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Regras de Haia | Hague Rules

Comemorações | Celebrations

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COMEMORANDO OS 100 ANOS DAS REGRAS DE HAIA

COMMEMORATING 100 YEARS OF THE HAGUE RULES

VOLUME II

Coordenador
ALEXANDRE DE SOVERAL MARTINS

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ÍNDICE

NOTA INTRODUTÓRIA

As «Regras de Haia» comemoraram em 2024 o seu 100.º Aniversário. Portugal aderiu à Convenção de Bruxelas de 1924 em 1931 (Carta de Adesão de 5 de dezembro de 1931, depositada em 12 de dezembro do mesmo ano e publicada no Diário do Governo em 1932). Muitos Estados são Partes Contratantes e conhecimentos de carga emitidos por todo o Mundo incorporam as suas disposições – na sua versão original ou com as alterações do Protocolo de Visby (1968). Várias tentativas surgiram para adotar soluções mais modernas, mas ou foram apenas aceites por um reduzido número de Estados, ou nunca entraram em vigor. E isso também prova a importância das «Regras de Haia».

Por isso, 2024 foi tempo de celebrar, e o Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra esteve no centro dessas comemorações. Várias iniciativas foram planeadas e executadas para discutir as «Regras» e a sua aplicação, mas também para lançar um olhar sobre os desafios que o transporte marítimo terá de enfrentar nos anos vindouros: riscos de segurança, preocupações ambientais, navios autónomos… O Aniversário foi uma oportunidade para pensar em todos esses assuntos e em muitos mais, e bem assim para homenagear a tradição marítima portuguesa.

O ponto alto das Comemorações teve lugar em 8.11.2024 com a realização de um Congresso Internacional que reuniu especialistas de Portugal, da Itália e da Grécia. Este livro dá a conhecer os estudos da maior parte das/os oradoras/es que nessa altura tivemos o prazer de ouvir e com ele agradecemos às/aos Colegas que nos ajudaram a tornar esta festa muito mais rica.

A Comissão Organizadora das Comemorações foi composta por Alexandre de Soveral Martins (Presidente), Alexandra Aragão, Dulce Lopes, Licínio Lopes Martins e Suzana Tavares da Silva.

Alexandre de Soveral Martins

INTRODUCTORY NOTE

The «Hague Rules» Convention celebrated its 100th Anniversary in 2024. Portugal acceded to the 1924 Brussels Convention in 1931 (Carta de Adesão of 5th December 1931, deposited on 12th December 1931, and published at the Diário do Governo in 1932). Many States are Contracting Parties, and Bills of Lading all over the World incorporate its provisions, either in their original version, or with the amendments of the Visby Protocol (1968). Attempts have been made to have more modern solutions, but either they were adopted by only a few States, or they did not take effect until now. And that is also an evidence of the importance of the «Hague Rules».

Therefore, 2024 was time to celebrate, and the Institute for Legal Research of the Law Faculty of the University of Coimbra was at the centre of those commemorations. Several events took place (books, a Congress, Webinars…) to discuss the «Rules» and its application, but also to have an insight on the challenges that maritime transport will be facing in the years to come: security risks, environmental concerns, autonomous ships… The Anniversary was an opportunity to think about all those issues and many more, and to pay a tribute to the Portuguese maritime tradition.

The highlight of the Celebrations took place on 8.11.2024 with an International Congress that brought together experts from Portugal, Italy and Greece. This book presents the studies of most of the speakers we had the pleasure of hearing at and with it we thank the colleagues who helped us make this celebration much richer.

The Organising Committee for the Celebrations was composed by Alexandre de Soveral Martins (President), Alexandra Aragão, Dulce Lopes, Licínio Lopes Martins and Suzana Tavares da Silva.

Alexandre de Soveral Martins

EXCEPTED PERILS UNDER THE HAGUE RULES

(https://doi.org/10.47907/ComemorandoRegrasdeHaia/2/01)

Stefano Pollastrelli*

Summary: 1. Obligations of the maritime carrier. 2. The maritime carrier liability regime: constituent facts. 3. Facts preventing the liability of the maritime carrier. The excepted perils. 4. Final Remarks.

Keywords: maritime carriage of goods, maritime carrier liability, excepted perils.

1. Obligations of the maritime carrier

The maritime carrier assumes the main obligation of transfer from one place to another, with the consequent essential performance to protect the goods being transported, as in any other contract for the transport of goods[1].

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[1] Sergio Ferrarini, *I contratti di utilizzazione della nave e dell'aeromobile*, Roma: Foro italiano, 1947, 99 ss.; Antonio Lefebvre D'Ovidio, *Studi per il codice della navigazione*, Milano: Giuffrè, 1951, 87 ss.; Fiorentino, Adriano, *I contratti navali*, Napoli: Jovene, 1959, 71 ss.; Guido De Vita, *Contributo alla teoria del trasporto marittimo di cose determinate*, Milano: Giuffrè, 1964; René Rodière, *Traité général de droit maritime*, *Affrètements e transports*, II, Paris: Dalloz, 1967; Francesco Berlingieri, *La disciplina della responsabilità del vettore di cose*, Milano: Giuffrè, 1978; Raoul C. Carver, *Carriage by Sea*, London: Steven & Sons, 1982; Sergio Maria Carbone, *Le regole di responsabilità del vettore marittimo*, Milano: Giuffrè, 1984; Giorgio Righetti, *Trattato diritto marittimo*, II, Milano: Giuffrè, 1990, 531 ss.; Stefano Zunarelli, "Trasporto marittimo", in *Enc. dir.*, XLIV, Milano, 1992, 1202 ss.; William Tetley, *Marine Cargo Claims*, Cowansville: Les Éditions Yvon Blais, 2008; Aleka Mandaraka Sheppard, *Modern Maritime Law*, *2, Managing Risks and Liabilities*, Abingdon: Informa Law from Routledge, 2013, 97 ss.; Simon Baughen, *Shipping law*, London:

In the oldest maritime contracts for the carriage of goods, the carrier excluded his liability only in the event of an «Act of God (or Queen's) enemies». Progressively, the clauses addressing the carrier's negligence began to increase in maritime practice, making the position of the carrier itself lighter and less strict. The situation around 1800 was such that the carrier enjoyed a broad regime of Non-responsibility, through the use of total exemption clauses (the so-called «negligence clauses»).

This particular situation led American and English legislators to intervene to reach a compromise between carriers, shippers and insurers and, above all, to avoid inequities.

The *Harter Act* of 1893 marks a point of regulatory balance[2]. The law provides for an implied condition of seaworthiness and sets out the cases of exemption used in practice in a regulatory scheme. In essence, the carrier could invoke a cause of exemption (with the exception of fire) only if he could demonstrate the seaworthiness of the ship. So the worthiness constituted a condition precedent in the law.

After the end of the First World War, on the basis of the regulatory scheme of the American *Harter Act*, the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* was stipulated, signed in Brussels on 25 August 1924 (*The Hague Rules*), and subsequently modified by the Brussels Protocols of 1968 and 1979 (*The Hague-Visby Rules*)[3]. The Brussels Convention of 1924 applies to

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Routledge, 2015, 17 ss.; Ignacio Arroyo Martinez, *Curso de Derecho Maritimo (Ley 14/2014, de Navegacion Maritima)*, Pamplona: Civitas, 2015, 331 ss.; L. Maraist, Frank, *et al.*, *Cases and Materials on Maritime Law*, St. Paul mn: Thomson West, 2016, 861 ss; Arun Kasi, *The Law of Carriage of Goods by Sea*, Singapore: Springer, 2021; Pierre Bonassies / Christian Scapel / Bloch Cyril, *Droit maritime*, Paris: lgdj, 2022, 331 ss.; Antonio Lefebvre D'Ovidio / Gabriele Pescatore / Leopoldo Tullio, *Manuale di diritto della navigazione*, Milano: Giuffrè, 2022, 542 ss.; Francesco Alessandro Querci / Stefano Pollastrelli, *Diritto della navigazione*, Padova: Cedam / Wolters Kluwer, 2023, 447 ss.; Sergio Maria Carbone; Celle, Pierangelo; Lopez De Gonzalo, Marco, *Il diritto marittimo attraverso i casi e le clausole contrattuali*, Torino: Giappichelli, 2024, 187 ss.

[2] Giuseppe Riccardelli, "Harter Act", in *Enc. dir.*, xix, Milano, 1970, 946 ss.

[3] Antonio Lefebvre D'Ovidio, *La disciplina convenzionale della responsabilità del vettore marittimo*, Roma: Foro italiano, 1938; Francesco Berlingieri, *La Convenzione di Bruxelles 25 agosto 1924 sulla polizza di carico*, Genova, 1974; Idem, *Le Convenzioni internazionali di diritto marittimo e il codice della navigazione*,

the international maritime transport of goods represented by bills of lading[4].

The carrier must prepare the ship in a state of seaworthiness and also cargoworthiness but the seaworthiness is no longer considered a condition precedent as was foreseen in American law. The carrier must diligently prepare the ship in a seaworthiness condition at the beginning of the voyage and will be held responsible if the damage involves the seaworthiness of the ship (Art. IV.1). The proof that the ship was delivered in a seaworthy condition shall be provided by the carrier. It follows that the carrier is not liable for unseaworthiness that occurs after the beginning of the journey[5].

The carrier's obligations in relation to the custody of the transported goods are listed in the combined provisions of Art. II and Art. III.2 of the Hague-Visby Rules, which state that the carrier must proceed appropriately and with care with the loading, maintenance, stowage, transport, custody, care and unloading of the same, implying that he will be liable for their failure. The carrier shall exercise due diligence to make the ship in all respects seaworthy and therefore he is responsible

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Milano: Giuffrè, 2009; Jasper Ridley, *The Law of Carriage by Land, Sea and Air*, London: Ridley; Sergio Maria Carbone, *Contratto di trasporto marittimo di cose*, Milano: Giuffrè, 2010; Marco Lopez de Gonzalo, «La disciplina internazionale uniforme del trasporto marittimo di cose», in Francesco Morandi, *I contratti del trasporto*, I, Bologna: Zanichelli, 2013, 612 ss.; Caslav Pejovic, *Transport. Documents in carriage of goods by sea*, Oxon / New York: Routledge, 2020; M. Januário da Costa Gomes, in Maria João Antunes / Alexandre de Soveral Martins, coord., *As regras da Haia (e Haia-Visby) face aos novos desafios do shipping*, in *Comemorando os 100 anos das regras de Haia*, Coimbra, 2022, 19 ss.

The *United Nations Convention on the Carriage of Goods by Sea* (*Hamburg Rules*) signed on 31 March 1978 is in force since 1 November 1992. The *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (*Rotterdam Rules*), opened for signature on 23 September 2009, is not yet in force.

See Francesco Berlingieri, "La disciplina della responsabilità del vettore e la distribuzione dell'onere della prova nelle regole dell'Aja-Visby, nelle regole di Amburgo e nelle regole di Rotterdam", *Dir. mar.* (2014) 242 ss.

[4] Italian Cass. civ. 3 December 1984, n. 6298, in *Dir. mar.*, 1985, 317. Cfr. Francis Rose / Francis M. B. Reynolds, *Carver on Bill of Lading*, London: Sweet and Maxwell; 2022; Christopher Smith KC, *et al.*, *Scrutton On Charter Parties and Bills of Lading*, London: Sweet and Maxwell, 2024.

[5] Giuseppe Riccardelli, *Navigabilità della nave all'inizio del viaggio e dottrina degli stages*, in *Riv. dir. nav.*, 1963, 224 ss.

for the failure of his servants to ensure the vessel was seaworthy due to their negligence[6].

2. The maritime carrier liability regime: constituent facts

The fact constituting the liability of the maritime carrier arises from the failure to provide the transfer of goods (which entails damages from failure to carry out the transport and damage from delay), and from the failure to fulfill the obligation to protect goods (which entails damages relating to loss or failure). The burden of proof lies with the shipper who establishes the carrier's presumption of liability.

The period of application of the carrier's liability regime according to the Hague Rules is derived from Art. I, letter *e*) («Carriage of goods covers the period from the time when the goods are loaded on to the time they are discharged from the ship»), therefore from the beginning of the loading operations to the end of the unloading operations.

Regarding the evidentiary facts system concerning the liability of the maritime carrier for loss or damage of goods, the shippers must prove that the goods were not delivered to the contractually agreed place of destination, or that they arrived at the place of destination in a different state of conservation or in a different quantity from that which can be ascertained at the initial moment of transport, as well as the time period of the carrier's liability within which the loss or damage occurred to the goods.

The proof of the existence of damage to the cargo is therefore based on the different conditions that affect the goods at the time of redelivery compared to the previous moment of their delivery to the carrier. The proof is easy in the presence of a bill of lading which certifies the condition of goods[7]. In any case, the carrier has the option to mark the bill of lading of the reserves, at the time of embarkation, to avoid liability, if there is a visible state of damage before loading.

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[6] Leopoldo Tullio, "Responsabilità del vettore nel trasporto di cose", in Alfredo Antonini, ii, coord., *Trattato breve di diritto marittimo*, Milano: Giuffrè, 2008, 172.

[7] Andrea Arena, *La polizza di carico e gli altri titoli rappresentativi di trasporto*, i, ii, Milano / Roma: Giuffrè, 1951; Francesco Alessandro Querci, *Polizza di carico e lettera di garanzia*, Camerino: Jovene, 1971; Antonio Pavone La Rosa, "Polizza di carico", in *Enc. dir.*, xxxiv, Milano, 1985, 201 ss.; Antonini, Alfredo, *Natura giuridica della polizza di carico e regime delle riserve*, in *Dir. trasp.*, 2013, 391 ss.; Richard Aikens, *et al.*, *Bills of Lading*, Abingdon: Informa Law from Routledge, 2021.

3. Facts preventing the liability of the maritime carrier. The excepted perils

When the carrier is actually placed in a situation of presumed liability, after the shipper has provided the fact constituting the carrier's liability, in case of damages, he can prove an impediment (or an impeditive fact) to his liability in order to free himself from his presumption.

Firstly, according to the Hague-Visby Rules, the carrier should not be held liable for loss or damage arising from the unseaworthiness of the ship, when he provides evidence that he has used reasonable diligence in preparing the ship for seaworthiness, before the beginning of the journey, and to secure that the ship is properly manned, equipped and supplied regarding the correct and suitable conservation of the cargo (cargoworthiness), as established by Art. III, § 1.

Furthermore, the carrier is not liable for damages resulting from a series of events considered to constitute typical risks of maritime navigation, known as «*excepted perils*», listed in Art. IV, § 2, of the Hague Rules, whose list is broader than that contained in the American *Harter Act*. In fact, it is a very long list in which excepted perils are taken from the consolidated practice of maritime transport of goods

This is a series of circumstances considered extraneous to the scope of the entrepreneurial risk of the maritime carrier, and consequently capable of exempting the carrier from responsibility for the loss or damage of goods transported.

To benefit from the exemption, the carrier must prove that the damage was caused by one of the following «*excepted perils*»[8]. There are about 17 cases of exception:

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;
b) Fire, unless caused by the actual fault or privity of the carrier;
c) Perils, dangers and accidents of the sea or other navigable waters;
d) Act of God;
e) Act of war;
f) Act of public enemies;

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[8] Giorgio Righetti, *La responsabilità del vettore nel sistema dei pericoli eccettuati*, Milano: Giuffrè, 1960.

g) Arrest or restraint of princes, rulers or people, or seizure under legal process;
h) Quarantine restriction;
i) Act or omission of the shipper or owner of the goods, his agent or representative,
j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;
k) Riots or civil commotions;
l) Saving or attempting to save life or property at sea;
m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
n) Insufficiency of packaging;
o) Insufficiency or inadequacy of marks;
p) Latent defects not discoverable by due diligence;
q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

This last test is more burdensome for the carrier but it is not required for the other excepted perils. Indeed, this is an atypical hypothesis (it is therefore called «*a generic excepted peril*») which gives rise to a greater burden of proof on the carrier who must prove that the event cannot be attributed to his own liability or that of his agents, as a direct cause.

These exemptive events provided for by law place the burden on the carrier to demonstrate the existence of a causal link between this event and the occurrence of the loss or damage to transported goods.

At this point, in the Signature Protocol of the Rules (paragraph 3, no. 1) it is specified that the Contracting States, for cases referred to in paragraph 2 *c*) to *p*) of Art. IV, provide that the shipper may prove the fault of the carrier or the fault of his servants in the management of the ship. This is the so-called «*confirmation evidence*», that is establishing that the harmful event was due to the fault of the carrier, therefore exceeding the existence of the excepted event.

The excepted perils are legal presumptions of fortuitous events, whereby not only the shipper can provide the proof that the exonerative event invoked by the carrier does not exist or that it is not the real cause of the damage, but he can also demonstrate that, in the specific case, the damage is attributable to the carrier (for example, in the case of damage to the goods due to the exceptional bad weather that the ship encountered, the shipper can still try to prove the fault of the carrier, if the latter, despite being duly informed about the weather conditions, ordered the captain to undertake navigation and cross the area hit by the storm).

According to the Hague Rules, the aforementioned proof is excluded in the cases of negligence in the navigation (letter *a*) and fire, not caused by the fault of the carrier (letter b) since, in these cases, the intention was to exonerate the carrier despite the existence of a negligent act. In the two aforementioned cases, in fact, the impossibility of providing confirmation evidence lies in the fact that the two excepted perils are already negligent by their very nature[9].

In summary, the burden of proof system is as follows:

1) The shipper must prove the loss or damage to goods and that the loss or damage occurred during the period of the carrier's custody;
2) To exclude his liability, the carrier can prove that the loss or damage was caused:
   a) by the unseaworthiness of the vessel not attributable to his lack of diligence;
   b) from one of the events falling within the excepted perils (just mentioned above);
   c) from an event falling under letter *q*) not attributable to his fault or that of his servants;
3) The shipper can provide the «*confirmation evidence*», that is proving that the loss or damage was due to the fault of the carrier and/or his agents or that the event is not included in the list of excepted perils, that is not related to an excepted peril.
4) In the case that the carrier invokes a fire event, the shipper can prove that the event is attributable to the fault of the carrier and his servants.

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[9] Antonio Lefebvre D'Ovidio / Gabriele Pescatore / Leopoldo Tullio, *Manuale di diritto della navigazione*, 591.

5) The carrier has the burden of proving the cause of the damage: he therefore assumes the risk of damage resulting from a cause that remains unknown[10].

Among the most important excepted perils, we can highlight the following.

3.1. Negligence in navigation and fire

Negligence in navigation and fire are the only excepted perils that exonerate the carrier despite his being negligent. The carrier would be required to respond if they were not expressly included in the list, provided by the Hague Rules, of the causes for exclusion of his liability.

The negligence in navigation, in the context of the Rules, represents the excepted peril that has most generated interpretative doubts due to the problems that have arisen in identifying its exact definition and the precise characteristics that differentiate it from the management of the ship, of which the carrier, however, responds. The reference to negligence in navigation is in the Art. IV, § 2, lett. *a*) of the Rules: «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». From this formula emerges the distinction between negligence in the navigation, therefore negligent navigation strictly speaking, and negligence in the management of the ship (a «commercial fault»)[11].

The distinction first appeared in an 1885 bill of lading.

Both jurisprudential and doctrinal orientation has stated that the negligent, imprudent or careless behavior of the master or crew in carrying out professional-nautical tasks (committing maneuvering errors or anchoring defects) constitutes negligence in navigation[12].

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[10] Sergio Maria Carbone, *Contratto di trasporto marittimo di cose*, 390 ss.; Sergio Maria Carbone; Celle, Pierangelo; Marco Lopez de Gonzalo, *Il diritto marittimo attraverso i casi e le clausole contrattuali*, 245.

[11] Giuseppe Riccardelli, *La colpa nautica*, Padova: Cedam, 1965.

[12] Italian Cass. civ. 30 December 1959, n. 3586, in *Dir. mar.*, 1960, 184. Giorgio Righetti, *Trattato diritto marittimo*, II, 746 ss.; Sergio Maria Carbone, *Contratto di trasporto marittimo di cose*, 324 ss.; Francesco Siccardi, «Il regime di responsabilità del vettore nel trasporto marittimo di cose», in Alfredo Antonini, *La responsabilità degli operatori del trasporto*, Milano: Giuffrè, 2008, 11 ss.

Errors relating to the management of the ship also fall into the category of errors in the navigation of the ship. These are negligences regarding the state of maintenance and management of the parts of the ship relevant to its navigation (maintenance/operation status of the machinery, the hull or the anchors).

Whereas, the conduct of the master or crew in operations concerning the maintenance of the parts of the ship relating to the commercial use of the ship must be placed within the concept of the negligence in the commercial employment of the ship (holds, tackles, cold rooms).

It is important to observe the purpose of the act committed or omitted by the carrier. Nonetheless, in practice, many behaviors of the ship's master serve both cargo conservation and navigation safety, at the same time.

It should be noted that the faults of the master and crew which, although relating to the management of the ship, have effects on the cargo, do not exempt the carrier from responsibility for the loss or damage of transported goods, since they could have been avoided with the adoption of specific actions aimed at protecting the goods during the sea voyage.

The issue must be assessed on a case-by-case basis.

For these reasons, negligence in navigation was not included in the excepted perils of the Rotterdam Rules[13].

Fire, as an excepted peril, is based on the absence of fault of the carrier.

Fire has always historically been considered an event exempting the carrier from liability, as reported in the ancient British statutes. The absence of fault of the carrier was provided for in the *Merchant Shipping Act* 1894.

Maritime doctrine holds that the non-responsibility of the carrier, in the case of fire, ceases if the shipper establishes that the fire is due to the fault of the carrier[14].

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[13] Sergio Turci, «Riflessioni sulla distribuzione degli oneri probatori nelle Rotterdam Rules», in *Scritti per Francesco Berlingieri*, Numero speciale *dir. mar.*, ii, 2010, 1116; Francesco Munari / Andrea La Mattina, "The Rotterdam Rules and their implications for environmental protection", jiml (2010), 375.

[14] Francesco Berlingieri, *Le Convenzioni internazionali di diritto marittimo e il codice della navigazione*, 77.

The issue of dividing the burden of proof was a factor of disagreement between American and English judges before the Hague-Visby Rules.

The carrier's liability arises if the shipper manages to demonstrate the inadequacy of the on-board equipment or behaviors of the carrier and his servants which made the outbreak of the fire possible, without their taking appropriate measures to prevent the fire from spreading.

This rule is also present in the Rotterdam Rules as an excepted peril («fire on the ship», Art. 17.3).

3.2. *Perils of the sea*

Peril of the sea is an excepted peril established in letter *c*), Art. IV, § 2, of the Hague-Visby Rules and indicates that the occurrence of an accident or danger at sea does not make the carrier responsible for the damage that this event may cause to the goods, unless the shipper proves the carrier's fault.

In order to be classified as a «sea risk», an event must present characteristics of exceptionality, unpredictability and inevitability of navigation, such as to annihilate any preventive measures to protect the goods that have been adopted to prevent harmful consequences for the cargo.

Jurisprudence has clarified that to have «peril of the sea», the on-board persons must not be able to prevail over the event in question in its violence and possible consequences on the cargo: violence capable of causing extensive damage to the essential structures of the ship, even if not particularly exposed[15].

Both jurisprudence and legal doctrine have underlined the importance of evaluating the meteorological-marine event in configuring a «sea risk», examining the characteristics of the vessel used, the type of navigation for which it is intended and the seasonal time frame during which the transport is carried out, in order to be able to evaluate the causal link between the event and the damage that has occurred. For example, a storm of great severity at sea, even if it falls within the perils of the sea, is not considered an exempting factor of

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[15] Italian Trib. Genova 8 September 1988, in *Dir. mar.*, 1990, 108; Cour de Cassation belge 13 April 1956, *ivi*, 1958, 133.

the carrier's liability, having regard to the time of the year and to the maritime area[16].

A very strong wind is not considered a peril of the sea as it is to be expected in winter in the North Atlantic Sea[17].

In fact, it is also important to evaluate the conduct of the ship's master in respect to the damage suffered which, if it turns out to be erroneous, leads to negligence in navigation.

3.3. Inherent defect of the goods

With the definition "Inherent defect of the goods", compliant with letter *m),* means any intrinsic and original defect of the goods, or any quality of the goods that makes them absolutely unsuitable to withstand the normal events of transport by sea.

It is certainly one of the exonerative hypotheses most frequently invoked by maritime carriers in the case of cargo damage.

Jurisprudence requires extremely rigorous proof regarding the actual existence of the alleged defect, especially with reference to the adoption by the carrier of precautionary measures suitable to prevent or counteract the intrinsic tendency of the goods to deteriorate. It must be a pathological defect or an original defect of the goods that cannot be seen externally[18].

This does not exclude the possibility that the shipper may prove deficiencies of the carrier in the measures taken to keep the condition of goods unchanged.

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[16] Sergio Maria Carbone, *Contratto di trasporto marittimo di cose*, 351 ss.; Francesco Berlingieri, *Le Convenzioni internazionali di diritto marittimo e il codice della navigazione*, 82 ss.

[17] US District Court-Eastern District of Louisiana (*Steel Coils v. M/V Lake Marion*), in *Am. Mar. Cases*, 2002, 1680.

[18] Supreme Court 5 December 2018 (*Volcafe Ltd v. Compania Sud Americana De Vapores*), in <www.supremcourt.uk> («I would hold that the carrier had the legal burden of proving that he took due care to protect the goods from damage, including due care to protect the cargo from damage arising from inherent characteristics such as its hygroscopic character. I would reinstate 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, it must follow that the carrier has failed to prove that the containers were properly dressed»); us District Court-Eastern District of Louisiana (*Trans Florida Foliage v. M/V American Entente*), in *Am. Mar. Cases*, 1986, 2532.

However, wastage in weight of goods, that is to say, particular types of goods that suffer a wastage in weight during maritime transport is a different situation and exempts the carrier from his liability.

3.4. Excepted atypical or unnamed perils

The excepted atypical or unnamed perils are those foreseen in letter *q)* of the Hague-Visby Rules.

The carrier can exempt himself from his liability by proving that the event causing the damage is not attributable to his negligence or that of his agents[19].

Among the most frequent cases is the theft of goods where the carrier must prove that he has carried out adequate surveillance and custody of the goods.

Another issue is related to hold humidity.

This situation falls under letter. *q)* unless the carrier proves that the damage does not depend on his negligent conduct. It should be noted that for some types of goods, hold humidity is a phenomenon that is difficult to eliminate.

This is a closing formula in the excepted perils which requires a specific proof of the exempting event by the carrier.

4. Final Remarks

Finally, excepted perils constitute the nerve center of the maritime carrier liability system.

The shipper must prove that the damage to goods is causally linked to acts that occurred in the period in which the carrier's activity took place and that the conditions of the goods upon arrival are different from those at the time of shipment.

Following this, the carrier in order to quash the presumption of liability, must prove an exonerative event that acted as a substantial factor in the damage.

Within this particular evidentiary system, excepted perils play a significant role in the carrier's liability in the contract of carriage of goods in the international maritime transports.

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[19] Italian Cass. civ. 30 January 1990, n. 639, in *Dir. mar.*, 1991, 92.

The liability is due to fault and it is presumed.

This type of liability is confirmed by the Rotterdam Rules, not yet in force, which however have created a more complex system of liability, a sort of "ping-pong burden of proof situation"[20], but the basic discipline is the same as that of the Hague Rules still in force 100 years after its signing.

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[20] Kofi Mbiah, "The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: the Liability and Limitation of Liability Regime", in CMI *Yearbook 2007-2008*, II, 291: «The balance of interests between carrier and cargo now lies in the fact that, apart from the shifting of the burden of proof albeit subtly on the carrier, the Article IV v 2 exceptions of The Hague Visby rules are now merely rebuttable presumptions of the absence of fault and would not automatically exonerate the carrier from liability».

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