the responsibility for adducing evidence of one particular issue of fact (often referred to as the “evidentiary burden”). Order of proof, on the other hand, related to the sequence in which the facts or allegations had to be proven by one party or the other to the suit during the trial. This traditional distinction between burden of proof and order of proof was understood and applied in marine cargo claims as in other types of litigation.

The text, Marine Cargo Claims, since its first edition (sent to the publisher in 1964), has discussed the burden and the order of proof in this classic sense. The order of the chapters (after the seven first preliminary chapters) has been in the order in which the proof must be made, as I see it. See the discussions surrounding footnotes 127 to 148, infra.

III. Four Basic Principles of Burden of Proof

Four general principles of proof run as unbroken threads through Hague and Hague/Visby Rules jurisprudence. The first three principles are not always apparent but nevertheless are present in every cargo claim where the claimant has properly made his claim and the carrier has properly defended himself. The fourth principle is not as common but is noteworthy.


1) First principle of proof – A carrier is prima facie liable for all loss or damage to cargo received in good order and out-turned short or in bad order

a) A rebuttable presumption of liability

It is the first principle of proof of a marine cargo claim that the carrier is prima facie liable for all loss or damage to cargo received in good order and out-turned short or in bad order.

The carrier having received the goods in good order under a clean bill of lading and having received bad order receipts on delivery is prima facie liable for the loss or damage, which is presumed to have occurred while the goods were in its custody. This presumption reflects art. 3(4) of the Hague and Hague/Visby Rules, which provides that: “Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3(a), (b), and (c).”

Prima facie (at first sight) means that the proof is rebuttable so that the carrier has the burden of making proof sufficient to overturn claimant’s prima facie case. The carrier discharges this burden by showing that the loss or damage was caused by one of the excepted


perils contemplated by art. 4(2)(a) to (q). The point has been reiterated frequently in decisions from the United States, Canada, the United Kingdom and other Commonwealth jurisdictions. This onus on the carrier has been held to flow from "...the common law principle that he who seeks to rely upon an exception in his contract must bring himself within it." 9

The first principle of proof was already well established before the Hague Rules were adopted. It was voiced powerfully by Lord Esher, M.R. in The Glendarroch, a decision which continues to be cited frequently:

It would be enough for the cargo owner to prove the contract and non-delivery. From this, a breach of the obligation of proper and careful conduct would be inferred. Once that was established, it would be for the carrier to bring itself within the exceptional immunity. The onus of doing so would lie upon it.

As Viscount Sumner said in Gosse Millerd, Ltd. v. Can. Government Merchant Marine Ltd., 10

As the cargo in question was shipped in good order and condition and was delivered damaged, in a manner which was preventable and ought


not to have been allowed to occur, there was sufficient evidence of a breach by the carrier of his obligations under Art. III, r. 2 of the Act of 1924, to shift to him the onus of bringing the cause of the damage specifically within Art. IV, r. 2, so as to obtain the relief for which it provides.

Much the same thing was said in Edouard Materne v. S.S. Leerdam: 11

It is well established that a carrier of goods by sea is prima facie liable for damage to cargo received in good condition but which is outturned in a damaged condition at the end of the voyage, unless the carrier can affirmatively show that the immediate cause of the damage is an excepted cause for which the law does not hold him responsible.

When the loss or damage is unexplained, the carrier cannot rebut the prima facie case of the claimant merely by proving that he took reasonable care of the goods. He must explain the cause of the loss. The Fifth Circuit has held: 12

To rebut the presumption of fault when relying upon its own reasonable care, the carrier must further prove that the damage was caused by something other than its own negligence. Once the shipper establishes a prima facie case, under "the policy of the law" the carrier must "explain what took place or suffer the consequences." [The law casts upon the carrier] the burden of the loss which it cannot explain or, explaining, bring within the exception case in which he is relieved from liability.

In Fagundes Sucena v. Miss. Shipping Co., 13 flour was damaged by salt water and the court record failed "to disclose the cause of the damage to the cargo in question":

The merchandise in question, having been received by respondent in apparent good order and condition and having been delivered by respondent in a damaged condition, a prima facie case for the libellant


has been made, and respondent has the affirmative burden of proving that the cause of the damage was one for which it has no responsibility under its bill of lading, or under the Carriage of Goods by Sea Act.

The respondent has failed to carry the burden of proving that the cause of the damage was one for which it has no responsibility under the bill of lading or the Carriage of Goods by Sea Act.

In *Nisso-Iwai v. Stolt Lion*, the Second Circuit reversed the trial judge and imposed the rule that once the shipper proves good order at shipment and bad order at discharge there is a *prima facie* case which places the burden of proof on the carrier. The Second Circuit repeated its astonishment in the same case to the same judge who was still reluctant to impose on the carrier the burden of proving absence of fault (when, of course, it could not prove an excusable exception).

In Canada, the same view prevails. In *Cargill Grain Co. v. N.M. Paterson & Sons*, for example, Wells D.J.A. relied on Wright J. in *Gosse Millerd, Ltd. v. Can. Government Merchant Marine Ltd.*, and held:

> ... the fact that the goods were damaged raises a *prima facie* case of negligence, which can only be met by showing what actually occurred.

In *Kaufman Ltd. v. Cunard Steamship Co. Ltd.*, Smith D.J.A. held:

> It having been established at least *prima facie* that the fires were "shipped in good condition internally" the shipowner, in order to escape liability, was obliged to prove either that the damage existed when he accepted the goods for carriage or that he is entitled to the benefit of the exemptions afforded by the Water Carriage of Goods Act, 1936.

France has taken the same position. La *Cour d’Appel de Bordeaux* held that when the cause of damage cannot be determined, the damage is presumed to have taken place during the maritime part of the carriage.

Le *Tribunal de commerce du Havre* held:

> ... les manquants ou avaries sont toujours présumés avoir eu lieu au cours du transport maritime, sauf preuve contraire...

(Translation)

> ... shortage or damage is always presumed to have taken place during the course of the maritime carriage, unless there is contrary proof...

Seawater damage provides a good example of how the onus is placed on the carrier. In *Konfort S.A. v. S.S. Santo Cerro*, the surveyor tested and found salt on both the torn paper wrappings and the steel wire cargo. The carrier was expected to contradict this proof and being unable to do so was held responsible. In *Wessels v. Asturias*, the Second Circuit held:

> Proof of the presence of seawater... raises a presumption of unseaworthiness which the carrier must rebut.

In *George E. Pickett*, cargo was received under a clean bill of lading and discharged dripping wet. It was held that the carrier was responsible for the unexplained damage despite the fact that the vessel was new, was on its second voyage, the shipment was stowed in the driest and safest place on board and the hold showed no wetness on inspection after discharge.

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14. 617 F.2d 907 at p. 912, 1980 AMC 867 at p. 872 (2 Cir. 1980). "Under COGSA, a shippers or consignee may establish a *prima facie* case against the "carrier," in this case the vessel owner..., by showing that the cargo was delivered in good condition to the carrier but was in damaged condition when discharged." Cited were *Varna Trading Co. v. S.S. Mette Skou*, 536 F.2d 100 at p. 104, 1977 AMC 702 at p. 707-08 (2 Cir. 1977), cert. denied. 434 U.S. 882, 1978 AMC 1886 (1977); *Travelers Indem. Co. v. S.S. Polarland*, 418 F. Supp. 985 at p. 987, 1976 AMC 1876 at pp. 1860-61, affirmed 562 F.2d 39 (2 Cir. 1977).
18. [1965] 2 Lloyd’s Rep. 564 at p. 566. See also *Wirth Ltd. v. Belcan N.V.* (1996) 112 F.T.R. 81 at p. 97 (F.C. C. An.), where Nadon J. held: “Since the carrier has not met its burden of proving that the damage to this [steel] rail falls under one of the exceptions provided at Article IV of the Hague/Visby Rules, judgment must be rendered in favour of the plaintiff.”
19. May 7, 1951, DMF 1951, 393.
22. 126 F.2d 999 at p. 1001, 1942 AMC 360 at p. 362 (2 Cir. 1942). See also *The Maseehima Maru (Shiroye Ltd. v. Kawasaki Kisen)* [1974] 2 Lloyd’s Rep. 384 at p. 397: “This seawater damage raises a presumption of negligence that the carrier has not rebutted.”
2) American definitions of a peril of the sea

Two basic definitions of peril of the sea in carriage of goods cases have been developed by American courts over the years, both of them emphasizing the extraordinary or irresistible nature of a peril. The first definition was expressed by the Second Circuit in The Giulia:8

"... those perils which are peculiar to the sea, and which are of an extraordinary nature or which arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence."

Hough, J. in The Rosalia,6 rephrased the same idea, stating that a peril of the sea "means something so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety."

The other basic definition of peril found in U.S. case law is that of Learned Hand, J., who defined the term in a celebrated quotation from The Naples Maru:6

The phrase, "perils of the sea", has at times been treated as though its meaning were esoteric; Judge Hough's vivid language in the Rosalia has perhaps given currency to the notion. That meant nothing more, however, than that the weather encountered must be too much for a well-found vessel to withstand."

Learned Hand J.'s formulation has also found favor in subsequent American decisions.7

The above definitions do not, however, point out the importance of circumstances in determining whether or not an exculpatory peril exists in a given case. A peril in some areas is not a peril elsewhere (e.g. a storm on the Great Lakes may be a peril, being extraordinary there, but would not be a peril in the North Atlantic, where it is to be expected. Nor do these definitions take into consideration the effect of different seasons of the year (e.g. a storm in June in the Atlantic might be a peril, whereas a storm in February in the same place would be expected and, therefore, not a peril).

In practice, however, U.S. courts, do take account of the surrounding circumstances in evaluating whether a defence of peril has been established.8 They recognize that no perfect definition of the exception can be found, when the differing facts of each case are of paramount importance.9

3) United Kingdom definitions of peril of the sea

English admiralty law defines peril in terms of the foreseeability and possibility of averting the danger, rather than in terms of its irresistibility or extraordinary character. Lord Herschell in The Xantho observed:10 "There must be some casualty, something which

Black, 2 Ed., 1975, para. 3.32 at p. 162, defining peril of the sea as "... the fortuitous action of the elements at sea, of such force as to overcome the strength of the well-found ship or the usual precautions of good seamanship." This definition was cited with approval in Taisho Marine & Fire Inc. Co. v. M/V Sea-Land Endurance 815 F.2d 1270 at p. 1272, 1987 AMC 1730 at p. 1732 (2 Cir. 1987) and in Eastman Kodak Co. v. S.S. Sealand Voyager 1991 AMC 2350 at p. 2360 (D. N.J. 1991), affirmed without opinion 958 F.2d 362, 1992 AMC 1520 and 1816 (3 Cir. 1992). 8. See J. Gerber & Co. v. S.S. Sabine Howaldt 457 F.2d 650, 1977 AMC 539, [1977] 2 Lloyd's Rep. 78 (2 Cir. 1971), where various factors (e.g. the time and place of the storm, the wind velocity, sea conditions, and the condition of the vessel) were taken into account in ascertaining whether a defence of peril was admissible. See also Thapsus Ltd. v. M/V Lakmos 213 F.2d 422 at p. 435, 1955 AMC 1408 at p. 1403 (2 Cir. 1954), cert. denied sub nom. Bay Ocean Management, Inc. v. Steel Coils, Inc. 350 U.S. 949, 2004 AMC 3000 (2003); Schoenbaum, 4 Ed., 2004, para. 10-29. 9. 281 F.2d at p. 288 (2 Cir. 1960). See also Schoenbaum, ibid. 10. 106 F.2d 32 at p. 34, 1939 AMC 187 at p. 190 (2 Cir. 1939). See also Illuminy 45 F. Supp. 813 at pp. 817-819, 1942 AMC 910 at pp. 916-917 (S.D. Ga. 1942).
could not be foreseen as one of the necessary incidents of the voyage."

He further held:

It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding.

The Privy Council later expressed a similar view in Canada Rice Mills Ltd. v. Union Marine and General Insurance Company Limited, a marine insurance case, where Lord Wright declared:

...in their Lordships' judgment, it cannot be predicated that where damage is caused by a storm, even though its incidence or force is not exceptional, a finding of loss by peril of the sea may not be justified.

English legal writers have endorsed Lord Herschell's and Lord Wright's view.

English courts continue to reject the defence of peril where the bad weather was foreseeable, and require that it be, if not exceptional, at least unanticipated.

4) Canadian definitions of peril of the sea

Canadian judges have taken the same view as English judges of what constitutes a marine peril. The unforeseeability and the inevitability of the bad weather have frequently been reiterated as the major elements of the peril exception in Canadian maritime law. Thus, in Canadian National Steamships Ltd. v. Bayliss, Chief Justice Duff of the Supreme Court of Canada held that, to avoid themselves of the defence, the Appellant carriers had the onus of showing that.

...to constitute a peril of the sea the accident need not be of an extraordinary nature or arise from irresistible force. It is sufficient that it be the cause of damage to goods at sea by the violent action of the wind and waves, when such damage cannot be attributed to someone's negligence.

Pinard, J. of the Federal Court of Canada made the point again in Kruger Inc. v. Baltic Shipping Co.

Therefore, it is not so much the severity of the storm that must be considered here as the fact that it could have been foreseen or guarded...

...
against as probable incident of the intended voyage in the North Atlantic at that time of the year.

In deciding whether a case of peril has been made, the court evaluates all relevant circumstances, and in particular the wind velocity, wave height, sea conditions, damage to the ship, location and time of year.\(^{21}\)

### 5) Australian definitions of peril of the sea

Although Australian maritime law, like that of Canada, is derived primarily from English admiralty law, the Australian High Court has taken a different view of the defence of perils of the sea in carriage of goods cases under the Hague Rules. In *The Bunga Seroja*,\(^{22}\) the New South Wales Court of Appeal, ruling on a case involving damage to a cargo caused by a storm that was not only foreseeable, but actually foreseen, by the master, held that the defence of art. 4(2)(c) of the Rules nevertheless applied. The Court held that there was a difference between the more liberal “Anglo-Australian” conception of “perils of the sea”, whereby the exception is admissible even where the bad weather which caused the damage was expected, and the more restrictive “United States-Canadian” understanding of the exception, requiring unforeseeability of the storm. The High Court, as authority, relied on its own erroneous decision in *Shipping Corp. of India v Gamlen Chemical Co (Australasia) Pty Ltd.*\(^{23}\)

The Australian High Court dismissed the appeal in *The Bunga Seroja*,\(^{24}\) relying on its earlier decision in *Gamlen*:

In *Gamlen*, Mason and Wilson JJ said that “sea and weather conditions which may reasonably be foreseen and guarded against may constitute a peril of the sea.” The fact that the sea and weather conditions that were encountered could reasonably be foreseen, or were actually forecast, may be important in deciding issues like an issue of alleged want of seaworthiness of the vessel, an alleged default of the master in navigation or management, or an alleged want of proper stowage. Similarly, the fact that the conditions encountered could have been guarded

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