The Legal and Economic Impact of the Caspiana Clause under Bills of Lading and Charterparties

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1 Introduction

Bills of lading and charterparties play an important role in many international commercial transactions. Terms and conditions contained in charterparties determine the rights and liabilities of the charterer and the owner, while the terms and conditions in bills of lading are usually considered by various courts in many countries in determining the rights and liabilities of the parties (carrier, shipper, consignee, or bill of lading holder) to the bill of lading. Many charterparties are issued today as being subject to bills of lading, and most bills of lading issued today are subject to national laws or international conventions: the Hague Rules 1924, the Hague-Visby Rules 1968, the Hamburg Rules 1978, and the Rotterdam Rules 2008,[1] which impose on the carrier minimum liabilities that cannot be lessened with exclusion clauses inserted in the bill of lading.[2]

The current legal system concerning bills of lading, however, is a consequence of developments that started approximately two-hundred years ago. In the early nineteenth century, a strict liability system protected cargo owners, where carriers were strictly liable for the safe transport and delivery of the cargo to its destination.[3] This situation led various national courts and commentators to describe the carrier as the 'insurer' of the goods.[4] By the late nineteenth century, the situation changed. Carriers avoided strict liability by including exclusion clauses in their bills of lading. The exclusion clauses included losses and damage from perils of the seas, jettison, frost, decay, collision, strikes, benefit of insurance, deviation, unseaworthy ships, and the carriers' own negligence.[5] Those exclusion clauses were absolutely in the carrier's favor and the cargo was transported entirely at the merchant's

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[1] Those Rules are known as: 'International Convention for the unification of Certain Rules Relating to Bills of lading. Signed at Brussels, August 25, 1924', 'Protocol to Amend the International Convention For the Unification of Certain Rules of Law Relating to Bills of Lading Signed at Brussels on 25 August 1924. Signed at Brussels, 23 February 1968', 'Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (21 December, 1979)', and 'United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)'. See John F. Wilson & Charles Debattista, *World Shipping Laws: International Conventions v. Carriage by Sea* (October 1980) V/1/CONV-V/6/CONV. The above Rules were created to redress the imbalance which had existed between shipowners and cargo owners regarding the loss or damage to goods. See Sarah C. Derrington, 'A Piece – Neither A Package Nor A Unit: *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA*', (2005) 68(1) *Modern Law Review* 111, 113. However, it should be noted that on December 11, 2008, the United Nations adopted a new convention: 'The United Nations Convention on Contracts for the International Carriage of Goods Wholly or partly by Sea', which is known as 'The Rotterdam Rules'. For a detailed explanation of the later Rules, see Felix W.H. Chan, 'In Search of a Global Theory of Maritime Electronic Commerce: China's Position on the Rotterdam Rules', (2009) 40 *Journal of Maritime Law & Commerce* 185; Michael F. Sturley, 'Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States', (2009) 44 *Texas International Law Journal* 427; Proshanto K. Mukherjee & Abhinayan Basu Bal, 'A Legal and Economic Analysis of the Volume Contract Concept under the Rotterdam Rules: Selected Issues in Perspective', (2009) 40 *Journal of Maritime Law & Commerce* 579.

[2] It should noted that the Rotterdam Rules 2008 are not yet in force as twenty States are required for the Rules to come into force (The Rules will enter into force twelve months after ratification by at least twenty States). See Article (94) of the Rotterdam Rules 2008.

[3] Ocean carriers, whom were presumed to be dishonest, were also strictly liable under Roman law for the safe transport and delivery of the cargo. See Adolf Berger, *Encyclopedic Dictionary of Roman Law* (2004) 668-69.

[4] See, for example, the English case *Forward v. Pittard*, 99 Eng. Rep. 953, pp. 956-57 (K.B. 1785) (per Lord Mansfield); Samuel Robert Mandelbaum, 'Creating Uniform Worldwide Liability Standards for Sea Carriage of Goods under the Hague, COGSA, Visby and Hamburg Conventions', (1996) 23 *Transportation Law Journal* 471, 474; Michael F. Sturley, 'The History of COGSA and the Hague Rules', (1991) 22 *Journal of Maritime Law & Commerce* 1, 4-5.

[5] Benjamin W. Yancey, 'The Carriage of Goods: Hague, COGSA, Visby and Hamburg', (1983) 57 *Tulane Law Review* 1238, 1240. For a details explanation of the history of shipping policies see, Joseph C. Sweeney, 'From Columbus to cooperation-trade and shipping policies from 1492 to 1992', (1990) 13 *Fordham International Law Journal* 481.

risk.[6] On the other hand, various charterparties include a clause that limits the charterer's right to nominate the ports at which the ship will call. According to such a clause, the charterer is obliged to direct the ship only to safe ports.[7]

Nowadays, countries vary in considering the applicability of the above clauses. This article only focuses on and analyses a certain exclusion clause, which is common to find in bills of lading and charterparties exempting the carrier from liability in the event of strikes, lock-outs, restraint of labor or labor disturbance from whatever cause, whether partial or general. The carrier, in such cases and under such clause, has the right to discharge goods at any other safe and convenient port, which is currently known as the 'Caspiana Clause'.

This article deals with the above exclusion clause (the Caspiana Clause) and proves the existence of a long-standing shortcoming that has been ignored for a long time by the provisions of the international mandatory liability regimes dealing with carriage of goods by sea.

2 The Meaning of Strikes, Lockouts, and Restraint of Labor or Labor Disturbance

In the context of maritime law, it is common to find clauses in bills of lading exempting the carrier from liability in the event of strikes, lock-outs, restraint of labor or labor disturbance from whatever cause, whether partial or general. The terms 'strikes', 'lock-outs', and 'restraint of labor or labor disturbance' are defined under various maritime cases and by a range of scholars.

The term 'strike' is defined by the Cambridge English Dictionary[8] as: 'to refuse to continue working because of an argument with an employer about working conditions, pay levels, or job losses'. The term 'strike' was also defined by Lord Denning in *Tramp Shipping v. Greenwich Marine, The New Horizon*[9], a United Kingdom case. In that case, a vessel was delayed in discharging its goods because workers were in dispute with their employers over conditions. As a consequence, the workers refused to work a night shift and then stopped work altogether. The issue before the Court of Appeal was whether the stoppage of work amounted to a strike or not. The Court of Appeal ruled that the action by workers amounted to a strike. Lord Denning stated:

> I think a strike is a concreted stoppage of work done by men with a view to improving their wages or conditions, or giving vent to grievance, or making a protest about something or other, or supporting or sympathizing with other workmen in such endeavor. It is distinct from a stoppage brought about by an external event such as bomb scare or by apprehension of danger.[10]

The term 'lockout', on the other hand, is defined by the Cambridge English Dictionary[11] as: ''an occasion when an employer prevents workers from entering their place of work until they agree to particular conditions''. In addition, a general definition of the term 'lockout' is provided by Smith and Wood,[12] which considers both 'lock-out' and 'strike' within the same structure:

> …A lock-out involves the closing of a place of employment, the suspension of work or the refusal by an employer to continue to employ any number of his employees. A strike involves cessation of work by a body of employees acting in combination, a concerted refusal to continue work. In the case of both strikes and lock-outs, these actions must be in consequence of a dispute and in each case the aim of the action must be to coerce the employees or employers, as the case may be, to accept or not to accept terms or conditions of, or affecting, employment.

On the other hand, a 'restraint of labor or labor disturbance' may be interpreted more broadly than a 'strike' or 'lock-out'. Whilst a strike or lock-out, as mentioned above, is a consequence of a dispute between employees and employers over terms or conditions of employment, there is no such limitation placed upon a 'restraint of labor or

[6] Indira Carr & Peter Stone, *International Trade Law* (4th ed. 2009) 229.
[7] Alexander McKinnon, 'Administrative Shortcomings and their Legal Implications in the Context of Safe Ports', (2009) 23 *Australian & New Zealand Maritime Law Journal* 186, 203-04.
[8] Cambridge English Dictionary, *Cambridge Dictionaries Online, Strike verb (stop work)*. <http://dictionary.cambridge.org/dictionary/british/strike> at 01 December 2017.
[9] [1975] 2 Lloyd's Rep 314. The Court of Appeal in the later case referred to the following case in defining the term 'strike': *Williams Brothers (Hull) Ltd v Namlooze Vennootschap WH Berghuys Kolenhandel* (1915) 21 Com. Cas. 253, p. 257.
[10] 'Ibid 317'.
[11] Cambridge English Dictionary, *Cambridge Dictionaries Online, Lockout noun*. <http://dictionary.cambridge.org/dictionary/british/lockout> at 05 December 2017.
[12] I.T. Smith & J.C. Wood, *Employment Law* (13th. ed. 2017) 127.

labor disturbance' which may be carried out by individuals from outside the workplace, whose intentions may have nothing to do with terms or conditions of employment. Such a matter may, for example, be politically motivated by individuals, for example, activists, seeking a forum for their grievances.[13]

If the above definitions are applicable, then the strike, lock-outs, and restraint of labor or labor disturbance exception clause, not only covers direct loss but also losses caused due to the after-effects of a strike, lock-outs, or restraint of labor or labor disturbance. For example, loading could be delayed as a result of congestion due to a strike, even though the strike had ended by the time the ship calls at the port of loading.[14] On the other hand, if the above definitions are applicable, then the strike, lock-outs, and restraint of labor or labor disturbance exception clause, would not be applicable for a strike, lock-outs, and restraint of labor or labor disturbance which began only after laytime had ended. Thus, in *Union of India v Compania Naviera Aeolus*,[15] a United Kingdom case, Lord Reid explained that:

> If a strike occurs before the end of the laytime neither party can be blamed in any way. But if it occurs after demurrage has begun to accrue the owner might well say: true, your breach of contract in detaining my ship after the end of the laytime did not cause the strike, but if you had fulfilled your contract the strike would have caused no loss because my ship would have been on the high seas before it began: so it is more reasonable that you should bear the loss than that I should. So it seems to me right that if the respondents are to escape from paying demurrage during this strike they must be able to point to an exceptions clause which clearly covers this case. And in my judgment they cannot do that.[16]

3 The Origin of the Caspiana Clause

Bills of lading usually contain a clause that allows the carrier to discharge goods for a strike, lockout, or restraint of labor or labor disturbance port at any other safe and convenient port. Such clause is currently known as the 'Caspiana Clause', which is named after the English case *Renton (GH) & Co. Ltd. v Palmyra Trading Corp. of Panama*.[17] In that case, timber was shipped in the vessel, *Caspiana*, from Canada to the United Kingdom. Four bills of lading were issued: three of them provided for delivery at London and a fourth for delivery at Hull. However, the vessel, *Caspiana*, diverted and proceeded to Hamburg and there discharged the timber, since the United Kingdom's London and Hull ports were strike-bound. The shipowners (the defendants) took no steps to forward the timber to the discharge ports (London and Hull) once the strike had ended. Thus, the shipowners made the timber available to the cargo interests (the plaintiffs) at Hamburg, and the cargo interests were consequently compelled to sustain additional expenses in order to have their timber brought to the United Kingdom ports. Therefore, the dispute arose over the cost of shipment sustained by the cargo interests, which they sought to recover from the shipowners.[18]

The question was whether the shipowners, who issued the bills of lading, could rely upon the terms of the so-called 'strike clause', which gave a right to the shipowners to deliver the timber at Hamburg.

According to the cargo interests, the cost of shipment was the liability of the shipowners. The latter contended that the following strike clause in the bills of lading exempted them from liability:

> 14(c) Should it appear that ... strikes ... would prevent the vessel from ... entering the port of discharge or there discharging in the usual manner and leaving again ... safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port ... (f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfillment of the contract...[19]

The cargo interests argued that the strike clause offended Article III(8)[20] of the Hague Rules, and that the discharge at Hamburg did not amount to a 'reasonable deviation' under Article IV(4)[21] of the same rules.[22]

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[13] Susan Hodges, *Cases & Materials on Maritime Insurance Law* (2015) 583.
[14] See the English Case: *Leonis v. Rank (No. 2)* (1908) 13 Com. Cas. 215.
[15] [1962] 2 Lloyd's Rep. 175.
[16] 'Ibid 179'.
[17] [1957] AC 149.
[18] 'Ibid 149-51'.
[19] 'Ibid 162'.
[20] Article III(8) of the Hague Rules provides: 'Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this

At the trial, Justice McNair held that the strike clause was invalid since it was inconsistent with the duty of the shipowners to discharge the timber at the port named in the bill of lading as the destination. Further, his Honour held that the clause constituted an exemption from the shipowner's liability under Article III(2)[23] of the Hague Rules, which clearly provides that the shipowner shall 'properly discharge' the cargo. As a consequence, the discharge should take place at the proper port. According to the learned judge, the shipowner should be allowed to discharge the timber elsewhere if the port of destination is strike-bound, but in this case the shipowners had to bear the cost of warehousing the cargo at a substitute port and of forwarding the cargo to its destination. Thus, shipowners could not treat the discharging of the timber elsewhere as 'due fulfillment of the contract'.[24]

The House of Lords overturned the decision at first instance. Viscount Kilmuir LC quoted Jenkins LJ:[25]

> ... It is necessary in considering the authorities on which Mr. Mocatta (counsel for the appellants) relies to consider carefully the form of the deviation clauses in each case. They were invariably in so extensive a form that, if they were fully and literally construed, the shipowners had a complete discretion to delay intolerably and so defeat the main object and intent of the contract if they so desired. The distinction between these cases and that before your Lordships' House has been so well stated by Jenkins LJ that I find it impossible to improve on his words, which I quote: ... there is a material difference between a deviation clause purporting to enable the shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so, and provisions such as those contained in clause 14(c) and (f) in the present case, which are applicable and operative only in the event of the occurrence of certain specified emergencies. The distinction is between a power given to one of the parties which, if construed literally, would in effect enable that party to nullify the contract at will, and a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either arising to prevent or impede the performance of the contract in accordance with its primary terms.[26]

Viscount Kilmuir LC also argued that Article III(2) of the Hague Rules did not require goods to be transported from a certain port to another if the contract said they need not be moved in a certain event. He also argued that the nature and ordinary meaning of the obligation of the shipowners to 'discharge properly' meant 'in accordance with a sound system' and not at a particular place. As a consequence, the strike clause did not extend the power to deviate permitted by the Hague Rules, but rather defined the contractual voyage to be performed in certain circumstances.[27]

Consequently, the House of Lords held that the strike clause defined the contractual voyage, and was not inconsistent with the Hague Rules. Consequently, there was no need for the shipowners to rely on Article IV(4) to justify their deviation.[28]

Although the above decision could be considered as the leading case dealing with strike clauses, its application may create certain problems, which are explained below.

4 The Problem of the Caspiana Clause

Simon Baughen[29] argues that distinguishing between obligations and exceptions clauses can create problems if we consider the following clauses:

Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability'.

[21] Article IV(4) of the Hague Rules provides: 'Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom'.

[22] 'Supra note 17, 165'.

[23] Article III(2) of the Hague Rules provides: 'Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried'.

[24] 'Supra note 17, 160'.

[25] [1956] 1 QB 462, 502.

[26] 'Supra note 17, 164'.

[27] 'Supra note 17, 166'.

[28] For a detailed discussion of the facts and the decision of the House of Lords in this case, see Martin Dockray, *Cases & Materials on the Carriage of Goods by Sea* (4th ed. 2016) 90, 426, 428.

[29] Simon Baughien, *Shipping Law* (6th ed. 2015) 105-106.

(1) Transshipment clauses: Such clauses usually contain a liberty for the shipowner to transship coupled with a clause providing that the carrier's liability shall end once the goods are not under its possession. Article III(8) of the Hague Rules will not apply on the above liberty for the shipowner to transship, as held by Branson J in the English case *Marcelino Gonzales Y Compania S en C v. James Nourse Ltd*.[30] In that case, goods were damaged following discharge into lighters. The carrier was not liable because such discharge fell within a liberty to transship, and thus, the carrier was entitled to rely on the exceptions contained in the bill of lading. In this context, Simon Baughen[31] argues that:

> The classification of the second part of a transshipment clause, though, is unclear. By its wording it would seem to define the scope of the carrier's contractual undertaking contractually in exactly the same way as the strike clause in *Renton (GH) & Co. Ltd. v. Palmyra Trading Corp. of Panama*.[32] On the other hand, it could be argued that it is more in the nature of an exceptions clause if the liberty to transship can be invoked wholly for the commercial convenience of the carrier. In contrast, the strike clause in *Renton (GH) & Co. Ltd. v. Palmyra Trading Corp. of Panama* was directed at a specific problem arising through the actions of a party over which neither the carrier nor the cargo owner had any control. *Dicta* in *Holland Colombo Trading Society v. Alawdeen*[33] suggest such a clause may be caught by Article III(8). However, the decision predates *Renton (GH) & Co. Ltd. v. Palmyra Trading Corp. of Panama* and the *dicta* make no reference to the critical distinction between obligations and exceptions clauses. If such a clause is, in truth, an obligations clause, the carrier may find that it is subject to restrictive construction, such as that adopted by Brandon J in *The Berkshire*.[34]

(2) Identity of carrier and demise clauses: Such clauses allow the claimant to sue the party named as carrier by the clause. This may create confusion as to whether the clause exonerates the party who would, in the absence of the clause, be held to be the carrier. Nevertheless, given the use of the word 'carrier' in the singular in the Hague Rules, it is likely that the English courts would hold that there could be only one carrier under those Rules; i.e. the party defined in the clause and no other.

(3) Free in and free out clauses: Such clauses distribute liability between the shipper and receiver for loading and stowing, and discharge. In the English case *The Jordan II*,[35] the Court of Appeal held that such clauses constitute valid obligation clauses, such that Article III(8) of the Hague Rules does not apply to them. In that case, goods were carried from India to Spain under a bill of lading which incorporated the terms of a STENMOR ore charter. The freight clause under the bill of lading, Clause (3) provided that the charter was on FIOST ('free in, out, stowed and trimmed') terms, whilst Clause (17) provided that 'shipper, charterer, receiver' were to load, trim and discharge the goods. Those clauses relieved the shipowner not only of the costs of these operations, but also of liability for them. The *Jordan II* case was decided by the House of Lords.[36]The House of Lords held that that a bill of lading carrier could rely on FIOS (free in, out, stowed) clauses, incorporated from a charterparty, to contract out of liability for loading, stowing and discharging the goods. Thus, incorporation of the Hague Visby Rules, specifically Article III(2) and (8), does not render the FIOS clauses of the contract null and void. Parties are free to determine and allocate liability by their own contract as long as such clauses are extremely clear and precise. Lord Steyn noted that long-standing precedent is to the effect that such clauses are permissible and that in such circumstances the carrier is not liable. Thus, the rule in *Renton (GH) & Co. Ltd. v. Palmyra Trading Corp. of Panama*[37] had stood for almost fifty years. Lord Steyn concluded that even if he had been convinced that the cargo owners' interpretation of the Hague/Hague-Visby Rules was correct, the case against departing from Renton is nevertheless overwhelming.

In conclusion, the inclusion of the above clauses in bills of lading governed by the Hague Rules or the Hague-Visby Rules are not construed as a lessening of the carrier's obligation towards cargo management under Art III(2) and

[30] [1936] 1 KB 565.
[31] Simon Baughien, above n [29], 105.
[32] 'Supra note 17'.
[33] [1954] 2 Lloyd's Rep. 45.
[34] [1974] 1 Lloyd's Rep. 185.
[35] [2003] EWCA Civ. 144; [2003] 2 Lloyd's Rep. 87, CA.
[36] [2005] UKHL 49; [2005] 1 Lloyd's Rep. 57, 62.
[37] 'Supra note 17'.

therefore void under Art III(8). Article III(2) of the Hague Rules,[38] as interpreted in *Renton (GH) & Co. Ltd. v. Palmyra Trading Corp. of Panama*,[39] applies only to the method of loading, carrying and discharging and not to the place of discharge. As a consequence, whenever there is a Caspiana clause, the consignee will not be able to recover the cost of transshipping the goods to the original destination once the strike is over.[40]

5 The Problem of Charterparties

None of the international mandatory liability regimes (Hague, Hague-Visby, Hamburg, and Rotterdam Rules) apply to the relationship between the charterer and the owner. They do apply, however, to a bill of lading holder (other than the charterer).[41] Therefore, freedom of contract between the charterer and the owner applies, making the application of any strikes, lock-outs, restraint of labor or labor disturbance clauses dependent on the interpretation of the clauses. The Rotterdam Rules 2008, on the other hand, have another approach to naming the persons entitled to mandatory protection, not including the charterer.[42] This means that as between the owner and the bill of lading holder (or person with a status defined by the Rotterdam Rules 2008), the mandatory regime prevails, notwithstanding what is mentioned above concerning the nature of the regimes as to their non-applicability on the relationship between the charterer and the owner.

It is worthwhile to mention that even when the international mandatory liability regimes do not apply to the relationship between the charterer and the owner, and freedom of contract exists between the charterer and the owner, the exclusion clauses will still be effective under the contract in protecting the shipowner so long as they are clearly worded.[43] However, in many cases the exclusion clauses might not be clear in the way they are added in the charter. Such clauses, whether excusing the carrier from breaches, relieving the carrier of certain obligations, or excluding or reducing the carrier's liability in liquidated damages, are exclusion or exceptions clauses, and as a consequence, must be clearly expressed if they are to have that effect. Unclear or ambiguous clauses will be ineffective for that purpose. They must be clearly worded[44]. In the English case, *The Kalliopi A*,[45] a ship was chartered for the carriage of goods of shredded scrap from Rotterdam to Bombay. The ship was affected by congestion both during laytime and thereafter. The charterers claimed to be exempted from liability to pay demurrage by a clause in the charter, which provided that: '… unavoidable hindrances which may prevent … discharging … always mutually excepted.' The court held that the clause was not clear enough to excuse the charterers from any liability in respect of periods when the ship was on demurrage, and in consequence, charterers were in breach of contract. However, if such clauses are clear, then charterers might be able to escape liability. In the English case, *President of India v N G Livanos Maritime Co, The John Michalos*,[46] clause (62) of the charter provided that: 'Charterers shall not be liable for any delay in … discharging … which delay … is caused in whole or in part by strikes … and any other causes beyond the control of the charterers'. Other clauses of the charter dealt with causes beyond the charterers' control which interrupted laytime. The ship came on demurrage at the discharge port and was then delayed for twenty-six days by a strike. The court held that clause (62) was clear enough to relieve the charterers from liability for demurrage.

In conclusion, it is a basic rule that the shipowners must deliver the cargo in the same order and condition as it was when shipped. Charterparties and bills of lading contain provisions relating to the shipowner's liability in this regard and also contain specific clauses listing exceptions exonerating the shipowner from liability. The carrier who seeks the benefit of these exception clauses has the burden of providing clear clauses, in addition to proving that the loss or damage was caused by an excepted peril.

[38] See also Article III(2) of the Hague-Visby Rules 1968.
[39] 'Supra note 17'.
[40] Indira Carr & Peter Stone, above n [6], 225.
[41] See Article V of the Hague Rules 1924, Article V of the Hague-Visby Rules, Article (II/3) of the Hamburg Rules 1978, and Article (6) of the Rotterdam Rules 2008.
[42] See Article (7) of the Rotterdam Rules 2008.
[43] Michael P. Furmston, *Cheshire, Fitfoot & Furmston's Law of Contract* (17th ed. 2017) 213-214.
[44] *The Forum Craftsman* [1991] 1 Lloyd's Rep 81, *per* Hobhouse J**.**
[45] *The Kalliopi A* [1988] 2 Lloyd's Rep 101, CA, applied in *The Lefthero* [1992] 2 Lloyd's Rep 109, CA and *The Solon* [2000] 1 Lloyd's Rep 292.
[46] [1987] 2 Lloyd's Rep 188.

6 The Hague, Hague-Visby, Hamburg, and Rotterdam Rules and the Caspiana Clause

Carriers may declare force majeure on shipments once a port is shutdown while shippers can be socked with hundreds or even thousands of dollars worth of additional freight costs to get their cargo to its final destination. Carriers may discharge cargo in a port other than the one agreed with the shippers. As a consequence, shippers will have to pay demurrage and reloading costs to bring the cargo back to its final destination specified on the bill of lading. Therefore, the basic problem is whether the carrier should be held liable to pay wholly or partially the transfer costs to bring the goods back from the substitute port to the original port specified in the bill of the lading. This leads us to examine and consider what, in reality, the international mandatory liability regimes cover.

Article (IV/2/j) of the Hague Rules 1924 and the Hague-Visby Rules 1968 provides: 'Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general.' In addition, Article III(2) of the Hague Rules 1924 and the Hague-Visby Rules 1968 provides: 'Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.' Whereas, Article III(8) of the Hague Rules 1924 and Hague-Visby Rules 1968 provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

The above Articles define the limits of the carriers' liabilities. Article (IV/2/j) appears to provide an exemption to the carrier or the ship from any damages to the goods resulting from strikes or lockouts or stoppage or restraint of labor. While if we read Article III(2) literally, the provision would require the carrier to perform all tasks mentioned in a proper and careful manner. At the same time, under Article III(8), the provision clearly provides that carriers are not entitled to lessen their liability by adding a clause for that purpose. Of course, as mentioned above, the case law in relation to this issue clearly clarifies that such Rules did not intend to impose a rigid system in this respect and deny the freedom of contract concept. Carriers are bound to play some part in loading and discharging the goods, but they are free to determine by their own contracts each party's role. Thus, the whole contracts of carriage of goods are subject to the Rules but loading and discharging the goods are obligations that are left to the parties themselves to decide. Accordingly, carriers are entitled to rely on any clause in a bill of lading that permits discharge at an alternative port in the event of a strike, lockout, stoppage, or restraint of labor at the contractual discharge port. Therefore, carriers are not liable for the costs of transshipping the goods to the contractual discharge port. If such a clause operates by defining the scope of the carrier's liabilities, then it cannot amount to a 'clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules'.

On the other hand, Article (V/1/2/3) of the Hamburg Rules 1978 provides:

1. 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.
2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.
3. The person entitled to make a claim for the loss of goods may treat the goods as lost if they have not been delivered as required by article 4 within 60 consecutive days following the expiry of the time for delivery according to paragraph 2 of this article.

Article (XXIII/1) of the Hamburg Rules 1978 also provides:

> Any stipulation in a contract of carriage by sea, in a bill of lading, or in any other document evidencing the contract of carriage by sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this Convention. The nullity of such a stipulation does not affect the validity of the other provisions of the contract or document of which it forms a part. A clause assigning benefit of insurance of the goods in favor of the carrier, or any similar clause, is null and void.

The Hamburg Rules 1978 do not contain any provision that exempts the carrier or the ship from any damages to the goods resulting from strikes or lockouts or stoppage or restraint of labor. The Rules expressly clarify that the basis of liability of the carrier is assumed liability, as provided under Article (V/1) above. Thus, the shipper or consignee is responsible for loss and delay in delivery of the goods only when the carrier proves he 'took all measures that could reasonably be required to avoid the occurrence and its consequences'. That means the carrier is liable for loss, damage, or delay in delivery of goods, if the loss occurred while the goods were under the carrier's charge, unless the carrier proves that he took all measures that would reasonably be required to avoid the occurrence and its consequences. Accordingly, if we read Article (V/1/2/3) literally, the provision requires the carrier to deliver the goods to the consignee at the port of discharge. However, the 'common understanding' at the end of the Hamburg Rules 1978 provides:

> COMMON UNDERSTANDING ADOPTED BY THE UNITED NATIONS CONFERENCE ON THE CARRIAGE OF GOODS BY SEA
> It is the common understanding that the liability of the carrier under this Convention is based on the principle of presumed fault or neglect. This means that, as a rule, the burden of proof rests on the carrier but, with respect to certain cases, the provisions of the Convention modify this rule.

This statement may well cover strikes. Thus, for example, if the carrier shows that a strike caused damage to the goods, then the carrier has shown that there is no fault on his side, unless his fault can be connected with the strike having arisen. The main difference between the Hamburg Rules 1978, on the one hand, and the Hague Rules 1924 and the Hague-Visby Rules 1968, on the other hand, is the liability for delay. The Hague Rules 1924 and the Hague-Visby Rules 1968 do not cover liability of delay of the carrier, while the Hamburg Rules 1978 do. Under the Hamburg Rules 1978, the carrier's obligations are not only to carry the goods to the place of destination, but also to deliver them to the consignee. Still, whenever the Hamburg Rules 1978 apply, carriers may not be entitled to depend on any clause in a bill of lading that permits discharge at an alternative port in the event of a strike, lockout, stoppage, or restraint of labor at the contractual discharge port; however, carriers may be entitled to depend on the 'common understanding' of the Hamburg Rules 1978 if they show that a strike caused damage to the goods, and consequently they will not be liable for the costs of transshipping the goods to the contractual discharge port. This view prevailed in the formulation of the Hamburg Rules, but lost out in the Rotterdam Rules 2008 as we shall see below. Thus, the Hamburg Rules 1978 are not really that different from the Hague and Hague-Visby Rules, except for the fact that the nautical fault exception was not included in the Hamburg Rules.[47]

Nowadays, the Hamburg Rules are strongly opposed by shipowners as they fear that such Rules will increase the carrier's liability, while shippers believe that such Rules set a fair balance between the liabilities of the carrier and the shipper. This situation led to the creation of the Rotterdam Rules 2008. Article (17) of the Rotterdam Rules 2008 provides the basis of liability of the carrier:

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.
2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article 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.
3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:

[47] The Hague and Hague-Visby Rules catalogue, under Article (IV/2), is non-independent, except for nautical fault and fire, in relation to the catalogue's q)-clause which provides that the carrier is not liable for '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'. The rest of the catalogue (except for nautical fault and fire) contains only examples of situations where the carrier has no fault, such as act of God or quarantine restrictions.

.....

(*e*) Strikes, lockouts, stoppages, or restraints of labour;

.....

(*i*) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;

.....

6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

Article (13) of the Rotterdam Rules 2008 also imposes specific obligations on the carrier:

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.
2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

The Rotterdam Rules 2008, similarly to the Hague Rules 1924 and Hague-Visby Rules 1968, deals with strikes, lockouts, stoppage, and restraint of labor. By reading Article (17/3/e), the provision appears to provide an exemption to the carrier from any loss, damage, or delay to the goods resulting from strikes or lockouts or stoppage or restraint of labor. Unlike the Hamburg Rules 1978, the Rotterdam Rules 2008 initially clarify that the basis of liability of the carrier is not assumed liability, as provided under Article (17/1) above, since the burden of proof is on the claimant (the shipper or consignee) to prove 'that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility'. Then, under Article (17/2/3), the Rotterdam Rules 2008 clarify that the basis of liability of the carrier is assumed liability, where the cargo interests have no burden of proof concerning the primary stage of the carrier's fault issue, but will have it in a rebuttal situation.Thus, the carrier is responsible for loss, damage, and delay in delivery of the goods only when it proves that the cause of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in Article (18).[48] This leads us to the conclusion that the Rotterdam Rules 2008 apply the same approach as the Hague Rules 1924, the Hague-Visby Rules 1968 and even the Hamburg Rules 1978, especially when we at first glance read Articles (13) and (17) of the Rotterdam Rules 2008, but that is not the case.

The Rotterdam Rules 2008 under Article (11) provide: 'The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.' In addition, under Article (13) of the same Rules, 'the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars'. This means that the carrier is free to include other terms in the contract of carriage that are outside the Rules. If so, then what type of terms could possibly be included? Article (XIII) above gives that right to the carrier and the shipper to include any terms that are not restricted by the Rotterdam Rules 2008. Thus, the carrier and the shipper may include a liberty clause such as the 'Caspiana Clause', which would permit the carrier to discharge the goods at a different place other than the original port of discharge under certain exceptional circumstances, such as strike, lockout, and restraints of labour. Such a clause would be interpreted as providing an alternative port of discharge, which can be chosen by the carrier under certain circumstances and would not be automatically invalidated as a derogation from the carrier's obligation under Article (11) of the Rotterdam Rules 2008.

The Rotterdam Rules 2008 provide new provisions that explain how the carrier can be instructed by the shipper or the consignee in certain circumstances. Article (28) of the same Rules provides:

[48] Article (18) of the Rotterdam Rules 2008 provides: '*Liability of the carrier for other persons*
The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:
(*a*) Any performing party;
(*b*) The master or crew of the ship;
(*c*) Employees of the carrier or a performing party; or
(*d*) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.'

> The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

In addition, Article (29) of the same Rules provides:

> 1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:
>   a. For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and
>   b. For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.
> 2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

The above Articles emphasise, under certain circumstances, that the carrier has a general duty of care with respect to the goods in order to protect the interests of the shipper. Before the existence of new telecommunications technologies, the carrier was not able to communicate with the shipper during the carriage. Therefore, the carrier had to act on its own in such circumstances. However, at present, direct communication is available, and the carrier, under Articles (28) and (29) of the Rotterdam Rules 2008, is obliged to ask for instructions relating to the goods from the shipper,[49] and at the same time, the shipper is also obliged to provide such instructions. The Rotterdam Rules 2008 do not oblige the carrier to carry out any instructions given under those Articles. The carrier may not be reasonably able to execute the instructions, or the instructions given to the carrier may clearly not be in the proper interests of the goods. In such circumstances, the carrier's general duty of care for the goods shall override the instruction**s.**[50] The Rotterdam Rules 2008, under those Articles, provide a new vision for dealing with liberty clauses such as the 'Caspiana Clause', which would permit the carrier to discharge the goods at a different place other than the original port of discharge under certain circumstances, such as strike, lockout, and restraints of labour. Such instructions under those Articles would help carriers and shippers to deliver the goods to a safe port if certain circumstances occurred at the original port of discharge, but still would not solve the problem of who shall handle the costs of transshipping the goods to the original port of discharge once the circumstances are ended. Of course, it should be remembered that the Rotterdam Rules 2008 are not in force. Time will show whether the Rotterdam Rules 2008 will become the international norm, or whether they will be moved to the dusty archives of maritime law conventions.

In conclusion, it is necessary to consider what the above international mandatory liability regimes cover in reality. In view of the cargo interests, but not in view of pure documentary issues, it is clear that the international mandatory liability regimes cover the carrier's liability due to loss of or damage to the goods. In addition, the Hamburg Rules 1978 and the Rotterdam Rules 2008 include provisions on the carrier's liability for delay in the delivery of the goods. The word 'loss' often used in the international mandatory liability regimes does not cover loss in the economic sense, but is meant to cover the physical loss of the goods.[51] This shows when the wording is 'loss of or damage to the goods'.[52] A clear reflection of this is Article (V/1) of the Hamburg Rules 1978, which provides: 'The carrier is liable for loss resulting from loss of or damage to the goods...'. 'Loss' is in double use to make it completely clear that the provision is dealing with physical loss with economic consequences. The word 'loss' does not in this context cover costs arisen for the cargo interests due to varying other circumstances, such as in the case where goods have been carried from a substitute port to the original port with subsequent additional costs. There is no loss of or damage to the goods themselves. There might be delay in delivery, but that in itself creates problems as the Hague Rules 1924 and the Hague-Visby Rules 1968 do not cover so-called pure delay, but only loss of or

[49] Article (51/1/a) of the Rotterdam Rules 2008 provides: 'The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party.'
[50] Gertjan van der Ziel, 'Chapter 10 of the Rotterdam Rules: Control of Goods in Transit', (2009) 44 *Texas International Law Journal* 375, 383.
[51] See Yvonne Baatz & Others, *The Rotterdam Rules: A Practical Annotation* (2013) 189; Francesco Berlingieri, 'A Comparative Analysis of the Hague-Visby Rules, The Hamburg Rules and The Rotterdam Rules', (2009) *General Assembly of the AMD, Marrakesh 5-6 November 2009*, 1, 33; Robert Hallawell, 'Allocation of Risk between Cargo Owner and Carrier', (1979) 27(3) *The American Journal of Comparative Law* 357.
[52] See Articles (V/1), (V/4/a/i), (VII/1), (IX/3), (XXIII/4), (XXIV/2) of the Hamburg Rules 1978, and Articles (17/1), (22/1), (22/3), (23/1), (23/2), (25/3), (52/4), (60), (81/a) and (82) of the Rotterdam Rules 2008.

damage to the goods caused by such delay.[53] The above mentioned English case *Renton (GH) & Co. Ltd. v Palmyra Trading Corp. of Panama* case[54] is normally taken up when deciding the validity of the free-in-and-out (FIO) clause or its variations. The conclusion of the Court in that situation was that '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'.[55] The same result prevails in applying the international mandatory liability regimes.[56]

The legal concept of deviation is another issue.[57] Article (IV/4) of the Hague Rules 1924 and the Hague-Visby Rules 1968 provides:

> Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

The criterion for 'reasonable deviation' under the above Rules is the existence of a danger and not in its cause.[58] The Hamburg Rules 1978, however, under Article (V/6), replace deviation with 'measure to save life' or 'reasonable measure to save property'.[59] The above mentioned English case *Renton (GH) & Co. Ltd. v. Palmyra Trading Corp. of Panama* case[60] follows the same result and conclusion as above: as long as the contract is fulfilled properly, the exercise of the carrier's right to select a substitute port is no deviation, but is a performance of the contractual voyage. However, this is not an absolute state of law. The deviation shall be reasonable as expressly mentioned in Article (IV/4) of the Hague Rules 1924 and the Hague-Visby Rules 1968, but it is unclear under those Rules whether the carrier shall be liable and entitled to the limitation of liability if the deviation is not to save or attempt to save life or property at sea or is not a reasonable deviation. If the carrier wants to protect itself by applying Article (IV/4) above, it shall exert all reasonable methods to avoid the strike and its consequences. Accordingly, when the carrier fails to take such reasonable exertions, then it will not be protected by the strike clause. Thus, the strike clause will not be applicable if the strike at the port of loading does not prevent the carrier from loading the goods. Therefore, an inexcusable deviation from the contemplated course exposes the goods to greater danger than has been agreed and accordingly may cause the loss of or damage to the goods. Therefore, where the carrier has unreasonably deviated from the agreed or advertised course of the voyage, he is violating the contract of carriage. The carrier accordingly must not be given the benefit of any of the exemption clauses such as the strike clause contained in the bill of lading.

The Rotterdam Rules, conversely, are highly restrictive in applying deviation rules and principles outside the scope of the Rules, as seen under Article (24). The Rotterdam Rules take the further step of clarifying that a deviation, in and of itself, does not deprive the carrier of any of its rights under the Rules. Article (24) explicitly provides:

> When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in Article 61.

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[53] See Nil Kula Degirmenci, 'Article 12(3) of the Rotterdam Rules: In the Middle of Serious Concerns and Important Features', (2014) 45(2) *Journal of Maritime Law & Commerce* 233, 249; Omer Berkay Dagli, 'Analyze Obligations and Liability of the Carrier under the Rotterdam Rules with Comparison Between Vosby Protocol and Hamburg Rules', (2013) *Proficiency in Admiralty Law Term Project, Istanbul Technical University-Maritime Faculty* 1, 9; Jose Angelo Estrella Faria, 'Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules', (2009) 44 *Texas International Law Journal* 277, 298.

[54] 'Supra note 17'.

[55] A direct quote from Thomas Edward Scrutton & Others, *Scrutton on Charterparties and Bills of Lading* (23rd ed. 2015) 430-431.

[56] Hakan Karan, 'Any Need for a New International Instrument on the Carriage of Goods by Sea: The Rotterdam Rules?', (2011) 42(3) *Journal of Maritime Law & Commerce* 441, 444.

[57] For a detailed history of the deviation doctrine see, Michael F. Sturley, *Deviation, Benedict on Admiralty: Carriage of Goods by Sea*, Vol. 2A, chapter XII (7th rev. ed. 2007); Steven F. Friedell, 'The Deviating Ship', (1981) 32 *Hastings Law Journal* 1535.

[58] See, e.g., the English case *Kish v. Taylor* [1912] AC 604, where the House of Lords held that deviation resulted from initial unseaworthiness is justified.

[59] Article (V/6) of the Hamburg Rules provides: 'The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.' See Dorian Tozaj & Ermal Xhelilaj, 'Hamburg Rules v. Hague Visby Rules: An English Perspective', (2011) 13 *Constanta Maritime University Annals* 30, 32 (arguing that apparent permission of deviation for the sole purpose of saving property remains favorable to the carrier at the shippers expense).

[60] 'Supra note 17'.

In other words, the Rules have an explicit provision - Article (61) - under which a carrier can lose its limitation rights.[61] Article (61) is the exclusive remedy for claimants seeking to break limitation. Thus, if a carrier's breach, including a breach that qualifies as a deviation, falls within the terms of Article (61), then the carrier loses its limitation rights under that Article. Therefore, there is no place in the Rules for a supplementary remedy created by the courts that would give claimants an additional ground to break limitation. This clarifying provision will be a welcome change in United States law.[62]

7 The Economic Factor

As mentioned above, bills of lading and Charterparties include the name of the port of discharging the goods, as agreed with the shipper or charterer. The carrier, therefore, shall deliver the goods to that port of discharge on a certain date as agreed under the bill of lading or the charter. If a strike, lockout, or restraints of labour happened at the port of discharge, the carrier, under such circumstances, might not be able to discharge the goods on time agreed on under the bill of lading or the charter. Thus, the carrier usually, under such circumstances, discharges the goods at the nearest safe port. In such a case, carriers usually take no further steps to forward the goods to the port of discharge once the strike, lockout, or restraints of labour is ended. Therefore, the carrier would make the goods available to the cargo interests at the safe port, and the cargo interests would be compelled to sustain additional expenses in order to have their goods brought back to the original port of discharge. Such expenses might be too high, where the cargo interests would raise a dispute over the cost of transshipping the goods, which they sought to recover from the carrier.

The above dispute can prevent people from receiving adequate compensation to match their losses in some scenarios, and therefore, will not create uniformity and certainty in the outcome of claims throughout the world's maritime tribunals. If consistency is achieved in receiving adequate compensation, then those who invest in and operate shipping ventures can do so with full knowledge of their rights and duties.

In reality, if the problem of who shall handle the costs of transshipping the goods to the original port of discharge is solved, then there is no direct evidence that proves that such a solution would create uniformity and certainty in the outcome of maritime claims, and thereby reduce legal costs. Nevertheless, there are sensible arguments and indirect evidence that might prove this issue.

Rationally, the non-uniformity and uncertainty in the outcome of maritime claims will make carriers offer different freight rates depending on each individual case. Insurers, on the other hand, will quote different premiums, and therefore, expense and delay will arise in examining the details of each individual bill of lading or charter as in relation to the liability of carriers. Similarly, buyers and sellers of goods will not be able to agree on the price of the goods until they know the cost of carriage and insurance.[63] As a result, when insurance is required by the buyer of the goods, the seller shall provide at the buyer's expense strikes, lockout, stoppage, and restraints of labour risk insurances if procurable.[64]

Consequently, the economic purpose of creating uniformity and certainty in the outcome of maritime claims is to enable carriers to offer standard freight rates for all cases, on the ground of knowing that their liabilities are limited

[61] Article (61) of the Rotterdam Rules provides: *Loss of the benefit of limitation of liability*: '1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result. 2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.'

[62] See, e.g., Martin Davies, *Deviation is Alive and Well and Living in New South Wales,* (1991) 19 *Australian Business Law Review* 379 (describing a case in which the old deviation principles still applied); but see, e.g., Simon Baughen, 'Does Deviation Still Matter?', (1991) *Lloyd's Maritime & Commercial Law Quarterly* 70 (arguing that the traditional deviation doctrine should no longer apply in light of recent developments).

[63] Kenneth Diplock, 'Conventions and Morals-Limitation Clauses in International Maritime Conventions', (1969-1970) 1 *Journal of Maritime Law & Commerce* 525, 527.

[64] John Michael Pierobon, *CIF - Cost, Insurance and Freight Responsibilities*, March 20, 2010. <http://www.pierobon.org/export/ch11/cifr.htm> at 15 December 2017.

to a figure.[65] Thus, there shall be no delay and cost to carriers and to the cargo interests, which may arise by valuating the shipment and by changing the freight rate accordingly.[66]

The above sensible arguments are recognized by various national courts. For example, in *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*,[67] a United States case, the Second Circuit stated that:

> At the time of its enactment [Hague Rules 1924] the House Report, H.R. Rep. #2218, 74th Cong., 2d Sess. 7 (1936), said, the uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading.[68]

To cut a long story short, as Marten Bevan[69] stated: 'There is essentially a trade-off in operation between the costs of undertaking a risky maritime adventure, notably insurance costs, and the amount of compensation available if something goes wrong.'

8 Conclusion

One of the most troubling features of carriage of goods by sea is determining the extent the carriers' or charterers' liabilities. The shortcomings in the provisions of international conventions that relate to carriage of goods by sea is very obvious in solving the 'Caspiana Clause' problem of who shall handle the costs of transshipping the goods to the original port of discharge after a strike, lockout, stoppage, or restraints of labour is ended.

The trend of various national courts in solving the 'Caspiana Clause' problem under the Hague Rules 1924 and the Hague Visby-Rules 1968 is that carriers shall not be liable for compensating the cargo interests for such transshipment. Strikes, lockout, stoppage, or restraints of labour at the port of discharge are circumstances out of the carrier's control: therefore, the carrier is surely not liable for the existence of such circumstances. However, cargo interests are also not liable for the existence of such circumstances, and therefore, it is unfair to consider such a situation to be handled in expense and costs by cargo interests alone.

Case law under the Hamburg Rules 1978 does not yet deal with the 'Caspiana Clause' problem, but it is clear from the provisions of those Rules that a vague solution is suggested under those provisions. Under the Hamburg Rules 1978, the carrier is obliged to carry the goods to the place of destination and deliver them to the consignee. Thus, carriers have no right to rely on any clause in bills of lading or charterparties that permits discharge at an alternative port in the event of a strike, lockout, stoppage, or restraint of labor at the contractual discharge port. However, carriers may rely on the 'common understanding' of the Hamburg Rules 1978 if they show that strike caused damage to the goods, and as a consequence, they will not be liable for the costs of transshipping the goods to the contractual discharge port. This solution is also unfair for cargo interests since, as stated above, cargo interest in circumstances of strikes, lockout, stoppage, or restraints of labour at the port of discharge are not liable for the existence of such circumstances.

The Rotterdam Rules 2008, on the other hand, deal with the 'Caspiana Clause' problem in pretty much the same way as the Hague Rules 1924, the Hague-Visby Rules 1968 and the Hamburg Rules 1978 did, but have added a new system to deal with liberty clauses such as the 'Caspiana Clause'. Carriers under that system are obliged to follow

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[65] Kenneth Diplock, 'Conventions and Morals-Limitation Clauses in International Maritime Conventions', (1969-1970) 1 *Journal of Maritime Law & Commerce* 525, 527. See also Proshanto K. Mukherjee & Abhinayan Basu Bal, above n [1], 606 (Arguing that '…those who are trading through service contracts lose some of the economic efficiency benefits when they submit themselves to any existing carriage of goods regime. The Rotterdam Rules provides an opportunity to create a legal framework within which those trading through volume contracts can operate within a carriage liability regime that is adequately flexible so that certain derogations can be made which will inure to the benefit of the parties in terms of economic efficiency and at the end of the day benefit international trade and the trading community as a whole.').

[66] **S**ee Kenneth Diplock, above n [62], 529.

[67] 422 F.2d 7 (2d Cir. 1969).

[68] 'Ibid 14-15'. See also *Tessler Brothers (B.C.) Ltd. v. Italpacific Line*, 494 F.2d 438, p. 445 (9th Cir. 1974) (One of the specific purposes of COGSA [The Hague Rules 1924] was to obviate the necessity for shipper to make a detailed study of the fine print clauses of a carrier's regular bill of lading on each occasion before shipping a package).

[69] Marten Bevan, 'Limitation of Liability for Personal Injury in New Zealand: ACC Meets the Sea', (2006) 20 *Australian & New Zealand Maritime. Law Journal* 16, 17.

the instructions of shippers, or cargo interests if shippers designated such a right to one of the cargo interests, in order to discharge the goods at a different place other than the original port of discharge under certain circumstances, such as strike, lockout, and restraints of labour. Such a system would not solve the problem of those who will handle the costs of transshipping the goods to the original port of discharge once the circumstances are ended. As a result, the Rotterdam Rules 2008 also do not solve the 'Caspiana Clause' problem.

The master or carrier is unlikely to be aware of deficiencies in a port's administration, which would lead to strikes, lockout, stoppage, or restraints of labour. There is, however, the possibility that, where the master or carrier is aware of such deficiencies, he may be negligent in allowing the ship to proceed there. Still, under usual circumstances, the situation represents a contractual allocation of risk between carriers and cargo interests, since administrative shortcomings are capable of rendering a port unsafe.[70]

In conclusion, the present situation of international mandatory liability regimes is that they have shortcomings in their provisions in solving the 'Caspiana Clause' problem. The application of those regimes in courts may well lead to the application of the strikes or lockout clauses. Strikes or lockout clauses in bills of lading or charterparties shall become more specific and vary from clauses that place the entire risk on cargo interests on those that attempt to spread the risks evenly between carriers and cargo interests. The below strike or lock-out clauses are a clear and reasonable example in spreading liability evenly on carriers and cargo interests:

(a) If there is a strike or lock-out affecting or preventing the actual loading of the cargo, or any part of it, when the Vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, the Master or the Owners may ask the Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless the Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, the Owners shall have the option of cancelling this Charter Party. If part cargo has already been loaded, the Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

(b) If there is a strike or lock-out affecting or preventing the actual discharging of the cargo on or after the Vessel's arrival at or off port of discharge and same has not been settled within 48 hours, the Charterers shall have the option of keeping the Vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging until the strike or lock-out terminates and thereafter full demurrage shall be payable until the completion of discharging, or of ordering the Vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after the Master or the Owners have given notice to the Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this Charter Party and of the Bill of Lading shall apply and the vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance to the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

(c) Except for the obligations described above, neither the Charterers nor the Owners shall be responsible for the consequences of any strikes or lockouts preventing or affecting the actual loading or discharging of the cargo.[71]

However, such clauses are imposed by carriers and logically carriers will most likely attempt to avoid spreading liability evenly between them and cargo interests. Thus, there should be a mechanism to impose strikes or lockout clauses in bills of lading or charterparties that spread liability evenly between carriers and cargo interests, but such a mechanism may not be reflected in the provisions of the current international mandatory liability regimes. Therefore, either any of the current international mandatory liability regimes should be amended in order to impose such a mechanism, where for the time being obviously none of them would be amended, or such mechanism would be imposed on the carriers outside the scope of the current international mandatory liability regimes.

[70] Alexander McKinnon, above n [7], 203-04.
[71] BIMCO, *Strike Clause*, March 10, 2010, <https://www.bimco.org/Corporate%20Area/Documents/Clauses/Strike_Clause.asp> at 21 December 2017.