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Enhancing of Carriers' Liabilities in the Rotterdam Rules – Too Expensive Costs for Navigational Safety?

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ABSTRACT: The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the 'Rotterdam Rules') was adopted by the General Assembly of the United Nations on 11 December 2008. The Rotterdam Rules contain two oft-criticised changes from the existing regime governing international carriage of goods widely adopted among maritime nations, namely the 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 'Visby Protocol' or the 'Hague-Visby Rules'). These changes are, namely, an extension of the carrier's obligations to maintain seaworthy vessel throughout the voyage (Article 14) and a deletion of an exclusion of carrier's liabilities due to negligent navigation (Article 17). This paper addresses implications of these changes and assess whether ship-owners and ship-operators can comply with these without having to incur excessive additional expenses.

1 INTRODUCTION

The 'United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea' (the 'Rotterdam Rules') was adopted by the General Assembly of the United Nations on 11 December 2008. The Signing Ceremony was held on 23 September 2009, with immediate positive response from various nations who have become the Signatories. At the time of writing, Spain, Congo and Togo have ratified.[3] The Rotterdam Rules will come into force within a year after ratification by the twentieth nation.[4] However, as can be observed, the process of ratification has been slow over the period of almost six years and countries which have ratified the Rotterdam Rules so far are not countries with shipping influence. They do not own large commercial fleet. One would hope that the Rotterdam Rules can mark the end to a long journey of hard work – started in 1990s as a joint project of the United Nations Commission on the International Trade Law (UNCITRAL) and the Comite Maritime International (CMI).[5] The world waits for the day it comes into force with excitement since throughout the entire history of international legal regimes governing international transportation of goods by sea, a uniformity of international rules has never been achieved. Draftsmen of the Rotterdam Rules were

[3] See United Nations Treaties Collection <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&lang=en> accessed 11 June 2014.
[4] Article 94.
[5] Kirval L. 2012 European Union's Stance on the Rotterdam Rules *TransNav International Journal on Marine Navigation and Safety at Sea Transportation* 6:555-562.

ambitious to see the Rotterdam Rules fulfill goals, as summarised from the Preamble by Nikaki and Soyer,[6]

1 Promotion of legal certainty;
2 Harmonization and modernization of the rules governing international contract of carriages;
3 Promotion of the development of trade in an equal and mutually beneficiary manner;
4 Enhancement of efficiency.

A million dollar question is whether the Rotterdam Rules achieve the purported aims set out by the draftsmen. Further question is whether a day for such uniformity will *ever* come.

Among the current imperfect state of uniformity, the International Convention for the Unification of Certain Rules Relating to the Bills of Lading, Brussels, 25 August 1924 (the 'Hague Rules') along with its subsequent Protocol of 1968 (the 'Visby Protocol' or the 'Hague-Visby Rules') has received warmest welcome among maritime nations, including Norway, United Kingdom, Poland, Singapore, and Hong Kong SAR.[7] The Hague-Visby Rules were negotiated and signed, soon after the end of the Second World War. Several new nations had come into existence by then. They had not participated in the process leading up to the formation of the Hague Rules. They strived for competitiveness and they viewed principles as enshrined in the Hague Rules to be in favour of already developed countries with large maritime trade – which they found to be unacceptable.[8] The Hague-Visby Rules have been perceived as 'ship-owning friendly' for they allow ship-owners to negate their liabilities due to negligence of their servants or their agents in navigation of ships (Article IV(2)(a)).[9] Therefore, these new nations moved for another international legal regime for carriage of goods by sea, namely the 'United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)' (the 'Hamburg Rules'). However, the Hamburg Rules did not receive warm welcome among influential maritime nations. Therefore, 'the Hamburg Rules frustrated the hopes of achieving worldwide uniformity…by creating yet another international carriage regime that applies to a truncated proportion of international shipping contracts'.[10] To the relief of many countries, such exception provided to ship-owners for negligence of their servants or agents no longer exists in the Rotterdam Rules (Article 17). At the same time, in contrast to the ship-owners' obligations in the Hague-Visby Rules to maintain seaworthy ship 'at the beginning of the voyage' (Article III(1)), the Rotterdam Rules have extended this obligation throughout the entire voyage (Article 14). The rationale for such an exception and such an extent of duty in the Hague-Visby Rules was based on 'the anachronistic assumption that the ship-owner neither had control over the vessel once she sailed, nor sophisticated technical navigation aids once at sea…'[11] It is doubtful such rationale stands a test of time in modern context. The purpose of this article is to examine these two significant changes and evaluate whether these are feasible for ship-owning interests to comply and whether such changes would be welcomed by ship-owning interest nations. To achieve this aim, this article will be divided into three parts. In the first part, the author will explore the ambit of the shipowners' obligations to maintain seaworthy vessel under the Hague-Visby Rules and also the ambit of the exception of negligent navigation. Afterwards, in the second part, the author will trace the rationale for changes made in the Rotterdam Rules along with offering his analysis on practical implications of such changes. The final part will be concluded by evaluating the feasibility of such changes in light of modern maritime practices.

2 HAGUE-VISBY RULES: SHIPOWNERS' OBLIGATIONS TO MAINTAIN SEAWORTHY VESSEL AND NEGLIGENT NAVIGATION EXCEPTION

As mentioned above, two significant aspects of the Hague-Visby Rules will be briefly outlined in this part: ship-owners' obligations to maintain seaworthy vessel and negligent navigation exception available to ship-owners.

2.1 *Ship-owners' obligations to maintain seaworthy vessel*

To begin with, Article III(1) of the Hague-Visby Rules should be re-cited in full:

> The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
> 1 Make the ship seaworthy
> 2 Properly man, equip and supply the ship
> 3 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.

Two points should be emphasised here. First, the duration of the obligations is only 'before and at the beginning of the voyage'. Secondly, the standard of such obligations is rested upon 'due diligence'. The authority in point as to the duration of the duty is the decision of the Privy Council in *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine Ltd.*[12] In this case, cargoes had already been loaded when the ship's pipes were found to be blocked by ice. The Master ordered the use of an acetylene torch to thaw out the ice. Due to negligence of the ship's officers, the ship caught fire causing the loss of cargoes.[13] One of the issues in this case was whether the duty to provide a seaworthy vessel (or to be more precise the

[6] Nikaki, Theodora, and Soyer, Baris. 2012 A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves? *Berkley Journal of International Law* 30:303-348.
[7] See Comite Maritime International, 'CMI Yearbook 2010' <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202010.pdf> accessed 11 June 2014.
[8] Frederick David C. 1991 Political Participation and Legal Reform in the International Maritime Rulemarking Process: From the Hague Rules to the Hamburg Rules *Journal of Maritime Law and Commerce* 22: 81-117.
[9] See Baughen, Simon, 2012. *Shipping Law*. Oxford: Routledge, page 95.
[10] Nikaki and Soyer (n 4) 304.
[11] Ibid., 329.
[12] *Maxine Footwear Co. Ltd v Canadian Government Merchant Marine Ltd.* [1999] A.C. 589.
[13] Ibid., 593.

duty under Article III(1)(c) of the Hague Rules applicable at the time) ended upon the goods loaded onto the ship. The Privy Council explained the phrase 'before and at the beginning of the voyage' to mean 'the period from at least the beginning of the loading until the vessel starts on her voyage'.[14] As for the standard of due diligence, this is explained as equal to the duty to take reasonable care in common law.[15] The modern authority which demonstrates this standard is in the case of *The Eurasian Dream*.[16] The case involved a car carrier which was destroyed by fire. The claimants, whose cargoes were destroyed, alleged unseaworthiness. Citing *The Amtelslot*, [17] Cresswell J. explained that '[t]he exercise of due diligence is equivalent to the exercise of reasonable care and skill: "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"'. [18] Such obligations to exercise due diligence to provide a seaworthy vessel are said to be 'non-delegable' obligations. This is a well-established legal position since the decision of the House of Lords in 1961 in *The Muncaster Castle*.[19] The case involved damages to cargoes due to the sea water entered the cargo hold. It was discovered that the inspection cover was not properly tightened due to the negligence of the fitter employed by the independent contractor.[20] The House of Lords, taking into account the history of the Hague Rules and the need to maintain uniformity in the interpretation of international conventions, unanimously held that the ship-owner in this case failed to exercise due diligence. In the passage of Lord Radcliffe, '[w]hat is stressed throughout is that the obligation of the carrier is "not limited to his personal diligence"…The carrier's responsibility for the diligence of those whom he employs to discharge his own primary duty has been stated and recognized…'[21]

Such entire scheme of the ship-owners' obligations to provide a seaworthy vessel has been well-understood and consistently applied for over eighty years. Indeed, this scheme is coherent with a marine insurance system as far as the English law is concerned. In English law, there exists a concept of 'warranty' which is explained as 'a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts'. [22] Non-compliance with the warranty entitles the insurer to be discharged from its liability as from the date of the breach. [23] There may be either an express or an implied warranty.[24] It must be observed that there is a warranty implied by law for seaworthiness. However, for a voyage policy,[25] the extent of this implied warranty only encompasses 'the commencement of the voyage'.[26] In case of the time policy, the implied warranty of seaworthiness does not exist. But, the insurer will not be liable if it can prove the assured was privy to such unseaworthiness. [27] There is no doubt that cargo insurances are contained in a voyage policy from the loading port to the discharge port. However, one may argue the Marine Insurance Act which sought to 'codify' the common law relating to marine insurance as existed prior to 1906 is an even older piece of legislation in comparison with the scheme in the Hague-Visby Rules.

The Hague-Visby Rules make it clear of the prime importance of the seaworthiness obligation in the sense that ship-owners can only rely on a list of exceptions provided to them in Article IV(2) if they fulfilled their duty under Article III(1). This is apparent from the language of Article IV(1): 'Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy…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'.

Article IV(1) of the Hague-Visby Rules contains the list of seventeen grounds for ship-owners to seek exemption from their liabilities. The widest ground is provided in Article IV(2)(q) which is dubbed by academic commentators as a 'catch-all exception', gives exception for 'any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier…' The Rotterdam Rules, whilst do not spell out this exception so explicitly, retain this 'catch-all exception' as in the language of Article 17(2): 'The carrier is relieved of all or part of its liability…if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in Article 18'. Indeed, as can be seen from Article 17(3), the Rotterdam Rules retain list of the exception in the Hague-Visby Rules, except one – exception as per Article IV(2)(a) mentioned earlier. This particular exception reads: 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from – (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship'. To what extent ship-owners are negatively affected by

[14] Ibid., 603.
[15] Girvin, Stephen, 2007. *Carriage of Goods by Sea*. Oxford: Oxford University Press, para 26.20.
[16] *Papera Traders Co Ltd and Others v Hyundai Merchant Marine Co. Ltd and Another* (*The "Eurasian Dream"*) [2002] EWHC 118 (Comm); [2002] 1 Lloyd's Rep. 719.
[17] *Union of India v N.V. Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223.
[18] *The Eurasian Dream* (n 14) para 131.
[19] *Riverstone Meat Company, Pty., Ltd v Lancashire Shipping Company Ltd.* [1961] 1 Lloyd's Rep. 57.
[20] Ibid., 65-66.
[21] Ibid., 84.
[22] Section 33(1) of the Marine Insurance Act 1906.
[23] Section 33(3) of the Marine Insurance Act 1906; *The Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* (*The "Good Luck"*) [1991] 2 Lloyd's Rep. 191.
[24] Section 33(2) of the Marine Insurance Act 1906.
[25] According to s.25(1) of the Marine Insurance Act 1906: 'Where the contract is to insure the subject-matter "at and from", or from one place to another or others, the policy is called a 'voyage policy', and where the contract is to insure the subject-matter for a definite period of time the policy is called a 'time policy'. A contract for both voyage and time may be included in the same policy…'
[26] Section 39(1) of the Marine Insurance Act 1906.
[27] For discussion on this issue, see *Manifest Shipping Co. Ltd v Uni-Polaris Shipping Co. Ltd and Ors* [2001] 1 UKHL/1; [2001] 1 Lloyd's Rep. I.R. 247.

such a change brought about by the Rotterdam Rules? It is the question which the paper now turns to address.

2.2 *Negligent navigation exception*

As explained by Wilson, this type of exception had existed long before the Hague-Visby Rules.[28] This negligent navigation exception has come to a sharp focus again following a fairly recent decision of the Supreme Court of New Zealand in *The Tasman Pioneer*.[29] An extreme situation in this case indeed leads to some doubts whether debates on the need for this negligent navigation exception which have persisted since the negotiation leading to the drafting of the Hamburg Rules should actually be revisited. As a re-collection, the Hamburg Rules took a cargo-owning orientated approach and there is no similar list of exceptios as provided in the Hague-Visby Rules. Instead, ship-owners are presumed to be liable for loss or damage to cargoes.[30]

In *The Tasman Pioneer*, the Master chose to navigate the vessel via the shorter route in order to make the voyage on schedule. Unfortunately, the vessel hit the rocks causing damage to the hull of the vessel letting in seawater. Instead of reporting incidents to the ship-owner and the relevant authorities for necessary measures to be arranged in time, including salvage, the Master proceeded with the voyage. He tried to change the route back to the original longer one the vessel should have taken. He also instructed the alteration of the navigational chart and asked his colleagues to lie as to the cause of the damage.[31] Due to the delay in taking appropriate measures, the plaintiffs' cargoes were damaged by seawater. Nevertheless, the Supreme Court of New Zealand held in this case the ship-owner is entitled to invoke a defence under Article IV(2)(a) of the Hague-Visby Rules.[32]

The only qualification to limit the applicability of the aforementioned Article IV(2)(a), as explained further in *The Tasman Pioneer*, is when there was a 'barratry',[33] drawing reference from Article IV(5)(e) depriving carriers' servant or agent from raising a defence or entitlement to limit liability again if the losses or damages were 'resulted from an act or omission of the servant or agent done with intent to cause damage…' In this respect, to prove barratry, it must be established that 'damage had resulted from an act or omission of the master or crew done with intent to cause damage, or recklessly and with knowledge that damage would probably result'.[34] This qualification, plausible as it is, may attract certain difficulties in practice. The burden of proof falls upon consignees who hold constructive possession to goods by way of a transfer of a bill of lading.[35] These persons did not involve in a voyage and did not have any means of access to communications between ship-owners and crewmen. Unless in rare cases of clear circumstances, it is submitted that consignees are likely to fail in their burden of proof and ship-owners would be able to resort to their exception under Article IV(2)(a).

3 SHIP-OWNERS' OBLIGATIONS TO MAINTAIN SEAWORTHY VESSEL AND NEGLIGENT NAVIGATION EXCEPTION: CHANGES MADE BY THE ROTTERDAM RULES

Unlike the Hague-Visby Rules, the Rotterdam Rules take into account reality of modern transportation of goods. This can be seen from a definition of a 'contract of carriage' in Article 1(1): '…a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to sea carriage'. In a sense, the Rotterdam Rules acknowledge increasing use of multi-modal transportations. Specifically, in relation to the carriage by sea, as mentioned earlier, the Rotterdam Rules extend the ship-owners' obligations in this respect throughout the voyage. The opening language of Article 14 reads: 'The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence…' This change necessarily has a bearing on the allocation of risks in sea carriage between ship-owners on the one hand and cargo-owners (shippers or consignees of the bill of lading) on the other hand. In other words, there is an alteration in the mode of determining 'who pays for damage done to cargo during the movement of the goods by [shipping] industry…'[36] This, however, may not have any impacts on ship-owners' current practices. As Nikaki explains, the rationale of the Rotterdam Rules in this regard is nothing more than to align ship-owners' liabilities with those responsibilities they currently have under the public law.[37] A reference to the public law here is a reference to the 'International Management Code for the Safe Operation of Ships and for Pollution Prevention' (the "ISM Code").[38] Relevant parts of the ISM Code may be quoted here in some lengths:

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[28] Wilson, John F., 2010. *Carriage of Goods by Sea*. Essex: Pearson Education Limited, page 273.

[29] *Tasman Orient Line CV v New Zealand China Clays and Others* (*The "Tasman Pioneer"*) [2010] NZSC 37; [2010] 2 Lloyd's Rep. 13.

[30] Article 5(1) of the Hamburg Rules provides: 'The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences'.

[31] *The Tasman Pioneer* (n 27) [1]-[4].

[32] Ibid., [31]-[32].

[33] Ibid., [10]-[12].

[34] Ibid., [13].

[35] Section 2(1) of the Carriage of Goods by Sea Act 1992: '(1) Subject to the following provisions of this section, a person who becomes: (1) the lawful holder of a bill of lading…shall (by virtue of becoming the holder of a bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract'.

[36] Sweeney, Joseph C. 1991 UNCITRAL and The Hamburg Rules – The Risk Allocation Problem in Maritime Transport of Goods *Journal of Maritime Law and Commerce* 22: 511-538.

[37] Nikaki, Theodora. 2010 The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know? *Tulane Maritime Law Journal* 35: 1-44.

[38] The ISM Code 'was adopted by the International Maritime Organisation (IMO) on November 4, 1993, and later incorporated into

4 RESOURCE AND PERSONNEL

The company should ensure that the master is:
1 properly qualified for command;
2 fully conversant with the Company's safety management system; and
3 given the necessary support so that the master's duties can be safely performed.

The Company should ensure that each ship is manned with qualified, certificated and medically fit seafarers in accordance with national and international requirements.

The Company should establish procedures to ensure that new personnel and personnel transferred to new assignments related to safety and protection of the environment are given proper familiarization with their duties. Instructions which are essential to be provided prior to sailing should be identified, documented, and given.

The Company should ensure that all personnel involved in the Company's safety management system have an adequate understanding of relevant rules, regulations, codes and guidelines.

The Company should establish and maintain procedures for identifying any training which may be required in support of the safety management system and ensure that such training is provided for all personnel concerned.

The Company should establish procedures by which the ship's personnel receive relevant information on the safety management system in a working language or languages understood by them.

The Company should ensure that the ship's personnel are able to communicate effectively in the execution of their duties related to the safety management system.

5 MAINTENANCE OF THE SHIP AND EQUIPMENT

The Company should establish procedures to ensure that the ship is maintained in conformity with the provisions of the relevant rules and regulations and with any additional requirements which may be established by the Company.

In meeting these requirements, the Company should ensure that:
1 inspections are held at appropriate intervals;
2 any non-conformity is reported, with its possible cause, if known;
3 appropriate corrective action is taken; and
4 records of these activities are maintained.

The Company should identify equipment and technical systems the sudden operational failure of which may result in hazardous situations. The safety management system should provide for specific measures aimed at promoting the reliability of such equipment or systems. These measures should include the regular testing of stand-by arrangements and equipment or technical systems that are not in continuous use.

The inspections mentioned in 5.2 as well as the measures referred to in 5.3 should be integrated into the ship's operational maintenance routine.

It must be noted that the ISM Code provides a set of modern regulations concerning ship safety. It came out amidst modern shipping practices. This is in contrast with the Hague-Visby Rules which came out just after the Second World War. This is not to mention that the rules on seaworthiness of ship did not change from that of the Hague Rules which came out in 1924. There was a rationale back then to limit obligations to provide seaworthy vessel to the period at the beginning of the voyage considering difficulties in communications and controls between ships and shores. Such a scene has completely changed. In modern shipping environment, with developments of communications and satellite systems, ship staffs and ship-owners along with their personnels on shore are in frequent communication. Ship-owners have access to a network of shipping agents worldwide. This necessarily means that any defects on any parts of the vessel occurred during the voyage which may compromise the safety and the seaworthiness of the vessel can be corrected at the nearest port. Repairs of either permanent or temporary nature can be expediently arranged. Specific training institutions are available to train up ship staffs. A decade of the existence of the ISM Code means that ship-owners are familiar with the requirements under the ISM system and have implemented and embraced this into their firms' culture. Taking all these into account, the author is inclined to agree with Nikaki[39] that the Rotterdam Rules did not impose any additional demand upon ship-owners. Ship-owners are unlikely to incur additional costs to make themselves in compliance with their obligations to provide seaworthy vessel under the Rotterdam Rules. Compliance with the ISM Code renders a favourable presumption on the part of ship-owners that due diligence was exercised. In contrast, a failure to comply with the ISM Code would provide a pistol for cargo interests to point that there was a lack of due diligence.[40]

However, there has been a view that the ship-owners' seaworthiness obligations should be differently interpreted between the obligations at the time before the commencement of the voyage and those at the time during the voyage. In the case of the latter, 'the carrier will only be liable for those decisions it made or for those which it should have been made during the voyage'.[41] However, during the voyage, the control is in the hands of the Master and therefore it is maintained that the breach of seaworthiness obligations at the commencement of the voyage would be easier to prove.[42] It is

the International Convention for the Safety of Life at Sea Convention (SOLAS) 1974'. Ibid.

[39] See Nikaki (n 35).
[40] Girvin (n 13) para 23.17.
[41] Ülgener, Fehmi M., 'Obligations and Liabilities of the Carrier' in Güner-Özbeck, M.D. (ed.) 2011. *The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules*. Berlin and New York: Springer, page 139, 142.
[42] Ibid.

respectfully argued that this interpretation fails to take into account instantaneous means of communications available in this present era and the language of Article 14 does not suggest any different standard.

The actual increasing costs for ship-owners, if the Rotterdam Rules are in force, come from a new liability in 'negligent navigation', which they would not have met under the Hague-Visby Rules. This causes difficulties for ship-owners in practice as even the most competent crewman can act negligently.[43] Ship-owners are not always on board to control decisions made by ship staffs. 'T]he removal of the nautical fault defense would result in less efficient and less cost-effective management of the risks and division of the financial consequences between P & I Clubs and cargo insurers'.[44] Ship-owners may face large claims from cargo-owners in the event of serious damages to goods due to large incidents such as a collision caused by negligent navigation.[45] However, this appears to disregard balancing mechanism for ship-owners to be able to limit their liabilities under the Rotterdam Rules (Articles 59-60) or the Convention on Limitation of Liability for Maritime Claims, 1976. Plus, it is questionable why ship-owners should benefit from the privilege granted under the 'negligent navigation' exception when same is not available to carriers in other modes of transportation.[46] It may be the case that, in order to balance and cope with expected increase in liabilities, ship-owners will not hesitate to increase freights. However, shipping industry has its scene changed from the time before the coming into force of the Hague Rules. At the period prior to the drafting of the Hague Rules, ship-owners had a relatively stronger bargaining power. They had a practice of inserting exclusion clauses into bills of lading exempting their own liability for negligence. Courts in different jurisdictions reacted differently to such a contractual provision. In the United Kingdom where ship-owning interests were influential, the validity of such clause was upheld.[47] The fact is that ship-owners no longer hold strong bargaining power. This is especially the case since the global economic downturn in late 2008 which has caused ship-owners to fight for trade. Ship-owners who unscrupulously increase the freight will be sanctioned by industrial mechanism. Protection and Indemnity (P & I) clubs, representing ship-owning interests, also need to bear this in mind. Any unnecessary increase in calls will face an objection by ship-owning representatives sitting on the Board of Directors of the P & I club in question. At the same time, P & I clubs also have their own mechanism in calculating their calls, taking into account also claim records of relevant ship-owners. In order to minimise claim records, it is necessary for ship-owners to tighten up their safety and security measures. This can be done, for example, by appointing owners' representatives regularly joining the vessel to provide ship staffs with guidance, especially when significant decisions in relation to navigation have to be made. Placing many procedure manuals on board for ship staffs to comply would no longer be efficient. Regular drillings should be conducted on shore and on board for ship staffs and shore staffs so they are familiar with decision making and they can co-ordinate with each other in emergency situations. Promotion of ship staffs into significant ranks such as the Master needs to be carefully considered, taking into account experiences of relevant ship staffs. Instead of raising unnecessary concerns on the unavailability of negligent navigation exception, it is submitted that ship-owners should turn their focus on risk management aspects of their business. They should focus their concerns on how to avoid or reduce liabilities for negligent navigation.

[43] Bachxevanis, Konstantinos. 2010 'Crew Negligence' and 'Crew Incompetence': their distinction and its consequence *Journal of International Maritime Law* 16:102-131.

[44] Weitz, Leslie Tomasello. 1997-1998 The Nautical Fault Debate (the Hamburg Rules, the U.S. COGSA 95, the STCW 95, and the ISM Code) *Tulane Maritime Law Journal* 22:581-594.

[45] Ibid.

[46] Tetley, William. 2008 *Marine Cargo Claims Volume 1*, Quebec: Les Editions Yvon Blais Inc, 954.

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6 CONCLUSION

Superficially, the Rotterdam Rules appear to increase ship-owners' liabilities beyond those in the Hague-Visby Rules and of course one concern would be whether the Rotterdam Rules will gain support from shipping interests or ship-owning countries. However, upon closer scrutiny, the Rotterdam Rules do not seem to increase ship-owners' obligations beyond acceptable limits. Obligations to provide a seaworthy vessel throughout the voyage are merely reflections of ship-owners' current practices under the ISM Code. The deletion of shipowners' exception for negligent navigation is just a mere adjustment for a right balance between ship-owning interests and cargo-owning interests and an attempt to put liabilities of ship-owners in line with liabilities of operators of other modes of transportation. It will not be reasonable if any countries will change their law relating to international carriage of goods along this line, abandoning the usual approach as in the Hague-Visby Rules. However, whether the Rotterdam Rules should be adopted in full, giving a complex structure of 92 provisions in total, should be left for further discussion, which is beyond the scope of this article.

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