, it does not matter that its unfitness is due to some latent defect which the shipowner does not know of, and it is no excuse for the existence of such a defect that he used his best endeavours to make the ship as good as it could be made.[31]

In *Steel v State Line Steamship Co*, Lord Blackburn described the obligation as amounting to an undertaking 'not merely that [the shipowners] should do their best to make the ship fit, but that the

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[18] See eg *Touteng v Hubbard* (1802) 3 B & P 291; *Christy v Row* (1808) 1 Taunt 300; *Havelock v Geddes* (1809) 10 East 554; *Bell v Puller* (1810) 2 Taunt 285; *Davidson v Gwynne* (1810) 12 East 381; *Harrison v Wright* (1811) 13 East 343; *Levy v Costerton* (1816) Holt 167; *Deffell v Brocklebank* (1817) 4 Price 36; *Hurgar v Morley and the Commissioners of the Transport Board* (1817) 3 Merivale 20; *Ripley v Scaife* (1826) 5 B & C 167; *Porter v Izat* (1836) 1 M & W 381; *Blyth v Smith* (1843) 5 Man & G 405; *Cauvin v Landsberg* (1851) 1 S 86 (Cape SC); *Thompson v Gillespy* (1855) 5 E & B 209.

[19] David MacLachlan *A Treatise on the Law of Merchant Shipping* (William Maxwell 1860) 349.

[20] T G Carver *A Treatise on the Law Relating to the Carriage of Goods by Sea* (Stevens & Sons 1885) 19.

[21] T E Scrutton *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading* (William Clowes & Sons Ltd 1886) art 29. See David Foxton *The life of Thomas E Scrutton* (Cambridge University Press 2013) 138.

[22] (1872) LR 7 CP 421, 435 (affirmed (1874) LR 9 CP 390, 392, (1875) 3 Asp MLC 23, 25 (HL)).

[23] The cargoworthiness component of a seaworthy vessel is widely accepted: see *Tattersall v The National Steamship Co Ltd* (1884) 12 QBD 297, 300; *Owners of Cargo on Board SS Waikato v The New Zealand Shipping Co Ltd* [1898] 1 QB 645, 647; *Rathbone Brothers & Co v Maciver, Sons & Co* [1903] 2 KB 378, 386; *Martin v Southwark*, 191 US 1 (1903), 24 S Ct 1, 3; *Fleming v Ramsay* (1905) 25 NZLR 596; *Virginia Carolina Chemical Co v Norfolk and North American Steam Shipping Co* [1912] 1 KB 229, 243–44.

[24] The vessel must be '… in a condition to bear all the ordinary vicissitudes of the voyage …': *Thin v Richards & Co* [1892] 2 QB 141, 143 (Lord Esher MR). See also *Northern Steamship Co Ltd v Dominion Portland Cement Co Ltd* [1921] NZLR 372, 375.

[25] *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774, 780.

[26] *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1926) 24 Ll L Rep 446, 458.

[27] *The Vortigern* [1899] P 140.

[28] See *Stanton v Richardson* (1875) 3 Asp MLC 23 (HL); *Tattersall v The National Steamship Co Ltd* (1884) 12 QBD 297, 300; *W Angliss & Co (Australia) Pty Ltd v P & O Steam Navigation Co* (1927) 28 Ll L Rep 202.

[29] See *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (n 26) 396.

[30] *President of India v West Coast Steamship Co (The Portland Trader)* [1963] 2 Lloyd's Rep 278, 280–81 (Dist Ct, Oregon).

[31] *McFadden Brothers & Co v Blue Star Line Ltd* [1905] 1 KB 697, 703 (Channell J). See also *Martin v Southwark* (n 23); *Virginia Carolina Chemical Co v Norfolk & North American Steam Shipping Co* [1912] 1 KB 229, 243.

ship should really be fit'.[32] The test for determining seaworthiness was, in due course, laid down as follows by Channell J in *McFadden v Blue Star Line*:

> A vessel must have that 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… If the defect existed, the question to be put is: Would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.[33]

While it was recognised by the courts that standards of seaworthiness could rise with more sophisticated knowledge, for example in shipbuilding, navigation[34] and equipment,[35] perfection was not expected: 'You do not test it by absolute perfection or by absolute guarantee of successful carriage. It has to be looked at realistically, and the most common test is: Would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?'[36]

As further expressed, the duty of a shipowner was not to adopt all the newest inventions; the 'ship need not be always, in all ways, up to date'.[37] Scrutton LJ held that:

> [The vessel] certainly need not have fittings or instruments which had not at the time been invented, because by subsequent inquiry a danger has been discovered which these fittings and instruments when invented might avert. While the shipowner may be bound to add improvements in fittings where the improvement has become well known or the discovery of danger established, the position is quite different where at the time of the voyage the discovery had not been made or the danger discovered.[38]

Due diligence under the Hague and Hague-Visby Rules

The 'due diligence' standard in Article III rule 1 of the Hague and Hague-Visby Rules originated in the Liverpool Conference Form 1882,[39] which refers to a 'want of due diligence by the Owners of the Ship'.[40] Within a decade, the due diligence standard was inserted into section 2 of the Harter Act 1893,[41] to the effect that it was unlawful

> for any vessel transporting merchandise or property … to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of 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 any wise be lessened, weakened or avoided.

Similar wording, influenced by this provision, was implemented in the New Zealand Shipping and Seaman Act 1903,[42] the Australian Sea Carriage of Goods Act 1904[43] and the Canadian Water-

[32] (1877) 3 App Cas 72, 86.
[33] [1905] 1 KB 697, 706.
[34] *Burges v Wickham* (1863) 3 B & S 669, 693 (marine insurance).
[35] ibid. See also *Martin v Southwark* (n 23); *Mount Park Steamship Co v Grey* (1910) *Shipping Gazette* (12 March 1910, HL) (cited by Scrutton LJ in *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (n 26) 454).
[36] *MDC Ltd v NV Zeevaart Maatschappij Beursstraat* [1962] 1 Lloyd's Rep 180, 186 (McNair J).
[37] *Mount Park Steamship Co v Grey* (n 23) (Lord Loreburn LC), cited in *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (n 26) 454.
[38] ibid 454–55.
[39] Drafted at the Liverpool Conference of the then Association for the Reform and Codification of the Law of Nations (later, from 1895, the International Law Association): see Michael F Sturley 'The history of COGSA and the Hague Rules' (1991) 22 *Journal of Maritime Law & Commerce* 1, 6.
[40] See Michael F Sturley *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules, vol 2* (Fred B Rothman & Co 1990) 62.
[41] Ch 105 (see now 46 USCA §30705). See Joseph C Sweeney 'Happy birthday, Harter: a reappraisal of the Harter Act on its 100th anniversary' (1993) 24 *Journal of Maritime Law & Commerce* 1.
[42] 3 Edw 7, No 96, s 293: '… due diligence to make the ship in all respects seaworthy and properly manned, equipped, and supplied …'.
[43] Act No 14, 1904 s 5(b): 'any obligations of the owner or charterer or any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation …'.

Carriage of Goods Act 1910.[44] This legislation, notably that of Canada, provided a template for the Hague and Hague-Visby, Article III rule 1, which reads that:

> The carrier[45] shall be bound before and at the beginning of the voyage to exercise due diligence to
> (a) Make the ship seaworthy.
> (b) Properly man, equip and supply the ship.
> (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

There are several distinctive features of this provision. The first is the period of application, 'before and at the beginning of the voyage', covering the period 'from at least the beginning of the loading until the vessel starts on her voyage'.[46] If, however, the vessel is unseaworthy owing to some earlier breach of due diligence, the carrier will be liable on the ground of actual or imputed knowledge of the defects or failure to use due diligence continuing to the date relevant to the particular contract of carriage.[47] Once the vessel starts on the voyage, the obligation no longer applies[48] and the period of coverage, unlike that at common law, is not broken by the doctrine of stages.[49]

The second feature of the provision relates to the standard of the carrier's obligation, which, as already noted, is one of 'due diligence'.[50] Due diligence has been interpreted by the courts as 'indistinguishable from an obligation to exercise reasonable care'[51] and so 'lack of due diligence is negligence …'.[52] Such lack of due diligence includes miscalculations as to the quantity of bunkers required for a trans-Pacific voyage, the speed of the vessel and failing to take in account the current;[53] a failure by the master to press up three double-bottom tanks, so that a vessel became unstable and was unseaworthy;[54] the stowage of tank containers of isopentane below deck;[55] a failure by the chief engineer to carry out engine crankshaft inspections correctly;[56] and a failure by the chief engineer to carry out proper checks and measurements on an engine bearing.[57]

The third feature of the carrier's obligation is that it is overriding[58] in nature and not delegable to servants or agents: 'the shipowners' obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done'.[59] If responsibilities are delegated to independent

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[44] c 61 s 4(b). This is *in pari materia* with s 5(b) of the Australian Act, ibid. For discussion of this legislation see H C Gutteridge 'The limitation of the liability of shipowners' (1921) 2 *Economica* 180, 186.

[45] That is, the shipowner or charterer: see art 1(a).

[46] *The Steel Navigator*, 23 F 2d 590 (2nd Cir 1928) 591–92; *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589, 603 (PC); *Western Canada Steamship Co Ltd v Canadian Commercial Corp* [1960] 2 Lloyd's Rep 313, 319 (Can Sup Ct); *The Makedonia* [1962] P 190, 194; *CHS Inc Iberica SL v Far East Marine SA (The MV Devon)* [2012] EWHC 3747 (Comm) [43].

[47] *W Angliss & Co (Australia) Pty Ltd v P & O Steam Navigation Co* [1927] 2 KB 456, 463; *Fyffes Group Ltd v Reefer Express Lines Pty Ltd (The Kriti Rex)* [1996] 2 Lloyd's Rep 171, 185.

[48] See eg *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd (The Chyebassa)* [1967] 2 QB 250, 274–75 (upholding *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd (The Chyebassa)* [1966] 1 Lloyd's Rep 450, 457).

[49] *Sellers Fabrics Pty Ltd v Hapag-Lloyd AG* [1998] NSWSC 646; *The Chyebassa* (n 48) 275; *The Makedonia* (n 46) 195.

[50] See generally Malcolm Clarke *Aspects of the Hague Rules* (Martinus Nijhoff 1976) chs 14–15. The more stringent common law standard is abolished in legislation enacting the Rules: see eg Carriage of Goods by Sea Act 1971 s 3; (Australia) Carriage of Goods by Sea Act 1991 (Cth) s 17; (Malaysia) Carriage of Goods by Sea Act 1950 No 527 s 3; (Singapore) Carriage of Goods by Sea Act 1972 (rev ed 1998) s 4; (South Africa) Carriage of Goods by Sea Act 1986 No 1 s 2.

[51] See *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1960] 1 QB 536, 581 (Willmer LJ); *Union of India v NV Reederij Amsterdam* [1963] 2 Lloyd's Rep 223, 235; *Christian Anderson v Attorney General of New Zealand (The Danica Brown)* [1995] 2 Lloyd's Rep 264, 266.

[52] *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118 (Comm), [2002] 1 Lloyd's Rep 719 [155].

[53] *E B Aaby's Rederei AS v The Union of India (The Evje) (No 2)* [1978] 1 Lloyd's Rep 351, 354.

[54] *The Friso* [1980] 1 Lloyd's Rep 469, 476.

[55] *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep 255, 268.

[56] *The Antigoni* [1991] 1 Lloyd's Rep 209, 215.

[57] *MT Cape Bonny Tankschiffarts GmbH & Co KG v Ping An Property & Casualty Insurance Co of China Ltd (The Cape Bonny)* [2017] EWHC 3036 (Comm), [2018] 1 Lloyd's Rep 356.

[58] *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* (n 46) 602–603. See Clarke (n 50) 161.

[59] *Riverstone Meat Co Pty v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] AC 207, 844. (Viscount Simonds, overruling [1959] 1 QB 74, [1960] 1 QB 536). See also *International Navigation Co v Farr & Bailey Manufacturing Co* (1901) 21 S Ct 591, 593; *The British Columbia Sugar Refining Co Ltd v The Thor* [1965] 2 Ex CR 469 [10]; Clarke (n 50) ch 17.

contractors, surveyors or other persons and such persons are negligent, the carrier remains liable,[60] it being no defence that reliable experts were engaged or that the shipowner lacked the necessary expertise to check their work.[61] However, the carrier does not assume such responsibilities until the vessel comes under its 'orbit',[62] or its ownership, possession or control.[63] When a new vessel is commissioned, chartered or purchased from another person,[64] the carrier is not liable for existing defects rendering the vessel unseaworthy, unless these were reasonably discoverable by the exercise of due diligence at the time of takeover.[65] If, however, the defect could have been apparent on a reasonable inspection of the vessel at the time that the vessel was taken over, the shipowner cannot rely for protection even on the certificate of a surveyor or any other classification society.[66] Thus, where a carrier failed to appreciate that there had been inadequate proof testing of crane hooks by a classification society, for whose failings it was responsible, it was held not to have acted with due diligence.[67]

The fourth feature of the provision is the express wording in Article III rule 1(a), (b) and (c). This embraces each of the distinct elements of seaworthiness recognised at common law and does not have any extended or unnatural meaning.[68] Nevertheless, the provision explicitly requires due diligence by the carrier in the manning,[69] equipment[70] and supply of the vessel. Underlying the importance attached to the vessel also being cargoworthy, the 'holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, [are] fit and safe for their reception, carriage and preservation'.[71]

The final feature of this first base obligation in the Hague and Hague-Visby Rules is the burden of proof.[72] The answer appears, at first sight, to be provided by Article IV rule 1, the relevant sentence of which states that 'whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article'. On a literal reading, this appears to impose a positive duty on the carrier to prove the exercise of due diligence, but it has been accepted over a long period of time that the common law scheme of proof has been transposed into the Rules.[73]

Due diligence: developing law

A substantial number of reported cases have analysed the breadth of the seaworthiness obligation and this article is not the place to attempt a comprehensive analysis.[74] Instead, two areas are

[60] See *W Angliss & Co (Australia) Pty Ltd v Peninsula & Oriental Steam Navigation Co* (n 47) 462; *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [2000] 2 Lloyd's Rep 191, 199.

[61] But this does not extend to responsibility for manufacturers, exporters or shippers in their stuffing of containers and description of their contents: *The Kapitan Sakharov* (n 55) 272.

[62] *The Muncaster Castle* (n 59) 867.

[63] *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2006] EWHC 122 (Comm), [2006] 1 Lloyd's Rep 649 [37].

[64] See *W Angliss and Co (Australia) Pty Ltd v Peninsular and Oriental Steam Navigation Co* (n 47) 461; *The Muncaster Castle* (n 59) 853–54.

[65] *The Muncaster Castle* (n 59) 853–54.

[66] *The Happy Ranger* (n 63) [44].

[67] ibid [62].

[68] *Actis Steamship Co Ltd v The Sanko Steamship Co Ltd (The Aquacharm)* [1982] 1 WLR 119, 122; *Ben Line Steamers Ltd v Pacific Steam Navigation Co (The Benlawers)* [1989] 2 Lloyd's Rep 51, 60; *Empresa Cubana Importada de Alimentos Alimport v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep 586, 592; *The Gang Cheng* (1998) 6 MLJ 468, 488; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad (The Bunga Seroja)* [1999] 1 Lloyd's Rep 512 [86].

[69] See below.

[70] See Girvin (n 3).

[71] See text to n 22 above.

[72] See Clarke (n 50) ch 12.

[73] See *Minister of Food v Reardon Smith Line Ltd* [1951] 2 Lloyd's Rep 265, 271–72; *The Hellenic Dolphin* [1978] 2 Lloyd's Rep 336, 339; *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra)* [2019] EWHC 481 (Admlty), [2019] 1 Lloyd's Rep 595 [56]–[57] (distinguishing *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5)). See the fuller discussion in Stephen Girvin *Carriage of Goods by Sea* (2nd edn Oxford University Press 2011) [27.28].

[74] See, however, Girvin (n 3).

considered. The first concerns manning, certification and documentation; the second concerns passage planning and the technical sophistication of ships.

Manning

It is not enough for the carrier to provide a structurally fit and cargoworthy vessel. As enumerated in Article III rule 1(b) of the Hague and Hague-Visby Rules, the vessel must also be 'properly manned'. As a minimum, this entails having on board sufficient crew for the voyage,[75] including, if required, a pilot.[76] What amounts to 'sufficiency' will be a question of fact in each case.

Sufficiency is also affected by SOLAS 1974, which requires contracting states[77] to take measures to ensure that all ships are 'sufficiently and efficiently managed'[78] under the IMO Principles of Minimum Safe Manning.[79] The requirement that the vessel is 'properly manned' goes further than sufficiency and extends to the competence, both of the vessel's crew[80] and the master.[81] In the leading case, *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,[82] the court found that, although certain of the vessel's machinery was in a reasonably good condition '… by reason of its age, it needed to be maintained by an experienced, competent, careful and adequate engine room staff'.[83] Salmon J continued that:

> [W]ould a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this engine room staff? … I have no doubt that the true answer to this question is 'No'. It is obvious from the owners' associated company's letter … to the owners' … agents that the owners were informed that as the engines were very old it was necessary to engage an engine room staff 'of exceptional ability, experience and dependability'.[84]

Competence can also be affected by personality, an aspect of competence that has become much more important as the numbers of crew numbers on board have diminished:[85]

> In considering efficiency, the matters to be considered, in my view, are not limited to a disabling want of skill and a disabling want of knowledge. A man may be well qualified and hold the highest grade in certificates of competency and yet have a disabling lack of will and inclination to use his skill and knowledge so that they are well nigh useless to him. Such a man may be unable efficiently to use the skill and knowledge which he has through drunken habits or through ill-health.[86]

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[75] Abbott (n 13) 181. See *Northern Commercial Co v Lindblom*, 162 F 250, 254 (9th Cir 1908); *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 34.

[76] See eg *Newfoundland Export & Shipping Co Ltd v United British SS Co Ltd (The Framlington Court)*, 69 F 2d 300, 304 (5th Cir 1934) 304.

[77] See eg The Merchant Shipping (Standards of Training, Certification and Watchkeeping) Regulations 2015 (SI 2015/782) reg 46.

[78] SOLAS 1974 Ch 5 reg 14.1.

[79] Resolution A.1047(27) (20 December 2011).

[80] See text to n 7: *Charter party of the Cheritie* (1531); Abbott (n 13) 181. See Roger White 'The human factor in unseaworthiness claims' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 221.

[81] *Moore v Lunn* (1923) 15 Ll L Rep 155, 156 (master and chief engineer 'habitual drunkards'); *Standard Oil Co of New York v Clan Line Steamers Ltd* [1924] AC 100, 120–21 (a 'disabling want of skill and disabling want of knowledge … equally renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy'); *The Roberta* (1937) 58 Ll L Rep 231, 233 ('untrustworthiness and incompetence of [the] engineer'); *The Makedonia* (n 46) 336 (inefficiency of the chief engineer); *Sanko Steamship Co Ltd v Sumitomo Australia Ltd (No 2)* 63 FCR 227, 285 (incompetent crew causative of the grounding of a vessel).

[82] [1962] 2 QB 26.

[83] ibid 34. It does not, however, follow from the mere fact of a collision that the master and crew are incompetent: *State Trading Corp of India v Doyle Carriers Inc (The Jute Express)* [1991] 2 Lloyd's Rep 55, 59.

[84] ibid. See also *Rio Tinto Co Ltd v The Seed Shipping Co Ltd* (1926) 24 Ll L Rep 316; *The Framlington Court* (n 76) 304; *The Makedonia* [1962] 1 Lloyd's Rep 316; *Robin Hood Flour Mills Ltd v NM Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Rep 276; *The Eurasian Dream* (n 52).

[85] *The Makedonia* (n 84) 335 (Hewson J).

[86] See *The Lady M* (n 5), where there were doubts, not sufficiently supported by evidence, as to the mental state of a chief engineer.

Current law is also influenced by international regulation on the competency of crew, as laid down by the STCW Convention 1978 (as amended).[87] In particular, Chapters II and III of the STCW Convention[88] specify mandatory minimum requirements, respectively, for the certification of the master and deck department and engine department of ships.[89] Further influence is provided by the Maritime Labour Convention 2006,[90] which while setting down minimum requirements for seafarer's employment and conditions of seafarer's employment also has an impact on the extent of the carrier's obligation to provide a seaworthy vessel.[91]

Documentation and certification

A wide range of certificates, papers and documents are required onboard vessels[92] and the absence of such documentation may be a breach of the carrier's obligation to provide a seaworthy vessel. As Kerr LJ has cautioned, however, there is no[93] 'basis for holding that such certificates can properly be held to include documents other than those which may be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's ports of call'.

Thus, while a vessel will be unseaworthy if the necessary health certificate from a port health authority[94] or a consular manifest[95] is unavailable, other cases have held that a vessel will be seaworthy even when not carrying a deck certificate of clearance[96] or an ITF Blue Card,[97] or where RightShip approval has not been obtained.[98]

The documentation standards required have continued to evolve in response to technological and legal change.[99] Indeed, the growth in the regulation of international shipping has also imposed greater legal requirements on shipowners and an increasing avalanche of regulation requiring onboard paper certificates;[100] depending on their significance, the absence of the required documentation may impact on the carrier's seaworthiness obligation. Thus, a vessel will be unseaworthy if it is not ISM Code compliant[101] or if it does not carry a valid ISSC certificate required by the ISPS

[87] The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (amended in 1995, 1997 and 2010).

[88] These amendments, the so-called 'Manila Amendments' to the STCW, were agreed in 2010 and came into force on 1 January 2012.

[89] See The Merchant Shipping (Standards of Training, Certification and Watchkeeping) Regulations 2015 (n 77) pt 2.

[90] See the statutory instruments passed during the period 2010–2014 pursuant to the Merchant Shipping Act 1995 ss 85–86.

[91] See eg Pengfei Zhang and Edward Phillips 'Safety first: reconstructing the concept of seaworthiness under the Maritime Labour Convention 2006' (2016) 67 *Marine Policy* 54.

[92] See eg List of Certificates and Documents Required to be Carried on Board Ships (19 July 2017) FAL.2/Circ.131 MEPC.1/Circ.873 MSC.1/Circ.1586 LEG.2/Circ.3. Different flag administrations also lay down detailed requirements: see eg 2012 List of Certificates, Documents and Publications Required to be Carried on Board Singapore Flag Ships, MPA Shipping Circular No 6 of 2012: www.mpa.gov.sg/web/wcm/connect/www/9209e424-e98b-4a0d-b4ee-04409cf645c1/shipping-circular-no-6-of-2012.pdf?MOD=AJPERES.

[93] *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd (The Derby)* [1985] 2 Lloyd's Rep 325, 331.

[94] See *Levy v Costerton* (n 18); *Ciampa v British India Steam Navigation Co Ltd* (n 25).

[95] *Dutton v Powles* (1862) 2 B & S 191. Including a deratisation certificate: *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines Ltd (The Madeleine)* [1967] 2 Lloyd's Rep 224, 241.

[96] *Wilson v Rankin* (1865) LR 1 QB 162; *Chellew Navigation Co Ltd v AR Appelquist Kolimport AG* (1933) 45 Ll L Rep 190.

[97] *The Derby* (n 93).

[98] *Seagate Shipping Ltd v Glencore International AG (The Silver Constellation)* [2008] EWHC 1904 (Comm), [2008] 2 Lloyd's Rep 440.

[99] See eg *Martin v Southwark* (n 23) 3.

[100] There is likely to be relief in future with the momentum to issue e-certificates: see eg Wei Zhe Tan 'Denmark, Norway and Singapore port authorities ink pact on E-Certificates' *Lloyd's List* (25 April 2017); 'DNV GL rolls out e-certificates for its classed vessels' *Lloyd's List* (17 October 2017).

[101] The International Safety Management Code (the ISM Code) is mandatory under SOLAS 1974 ch IX (as amended): *The Eurasian Dream* (n 52) 739. See Hannu Honka 'The standard of the vessel and the ISM Code' in Johan Schelin (ed) *Modern law of Charterparties* (Axel Ax:son Institute of Maritime and Transport Law 2003) 105. It is also a breach of the carrier's marine insurance cover not to have such certification: see eg the International Hull Clauses (1/11/03) cll 13.1.4 and 13.1.5.

Code,[102] or an International Sewage Pollution Prevention (ISPP) certificate, required under MARPOL 1973/1978.[103]

Some standard clauses make provision for the evolving scope of these requirements. Thus, in *The Elli and the Frixos*,[104] the parties drafted a clause to the effect that shipowners warranted that the vessel complied 'with all applicable conventions, laws, regulations and ordinances of any international, national, state or local government entity … including … MARPOL 1973/1978 as amended and extended …'. The chartered tankers did not have double-bottom tanks but, before the end of the relevant time charterparties, MARPOL Regulation 13H came into force, requiring oil tankers of 5,000 tons deadweight and above, carrying heavy grade oil as cargo, to be fitted with double bottoms or double-sides not used for the carriage of oil and extending to the entire cargo tank length. The effect of this requirement was that the shipowners were in breach because they had failed to obtain an exemption under the changes to MARPOL, affecting the vessel's cargo carrying capacity. The court held that the warranty explicitly given in the clause applied both on and after delivery and expressly referred to MARPOL as amended and extended.[105]

A related area of significance is the implementation of MARPOL Annex VI, which has made it mandatory from 1 January 2020 for all vessels to burn only very low sulphur fuel oil,[106] although vessels may continue to operate burning high sulphur fuel oil (HSFO) if fitted with exhaust gas cleaning systems (scrubbers).[107] Vessels must now carry a supplement to the mandatory international air pollution prevention (IAPP) certificate relating to the control of emissions from ships.[108] It is clear that where a carrier provides a vessel which is incapable of burning compliant fuel it will be unseaworthy,[109] but the vessel is also likely to be unseaworthy if the relevant certificate is unavailable or not held on board, particularly if the vessel is inspected by port state control.[110] Unsurprisingly, leading organisations such as BIMCO have drafted clauses taking account of the new regime for time charterparties, where the normal expectation is that time charterers provide and pay for bunkers.[111] Thus, the 2020 Marine Fuel Sulphur Content Clause for Time Charterparties provides that the owners of the time chartered vessel 'warrant that [it] shall comply with the Sulphur Content Requirements' and will be liable 'for any losses, damages, liabilities, delays, deviations, claims, fines, costs, expenses, actions, proceedings, suits, demands' arising out of a failure to comply.[112] The caveat is that charterers must have supplied the vessel with compliant fuels, as specified elsewhere in the clause.[113]

Technical developments

Vessels carry sophisticated technical equipment. Regulation 19 of Chapter V of SOLAS 1974 (as amended) lays down detailed requirements as to the required shipborne navigational equipment and

[102] An International Ship Security Certificate issued pursuant to the International Ship and Port Facility Security Code (the ISPS Code), mandatory under SOLAS 1974 ch XI-2. See generally Stephen Girvin 'Commercial implications of the ISPS Code' (2005) 330 *Marlus* 307.

[103] See MARPOL 1973/1978 Annex IV reg 5. Cf *Polestar Maritime Ltd v YHM Shipping Co Ltd (The Rewa)* [2012] EWCA Civ 153, [2012] 1 Lloyd's Rep 510 (effect of detention by port state control on a sale under the Norwegian Saleform).

[104] *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli and the Frixos)* [2008] EWCA Civ 584, [2008] 2 Lloyd's Rep 119.

[105] ibid [24], [26].

[106] 0.50% m/m: see MARPOL Annex VI reg 14.1. Additional restrictions (0.10% m/m on or after 1 January 2015) apply within emission control areas: MARPOL Annex VI regs 3–7. See generally Kate Lewins 'The Sulphur Cap 2000' (2019) 25 *Journal of International Maritime Law* 177; Kate Lewins and Mathew Loxham 'Controlling PM by proxy? International regulation of suphur and PM emissions from shipping' (2020) *LMCLQ* 44.

[107] It is estimated that the investment cost of scrubbers ranges from 2–10 million per ship, depending on the ship type, scrubber type and whether the vessel is a new build or whether the scrubbers are retrofitted: See Magda Daskalou 'Where does the sector stand?' (2019) 33(4) *Maritime Risk International* 14.

[108] See Resolution MEPC.286(71) (adopted on 7 July 2017).

[109] See eg Julian Clark and Chris Primikiris 'Who pays for scrubbers in a time charter?' *Lloyd's List* (30 January 2019).

[110] See Resolution MEPC.321(74) (adopted on 17 May 2019), which contains Guidelines for Port State Control under MARPOL Annex VI Chapter 3.

[111] *The Saint Anna* [1980] 1 Lloyd's Rep 180, 182.

[112] Marine Fuel Sulphur Content Clause for Time Charterparties 2020 cl (c).

[113] ibid cl (b). See also the Intertanko Bunker Compliance Clause for Time Charterparties cll 2.1 and 2.2.

systems for ships constructed on or after 1 July 2002.[114] These requirements extend to include having: a bridge navigational watch alarm system (BNWAS);[115] an echo-sounding device 'to measure and display the available depth of water';[116] an electronic plotting aid 'to plot electronically the range and bearing of targets to determine collision risk';[117] an automatic identification system (AIS);[118] and an automatic radar plotting aid (ARPA).[119]

All ships are required to have nautical charts and nautical publications to plan and display the ship's route,[120] recognised as much a part of a vessel's equipment as a compass or radar.[121] The requirement for vessels to have an electronic chart display and information system (ECDIS) was progressively implemented for different vessels and tonnages with effect from 1 July 2012; since1 July 2018, it has been mandatory for all vessels to have these systems onboard.[122]

These requirements were brought into focus in *The CMA CGM Libra*,[123] which concerned a 131,332-ton container vessel which ran aground on departure from Xiamen on 17 May 2011. The incident resulted in a total claim in general average by the owners against cargo of US$13 million but only 92 per cent of cargo owners paid their contributions. The remaining cargo owners refused to pay, alleging that the cause of the casualty was the unseaworthiness of the vessel leading to the master's negligent navigation of the vessel. The alleged specific cause of the vessel's unseaworthiness was an inadequate passage plan, prepared by the second officer.[124]

Counsel for the carrier argued that a defective passage plan was not, of itself, sufficient to make a ship unseaworthy but Teare J found that the carrier's duty of due diligence was applicable in the context of (i) the recognition by the IMO in 1999 of passage planning[125] and (ii) the use by ships of electronic charts displayed on ECDIS.[126] In Teare J's view:

> A proper passage plan is now, like an up to date and properly corrected chart, a document which is required at the beginning of the voyage. If a vessel carries a chart which the second officer has failed to correct to ensure that it is up to date or carries a passage plan which is defective because it lacks a required warning of 'no go' areas then those are two aspects of the vessel's documentation which are capable of rendering the vessel unseaworthy at the beginning of the voyage.[127]

Although it was argued that a one-off defective passage plan could not make the vessel unseaworthy and, moreover, that a defective passage had never before rendered a vessel unseaworthy, the court disagreed. Teare J held that just as the standard of seaworthiness could rise[128] so too could the standard rise with improved knowledge of the documents that had to be prepared prior to the

[114] There are alternative arrangements for ships constructed before 1 July 2002: see Chapter V of SOLAS 1974 (as amended) reg 19.1.2.1.
[115] ibid reg 19.2.2.3.
[116] ibid reg 19.2.3.1.
[117] ibid reg 19.2.3.3.
[118] ibid reg 19.2.4. See Simon Gault and Steven Hazelwood *Marsden & Gault on Collisions at Sea* (14th edn Sweet & Maxwell 2016) App 13.
[119] For vessels of 10,000 gross tons and above: ibid reg 19.2.8. See *Marsden & Gault on Collisions at Sea* (n 118) App 11. Such a device was, for example, fitted in *The CMA CGM Libra* (n 73) [10].
[120] SOLAS 1974 (as amended) reg 19.2.4. There are authorities which have held that navigational charts are an essential element for a seaworthy ship: see *The Maria*, 91 F 2d 819, 824 (4th Cir 1937); *Union Oil Co of California v MV Point Dover*, 756 F 2d 1223, 1229 (5th Cir 1985); *Sanko Steamship Co Ltd v Sumitomo Australia Ltd (No 2)* (n 81) 285.
[121] *The Marion* [1982] 2 Lloyd's Rep 52, 57. See also *Marsden & Gault on Collisions at Sea* (n 118) App 14.
[122] SOLAS 1974 (as amended) reg 19.2.10. See *Marsden & Gault on Collisions at Sea* (n 118) App 10.
[123] *The CMA CGM Libra* (n 73); D R Thomas 'Seaworthiness: the documentary dimension' (2019) 25 *Journal of International Maritime Law* 100.
[124] *The CMA CGM Libra* (n 73) [25].
[125] Guidelines for Voyage Planning, Resolution A 893(21) (4 February 2000). See also IMO *Passage Planning Guidelines* (4th edn Witherby 2016).
[126] This mandatory requirement only applied from 1 July 2016: see SOLAS 1974 (as amended) reg 19.2.10.7. The *CMA CGM Libra*, a post-Panamax container vessel, was built in 2009.
[127] [2019] EWHC 481 (Admlty) [85].
[128] See n 34 above.

voyage.[129] The court found that the vessel was unseaworthy because the defective passage plan was causative of the grounding of the vessel.[130] Although the court was referred to *The Torepo*,[131] which involved a passage plan prepared by pilots, the case had established that it was not arguable that there was any want of due diligence by the carrier in furnishing the vessel with the available large-scale charts.[132] The court therefore found that the case was distinguishable from the instant case because in that case there had been no failure by the master before the commencement of the voyage and so there was no breach of the duty of due diligence to make the vessel seaworthy.[133]

Having established causative unseaworthiness, the next issue for the court was whether there had been a failure to exercise due diligence. After considering the authorities, the court held that there was an absence of due diligence because the master and second officer had failed to exercise reasonable skill and care when preparing the passage plan.[134] A further issue was the submission that due diligence had been exercised because the owners' SMS (safety management system) – made under the mandatory requirements of the ISM Code[135] – contained appropriate guidance for passage planning.[136] The court rejected this argument because it was not sufficient for the owner itself to exercise due diligence: its servants or agents had to have shown due diligence, such a duty being non-delegable.[137]

This case is significant for carriers. It establishes, for the first time,[138] that a failure to prepare an adequate passage plan is, where also causative, evidence of unseaworthiness and a breach by the carrier to exercise due diligence to make the vessel seaworthy. As now upheld on appeal,[139] it confirms that a defective passage plan and charts which have not been updated to reflect information contained in a Notice to Mariners are matters which impact on the seaworthiness of a vessel.[140] *See Postscript on page 462 for further comment on the judgment of the Court of Appeal*. Whether such a failure will occur quite so readily in an age of electronic charts is a moot point, but the importance of passage planning in the context of a seaworthy vessel is now beyond doubt.[141]

Care of cargo: historical background

Historically, the carrier's duty to care for cargo arises contractually and also in bailment. In 1802, Charles Abbott stated that:

> [t]he master must during the voyage take all possible care of the cargo … the master and owners are held responsible for every injury, that might have been prevented by human foresight or care. In conformity to which principle they are responsible for goods stolen or embezzled on board the ship by the crew or other persons, or lost or injured in consequence of the ship sailing in fair weather against a rock or shallow known to expert mariners.[142]

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[129] [2019] EWHC 481 (Admlty) [87].
[130] ibid [92].
[131] [2002] EWHC 1481 (Admlty), [2002] 2 Lloyd's Rep 535.
[132] ibid [116]. See also *Consolidated Mining & Smelting Co of Canada Ltd v Straits Towing Ltd* [1972] 2 Lloyd's Rep 497, 502, 506 (BC); *Sanko Steamship Co Ltd v Sumitomo Australia Ltd (No 2)* (n 81) 274.
[133] [2019] EWHC 481 (Admlty) [83].
[134] ibid [101].
[135] See n 101.
[136] [2019] EWHC 481 (Admlty) [102].
[137] ibid [113].
[138] See *Cosco Bulk Carrier Co Ltd v Tianjin General Nice Coke & Chemicals Co Ltd (The Jia Li Hai)* [2017] EWHC 2509 (Comm), [2018] 1 Lloyd's Rep 396 [5], where allegations as to inadequate 'systems in place in relation to passage planning and/or bridge management' were not established.
[139] *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra)* [2020] EWCA civ 293. See David Osler '*CMA CGM Libra* decision upheld on appeal' *Lloyd's List* (6 March 2020).
[140] See David Osler 'CMA CGM Libra ruling raises bar on seaworthiness, WFW argues' *Lloyd's List* (8 April 2019).
[141] In evidence, the master did state that he would not have made such an alteration if there had been a warning on the chart about charted depths being unreliable: see [2019] EWHC 481 (Admlty) (n 133) [90]. See also David Osler 'Mandatory e-charts cut risk of CMA CGM Libra re-run, UK Club argues' *Lloyd's List* (23 April 2019).
[142] See Abbott (n 13) 196. Cf also the bill of lading for the *White Angel* (1549), which provides that 'it is aggreed that in case the sayed merchaundize should be loste or spoyled through the defaulte of the sayed maister of the shipp or the company of the same, the sayed maister shall be bounde to make it good'. See Marsden (n 9) 60.

The leading case is *Notara v Henderson*,[143] which concerned beans shipped on *The Trojan* and which were wetted by seawater in consequence of a collision at an intermediate port, Liverpool. On arrival at Glasgow, the beans had deteriorated in value. If, however, they had been removed and dried at Liverpool, the decomposition would have been mitigated. The plaintiffs claimed the amount of the extra depreciation. Willes J noted that the law, up to a certain point, was clear on the matter but, as there was an absence of English authority, he cited civil law authorities, where the principle had been distinctly recognised.[144] Willes J held that:[145]

> [i]t appears to us that the duty of the master … as representing the shipowner, [is] to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and arrest their loss, destruction, or deterioration, by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability.[146]

At common law, liability also arose in the case of shipowners who were common carriers for reward,[147] usually in the liner and tariff trades.[148] Such common carriers were considered as insurers of the goods.[149] As such, common carriers were absolutely responsible for delivering in like order and condition at the destination the goods bailed for carriage,[150] unless it was proved that negligence had not contributed to the loss suffered or if the loss was due Act of God, or caused by the Queen's enemies, inherent vice, defective packing and jettison or other general average sacrifice. Such common carriers are now practically extinct and, for this reason, are no longer considered to be a usual paradigm for the common law liability of the shipowner.[151]

More importantly, the common law liability of the carrier is considered to be the same as that of a bailee for reward, as recognised in *Notara*.[152] A bailee must take reasonable care of the goods[153] and also ensure that the goods are protected from damage or loss.[154] The goods must, therefore, be preserved, if necessary by pumping or ventilation.[155] There is, moreover, a duty and to take steps to preserve cargo exposed to danger,[156] deterioration[157] or heavy weather.[158] The steps taken will ultimately depend upon the circumstances of each particular case[159] and the owner of the cargo will be bound to reimburse the owner for his expenses preserving the cargo if such steps were necessary.[160]

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[143] (1872) LR 7 QB 225 (upholding (1869–70) LR 5 QB 346).

[144] Including Robert Pothier *Traité des obligations* (1861); *Traité des Contrats de Louage Maritimes* (1865); Code Civil (1804); German Mercantile Code (HGB) (1900).

[145] (1872) LR 7 QB 225, 235.

[146] See also *Industrie Chimiche Italia Centrale & Cerealfin SA v Alexander G Tsavliris & Sons (The Choko Star)* [1989] 2 Lloyd's Rep 42, 47.

[147] *The Liver Alkali Co v Johnson* (1874) LR 9 Exch 338, 340–41; *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1927] 2 KB 432, 434.

[148] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5) [8].

[149] *Forward v Pittard* (1785) 1 TR 27, 33 (Lord Mansfield).

[150] *Morse v Slue* (1671) 1 Ventris 190; *Coggs v Bernard* (1703) 2 Ld Raym 909, 918; *Riley v Horne* (1828) 5 Bing 217, 220; *Nugent v Smith* (1875) 1 CPD 19, 33; *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538, 544–45.

[151] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5) [8]. See also Graham McBain 'Time to abolish the common carrier' [2005] *Journal of Business Law* 545.

[152] *Notara v Henderson* (n 143) 233 (quoting Pothier, *Traité des obligations* (1861)). See also *Volcafe* (n 5).

[153] *Lotus Cars Ltd v Southampton Cargo Handling plc (The Rigoletto)* [2000] 2 Lloyd's Rep 532 [82]; *Westrac Equipment Pty Ltd v Owners of the Ship 'Assets Venture'* [2002] FCA 440, 192 ALR 277 [30].

[154] *Amies v Stevens* (1718) 1 Stra 127; *Dale v Hall* (1750) 1 Wils KB 281; *Barclay v Cuculla y Gana* (1784) 3 Dougl KB 389; *Lee Cooper Ltd v CH Jeakins & Sons Ltd* [1967] 2 QB 1, 8–9; *Enimont Overseas AG v RO Jugotanker Zadar (The Olib)* [1991] 2 Lloyd's Rep 108, 116; *East West Corp v DKBS 1912 & AKTS Svendborg* [2003] EWCA Civ 83, [2003] QB 1509 [28].

[155] See eg *Davidson v Gwynne* (n 18).

[156] *Notara v Henderson* (n 143); *Adam v Morris* (1890) 18 R 153.

[157] *Hansen v Dunn* (1906) 11 Com Cas 100.

[158] *The Thrunscoe* [1897] P 301, 304.

[159] *Tronson v Dent* (1853) 8 Moo PCC 419, 449–50; *Notara v Henderson* (n 143) 237; *Garriock v Walker* (1873) 1 R 100, 114.

[160] *Garriock v Walker* (n 159) 114.

Care of cargo: the Hague and Hague-Visby Rules

As was also the case in relation to due diligence, section 2 of the Harter Act 1893[161] provided that it was not lawful to introduce clauses whereby: 'the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided'.

This was, in due course, followed in the Australian Sea Carriage of Goods Act 1904, albeit with wording rendering 'illegal, null and void, and of no effect' clauses whereby the owner, charterer, master or agent of any ship was excused from: 'negligence, fault, or failure in the proper loading, stowage, custody, care, or delivery of goods received by them or any of them to be carried in or by the ship …'.[162]

The wording of Article III rule 2 of the Hague and Hague-Visby Rules casts a positive duty on the carrier, subject to the provisions of Article IV, to 'properly and carefully load, handle, stow, carry, keep, care for and discharge the goods delivered'. There are several distinctive aspects of this provision.

The first aspect of Article III rule 2 is the duty 'properly and carefully' to care for the goods. This requirement has been the subject of several important cases. In *Gosse Millard*[163] *v Canadian Government Merchant Marine Ltd*, Wright J assimilated the meaning of these words with the common law obligation to carry the goods safely[164] but, in *The Caspiana*,[165] Viscount Kilmuir suggested that: 'the natural and ordinary meaning of 'properly' in antithesis to 'carefully' in the phrase 'properly and carefully load, handle, stow, carry, keep, care for and discharge' is in accordance with a sound system'.

This was explored further in what is still the leading case (at least in this respect),[166] *Albacora SRL v Westcott and Laurence Line*.[167] That case concerned a consignment of 1,200 cases of wet salted ling fillets carried in the unrefrigerated holds of the *Maltasian* from Glasgow to Genoa. On discharge, the fish were found to have suffered a form of bacterial contamination. It emerged that above 41°F the halophilic bacteria developed so that the cargo could only be safely carried on the voyage at the relevant time of year in refrigerated holds. However, no one had appreciated that at the time. In the House of Lords, Lord Reid opined that the carrier's obligation was to 'adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods',[168] while Lord Pearce[169] elaborated that: 'A sound system does not mean a system suited to all the weaknesses and idiosyncrasies of a particular cargo, but a sound system under all the circumstances in relation to the general practice of carriage of goods by sea. It is tantamount, I think, to efficiency'.

For Lord Pearson, 'properly' added something to 'carefully'; if 'carefully' meant merely taking care it was a requirement that the 'element of skill or sound system is required in addition to taking care'.[170]

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[161] See n 41.

[162] Act No 14, 1904 s 5(b); Canadian Water-Carriage of Goods Act 1910 s 4(b). Note that the same provision is not found in the New Zealand Shipping and Seaman Act 1903, 3 Edw 7 No 96.

[163] Gosse Millard is a variant spelling of the claimants in the case, the Gosse-Millerd Packing Co Ltd, formerly a canning company on the Fraser River in British Columbia: see *American Can Co Ltd & Gosse Millerd Ltd v Canadian Government Merchant Marine Ltd* (1927) 28 Ll L Rep 88.

[164] *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* (n 147) 434. Wright J's view was expressly rejected in *Albacora SRL v Westcott and Laurence Line* [1966] 2 Lloyd's Rep 53, 64 as it was by the High Court of Australia in *Shipping Corporation of India Ltd v Gamlen Chemical Co (Australasia) Pty Ltd* (1980) 147 CLR 142, 163.

[165] *G H Renton & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149, 166.

[166] But no longer in relation to the burden of proof: see *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5) [27]. See also text to n 222 below.

[167] *Albacora SRL v Westcott and Laurence Line* (n 164).

[168] ibid 58.

[169] ibid 62.

[170] ibid 64. See also *Federal Flour Mills Ltd v Ta Tung* [1971] 2 MLJ 201, 208; *Hilditch Pty Ltd v Dorval Kaiun KK (No 2)* [2007] FCA 2014, 245 ALR 125 [78]; *CV Sheepvaartonderneming Ankergracht v Stemcor (Asia) Pty Ltd* [2007] FCAFC 77, 160 FCR 342 [88].

The significance of differentiating between 'properly' and 'carefully' is that the carrier is bound not only to adopt a sound system for handling, carrying and caring for the goods but must also be careful in its application of that system.[171] One of the indicia of a sound system is that it is in accordance with general industry practice.[172]

The second aspect of Article III rule 2 is that care must be taken in respect of a list of carriage operations, namely to 'load, handle, stow, carry, keep, care for and discharge the goods'.[173] While it appears that the carrier is responsible for each and all of these operations, Devlin J in *Pyrene Co Ltd v Scindia Navigation Co Ltd*[174] explained that this was not the case, in effect following the common law rule that the duty to load, stow and discharge the cargo prima facie rested on shipowners but could be transferred by agreement to cargo interests.[175] The object of the Rules was:[176]

> [t]o define not the scope of the contract service but the terms on which that service is to be performed. On this view the whole contract of carriage is subject to the rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.[177]

Under English law, therefore, the carrier may contract out of the obligations listed; if it undertakes any of the specified obligations, these must be performed 'properly and carefully'.[178] Although accepted in some jurisdictions,[179] there is contrary authority in other jurisdictions[180] and critical commentary in the literature.[181] Nevertheless, this view of Article III rule 2 was upheld by the House of Lords in *The Jordan II*.[182]

The third aspect of Article III rule 2 is concerned with the express relationship between it and Article IV. Unlike the 'first base' obligation to provide a seaworthy ship, this provision of the Rules is expressly made subject to Article IV and, for this reason, does not have the same overriding effect as Article III rule 1. While responsibility may be delegated to the servants or agents of the carrier, liability for proper and careful performance remains with the carrier.[183]

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[171] See eg Julian Cooke and others *Voyage Charters* (4th edn Informa 2014) para 85.117 (citing *Seafood Imports Pty Ltd v ANL Singapore* [2010] FCA 702, (2010) 272 ALR 149), approved in *Alianca Navegacao e Logistica Ltda v Ameropa SA (The Santa Isabella)* [2019] EWHC 3152 (Comm) [107].

[172] See eg *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* [2016] EWCA Civ 1103, [2017] QB 915 [72]; *The Santa Isabella* (n 171) [108].

[173] This list of operations is also found in art II of the Rules.

[174] [1954] 2 QB 402.

[175] *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co (The Jordan II)* [2004] UKHL 49, [2005] 1 WLR 1363 [11].

[176] *Pyrene Co Ltd v Scindia Navigation Co Ltd* (n 174) 418.

[177] See also *G H Renton & Co Ltd v Palmyra Trading Corp of Panama* (n 165) 170; *A/S Iverans Rederi v KG MS Holstencruiser Seeschiffahrtsgesellschaft mbH & Co (The Holstencruiser)* [1992] 2 Lloyd's Rep 378, 380; *Balli Trading Ltd v Afalona Shipping Co Ltd (The Coral)* [1993] 1 Lloyd's Rep 1, 5; *Yyzhny Zavod Metall Profil LLC v Eems Beheerder BV (The MV Eems Solar)* [2013] 2 Lloyd's Rep 487 [93]; *Société de Distribution de Toutes Merchandises en Côte D'Ivoire v Continental Lines NV (The Sea Miror)* [2015] EWHC 1747 (Comm), [2015] 2 Lloyd's Rep 395 [7].

[178] See eg *G H Renton & Co Ltd v Palmyra Trading Corp of Panama* (n 165) 170 (Lord Morton), 174 (Lord Somervell); *The Jordan II* (n 175); *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 172).

[179] *East & West Steamship Co v Houssain Brothers* (1968) 20 PLD SC 15; *The New India Assurance Co Ltd v M/S Splosna Plovba* (1986) AIR Ker 176; *International Ore & Fertilizer Corp v East Coast Fertilizer Co Ltd* [1987] 1 NZLR 9.

[180] See eg *Associated Metals and Minerals Corp v M/V The Arktis Sky*, 978 F 2d 47 (2nd Cir 1992); *Tubacex Inc v M/V Risan* 45 F 3rd 951 (5th Cir 1995); *Nikolay Malakhov Shipping Co Ltd v SEAS Sapfor Ltd* (1998) 44 NSWLR 371, 387–88; *The MV Sea Joy* (1998) 1 SA 487 (C).

[181] It has, for example, been criticised as 'a most extraordinary construction … which does extreme violence to the words of the rules [and] is completely at odds with the whole purpose of the Hague Rules and Hague-Visby Rules …': *The Laws of Scotland: Stair Memorial Encyclopaedia, vol 21* (Butterworths 1994) para 594.

[182] *The Jordan II* (n 175). See also *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 172) [108]; *The Alhani* (n 5) [24].

[183] See *W Angliss & Co (Australia) Pty Ltd v Peninsular and Oriental Steam Navigation Company* (n 47) 462; *International Packers London Ltd v Ocean Steam Ship Co Ltd* [1955] 2 Lloyd's Rep 218, 236; *The Muncaster Castle* (n 59) 856; *The Chyebassa* (n 48).

Care of cargo: developing law

Cases since *Albacora*[184] have been required to consider this requirement against the relevant facts. Thus, it has been held that a carrier has not acted carelessly or inconsistently with standard practice in failing to heat cargo, it not being general practice to heat crude oil cargoes.[185] On the other hand, where automotive diesel oil (ADO) was contaminated by the vessel's inert gas system,[186] and where there had been a failure to take steps to prevent cross-contamination of gasoil and gasoline cargoes through the inert system,[187] these were symptomatic of a failure to take care of the cargo. A further example of a failure of due care occurred where a container became stuck in defrost mode owing to the incompatibility between the container's controller and the software with which it was fitted and a failure to carry out an appropriate monitoring and inspection of the container as a result of which the cargo of frozen seafood was spoiled.[188]

Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)

The *Volcafe* case[189] arose from relatively minor condensation damage[190] to a cargo of green coffee beans loaded in containers in Colombia, transhipped in Panama, and discharged in northern Germany. The coffee beans were hygroscopic[191] but not unusual or atypical and, the containers containing the beans were lined with Kraft paper.[192] At the trial in the London Mercantile Court,[193] the judge held that the carrier had not demonstrated a sound system, understood as relating to the prevention of damage to a normal cargo from the risks reasonably to be expected during the contracted carriage.[194] He held that, as a minimum, the concept of a sound system required that there existed a rational, adequate and reliable basis for concluding that it would prevent the otherwise threatened damage.[195] As the carrier had failed to adduce evidence of a suitable empirical study that a particular weight and/or type of Kraft paper was sufficient in practice to prevent damage throughout the carriage,[196] it had not demonstrated a sound system.

The Court of Appeal[197] parted company with the judge on this point. Concerning the requirement to provide a sound system, the Court of Appeal reverted to the *dicta* of Lords Reid, Pearce and Pearson in the *Albacora* case[198] and confirmed that the carrier was not required to employ a system which would prevent damage.[199] The judge had erred in imposing a standard beyond what the law required when concluding that a sound system had to be underpinned by a theoretical calculation or empirical study.[200] The required standard should, instead, have been based on general practice in the container industry and, in that respect, the carrier had not fallen short.[201]

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[184] See n 167.
[185] *Gatoil International Inc v Tradax Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd's Rep 350, 365.
[186] *Caltex Refining Co Pty Ltd v BHP Transport Ltd (The Iron Gippsland)* [1994] 1 Lloyd's Rep 335 (NSW), 359.
[187] *The Petroleum Oil & Gas Corp of South Africa (Pty) Ltd v FR8 Singapore Pte Ltd (The Eternity)* [2008] EWHC 2480 (Comm), [2009] 1 Lloyd's Rep 107, [27].
[188] *Seafood Imports Pty Ltd v ANL Singapore* (n 171).
[189] See *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5).
[190] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 172) [1], [4].
[191] See generally UK P&I Club *Carefully to Carry* (Witherbys 2018) ch 27 https://www.ukpandi.com/loss-prevention/cargo/carefully-to-carry/.
[192] Although how much and of what thickness was a matter of some dispute: see eg *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5) [40].
[193] [2015] EWHC 516 (Comm), [2015] 1 Lloyd's Rep 639.
[194] ibid [45]. This appears to resurrect the judgment of Wright J in *Gosse Millard v Canadian Government Merchant Marine Ltd* (n 147).
[195] ibid [46].
[196] ibid [47]–[48].
[197] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 172).
[198] See n 167.
[199] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 172) [64].
[200] ibid [68].
[201] ibid [71]–[72].

On appeal to the Supreme Court,[202] the main points of appeal were the incidence of the burden of proof[203] and the inherent vice defence in the Hague and Hague-Visby Rules. Lord Sumption JSC[204] did not directly address the standard required pursuant to Article III rule 2 other than to suggest that he was not convinced that the deputy judge was in error.[205] He went on to chastise the Court of Appeal for disagreeing with the deputy judge's critical conclusions on the evidence and for making positive findings of its own.[206] The Supreme Court therefore reinstated the deputy judge's conclusions about the practice of the trade in the lining of unventilated containers for the carriage of bagged coffee and the absence of evidence that the containers were dressed with more than one layer of lining paper. In the absence of evidence about the weight of the paper employed, the carrier had failed to prove that the containers were properly dressed.[207]

The Santa Isabella

In *The Santa Isabella*,[208] the court had to revisit a not uncommon problem, namely a failure to ventilate hygroscopic cargoes.[209] The case arose following involving extensive delays and damage to a cargo of white corn/maize[210] shipped from Topolobampo to Durban and Richards Bay in South Africa. The voyage charterers of the *Santa Isabella* alleged that the cargo damage was caused by the vessel taking the Cape Horn route rather than the Panama Canal route to Durban and also the failure by the vessel to ventilate the cargo in accordance with a sound system. Much of the interest in the case lies in the court's analysis of the carrier's choice of route and as to what considerations affect the carrier's choice of the 'usual' or a 'reasonable' route.[211] There were, however, two related questions, analysed at some length in the judgment, which are of importance in any consideration of Article III rule 2 of the Hague and Hague-Visby Rules.

The first issue was whether the adoption of a particular route was a breach of Article III rule 2. The claimant argued that it was relying on *obiter* Canadian authority *The Washington*,[212] to the effect that a failure to change or alter course was negligence in the care of the cargo. The judge held that a decision to hold a course through the middle of a storm, in circumstances which would ordinarily result in damage to cargo, was a breach of Article III rule 2, notwithstanding that it concerned the course steered by the ship rather than matters occurring on board ship.[213] Nevertheless, the judge determined that there were limits to the application of this principle, particularly as the comments by Heald J in *The Washington* were directed at particular local weather conditions rather than the overall routing decision for the voyage as a whole. He confirmed that following *The Washington*

> [w]ould overlay the relatively clear and well-established principles for identifying the contractual route with a need for wide-ranging consideration of the subtleties of how one or more cargo being carried by the vessel may be affected by the length, likely temperatures/humidities and sea conditions of alternative routes, and of which factors prevail given potentially countervailing considerations of voyage time, cost, and the different needs of other cargos that may be on board. [The claimants'] approach would create considerable uncertainties, for example … whether the duty is to choose the route that minimises the risk to the cargo, or merely to avoid a route where cargo damage would be almost inevitable; how to make the decision where one route is markedly longer or more expensive whilst creating a modest reduction in risk to the cargo; and by what standard the shipowner/Master's decision will later be measured.[214]

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[202] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5).
[203] See text to n 222 below.
[204] The four other judges (Lord Reed DPSC and Lords Wilson, Hodge and Kitchen JJSC) agreed.
[205] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5) [40].
[206] ibid [41]–[42].
[207] ibid [43].
[208] *The Santa Isabella* (n 171).
[209] See also *Jahn (Trading as CF Otto Weber) v Turnbull Scott Shipping Co Ltd (The Flowergate)* [1967] 1 Lloyd's Rep 1.
[210] See *Carefully to Carry* (n 191) ch 3.
[211] These issues are not considered in this article.
[212] [1976] 2 Lloyd's Rep 453 (FC).
[213] *The Santa Isabella* (n 171) [119].
[214] ibid [121].

The judge therefore concluded that the claimants' 'sound system' approach would, in reality, displace the well-established law on contractual route and, for this reason, he was unable to accept the argument as to breach of Article III rule 2.[215]

The second issue in the case concerned the ventilation of the cargo and the consequences of an infestation of weevils at Durban and at Richard's Bay. In both instances, the judge found that there was a breach of the duty to care for the cargo under Article III rule 2. As the evidence indicated that there had been a failure to ventilate at night, this was not a sound system. In particular, there was no description of any system for ventilation in the vessel's SMS documents[216] and neither was this described in the cargo operations manual.[217] The judge found that during 33 days of the voyage to Durban, via Cape Horn, conditions were conducive to condensation occurring in the holds.[218] If there had been proper ventilation when it was safe to do so (including ventilation at night, save when weather conditions made it unsafe), there would have been 6 to 12 inches of dried crust at the top of the cargo but no greater type or degree of level of cargo damage.[219] In relation to the infestation of weevils, the judge concluded that these resulted, on a balance of probabilities, from inadequate cleaning of the topsides following loading and following fumigation in Durban. Once again, the shipowner had breached its duty under Article III rule 2.[220]

The case is important because it sets clear boundaries between the obligation to prosecute the voyage with reasonable dispatch and without deviating and the carrier's obligation under Article III rule 2. While recognising the strength of the decision in *The Washington*,[221] the judge recognised that there had to be limits to the principle set out in that case, particularly in the context of the shipowners other obligations to a voyage charterer.

Care of cargo: burden of proof

The Hague and Hague-Visby Rules are silent as to the burden of proof for claims arising under Article III rule 2.[222] In *The Glendarroch*,[223] a case decided 30 years before the enactment of the Hague Rules, Lopes LJ affirmed that the burden of proof was 'on the person who affirms a particular thing' and the burden of proving that the loss which has happened is attributable to an excepted cause lay on the person who was setting it up.[224] He continued that, if the excepted cause was sufficient to account for the loss, the burden of showing that there was something else which deprived the party of the power of relying on the excepted cause lay on the person who set up that contention.[225] Thus, on this view, the cargo owner must produce a bill of lading attesting to the shipment of the goods in good order and condition and must adduce evidence that the goods have been lost or damaged in transit.[226] The carrier must bring the cause of damage within one of the exceptions in Article IV rule 2[227] and, if unable to do so, will be liable unless it can prove that the damage or loss occurred 'without [its] actual fault or privity … or without the fault or neglect of [its] agents or servants'.[228] If, however, the carrier is successful in bringing the loss within an exception, it will escape liability unless the cargo owner establishes a breach of duty under Article III rule 2.[229] In *Volcafe Ltd v Cia*

[215] ibid [124].
[216] That is, pursuant to the ISM Code (n 101).
[217] *The Santa Isabella* (n 171) [176].
[218] ibid [192].
[219] ibid [219].
[220] ibid [239].
[221] See n 212.
[222] Unlike in relation to the due diligence obligation to provide a seaworthy vessel: see art IV r 1. See text to n 72 above.
[223] [1894] P 226.
[224] ibid 234.
[225] ibid 234–35. See also *Yeo Goon Nyoh v Ocean Steamship Co Ltd* [1967] SGHC 27, [1965–1967] SLR(R) 783.
[226] See eg *Gosse Millard v Canadian Government Merchant Marine Ltd* (n 147) 434; *Volcafe Ltd v Compania Sud Americana de Vapores SA (Trading as CSAV)* (n 172) [36].
[227] *Beckford v Clerke* (1663) 1 Keb 830, 831; *Thomas Wilson Sons & Co v Owners of Cargo of the Xantho (The Xantho)* (1887) 12 App Cas 503, 512.
[228] See art IV r 2(q).
[229] See also *Albacora SRL v Westcott and Laurence Line* (n 164) 64.

Sud Americana de Vapores SA (trading as CSAV),[230] the Court of Appeal confirmed this view of the burden of proof,[231] rejecting Wright J's[232] dictum in *Gosse Millard v Canadian Government Merchant Marine Ltd*[233] that it was for the carrier to disprove its own fault or neglect or that of its servants.[234]

The Supreme Court in *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)*[235] has firmly rejected this orthodoxy. Lord Sumption emphasised that the Hague Rules did not alter the status of a contract of carriage by sea as a species of bailment in which the carrier bears the burden of disproving negligence.[236] The leading House of Lords decision of more than 50 years' standing, *Albacora SRL v Westcott & Laurence Line Ltd*,[237] is dismissed as 'mistaken'[238] and *The Glendarroch*[239] overruled in the following terms:

> *The Glendarroch* has stood for a long time. But it has rarely featured in the reasoning of subsequent case law, and the basis on which it was decided is technical, confusing, immaterial to the commercial purpose of the exception and out of place in the context of the Hague Rules. The decision may have been justifiable in the more formal conditions of pleading and trial practice in the 1890s, or as applied to the notional bill of lading terms which the Court of Appeal was considering. But as the source of a general rule governing the burden of proof, it should no longer, in my view, be regarded as good law.[240]

Lord Sumption summarised the position:

> The true rule is that the carrier must show *either* that the damage occurred without fault in the various respects covered by article III rule 2, *or* that it was caused by an excepted peril. If the carrier can show that the loss or damage to the cargo occurred without a breach of the carrier's duty of care under article III rule 2, he will not need to rely on an exception.[241]

Reaction to this reasoning has, in general terms, almost inevitably been divided. On the one hand, the outcome is simple and clear, providing certainty[242] and welcome clarification on the burden of proof where cargo has arrived damaged.[243] On the other hand, it is arguable that the bailment approach is not appropriate in the context of an international convention predicated on contracts of carriage,[244] albeit one that recognises that the defences and limits of liability apply 'whether the

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[230] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 172).

[231] Described by an eminent (now retired) Court of Appeal judge as 'the working hypothesis on which I normally worked when dealing with damage to cargo claims and the decision of the Court of Appeal came as no surprise': Lord Justice Longmore 'Is law no more than a working hypothesis?' (The Lords Goff and Hobhouse Memorial Lecture 2019) [10] https://7kbw.co.uk/wp-content/uploads/2019/03/Longmore-Booklet-25.02.2018.pdf.

[232] Later dubbed 'Lord Wright's heresy': see R Colinvaux and K C McGuffie *Carver's Carriage by Sea, vol 1* (12th edn Stevens & Sons 1971) para 266A.

[233] *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* (n 147) 434–35. Upheld in *Successors of Mointe Comte & Co Ltd v East Asiatic Co Ltd & Singapore Harbour Board* [1954] 1 MLJ 113, 115; *Yeo Goon Nyoh v Ocean Steamship Co Ltd* (n 225) [11]; *The Gang Cheng* (n 68) 489.

[234] Cf *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154, 194 where Lord Wright (as he now was) stated that: 'In modern times the practice of having special contracts has been superimposed on the custom of the realm. These contracts contain exceptions. If the carrier pleads an exception, the goods owner may counter by pleading the fault of the carrier, but the onus of proving that, as also of proving an allegation of unseaworthiness, is, as I have already explained, on the goods owner who makes it'.

[235] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5).

[236] *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd's Rep 210, 216.

[237] *Albacora SRL v Westcott and Laurence Line* (n 164).

[238] Together with *The Bunga Seroja* (n 68): see *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5) [27].

[239] *The Glendarroch* (n 223).

[240] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5) [33].

[241] ibid [25].

[242] Paul Todd 'The Hague Rules and the burden of proof' [2019] *Lloyd's Maritime and Commercial Law Quarterly* 183, 189.

[243] Richard Hedlund 'Coffee and water don't mix: clarifying the burden of proof under the Hague Rules' [2019] *Journal of Business Law* 223, 235.

[244] See art I(b); Stuart Hetherington 'Contracts for the carriage of goods by sea: onus of proof – is it contractual or bailment?' (2019) 25 *Journal of International Maritime Law* 188, 200. This is also implicit in the comments of Lord Justice Longmore, referring to the Supreme Court's approach as 'drawing on the ancient law of bailment': see n 231 [11].

action be founded in contract or in tort'.[245] Moreover, bailment reasoning causes difficulty with bills of lading issued by freight forwarders and time charterers,[246] neither of which has actual possession of cargo.[247] Lord Sumption JSC accepted that matters of proof under Article III rule 2 were determinable by the law of the forum, varying from one jurisdiction to another[248] and, while this is technically correct, this also loses sight of the fact that the Rules are enshrined in an international convention intended to promote the unification of the domestic law of contracting states.[249] While bailment reasoning may sit comfortably with English lawyers,[250] there is also potential for different outcomes in other jurisdictions, undermining the object and purpose of the Rules.[251] The reasoning will resonate well with cargo interests for whom the pleading of cargo claims under Article III rule 2[252] will be favourably affected,[253] particularly when English law applies, but the converse will be true for those who represent carriers, such as P & I clubs,[254] for whom there must be the prospect of an increase of claims concerning hygroscopic cargoes.[255]

Conclusion

This article has sought to demonstrate that the carrier's 'first base' obligation to provide a seaworthy ship[256] and 'second base' obligation to take care of the cargo in the Hague and Hague-Visby Rules have been laid down in early contracts, particularly voyage charterparties, and strongly embedded in the jurisprudence of the courts in England and elsewhere. Most carriers have more than a nodding acquaintance with the broad scope of these obligations, both at common law and under the Rules, and this article should assist to emphasise how these principles have developed and are likely to develop in the future.

This article has shown that, although our understanding of the scope of the obligation to exercise due diligence to provide a seaworthy ship is reasonably well-defined, law and regulation has developed so rapidly, particularly since the enactment of the Visby Protocol, that the courts will consider the implications of these developments by applying well-established principles. So too in the case of the fundamental obligation to care for cargo. While there may not be much appetite for appeals on matters of pure principle,[257] the *Volcafe* case has shown that, relatively rare as such cases

[245] See art IV *bis* r 1 of the Hague-Visby Rules (but not the Hague Rules): see eg Anthony Diamond QC 'The Hague-Visby Rules' [1978] *Lloyd's Maritime and Commercial Law Quarterly* 225, 248; David Foxton (ed) *Scrutton on Charterparties and Bills of Lading* (24th edn Sweet & Maxwell 2019) para 14-099.

[246] Such house bills of lading may not even function as bills of lading: see *Australia Capital Financial Management Pty Ltd v Freight Solutions (Vic) Pty Ltd* [2017] NSWDC 279 (upheld in *Cro Travel Pty Ltd v Australia Capital Financial Management Pty Ltd* [2018] NSWCA 153).

[247] The reasoning has been criticised as 'doctrinally unsound': see Justice Angus Stewart 'The fluctuating incidence of the burden of proof under the Hague-Visby Rules: the implications of *Volcafe v CSAV* [2019] AC 358 for the position in Australia' (2019) [77] https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/stewart-j-20191024.

[248] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 5) [15].

[249] See eg *Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, 343; *William Holyman & Sons Pty Ltd v Foy & Gibson Pty Ltd* (1945) 73 CLR 622, 633 (HCA); *Shipping Corp of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (n 164) 159; *The Hollandia* [1983] 1 AC 565, 575–73; *Anglo-Irish Beef Processors International v Federated Stevedores Geelong* [1997] 2 VR 676, 696; *The Bunga Seroja* (n 68) [71]; *Tilbury v International Oil Pollution Compensation Fund* [2003] EWCA Civ 65, [2003] 1 Lloyd's Rep 327 [16], [21].

[250] See *Scrutton on Charterparties and Bills of Lading* (n 245) vi.

[251] A point cogently made by Justice Angus Stewart (n 247) [81].

[252] But not, of course, art III r 1.

[253] As noted by Lord Justice Longmore (n 231) [11]: 'Even if another cargo claim came before the Supreme Court (an event which, on past history, has only happened once every 50 years or so) a different conclusion would be most unlikely'.

[254] It has been suggested that 'carriers and shipowners are going to find life much more difficult in defending cargo claims going forward. Where cargo had to show what they did wrong, they have now got to show they did everything right': see David Osler 'Volcafe ruling switches burden of proof for cargo damage' *Lloyd's List* (12 December 2018).

[255] See eg '"Detrimental" cargo carriage judgment overturned in appeal court' (2016) 30(10) *Maritime Risk International* 6.

[256] See Girvin (n 3).

[257] In so-called 'test cases'.

are,[258] there is a risk that such appeals can lead to the highest court reconsidering an accepted understanding of the law and recalibrating the accepted position by reference to common law principles, such as bailment. While bailment has provided a rich vein of reasoning in carriage of goods cases, often when contractual rights of action are not available, recourse to such reasoning in the interpretation of an international convention is, it is respectfully submitted, inherently problematic.

Postscript

The Court of Appeal[259] handed down its judgment on 4 March 2020, affirming the decision by Teare J. Flaux LJ rejected the argument that because the preparation of a passage plan could be an act of navigation involving an exercise of judgement and seamanship, this fell within Article IV rule 2(a) and a defect in the plan could not constitute unseaworthiness.[260] He also rejected as unprincipled the submission that while negligent management of the vessel before the commencement of the voyage could render the vessel unseaworthy, negligent navigation could not.[261] While the acts of the master and crew if committed during the course of the voyage attracted the exception in Article IV, rule 2(a), they did not do so before or at the commencement of the voyage when the overriding obligation under Article III rule 1 came into play and which rendered the vessel unseaworthy.[262] Flaux LJ confirmed that it was not necessary to characterise an alleged defect as affecting or relating to an attribute of the vessel; an uncorrected chart which was not up-to-date and a passage plan which was defective because it did not contain a warning of no-go areas were both aspects of the vessel's documentation which were capable of rendering the vessel unseaworthy at the beginning of the voyage.[263]

Males LJ and Haddon-Cave LJ delivered concurring judgments. Males LJ confirmed that, though apparently novel, the finding of the unseaworthiness of a vessel due to a defective passage plan was no more than the application of well-established principles.[264] Haddon-Cave LJ referred to the temporal wording, 'before and at the beginning of the voyage', in Article III rule 1 and stressed the intention of the signatories of the Hague Rules to divide the allocation of risk for maritime cargo adventures into two separate regimes. On that basis, the submissions of the appellant shipowners, sought to elide these two regimes and 'were heterodox'.[265]

[258] The last appeal on the Rules (to the then House of Lords) was *The Jordan II* (n 175).
[259] *Alize 1954 v Allianz Elementar Versicherungs AG (The CMA CGM Libra)* [2020] EWCA Civ 293.
[260] ibid [48].
[261] ibid [49].
[262] ibid [54].
[263] ibid [64].
[264] ibid [85].
[265] ibid [103].